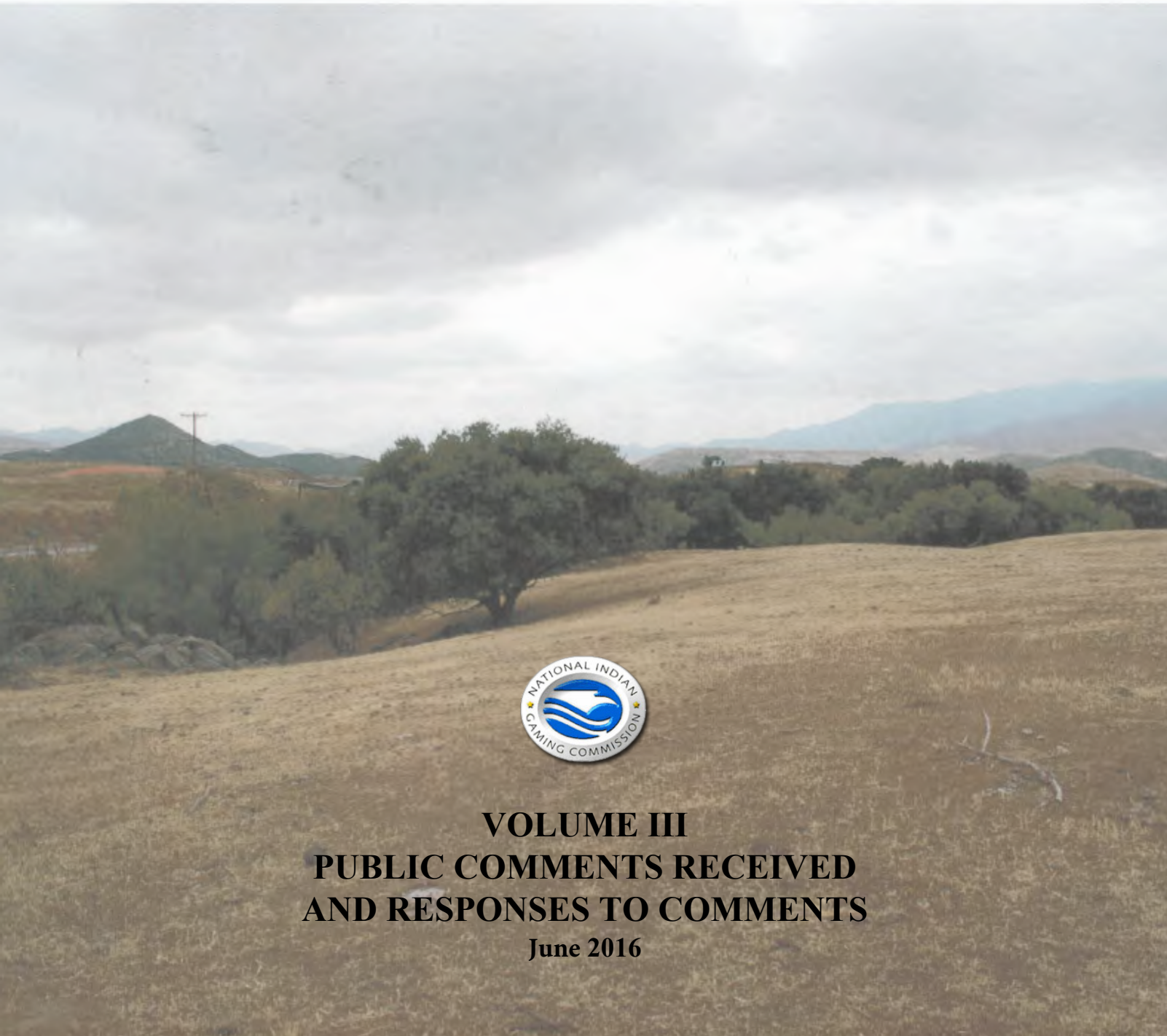
FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT

Jamul Indian Village



VOLUME III
PUBLIC COMMENTS RECEIVED AND RESPONSES TO COMMENTS

June 2016

FINAL SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT

Jamul Indian Village

National Indian Gaming Commission
90 K Street, Suite 200
Washington DC 20002

VOLUME III

PUBLIC COMMENTS RECEIVED AND RESPONSES TO COMMENTS

June 2016

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SECTION 1.0

PUBLIC COMMENTS RECEIVED

Comment Letter #1

U.S. ENVIRONMENTAL PROTECTION AGENCY

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

May 10, 2016

John Hay
Associate General Counsel
National Indian Gaming Commission
c/o Department of the Interior
1849 C Street NW, Mail Stop #1621
Washington, DC 20240

Subject: EPA comments on the Jamul Indian Village Draft Supplemental Environmental Impact Statement (DSEIS), San Diego County, California (CEQ# 20160072)

Dear Mr. Hay:

The U.S. Environmental Protection Agency (EPA) has reviewed the above-referenced document pursuant to the National Environmental Policy Act (NEPA), Council on Environmental Quality (CEQ) regulations (40 CFR Parts 1500-1508), and our NEPA review authority under Section 309 of the Clean Air Act.

The DSEIS supplements the 2003 Final Environmental Impact Statement (FEIS) for Jamul Indian Village to address revisions to the proposed action that have occurred since the FEIS. Specifically, the project no longer includes a 101-acre fee-to-trust transfer, and the gaming facility has been revised to fit entirely on-Reservation. EPA understands that, without the fee-to-trust transfer, the project no longer requires BIA approval, and construction of the revised project was reevaluated in 2013 under a Tribal Environmental Evaluation (TEE) pursuant to the 1999 Tribal-State Compact process. The scope of the current proposed action is limited to the Gaming Management Agreement between the Tribe and the proposed operator San Diego Gaming Ventures, subject to approval by the National Indian Gaming Commission (NIGC). Because approval of the management contract is not a prerequisite to the Tribe's right to build a casino, the gaming facility is currently under construction and scheduled to open in the summer of 2016.

1-1 Although the TEE is not, itself, a NEPA document, it is incorporated by reference in the DSEIS and includes information regarding matters relevant to EPA's jurisdiction and expertise, including wastewater disposal. The project description in the Wastewater Addendum to the TEE indicates that most of the treated wastewater would be disposed within an on-Reservation disposal field. However, according to the letter reports in the Addendum, which document the soil conditions and percolation test methodology/results for the disposal field locations[1], the rock characterization within the effluent infiltration area identified fractures that could enable treated effluent flows to intersect groundwater and daylight along Willow Creek to the east and southeast of the infiltration areas. This indicates a potential hydrological connection between groundwater and surface waters. The Clean Water Act prohibits the discharge of any pollutant to surface waters of the United States without a National Pollutant Discharge Elimination System (NPDES) permit. Because of the potential hydrological connection identified, an

[1] Appendix 1, February 23, 2015 letter from Construction Testing and Engineering, Inc. to Jamul Indian Village of California with subject: *Summary of Percolation Rates and Rock Characterization for Proposed Stormchamber Infiltration Design, Jamul Indian Village Hollywood Casino, West Side of SR94, South of Melody Road, Jamul, California*

1-1 cont. NPDES permit may be required for the proposed wastewater disposal; however, the SDEIS does not disclose this and EPA has not received an application for such a permit.

1-2 Based on the potential for unpermitted discharges to enter surface waters, we have rated the DSEIS as *Environmental Concerns – Insufficient Information (EC-2)* (see enclosed "Summary of Rating Definitions"). We recommend that the Final EIS carefully evaluate and disclose whether there would be a discharge of pollutants to Willow Creek from the wastewater treatment system, and identify all Federal permits, licenses, and other entitlements that must be obtained to implement the proposal, per 40 CFR 1502.25(b). Please contact Jamie Marincola in EPA Region 9's Water Division, NPDES Permits Office, at 415-972-3520 or marincola.jamespaul@epa.gov, for additional information regarding NPDES permitting.

1-3 Subsurface disposal to leachfields is regulated by EPA as a Class V well under the Underground Injection Control (UIC) Program and requires registration and operation in a manner that will not contaminate underground sources of drinking water. The installation and calibration of subsurface disposal lines should be closely monitored by the responsible engineer, along with development of a monitoring program that will ensure the subsurface effluent disposal system is operating effectively. Class V wells must be registered at: http://www2.epa.gov/uic/forms/underground-injection-wells-registration. The EPA Region 9 contact for the UIC program is Leslie Greenberg, who can be reached at 415-972-3349 or greenberg.leslie@epa.gov.

1-4 The DSEIS states that the Tribe would obtain any necessary operating permits from the U.S. EPA to ensure that proposed new or modified commercial and industrial equipment and operations comply with federal Clean Air Act requirements, including applicable federal New Source Review (NSR) rules. A minor NSR permit would be required prior to construction if the aggregate potential to emit from stationary emission units at the facility would exceed the minor NSR thresholds listed in Table 1 at 40 CFR 49.153. The operational air emissions in Table 5-2 of the DSEIS are well below those thresholds, but the estimates appear low for the equipment identified. We recommend that the project proponent use the potential to emit, instead of projected actual emissions, when calculating emissions to determine permitting applicability. If you have any questions regarding Tribal NSR, please contact Lawrence Maurin in EPA Region 9's Air Division at (415) 972-3943 or maurin.lawrence@epa.gov.

EPA appreciates the opportunity to review this DSEIS. When the Final SEIS is released for public review, please send one copy to the address above (mail code: ENF-4-2). If you have any questions, please contact me at (415) 972-3521, or contact Karen Vitulano, the lead reviewer for this project, at 415-947-4178 or vitulano.karen@epa.gov.

Sincerely,

Kathleen Martyn Goforth, Manager
Environmental Review Section

Enclosure: Summary of EPA Rating Definitions

cc: Erica Pinto, Chairwoman, Jamul Indian Village
Richard Tellow, Environmental Director, Jamul Indian Village

SUMMARY OF EPA RATING DEFINITIONS*

This rating system was developed as a means to summarize the U.S. Environmental Protection Agency's (EPA) level of concern with a proposed action. The ratings are a combination of alphabetical categories for evaluation of the environmental impacts of the proposal and numerical categories for evaluation of the adequacy of the Environmental Impact Statement (EIS).

ENVIRONMENTAL IMPACT OF THE ACTION

"LO" (Lack of Objections)

The EPA review has not identified any potential environmental impacts requiring substantive changes to the proposal. The review may have disclosed opportunities for application of mitigation measures that could be accomplished with no more than minor changes to the proposal.

"EC" (Environmental Concerns)

The EPA review has identified environmental impacts that should be avoided in order to fully protect the environment. Corrective measures may require changes to the preferred alternative or application of mitigation measures that can reduce the environmental impact. EPA would like to work with the lead agency to reduce these impacts.

"EO" (Environmental Objections)

The EPA review has identified significant environmental impacts that should be avoided in order to provide adequate protection for the environment. Corrective measures may require substantial changes to the preferred alternative or consideration of some other project alternative (including the no action alternative or a new alternative). EPA intends to work with the lead agency to reduce these impacts.

"EU" (Environmentally Unsatisfactory)

The EPA review has identified adverse environmental impacts that are of sufficient magnitude that they are unsatisfactory from the standpoint of public health or welfare or environmental quality. EPA intends to work with the lead agency to reduce these impacts. If the potentially unsatisfactory impacts are not corrected at the final EIS stage, this proposal will be recommended for referral to the Council on Environmental Quality (CEQ).

ADEQUACY OF THE IMPACT STATEMENT

Category "1" (Adequate)

EPA believes the draft EIS adequately sets forth the environmental impact(s) of the preferred alternative and those of the alternatives reasonably available to the project or action. No further analysis or data collection is necessary, but the reviewer may suggest the addition of clarifying language or information.

Category "2" (Insufficient Information)

The draft EIS does not contain sufficient information for EPA to fully assess environmental impacts that should be avoided in order to fully protect the environment, or the EPA reviewer has identified new reasonably available alternatives that are within the spectrum of alternatives analyzed in the draft EIS, which could reduce the environmental impacts of the action. The identified additional information, data, analyses, or discussion should be included in the final EIS.

Category "3" (Inadequate)

EPA does not believe that the draft EIS adequately assesses potentially significant environmental impacts of the action, or the EPA reviewer has identified new, reasonably available alternatives that are outside of the spectrum of alternatives analyzed in the draft EIS, which should be analyzed in order to reduce the potentially significant environmental impacts. EPA believes that the identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. EPA does not believe that the draft EIS is adequate for the purposes of the NEPA and/or Section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS. On the basis of the potential significant impacts involved, this proposal could be a candidate for referral to the CEQ.

*From EPA Manual 1640, Policy and Procedures for the Review of Federal Actions Impacting the Environment.

Comment Letter #2

CALIFORNIA DEPARTMENT OF FISH AND WILDLIFE

State of California – Natural Resources Agency
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EDMUND G. BROWN JR., Governor
CHARLTON H. BONHAM, Director

April 27, 2016

John R. Hay, Associate General Counsel
National Indian Gaming Commission
1849 C Street NW, Mail Stop # 1621
Washington DC 20240
John_Hay@nigc.gov

Subject: Draft SEIS Comments, Jamul Indian Village, March 2015 (SCH # 2013064002)

Dear Mr. Hay:

2-1 The California Department of Fish and Wildlife (Department) has reviewed the Draft Supplemental Environmental Impact Statement (DSEIS) for the Jamul Indian Village Proposed Gaming Management Agreement. The Department is a Trustee Agency and a Responsible Agency pursuant to the California Environmental Quality Act (CEQA; §§ 15386 and 15381, respectively) and is responsible for ensuring appropriate conservation of the state's biological resources, including rare, threatened, and endangered plant and animal species, pursuant to the California Endangered Species Act (CESA; Fish and Game Code § 2050 et seq.) and other sections of the Fish and Game Code. The Department also administers the Natural Community Conservation Planning program. The Department's Rancho Jamul Ecological Reserve (RJER) is located immediately adjacent to the Jamul Indian Village Gaming Development Project (JIV Casino project).

2-2 The Department commented on previous JIV Casino project documents during the respective public comment periods for the CEQA Notice of Preparation (August 2006, SCH# 2006071038), subsequent Draft Environmental Impact Report (September 2006, SCH# 2006071038), and the Tribal Environmental Evaluation (April 2012, SCH# 2012031047). Additionally, on April 13, 2016, the Department provided comments to the United States Environmental Protection Agency and the Jamul Indian Village Development Corporation regarding our concerns with the JIV Casino Wastewater Addendum Tribal Environmental Evaluation for the Jamul Indian Village Gaming Development Project dated April 2015 (hereinafter referred to as the Wastewater Addendum).

2-3 In accordance with Section 102(2)(C) of the National Environmental Policy Act 42 U.S.C. 4321 *et seq.*, the National Indian Gaming Commission (NIGC), in cooperation with the Jamul Indian Village (JIV) prepared the DSEIS to update the environmental conditions described in the 2003 Final EIS and to approve the proposed Gaming Management Agreement (GMA) between the JIV and the San Diego Gaming Ventures (SDGV). If approved, the GMA would allow SDGV to assume responsibility for the operation and management of the JIV Gaming Facility. In accordance with the DSEIS "…SDGV would secure expert, licensed services for operation/maintenance of items such as the wastewater facility…" and that "…SDGV would not attempt to operate/manage these facilities itself." The Department assumes that SDGV intends to contract for third party services to operate and maintain the on-site water treatment system (OWTS). The Department is therefore providing our April 13, 2016 comment letter concerning the design, operation, monitoring and maintenance of the JIV Wastewater Addendum for the

2-3 cont.

NIGC's consideration. We suggest that the GMA specify that a qualified, licensed operator is required for the OWTS and specify the appropriate parties and remedy procedures for addressing any concerns regarding the operation, maintenance, and monitoring of the OWTS.

The Department appreciates your attention to this issue. For further collaboration please contact Richard Burg, Senior Environmental Scientist Supervisor, Wildlife and Lands Program at Richard.Burg@wildlife.ca.gov or (858) 627-3939.

Sincerely,

Edmund Pert
Regional Manager
South Coast Region

ec: Erica Pinto, Jamul Indian Village Development Corporation
Mendel Stewart, U.S. Fish and Wildlife Service, Carlsbad
David Gibson, RWQCB, San Diego
Amy Harbert, County of San Diego

bc: Tracie Nelson, CDFW, San Diego
Eric Weiss, CDFW, San Diego
Terri Stewart, CDFW, San Diego
Gail Sevrens, CDFW, San Diego

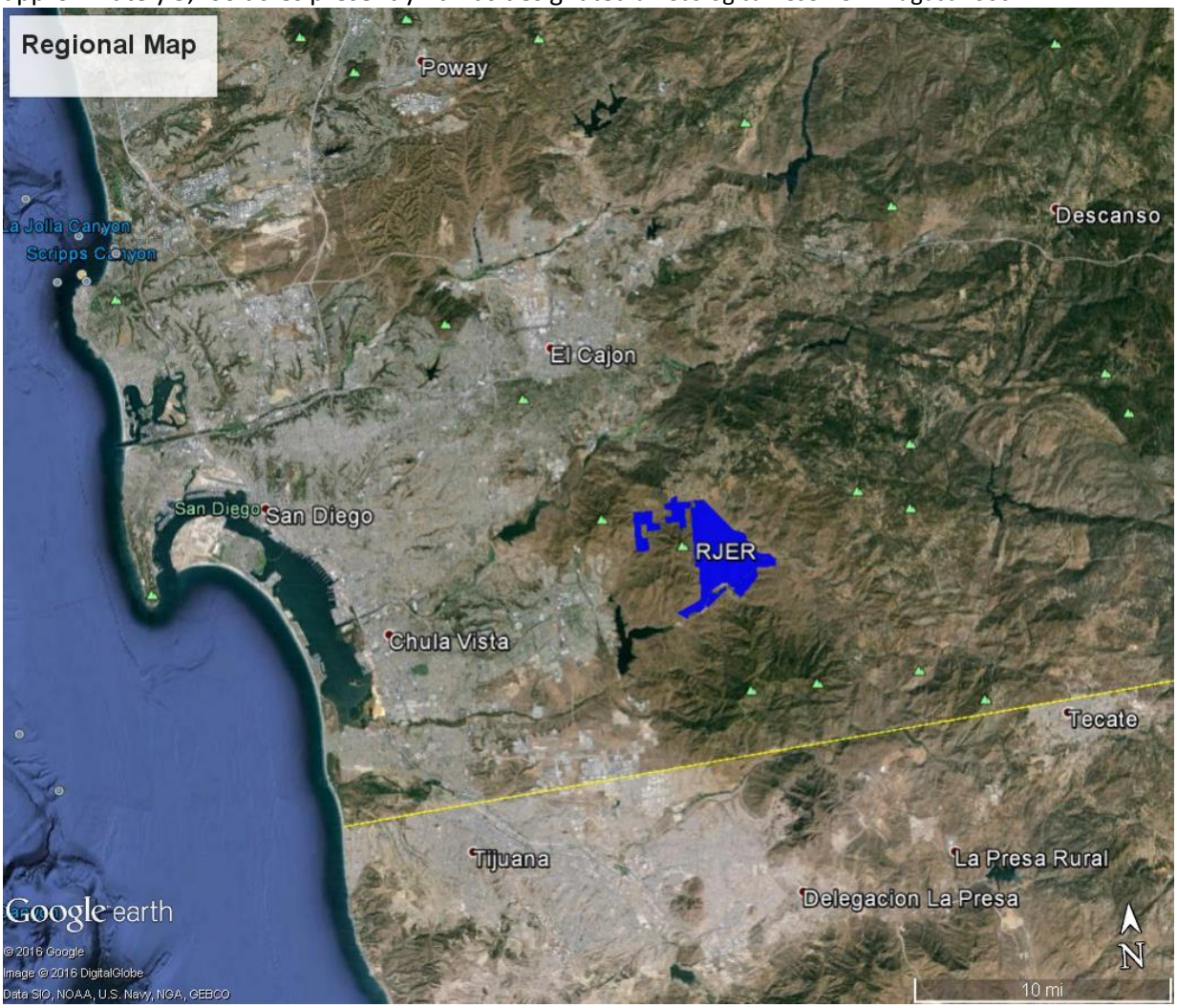
Enclosure

Exhibit A

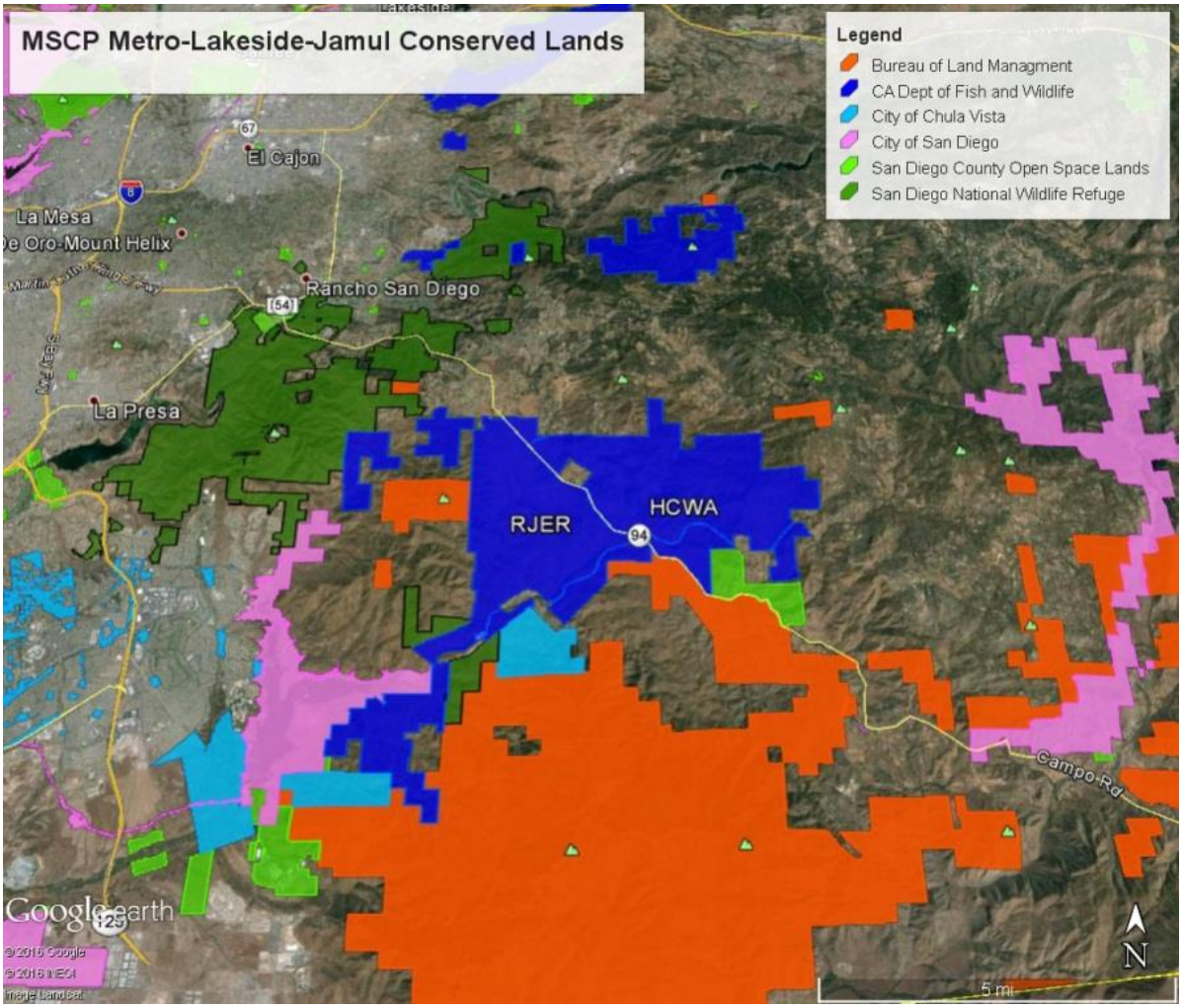
California Department of Fish and Wildlife
Rancho Jamul Ecological Reserve

Background

Rancho Jamul Ecological Reserve (RJER) became a property of the State of California, Department of Fish and Wildlife (Department) in January 1998, following title transfer from the Trust for Public Lands, which purchased the property from the Daley family in 1997. Acquisition and preservation of the lands that became RJER was driven by San Diego County's Multiple Species Conservation Program (MSCP). The development of the county MSCP was pursuant to Section 10(a) of the federal Endangered Species Act of 1973 (as amended), and the California's Natural Communities Conservation Program Act of 1992 (as amended). The reserve was acquired in phases, expanding from the original 2,275 acres to approximately 5,700 acres presently. It was designated an ecological reserve in August 2000.



The conservation and management of RJER is a central part of the MSCP's Metro-Lakeside-Jamul unit. Fragmentation of habitats represents the greatest threat to protecting the full spectrum of the County's unique and sensitive wildland resources. The reserve connects the San Diego National Wildlife Refuge (SDNWR) lands of the United States Fish and Wildlife Service (USFWS) to the northwest, County and City (San Diego, Chula Vista) open space lands to the west, the Bureau of Land Management (BLM) to the south, and Department's Hollenbeck Canyon Wildlife Area to the east. Preserved land continuity is necessary to preserve large contiguous home-range territories required by species such as mountain lion, American badger, and golden eagle, as well as protecting migration corridors and genetic linkages necessary to keep gene pools from bottle necking, isolating subpopulations and making them vulnerable to threats such as wildfires and drought.



The RJER is host to a multitude of past and ongoing conservation biology related research efforts, in coordination with federal, state, and local governments; universities, and non-government conservation organizations. These efforts assist conserved land managers to identify and apply best management practices to specific habitat units in

order to restore, enhance, and manage habitats in support of listed and sensitive wildlife resources.

Located within RJER, the Conservation Education Center (CEC) functions as office and equipment space for Department reserve management staff, as well as USFWS and BLM staff. The CEC also houses the Department's partners in education and community outreach services. This grant-funded program is administered by a locally based non-profit organization, which delivers services to all three agencies. The program provides field trip opportunities to local area schools, teaching children natural history, biology, ecology, and watershed based conservation concepts, as well as coordinating community education, connecting people to their conserved lands.

Environmental Setting

RJER lies within the 93,000 acre Otay River Watershed, and is traversed by two major drainages, which flow towards the south and southwest, eventually merging beyond the reserve and flowing into the Lower Otay Reservoir. One of these drainages, Jamul Creek, is a seasonal tributary that drains the northern portion of the reserve, and has a contributing drainage basin (the Jamul Subbasin) of approximately 7,795 acres. Two branches of the creek enter into the property from the east (HCWA) through culverts underneath SR 94. The northern branch flows directly southward, between the Jamul Mountains to the west and the more gentle hills of the reserve to the east, and merges with the southern branch (main trunk), which flows towards the southwest along a broad plain that accommodates the CEC.

The second major drainage of RJER, Dulzura Creek, is located southeast of Jamul Creek, and drains the southeastern portion of the reserve. This tributary has a contributing drainage basin (the Hollenbeck Subbasin) of approximately 31,713 acres. The northern branch of Dulzura Creek enters into RJER from the HCWA through a culvert underneath SR 94, and flows in a southwesterly direction until it joins the main tributary. This main branch of Dulzura Creek serves as a conduit (shut off at present) for transporting water from Barrett Lake to Lower Otay Reservoir, both of which are operated by the City of San Diego. It flows along SR 94 from the southeast and flows into the southeastern corner of the reserve through a culvert, and then heads southwest along a broad valley between rolling hills. It continues downstream (westbound) along Otay Lakes Road where it joins with Jamul Creek approximately three miles from Hwy 94. Mean daily flow data recorded between 1940 and 1997 by a stream gauge located just below the confluence of Jamul and Dulzura Creeks indicate that the flow rate ranges seasonally from approximately 5 cubic feet per second (cfs) in October to 68 cfs in March (Wildlands Inc., 1999).

The condition of these two major drainages has improved tremendously since cattle were removed when the area was proposed for acquisition (1996) and since Wildlands Inc. began their restoration efforts in 2000. Past grazing practices and agricultural uses left the creeks denuded, entrenched and disconnected from adjacent terraces, thereby reducing the heterogeneity of the riparian habitat, reducing native species diversity, and increasing the number of non-native plants along the riparian corridor (Wildlands Inc., 1999). Restoration and enhancement efforts have expanded the floodplains, established overflow channels, removed exotics, restored native vegetative cover and

increased riparian structural diversity. These efforts have enhanced breeding and foraging opportunities for native fauna that is dependent on multiple level riparian habitats. To date, the mitigation bank has restored over 55 acres of wetland habitats within RJER, and plans to restore the remaining 26 acres of stream, riparian and wetland habitats within the Bank's easement are being finalized.

Additional restoration efforts to restore stream and riparian segments outside of the easement, but within the boundaries of RJER, are also ongoing. River Partners, a non-profit organization, has been implementing several restoration efforts on and off Department's south county conserved lands, as part of a larger Otay River watershed regional area plan. This regional effort includes a 60 acre riparian habitat restoration and enhancement effort on RJER, which began in 2013 and covers the longest remaining portion of Jamul Creek/Otay River outside of the mitigation bank easement.

Other aquatic habitats in the form of artificial ponds can be found at RJER. Presumably, these ponds were developed to support livestock and agricultural uses. Highline ditches historically carved into the hillslopes functioned to capture overland surface flows and channel water into the ponds. The water levels in two of the ponds can be supplemented using groundwater supplies, and another pond is an excavated depression (a 'sump') within the floodplain of Jamul Creek. The water level in this pond is the exposed surface of the groundwater table. Earthen dams installed across existing stream channels formed the remaining ponds, which filled via the capture of in-stream flows, historically supplemented by the highline ditch system. These ditches have been allowed to slough and erode, and no longer function to re-route overland flows into the ponds. The temporarily captured overland flows now seep into the soils immediately, thus helping to maintain relatively stable groundwater levels within the basin.

Altered hydrological stream functions, particularly water impoundment facilities, provide habitat for non-native aquatic species. All non-native species compete for food resources with the native species. Non-native species such as bullfrog, African-clawed frog, sunfish, bass and crappie are ravenous predators, known to consume native snakes, toads, turtles, birds, and even small mammals. Non-native fish species can be eliminated from aquatic habitats which can be dried, either naturally or by pumping. Non-native frogs and crayfish numbers can only be controlled by seasonal drying of man-made aquatic habitats, and through active removal from aquatic habitats that cannot be pumped dry. Native toad species in these arid climates generally achieve terrestrial mobility within 30-60 days, depending on conditions. The non-native frogs are dependent on standing water for longer periods than the native species, taking 90+ days for bullfrog tadpoles to reach terrestrial mobility.

During the period 1998-2001, as part of a multi-agency coordinated effort, the United States Geological Survey (USGS) began work assessing the existing aquatic habitats within the reserve. Seven of the largest ponds were surveyed for aquatic species, and actions were taken to eliminate or reduce the non-native aquatic species, specifically by re-establishing a more natural hydrology, allowing the ponds to dry seasonally.

For the purposes of establishing a baseline to which all future reserve management efforts could be gaged, the multi-agency coordinated efforts which began in 1998 grew into a full scale property wide biodiversity analysis in 2001. The resulting biodiversity

baseline inventory included all plants, invertebrates, avifauna, herptofauna, and mammalian species which could be detected employing the various survey methods in use at the time.

Unfortunately, much of the existing mature coastal sage scrub and chaparral habitats within the reserve were heavily damaged by wildfire in October of 2003. Monitoring efforts to gage the recovery of the reserve's wildlife resources were re-initiated 2004 through 2006. The property burned again in 2007, followed by additional monitoring efforts (property specific and regional), some of which are ongoing. The two large-scale wildfires resulted in the extirpation of a handful of rare and sensitive species from the reserve. Efforts to re-establish sensitive species populations lost to wildfire and other causes are ongoing.

Aquatic Species Impacted, or at Risk of Impact:

When the aquatic resources analysis began in 1998, seven non-native aquatic species were found in the various ponds. The north pond was home to four of these: swamp crayfish (*Procambarus clarkia*), green sunfish (*Lepomis cyanellus*), African-clawed frog (*Xenopus laevis*), and bullfrog (*Rana catesbeiana*). With the exception of the 'sump' pond, which cannot be pumped dry, and the cistern pond, which is necessary for area fire control, the five remaining ponds were allowed to dry naturally, or were pumped dry in early 1999, before the rains. Other ponds also supported non-native fishes, including bluegill sunfish (*Lepomis macrochirus*), largemouth bass (*Micropterus salmonoides*), black crappie (*Pomoxis nigromaculatus*), black bullhead (*Ameriurus melas*), and mosquito fish (*Gambusia affinis*), evidencing the ponds were wetted year round. Pond drying efforts resulted in the permanent disappearance of all non-native fish species from the five ponds, and a significant, albeit temporary, reduction in the non-native crayfish and predatory frog populations. Currently, only mosquito fish are still found at RJER, and only in the sump pond. Non-native species control efforts (removal and seasonal drying) have remained periodic, but ongoing.

It is unclear why drying the ponds for a single year was successful in preventing the ponds from holding water year-round in subsequent years. It is noted that 2002 and 2003 were below normal rainfall years, and it may be that whatever clay or bentonite layer was in the ponds may have cracked or degraded during the dry-down periods. The ponds, however, have maintained the more desired natural hydrology needed by the native species, becoming wetted only in the rainy season and drying up shortly after the rains cease. The ponds were re-sampled for aquatic resources following dry-down and rewetting. By 2001, four native aquatic species were found to be present in the ponds, and only the north pond hosting all four species. The native species include western spadefoot toad (*Spea hammondii*), western toad (*Bufo boreas*), Pacific treefrog (*Hyla regilla*), and two-striped garter snake (*Thamnophis hammondii*).

Amphibians, and reptiles to a slightly lesser extent, are sensitive to water quality issues. Studies find significant correlations between ammonia, phosphorous, particulates, biological oxygen demand, and total nitrogen levels and anuran development, resulting in lower anuran diversity, density, and reproductive success.

Western spade foot toad: Periodic monitoring by USGS finds the majority of positive detections of western spadefoot toad have been observed at the two pitfall arrays located most proximal to the north pond (61% of the records in just 8% of the arrays). As the only site in the immediate area that can hold standing water long enough to host amphibians from egg to terrestrial stage, this pond may be the most important breeding/rearing site at RJER for this species.

The western spadefoot toad is designated a State Species of Special Concern, and is under review for listing as ESA-threatened or endangered. On July 1, 2015, the 2012 petition to list western spadefoot toad was found to present substantial scientific or commercial information indicating that the petitioned action may be warranted for the western spadefoot toad. The species is officially entered in the Federal Register as Under Review (12 month) for potential listing as ESA-threatened or endangered.

Two striped garter snake: California State Species of Special Concern. This species forages primarily in water.

Western pond turtle: Jamul Creek is considered a better candidate than Dulzura Creek for the protection of existing native aquatic species, and for the re-introduction of extirpated rare, threatened, and endangered species. Dulzura Creek is employed for water conveyance between Barrett Lake and the Otay Reservoirs. These water transfer patterns are not managed to mimic the natural hydrograph of the arid southwest, making non-native aquatic species populations more challenging to control in Dulzura creek. Water quality changes are introduced by the transfer of water from one watershed to another via the use of the flumes and man-made canals prior to entering the Dulzura Creek stream channel. Western pond turtles are known to be sensitive to unbalanced levels of dissolved oxygen, pH, turbidity, nitrate, and phosphate levels. Monitoring water quality for pond turtle habitat management is recommended. Lead and aluminum level monitoring is also recommended for areas influenced by upstream urbanization.

The western pond turtle is designated a State Species of Special Concern, and is under review for listing as ESA-threatened or endangered as of April 10, 2015. http://ecos.fws.gov/tess_public/profile/speciesProfile?spcode=C06B

Since 2001, much of the stream restoration work at RJER has been completed, and actions taken to reduce and control invasive aquatic species in Jamul Creek have been implemented. As of October 2014 a small number of male and female western pond turtles were translocated from an adjacent watershed to the Jamul Creek sub-basin within the reserve. Preliminary baseline data was collected from each pond turtle prior to translocation. The pond turtles were fitted with telemetry units to facilitate careful monitoring of their activities and locations. A handful of additional turtles were translocated from the same donor population in 2015. As of late 2015, two of these pond turtles have migrated from their translocation site to nearby instream pools within Jamul Creek. Monitoring continues for this population.

Other species which could be affected: RJER supports a high diversity of bat species including twelve of the sixteen species commonly found in the county, and one of the rare visitors, the big free-tailed bat (*Nyctinomops macrotis*) (USGS 2002).

Species detected within RJER include the pallid bat (*Antrozous pallidus*), Townsend's big-eared bat (*Corynorhinus townsendii*), big brown bat (*Eptesicus fuscus*), hoary bat (*Lasiurus cinereus*), four species of little brown bats (*Myotis californicus, M. ciliolabrum, M. evotis*, and *M. yumanensis*), western pipistrelle (*Pipistrellus hesperus*), and three species of free-tailed bats (*Eumops perotis, Nyctinomops femorosacca*, and *Tadarida brasiliensis).*Dulzura Creek, Jamul Creek, and the artificial ponds are the most important elements of bat foraging habitat in RJER because they provide drinking water, and are a good source of aquatic–emergent insects.

Survey data has documented the presence of least Bell's vireo (*Vireo bellii pusillus*) a Federal and state listed endangered species along much of Jamul and Dulzura Creeks. Critical habitat is designated along Jamul Creek for this species. In addition, the California gnatcatcher is known to occur just downstream of the proposed wastewater/stormwater treatment facility and critical habitat is present juxtaposed to Jamul Creek.

The arroyo toad is also listed as endangered under the ESA, and is a state designated Species of Special Concern. Notes from the August 13, 1989 Wildlife Conservation Board meeting during funding evaluation of the RJER expansion 1 specifically identify the potential for the re-introduction of the federally endangered arroyo toad as reason to support expansion funding. Segments of Jamul and Dulzura creeks restored via the mitigation bank provide suitable habitat and potential reintroduction sites for this species.

This list is not intended to be a full list but a partial list of species that may be at risk and impacted by the management of wastewater and stormwater from the JIV tribal property. Changes to the natural hydrograph and/or changes to stream and ground water quality could affect vegetation health, impact channel systems, and degrade sensitive habitat including designated critical habitat for the least Bell's vireo and California gnatcatcher.

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EDMUND G. BROWN JR., Governor
CHARLTON H. BONHAM, Director

April 13, 2016

Jared Blumenfeld, Regional Administrator
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Email: r9.info@epa.gov

Erica Pinto, Chairwoman
Jamul Indian Village Development Corporation
14191 Highway 94
Jamul, CA 91935
info@jamulindianvillage.com

Subject: Comments on the Wastewater Addendum Tribal Environmental Evaluation Jamul Indian Village Gaming Development Project, April 2015

Dear Mr. Blumenfeld, Ms. Johnson and Ms. Pinto:

This letter details the California Department of Fish and Wildlife's (Department) concerns regarding the Wastewater Addendum Tribal Environmental Evaluation for the Jamul Indian Village Gaming Development Project dated April 2015 (hereinafter referred to as the Wastewater Addendum). The Department is a Trustee Agency and a Responsible Agency pursuant to the California Environmental Quality Act (CEQA; §§ 15386 and 15381, respectively) and is responsible for ensuring appropriate conservation of the state's biological resources, including rare, threatened, and endangered plant and animal species, pursuant to the California Endangered Species Act (CESA; Fish and Game Code § 2050 et seq.) and other sections of the Fish and Game Code. The Department also administers the Natural Community Conservation Planning program. The Department's Rancho Jamul Ecological Reserve (RJER) is located immediately adjacent to the Jamul Indian Village Gaming Development Project (JIV Casino project).

The Department commented on previous JIV Casino project documents during the respective public comment periods for the CEQA Notice of Preparation (August 2006, SCH# 2006071038), subsequent Draft Environmental Impact Report (September 2006, SCH# 2006071038), and the Tribal Environmental Evaluation (April 2012, SCH# 2012031047). Additionally, Department staff conveyed concerns regarding potential discharge of wastewater in a teleconference with the JIV tribe and their consultants (November 5, 2014). However, there was no follow-up meeting or response from the JIV tribe or their consultants addressing the Department's concerns.

Significant changes to the JIV Casino project have been made since the 2012 Tribal Environmental Evaluation was submitted for public review. Of concern are the stormwater and wastewater strategies outlined in the Tribal Environmental Evaluation and project addendums (Addendum Tribal Environmental Evaluation Jamul Indian Village Gaming Development Project dated February 2014; Addendum Long Soil Nails Tribal Environmental Evaluation Jamul Indian Village Gaming Development Project dated June 6, 2014; and, Addendum Tribal Environmental

Evaluation Temporary Constructing Staging Jamul Indian Village Gaming Development Project dated October 2014) which were posted to the JIV website in 2014/2015. Despite the potential downstream effects to the wildlife and stream-dependent habitats at RJER, the Department was not formally notified of the posted plan amendments and only became aware of them via verbal communication and public media. Most recently, the JIV Casino project released the Wastewater Addendum (Wastewater Addendum Tribal Environmental Evaluation Jamul Indian Village Gaming Development Project dated April 2015), the subject of this letter; again, the Department was not formally notified of this addendum.

The Department views protection of stream, riparian, and wetland habitats from impacts related to project construction and long-term facility management activities on tribal lands within the jurisdiction of the United States Environmental Protection Agency (USEPA[1]). Accordingly, we are providing the following comments on the Wastewater Addendum to the USEPA.

The JIV Casino project includes the construction and operation of a 228,000 square foot gaming complex on the Jamul Indian Village Reservation (Reservation). The Reservation is approximately 6.2 acres in size and is located approximately 1 mile south of the community of Jamul, in unincorporated San Diego County. The Department's RJER (approximately 5,700 acres) is located adjacent to the Reservation's southern boundary. Hollenbeck Canyon Wildlife Area (approximately 6,100 acres), also owned and managed by the Department, is located to the east of the Reservation, on the opposite side of State Route 94. Conserved land under the County of San Diego's South County Segment of the Multiple Species Conservation Program is located adjacent to the northern boundary of the Reservation. Willow Creek, an ephemeral stream, flows onto the Reservation from the north and exits the property to the south where it flows onto RJER then meanders approximately 0.5 mile before being captured in one of RJER's ponds. Willow Creek is a tributary to Jamul Creek, thence the Otay River, and thus a tributary to the Otay Reservoirs, a major water supply system for the City of San Diego.

Based on our review, the JIV Casino project intends to infiltrate treated wastewaters (storm and wastewater flow) into two sub-basins (disposal fields) located on the west side of Willow Creek (between 4–35 feet from the mapped floodplain of the creek)[2].

Specifically, the Wastewater Addendum includes the refinement of treated water generation estimates, water balance estimates, modification of treated water storage tank capacity and location, and modification of treated water disposal methods. Physical changes to the JIV Casino site would result from the modified size and location proposed for the treated water tank, and construction of the treated water disposal field. As components of the Wastewater Addendum, several letter reports are included to address the geology, soil conditions, percolation test results and methodology, and location of the disposal field.

The comments provided below are based on the Department's review of the Wastewater Addendum and our outstanding concerns for the JIV Casino project and its potential to affect

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[1] Information specific to JIV's compliance with the regulatory authority of the USACE can be found in Appendix 14, Waters of the U.S. Delineation Report, located on the JIV website (http://www.jamulindianvillage.com/relevant-documents/) and the 2012 Construction General Permit NOI at: http://ofmpub.epa.gov/apex/aps/f?p=137:4:::NO::P4_PERMIT_ID,P4_PERMIT_TYPE:13734,#C010#

[2] Figure 2 Exploration Location Map (IMP B & C) Jamul Gaming Facility Development Jamul Indian Village San Diego County, California. Construction Testing and Engineering, Inc., June 3, 2014. Proposed IMP Catch Basin Evaluation of Percolation Rates Jamul Indian Village Hollywood Casino West Side of SR94, South of Melody Road Jamul, California. Report prepared by Construction Testing & Engineering, project number 10-11795T.

the RJER (refer to Exhibit A). In particular, we are concerned with potential discharge from the on-site water treatment system (OWTS), inadequate separation of static groundwater from effluent disposal fields, the lack of adequate percolation rates in disposal fields, proximity of the seepage pits to Willow Creek, effective stormwater treatment strategies, and increased daily flow. These factors have the potential to impact:

- the hydroperiod and water quality of Willow Creek;
- surface and groundwater quality;
- fish and wildlife resources, including State Species of Special Concern;
- ongoing wildlife research;
- and threaten ongoing and future state and federal wildlife project funding and grants.

It is intended that the following comments facilitate a dialogue among the USEPA, the Department, and the JIV tribe regarding the JIV Casino project's methods for treating waste and stormwater discharges.

1. Assumptions

   The State of California's Regional Water Quality Control Board's (RWQCB) Local Agency Management Program (LAMP) for OWTS engineering and the County of San Diego's Department of Environmental Health (DEH) Design Manual for OWTS was referred to during the Department's process of evaluating the JIV Casino project's potential effects to water quality. The RWQCB, Region 9, has authorized the County of San Diego DEH to issue certain OWTS permits throughout the county (County of San Diego, November 25, 2013). Pursuant to Assembly Bill 855, the State Water Resources Control Board developed standards for OWTS to be implemented by qualified local agencies. "The OWTS Policy allows local agencies to approve OWTS, based on local ordinance, after approval of a LAMP by the Regional Water Quality Control Board" (RWQCB LAMP, 2015).

   In consideration of the Tribal-State Compact Between the State of California and the Jamul Indian Village (October, 1999), which states "[i]n the absence of a promulgated tribal standard in respect to a matter identified in those subdivisions [specifically Section 10.2 (b) relating to water quality], or the express adoption of an applicable federal statute or regulation in lieu of a tribal standard in respect to any such matter, the applicable state statute or regulation shall be deemed to have been adopted by the Tribe as the applicable standard," the Department evaluated the JIV Casino project pursuant to the RWQCB LAMP and County of San Diego DEH. If the Tribe has promulgated a tribal water quality standard, the Department requests a copy of the adopted tribal standard to aid our review of the JIV Casino project. At the time of this review, the Department is unaware of any OWTS tribal standard and therefore conducted our review under the auspices of the County of San Diego DEH's Design Manual for OWTS and the RWQCB's LAMP.

2. Onsite Water Treatment Systems

   According to the January 2013 Final Tribal Environmental Evaluation (Final Tribal EE) the JIV Casino project will utilize membrane bio-reactor technology to treat the wastewater effluent generated on site; however, we were unable to locate specifications for the membrane bio-reactor or minimum water quality thresholds required for the

treatment and associated discharge of effluent in the Final Tribal EE or Wastewater Addendum. Furthermore, the Department was unable to find assurances that wastewater discharges and infiltration will "...be treated to a level that meets California Title 22 recycled water quality standards" (Final Tribal EE) absent a comprehensive operations labor plan including: daily visual inspections, daily water sampling, semi-annual component cleaning, periodic system adjustments, and alarm responses (Seattle Public Utilities, 2008). In regard to the on-site wastewater treatment system (OWTS), the Department recommends that a qualified entity, or combination of entities (e.g., the USEPA, RWQCB, or the County of San Diego DEH), provide a technical review of the changes to the wastewater management strategies identified in the April 2015 Wastewater Addendum. According to the 2006 draft EE document "...since the proposed facilities are located on tribal lands held in federal trust, they are subject to regulation by the federal government, specifically by the U.S. Environmental Protection Agency (USEPA), or through the RWQCB" (page 33).

Furthermore, Appendix 2 of the 2013 Final Tribal EE states, "[t]he amount of involvement by the USEPA will depend largely on the method for effluent disposal. If, for example, the project will propose to discharge effluent to the creek, an NPDES permit would be required. This permit may be difficult to obtain in the San Diego Region and would include ongoing monitoring/reporting requirements that can be costly. Treatment alternatives that involve beneficial re-use, onsite subsurface disposal, and hauling of effluent would require coordination with the USEPA, but would not likely be subject to a USEPA permit" (page 7). The Department requests documentation regarding the USEPA's review of the JIV Casino project, its effluent disposal methods, and USEPA's determination regarding the NPDES permit applicability to the project.

Given their local expertise with on-site waste effluent systems, the Department recommends that the Jamul Indian Village consult with the County of San Diego DEH Land and Water Quality Division and the RWQCB based on the size of the OWTS (excess of 10,000 gallons per day). The Department requests to be notified which entity or combination of entities is consulted for technical review and requests a copy of the review.

Finally, it is unclear from our review of the technical documents whether (1) discharge into the disposal field (via Stormchambers), as a product of the OWTS, is deemed wastewater effluent or stormwater, and (2) methods used to determine the size and location of the disposal fields based on the soil conditions, geologic characteristics, and groundwater information reported in the Wastewater Addendum. Therefore, the Department requests clarification as to how effluent discharges are classified and supplemental documentation demonstrating the appropriate location and sizing of the waste treatment system and disposal fields based on the existing site conditions.

3. <u>Disposal Fields</u>

Based on our review of the percolation testing data, technical specifications of the OWTS, and the placement of the disposal fields in proximity to Willow Creek, we are unclear on the overall efficacy of the system design, capacity of the on-site subsurface disposal system to effectively handle the proposed discharges, and parties responsible in operating, maintaining, and monitoring the treatment facility discharges for the life of the facility. The Department previously commented (comment No. 4, in our response

letter on the draft Tribal Environmental Evaluation for the JIV Casino addressed to Chairman Raymond Hunter of Jamul Indian Village dated April 25, 2012) on the potential for the proposed OWTS to affect surface and groundwater quality due to its proximity of Willow Creek and downstream waterbodies. The efficacy of the effluent treatment from the OWTS associated with the JIV Casino project or how the project's OWTS and Supplemental Treatment Systems ([STS] ultraviolet light treatment) meets the standards under the RWQCB's LAMP and the County of San Diego's DEH Design Manual for OWTS is not described. Absent a qualified third-party review of the OWTS, the Department is concerned that the analysis of the disposal field design identified in the Wastewater Addendum is incomplete. The Department requests clarification for the following items as it pertains to the disposal fields:

Observed Percolation Rates

a) Based on our review of the percolation test, areas identified as IMP-B (PT-1 through PT-3), IMP-C (PT-4 and PT-5), and Stormchamber sites (SCP-1 through SCP-6) exceeded the 60 minutes per inch (MPI) percolation rates (ranging from 96 MPI to 480 MPI) specified by RWQCB LAMP guidelines and the San Diego DEH Design Manual for OWTS. Consequently, we are concerned with siting the disposal fields and Stormchamber in this location. Even with the inclusion of a supplemental treatment system (STS), it is unclear from the analysis whether the sizing of the disposal systems has adequately accounted for the minimum percolation rates, underlying geologic conditions, and the influence these conditions have on the effectiveness and long-term performance of the OWTS. The Department remains concerned that effluent may not be adequately treated prior to reaching groundwater or result in the effluent daylighting due to low soil permeability. According to the RWQCB LAMP, sites with low permeability simply pose too high a risk to water quality (and thus biological integrity) and public health regardless of the unsaturated soil interval available.

Unsaturated Soil Interval

b) With regard to the OWTS and STS sites, the RWQCB LAMP states that "[s]ome sites are not acceptable for conventional or alternative [STS] OWTS based on low soil permeability, *regardless* [emphasis added] of the unsaturated soil interval available at the site" (page 10). In addition to our concerns that the RWQCB LAMP of County DEH percolation rates were not met within IMP-B, IMP-C, SCP-2, and SCP-4 through SCP-6, the unsaturated soil interval is less than specified in the RWCQB LAMP and County of San Diego DEH Design Manual for OWTS. Based on the Construction Testing and Engineering's Percolation Test Hole Logs, refusal was encountered at a depth of 3–4 feet. The RWQCB guidance specifies an interval of 5 feet of unsaturated soil or 10 feet for sites that do not meet the specified soil drainage rates (e.g., above impervious geologic formations or "refusal" similar to the conditions reported in the Percolation Test Hole Logs). If the intent is to design the disposal system in accordance with the RWQCB LAMP, the current placement would not be permissible according to the testing results (averaged percolation rates and unsaturated soil intervals) when compared to the engineering design specifications provided in the RWCB LAMP and the County of San Diego DEH Design Manual for OWTS.

Groundwater Depth

a) A discussion is provided in the Environmental Checklist of the Wastewater Addendum addressing wastewater; however, we were unable to locate where the groundwater borings were provided in the proposed disposal fields. This information is essential to demonstrate adequate separation of static groundwater from effluent disposal fields. According to the November 25, 2013 San Diego OWTS Groundwater Separation Policy (Policy), the typical observation well for groundwater monitoring "...shall extend to a minimum of 15 feet unless refusal is reached" (page 53). The test results provided for the JIV Casino project appear shallower than the aforementioned specifications. The Policy cites that "[d]eeper depths may be required depending on site specific conditions as determined by DEH of the project engineer. Site specific conditions may include but not be limited to; the proposed depth of the system, local geology, soil types encountered, elevation and terrain, features onsite, evidence and/or knowledge of historic groundwater levels in the area, and the anticipated fluctuation of the groundwater table in times of normal to above normal annual rainfall" (page 53). The Department believes supplemental groundwater borings of a deeper depth should be provided given that the distance between the centerline of Willow Creek (e.g., features on site) and the nearest disposal field is just 20 feet, and the region's unprecedented 4 year-long drought may have yielded an artificially low groundwater level during the supplemental 2014 and 2015 percolation test bores provided in the April 2015 Wastewater Addendum. Guidance from the County of San Diego DEH states that groundwater bores during periods of drought may not ensure sufficient separation (5 foot minimum, or 10 foot minimum for seepage pits or horizontal pit systems) between the bottom of the OWTS and the groundwater level during an average to above average rainfall year. The February 23, 2015 Construction Testing and Engineering letter states that "[g]roundwater was not encountered in the borings [percolation test bores] advanced for the WWTP geotechnical investigation. The borings were advanced to a maximum explored depth of approximately 20.5 feet bgs [below graded surface]" (page 19). The drill logs provided in the 2015 Wastewater Addendum report drilled depths of only 4 feet. The Department was not able to locate a corresponding discussion that specifies the location(s) of groundwater borings (and corresponding drill logs).

b) According to the San Diego OWTS Groundwater Separation Policy, "[d]uring periods of below normal rainfall, or after periods of drought where there has not been sufficient ground water recharge, the absence of groundwater in test borings in areas where groundwater is suspect may not mean that approval to issue a septic tank permit can be granted. Experience has shown that there are instances where the absence of groundwater in a 10, 15, or even 20 foot-deep observation boring on a lot does not guarantee that groundwater will not rise to within 5 feet from the bottom of the proposed OWTS during periods of normal or above normal rainfall" (page 54). Based on this guidance, the Department believes supplemental data (e.g., evidence of deep borings during a period with average or above average rainfall) is needed to demonstrate an unsaturated soil interval exists between the disposal fields and existing groundwater levels. Furthermore, the RWQCB LAMP has suggested that in some cases "...the only certain way to determine depth to high groundwater on a site is to observe the groundwater depth during or immediately after an above average rainfall season" (page 18). Subsequent test pits performed during a year with

average to above average rainfall may influence the determination of the JIV Casino project's groundwater depth.

Net Useable Land Area and Setbacks

c) In reviewing the Percolation Testing Exploration Location Map, IMP B & C (Construction Testing & Engineering, Inc. Figure 2 and Figure 2a, June 3, 2014), the eastern edge of the treated water disposal chambers are within 4–25 feet of the floodplain limits (minimum 20 feet from centerline) of Willow Creek. Typically, the RWQCB LAMP requires direct seepage pits to provide a minimum 100-foot buffer from edge of flowline or top of bank. The Department requests an analysis of the JIV Casino project's conformance with the RWQCB LAMP and the net usable land area requirements to buffer Willow Creek.

4. Stormwater Treatment

It is unclear per Mitigation Measure H (4) of the Mitigation Monitoring and Reporting Program if a mechanical treatment system is in place to address oil and grease discharges and other non-visible pollutants identified in the Storm Water Pollution Prevention Plan, or whether a copy of a "...visual monitoring program and a chemical monitoring program..." has been provided in the Wastewater Addendum.

5. Downstream Impacts to Willow Creek Hydroperiod and Peak Daily Flows

The Department is concerned that the Wastewater Addendum did not include an analysis regarding the JIV Casino project's potential to influence the natural hydroperiod and potential nutrient loading of Willow Creek. Absent this analysis, the Department is unsure how much surface or subsurface flows may be received by Willow Creek. An increase in flows may pose considerable resource management hurdles and infrastructure (e.g., existing ponds and their infrastructure) management challenges. Depending on the level of treatment of the OWTS, nutrient loads at Willow Creek may be increased over current levels, which may influence species and habitat composition in addition to potentially affecting those potable water wells that serve the Department's RJER.

6. Effects to Wildlife Studies and Funded Projects

The Department is concerned that any change to water flows, flow interval, or water quality of Willow Creek could potentially compromise millions of dollars of state and federally funded ongoing restoration efforts and research programs, including those that benefit federal species. Since 2001, much of the stream restoration work at RJER has been completed, and actions taken to reduce and control invasive aquatic species in Jamul Creek have been implemented. RJER is finalizing plans to restore the remaining 26 acres of stream, riparian, and wetland habitats downstream of Willow Creek. There are currently aquatic species/habitat recovery efforts for western spadefoot toad (*Spea hammondii*; under review for Endangered Species Act [ESA] listing as threatened or endangered and a State Species of Special Concern [SSC]), western pond turtle (*Emys marmorata* ssp. *pallida*; under review for ESA listing as threatened or endangered and a SSC), and the two-striped garter snake (*Thamnophis hammondii*; SSC). Efforts are pending to reintroduce arroyo toad (*Bufo californicus*; ESA-listed as endangered, SSC).

Some of the research studies at RJER follow long term trends in species/habitat composition and a change to the current baseline could undermine current research/recovery efforts. Changes to the underlying habitat values and subsequent species composition could result in the waste of state and federal funds by introducing unquantified variables, undermining their original purpose of species/habitat recovery efforts. Changes to the natural hydrograph and/or changes to stream and groundwater quality could affect vegetation health, impact channel systems, degrade habitat, reduce biodiversity and have significant negative ecosystem effects.

The Department appreciates your attention to this issue. For further collaboration please contact Richard Burg, Senior Environmental Scientist Supervisor, Wildlife and Lands Program at Richard.Burg@wildlife.ca.gov (858) 627-3939.

Sincerely,

Edmund Pert
Regional Manager
South Coast Region

ec: David Gibson, CA Regional Water Quality Control Board, San Diego
Amy Harbert, San Diego County Department of Environmental Health, San Diego
Mendel Stewart, U.S. Fish and Wildlife Service, Carlsbad

bc: Tracie Nelson, CDFW San Diego
Eric Weiss, CDFW San Diego
Terri Stewart, CDFW San Diego
Gail Sevrens, CDFW, San Diego
David Lawhead, CDFW, San Diego

Enclosures:

Exhibit A: Rancho Jamul Ecological Reserve: Background, Environmental Setting, and Species Impacts

References:

Construction Testing and Engineering, Inc., May 20, 2014. Geologic Characterization for Proposed Soil Nail Walls Jamul Indian Village Hollywood Casino West Side of SR94, South of Melody Road Jamul, California. Report prepared by Construction Testing & Engineering, project number 10-11795T.

Ibid, June 3, 2014. Proposed IMP Catch Basin Evaluation of Percolation Rates Jamul Indian Village Hollywood Casino West Side of SR94, South of Melody Road Jamul, California. Report prepared by Construction Testing & Engineering, project number 10-11795T.

Ibid, June 6, 2014. Preliminary Geotechnical Investigation, Proposed Waste Water Treatment Plant Jamul Indian Village Hollywood Casino, 14191 Highway 94 Jamul, California. Report prepared by Construction Testing & Engineering, project number 10-11795T.

Ibid, February 4, 2015. Proposed Stormchamber Evaluation of Percolation Rates Jamul Indian Village Hollywood Casino West Side of SR94, South of Melody Road Jamul, California. Report prepared by Construction Testing & Engineering, project number 10-11795T.

Ibid, February 18, 2015. Proposed East Stormchamber Evaluation of Percolation Rates Jamul Indian Village Hollywood Casino West Side of SR94, South of Melody Road, Jamul, California. Report prepared by Construction Testing & Engineering, project number 10-11795T.

Ibid, February 23, 2015. Summary of Percolation Rates and Rock Characterization for Proposed Stormchamber Infiltration Design Jamul Indian Village Hollywood Casino West Side of SR94, South of Melody Road Jamul, California. Report prepared by Construction Testing & Engineering, project number 10-11795T.

County of San Diego Department of Environmental Health Land and Water Quality Division, 2013. Design Manual for Onsite Wastewater Treatment Systems March 22, 2010 Edition (Updated November 22, 2013).

Jamul Indian Village, February 2014. Addendum Tribal Environmental Evaluation Jamul Indian Village Gaming Development Project.

Ibid, June 6, 2014. Addendum Long Soil Nails Tribal Environmental Evaluation Jamul Indian Village Gaming Development Project.

Ibid, October 2014. Addendum Tribal Environmental Evaluation Temporary Constructing Staging Jamul Indian Village Gaming Development Project.

Ibid, April 2015. Wastewater Addendum Tribal Environmental Evaluation Jamul Indian Village Gaming Development Project.

Jamul Indian Village and State of California, October 8, 1999. Tribal-State compact between the State of California and the Jamul Indian Village (Addendums A and B).

Seattle Public Utilities Utility Systems Management Branch, February 2008. Onsite wastewater treatment systems: A technical review.

Comment Letter #3

DIANNE JACOB: SUPERVISOR, SECOND DISTRICT
SAN DIEGO COUNTY BOARD OF SUPERVISORS

DIANNE JACOB

SUPERVISOR, SECOND DISTRICT
SAN DIEGO COUNTY BOARD OF SUPERVISORS

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Eucalyptus Hills
Fernbrook
Flinn Springs
Granite Hills
Grantville
Guatay
Harbison Canyon
Jacumba
Jamul
Julian
Lake Morena
Lakeside
Mount Helix
Mount Laguna
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Viejas

April 27, 2016

John Hay, Associate General Counsel
National Indian Gaming Commission
1849 C Street NW, Mail Stop #1621
Washington, DC 20240

Dear Mr. Hay:

RE: Draft Supplemental Environmental Impact Statement for the Jamul Indian Village Proposed Gaming Management Agreement

As Supervisor of the San Diego County Board of Supervisors representing the Second District which includes the rural community of Jamul, I submit the following comments on the draft supplemental environmental impact statement (SEIS) for the gaming management contract for the Jamul Indian Village (JIV).

The scope of the Draft SEIS is stated to be limited to the approval of a gaming contract between JIV and San Diego Gaming Ventures (SDGV). Furthermore, the SEIS concludes that the proposed action would not result in an impact to the environment, stating that "Should the National Indian Gaming Commission (NIGC) not approve the gaming management contract, JIV would simply assume management responsibilities for the gaming facility". This approach leaves the County and the State with inadequate information to evaluate the environmental impacts associated with this action, as required under the National Environmental Protection Act (NEPA) and the California Environmental Quality Act (CEQA). 3-1

I am in agreement with the comments submitted by the County of San Diego that there are serious potential environmental impacts associated with JIV's proposed wastewater treatment facility that require further Federal oversight and requirements. The proposed wastewater system design has changed since the original Tribal Environmental Evaluation was completed. The Draft SEIS does not provide any details about reporting or monitoring requirements. In addition, the Draft SEIS does not require that JIV have an emergency response plan for non-treated wastewater in case of a failure at the proposed plant. 3-2

Also, by limiting the scope of the Draft SEIS to the approval of a gaming contract, the NIGC is neglecting serious traffic safety concerns. Although JIV has stated that there will be traffic improvements made on State Route 94, there is no requirement 3-3

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or guarantee that they will be completed prior to the proposed opening of the casino. The Draft SEIS should take into account the potential traffic impacts, which will have a significant impact on the operations of the casino and the surrounding communities. 3-3 cont.

Thank you for your consideration of these potential environmental and public, health, and safety impacts. I look forward to the NIGC's response to the concerns outlined in this letter as well as those raised by the County of San Diego and community members.

Sincerely,

DIANNE JACOB
Vice-Chairwoman

Comment Letter #4

COUNTY OF SAN DIEGO: PLANNING & DEVELOPMENT SERVICES

County of San Diego

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April 28, 2016

National Indian Gaming Commission
Department of the Interior
Attention: John R. Hay, Associate General Counsel
1846 C Street, NW
Washington, DC 20240

Via E-mail: John_Hay@nigc.gov

COMMENTS ON THE DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE JAMUL INDIAN VILLAGE PROPOSED GAMING MANAGEMENT AGREEMENT, SAN DIEGO COUNTY, CALIFORNIA

The County of San Diego (County) has reviewed the Draft Supplemental Environmental Impact Statement (SEIS) for the gaming management contract for the Jamul Indian Village (JIV). The County also made comments on the Notice of Intent to Prepare a DEIS on July 25, 2013, to the Bureau of Indian Affairs. The Department of Public Works and Planning & Development Services has reviewed the Draft SEIS and has the following comments.

General Comments

4-1 The scope of the Draft SEIS is limited to the approval between JIV and San Diego Gaming Ventures (SDGV). The SEIS concludes that the proposed action would not result in an impact to the environment, concluding that "should the NIGC not approve the GMA, JIV would simply assume management responsibilities for the gaming facility." This approach has narrowed environmental review of the project for local agencies trying to assess mitigation under NEPA and the aspects of the casino project that are subject to the California Environmental Quality Act. The County has the following other general comments:

4-2

1. The proposed Management Contract is currently subject to the terms of the 1999 JIV Compact, which will expire in the year 2020. The proposed Management

4-2 cont. Contract specifies a 7 year term; under the both regulatory and discretionary authority that the National Indian Gaming Commission has over Gaming Management Contracts JIV proposes to execute with professional service providers. The Final SEIS should clarify how the management Contract is able to extend beyond the time period allowed under the Gaming Compact without its extension.

4-3 2. Additionally, the proposed Management Contract specifies a 7 year term; with justification required to extend beyond five years. Through this process, please provide: "Justification," consistent with the provisions of CFR Title 25, Chapter III, Subchapter C, §533.3(f) and §531.1(h).

Wastewater

4-4 1. The Wastewater system was revised since the original Tribal Environmental Evaluation was reviewed, with a supplemental published in 2015. The SEIS Design criteria of the wastewater treatment facility (currently under construction) have not been presented in the documents. It is our assumptions that all the treatment processes are designed considering worst case scenario with full redundancy. All storage basins shall be adequately designed and constructed to prevent any spills to the environments. It should be specified in the Final Supplemental EIS if any federal agency will respond if the system does fail.

4-5 2. Page 5-5 states that Excess treated water would need to be disposed via trucking to the City of San Diego Pump Station No.1 during winter months. The Final EIS should clarify if the facility have emergency response plan for non-treated wastewater in case of the plant failure.

4-6 3. Page 5-11 states the facility shall be subject to federal clean water regulations as enforced by the EPA and the Regional Water Quality Control Board. Please describe the monitoring and reporting requirements applicable to the Reservation to ensure the quality of salinity, total dissolved solids, chlorides, nitrate, sulfate and aluminum discharged to groundwater. The Final SEIS should also list any permits or coordination with the EPA for any discharge as a part of the document.

4-7 4. Pages 5-49 to 5-50 state that by using recycled water on-site, the total water demand is decreased from 86,730 gallons per day (gpd) to 34,692 gpd. The SEIS should describe in detail how 50,000 gpd of recycled water would be allocated/used for irrigation, cooling tower, and toilet/urinal flushing.

The County appreciates the opportunity to participate and comment on this project. We look forward to providing additional assistance at your request. If you have any questions regarding these comments, please contact Eric Lardy, Land Use/Environmental Planning Manager, at (858) 694-3052, or via email at Eric.Lardy@sdcounty.ca.gov

Sincerely,

Joseph Farace, AICP
Group Program Manager
Advance Planning Division

Attachment: Jamul Dulzura Community Planning Group Letter Dated April 27, 2016 Regarding the Draft Supplemental Environmental Impact Statement for Jamul Indian Village Proposed Gaming Management Agreement

e-mail cc:
Bob Spanbauer, Policy Advisor, Board of Supervisors, District 2
Megan Jones, Group Program Manager, Land Use and Environment Group
Eric Lardy, Land Use/Environmental Planning Manager, Planning & Development Services
Justin Crumley, Senior Deputy County Counsel, County of San Diego
Dan Brogadir, Wastewater Division, Department of Public Works

Jamul Dulzura Community Planning Group
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April 27, 2016

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1849 C Street NW, Mail Stop #1621
Washington, DC 20240
John_Hay@nigc.gov

Dear Mr. Hay:

RE: Draft Supplemental Environmental Impact Statement for Jamul Indian Village Proposed Gaming Management Agreement

After reviewing the Supplemental Environmental Impact Statement (SEIS) in detail the Jamul Dulzura Community Planning Group (JDCPG) continues to find that the SEIS is flawed in many areas and maintains its position urging denial of the proposed Gaming Management Agreement between the Jamul Indian Village and San Diego Gaming Ventures.

In its opening paragraph, Section 1.1 of the SEIS the SEIS states "This Supplemental Environmental Impact Statement (SEIS) has been prepared to address revisions to the Proposed Action previously addressed in the *Final Environmental Impact Statement: Jamul Indian Village*, which was completed in 2003." The paragraph ends with "Thus, the scope of the current Proposed Action is limited to the Gaming Management Agreement (GMA) between JIV and the proposed operator (San Diego Gaming Ventures [SDGV]) subject to approval by the National Indian Gaming Commission (NIGC)." These two sentences clarify that the JIV is still not addressing the off-reservation impacts as required by the compact agreement, but plans to move forward with opening the gaming facility.

It must be noted that while much time and effort has been spent going through the motions of conducting a proper EIS, and in the preparation of many documents in the time between 2003 and present, little has changed in the gaming facility plan since 2003. Documentation submitted by JIV continues to be inconsistent and riddled with false statements. Please observe section 1.3 of the SEIS document that states in paragraph two the original design proposed in 2003 included a 205,194 square foot gaming facility. Paragraph 5 of the same section states the size of the current gaming facility will be 203,000 square feet. Paragraph 5 claims this is a 53% size reduction. Changes to the project design, and planned mitigation proposed by JIV still fail to adequately address most of the same major off-reservation impacts identified in 2003. These same concerns have been consistently restated by the JDCPG in every response document to date.

Again, for the record, here is a partial list of major concerns and off-reservations impacts previously identified that are in need of mitigation.

Wastewater concerns (4.9.2)
Wastewater concerns include problems with potential discharge from on-site water treatment system, inadequate separation of static groundwater from effluent disposal fields, lack of adequate percolation rates in disposal fields, proximity of seepage pits to Willow Creek, and effective storm water treatment strategies among other wastewater concerns.

The most recent examination of the proposed onsite water treatment system (OWTS) was completed by Black & Veatch who were unable to determine the efficacy of the system due to the limited information provided by the gaming facility. They were unable to determine if the system could treat the anticipated volume of waste and additional information was requested from the gaming facility. The request was refused. The system's treatment of brine water and raw water discharge, as well as the treated water discharge, may well be the greatest concern. If the subsurface disposal system is not designed/reviewed/approved properly and does not work, there is no proposed backup or expansion system. Groundwater contamination and surface water contamination of Oak Creek and the downstream properties is a real possibility. They propose a shallow subsurface disposal system rather than a deeper horizontal seepage pit system which may result in the shallow surface soils which are more likely underlain by dense granite formations that will not percolate.

There is no offer of third-party oversight in the operation, only submittal of reports. This dependence upon their self-monitoring and a lack of independent reporting puts the greater community at risk including a key resource, Otay Lakes, the water supply for City of San Diego. In summary, without plans and calculations being provided for a complete third party review, and without any way to enforce the proposed mitigation measures, this document has very little value to insure that the JIV designs, constructs, or operates an adequate sanitary disposal system. In the event of future operational issues there is no plan of expansion included. California Fish and Wildlife addresses these same concerns in their April 13, 2016 letter to the US EPA and JIV Development Corporation.

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Because so many of our residents are entirely dependent upon groundwater, it is **imperative that no groundwater** ever be used in this facility or any future facility associated with this commercial development. Population growth coupled with the extreme drought conditions in our State, have caused many residents' wells to go dry.

As previously stated in section 4.9.2 in our discussion on wastewater, we need to reiterate the necessity that additional measures and independent monitoring of the wastewater need to be taken to ensure the quality and quantity of our groundwater.

Traffic impacts (4.8.1)

Traffic issues may well be the most severe immitigable negative impact on our community. The Caltrans mitigation measures for five intersections on SR-94 and the two ingress/egress proposals, are woefully inadequate to address the major off-site impacts on our roads. When 9000+ cars are added to the already overburdened rural highway 94, the stress and impact will be enormously felt on many of the County roads. Proctor Valley Road and Otay Lakes Road could be expected to supply major access from the South Bay to the proposed casino by patrons and employees alike. Neither of these roads is capable of large increases in traffic without costly major improvements. The SEIS does not address these important corridors, even though our JDCPG has met with the JIV and Caltrans and consistently pointed out that these two roads need to be improved for safety of the prospective patrons of the casino and members of our community who use these roads in their daily commute.

The proposed casino will more than double the Average Trips per Day on SR94, a route that currently has a rate of fatal accidents per mile five times the county average. Accidents and emergencies will force drivers to search for alternative routes on slower, narrow, winding County roads or to attempt to find shortcuts through backroads. It is important to remember that Jamul is unique and does **not** have sufficient alternative circulation routes for emergency situations. Such emergencies are compounded by these narrow two-lane roads. It is important that these roads be brought up to a safety standard that will be able to handle the immense increase in traffic that is expected.

Our JDCPG, after gathering input from our community, worked with the County on a matrix of 31 County road intersections and segments that could be severely impacted. This matrix is attached to this document. The SEIS needs to address these off-site impacts generated by the proposed gaming facility. To highlight a few for you: The matrix includes Steele Canyon Road where it intersects with Willow Glen Drive to Jamul Drive, which is already above capacity due to drop-offs and pick-ups at Jamacha Elementary School. It will need additional lanes to accommodate the traffic. Jamul Drive from Lyons Valley Road to Steele Canyon is very curvy and narrow and must be widened as it will be used as an alternative detour to avoid traffic congestion on SR-94. Willow Glen to SR-54 also services Sycuan Casino and is already at capacity. We have a very serious problem at SR-94 and Vista Sage which has been the scene of many accidents. It needs a continuous left turn lane on SR94 westbound and eastbound or at the minimum a left turn lane westbound. Almost as severe is the SR-94 and Vista Diego Road which has extreme site distance problems and needs a left turn lane plus acceleration lanes going westbound. Scheduled in the future is the re-configuration and re-alignment of the intersections of Honey Springs Road and Otay Lakes Road, but with the increase in traffic, especially from South Bay and Tecate, this must be completed as part of the traffic mitigation before more people are killed. We have gone into detail on the attached matrix, and would urge you to insist these roads are safe before the proposed casino is opened.

Increased traffic, due to the proposed gaming facility, will severely and negatively impact the ability of SR 94 to handle the anticipated traffic volumes. The increased level of wear and tear is expected to hasten road degradation. This will have impact on the International Port of Entry, community wildfire evacuation, and emergency services response. SR94 serves as a primary access to the Mexican border and congestion will impede the ability of the government to maintain operational control in national security matters.

Please see attached matrix of Impacts from JIV to SR-94 & Feeder Roads.

By far the most **significant, immitigable, negative impact to our rural community is TRAFFIC!**

Air Quality (4.4)
In Sections 4.4.1.1 through 4.4.1.8, the SEIS discusses various Air Pollutants. The majority of these pollutants come from motor vehicles, including diesel motor vehicles. Sections 4.4.2.1 through 4.4.2.4 discuss Federal & State Regulations of Air Quality. Currently, prior to opening, the Gaming Facility site meets most of the federal standards for criteria pollutants. These are measured by the nearest monitoring station located in El Cajon, over 7 miles away from the site. If air quality is currently marginal, and the Gaming Facility adds an additional 9000 vehicle trips daily, plus diesel utility vehicles, air quality within the entire Jamul Dulzura area will be significantly degraded to a dangerous level. Lack of local monitoring receptors is a flaw in both the analysis and future comparable data.

Biological Resources 4.5

The Gaming Facility site is adjacent to the Rancho Jamul Ecological Reserve, the Hollenbeck Canyon Wildlife Area, and the U.S. Fish & Wildlife Reserve. The Willow Creek riparian corridor with Southern Coast Live Oak runs through the facility and adjacent to it. These protected and open spaces have allowed wildlife and migratory movements. The area surrounding the Gaming Facility site is located within a "core biological area" of San Diego County as determined by the Multiple Species Conservation Program (MSCP) that supports numerous threatened and endangered animal and plant species such as the coastal California gnatcatcher, Quino checkerspot butterfly, San Diego horned lizard and San Diego fairy shrimp.

Section 4.5.2 refers to over-grazing creating the decimation of the Quino checkerspot butterfly and California Gnatcatcher. Both can be reestablished if given the biological opportunity erased by the Gaming Facility.

Golden Eagle pairs are located in the Rancho Jamul Ecological Reserve and Hollenbeck Canyon Wildlife area. Threatened Burrowing Owl species are prevalent. The huge increase of night traffic between these preserves from the Gaming Facility will have a deadly effect on all wildlife, including the endangered species. Several endangered species are listed as not being observed within the Gaming Facility site during multiple studies. These studies were conducted

during non-breeding seasons. Immediately thereafter, construction to the facility began. Biologists have determined that the noise from construction has prevented breeding pairs from choosing the area for nesting. Again, our concerns about biological impact have been ignored. Section 5.2.4.2 states during construction, noise barriers, either natural or man-made, would be used to reduce noise from heavy machinery. This never happened. The noise from machinery was nearly constant and extreme. There were no noise barriers. If there were migratory endangered wildlife adjacent to the Gaming Facility, construction guaranteed its elimination. The fact stands that the combined impacts of cars, buses, trucks, human activity, light, and noise, will render the conservation and regeneration of parcels adjacent to the project unsuccessful.

Visual Resources AKA Dark Skies (4.10.3)

The County of San Diego has designated the Jamul Sub-Region as a Dark Sky area, restricting light pollution by commercial properties. The Gaming Facility states they will use lights designed to mitigate the illumination of area. The effect of headlights from the additional 9000 vehicles per day is not addressed and is important to skies not only within the confines of the Gaming Facility, but throughout the entire adjacent area, including Rancho Jamul Ecological Reserve and Hollenbeck Canyon Wildlife area. An additional unintended consequence of this huge increase in traffic would be a corresponding dramatic escalation in road-kill impact on the native wildlife, for which there is no mitigation available. The limited study area does not reflect the actual area that will be impacted by this development.

Public Health and Safety (4.9.5)

JIV has recognized the need for onsite health and safety services, but has made no provision for increased needs offsite. Additional law enforcement and emergency medical services will be required, but the JIV has only agreed to fee-for-service of one sheriff and a 4x4 vehicle both to be used onsite. In addition, numerous studies nationwide have been conducted which show an increased level of crime in communities post casino development, (Ref. Gaming Economics 17 November 2004). It is important to note that there are no mitigation measures provided for offsite security within our neighborhoods that begin approximately a half-mile away from the proposed project.

Socio-Economic (4.7)

Previous studies indicate that for every dollar spent in a casino, public funds in the amount of three dollars must be spent to mitigate social problems such as crime, alcoholism, gambling addiction, and domestic violence. The State of California does not collect sales tax from any tribes so sales tax revenue cannot be used as an offset in mitigation fees.

The Jamul Dulzura Community Planning Group (JDCPG), an elected body of the County of San Diego, responsible for land-use planning in the Jamul Dulzura Sub region, San Diego County,

hereby strongly recommends that the National Indian Gaming Commission deny approval of the Gaming Management Contract between the Jamul Indian Village and San Diego Gaming Ventures, LLC and direct the Jamul Indian Village to properly mitigate all off site impacts including, but not limited to those stated above and attached to this letter.

We look forward to the previously promised public hearing on this matter.

Sincerely,

William Herde

William Herde, Vice-Chair
Jamul Dulzura Community Planning Group

Cc: Secretary Sally Jewell, Department of Interior
Senator Dianne Feinstein
Senator Barbara Boxer
Congressman Duncan D. Hunter
Congress Juan Vargas
Governor Jerry Brown
State Senator Joel Anderson
State Senator Ben Hueso
Assemblyman Brian Jones
Supervisor Dianne Jacob

Attachment: Impacts from JIV to SR-94 & Feeder Roads

Impacts from JIV to SR-94 & Feeder Roads			
Segment / Intersection	**Impact**	**County Review/Project**	**Community Input**
Steele Canyon Road(Willow Glen Drive to Jamul Drive)	Direct Impact from additional traffic needs to be fully mitigated.	Capacity improvements to Bridge and road segment	Already above capacity before & after Jamacha Elem school drop-offs & pickups. Need to add additional lanes to accommodate traffic.
Steele Canyon Road(SR-94 to Willow Glen Drive)	Direct Impact from additional traffic needs to be fully mitigated.		
Jamul Drive (Lyons Valley Road to Steele Canyon Road)	Direct Impact from additional traffic needs to be fully mitigated.	No proposed project	Will be used as an alternative detour to avoid traffic congestion on SR 94 and must be widened. Very curvy and narrow – bicyclists exacerbate the problem
Willow Glen Drive to SR-54	Direct Impact from additional traffic needs to be fully mitigated.	No proposed project	Also services Sycuan Casino – needs additional lanes as is already at capacity.
SR-94 / Vista Sage Road	Intersection Impacted, no turnout area.	Site Distance Improvements	Needs continuous left turn lane on SR 94 westbound and eastbound or at minimum left turn lane westbound. Many accidents!

Impacts from JIV to SR-94 & Feeder Roads			
Segment / Intersection	**Impact**	**County Review/Project**	**Community Input**
SR-94 / Vista Diego Road	Intersection Impacted, no turnout area.	Site Distance Improvements, grading and retaining wall	Needs left turn lane on SR 94 eastbound plus additional acceleration lane going westbound.
SR-94 / Honey Springs & Otay Lakes Road	Intersections not improved, off-set intersection with impact from project. Eastbound to Northbound sight visibility constrained.	Signalize intersection, Site Distance Improvements	Must coordinate the two offset intersections or re-configure them to meet and signalize the intersection.
Honey Springs/Skyline Truck Trail and Lyons Valley Road'4 corners'	Intersection and Sight Distance.	Site Distance Improvements	Agree
Lyons Valley Road and Japatul Valley Road	Intersection and Sight Distance.	No proposed project	Agree
Lawson Valley Road and Skyline Truck Trail	Intersection and Sight Distance.	Site Distance Improvements	This is an offset intersection – both need to be widened adding acceleration and deceleration lanes or a continuous left turn lane to service both intersections

Impacts from JIV to SR-94 & Feeder Roads			
Segment / Intersection	**Impact**	**County Review/Project**	**Community Input**
Peg Leg Mine Road and Lyons Valley Road ***Add Rio Madre, Rio Grande & Loma Vista***	Intersection and Sight Distance.	Site Distance Improvements	Very difficult sight distance need additional turn lane. Consider continuous left turn lane to cover all four Lyons Vly Rd intersections
Rocky Sage Road and Lyons Valley Road	Intersection and Sight Distance.	Site Distance Improvements, minor grading	Severe "S" curve makes sight distance very difficult. See above
Pleasant View Lane and Lyons Valley Road and Jefferson	Intersection and Sight Distance.	No proposed project	See above re continuous left turn lane to cover all 3 intersections. Left turn onto Jefferson needs longer left turn lane for safety
Hidden Trail and Skyline Truck Trail	Intersection and Sight Distance.	No proposed project	Leads to Skyline Ranch Development – has left turn lane going eastbound = needs acceleration & de-acceleration lanes
Babel Drive and Skyline Truck Trail	Intersection and Sight Distance.	No proposed project	Agree
Melody Road and Proctor Valley Road	Intersection and Sight Distance.	No proposed project	Limited sight visibility – needs stop signs as a minimum

Impacts from JIV to SR-94 & Feeder Roads			
Segment / Intersection	**Impact**	**County Review/Project**	**Community Input**
Calle Mesquite/ Calle Bueno Ganar/Proctor Valley Road	Intersection and Sight Distance.	No proposed project	Look at Melody Road segment cars will travel from SR94 to Chula Vista via Melody Rd
Lyons Valley Road and Skyline Truck Trail	Intersection and Sight Distance.	Site Distance Improvements	Leads out from 2 schools. Now a three way stop – consider signalizing intersection. Cars running stop sign cause accidents.
Jamul Drive and Lyons Valley Road	Intersection and Sight Distance.	Site Distance Improvements	Major site distance problems – "T-Bone crashes" occur often – consider signalization w/light triggered by Jamul Dr traffic
Cumulative Impacts (TIF)	Cumulative Impacts to JIV Area	TIF Payment	This should have been in the MOU!!! Please make sure you get enough to cover <u>all</u> of the road improvements.
Expand SR-94 along bridge near Steele Canyon High School	Capacity Improvement SANDAG proposed improvements in 2040		Must be widened. It is a dangerous traffic choke point as SR94 proposed to go from 4 lanes to 2 over the bridge and back to 4 after bridge.

Impacts from JIV to SR-94 & Feeder Roads			
Segment / Intersection	**Impact**	**County Review/Project**	**Community Input**
Traffic Study Steele Canyon High School	Internal circulation study		Must be completed for the safety of 2200 students! Very dangerous!
Pedestrian Improvements SR-94	Steele Canyon High School to Jamacha Road (1.4 Miles)		Need to re-establish safe walking path for students & cross country teams paralleling SR94. In addition need a safe pedestrian equestrian path under SR94 through a tunnel
Proctor Valley Road	Proctor Valley Road from Echo Valley is a two lane bumpy dirt road which would be used as a route from South Bay, Chula Vista & National City to proposed casino.		Need to make it safe to travel from South Bay to Jamul – Must be upgraded!
SR-94 at Millar Ranch Road	Not addressed		Lane expansion will make exiting Millar Ranch Road unsafe. Remember all radio serving Cal fire, emergency, cell and TV antennas located on top of San Miguel – Millar Ranch Rd only access!!! Consider "trip switch" signal installed.

Impacts from JIV to SR-94 & Feeder Roads			
Segment / Intersection	**Impact**	**County Review/Project**	**Community Input**
Otay Lakes Road	Not Addressed		Traffic from South Bay will increase significantly – Bicyclists from Olympic Training Center plus regular organized bike rides occur on this 2-lane road on a consistent basis – some very serious!

JIV SEIS states on pg. 5-76:
The cumulative analysis assumes the completion of two projects identified in the Mobility Element of the San Diego County General Plan: completion of Proctor Valley Road as a 2-lane light collector from Chula Vista city limits to SR-94, and realignment of Otay Lakes Road with the intersection of Honey Springs Road to form a four-way intersection at SR-94.

On section 6.1 the statement is made:
Neither the Proposed Action nor No Action Alternative would result in an impact on the environment; therefore, no mitigation measures are required.

Comment Letter #5

JAMUL DULZURA COMMUNITY PLANNING GROUP

Jamul Dulzura Community Planning Group
P.O. Box 613 • Jamul, CA 91935

April 27, 2016

John R. Hay
Associate General Counsel
1849 C Street NW, Mail Stop #1621
Washington, DC 20240
John_Hay@nigc.gov

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5-14 cont.

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5-18 cont.

hereby strongly recommends that the National Indian Gaming Commission deny approval of the Gaming Management Contract between the Jamul Indian Village and San Diego Gaming Ventures, LLC and direct the Jamul Indian Village to properly mitigate all off site impacts including, but not limited to those stated above and attached to this letter.

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Sincerely,

William Herde

William Herde, Vice-Chair
Jamul Dulzura Community Planning Group

Cc: Secretary Sally Jewell, Department of Interior
Senator Dianne Feinstein
Senator Barbara Boxer
Congressman Duncan D. Hunter
Congress Juan Vargas
Governor Jerry Brown
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Assemblyman Brian Jones
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Segment / Intersection	**Impact**	**County Review/Project**	**Community Input**
Steele Canyon Road(Willow Glen Drive to Jamul Drive)	Direct Impact from additional traffic needs to be fully mitigated.	Capacity improvements to Bridge and road segment	Already above capacity before & after Jamacha Elem school drop-offs & pickups. Need to add additional lanes to accommodate traffic.
Steele Canyon Road(SR-94 to Willow Glen Drive)	Direct Impact from additional traffic needs to be fully mitigated.		
Jamul Drive (Lyons Valley Road to Steele Canyon Road)	Direct Impact from additional traffic needs to be fully mitigated.	No proposed project	Will be used as an alternative detour to avoid traffic congestion on SR 94 and must be widened. Very curvy and narrow – bicyclists exacerbate the problem
Willow Glen Drive to SR-54	Direct Impact from additional traffic needs to be fully mitigated.	No proposed project	Also services Sycuan Casino – needs additional lanes as is already at capacity.
SR-94 / Vista Sage Road	Intersection Impacted, no turnout area.	Site Distance Improvements	Needs continuous left turn lane on SR 94 westbound and eastbound or at minimum left turn lane westbound. Many accidents!

Impacts from JIV to SR-94 & Feeder Roads			
Segment / Intersection	**Impact**	**County Review/Project**	**Community Input**
SR-94 / Vista Diego Road	Intersection Impacted, no turnout area.	Site Distance Improvements, grading and retaining wall	Needs left turn lane on SR 94 eastbound plus additional acceleration lane going westbound.
SR-94 / Honey Springs & Otay Lakes Road	Intersections not improved, off-set intersection with impact from project. Eastbound to Northbound sight visibility constrained.	Signalize intersection, Site Distance Improvements	Must coordinate the two offset intersections or re-configure them to meet and signalize the intersection.
Honey Springs/Skyline Truck Trail and Lyons Valley Road'4 corners'	Intersection and Sight Distance.	Site Distance Improvements	Agree
Lyons Valley Road and Japatul Valley Road	Intersection and Sight Distance.	No proposed project	Agree
Lawson Valley Road and Skyline Truck Trail	Intersection and Sight Distance.	Site Distance Improvements	This is an offset intersection – both need to be widened adding acceleration and deceleration lanes or a continuous left turn lane to service both intersections

Impacts from JIV to SR-94 & Feeder Roads			
Segment / Intersection	**Impact**	**County Review/Project**	**Community Input**
Peg Leg Mine Road and Lyons Valley Road ***Add Rio Madre, Rio Grande & Loma Vista***	Intersection and Sight Distance.	Site Distance Improvements	Very difficult sight distance need additional turn lane. Consider continuous left turn lane to cover all four Lyons Vly Rd intersections
Rocky Sage Road and Lyons Valley Road	Intersection and Sight Distance.	Site Distance Improvements, minor grading	Severe "S" curve makes sight distance very difficult. See above
Pleasant View Lane and Lyons Valley Road and Jefferson	Intersection and Sight Distance.	No proposed project	See above re continuous left turn lane to cover all 3 intersections. Left turn onto Jefferson needs longer left turn lane for safety
Hidden Trail and Skyline Truck Trail	Intersection and Sight Distance.	No proposed project	Leads to Skyline Ranch Development – has left turn lane going eastbound = needs acceleration & de-acceleration lanes
Babel Drive and Skyline Truck Trail	Intersection and Sight Distance.	No proposed project	Agree
Melody Road and Proctor Valley Road	Intersection and Sight Distance.	No proposed project	Limited sight visibility – needs stop signs as a minimum

Impacts from JIV to SR-94 & Feeder Roads			
Segment / Intersection	**Impact**	**County Review/Project**	**Community Input**
Calle Mesquite/ Calle Bueno Ganar/Proctor Valley Road	Intersection and Sight Distance.	No proposed project	Look at Melody Road segment cars will travel from SR94 to Chula Vista via Melody Rd
Lyons Valley Road and Skyline Truck Trail	Intersection and Sight Distance.	Site Distance Improvements	Leads out from 2 schools. Now a three way stop – consider signalizing intersection. Cars running stop sign cause accidents.
Jamul Drive and Lyons Valley Road	Intersection and Sight Distance.	Site Distance Improvements	Major site distance problems – "T-Bone crashes" occur often – consider signalization w/light triggered by Jamul Dr traffic
Cumulative Impacts (TIF)	Cumulative Impacts to JIV Area	TIF Payment	This should have been in the MOU!!! Please make sure you get enough to cover all of the road improvements.
Expand SR-94 along bridge near Steele Canyon High School	Capacity Improvement SANDAG proposed improvements in 2040		Must be widened. It is a dangerous traffic choke point as SR94 proposed to go from 4 lanes to 2 over the bridge and back to 4 after bridge.

Impacts from JIV to SR-94 & Feeder Roads			
Segment / Intersection	**Impact**	**County Review/Project**	**Community Input**
Traffic Study Steele Canyon High School	Internal circulation study		Must be completed for the safety of 2200 students! Very dangerous!
Pedestrian Improvements SR-94	Steele Canyon High School to Jamacha Road (1.4 Miles)		Need to re-establish safe walking path for students & cross country teams paralleling SR94. In addition need a safe pedestrian equestrian path under SR94 through a tunnel
Proctor Valley Road	Proctor Valley Road from Echo Valley is a two lane bumpy dirt road which would be used as a route from South Bay, Chula Vista & National City to proposed casino.		Need to make it safe to travel from South Bay to Jamul – Must be upgraded!
SR-94 at Millar Ranch Road	Not addressed		Lane expansion will make exiting Millar Ranch Road unsafe. Remember all radio serving Cal fire, emergency, cell and TV antennas located on top of San Miguel – Millar Ranch Rd only access!!! Consider "trip switch" signal installed.

Impacts from JIV to SR-94 & Feeder Roads			
Segment / Intersection	**Impact**	**County Review/Project**	**Community Input**
Otay Lakes Road	Not Addressed		Traffic from South Bay will increase significantly – Bicyclists from Olympic Training Center plus regular organized bike rides occur on this 2-lane road on a consistent basis – some very serious!

JIV SEIS states on pg. 5-76:
The cumulative analysis assumes the completion of two projects identified in the Mobility Element of the San Diego County General Plan: completion of Proctor Valley Road as a 2-lane light collector from Chula Vista city limits to SR-94, and realignment of Otay Lakes Road with the intersection of Honey Springs Road to form a four-way intersection at SR-94.

On section 6.1 the statement is made:
Neither the Proposed Action nor No Action Alternative would result in an impact on the environment; therefore, no mitigation measures are required.

Comment Letter #6

LAW OFFICES OF STEPHAN C. VOLKER

Stephan C. Volker
Alexis E. Krieg
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10.370B.01

April 28, 2016

via Email and U.S. Mail

John R. Hay, Associate General Counsel
National Indian Gaming Commission
c/o Department of the Interior
1849 C Street NW
Mail Stop #1621
Washington, DC 20240
John_Hay@nigc.gov

Re: **Draft SEIS Comments, Jamul Indian Village**

Dear Mr. Hay:

6-1 On behalf of Jamulians Against the Casino we submit the following comments on the National Indian Gaming Commission's ("NIGC's") Draft Supplemental Environmental Impact Statement ("Draft SEIS") for the Jamul Indian Village ("JIV") Proposed Gaming Management Agreement ("GMA"). The Draft SEIS presents a brief summary of the wide-ranging changes that have occurred to JIV's plans to operate a casino in the community of Jamul. JIV's current casino construction is being financed by San Diego Gaming Ventures ("SDGV") and Penn National Gaming ("PNG"), on the understanding that these gaming managers would recoup their investment upon NIGC's approval of the pending GMA. Yet JIV's construction has evaded review under the National Environmental Policy Act, 42 U.S.C. section 4321 et seq. ("NEPA"), and continues to do so.

6-2 NEPA's statutorily declared purpose is to "encourage productive and enjoyable harmony between man and his environment; [and] to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. NEPA was enacted in response to "the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances." 42 U.S.C. § 4331. NEPA recognizes the "critical importance of restoring and maintaining environmental quality to the overall welfare and development of man," and requires "cooperation with State and local governments, and other

concerned public and private organizations, to use all practicable means and measures . . . to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony." 42 U.S.C. § 4331.

6-2 cont.

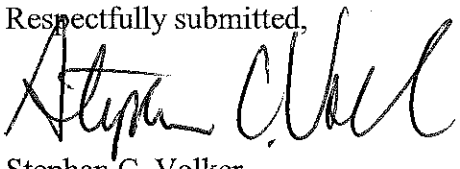
Approval of the pending GMA would undermine NEPA's central purpose by further dividing an already segmented project, and continuing to allow construction of the casino to evade NEPA review. Indeed, the GMA is part of the larger casino project that includes construction of the casino and related access to SR 94, improvements to intersections along SR 94, operational access to the casino from SR 94, and utility improvements along the same right-of-way, all to enable casino operation by SDGV. By improperly segmenting the GMA from the remaining project actions, the public and the agency are deprived of the full picture of the project in violation of NEPA. 42 U.S.C. § 4332; 40 C.F.R. § 1508.25. "Although federal agencies are given considerable discretion to define the scope of NEPA review, connected, cumulative, and similar actions must be considered together to prevent an agency from 'dividing a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.'" *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 894 (9th Cir. 2002) (internal citation omitted).

6-3

Agency cooperation in preparing environmental documents for the same project under CEQA and NEPA is not only allowed, it is encouraged. *City of Davis v. Coleman*, 521 F.2d 661, 666 fn. 3 (9th Cir. 1975) ("We see no good reason, however, why the [EIS and EIR] cannot be prepared jointly, and embodied in a single document which meets the requirements of both NEPA and CEQA"). Caltrans, the lead agency for the related CEQA approvals, maintains that "[c]ombined documentation is the most efficient means to comply with state and federal requirements." Caltrans Environmental Handbooks, Volume 1, Chapter 37. The Environmental Handbooks further articulate that preparing a NEPA document for a project after a CEQA document "often causes frustration and project delay as compliance with federal requirements often requires additional studies and coordination." *Id.*

Where, as here, the pending GMA has no independent utility outside the casino's operation and guest access, the separation of the GMA from the remainder of the project violates NEPA and distorts the entire EIS, including its impact analysis, consideration of alternatives, and consideration of mitigation measures. 42 U.S.C. § 4332; 40 C.F.R. § 1508.25.

Respectfully submitted,



Stephan C. Volker
Attorney for Jamulians Against the Casino

Comment Letter #7

LAW OFFICES OF WEBB & CAREY

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GAMING COMMISSION
2016 MAY -3 AM 11: 56

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April 28, 2016

John Hay
Associate General Counsel
National Indian Gaming Commission (NIGC)
c/o Department of the Interior
1849 C Street N.W., Mail Stop #1621,
Washington, D.C. 20240
John_Hay@nigc.gov

50316-11

Re: **Draft Supplemental Environmental Impact Statement (SEIS) Comments, Jamul Indian Village**

Dear Mr. Hay and the NIGC:

7-1 As you are probably very well aware, our office continues to represent the families of Walter Rosales and Karen Toggery in their claims against the government for the intentional disinterment and removal of their families' remains from the government's portion of the Jamul Indian cemetery in violation of the U.S. and California Constitutions, the Native American Graves Protection Act (NAGPRA), 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. 1996, the Religious Freedom Restoration Act (RFRA), 42 U.S.C. 2000bb-1, the Religious Land Use & Institutionalized Persons Act (RUILPA), 42 U.S.C. 2000cc, California common law, Health & Safety Code (HSC.) 7050.5, 7052, 7054, 7054.6, 7054.7, 7055, 7500, 8102, 8558-80, Public Resources Code (PRC) 5097.5-5097.994, and Penal Code 487, and 622.5.

7-2 Our clients continue to oppose the pending application to approve a Gaming Management Agreement (GMA) for the half-blood Indian community known as the Jamul Indian Village. Our clients hereby further memorialize their "comments," and continuing opposition to the Draft SEIS and any further consideration of the GMA by the NIGC and BIA, since it is premature, arbitrary and capricious to consider either, at this time, for the reasons stated in their opposing comments of October 1, 2003, and the claims stated in *Rosales et al. v. Dutschke et al.*, E.D. Cal. Case No. 15-1145, and *Jamul Action Commmittee et al. v. Chaudurhi*, E.D. Cal. Case No. 13-1920, copies of which are attached, which can be summarized as follows:

7-2 cont.

1. The SEIS fails to address the intentional disinterment and removal of Rosales and Toggery's families' human remains and funerary objects from the government's portion of the Jamul Indian cemetery on which the GMA is proposed to be performed, without consent of Rosales and Toggery and in violation of their Constitutional right to the free exercise of their religious burial rights and their right to due process and just compensation for the taking of their families' remains without their consent, and in violation of NAGPRA, AIRFA, RFRA, RUILPA, HSC, PRC and Penal Codes.

   Kenny Meza, former chairman of the JIV and self appointed grave digger, confessed under oath that JIV had knowledge of the interment of our clients' families' remains on the federal government's portion of the Jamul Indian cemetery for at least 20 years. He purposely had them dug up and removed from their burial sites, without our clients' consent, and without any of the required dignity and federal and state permits.

   Meza's testimony was corroborated by 20 eyewitnesses, the County's Death Certificates, and the Cal. Dept. of Health Permits for Disposition of Human Remains, our notice to the Coroner's Office and the Native American Heritage Commission, all of which show the lawful interment of our clients' families' remains on the government's portion of the Indian cemetery and the illegal disinterment and removal by members of the JIV.

7-3

2. The SEIS fails to establish the findings of fact and conclusions required by 25 CFR 151.3 and 151.4, with regard to the "tribe's governing documents authorizing the tribe to take the requested action," and "the reservation boundaries." The land on which the GMA is to be performed does not qualify for "gaming" under IGRA, 25 USC 2703(4), since it has never been proclaimed to be a "reservation," nor land "over which an Indian tribe exercises governmental power."

7-4

3. The SEIS fails to establish the findings of fact and conclusions required by 25 CFR 83, with regard to any purported "tribe's governing documents authorizing the tribe to take the requested action."

7-5

4. Class III gambling is not lawful on the government's portion of the Jamul Indian cemetery on which the GMA is to be performed under 25 U.S.C. 2710 and 2719.

7-6

5. The proposed Class III gaming violates the Indian Gaming Regulatory Act (IGRA) and the Jamul Tribal-State compact.

Finally, our clients continue to adopt all of the reasons evidencing the deficiencies of the original EIS, which were read into the record on February 6, 2003, along with those filed in response to the Notice of Availability, 81 Fed. Reg. 13418, and particularly those evidencing the items outlined in the October 2001 Checklist:

7-7

1. Evidence of unmitigable environmental impacts.

2. Reasonably anticipated unmitigable impacts on the social structure, infrastructure, services, housing, community character, and land use patters of the surrounding community.

3. Unmitigable impact on the economic development, income, and employment of the surrounding community.

4. Costs of impacts to the surrounding community beyond the sources of revenue to accommodate them.

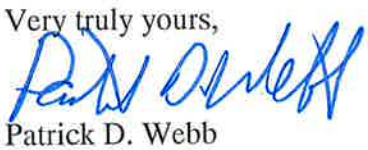
7-8

Should the BIA continue to take any further action with regard to the SEIS, our clients will have no alternative but to pursue their rights under the Administrative Procedure Act, 5 U.S.C. 701-706, to set aside any such agency action for failure to meet statutory, procedural, and constitutional requirements, where such action is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

7-9

For all of these reasons, our clients continue to oppose the pending application to approve the GMA, and insist that it remains premature, and will be arbitrary and capricious, for the NICG/BIA to further consider the SEIS, at this time.

Very truly yours,



Patrick D. Webb
WEBB & CAREY

cc: Walter Rosales
Karen Toggery

Comment Letter #8

JAMUL ACTION COMMITTEE, INC.

JAMUL ACTION COMMITTEE, INC.

P.O. BOX 1317, JAMUL, CA 91935

April 27, 2016

John R. Hay, Associate General Counsel
1849 C Street NW, Mail Stop #1621
Washington, DC 20240
John_Hay@nigc.gov

RE: Draft Supplemental Environmental Impact Statement for the Jamul Indian Proposed Gaming Management Agreement

Dear Mr. Hay,

8-1 The Jamul Action Committee is a local organization representing the community of Jamul and adjacent areas. The Committee has reviewed the SEIS, along with other local groups. The Committee has grave concerns about the misstatements, lack of accurate information and the un-mitigable consequences of such a proposed project. In your role to make sure that the proposed contract will ensure the off-site impacts are addressed and mitigated, we want to provide you additional input to those offsite impacts.

8-2 First, we want to be on the record that none of the four parcels on which the casino is being constructed is a "reservation" for IGRA purposes - as defined by the Indian Reorganization Act and the Indian Gaming Regulatory Act.

To be a "reservation" in a legal sense, the property must first be taken into trust and, then, the Secretary of Interior can proclaim it to be a reservation. The "Daley parcel" has never been taken into trust. Nor has the Secretary ever proclaimed it to be a reservation. None of the four parcels where the casino is being construct has been formally or legally declared a reservation.

The legal definition of the word "reservation" outlined in the 2008 regulations for IRA and IGRA purposes is relatively precise. None of the four parcels qualify.

8-3 We are also concerned that a document written in 2013 is being used. This makes it over thirteen years old. Many things have occurred since this document was vetted. The 2013 document the EE is flawed and failed to address the many concerns we will put forth.

To help you grasp the reasons we have concerning the offsite impacts to this commercial complex in a rural area, we want you to be aware of several contributing factors.

JAMUL ACTION COMMITTEE, INC.

P.O. BOX 1317, JAMUL, CA 91935

8-4 The site of the casino is on a 4.6 parcel. The sliver of land to the west is a legal easement access to the Roman Catholic Diocese Historical cemetery. The adjacent land to the east is the huge Ecological Reserve of over 33 thousand acres. The entrance to the proposed casino is a fee simple parcel. The entrance is actually on a very dangerous curve on State Route 94. The surrounding community of Jamul is rural. The majority of the properties are residential, on well water and septic systems.

8-5 The area is prone to wildland fires. In 2007 we had the Harris Fire which destroyed over 300 homes and burned thousands of acres. Evacuation during the fire made it very evident that the only artery through the area can come to a standstill quickly. We have repeatedly witnessed delays from an accident closing the road for hours. Just last year, with a fatality the road was closed for over 10 hours.

Traffic has been the unifying concern for all the community. Caltrans has identified the SR 94 section thru Jamul at a Level F for service without the additional projected casino traffic of an additional 9000+ car trips a day.

8-6 The SEIS does not adequately address the two lane road. Nor does it identify the fact that SR94 is a corridor which also serves the Tecate, Mexico International Border crossing. With the proposed casino, it will more than double the ATD. Right now the fatality rate accidents per mile on this stretch of SR94 are five times the County average. Jamul has very few interior roads and there are no real alternative routes for emergency situations such as accidents, wildland fires, earthquakes or an unforeseen disaster.

8-7 The SEIS fails to address any of the off-site impacts that will be generated from a facility that is of a commercial nature over 203000 square feet with a parking structure for 1900+ cars.

8-8 Please note also that the SEIS says the facility is reduced by 53% but the fact is the original 2003 facility was 205,194 square feet and the current facility is 203,000 square feet. If it was reduced by 53% the facility would be 108,753 square feet. This is one example of the erroneous and false statements made throughout the SEIS.

8-9 The Wastewater is a red flag to us for several reasons. First the wastewater treatment was presented as a state of the arts process. The facility was to be located at the bottom of the parking structure. In 2015 the EE was amended and the wastewater treatment plant was moved across Willow Creek with open air overflow pits being proposed. No plans have been provide for review. There is no proposed backup or expansion system. Failure of the system can lead to many complications including contaminated waters on to the Ecological Reserve. Trucking the affluent if necessary is not addressed in the off-site impacts in the SEIS.

JAMUL ACTION COMMITTEE, INC.

P.O. BOX 1317, JAMUL, CA 91935

8-10 establishing the Ecological Preserve by the Federal government, State, County and the City of San Diego. Another concern is the increase for wildlife deaths on the SR 94 corridor and on County roads as patrons go to and from the proposed casino.

8-11 Dark Skies/Visual Resources again in not adequately addressed. Using lights at the facility does not mitigate the offsite impacts mainly for cars traveling to and from the facility which will be open 24 hours a day. There is no mention for offsite mitigation for the Ecological Reserve impacts to the wildlife.

8-12 Public Health and Safety ties back into the traffic impacts. The offsite impacts will increase crime in the surrounding area. Emergency services will also be impacted. These impacts including additional law enforcement, ambulance services and fire fighters are not addressed.

8-13 The Jamul Action Committee urges the NIGC to thoroughly examine the application and review of the SEIS. We recommend denial of the Gaming Management Contract between the Jamul Indian Village and San Diego Gaming Ventures, LLC until the offsite impacts are mitigate properly and timely prior to the opening of the facility.

Sincerely,

Glenn Revell

Glenn Revell, Chairman,
Jamul Action Committee, Inc.

CC: San Diego County Supervisor Dianne Jacob
Secretary Sally Jewell, Department of Interior
Senator Dianne Feinstein
Governor Jerry Brown
Congressman Juan Vargas
Congressman Duncan D. Hunter
Jamul Dulzura Community Planning Group

Comment Letter #9

ROB MURPHY

From: Rob Murphy
To: Hay, John
Subject: Drast SEIS comments , Jamul Indian Village
Date: Thursday, March 24, 2016 9:19:45 PM

9-1 Hello, I received your letter regarding JIV's management contract with Penn. In case you arent aware, there are several lawsuits in progress against JIV for building this ILLEGAL casino. As you can see from the jacjamul.com website, JIV is not a legal tribe and has no right to build a casino. In addition they are making a mess of a rural community endangering lives and health putting a massive casino on a small windy canyon rural road. As for health they are going to dump waste water onto non JIV lands thus polluting the towns water supply. Thirdly they have dug up graves in the process of building. It's pretty obvious that CA state is getting a potential casino income from this project an have thus paid off all judges and ignored all state and federal laws in getting this far. This travesty must be stopped and will be with the massive opposition Jamul poses to this mess. Please read the history and the law before allowing this casino to continue.
--

Rob

SECTION 2.0

RESPONSES TO COMMENTS

SECTION 2.0

RESPONSES TO COMMENTS

COMMENT LETTER #1: U.S. ENVIRONMENTAL PROTECTION AGENCY

General Response

The wastewater treatment facility is not part of the Proposed Action considered in the SEIS. It is part of the overall JIV Gaming facility that is considered part of the No Action Alternative conditions (see SEIS Section 1.6 *No Action Alternative/Baseline Conditions*, Section 1.7 *Issues to be Resolved and Areas of Controversy*, and Section 3.4 *No Action Alternative*) that were fully evaluated through the JIV Final EE (2013 including addendums) and Caltrans Final EIR (2016). The wastewater treatment facility currently being constructed on the Reservation was fully evaluated in the April 2015 Wastewater Addendum (see Section 3.4.1 *Jamul Gaming Facility* of the SEIS) to the Final Tribal Environmental Evaluation (Final TEE).

To fully disclose information concerning the JIV Gaming Facility, this SEIS references relevant portions of the Final TEE (2013) and addenda, as well as the Caltrans EIR within Section 4.0 *Description of Affected Environment* and Section 5.0 *Environmental Consequences*. The JIV Gaming Facility (including wastewater treatment facility) is being constructed and operated regardless of whether the Proposed Action is approved by the NIGC. As stated in Section 3.4 *No-Action Alternative* of the SEIS, the JIV would assume responsibility for managing the Gaming Facility (including wastewater facility) should the Proposed Action be denied.

Notwithstanding the fact that the wastewater treatment facility is a component of the No Action Alternative and not part of the Proposed Action, we have carefully reviewed EPA's comments on the facility and are providing detailed responses to those comments below.

Many of the comments are concerned with the potential impact of the operation of subsurface storage chambers for excess reclaimed wastewater. Reclaimed water will primarily be used for irrigation and can also be used for water features and uses that include direct human contact. The excess water placed in storage will be high quality water treated to California Title 22 standards[1]. While the structures used to build the chambers are typically used for stormwater

[1] As noted in the DSEIS: Reclaimed (or recycled) water in this document means wastewater that has been treated sufficiently to meet the California Department of Health Services' (DHS) comprehensive recycled water regulations that define treatment

management, the ‘stormchambers’ will not be used to handle storm runoff. They will be used seasonally to store excess reclaimed water that cannot be used for irrigation when irrigation demands are low. The bottoms of the storage chambers have been intentionally designed to allow reclaimed water to locally recharge groundwater. The project has a limited working area and the alternative is to haul the water offsite for disposal. While water hauling is anticipated, local recharge is viewed to be an environmentally preferable alternative.

It is recognized that discharge of reclaimed water to the Willow Creek channel is of concern to EPA, primarily due to the potential for fractures in the underlying weathered granitic rock to support preferential flow and cause reclaimed water to discharge into the channel. While the weathered rock is fractured it is more similar to a dense soil from a geotechnical and hydrologic perspective. Described as GRw (weathered, decomposed granite), the material is readily excavated by hand and possesses intergranular porosity and water storage capacity on the order of 5 percent. Extensive field observations and tests conducted during construction support that the GRw behaves similar to a low permeability soil.

Leakage rates from the subsurface storage chambers have been field tested and support that there are no anomalously high leakage rates as would be expected if either of the chambers were being drained by a high permeability fracture zone. Further description of the testing and field observations follow in these response to comments.

Given the overall concern regarding the potential for reclaimed water to discharge into the typically dry channel, shallow groundwater monitoring wells are being recommended/considered for mitigation monitoring. The use of monitoring wells will allow the facility to control the recharge of reclaimed water and cease use of the storage chambers should the potential for groundwater discharge be indicated by observed groundwater levels.

Detailed Responses

Response 1-1:

> The casino wastewater treatment and disposal information was incorporated by reference into the Draft SEIS for baseline purposes. As noted on Page 1-7 of the Draft SEIS (Section 1.7), the gaming facility (construction and operation) is a component of the No Action Alternative conditions, not part of the Proposed Action. The Proposed Action is the Gaming

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processes, water quality criteria, and treatment reliability requirements for public use of recycled water. These regulations are contained in Title 22, Division 4, Chapter 3, of the California Code of Regulations, commonly referred to as Title 22.

The wastewater treatment plant would treat to the disinfected tertiary level, the highest level of treatment categorized by Title 22. Approved uses of tertiary recycled water include: irrigation of food crops, parks and playgrounds, residential landscaping, pasture, and vineyards; supply for non-restricted recreational impoundments and fish hatcheries; toilet flushing; and fire suppression.

Management Agreement between the Tribe and SDGV. The issue raised by the commenter addresses operation of the wastewater facility, not conclusions regarding Proposed Action effects.

As noted in the general response, the purpose of the referenced stormchambers is to provide storage for excess reclaimed water from the WWTP that will be treated to meet Title 22 Drinking Water Standards. Storage is to occur on temporary basis during winter months when irrigation demands are low. These storage areas will not handle stormwater runoff, be used for septic disposal, or function as any sort of water treatment system. This understanding is critical regarding the flow duration, quality, and quantity of reclaimed water that will be percolating into the underlying soil.

CTE's February 23, 2015 letter was reviewed by EPA. The letter includes a summary of site characterization work and explains that the soil medium beneath the stormchamber storage areas was anticipated to consist of a combination of engineered fill material, residual soil, and highly weathered granitic rock. Actual conditions observed during grading and construction of each storage chamber area confirmed that the bottom elevation of each chamber primarily consists of weathered granitic rock (map unit GRw). The GRw behaves as a dense soil and was readily excavated using conventional equipment.

As described in the February 23, 2015 letter, the GRw map unit consists of extremely to highly weathered, very weak to weak, granitic rock with low hardness. The rock is described as weak and friable because it breaks very easily and has intergranular porosity. It is also locally described as decomposed granite (DG). The GRw rock is highly fractured with an average fracture frequency of one fracture per foot. Fractures were consistently observed to be narrow to very narrow, closely spaced, tight to healed, iron-stained, and infilled with clay. The GRw rock matrix is easily broken and becomes a loose sand following excavation. These conditions support that the GRw has properties consistent with a soil and hydrologically can be considered a porous media. Based on these observations, the potential for discrete fracture flow within the GRw map unit was considered to be very limited. This condition was confirmed during the detailed mapping of the main excavation for the parking structure and casino, as well as during observations made during grading for the WWTP and stormchamber areas.

We have provided a representative geologic cross section that depicts the distribution and depths of rock types across the site. It extends from the deep excavation conducted for the casino and parking structure across Willow Creek, and includes the area beneath the WWTP and storage chamber areas (see Figure 1). As shown on the cross section the GRw and GRt (less weathered transitional portion of the GRw) map units extend to depths coincident with the observed groundwater elevations of approximately 870 to 872 feet above mean sea level. These rock units were excavated with conventional excavation equipment

and readily broke down to silty to clayey sand material. In addition, no fracture flow from within these rock units was observed during the detailed fracture mapping that was conducted during the as-graded mapping of the main excavation as it was advanced to design depths. These observations confirmed the soil-like nature of the GRw map unit and strongly support that seepage and groundwater flow occurs through the entire weathered rock mass and not along macro-scale fractures or fracture zones.

EPA commented that fracture flow at depth along the fractures is “anticipated” to intersect groundwater elevations and daylight along Willow Creek. Fracture-dominated flow is anticipated to occur within the underlying GR map unit because it consists of slightly weathered to fresh granitic rock. In contrast to the GRw, this deeper rock mass is of very low permeability, with the only available storage and flow for groundwater to occur within fractures. As shown on the cross sections, the map unit GR is deeper than typical groundwater elevations, and at lower elevations than the base line of Willow Creek, which is at approximate elevation of 880 feet above mean sea level.

Percolation tests were conducted on the storage chambers (described as the Upper West Chamber and Lower East Chamber) after they were constructed to confirm actual storage capacities and percolation rates. A week-long percolation test was conducted in April of 2016, and consisted of filling both chambers with potable water. The water was obtained from an on-site fire hydrant. The Upper West Chamber Area held approximately 29,200 gallons, and the Lower East Chamber held approximately 21,776 gallons.

Once the chambers were full the water was turned off and allowed to drain via subsurface percolation. Water levels in the chambers were then recorded to measure actual percolation rates of the installed systems. Measured flow rates were on the order of 1.2×10^{-3} inches per minute (0.14 ft/day) for the Upper West Chamber area, and 3.3×10^{-3} inches per minute (0.40 ft/day) for the Lower East Chamber Area. These rates are low and reflect the relatively low permeability of the GRw and lack of high permeability fractures that would accelerate drainage. Water levels decreased at relatively constant rates during the week-long tests. There were no jumps or spikes in the percolation rates as would be expected if enhanced flow along a fracture was occurring.

The site area was inspected during and after the percolation testing and no water was observed to daylight along any of the adjacent slopes or daylight in Willow Creek. These observations support that water percolating from the storage chambers will move through the porous groundmass of the GRw map unit.

Engineering controls will also be in place for the operation of the reclaimed water storage system to ensure that no surface water discharge would occur. The operation of the facility on the Jamul Indian Village includes such features as 100% disposal field redundancy,

130,000 gallon water storage tank, groundwater monitoring adjacent to Willow Creek, extensive Title 22 water reuse within the gaming facility, and water trucking to San Diego Metro Pump Station No. 1 Receiving Station. Storage of excess Title 22 water in the on-site chambers will only be done when reclaimed water cannot be fully used and is expected to occur seasonally during winter when irrigation demands are low. Since adoption of the Wastewater Addendum for the Final TEE, the Tribe has also implemented an alarm activation system that ensures cessation of flows to the chambers if the potential for surfacing has been detected (prior to surface water discharge). These flows would be diverted to the back-up unused chambers, to the storage tank and/or to water trucking (or a combination thereof).

The flexible, dynamic wastewater disposal system described above and implemented by the Tribe on the Jamul Indian Village site provides assurances against a resulting surface water discharge that necessitates an NPDES Permit. With that said, the Tribe has agreed to file an application for an NPDES Permit. As of the date of Final SEIS publication, the Tribe is preparing an NPDES application for consideration by EPA Region 9.

Response 1-2

Please see Response 1-1. Comment is noted and forwarded to the NIGC decision maker for consideration prior to project approval.

Response 1-3

The information has been forwarded to the Tribe for their consideration. We have also contacted Leslie Greenberg to discuss the Class V registration program on the behalf of the Tribe (per. comm. 5/25/2016).

It is recognized that the reclaim water storage systems will cause injection of non-hazardous fluids into or above underground sources of drinking water and thus be classified as a Class V well. As noted in our general response, the water will be treated to tertiary Title 22 standards and managed with engineering controls to not pose a threat to ground water quality.

Response 1-4

The comment is noted and forwarded to the JIV for their consideration in determining permitting applicability.

COMMENT LETTER #2: CALIFORNIA DEPARTMENT OF FISH AND GAME

Response 2-1:

The comment identifies CDFW's role under the California Environmental Quality Act (CEQA), and their interest in lands adjacent to the JIV Reservation. The comment is noted and forwarded to the NIGC decision maker for consideration prior to project approval. It should be noted that the Proposed Action is not subject to CEQA.

Response 2-2:

Please see EPA General Response and RTC 1-1 through 1-4. The comment is noted and forwarded to the NIGC decision maker for consideration prior to project approval.

Response 2-3:

Please see EPA General Response and RTC 1-1 through 1-4. The comment is noted and forwarded to the NIGC decision maker for consideration prior to project approval.

COMMENT LETTER #3: DIANNE JACOB: SUPERVISOR, SECOND DISTRICT SAN DIEGO COUNTY BOARD OF SUPERVISORS

Response 3-1:

The JIV Gaming Facility is not part of the SEIS Proposed Action, which consists of the Gaming Management Agreement between the JIV and SDGV. The NIGC is not responsible for evaluating the environmental consequences of the JIV Gaming Facility and is not responsible for mitigating any environmental impacts associated with the JIV Gaming Facility. The NIGC is responsible, through this SEIS, to address the environmental consequences of approving the Gaming Management Agreement between the JIV and SDGV.

As detailed in Section 1.3 *Gaming Facility Planning History* of the Draft SEIS (pages 1-2 through 1-5), the environmental impacts of the JIV Gaming Facility were previously addressed through two public processes: (1) JIV's 2013 Final Tribal Environmental Evaluation, and (2) Caltrans' 2016 State Route 94 Improvement Project Final Environmental Impact Report.

The Proposed Action consists of approval of a Gaming Management Agreement between the JIV and SDGV to permit SDGV to manage the JIV Gaming Facility on the JIV Reservation (see Section 2-1 *Introduction* of the Draft SEIS, page 2-1). The Proposed Action addresses the consequences of SDGV running the day-to-day

operations of the JIV Gaming Facility. SDGV would secure expert, licensed services for operation/maintenance of items such as the wastewater facility, fire services, electrical/heating, food services, etc. (see Section 3.3 Proposed Action of the Draft SEIS, page 3-3).

Section 5.3 *Environmental Consequences of the Proposed Action* of the Draft SEIS (page 5-87) states the following:

> "As stated in Section 3.3, the proposed GMA would allow SDGV to control the day-to-day operation of the JIV Gaming Facility. SDGV would, among other things, determine use of vendors; rates; pricing; charges to guests or patrons; concessioners, the issuance of credit; the granting of complementaries; the terms of admittance to the Gaming Facility for purposes of entertainment; staffing levels; organizational structure; and the type and character of publicity, marketing, advertising, entertainment and promotion. Full operational efficiency of the JIV Gaming Facility would result in patronage/traffic as described in the No Action Alternative baseline analysis. It is assumed for purposes of this analysis that the Gaming Facility would be used as planned and described in the Final TEE and in Section 3.4 of the SEIS. That is, all parking demand would be met in the planned parking structure and surface parking lot, water demand met with potable water from the Otay Water District, wastewater treatment would be provided by the on-site wastewater treatment and wastewater disposal provided on-site and by trucking, etc. The GMA would not alter the external look and operation of the facility. Internally, promotional/advertising programs, entertainment acts, staffing, etc. would all be accommodated within the planned areas of the facility. No new temporary or permanent structures beyond those identified in the No Action Alternative baseline description in Section 3.4 would result from approval of the Proposed Action. The GMA is merely an operational feature of the Tribal-approved Gaming Facility. The GMA would not result in activities that would impact the environment. Additionally, the operation of the Gaming Facility by SDGV would not contribute to a cumulative environmental impact.
>
> The GMA does not grant SDGV the authority to construct gaming related facilities beyond those identified in the Final

> TEE/Addendums. The GMA is limited to the management of the Gaming Facility as described in Section 3.3.

The Draft SEIS does contain sufficient information for the commenter to evaluate the environmental impacts associated with the Proposed Action as stated in Section 3.0 *Proposed Action and No Action Alternative* of the SEIS.

The Proposed Action does not require an approval subject to CEQA.

Response 3-2:

The wastewater system referred to by the commenter is not an element of the Proposed Action, but rather an element of background information presented in for full disclosure purposes in the Draft SEIS. Please see EPA General Response and RTC 3-1. The Proposed Action, as presented on page 2-1 *Introduction* of the Draft SEIS, consists of approval of a Gaming Management Agreement between the JIV and SDGV to permit SDGV to manage the JIV Gaming Facility on the JIV Reservation. The wastewater treatment facility will be managed and run by a licensed company in compliance with federal law, subject to oversight from the U.S. Environmental Protection Agency. Additionally, San Diego County recently approved a Memorandum of Understanding with the Tribe that addresses the operation and maintenance wastewater plant in the following way:

> The JIV shall ensure the wastewater system is operated and maintained in a manner that protects the beneficial uses of the region's surface and ground waters and preserves the water quality objectives established in the Water Quality Control Plan for the San Diego Basin (Basin Plan). The JIV shall provide updates on the status of and activities related to the operation of the wastewater system within the semi-annual mitigation reports provided to the County. (adopted County-Tribal MOU, page 14)
>
> The JIV shall develop a Response Plan that establishes protocols in the event of a wastewater treatment spill, off-spec discharge, odor or similar event and provide copies to the United States Environmental Protection Agency, San Diego Regional Water Quality Control Board and County within 10 days of execution and final approval of this Agreement. (adopted County-Tribal MOU, page 14)

> The JIV shall provide notice and water quality reports for all flows of any raw or partially treated wastewater discharge into the storm chamber, watershed or other areas of the site from the wastewater treatment facility to the United State Environmental Protection Agency, San Diego Regional Water Quality Control Board and County. (adopted County-Tribal MOU, page 14)

Oversight from U.S. EPA through the NPDES permit discussed in Response 1-1, together with the County approved MOU, adequately addresses the commenter's wastewater concerns.

Response 3-3:

Please see RTC 3-1. The operation of the JIV Gaming Facility would occur with or without the Proposed Action, which is focused on the gaming management agreement. As stated in Section 1-6 *No Action Alternative/Baseline Conditions* in the Draft SEIS (page 1-6), the JIV Gaming Facility is considered as part of the No Action Alternative baseline conditions, as such traffic impacts resulting from the JIV Gaming Facility is presented in the Draft SEIS as part of the No Action Alternative baseline conditions (see Section 5.1 *Introduction* of the Draft SEIS (page 5-1). Therefore, the Draft SEIS does take into account the potential traffic impacts resulting from the operation of the JIV Gaming Facility.

COMMENT LETTER #4: SAN DIEGO COUNTY

Response 4-1:

Please see RTC 3-1.

Response 4-2:

If approved, the Gaming Management Contract would be in effect for a period of up to 7-years, as allowed under federal law. At the appropriate time, it is expected that the Tribe would seek, and receive, an amended Tribal/State Compact, allowing for operation of the gaming facility past 2020. In the unlikely occurrence that the JIV's Compact with the State of California is not renewed, the gaming facility would cease operation upon the Compact's expiration and the Gaming Management Agreement between the JIV and SDGV would no longer be in effect. In this scenario, the operation of the JIV Gaming Facility would cease.

Response 4-3:

The Tribe and SDGV would provide “justification” at such time an extension of the Gaming Management Agreement is sought. If not, the Tribe would manage the JIV Gaming Facility themselves (see Draft SEIS No Action Alternative), or the Tribe would find another party to manage the facility (in which case, NEPA compliance of that proposed agreement would occur).

Response 4-4:

Please see EPA General Response and RTC 1-1 through 1-4, and RTC 3-2.

Response 4-5:

Please see RTC 3-2. The commenter correctly notes that excess treated wastewater would be disposed by trucking at the San Diego Metro Pump Station No. 1 Receiving Station. The commenter then requests clarification on emergency response plans to handle non-treated water in the event of WWTP failure. While the commenter does not specify what “facility” they are referring to, we assume it is the Tribe’s WWTP facility. With regards to the Tribe’s WWTP, the Tribe has submitted a construction phase WWTP Response Plan to San Diego County pursuant to the requirements of the County-Tribal MOU. An operational Response Plan will be developed and submitted to the County prior to JIV Gaming Facility operation.

Response 4-6:

Please see RTC 3-2.

Response 4-7:

Details of treated wastewater reuse are presented in Appendix 12 Jamul Gaming Facility Wastewater Treatment and Re-Use Analysis.

COMMENT LETTER #5: JAMUL DULZURA COMMUNITY PLANNING GROUP

Response 5-1:

The comment is a lead-in to detailed comments. The comment is noted and forwarded to the NIGC decision maker for their consideration. Specific responses to comments addressing why the commenter believes the SEIS is “flawed in many areas” are presented below in RTC 5-2 through 5-18.

Response 5-2:

Compliance with the Tribal-State Compact to address off-reservation impacts was undertaken by the Tribe in their 2013 Final Tribal Environmental Evaluation. This was noted in the referenced paragraph (Section 1.1) with the following: "This revised Gaming Facility was evaluated through the 1999 Tribal-State Compact process. Through this process, the Tribe prepared a Draft Tribal Environmental Evaluation (Draft TEE) in 2012 and provided it to the public for review and comment. Incorporating the comments that were received from agencies, organizations and individuals, the Tribe provided responses and a final environmental evaluation in the 2013 Final Tribal Environmental Evaluation (Final TEE)." The Proposed Action being addressed in the SEIS is the Gaming Management Agreement between the JIV and SDGV (as stated in Sections 1.0, 2.0 and 3.0 of the Draft SEIS). Please see RTC 3-1.

Response 5-3:

The commenter fails to note that Section 1.3, paragraph 2 of the SEIS also states that the 2003 proposal included a 222,985 square foot 300-room hotel, which was eliminated in the 2010 version of the project. Taken together, the 2003 proposal for a 205,194 square foot gaming facility and 222,985 square foot hotel equals 428,179 total square feet. When compared with the 2010 proposal for a 203,000 square foot gaming facility, the project square footage was reduced by 53% ((428,179-203,000)/428,179).

Response 5-4:

Please see RTC 3-1. The SEIS completely and adequately addresses the potential impacts resulting from the Proposed Action, which is the proposed Gaming Management Agreement between the JIV and SDGV.

Response 5-5:

Please see EPA General Response, RTC 1-1 through 1-4, and RTC 3-1 through 3-2.

Response 5-6:

Please see EPA General Response, and RTC 3-1 and 3-2. Potable water to the JIV Gaming Facility will be supplied by the Otay Water District. No groundwater would be used.

Response 5-7:

Please see RTC 3-1. The Project being addressed in the SEIS is the Gaming Management Agreement between the JIV and SDGV, not the JIV Gaming Facility.

Response 5-8:

Please see RTC 5-7.

Response 5-9:

Please see RTC 5-7.

Response 5-10:

Please see RTC 5-7.

Response 5-11:

Please see RTC 5-7. With that said, the air quality in the San Diego region is generally reported as “good” to “moderate” for all air pollutants as reported by the SDAPCD and US EPA. As correctly noted in the comment, the region meets the Federal standards for all pollutants. Ozone is the only exception. The designation of “marginal” non-attainment as identified, is the least severe of the various non-attainment designations for ozone. However, the generation of additional pollutants does not specifically mean there will be additional degradation of the air quality within the region. According to the Federal Clean Air Act (CAA), some emissions can be produced within a region that would have a de minimis effect on the region’s ability to achieve attainment, i.e. the emissions have no measureable effect on the region’s air quality. The federal CAA de minimis levels are typically used by local air districts in California to set daily maximum limits, such as CO where the CAA de minimis level of 100 tons, is converted to pounds and divided over the number of days in a year ([100*2000]/365 = ~ 550 pounds per day) to determine an amount a project may emit that is less than significance in a single day. Thus, while a project may emit pollutants in a region, emissions of less than the de minimis amounts would not worsen air quality nor would they obstruct the timely attainment of the national ambient air quality standards.

Response 5-12:

The commenter makes a statement regarding the proximity of the JIV Gaming Facility site to various biological features/resources. Section 4.5 *Biological Resources* of the

SEIS presents the Biological Resources setting (beginning on page 4-24). The comment is noted and forwarded to the NIGC decision maker for their consideration.

Response 5-13:

Please see RTC 3-1. The JIV Gaming facility is considered part of the No Action Alternative conditions that were fully evaluated through the JIV Final EE (2013 including addendums) and Caltrans Final EIR (2016). The points being made by the comment are directed at the JIV Gaming Facility, which is outside the scope of the Proposed Action being evaluated in the SEIS. The Proposed Action (Gaming Management Agreement) would not affect the Quino checkerspot butterfly and /or California Gnatcatcher. See Section 5.3 *Environmental Consequences of the Proposed Action* of the SEIS, page 5-87.

Response 5-14:

Please see RTC 3-1 and 5-13. The Proposed Action (Gaming Management Agreement) would not negatively affect the biological resources identified in this comment.

Response 5-15:

Please see RTC 3-1 and 5-13. The Proposed Action (Gaming Management Agreement) would not negatively affect dark skies or roadkill.

Response 5-16:

Please see RTC 3-1 and 5-13. The Proposed Action (Gaming Management Agreement) would not negatively affect public health and safety.

Response 5-17:

Please see RTC 3-1 and 5-13. The Proposed Action (Gaming Management Agreement) would not negatively affect socio-economics.

Response 5-18:

The comment is noted and forwarded to the NIGC decision maker for consideration.

COMMENT LETTER #6: LAW OFFICES OF STEPHAN C. VOLKER

Response 6-1:

This comment does not raise any specific or significant environmental issues concerning the Proposed Action, but instead makes the general allegation that "casino construction" "has evaded review under the National Environmental Policy Act, 42 U.S.C. section 4321 et seq. ("NEPA")…." Because this comment does not identify the claimed environmental issues with sufficient specificity, no response is required. Nevertheless, NIGC notes that the Proposed Action is not the construction and operation of the JIV gaming facility. The Proposed Action is simply a proposal to approve a contractual agreement for the day-to-day management of the gaming facility that has already been constructed by JIV on its reservation lands and is scheduled to open in summer 2016.

Construction and operation of the JIV gaming facility was evaluated pursuant to a separate environmental review process the purpose of which is to satisfy NEPA and the California Environmental Act (CEQA). In the Tribal-State Gaming Compact and State laws, JIV undertook a comprehensive environmental review process to evaluate the environmental effects of construction and operation of the gaming facility that culminated in the preparation of a Final Tribal Environmental Evaluation ("FTEE"). A copy of this document may be found at: http://www.jamulindianvillage.com/relevant-documents/ The FTEE was certified and construction and operation of the gaming facility was approved by JIV in 2013.

Response 6-2:

Segmentation of a "project" is prohibited under CEQA. This concept is not articulated in the NEPA context. Nevertheless, to the extent the commenter is suggesting that construction and operation of the gaming facility is a connected action under NEPA, the commenter is incorrect. The Ninth Circuit Court of Appeals applies an 'independent utility' test to determine whether multiple actions are so connected as to mandate consideration in a single environmental impact statement. The crux of the test is whether 'each of two projects would have taken place with or without the other and thus had independent utility.'" *Sierra Club v. Bureau of Land Management* (9th Cir. 2015) 786 F.3d 1219, 1226; *see also Pac. Coast Fed. of Fishermen's Ass'ns v. Blank,* 693 F.3d 1084, 1098 (9th Cir.2012). "[W]hen one of the projects might reasonably have been completed without the existence of the other, the two projects have independent utility and are not 'connected' for NEPA's purposes." *Id.* at 1098–99. Construction and operation of the JIV casino was approved pursuant to a separate and comprehensive environmental review process (see Response 6-1 above) approximately three years ago. The gaming facility has been constructed and will operate regardless of whether

the Proposed Action is approved or disapproved. Specifically, if the Proposed Action is not approved, JIV will simply operate the casino without the aid of a professional gaming management corporation. Thus, the gaming facility can be completed without the existence of an approved management agreement and the facility and the agreement are not connected actions under controlling NEPA law.

Response 6-3:

Please see Response 6-2 above.

COMMENT LETTER #7: LAW OFFICES OF WEBB & CAREY

Response 7-1:

This comment does not raise any specific or significant environmental issues concerning the Proposed Action and thus does not require any response. Nevertheless, NIGC notes that the Proposed Action is simply a proposal to approve a contractual agreement for the day-to-day management of the gaming facility that has already been constructed by JIV on its reservation lands and is scheduled to open in summer 2016. As such, there is no way that the Proposed Action could have any impact whatsoever on any human remains.

Response 7-2:

As stated in Response 7-1 above, the Proposed Action will not in any way impact human remains.

Response 7-3:

This comment does not raise any specific or significant environmental issues concerning the Proposed Action and thus does not require any response. Nevertheless, NIGC notes that JIV is a federally recognized Indian tribal government. 79 Fed. Reg. 4748-02, 4750 (January 29, 2014) (Department of the Interior's statutorily-mandated listing of "Indian Entities Recognized and Eligible To Receive Services From The United States Bureau of Indian Affairs").

Response 7-4:

This comment does not raise any specific or significant environmental issues concerning the Proposed Action and thus does not require any response. Nevertheless, NIGC notes that compliance the National Environmental Policy Act (NEPA) does not entail consideration of JIV's governing documents.

Response 7-5:

This comment does not raise any specific or significant environmental issues concerning the Proposed Action and thus does not require any response. Nevertheless, as explained in Response 7-3 above, JIV is a federally recognized Indian Tribe and construction and operation of its gaming facility is authorized under the Tribal-State Gaming Compact executed by and between JIV and the State of California in 1999. Operation of the gaming facility is also authorized under the Indian Gaming Regulatory Act.

Response 7-6:

Please see Response 7-5 above.

Response 7-7:

This comment does not identify the claimed environmental issues with sufficient specificity, and, therefore, no response is required. Nevertheless, NIGC notes that it has prepared an environmental impact statement for the Proposed Action and thus NIGC has performed the most extensive form of environmental review available under NEPA. The environmental impact statement duly evaluates the direct, indirect and cumulative effects of the Proposed Action on the physical environmental in accordance with 40 CFR § 1508.8 and imposes mitigation measures to reduce or avoid any adverse effect the Proposed Action may could have on the physical environment in satisfaction of NEPA requirements.

Response 7-8:

Please see Response 7-1 above.

Response 7-9:

Please see Response 7-1 above.

COMMENT LETTER #8: JAMUL ACTION COMMITTEE, INC.

Response 8-1:

The comment is a lead-in to detailed comments. The comment is noted and forwarded to the NIGC decision maker for their consideration. Please see RTC 8-2 through 8-13 for specific responses.

Response 8-2:

Please see Responses 3-1 and 7-5 above. The issue of whether the JIV Reservation is a “reservation” is noted and forwarded to the NIGC decision maker for their consideration. This comment does not raise an issue concerning the adequacy of the environmental analysis provided in the SEIS.

Response 8-3:

A document written in 2013 is three years old, not “over thirteen years old” as noted by the commenter.

Response 8-4:

Please see RTC 3-1. The setting of the surrounding area was fully disclosed in Section 4.0 *Description of Affected Environment* of the SEIS. The JIV has recently completed a multi-year engineering and environmental process with the State Department of Transportation (Caltrans) to improve the access of SR-94 to the JIV Reservation. At present, the JIV has pulled permits to begin the improved access.

Response 8-5:

Please see RTC 3-1 and 8-4. The comment is noted and forwarded to the NIGC decision maker for consideration.

Response 8-6:

Please see RTC 3-1.

Response 8-7:

Please see RTC 3-1.

Response 8-8:

Please see RTC 5-3.

Response 8-9:

Please see EPA General Response, RTC 1-1 through 1-4, and RTC 3-1 through 3-2.

Response 8-10:

Please see RTC 5-15.

Response 8-11:

Please see RTC 5-15.

Response 8-12:

Please see RTC 5-16.

Response 8-13:

Please see RTC 3-1. The comment is noted and forwarded to the NIGC decision maker for consideration.

COMMENT LETTER #9: Rob MURPHY

Response 9-1:

Please see RTC 3-1. The comment is noted and forwarded to the NIGC decision maker for consideration.

SECTION 3.0

REVISIONS TO DRAFT SEIS TEXT (SEIS ERRATA)

SECTION 3.0

REVISIONS TO DRAFT SEIS TEXT (SEIS ERRATA)

The public comments received (see Section 1.0) and responses to comments (see Section 2.0) to the Draft SEIS did not result in any changes to the Draft SEIS text.

Attachments

Letter 7.0 Webb & Carey Attachments

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JAMUL ACTION COMMITTEE, JAMUL COMMUNITY CHURCH, DARLA KASMEDO, PAUL SCRIPPS, GLEN REVELL and WILLIAM HENDRIX, Plaintiffs, v. **TRACIE STEVENS, Chairwoman of the National Indian Gaming Commission; JONODEV CHAUDHURI, Acting Chairman of the National Indian Gaming Commission; DAWN HOULE, Chief of Staff for the National Indian Gaming Commission; SALLY JEWELL, Secretary of the U.S. Department of the Interior, KEVIN WASHBURN, Assistant Secretary – Indian Affairs; PAULA L. HART, Director of the Office of Indian Gaming, BIA; AMY DUTSCHKE, Regional Director, BIA; JOHN RYDZIK, Chief, Environmental Division, BIA; U.S. DEPARTMENT OF THE INTERIOR; NATIONAL INDIAN GAMING COMMISSION; RAYMOND HUNTER; CHARLENE CHAMBERLAIN; ROBERT MESA; RICHARD TELLOW; JULIA LOTTA; PENN NATIONAL, INC.; SAN DIEGO GAMING VILLAGE, LLC.; and C.W.DRIVER INC.** **Defendants.**	Case No. 2:13-cv-01920 KJM-KLN **SECOND AMENDED AND SUPPLEMENTAL COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

Plaintiffs file this Second Amended and Supplemental Complaint for Declaratory and Injunctive Relief against Defendants, and each of them, and allege as follows:

NATURE OF THE ACTION

1. Plaintiffs challenge the attempts by the Defendants to approve, facilitate, allow and build an illegal Indian gambling casino on a 4.66 acre parcel (Parcel) in the small rural community of Jamul near San Diego, California. The casino is being built by the Jamul Indian Village (JIV) on property owned by the United States. The proposed Indian casino is illegal because it is being constructed on land that is not eligible for gambling under the Indian Gaming Regulatory Act (IGRA). Plaintiffs seek a declaration that Defendants' actions violate federal and California law and an injunction against the continued construction of the illegal casino.
2. This lawsuit was triggered by the National Indian Gaming Commission's (NIGC) declaration that the JIV has a Reservation that qualifies as "Indian lands" eligible for gambling under IGRA. This Indian lands determination (ILD) was first included in the "PUBLIC NOTICE: Notice of Intent to Prepare a Supplemental Environmental Impact Statement for the Approval of a Gaming Management Contract" issued by the NIGC on April 4, 2013.
3. On April 5, 2013, the JIV, based on the ILD, applied to the NIGC for approval of the Jamul Indian Village Gaming Ordinance (No. 2013-05.) The NIGC approved the JIV Gaming Ordinance for the supposed JIV Reservation on July 1, 2013.
4. Also on April 5, 2013, the JIV, with Penn National, based on the ILD, applied to the NIGC for approval of a Gaming Management Contract. The NIGC, without first complying with NEPA, approved the Gaming Management Contract on or about January 5, 2014.
5. The Defendants initiated construction on the illegal casino on or about January 10, 2014.
6. Plaintiffs, by this lawsuit challenge the NIGC ILD, and approval of the JIV Gaming Ordinance and Gaming Management Contracts and the continued construction of an illegal casino on the Parcel by Defendants. Plaintiffs request that the NIGC's decisions be vacated and that the Defendants be enjoined from constructing an illegal casino on the Parcel.

PARTIES

7. Plaintiff, JAMUL ACTION COMMITTEE (JAC) is a non-profit organization of citizens living in and around the rural unincorporated town of Jamul, California. The JAC and its members are dedicated to preserving the small-town rural lifestyle of its community. JAC's members own homes and operate businesses in the town of Jamul that are being adversely affected by current construction on the Parcel and would be adversely impacted if, as a result of Defendants approvals and actions, a major illegal gambling casino is built on the Parcel.

8. Individual Plaintiffs DARLA KASMEDO, GLEN REVELL, PAUL SCRIPPS and WILLIAM HENDRIX are all members of JAC. JAC members also include: Gary L. Classen, Kymm Salmonsen, Andrew Salmonsen, Michael Stalnaker, Randy White, Lisa Darroch, Donald Beers, Roberto Salazar, Marcia Spurgeon, Michael Spurgeon, Donna Hendrix, Peter Shenas, Celeste Shenas, J. Randy Terry, Patty Terry, and Gene Luise Merlino. All JAC members reside in Jamul, California. All of these individuals are adversely affected by current construction activities on the Parcel and will be adversely impacted if, as a result of Defendants' approvals and actions, an illegal Indian casino is constructed on the Parcel.

9. The JAMUL COMMUNITY CHURCH (JCC) is a community based Christian Church located in the town of Jamul. The JCC and its community are adversely affected by current construction on the Parcel and will be adversely impacted if, as a result Defendants' approvals and actions, an illegal Indian casino is constructed and gambling is allowed on the Parcel.

10. The individual Federal Defendants are employees, officials or appointees of the NIGC, the Department of Interior (DOI), and the Bureau of Indian Affairs (BIA) and include:

    a. TRACIE STEVENS, Chairwoman of the NIGC.

    b. SALLY JEWELL, Secretary of the DOI,

    c. KEVIN WASHBURN, Assistant Secretary of the DOI for Indian Affairs,

d. PAULA L. HART, Director of the Office of Indian Gaming for the BIA,

e. AMY DUTSCHKE, Regional Director for the Pacific Region of the BIA,

f. JOHN RYDZIK, Chief of the Environmental Division of the BIA, and

g. DAWN HOULE, Chief of Staff of the NIGC, and

h. JONODEV CHAUDHURI, Acting Chairman of the NIGC.

The individual Federal Defendants are being sued in their official capacity for actions and decisions for which they bear the responsibility. They are also being sued in their personal capacity for allowing and facilitating the construction of an illegal casino on the Parcel in violation of federal and State law including constitutional violations. Each Defendant has acted, or threatened to act, under the color of federal governmental authority to the injury of Plaintiffs in violation of federal law and in excess of federal limitations upon their power and authority. *Ex parte Young* (1908) 209 U.S. 123.

11. Defendant, DEPARTMENT OF INTERIOR, is a cabinet level agency of the United States and is the agency responsible for managing the affairs of Indian tribes primarily through the BIA. The DOI is responsible for insuring compliance with its laws and regulations and for supervising its officials and employees including those in the BIA.

12. Defendant, NATIONAL INDIAN GAMING COMMISSION, is an independent agency that is responsible for making Indian lands determinations and approving gaming ordinances and management contracts under IGRA. The NIGC is responsible for insuring compliance with its laws and regulations and for supervising their officials and employees.

13. Defendants RAYMOND HUNTER, CHARLENE CHAMBERLAIN, ROBERT MESA, RICHARD TELLOW, and JULIA LOTTA are council members or officials of the JIV. They are being sued in their personal capacity for allowing and facilitating the construction of an illegal casino on the Parcel in violation of federal and State law including constitutional

violations. Each of these Defendants has acted, or threatened to act, under the color of JIV governmental authority to the injury of Plaintiffs in violation of federal law and in excess of federal limitations upon their power and authority. *Ex parte Young* (1908) 209 U.S. 123; *Michigan v. Bay Mills Indian Community* (S.Ct. No. 12-515; May 27, 2014) and *Salt River Project Agricultural Improvement and Power District v. Lee,* 672 F.3d 1176 (9th Cir. 2012).

14. Although not named as a defendant, nor federally recognized as an Indian tribe, the JIV has voluntarily participated in this case as though it was a party. The JIV filed briefs, motions, opposition to motions and requests for judicial notice in this case which, over Plaintiffs' objections, have been accepted and decided by the Court. Plaintiffs, by naming the JIV Council Members and Officials, do not concede that the JIV is a federally recognized tribe.

15. Defendant PENN NATIONAL, INC. is a corporation doing business in California. Penn National signed management and development contracts with the JIV, submitted them to the NIGC for approval and is implementing them by constructing or managing the construction of the illegal casino on the Parcel. Penn National has issued press releases and public statements confirming that they have initiated construction of a casino on the Parcel.

16. Defendant SAN DIEGO GAMING VILLAGE, LLC (SDGV) is a corporation doing business in California that was identified by the NIGC in the Notice of Intent to Prepare a Supplemental Environmental Impact Statement (SEIS) for the Approval of a Gaming Management Contract as the corporate entity proposing a gaming management contract with JIV for the management of the illegal casino on the Parcel.

17. Defendant C.W.DRIVER is a corporation and contractor doing business in California. Plaintiffs are informed and believe, and on that basis allege that C.W.DRIVER has been retained by JIV council members, Penn National and/or SDGV to construct, and is currently constructing, the illegal Indian casino on the Parcel.

JURISDICTION AND VENUE

18. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1331 et. seq, 5 U.S.C. §§ 701-706, 28 U.S.C. §§ 2201-2202, 25 U.S.C. § 2714, and 18 U.S.C. § 1166.

19. The United States waived sovereign immunity from suit under 5 U.S.C. §§701-706, 28 U.S.C. §2201(a) and 25 U.S.C. § 2714. The other Defendants do not have immunity from suit.

20. An actual case and controversy exists between the parties, warranting the Court's declaration pursuant to 28 U.S.C. § 2201 of the rights, remedies and relations of the parties with respect to the Parcel and whether or not it qualifies a Indian land eligible for gambling under IGRA.

21. All applicable federal administrative remedies have been exhausted prior to initiating this lawsuit against the Federal defendants as required by 5 U.S.C. §704. This action arises under federal law, including IRA, 25 U.S.C. §§ 465 *et. seq.* IGRA, 25 U.S.C. §§ 2700 *et seq.* and 18 U.S.C. § 1166, the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, the Native American Grave Protection and Repatriation Act, 25 U.S.C. §§ 3001 et seq., the U.S. Constitution, the California Admissions Act of 1850, and principles of federalism.

22. The NIGC's approval of the ILD on April 4, 2013, the JIV Gaming Ordinance on July 1, 2013, and the JIV-Penn National Gaming Management Contract on or about January 5, 2014, are final agency actions subject to review under IGRA. 25 U.S.C. § 2714.

23. Venue is proper in the District Court for the Eastern District of California under 28 U.S.C. §§ 1391(b) and (e) and 5 U.S.C. § 703. Venue is proper in this judicial district because at least one defendant resides or has an office in this judicial district, and because a substantial portion of the events giving rise to the Plaintiffs' claims occurred in this district.

24. The Plaintiffs have standing to pursue the claims asserted in this complaint. *Bond v. United States* 131 S.Ct. 2355 (2011), *Match-E-Be-Nash-She-Wish Band v. Patchak* 132 S.Ct. 2199 (2012), and *Michigan v. Bay Mills Indian Community* (S.Ct. No. 12-515; May 27, 2014)

LEGAL BACKGROUND

25. On September 9, 1850, California was admitted to the Union. (California Admissions Act; 9 Stats. 452 (1850).) California entered the Union on an "equal footing" with, and with the same public property rights, jurisdiction and regulatory authority, as all other States.

26. In 1864, Congress passed an Act which stated that no more than four reservations could be established within the State of California. (13 Stat. 39 (1864).) The four reservations were Round Valley, Hoopa Valley, Tule River and "Mission." *Mattz v. Arnett* (1973) 412 U.S. 481, 489-491. The Parcel was not one of the four reservations.

27. In 1887, Congress passed the General Allotment Act. (24 Stat. 388 (1887).) This Act authorized the President to allot portions of reservation lands to individual Indians. The Jamul Indians did not own reservation land that was subject to the General Allotment Act.

28. In 1891, Congress provided for the creation of a limited number of additional reservations in California for "Mission" Indians in the Mission Indian Relief Act (MIRA). (Act of Jan 12, 1891, 26 Stat. 212.) The creation of a Mission Indian reservation required the approval and signature of the Secretary of Interior and the President. The Parcel was not acquired or created as a Mission Indian reservation. Nor was it approved by the President.

29. In 1924, Congress conferred citizenship on all Indians born in the United States including the Indians of San Diego County. (8 U.S.C. § 1401(b).) And, by reason of the 14th amendment, the grant of federal citizenship had the additional effect of making Indians citizens of the States where they resided. Citizenship bestows rights and corresponding duties which one is not free to selectively adopt or reject. Giving governmental preferences and benefits to citizens or groups of citizens based on race is a violation of the federal and State constitutions. Defendants' attempt to confer benefits on the JIV as racial quarter-blood Indian community is an unconstitutional violation of the equal protection and due process rights of Plaintiffs.

30. In 1934, Congress enacted the IRA. (25 U.S.C. §§ 461 et seq.) A purpose of the IRA was to reacquire lands within reservations that, pursuant to the General Allotment Act of 1887, were allotted to Indians. IRA benefits are limited by its terms to recognized tribes under federal jurisdiction in 1934. *Carcieri v. Salazar* 132 S.Ct. 1058 (2009). The Jamul Indians were not a recognized tribe under federal jurisdiction in 1934. Nor were they on the list of 258 federally recognized tribes that existed in 1934. Nor was any land owned by Jamul Indians subject to the 1887 General Allotment Act that was remedied by the IRA in 1934.

31. In 1978 the DOI adopted regulations outlining "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe." These procedures are currently codified at 25 C.F.R. §§ 83.1-83.13.

32. The JIV has not filed a Part 83 petition to become a federally recognized tribe. Nor could the JIV meet the requirements of Part 83. As a general matter, to obtain federal recognition, a tribe must demonstrate that it's "membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity." (25 C.F.R. §83.7(3).) The JIVwas never a body politic that continued without interruption since time immemorial, never had powers of inherent sovereignty, and was not a single identifiable group that historically governed itself or functioned as a single autonomous political entity.

33. In the 1970's representatives of the JIV asked the BIA how it could obtain federal recognition. The BIA told the JIV that the only avenues to obtain federal recognition were through an Act of Congress or the Part 83 process. In the alternative, the BIA told JIV that they could organize themselves as a half-blood Indian organization under the Section 19 of the IRA. It was pointed out to the JIV that federal recognition under Part 83 and of organizing as a half-blood Indian community under Section 19 are two different things. In order for the JIV to

become a federally recognized tribe under Part 83 it would have to submit a detailed petition and undergo a lengthy process of consideration. Several years would have been required to complete this. In 1981the JIV opted to organize themselves as a Section 19 half-blood Indian community and not to pursue the Part 83 federal recognition process even though they knew the significant limitations if they organized themselves as a half-blood Indian community.

34. In 1980, the DOI adopted regulations for "the acquisition of land by the United States in trust status for individual Indians and Indian tribes." (45 Fed. Reg. 62034-62037; September 5, 1980.) These regulations are currently codified at 25 C.F.R. §§ 151.1 – 151.15. Trust acquisitions must be authorized by an Act of Congress and must be approved by the Secretary of Interior and published in the Federal Register for thirty days to be effective. 25 C.F.R. §§ 151.3 and 151.12 (b). The Parcel has not been taken into trust by the Secretary of Interior.

35. In 1988, Congress enacted the Indian Gaming Regulatory Act. (Pub. Law 100-497; 25 U.S.C §§ 2701 et seq.) Under IGRA "Indian lands" eligible for gaming are limited to: (1) lands within a reservation or (2) trust land or restricted Indian lands over which a tribe exercises governmental control. (25 U.S.C. § 2703(4)(A)&(B).) The Parcel is neither trust land, restricted Indian land nor reservation land and, therefore, is not eligible for an Indian casino under IGRA. Defendants' treatment of the Parcel as though it was Indian lands is in violation of federal law and in excess of the limits upon their governmental power and authority.

36. In 1994, Congress enacted the Federal Recognition Tribal List Act. (Pub. Law 103-454.) To be on this list a tribe must have obtained federal recognition "by Act of Congress" or "by the administrative procedures set forth in Part 83 of the Code of Federal Regulations denominated 'Procedures for Establishing that an American Indian Group Exist as an Indian Tribe.' " (Id.) The JIV has not filed a petition to become a tribe pursuant to the procedures of Part 83.

37. The BIA prepared and published a list entitled: "Indian Entities Recognized and Eligible To Receive Services From the Bureau of Indian Affairs." The BIA list included Part 83 federally recognized tribes and other "Indian entities". The JIV was included on this list as an Indian entity known as the "Jamul Indian Village of California" – a half-blood Indian community.

38. The only administrative way to become a federally recognized tribe is through the 25 C.F.R. Part 83 petition process. The inclusion of the JIV on this BIA list of "Indian Entities" entitled to BIA services did not make the JIV a federally recognized tribe under Part 83 or otherwise.

39. In 2006 the NIGC and DOI entered into a MEMORANDUM OF AGREEMENT which requires the NIGC Office of General Counsel (OGC)to prepare an opinion on "whether a tribe has Indian lands" whenever "a tribe requests that the NIGC approve a management contract or ordinance for gaming". The NIGC issued its ILD on April 4, 2013. On April 5, 2013, the JIV submitted a gaming ordinance and a gaming management contract to the NIGC for approval. Both were subsequently approved by the NIGC. Plaintiffs are informed and believe, and on that basis allege, that the OGC prepared an ILD for the NIGC Chairwoman to consider when reviewing the proposed gaming ordinance and gaming management contract.

STATEMENT OF FACTS

40. Between 1850 and 1978, the Parcel was in private ownership subject to the sovereignty jurisdiction and regulatory authority of the State of California. The Parcel was never public domain land nor reserved from public domain land. Nor did the State of California ever cede sovereignty or jurisdiction over the Parcel to the United States. See Cal. Gov. Code §§ 110 et seq. and 40 U.S.C. § 255

41. On December 12, 1978, the private owner recorded the gift grant deed for the Parcel in fee to the United States for the benefit of Jamul Indians of one-half degree or more Indian blood as designated by the Secretary of the Interior.

42. Consistent with the 1978 gift deed, the Secretary of Interior retained fee ownership of the Parcel and designated individual Jamul Indians as the beneficial owners who then lived on the Parcel and on adjacent land deeded to the Diocese of San Diego as an Indian cemetery.

43. In 1981, the JIV, with assistance of the BIA, became a "formal organization", and adopted a constitution, as "half-blood members of the Jamul Indian Village". The JIV's constitution does not identify a reservation or the Parcel as being the territory of the JIV. Nor did the Secretary designate a beneficial interest in the property in favor of the JIV after it was created.

44. The JIV is not a federally recognized tribe. The JIV has never petitioned for tribal recognition pursuant to 25 CFR Part 83. Nor has Congress recognized the JIV by an Act or Treaty.

45. After it was organized, the JIV claimed a beneficial interest in the Parcel. This claim is disputed and has been litigated by the individual Jamul Indians which were designated by the Secretary of Interior as the Parcel beneficiaries prior to the creation of the JIV. That litigation is continuing and involves competing claims to the beneficial interest in the Parcel. None of the Plaintiffs were or are involved in those lawsuits. None of the lawsuits between Jamul Indians and the JIV involve IGRA or the Indian lands issue present in this case. Nor do the Plaintiffs claim an ownership or a beneficial interest in the Parcel.

46. Even if the JIV has a beneficial interest in the Parcel, it is not trust land as that term is used in IGRA. And, despite claiming to be the beneficial owners of the Parcel, the JIV has never applied to the Secretary to have the Parcel taken into trust pursuant to 25 C.F.R. Part 151.

47. In 1993, the JIV submitted a proposed Class II Gaming Ordinance to the NIGC for approval. The JIV Proposed gaming ordinance did not specify a reservation or the Parcel or any other land as being Indian lands eligible for Class II gaming under IGRA.

48. In 1994, the NIGC approved the JIV Class II Gaming Ordinance. But the Parcel was not identified in the proposed ordinance. In fact, because the location of the casino was not

identified in the proposed ordinance, the NIGC cautioned the JIV stating in the letter of approval that: "It is important to note that the gaming ordinance is approved for gaming only on Indian lands as is defined in the IGRA."

49. In 1996 the JIV, with support of the BIA, admitted Jamul Indians, who were only one-quarter Indian blood as members of the JIV. These less-than-half-blood Indians are now more than a majority of the members of the JIV. Consequently, the JIV no longer meets the requirement of half-blood Indian community anticipated by the IRA and is, instead, a race based quarter-blood Indian community and not a tribal government.

50. On October 8, 1999, the JIV and the State of California entered into a Tribal-State Compact. The Parcel is not mentioned in the Compact. Nor is it identified as Indian lands owned by the JIV in the Compact. Instead the Compact was based on representations of the JIV that they are a recognized tribe possessing the powers of self-government over Indian land eligible for gaming under IGRA. Some of the key provisions of the Compact relevant here include:

a. Section 15.6 of the Compact provides in part that: "In entering into this Compact, the State expressly relies upon the forgoing representations of the Tribe [that it is a federally recognized tribe with Indian land as defined by IGRA], and the State's entry into the Compact is expressly made contingent upon the truth of those representations as of the date of the Tribe's execution of this Compact."

b. Section 4.2 of the Compact provides: "The Tribe may establish and operate not more than two Gaming Facilities, and only on those Indian lands on which gaming may lawfully be conducted under the Indian Gaming Regulatory Act."

c. Section 10.8.3(b) of the Compact provides, in part, that: " On or after January 1, 2003, but not later than March 1, 2003, the State may request negotiations for an amendment to this Section 10.8 on the ground that , as it presently reads, the section has proven to be

inadequate to protect the off-Reservation environment from significant adverse impacts resulting from Projects undertaken by the Tribe or to insure adequate mitigation by the Tribe of significant adverse off-Reservation impacts."

d. Section 10.8.3(c) of the Compact provides, in part that: "If the State has requested negotiations pursuant to subdivision (b) but, as of January 1, 2005, there is neither an agreement not an order against the State . . . then, on that date, the Tribe shall immediately cease construction and other activities on all projects then in progress that have the potential to cause adverse off-Reservation impacts, unless and until an agreement to amend this Section 10.8 has been concluded between the Tribe and the State."

51. In March 2000 California amended the California Constitution to authorize the Governor "to negotiate and conclude compacts, subject to the ratification by the Legislature" for the conduct of Class III gaming "by federally recognized tribes on Indian lands in California in accordance with federal law." Cal. Const. Art. 4, Sec. 19(f).

52. On May 5, 2000, the DOI approved the 1999 Compact between the JIV and the State. But the DOI letter conditioned its approval as follows: "[T]he Compact provides that gaming will be located on the Tribe's 'reservation land, which is located in San Diego County, California.' The terms of the Compact are approved only to the extent that they authorize gaming on 'Indian Lands' as defined by IGRA, now or hereafter acquired by the Tribe."

53. On July 17, 2001, Governor Davis sent a letter to the BIA asserting that a proposed "gaming establishment" in the Jamul area would be "detrimental to the surrounding community."

54. In 2002, the JIV initiated activities toward obtaining NIGC approval to construct a casino project on property other than the Parcel.

55. On or about February 28, 2003, as anticipated in the Compact, Governor Davis sent a letter to the JIV requesting renegotiation of Section 10.8. The JIV ignored the Governor's request and

did not negotiate an amendment of Section 10.8. Nor did the JIV obtain a Court order that it need not renegotiate Section 10.8 of the Compact with the State. California failed to withdraw this request to renegotiate Section 10.8 prior to March 1, 2003.

56. In late 2003 the JIV revised their proposal to provide for the construction of a casino on the Parcel and not on proposed trust land.

57. On September 10, 2004, Governor Schwarzenegger sent a letter to the BIA confirming Governor Davis's earlier concern that an approval of a gaming establishment in Jamul would be detrimental to the surrounding community.

58. On January 1, 2005 the JIV was required by the terms of the Compact to immediately cease construction and other activities on their proposed casino projects on the Parcel unless and until they reach an agreement with the State to amend this Section 10.8. The JIV and the State have not concluded such an agreement. Thus the current construction activities of a casino on the Parcel are in violation of the Compact and federal law.

59. On December 27, 2012, the JIV forwarded a tribal resolution to the NIGC declaring its intention to negotiate a management contract with SDVG and requesting that the NIGC begin the NEPA review process for approval of a management contract.

60. On January 2, 2013, the NIGC asked the BIA to prepare a record of decision to support the NIGC's approval of the gaming management contract and related Indian lands determination.

61. On February 7, 2013, the NIGC entered a four-party professional services agreement with the BIA, the JIV, and Environmental Data Systems, Inc. memorializing that EDS will provide environmental consulting services, with project management from the BIA, to prepare the necessary environmental documentation.

62. On April 3, 2013, the JIV applied to the NIGC to approve a Class III Gaming Ordinance under IGRA. This new ordinance replaced the JIV's 1994 Class II Gaming Ordinance.

63. On April 4, 2013 the NIGC issued a "PUBLIC NOTICE: Notice of Intent to Prepare a Supplemental Environmental Impact Statement (SEIS) for the Approval of a Proposed Gaming Management Contract "for a casino to be constructed on the Parcel. The Notice provides in part that: "The Gaming Management Contract, if approved, would allow SDGV to manage the approved 203,000 square foot tribal gaming facility to be located on the Tribe's Reservation, which qualifies as "Indian lands" pursuant to 25 U.S.C. 2703."

64. On April 5, 2013, the JIV and Penn National announced in a press release that the management and development contracts were signed by Defendant Hunter as Chairman of the JIV and by Defendant Penn National based on the NIGC Indian lands determination that the JIV "reservation" was Indian lands. The contracts were submitted to NIGC for approval.

65. On April 10, 2013, the NOTICE was published in the Federal Register. (78 Fed.Reg. 21398).

66. The NIGC Notice also indicated that it will circulate the SEIS and complete the NEPA process before considering and, possibly, approving the proposed gaming management contract. See 25 C.F.R. §§ 522.2 and 559.1-2. It has been 18 months and the SEIS still has not been circulated for public input and comment. In the meantime, before complying with NEPA, the Defendants are illegally allowing construction of the casino to go forward

67. On July 1, 2013, Defendant Stevens approved JIV's amended Class III Gaming Ordinance for the JIV's Reservation. The JIV amended the Gaming Ordinance at the direction of the OGC.

68. The NIGC was required, and apparently did approve the management contract, submitted on April 5, 2013, within nine months, or before January 5, 2014. 25 U.S.C. §§ 2710 & 2711.

69. On January 10, 2014, the JIV and Penn National announced the initiation of construction of a million square foot building/casino on the Parcel while they continued to work with the NIGC on management issues. The initiation of construction was based on the approved ILD, the approved JIV Gaming Ordinance and the approved JIV-Penn National Management Contract,

70. In April 2014, the JIV and Defendant Raymond Hunter, with the concurrence and approval of Defendants JIV Council Members, filed briefs in this case claiming that their beneficial interest in the Parcel is trust land which, under their Compact with the State, supposedly gives it the "federal right to develop a tribally-owned gaming enterprise on its Indian lands."

71. Unlike the Federal Defendants, the JIV and Defendants JIV Council Members do not claim that the Parcel is a "reservation." Nor do they claim that that their beneficial interest in the Parcel was taken into trust for the JIV per 25 C.F.R. Part 151.

72. The JIV's beneficial interest claim to the Parcel is not a reservation or trust land under JIV's governmental control and therefore it is not Indian lands as defined by IGRA.

73. A tribe does not have the authority to unilaterally declare or create a reservation or trust land for its own benefit, or to put lands into trust without complying with 25 CFR Part 151. *City of Sherrill v. Oneida Nation of New York* 1255 S.Ct. 1478 (2005).

FIRST CLAIM FOR RELIEF

Declaratory and Injunctive Relief - Indian Gaming Regulatory Act

74. Plaintiffs repeat and re-allege paragraphs 1 through 73 inclusive, of this Second Amended and Supplemental Complaint, as if fully set forth here.

75. Plaintiffs seek a declaration from this Court that, contrary to the determination of the NIGC, the Parcel is not a reservation or Indian lands eligible for gaming under IGRA. The Plaintiffs seek a declaration that the NIGC's approvals of the gaming ordinance and gaming management contract based on this incorrect ILD are arbitrary, capricious and contrary to law.

76. Plaintiffs also seek injunctive relief from this Court enjoining the construction of an illegal casino on the Parcel and enjoining the implementation of the NGIC approved JIV Gaming Ordinance and the JIV/Penn National gaming management and development contracts which are facilitating construction of an illegal casino on the Parcel by the Defendants.

77. Contrary to the NIGC's ILD, the Parcel is not an Indian reservation. Congress has limited the number of reservations in California to four in the 1864 Four Reservations Act and to the Mission Indian reservations allowed by the 1891 MIRA. The Parcel was not created as an Indian reservation by either of these Acts or by any other Act of Congress.

78. The Federal Defendants' determination in the SEIS Notice that the Parcel is a "Reservation, which qualifies as 'Indian Lands' pursuant to 25 U.S.C. 2703" as being eligible for gambling under IGRA is arbitrary and capricious and contrary to law. This NIGC Indian lands determination should be reversed and vacated by this Court.

79. The Federal Defendants' approval of the JIV's Gaming Ordinance based on their determination that the Parcel is a "Reservation, which qualifies as 'Indian Lands' pursuant to 25 U.S.C. 2703" as being eligible for gambling under IGRA is arbitrary and capricious and contrary to law. NIGC's approval of the gaming ordinance should be vacated by this Court.

80. The Federal Defendants' approval of the gaming management and development contracts between JIV and Penn National and/or SDGV based on their determination that the Parcel is a "Reservation, which qualifies as 'Indian Lands' pursuant to 25 U.S.C. 2703" as being eligible for gambling under IGRA is arbitrary and capricious and contrary to law. NIGC's approval of the gaming and management contracts should be reversed and vacated by this Court.

81. Based on this unlawful Indian lands determination and the related approvals, the Federal Defendants have approved, allowed and facilitated the construction of a major casino on the Parcel in violation of State and federal law and to the detriment and injury of Plaintiffs.

82. As a result of this unlawful Indian lands determination, approvals of the management contract and gaming ordinance and the casino construction, the JIV is being allowed to build a Class III casino on the Parcel which, if completed, will cause major environmental impacts in and around the town of Jamul and San Diego County and irreversible harm to the Plaintiffs and

their members and community. It would be an illegal gambling casino which should be enjoined as a violation of IGRA and a public nuisance under State and federal law.

83. Plaintiffs are entitled to injunctive relief to enjoin the continued construction of an illegal casino on the Parcel. Granting preliminary and permanent injunctive relief will be in the public interest and consistent with the State law and policy to prevent illegal gaming on land that does not qualify under IGRA for gaming.

84. Plaintiffs have no adequate remedy at law. Plaintiffs have a high likelihood of success on the merits of the claims. Plaintiffs request an injunction against Defendants, and each of them, to prevent the construction of an illegal casino on the Parcel in violation of federal and State law.

85. Plaintiffs request that the Court reverse and vacate the NIGC's approvals of the ILD, Gaming Ordinance and Management Contract as being arbitrary, capricious and contrary to law.

SECOND CLAIM FOR RELIEF

Declaratory and Injunctive Relief - Indian Reorganization Act of 1934

86. Plaintiffs repeat and re-allege paragraphs 1 through 85 inclusive, of this Second Amended and Supplemental Complaint, as if fully set forth here.

87. Plaintiffs seek a declaration from this Court that, contrary to the assertions of the Defendants JIV Council Members, the beneficial interest in Parcel in favor of half-blood Jamul Indians is not trust land over which the JIV lawfully exercises governmental power or Indian lands eligible for gaming under IGRA.

88. Plaintiffs also seek injunctive relief from this Court enjoining the construction of an illegal casino on the Parcel and enjoining the implementation of the JIV Gaming Ordinance and implementation of the JIV management and development contracts which are facilitating the construction of an illegal casino on the Parcel by the Defendants.

89. Neither the Parcel, nor the beneficial interest in the Parcel for half-blood Jamul Indians, is trust land over which a federally recognized Indian tribe lawfully exercises governmental power and therefore is not Indian lands eligible for gaming or an Indian casino under IGRA.

90. Under the IRA, the DOI is authorized to take land into trust for only those tribes that were federally recognized and under federal jurisdiction in June 1934 when the IRA was enacted. 25 U.S.C. §§ 465, 467, & 479; *Carcieri v. Salazar, supra.*

91. Neither the JIV, nor the Defendants JIV Officials, was a federally recognized tribe in June 1934 when Congress enacted the IRA. Thus neither the JIV, nor the Defendants JIV Officials, is eligible to have lands placed into trust under the IRA on their behalf because they were not a recognized tribe under federal jurisdiction in 1934. *Carcieri v. Salazar, supra.*

92. Neither the JIV, nor the Defendants JIV Officials, have applied to the BIA or DOI to have the Parcel, or the claimed beneficial interest in the Parcel, taken into trust for the benefit of the JIV pursuant to the IRA or 25 C.F.R. Part 151 or pursuant to any other Act.

93. The Secretary of Interior has not taken the Parcel, or the JIV's claimed beneficial interest in the Parcel, into trust for the JIV or for the Defendants JIV Officials pursuant to 25 C.F.R. Part 151 or the IRA or any other Act of Congress.

94. There is no other act, statute or regulation in existence that authorizes the Defendants to take the Parcel, or the claimed beneficial interest the Parcel, into trust for the JIV.

95. The JIV was created by the BIA in 1982 as a non-governmental half-blood Indian community. It later changed its membership to become a less-than-half-blood Indian community. It was not in existence in 1934. The JIV has not petitioned for tribal recognition pursuant to 25 C.F.R. Part 83 and has never lawfully exercised governmental power over the Parcel.

96. Defendants' decision that the Parcel qualifies for gambling under 25 U.S.C. § 2703 is arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, beyond the

scope of the Secretary's authority under the IRA, and issued in a manner not in accordance with law. 5 U.S.C. § 706(2).

97. There is an actual controversy among the parties, within the meaning of the federal Declaratory Relief Judgment Act (28 U.S.C. § 2201) regarding the eligibility of an Indian community, not federally recognized as a tribe, such as the JIV, to receive or hold trust lands under the IRA as though it were a federally recognized tribe in 1934. There is also an actual controversy among the parties regarding whether the JIV's beneficial ownership claim to the Parcel qualifies as Indian lands eligible for gaming under IGRA. A declaratory judgment in favor of Plaintiffs and against the Defendants on these issues is necessary and proper.

98. Plaintiffs' remedies at law are inadequate. Injunctive relief, both preliminary and permanent, is necessary to prevent irreparable injury to the Plaintiffs. In the absence of the injunctive relief requested in this action, an unlawful casino complex will be constructed by Defendants and will be allowed to open and operate in the rural Jamul community in San Diego County. The Defendants JIV Officials should be enjoined from approving or implementing the management and development contracts and from facilitating or continuing the construction of an illegal casino on the Parcel based on their unlawful claim that their claimed beneficial interest in the Parcel is trust land eligible for Indian gaming under IGRA.

99. Plaintiffs request that the Court reverse and vacate the NIGC's approval of the JLD, Gaming Ordinance and Management Contract as being arbitrary, capricious and contrary to law including, but not limited to, the IRA.

THIRD CLAIM FOR RELIEF

Declaratory Relief and Injunctive Relief – Constitutional Law

100. Plaintiffs repeat and re-allege paragraphs 1 through 99 inclusive, of this Second Amended and Supplemental Complaint, as if fully set forth here.

101. After California became a sovereign State of the United States in 1850, on an equal footing with all other States, it received regulatory and police power jurisdiction over all property within the State – including federally owned public domain lands. Until public domain lands are conveyed to the State or into private ownership, the United States retains limited regulatory authority over public domain lands if necessary to further a federal purpose. *Kleppe v. New Mexico* 429 U.S. 873 (1976).

102. Thus, the United States has the authority, in some circumstances, to create an Indian reservation from retained public domain lands. By definition, an Indian reservation is created by the Secretary, pursuant to an Act of Congress, executing an order withdrawing specific parcels from public domain land and reserving it for the specific purpose of the withdrawal order. *See U.S. v. Midwest Oil Co.* 236 U.S. 459 (1915).

103. But after public domain property is conveyed to the State, or into private ownership, the United States no longer has authority to create an Indian reservation over non-public domain lands. *See Hawaii v. Office of Hawaiian Affairs*, 129 S Ct. 1436 (2009). The Supreme Court concluded that "it would raise grave constitutional concerns" if Congress sought to "cloud Hawaii's title to its sovereign lands" after it had joined the Union. "We have emphasized that Congress cannot, after statehood, reserve or convey...lands that have already been bestowed upon a state..." *Hawaii v. Office of Hawaiian Affairs, supra.*

104. The State of California entered the Union on September 9, 1850, on an equal footing with all other States. As is the case with all States, public domain lands in California were to be transferred to either the State or into private ownership subject to State jurisdiction and regulation. California's Act of Admission mandated that California shall not interfere with the primary disposal of public domain lands by the United States. (9 Stats. 452.)

105. In addition, in 1864, Congress limited the number of Indian Reservations that could be created in California from public domain lands to four. (13 Stat. 39.) In 1891 MIRA allowed for the creation of Mission Indian reservations. (26 Stat. 212) The remainder of the public domain land was to be transferred to the State or eventually sold into private ownership.

106. The Defendants' decision that the Parcel is reservation or Indian lands eligible for gambling free from State regulation is an unconstitutional infringement on private land titles and on State's plenary power to regulate its citizenry because the Parcel was never part of the public domain and was never lawfully reserved.

107. The decision by the Federal Defendants that the Parcel is a reservation or Indian lands exempt from State regulation, is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. It should be vacated and its implementation enjoined as an unconstitutional usurpation of State jurisdiction and regulation.

108. In addition the Defendants attempt to exclude the Parcel from State jurisdiction and regulation is contrary to an established directive from the Secretary of Interior. See Notice of the Office of the Secretary of Interior, issued pursuant to 25 C.F.R § 1.4, adopting and applying State laws on all Indian property in California (30 Fed.Reg. 8722 (1965).).

109. By attempting to preclude the application of State law to the Parcel is a violation of the Constitution and the principles of federalism. Each Defendant has acted, or threatened to act, under the color of governmental authority to the injury of Plaintiffs in violation of federal law and in excess of federal limitations upon the power and authority of each such Defendant.

110. The JIV was organized in 1981 as a half-blood Indian community. Although not a federally recognized tribe, this racial half-blood Indian community is consistent with the IRA.

111. The JIV reorganized itself in 1996 as a quarter-blood Indian community. This racial quarter-blood Indian community is not allowed by, the IRA.

112. The Federal Defendants efforts to give the JIV preference and benefits based on its make-up of quarter-blood Indians is a violation of the United States Constitutions and the equal protection rights of the Plaintiffs. Each Defendant has acted, or threatened to act, under the color of federal governmental authority to the injury of Plaintiffs in violation of federal law and in excess of federal limitations upon the power and authority of each such Defendant.

113. There is an actual controversy among the parties, within the meaning of the federal Declaratory Relief Judgment Act (28 U.S.C. § 2201) regarding whether the Defendants can hold the Parcel free from State and local regulation and for the benefit of a racial quarter blood Indian community. Plaintiffs contend that the federal government cannot, after statehood, reserve, convey, or regulate lands that are no longer public domain lands. The Federal Defendants claim that they have the authority to acquire and hold lands into trust for the JIV free of State and local regulation and that they can give preferential treatment to the JIV as a quarter-blood Indian racial group. Also Defendants JIV Officials claim that they need not comply with State and local laws or the Constitution when constructing a casino on the Parcel. A declaratory judgment by this Court in favor of Plaintiffs on these issues is necessary and proper.

114. Plaintiffs' remedies at law are inadequate. Injunctive relief, both preliminary and permanent, is necessary to prevent irreparable injury to the Plaintiffs, the public and the environment if a casino is constructed on the Parcel in violation of State and federal law. In the absence of the relief requested in this action, an unlawful casino complex will be allowed to open and operate in the rural Jamul community in San Diego County without complying with State and local law. Plaintiffs request a mandatory injunction directing the Defendants to comply with State and local law when developing the Parcel.

FOURTH CLAIM FOR RELIEF

Injunctive Relief and Damages – Public Nuisance and Nuisance Per Se

115. Plaintiffs repeat and re-allege paragraphs 1 through 114 inclusive, of this Second Amended and Supplemental Complaint, as if fully set forth here.

116. Plaintiffs bring this claim for injunctive relief and damages against the individual Federal Defendants, the individual JIV Defendants and the three corporate Defendants. They are being sued in their personal capacity for allowing and facilitating the construction of an illegal gambling casino on the Parcel in violation of federal and State law. Each such Defendant has acted, or has threatened to act, under the color of governmental authority to the injury of Plaintiffs in violation of federal and State law and in excess of the federal and State limitations upon their power and authority. *Ex parte Young* (1908) 209 U.S. 123.

117. The California Constitution allows and limits Class III gaming to "federally recognized tribes [with an approved tribal-state compact] on Indian lands in California in accordance with federal law." Cal. Const. Art. 4, Sec. 19(f).

118. IGRA defines Indian lands to include reservations or trust lands over which a federally recognized tribe has lawfully exercised governmental power. Neither the Parcel, nor JIV's claimed beneficial interest in the Parcel, qualifies as Indian lands under IGRA.

119. The JIV was organized as a half-blood Indian community and has not petitioned to become a "federally recognized tribe" under Part 83. The Parcel is not "Indian lands in California" eligible for gambling under IGRA. Thus the proposed gambling casino on the Parcel by the JIV and Defendants JIV Officials is illegal in California.

120. California Penal Code section 11225, provides that: "Every building or place used for the purpose of illegal gambling . . . is a nuisance which shall be enjoined, abated and prevented, and for which damages may be recovered, whether it is a public or private nuisance."

121. California Penal Code section 11226 provides that "any State resident of the County may maintain an action in equity to enjoin, abate and prevent a nuisance."

122. The construction of an illegal casino is a public nuisance and violation of law that will cause significant harm to the Plaintiffs, long-time residents of Jamul, who live near the Parcel.

123. The negative effects of building and operating the casino in Plaintiffs' community include: (a) an irreversible change in the rural character of the area; (b) loss of enjoyment of the aesthetic and environmental qualities of the agricultural land surrounding the casino site; (c) increased traffic; (d) increased light, noise, air, and storm water pollution; (e) increased crime; (f) diversion of police, fire, and emergency medical resources; (g) decreased property values; (h) increased property taxes; (i) diversion of community resources to the treatment of gambling addiction; (j) weakening of the family conducive atmosphere of the community; and (k) other aesthetic, socioeconomic, and environmental problems associated with gambling.

124. Plaintiffs' remedies at law are inadequate. Injunctive relief, both preliminary and permanent, against the Defendants, enjoining the continued construction of the illegal casino is necessary to abate and prevent a public nuisance and to prevent irreparable injury.

125. The Plaintiffs seek injunctive relief to prevent the continued construction of an illegal casino in Jamul, San Diego. The continued construction of an illegal gambling casino on non-Indian lands should be enjoined as a public nuisance and a public nuisance per se in violation of State and federal law. Cal. Const. Art. 4, Sec. 19 and Cal. Penal Code § 11225.

FIFTH FOR RELIEF

Declaratory Relief and Mandate - National Environmental Policy Act

126. Plaintiffs repeat and re-allege paragraphs 1 through 125 inclusive, of this Second Amended and Supplemental Complaint, as if fully set forth here.

127. The Defendants approval and implementation of the ILD, the gaming ordinance and management and development contracts violate the National Environmental Policy Act (NEPA). 42 U.S.C. § 4321 et. seq.; 40 C.F.R. 1500 et seq. The Defendants did not prepare an environmental assessment or comply with NEPA before approving the ILD, tribal gaming ordinance or the management and development contracts and the construction of the casino.

128. NEPA requires that "all agencies of the Federal Government shall...include in every recommendation or report on...major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official." 42 U.S.C. § 4332. The approval of the ILD, gaming ordinance, management and development contracts and casino construction on land owned by the United States are a major federal actions under NEPA.

129. Defendants ignored or failed to adequately consider or mitigate the environmental impacts of their actions and the proposed illegal Indian casino on Jamul and the surrounding community, including the socio-economic impact, such as the impacts associated with crime and problem gambling, and the impacts on public and social services, such as wastewater service, fire and emergency medical services, law enforcement, housing, roads and transportation resources, schools, cultural and archaeological resources including the internment of human remains and funerary objects and other public and social services.

130. Defendants' failed to take a proper "hard look" at the environmental impact of the proposed mega-casino development before approving the ILD, approving the JIV gaming ordinance, approving the management and development contracts and initiating casino construction. 42 U.S.C. § 4321 *et seq.*; 40 C.F.R. § 1508.8.

131. Specifically, the Defendants failed to take a hard look at the significant, inherent, and well documented negative and detrimental impacts to: (a) transportation and traffic, (b) road access, (c) fire and emergency services, (d) biology and the Multiple Species Conservation

Plan for the neighboring Rancho Jamul Ecological Preserve, (e) failure to comply with CEQA and NEPA, (f) hydrology and water quality, (g) groundwater resources, (h) soils and geology, (i) cultural and archeological resources, not to mention the interment of human remains and funerary objects on the Parcel, (j) noise, (k) air quality and climate change, (l) wastewater treatment, (m) electrical power, (n) visual impacts, (o) community character, (p) growth, and (q) Jamul's dark skies.

132. Defendants also failed to fully consider or adequately assess the impact that the ILD and proposed casino will have on local communities, as required by 25 C.F.R. § 151.10(e) and NEPA, and Defendants failed to assess and propose adequate mitigation measures for these community related impacts.

133. Defendants failed to adequately consider alternatives to approving the gaming ordinance and management contract as required by 40 C.F.R. § 1502.14. Defendants were required to "[r]igorously explore and objectively evaluate all reasonable alternatives ...." *Id.* Yet the Defendants failed to even consider whether the JIV could legally build a casino on the Parcel.

134. Defendants failed to conduct a fair, unbiased and complete analysis of the human impacts that will be caused by approving the gaming ordinance and management contract, as required by NEPA. For example, Defendants failed to consider the detrimental economic impacts on tribal governmental operations and member services that the mega-casino development will have on the Sycuan, Viejas and Campo tribes, including loss of jobs, inability to make per capita payments to its citizens, and elimination of contributions to local organizations.

135. Despite the Public Notice, the SEIS for the proposed Gaming Management Contract was never prepared or circulated as required by NEPA. Nor was the proposed Gaming Management Contract provided. Nor were the terms of the Gaming Management Contract disclosed as required by 25 U.S.C. §§ 2710(d) (9) and 2711(b)-(f).

136. Defendants failed to comply with 40 C.F.R. § 1506.5 and 1506.6 in conducting public hearings, in conducting the public participation and public hearing process, and in reviewing and approving the proposed SEIS in violation of the APA. 5 U.S.C. §§ 702, 704,706

137. The DOI failed to ensure complete and proper public participation, including by failing to properly consult under 25 C.F.R. Part 292, properly consider comments of, and allow or adequate participation by the general public, by denying access and time to certain participants at the expense of other participants, and by denying requests to extend or reopen the comment period and the public hearing process.

138. The failure of the Defendants to comply with NEPA or to take a "hard look" at, and adequately address, the adverse environmental and socio-economic impacts of the ILD, and related actions, is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law (5 U.S.C. § 706.)

139. Furthermore, Federal Defendants gave preferential treatment to the Indians and the JIV and were required to resolve all doubts in favor of the Indians and JIV. Consequently, Federal Defendants are not able to comply with NEPA and take an unbiased "hard look" at the casino project and its impacts.

140. There is an actual controversy among the parties, within the meaning of the federal Declaratory Relief Judgment Act (28 U.S.C. § 2201) and an actual case and controversy under Article III of the United States Constitution, regarding whether the Federal Defendants complied with the provisions of NEPA before they approved the ILD and management and development contracts. A declaratory judgment by this Court in favor of Plaintiffs and against the Federal Defendants on these issues is necessary and proper.

141. Plaintiffs' remedies at law are inadequate. Injunctive relief, both preliminary and permanent, is necessary to prevent irreparable injury to the Plaintiffs. In the absence of the

relief requested in this action, an unlawful casino complex will be allowed and constructed by Defendants and allowed to open and operate in the Jamul community in San Diego County by the Defendants before the NEPA process is complete. The Defendants' approvals of the ILD, management and development contracts and casino construction should be vacated and should be enjoined until the Defendants completely comply with NEPA.

142. The Plaintiffs request that the Court mandate that the NIGC complete and circulate the SEIS before approving or implementing the gaming ordinance or management contract.

SIXTH CLAIM FOR RELEIF

Declaratory and Injunctive Relief – Violation of the Federally Approved Compact

143. Plaintiffs repeat and re-allege paragraphs 1 through 142 inclusive, of this Complaint, as if fully set forth here.

144. The 1999 Compact between the State and JIV was approved by the DOI in 2000. A Compact, once approved by the DOI, becomes federal law and is enforceable as such.

145. The Compact authorized gaming facilities "only on those Indian lands on which gaming may lawfully be conducted under the Indian Gaming Regulatory Act." Compact, Section 4.2.

146. The DOI May 5, 2000 letter of approval of the terms of the Compact was "only to the extent that they authorize gaming on 'Indian lands' as defined by IGRA."

147. The Compact is based on JIV's generic representations and does not identify the Parcel or any property as Indian lands eligible for gaming under IGRA.

148. Furthermore, the Compact prohibits the construction of a gaming facility on Indian lands by the JIV after January 1, 2005 "unless and until an agreement to amend this Section 10.8 has been concluded between the Tribe and the State." Compact, Section 10.8.3(c).

149. Section 10.8 of the Compact incorporates the policies and purposes of NEPA and CEQA to mitigate any and all significant adverse off-reservation environmental impacts resulting

casino construction projects. Despite a timely request from the State, on or about February 28, 2003, the JIV has not agreed to an amendment to Section 10.8 of the Compact. Construction on the casino should cease until Section 10.8 is amended.

150. The Plaintiffs seek a declaration from this Court that the Parcel is not Indian lands eligible for gaming under the Compact, the DOI approval of the Compact or IGRA.

151. The Plaintiffs also seek a preliminary and permanent injunction from this Court enjoining the continued construction of the casino because it violates the Compact, the DOI approval of the Compact and IGRA.

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court enter judgment in their favor and against all the Defendants, and each of them, as follows:

A. That this Court declare that the Federal Defendants approvals of the ILD, the JIV gaming ordinance and the JIV-Penn National management and development contracts based on the finding that the Parcel is reservation or Indian lands eligible for tribal gaming under IGRA are arbitrary, capricious, and contrary to law.

B. That this Court declare that neither the Parcel, nor the JIV Defendants claimed beneficial interest in the Parcel is trust land under JIV's government control or Indian lands eligible for tribal gaming under the IRA, IGRA and their implementing regulations;

C. That this Court declare that the Defendants have no authority to take the Parcel in trust or to treat it as a reservation free of State regulation and that the decision to do so in the ILD, gaming ordinance and management contract is arbitrary, capricious and contrary to law;

D. That this Court declare that the Defendants attempt to give benefits and preference to the JIV as a racial group of less than half-blood Indians violates the Constitution, due process and equal protection;

E. That the Court enjoin the continued construction of the illegal casino by the Defendants on the Parcel as a public nuisance and a nuisance per se;

F. That this Court declare that the Defendants failed to comply with NEPA and mandate that they comply with NEPA before they approve or implement the ILD, gaming ordinance and management contract and before allowing continued construction on the Parcel;

G. That this Court declare that the construction of the casino on the Parcel is a violation of the federally approved Compact, the DOI and IGRA and enjoin the continued construction of the casino by the Defendants;

H. That the Court enter an order mandating the Federal Defendants to disclose the ILD and all related documents in their possession as required by the APA. 5 U.S.C. § 706.

I. That this Court enter an order enjoining the Defendants from approving or implementing any aspect of the ILD, gaming ordinance or management and development contracts;

J. That this Court enter a judgment and an order enjoining Defendants from allowing, facilitating or continuing the construction of the illegal casino on the Parcel;

K. That this Court enter judgment and an order awarding Plaintiffs' costs and reasonable attorney's fees as permitted by law including the Equal Access to Justice Act; and

L. That this Court award such further relief as to the Court deems just and proper.

Dated: August 26, 2014

Respectfully submitted,

/s/Kenneth R. Williams

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WALTER ROSALES AND KAREN TOGGERY, ESTATE OF HELEN CUERRO, ESTATE OF WALTER ROSALES' UNNAMED BROTHER, ESTATE OF DEAN ROSALES, ESTATE OF MARIE TOGGERY, ESTATE OF MATTHEW TOGGERY, APRIL LOUISE PALMER, and ELISA WELMAS Plaintiffs, v. **AMY DUTSCHKE, Regional Director, BIA; JOHN RYDZIK, Chief, Environmental Division, BIA; KENNY MEZA; CARLENE A. CHAMBERLAIN; ERICA M. PINTO; ROBERT W. MESA; RICHARD J. TELLOW; PENN NATIONAL GAMING INC.; SAN DIEGO GAMING VENTURES, LLC; and C.W. DRIVER,** Defendants.	Civ. No. **COMPLAINT DEMANDING TRIAL BY JURY**

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NATURE OF THE ACTION

1. Plaintiffs, WALTER ROSALES and KAREN TOGGERY are Native American residents of San Diego County of one-half or more degree of California Indian blood, and former leaders of the half-blood Indian community, known as the Jamul Indian Village, "JIV," who until recently lived on the Indian cemetery in Jamul, where their families have lived since the late 1800's. Rosales and Toggery own and control their families' human remains and funerary objects that were interred in burial sites below, on, and above the Indian cemetery. Those remains and objects have been feloniously disinterred and desecrated by the Defendants in a race to illegally build a casino on the U.S. government's portion of the Indian cemetery property before they are stopped and the law is enforced.

2. The executive council members of the JIV, along with the complicity of the other Defendants, have committed some of the most heinous and grisly of crimes in their headlong rush to illegally build a casino on the U.S. government's portion of the Jamul Indian cemetery. The Defendants have intentionally and feloniously disinterred and desecrated Rosales and Toggery's families' human remains and funerary objects, and unceremoniously dumped them on a CalTrans highway construction site. These crimes are felonies, and Defendants have no immunity for having committed them.

3. Alleged members of the JIV have repeatedly and falsely testified concerning these crimes. They first claimed that there weren't any interments on the government's portion of the Indian cemetery. Then they admitted that they learned of the interments, but denied any knowledge of the interments at the time that Rosales and Toggery's families remains were dug up and dumped on CalTrans construction site. Now, their most recent declarations under oath admit that they began construction, with knowledge of the interment of Rosales and Toggery's families remains and funerary objects on the government's portion of the Indian cemetery, and intentionally had them excavated and removed.[1]

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[1]See for e.g., Defendant and one time JIV chairman, Kenny Meza's admission in the January 2003 *California Lawyer*: "All the stuff that my brother, parents, godparents, and uncles once owned has been burned and buried on this land. And when the bulldozers come, they're going to dig it all up."

4. Rosales and Toggery, along with Plaintiffs, APRIL PALMER and ELISA WELMAS, hereby sue two federal agency officials, the executive officers of the half-blood community, and their contractors for their continuing personal injuries arising from this desecration of their families' human remains and funerary objects, pursuant to this Court's concurrent jurisdiction over the federal Defendants and the government's portion of the Jamul Indian cemetery property on which Rosales and Toggery's families' remains and funerary objects were desecrated, and from which they were illegally excavated and removed. See, *Michigan v. Bay Mills Ind. Community ("Bay Mills")* (2014) 134 S.Ct. 2024, 2035, discussed further herein.

PARTIES

5. Plaintiffs, WALTER J. ROSALES, and KAREN TOGGERY, are Native American residents of San Diego County of one-half or more degree of California Indian blood.

6. Plaintiff, WALTER J. ROSALES, is also a lineal descendant and son of Native American, Helen Cuerro, the personal representative of his mother's estate, the ESTATE OF HELEN CUERRO, his son's estate, the ESTATE OF DEAN ROSALES, his unnamed brother's estate, the ESTATE OF WALTER ROSALES' UNNAMED BROTHER, and a lienal descendant with ownership and control of their human remains and Native American cultural items, as set forth in Cal. Pub. Res. C. 5097.9-5097.99 and Health & Safety C. 7001 and 7100. "[T]he next of kin...have property rights in the body which will be protected, and for a violation of which they are entitled to indemnification." *Christensen v. Sup. Ct.* (1991) 54 Cal.3d 868, 890, citing *O'Donnell v. Slack* (1899) 123 Cal. 285, 289.

7. Plaintiff, KAREN TOGGERY, is also a lineal descendant and daughter of Native American, Marie Toggery, and the personal representative of her mother's estate, the ESTATE OF MARIE TOGGERY, as well as the mother of her son Matthew Toggery, and the personal representative of the ESTATE OF MATTHEW TOGGERY, and a lineal descendant with ownership and control of their human remains and Native American cultural items, as set forth in Cal. Pub. Res. C. 5097.9-5097.99 and Health & Safety C. 7001 and 7100.

8. Plaintiff APRIL LOUISE PALMER, is the sister of DEAN ROSALES, and the daughter of WALTER ROSALES, and the granddaughter of HELEN CUERO, and a resident of Riverside

County.

9. Plaintiff ELISA WELMAS is the mother of DEAN ROSALES, the former wife of WALTER ROSALES, and the daughter-in-law of HELEN CUERO, and a resident of Riverside County.

10. Defendant AMY DUTSCHKE is Regional Director for the Pacific Region of the Bureau of Indian Affairs, "BIA," with an office in Sacramento, California.

11. Defendant JOHN RYDZIK is the Chief of the Environmental Division of the BIA, with an office in Sacramento, California.

12. These individual federal Defendants are being sued both in their official and personal capacities for decisions for which they bear the responsibility and allowing and facilitating the desecration of Plaintiffs' families human remains and funerary objects by causing the construction of an illegal casino on the portion of the Jamul Indian cemetery owned by the U.S, in violation of federal and state law, including Constitutional violations. Each individual Defendant has acted, or threatened to act, under the color of federal governmental authority to the injury of Plaintiffs in violation of federal law and in excess of federal limitations upon their power and authority. *Ex parte Young* (1908) 209 U.S. 123; *Michigan v. Bay Mills Indian Community* (2014) 134 S.Ct. 2024, 2035; *Salt River Project Agricultural Improvement and Power District v. Lee* (9th Cir. 2012) 672 F.3d 1176, 1177.

13. Defendants KENNETH MEZA, CARLENE A. CHAMBERLAIN, ERICA M. PINTO, ROBERT W. MESA, and RICHARD J. TELLOW, are current and/or former officials of the JIV.

14. These individual non-federal Defendants are being sued in their personal capacities for allowing and facilitating the desecration of Plaintiffs' families human remains and funerary objects by causing the construction of an illegal casino on the portion of the Jamul Indian cemetery owned by the U.S, in violation of federal and state law, including Constitutional violations. Each individual Defendant has acted, or threatened to act, under the color of federal governmental authority to the injury of Plaintiffs in violation of federal law and in excess of federal limitations upon their power and authority. *Ex parte Young* (1908) 209 U.S. 123; *Michigan v. Bay Mills Indian Community* (2014) 134 S.Ct. 2024, 2035; *Salt River Project Agricultural Improvement and Power District v. Lee* (9th

Cir. 2012) 672 F.3d 1176, 1177.

15. The JIV is not a party to this action, and is not a federally recognized tribe under the Indian Reorganization Act, "IRA," 25 U.S.C. 461 et seq., has no sovereign immunity, and has no right, title or interest in Plaintiffs' families' human remains and funerary objects, or in the government's portion of the Jamul Indian cemetery.

16. Defendant PENN NATIONAL GAMING, INC. (PENN NATIONAL) is a corporation doing business in California. Penn National signed management and development contracts with the JIV, and is implementing them by constructing or managing the construction of the illegal casino on that portion of the Indian cemetery owned by the U.S.

17. Defendant SAN DIEGO GAMING VENTURES, LLC (SDGV) is a corporation doing business in California, and is a subsidiary affiliate of Penn National, that was identified in the Federal Register as seeking approval of a Gaming Management Contract as the corporate entity proposing a gaming management contract with JIV for the management of the illegal casino on the portion of the Indian cemetery owned by the U.S.

18. Defendant C.W.DRIVER, is a corporation and contractor doing business in California. Plaintiffs are informed and believe, and on that basis allege that C.W.DRIVER has been retained by JIV council members, Penn National and/or SDGV to construct, and is currently constructing, the illegal Indian casino on the portion of the Indian cemetery owned by the U.S.

19. The true names and capacities, whether individual, corporate, associate or otherwise, of DOES 1-20, are unknown to Plaintiffs at this time, who, therefore, sue said Defendant by said fictitious names. Plaintiffs are informed and believe, and based thereon allege, that DOES 1-20 are responsible in some measure for the actions, events and happenings herein alleged, and was the legal cause of injury and damages to the Plaintiffs as herein alleged, and thereby causing irreparable damage to Native American human remains, along with the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in Cal. Pub. Res. C. 5097.9-5097.99, by knowingly and/or willfully mutilating, disinterring, wantonly disturbing, excavating and willfully removing them to state property without authority of law. When the true names and capacities of

said Defendants are ascertained by Plaintiffs, Plaintiffs will seek leave to amend this complaint to insert their true names and capacities, and will serve said Doe Defendants when they become known.

20. At all times herein mentioned, Defendants, and each of them, were the agent, employee and/or joint venturer of their co-defendants, and were acting within the course and scope of such agency, employment and/or joint venture, with the permission and consent of their co-defendants and defendants. Furthermore, that at all times herein mentioned, Defendants, while acting as principals, expressly directed, consented to, approved, affirmed and ratified each and every action taken by the other herein alleged. Each reference to one defendant is also a reference to each and every other defendant. Plaintiffs are informed and believe and thereon allege that the defendants, and each of them, conspired with each other, to engage in acts in furtherance of a conspiracy to wrongfully and illegally violate the Plaintiffs' rights, rendering each of the defendants jointly and severally liable for all resulting and irreparable personal injury and damage to Plaintiffs.

JURISDICTION AND VENUE

21. The jurisdiction of this Court is invoked pursuant to 5 U.S.C. §§701 -706, 18 U.S.C. §§ 1151, 1162 and 1166, 25 U.S.C. §465 et seq., 2700 et seq., 3001-13, 28 U.S.C. §§ 1131 et seq., 1343, 1360, and 2201-2202.

22. Plaintiffs' claims also arise under California common and statutory law, to the same extent that any California court has jurisdiction over other civil and criminal causes of action, and those civil laws of California that are of general application to private persons or private property shall have the same force and effect, as they have elsewhere within California., as held for e.g., in *People v. Van Horn* (1990) 218 Cal. App.3d 1378, and *Christensen v. Sup. Ct.* (1991) 54 Cal.3d 868, 887.

23. The Defendants do not have immunity from suit.

24. An actual case and controversy exists among the parties, warranting the Court's declaration pursuant to 28 U.S.C. § 2201 of the rights, remedies and relations of the parties with respect to the Plaintiffs' ownership and control of their families' human remains and funerary objects, the portion of the Indian cemetery owned by the U.S., and whether or not it qualifies as land eligible for gambling under the Indian Gaming Regulatory Act, "IGRA." 25 U.S.C. 2014 et seq.

25. All applicable federal administrative remedies have been exhausted prior to initiating this

lawsuit against the Defendants as required by 5 U.S.C. §704. This action arises under federal law, including IRA, 25 U.S.C. §§ 465 *et. seq.* IGRA, 25 U.S.C. §§ 2700 *et seq.* and 18 U.S.C. § 1166, the Native American Graves Protection Act, "NAGPRA," 25 U.S.C. 3001 et seq., the Archaeological Resources Protection Act, "ARPA," 16 U.S.C. §470aa et seq., the U.S. Constitution, the California Admissions Act of 1850, and principles of federalism.

26. Venue is proper in the District Court for the Eastern District of California under 28 U.S.C. §§1391(b) and (e) and 5 U.S.C. § 703 . Venue is proper in this judicial district because at least one defendant resides or has an office in this judicial district, and because a substantial portion of the events giving rise to the Plaintiffs ' claims occurred in this district.

27. The Plaintiffs have standing to pursue the claims asserted in this complaint. *Bond* v. *United States* 131 S.Ct. 2355 (20 11), *Match -E-Be-Nash-She-Wish Bandv. Patchak* 132 S.Ct. 2 199 (2012), *Michigan v. Bay Mills Indian Community* (20 14) 134 S.Ct. 2024, 2035, *Christensen v. Sup. Ct.* (1991) 54 Cal.3d 868, 887, and *Palmquist v. Standard Acc. Ins. Co.*, 3 F.Supp. 358 (S.D. Cal. 1933).

GENERAL ALLEGATIONS

1. Walter Rosales and Karen Toggery Own and Control Their Families Human Remains and Funerary Objects

A. History of the Jamul Indian Cemetery and Remnants of Capitan Grande Band

28. Since the community of Jamul was a part of the Republic of Mexico, the Native American families of which Walter Rosales and Karen Toggery are the lineal descendants have inhumed, interred, deposited, and dispersed more than a hundred of their deceased family members' human remains, and items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in NAGPRA, 25 U.S.C. 3001-2, 43 C.F.R. 10.1-17, and Cal. Pub. Res. C., "P.R.C.," 5097.9-5097.99, according to their religious beliefs in burial sites below, on, and above the ground at the Indian cemetery in Jamul.[2]

[2]"'[B]urial site' means any natural or prepared physical location, whether originally below, on, or above the surface fo the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited." 25 U.S.C. 3001(1). California law further protects lawfully interred cremations. "'Human remains' or 'remains' means the body of a deceased person, regardless of its state of decomposition, and cremated remains," Cal. Health & Safetey Code, "H.S.C.," 7001,

29. These Indians have lived on an acre of private land that has been dedicated as an Indian cemetery, in Jamul, California, since at least the latter part of the Nineteenth Century. See, Exs. A, B, C, E, and F. The BIA Director of Tribal Government Services further stated on July 1, 1993: "The Jamul Indians lived on one acre of private land and on land deeded to the Diocese of San Diego as an Indian cemetery." Ex. I, at 3.

30. According to the federal government, these Indians are the remnants of the Capitan Grande tribe, and thus have not been, and are not subject to being, recognized as a separate tribe under the IRA. 25 U.S.C. 461, et seq. On January 18, 1982, the California Program Office of the Indian Health Service found: "Sometime in the 1800's, Indians from the nearby El Capitan Grande area settled adjacent to an existing cemetery near the village of Jamul." FONSI for Domestic Water Supply & Waste Disposal Facilities, Project No. CA 79-719. The Capitan Grande tribe was divided into the Barona and Viejas bands, when the San Diego River was dammed, and El Capitan Reservoir was created and allowed to flood the Capitan Grande village in the 1930's.

31. When California was a part of the Republic of Mexico between 1823 and 1846, all Indians living in and around the Indian cemetery in Jamul had already become full citizens of the Republic of Mexico on February 4, 1821, pursuant to the Plan of Iguala, which was one of the charter documents of the Mexican Republic.[3] Thereby, they were no longer treated as members of separate tribes, they had the right to own land, and subject to a property qualification, could vote.

32. Between 1846 and 1850, California was governed by several United States Military Governors. The territory that was to become California, including the Jamul cemetery, was ceded to the United States by Mexico in 1848 pursuant to the Treaty of Guadalupe Hidalgo. 9 Stats.922

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since "'interment; means the disposition of human remains...in the case of cremated remains, by inurnment, [or] placement below, on, or above the surface of the earth," in a cemetery, H.S.C. 7009, and constitutes a protected "burial site," H.S.C. 8012, which is defined as the "process of placing human remains in a grave," H.S.C. 7013, which is further defined as "a space of earth in a burial park, used or intended to be used, for the disposition of human remains," H.S.C. 7014, which in turn is defined as "a tract of land for the burial of human remains in the ground, used, or intended to be used, and dedicated, for cemetery purposes." H.S.C. 7004. See, Ex. U, as to the religious beliefs and burial practices of the Kuymeyaay from whom Rosales and Toggery have descended.

[3] Therein the charter provides: "All the inhabitants of New Spain, without distinction, whether Europeans, Africans or Indians, are citizens fo the monarchy, with the right to be employed in any post, according to their merits and virtues."

(1850). The treaty provided for the protection of public and private property rights. Specifically property rights "of every kind," (including Indian property rights in their dead) that were respected under Mexican law were also to be respected by the United States. *Id.*

B. Creation of the Sanctified Indian Cemetery, Place of Worship, and Religious Ceremonial Site in Jamul

33. "It is a universally held belief among Indians that if the dead or the funeral goods interred with them are disturbed, their spirits will wander, and in the words of [Supreme Court Justice of the Pawnee Nation]Walter Echo-Hawk, that 'restless spirits will bring evil to those who allowed their graves to be disturbed.'... While actual practices and religious beliefs may vary widely between cultures, and even within ethnic groups, the concern for the dead and the sensibilities of the living is a universal value held by all societies in all ages. The sepulture of the dead has, in all ages of the world, been regarded as a religious rite. The place where the dead are deposited, in all civilized nations and many barbarous ones is regarded in some measure at least, as consecrated ground... Consequently, the normal treatment of a corpse, once it is decently buried, is to let it lie. This idea is so deeply woven into our legal and cultural fabric that it is commonplace to hear it spoken of as a 'right.'" Thomas, "Indian Burial Rights Issues: Preservation or Desecration," Spring 1991, 59 *U.M.K.C. Law Review* 747.[4]

34. "Burial rites or their counterparts have been respected in almost all civilizations from time immemorial. [Citations.] They are a sign of the respect a society shows for the deceased and for the surviving family members. … [For example] The outrage at seeing the bodies of American soldiers mutilated and dragged through the streets is … a[n] … instance of the … understanding of the interests decent people have for those whom they have lost. Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own. In addition this well-established cultural tradition

[4] See the universal condemnation of the Poarch Creek Band of Creek Indians desecration of the Hickory burial ground to build a casino, by the Inter-Tribal Council of the Five Civilized Tribes of the Chickasaw, Choctaw, Cherokee, Muscogee (Creek) and Seminole Nations, representing 750,000 blood descendants, in Ex. S, and former Vice Chair Okla. Indian Affairs Comm., Dan Jones,' "You'll Mock Death But Once," *Indian Country Today*, 8- 20- 2012, Ex. T.

acknowledging a family's control over the body and death images of the deceased has long been recognized at common law." *National Archives and Records Admin. v. Favish*,541 U.S. 157, 167-68 (2004).

35. "[T]he next of kin...have property rights in the body which will be protected, and for a violation of which they are entitled to indemnification." *Christensen v. Sup. Ct.*. 54 Cal.3d 868, 890 (1991), citing *O'Donnell v. Slack*, 123 Cal. 285, 289 (1899), finding violation of the Health & Safety Code to be *per se* negligent under Evid. C. 669. "A surviving spouse, entitled to custody and possession of a deceased person for the purposes of preservation and burial, may maintain an action for damages against anyone who unlawfully and without authority mutilates or destroys such body." *Palmquist v. Standard Acc. Ins. Co.*, 3 F.Supp. 358 (S.D. Cal. 1933). Cal. H.S.C. 8301.5 further evidences Rosales and Toggery's interest in the proper disposition of their families' remains: "The Legislature recognizes... The urge to associate even after death also stems from an intense social and cultural need to ensure that people are connected with their past, and also to ensure that the graves and surrounding grounds are kept, tended, adorned, and embellished according to the desires and beliefs of the decedent, family, or group."

36. From their birth, Rosales and Toggery have been the lineal descendants of the Native American families that have lived and have inhumed, interred, deposited, and dispersed more than a hundred of their deceased family members' human remains, and items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in P.R.C. 5097.9-5097.99, H.S.C. 7001 and 7100, and NAGPRA, 25 U.S.C. 3001-2, 43 C.F.R. 10.1-10.17, according to their religious beliefs in burial sites below, on, and above the Jamul Indian cemetery for more than a hundred years. Recently, the San Diego Museum of Man repatriated a significant collection of Native American human remains and funerary objects, which have also been inhumed, interred, deposited, dispersed, and placed, in burial sites below, on, and above, the cemetery.

37. Rosales and Toggery have personal knowledge of more than 20 of the hundreds of Native Americans whose human remains, and items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of

cultural patrimony, as defined in P.R.C. 5097.9-5097.99, H.S.C. 7001 and 7100, and NAGPRA, 25 U.S.C. 3001-2, 43 C.F.R. 10.1-10.17, have been interred and deposited in burial sites below, on, and above the Indian cemetery in Jamul.

38. Walter Rosales was personally present when his un-named younger brother's human remains and his mother, Helen Cuerro's human remains, and his son, Dean Rosales' human remains, were inhumed, interred, and deposited, along with the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in P.R.C. 5097.9-5097.99, H.S.C. 7001 and 7100, and NAGPRA, 25 U.S.C. 3001-2, 43 C.F.R. 10.1-10.17, in burial sites below, on and above the ground on the portion of the Indian cemetery of which Rosales and Toggery are the beneficial owners and the U.S. holds title.

39. Karen Toggery was personally present when her mother, Marie Toggery's human remains and her son, Matthew Tinejero Toggery's human remains, were inhumed, interred and deposited, along with the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in P.R.C. 5097.9-5097.99, H.S.C. 7001, 7100, and NAGPRA, 25 U.S.C. 3001-2, 43 C.F.R. 10.1-10.17, in burial sites below, on and above the ground at the Indian cemetery.

40. The interments of Rosales and Toggery's families' remains and funerary objects are further corroborated by the Cal. Dept. Of Health Permits for Disposition of Human Remains, San Diego and Riverside County Death Certificates, and the San Diego Rural Fire Prot. Dist. Daily Logs of the cremated funerary objects. Ex. K.

41. Rosales and Toggery are the lineal descendants that own and control their predecessors' human remains and Native American and associated cultural items, which are personal rights, as set forth in P.R.C. 5097.9-5097.99, H.S.C. 7001, 7100, and 25 U.S.C. 3001-2, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, which have been inhumed, interred, deposited, dispersed, and placed, in burial sites below, on and above the cemetery over the last 100 years.

42. By virtue of these acts, a Native American sanctified cemetery, place of worship, religious

and ceremonial site, and sacred shrine, as defined by P.R.C. 5097.9, H.S.C. 7003-4, 8558, 8560, 8580, NAGPRA, 25 U.S.C. 3001, and 43 C.F.R. 10.2, have been located at the cemetery, which dedication to cemetery purposes all of its landowners are estopped to deny by their acquiescence in such use for more than 100 years. This dedication to cemetery use also means that the government's portion of the Indian cemetery is not a reservation. *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1268 (10th Cir. 2001), *cert. denied*, 534 U.S. 1078 (2002); *Mechoopda Indian Tribe of Chico Rancheria v. Schwarzenegger*, 2004 WL 1103021, *12 (E.D. Cal. 2004).

43. Property so dedicated to cemetery purposes shall be held and used exclusively for cemetery purposes, unless and until the dedication is removed from all or any part of it by an order and decree of the superior court of the county in which the property is situated, pursuant to H.S.C. 8580. Moreover, after such dedication by use and as long as the property remains dedicated to cemetery purposes, no road, alley, pipe line, pole line, or other public thoroughfare or utility shall be laid out, through, over, or across any part of it without the consent of not less than two-thirds of the owners of those interred there, pursuant to H.S.C. 8560.

C. The Indian Cemetery Property Has Always Been Private Property

44. The Indian cemetery in Jamul has been private property since before California became a State. It covers more than 7 acres and at least 3 parcels of property according to San Diego County Recorders' parcel maps, and probably extends onto what is now a California ecological reserve.[5] Exs. A-F. Native American families and their lineal descendants occupied and possessed that cemetery and the property contiguous to that Indian graveyard in Jamul, California, since the private property was owned at various times by Mexican Governor and Don, Pio Pico, U.S. General Henry S. Burton and his widow Maria Amparo Ruiz de Burton, John D. Spreckel's Coronado Beach Company, the Lawrence and Donald Daley families, the Catholic Diocese, and by the U.S. as trustee for the beneficial ownership of "Jamul Indians of one-half degree or more Indian blood," as reflected

[5] Historical cemeteries are often subsequently discovered to extend beyond later erected temporal fencing, as in Pallyup, Washington, and San Diego's El Campo Santo Cemetery, where many graves have been discovered beneath what is now San Diego Ave. See Ex. P.

in Exs. A-F.[6]

45. On September 26, 1912, J.D. Spreckel's Coronado Beach Company deeded a portion of the cemetery in Jamul to the Roman Catholic Bishop of Monterey and Los Angeles, a corporate in sole of the State of California, "to be used for the purposes of an Indian graveyard and approach thereto," "to have and to hold the above granted and described premises unto the said Grantee, his successors and assigns forever for the purpose above specified," as set forth in Exs. A, B, C, and E. In 1912, Father LaPointe and the Catholic church erected a chapel at the cemetery. Since 1956 the diocese of St. Pius X has maintained the chapel, for the purpose of ministering at the Indian cemetery.

46. Subsequently, the Catholic Diocese has retained title, ownership and control of a portion of the cemetery granted by the Coronado Beach Company. The Catholic Diocese also explicitly maintained for "[itself and its] successors or assigns an easement for (1) utility service lines and (2) ingress and egress over the existing well-traveled road," which the San Diego County tax assessor's maps continue to describe as "the Indian cemetery," as set forth in Exs. B & E.

47. The remaining portion of the private Indian cemetery property, where Appellants' families' remains were originally interred, but from which they have been illegally disinterred, excavated and removed, is now owned by the United States, Ex. D, jurisdiction over which has never been ceded by the State under 40 U.S.C. 255 and Government Code 127.

48. In 1924, Congress conferred citizenship on all Indians born in the United States including the Indians of San Diego County. 8 U.S.C. § 1401(b). And, by reason of the 14th amendment, the grant of federal citizenship had the additional effect of making Indians citizens of the states where they resided. State citizenship bestows rights and corresponding duties which one is not free to selectively adopt or reject. Included with a citizen's rights and duties is the obligation to comply with State and local laws and regulations and pay appropriate taxes for the support of State and local governments. The Defendants attempt to use an illegal April 10, 2013 Indian Lands decision to insulate the government's portion of the Indian cemetery from state and local laws, regulations and

[6]See also, *United States v. Pio Pico,* 27 F.Cas. 537 (1870); *Estate of Burton*, 63 Cal. 36 (1883); *G.W.B.McDonald, Administrator v. Burton,* 68 Cal. 445 (1886); *Henry H. Burton v. Maria A. Burton,* 79 Cal. 490 (1889); *In re Burton's Estate,* 93 Cal. 459 (1892); and *McDonald v. McCoy*, 121 Cal. 55 (1898), tracing the history of the private ownership of the property.

taxation is unconstitutional, violates equal protection, and therefore is arbitrary, capricious and against the law.

49. The Indian cemetery has never ceased to be private property. The cemetery was never part of, nor reserved or withdrawn from, public domain lands. It has always been privately owned; first within Mexico, then the Republic of California, then within the United States when acquired from Mexico by way of the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1850), and now within the State of California, since the United States ceded jurisdiction over all such private property acquired from Mexico to the State of California, when it was admitted to the Union on an "equal footing," with the same jurisdiction over all private property, as all other States, per Article IV, Section 3 of the U.S. Constitution. Thereby, California received regulatory and police power jurisdiction over all private property within the State, including the Jamul Indian cemetery.

D. A Portion of the Indian Cemetery is Gifted to the United States for the Beneficial Ownership of Individual Half-Blood Indians in Jamul

50. Sometime after September 26, 1912, J.D. Spreckel's Coronado Beach Company and its successors transferred the remaining portion of the cemetery in Rancho Jamul to the Daley family, and on December 12, 1978, Lawrence and Donald Daley gifted a 4.66 acre portion of the cemetery by recording a grant deed of what is now known by the San Diego County recorder's parcel number, 597-080-04, to "the United States of America in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." Ex. D. This land was conveyed to the United States as trustee for its beneficial owners, "Jamul Indians of one-half degree or more Indian blood," including Rosales and Toggery's families, the ownership and possession being that of ordinary proprietors. *Paul v. United States*, 371 U.S. 245, 264 (1963).

51. The Daley families agreed to convey title to the land then occupied by the Plaintiffs' families to the United States under California trust law for the explicit benefit of those half-blood Jamul Indians then occupying the property. The Daley families specifically agreed to this form of conveyance in order to provide a place protected by the United States as a trustee to protect the living and the dead against all forms of alienation, trespass, desecration, mutilation, disinterment, and any other infringement. This conveyance constitutes a donation of property for the benefit of Indians, pursuant to 25 U.S.C. 451.

52. Thus, the government's portion of the Indian cemetery remains in a California trust for the benefit of the half-blood Jamul Indians described on the face of the deed. *Coast Indian Community v. U.S.* ("*Coast*"), 550 F.2d 639 (Fed. Cl. 1977); *United States v. Assiniboine Tribe* ("*Assiniboine*"), 428 F.2d 1324, 1329-30 (Fed. Cl. 1970); *Chase v. McMasters* ("*Chase*"), 573 F.2d 1011, 1016 (8th Cir. 1978), cert. denied, 439 U.S. 965 (1978); *United States v. State Tax Comm.*, 535 F.2d 300, 304 (5th Cir. 1976); *City of Shakopee v. United States*, 1997 U.S. Dist. LEXIS 2202, *19-20 (D. Minn. 1997); and as recognized by *Carcieri v. Salazar,* 555 U.S. 379, 382-83, 388-90, 394-95, 398-99 (2009), citing *Opinions of the Solicitor* at 668, 724, 747, and 1479 (1979), attached hereto as Ex. H.

53. The BIA Director of Tribal Government Services further admits: "On June 28, 1979, the United States acquired from Bertha A. and Maria A. Daley [Lawrence and Donald's wives] a portion of the land known as 'Rancho Jamul' which it took 'in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate.' ...The United States accepted these conveyances of land in accordance with the authority contained in Sections 5 and 19 of the Indian Reorganization Act of 1934." Exhibit I, at 3. Section 5 of the IRA, 25 U.S.C. § 465, permits the U.S. to take land into trust for "Indians." Section 19 of the IRA in turn defines "Indians" to include: "all other persons of one-half or more Indian blood." 25 U.S.C. § 479. The text of Section 19 has not changed since its enactment in 1934.

54. Congress specifically enacted the IRA, 25 U.S.C. 465, to ensure that land acquired in trust for individual Indians would not be alienated by anyone without the government's express approval. In fact, the IRA continues to specifically provide for the acquisition of land by the United States for the benefit of individual Indians "through purchase, relinquishment, gift, exchange, or assignment...for the purpose of providing land for Indians." 25 U.S.C. 465, as acknowledged by the Supreme Court in *Carcieri v. Salazar* ("*Carcieri*"), 555 U.S. 379, 399 (2009).

55. [T]itle shall be taken in 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).

56. "Section 5 [25 U.S.C. 465] authorizes the Secretary of the Interior to purchase or otherwise acquire land for landless Indians," and not just for "recognized Indian tribes now under Federal jurisdiction," at the time of the enactment of the IRA in 1934. H.R. Rep. No.

1804, 73d Cong., 2d Sess. 6-7 (1934).

57. The Federal government's *Handbook of Federal Indian Law*,[7] provides that "...[A] number of statutes have allowed individual Indians to obtain trust or restricted parcels out of the public domain and not within any reservation. ..." *Id.*, (DOI 1982) Ch. 1, Sec. D3c, p. 40-41, and (DOI 2005) §3.04 (n114) Fn 443, citing *City of Tacoma v. Andrus*, 457 F. Supp. 342 (D.D.C. 1978), and *Chase*, 1016.

58. The government's *Handbook* also admits that: "The Secretary may exercise this authority for all individuals of one-half or more Indian blood.... This approach has also been used for the Quartz Valley Indians, Duckwater Shoshone Indians, Yomba Shoshone Indians, Port Gamble Band of Clallam Indians, and Sokaogan Chippewa Indians (Mole Lake Band)... This procedure has been suggested for other Indian groups as well. *E.g.*, May 1, 1937, *reprinted in Opinions of the Solicitor*, *supra* not 76, at 1479 (status of Nahma and Beaver Island Indians)." *Handbook* (DOI 1982) Ch.1, Sec. B2e, pp.15-16, fn. 86, and (DOI 2005) § 3.02, 146 (n99) Fn105.

59. The acquisition and designation of these Jamul Indians of one-half degree or more Indian blood as the beneficial owners of the cemetery property, follows the history, custom and practice of similar acquisitions and designations of other half-blood communities after June of 1934. "The Secretary has long exercised his §465 trust authority [to] take land into trust for...individual Indians who qualified for federal benefits by lineage or blood quantum. For example,...the Mole Lake Chippewa Indians of Wisconsin,...the Shoshone Indians of Nevada, the St. Croix Chippewa Indians of Wisconsin, and the Nahma and Beaver Inland Indians of Michigan. See 1 DOI, *Opinions of the Solicitor*, pp. 706-707, 724-725, 747-748 (1979)," *Carcieri*, J. Stevens dissenting at 406-7; Ex. H, and also includes the Mississippi Choctaws.

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[7] Congress directed the Secretary of Interior to revise and republish Cohen's *Handbook* in 25 U.S.C. 1341(a)(2), thereby binding the U.S. by its admissions with regard to the lands held in trust for individual Indians.

E. The United States Designated the Individual Half-Blood Indians in Jamul as the Beneficial Owners of the Government's Portion of the Indian Cemetery

60. The United States Department of Interior, Bureau of Indian Affairs, August 3, 2000 response to a Freedom of Information Act (FOIA) request, confirms that the "current trust parcel was accepted into trust in 1978 for Jamul Indians of ½ degree (4.66 acres)," and that there is "no record of the 1978 trust parcel being known as the Jamul Village," as reflected in Ex. F.

61. This is consistent with the half-blood community's constitution, Article II, Territory, which does not identify the 4.66 acre cemetery parcel, as within the territory of the Jamul Indian Village in Ex. G. It is also consistent with Cal. Dept. of Fish & Game, May 21, 2007 Map of Watershed, Wildlife and Creek Beds Surrounding JIV and Lakes Entertainment Properties, Ex. L; Governor Gray Davis' Director of Community and Intergovernmental Relations letter of July 17, 2001, finding JIV's proposed need to acquire and use trust land as inconsistent with the Rancho Jamul Ecological Reserve and the Multiple Species Conservation Plan established by U.S. Dept. of Fish & Wildlife Service, Cal. Dept. Fish & Game, and the County of San Diego, due to "significant and potentially unmitigable adverse impacts," and a "paradigm for the kind of land use conflicts the BIA should not permit," Ex. M, and Governor Arnold Schwarzenegger's Legal Affairs Secretary's letters of August 29, 2005 and December 20, 2005, April 2, 2007, and April 5, 2007, finding the JIV to be in breach of the Compact for proposing, among other violations, to operate Class III gambling on land that does not qualify for such gambling. Ex. N.

62. Therefore, when the U.S. accepted the deed for the portion of the cemetery on which Rosales and Toggery lived, the U.S. thereby designated the individual Indian families then possessing and residing thereon as the beneficial owners under California trust law. Similar forms of the Jamul grant deed have long been accepted by the BIA and similar designations of individual Indians' beneficial ownership have long been made by the BIA, and enforced by the courts. *Coast* at 651 n32; *Assiniboine*, at 1329-30; *State Tax Comm.*, at 304, *Chase* at 1016, and as recognized by *Carcieri* at 382-83, 388-90, 394-95, 398-99 (2009), citing *Opinions of the Solicitor* at 668, 724, 747, and 1479 (1979), Ex. H.

63. *Coast*, held on nearly identical facts, that the parcel in question, "was not acquired for a tribe, leaving only the possibility under the [Indian Reorganization] Act that it was purchased for

individual Indians. The deed and proclamation say nothing to contradict this. Thus, the land was taken in trust for the individual Coast Indian Community members. *Coast*, 550 F.2d 639, 651, n32."

64. The *Coast* deed "was conveyed to the United States: ...'in Trust for such Indians of Del Norte and Humboldt Counties, in California, eligible to participate in the benefits of the [Indian Reorganization] Act of June 18, 1934, as shall be designated by the Secretary of the Interior...'" 550 F.2d 641-41.

65. The Jamul deed was conveyed to the United States "in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." See, Ex. D. There, as here, "the United States acquired the [land]...pursuant to ... 25 U.S.C. 465, which provided that the title to land acquired under it 'shall be taken in the name of the United States in trust for the...individual Indian for which the land is acquired...'" *Coast*, 651, n32.

66. This is consistent with the federal regulations for then unorganized groups of individual Indians, whereby such designation of such individual Indians as beneficial owners was accomplished by: (1) locating the individual Indians on the parcel, (2) providing for their needs, (3) acquiescing in their continued presence on, and use of, the parcel for more than 28 years, (4) building houses for them on the parcel, (5) providing them with services usually accorded to Indians living on such property, (6) allowing them to inhume, inter, deposit, disperse and place the human remains and funerary objects of their dead, below, on, and above the property, and further (7) providing strong and uncontroverted evidence of their designation as the beneficial owners of that portion of the Indian cemetery, parcel 597-080-04, as a matter of law, within the meaning of the grant deed, as in *Coast*, *Assiniboine*, *State Tax Comm* and *Chase*.

67. In *Chase v. McMasters* ("*Chase*") 573 F.2d 1011, 1016 (8th Cir. 1978), the court enforced an individual Indian's beneficial ownership of trust land acquired for her benefit under the IRA, stating: "The Secretary may purchase land for an individual Indian and hold title to it in trust for him...Section 465 lists gifts among the means by which the Secretary may acquire land, and it was amended to authorize acquisition of land in trust for individual Indians... See 78 Cong. Rec. 11126 (1934)... The land acquired may be located... without a reservation." *Chase*, at 1016. "The Act not only authorized the Secretary to acquire land for Indians, 25 U.S.C. 465, but continued the trust

status of restricted lands indefinitely, 25 U.S.C. 462..." *Chase*, at 1016.

68. "[I]t is now firmly established that the Indian title is equivalent to beneficial ownership." *In re Fredenberg*, 65 F.Supp.4, 6 (D. Wis. 1946). See also, *Choctaw & Chicasaw Nations v. Seitz*, 193 F.2d 456 (10th Cir. 1951), *cert. denied*, 343 U.S. 919 (1952); *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984); *Narragansett Tribe of Indians v. So. R.I. Land Dev. Corp.*, 418 F.Supp. 798 (D.R.I. 1976).

69. Therefore, the government's portion of the Indian cemetery was taken in trust for the individual half-blood Native American families then possessing and residing on the cemetery parcel, including Rosales and Toggery and their families, pursuant to 25 U.S.C. 465, as held in *Coast*, *Assiniboine Tribe*, *State Tax Comm., Chase*, and acknowledged in *Carcieri*, citing the *Opinions of the Solicitor*, Ex. H.

F. California Retains Concurrent Jurisdiction over the Jamul Indian Cemetery, and Finds Gambling on the Government's Portion of the Indian Cemetery Would be Detrimental to the Surrounding Community

70. The state of California retains full police power jurisdiction over the government's portion of the Jamul Indian Cemetery, beneficially owned by the individual half-blood Jamul Indians, just as any state does with many federal cemeteries, like Fort Rosecrans in San Diego or Arlington National Cemetery.[8] "Such [proprietorial] ownership and use without more do not withdraw the lands from the jurisdiction of the state." *Surplus Trading Co. v. Cook*, 281 U.S. 647, 650 (1930).

71. The cemetery has always been privately owned; first within Mexico, then the Republic of California, then within the United States when acquired from Mexico by way of the Treaty of Guadalupe Hidalgo of 1848, 9 Stat. 926, and now within the State of California, since the United States ceded jurisdiction over all such private property acquired from Mexico to the State of California, when it was admitted to the Union. On September 9, 1850, when California was admitted to the Union, 9 Stats. 452 (1850), California entered the Union on an "equal footing" with, and with the same jurisdiction and regulatory authority over all private property, as all other States, per Article IV, Section 3 of the U.S. Constitution.

[8] See the Navy Jurisdictional Maps for San Diego, depicting federal ownership of Fort Rosecrans National Cemetery, in Haines, *Federal Enclave Law*, (Atlas 2011) at 266. Ex. Q.

72. Thereby, California received regulatory and police power jurisdiction over all public domain property not reserved to the United States, and all private property within the State, including the Indian cemetery in Jamul.

73. The Constitution places the authority to dispose of public land exclusively in the Congress and executive power to convey any interest in these lands must be traced to some Congressional delegation of its authority. *Sioux Tribe v. United States*, 316 U.S. 317, 326 (1942); *Donahue v. Butz*, 363 F.Supp. 1316, 1321 (N.D. Cal. 1973). Here, no portion of the cemetery was ever part of, reserved or withdrawn from, public domain lands by any act of Congress or delegation of its authority. Once public domain lands are conveyed to the State or into private ownership, the United States retains no regulatory authority over such lands. *Hawaii* v. *Office of Hawaiian Affairs, 556* U.S. 163, 176 (2009); *Kleppe v. New Mexico* 426 U.S. 529, 540 (1976). After public domain property is conveyed to the State, or into private ownership, the United States no longer has authority to acquire non-public domain lands, nor can they be restored to federal jurisdiction by a unilateral federal act that purports to change the nature of the original grant of jurisdiction to the State, without condemnation or consent of the State by a majority of its legislature. *Hawaii v. Office of Hawaiian Affairs,* 556 U.S. 163, 176 (2009), "Congress cannot, after statehood, reserve or convey. ...lands that have already been bestowed upon a state..." As confirmed in several recent Supreme Court decisions, including *Carcieri v. Salazar* and *Hawaii v. Office of Hawaiian Affairs*, and *City of Sherrill v. Oneida Indian Nation*, 544 U..S. 197 (2005), the federal government has had no authority to create a reservation or Indian lands on public domain lands within the exterior boundaries of the State of California, since well before the government's portion of the Indian cemetery was gifted to the U.S. in 1978.

74. Though the Federal government has the power under Article I, Section 8 of the U.S. Constitution to acquire land within a State: "To exercise exclusive legislation in all cases whatsoever,... over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings;" and to thereby acquire the "special maritime and territorial jurisdiction," under 18 U.S.C. 7, it may only do so "by consent of the legislature of the State in which the same shall be." "Without the

State's consent" the United States does not obtain the benefits of Art. I, § 8, cl. 17, its possession being simply that of an ordinary proprietor. *James v. Dravo Contracting Co.*, 302 U.S. 134, 141-142 (1937)." *Paul v. United States* 371, US 245, 264 (1963). Here, there is no evidence that California has ever consented to cede its concurrent jurisdiction over the government's portion of the Indian cemetery, as required by 40 U.S.C. 255 and Cal. Govt. C. 127.

75. Upon such land acquisitions by the Federal government as an ordinary proprietor, the United States does not have exclusive jurisdiction over the property. "The Constitution does not command that every vestige of the laws of the former sovereignty must vanish. On the contrary its language has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred. This assures that no area however small will be left without a developed legal system for private rights." *Paul v. United States*, 371, US 245, 264-65 (1963).

76. Hence, if an Indian reservation were to be lawfully created, unlike here where no reservation has been created, "an Indian reservation is considered part of the territory of the State." *Nevada v. Hicks,* 533 U.S. 353, 361-62 (2001). "It is not unusual for the United States to own within a State lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the State....Such reservations are part of the State within which they lie..." *Surplus Trading Co. v. Cook*, 281 U.S. 647, 650 (1930). This is the reason that lawfully created " Indian reservations, however, are not [exclusive] federal enclaves," and are a subset of partial federal enclaves where the State has never consented to cede its jurisdiction over the land to the United States. *Carcieri v. Norton* (1st Cir. 2005) 398 F.3d 22, 31-32. "State sovereignty does not end at a reservation's border." *Nevada v. Hicks,* 533 U.S. 353, 361 (2001), quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561(1832).

77. Therefore, when the State of California entered the Union the Jamul Indian cemetery was private property and remains within the concurrent jurisdiction of the State of California today. Moreover, the State of California has never ceded its concurrent jurisdiction over the cemetery. This is confirmed by the lack of any "notice of such acceptance" of the "cession of such jurisdiction, exclusive or partial," having been filed with the Governor of the State of California, as required by

40 U.S.C. 255, and the lack of any entry in the "index of record of documents with description of the lands over which the United States acquired jurisdiction," required by Cal. Govt. Code 127.

78. California's general consent to the acquisition of state lands by the United States is limited to lands lawfully purchased or condemned, as set out in Government Code §110, and does not apply to gifts, as made by the Daleys here. 25 U.S.C. 451. Thus, the portion of the cemetery owned by the U.S. remains within the concurrent jurisdiction of the State of California today. See for e.g., *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), "state laws may be applied unless such application would ...impair a right granted or reserved by federal law;" and *Acosta v. County of San Diego,* 126 Cal. App. 2d 455 (1954). Moreover, the Supreme Court has acknowledged that Congress' power to exercise control over Indian affairs, still has "constitutional limits" if its Indian legislation "interferes with the power or authority of any State." *United States v. Lara*, 541 U.S. 193, 205, (2004); *Gila River Indian Cmty. v. United States*, 2013 U.S. App. LEXIS 10056, *91, (9th Cir. 2013) J. Smith, dissenting.

79. Moreover, since the government's portion of the Indian cemetery was never conveyed to the JIV, any subsequent acquisition of the land by an I.R.A. tribe must comply with the after 1988 acquired provisions of IGRA in 25 U.S.C. 2719. "Therefore, while the Secretary of the Interior investigates whether gaming on the proposed trust land... 'would not be detrimental to the surrounding community,' the proper spokesperson for the land in question is necessarily a representative of the state where the land is located.""Unless and until the appropriate governor issues a concurrence, the Secretary of the Interior has no authority under 25 U.S.C. 2719(b)(1)(A) to take land into trust for the benefit of an Indian tribe for the purpose of the operation of a gaming establishment." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 367 F.3d 650, 656 (7th Cir. 2004); see also, *Confederated Tribes of Siletz Indians v. United States*, 841 F.Supp. 1479, 1486 (D. Ore. 1994).

80. Here, both California Governors, Davis and Schwarzenegger, have already determined that the proposed gambling establishment would be "detrimental to the surrounding community," and no subsequent governor has determined that it would not be detrimental to the surrounding community. As catalogued in former Governor Davis' July 17, 2001 letter, Ex. M, to the Acting

Superintendent of the BIA, and Governor Schwarzenegger's September 10, 2004, Ex. N, letter to Clayton Gregory, Pacific Regional Director of the BIA, their determination that such a gaming establishment would be detrimental to the surrounding community is also shared by the local government officials, including United States Representative Duncan Hunter, then California State Senator David G. Kelley, then State Assemblyman, now Senator Jay La Suer, the County of San Diego Board of Supervisors, Otay Water District, the Jamul/Dulzura Planning Group, the Sierra Club, the Endangered Habitats League, the Back Country Coalition, not to mention several thousand residents of Jamul. See, Ex. AA.

81. As both Governors Davis and Schwarzenegger inescapably concluded: the "proposal is inconsistent with the Multiple Species Conservation Plan, established by the United States Fish and Wildlife Service, the State Department of Fish and Game and the County of San Diego, restrictions on development and presents a serious threat to the viability of a significant portion of the State's recently acquired ecological reserve." "...here, there are significant potentially unmitigable adverse impacts on sensitive State resources..." "...The Bureau's own rules, likewise, compel rejection of this application. In this case, the ...proposed use represents a paradigm for the kind of land use conflicts which the Bureau should not permit to occur..." "...it unnecessarily threatens to degrade significant State environmental resources and is thus inimical to the public health and welfare. We believe that a fair balancing of ...interests in this instance requires that the Bureau deny the... application at this time." Exs. M & N.

82. Therefore, since the government's portion of the Indian cemetery has never been taken into trust for any tribe, nor transferred to any tribe, any subsequent acquisition by the United States, through purchase or condemnation of the property, in trust for a tribe, will be after October 17, 1988, and does not have the state's consent to cede jurisdiction to the United States, the land still will not qualify for gambling under IGRA, since, as noted above, the Governor has not concurred in a Secretarial determination that "a gaming establishment on newly acquired lands would not be detrimental to the surrounding community." 25 U.S.C. 2719(b)(1)(A).

83. California's trust law and concurrent jurisdiction also govern the enforcement of Rosales and Toggery's beneficial interest in the grant deed for the government's portion of the Indian cemetery.

84. The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a ...disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated...The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal government was created, and would seriously embarrass the landed interests of the State." *United States v. Fox*, 94 U.S. 315, 320-21 (1877).

85. "The *Fox* case is only one of a long line of cases which have consistently held that part of the residue of sovereignty retained by the states, a residue insured by the Tenth Amendment, is the power to determine...who may be made beneficiaries," of a deed to the United States. *United States v. Burnison*, 339 U.S. 87, 91-92 (1950).

86. Hence, Rosales and Toggery's beneficial interest in the government's portion of the Indian cemetery remains subject to California's trust and estates law, particularly since it is undisputed that the Secretary of the Interior has yet to approve the acquisition of the property in trust for the JIV, pursuant to the government's land acquisition regulations. 25 C.F.R. 151.3. which provide: "No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary."

87. Moreover, since the Indian cemetery remains within the concurrent jurisdiction of the State of California today, and was never reserved from the public or private domain, California retains State and local police power over the cemetery pursuant to the 10th Amendment of the U.S. Constitution and Pub. Law 280, 18 U.S.C. 1162 and 28 U.S.C. 1360.

88. Criminal conduct by Indians which causes injury remains within California jurisdiction, 18 U.S.C. 1162, 28 U.S.C. 1360, and will be deemed the proximate cause of an injury, thereby superseding any prior negligence which might otherwise be deemed a contributing cause. *Koepke v. Loo,* 18 Cal.App.4th 1444, 1449 (1993). This is the same criminal jurisdiction California has if one of the columbariums at Fort Rosecrans Nat'l Cemetery was vandalized and disinterred a veteran's remains from its niche.

89. Thus, the Cal. Pub. Res., Health & Safety Codes and CEQA, concurrently govern the use of the Jamul Indian cemetery, along with the federal NAGPRA, 25 U.S.C. 3001 et seq., which defines

the portion of the cemetery in which the U.S. holds title, as "Federal lands other than tribal lands which are controlled or owned by the United States." 25 U.S.C. 3001(5) and 43 C.F.R. 10.2(f)(1) and 10.4(d).

90. Furthermore, federal regulations, 25 C.F.R. 1.4(b), and the DOI July 2, 1965 Secretarial Order, 30 F.R. 8722, adopted and made applicable "all of the laws, ordinances, codes, resolutions, rules or other regulations of the State of California, now existing or as they may be amended or enacted in the future, limiting, zoning, or otherwise governing, regulating or controlling the use or development of any real or personal property, including water rights, leased from or held or used under agreement with and belonging to any Indian...that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States and located within the State of California."

G. Defendants' Desecration of Rosales & Toggery's Families' Human Remains and Funerary Objects

91. More than 20 eyewitnesses have testified to Rosales and Toggery's families' interment on the cemetery property, and the undeniable evidence that the Defendants have illegally disinterred and dumped Rosales and Toggery's families' human remains and funerary objects on a State highway project at the juncture of State Routes 11-125-905 on the Mexican border, in declarations on file in *Rosales et al. v. CalTrans et al.,* San Diego Superior Court Case No. 2014-00010222.

92. Before any excavation of the cemetery parcel, Rosales and Toggery continuously and repeatedly put all persons, including the Defendants, the California Attorney General, the Native American Heritage Commission, the San Diego County Coroner, the California Victim Compensation and Government Claims Board, U.S. District Courts for the District of Columbia and So. California, and the San Diego Superior Court, on written notice of:

(A) Their ownership and control, as lineal descendants, of their deceased Native American family members' human remains, and the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in P.R.C. 5097.9-5097.99, NAGPRA, 25 U.S.C. 3002, and its regulations, 43 C.F.R. 10.1-10.17, that for more than 100 years have been inhumed, interred and deposited in burial sites below, on and above, the Indian cemetery on which they lived; and

(B) Their preference, as lineal descendants, to leave their families' human remains and funerary objects in place, as required by P.R.C. 5097.98, the CEQA Guidelines, 14 Cal. Code Regs. 15126.4 (b)(3), and NAGPRA, 25 U.S.C. 3002, and its regulations at 43 C.F.R. 10.1-10.17.

93. On March 10, 2014, the California Victim Compensation and Government Claims Board received Plaintiffs claims, and on March 11, 2014, notified Plaintiffs that the Board found: "Based on its review of [Plaintiffs'] claim, Board staff believes that the court system is the appropriate means for resolution of these claims, because the issues presented are complex and outside the scope of analysis and interpretation typically undertaken by the Board...The Board's rejection of your claim will allow you to initiate litigation should you wish to pursue this matter further."

94. Such notice has been published in the records of the Catholic Diocese, newspapers of general circulation, letters to CalTrans, the records and files of the San Diego Superior Court and in the Public Access to Court Electronic Records. In addition, the recorded declaration by the Coronado Beach Company and the Catholic Diocese provided constructive notice to all persons of the dedication of the cemetery property to cemetery purposes, pursuant to H.S.C. 8551-8558, which dedication shall not be affected by any alienation of the property or nonuse, except as provided by H.S.C. 8550-8561, which has not occurred here.

(1) California Health & Safety, Public Resources and Penal Code Violations

95. Despite such express notice, Defendants commenced operations on February 10, 2014, and conducted grading, operation of heavy equipment, moving and hauling dirt and/or gravel and other construction activities, excavated and removed Rosales and Toggery's families' human remains and funerary objects, causing them to be illegally dug up and deposited on state property owned and controlled by CalTrans in violation of the following California statutes:

Health and Safety Code, "H.S.C.," §§:

> 7050.5 & 7052, both provide that mutilation, disinterment, and wrongful removal of human remains is a **felony**, and prohibit further excavation or disturbance of the site or any nearby area reasonably suspected to overlie adjacent remains until the lineal descendants preference for "preservation of the Native American human remains and associated items in place," has "been made to the person responsible for the excavation, in the manner provided in Section 5097.98 of the Public Resources Code,"

7054, providing that disposal of human remains in any place except a cemetery is a misdemeanor,

7054.6, prohibiting removal of cremated human remains kept in or on the property owned and occupied by anyone who is a person in control of the disposition of remains without their consent, and without the authority of a permit for disposition granted under Section 103060,

7054.7, prohibiting commingling remains without express written consent of the lineal descendants,

7055, prohibits removal of remains out of the district in which the death occurred without a permit,

7500, prohibiting removal of remains without an order of the health dept. or superior court,

8011, without applying state's **repatriation** policy with NAGPRA,

8015-16, requiring upon demand the agency **shall repatriate** human remains,

Public Resources Code, "P.R.C.":

5097.5 prohibiting excavation of historic burial grounds,

5097.7 providing for forfeiture of vehicle and equipment used to excavate historic burial grounds,

5097.9 prohibiting public agency from interfering with Plaintiffs' free exercise of religion, and damage to a sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property,[9]

5097.94 mandatorily providing that **the court shall issue an injunction** to prevent irreparable damage to and assure access to a sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, unless there is clear and convincing evidence, that the public interest and necessity require otherwise,

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[9] Here, by virtue of the Plaintiffs' families' burials and the landowners' acquiescence for more than 100 years, the Church, the State and the federal government are estopped to deny that a Native American sanctified cemetery, place of worship, religious and ceremonial site, and sacred shrine, as defined by P.R.C. 5097.9, and H.S.C. 7003-4, and 8558, 8560, 8580, have been located at the cemetery, now on State property partially owned by the federal government as a private proprietor, and within the concurrent jurisdiction of both California and the U.S.

5097.94(k) providing for **mediation**, **upon application of either of the parties**, disputes arising between landowners and known descendents relating to the treatment and disposition of Native American human burials, skeletal remains, and items associated with Native American burials. The agreements shall provide protection to Native American human burials and skeletal remains from vandalism and inadvertent destruction and provide for sensitive treatment and disposition of Native American burials, skeletal remains, and associated grave goods consistent with the planned use of, or the approved project on, the land.

5097.97 providing for investigation of any Native American's claim that a sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property has been irreparably damaged,

5097.98 providing upon the discovery of Native American human remains, which may be an **inhumation or cremation and in any state of decomposition** or skeletal completeness, and any items associated with the human remains, **the landowner shall ensure that the immediate vicinity** according to generally accepted cultural or archaeological standards or practices where the Native American human remains are located, **is not damaged or disturbed** by further development activity and shall confer with the most likely descendants as to their preference to **preserve the remains "in place,"** and that **any items associated** with the human remains that are placed or buried with the Native American human remains are **to be treated in the same manner as the remains**.

5097.98(e)(f) Where the parties are unable to agree on the appropriate treatment measures, the human remains and items associated and buried with Native American human remains **shall be reinterred** with appropriate dignity...**in a location not subject to further and future subsurface disturbance**.

5097.99 providing that **possession of Native American human remains without an agreement** treating or disposing, with appropriate dignity, of the human remains and any items associated with Native American burials is a **felony**,

5097.991 providing it is the policy of the state that Native American remains and associated grave artifacts shall be **repatriated**,

5097.993 providing that anyone unlawfully excavating upon, removing, destroying, injuring, or defacing a Native American burial ground on public or private land is guilty of a misdemeanor and subject to a fine of $50,000 for each violation;

and Penal Code section 487, grand theft.

96. No permit has been posted by Defendants to excavate soil from the cemetery and deposit it on state property owned and controlled by CalTrans; nor have they notified the San Diego County coroner of their intent to disturb human remains on the site and any nearby area reasonably suspected to overlie adjacent human remains, as required by H.S.C. 7050.5, and ARPA, 16 U.S.C. 470aa et

seq., and 43 C.F.R. 10.3(b)(1).

97. No permit required by H.S.C. 7500 et seq., has been posted at the cemetery or the state property owned and controlled by CalTrans on which excavated soil from the cemetery has been deposited, for anyone to grade, excavate, damage, disinter, remove or otherwise alter or deface, or attempt to grade, excavate, damage, disinter, remove or otherwise alter or deface, human remains or funerary objects from the cemetery. Nor can any such permit be granted, without the consent of the closest lineal descendants owning and controlling the human remains and funerary objects, which consent Rosales and Toggery, who are the owners of their families' human remains and funerary objects, have not granted.

98. Furthermore, no permit required by Title 25 U.S.C. 3002(c) and 16 U.S.C. 470cc has been posted by any federal land manager on the property for anyone to grade or excavate the Indian cemetery parcel upon which a casino is illegally being built. Nor can any such permit be granted by any federal land manager under 16 U.S.C. 470cc, without the consent of all of the Indian beneficial owners, which consent Rosales and Toggery have not granted.

99. Defendants also failed to obtain the appropriate permits from the San Diego Coroner and/or obtain the necessary judgment from a Superior Court authorizing the removal and disposition of Rosales and Toggery's families' remains, and any disuse of the government's portion of the Indian cemetery, required by H.S.C. 7050.5, 7500 and 8580, and P.R.C. 5097.98 and 5097.99.

100. Furthermore, Defendants' knowing mutilation, disinterment, wanton disturbance, excavation and willful removal of such human remains by grading, operation of heavy equipment, moving dirt and/or gravel, and other construction activities, and dumping of the excavated soils from the cemetery on state property owned and controlled by CalTrans, without authority of law is a crime, under H.S.C. 7050.5, and any person willfully mutilating or disinterring any remains known to be human without authority of law is guilty of a felony, under H.S.C. 7052, as is anyone obtaining or possessing, or who removes with malice or wantonness, and without authority of law, any Native American artifacts or human remains from a Native American grave or cairn, pursuant to P.R.C. 5097.99, and any person who deposits or disposes of any human remains in any place, except in a

cemetery, is guilty of a misdemeanor, pursuant to H.S.C. 7054.

101. P.R.C. 5097.98, further provides that upon notice and recognition of the presence of Native American human remains, which may be an inhumation or cremation, and in any state of decomposition or skeletal completeness, the landowner is obligated to ensure that the immediate vicinity, according to generally accepted cultural or archaeological standards or practices where the Native American human remains are located, is not damaged or disturbed by further development activity, so long as the lineal descendants' preferences are to preserve the Native American human remains and associated items in place, and that any items associated with the human remains that are placed or buried with the Native American human remains are to be treated in the same manner as the remains.

102. Here, Rosales and Toggery's preferences are to preserve their families' Native American human remains and associated cultural items "in place," as the lineal descendants' with ownership and control of their predecessors' human remains and associated cultural items, pursuant to NAGPRA, 25 U.S.C. 3002, 43 C.F.R. 10.1-10.17, and the directives of the National Center for Cultural Resources and the National NAGPRA Program, Ex. W, P.R.C. 5097-5097.994, H.S.C. 7100, and CEQA and its *Guidelines*. Cal. Code Regs., tit. 14, § 15000 et seq., developed by the Office of Planning and Research and adopted by the Resources Agency. P.R.C. 21083; *id.*, former 21087. "[C]ourts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA." *Laurel Heights Improvement Assn. v. Regents of University of California,* 47 Cal.3d 376, 391, fn.2 (1988).

103. The Defendants have violated the CEQA Guidelines and the directives of the National Center for Cultural Resources and the National NAGPRA Program, as published on its website, http://www.cr.nps.gov/nagpra/, copies of which are attached as Exhibit W, and Cal. Pub. Res. Code 5097.98, as amended September 30, 2006, since the U.S. is the undisputed title owner of the land where the Native American human remains (which may be an inhumation or cremation and in any state of decomposition or skeletal completeness) were discovered, identified, excavated and removed, and since they have failed to stop work and ensure that the immediate vicinity, according to generally accepted cultural or archaeological standards or practices where the Native American

human remains are located, is not damaged or disturbed by further development activity, where, as here, the lineal descendants' preferences are to preserve the Native American human remains and any items associated with the human remains that are placed or buried with the Native American human remains, in place.

104. The California Environmental Quality Act Guidelines also provide that preservation in place is the preferred manner to mitigate impacts on historic archaeological resources, including human remains and their associated funerary objects, since preservation in place maintains the relationship between artifacts and the archaeological context, and avoids conflict with religious or cultural values of groups associated with the site. 14 Cal. Code Regs. 15126.4(b)(3). Preservation in place is accomplished by planning construction to avoid archaeological sites and deeding the site into a permanent conservation easement. 14 Cal. Code Regs. 15126.4(b)(3)(B)1 and 4; see also 14 Cal. Code Regs. 15064.5(e).

(2) NAGPRA Violations

105. The Defendants have also violated NAGPRA, 25 U.S.C. 3001 et seq., and its regulations, 43 C.F.R. 10.1-17, by failing to cease all forms of construction activity in connection with an on-going activity, where there has been a discovery, identification, excavation and removal of Native American human remains and funerary objects, as here, without a prior written plan of action on Federal lands. The Defendants have also violated the statute and its regulations by failing to cease all activity in the area of the identification of the human remains, failing to make reasonable efforts to protect the items discovered before resuming such activity, and failing to provide written notice to the lineal descendants, consultation with known lineal descendants, and a written plan of action for disposition and repatriation, including the kinds of objects considered cultural items; the planned treatment, care, and handling, including traditional treatment, of human remains and other cultural items; the place and manner of delivery of Plaintiffs' families' human remains and funerary objects, as required by 25 U.S.C. 3002(d) and 43 C.F.R. 10.2(f), 10.2(g)(4), 10.4(b), 10.4(c), 10.4(d) and (e), 10.5, 10.6 and 10.10.

106. Here, where "the discovery [of human remains] occurred in connection with an activity,

including (but not limited to) construction, mining, logging, and agriculture," the Defendants have failed to "cease the activity in the areas of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice under this subsection," in violation of 25 U.S.C. 3002(d)(1). Moreover, the work may not resume, until the remains and funerary objects are properly protected as required by section 43 C.F.R. 10.4(d) and 10.6, where, as here, the Defendants have failed to secure and protect the human remains and funerary objects, including stabilizing and covering them, in the first place. *San Carlos Apache Tribe v. U.S.*, 272 F. Supp. 2d 860, 888-90 (D. Ariz. 2003), and *Yankton Sioux Tribe v. U. S.(Army Corps of Engineers)*(*Yankton Sioux I*), 83 F.Supp.2d 1047, 1057 (D. S.D. 2000), *Yankton Sioux II*, 209 F. Supp.2d 1008, 1021-22 (D.S.D. 2002), and *Yankton Sioux III*, 258 F. Supp.2d 1027, 1032-5 (D.S.D. 2003).

> 107. The [Army] Corps [of Engineers] was required to comply with the notice, certification, and consultation provisions of the NAGPRA regarding the discovery of the cemetery and its contents...As the federal agency responsible for managing the site, it must 'further secure and protect the inadvertently discovered human remains, including where necessary, stabilizing and covering.' *Yankton Sioux I,* at 1057.

108. In the *Yankton Souix* trilogy, the State of South Dakota and its contractors were developing 100 camping spots, new roads, comfort stations, parking lots and dumping stations at the North Point Public Recreation Area at Lake Francis Case.

> 109. The Court notes that all persons conducting construction activities at North Point must comply with NAGPRA as to *each* inadvertent discovery of Native American human remains [and] funerary objects...In addition, *each* inadvertent discovery of Native American cultural items will require compliance with the protection, notification, certification and consultation duties imposed by NAGPRA and its implementing regulations. *Yankton Sioux II*, 209 F Supp.2d 1008, 1025-26.

110. Here, Defendants knew that Rosales and Toggery's families' human remains and funerary objects were being unlawfully and intentionally excavated and removed from the cemetery parcel, and the Defendants failed to: (a) obtain the required Archaeological Resources Protection Act (ARPA) permit from the Deputy Commissioner of Indian Affairs at the BIA, as required by 43 C.F.R. 10.3(b) and 10.4(d)(1)(v), *San Carlos Apache Tribe v. U.S.* 272 F. Supp. 2d 860, 888-90, citing *Yankton Sioux I* 83 F. Supp.2d at 1057; (b) provide written notice to, consult with or, obtain

the consent of, the lineal descendants to the Federal agency's proposed treatment of the human remains, funerary objects, sacred objects, or objects of cultural patrimony to be excavated, and the proposed disposition of any human remains, funerary objects, sacred objects, or objects of cultural patrimony, and failed to provide a list of all lineal descendants that are being, or have been, consulted regarding the particular human remains, funerary objects, sacred objects, or objects of cultural patrimony, pursuant to 43 C.F.R. 10.5; (c) prepare and provide a written plan of action to the lineal descendants that establishes custody, treatment, care, and handling of human remains and funerary objects, and disposition of the remains and objects consistent with their custody as required by 43 C.F.R. 10.5 and 10.6; and (d) prove the consultation or consent was shown to the Federal agency official responsible for the issuance of the required permit, in violation of 43 C.F.R. 10.3(b), 10.4(d)(1)(v) and 10.4(e)(iii), and 43 C.F.R. 10.4(d)(1)(vi) and 10.4(e)(iv).[10]

111. Here, the Defendants further failed to comply with 43 C.F.R. 10.4(c), which provides, where the federal official is given notice of the Native American human remains and funerary objects, for which no plan of action was developed prior to the discovery, in connection with an on-going activity on Federal lands, the person in addition to providing the notice required by 25 U.S.C. 3002(d)(1), must stop the activity in the area and make a reasonable effort to protect the human remains, funerary objects, sacred objects, or objects of cultural patrimony.

112. The Defendants further failed to comply with 43 C.F.R. 10.4(d)(1), and (ii) and (e)(1) and (ii), which provides, as soon as possible, but no later than three days after receipt of the written confirmation of notification of the Native American human remains by the federal official, for which no plan of action was developed prior to the notification, the responsible Federal agency official must take immediate steps, if necessary, to further secure and protect the human remains, funerary

[10] *Yankton Sioux II & III*' injunctions were based upon 43 C.F.R.: "10.4 governing inadvertent discoveries explicitly incorporates the requirements of 10.3(b) [which requires an ARPA permit, notification of, and consultation with, lineal descendants and a written plan for disposition and repatriation] if the inadvertently discovered remains must be excavated or removed. See 43 C.F.R. 10.4(b)(1)(v);" 209 F. Supp.2d 1008, 1021. *Yankton Sioux II* reserved judgment for a permanent injunction, and a continuing injunction against construction was granted as to the site where the human remains were interred in *Yankton Sioux III*, "the Court will order that no further excavation, building or other construction activities be conducted in Area A..." 258 F. Supp.2d at 1034.

objects, sacred objects, or objects of cultural patrimony, including, as appropriate, stabilization or covering on Federal lands. See, *San Carlos Apache Tribe v. U.S.* 272 F. Supp. 2d 860, 888-9 (D. Ariz. 2003).

113. None of this was done. No federal agency official has taken any steps, let alone immediate steps, to protect Rosales and Toggery's families' human remains and funerary objects. The Defendants have further failed to provide written notice and a plan of action that documents the traditional treatment of human remains and other cultural items; the planned treatment, care, and handling, including the nature of reports to be prepared, as required by 43 C.F.R. 10.3(b)(1) for a permit to be issued by the Bureau of Indian Affairs under 16 U.S.C. 470aa et seq.; and the planned disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony as required by 43 C.F.R. 10.6. The "...lack of [written] notice may [alone] support the issuance of a permanent injunction regarding the notice requirements." *Yankton Sioux II* , 209 F. Supp.2d 1008, 1020 (D.S.D. 2002).[11]

114. The Defendants failed to initiate the consultation with the lineal descendants required in 43 C.F.R. 10.4(d)(iv). As noted in *Yankton Sioux I* at 1055-58, no one is allowed to conduct construction activity in the area of a discovery, identification, excavation and removal of human remains, until the federal agency "has consulted with possible lineal descendants and other tribes whose members might be buried at the site, and used that consultation to develop a written plan of action. See 43 C.F.R. 10.3(b); 43 C.F.R.10.4(d)(1)(v)."

115. The Defendants further failed to comply with 43 C.F.R. 10.6, by failing to transfer physical custody of the discovered human remains, funerary objects, sacred objects, or objects of cultural

[11] See for e.g., the May 1, 2003 Draft Agreement for Consultation, Treatment and Disposition of Human Remains and Cultural Items that may be Discovered Inadvertently During Planned Activities at the Statute of Liberty between DOI, National Park Service and the Delaware Nation and the Stockbridge-Munsee Community of Wisconsin, at 2-3, which states: "The Park and the Tribes agree that the preferred treatment of inadvertently discovered human remains and cultural items is to leave the human remains and cultural items *in-situ* and protect them from further disturbance...If the remains and cultural items are left *in-situ*, no disposition takes place and the requirements of 43 C.F.R. 10.3-10.6 will have been fulfilled. The specific locations of discovery shall be withheld from disclosure (with the exception of local law enforcement officials and tribal officials as described above) and protected to the fullest extent allowed by federal law." Ex. T.

patrimony to Rosales and Toggery as the lineal descendants, following appropriate procedures, which must respect traditional customs and practices, after thirty days notice to the lineal descendants. They further failed to publish the required notices two times at least a week apart, of the proposed disposition in a newspaper of general circulation in the area in which the human remains, funerary objects, sacred objects, or objects of cultural patrimony were discovered, and failed to solicit further claims to custody, prior to disposition. The Federal agency official then failed to send a copy of the notice and information on when and in what newspaper(s) the notice was published to the Manager of the National NAGPRA Program.

116. The federal Defendants have also violated the directives of the National Center for Cultural Resources and the National NAGPRA Program, as published on its website,[12] along with P.R.C. 5097.98, since the U.S. is the undisputed title owner of the land where the Native American human remains (which may be an inhumation or cremation and in any state of decomposition or skeletal completeness) were interred, and since they have failed to stop work and ensure that the immediate vicinity, according to generally accepted cultural or archaeological standards or practices where the Native American human remains are located, is not damaged or disturbed by further development activity, where, as here, the lineal descendants' preferences are to preserve the Native American human remains and any items associated with the human remains that are placed or buried with the Native American human remains, in place.[13]

117. The Defendants further failed to comply with 43 C.F.R. 10.10, by failing to repatriate Rosales and Toggery's lineal descendants' human remains and associated funerary objects as they have requested. The repatriation of human remains, funerary objects, sacred objects, or objects of cultural patrimony must be accomplished by the Federal agency in consultation with the requesting lineal

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[12] http://www.nps.gov/nagpra/MANDATES/INDEX.HTM; see for e.g.: http://www.nps.gov/nagpra/TRAINING/SubpartB_Overview.pdf; http://www.nps.gov/nagpra/TRAINING/Discovery_Tribal_Lands.pdf. Ex. W.

[13] See for e.g., the May 1, 2003 Draft Agreement for Consultation, Treatment and Disposition of Human Remains and Cultural Items that may be Discovered Inadvertently During Planned Activities at the Statute of Liberty between DOI, National Park Service, the Delaware Nation and the Stockbridge-Munsee Community of Wisconsin, at 2-3, maintaining the lineal descendants' preferences that the human remains and associated items remain in place. Ex. V.

descendants, as appropriate, to determine the place and manner of the repatriation. 43 C.F.R. 10.10. None of which has been done here.[14]

> 118. ...[T]he regulations' concern for the traditional treatment of Native American human remains and funerary objects, see 43 C.F.R. 10.5(e)(7), and (g), suggests that the [Army] Corps should be sensitive to any desire of the...members to perform the actual recovery of the remains and the ...requests for treating the remains with dignity until final custody of the remains can be determined. *Yankton Sioux I* at 1059.

> 119. The process necessary for legally and culturally proper reburial should be continuing even as this lawsuit progresses, and no further excavation, building or other construction activities [shall] be conducted...until...the human remains and funerary objects inadvertently discovered...are properly buried according to law and the customs of the peoples culturally affiliated with those remains and objects...The other issues raised in this litigation can be decided after the human remains and funerary objects have been properly reburied. *Yankton Sioux II* at 1025.

120. The government's fiduciary duty and general trust responsibility over Native Americans compels the enforcement of the NAGPRA regulations against any third parties who are mutilating, desecrating, disinterring, excavating and removing Rosales and Toggery's families' human remains and funerary objects, and further compels restraining such third parties from excavation, operation of heavy equipment, movement and hauling of dirt and gravel, or any other construction activities on the site of all burial grounds, human remains, and associated funerary objects, until the remains and funerary objects are properly protected as required by NAGPRA and its regulations. *Yankton Sioux I,* at 1057, *Yankton Sioux II*, at 1021-22, and *Yankton Sioux III*, at 1032-5; *San Carlos Apache Tribe v. U.S.* 272 F. Supp. 2d 860, 888-90 (D. Ariz. 2003).

121. The government's trust responsibility over Native Americans ensures that federal law protects both the majority and minority of a half-blood Indian community's members. "The Secretary of the Interior is charged not only with the duty to protect the rights of any tribe, but also the rights of individual members. And the duty to protect these rights is the same whether the infringement is by nonmembers or by members of the tribe." *Seminole Nation of Okla. v. Norton*, 223 F. Supp.2d

[14] See, the detailed descriptions required for the human remains and cultural items being repatriated in the Notice of Intent to Repatriate Cultural Items in the Possession of the San Diego Museum of Man, published in 64 Fed. Reg. 56,219 (October 18, 1999), 69 Fed. Reg. 4315 (January 29, 2004), 69 Fed. Reg. 4316 (January 29, 2004), at Ex. X. Currently, the National NAGPRA Program of the National Park Service has published 50,518 such notices of repatriated human remains and 1,185,948 repatriated associated funerary objects, since NAGPRA was adopted in 1990. http://www.nps.gov/nagpra/FAQ/INDEX.HTM#Discovery.

122, 137-38, 146-47 (D.D.C. 2002); *Milam v. United States*, 10 Indian Law Reporter ("ILR") 3013, 3017 (D.D.C. Dec. 23, 1982).[15] The government is not allowed "to be guided by the results it favors in its relationship with Indian tribes..." *Seminole* at 137-38, 146-47; *Milam*, at 3017. See also, *Thomas v. United States*, 141 F. Supp.2d 1185, 1203 (W.D. Wisc. 2001).

122. In discharging this trust duty, federal courts hold the United States to the highest fiduciary standard to take "all appropriate measures for protecting" individual Indian interests. *U.S. v. Creek Nation,* 295 U.S. 103, 109-10 (1935); *Osage Tribe of Indians of Okla. v. U.S.*, No. 99-550 L, (Ct. Fed. Cl. 2006), quoting *Coast Indian Cmty. v. U.S.*, 550 F2d 639, 652 (Ct. Cl. 1977)("the United States must be held to the 'most exacting fiduciary standards' in its relationship with the Indian beneficiaries." "The 'standard of duty for the United States...is not mere 'reasonableness' but the highest fiduciary standards.'" *Minn. Chippewa Tribe v. U.S.*, 14 Cl. Ct. 116, 130 (1987); *U.S. v. Mason*, 412 U.S. 391, 398 (1973); *Duncan v. U.S.*, 667 F.2d 36, 45 (Fed. Ct. Cl. 1981)(citing *Coast, supra*).

(3) Plaintiffs' Continuing Irreparable Damage

123. Defendants' knowing and wilful grading, excavation, demolition, operation of heavy equipment, moving dirt and/or gravel, and other construction activities, have been mutilating, disinterring, wantonly disturbing, intentionally excavating, willfully removing Rosales & Toggery's families' human remains and funerary objects, and dumping them on state property owned and controlled by CalTrans, in breach of their duty of care, have thereby caused, and will continue to cause, unless enjoined, severe and irreparable physical and bodily injury, including severe emotional distress and personal injury damages to Rosales and Toggery and their families' human remains, along with the items associated therewith, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in, and

[15] Thus here, where both the propriety of non-tribal third parties efforts to co-opt an Indian community's affairs and "the acts of federal officials in approving" such an action," are in question, the matter is not insulated from federal court review. *Milam*, at 3015, citing *Harjo v. Kleppe*, 420 F. Supp. 1110, 1117 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978); *U.S. v. Pawnee Business Council*, 382 F. Supp. 54, 59 (N.D. Okla 1974). "As trustee, the United States is charged with the responsibility of safeguarding, from both external and internal threats...the political rights of Indians." *Milam* at 3015.

prohibited by, H.S.C. §§7050.5, 7052, 7054, 7054.6, 7054.7, 7055, 7500, 8011, 8015-16, P.R.C. 5097.9-5097.99, Penal Code 487, NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, and the general trust responsibility of the federal Defendants over Indians, in an amount in excess of $4 million, subject to proof at trial.

124. Defendants' knowing and wilful grading, excavation, demolition, operation of heavy equipment, moving dirt and/or gravel, and other construction activities, have been mutilating, disinterring, wantonly disturbing, intentionally excavating, and willfully removing Rosales & Toggery's families' human remains and funerary objects, and dumping them on state property owned and controlled by CalTrans, in breach of their duty of care, has also caused and will continue to cause, unless enjoined, irreparable damage to, and interference with, the Plaintiffs' free expression and exercise of Native American religion as provided in the United States Constitution and the California Constitution, and has caused and shall continue to cause, unless enjoined, severe and irreparable damage to the Plaintiffs' Native American sanctified cemetery, place of worship, religious or ceremonial site, and sacred shrines located on said parcels, in an amount in excess of $4 million dollars, subject to further proof at trial.

125. Such acts will also unduly interfere with the Plaintiffs' civil rights to due process and equal protection of the laws. Plaintiffs will be greatly and irreparably damaged by reason of Defendants' infringement and violation of these civil rights, and unless Defendants are enjoined by this court, said acts will further violate Plaintiffs' civil rights, and further irreparably harm the Plaintiffs.

126. Defendants' conduct has created what the California Supreme Court describes as "liability for the serious emotional distress caused by such egregious, but clandestine, misconduct," which caused "Plaintiffs to suffer physical injury, shock, outrage, extreme anxiety, worry, mortification, embarrassment, humiliation, distress, grief and sorrow." *Christensen v. Sup. Ct.* (1991) 54 Cal.3d 868, 887.

127. These "statutes governing the disposition of human remains exist not only to ensure removal of dead bodies and protect public health, but also to prevent invasion of the religious, moral, and esthetic sensibilities of the survivors. These laws were enacted to prevent the type of harm alleged

here to the statutory rights holders, and create a duty to those persons....If, under the circumstances, [one Defendant] should have foreseen that the [other defendants] would violate the law, then its conduct may be found to be negligent per se." These statutes "reflect a policy of respecting the religious, ethical, and emotional concerns of close relatives and others having an interest in assuring that the disposition of human remains is accomplished in a dignified and respectful manner." "A policy of respecting religious beliefs with regard to the disposition of human remains is manifest." *Christensen v. Sup. Ct.* (1991) 54 Cal.3d 868, 893-94, 896, 897.

128. "Similar recognition that the sensibilities of all survivors merit protection is found in...[H.S.C.] Section 7050.5 [which] prohibits desecration of human buried remains, and makes special provision for proper disposition of Native American remains discovered during an excavation. The Legislature's findings include express recognition of Native American 'concerns regarding the need for sensitive treatment and disposition' of such remains. (Stats. 1982, ch. 1492, §1. Subd. (2) p. 5778)." *Christensen v. Sup. Ct.* (1991) 54 Cal.3d 868, 897.

129. Breach of these statutory duties "cause[s] mental anguish to the decedent's bereaved relations...in their most difficult and delicate moments...[t]he exhibition of callousness or indifference, the offer of insult and indignity, can of course...visit agony akin to torture on the living....The tenderest feelings of the human heart center around the remains of the dead." *Christensen* at 895, citing *Allen v. Jones*, 104 Cal.App.3d 207, 211 (1980).[16]

(4) Plaintiffs' Irreparable Damage Will Continue Unless Enjoined

130. To prevent such wrongful conduct of the defendants as herein alleged, Plaintiffs are entitled to a temporary, preliminary and permanent injunction to prevent great and irreparable injury resulting from the infringement and violation of these personal and civil rights, from the likelihood that damages cannot properly compensate Plaintiffs for such irreparable personal harm, and that

[16] See for e.g., The Inter-Tribal Council of the Five Civilized Tribes of the Chickasaw, Choctaw, Cherokee, Muscogee (Creek) and Seminole Nations, representing 750,000 blood descendants condemning the Poarch Creek Band of Creek Indians' desecration of the Hickory burial ground, and the former Vice Chair of the Okla. Indian Affairs Comm., Dan Jones,' "You'll Mock Death But Once," *Indian Country Today*, August 20, 2012. Exs. S and T.

Defendants will be unable to respond in damages, and from the difficulty or impossibility to ascertain the exact amount of personal bodily injury and personal property damage Plaintiffs have sustained, and will in the future sustain. These ongoing and continuing injuries sustained by Plaintiffs cannot be fully compensated in damages and Plaintiffs are without an adequate remedy at law without the imposition of the requested equitable injunctive relief.

131. In *Yankton Sioux II and III*, the Courts granted both a preliminary and permanent injunction to maintain the status quo, which included "that the Court order defendants to cease all construction activity at location A [the site of the human remains]," based upon: (1) the threat of irreparable harm to the plaintiffs' human remains and funerary objects from construction activities at the site of their discovery; (2) the balance of harm tipping in favor of the plaintiffs given the inherently sensitive nature of the human remains and funerary objects, and the minimal harm to the third party State contractors, and the fact that there could be no harm to the Federal defendants since they were already compelled to comply with NAGPRA; (3) the fact that it was probable that plaintiffs would prevail "on at least some of their NAGPRA claims," since, as here, the government was wrong to assert that it need not comply with the requirements of 10.3(b) with regard to discoveries of human remains, which ultimately supported a permanent injunction restraining construction at the site of the human remains; and (4) the public interest, since Congress directed the protection of such Native American cultural items in NAGPRA, given the plaintiffs' beliefs about how disturbance of the families' remains affects plaintiffs' lives. 209 F. Supp.2d 1008, 1022-24, and 258 F. Supp.2d 1027, 1032-34.

132. See also, *Center for Biological Diversity v. Dept. of Fish & Wildlife,* 2014 Cal.App. LEXIS 256 (2014), DFW and the developer were enjoined until an environmental impact report was prepared and complied with the CEQA *Guidelines*, 14 Cal. Code Regs. §15126.4(b)(3)(A), (b)(3)(B)1 and 4, and 15064.5(e), requiring the preservation of human remains "in place." There, development was barred within a 100 foot buffer around the remains preserved in place, and there was an "immediate cessation of grading," and the human remains were required to be "handled or treated consistent with §5097.98 and *Guidelines* §15064.5(e)." *Id.,* *117. In *Ballona Wetlands Trust v. City of Los Angeles*, 201 Cal.App.4th 455, 469 (2011), a writ of mandate vacated the City's

certification of the EIR and its project approvals and ordered the EIR revised for failure to discuss preservation "in place" as a means to mitigate the significant effects on human remains.

133. San Diego Superior Court Judge Judith Hayes granted similar injunctive relief against Padre Dam Municipal Water District's $20 million reservoir and pumping station project because it would violate the P.R.C. and H.S.C., and was needed to prevent severe irreparable damage and desecration to the original Capitan Grande Band's sacred burial site. The water district was ordered to find an alternative site for the project, despite the fact that delay was costing $150,000 per month, and finding another site would add $10 million to the cost, and would likely force the district to drop the project. Although the pumping station would have benefitted the Band, the balance of hardships was in favor of protecting the Native Americans' cultural patrimony, according to the Band's Tribal Chairman Bobby L. Barrett: "To move forward and desecrate this sacred burial ground would dishonor those who have been laid to rest there." See, Case No. GIC 2010-00093203, Ex. O.

134. Similarly, in Puyallup, Washington, a stop work order was recently issued for all work by Trammel Crow in front of the Indian Willard Cemetery, which is 200 years old, fearing ancestral remains might be disturbed, and where tribal archaeologist Brandon Renyon stated: "We don't know the boundaries of the cemetery, because it dates back to the 1800's, maybe earlier." There the city was unaware until recently that anyone contended that the area of the cemetery included a larger area outside the existing fence. "There's no way to tell how many are buried within the fences, and no certainty on how far beyond those fences grave sites might exist." LaRue, *The News Tribune*, December 2, 2013, Ex. P.

135. In San Diego's Old Town, the fence also does not enclose all of the grave sites at El Campo Santo Cemetery beneath San Diego Ave. www.oldtownsandiegoguide.com. The most likely descendents of Graton Rancheria also obtained an order repatriating Coast Miwok Indian remains and artifacts for reinterment pursuant to CEQA *Guidelines*, **before** construction of the $55 million Rose Lane housing development on San Francisco Bay. Ex. R.

136. The desecration of Rosales and Toggery's families' remains and funerary objects also requires Defendants to be enjoined due to their failure to complete the Supplemental Environmental

Impact Statement that must be prepared, reviewed, and given a public hearing, concerning their violations of Cal. P.R.C., H.S.C. Penal Codes, and NAGPRA, before construction is allowed. See for e.g., *Quechan Indian Tribe v. U.S.* 535 F.Supp.2d 1072, 1106, 1121-22 (S.D. Cal. 2008), finding Western Area Power Admin. agency *per se* liable for inflicting severe and irreparable damage to the cultural sites in violation of P.R.C. 5097.5, 5097.9, and Pen. C. 622.5, which were also alleged to have violated NEPA; *Crow Creek Sioux Tribe v. Brownlee*, 331 F.3d 912, 914 (D.C. Cir. 2003), finding the Army Corps of Engineers Environmental Impact Statement complied with NEPA's requirement to take a hard look at Indian "burial remains and cultural artifacts on the transferred lands;" and *Slockish v. U.S.F.H.A.*, 2012 U.S. Dist. LEXIS 118718, *41 (D. Ore. 2012), finding that the administrative record should be supplemented, under the NEPA exception for administrative review, to further develop the government's prior knowledge of cairns and burial sites on the project property, and to determine whether the agency "neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative or otherwise swept stubborn problems or serious criticism . . . under the rug," citing *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir. 1988).

137. Defendants' grading, operation of heavy equipment, moving and hauling dirt and/or gravel, and other construction activities, excavation and removal of Rosales & Toggery's families' human remains and funerary objects, and dumping them on state property owned and controlled by CalTrans has also caused and will continue to cause, unless enjoined, irreparable damage to, and interference with, the Native American sanctified cemetery, place of worship, religious and ceremonial sites, sacred shrines located on federal lands, and the free expression and exercise of Native American religion as provided in the United States and the California Constitutions, in violation of Pub. Res. C. 5097.9-5097.994. Defendants' conduct has barred and will continue to bar appropriate access by Native Americans to the Native American sanctified cemetery, place of worship, religious and ceremonial sites, sacred shrines located on federal lands.

138. Where, as here, adequate and appropriate mitigation is not available, and since there is no clear and convincing evidence that the public interest and necessity require otherwise, the Court is required to issue an injunction, to prevent severe and irreparable damage to, and to assure

appropriate access for Native Americans to, the Native American sanctified cemetery, place of worship, religious and ceremonial sites, and sacred shrines located on the federal lands, as required by P.R.C. 5097.94, NAGPRA, 25 U.S.C. 3001 et seq., and 43 C.F.R. 20.1-17.

2. JIV Has No Right, Permit or Authorization to Desecrate Plaintiffs' Families Remains to Build a Casino on the Jamul Indian Cemetery

139. The JIV does not have any right, authorization or permit to construct, what after all these years, remains an illegal casino, on the portion of the Jamul Indian cemetery, beneficially owned by Rosales and Toggery, and titled in the U.S. Moreover, the JIV has no standing to oppose Plaintiffs' claims before this federal court, because the JIV has no cognizable interest in Rosales and Toggery's families' human remains and funerary objects or the government's portion of the Jamul Indian Cemetery, and because the JIV has failed to exhaust its administrative remedies before coming to Court. The JIV did not exist when the U.S. acquired the portion of the Indian cemetery for the individual half-blood Indians in Jamul, and has never acquired nor exercised governmental power over that portion of the Indian cemetery on which it is illegally building a casino.

140. The land does not qualify for Indian gambling because it was not acquired by the JIV, nor taken into trust for the JIV, since the JIV was not recognized under federal jurisdiction in 1934, *Carcieri v. Salazar*, 555 U.S. 379 (2009), and the JIV has never been recognized by the federal government as a "tribe" under the Indian Reorganization Act, 25 U.S.C. 479. It has only been recognized as a "half-blood Indian community," which has no right to build a casino on the cemetery parcel under IGRA, since the Indian cemetery is not held in trust for a tribe, and no tribe lawfully exercises governmental power over the cemetery property. 25 U.S.C. 2701 and 2703(4); *La Courte Oreilles Band of Lake Superior Chippoewa Indians v. United States* 367 F.3d 650, 657 (7th Cir. 2004); *Confederated Tribes of Siletz Indians v. United States*, 841 F.Supp. 1479, 1486 (D. Ore. 1994).

A. JIV was not Recognized Under Federal Jurisdiction in 1934

141. It is undisputed that because the JIV did not then exist, it could not be, and was not, recognized under federal jurisdiction when the IRA was adopted on June 18, 1934. "Congress has

restricted the eligibility for... "organizing" under the IRA to "tribes" recognized under federal jurisdiction in 1934. *Sandy Lake Band of Miss. Chippewa ("Sandy Lake") v. United States*, 2012 U.S. Dist. LEXIS 63458, *3-4 (D. Minn. 2012), citing *Carcieri*. As with the Ukiah Valley Pomo Indians, "the IRA dictates which tribes are eligible to invoke the IRA, and plaintiffs cannot satisfy that definition." *Allen v. United States*, 871 F.Supp.2d 982, 993 (N.D. Cal. 2012). "Congress delegated to the Secretary the authority to promulgate rules and regulations governing Secretarial elections," under the IRA, 25 U.S.C. 479, and the regulations are codified in 25 C.F.R. Part 83. *Sandy Lake*, 2012 U.S. Dist. LEXIS 63458, *3; *Muwekma Ohlone Tribe v. Salazar*, 813 F.Supp.2d 170, 173 (D.D.C. 2011).

142. "Congress has specifically authorized the Executive Branch to prescribe regulations...to determine which Indian groups exist as tribes," and the BIA has prescribed regulations to determine which Indian groups may qualify to "organize" or "reorganize" as tribes, under the IRA. *James v. HHS*, 824 F.2d 1132, 1137 (D.C. Cir. 1987); *Miami Nation of Indians of Indiana v. U.S.D.O.I.*, 255 F.3d 342, 350-51 (7th Cir. 2001), finding the Miami Nation failed to satisfy DOI's regulations for recognition as a tribe.

143. The Department of Interior promulgated regulations in 1978, establishing a uniform procedure for "recognizing" American Indian tribes, known as Part 83. 25 C.F.R. 83.1-83.13. *Allen*, 871 F.Supp.2d 982, 990. To obtain federal recognition, a tribe must demonstrate that it's "membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity." 25 C.F.R. 83.7(c): Ex. I, at1. *Sandy Lake* went on to hold:

144. ...by requiring an entity seeking an IRA election to first request federal acknowledgment, the regulations ensure that the evidence the Sandy Lake Band offers in support of its claim that it qualifies as an Indian tribe under Section 479 will be presented to the appropriate agency with the requisite expertise and established regulatory process. ...

Carcieri v. Salazar, 555 U.S. 379 (2009) held that the term "now under Federal jurisdiction" refers to Indian tribes under Federal jurisdiction in 1934. The effect of this holding is that the Secretary may not expand the definition of Indian tribes eligible for an IRA election to include those not under Federal jurisdiction in 1934. *Id.*, at *9-10, and repeating its holding for emphasis again at *25-26.

145. The Supreme Court "has long made clear that Congress and therefore the Secretary-lacks constitutional authority to 'bring a community or body of people within [federal jurisdiction] by arbitrarily calling them an Indian tribe.'" *Carcieri*, at 412, J. Stevens, dissenting, and citing *United States v. Sandoval*, 231 U.S. 28, 46 (1913). Moreover, a tribe cannot establish governmental jurisdiction through its unilateral actions. *City of Sherrill v. Oneida Indian Nation* (*Sherrill*), 544 U.S. 197, 203, 219-20 (2005); *Citizens Against Casino Gambling in Erie Co. v. Stevens* (*CACGE*), 945 F.Supp. 2d 391, 401 (W.D.N.Y. 2013).

B. JIV Never Acquired Nor Exercised Governmental Power Over the Government's Portion of the Jamul Indian Cemetery On Which It is Illegally Building a Casino

146. Since the JIV did not exist when the IRA was enacted on June 18, 1934, it was not under federal jurisdiction and the federal government could not recognize a government to government relationship with the JIV, nor allow the JIV to acquire or exercise governmental power over the government's portion of the Jamul Indian cemetery. *Carcieri v. Salazar* (2009) 555 U.S. 379, 382-84, 395 (2009). At most, JIV was a community of individual Indians not affiliated with a tribe. Consequently, the federal government was without the legal authority to acquire or hold, and did not acquire or hold, any portion of the Indian cemetery in trust for the JIV. The IRA only authorizes the Secretary of the Interior to take land in trust for "any recognized Indian tribe now under Federal jurisdiction," in 1934. 25 U.S.C. § 479.

147. The Supreme Court further holds that the IRA does not allow the Secretary to lawfully take land into trust for a tribe, that was not "now under Federal jurisdiction," when the IRA was enacted on June 18, 1934. *Carcieri v. Salazar*, 555 U.S. 379, 382-3 (2009): "Because the record in this case establishes that the [] Tribe was not under federal jurisdiction when the IRA was enacted, the Secretary does not have the authority to take the parcel at issue into trust." See also, *United States v. John*, 437 U.S. 634, 650 (1978).

148. Various federal documents admit that the JIV was not named among the tribes listed as receiving services from the federal government in 1934, as shown in the government's Haas Report entitled Ten Years of Tribal Government under the IRA. The JIV is not named in the BIA's list of Governing Bodies of Indian Groups Under Federal Supervision in 1965. Further, Senate Report No.

1874, dated July 1958, notes that the JIV had never received any social services from the BIA due to the status of its members as Indians. As Justice Breyer acknowledges in *Carcieri*, at 398, the JIV is not among the list of 258 tribes compiled by the DOI following enactment of the IRA, citing the *amicus* Brief for Law Professors Specializing in Federal Indian Law, at App. 2, No. 12, 2008 WL 3991411.

149. Consequently, because the JIV had never previously existed, and was not a recognized tribe under federal jurisdiction in June of 1934, the JIV never acquired, nor has been transferred, nor has ever lawfully exercised governmental power over that portion of the Indian cemetery on which the individual half-blood Jamul Indians resided, and which was gifted to the U.S. by the Daleys in 1978. Therefore, the U.S. was without the legal authority to acquire this land, and did not acquire this land, in trust for the JIV, and only acquired this land in trust for the individual half-blood Jamul Indians, including Walter Rosales and Karen Toggery's families, who were then living at the Indian cemetery.

C. JIV Has Never Been Recognized as an IRA Tribe

150. The law governing Federal recognition of an Indian tribe is universally clear. The JIV has failed to have been federally recognized as a tribe, as opposed to a half-blood Indian community, by any of the three means of recognition: (1) an act of Congress, (2) the administrative procedures set for in Part 83 of the Code of Federal Regulations,[17] or (3) a decision of a United States court.[18] *Allen v. United States* (*Allen*), 871 F.Supp.2d 982, 994 (N.D. Cal. 2012), citing *David Laughing Horse Robinson v. Salazar* (*Robinson*), 838 F.Supp.2d 1006, and later at 885 F.Supp.2d 1002, 1024-26 (E.D. Cal. 2012); *Cherokee Nation of Okla. v. Norton* (*Cherokee Nation*), 2005 U.S. Dist. LEXIS 2773, *3-4, *34 (10th Cir. 2005), reversing the "listing" of the Delaware Tribe, because it "never

[17] For example, the mandatory criteria for Federal acknowledgment includes that: "The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900," 25 C.F.R. 83.7, which the government concedes JIV cannot establish here. Ex. I; see also, *Price v. Hawaii*, 764 F.2d 623, 627 (9th Cir. 1985) finding the *Houohana* did not "satisfy the historical requirement for tribal status implicit in 83.7(a)," because it was founded in 1974.

[18] None of Rosales and Toggery's prior litigation was decided on the merits; all of their lawsuits were procedurally dismissed for lack of jurisdiction, and therefore produced no final judgments that the JIV was ever recognized as an IRA tribe.

formally petitioned for acknowledgment," and reversing the DOI's recognition as arbitrary, capricious and against the law for "failing to follow the Part 83 procedures for recognizing an Indian tribe;" *United Tribe of Shawnee Indians v. United States* (*Shawnee*), 253 F.3d 543, 547-48 (10th Cir. 2001); and *James v. HHS* (*James*), 824 F.2d 1132, 1137 (D.C. Cir. 1987).

151. The Supreme Court also holds that "Congress did not intend to delegate interpretive authority to the Department [of Interior, as to when a tribe was recognized under Federal jurisdiction]." *Caricieri* at 397. J. Breyer, concurring. The Supreme Court "has long made clear that Congress and therefore the Secretary-lacks constitutional authority to 'bring a community or body of people within [federal jurisdiction] by arbitrarily calling them an Indian tribe'." *Carcieri* at 413, J. Stevens, dissenting, citing *United States v. Sandoval*, 231 U.S. 28, 46 (1913). As noted above, a tribe cannot establish jurisdiction through its unilateral actions. *Sherrill* at 203, 219-20; *CACGE* at 401.

152. The court in *Allen* also notes that the government's *Handbook of Federal Indian Law* provides "that there are several federal statutes that specifically define the term 'Indian tribe,' and these statutes reveal that tribes 'cannot be neatly divided into 'recognized' and 'non-recognized' tribes for all purposes; rather, a tribe may be a legal entity for some federal purposes, but not for others.'" 871 F.Supp.2d 982, 991, citing 3.02(6)(a) (2005 ed.). "The term 'Indian tribe' has distinct and different meanings for native people and for federal law." *Id.*, at 992, citing 3.02(2) (2005 ed.).

153. Here, it is undisputed that JIV has yet to be federally recognized under any of the three means: (1) Congress has never recognized the JIV, (2) the JIV has admittedly failed to petition for, and has never received, recognition under Part 83, and (3) no court has, or had, jurisdiction to decide whether the JIV qualifies for federal recognition as a tribe, since the JIV never exhausted the administrative recognition procedure Congress delegated to the Executive branch. *Allen*, at 991-94; *Robinson* at 1024-26, citing *Shawnee*, at 547-48; *Cherokee Nation*, at *2-*3, *34; *James*, at 1137.

154. Here, the JIV voluntarily elected not to seek recognition under the Part 83 IRA regulations, 25 C.F.R. 83.1-83.13, as a federally recognized "tribe,"when they only petitioned for recognition as a "half-blood dependent Indian community." BIA's Tribal Government Services July 1,1993 letter to Raymond Hunter, Ex. I. In fact, JIV purposefully elected not to petition for administrative

recognition as an IRA tribe, because they thought it would take too long, and they didn't want to wait for dispersal of the federal benefits which they have been receiving as a half-blood Indian community, since 1981. Ex. I. Therein, the federal Defendants are bound by their admission that:

155. The origin of the Jamul Indian Village is different from that of an historic tribe. The term 'tribe' as used in Federal Indian affairs generally refers to a community of people who have continued as a body politic without interruption since time immemorial and retain powers of inherent sovereignty.... Ex. I, 1.

156. You will recall that prior to 1980, the Jamul Indian Village was not a federally recognized tribal entity. During the 1970's representatives of the Village explored with the Bureau of Indian Affairs (Bureau) means whereby it could obtain Federal recognition and were variously advised the only avenues open to them were to seek a legislative solution, go through the Federal acknowledgment process, or the more limiting action of recognition by the Secretary as a half-blood organization. It was pointed out that acknowledgment of existence as an Indian tribe and of existence as a half-blood community are two different things. Ex. I, 2.

157. In order for the Secretary to acknowledge the Jamul community as a tribe under 25 C.F.R. Part 83, previously 25 C.F.R. 54, it would have to submit a detailed petition and undergo a lengthy process of consideration. Several years would have been required to complete this. If the community was not determined to exist as a tribe after this consideration, it would still have the option to organize as a half-blood community under the IRA. Representatives of the Village opted to seek recognition as a half-blood Indian community even though they were aware of the limitations that result from organizing as a half-blood community. Ex.I, 2.

158. ...on November 7, 1975, the Commissioner of Indian Affairs...notified the Area Director that pursuant to Section 19 of the Indian Reorganization Act (IRA) of June 18, 1934 (25 U.S.C. 479), certain benefits of that Act are available to persons of one-half or more Indian blood even though they lack membership in a federally recognized tribe. **The Commissioner found that while those individuals at Jamul of one-half degree or more Indian blood do not now constitute a federally recognized entity and do not possess a land base**, they are entitled to services provided by the Bureau to individual Indians pursuant to Section 19 of the IRA. The Commissioner further held that should these Jamul half-bloods secure, in trust status, the tract of land on which they reside they would be eligible to organize as a community of adult Indians of one-half degree or more Indian blood under Section 16 of the IRA. Ex. I, 2.

159. On July 12, 1979, the Commissioner of Indian Affairs in response to an inquiry advised the Sacramento Area Director [of the BIA] that: 'To be created as a community of persons of one-half degree or more Indian blood, the Jamul Inidans must first organize under the Indian Reorganization Act...When this proposal has been adopted by the community in an election called by the Secretary, and has been approved by the Secretary, the Jamul Indians will be able to receive services as [such] a community. Ex. I, 3.

160. In approving the IRA constitution, the Village was authorized to exercise those self-

> governing powers that have been delegated by Congress or that the Secretary permits it to exercise...For example, some IRA entities availed themselves of the opportunity to adopt an IRA constitution...However, they are composed of remnants of tribes who were gathered onto trust land. Those persons had no historical existence as self-governing units. They now possess only those powers set forth in their IRA constitution. **They are not an inherent sovereign...Such is the case with Jamul Indian Village.** Ex. I, 3.[19] (emphasis added)

161. Here, JIV is a dependent half-blood Indian community, and not a federally recognized tribe. As conceded by the federal government, the JIV are the remnants of the Capitan Grande tribe, and thus are not subject to being recognized as a separate tribe. On January 18, 1982, the California Program Office of the Indian Health Service stated: "Sometime in the 1800's, Indians from the nearby El Capitan Grande area settled adjacent to an existing cemetery near the village of Jamul." FONSI for Domestic Water Supply & Waste Disposal Facilities, Project No. CA 79-719.

D. A Half-Blood Indian Community is Not an IRA Tribe and has No Inherent Sovereignty

162. The U.S. Supreme Court and the Ninth Circuit in compliance therewith, hold that a half-blood dependent Indian community of individual Indians is not a federally recognized Indian tribe. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998); *United Sates v. McGowan*, 302 U.S. 535, 539 (1938); *United States v. Sandoval*, 231 U.S. 28, 47 (1913); *Nisqually Ind. Tribe v.Gregoire*, 623 F.3d 923, 927 (9th Cir. 2010), "the [Frank's Landing] Community is not a federally-recognized Indian tribe; rather, it is a 'self-governing dependent Indian Community;'" see also, *United States v. Arrieta*, 436 F.3d 1246, 1249 (10th Cir. 2006) finding the assault on Shady

[19] It should be noted that though the term "created tribe" has fallen into disuse upon the adoption of the 1994 amendments to the Part 83 recognition procedures, however, "the 94 amendments do not appear to prohibit the BIA from requiring a tribe to trace its roots to a historic Indian tribe in order to attain federal recognition." *United Houma Nation v. Babbit*, 1996 U.S. Dist. LEXIS 16437, *8 (D.D.C. 1996). "As evidence that Congress has forbidden making any distinction between historic and non-historic tribes in the administrative acknowledgment process, the plaintiffs point to the 94 Amendments. However, the test of these amendments does not provide compelling support that Congress has spoken directly to this issue. While both amendments, codified at 25 U.S.C. 476 (f) and (g), prohibit making distinctions among those Indian tribes that have attained federal recognition, neither section addresses the process by which Indian tribes actually achieve federally recognized status." *Id.*, at *9. "...[A]t least at this stage of the case, the argument is unpersuasive. ...there appears to be scant, if any, evidence that Congress intended the same prohibitions to apply to the process by which tribes achieve federal recognition." *Id.*, at *10.

Lane was not within a reservation or allotment, but was within the Pojoaque Peublo dependent Indian community.

163. When the United States designated the individual half-blood Indians in Jamul as the beneficial owners of that portion of the Indian cemetery in which they were in possession in 1978, they became eligible to organize, and were subsequently organized, as a community of adult Indians of one-half degree or more Indian blood under Section 16 of the IRA. But this did not recognize the community as an IRA tribe.

164. The Federal government's *Handbook of Federal Indian Law*, authorized and funded by Congress in the Indian Civil Rights Act of 1968, 25 U.S.C. 1341(a)(2), admits that "[p]ersons of one-half or more Indian blood...but not residing on a reservation cannot organize under the IRA, but are nevertheless eligible to enjoy some of its provisions." *Id.*, Ch.1, Sec. B2e, at 15-16 (1982 Ed.), citing *Maynor v. Morton*, 510 F.2d 1254, 1256-57 (D.C. Cir. 1975), upholding the DOI's finding that: "These people" [the Siouan or Lumbee Indians] did "not obtain tribal status or any rights or privileges in any Indian tribe." In *Maynor*, the D.C. Circuit specifically found:

165. ...the IRA was primarily designed for tribal Indians, and neither Maynor nor his relatives had any tribal designation, organization, or reservation at that time, it is clear from the language of the statute that some benefits of the Act were also open to any nonreservation Indian who could prove that he possessed at least one-half Indian blood. Among these benefits was the right to petition the Secretary to establish a reservation for such individuals, which, if granted, would afford them access to a wide range of federal Indian services (as members of a recognized Indian group on a reservation). *Maynor* at 1256-57.

166. There, the Court further found that the North Carolina Lumbee Indians were not a recognized IRA tribe, and though entitled to petition for recognition and the proclamation of a reservation, they did not petition for either, and like the JIV here, were content to receive the federal monetary benefits accorded their recognition as a half-blood dependent Indian community. "This and other benefits available under the IRA to non-reservation Indians were first detailed in a memorandum, dated 8 April 1935, to [John Collier] the Commissioner of Indian Affairs from then Assistant Solicitor Felix S. Cohen, who later authored the treatise Federal Indian Law (1942)." *Maynor* at 1256, fn. 7. Cohen's memo stated:

> 167. "Clearly, this group [Siouan Indians of North Carolina, now known as the Lumbee Indians] is not a recognized Indian tribe 'now under federal jurisdiction' within the language of section [479]. Neither are the members of this group residents of an Indian reservation (as of June 1, 1934).These Indians, therefore, like many other Eastern groups, can participate in the benefits of the [IRA] only in so far as individual members may be one half or more Indian blood."[20]

168. Cohen's memo goes on to point out just what the IRA then stated: that if such landless half-blood Indians petition for the proclamation of a reservation, and such a reservation is proclaimed and they reside thereon, they will then qualify under 25 U.S.C. 476 to reorganize and adopt a constitution, when recognized as a tribe for the purposes of the IRA. 25 U.S.C. 476 as it existed from when it was enacted in 1934, until it was first amended in 1988, provides:

> Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe.

169. However, qualifying to become recognized, is not automatic recognition. The formerly landless Indians must still comply with the regulations mandated by Congress and prescribed by the Secretary to become recognized as a an IRA tribe. 25 C.F.R. 83 et seq. These Part 83 regulations for recognition as an IRA tribe were finally put in place in 1978. Thus, a half-blood dependent Indian community must still go through the Part 83 recognition process, to become recognized as an IRA tribe, even when they have been allowed to adopt a constitution and bylaws as a dependent half-blood Indian community. This, the JIV has voluntarily chosen not to do. BIA's Tribal Government Services July 1,1993 letter to Raymond Hunter, Ex. I, 1-3.

170. A group of non-tribal landless Indians cannot simply acquire land and unilaterally declare themselves an IRA tribe, without complying with the federal regulations for such recognition; a tribe cannot establish jurisdiction through its unilateral actions. *Sherrill* at 203, 219-20; *CACGE* at 401.

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[20] Brownell, Who is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law, 34 U. Mich. J.L. Reform 275, 287 (2001), citing article quoting unpublished memorandum from Cohen to Collier of April 8, 1935; the full memo can be found in the Collections of the Manuscript Division, Justice Blackmun Papers on *U.S. v. John*, 437 U.S. 634, Library of Congress.

171. Therefore, here, as in *Maynor*, where such landless Indians failed to petition for the proclamation of a reservation, and were not under federal jurisdiction in 1934, like the JIV, they remain a half-blood dependent Indian community, and did not become a federally recognized IRA tribe. Based upon Cohen's 1935 memo, the *Maynor* court concluded:

> Following enactment of the IRA in 1934, plaintiff Maynor and 208 other persons residing in Robeson County petitioned the Secretary for recognition as persons of one-half or more Indian blood. The Department of the Interior sent a team of anthropologists and other specialists to determine the quantum of Indian blood of each applicant. After extensive study, in 1938 a total of only 22 applications including Maynor's, were approved.
>
> Maynor and the other 21 were informed by the Department that they were "entitled to benefits established by the Indian Reorganization Act. Please note that no other benefits are involved. These people do not obtain tribal status or any rights or privileges in any Indian tribe." *Maynor* at 1256-57.

172. Here, the governmental Defendants are also estopped to deny that the Director of Tribal Government Services has further stated on July 1, 1993: "The Constitution of the Jamul Indian Village was approved by the Deputy Assistant Secretary-Indian Affairs on July 7, 1981. In approving the IRA Constitution, the Village was authorized to exercise those self-governing powers that have been delegated by Congress or that the Secretary permits it to exercise... For example, some IRA entities availed themselves of the opportunity to adopt an IRA constitution... However, they are composed of remnants of tribes who were gathered onto trust land. Those persons had no historical existence as self-governing units. They now possess only those powers set forth in their IRA constitution. **They are not an inherent sovereign**... **Such is the case with Jamul Indian Village**." Ex I, 3 (emphasis added).

173. [T]he term "dependent Indian communities"...refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements–first, they must have been set aside by the Federal Government for the use of the Indians as Indian land, second, they must be under federal superintendence. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 (1998).

174. "Frank's Landing is a geographic location consisting of three parcels of land, none of which is located on the Nisqually or Squaxin Reservations. The parcels are instead held in trust by the United States for the benefit of individually named Indians. The three parcels were set aside for these individuals in 1918. The people, society, and government located at and associated with Frank's Landing are referred to as the "Community." The Community is not a federally-recognized Indian tribe; rather, it

> is a "self-governing dependent Indian Community." *Nisqually Ind. Tribe*, 623 F.3d 923, 927.

175. In *United Sates v. McGowan*, 302 U.S. 535, 537, 539 (1938), Justice Black held that the Reno Indian Colony was a dependent Indian community, because the Federal government held the Colony's land in trust for the benefit of the individual Indians residing there:

> The Reno Indian Colony is composed of several hundred Indians residing on a tract of 28.38 acres of land owned by the United States and purchased out of funds appropriated by Congress in 1925 and 1926...The policy of Congress, uniformly enforced through the decisions of this Court, has been to regulate the liquor traffic with Indians occupying such a settlement. This protection is extended by the United States 'over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state.' *United States v. Sandoval*, 231 U.S. 28, 46...Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out...The federal prohibition against taking intoxicants into this Indian colony does not deprive the state of Nevada of its sovereignty over the area in question. The federal government does not assert exclusive jurisdiction within the colony. Enactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the federal enactments. *McGowan*, 302 U.S. 535, 538-39.

176. The Ninth Circuit further holds that whether "a group of citizens of Indian ancestry...has maintained an organized tribal structure...is a factual question which a district court is competent to determine." *United States v. Washington*, 641 F.2d 1368, 1371, 1373 (9th Cir. 1981), finding that "the appellants had not functioned since treaty times as 'continuous separate, distinct and cohesive Indian cultural or political communities;" *Native Village of Tyonek v. Puckett*, 957 F.2d 631, 632 (9th Cir. 1992). Where those facts are in conflict, as here, a trial is required before the Court may determine the status of the dependent Indian community, presuming the group of Indians has exhausted its administrative remedies, has standing, and has become a party to the action. None of which the JIV has done.

177. [W]e have not addressed the question whether any Alaskan native village constitutes an Indian tribe for the purpose of sovereign immunity. We cannot reach this question because, as noted above, the district court failed to enter express findings of fact or develop a record to support its conclusion that the Native Village of Tyonek is an Indian tribe protected by sovereign immunity. Accordingly, we must remand so that an adequate record can be prepared so that we may review this 'complex factual question.'" *Tyonek*, at 635.

178. Here, the Ninth Circuit holds that the JIV can't have any Court finally determine the half-blood Indian community's status, without a trial and without having exhausted the administrative remedies under 25 C.F.R. Part 83 with the BIA. See, Section 3 below; *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1388 (9th Cir. 1988) *reversed on other grounds*, 522 U.S. 520 (1998), "As we have outlined, not all Indian communities are considered tribes and therefore sovereign powers. The community in this case may not be sovereign. Until that uncertainty is resolved, amici's contention is premature...[T]he ultimate conclusion as to whether an Indian community is Indian country is quite factually dependent. It is also dependent on whether the inhabitants constitute a tribe for legal purposes, which, as we discussed earlier, is another complex factual question." *Id.*, 1388, 1391. Ultimately, the Supreme Court found that the Native Village of Venetie was not a sovereign, and was not even a dependent Indian community, unlike here, primarily because the U.S. was no longer the title holder and the land was not under the superintendence of the Federal government. 522 U.S. 520, 532.

179. The Tenth Circuit has held in *United States v. Martine*, 442 F.2d 1022, 1023-24 (10th Cir. 1971) that the "proper approach" to the determination of the status of a dependent Indian community is to hold a trial as to any conflicting facts: There:

> 180. The term "Indian country' as used in section 1151 includes Indian reservations, dependent Indian communities, and all Indian allotments. The particular place where the accident took place was neither on an Indian reservation nor on an allotment. It was in an area known as the Ramah community and on land owned by the Navajo Tribe, it having been purchased with tribal funds from a corporate owner. Jurisdiction therefore rests on the claim that the area in question is a dependent Indian community.
>
> 181. The trial court received evidence as to the nature of the area in question, the relationship of the inhabitants of the area to Indian Tribes and to the federal government, and the established practice of government agencies toward the area....Only after considering all of the various factors we have noted, as well as any other relevant factors, can the trial court determine the status of a particular area. The mere presence of a group of Indians in a particular area would undoubtedly not suffice. *Martine*, 442 F.2d 1022, 1023-24.

182. Similarly, the Eighth Circuit holds in *United States v. South Dakota*, 665 F.2d 837, 839-43 (8th Cir. 1981) that the "proper approach" in determining the status of a dependent Indian community is to hold a trial of any conflicting facts concerning the following factors:

> 183. [W]hether a particular geographical areas is a dependent Indian community depends on a consideration of several factors. These include: (1) whether the United States has retained 'title to the lands which it permits the Indians to occupy' and 'authority to enact regulations and protective laws respecting this territory,' 636 F2d at 212, citing *United States v. McGowan*, 302 U.S. 535, 539, 58 S. Ct. 286, 288, 82 L. Ed. 410 (1938); (2) 'the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area,' 636 F.2d at 212, citing *United States v. Martine*, 442 F.2d 1022, 1023 (10th Cir. 1971); (3) whether there is 'an element of cohesiveness ... manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality,' 636 F.2d at 212-13, citing *United States v. Morgan*, 614 F.2d 166, 170 (8th Cir. 1980); and (4) 'whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples,' 636 F.2d at 213, citing *United States v. Mound*, 477 F. Supp. 156, 158 (D.S.D. 1979), citing *Youngbear v. Brewer*, 415 F.Supp. 807, 809 (N.D. Iowa 1976), *aff'd*, 549 F.2d 74 (8th Cir. 1977).

184. There, the Court declared that the housing project located within the City of Sisseton to be a "dependent Indian community" within the meaning of the federal statute defining "Indian country," 18 U.S.C. 1151(b), and held that the fact that the State had asserted jurisdiction over the housing project did not necessarily defeat the finding that the project was a dependent Indian community. *United States v. South Dakota.*, at 841-42. There, as here, the grant deed explicitly conditioned the transfer to the United States: "The land so transferred by this Corporation will be used exclusively for a Low Rent Housing Project and will not be used for any other purpose." *Id.*, 839-41. The Court also found that: "The test for determining what is a dependent Indian community must be a flexible one, not tied to any single technical standard such as percentage of Indian occupants." *Id.,* 842. There, as here, many of the "programs provided to the project residents are provided under contract with the federal government, through the BIA and the IHS [Indian Health Service]."

185. Thus, JIV's Secretarial election only adopted a constitution for a half-blood Indian community and not an IRA tribe. The JIV was never a body politic that continued without interruption since time immemorial, never had powers of inherent sovereignty, and was not a single identifiable group that historically governed itself or functioned as a single autonomous political entity.

186. When the half-blood community, known as Jamul Indian Village, was created and first recognized, it was not, and subsequently has never been an IRA tribe. More importantly, it was a landless entity. To date, no branch of the United States government has set aside or created an

Indian reservation or taken the government's portion of the cemetery into trust for the half-blood Indian community known as the Jamul Indian Village. The government's portion of the Indian cemetery was not acquired for any Indian tribe, and has never been recognized by any branch of the federal government as being land subject to the lawful exercise of any tribal governmental power, including the half-blood Indian community known as the Jamul Indian Village.

E. Listing of a Half-Blood Indian Community Does Not Create or Recognize an IRA Tribe

187. There is no "listing" of the JIV as a recognized IRA tribe in any of the three ways in which such recognition can be made: (1) Congress has not recognized the JIV, (2) the executive branch has not conducted the required review in the administrative procedures set forth in Part 83 of the C.F.R.,, and (3) there is no final decision on the merits by any U.S. court with jurisdiction to decide the merits of the JIV status. *Allen*, at 991-94; *Robinson* at 1024-26, citing *Shawnee*, at 547-48; *James*, at 1137; *Cherokee Nation*, at *2-3, *34, twice reversing the "listing" of a tribe, finding, as here, "the Delawares never formally petitioned for acknowledgment," and reversing the DOI's recognition as arbitrary, capricious and against the law for "failing to follow the Part 83 procedures for recognizing an Indian tribe."

188. While such "listing" was once held to "generally," but not always, constitute recognition as a tribe, see for e.g., *Larimer v. Konocti Vista Casino*, 814 F.Supp.2d 952, 955 (N.D. Cal. 2011) and *Ingrassia v. Chicken Ranch Bingo & Casino*, 676 F.Supp.2d 953, 957 (E.D. Cal. 2009), the decision upon which these cases rely, *Cherokee Nation of Okla. v. Norton*, 117 F.3d 1489, actually holds that the DOI's listing "cannot be dispositive of the sovereign immunity issue," *Id.*, 1499, and has twice been upheld by the Tenth Circuit. There, the Court of Appeal explicitly found that a listing on the *Federally Recognized Indian Tribe List Act of 1994* is not dispositive of tribal status. *Cherokee Nation* at *3-4, *34. There, as here, the DOI's "listing" of the Delaware Tribe was found to be arbitrary, capricious and against the law for "failing to follow the Part 83 procedures for recognizing an Indian tribe," where the Delawares "never formally petitioned for acknowledgment." There, as here, the purported tribe was also not an indispensable party because it was not a recognized tribe. *Id.*

189. Thus, contrary to the false public statements by the JIV, being "listed" pursuant to the *Federally Recognized Indian Tribe List Act of 1994*, does not necessarily mean that the "entity" is a federally recognized tribe or that the entity has any inherent sovereignty, because the list includes entities that are not tribes, have no inherent sovereignty, and only possess limited powers delegated by Congress, such as half-blood Indian communities. The "list used the term 'entities' in the preamble and elsewhere to refer to and include all the various anthropological organizations, such as bands, pueblos and villages," 60 F.R. 9250, see also 44 F.R. 7235, many of which are dependent Indian communities, and not tribes. *Alaska v. Native Village of Venetie Tribal Gov't.,* 522 U.S. 520 (1998); see for e.g., *Nisqually Ind. Tribe v.Gregoire*, 623 F.3d 923, 927 (9th Cir. 2010). In fact, the federal government has long conceded that the subsequent "wholesale listing of Alaska native entities" therein is strong evidence that not every entity "listed" is a recognized tribe. See, Judge Karlton's discussion at 16, in his April 23, 1992 Order granting the federal defendants' motion for summary judgment, *Ione Band of Miwok Indians v. Burris*, Civ. No. S-90-993 LKK (E.D. Cal. 1992), Ex. Y & Z.

190. The original "list" published by the BIA in 1978 did not list the Jamul Indian Village. 44 F.R. 7235. The original list also is more accurately titled "*Indian Tribal Entities that Have a Government-to-Government Relationship with the United States*," since "[t]he United States recognizes its trust responsibility to these Indian entities and, therefore, acknowledges their eligibility for programs administered by the Bureau of Indian Affairs." 44 F.R. 7235. JIV was not "listed" therein, until November 24, 1982, following its election to become a "half-blood dependent Indian community." 47 F.R. 53130-33.

191. Moreover, the 1995 preamble to the list continues to state: **"Inclusion on the list does not resolve the scope of powers of any particular tribe over land or non-members."** 60 F.R. 9251 (emphasis added). Hence, even the subsequent lists after 1994 by their own terms only include: "Indian Tribal Entities Within the Contiguous 48 States Recognized and Eligible to Receive Services From the Bureau of Indian Affairs." 60 F.R. 9250; compare the original 1979 listing of "tribal entities." 44 F.R. 7235. Being on the list says nothing about exercising governmental power over land, nor whether the entity was qualified to organize or reorganize as a tribe under the IRA. Here,

the JIV was only recognized to be a "half-blood dependent Indian community" in 1981, and is not, and never was, recognized as a tribe under federal jurisdiction in 1934, or thereafter.

192. Hence, the JIV's inclusion on this administrative list of entities and groups entitled to receive federal services is with the caveat that the JIV has never petitioned or received recognition as an IRA tribe from the executive branch of the United States under 25 CFR Part 83, and that Congress, as the legislative branch, has yet to recognize the JIV, and thus the United States has yet to lawfully exercise federal jurisdiction over any tribe, known as the JIV.

193. Therefore, any listing of the JIV's eligibility to receive federal monetary benefits, does not create, nor recognize the entity as an IRA tribe, and only acknowledges its existence as a half-blood dependent Indian community. Moreover, "[a]dministrative actions taken in violation of statutory authorization or requirement are of no effect." *City of Santa Clara v. Andrus*, 572 F.2d 660, 677 (9th Cir. 1978), citing *Utah Power & Light Co. v. United States*, 243 U.S. 389, 392 (1917), and "unauthorized agency action may be disregarded as null and void." See, e.g., *Employers Ins. Of Wassau v. Browner* , 52 F.3d 656, 665 (7th Cir. 1995); *N.L.R.B. Union v. Federal Labor Relations Auth.*, 834 F.2d 191, 196 n. 6 (D.C. Cir. 1987); *Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286, 293 (2d Cir. 2006).

F. The State Compact Does Not Create Nor Recognize an IRA Tribe, Nor Allow JIV to Exercise Governmental Power over any portion of the Jamul Indian Cemetery and Further Requires That Construction Be Enjoined Until the Compact is Amended

194. The fact that the JIV entered into a Compact with the State of California along with 65 other entities claiming to be tribes, on October 18, 1999, does not indicate, nor create, a recognized IRA tribe in any of those entities. Nor does it allow gambling on, or allow the JIV to exercise governmental power over, any specific parcel of land or any portion of the Jamul Indian Cemetery. The JIV Compact is silent as to the location of any proposed gambling site. http://www.cgcc.ca.gov/documents/compacts/original_compacts/Jamul_Compact.pdf. Similarly, JIV's Gaming Ordinances are also silent as the location of any proposed gambling site.

195. There was intense political pressure to execute these Compacts, and the State did not require that each Indian entity establish by a preponderance of the evidence that it had been lawfully

recognized by the United States, or that it lawfully exercised governmental power over any land proposed for Indian gambling. Instead the State accepted the entities' representations on faith, subject to disavowal if, as here, the representations turned out not to be true.

196. Moreover, the Ninth Circuit has specifically found that non-site-specific gaming ordinances and compacts, like JIV's, do not authorize gambling on any particular parcel of land, and only upon subsequent acquisition or identification of the parcel on which gambling is proposed, will the NIGC be required to determine whether the specific parcel of land qualifies for Indian gambling; until the specific parcel of land is identified upon which gambling is proposed there is nothing to approve or disapprove under 25 U.S.C. 2710(b)(1). *North Co. Community Alliance v. Salazar* 573 F.3d 738, 747 (9th Cir. 2009), "IGRA does not require a tribe to submit a site-specific proposed ordinance as a condition of approval by the NIGC under 2710(b)," and "the NIGC was not required in 1993, when it approved the Nooksacks' non-site-specific Ordinance to make an Indian lands determination for the parcel on which the Casino is located."

197. Hence, until construction of a casino was located on the portion of the Indian cemetery beneficially owned by the individual half-blood Indians, including Rosales and Toggery, in the NIGCs April 10, 2013 notice of intent to prepare a Supplemental Environmental Impact Statement, there was no Indian lands decision, and the Compact, like JIV's original gambling ordinances, was silent as to where any gambling facility was going to be constructed.

198. Because the State recognized that it was being asked to accept the 65 entities' representations on their face, in haste, and without any evidence or hearing to determine the true facts, the State made the enforceability of the Compact contingent upon the terms of Section 15.6 of the Compact, wherein each entity is limited to the facts as represented, many of which have subsequently been found, as here, not to be true. Therein the Compact further states: "In entering into this Compact, the State expressly relies upon the forgoing representations of the Tribe [that it is a federally recognized tribe with Indian land as defined by IGRA], and the State's entry into the Compact is expressly made contingent upon the truth of those representations as of the date of the Tribe's execution of this Compact." Hence, where the representations that the JIV is a federally recognized tribe with Indian

land as defined by IGRA have turned out not to be true, the JIV's Compact is expressly unenforceable and void *ab initio*.

199. Section 4.2 of the Compact further limits proposed gambling to only those lands authorized under IGRA: "The Tribe may establish and operate not more than two Gaming Facilities, and only on those Indian lands on which gaming may lawfully be conducted under the Indian Gaming Regulatory Act." Here also, since the JIV has no land over which it lawfully exercises governmental power, the Compact does not authorize any gambling on the government's portion of the Indian cemetery.

200. When on May 5, 2000, the DOI approved the 1999 JIV Compact, the DOI also expressly conditioned its approval as follows: "The terms of the Compact are approved only to the extent that they authorize gaming on 'Indian Lands' as defined by IGRA, now or hereafter acquired by the Tribe." Hence, neither the Compact, nor the JIV gaming ordinances, constitute any approval of gambling on the government's portion of the Indian cemetery beneficially owned by the individual half-blood Indians, nor do they constitute any Indian Lands decisions by the state government. There never was an Indian Lands decision, as to the government's portion of the Indian cemetery, until the NIGC issued its April 4, 2013 Notice of Intent to Prepare a Supplemental Environmental Impact Statement, which remains an abuse of discretion, arbitrary, capricious and against the law.

201. In further recognition of the haste in which the State was being asked to negotiate the 65 compacts, and the then proven inadequacy of Section 10.8, to protect the off-Reservation environment from significant adverse impacts, the State further protected the communities in the neighborhoods of the proposed gambling facilities by specifically providing that all construction of such gambling facilities shall cease, after the Governor calls for the amendment of Section 10.8 to further prevent significant adverse environmental effects from the construction and operation of a casino, until Section 10.8 was so amended.

202. Therein the Compact further provides in Section 10.8.3(b): "On or after January 1, 2003, but not later than March 1, 2003, the State may request negotiations for an amendment to this Section 10.8 on the ground that, as it presently reads, the section has proven to be inadequate to protect the

off-Reservation environment from significant adverse impacts resulting from Projects undertaken by the Tribe or to insure adequate mitigation by the Tribe of significant adverse off-Reservation impacts."

203. Section 10.8.3(c) of the Compact further provides: "If the State has requested negotiations pursuant to subdivision (b) but, as of January 1, 2005, there is neither an agreement nor an order against the State...then, on that date, the Tribe shall immediately cease construction and other activities on all projects then in progress that have the potential to cause adverse off-Reservation impacts, unless and until an agreement to amend this Section 10.8 has been concluded between the Tribe and the State."

204. As the JIV concedes in its *amicus* brief, AB 4:25, the portions of the Compact that survive the JIV's misrepresentations, are both federal law and a binding contract on the JIV. *Cuyler v. Adams*, 499 U.S. 433, 440 (1981); See also, *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997) and IGRA, 25 U.S.C. 2710(d)(1)(c) and (d)(3).

205. On February 28, 2003, Governor Davis served the state's notice triggering the amendment process of Section 10.8 on all of the 65 Compact tribes, including the JIV. *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, No. 04CV1151, 2008 WL 6136699, *3 (S. D. Cal. Apr. 29, 2008), *aff'd,* 602 F.3d 1019 (9th Cir. 2010). The JIV ignored the Governor's request and did not negotiate an amendment of Section 10.8. Nor did the JIV obtain a Court order against the state that it need not renegotiate Section 10.8 of the Compact with the State. California further failed to withdraw this request to renegotiate Section 10.8 prior to March 1, 2003, as conceded by the JIV. In the meantime, 13 of the now 73 Compact tribes negotiated amended compacts with the State. See, http://www.cgcc.ca.gov/?pageID=compacts. [21]

206. Therefore, on January 1, 2005 the JIV was required by the terms of the Compact to immediately cease construction and other activities on their proposed casino projects on the government's portion of the Indian cemetery unless and until JIV reaches an agreement with the

[21] Thus, after Gov. Davis was recalled, his later attempt to withdraw his demand to renegotiate Section 10.8 on his way out of office in November of 2003, was too late to prevent the agreed upon January 1, 2005 injunction of all casino construction projects without an amended compact.

State to amend this Section 10.8, and until JIV establishes a preponderance of evidence that JIV lawfully has exhausted its administrative remedies and demonstrated pursuant to the Part 83 regulations that it was under federal jurisdiction as of June 18, 1934, and has lawfully been permitted to exercise governmental power over the government's portion of the Indian cemetery. None of which has yet been established.

G. Because the IRA Bars Transfer of the Government's Portion of the Indian Cemetery to the JIV, the JIV has Never Lawfully Exercised Governmental Power over that parcel.

(1) The Individual Half-Blood's Beneficial Ownership of their Families' Final Resting Place Was: Never Transferred to the JIV, Never Taken into Trust for the JIV, and JIV Has Never Exercised Governmental Power over that Cemetery Property.

207. The Jamul Indians of one-half degree or more Indian blood, including Rosales and Toggery, have never attempted to transfer, nor lawfully transferred, their individual beneficial interest in the government's portion of the cemetery property to the JIV, because such a transfer is barred by the IRA, as confirmed in *Carcieri*. Moreover, the JIV never applied to have that portion of the cemetery taken into trust for the JIV, nor has the DOI Secretary taken that portion of the cemetery into trust for the JIV, and the JIV has never exercised governmental power over that portion of the cemetery.

208. Just as the JIV never applied for, or obtained, recognition as an IRA tribe under 25 C.F.R. 83 et seq., or applied for, or had a reservation proclaimed under 25 U.S.C. 467, the JIV has never applied for, or acquired, the government's portion of the Indian cemetery to be taken into trust under 25 C.F.R. 151 et seq.[22] *City of Shakopee v. United States*, 1997 U.S. Dist. LEXIS 2202, *19-20 (D. Minn. 1997). There still must be: (1) a formal application to have land taken into trust, (2) findings by the Secretary either denying the application or intending to take the land into trust, (3) a notice of appeal rights to all interested parties, including state and local governments, (4) an opportunity for administrative appeal, (5) a notice of final agency decision published in the Federal Register or newspaper of general circulation for 30 days, and (6) the opportunity for review in the appropriate

[22] 25 C.F.R. 151.3, provides: "No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary."

federal district court under 25 C.F.R. 151.12(b). *City of Shakopee v. United States*, 1997 U.S. Dist. LEXIS 2202, *19-20 (D. Minn. 1997). None of the six required procedures have occurred here.

209. This is confirmed by the absence of any grant deed purporting to make such a transfer. Just as the IRA bars the government from taking the portion of the Indian cemetery into trust for the JIV, the IRA also bars the individual Indians of one-half degree or more Indian blood living in Jamul that have been designated the beneficial owners of that parcel, from lawfully transferring their beneficial interest and trust status to the JIV, since it was not under federal jurisdiction in June of 1934. *Carcieri* at 382-3. Thus, the government's portion of the Indian cemetery held in trust for the individual half-blood Indians in Jamul has never been transferred to the JIV, and the JIV has never lawfully exercised governmental power over that portion of the Indian cemetery.

210. This is further confirmed by the United States Department of Interior, Bureau of Indian Affairs, August 3, 2000 response to a Freedom of Information Act (FOIA) request, confirms that the "current trust parcel was accepted into trust in 1978 for Jamul Indians of ½ degree (4.66 acres)," and that there is "no record of the 1978 trust parcel being known as the Jamul Village," as reflected in Ex. F. This is consistent with the half-blood community's constitution, Article II, Territory, which does not identify the 4.66 acre cemetery parcel, as within the territory of the Jamul Indian Village. Ex. G. It is also consistent with Governor Arnold Schwarzenegger's Legal Affairs Secretary's letters of August 29, 2005 and December 20, 2005 to the Jamul Indian Village in Ex. N.

211. This is further confirmed by the fact that during 1996 a faction of individuals, who were not all Jamul Indians of one-half degree of Indian blood, claims to have admitted Jamul Indians, who were only one-quarter Indian blood, as members of the community, and now comprise more than a majority of the members of the community. Thus, the JIV is further legally precluded by the 1978 grant deed from claiming any beneficial ownership interest in the cemetery parcel, since JIV now claims to be comprised of a majority of members who are, admittedly, not one-half degree or more of Indian blood.

212. The JIV therefore has never had jurisdiction over, nor lawfully exercised governmental power over the cemetery parcel, and there has never been a transfer of the parcel to the subsequently

organized half-blood community, nor has the Secretary of the Interior ever lawfully designated the subsequently organized half-blood community to be a beneficiary of the grant deed for the cemetery property, nor has the Secretary ever taken that portion of the cemetery property into trust for the JIV.

(2) The U.S. Never Transferred the Beneficial Ownership of the Cemetery Property from the Individual Indians to the Half-Blood Community

213. Where, as here, no subsequent grant deed for the cemetery parcel was ever recorded, the individual beneficial ownership of the trust property was not, as a matter of law, transferred to any subsequently recognized half-blood community, including the JIV. *Coast*, 550 F.2d 639, 651; *United States v. Assiniboine Tribe* ("*Assiniboine*"), 428 F.2d 1324, 1329-30 (Fed. Cl. 1970); *United States v. State Tax Comm.*, 535 F.2d 300, 304 (5th Cir. 1976); and *Opinions of the Solicitor* at 668, 724, 747, and 1479; Exhibit H.

214. The U.S. has no evidence that the subsequently created half-blood community, known as the "Jamul Indian Village," was ever designated as the beneficiary of the cemetery parcel, nor that any grant deed ever transferred the cemetery property to the half-blood community. In fact, the only evidence is that the Secretary of the Interior designated the individual "Jamul Indians of one-half or more Indian blood" to be the beneficiaries of the cemetery property, by allowing them to reside upon the California trust land for 28 years, just as occurred in *Coast*, 550 F.2d at 651, n32; Ex. F.

215. Since Congress never granted the half-blood community known as the Jamul Indian Village "jurisdiction" over the cemetery parcel to which the U.S. holds title, the express beneficiaries of the deed to the United States for the cemetery parcel were, and still are, the individual half-blood Jamul Indians who were allowed to reside on the property since 1978, and not the half-blood community that was subsequently recognized by an acting deputy assistant secretary of the BIA in 1982. *United States v. Sandoval* (1913) 231 U.S. 28, 46, citing *United States v. Holliday*, 70 U.S. 407, 418 (1865); see also, *Kansas v. Norton*, 249 F.3d 1213, 1229-31 (10th Cir. 2001).

216. Thus, the government is estopped to deny, that the "only possible" beneficial owners of the cemetery property and designation that exists in the 1978 grant deed, as a matter of law, is that the cemetery parcel was taken in trust for the "individual" "Jamul Indians of one-half degree or more

Indian blood," as was held in *Coast*, 550 F.2d at 651, n32, *Assiniboine*, 428 F.2d 1324, 1329-30 and *State Tax Comm.*, 535 F2d. at 304, and acknowledged by the Supreme Court in *Carcieri* at 382-83, 388-90, 394-95, 398-99.

217. The Government further admits that it failed to follow its own guidelines for recording a grant deed to a subsequently recognized half-blood community, and therefore the existing grant deed for the cemetery parcel, as a matter of law, only created a beneficial interest in the individual Jamul Indians of one-half degree or more Indian blood. *Opinions of the Solicitor*, at 668, 724, 747, and 1479; Exhibit H. There, the Solicitor of the Interior specifically advised the field personnel of the BIA that any transfer of the individual Indians' designated beneficial interest to any subsequently recognized tribe, must still be accomplished the old fashioned way by recording a grant deed.

218. Here, no grant deed ever transferred the individual Indians' designated beneficial interest in the cemetery parcel to any tribe. Following the recording of the original 1978 grant deed there is no subsequent record of any transfer of the parcel from the United States' trust on behalf of the individual half-blood Jamul Indians designated by the Secretary to the JIV.

219. The U.S. is estopped to deny that its own *Handbook of Federal Indian Law*, (DOI 1982) Ch. 11, B3, pp. 615-16, and (DOI 2005) §16.03, p. 883, concedes that all individual designated beneficiaries are cotenants in the trust land held by the U.S., and have equal rights to possession of the property, and no single cotenant has the right to exclude any other cotenant from the property. Cal. Civil Code 685-86; *Zaslow v. Kroenert*, 29 Cal.2d 541, 548 (1946). Therefore, all of the individual cotenants must consent to any transfer of their individual beneficiaries' designation to a subsequently recognized "tribe," before the subsequently recognized "tribe" may lawfully be designated as the beneficiary and acquire "jurisdiction" over the cemetery parcel. *Id.*

220. Here, Rosales and Toggery have not consented to any transfer of their beneficial interest in the cemetery parcel. Nor is there evidence of any such consent by any, let alone all, of the individual Indian co-tenants to transfer their beneficial interest in the cemetery parcel. Quite simply, the government never recorded a subsequent grant deed, transferring the individual Indian beneficiaries' interest in the cemetery parcel to the half-blood community known as Jamul Indian Village.

221. Here, it is no wonder that the "Jamul Indians of one-half degree or more Indian blood" have never consented to transfer their individual designation as beneficial owners to any subsequently created half-blood community, since the Interior Board of Indian Appeals found non-members participating in the half-blood Indian community, perhaps from the time the entity was first created in 1982. 32 IBIA 166.

222. The government's *Handbook of Federal Indian Law* further explains the significant distinction between (1) taking land into trust for "individual" Indians, before they are allowed to become a half-blood community under the IRA, as here, and (2) recognizing a landless half-blood community and requiring the Secretary to transfer the land in trust from the individual Indians, with their consent, to the half-blood community, after it was recognized. *Id.*, (DOI 2005) §3.02, p. 135. Here, after the half-blood community was finally recognized in 1982, the government never obtained the consent of the individual Indians to transfer the cemetery parcel into trust for the half-blood community. Nor did the government ever convey title to the cemetery parcel in trust for the half-blood community known as the JIV.

223. For example, the DOI Solicitor's Memorandum concerning the St. Croix Chippewas, *Opinions of the Solicitor*, at 724, Ex. H, cited by both the *Handbook*, (DOI 2005) § 3.02, 146 (n99) Footnote 105, and Justices Breyers at 398-99, and Stevens, at 407, in *Carcieri*, confirms that where the grant deed, Ex. D, fails to contain the final phrase, "until such time as they organize under section 16 of the [IRA] and then for the benefit of such organization," the property remains in trust for the individual Indians, who have never decided to transfer their beneficial interest to any subsequently recognized half-blood community.

224. This is exactly what happened here. The original grant deed, Ex. D, did not contain the phrase transferring the beneficial interest in the property to the subsequently recognized half-blood community known as the JIV. It is undisputed that the half-blood Indian community did not exist and was not under federal jurisdiction in 1934, and was not organized until 1982. The half-blood community known as the JIV still has not been recognized by Congress, has not completed the

administrative remedies to become recognized under the Part 83 regulations, and has not been finally determined to be a recognized tribe by any court.

225. There is also no dispute that the Government failed to follow its own guidelines in recording the grant deed. *Opinions of the Solicitor* at 668, 724, 747, and 1479, attached in Ex. H. Hence, for there to be any subsequent transfer of the individual Jamul Indians' designated beneficial interest in the cemetery parcel to any subsequently recognized half-blood community, such a transfer must still be accomplished the old fashioned way by recording a grant deed. Here, no grant deed ever transferred the individual Indians' designated beneficial interest in the government's portion of the cemetery parcel to the half-blood community known as the JIV.

226. These Solicitors' memoranda also admit that the 1978 trust acquisition cannot be made for a half-blood community that did not then exist. For example, with regard to the Mississippi Choctaw, the Solicitor found that a grant deed simply cannot "designate" a community that doesn't exist as a beneficiary, since "there is in fact no existing tribe of Indians in Mississippi known as the Choctaw Tribe." *Opinions of the Solicitor*, at 668, Ex.H. There, Solicitor Margold describes how the grant deed should have been prepared to put the property in trust for the Mississippi Choctaws: "The United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior, **until such time as the Choctaw Indians of Mississippi shall be organized as an Indian tribe** pursuant to the act of June 18, 1934 (48 Stat. 984), and **then in trust for such organized tribe**." *Opinions of the Solicitor*, at 668 (emphasis added), Ex. H. Similarly here, no such language appears in the 1978 Jamul grant deed. Ex. D.

227. There, the individual Choctaws had to consent and the deed had to be amended and re-recorded to designate any subsequently recognized community a beneficiary. Since the deed did not contain the words: **"until such time as the Choctaw Indians of Mississippi shall be organized as an Indian tribe**" or "**then in trust for such organized tribe**," the property remained in trust for the individual Indians, and not a tribe, as held in *Coast*, 550 F.2d at 651, and *State Tax Comm.*, 535 F.2d 300, 304, where the court held that the absence of the words "then in trust for such organized tribe" in a relief act designating individual Choctaw beneficiaries meant that "only those individuals

designated by the Interior Secretary were to have the benefit of this" designation, since "[n]either a tribe nor a reservation is mentioned."

228. The government's own Solicitor's written instructions to its BIA field superintendents states: "In all of those cases where the title papers have already been returned to the field, instructions should be given to the field agents to have the deeds corrected before they are recorded. In that case where the deed has already been recorded and accepted, it will be necessary to secure a new deed. The necessary corrections will be made in the other cases which are now pending in this office. The error...arises perhaps out of unusual circumstances, but its one that might have been avoided." *Opinions of the Solicitor*, at 668, Ex.H.

229. Here, the consent of the individual half-blood Jamul Indians, including Rosales and Toggery, has never been obtained, and the original deed has never been changed, altered, or re-recorded. The 1978 grant deed does not contain the words, "until such time as they organize," proscribed by the U.S. Solicitor to put the property into trust for a subsequently recognized half-blood community, after it was organized. Ex. D. Nor does it state: "and then in trust for such organized tribe." Moreover, it is undisputed that there was no transfer of the designation of the individual Indian beneficiaries to any subsequently recognized half-blood community, since no subsequent grant deed has ever been recorded.

230. Therefore, as a matter of law, the government Defendants are estopped by its own Solicitor's memoranda and the failure to record any subsequent grant deed transferring the government's portion of the Indian cemetery to deny that it is still held in trust for the designated individual half-blood Jamul Indian beneficiaries, since the government concedes that the "Jamul Indians of one-half degree or more Indian blood,"did not exist as a tribe, and were not recognized as a tribe in 1978, let alone in 1934. *Opinions of the Solicitor* at 668, 724, 747, 1479, Ex. H, and Ex. I.

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(3) JIV Has No Right, Permit or Authorization to Build a Casino on the portion of the Indian Cemetery Beneficially Owned by Individual half-blood Indians and Under the Concurrent Jurisdiction of California, Because No Grant Deed Ever Transferred Governmental Control over the Cemetery Property to JIV

231. Since there was never a subsequent transfer of the individual Indians' beneficial interest in the cemetery parcel to the subsequently organized half-blood community, the individual beneficial ownership of the cemetery parcel has never been under the governmental power of the Jamul Indian Village, and as such, is federal private property, not tribal lands, and does not qualify for gambling under 25 U.S.C. 2703, remains subject to California's concurrent jurisdiction and law, including, but not limited to, Public Law 83-280, Cal. Pub. Res. Code and Cal. Health & Safety Codes, CEQA and NAGPRA, 25 U.S.C. 3002, as further required by 25 C.F.R. 1.4(b), and the DOI July 2, 1965 Secretarial Order, 30 F.R. 8722, and remains in trust for the beneficial use and quiet enjoyment of the individuals of one-half or more degree of Indian blood, including Rosales and Toggery, who then resided on the property.

232. Therefore, since the government and the individual half-blood Indians living in Jamul are barred from lawfully transferring their beneficial interest and trust status to the JIV, and since the JIV was not under federal jurisdiction in June of 1934, the JIV has never lawfully exercised governmental power over the parcel, which thereby precludes the parcel from qualifying for gambling under IGRA, since IGRA only permits gambling on "Indian lands," "over which an Indian tribe exercises governmental power." 25 U.S.C. 2703(4)(B). "The Secretaries of the Interior [and the NIGC] have no authority to permit gaming on after acquired trust lands absent the power delegated by Congress in IGRA." *La Courte Oreilles Band of Lake Superior Chippoewa Indians v. United States,* 367 F.3d 650, 657 (7th Cir. 2004).

233. Since the government's portion of the Indian cemetery was never transferred to the JIV and remains within the concurrent jurisdiction of the State of California today, and was never reserved from the public or private domain, California retains State and local police power over the cemetery

pursuant to the 10th Amendment of the U.S. Constitution and Pub. Law 280, 18 U.S.C. 1162 and 28 U.S.C. 1360.

234. Thus, the Cal. Pub. Res., and Health & Safety Codes, concurrently govern the use of the Jamul Indian cemetery, pursuant to 25 C.F.R. 1.4(b), and the DOI July 2, 1965 Secretarial Order, 30 F.R. 8722, along with the federal NAGPRA, 25 U.S.C. 3001 et seq., which defines the portion of the cemetery in which the U.S. holds title, as "Federal lands other than tribal lands which are controlled or owned by the United States." 25 U.S.C. 3001(5) and 43 C.F.R. 10.2(f)(1) and 10.4(d).

3. JIV has No Standing as a Required or Indispensable Party or an *amicus curiae,* Because it has Failed to Exhaust its Administrative Remedies and is Not a Recognized IRA Tribe

A. JIV Failed to Petition for Recognition as an IRA Tribe

235. The federal government admits that the JIV never petitioned under the Part 83 regulations to be recognized as an IRA "tribe," before it attempted to utilize the IRA to adopt its constitution as a "half-blood dependent Indian community" to obtain federal benefits. Ex. I. Having failed to petition for recognition as an I.R.A. tribe, the JIV has no standing to seek to have its status determined in this action, because it has failed to exhaust its administrative remedies to lawfully obtain recognition as an IRA tribe. *Nisqually Indian Tribe v. Gregoire* (*"Nisqually"*) 623 F.3d 923, 927 (9th Cir. 2010); *White Mountain Apache Tribe v. Hodel* (*White Mountain Apache Tribe*), 840 F.2d 675, 677 (9th Cir. 1988); *Allen v. United States*, 871 F.Supp.2d 982, 991-93 (N.D. Cal. 2012) "'[F]ederal courts may not assert jurisdiction to review agency action until the administrative appeals are complete,' [citing] *White Mountain Apache Tribe*;" *Cherokee Nation of Okla. v. Norton*, 2005 U.S. Dist. LEXIS 2773, *3-4, *34 (10th Cir. 2005), reversing the "listing" of the Delaware Tribe, because it "never formally petitioned for acknowledgment, and reversing the DOI's recognition as arbitrary, capricious and against the law for failing to follow the Part 83 procedures for recognizing an Indian tribe;" *Butte Co. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010), DOI's arbitrary and capricious refusal to consider evidence why Tribe's land was not Indian lands remanded to exhaust administrative remedies; *Sandy Lake Band of Miss. Chippewa ("Sandy Lake") v. United States*, 2012 U.S. Dist. LEXIS 63458, *10 (D. Minn. 2012) dismissing plaintiffs' action for lack of subject matter

jurisdiction and failure to engage in the Federal acknowledgment process and failing to exhaust administrative remedies; and *United Houma Nation v. Babbit*, 1996 U.S. Dist. LEXIS 16437, *4, *8 (D.D.C. 1996), denying an injunction to freeze the administrative review process, where the group "failed to satisfy the historic criterion of 25 C.F.R. 83.7(e), and related provisions of 25 C.F.R. 83.7(a) and (b)."

236. See also, *Ione Band of Miwok Indians v. Burris*, Civ. S-90-993 LKK, (E. D. Cal. 1996), Exs. Y & Z, granting the governmental defendants summary judgment, finding "the Ione Band did not pursue the administrative federal recognition process," and "Plaintiffs' failure to apply for recognition through the administrative process described in the acknowledgment regulations bars their claims because there is no final agency action yet ripe for review," citing *White Mountain Apache Tribe*, and *James v. HHS*, 824 F.2d 1132 (D.C. Cir. 1987), dismissing plaintiffs' claims for lack of jurisdiction and failure to exhaust administrative remedies under 25 C.F.R. 83, which was followed most recently by *Mackinac Tribe v. Jewell*, 1:14-cv-0456 KBJ, Document 19, 25-28 of 29 (D.D.C. March 31, 2015); *David Laughing Horse Robinson v. Salazar*, 885 F.Supp.2d 1002, 1031-32 (E.D. Cal. 2012), finding the Court had no jurisdiction to determine "whether the Kawaiisu are the present day embodiment of the alleged historical tribe," because to do so "would infringe upon the role committed to the other two branches and violate separation of powers," where plaintiffs failed to exhaust administrative remedies for acknowledgment under 25 C.F.R. 83, citing *Shinnecock Ind. Nat. v. Kempthorne*, 2008 WL 4455599, *1 (E.D.N.Y. 2008), finding such a "quintessentially political decision must be left to the political branches of government and not the courts."

237. In *Allen*, the Ukiah Valley Pomo Indians were not a federally recognized tribe. They sought to organize under the IRA, but the court found that "before plaintiffs can invoke the provisions of the IRA, they must first complete acknowledgment proceedings before the BIA and become federally recognized." 871 F.Supp.2d 982, 991. Since "the IRA provides a definition of the term 'tribe,' ...as the government contends...recognition as a 'tribe' is a prerequisite to invoking the provisions of the IRA....the group seeking to organize must make a 'prima facie' showing that they are a 'tribe' within the meaning of the IRA," and not just a half-blood Indian community. *Id.*, at 991-92.

238. Here, the the government concedes that the JIV voluntarily elected not to make such a prima facie showing and did not petition for recognition as an IRA tribe, and merely sought recognition as a "half-blood dependent Indian community," even though they were fully "aware of the limitations that result from organizing as a half-blood Indian community." Ex. I at 2. The JIV half-blood Indian community has never initiated or completed an application to be formally recognized as an IRA tribe under 25 C.F.R. Part 83. Therefore, JIV, like the Ukiah Pomos, Franks Landing Indian Community and the Sandy Lake Band, never became a federally recognized tribe, even though they have been recognized as a half-blood dependent Indian community, and have been "listed" on the Tribal Entities that have a Government-to-Government Relationship with the United States. 44 F.R. 7235, as noted above.

239. Hence, not only does the executive branch "listing" of the JIV as an entity entitled to limited federal benefits not constitute recognition of the JIV as a tribe under the IRA, but the executive branch is not authorized to create a tribe by recognizing JIV as a tribe without JIV exhausting the administrative acknowledgment procedures in compliance with the government's Part 83 regulations. *James v. HHS* 824 F.2d 1132, 1139 (D.C. Cir. 1987); *David Laughing Horse Robinson v. Salazar*, 885 F.Supp.2d 1002, 1031-32 (E.D. Cal. 2012); *Shinnecock Ind. Nat. v. Kempthorne*, 2008 WL 4455599, *1 (E.D.N.Y. 2008).

240. As noted above, the Supreme Court "has long made clear that Congress and therefore the Secretary-lacks constitutional authority to 'bring a community or body of people within [federal jurisdiction] by arbitrarily calling them an Indian tribe'." *Carcieri* at 413, J. Stevens, dissenting, citing *United States v. Sandoval*, 231 U.S. 28, 46 (1913).

241. [I]n respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts. *Id.*, 47.

242. A tribe cannot establish jurisdiction through its unilateral actions. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203, 219-20 (2005). "Where no expression of congressional intent or purpose exists, a tribe cannot establish jurisdiction through its unilateral actions." *Citizens Against Casino Gambling in Erie Co. v. Stevens*, 945 F.Supp. 2d 391, 401 (W.D.N.Y. 2013), landless

Kialagee Tribal Town did not obtain jurisdiction over a restricted allotment owned by members of the Muscogee Nation through unilateral act of leasing the land.

243. Having failed to petition for recognition as an I.R.A. tribe under the Part 83 regulations, the JIV therefore has no standing to appear as *amicus curiae*, or otherwise in this action.

B. JIV Failed to Petition for Proclamation of a Reservation

244. There is no dispute that the JIV has never applied for, nor had proclaimed, a reservation under 25 U.S.C 467. Moreover, the JIV has never been qualified to be "organized" or "reorganized" as a "tribe," under the Indian Reorganization Act, since it has never resided on a reservation. *Coast Indian Community v. U.S.* ("*Coast*"), 550 F.2d 639 (Fed. Cl. 1977), 550 F2.d 639, 651, n. 32; *Handbook of Federal Indian Law*, Ch.1, Sec. B2e, at 15-16 (1982 Ed.), citing *Maynor v. Morton*, 509 F.2d 1254 (D.C. Cir. 1975); Ex. I, at 3.

245. Neither Congress, nor the Secretary of the Interior under the delegated power of 25 U.S.C. 467, ever proclaimed an Indian reservation in Jamul, since Congress specifically limited California to four Indian reservations in 1864, pursuant to The Four Reservations Act § 2, ch. 48, 13 Stat. 39, 40. *Mattz v. Arnett*, 412 U.S. 481, 489-91 (1973). These four reservations, the Round Valley, the Mission, the Hoopa Valley, and the Tule River, do not include one for the JIV. Moreover, the government has conceded that the Mission Reservation's 19 tracts in So. California did not include any land in Jamul, California, nor even mention any tribe in Jamul. See, *Mattz v. Arnett*, 412 U.S. 481, 493, n. 15, 494 (1973).

246. Moreover, the dedication of the government's portion of the cemetery to cemetery use also confirms that it is not a reservation. *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1268 (10th Cir. 2001), *cert. denied*, 534 U.S. 1078 (2002), "Although the Huron Cemetery was reserved by the federal government in the 1855 treaty, it is uncontroverted that the reservation was made strictly for purposes of preserving the tract's status as a burial ground. For these reasons, we conclude the Secretary's determination that the Huron Cemetery is a "reservation" for purposes of IGRA, and his resulting determination that the Shriner Tract can be used by the Wyandotte Tribe for gaming purposes under the IGRA (25 U.S.C. 2719(a)(1)), was incorrect;" *Mechoopda Indian Tribe of Chico*

Rancheria v. Schwarzenegger, 2004 WL 1103021, *12 (E.D. Cal. 2004), finding "It is hard to believe that the Tribe really wants to negotiate to build a gambling casino on their burial ground, but that is what they argue...[However] the Tribe can prove no set of facts establishing that it has Indian land eligible for a gaming facility under the IGRA," due to the use restriction on the cemetery parcel.

247. An Indian tribe's jurisdiction and authority to exercise governmental power over particular property derives from the will of Congress. *United States v. Sandoval* 231 U.S. 28, 46 (1913), citing *United States v. Holliday*, 18 L.Ed. 182, 186; see also, *Kansas v. Norton*, 249 F.3d 1213, 1229-31 (10th Cir. 2001). Here, since Congress never granted the JIV "jurisdiction" over the portion of the cemetery to which the U.S. holds title, and has never created a reservation for the JIV, the express beneficiaries of the grant deed were and still are, the individual half-blood Jamul Indians who were allowed to reside on the property since 1978, including Rosales and Toggery, and not the half-blood Indian community, known as the JIV.

248. At one time, "[a]n Indian reserveration...may be set apart by an act of Congress, by treaty, or by executive order." *Peters v. Pauma School Dist.*, 91 Cal.App. 792, 794 (1928), holding, "the

249.facts set forth in the findings do not establish that petitioner resides upon an Indian reservation." However, However, at no time has Congress, a treaty, or an executive order, created a reservation for the JIV.

250. A reservation cannot be established by "custom or prescription." *Id.*, citing 31 Corpus Juris, 499. "The fact that a particular tribe or band of Indians have for a long time occupied a particular tract of country does not constitute such tract an Indian reservation." *Peters,* at 794, quoting the *Matter of Forty-Three Cases Cognac Brandy*, 14 F. 539 (D.Minn. 1882).

251. Here, not only is there no act of Congress, treaty, or executive order, creating a reservation in Jamul, there is no administrative Secretarial "proclamation" or "application for a proclamation" of any reservation over non-public domain land in Jamul, as required by 25 U.S.C. 467, as a matter of law. *Peters v. Pauma School Dist.*, 91 Cal.App. 792, 794 (1928); *Citizens Exposing Truth About Casinos v. Kempthorne,* 492 F.3d 460, 469 (D.C. Cir. 2007), "the Sackrider property would not qualify as a reservation until the Band applied for and obtained a reservation proclamation under 25

U.S.C. 467;" *Donahue v. Butz*, 363 F.Supp. 1316, 1323 (N.D. Cal. 1973), finding executive officials have no "trust responsibility, right or duty to set aside reservation lands."

252. Here, just as with the JIV's express election not to exhaust its administrative remedies and to forgo applying for recognition as an IRA tribe under the Part 83 regulations, the JIV has similarly failed to apply for a proclamation of any reservation under 25 U.S.C. 467, and neither the Congress, nor the Secretary of the DOI, has proclaimed any reservation for the JIV.

253. "During the 1850's, the modern meaning of Indian reservation emerged, referring to land set aside under federal protection for the residence or use of tribal Indians, regardless of origin...This definition of the term 'reservation' has since been generally used and accepted." *Handbook of Federal Indian Law*, §3.04[c][ii] p. 165 (DOI 2005). However, the creation of a reservation still requires there to be "tribal" Indians of a federally recognized tribe, which JIV is not, and an act of Congress to lawfully create or authorize setting aside such a reservation, and it can no longer be created by the mere acceptance of a grant deed under the IRA. *Id.*; 43 U.S.C. 150; see for example, *Sac & Fox Tribe of the Mississippi in Iowa v. Licklider*, 576 F.2d 145, 149-50 (8th Cir. 1978), creation of any reservation still required the property to be beneficially held for a federally recognized treaty tribe, the Sac & Fox Tribe of the Mississippi in Iowa.

254. The government's regulations for Indian land acquisitions further defines and limits a reservation to: "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction." 25 C.F.R. 151.2(f) (45 F.R. 62036, Sept. 18, 1980). Therefore here, the government's portion of the Indian cemetery is not a reservation, since the JIV has never applied for, and has yet to be recognized by the United States as having, governmental jurisdiction over any portion of the Indian cemetery.

255. Though the Executive Branch once had its own authority to withdraw public lands to create Indian reservations, which the Supreme Court had previously affirmed in *U.S. v. Midwest Oil Co.*, 236 U.S. 459 (1915), and acknowledged in *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902), Congress explicitly eliminated that authority in 1919. 43 U.S.C. 150: "No public lands of the United States shall be withdrawn by Executive Order, proclamation or otherwise, for or as an Indian

reservation except by act of Congress." (June 30, 1919, ch. 4, §27, 41 Stat. 34.); *Handbook of Federal Indian Law*, §1.04, p. 81, n498 (DOI 2005).

256. The Government's *Handbook of Federal Indian Law* (DOI 1982) declares: "Any implication that lands purchased [or acquired] for tribes under section 5 of the IRA [25 U.S.C. 465] would constitute a reservation is negated by section 7 of that Act, 25 U.S.C. 467..." Ch. 1, Sec. D5, page 45, fn. 158. Thus, the Government's mere acquisition of the land in trust for the benefit of half-blood individual Jamul Indians did not create a reservation. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), acquisition of federal forest lands under the IRA did not create, nor become part of, a reservation; *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1257 (10th Cir. 2001); *Wisconsin v. Stockbridge-Munsee Community* 67 F.Supp. 2d 990, 1003 (E.D. Wis. 1999), granting preliminary injunction prohibiting Defendants from conducting Class III games on trust land not within any reservation.

C. JIV Has Failed to Exhaust its Administrative Remedies, and Has No Standing To Seek a Determination as to Whether It Qualifies to be Recognized as an IRA Tribe

257. JIV is barred from seeking JIV's status from the court, because JIV has failed to exhaust its administrative remedies to lawfully obtain federal recognition as an IRA tribe. Therefore, JIV has no standing as either a necessary or indispensable party, nor by way of an *amicus curiae*, or otherwise.

258. Thus, the Court must await JIV's completion of the formal application for recognition under the Part 83 administrative procedure, which JIV hasn't even commenced, before the Court will have jurisdiction to decide whether the JIV has been lawfully recognized by the federal government. *James v. HHS* 824 F.2d 1132, 1139 (D.C. Cir. 1987).

259. In the meantime, JIV has no standing in this action, since it is neither a required nor an indispensable party to this action. *Michigan v. Bay Mills Ind. Cmty.("Bay Mills"),*134 S.Ct. 2024, 2035 (2014); *Salt River Project Agric. Imp. & Power Dist. v. Headwaters Resources Inc.*, 672 F.3d 1176, 1177 (9th Cir. 2012), finding "the tribe is not a necessary party because the tribal officials can be expected to adequately represent the tribe's interests in this action and because complete relief

can be accorded among the existing parties without the tribe;" *Thomas v. United States*, 189 F.3d 662, 664 (7th Cir. 1999), which specifically holds that the Lac Courte Orielles Band of Lake Superior Chippewa Indians was not a required or indispensable party to an action alleging that the federal defendants had failed to follow the administrative procedures for Secretarial elections.

260. For example, "[W]hether the Kawaiisu are entitled to such acknowledgment is a non-justiciable political question and thus beyond the purview of the court...This court's determination of whether the Kawaiisu are the present day embodiment of the alleged historical tribe, would infringe upon the role committed to the other two branches and violate separation of powers...Here, the proper resolution of the claim is to proceed first through the administrative process because recognition is the issue. Recognition requires the DOI's special expertise to determine tribal status...the plaintiffs claim would be dismissed for failure to exhaust administrative remedies because those remedies have not been exhausted." *David Laughing Horse Robinson v. Salazar*, 885 F.Supp.2d 1002, 1031-32 (E.D. Cal. 2012).

261. "The key distinction is that the land claims may be justiciable, but the tribal status is not....it is undisputed that the Kawaiisu has never been recognized under the DOI/BIA's acknowledgment regulations, the executive-not the courts-must make the recognition determination...Where tribal status is at issue, the issue requires exhaustion of administrative remedies." *Id.*, 1032-33.

262. "[T]he court concludes that the district court was correct in ruling that appellants were required to exhaust administrative channels concerning the issue of tribal recognition prior to seeking judicial review." *James v. HHS* 824 F.2d 1132, 1139 (D.C. Cir. 1987), and followed by *Mackinac Tribe v. Jewell*, 1:14-cv-0456 KBJ, Document 19, 25-28 of 29 (D.D.C. March 31, 2015). "In this case, requiring exhaustion of the Department of the Interior's procedures for tribal recognition, before permitting judicial involvement, serves the purposes of the exhaustion doctrine." *Id.*, at 1137, citing *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 50-51 (1938). "[R]equiring exhaustion allows the Department of the Interior the opportunity to apply its developed expertise in the areas of tribal recognition. The Department of the Interior's Branch of Acknowledgment and Research was established for determining whether groups seeking tribal recognition actually constitute Indian tribes and presumably to determine which tribes have previously obtained federal recognition. See,

25 C.F.R. 83.6(b)...It is apparent that the agency should be given the opportunity to apply its expertise prior to judicial involvement." *Id.*, at 1138, citing *Runs After v. United States*, 766 F.2d 347, 351-52 (8th Cir. 1985).

263. In *Shinnecock Ind. Nat. v. Kempthorne*, 2008 WL 4455599, *1 (E.D.N.Y. 2008) the court dismissed the recognition claims as a matter of law finding: "The issue of federal recognition of an Indian tribe is a quintessential political question that, in the first instance, must be left to the political branches of government and not to the courts." "As *James* and *Shawnee* demonstrate, historical recognition by the Executive Branch does not allow... an entity to completely bypass the BIA's recognition process." *Id.,* 1034.

264. Hence, the JIV has no lawfully recognized sovereignty, and exercises no lawful governmental power over any land that qualifies for Indian gambling. Thus, it has no protectable interest justifying participation in this action, nor can it be an indispensable party, since the executive council members have been named as Defendants and can adequately represent the JIV's alleged interests, as held in *Michigan v. Bay Mills Indian Community,* 134 S.Ct. 2024 (2014)*, Thomas v. United States*, 189 F.3d 662, 664 (7th Cir. 1999), and *Salt River*, *supra*, at 1177. Here, just as in *Thomas*, the JIV has been "trying to leverage its failure to follow the prescribed statutory procedures into an unreviewable decision," as to its status as a half-blood dependent Indian community, "by taking advantage of Rule 19. We cannot condone this kind of ploy." *Id.*, at 669. Neither can this Court.

4. There Has Been No Prior Final Adjudication of any Issue in this Action

265. Contrary to the public statements by the JIV, the merits of Rosales and Toggery's prior litigation have never been found lacking, abusive, or to have deprived the JIV of any rights as a half-blood Indian community. Similarly, JIV has failed to demonstrate that any prior litigation was ever decided on the merits, or that any prior procedural dismissal of Rosales and Toggery's prior claims without a decision on the merits has any *res judicata* or collateral estoppel affect on any issue pending in this action.

266. There can be no issue preclusion without a final adjudication in the prior action. Here, there are no prior final adjudications of any issue pending in this case.

267. Since the JIV is not a party to this action, and has not properly supported its erroneous public assertions with the requisite "sufficient record," including complete copies of the prior complaints, answers, and orders in the prior litigation, there is no record of any issue preclusion in this action. *United States v. BaslerTurbo-67 Conversion DC-3 Air*, 1996 U.S. LEXIS 4685, *7-8 (9th Cir. 1996), the seeker of issue preclusion "must introduce a sufficient record to clearly demonstrate the fact that the very issues have been previously litigated between its opponent and someone else;" *Frankfort Digital Servs. v. Kistler*, 477 F3d. 1117, 1123 (9th Cir. 2007), "[a]ny reasonable doubt as to what was decided by a prior judgment should be resolved against giving it [issue preclusion] effect."

> 268. It is not enough that the party introduce the decision of the prior court; rather, the party must introduce a sufficient record of the prior proceeding to enable the trial court to pinpoint the exact issues previously litigated. *Id.* Where the record before the district court was inadequate for it to determine whether it should apply the doctrine of collateral estoppel, we will not consider the issue on appeal. *Clark v. Bear Stearns & Co*., 966 F.2d 1318, 1321 (9th Cir. 1992).

269. Plaintiffs are not collaterally estopped by any of the prior litigation among Rosales, Toggery, the federal and state agencies, since none of those cases decided any of the merits of the claims in this action. Here, there will be no re-litigation because the substantive issues weren't litigated in any of the prior litigation. Most importantly, none of those cases ever decided the merits of the fact that the JIV was never under federal jurisdiction in 1934, and that Rosales and Toggery's families remains are to be protected on the government's portion of the Indian cemetery.

270. All of the prior litigation among the members of the JIV were dismissed on procedural grounds, due to a lack of jurisdiction to decide the merits in the absence of an indispensable party, claiming, albeit falsely, sovereign immunity, all of which have been superceded by subsequent Supreme Court opinions. Therefore, none of those decisions have any issue preclusive effect under the doctrines of *res judicata* or collateral estoppel, having been "dismissed without prejudice," per both F.R.C.P. or F.C.F.C., Rule 19, and C.C.P. 389(b). *Costello v. United States*, 365 U.S. 265, 286-87 (1961); *United States v. Hatter*, 532 U.S. 557, 566, (2001), no issue preclusion where the court did not reach the merits of the Cherokee Nation's claim; *Wilson v. Bittick*, 63 Cal.2d 30,

35-36 (1965), "the involuntary dismissal which terminated that proceeding was in no sense a ruling on the substance of the plaintiff's claim."[23]

271. Dismissal under F.R.C.P. Rule 12(b)(7) due to an absent required party under federal Rule 19 is without prejudice, and therefore is not an adjudication on the merits, and thus does not have claim preclusive effect. *Followay Productions Inc. v. Maurer*, 603 F.2d 72, 76 (9th Cir. 1979); *Univ. of Pittsburgh v. Varian Medical Systems, Inc.*, 569 F.3d 1328, 1332 (Fed. Cir. 2009), citing *Hughes v. United States*, 71 U.S. (4 Wall.) 232, 237 (1866), and 18A Charles A. Wright, *Federal Practice and Procedure* § 4438 (2d ed. 1987).

272. Issue preclusion applies only to preclude litigation of issues "actually and necessarily decided at the previous proceeding [that are] identical to the one which is sought to be relitigated, and where "the first proceeding ended with a final judgment on the merits;" *Syverson v. IBM*, 472 F.3d 1072, 1078 (9th Cir. 2007); *Whelan v. Abell*, 48 F.3d 1247, 1255-56 (D.C. Cir. 1995); and "must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding." *Commissioner v. Sunnen*, 333 U.S. 591, 599-600 (1948). If it is "uncertain whether [an] issue was actually and necessarily decided in [prior] litigation, then relitigation of the issue is not precluded." *Next Wave Personal Comm. Inc. v. F.C.C.*, 254 F.3d 130, 147 (D.C. Cir. 2001).

273. For example, in *United States v. Washington*, 641 F.2d 1368, 1374 (9th Cir. 1981), the appellants claimed that the court was bound by decisions of the Indian Claims Commission and the Court of Claims in which the appellants were allowed to pursue claims on behalf of members.

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[23] The fact that there has been a lot of litigation among the members of the JIV is merely a testament to the procedural hurdles that must be overcome in finally reaching a decision on the merits, now that *Carcieri v. Salazar*, 555 U.S. 379 (2009), and *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199 (2012), and *Michigan v. Bay Mills Ind. Cmty.,*134 S.Ct. 2024 (2014) have cleared the procedural underbrush, and established that the land doesn't qualify for gambling, Plaintiffs have standing, and the JIV is not an indispensable party, when its executive officers are sued in their individual capacity for violating the law. Like the 58 years it took for *Brown v. Board of Education*, 347 U.S. 483 (1954) to repudiate *Plessy v. Ferguson*, 163 U.S. 537 (1896), and the decades of litigation to establish the Tobacco Companies' liability, many disputes take years before a final decision on the merits may be entered. Rosales and Toggery, have laudably persisted in the assertion of the truth, despite the fact that the merits of Plaintiffs' claims have never been decided in any of the prior litigation.

"Those claims, however, involved compensation for individuals, not fishing rights for tribal units. The causes of action and factual issues litigated were different, and the doctrines of res judicata and collateral estoppel are therefore inapplicable." *Id.*, 1374, citing 1B Moore's Federal Practice, P0.405(1), (3).

274. Neither *res judicata* nor collateral estoppel bars the re-litigation of an issue, unless the issue was "necessary to support the judgment entered in the prior proceeding." *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1060, 1086 (9th Cir. 2007); *Knox Co. Educ. Assn. v. Knox Co. Bd. Educ.*, 156 F.3d 361, 376 (6th Cir. 1998); *Anthan v. Prof. Air Traffic Controllers Org.*, 672 F.2d 706, 710 (8th Cir. 1982). A decision has precedential value only as to "the precise issues necessarily presented and necessarily decided." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). A summary disposition on appeal affirms only the judgment of the court below, and no more may be read into the summary disposition on appeal than was essential to sustain that judgment. *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 182-183 (1979).

275. Here, contrary to public statements by the JIV, no court has made a final decision on the merits as to the identical issues, as for whom the United States holds the portion of the Indian cemetery in trust, and the fact that the JIV was not under federal jurisdiction in 1934:

276. *Rosales v. Kean Argovitz Resorts*, No. 00cv1910 (S.D. Cal. 2000), was dismissed for failure to state a claim under the Civil Rights Acts for invidious discrimination against Native Americans by Lakes Gaming, and reached no final decision as to whether the JIV was under federal jurisdiction in 1934, or the merits of the beneficial ownership of the government's portion of the Indian cemetery.

277. *Rosales VII*, Case No. 01cv951 (S.D. Cal. 2001) was appealed,[24] and the Ninth Circuit affirmed a procedural dismissal for lack of an indispensable party. Hence, any dicta concerning for

[24] Rosales and Toggery adopt JIV's roman numeral naming convention when referring to the prior lawsuits.

whom the cemetery parcel was held in trust is not a final decision on the merits and can provide no basis for *res judicata* or collateral estoppel.[25]

278. *Rosales IX*, No. 3:07cv624 (S.D. Cal. 2007), was dismissed as premature since the court found a lack of subject matter jurisdiction since then, unlike here and now, there had not yet been an actual discovery of desecrated human remains, and due to the absence of an indispensable party. Again, such procedural dismissal is not a final decision on any of the merits as to whether the JIV was under federal jurisdiction in 1934 or the ownership of the government's portion of the Indian cemetery.

279. *Rosales X*, No. 1:08cv512, 89 Fed. Cl. 565 (Ct. Fed. Cl. 2008), claim for damages arising from their wrongful eviction was similarly dismissed for lack of jurisdiction under the Indian Tucker Act, and due to an absent indispensable party. Neither jurisdictional ruling decided the merits of any claim by Plaintiffs here. The JIV is no longer an indispensable party following *Michigan v. Bay Mills Ind. Commty,* 134 S.Ct. 2024 (2014), and Plaintiffs naming of the executive council members of the JIV as Defendants. Moreover here, Plaintiffs' personal injury claims arising from the desecration of Plaintiffs' families' remains did not accrue under the Indian Tucker Act, until excavation began on or about February 10, 2014.

280. In none of Rosales and Toggery's prior actions were their claims the same as Plaintiffs raise here. None of those claims were premised upon the 2014 desecration of their families' human remains and funerary objects, obviously because it had not yet occurred. Most importantly, the

[25] Moreover, since the Ninth Circuit in *Rosales VII* ordered the So. Dist. of Cal. not to exercise its jurisdiction in equity and good conscience under F.R.C.P. Rule 19, and in *Rosales IX*, the So. Dist. of Cal. followed that order, there still has been no decision on the merits as to the beneficial ownership of the cemetery parcel, and the So. Dist. Cal.' statements concerning such ownership are not binding on this Court, nor do they preclude any of Plaintiffs' claims here. "When a judgment is based upon alternative grounds or multiple grounds, and on appeal it is affirmed on only one ground, without reaching the others, only the issue reached on appeal is a basis for collateral estoppel." *Janicki Logging Co. Inc. v. U.S.*, 36 Fed. Cl. 338, 340 (Ct. Cl. 1996), *aff'd* 124 F.3d 226 (Fed. Cir. 1997)(table); *see also*, *Trauma Service Group, Ltd. v. United States*, 33 Fed. Cl. 426, 433, fn. 5 (CFC 1995). No more may be read into summary disposition on appeal than is essential to sustain that judgment. *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 182-183 (1979). Thus, the Ninth Circuit's final decision was that the federal court did not have jurisdiction to decide the beneficial ownership of the cemetery parcel, which as noted above is a procedural dismissal without prejudice, and not a final decision on the merits.

Plaintiffs here, do not seek allotments or land patents, for loss of the beneficial interest in the government's portion of the Indian cemetery, as Rosales and Toggery did in *Rosales VII, IX* and *X.*

281. No court has finally determined that Plaintiffs' claims accrued more than 6 years before this action was filed. Plaintiffs' claims here do not arise from the date of the grant deed for the government's portion of the Indian cemetery, but from the 2014 desecration of their families' remains and funerary objects. Moreover, until April 10, 2013, 78 F.R. 31398, though the individual and corporate Defendants had been threatening to build a casino for almost 20 years, and had made applications to acquire other trust lands, no tribal, state or federal action had ever identified the government's portion of the Indian cemetery as being qualified for Indian gambling.

282. Moreover, since the individual members' prior lawsuits were all dismissed for lack of jurisdiction, the procedural findings therein are not final decisions on the merits as to who are the beneficial owners of the cemetery parcel. As to this issue, even if the half-blood dependent Indian community, known as the JIV, may have been mistakenly assumed to be the beneficial owner of the government's portion of the cemetery parcel in some of the prior litigation, there was never a final adjudication of that fact, or whether anyone other than the U.S. lawfully exercised governmental control over the government's portion of the cemetery parcel.

283. Thus, the status of the government's acquisition has never been finally decided, and Plaintiffs' claims are not barred by any statute of limitation, since Plaintiffs are well within six years of the government first asserting that it made an Indian Lands Decision on April 10, 2013. *Wind River Mining Corp. V. United States*, 946 F.2d 710 (9th Cir. 1991). Moreover, as noted above, "administrative actions taken in violation of statutory authorization or requirement are of no effect," *City of Santa Clara v. Andrus*, 572 F.2d 660, 677 (9th Cir. 1978), citing *Utah Power & Light Co. v. United States*, 243 U.S. 389, 392 (1917), and "unauthorized agency action may be disregarded as null and void," without regard to any statute of limitations. See, e.g., *Employers Ins. Of Wassau v. Browner* , 52 F.3d 656, 665 (7th Cir. 1995); *N.L.R.B. Union v. Federal Labor Relations Auth.*, 834 F.2d 191, 196 n. 6 (D.C. Cir. 1987); *Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286, 293 (2d Cir. 2006), "The D.C. Circuit has explained that ...substantive challenges to agency action–for example, claims that agency action is unconstitutional, that it exceeds the scope of the agency's

substantive authority, or that it is premised on an erroneous interpretation of a statutory term–have no time bars..."

5. There Has Been No Prior Final Adjudication that JIV was an Indispensable Party, all of which have been Superceded by Recent United States Supreme Court Decisions

284. There has been no prior final decision on the merits as to whether JIV is either a required or an indispensable party in any action–all such prior procedural dismissals being without prejudice, and the law having been fundamentally changed in the meantime. *Costello v. United States*, 365 U.S. 265, 286-87 (1961)*; Followay Productions Inc. v. Maurer*, 603 F.2d 72 (9th Cir. 1979); *Wilson v. Bittick*, 63 Cal.2d 30, 35-36 (1965).

285. As noted above, procedural dismissals under both federal and state rules due to a lack of subject matter jurisdiction or an absent required party are without prejudice, as a matter of law (even if mistakenly delineated with prejudice by the trial court), and therefore are not an adjudication on the merits, and thus do not have claim preclusive effect. *Dredge Corp. v. Penny*, 338 F.2d 456, 463 (9th Cir. 1964); *Univ. of Pittsburgh v. Varian Medical Systems, Inc.*, 569 F.3d 1328, 1332 (Fed. Cir. 2009), citing *Hughes v. United States*, 71 U.S. (4 Wall.) 232, 237 (1866); *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1284 (10th Cir. 2012) and 18A Charles A. Wright, *Federal Practice and Procedure* § 4438 (2d ed. 1987).

286. Any prior procedural dismissal based upon alleged indispensability has also been superceded by the United States Supreme Court decisions in *Carcieri v. Salazar*, 555 U.S. 379 (2009), finding the JIV has no protectable interest in the government's portion of the cemetery parcel, since the JIV was not under federal jurisdiction in 1934, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199 (2012), finding that neighbors have standing to challenge Indian lands decisions under the A.P.A., and *Michigan v. Bay Mills Ind. Cmty.("Bay Mills"),*134 S.Ct. 2024 (2014), which holds that even if the JIV, were a federally recognized tribe in 1934, which it isn't, it would not be either a required, nor an indispensable, party to this action, since the JIV executive council members have been named as individual Defendants, and since they have no

immunity for violating IGRA, failing to comply with the IRA, and violating NAGPRA and California's public nuisance statutes. Therein, the Supreme Court holds:

> And if Bay Mills went ahead anyway, [and operated a illegal casino] Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license. See §432.220; see also §600.3801(1)(a) (West 2013) (designating illegal gambling facilities as public nuisances). As this Court has stated before, analogizing to *Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)*, **tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct**. See *Santa Clara Pueblo*, *436 U.S. at 59, 98 S. Ct. 1670, 56 L. Ed. 2d 106*...In short (and contrary to the dissent's unsupported assertion, see *post,* at 11), the panoply of tools Michigan can use to enforce its law on its own lands–no less than the suit it could bring on Indian lands under §2710(d)(7)(A)(ii)–can shutter, quickly and permanently, an illegal casino. *Bay Mills*, 134 S. Ct. 2024, 2035. (emphasis added).[26]

287. Since these decisions have so fundamentally changed the law, the Supreme Court's intervening decisions also create an exception to any issue preclusion under the doctrine of collateral estoppel or otherwise. "[E]ven if the core requirements for issue preclusion are met, [which have not been met here] an exception to the doctrine's application would be warranted due to [the Supreme] Court's intervening decision...", citing the RESTATEMENT (SECOND) OF JUDGMENTS, §28, Comment *c* (1982), which also states: "where the core requirements of issue preclusion are met, an exception to the general rule may apply when a 'change in [the] applicable legal context' intervenes." *Bobby v. Bies*, 556 U.S. 825, 836, (2009); *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 362-63 (1984); *Montana v. United States,* 440 U.S. 147, 162 (1979); *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948); *Burlington N. Santa Fe R.R. v. Assiniboine & Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767, 770 (9th Cir. 2003). "Courts have crafted an exception to the collateral estoppel principle when there has been a change in the applicable law between the time of the original decision and the subsequent litigation in which collateral estoppel is invoked." *Bingaman v. Department of the Treasury*, 127 F.3d 1431, 1437 (Fed. Cir. 1997).

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[26] It should be noted that the Supreme Court has also recently held in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2212 (2012), that a neighboring citizen or group of citizens, like the Plaintiffs here, have standing to challenge the illegal acts of such executive council members, and their contractors, just as any State was held to have standing to sue the executive council members for violating the IRA, IGRA, NAGPRA or any of the State's laws in *Bay Mills.*

6. JIV Remains an Unessential Third Party to this Action and is Adequately Represented by the Named Defendant Executive Council Members who have No Immunity for Violating California and Federal law

288. Now that the U.S. Supreme Court has resolved the split among the Circuits in *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014), JIV is not an indispensable party to this action, as a matter of law, where it is adequately represented by its executive council members, as here, who are named defendants, and are not immune for their violations of the IRA, IGRA, NEPA, NAGPRA and California's P.R.C., H.S.C. and Penal Codes. By eliminating the prior split in the circuits, the Supreme Court has also eliminated the grounds for the prior procedural dismissals that prevented the merits of Rosales and Toggery's claims arising from the desecration of their families' remains and the beneficial ownership of the government's portion of the Indian cemetery from being finally adjudicated, until now.[27]

289. "Nor does the immunity extend to members of the tribe just because of their status as members. ...When tribal officials act outside the bounds of their lawful authority, however, most courts would extend the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to allow suits against the officials, at least for declaratory or injunctive relief." *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 40 Cal.4th 239, 248 (2006), citing *Ex parte Young*, 209 U.S. 123 (1908); *Boisclair v. Sup. Ct.* 51 Cal.3d 1140, 1157-58 (1990). See also, *Salt River Project Agricultural Improvement and Power District v. Lee*, 672 F.3d 1176, 1177 (9th Cir. 2012).

290. In sum, we hold that (1) the Navajo Nation is not a necessary party under Rule 19(a)(2)(A) because the plaintiffs seek relief only against the current Navajo officials; (2) the Navajo nation is not a necessary party under Rule 19(a)(1)(B)(I) because the officials adequately represent the tribe's interests, and (3) the Navajo Nation is not a necessary party under Rule 19(a)(1)(B)(ii) because its absence will not risk subjecting the plaintiffs to inconsistent obligations.

Indeed, a contrary holding would effectively gut the *Ex parte Young* doctrine. That doctrine permits actions for prospective non-monetary relief against state or tribal officials in their official capacity to enjoin them from violating federal law, without

[27] Compare *Burlington Northern Railroad Co. v. The Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991), "tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law," with *Shermoen v. United States*, 982 F2d 1312, 1319-20 (9th Cir. 1992), attempting to create an exception to *Burlington Northern* for "relief requiring affirmative action by a sovereign or the disposition of unquestionably sovereign property," neither of which can be found in the enforcement of NAGPRA and California's H.R.C. and P.R.C., after the holding in *Bay Mills*.

> the presence of the immune State or tribe. *See Ex parte Young*, 209 U.S. 123 (1908). *Salt River Project Agricultural Improvement and Power District v. Lee,* 672 F.3d 1176, 1181 (9th Cir. 2012).

291. *Thomas v. United States*, 189 F.3d 662, 664 (7th Cir. 1999), also specifically holds that the Lac Courte Orielles Band of Lake Superior Chippewa Indians was not a required or indispensable party to an action alleging that the federal defendants had failed to follow the administrative procedures for Secretarial elections.

292. Even if *Bay Mills* had not held that a tribe is not an indispensable party, where its non-immune executive council members have been sued, the JIV also has no "legally protected interest" to be an indispensable party, because its "claimed" interest is "patently frivolous." *Davis v. United States*, 192 F.3d 951, 958-59 (10th Cir. 1999), reversing the dismissal of plaintiffs' Certificates of Degree of Indian Blood (CDIB) claims, finding the Tribe was not an indispensable party, since the Tribe's claim to a protected interest was patently frivolous, since there was no evidence in the record that the Tribe had "a legitimate claimed interest in Plaintiffs' CDIB claim."

293. Here, the JIV's claim to exercise governmental power over the U.S. government's portion of the Indian cemetery is just as patently frivolous, since there simply is no evidence disputing the fact that the JIV was not under federal jurisdiction in 1934, and therefore has never lawfully exercised governmental power over the government's portion of the Indian cemetery.

294. In *Yellowstone County v. Pease,* 96 F.3d 1169, 1172 (9th Cir. 1996), the Ninth Circuit found that a tribal court had no legally protected interest, where the Tribe had no legal interest in the tax to be collected from the defendant.

> Pease's contention that the tribal court has a legally protected interest in maintaining a court system that adjudicates property rights is also without merit. First, this case is not about the Tribe's right to tax reservation lands; rather, this action arose from Pease's claim that the *County,* a political subdivision of the State of Montana, is powerless to tax his fee-patented property...unlike other cases where courts have concluded that tribes are necessary parties under Rule 19(a), ...the tribal court does not have a legally protected interest that would be impaired or impeded by the County's suit. *Id.*

295. In *Citizen Band Potawatomi Indian Tribe of Okla. v. Collier*, 17 F.3d 1292, 1294 (10th Cir. 1994), the United States failed to show that the Absentee-Shawnee tribe had a "legally protected interest," since the tribe had never been granted an "undivided trust or restricted interest" in the land.

> The 1872 Act does not create any "undivided trust or restricted interest" of the Absentee-Shawnee tribe in the Potawatomi tribe's land ....this "interest" is merely an expectation...This expectation is not a legally protected interest for purposes of 12(b)(7) necessary party analysis. *Potawatomi*, 17 F.3d 1292, 1294.

296. Similarly here, the JIV has no legally protected interest in the U.S. government's portion of the Indian cemetery. At best, it has an expectation that someday it might be recognized as an IRA tribe under federal jurisdiction in 1934, and that it might lawfully acquire land that qualifies for Indian gambling, with the concurrence of the Governor that such acquisition and use would not be detrimental to the community. But until both of these requirements are met, JIV has no legally protectable interest in the government's portion of the cemetery property, and remains an unessential third party to Plaintiffs' action.

297. Moreover, where, as here, "plaintiffs' action focuses solely on the propriety of [governmental action], the absence of a Tribe does not prevent the plaintiffs from receiving their requested declaratory relief." *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1258 (10th Cir. 2001); *Kansas v. United States,* 249 F.3d 1213, 1226 (10th Cir. 2001), "although the tribe had an economic interest in the suit's outcome," its gaming interest was not a sufficiently direct interest to make the tribe an indispensable party, since "the Federal Defendants' interests, considered together, are substantially similar, if not identical, to the Tribe's interests...;" *Antoine v. United States,* 637 F.2d 1177, 1181-82 (8th Cir. 1981),"the government [and its employees] may be held liable... regardless of the presence or absence of other potential parties."

298. Enjoining the Defendants from violating IRA, IGRA, NAGPRA and California's P.R.C., H.S.C. and Penal Codes will not invalidate any lawful ordinances, rules, regulations or practices of the JIV half-blood Indian community. Nor will such an injunction impair JIV's ability to exhaust its administrative remedies. Nor will it impair the negotiation, adoption, and enforcement of JIV's compact, ordinances, rules, regulations or contracts in compliance with the IRA and IGRA. Plaintiffs' relief does not seek to, and would not, invalidate any lawful compact or contract; while

any unlawful portion of any compact or contract entered by or among the Defendants is void and unenforceable in any event.

299. The fact that the named Defendants have no sovereign immunity for violating these laws, and all have the same interest as does the JIV in defending against these violations, the JIV is precluded from erroneously asserting any sovereign impairment under *E.E.O.C. v. Peabody W. Coal Co.*, 619 F.3d 1070, 1082 (9th Cir. 2010), or *Greyhound Racing, Inc. V. Hull*, 305 F.3d 1015, 1024 (9th Cir. 2002), *Pit River Home v. United States*, 30 F.3d 1088, 1092 (9th Cir. 1994), *Conf. Tribes of Chehallis Reservation v. Lujan*, 928 F.2d 1496, 1497 (9th Cir. 1991), *Dawavendewa v. Salt River Project Agric. Imprv. and Power Dist.*, 276 F.3d 1150 (9th Cir. 2002), and *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992). None of these cases are apposite, since the non-immune individual government office holders were not named Defendants, as they are here, under the *Ex parte Young* doctrine reaffirmed in *Bay Mills*, and available to adequately represent the absent immune governmental entities.

300. *Shermoen* and *Dawavendewa* are also limited to their facts, and only apply where the "relief cannot be granted by merely ordering the cessation of the [illegal] conduct complained of," as here, where Plaintiffs' relief requires no "affirmative action by the sovereign or the disposition of unquestionably sovereign property." *Id.*, 1320. Here, Plaintiffs merely seek damages and an injunction based upon the Defendants' violation of the law, and do not seek the disposition of any unquestionably sovereign property.

301. Hence, Plaintiffs' injunctive relief will not prevent the half-blood JIV Indian community from exercising any sovereignty, since the government's portion of the Indian cemetery has never been lawfully subject to JIV's governmental power. Moreover, since *Bay Mills* holds that JIV is adequately represented by its executive council members and contractors, who are named Defendants in this action, JIV therefore cannot be prejudiced, as a matter of law, by a decision on the merits that it was not recognized under federal jurisdiction in 1934, and therefore cannot lawfully exercise governmental power over that portion of the Indian cemetery.

302. Neither the half-blood JIV Indian community, nor any other community of citizens, has the right to plant a flag in the U.S. government's portion of a privately owned Indian cemetery in California, and falsely claim sovereignty over it, and prevent the lineal descendants from protecting their families' remains against their false claims. A half-blood community of Indians simply cannot establish jurisdiction through its unilateral actions. *Sherrill* at 203, 219-20; *CACGE* at 401.

303. Thus, JIV is neither a required nor indispensable party to this action, since the executive council members have been named as Defendants and can adequately represent the JIV's alleged interests, as held in *Bay Mills, Thomas, supra*, at 664, and *Salt River*, *supra*, at 1177. As noted above, and just as in *Thomas*, the JIV is "trying to leverage its failure to follow the prescribed statutory procedures into an unreviewable decision," as to its status as a half-blood dependent Indian community, "by taking advantage of Rule 19. We cannot condone this kind of ploy." *Id.*, at 669. Neither can this Court.

304. This action may now finally decide the merits of Plaintiffs' claims for the desecration of their families' remains on the government's portion of the Indian cemetery property. JIV is not a required or indispensable party to this action, as a matter of law, since none of the federal, corporate or individual Defendants have any immunity for their violations of IRA, IGRA, NAGPRA and the California P.R.C., H.S.C. and Penal Codes, after *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2035 (2014), and since they have been named as Defendants.

FIRST CAUSE OF ACTION

(Tortious Violation of Statute and Negligence Against All Defendants)

305. Plaintiffs incorporate by reference each and every allegation contained in paragraphs 1 through 303, inclusive, of this complaint as though fully set forth herein.

306. The Defendants owe a duty of care to the Plaintiffs to exercise reasonable care and comply with the law in the performance of the work they perform, including, but not limited to, complying with the U.S. Constitution, particularly Amend. 1, 4, 5, and 14, NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, Article I, Sections. 1, 2, 3, 4, 7, 13, 19, 24 and 31 of the California Constitution, the California Environmental Quality Act, Cal. Health & Safety Code §§7050.5, 7052, 7054, 7054.6,

7054.7, 7055, 7500, Public Res. Code 5097.9-5097.99, and Penal Code 487, and not violating the Plaintiffs' civil rights, as are enjoyed by California citizens, due to their age, ancestry and their political and religious beliefs.

307. Plaintiffs are informed and believe and thereon allege, that Defendants both intentionally and negligently breached their duty to Plaintiffs by failing to use reasonable care to protect the interests of, and prevent personal injury to, the Plaintiffs, by violating the law, and by negligently acting in the manner set forth in the allegations incorporated herein.

308. These acts include, but are not limited to: mutilating, disinterring, wantonly disturbing, demolishing, excavating, willfully removing, and permitting the dumping of the Plaintiffs' families' human remains and funerary objects on federal and state property, causing severe bodily injury, emotional distress, and irreparable damage to the Plaintiffs and their personal property, Native American human remains, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in, and prohibited by, NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, the California Environmental Quality Act, Cal. Pub. Res. Code §§21000-21177, 14 C.C.R. 15000-15387, Cal. Health & Safety Code §§7050.5, 7052, 7054, 7054.6, 7054.7, 7055, 7500, 8011, 8015-16, and Cal. Pub. Res. Code §§ 5097.9-5097.99, and Penal Code 487.

309. These acts have caused Plaintiffs' severe personal, physical and bodily injury, including severe emotional distress, and irreparable damage to themselves and their personal property, Native American human remains, along with the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, and Cal. Pub. Res. Code 5097.9-5097.99, by knowingly and/or willfully mutilating, disinterring, wantonly disturbing, and willfully removing, damaging, or otherwise altering or defacing, them without authority of law, in an amount in excess of $4 million, subject to further proof at trial.

310. These acts have also caused substantial emotional distress and personal injury and irreparable damage to, and interference with, the Plaintiffs' free expression and exercise of Native American religion as provided in the United States Constitution and the California Constitution, and has caused

and shall further cause severe and irreparable damage to the Plaintiffs' Native American sanctified cemetery, place of worship, religious or ceremonial site, and sacred shrines, in an amount in excess of $4 million, subject to further proof at trial.

311. Such acts will also unduly interfere with the Plaintiffs' civil rights to due process and equal protection of the laws. Plaintiffs will be greatly and irreparably damaged by reason of Defendants' infringement and violation of these civil rights, and unless Defendants are enjoined by this court, said acts will further violate Plaintiffs' civil rights, and further irreparably harm the Plaintiffs. Plaintiffs have therefore suffered general and consequential damages proximately caused by the Defendants' negligence in an amount subject to proof at the time of trial.

SECOND CAUSE OF ACTION

(For Declaratory and Injunctive Relief against all Defendants)

312. Plaintiffs incorporate by reference each and every allegation contained in paragraphs 1 through 310, inclusive, of this complaint as though fully set forth herein.

313. Plaintiffs are the lineal descendants' with ownership and control of their predecessors' human remains and Native American associated cultural items, as set forth in NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, Cal. Pub. Res. Code 5097.9-5097.99, and Cal. Health & Safety Code 7100, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony.

314. Plaintiffs' preferences are to preserve their families' Native American human remains and associated cultural items in place, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in, and required by, NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, Cal. Pub. Res. Code 5097.9-5097.99, and the CEQA Guidelines, 14 Cal. Code Regs.15126.4 (b)(3).

315. Pursuant to NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, Cal. Public Resources and Health & Safety Codes and the regulations adopted pursuant thereto, Plaintiffs are entitled to;

(A) an injunction preventing Defendants from any further knowing and/or willful mutilation, disinterment, wanton disturbance, excavation, and willful removal of Plaintiffs' Native

American human remains, along with the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, without authority of law, and permitted dumping of the Plaintiffs' families' human remains and funerary objects on state property owned and controlled by CalTrans, which have caused, and will continue to cause, irreparable damage to the Plaintiffs' Native American human remains, along with the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in Cal. Pub. Res. Code 5097.9-5097.99 and NAGPRA 25 U.S.C. 3001 et seq., and 43 C.F.R. 10.1-17;

(B) a written plan of action specifically including Plaintiffs' ownership, custody and control of, and the kind of traditional and planned treatment, care and handling of, and the disposition and repatriation of, any of their human remains, funerary objects sacred objects, or objects of cultural patrimony which have been, or may be, recognized pursuant to Cal. Pub. Res. Code 5097.98, and NAGPRA, 25 U.S.C. 3001 et seq., and 43 C.F.R. 10.1-17;

(C) transfer of custody to Plaintiffs any of their Native American human remains and funerary objects that have been disturbed, excavated and otherwise removed from where they were originally interred, pursuant to Cal. Pub. Res. Code 5097.98, and NAGPRA, 25 U.S.C. 3001 et seq., and 43 C.F.R. 10.1-17;

(D) repatriation of Plaintiffs' families' Native American human remains and funerary objects that have been disturbed, excavated and otherwise removed from where they were originally interred, pursuant to Cal. Pub. Res. Code 5097.98, H&S Code 8015-16, and NAGPRA, 25 U.S.C. 3001 et seq., and 43 C.F.R. 10.1-17; and

(E) prevention of further disturbance of Plaintiffs' human remains and funerary objects until the Plaintiffs' preference for the preservation of their Native American human remains and associated items in place, and that any items associated with the human remains that are placed or buried with the Native American human remains are to be treated in the same manner as the remains,

is carried out pursuant to Cal. Health and Safety Code 7050.5 and Cal. Pub. Res. Code 5097.98, and NAGPRA, 25 U.S.C. 3001 et seq., and 43 C.F.R. 10.1-17.

316. Cal. Pub. Res. Code 5097.95 and NAGPRA, 25 U.S.C. 3009, provide that all government agencies shall cooperate in carrying out their duties under the California Native American Graves Protection Act, as codified in Cal. Pub. Res. Code 5097.9-5097.99, H&S Code 8100 et seq., and NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17. Therefore, since the personal rights of the Plaintiffs, as the lineal descendants of their Native American ancestors, cannot be adequately protected without preventing the unlawful excavation, removal and dumping of their families' human remains and funerary objects on state property owned and controlled by CalTrans, Plaintiffs are entitled to an injunction to preserve their preference that their families' human remains and associated cultural items remain "in place," as called for in Cal. Pub. Res. Code 5097.9-5097.99, and NAGPRA, 25 U.S.C. 3001 et seq., and 43 C.F.R. 10.1-17, and which have been inhumed, interred, and deposited in burial sites below, on and above the cemetery over the last 100 years.

317. If the Defendants are not enjoined from knowingly and wilfully grading, operating heavy equipment, moving dirt and/or gravel, and other construction activities, and otherwise mutilating, disinterring, wantonly disturbing, demolishing, excavating, willfully removing, and causing irreparable damage to, the Plaintiffs' personal property, Native American human remains, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in, and prohibited by, NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, Cal. Health & Safety Code §§7050.5, 7052, 7054, 7054.6, 7054.7, 7055, 7500, Public Res. Code 5097.9-5097.99, and Penal Code 487, the Plaintiffs will continue to suffer severe and irreparable personal injury, physical and bodily injury, including severe emotional distress.

318. Cal. Pub. Res. Code 5097.97 also provides that since the Native American individual Plaintiffs have advised the California Native American Heritage Commission that a proposed action by a government agency may cause severe or irreparable damage to a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, or may bar appropriate access thereto by Native Americans, and the proposed action would result in such damage or interference, and the government agency fails to accept the mitigation measures

recommended, Plaintiffs' action is further authorized by Cal. Pub. Res. Code 5097.94 to prevent severe and irreparable damage to, and to assure appropriate access for Native Americans to, the Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property.

319. Plaintiffs are also entitled to a temporary, preliminary and permanent injunction to prevent the Defendants' further violation of Cal. Pub. Res. Code 5097.9, and to prevent any government agency, and any private party from using or occupying government owned property, or operating on government owned property, under a public license, permit, grant, lease, or contract made on or after July 1, 1977, in any manner whatsoever to interfere with the free expression or exercise of Native American religion as provided in the United States Constitution and the California Constitution; and to prevent any such agency or party from causing severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, where, as here, there is no clear and convincing showing that the public interest and necessity so require.

320. Cal. Pub. Res. Code 5097.94 further provides that where, as here, severe and irreparable damage will occur, appropriate access will be denied, appropriate mitigation measures are not available, and there is no clear and convincing evidence that the public interest and necessity require otherwise, the court shall issue an injunction, to prevent severe and irreparable damage to, and to assure appropriate access for Native Americans to, the Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property. The California legislature specifically provided, in enacting the 1982 amendments to Cal. Pub. Res. Code 5097.94, that: "The purpose of the act is: To provide protection to Native American human burials and skeletal remains from vandalism and inadvertent destruction."

321. Similarly, Cal. Pub. Res. Code 5097.98, as amended, provides that upon the recognition of Native American human remains, which may be an inhumation or cremation, and in any state of decomposition or skeletal completeness, the Plaintiffs are entitled to a temporary, preliminary and permanent injunction to prevent the government landowner from failing to ensure that the immediate vicinity, according to generally accepted cultural or archaeological standards or practices where the

Native American human remains are located, is not damaged or disturbed by further development activity, so long as the lineal descendants' preferences are to preserve the Native American human remains and associated items in place, and that any items associated with the human remains that are placed or buried with the Native American human remains are to be treated in the same manner as the remains.

322. Therefore, since the individual Plaintiffs, lineal descendants of the Native Americans whose human remains, and the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in NAGPRA, 25 U.S.C. 3001 et seq., and Cal. Pub. Res. C. 5097.9-5097.99, have been inhumed, interred, and deposited in burial sites below, on and above the cemetery over the last 100 years, seek to preserve these Native American human remains and associated items in place, the court is required to issue an injunction to prevent their further mutilation, disinterment, disturbance, excavation, removal, and severe and irreparable damage on both federal and state property in violation of NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, the California Constitution, the California Environmental Quality Act, Cal. Health & Safety Code §§7050.5, 7052, 7054, 7054.6, 7054.7, 7055, 7500, Public Res. Code 5097.9-5097.99, and Penal Code 487.

323. An actual controversy has arisen and now exists between Plaintiffs and Defendants regarding their respective rights, duties and obligations in that Plaintiffs contend that Defendants are liable to Plaintiffs for the statutory, contractual, and tortious personal injuries and deprivations of their civil rights alleged herein, and defendants deny such liability to Plaintiffs.

324. Plaintiffs desire a judicial determination of the respective rights of Plaintiffs and Defendants.

325. Such a declaration is necessary and appropriate at this time so that the parties may ascertain their rights and duties with respect to each other.

326. Plaintiffs have been greatly and irreparably damaged by reason of said Defendants' statutory and tortious deprivations of Plaintiffs' personal and civil rights alleged herein, and unless Defendants are enjoined by this court, they will continue the violation of Plaintiffs' rights further irreparably harming the Plaintiffs.

327. As a result of the wrongful conduct of said defendants as herein alleged, Plaintiffs are entitled to a temporary, preliminary and permanent injunction to prevent great and irreparable injury resulting from the infringement and violation of their personal and civil rights, from the likelihood that damages cannot properly compensate Plaintiffs for such irreparable personal harm, from the likelihood that Defendants will be unable to respond in damages, and from the difficulty or impossibility to ascertain the exact amount of personal bodily injury and damage Plaintiffs have sustained, and will in the future sustain. These ongoing and continuing injuries sustained by Plaintiffs cannot be fully compensated in damages and Plaintiffs are without an adequate remedy at law without the imposition of the requested equitable injunctive relief.

WHEREFORE Plaintiffs pray for judgment as follows:

1. General and compensatory damages according to proof;

2. That the Defendants, and their officers, agents, servants, employees and attorneys and all persons in active concert with them, or any of them, be temporarily, preliminarily and permanently enjoined from permitting dumping, grading, excavating, removal, operating heavy equipment, moving dirt and/or gravel, or any other construction activities, involving any portion of the Jamul Indian cemetery in violation of NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, the California Constitution, the California Environmental Quality Act, Cal. Health & Safety Code §§7050.5, 7052, 7054, 7054.6, 7054.7, 7055, 7500, Public Res. Code 5097.9-5097.99, and Penal Code 487, and otherwise mutilating, disinterring, removing, excavating, and disturbing in any way, any Native American human remains, and the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, and Cal. Pub. Res. C. 5097.9-5097.99.

3. That Plaintiffs be awarded punitive damages;

4. That Plaintiffs be awarded their reasonable attorneys' fees, costs, and expenses in this action; and

5. That Plaintiffs be awarded such other and further equitable and legal relief as this court may deem just and proper.

JURY DEMAND

Plaintiffs hereby demand trial by jury.

Dated: May 26, 2015 **WEBB & CAREY**

/s/Patrick D. Webb
Attorneys for Rosales and Toggery

Patrick D. Webb, Esq. State Bar No. 82857
WEBB & CAREY
402 West Broadway Ste 1230
San Diego CA 92101
Tel 619-236-1650
Fax 619-236-1283

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WALTER ROSALES AND KAREN TOGGERY, ESTATE OF HELEN CUERRO, ESTATE OF WALTER ROSALES' UNNAMED BROTHER, ESTATE OF DEAN ROSALES, ESTATE OF MARIE TOGGERY, ESTATE OF MATTHEW TOGGERY, APRIL LOUISE ROSALES, and ELSA WELMAS Plaintiffs, v. **AMY DUTSCHKE, Regional Director, BIA; JOHN RYDZIK, Chief, Environmental Division, BIA; KENNY MEZA; CHARLENE CHAMBERLAIN; ROBERT MESA; RICHARD TELLOW; PENN NATIONAL INC.; SAN DIEGO GAMING VILLAGE, LLC; and C.W. DRIVER INC.,** Defendants.	Civ. No. **INDEX OF EXHIBITS TO COMPLAINT DEMANDING TRIAL BY JURY**

INDEX OF EXHIBITS TO COMPLAINT

1. Exhibit A is a copy of the recorded September 26, 1912, J.D. Spreckel's Coronado Beach Company deed of a portion of the cemetery in Jamul, California, to the Roman Catholic Bishop of Monterey and Los Angeles, a corporate in sole of the State of California, "to be used for the purposes of an Indian graveyard and approach thereto," "to have and to hold the above granted and described premises unto the said Grantee, his successors and assigns forever for the purpose above specified," which was recorded in Book 361.

2. Exhibit B is a copy of the 1931 Map of Survey of Rancho Jamul, L.S. 430.

3. Exhibit C is a copy of the August 7, 1971 Union Tribune article, "Cemetery Houses the Living," by Ernesto Flores.

4. Exhibit D is a copy of the recorded December 22, 1978 deed from Donald and Lawrence Daley of the remainder of the Indian cemetery to "such Jamaul Indians of one-half degree or more Indian blood."

5. Exhibit E is a copy of Bureau of Indian Affairs, Sacramento, Carmen Facio's May 9, 2000 memo to Bureau of Indian Affairs, Washington D.C., Nancy Pierskalla.

6. Exhibit F is a copy of the July 13, 1993, Indian cemetery map recorded with the San Diego County Recorder.

7. Exhibit G is a copy of the original May 9, 1981 Jamul Indian Village half-blood community constitution.

8. Exhibit H is a copy 1 *Opinions of the Solicitor of the Department of Interior Relating to Indian Affairs 1917-1974* ("*Opinions of the Solicitor*") at 668, 724, 747, and 1479 (1979).

9. Exhibit I is a copy of the July 1, 1993 BIA Tribal Government Services letter to Raymond Hunter.

10. Exhibit J is a copy of the May 25, 1982 grant deed containing the easement for the cemetery road retained by the Catholic Dioscese.

11. Exhibit K is a copy of State of California, Department of Health Services, Office of State Registrar's September 10, 1996 Application and Permit for Disposition of Human Remains for Helen Cuerro and Dean Rosales on 14191 Highway 94, Jamul, CA 91935, and the County of San Diego and Riverside, Certificates of Death for Helen Cuerro, Marie Toggery, Mathew Tinaojheda Toggery, and Dean Rosales, and a copy of the Daily Log Records By Date for San Diego Rural Fire Prot. Dist., dated June 30, 2002.

12. Exhibit L is a copy Cal. Dept. of Fish & Game, May 21, 2007 Map of Watershed, Wildlife and Creek Beds Surrounding JIV and Lakes Entertainment Properties.

13. Exhibit M is a copy of Governor Gray Davis' letter of July 17, 2001 letter to the Acting Superintendent of the BIA.

14. Exhibit N is a copy of Governor Arnold Schwarzenegger's Legal Affairs

Secretary's letters of August 29, 2005 and December 20, 2005, April 2, 2007 to the Jamul Indian Village, and April 5, 2007 to John Sansone, San Diego County Counsel.

15. Exhibit O is a copy of the temporary restraining order in *Viejas Band of Kumeyaay Indians v. Padre Dam Municipal Water District*, Case No. GIC 2010-00093203, and Gale Toensing's June 17, 2010 article in Indian Country Today, "Court Orders Construction Halt on Viejas Sacred Site," and her July 8, 2010 article in Indian Country Today, "Viejas ceremonial sanctified burial site to be protected 'in perpetuity.'"

16. Exhibit P is a copy of Larry Larue's December 2, 2013 article in the News Tribune, "Puyallup Tribe, City Working toward cemetery Solution."

17. Exhibit Q is a copy of the Navy Jurisdictional Maps for San Diego, depicting federal ownership of Fort Rosecrans National Cemetery, in Haines, *Federal Enclave Law*, (Atlas 2011) at 266.

18. Exhibit R is a copy of A. Burke's "California Indian Burial Ground Paved Over for Bay Area Housing," *Liberty Voice*, (April 28, 2014).

19. Exhibit S is a copy of The Inter-Tribal Council of the Five Civilized Tribes of the Chickasaw, Choctaw, Cherokee, Muscogee (Creek) and Seminole Nations Resolution, representing 750,000 blood descendants, condemning the Poarch Creek Band of Creek Indians' desecration of the Hickory burial ground.

20. Exhibit T is a copy of former Vice Chair of the Okla. Indian Affairs Comm., Dan Jones,' "You'll Mock Death But Once," *Indian Country Today*, August 20, 2012.

21. Exhibit U is a copy of "Ritual Flames Honor Kumeyaay Matriarch," *U.T. San Diego.com*, June 17, 2013; E. Davis, *Early Cremation Ceremonies of the Lusieno and Digueno Indians of So. California*, Indian Notes and Monographs, New York Museum of the American Indian (1921) 95-99; T. Waterman, *The Religious Practices of the Digueno Indians*, University of California Publications in American Archaeology and Ethnology (March 30, 1910, Vol. 8, No. 6, pp.305-7; E. Curtis, *The North American Indian* (1926) Vol 15/20, page 50.

22. Exhibit V is a copy of the May 1, 2003 Draft Agreement for Consultation, Treatment and Disposition of Human Remains and Cultural Items that may be Discovered Inadvertently During Planned Activities at the Statute of Liberty between DOI, National Park

Service and the Delaware Nation and the Stockbridge-Munsee Community of Wisconsin,

23. Exhibit W is a copy of the directives of the National Center for Cultural Resources and the National NAGPRA Program.

24. Exhbit X is a copy of the detailed descriptions required for the human remains and cultural items being repatriated in the Notice of Intent to Repatriate Cultural Items in the Possession of the San Diego Museum of Man, published in 64 Fed. Reg. 56,219 (October 18, 1999), 69 Fed. Reg. 4315 (January 29, 2004), 69 Fed. Reg. 4316 (January 29, 2004)

25. Exhibit Y is a copy of Judge Karlton's April 23, 1992 Order granting the federal defendants' motion for summary judgment in *Ione Band of Miwok Indians v. Burris*, Civ. No. S-90-993 LKK (E.D. Cal. 1992), see particularly page 17.

26. Exhibit Z is a copy of U.S. Magistrate Judge, Peter Nowinski's May 31, 1996 Findings and Recommendation Re: Dismissal, U.S. District Judge Lawrence Karlton's August 6, 1995 and September 4, 1996 Orders dismissing Plaintiffs' action, and U.S. District Judge David Levi's November 3, 1998 Order denying Plaintiffs' Temporary Restraining Order in *Ione Band of Miwok Indians v. Burris*, Civ. S-90-993 LKK, (E. D. Cal. 1996).

27. Exhibit AA is a copy of more than three thousand petitions that were signed by residents of Jamul against the casino.

EXHIBIT A

Photographed by T. FADER, Deputy Recorder

State of California }
County of San Diego }

On this 20th day of September AD 1912 before me, Lou B. Mathews a Notary Public in and for said County, residing therein, duly commissioned and sworn, personally appeared Ed. Fletcher, personally known to me to be the person described in and whose name is subscribed to the within instrument, as the attorney in fact of Charles B Gould, and acknowledged to me that he subscribed the name of Charles B Gould, thereto as principal, and his own name as attorney in fact.

In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

Lou B. Mathews
Notary Public in and for the County of San Diego, State of California

Recorded at Request of R. C. Sparks (S. D. Webber) Sep 26 1912 at 15 Min Past 10 Oclock A. M.

John H. Ferry County Recorder
Fee $ 10 COMPARED: Harold T. Angier by W. Howard Ferry Deputy Recorder

---

Coronado Beach Company, a corporation of the City of San Diego County of San Diego, State of California,

For and in consideration of the sum of One Dollar, Does Hereby Grant to The Roman Catholic Bishop of Monterey and Los Angeles, a corporation sole, of the State of California to be used for the purposes of an Indian graveyard and approach thereto, all that Real Property situated in the County of San Diego, State of California, bounded and described as follows:

Commencing at a point on the north boundary line of the Rancho Jamul distant 648.5 feet east from the Rancho Jamul corner No 16; thence east along said north boundary line 1383.0 feet to a point on the Westerly line of County Road; thence South 49° 13' east along said westerly line of County Road 26.2 feet to a point; thence west 594.7 feet to a point; thence south 58.0 feet to a point; thence south 86° 45' west 704.0 feet to a point; thence south 43° 35' west 88.5 feet to a point; thence south 59.9 feet to a point; thence west 44.2 feet to a point; thence north 239.0 feet to the point of beginning, containing 2.21 acres.

To have and to hold the above granted and described premises unto the said Grantee, his successors and assigns forever, for the purposes above specified.

In Witness Whereof, said corporation has caused this deed to be signed by its Vice President, and Secretary and its corporate seal to be affixed hereto this 11th day of July 1912.

Coronado Beach Company

Photographed By T. FADER, Deputy Recorder

Signed and executed in presence of Bernardo Brace Bombay } By W. Clayton Vice President and Harry L. Titus Secretary

State of California } ss.
County of San Diego }

On this 11th day of July in the year one thousand nine hundred and twelve before me Fred G. Whitehead, a Notary Public in and for said County, personally appeared W. Clayton known to me to be the Vice President, and Harry L. Titus, known to me to be the Secretary of the Corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

Fred G. Whitehead
Notary Public in and for the County of San Diego, State of California

Recorded at Request of Father E. Lapointe. Sep 26 1912, at 30 Min. Past 10 O'clock A. M.

John H. Ferry County Recorder
By Harold Angier Deputy Recorder

Fee $.90 COMPARED: Harold I. Angier

This Indenture made this 27th day of August 1912, Between Chase & Lindington, a Corporation, duly organized existing and doing business under and by virtue of the laws of the State of California and having its principal place of business at the City of San Diego, County of San Diego, State of California, the party of the first part, and L. May Faber party of the second part, Witnesseth:-

That said party of the first part, pursuant to a resolution duly passed at a meeting of its Board of Directors held at their office on August 27th 1912, and of record in Minute Book #1 at pages 59 et seq. for and in consideration of Ten ($10.00) Dollars, Gold Coin of the United States of America to it in hand paid by said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said party of the second part, her heirs and assigns forever, subject however to the County and State taxes of 1912 and the covenants and conditions hereinafter named, all that certain real property situate in the City of San Diego, County of San Diego, State of California, bounded and described as follows, to-wit:

Lots Nine (9) and Ten (10) Block Forty-three (43) of La Jolla

EXHIBIT B

L.S. NO. 430

MAP OF SURVEY OF

RANCHO JAMUL

SAN DIEGO COUNTY - CALIFORNIA

Surveyed May, 1931 Scale - 1 inch = 1000 feet

3 SHEETS - SHEET 1

Total Area - 8886.77 Acres

Meridian determined by solar observation

Surveyed for G.R. Daley, San Diego, California

Survey by Hugo Kuehmsted, Licensed Surveyor

I hereby certify that I am a Licensed Surveyor, and that this survey was made under my supervision as shown on this map, and that the monuments were set as shown hereon.

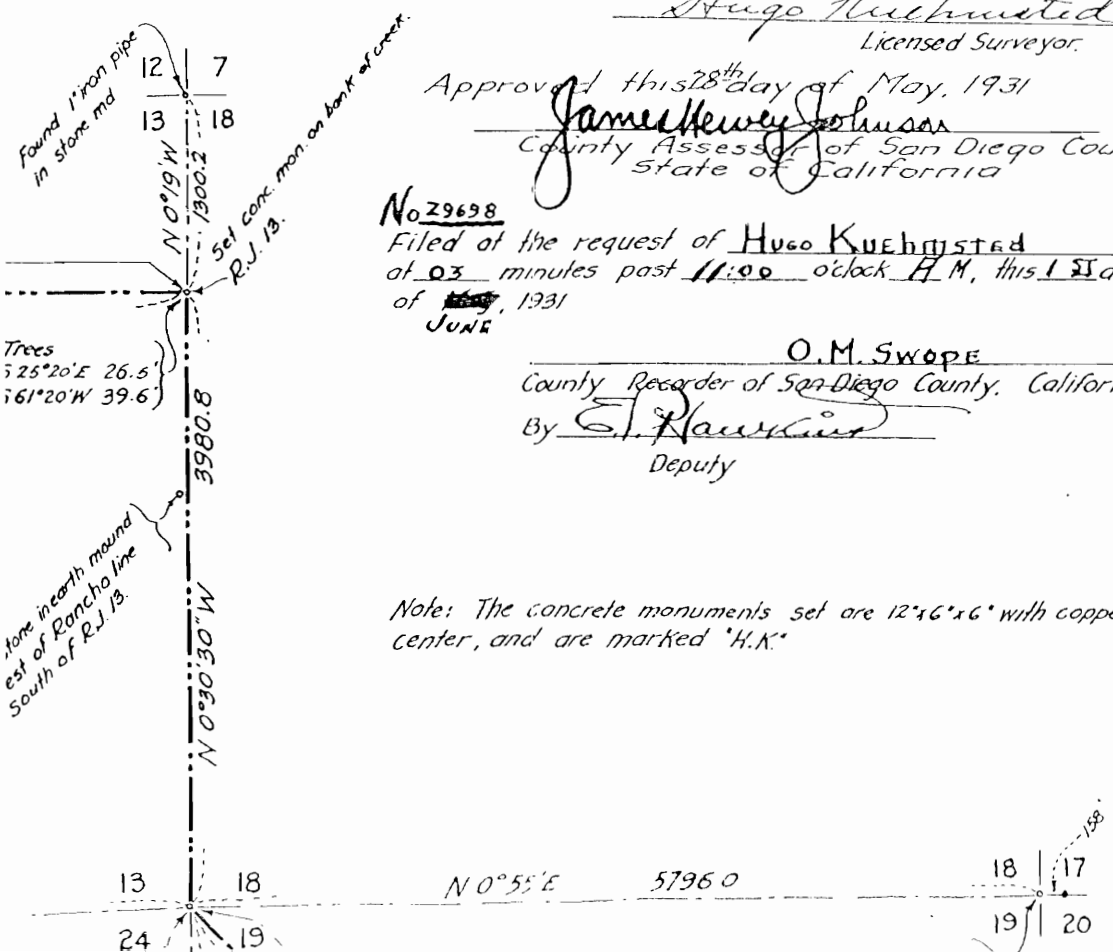
Hugo Kuehmsted
Licensed Surveyor.

Approved this 28th day of May, 1931

James Harvey Johnson
County Assessor of San Diego County.
State of California

No 29698
Filed at the request of Hugo Kuehmsted
at 03 minutes past 11:00 o'clock A M, this 1 st day
of ~~May~~ JUNE, 1931

O.M. SWOPE
County Recorder of San Diego County, California.
By G. Hawkins
Deputy



Note: The concrete monuments set are 12"x6"x6" with copper center, and are marked "H.K."

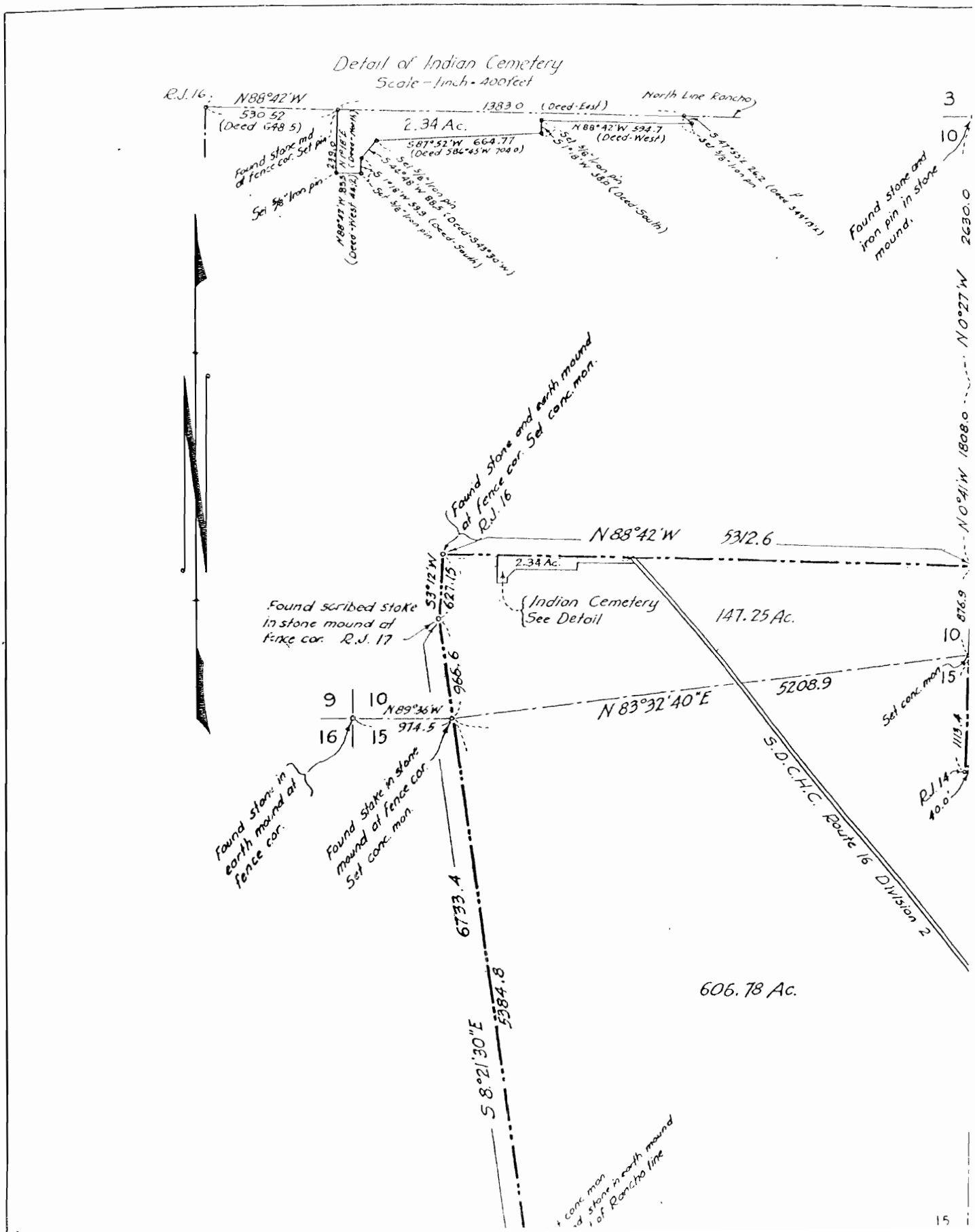

Detail of Indian Cemetery
Scale - 1 inch = 400 feet
R.J. 16
N88°42'W
530.52
(Deed 648.5)
1383.0 (Deed-East)
North Line Rancho
2.34 Ac.
S87°52'W 664.77
(Deed S86°45'W 704.0)
N88°42'W 594.7
(Deed-West)
Found stone and at fence cor. Set pin
Set 5/8" iron pin
Found stone and iron pin in stone mound.
Found stone and earth mound at fence cor. Set conc. mon.
R.J. 16
N88°42'W
5312.6
2.34 Ac.
Indian Cemetery
See Detail
147.25 Ac.
Found scribed stake in stone mound at fence cor. R.J. 17
S3°12'W
627.15
966.6
9
10
16
15
N89°36'W
974.5
N83°32'40"E
5208.9
Set conc. mon.
Found stone in earth mound at fence cor.
Found stake in stone mound at fence cor. Set conc. mon.
S.D.C.H.C. Route 16 Division 2
6733.4
5384.8
S8°21'30"E
606.78 Ac.
N0°27'W
N0°41'W
1808.0
2630.0
876.9
1113.4
R.J. 14
40.0
3
10
15

EXHIBIT C

Frank Lechappa, upper right, a Barona Indian, inspects well tended graves at Indian Catholic Cemetery in Jamul. One grave is that of veteran Daniel Aldamas lower left. Lower right is home of Pattie family that has lived in area for [illegible]

Rabbi Attracts Youth With Rock Service

By DIANA DIMARCO

PITTSBURGH (AP) — Rabbi Fredric S. Pomerantz is a round little man with longish red hair and a throbbing drive who looks more like a musician than a rabbi. He's both.

He worked his way through college playing drums in a band.

Now, at 31, he is associate rabbi of one of the country's largest Jewish congregations, the 1,900-family Temple Rodef Shalom. And he has set out on a course heretofore generally uncharted in Judaism.

It involved setting the traditional Hebrew prayer service to a rock beat, and organizing two coffeehouses for young people — gentile as well as Jewish.

IN SHARING

approach, common in Christian youth activities but still rare in Jewish worship, helps young people share mutual interests, Rabbi Pomerantz says, and adds: "It's the sharing that's important, the entertainment is secondary."

A restless, energetic man, he also is Jewish chaplain at Western Psychiatric Hospital, rabbinic advisor to the Pennsylvania Federation of Temple Youth, and originator of a free, informal education program that opened for high school students two years ago. It now also includes college students and adults.

The two coffeehouses, "The Back Door" for university students and "The Exit" for high schoolers, are open every weekend to all comers.

NEEDS CITED

"Kids need to feel part of a group and they also need someone to show them they have responsibilities," he says.

The title of the "rock" service, Sim Shalom, means "grant us peace," and that is [illegible] message, says Rabbi [illegible]ntz, who did the up[illegible] arrangement for brass, guitar, organ and drums.

"You've got to listen to the ideas and questions of the prayers," he says. "Yet if its the beat and the music that draws you into the meaning there's nothing wrong with that."

JAMUL INDIAN FAMILIES

Cemetery Houses The Living

By ERNESTO FLORES

In 1912, when San Diego was still a part of the Roman Catholic Diocese of Monterey, about three acres of hilly land in Jamul was turned over to the church by a realty company for use as a cemetery for Indians.

To fulfill that stipulation, the church for years has buried hundreds of Indians in the cemetery. It also erected a small chapel where services for the dead are held.

That the church regards the property as simply a place of burial was confirmed by administrators of the San Diego Roman Catholic Diocese. "As far as we are concerned the land is a cemetery and it will remain that way," they said.

SOME LIVE THERE

Actually, only a small portion of the land has been used as a burial ground. The church, for years, has allowed Indians to live on the open areas. Today about seven families make their homes on the cemetery land.

The families, who come from various tribes in the county, live under extremely poor conditions. Having no plumbing, they get their supply from a lone well pump at the bottom of a dry wash.

They have no electricity, no sewage system and no transportation except one or two dilapidated autos. Their houses are wooden shacks surrounded by piles of junk and garbage.

In spite of these problems, however, many of them express a desire to live and die there as their parents and grandparents before them.

Church authorities are not particularly happy with the activities of various groups taking an interest in the Indians at Jamul. Because of such activities, publicity has been given the plight of the Indians.

A church spokesman said he hopes the publicity about the Indians living in the cemetery will not reflect adversely on the church. He added, "we have tried our best to help them. They should do something to help themselves, too."

Mrs. Isabel Rosales, 77, is the oldest resident of the place. She said she has lived there all her life and she remembers the time when there were more Indians living there.

"Many of them are buried in that cemetery," she said pointing work-gnarled fingers at the rows of wooden crosses on a hill about 500 yards away. "Others left and didn't come back."

Mrs. Rosales' three surviving children all are married and live in other areas of the county. She lives alone. She said she has no place to go and intends to end her days there.

WON'T MOVE

This thinking is shared by Mrs. Marie Toggery, 50, whose husband died recently. She said her three children may not think as she, but as far as she is concerned, she is not going to live anywhere else.

Mrs. Toggery's son, Jessie, 19, wants to be a lawyer. His sister, Connie, 18, studies at Grossmont Continuation School and hopes to go to college next year. The other daughter, Karen 17, is a student at Granite Hills high school but wants to drop out and work.

Having experienced a marginal existence all their lives, the Toggerys seem to have developed an immunity to suffering. They could even laugh at the thought of death.

Mrs. Toggery was seriously ill for some time.

"I told my mother that if she dies, we just have to bury her in the cemetery," said Jessie jocularly. Mrs. Toggery joined her daughter in laughter.

NO EVICTION

The family's only means of income is a Veterans Administration benefit for the late Mr. Toggery, who was a veteran. Their monthly check formerly was $291, but this has been reduced to $287 for no apparent reason, said Mrs. Toggery.

With this amount they buy food, clothing and other necessities and send the children to school.

The Indians at Jamul have one consolation, however. According to church officials, the diocese has no plan to evict the families.

"Although technically they have no business being there, we can't remove them just like that," a diocesan spokesman said.

Nevertheless, officials have a few complaints. Although the San Diego Gas & Electric Co. has agreed to extend electric lines to that part of Jamul, the residents, except for one family, refuse to spend money to bring power to their homes.

GROUPS VISIT THEM

The diocese built a small chapel on a slope of a hill. The Rev. J. Walshe Murray, pastor of St. Pius X Church in Jamul under whose jurisdiction the cemetery falls, said he officiates in most of the funeral services. The church also erected a community house which the families use for meeting.

For years the Indian families have been left largely to their own devices. Lately, however, some concerned groups have visited them and asked about their welfare.

One such group is the Grassroot Indian Association which has the objective of "improving the living conditions of Indians in the county by peaceful and legal means."

Frank LaChappa, 22, a Barona Indian from Poway and the association's vice chairman, said his group has met in Jamul twice.

"We are a new group and our first task is to find out the condition of living in various Indian communities. That's why we come here as often as we can," he said.

Earl Ridenhour, himself a part Indian from Oklahoma and a member of the association, said the conditions in which most local Indians live "are so deplorable, we just have to do something to help them."

Younger Upholds Tax For Cable TV

SAN FRANCISCO (AP) — Atty. Gen. Evelle Younger has ruled that California's 332 general law cities can build and run their own cable television systems and tax citizens to fund the operation.

In the opinion requested by Senate President pro tem James Mills of San Diego, Younger said such a system is "a public work" and could be run as a public utility.

The state's 75 charter cities, including most major cities, were not covered by the ruling. Most cable television systems built to-date have been private ventures.

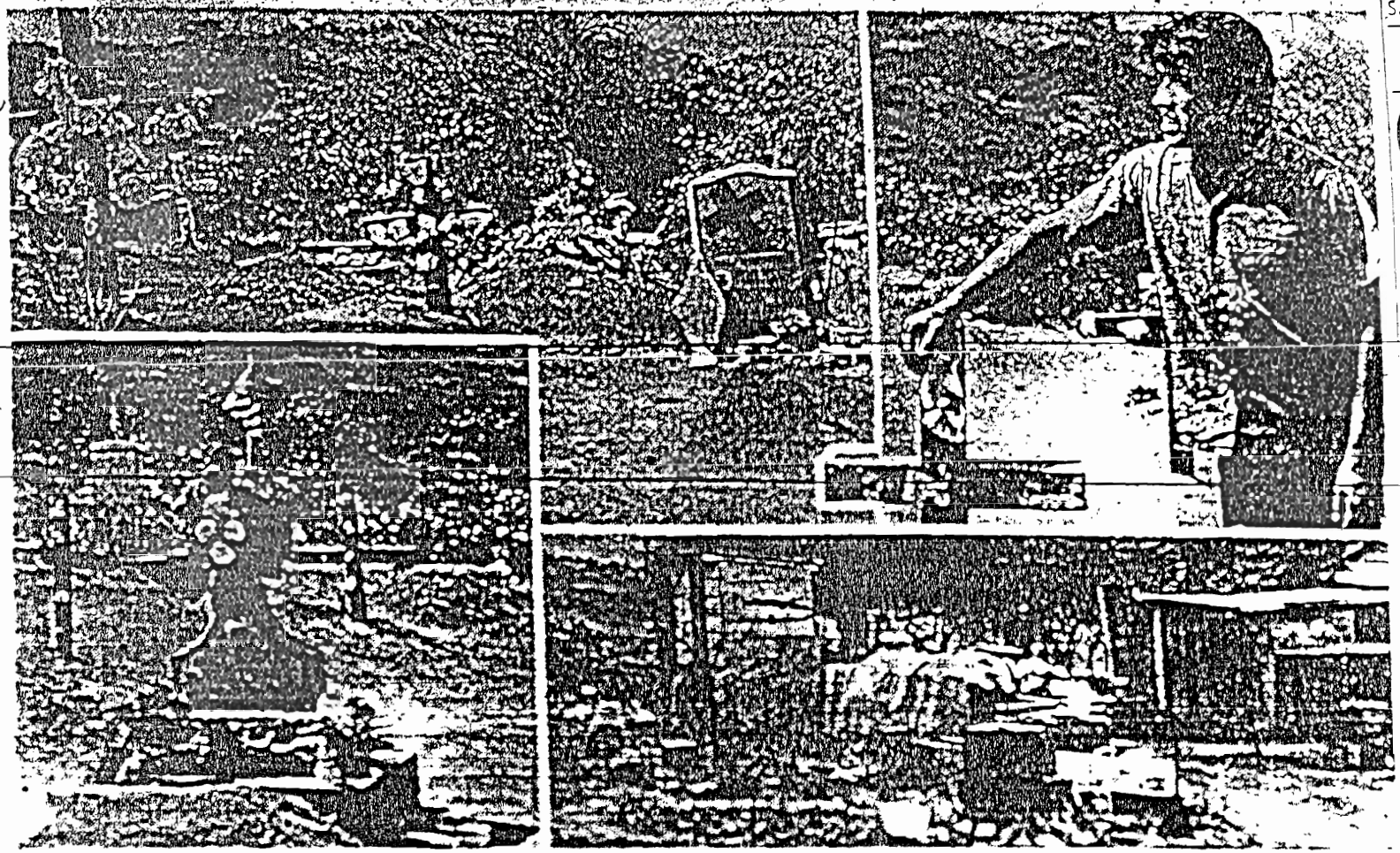
Revenues for the system could come from general obligation bonds and available tax money, Younger said.

IN EL CAJON
CALVARY BAPTIST CHURCH
10:15 a.m. —
Rev. DAVE MARSTELLER
7:00 p.m. — BROADCAST — KECR-FM
LINCOLN

FIRST CHU
RELIGIOUS
3795 GEORGIA STRE
CHET CASTE
9:30 THE WEAKNESS
AND THE STRENG
11:00 GOD POWER, T
EQUALIZER

THE EV
PRESBYTE
of San
HWY
WILLIAM O. LIVINGSTON
"HEATHI
HER HA
ADULT CLASSES
SUNDAY SCHOOL
Morning Worship
Church Office

Saturday, August 7, 1971



Frank Lechappa, upper right, a Barona Indian, inspects well tended graves at Indian Catholic Cemetery in Jamul. One grave is that of veteran Daniel Aldamas, lower left. Lower right is home of Indian family that has lived in area for years.

RELIGION

Child Worship Needs Stressed In New Book

WASHINGTON, UPI. — One of the most difficult [illegible] parents, Sunday [illegible] teachers and pastors [illegible] the experience [illegible] meaningful [illegible] children.

Adult worship [illegible] oriented and [illegible] spectators [illegible] pants. All [illegible] worship [illegible] insipid and [illegible] of adult [illegible]

Fortunat[illegible] the situation [illegible]

Not ong[illegible] Conference [illegible] sociation [illegible] newal of the [illegible] the Christian [illegible] ed a 200 page [illegible] called [illegible]

What [illegible] turgies" so potentially useful is the way it capitalizes both on children's wonder and awe about the world and their sometimes aggravating inability to sit still for any length of time.

Now the conference has issued a supplement to the book [illegible] children's [illegible]

[illegible]

Rabbi Attracts Youth With Rock Service

By DIANA DOMARCO

[illegible]

JAMUL INDIAN FAMILIES

Cemetery Houses The Living

By ERNESTO FLORES

[illegible] when San Diego [illegible] a part of the Roman [illegible] Diocese of Monterey [illegible]

Church authorities are not particularly happy with the activities of various groups [illegible] as the Indians at Jamul. Because of such activities, publicity has been given the plight of the [illegible] next year. The other daughter, Karen [illegible] is a student at Granite Hills high school [illegible]

[illegible] meetings.

[illegible] the Indian [illegible] been left largely [illegible]

EXHIBIT D

RECORDING REQUESTED BY 358

AND WHEN RECORDED MAIL TO

Name Bureau of Indian Affairs
Street Southern California Agency
Address 5750 Division Street, Suite 201
City & State Riverside, California 92506

FILE/PAGE NO. 78-554597
FEB 1978
RECORDED REQUEST OF
GRANTEE
DEC 27 1 49 PM '78
OFFICIAL RECORDS
RECORDER
SAN DIEGO COUNTY, CALIF.

SURVEY MONUMENT PRESERVATION USER FEE
$10.00

$5.00

SPACE ABOVE THIS LINE FOR RECORDER'S USE

TAX ROLL PARCEL NO. 597-080-01

GRANT DEED

DOCUMENTARY TRANSFER TAX $ -0-
_____ COMPUTED ON FULL VALUE OF PROPERTY CONVEYED.
_____ OR COMPUTED ON FULL VALUE LESS LIENS AND ENCUMBRANCES REMAINING AT TIME OF SALE.
William H. Granelle, Agency Realty Off
Bureau of Indian Affairs
Signature of Declarant or Agent determining tax. Firm Name

THIS INDENTURE made the _____ day of _____ 19____

BETWEEN Donald L. Daley and Lawrence A. Daley

, the parties of the first part

and The United States of America in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate

, the parties, of the second part,

WITNESSETH: That the said parties of the first part, ~~[illegible]~~ do _____ by these presents, GRANT for a valuable consideration unto the said parties of the second part, and to their heirs and assigns forever, all that certain ~~[illegible]~~ or parcel _____ of land, situate, lying and being in the _____ County of San Diego and State of California and bounded and particularly described as follows, to-wit: SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF.

ACCEPTANCE OF CONVEYANCE BY THE UNITED STATES IS TO BE ATTACHED HERETO AS EXHIBIT "B" AND RECORDED WITH THIS DEED.
THIS CONVEYANCE IS MADE IN ACCORDANCE WITH SECTIONS 5 AND 19 OF THE INDIAN REORGANIZATION ACT OF JUNE 18, 1934 (48 Stat. 985 and 988; 25 U.S.C. 465 and 479) AND MADE SUBJECT TO EASEMENTS AND RIGHTS-OF-WAY OF RECORD IN FAVOR OF THE PUBLIC OR THIRD PARTIES.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD, all and singular the said premises, together with the appurtenances, unto the said parties of the second part, and to their heirs and assigns forever.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hand and seals the day and year first above written.

X [signature]
X Donald L. Daley
Donald L. Daley and Lawrence A. Daley

STATE OF CALIFORNIA,
County of San Diego } ss.

On December 12, 1978, before me, the undersigned, a Notary Public in and for said State, personally appeared Lawrence A. Daley and Donald L. Daley

known to me to be the persons whose names are subscribed to the within instrument and acknowledged that they executed the same.

WITNESS my hand and official seal.

CHARLOTTE L. D. ARTHUR
NOTARY PUBLIC
SAN DIEGO COUNTY
My Commission Expires April 9, 1982

L. D. Arthur
Notary Public in and for said State

Title Order No. _____

Escrow or Loan No. _____

MAIL TAX STATEMENTS TO _____
NAME ADDRESS ZIP

78-554597

DEED—GRANT—WOLCOTTE FORM 770
REV. 5-70

This standard form covers most usual problems in the field indicated. Before you sign, read and make changes proper to your transaction. Consult a lawyer if you doubt the form's fitness.

LEGAL DESCRIPTION

All that portion of Rancho Jamul, in the County of San Diego, State of California, according to L.S. Map thereof No. 430, filed in the Office of the Recorder of said San Diego County, May 28, 1931, more particularly described as follows:

Beginning at corner R.J. 16 as shown on said L.S. Map No. 430; thence along the Northerly line of said Rancho Jamul S. 88°42'00" E., 529.24 feet (record N. 88°42' W., 530.52 feet) to the Westerly line of that certain parcel of land noted Indian Cemetery on said L.S. Map No. 430; thence along said Westerly line S. 01°20'53" W., 239.66 feet (record N. 01°18' E., 239.0 feet) to the Southwest corner of said Indian Cemetery; thence along the Southerly line of said Indian Cemetery S. 88°39'07" E., 83.55 feet (N. 88°42' W., 83.5 feet) to the TRUE POINT OF BEGINNING; thence continuing along said Southerly line as follows: N. 01°20'53" E., 59.94 feet (record S. 01°18' W., 59.9 feet); N. 44°50'53" E., 88.55 feet (record S. 44°48' W., 88.5 feet); N. 87°54'53" E., 665.17 feet (record S. 87°52' W., 664.77 feet); N. 01°20'53" E., 58.04 feet (record S. 01°18' W., 58.0 feet); S. 88°42'00" E., 598.46 feet to the Southwesterly line of Campo Road said point being on a 555.59 foot radius curve concave Southwesterly, a radial line from said points bears S. 47°16'18" W.; thence Southeasterly along the arc of said curve, through a central angle of 03°29'08" a distance of 33.80 feet; thence leaving said Southwesterly line N. 88°42'00" W., 338.54 feet; thence S. 21°58'02" E., 257.03 feet; thence N. 86°48'26" W., 721.24 feet; thence N. 86°21'37" W., 388.78 feet to the TRUE POINT OF BEGINNING, said described land consisting of 4.66 acres, more or less.

EXHIBIT "A" TO DEED FROM DONALD L. DALEY AND LAWRENCE A. DALEY DATED DECEMBER 12, 1978.

78-554597

IN REPLY REFER TO

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Sacramento Area Office
2800 Cottage Way
Sacramento, California 95825

ACCEPTANCE OF CONVEYANCE

The United States of America, acting through the undersigned, an authorized representative of the Secretary of the Interior, does hereby accept the conveyance made by Donald L. Daley and Lawrence A. Daley in that certain Grant Deed dated December 12, 1978. Said Grant Deed, with this Acceptance of Conveyance attached, shall be recorded in the Official Records of San Diego County, California.

Date: DEC 21 1978

Charles L. Toyebo Jr.
ACTING Area Director

Gregory

Pursuant to the authority delegated by 230 DM 1, 10 BIAM 2 (39 F.R. 32166) and 10 BIAM 3.1 (34 F.R. 637).

State of California)
) SS.
County of Sacramento)

On this 21st day of December, 1978, before me, the undersigned, a Notary Public in and for said State, personally appeared Charles L. Toyebo Jr., known to me to be the person whose name is subscribed to the within Acceptance of Conveyance and acknowledged to me that he executed the same for the United States of America.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this date.

CARMEN G. FACIO
NOTARY PUBLIC
My Commission Expires August 19, 1981

Carmen D. Facio

EXHIBIT "B" TO DEED FROM
DONALD L. DALEY AND
LAWRENCE A. DALEY DATED
DECEMBER 12, 1978.

On _____, before me, the undersigned, a Notary Public in and for said State, personally appeared Lawrence A. Daley and Donald L. Daley

known to me to be the person s whose names are subscribed to the within instrument and acknowledged that they executed the same.

WITNESS my hand and official seal.

OFFICIAL SEAL
L. D. ARTHUR
NOTARY PUBLIC
SAN DIEGO COUNTY
My Commission Expires April 9, 1982

L. D. Arthur
Notary Public in and for said State

Title Order No. _____

Escrow or Loan No. _____

MAIL TAX STATEMENTS TO _____
NAME ADDRESS ZIP

78-554597

DEED—GRANT—WOLCOTT FORM 778
REV. 2-70

This standard form covers most usual problems in the field indicated. Before you sign, read it, fill in all blanks, and make changes proper to your transaction. Consult a lawyer if you doubt the form's fitness for your purpose.

EXHIBIT E

Carmen Facio
05/09/00 11 34 AM

To Nancy Pierskalla/DC/BIA/DOI@BIA

cc George Skibine/DC/BIA/DOI@BIA

Subject Re Gaming in San Diego

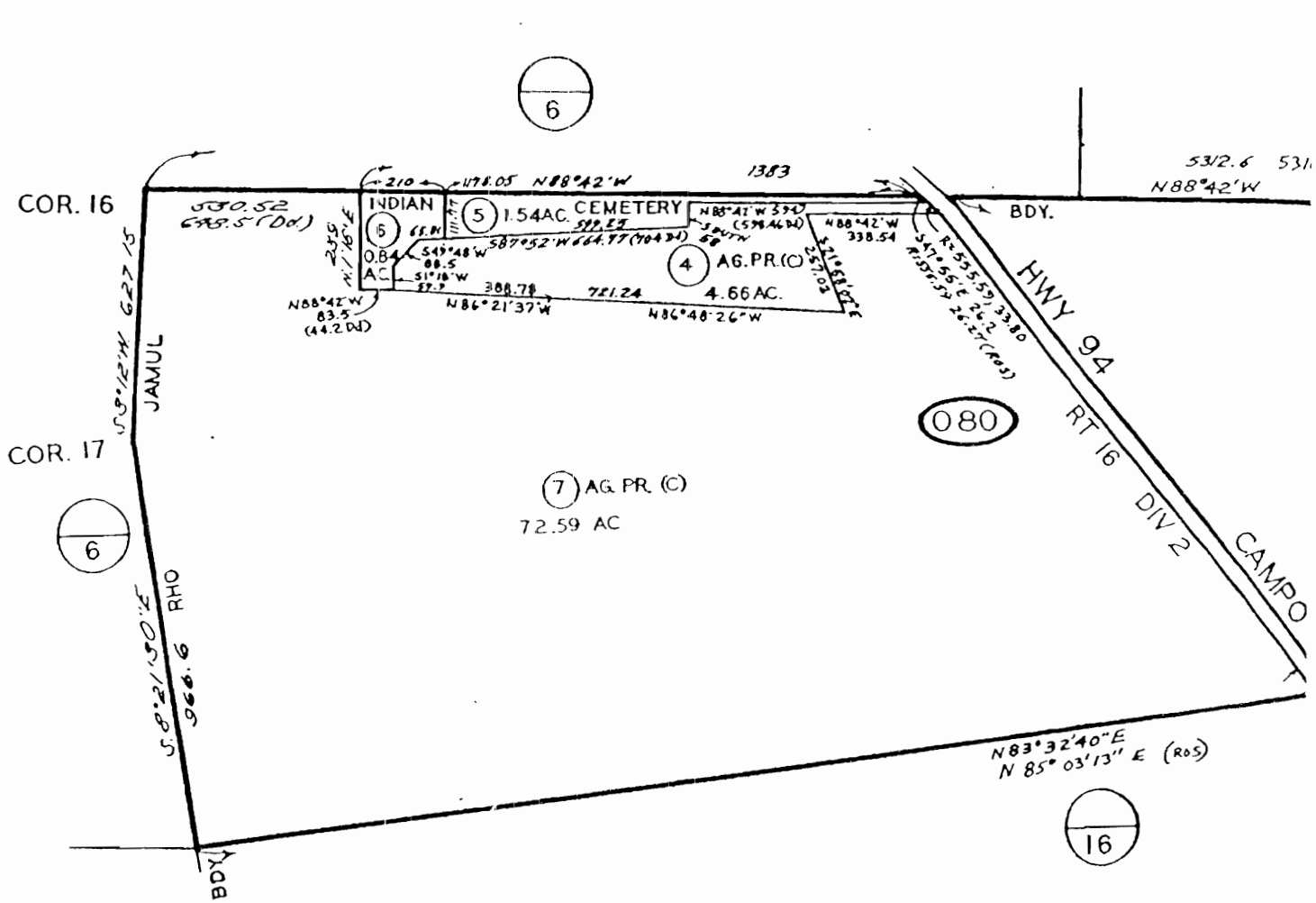
I forwarded your inquiry down to the SCA Supt. I currently have nothing on . We'll let you know.

For several years now, Jamul has been talking about getting the contiguous property - @ one point for a casino, and then again, just for a parking lot.

The current trust parcel was accepted into trust in 1978 for Jamul Indians of 1/2 degree (4.66 acres). They've expanded their membership, but the constitution states thay have jurisdiction over the Jamul Indian Village. I have no record of the 1978 trust parcel being known as the Jamul Village. There was also a small parcel accepted into trust in 1982 by the SCA Supt. for the Jamul Indian Village (1.37 acre).

Cuyapaipe has a reservation land base that there is no legal access to. They have an off-reservation piece that is leased to the So. Calif. Indian Health Council for 50 years. There's talk that they want the Health Council to move to another location so that Cuyapaipe can use the off-reservation tract for gaming. This tract is about 8.7 acres. An addition to this 8.7 acres was made in 1997 (1.43 acre) & its purpose was as the site of the Pinto Home for Girls and it's also under a 50-year lease. Of course, there's talk about putting more land in trust for Cuyapaipe for relocation of the health facility.

EXHIBIT F



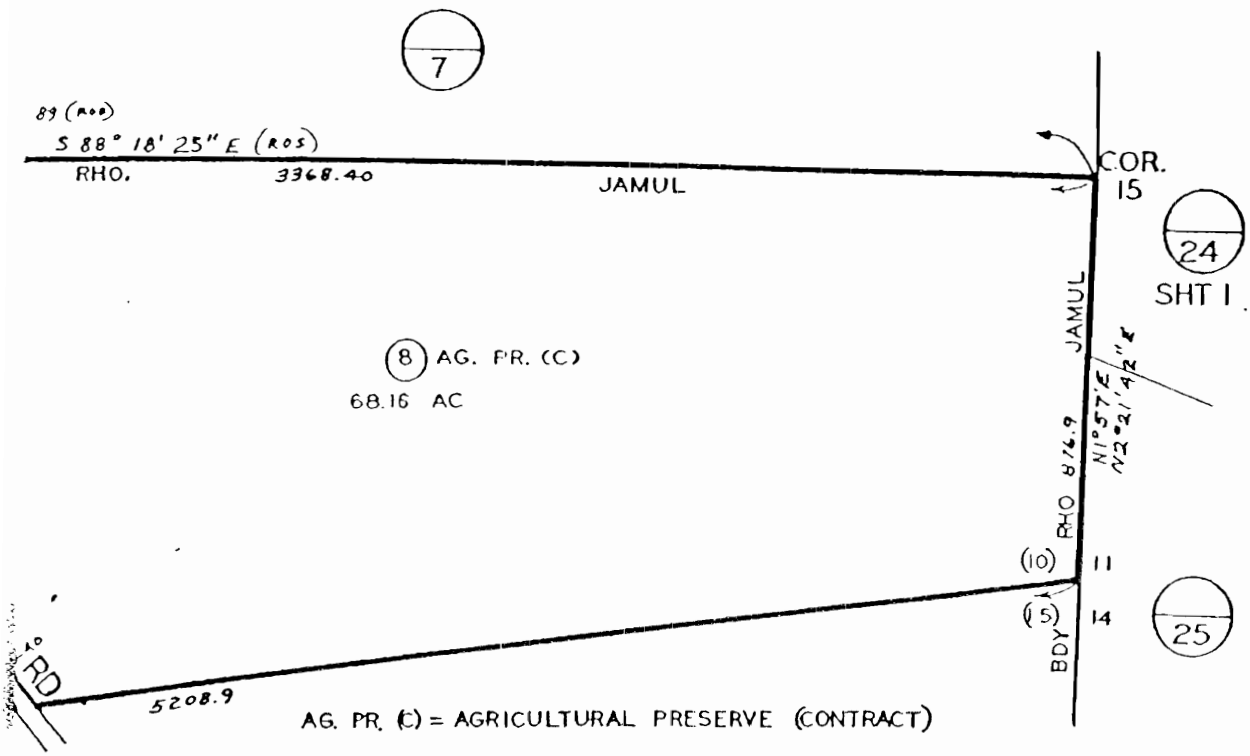
BERGGREN
9-28-75

THIS MAP WAS PREPARED FOR ASSESSMENT PURPOSES ONLY. NO LIABILITY IS ASSUMED FOR THE ACCURACY OF THE DATA SHOWN. ASSESSOR'S PARCELS MAY NOT COMPLY WITH LOCAL SUBDIVISION OR BUILDING ORDINANCES.

AGRICULTURAL PRESERVE
597-08

7-13-5

CHANGES					
BLK	OLD	NEW	YR	CUT	
080	PICK-UP	2	76	11014	PA
	1	3&4	79	4400	CAP
	2	5&6	82	2864	
	5	A-CHANGE	83	6165	
	3	7&8	94	1131	



LS 430 - RHO JAMUL SURVEY (SEC-10-T17S-R1E)
ROS 8756, 8961, 9173

EXHIBIT G

CONSTITUTION
OF THE
JAMUL INDIAN VILLAGE
SAN DIEGO COUNTY
JAMUL, CALIFORNIA

PREAMBLE

We the half blood members of the Jamul Indian Village, in order to form a better community government, to establish a formal organization, to promote our common welfare, and to secure the privileges and powers provided by the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) do hereby ordain and establish this constitution and bylaws.

ARTICLE - NAME

The name of this organization shall be the Jamul Indian Village, hereinafter referred to as the "village".

ARTICLE II - TERRITORY

The jurisdiction of Jamul Indian Village shall extend to all lands now within the confines of the Jamul Indian Village and to such other lands as may hereafter be added thereto.

ARTICLE III - MEMBERSHIP

Section 1. The members of the Jamul Indian Village shall consist of those persons who file applications for membership with and are found qualified by the executive committee under one of the following categories:

(a) Persons of 1/2 or more degree of California Indian Blood who filed as Jamul Indians and were listed on the September 21, 1968 Judgement Roll of Certain Indians of California.

(b) Persons of 1/2 or more degree of California Indian blood who reside in the Jamul Indian Village, Jamul, California, at the time of the adoption of this constitution.

(c) Persons of 1/2 or more degree of total California Indian blood whose ancestors meet the requirements of Sections 1 (a) or 1 (b) regardless of whether the ancestors are living or deceased.

(d) Persons who have been adopted by the village in accordance with an adoption ordinance approved by the Secretary of the Interior or his authorized representative, provided they are not less than 1/2 degree Indian blood.

EXHIBIT S

Sec. 2 No persons shall be a member of the Jamul Indian Village if he:

(a) Has been allotted on another reservation or on the public domain.

(b) Is officially enrolled with or has received a land use assignment or payments by reason of membership in another tribe, band, rancheria or village. Land or money received through inheritance shall not be a bar to enrollment as a member of the Jamul Village.

(c) Has relinquished in writing his membership in the Jamul Indian Village.

(d) Is less than one-half (1/2) degree Indian blood.

Sec. 3. The governing body shall adopt an enrollment ordinance, subject to the approval of the Secretary of the Interior, governing loss of membership and the enrollment of new members and prescribe rules and procedures by which the membership roll shall be prepared and thereafter kept current.

ARTICLE IV - GOVERNING BODY

Section 1. The governing body of the Jamul Indian Village shall be the general council composed of all qualified voters of the village who are eighteen (18) years of age or older. All actions of the general council shall be determined by the majority of the membership present, provided that a quorum is present.

Sec. 2. The general council shall elect from its members, by secret ballot, an executive committee consisting of a chairman, vice-chairman, and three (3) committee members who shall hold office for two (2) years or until their successors are duly elected and installed. The executive committee shall select a secretary-treasurer to assist them in the administration of tribal affairs. The secretary-treasurer may or may not be a member of the Jamul Indian Village, but shall not be entitled to vote as an officer.

Sec. 3. The general council may also appoint or elect such other committees as are deemed necessary or the chairman may be delegated the authority to appoint such committees if in the opinion of the general council it becomes necessary.

ARTICLE V - ELECTIONS

Section 1. The officers of the executive committee in office at the time of approval of this constitution by the Secretary of the Interior or his authorized representative shall continue in office until their successors are duly elected and installed in office. The first regular election of officers under this constitution shall be held in June of 1981. Thereafter elections shall be every two years. Regular elections of officers shall be conducted at the Jamul Tribal Hall in accordance with an election ordinance.

Sec. 2. An election ordinance shall be developed by the executive committee and adopted by the general council within six (6) months following the effective date of this constitution. Such ordinance shall include but not be limited to provisions for a fair election, secret balloting, nomination of candidates, absentee balloting and procedures

for handling protests and resolving election disputes. Provisions shall also be included regarding the conduct of recall and referendum elections and a uniform procedure for submitting petitions. Elections to amend this constitution shall be conducted in accordance with Article XVI of this constitution.

Sec. 3. All enrolled members of Jamul Village who are eighteen (18) years of age or older shall be entitled to vote in tribal elections.

Sec. 4. A candidate for a position on the executive committee must be a qualified voter of Jamul Village eighteen (18) years of age or older. No person who has been convicted of a felony or who within the last year preceding has been convicted of a crime involving dishonesty shall be eligible to hold office on the executive committee.

Sec. 5. All elections of tribal officers shall be by secret ballot.

Sec. 6 The time, place and manner of nominations shall be specified in the election ordinance adopted pursuant to Section 2 of this article.

ARTICLE VI - REMOVAL, RECALL AND FORFEITURE

Section 1. Not more than ten (10) days after receipt of a petition signed by thirty percent (30%) of the qualified voters requesting the removal from office of an elected official, the executive committee shall call a special general council meeting to hear the charges against the official. The petition must set forth the specific reasons for which removal is sought. Such general council meeting shall be held not less than ten (10) days nor more than twenty (20) of the date that a valid petition for removal action is filed with the executive committee. It shall at the same time notify the accused in writing of the charges against him and of the date, hour and place of the general council meeting at which time he may appear and answer those charges. After the accused has had full opportunity to be heard by the general council, a secret ballot vote for or against removal shall be conducted. The decision of a majority of those present and voting shall govern, provided that at least fifty percent (50%) of those eligible to vote shall vote. If the official is found guilty by such vote, his office shall be automatically vacated and the general council shall proceed to nominate candidates and elect a replacement official who shall serve the unexpired term of office.

Sec. 2. Recall. Upon receipt of a petition signed by at least thirty percent (30%) of the qualified voters requesting the recall of any member of the executive committee, the exective committee shall call a special general council meeting within ten (10) days of receipt of the petition. Such general council meeting shall be held not less than ten (10) days nor more than twenty (20) days of the date that a valid petition is filed with the executive committee. The general council shall vote by secret ballot whether to recall the member or members named in the petition. If a majority of the voters vote to recall a member, the position shall immediately be declared vacant. Once an individual has been subjected to recall proceedings, he or she shall not again be subject to such action during the balance of his or her term of office. No cause is required for recall action.

Sec. 3. If any officer shall die, resign, be removed or recalled from office, permanently leave the community, or shall be found guilty in any Federal or State Court of a felony while in office or of a crime involving dishonesty, that office shall automatically be declared vacant.

ARTICLE VII - VACANCIES

Except as provided in Section 1 of Article VI, any office which has been vacated, shall be filled by election of the general council at its next meeting and such replacement shall serve the unexpired term of office.

ARTICLE VIII - POWERS

Section 1. The general council of the Jamul Indian Village shall exercise the following powers subject to any limitations imposed upon such powers by Federal law and the Constitution of the United States:

(a) To negotiate with Federal, State and local governments;

(b) To retain legal counsel, the choice of counsel and the fixing fees to be subject to the approval of the Secretary of the Interior or his authorized representative so long as such approval is required by law;

(c) To prevent the sale, disposition, lease or encumbrance or tribal lands, interests in lands or other tribal assets without the consent of the village;

(d) To advise the Secretary of the Interior with regard to all appropriation estimates for Federal projects for the benefit of the Jamul Indian Village prior to the submission of such estimates to the Office of Management and Budget and to Congress;

(e) To establish ordinances governing the conduct of tribal members; providing for the maintenance of law and order and the administration of justice by establishing a tribal court and defining its powers and duties subject to the approval of the Secretary of the Interior where such approval is required by law.

(f) To establish or join such housing and other authorities as are necessary to promote the welfare of the village.

(g) To promote and protect the peace, health, morals, education and general welfare of the village and its members.

(h) To administer tribal assets and manage all economic affairs of the village.

(i) To borrow money from any source whatsoever without limit as to amount, and on such terms and conditions and for such consideration and periods of time as the general council shall determine; to use all funds thus obtained to promote the welfare and betterment of the village and its members; to finance tribal enterprises; or to lend money thus borrowed.

(j) To adopt any ordinances and resolutions necessary or incident to the exercise of any of the foregoing powers and duties.

(k) To levy and collect taxes and raise revenue to meet the needs of the tribe or to support tribal government operations.

(l) To cultivate and preserve native arts and crafts, culture and ceremonials.

(m) To establish ordinances, subject to approval by the Secretary of the Interior, providing for the manner of making, holding and revoking of assignments of village lands or interests therein, and to make leases of village lands in accordance with applicable laws.

Sec. 2. The executive committee shall have the following powers, but shall not commit the Jamul Indian Village to any contract, lease or other transaction unless it is authorized in advance by a duly enacted ordinance or resolution of the general council;

(a) To carry out all ordinances, resolutions or other enactments of the general council;

(b) To represent the Jamul Indian Village in all negotiations with Federal, State and local government and advise the general council of the results of all such negotiations.

Sec. 3. Any rights or powers heretofore vested in the Jamul Indian Village, but not expressly referred to in this constitution, shall not be lost by their omission but may be exercised by the adoption of appropriate amendments to this constitution.

ARTICLE IX - TRIBAL ENACTMENTS

Section 1. Ordinances. All final decisions on matters of general and permanent interest to members of the community shall be embodied in ordinances, such as an enrollment or an election ordinance. Such enactments shall be available for inspection by members of the general council during normal office hours.

Sec. 2. Resolution and Motions. All final decisions on matters of short term or one time interest where a formal expression is needed shall be embodied in resolutions. Other decisions of a temporary nature or relating to particular individuals, officials or committees shall be put in the form of motions and noted in the minutes and shall be available for inspection by members of the tribal council during normal office hours.

Sec. 3. All ordiances and resolutions shall be dated and numbered and shall include a certification showing the presence of a quorum and the number of members voting for or against the proposed enactment.

Sec. 4. No enactment of the Jamul General Council shall have any validity or effect in the absence of a quorum of the membership thereof at a legally called session.

Sec. 5. Approval of Tribal Enactments. Any resolution or ordinance which by the terms of this constitution or Federal law requires the approval of the Secretary of the Interior must be received by the local Bureau Superintendent no later than ten (10) days following its enactment in order to be considered for approval. It shall be the duty of the Secretary's local representative to issue acknowledgement of receipt of such enactment within five (5) working days of his receipt thereof. If timely filed, that enactment shall not become effective until it is approved by the Secretary's authorized representative, provided that if such enactment is not disapproved within ninety (90) days from the date it is timely received by the Secretary's local representative, it shall on the ninety-first (91st) day automatically become effective.

ARTICLE X - BILL OF RIGHTS

Section 1. All members of the community shall enjoy without hindrance, freedom of worship, conscience, speech, press, assembly and association.

Sec. 2. This constitution shall not in any way alter, abridge, or otherwise jeopardize the rights and privileges of the members of the community as citizens of the State of California or the United Sates.

Sec. 3. The individual property rights of any member of the Jamul Community shall not be altered, abridged or otherwise affected by the provisions of this constitution.

Sec. 4. Community members shall have the right to review all tribal records, including financial records, at any reasonable time in accordance with procedures established by the executive committee.

Sec. 5. In accordance with Title II of the Indian Civil Rights Act of 1968(82 Stat. 77), the Jamul Community in exercising its powers of self-government shall not:

(a) Make or enforce any law prohibiting the full exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(b) Violate the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizure, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(c) Subject any person for the same offenses to be twice put in jeopardy;

(d) Compel any person in any criminal case to be a witness against himself;

(e) Take any private property for a public use without just compensation;

(f) Deny to any person in a criminal proceeding the right to a speedy trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, at his own expense, to have the assistance of counsel for his defense;

(g) Require excessive bail, impose execessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six (6) months or a fine of $500.00 or both;

(h) Deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of laws;

(i) Pass any bill of attainder or ex post facto law;

(j) Deny to any person accused of imprisonment the right, upon request, to a trial by jury of not less than six (6) persons.

ARTICLE XI - MEETINGS

Section 1. Regular meetings of the general council shall be held on the third (3rd) Saturday of each month at 12:00 p.m. at a place designated by the executive committee.

Sec. 2. Special meetings may be called at any time by the chairman and shall be called by him upon the written request of the majority of the executive committee or upon the written request of eight (8) members of the general council provided that at least ten (10) days written notice shall be given in advance of the meeting in each instance.

Sec. 3. Thirty percent (30%) of the qualified voters shall constitute a quorum at all meetings of the general council. Notices of all general council meetings shall be given in writing at least ten (10) days in advance of the meeting.

Sec. 4. Regular meetings of the executive committee shall be called by the chairman or, in his absence, by the vice-chairman when deemed necessary.

Sec. 5. Special meetings of the executive committee may be called by the chairman at his discretion, and shall be called by him upon the written request of three (3) members of the executive committee.

Sec. 6. Three (3) members of the executive committee shall constitute a quorum for the conduct of its business.

ARTICLE XII - DUTIES OF OFFICERS

Section 1. The chairman shall preside at all meetings of the general council and of the executive committee. The chairman shall also be the chief executive officer of the village and exercise any authority delegated to him by the general council, such as to execute on behalf of the village all contracts, leases or other documents approved by the general council. When neither the general council nor the executive committee are in session the chairman shall be the official representative of the village. The chairman shall vote only in the case of a tie vote in either the general council or executive committee meeting.

Sec. 2. The vice-chairman, in the absence of the chairman, shall have the power and authority of the chairman and may, if authorized by the chairman, assist the chairman in the performance of his duties.

Sec. 3. The secretary-treasurer shall keep the minutes of both the general council and executive committee meetings. The secretary-treasurer shall certify the enactment of all ordinances or resolutions of both the general council and executive committee. The secretary-treasurer shall attend to the giving of all notices required by this document.

The secretary-treasurer shall have care and custody of all valuables for the village and deposit all money in an approved despository. The secretary-treasurer shall disburse all funds as ordered by the general council by check to be co-signed by the chairman. The secretary-treasure shall maintain all financial accounts, receipts and records which shall be available for inspection by officers of the general council. All financial records of the village shall be audited at least once each year and such other times as may be directed by the general council.

The secretary-treasurer shall notify by mail all members of the coming meetings or any special meetings at least ten (10) days prior to their occurance.

Also the secretary-treasurer will be expected to give a financial report at each general council meeting. All financial records shall be available for inspection by any member of the community through apoointment according to procedures established by the executive committee, and shall be open at all times for audit and inspection by representatives of the Bureau of Indian Affairs. At the expiration of the term of office, all the records and papers in the possession of the secretary-treasurer shall be turned over to the successor or the executive committee.

ARTICLE XIII - OATH OF OFFICE

Section 1. Each officer, elected or appointed hereunder, shall take an oath of office prior to assuming the duties thereof, by which oath he shall pledge himself to support and defend the Constitution of the United States and this constitution. Oath: I,_____do solemnly swear that I will support and defend the Constitution of the United States against all enemies; that I will carry out, faithfully and impartially, the duties of my office to the best of my ability; that I will promote and protect the best interests of my village in accordance with the Constitution of the Jamul Indian Village.

ARTICLE XIV - ORDER OF BUSINESS

Section 1. The following order of business is hereby established for all meetings:

(1) Call to order by the chairman.

(2) Roll Call.

(3) Ascertainment of a quorum.

(4) Reading of the minutes of the last meeting.

(5) Adoption of the minutes by voice vote.

(6) Treasurer's Report.

(7) Unfinished business.

(8) Reports.

(9) New Business.

(10) Adjourmment.

ARTICLE XV - SEVERABILITY

If any provision of this constitution shall, in the future, be declared invalid by a court of competent jurisdiction, the invalid provision shall be severed and the remaining provisions shall continue in full force and effect.

ARTICLE XVI - AMENDMENTS

Section 1. This constitution may be amended by a majority vote of the qualified voters of the Jamul Village voting in an election called for that purpose by the Secretary of the Interior or his authorized representative, provided that at least fifty-one percent (51%) of those entitled to vote shall vote in such election, but no amendment shall become effective until approved by the Secretary of the Interior or his duly authorized representative.

Sec. 2. It shall be the duty of the Secretary of the Interior or his authorized representative to call an election on any proposed amendment at the request of the general council or upon receipt of a petition signed by at least thirty percent (30%) of the qualified voters of the Jamul Village.

ARTICLE XVII - ADOPTION

Section 1. This constitution when adopted by a majority vote of the qualified voters of the Jamul Village, voting at an election called for that purpose by the Secretary of the Interior or his authorized representative in which at least fifty-one percent (51%) of those entitled to vote shall vote, shall be submitted to the Secretary of the Interior for his approval, and shall be effective from the date of his approval.

CERTIFICATE OF RESULTS OF ELECTION

Pursuant to an order issued on December 16, 1980, by William E. Hallett, Commissioner of Indian Affairs, the foregoing Constitution of the Jamul Indian Village, San Diego County, Jamul, California was submitted for ratification to the qualified voters of the village and was on May 9, 1981, duly ratified by a vote of 16 for, and 0 against, in an election in which at least fifty-one percent (51%) of the 23 (number) entitled to vote cast their ballots in accordance with Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) as amended by the Act of June 15, 1935 (49 Stat. 378).

Chairman, Election Board

Election Board Member

Election Board Member

APPROVAL

I, M. W. Bobby, Acting Deputy Assistant Secretary - Indian Affairs (Operations) by virture of the authority granted to the Secretary of the Interior by the Act of June 18, 1934 (48 Stat. 984), as amended, and delegated to me by 209 D.M. 8.3, do hereby approve the Constitution of the Jamul Indian Village, San Diego County, Jamul, California.

M. W. Bobby

Acting Deputy Assistant Secretary -
Indian Affairs (Operations)

Washington, D. C.

Date: July 7, 1981

EXHIBIT H

PURCHASES UNDER WHEELER-HOWARD ACT

August 31, 1936.

Memorandum for the Office of Indian Affairs.

The Office of Indian Affairs has submitted several titles for examination covering land in Mississippi being purchased under authority granted by the Wheeler-Howard Act (48 Stat. 984). Several opinions have been rendered and in one case the deed has been recorded and accepted. In every case submitted, the deed designates the grantee as the United States in trust for the Choctaw Tribe of Mississippi.

A further examination reveals that this designation is incorrect because there is in fact no existing tribe of Indians in Mississippi known as the Choctaw Tribe. The Choctaw tribe or nation of Indians, formerly of Mississippi, removed to Oklahoma and became one of the Five Civilized Tribes. Certain members of the tribe remained in Mississippi, taking allotments there and becoming citizens of the State, in accordance with the Dancing Rabbit Creek Treaty concluded September 27, 1830 (7 Stat. 333). Thereafter, when Oklahoma lands were allotted, some of the Indians remaining in Mississippi were permitted to enroll as citizens of the Choctaw nation in Oklahoma provided they removed to the Choctaw country. Those who remained, already citizens of Mississippi, thereby severed their relations with the Choctaw tribe. They therefore cannot now be regarded as a tribe.

The Wheeler-Howard Act, however, authorizes the purchase of land for Indians and defines the term "Indian" to include those persons of one half or more Indian blood regardless of membership in a recognized Indian tribe under Federal jurisdiction and regardless of residence on an Indian reservation. (Sec. 19 of the act of June 18, 1934, *supra.*) In so far as the Indians in Mississippi fall within this definition as to degree of blood, purchases may be made for their benefit. Moreover, these Indians may be organized under the provisions of the Wheeler-Howard Act after land has been acquired for them. Therefore, I suggest that the titles now being acquired be taken as follows:

> "The United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior, until such time as the Choctaw Indians of Mississippi shall be organized as an Indian tribe pursuant to the act of June 18, 1934 (48 Stat. 984), and then in trust for such organized tribe."

Several titles have already been examined, as I noted above, and no objection was made to the designation of the grantee there employed. In all of those cases where the title papers have already been returned to the field, instructions should be given to the field agents to have the deeds corrected before they are recorded. In that case where the deed has already been recorded and accepted, it will be necessary to secure a new deed. The necessary corrections will be made in the other cases which are now pending in this office.

The error discussed herein arises perhaps out of unusual circumstances, but is one that might have been avoided. I suggest that further difficulties of this kind can be reduced or eliminated by having the Indian Organization Unit of your office formally approve the designation of the grantee in each project undertaken. This formal approval should be recited in each title case submitted for my examination.

NATHAN R.

MARGOLD,

Case 2:15-cv-01145-KJM-KJN Document 1-1 Filed 05/27/15 Page 37 of 53

Solicitor

ISLETA AND SANTO DOMINGO PUEBLOS-
RIGHTS-OF-WAY

September 2, 1936

Memorandum for the Commissioner of Indian Affairs.

I am returning for further consideration your letters of July 28 and August 26, dealing with grants of rights of way over lands of the Isleta and Santo Domingo Pueblos in New Mexico to the A. T. & S. F. Railway Company and the Postal Telegraph-Cable Company.

While I agree with your conclusion that these grants may be made under authority of the acts of Congress cited in your letters I do not agree with the statement that the agreements entered into between the respective pueblos and the companies named above, are in violation of the restrictive provisions contained in the Indian Reorganization Act of June 18, 1934 (48 Stat. 984). The restrictive provisions to which you refer are contained in section 4 of the Reorganization Act and declare, with exceptions not here material, that "No sale, devise, gift, exchange or other transfer of restricted Indian lands * * * shall be made or approved." The right conveyed by these right of way grants is in interest in land and if the conveyance of such

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an interest is prohibited by the provision just quoted the conveyance cannot be made or approved whether it be in the form of an agreement between the Indians and the companies or is accomplished by approval of a map of definite location under the acts of Congress cited in your letters.

In my memorandum of September 6, 1934, I had occasion to consider the restrictive provisions contained in section 4 of the Reorganization Act and, after pointing out that such provisions had no application to conveyances of estates less than the fee, such as grants of rights of way in the nature of easements, held that such rights of way might be granted where there was a specific act of Congress so authorizing. Such acts of Congress are not superseded or repealed by anything contained in the Reorganization Act. The only limitations which the Reorganization Act imposes upon the exercise of authority conferred by such specific acts of Congress are: (a) a tribe organized under section 16 may veto the grant under the broad power given it by that section "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe" and (b) a tribe incorporated under section 17 may be given the power to make such grants without restriction.

Inasmuch as the Santo Domingo and Isleta Pueblos have not as yet organized or incorporated, limitations (a) and (b) above, are without application. The easement in each case, however, has received the approval of the pueblo. Approval may be given under the acts cited in your letters, but such letters should be revised to eliminate the erroneous statements referred to above.

NATHAN R.

MARGOLD,

viding for departmental approval may therefore be omitted

(3) Paragraph C (2d) , page 8, fails to take into consideration the possibility that Mose Daniels may predecease the grantor. The paragraph should be amended to cover this contingency.

(4) The provision on page 2 of the trust agreement amounts to a conveyance in trust of the mineral estate whereas there is equally a conveyance in trust under the mineral grant. In other words, under the present set-up there are two instruments conveying the same property to the same person. It seems to me that the artistic and lawyer-like way of accomplishing the desired result would be to convey the property by separate deed, subject to the terms of the trust agreement, and then to provide in the trust agreement that this property, when conveyed, shall be subject to the same conditions as the cash and Government bonds, except as otherwise provided. It seems to me that the trust agreement should be changed so as to negative the possibility that it will be construed as a second conveyance.

(5) Paragraph 11, page 15, dealing with the fees to be collected by the trustee may not be seriously objectionable but I doubt if the provisions of the paragraph are stated with clarity sufficient to avoid misunderstanding in the future. For one thing, it is not clear whether the trustee expects to receive a final distribution fee based upon the mineral rights as a part of the corpus of the trust. In view of the substantial payments otherwise provided for the paragraph may well be reworded to preclude such a payment.

Solicitor.

Approved and referred to the Commissioner of Indian Affairs for appropriate action.
Assistant Secretary.

STATUS OF ST. CROIX CHIPPEWAS

February 8, 1937.

Memorandum to the Commissioner of Indian Affairs:

The Solicitor's Office has been requested to determine the status of the St. Croix Chippewa Indians in Wisconsin for the purpose of determining their eligibility to organize under the Reorganization Act and of determining the beneficiary to be designated in the Trust Title of various camp site areas being purchased for these Indians from reorganization act funds.

This group of Indians numbers about 500 and are scattered in at least five counties in Wisconsin, frequently in clusters of 5 to 25 families. They have no reservation and those who have not established homes in white communities live as squatters on land to which they have no ownership rights. These Indians are commonly referred to by the Indian Office and by themselves as the "St. Croix Band of Lake Superior Chippewa Indians."

The question whether or not these Indians are a separate band of Indians or absentee members of one of the other bands of Lake Superior Chippewa Indians has already been finally decided by the Department and by Congress. The act of August 1, 1914 (38 Stat. 582, 606), directed the Secretary of the Interior to determine the status and tribal rights of these Indians and what benefits they would have received if they had removed to one of the reservations in Wisconsin and to make a roll of the Indians

entitled to benefits. Pursuant to this act Mr. Wooster was detailed to make this study. He submitted a report on December 1, 1914, which found that these Indians were absentee members of the Lac Courte Oreille Band and that out of some 800 possible members of this group of Indians only 95 were entitled to be enrolled for the purpose of receiving compensation in lieu of the allotments which they might have obtained. He based his finding of fact upon extensive testimony indicating that the Lac Courte Oreille Indians admitted that the chief of the St. Croix Indians and his followers were members tribe and belonged on the Lac Courte Oreille Reservation. A further indication was that this chief of the St. Croix Indians signed the treaty of September 30, 1854 (10 Stat. 1109), as a Lac Courte Oreille Indian. Mr. Wooster based his legal conclusion that only 95 persons were entitled to enrollment for compensatory benefits on the ruling of the Oakes case (172 Fed. 305), and the Kadrie case (281 U.S. 206), which cases are to the effect that absentee members of a tribe who have severed their tribal relations are still entitled to tribal rights but that their children born away from the tribe are not so entitled. Among the pertinent facts shown in his report are the high degree of intermarriage with white people, and of departure from Indian culture and their scattered condition. A second report was submitted by him on January 13, 1915, in which he submitted a roll of these 95 selected persons which show them to be members of the Lac Courte Oreille and certain other tribes and suggested that these persons be compensated by Congress with the approximate value of an allotment.

These reports were submitted by the Department of the Interior to Congress on December 7, 1914 (H.D. No. 1253 63d Cong., 3d Sess.) and on March 3, 1915 (H.D. No. 1663 63d Cong., 3d Sess.). Copies of these reports are attached for your information. Expressly referring to these reports Congress has passed statutes providing funds for distribution among the enrolled Indians or for land purchases for them for their relief and compensation. See act of February 14, 1920 (41 Stat. 432, 433); and the act of March 3, 1921 (41 Stat. 1246). These acts did not refer to these Indians as a band but designated them as "St. Croix Chippewa Indians" and were designed expressly to benefit those Indians found to be members of the Lac Courte Oreille Band and other tribes.

In view of the foregoing only one conclusion is possible and that is that the St. Croix Indians cannot now be recognized as a band. Congress has closed the question after a departmental investigation and finding. It is noted that the Interior Department appropriation act for the fiscal year 1937 (act of June 22, 1936, 49 Stat. 1757, 1729), in making available the unexpended balances of appropriations for the St. Croix Indians made under the act of February 14, 1920 above referred to, speaks of the "care of aged and indigent Indians of the band." I do not think the use of the word "band" here is sufficient to reverse the former deliberate finding, especially as the previous appropriations now revived were only for the Indians enrolled by Mr. Wooster.

Accordingly, benefits under the Indian Reorganization Act must be limited to those Indians who are in fact of one half Indian blood or more. In providing land for these Indians it is not necessary to restrict beneficial rights to those Indians who were placed on the roll by Mr. Wooster, as that roll represents an entirely different class of persons from those who can receive benefits under the Indian Reorganization Act, namely, those Indians of the half blood or more. However, Mr. Wooster's roil may be of assistance in determining the degree of blood as this roll does indicate the quantum of blood of the Indians placed upon it.

My conclusion is different from that reached in the case of the Mole Lake Indians who are also commonly considered a "lost band" in Wisconsin who received no reservation under the 1854 treaty. However, the St. Croix situation is not similar to that of the Mole Lake Indians as the question of the status of the Mole Lake Indians was never definitely decided by the Department or by Congress and as the facts in the two cases are quite different. The Mole Lake Indians live in one principal Indian community which is looked upon as their band home, whereas the St. Croix Indians live in numerous white villages and towns throughout Wisconsin. Moreover, the St. Croix Indians are highly assimilated into the white population, whereas, the Mole Lake Indians are principally full bloods and near full bloods who have kept distinct from the white population. The testimony available in connection with the Mole Lake Indians shows that the other bands recognize them as a separate band, whereas in the case of the St. Croix Indians the Lac Courte Oreille Indians admitted the St. Croix Indians to be members of the Lac Courte Oreille Band. While the St. Croix Indians have inhabited certain areas on the St. Croix River for numerous generations and might have been recognized as a separate band at the time of the 1854 treaty, they now present no characteristics entitling them to recognition as a band, particularly as there exists no form of band organization, as there does in the Mole Lake group. The difference between these two groups is also found in the report of the anthropologist who investigated these Indians in 1936. He states, "The St. Croix are a completely disorganized and deculturated group. The only cohesion they have as a social entity is based solely on the possession of a common language and a common racial type. Even these are disappearing, * * *".

In view of the conclusion which I reached I suggest that the procedure for extending benefits to these Indians under the Reorganization Act be as follows: the title to the land purchases being made in certain of the larger Indian groupings should be taken for the St. Croix Chippewa Indians of the half blood or more who may be designated by the Secretary of the Interior until such time as they organize under section 16 of the Reorganization Act and then for the benefit of such organization. After the land purchase is completed the Indians who come to reside upon this land would then be entitled to organize as Indians residing on a reservation. No other organization of these Indians is now possible.

NATHAN R.

MARGOLD,

Solicitor.

in those acts of providing equal fishing opportunities to all citizens.

FREDERIC L.

KIRGIS,

Acting Solicitor.

Approved: April 19, 1937.

OSCAR L. CHAPMAN, *Assistant* Secretary.

STATUS OF NAHMA AND BEAVER INDIANS

May 1, 1937.

Memorandum to the Commissioner of Indian Affairs.

The Organization Division requested an examination in this office of the status of the Nahma and Beaver Island Indians in Michigan, with a view to determining their opportunities for organization under the Indian Reorganization Act. In the memorandum presented by the Organization Division the following information on these groups is given:

> "1. The Nahma Indians are located at Nahma, Michigan in Delta County Upper Peninsula). I am advised that they are members of the Ottawa Tribe but are today inter-married with the Chippewa Tribe. The exact number is not known, but there are about 90 children from one group attending school.
>
> "2. The Beaver Island Indians are located on Beaver, North Fox, South Fox, Hog and High Islands in Lake Michigan within the territorial jurisdiction of the State of Michigan. They are descendants of the Chippewa Tribe and number between 200 and 300 persons. Mr. Cavill visited these islands in 1918 and compiled an appraisal and estimate of some 30 allotments."

Aside from this information there appears to be very little material available in the Interior Department bearing upon their band status. The Indian Office Mails and Files Division reported that they have no files on these groups. A search of the files on the Ottawa and Chippewa Indians generally for the last 20 years reveals no material on these Indians. The only evidence on the status of these Indians is the last treaty made with the Ottawa and Chippewa Indians, that of July 31, 1855 (11 Stat. 621), and the interpretations put upon it by the Department.

The treaty of 1855 provided that various sections of land in Michigan should be set aside for a number of different bands. The third paragraph reads as follows:

> "For the Beaver Island Band-High Island, and Garden Island, in Lake Michigan, being fractional townships 38 and 39 north, range 11 west-40 north, range 10 west, and in part 39 north, range 9 and 10 west."

The fourth paragraph provides as follows:

> "For the Cross Village, Middle Village, L'Arbrechroche and Bear Creek bands, and of such Bay du Noc and Beaver Island Indians as may prefer to live with them, townships 34

to 39, inclusive, north, range 5 west-townships 34 to 38, inclusive, north, range 6 west-townships 34, 36, and 37 north, range 7 west, and all that part of township 34 north, range 8 west, lying north of Pine River."

There is no mention of the Nahma Indians as such but it may be that the reference to the "Bay du Noc" Indians refers to the Nahma Indians since the Town of Nahma is situated on the Big Bay due Not In any case the Bay du Not Indians are not referred to as a band. This treaty was signed by five-groups of bands, namely, the Sault Ste. Marie Bands, Grand River Bands, Grand Traverse Bands, Little Traverse Bands, and Mackinac Bands. These five groups were composed of numerous subbands, each with a chief and his following. Possibly, the Nahma and Beaver Island Indians were such subbands. But neither in the signature to the treaty nor in the band rolls made for the payment of treaty annuities are these subbands designated by name.

Article V of the 1855 treaty provides that the tribal organization of the Ottawa and Chippewa Indians "is hereby dissolved" and that future negotiations in reference to any matters contained in the treaty should be carried on only with those Indians locally interested. This article has been consistently interpreted by the Interior Department, for as far back as the available files go, as providing for the dissolution of all tribal relations, including band relations, and the Interior Department has refused to recognize any of the Ottawa and Chippewa groups as bands. A sample of this attitude, which is repeated in innumerable instances of correspondence with Ottawa and Chippewa Indians, in the letter of February 15, 1917, to Mr. Eugene Hamlin concerning his credentials as a representative of Ottawa and Chippewa Indians near Harbor Springs, Michigan:

"Receipt is acknowledged of your letter of February 9, 1917, in which you say that you have been chosen as a delegate by certain of the Ottawa and Chippewa Indians of Michigan, and ask whether or not your credentials will be properly recognized to the end that you may be accorded a hearing when you visit this city.

"In answer you are advised that the Ottawa and Chippewa tribes of Indians many years ago became citizens of the United States and of the state in which they reside and are now not under the jurisdiction and control of the Government. The Office could not, therefore, save in a merely advisory capacity, interfere in any of your personal matters, nor could it approve your appointment or selection by a number of your people as a delegate. * * *"

"Of course it is to be understood that you or any of your people who may visit this city do so on their own responsibility and must look to their own resources for their expenses, etc."

The most recent test of the attitude of the Interior Department on the band status of the Ottawa and Chippewa groups occurred with relation to the Sault Ste. Marie Bands of Chippewa. A thorough investigation of the history of these bands was undertaken in an effort to prove their band status. It was found that a separate treaty was entered into with these bands subsequent to the July 31, 1855 treaty; that they were enrolled as separate bands in the money payment rolls of Ottawas and Chippewas from 1857

to 1867; that they retained their formal band organization down to the present time and continuous correspondence had been carried on between their band representatives and the Indian Office. However, in spite of this evidence tending to show their actual band status the Interior Department refused to accord them legal recognition as a band, in view of the dissolution of the Ottawa and Chippewa Tribe under the 1855 treaty and the cessation of the exercise of guardian over these Indians for nearly half a century.

If the Sault Ste. Marie Bands were not in a position to be recognized as a band by the Interior Department it is out of the question to establish any existing band status for the Mahna and Beaver Island Indians in view of the paucity of any evidence on the subject and in view of the fact that there is no showing in any treaty that the Nahma Indians were even recognized originally as a band.

There is no possibility of approaching organization for these Indians through their present land status as there are not existing reservations for these Indians. The land set aside under the third and fourth paragraphs of the 1855 treaty, quoted above, was entirely allotted and fee patented to individual Indians under other provisions of that treaty. The Executive order of August 9, 1855, provided for the withdrawal from sale of a number of sections and townships in Michigan to carry out the 1855 treaty, in which order High Island and Garden Island are named. However, all this land was disposed of by fee patenting in the manner provided by the treaty. No land of these Indians remains in trust status.

Accordingly I am of the opinion that the Nahma and Beaver Island Indians do not enjoy a status either as recognized bands or as Indians on a reservation entitling them to be organized under the Indian Reorganization Act and .that the only method of providing benefits is through the selection of those Indians among them who are of one half or more Indian blood and the purchase of land for them and their subsequent organization.

FREDERIC L.

KIRGIS,

Acting Solicitor.

War Assets Administration: equipment, materials, and supplies of all kinds, with an appraised value of not to exceed $6,300,000 from the surplus stores of these agencies, for use in the schools, hospitals, and agencies, or by any operating division of the Bureau of Indian Affairs in the United States and Alaska * * *." I understand that several million dollars' worth of surplus property may still be obtained under this authorization. Such property could doubtless be used to provide a considerable amount of relief for the Navajo Indians. To the extent provided by this statutory authorization, the use of surplus property could be made an element of the Navajo program.

MASTIN G. WHITE,
Solicitor.

ORGANIZATION 0F THE NOOKSACK INDIANS
UNDER THE INDIAN REORGANIZATION ACT

M-35013
December 9, 1947.

For Indians to be able to organize under section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 987, 25 U.S.C. sec. 476), they must constitute a "tribe, or tribes, residing on the same reservation," Therefore. the Nooksack Indians of the State of Washington, for whom no reservation has ever been set aside and who possess no recognized tribal status, are not eligible to organize under this provision of the Indian Reorganization Act.

1480 **DEPARTMENT OF THE INTERIOR**
DECEMBER 9, 1947

MASTIN G. W HITE , Solicitor:

Memorandum
To: The Commissioner of Indian Affairs.
From: The Solicitor. Subject: Proposed constitution for the Nooksack Indians.

I am returning to you the proposed constitution for the Nooksack Indians of the State of Washington, together with the covering letter to the Superintendent of the Tulalip Agency calling an election for the purpose of enabling these Indians to vote on the proposed constitution.

For Indians to be able to organize under section 16 of the Indian Reorganiztion Act of June 18, 1934 (48 Stat. 987, 25 U.S.C. sec. 476) , they must constitute a "tribe, or tribes, residing on the same reservation." The Nooksack Indians do not fit this description.

The Nooksack Indians hold no tribal land. No reservation has ever been set apart for them by treaty, act of Congress, or Executive order. Some of them received homestead allotments on the public domain, but apparently these are noncontiguous. Although they all live in Whattcomb County, they do not live in any one locality. No lands appear to have been purchased for them pursuant to the acquisition

provisions of the Indian Reorganization Act.

The Nooksack Indians were included in the enumeration of ,the tribes or bands of nontreaty Indians who were authorized to sue the United States in the jurisdictional act of February 12, 1925 (43 Stat. 886)) and, pursuant to that act, they asserted a claim against the United States based on aboriginal occupancy of lands alleged to have been taken from them by the United States. In the subsequent litigation, however, the Court of Claims found that the lands claimed by the Nooksack Indians were ceded to (the United States by the Indians who were parties to the Point Elliott Treaty of January 22, 1855 (12 Stat. 927)) and that on the basis of the evidence there was no possibility "of definitely determining the exact status of the Indians and ,the relationship between them and the Government." *Duwamish, et al. Indians* v. *United* States, 79 Ct. Cl. 530, 606, cert. denied 295 U.S. *755.*

The Court stated in the *Duwamish* case: *"There* is no doubt that after the execution of the Point Elliott Treaty they [the Nooksack Indians] were placed under the charge of an Indian agent, and after the ratification of the treaty came under the charge of the Indian agent for the Lummi Reservation, and participated in the distribution of benefits set forth in the treaty." In this connection, the court cited the Report of the Commissioner of Indian Affairs for the year 1877, p. 198. Earlier reports of the Commissioner indicate, that while the Nooksack Indians probably constituted at one time a separate tribe or band in contact with the Lummi Indians, they later became allied with the Lummi Tribe (1854, p. 257; 1857, p. 326; 1858, p. 223; *1867,* p. *59; I870,* p. 17). The *Handbook of American Indians* (Bureau of American Ethnology, Bulletin 30, Part 2) gives the following information with respect to the Nooksack Indians:

> "Nooksack (Mountain men). The name given by the Indians on the coast to a Salish tribe, said to be divided into three small bands, on a river of the same name, in Whatcomb Co., Wash. About 200 Nooksack were officially enumerated in 1906, but Hill-Tout says there are only about 6 true male Nooksack. They speak the same dialect as the Squawmish, from whom they are said to have separated."

On the basis of the existing authorities, and in the absence of other evidence, it is not possible for me to conclude that the Nooksack Indians constitute a "tribe, or tribes, residing on the same reservation," which may adopt a constitution pursuant to the provisions of the Indian Reorganization Act.

MASTIN G. WHITE ,
Solicitor

EXHIBIT I

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240

IN REPLY REFER TO:

Tribal Government Services - TR
2611 MS/MIB

JUL 1 1993

Honorable Raymond Hunter
Chairman, Jamul Indian Village
P. O. Box 612
Jamul, California 91935

Dear Chairman Hunter:

We have completed our legal and technical review of the proposed revised Constitution of the Jamul Indian Village submitted by the Sacramento Area Director by memorandum of September 18, 1992. The proposed revised constitution was accompanied by an unnumbered resolution adopted by the Jamul General Council on August 15, 1992, requesting that the Secretary of the Interior (Secretary) call and conduct an election to permit the qualified voters of the Village to vote on the adoption or rejection of the proposed revised document. The resolution complies with Article XVI of the Village constitution.

As a result of our review, we recommend modification to it. The changes in the enclosed version are to make the document legally and technically sufficient, that is not contrary to Federal law. Other modifications are to clarify the apparent intent of the drafters. The modifications are discussed below.

While many of the proposed changes are merely cosmetic, the primary thrust of the revision deals with the membership portion of the constitution. The Village proposes to revise the constitution by lowering the blood quantum from one-half (1/2) or more California Indian blood to one-quarter (1/4) degree. Lowering of the blood quantum would affect the very basis and foundation of the recognition of the Jamul Indian Village and could jeopardize continued recognition.

The origin of the Jamul Indian Village is different from that of an historic tribe. The term "tribe" as used in Federal Indian affairs generally refers to a community of people who have continued as a body politic without interruption since time immemorial and retain powers of inherent sovereignty. When such a tribe is organized pursuant to the Indian Reorganization Act (IRA), its governing authority is derived from acknowledgment of the fact that as a single identifiable group, it has historically governed itself. By adopting an approved IRA constitution, the historic tribe enters into a government-to-government relationship with the United States whereby the Federal Government agrees to acknowledge that the tribe possesses inherent powers of self-government as modified by applicable Federal law.

EXHIBIT C 25

You will recall that prior to 1980, the Jamul Indian Village was not a federally recognized tribal entity. During the 1970's representatives of the Village explored with the Bureau of Indian Affairs (Bureau) means whereby it could obtain Federal recognition and were variously advised the only avenues open to them were to seek a legislative solution, go through the Federal acknowledgment process, or the more limiting action of recognition by the Secretary as a half-blood organization. It was pointed out that acknowledgment of existence as an Indian tribe and of existence as a half-blood community are two different things. In order for the Secretary to acknowledge the Jamul community as a tribe under 25 CFR Part 83, previously 25 CFR 54, it would have to submit a detailed petition and undergo a lengthy process of consideration. Several years would have been required to complete this. If the community was not determined to exist as a tribe after this consideration, it would still have the option to organize as a half-blood community under the IRA. Representatives of the Village opted to seek recognition as a half-blood Indian community even though they were aware of the limitations that result from organizing as a half-blood Indian community.

On April 23, 1975, the Sacramento Area Director submitted 23 uncertified family tree charts of Jamul Indians who filed for the California judgment awards to be included with their request for Federal recognition. Consequently, on November 7, 1975, the Commissioner of Indian Affairs, in response to the Area Director's assertion that 20 of the 23 Indians who reside in the Jamul community possess one-half or more degree of Indian blood, notified the Area Director that pursuant to Section 19 of the Indian Reorganization Act (IRA) of June 18, 1934 (25 U.S.C. §479), certain benefits of that Act are available to persons of one-half or more Indian blood even though they lack membership in a federally recognized tribe. The Commissioner found that while those individuals at Jamul of one-half degree or more Indian blood do not now constitute a federally recognized entity and do not possess a land base, they are entitled to services provided by the Bureau to individual Indians pursuant to Section 19 of the IRA. The Commissioner further held that should these Jamul half-bloods secure, in trust status, the tract of land on which they reside they would be eligible to organize as a community of adult Indians of one-half degree or more Indian blood under Section 16 of the IRA.

On July 12, 1979, the Commissioner of Indian Affairs in response to an inquiry advised the Sacramento Area Director that:

> [A]cknowledgment of existence as an Indian tribe and of existence as a half-blood community are two different processes. In order for the Secretary to acknowledge the Jamul community as a tribe under 25 CFR 54 as requested by Superintendent Tomhave, it would have to submit a detailed petition and undergo a lengthy process of consideration. Several years would probably be required

complete this. If the community was not determined to exist as a tribe after this consideration, it would still have the option to organize as a half-blood community under the Indian Reorganization Act.

The Jamul community has already been determined to be eligible to organize as a community of persons of one-half degree or more Indian blood. To be treated as such a community, however, the Jamul Indians must first organize under the Indian Reorganization Act. We understand that the community is currently working on a proposed organizational document. When this proposal has been adopted by the community in an election called by the Secretary, and has been approved by the Secretary, the Jamul Indians will be able to receive services as a community.

The Jamul Indians lived on one acre of private land and on land deeded to the Diocese of San Diego as an Indian cemetery. On June 28, 1979, the United States acquired from Bertha A. and Maria A. Daley a portion of the land known as "Rancho Jamul" which it took "in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." Subsequently on May 25, 1982, the Roman Catholic Bishop of San Diego conveyed to the United States in trust for the Jamul Indian Village 1.372 acres. The United States accepted these conveyances of land in accordance with the authority contained in Sections 5 and 19 of the Indian Reorganization Act of 1934.

On December 16, 1980, in response to a petition submitted by the half-blood Indian community of Jamul requesting an IRA election, the Commissioner of Indian Affairs authorized the Superintendent, Southern California Agency, to call and conduct a Secretarial election to permit the qualified voters of the community to vote on the adoption or rejection of the proposed IRA constitution. The Commissioner noted in his letter that membership in the community was limited to individuals possessing one-half degree or more California Indian blood. The Constitution of the Jamul Indian Village was approved by the Deputy Assistant Secretary - Indian Affairs on July 7, 1981. In approving the IRA Constitution, the Village was authorized to exercise those self-governing powers that have been delegated by Congress or that the Secretary permits it to exercise. A number of "tribes" have been created, from communities of adult Indians, or expressly authorized by Congress under provisions of the IRA and other Federal statutes. For example, some IRA entities availed themselves of the opportunity to adopt an IRA constitution and are considered to be IRA "tribes." However, they are composed of remnants of tribes who were gathered onto trust land. These persons had no historical existence as self-governing units. They now possess only those powers set forth in their IRA constitution. They are not an inherent sovereign. Rather, that entity is a created tribe exercising delegated powers of self-government. Such is the case with Jamul Indian Village.

It has been the longstanding policy of the Bureau to require that organizational documents adopted by half-blood communities contain a membership requirement of one-half degree Indian blood or more. Consistent with the intent of Section 19 of the IRA, the Department of the Interior has over the more than 50 years since the passage of the IRA interpreted Section 19 to mean that those who seek recognition as a half-blood Indian community and subsequently organize under the IRA are forever restricted in their membership. In other words, once a half-blood Indian community, always a half-blood community. Therefore, the Village's proposal to lower the blood quantum from one-half degree California Indian blood to one-quarter or more degree is contrary to applicable Federal law and if adopted we would disapprove the constitution or any amendment that contained such language or intent. Any departure from the limitations imposed by Section 19 of the IRA could jeopardize the Village's continued right to Federal recognition and the rights of its members to Federal benefits and services. Further, since the United States acquired the Village's land in trust for Jamul Indians of 1/2 or more Indian blood, any action by the Secretary to approve membership of less than 1/2 degree Indian blood could be viewed as a breach of trust owed to those of 1/2 degree or more and thus a violation of applicable Federal law. Accordingly, we recommend you continue with the language as it now appears in the Village's existing constitution. The language was developed specifically to comply with the law.

We might also point out that even if it were possible to lower the blood quantum, the Council's proposal to amend each and every subsection of Section 1 of Article III is flawed. If it were possible to lower the blood quantum, which it is not, it could only be prospective in nature. That is, only persons of one-quarter degree California Indian blood born after the date of the adoption of an approved amendment would be eligible for enrollment. Thus, subsections (a), (b), (c) and (d) would remain as is with the addition of a new subsection to provide for those quarter bloods born after the adoption of the amendment.

The Village proposes to amend Section 4 of Article V - Elections by adding a proviso that the general council may waive the prohibition against convicted felons and those convicted of misdemeanors holding office in those instances it determines involve mitigating circumstances. In the first place constitutional prohibitions are not subject to waiver and in the second place, even if they were, in those instances where discretion is involved, the potential for unequal treatment exists. We recommend against this proposed amendment.

The Village proposes to amend Sections 1 and 2 of Article VI - Removal, Recall and Forfeiture by altering the timeframes within which to call a general council meeting from receipt of a petition for removal. If the executive committee takes the full 30 days to call the meeting, sufficient time will not be available to notice the meeting. We recommend the Village consider modifying the number of days by either reducing the number of days to call the meeting or extending the timeframe to hold the meeting.

Regarding the addition of the phrase "unless the general council waives this provision for mitigating circumstances" in Section 3, we recommend against this proposal as discussed above with reference to Section 4 of Article V because it creates the potential for unequal treatment.

Article VIII, Subsection 1(k) authorizes the Village to "levy and collect taxes and raise revenue." As we noted earlier, Jamul as a created entity is not an inherent sovereign and can exercise only those powers of self-government delegated to it. Those powers not within the power of a community include the power to condemn land of members of the village community, the regulation of inheritance of property of community members, the levying of taxes upon community members or others, and the regulation of law and order. It is within the community's authority to levy assessment and fees upon its members for the use of community property and privileges as these assessments would be incidental to the ownership of the property. The village community may also levy assessments on non-members coming or doing business on village lands. However, such assessments would be levied in its exercise of the community's powers as a land owner, not some historical, inherent power to tax.

NO TRIBAL FORUM

Article X - Tribal Enactments. The Village proposes to amend Section 2 by including a reference to "tribal council". We believe this is an inaccurate reference since the constitution does not provide for a tribal council but rather a general council. We believe the appropriate reference should therefore be the general council and recommend accordingly.

Section 5 proposes to increase the timeframe from ten (10) days to twenty (20) for submission of tribal enactments to the local Bureau Superintendent. It also provides that such enactments will become effective when approved by the Secretary or automatically at the expiration of ninety (90) days from submission. While we have no objection to the proposal, we note for the record that the timeframes imposed in Section 5 do not apply to actions provided for in Article XVI - Amendments. Federal law controls actions taken in Article XVI.

We note the omission of the phrase "an offense punishable by" in Section 5 (j) of Article X - Bill of Rights. Section 5(j) should read:

> (j) Deny to any person accused of <u>an offense punishable by</u> imprisonment the right, upon request, to a trial by jury of not less than six (6) persons.

Article XI - Meetings. The Village proposes to amend Article XI by changing the numerical requirement for requesting special meetings by the general membership from "8 members" to "twenty-five percent" in Section 2 and by changing the quorum in Section 3 from "thirty percent" to "twenty-five percent." We have no objections to these changes.

The Village proposes to eliminate from Section 3 of Article XII - Duties of Officers the requirement for an annual audit and the provision that financial records should be open at all times for inspection by the Bureau. We have no objection to this proposal. However, this does not preclude the Bureau from auditing and inspecting these records when required by Federal law.

The Village proposes to amend Articles XVI and XVII to provide that amendments to the constitution are automatically effective after ninety (90) days have elapsed from the date of submittal of such amendments. These proposals are contrary to Federal law, specifically the requirements of the Indian Reorganization Act of June 18, 1934, as amended by the Act of November 1, 1988, and, if adopted, the Secretary could not approve a constitution or an amendment which contained the proposed language. We, therefore, recommend the deletion of the phrase "or after ninety (90) days have elapsed from the date of submittal it shall become automatically effective" from both Articles XVI and XVII. Since specific duties were imposed upon the Secretary by Congress in the 1988 amendments to the IRA, it is not necessary to include time limitations. However, Article XVI could be amended as follows to reflect the statutory basis of these duties. The last sentence of Article XVI could read as follows:

> The amendment shall become effective when approved by the Secretary of the Interior or his duly authorized representative <u>or when deemed approved by the Secretary by operation of law</u>.

This concludes our technical comments. Please review and consider them and advise us accordingly. Should the Village have any questions about our comments or recommended modifications, we will be glad to discuss them with you in order to resolve any differences prior to the election. Should the Village agree with our recommendations, in accordance with Part III of the Secretary's Revised Guidelines for the Review of Proposed Constitutions, Revisions and Amendments dated March 4, 1988, please make a final written request accompanied by a resolution and the Secretary will issue an authorization letter to the Superintendent, Southern California Agency, to call and conduct an election consistent with the Secretary's election regulations found in Title 25 of the Code of Federal Regulations, Part 81.

Should the Village decide not to adopt any or all of the Bureau's modifications, the Village should submit a final written request accompanied by an appropriate resolution together with a copy of the document upon which the Secretarial election shall be called and an explanation as to why our modifications were not accepted. Such submission will ensure that all parties are agreed upon the document that is the subject of the Secretarial election. The Village's final request for a Secretarial election should be made directly to the BIA's Washington Office, Division of Tribal Government Services, MIB-2611, 1849 C Street N.W., Washington, D.C. 20240, to expedite action.

Upon receipt of the Village's final request for a Secretarial election, the election will be authorized without delay. However, such authorization does not carry with it the presumption of Secretarial approval should the constitution be adopted. Further, if adopted it will not be effective under Federal law until it is approved by the Secretary. Copies of the Village's final request should be furnished to the Superintendent, Southern California Agency, and to the Sacramento Area Director.

Sincerely,

/S/ CAROL A. BACON

Director, Office of Tribal Services

cc: Area Director, Sacramento
Superintendent, Southern California Agency
Regional Solicitor, Sacramento

EXHIBIT J

TAX ROLL PARCEL NO.
597-080-02 Code Area #79019

DOCUMENTARY TRANSFER TAX $ 0
Wilbrain H. Giannelli
TAX SIGNATURE

GRANT DEED

I, The Roman Catholic Bishop of San Diego, hereby grant to the United States of America in trust for the Jamul Indian Village all that land situated in the County of San Diego, California, more particularly described as follows:

All that portion of Rancho Jamul described in Deed to the Roman Catholic Bishop of Monterey and Los Angeles recorded September 12, 1912 in Book 567, Page 332, in the Office of the County Recorder of San Diego County, California; EXCEPTING THEREFROM a piece of of land described as follows: Commencing at Rancho Jamul Corner No. 16; thence N. 88°42' E., 739.37 feet to the true point of beginning as shown on Record of Survey Map No. 8138, filed December 2, 1976 in the Office of said County Recorder; thence S. 1°18' W., 111.77'; thence S. 87°55'38" W., 65.81'; thence S. 44°51'28" W., 88.60'; thence S. 1°19'25" W., 59.80'; thence N. 88°41'06" W., 83.66'; thence N. 1°24'08" E., 239.63'; thence N. 88°42' E., 210 feet to the True Point of Beginning, containing 0.838 acre, more or less. The parcel granted to the Jamul Indian Village contains 1.372 acres, more or less.

The grantor reserves to himself and his successors or assigns an easement for (1) utility service lines and (2) ingress and egress over the existing well-traveled road, or over any road that subsequently is built to replace the existing one.

IN WITNESS WHEREOF, The Roman Catholic Bishop of San Diego, grantor, herein have hereunto affixed his name this 25th day of May, 1982.

82-229256

RECORDED IN OFFICIAL RECORDS OF SAN DIEGO COUNTY, CA.
1982 JUL 27 AM 9 41
VERA L. LYLE COUNTY RECORDER

RF	4
MG	
TXPD	10
UF	—

ROMAN CATHOLIC BISHOP OF SAN DIEGO
a corporation sole,

Leo T. Maher
Incumbent

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

On this 25th day of May, 1982, before me Ch. Quittard, a Notary Public in and for said County and State, personally appeared LEO T. MAHER, known to me to the Roman Catholic Bishop of San Diego and to be the Incumbent of the corporation sole that executed the within instrument and acknowledged to me that said corporation sole executed the same.

WITNESS my hand and official seal.

CH Quittard
Notary Public in and for said County and State

OFFICIAL SEAL
C.H. QUITTARD
NOTARY PUBLIC-CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Expires Aug 27, 1984

ACCEPTANCE OF CONVEYANCE BY THE UNITED STATES IS TO BE ATTACHED HERETO AS EXHIBIT "A" AND RECORDED WITH THIS DEED. THIS CONVEYANCE IS MADE IN ACCORDANCE WITH SECTIONS 5 and 19 OF THE INDIAN REORGANIZATION ACT OF JUNE 18, 1934 (48 Stat. 985 and 988; 25 U.S.C. 465 and 479).

82-
Nº 229256

53

TAX ROLL PARCEL NO.

54

IN REPLY REFER TO:

Att No. 1

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
SOUTHERN CALIFORNIA AGENCY
5750 DIVISION STREET, SUITE 201
RIVERSIDE, CALIFORNIA 92506-3286

ACCEPTANCE OF CONVEYANCE

The United States of America, acting through the undersigned, an authorized representative of the Secretary of the Interior, in accordance with Sections 5 and 19 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 985 and 988; 25 U.S.C. 465 and 479), does hereby accept the conveyance made by The Roman Catholic Bishop of San Diego in that certain Grant Deed dated May 25, 1982.

Said Grant Deed, with this Acceptance of Conveyance attached, shall be recorded in the Official Records of San Deigo, California.

Date: July 2, 1982

Frank L. Haggerty Jr.
Acting Superintendent
Pursuant to the authority delegated by 230 DM 1, 10 BIAM 2 (39 F.R. 32166) and 10 BIAM 3.1 (34 F.R. 637), and Sacramento Area Office Redelegation Order 1 (43 F.R. 30131).

STATE OF CALIFORNIA)
) SS.
COUNTY OF RIVERSIDE)

On this 2nd day of July, 1982, before me, the undersigned, a Notary Public in and for said State, personally appeared Frank L. Haggerty, Jr., known to me to be the person whose name is subscribed to the within Acceptance of Conveyance and acknowledged to me that he executed the same for the United States of America.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this date.

Arlene J. Lacy
Notary Public in and for said State

EXHIBIT "A" TO DEED FROM THE ROMAN CATHOLIC BISHOP OF SAN DIEGO DATED May 25, 1982.

OFFICIAL SEAL
ARLENE J. LACY
NOTARY PUBLIC
RIVERSIDE CO., CALIF.
My commission expires 10-27-83

Return to:
RECORDING REQUESTED BY
MAIL TAX STATEMENT TO:
(Please print name & address)

DEPARTMENT OF THE INTERIOR
[illegible] SUITE 201
RIVERSIDE CA 92506

My Commission Expires Aug. 27, 1984

No. 229256 -82-

ACCEPTANCE OF CONVEYANCE BY THE UNITED STATES IS TO BE ATTACHED HERETO AS EXHIBIT "A" AND RECORDED WITH THIS DEED. THIS CONVEYANCE IS MADE IN ACCORDANCE WITH SECTIONS 5 and 19 OF THE INDIAN REORGANIZATION ACT OF JUNE 18, 1934 (48 Stat. 985 and 988; 25 U.S.C. 465 and 479).

EXHIBIT K

00737

APPLICATION AND PERMIT FOR DISPOSITION OF HUMAN REMAINS

USE BLACK INK ONLY—MAKE NO ERASURES, WHITEOUTS OR OTHER ALTERATIONS

1A. NAME OF DECEDENT—FIRST (GIVEN)	1B. MIDDLE	1C. LAST (FAMILY)	2. DATE OF BIRTH MONTH, DAY, YEAR	3. DATE OF DEATH MONTH, DAY, YEAR	4. SEX
Helen	Serafina	Cuerro	08/16/1932	09/05/1996	F

5A. CITY OF DEATH	5B. COUNTY OF DEATH—OUTSIDE CALIF., ENTER STATE	6. NAME, RELATIONSHIP, FULL MAILING ADDRESS AND ZIP CODE OF INFORMANT
El Cajon	San Diego	Walter Rosales - Son P O Box 85 Jamul, CA 91935

7A. TYPED NAME AND ADDRESS OF CALIFORNIA—FUNERAL DIRECTOR OR PERSON ACTING AS SUCH	7B. CALIF. LICENSE NUMBER —IF APPLICABLE	8A. SIGNATURE OF APPLICANT—Person taking permit	8B. DATE SIGNED
El Cajon Mortuary 684 S Mollison Ave El Cajon, CA. 92020	FD-1022	[signature]	09/10/96

ACKNOWLEDGMENT OF APPLICANT — I hereby acknowledge as applicant that the proposed disposition stated herein is one of the dispositions authorized by Section 10376 of the Health and Safety Code, and was authorized pursuant to Section 7100 of the Health and Safety Code.

PERMIT

AUTHORIZATION OF LOCAL REGISTRAR

THIS PERMIT IS ISSUED IN ACCORDANCE WITH PROVISIONS OF THE CALIFORNIA HEALTH AND SAFETY CODE AND IS THE AUTHORITY FOR THE DISPOSITION SPECIFIED IN THIS PERMIT.
NOTE: THIS PERMIT GIVES NO RIGHT OF DISPOSAL OUTSIDE OF CALIFORNIA.

9A. AMOUNT OF FEE PAID	9B. DATE PERMIT ISSUED	9C. SIGNATURE OF LOCAL REGISTRAR ISSUING PERMIT
$7.00	09/10/1996	9612803 ROETTA TYER

ANY CHANGE IN DISPOSITION REQUIRES A NEW PERMIT TO SHOW FINAL DISPOSITION.

9D. ADDRESS OF REGISTRAR OF DISTRICT OF DEATH— IF DEATH OCCURRED IN CALIFORNIA	9E. ADDRESS OF REGISTRAR OF DISTRICT OF DISPOSITION— IF DISPOSITION IS TO OCCUR IN ANOTHER DISTRICT IN CALIFORNIA
P.O. Box 85222 San Diego, Ca. 92186-5222	—

10. AUTHORIZED DISPOSITION(S) CHECK APPLICABLE ITEMS

- [ ] A. BURIAL (INCLUDES ENTOMBMENT)
- [X] B. CREMATION
- [X] C. DISPOSITION OF CREMATED REMAINS OTHER THAN IN A CEMETERY
- [ ] D. SCIENTIFIC USE
- [ ] E. TEMPORARY ENVAULTMENT
- [ ] F. DISINTERMENT
- [ ] G. SHIP IN TO CALIFORNIA
- [ ] H. TRANSIT TO OUTSIDE OF CALIFORNIA

FOR CORONER'S USE ONLY

- [ ] I. DISPOSITION PENDING—REMAINS LOCATED AT (Name and Address)

COMPLETE ALL APPLICABLE ITEMS

BURIAL	11A. NAME AND ADDRESS OF CALIFORNIA CEMETERY N/A	11B. DATE BURIED	11C. SIGNATURE OF PERSON IN CHARGE OF BURIAL	
CREMATION	12A. NAME AND ADDRESS OF CALIFORNIA CREMATORY Greenwood Crematory/4300 Imperial Ave San Diego, CA 92102	12B. DATE CREMATED 9-10-96	12C. SIGNATURE OF PERSON IN CHARGE OF CREMATION [signature]	
SCIENTIFIC USE	13A. NAME AND ADDRESS OF CALIFORNIA FACILITY RECEIVING REMAINS N/A	13B. DATE RECEIVED	13C. SIGNATURE OF PERSON IN CHARGE OF FACILITY	
TRANSIT	14A. NAME AND ADDRESS IN RECEIVING STATE OR COUNTRY WHERE REMAINS OR CREMATED REMAINS ARE TO BE SHIPPED N/A	14B. DATE SHIPPED	14C. ADDRESS AND SIGNATURE OF PERSON IN CHARGE OF PLACING WITH THE CARRIER	
SCATTERING AT SEA OR DISPOSITION OTHER THAN IN A CEMETERY	15A. ADDRESS, NEAREST POINT ON SHORELINE, OR OTHER DESCRIPTION SUFFICIENT TO IDENTIFY FINAL PLACE AND CA DISTRICT OF DISPOSITION RES-Walter Rosales/14191 Highway 94 Jamul, CA 91935	15B. DATE OF DISPOSITION	15C. SIGNATURE OF PERSON IN CHARGE OF DISPOSITION	15D. LICENSE NUMBER OF CREMATED REMAINS DISPOSER —IF APPLICABLE

COPY 1 OF THE PERMIT ACCOMPANIES THE REMAINS TO THE STATED PLACE OF DISPOSITION. THE PERSON IN CHARGE OF DISPOSITION IS RESPONSIBLE FOR COMPLETING AND FORWARDING THE PERMIT WITHIN 10 DAYS OF DISPOSITION TO THE REGISTRAR OF THE DISTRICT IN WHICH DISPOSITION OCCURRED OR THE DISTRICT NEAREST THE POINT WHERE THE CREMATED REMAINS WERE SCATTERED AT SEA. THE LOCAL REGISTRAR MAY DESTROY ANY ORIGINAL OR DUPLICATE PERMIT AFTER ONE YEAR FROM ISSUE DATE.

AUTHORIZATION FOR CREMATION & DISPOSITION

Cremation #: _____

Cremation Date: _____

- ☐ 82-975 Requa Avenue, Indio, California 92201 FE-967
- ☐ 51-990 South Jackson, Coachella, California 92236 FE-640 / CR-76
- ☐ 44-635 San Rafael Avenue, Palm Desert, California 92260 FE-1571

I authorize Fitzhenry Desert Chapel Crematory (the "Crematory") to cremate the body of Dean J. Rosella, deceased (the "Decedent") in accordance with the Crematory's rules and regulations and State laws and regulations. I certify that I have the legal right to authorize the cremation and control the disposition of the Decedent's remains. [NOTE: California law provides "Any person signing any authorization for the interment or cremation of any remains warrants the truthfulness of any fact set forth in the authorization, the identity of the person whose remains are sought to be interred or cremated, and his or her authority to order interment or cremation. ***He or she is personally liable for all damage occasioned by or resulting from the breach of such warranty.***"]

1. **Cremation Container ~** The Crematory will not accept the remains of the Decedent for cremation unless they are in a leak resistant, rigid combustible container. I authorize the Crematory to remove and dispose of handles, ornaments or other noncombustible parts of the cremation container and to lawfully dispose of the noncombustible casket or other container in any manner it deems appropriate.

2. **Mechanical or Radioactive Devices ~** Mechanical or radioactive devices, such as pacemakers, may be a hazard if placed in the cremation chamber. The Crematory will therefore not knowingly cremate any remains which contain such device.

I certify that the remains of the Decedent DO ____ DO NOT X *contain a mechanical or radioactive device.* (Place initials next to the correct statement)

If the decedent's remains do contain such a device, I authorize the Crematory to arrange for the removal of the device prior to the cremation. I further authorize the Crematory or its agent to dispose of any such device as it deems appropriate, unless other instructions are given here:

_____

_____

3. **Mementos, Jewelry, Dental Gold/Silver & Other Foreign Materials ~** Items such as personal mementos, jewelry, dental gold and silver, prostheses other foreign materials placed in the cremation chamber with the Decedent will either be destroyed or rendered unrecognizable. If any such items are recovered from the cremation chamber I authorize the Crematory to dispose of them.

4. **The Cremation Process ~** I acknowledge the following: The human body burns with the casket, container, or other material in the cremation chamber. Some bone fragments are not combustible at the incineration temperature and, as a result, remain in the cremation chamber. During the cremation, the contents of the chamber may be moved to facilitate incineration. The chamber is composed of ceramic or other material which disintegrates slightly during each cremation and the product of that disintegration is commingled with the cremated remains. Nearly all of the contents of cremation chamber, consisting of the cremated remains, disintegrated chamber material, and small amounts of residue from previous cremations, are removed together and crushed, pulverized, or ground to facilitate inurnment or scattering. Some residue remains in the cracks and uneven places of the chambers. Periodically, the accumulation of this residue is removed and interred in a dedicated cemetery property, or scattered at sea.

5. **Time of Cremation ~** The cremation will take place after all required permits are obtained, this completed and signed Authorization is received by the Crematory and after any scheduled funeral ceremony at which the decedent's body is to be present has been concluded. The Crematory will perform the cremation according to its schedule, and at its discretion, without obtaining any further authorization or instructions, unless the right of the person signing this document to authorize the cremation is contested by someone. In that event the Crematory may delay the cremation while it determines whether and how to proceed.

6. **Disposition ~** I authorize you to take the action I've indicated below with respect to the cremated remains of the Decedent. ***I understand that unless a suitable container is purchased or provided by me for the cremated remains, the Crematory will place such remains in a container which is designed for short term use and not recommended for any type of shipment.***

____ Deliver the remains to _____ (Name)

_____ (Address)

✓ Release the remains to: _____ (Name of Person) _____ (Relationship)

who will call for them at the funeral home.

IF PERMANENT ARRANGEMENT FOR FINAL DISPOSITION OF THE CREMATED REMAINS ARE TO BE CARRIED OUT BY THE UNDERSIGNED (OR THEIR DULY AUTHORIZED REPRESENTATIVE) AND HAVE NOT BEEN COMPLETED WITHIN 30 DAYS AFTER THE DATE OF THEIR AVAILABILITY FOR FINAL DISPOSITION, I/WE AUTHORIZE THE CREMATORY TO LAWFULLY SCATTER THE REMAINS AT SEA OR CHARGE A FEE FOR DELIVERY.
INITIALS ____

____ Mail the remains to _____ (Name)

_____ (Address)

[NOTE: Remains will be mailed via U.S. Postal Service, registered with return receipt requested. I understand that the Crematory is acting solely as my agent in mailing the remains, and I agree that the Crematory shall not be liable if the remains are lost or damaged while in the custody of the U.S. Postal Service.]

____ Scatter at sea via: _____ (Name of Service)

Witnesses (Name, Address, Phone) _____ _____ _____

_____ _____ _____

_____ _____ _____

[NOTE: I understand that the Crematory is acting solely as my agent as an accommodation to me in arranging for the scattering of the remains. I agree that the Crematory shall not be liable for any failure by the services named above to properly scatter the remains.]

7. **Special Instructions ~** Indicate special instructions below: _____

Take to Tribal Indian Village.

Container: B.C. Urn: _____

SIGNATURES ~ The following persons authorize the cremation and disposition of the Decedent named above:

Date:	✓	Walter Rosella	
Signature:	✓		
Print Name:	✓		
Address:	✓ P.O. Box 1472 Valley Center, Ca.		
Relationship to Decedent	✓ Mother	Father	

Name of Referring Mortuary: Indio

For more information about funeral, cemetery and cremation matters, contact:
Department of Consumer Affairs, Cemetery/Funeral Program, 400 R Street, Sacramento, California 95814: (800) 952-5210

STATE OF CALIFORNIA

CERTIFICATION OF VITAL RECORD

COUNTY OF SAN DIEGO

ASSESSOR/RECORDER/COUNTY CLERK

3 051996 | 48902 — STATE FILE NUMBER

CERTIFICATE OF DEATH

STATE OF CALIFORNIA

USE BLACK INK ONLYING PRESSURE, WHITEOUTS OR ALTERATIONS

VS-11 (Rev. 7/93)

3963701311 4 — LOCAL REGISTRATION NUMBER

0742

DECEDENT PERSONAL DATA

1. NAME OF DECEDENT—FIRST (GIVEN): Helen
2. MIDDLE: Serafina
3. LAST (FAMILY): Cuerro
4. DATE OF BIRTH MM/DD/CCYY: 08/16/1932
5. AGE YRS.: 64
6. IF UNDER 1 YEAR: MONTHS / DAYS; IF UNDER 24 HOURS: HOURS / MINUTES
8. SEX: F
7. DATE OF DEATH MM/DD/CCYY: 09/05/1996
8. HOUR: 0910
9. STATE OF BIRTH: CA
10. SOCIAL SECURITY NO.: [redacted]
11. MILITARY SERVICE: 19 ___ TO 19 ___ ☐ None
12. MARITAL STATUS: Never Married
13. EDUCATION—YEARS COMPLETED: 4
14. RACE: American Indian 30
15. HISPANIC—SPECIFY: ☐ YES ☒ NO
16. USUAL EMPLOYER: Self-Employed
17. OCCUPATION: Homemaker
18. KIND OF BUSINESS: Own Home
19. YEARS IN OCCUPATION: 40

USUAL RESIDENCE

20. RESIDENCE—STREET AND NUMBER OR LOCATION: 14191 Highway 94
21. CITY: Jamul
22. COUNTY: San Diego
23. ZIP CODE: 91935
24. YRS IN COUNTY: 64
25. STATE OR FOREIGN COUNTRY: CA

INFORMANT

26. NAME, RELATIONSHIP: Walter Rosales - Son
27. MAILING ADDRESS (STREET AND NUMBER OR RURAL ROUTE NUMBER, CITY OR TOWN, STATE, ZIP): P O Box 85/Jamul, CA 91935

SPOUSE AND PARENT INFORMATION

28. NAME OF SURVIVING SPOUSE—FIRST: –
29. MIDDLE: –
30. LAST (MAIDEN NAME): –
31. NAME OF FATHER—FIRST: Lawrence
32. MIDDLE: –
33. LAST: Cuerro
34. BIRTH STATE: CA
35. NAME OF MOTHER—FIRST: Louise
36. MIDDLE: –
37. LAST (MAIDEN): Calles
38. BIRTH STATE: CA

DISPOSITION(S)

39. DATE MM/DD/CCYY: 09/11/1996
40. PLACE OF FINAL DISPOSITION: RES-Walter Rosales/14191 Highway 94/Jamul, CA 91935

FUNERAL DIRECTOR AND LOCAL REGISTRAR

41. TYPE OF DISPOSITION(S): CR/RES
42. SIGNATURE OF FUNERAL DIRECTOR: [redacted]
43. LICENSE NO.: 800
44. NAME OF FUNERAL DIRECTOR: El Cajon Mortuary
45. LICENSE NO.: FD-1022
46. SIGNATURE OF LOCAL REGISTRAR: [redacted]
47. DATE MM/DD/CCYY: 09/10/1996

PLACE OF DEATH

101. PLACE OF DEATH: Madison Care
102. IF HOSPITAL OR NOTIFY ONE: ☐ ER ☐ EF/DOP ☐ DOA
103. FACILITY WITHIN HOSPITAL: ☒ CONV. ☐ MORT. ☐ REF. ☐ OTHER
104. COUNTY: San Diego
105. STREET ADDRESS—STREET AND NUMBER OR RURAL ROUTE: 1391 E Madison Ave
106. CITY: El Cajon

CAUSE OF DEATH

107. DEATH WAS CAUSED BY (ENTER ONLY ONE CAUSE PER LINE FOR A, B, C, AND D):

IMMEDIATE CAUSE (A): Cardiopulmonary Arrest — TIME INTERVAL BETWEEN ONSET AND DEATH: Hrs

DUE TO (B): Chronic Obstructive Pulmonary Disease — Yrs

DUE TO (C):

DUE TO (D):

108. DID DEATH REPORTED TO CORONER? ☐ YES ☒ NO — REFERRAL NUMBER
109. DID NOPSY PERFORMED? ☐ YES ☒ NO
110. AUTOPSY PERFORMED? ☐ YES ☒ NO
111. USED IN DETERMINING CAUSE? ☐ YES ☐ NO

112. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RELATED TO CAUSE GIVEN IN 107: None

113. WAS OPERATION PERFORMED FOR ANY CONDITION IN 107 OR 112? IF YES, LIST TYPE OF OPERATION AND DATE: No

PHYSICIAN'S CERTIFICATION

114. I CERTIFY THAT TO THE BEST OF MY KNOWLEDGE DEATH OCCURRED AT THE HOUR, DATE AND PLACE STATED, FROM THE CAUSES STATED.
PRESENT AT TIME OF DEATH MM/DD/CCYY: 05/22/1996
LAST SEEN ALIVE MM/DD/CCYY: 08/18/1996
115. SIGNATURE AND TITLE OF CERTIFIER: [redacted]
116. LICENSE NO.: A44411
117. DATE MM/DD/CCYY: 09/09/1996
118. TYPE ATTENDING PHYSICIAN'S NAME, MAILING ADDRESS + ZIP: John Gaidry, MD/4501 Mission Bay Dr/San Diego, CA 92109

CORONER'S USE ONLY

I CERTIFY THAT IN MY OPINION DEATH OCCURRED AT THE HOUR, DATE AND PLACE STATED FROM THE CAUSES STATED.

119. MANNER OF DEATH: ☐ NATURAL ☐ SUICIDE ☐ HOMICIDE ☐ ACCIDENT ☐ PENDING INVESTIGATION ☐ COULD NOT BE DETERMINED
120. INJURY AT WORK? ☐ YES ☐ NO
121. INJURY DATE MM/DD/CCYY
122. HOUR
123. PLACE OF INJURY
124. DESCRIBE HOW INJURY OCCURRED (ENTER INJURY RELATED IN INJURY)
125. LOCATION (STREET AND NUMBER OR LOCATION AND CITY AND ZIP CODE)
126. SIGNATURE OF CORONER OR DEPUTY CORONER: [redacted]
127. DATE MM/DD/CCYY
128. TYPED NAME, TITLE OF CORONER OR DEPUTY CORONER

STATE REGISTRAR

A: 4 | B: X | C: 2 | D | E | F | G | H | FAX AUTH. #: 9612803 | CENSUS TRACT

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INFORMATIONAL, NOT A LEGAL DOCUMENT

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June 6, 2014

Ernest J. Dronenburg, Jr.
Assessor/Recorder/County Clerk

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Ex. MM

003724619

STATE OF CALIFORNIA

CERTIFICATION OF VITAL RECORD

COUNTY OF SAN DIEGO

ASSESSOR/RECORDER/COUNTY CLERK

3 052001 091925 — STATE FILE NUMBER

CERTIFICATE OF DEATH

STATE OF CALIFORNIA

USE BLACK INK ONLY/NO ERASURES, WHITEOUTS OR ALTERATIONS

VS-11 (REV. 1/00)

3 200137 009167 — LOCAL REGISTRATION NUMBER

1075

DECEDENT PERSONAL DATA

1. NAME OF DECEDENT—FIRST (GIVEN): Marie
2. MIDDLE: Adelina
3. LAST (FAMILY): Toggery
4. DATE OF BIRTH MM/DD/CCYY: 08/04/1921
5. AGE YRS.: 79
IF UNDER 1 YEAR: MONTHS / DAYS
IF UNDER 24 HOURS: HOURS / MINUTES
6. SEX: F
7. DATE OF DEATH MM/DD/CCYY: 06/03/2001
8. HOUR: 1230
9. STATE OF BIRTH: CA
10. SOCIAL SECURITY NO.: [redacted]
11. MILITARY SERVICE: ☐ YES ☒ NO ☐ UNK
12. MARITAL STATUS: Widow
13. EDUCATION—YEARS COMPLETED: 6
14. RACE: American Indian/Kumayaay 30
15. HISPANIC—SPECIFY: ☐ YES ☒ NO
16. USUAL EMPLOYER: Self Employed
17. OCCUPATION: Homemaker
18. KIND OF BUSINESS: Own Home
19. YEARS IN OCCUPATION: 65

USUAL RESIDENCE

20. RESIDENCE—(STREET AND NUMBER OR LOCATION): 14191 Hwy 94 #14
21. CITY: Jamul
22. COUNTY: San Diego
23. ZIP CODE: 91935
24. YRS IN COUNTY: 79
25. STATE OR FOREIGN COUNTRY: CA

INFORMANT

26. NAME, RELATIONSHIP: Karen Toggery - Daughter
27. MAILING ADDRESS (STREET AND NUMBER OR RURAL ROUTE NUMBER, CITY OR TOWN, STATE, ZIP): 14191 Hwy 94 #14, Jamul, CA 91935

SPOUSE AND PARENT INFORMATION

28. NAME OF SURVIVING SPOUSE—FIRST: -
29. MIDDLE: -
30. LAST (MARIED NAME): -
31. NAME OF FATHER—FIRST: Pablo
32. MIDDLE: -
33. LAST: Tumpo
34. BIRTH STATE: CA
35. NAME OF MOTHER—FIRST: Ramona
36. MIDDLE: -
37. LAST (MAIDEN): Mesa
38. BIRTH STATE: CA

DISPOSITION(S)

39. DATE MM/DD/CCYY: 06/09/2001
40. PLACE OF FINAL DISPOSITION: Jamul Indian Reservation Cemetery/14191 Hwy 94/Jamul, CA 91935

FUNERAL DIRECTOR AND LOCAL REGISTRAR

41. TYPE OF DISPOSITION(S): BU
42. SIGNATURE OF EMBALMER: [redacted]
43. LICENSE NO.: 2808
44. NAME OF FUNERAL DIRECTOR: El Cajon Mortuary
45. LICENSE NO.: FD-1022
46. SIGNATURE OF LOCAL REGISTRAR: [redacted]
47. DATE MM/DD/CCYY: 06/07/2001

PLACE OF DEATH

101. PLACE OF DEATH: Madison Care Center
102. IF HOSPITAL, SPECIFY ONE: ☐ IP ☐ ER/ER ☐ OP ☒ CONV HOSP ☐ RES CARE ☐ OTHER
103. FACILITY OTHER THAN HOSPITAL: COUNTY: San Diego
105. STREET ADDRESS—(STREET AND NUMBER OR LOCATION): 1391 E Madison Ave
106. CITY: El Cajon

CAUSE OF DEATH

E149
E149

107. DEATH WAS CAUSED BY: (ENTER ONLY ONE CAUSE PER LINE FOR A, B, C, AND D)

		TIME INTERVAL BETWEEN ONSET AND DEATH
IMMEDIATE CAUSE	(A) Cardiopulmonary Arrest	15 Hrs
DUE TO	(B) End Stage Renal Disease	Yrs
DUE TO	(C) Diabeles Mellitus	Yrs
DUE TO	(D)	

108. DEATH REPORTED TO CORONER: ☐ YES ☒ NO — REFERRAL NUMBER
109. AUTOPSY PERFORMED: ☐ YES ☒ NO
110. AUTOPSY PERFORMED: ☐ YES ☒ NO
111. USED IN DETERMINING CAUSE: ☐ YES ☐ NO

112. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RELATED TO CAUSE GIVEN IN 107: None

113. WAS OPERATION PERFORMED FOR ANY CONDITION IN ITEM 107 OR 112? IF YES, LIST TYPE OF OPERATION AND DATE: No

PHYSICIAN'S CERTIFICATION

114. I CERTIFY THAT TO THE BEST OF MY KNOWLEDGE DEATH OCCURRED AT THE HOUR, DATE AND PLACE STATED FROM THE CAUSES STATED. DECEDENT (TYPE OR PRINT) MM/DD/CCYY: 05/13/2001 — DECEDENT LAST SEEN ALIVE MM/DD/CCYY: 06/03/2001
115. SIGNATURE AND TITLE OF CERTIFIER: [redacted]
116. LICENSE NO.: A50756
117. DATE MM/DD/CCYY: 06/05/2001
118. TYPE ATTENDING PHYSICIAN'S NAME, MAILING ADDRESS, ZIP: Tu Truong, MD, 5577 University Ave, San Diego, CA 92105

CORONER'S USE ONLY

119. I CERTIFY THAT IN MY OPINION DEATH OCCURRED AT THE HOUR, DATE AND PLACE STATED FROM THE CAUSES STATED.
120. INJURY AT WORK: ☐ YES ☐ NO
121. INJURY DATE MM/DD/CCYY
122. HOUR
123. PLACE OF INJURY
124. DESCRIBE HOW INJURY OCCURRED (EVENTS WHICH RESULTED IN INJURY)
110. MANNER OF DEATH: ☐ NATURAL ☐ SUICIDE ☐ HOMICIDE ☐ ACCIDENT ☐ PENDING INVESTIGATION ☐ COULD NOT BE DETERMINED
125. LOCATION (STREET AND NUMBER OR LOCATION AND CITY, ZIP)
126. SIGNATURE OF CORONER OR DEPUTY CORONER: [redacted]
127. DATE MM/DD/CCYY
128. TYPED NAME, TITLE OF CORONER OR DEPUTY CORONER

STATE REGISTRAR

A	B	C	D	E	F	G	H	FAX AUTH. #	CENSUS TRACT
4	X	2						2109896	

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June 6, 2014

Ernest J. Dronenburg, Jr.
Assessor/Recorder/County Clerk

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003724617

STATE OF CALIFORNIA

CERTIFICATION OF VITAL RECORD

COUNTY OF SAN DIEGO

ASSESSOR/RECORDER/COUNTY CLERK

3052004085026 — STATE FILE NUMBER

CERTIFICATE OF DEATH
STATE OF CALIFORNIA
USE BLACK INK ONLY. NO ERASURES, WHITEOUTS OR ALTERATIONS
(REV. 10/97)

3200437 009234 — LOCAL REGISTRATION NUMBER

DECEDENT'S PERSONAL DATA

1. NAME OF DECEDENT — FIRST: MATTHEW
2. MIDDLE: ROBERT
3. LAST: TINAOJHEDA
4. DATE OF BIRTH: 06/23/1985
5. AGE: 18
6. SEX: M
8. BIRTHPLACE: CA
9. SOCIAL SECURITY NUMBER: [redacted]
11. EVER IN U.S. ARMED FORCES? [ ] YES [X] NO [ ] UNK
12. MARITAL STATUS: NEVER MARRIED
7. DATE OF DEATH: 05/31/2004
8. HOUR: 1320
13. EDUCATION: HS GRADUATE
14. WAS DECEDENT SPANISH/HISPANIC/LATINO? [X] YES SPANISH [ ] NO
16. DECEDENT'S RACE: KUMEYAAY
17. USUAL OCCUPATION: SECURITY OFFICER
18. KIND OF BUSINESS OR INDUSTRY: CASINO
19. YEARS IN OCCUPATION: 0

USUAL RESIDENCE

20. DECEDENT'S RESIDENCE: 14191 HWY 94 #14
21. CITY: JAMUL
22. COUNTY/PROVINCE: SAN DIEGO
23. ZIP CODE: 91935
24. YEARS IN COUNTY: 18
25. STATE/FOREIGN COUNTRY: CA

INFORMANT

26. INFORMANT'S NAME, RELATIONSHIP: KAREN TOGGERY - MOTHER
27. INFORMANT'S MAILING ADDRESS: 14191 HWY 94 #14, JAMUL, CA 91935

SPOUSE AND PARENT INFORMATION

28. NAME OF SURVIVING SPOUSE — FIRST: –
29. MIDDLE: –
30. LAST: –
31. NAME OF FATHER — FIRST: JOSE
32. MIDDLE: –
33. LAST: TINAOJHEDA
34. BIRTHPLACE: MX
35. NAME OF MOTHER — FIRST: KAREN
36. MIDDLE: JEAN
37. LAST: TOGGERY
38. BIRTHPLACE: CA

FUNERAL DIRECTOR/LOCAL REGISTRAR

39. DISPOSITION DATE: 06/12/2004
40. PLACE OF FINAL DISPOSITION: JAMUL INDIAN RESERVATION CEMETERY, 14191 HWY 94, JAMUL, CA 91935
41. TYPE OF DISPOSITION(S): BU
42. SIGNATURE OF EMBALMER: [redacted]
43. LICENSE NUMBER: 8839
44. NAME OF FUNERAL ESTABLISHMENT: EL CAJON MORTUARY
45. LICENSE NUMBER: FD-1022
46. SIGNATURE OF LOCAL REGISTRAR: [redacted]
47. DATE: 06/07/2004

PLACE OF DEATH

101. PLACE OF DEATH: Highway
102. IF HOSPITAL, SPECIFY ONE: [ ] ER/OP [ ] DOA
103. IF OTHER THAN HOSPITAL, SPECIFY ONE: [ ] Hospice [ ] Nursing Home [ ] Decedent's Home [X] Other
104. COUNTY: San Diego
105. FACILITY NAME OR LOCATION WHERE FOUND: W/B ISR8, .1 mi E of Victoria Bridge
106. CITY: Alpine

CAUSE OF DEATH

107. CAUSE OF DEATH (Enter the chain of events — diseases, injuries, or complications that directly caused death. DO NOT enter terminal events such as cardiac arrest, respiratory arrest, or ventricular fibrillation without showing the etiology. DO NOT ABBREVIATE.)
IMMEDIATE CAUSE: Blunt impact injuries of head — (a) Rapid
(b)
(c)
(d)
108. DEATH REPORTED TO CORONER? [X] YES [ ] NO — REFERRAL NUMBER: 04-01098
109. BIOPSY PERFORMED? [ ] YES [X] NO
110. AUTOPSY PERFORMED? [X] YES [ ] NO
111. USED IN DETERMINING CAUSE? [X] YES [ ] NO
112. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RELATED TO THE UNDERLYING CAUSE GIVEN IN 107: None
113. WAS OPERATION PERFORMED FOR ANY CONDITION IN 107 OR 112? No
113A. IF FEMALE, PREGNANT IN LAST YEAR? [ ] YES [ ] NO [ ] UNK

PHYSICIAN'S CERTIFICATION

114. I CERTIFY THAT TO THE BEST OF MY KNOWLEDGE DEATH OCCURRED AT THE HOUR, DATE, AND PLACE STATED FROM THE CAUSES STATED. Decedent Attended Since: ___ Decedent Last Seen Alive: ___
115. SIGNATURE AND TITLE OF CERTIFIER: [redacted]
116. LICENSE NUMBER:
117. DATE:
118. TYPE, ATTENDING PHYSICIAN'S NAME, MAILING ADDRESS, ZIP CODE:

CORONER'S USE ONLY

119. I CERTIFY THAT IN MY OPINION DEATH OCCURRED AT THE HOUR, DATE, AND PLACE STATED FROM THE CAUSES STATED
MANNER OF DEATH: [ ] Natural [X] Accident [ ] Homicide [ ] Suicide [ ] Pending Investigation [ ] Could not be determined
120. INJURED AT WORK? [ ] YES [X] NO [ ] UNK
121. INJURY DATE: 05/31/2004
122. HOUR: 1320
123. PLACE OF INJURY (e.g., home, construction site, moving vehicle, etc.): Highway
124. DESCRIBE HOW INJURY OCCURRED (Give one which caused the injury): Driver, sport utility vehicle, ran off roadway, overturned
125. LOCATION OF INJURY (Street and number, or location, and city, and ZIP): W/B ISR8, .1 mi E of Victoria Bridge, Alpine, 91901
126. SIGNATURE OF CORONER / DEPUTY CORONER: [redacted]
127. DATE: 06/03/2004
128. TYPE NAME, TITLE OF CORONER / DEPUTY CORONER: Steven C. Campman, M.D. D.M.E.

STATE REGISTRAR: A 9 B X C 1 D E
FAX AUTH. #: 2410198
CENSUS TRACT:

5099 V485 0746 38 2

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Ernest J. Dronenburg, Jr.

June 6, 2014

Ernest J. Dronenburg, Jr.
Assessor/Recorder/County Clerk

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003724616

STATE OF CALIFORNIA

CERTIFICATION OF VITAL RECORD

COUNTY OF RIVERSIDE

RIVERSIDE, CALIFORNIA

CERTIFICATE OF DEATH

STATE OF CALIFORNIA
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VS-11 (REV. 10/4)

STATE FILE NUMBER: 3052006058890

LOCAL REGISTRATION NUMBER: 3200633008186

DECEDENT'S PERSONAL DATA

1. NAME OF DECEDENT — FIRST (Given): DEAN
2. MIDDLE: JOSEPH
3. LAST (Family): ROSALES
AKA ALSO KNOWN AS — Include full AKA (FIRST, MIDDLE, LAST):
4. DATE OF BIRTH mm/dd/cccy: 03/27/1974
5. AGE Yrs: 32
If UNDER ONE YEAR: Months / Days; If UNDER 24 HOURS: Hours / Minutes
6. SEX: M
9. BIRTH STATE/FOREIGN COUNTRY: CA
10. SOCIAL SECURITY NUMBER: [redacted]
11. EVER IN U.S. ARMED FORCES? YES [X] NO UNK
12. MARITAL STATUS (at Time of Death): MARRIED
7. DATE OF DEATH mm/dd/cccy: 08/09/2006
8. HOUR (24 hours): 0930
13. EDUCATION — Highest Level Completed (see worksheet on back): 09
14/15. WAS DECEDENT HISPANIC/LATINO(A)/SPANISH? (If yes, see worksheet on back) YES [X] NO
16. DECEDENT'S RACE — Up to 3 races may be listed (see worksheet on back): AMERICAN INDIAN, CABAZON TRIBE
17. USUAL OCCUPATION — Type of work for most of life. DO NOT USE RETIRED: INVESTOR
18. KIND OF BUSINESS OR INDUSTRY (e.g. grocery store, road construction, employment agency, etc.): CASINO
19. YEARS IN OCCUPATION: 10

USUAL RESIDENCE

20. DECEDENT'S RESIDENCE (Street and number or location): 85-780 APACHE TRAIL
21. CITY: COACHELLA
22. COUNTY/PROVINCE: RIVERSIDE
23. ZIP CODE: 92236
24. YEARS IN COUNTY: 14
25. STATE/FOREIGN COUNTRY: CA

INFORMANT

26. INFORMANT'S NAME, RELATIONSHIP: ELISA WELMAS, MOTHER
27. INFORMANT'S MAILING ADDRESS (Street and number or rural route number, city or town, state, ZIP): P.O. BOX 1472, VALLEY CENTER, CA 92082

SPOUSE AND PARENT INFORMATION

28. NAME OF SURVIVING SPOUSE — FIRST: JENNIE
29. MIDDLE: MARIE
30. LAST (Maiden Name): GONZALES
31. NAME OF FATHER — FIRST: WALTER
32. MIDDLE: JOSEPH
33. LAST: ROSALES
34. BIRTH STATE: CA
35. NAME OF MOTHER — FIRST: ELISA
36. MIDDLE: -
37. LAST (Maiden): WELMAS
38. BIRTH STATE: CA

FUNERAL DIRECTOR/ LOCAL REGISTRAR

39. DISPOSITION DATE mm/dd/cccy: 08/16/2006
40. PLACE OF FINAL DISPOSITION: JAMUL INDIAN VILLAGE CEMETERY, 14151 HWY 95, JAMUL, CA 91935
41. TYPE OF DISPOSITION(S): CR/BU
42. SIGNATURE OF EMBALMER: [redacted]
43. LICENSE NUMBER: -
44. NAME OF FUNERAL ESTABLISHMENT: FITZHENRY FUNERAL HOME
45. LICENSE NUMBER: FD-967
46. SIGNATURE OF LOCAL REGISTRAR: [redacted]
47. DATE mm/dd/cccy: 08/16/2006

PLACE OF DEATH

101. PLACE OF DEATH: IN FRONT OF A RESIDENCE — Hospital / Inpatient / Emergency Room / Dead on Arrival / Nursing Home / Residence / Other — SPECIFY ONE: Decedent's Home [X] Other
104. COUNTY: RIVERSIDE
105. FACILITY ADDRESS OR LOCATION WHERE FOUND: 85-650 AVENIDA DE LA ROSA
106. CITY: COACHELLA

CAUSE OF DEATH

107. CAUSE OF DEATH — Enter the chain of events — diseases, injuries, or complications — that directly caused the death. Do not enter terminal events such as cardiac arrest, respiratory arrest, or ventricular fibrillation without stating the underlying cause.
IMMEDIATE CAUSE (Final disease or condition resulting in death): (a) GUNSHOT WOUND TO HEAD
(b)
Sequentially list conditions, if any, leading to cause on Line A. Enter UNDERLYING CAUSE (disease or injury that initiated the events resulting in death) LAST: (c) (d)
Type of Medical Death Certificate: Coroner's Case
Case No.: SECS.
108. DEATH REPORTED TO CORONER? [X] YES [ ] NO — Inquiry Number: 2006-05525
109. (e) (f)
109. AUTOPSY PERFORMED? [ ] YES [X] NO
110. (g) (h)
110. AUTOPSY PERFORMED? [X] YES [ ] NO
111. (i) (j)
111. USED IN DETERMINING CAUSE? [X] YES [ ] NO
112. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RESULTING IN THE UNDERLYING CAUSE GIVEN IN 107: NONE
113. WAS OPERATION PERFORMED FOR ANY CONDITION IN ITEMS 107 OR 112? (If yes, state condition and date): NO
113A. IF FEMALE, PREGNANT IN LAST YEAR? YES [ ] NO [ ] UNK

PHYSICIAN'S CERTIFICATION

114. I CERTIFY THAT TO THE BEST OF MY KNOWLEDGE DEATH OCCURRED AT THE HOUR, DATE, AND PLACE STATED FROM THE CAUSES STATED. SIGNATURE AND TITLE OF CERTIFIER: [redacted]
Decedent Attended Since (a) mm/dd/cccy; Decedent Last Seen Alive (b) mm/dd/cccy
116. LICENSE NUMBER:
117. DATE mm/dd/cccy:
118. TYPE ATTENDING PHYSICIAN'S NAME, MAILING ADDRESS, ZIP CODE:

CORONER'S USE ONLY

119. I CERTIFY THAT IN MY OPINION DEATH OCCURRED AT THE HOUR, DATE, AND PLACE STATED FROM THE CAUSES STATED
MANNER OF DEATH: [ ] Natural [ ] Accident [ ] Homicide [X] Suicide [ ] Pending Investigation [ ] Could not be determined
120. INJURED AT WORK? [ ] YES [X] NO [ ] UNK
121. INJURY DATE mm/dd/cccy: 08/09/2006
122. HOUR (24 Hours): 0910
123. PLACE OF INJURY (e.g. home, construction site, wooded area, etc.): IN FRONT OF A RESIDENCE
124. DESCRIBE HOW INJURY OCCURRED (Events which resulted in injury): SHOT SELF WITH 9MM HANDGUN
125. LOCATION OF INJURY (Street and number or location, and city, and ZIP): 85-650 AVENIDA DE LA ROSA, COACHELLA, CA 92236
126. SIGNATURE OF CORONER/DEPUTY CORONER: [redacted]
127. DATE mm/dd/cccy: 08/15/2006
128. TYPE NAME, TITLE OF CORONER / DEPUTY CORONER: STEVE L ALBERT, DEPUTY CORONER

STATE REGISTRAR

A | B | C | D | E | "0120060002999 02" | FAX AUTH # | CENSUS TRACT

INFORMATIONAL, NOT A VALID DOCUMENT TO ESTABLISH IDENTITY

* 0 3 4 3 9 0 4 6 0 *

CERTIFIED COPY OF VITAL RECORDS
STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

This is a true and exact reproduction of the document officially registered and placed on file in the office of the County of Riverside, Assessor-County Clerk-Recorder

DATE ISSUED JUN 09 2011

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LARRY W. WARD
ASSESSOR COUNTY CLERK-RECORDER
RIVERSIDE COUNTY, CALIFORNIA

Daily Log Records By Date
San Diego Rural Fire Prot. Dist.
Log Date in 6/29/2002 to 6/29/2002

Date: 6/30/2002

Log Date: 6/29/2002

Time Out: 08:00
Time In: 08:00 **Date In:** 6/30/2002
Station: Station 66 **Shift:** A
Type: DAILY LOG
Description: A Shift
Notes:

08:00 A SHIFT ON DUTY
K.COX(OIC) R.ANDERSON(W/W)
D.ARGAN(R) E.FAULK(R)
B-705 W/DUTY NO BURN DAY
08:30 MORNING CHECK OFF

08:41 MED-AID 20967 BARRETT SMITH RD
09:30 AVALI INC#228216 DEPT#66-400

10:30 CLEAN DAY ROOM
12:00 LUNCH
13:00 CLEAN APP BAY'S AND OUTSIDE OF STA
15:00 ASSEMBLE STRIKE TEAM FOR LAKESIDE
17:00 CANCEL STRIKE TEAM
17:30 TOOK E-64 TO STA 64
18:00 DINNER

20:47 LEGEL FIRE 14191 HWY 94
20:55 AVALI INC#228313 DEPT#66-401

06:00 FF ANDERSON TO LAKESIDE FIRE TO RELEAVE
CAPT PHELPS
07:00 MORNING CLEAN UP

07:58 MED-AID 3255 AVA LOMA RD
08:30 AVALI INC#228368 DEPT#66-400

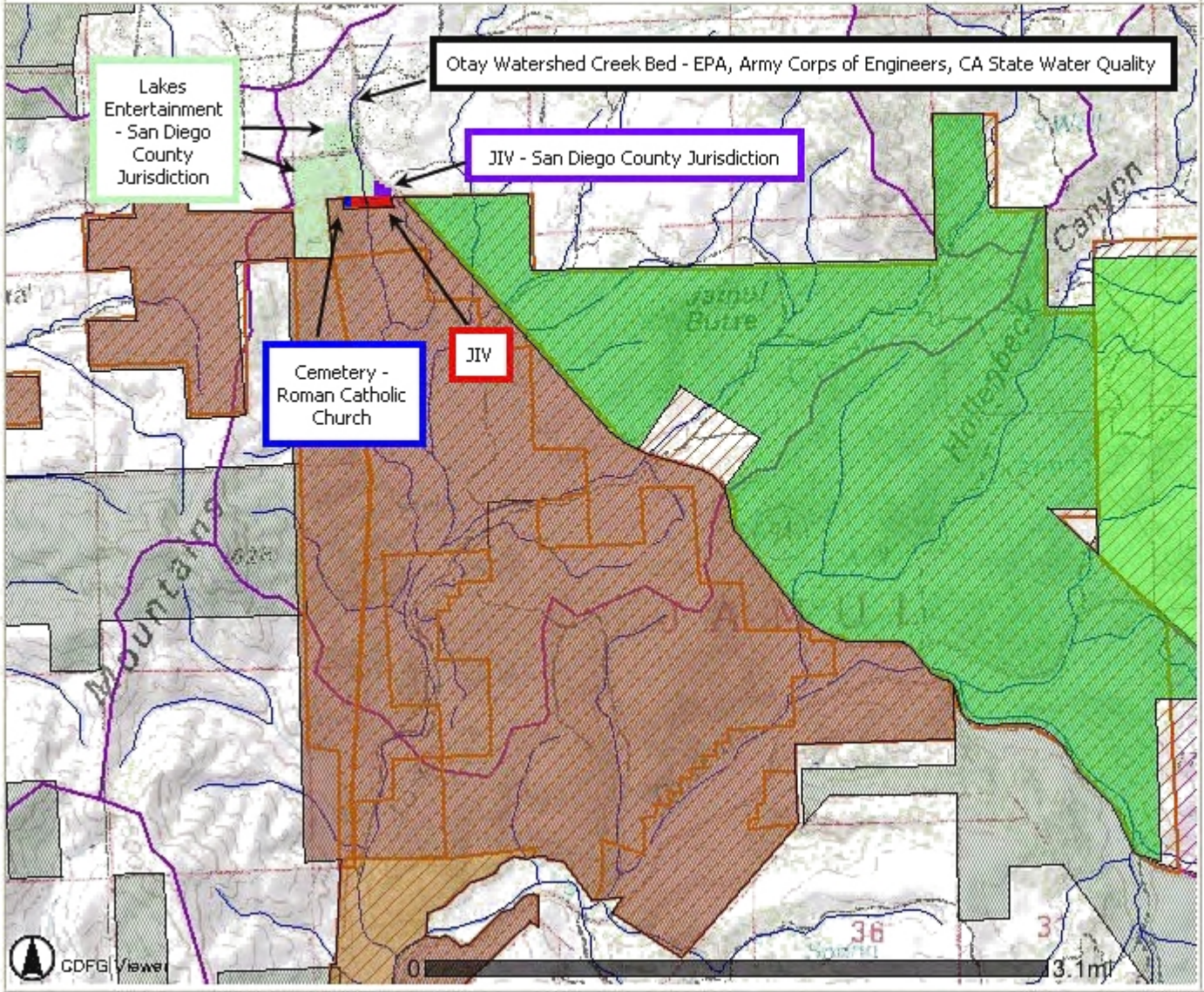
08:45 OFF SHIFT

EXHIBIT L

Jamul, CA - Dept. of Fish & Game

Watershed, Wildlife and Creek Beds surrounding Jamul and Lakes Entertainment properties

Date: 5/21/2007



Map Legend

DFG Lands

- Ecological Reserve
- Fish Hatchery
- Miscellaneous
- Public Access
- Undesignated
- Wildlife Area

Wildlife Conservation Board Projects

- Conservation Easement
- Fee Title
- Public Access
- Restoration/Enhancement
- Other or Multiple Functions

Hydrography 100k

Calwater Watersheds

Public and Conservation Lands

- LOCAL
- STATE
- FEDERAL
- NGO/Other

EXHIBIT M

OFFICE OF THE GOVERNOR

RECEIVED
JUL 18 2001
GOVERNOR'S OFFICE
LEGISLATIVE UNIT

July 17, 2001

Mr. Virgil Townsend, Acting Superintendent
U.S. Department of the Interior
Bureau of Indian Affairs
2038 Iowa Avenue, Suite 101
Riverside, California 92507-2471

Re: Jamul Indian Village Amended Notice of Fee to Trust Application for Assessor's Parcel Nos.597-060-04, 05 and 597-042-13

Dear Mr. Townsend:

The Governor's Office has reviewed the Jamul Indian Village's land acquisition application and supporting environmental assessment (hereafter "EA") seeking acceptance of title to the above described parcels of property in trust by the United States of America. We have also had the opportunity to review reports submitted by various State regulatory departments and agencies and have read letters submitted in opposition to that application by California State Senator David G. Kelley, United States Representative Duncan Hunter, the County of San Diego and County Supervisor Dianne Jacob, the Jamul/Dulzura Planning Group, the Endangered Habitats League and the Back Country Coalition as well as numerous letters from affected adjacent residents.

The application seeks to add approximately 101 acres of land (consisting of a 4.35 acre parcel, an 86 acre parcel and a 10 acre parcel) to the jurisdiction of the Tribe. The purpose of the proposed acquisition is to facilitate the demolition of the existing Tribal village on the Tribe's current 6 acre trust property and the construction on that site of a multilevel casino/parking structure. The newly acquired 4.35 acre property would provide access to the casino. The 86 acre parcel would provide space for an employee parking lot, a warehouse, a sewage treatment facility for the casino and a receptor site for an existing fire station which sits on land needed for the access road to the casino. The 10 acre parcel would serve as a receptor site for the relocation of existing tribal housing and tribal services offices currently located on the Tribe's 6 acre site.

The property at issue is located immediately north of the 3700 acre Rancho Jamul Ecological Reserve administered by the California Department of Fish and Game which itself is part of a larger 4800 acre reserve. The proposed acquisition is connected to that reserve by an intermittent stream over which the Tribe proposes to construct its casino. The 101 acres are currently subject to development restrictions pursuant to the Multiple Species Conservation Plan (hereafter "MSCP") established by the United States Fish and Wildlife Service, the State Department of Fish and Game and the County of San Diego. These restrictions are designed as part of a comprehensive habitat conservation planning program that attempts to preserve native habitats for a multitude of sensitive species.

Our review of the above mentioned materials leads to the inescapable conclusion that the Tribe's proposal is inconsistent with MSCP restrictions on development and presents a serious threat to the viability of a significant portion of the State's recently acquired ecological reserve. Consideration of the Tribe's application must have the benefit of a properly prepared environmental impact statement not simply an EA. In addition, the Bureau should view this as gaming rather than a non-gaming acquisition. The significant environmental impacts identified below compel preparation of an environmental impact statement. Similarly, the fact that the proposed gaming facility could not exist without this acquisition make it clear that the Tribe's application should be considered a gaming acquisition. As a result, we oppose the Tribe's application at this time.

Our opposition to the application is not based on the fact that gambling will occur on the Tribe's trust property per se. Rather, it is based on the size and extent of the operation envisioned by the Tribe and its adverse impacts to significant State resources. As the application notes, the Governor has executed a class III Tribal-State Gaming Compact with the Jamul Indian Village and obviously expected that some gaming devices would be operated on the property. When the Compact was executed, however, it was not anticipated that the entire existing village would be demolished and replaced with a casino and support facilities stretching over an additional 100 acres not then or now part of the Jamul trust property. The obvious constraints on the current trust property reasonably suggested that the Tribe would operate a smaller casino, perhaps with less than 350 gaming devices, along side the existing uses on the Tribe's present 6 acre site, possibly supplementing the income from that lesser number of machines with monies from the Revenue Sharing Trust Fund. Such a facility was not anticipated to represent a significant threat to the surrounding environment.

Environmental considerations have played and will continue to play an important role in the Governor's decision to approve a compact. Where, as here, there are significant potentially unmitigable adverse impacts on sensitive State resources from a casino project, that project should not be allowed to proceed until it can be conclusively demonstrated through enforceable mitigation measures that those impacts have been eliminated. In this case, no such showing has been made. As a result, because the purpose of this trust acquisition is to facilitate a casino project which has not provided sufficient assurance that its potential for environmental harm has been eliminated, it should be rejected. The Bureau's own rules, likewise, compel rejection of this application.

Under 25 C.F.R. section 151.10, in determining whether to approve an application to have lands taken into trust, the Secretary is required to consider, among other things, the tribe's need for the land, the purposes for which the land will be used, the impact on the State and its political subdivisions of the removal of the land from tax rolls and jurisdictional problems and potential land use conflicts which may arise as a result of the acquisition.

In this case, the Tribe's proposed use represents a paradigm for the kind of land use conflicts which the Bureau should not permit to occur as a result of a fee to trust proposal. As currently designed, the casino project is inconsistent with the County's land use plan for the area and is incompatible with the State's adjacent ecological reserve.

The Tribe's proposal is inconsistent with the County's land use regulations for the area, among other reasons, because it proposes to place access roads for the casino on the 4.35 acre parcel despite the fact that portions of this parcel are designated as mitigation land for development elsewhere. It is also inconsistent because its buffer zones from wetland areas on the site are smaller than required under the County's plan. Similarly, the casino proposal site plans fail to avoid the Gabbro soil types on the property to the extent necessary to avoid significantly impacting them and the sensitive plants and animals which depend on these soils for their existence. Moreover, though the Tribe's proposal includes conservation easement areas they do not meet County requirements in that they are not contiguous with each other or with the State's ecological reserve, are smaller than the County's plan requires and are limited to only 20 years rather than restricting development in perpetuity. The County's letter provides numerous other areas in which the Tribe's planned use of the acquisition property is inconsistent with the County's land use and public health and safety requirements.

Mr. Virgil Townsend
July 17, 2001
Page Four

The principal threats to the State's adjacent ecological reserve from the Tribe's proposed use of the trust acquisition property come from the proposed channelization of the intermittent stream which runs through the subject property and into the reserve, from road improvements generated by increased traffic on Highway 94 and from the effects associated with placing parking lots, lighting, exotic plant species and noise generating developments next to a sensitive habitat area.

Stream channelization under the Tribe's proposal does not appear to be limited to the acquisition but may impermissibly extend onto State property. Moreover, the plan does not describe the nature of its impacts on stream hydrology including increases or decreases in runoff rates. Such changes could damage riparian systems and alter habitat suitability for nesting birds and aquatic life dependent on particular flow levels. Enforceable commitments regarding flows and the nature of the channelization effort must be provided. Similarly, the plan does not include specific enforceable commitments with respect to lighting plans, the type of plant species to be utilized in landscaping, specific fuel modification plans and noise reduction efforts. Absent these commitments there is no assurance that exotic plant species will not invade the reserve, that lighting and noise will not effect species dispersal and survival and that fuel modification efforts will not destroy habitat. Likewise, there is no analysis of the impact road improvements necessitated by increased traffic will have on the reserve either through direct construction impacts, noise, lighting or fragmentation effects.

While we recognize that the Tribe's proposal is intended to improve the economic situation of its members, it unnecessarily threatens to degrade significant State environmental resources and is thus inimical to the public health and welfare. We believe that a fair balancing of State and Tribal interests in this instance requires that the Bureau deny the Tribe's application at this time.

Thank you for the opportunity to comment on this application.

Sincerely,

Dave Rosenberg
Director of Community and Intergovernmental Relations
and Senior Advisor to the Governor

EXHIBIT N

OFFICE OF THE GOVERNOR

August 29, 2005

Via Facsimile & U.S. Mail

Mr. Lee Acebedo
Chairman, Jamul Indian Village
P.O. Box 612
Jamul, California 91935

Re: Potential Compact Violation

Dear Chairman Acebedo:

Recent newspaper accounts indicate that the Jamul Indian Village is proposing to build a 30-story casino and hotel complex on approximately four acres of its roughly six acres of trust land in San Diego County. Because to date the Tribe has not provided the Governor's Office any concrete information regarding the details of this proposed project, we have been obliged to rely upon those newspaper accounts as well as our general knowledge of the Tribe's trust lands and the adjacent surroundings. Those accounts specifically raise troublesome questions about adequate provisions for fire protection, the assurance of appropriate water quality, and the Tribe's commitment to perform the required environmental analyses, as well as the Tribe's position on the use of fee lands for a portion of its Gaming Facility.

While we are mindful that some or all of the circumstances related by the news reports may be mistakenly reported, in the absence of contrary information from the Tribe we have no basis to doubt them. If those accounts are in fact true, we are concerned that the Tribe may be in material breach of its obligation to appropriately analyze, discuss and provide for mitigation of potential adverse off-trust land impacts for the project in conformity with the requirements of section 10.8.2 of its Tribal-State Class III Gaming Compact. It further appears that advancement of the Tribe's plans for construction and operation of the proposed Gaming Facility may additionally place the Tribe in material breach of the Compact for, among other things, failure to meet its duty to "conduct Class III gaming in a manner that does not endanger the public health,

safety, or welfare" (Compact, section 10.1); to operate a Gaming Facility only on its Indian lands (Compact, section 4.2), failure to comply with federal water quality standards applicable in California (Compact, section 10.2(b)); and to operate only those Gaming Devices authorized by the Compact (Compact section 4.0).

In order to provide the State with assurance that the Tribe's proposal will not materially breach its Compact obligations, we invite the Tribe, through an authorized representative, to contact the Governor's Office immediately to arrange a mutually agreeable time and place for the Tribe to provide the State with all pertinent details regarding its proposal. Should the Tribe choose not to accept this invitation to inform the State of its activities and provide assurances of its intent to comply with its Compact obligations, our office will be obliged to take further appropriate action under the Compact.

Please feel free to contact Peter Siggins or Stephanie Shimazu in the Legal Affairs Office at (916) 445-0873. We look forward to your timely response.

Sincerely,

PETER SIGGINS
Legal Affairs Secretary

OFFICE OF THE GOVERNOR

December 20, 2005

Mr. Leon Acebedo
Chairman, Jamul Indian Village
P.O. Box 612
Jamul, California 91935

Re: Compliance with Class III Gaming Compact

Dear Chairman Acebedo:

In a letter addressed to you in August of this year, the State expressed its concern over the Tribe's public pronouncements regarding its goal to construct, build, and operate a 30-story hotel and casino on a site less than five acres in size. The State's review at that time suggested that construction and operation of such a facility might place the Tribe in material breach of its Tribal-State Class III Gaming Compact for a number of reasons including, but not limited to, the failure of the Tribe to meet its duty to "conduct Class III gaming in a manner that does not endanger the public health, safety, or welfare" (Compact, section 10.1), to operate a Gaming Facility only on its Indian lands (Compact, section 4.2), to comply with federal water quality standards applicable in California (Compact, section 10.2(b)), to appropriately analyze, discuss and mitigate potential adverse off trust land impacts of this proposed project in conformity with the requirements of Compact section 10.8.2, and to operate only those Gaming Devices authorized by the Compact (Compact section 4.0).

In response to the August letter, the Tribe met with representatives from this office and provided assurances that it would not commence its proposed casino project until such time as it complied fully with its compact obligations and that its project would be constructed and operated in full accord with the requirements of the Compact. Moreover, the Tribe's counsel advised this office that any related activities conducted on the Tribe's trust lands prior to full compliance with Compact section 10.8.2 would be nothing more than ceremonial in nature and not actual commencement of the project. Recent Tribal activities both on and off of the Tribe's trust lands, however, can only be construed as a violation of the provisions of Compact section 10.8.2 and possibly section 4.2, and a material breach of the Compact.

As of the date of this letter, we are informed that the Tribe has removed at least three existing residential structures from the site and utilized heavy construction equipment to move earth for what appears to be a grading purpose. We regard these activities as the commencement of casino construction prior to the preparation of the required environmental documentation and analysis in violation of Compact section 10.8.2. Our view is informed in part by the Tribe's own official statement regarding its anticipated commencement of its casino project. In a September 9, 2005, statement, the Tribe indicated that the first stage of its project would be to move tribal members "off the reservation, allowing room for bulldozers to begin construction of the new casino." In that announcement, the Tribe stated, "We expect to break ground in December." The Tribe's activities to date are consistent with this statement of intent and constitute a material breach of its obligations to comply with Compact section 10.8.2 and a potential violation of section 4.2.

We do not view the removal of tribal members from their homes on the Tribe's trust lands as a ceremonial act nor is it in any way without environmental significance. Neither is the commencement of grading of the land. Steps as significant as these prior to the preparation of environmental reports and consultation with San Diego County and affected local residents with respect to the identification and mitigation of significant off-reservation environmental impacts indicates that the Tribe is not acting in good faith to meet its environmental obligations under the Compact

For these reasons, we are requesting, pursuant to Compact section 9.1(a) and (b), that the Tribe meet and confer with the State in the Office of the Governor on December 30, 2005, at 10:00 a.m., or at such mutually agreeable later date and time that is not later than January 4, 2006, in an attempt to resolve the issues involved in the Tribe's failure to comply with the Compact. The State further requests that the Tribe—and any individual or entity acting in furtherance of construction of the Gaming Facility and other development associated with it—immediately cease all construction and other activity with respect to that project until the parties have had an adequate opportunity to resolve the issues raised by this letter.

Pursuant to Compact section 9.1, the State specifically reserves the right to seek injunctive relief against further construction efforts by the Tribe with respect to the class III gaming project identified above in the event that the requests set forth in this letter do not receive a satisfactory response from the Tribe.

This letter shall further constitute the sixty (60) day written notice and opportunity pursuant to Compact section 11.2.1 (c) to cure the Tribe's material breach of its Compact obligations. We recognize that restoring the site to its condition prior to the removal of the residential structures is not possible. Therefore, we are requesting the Tribe to cure this breach by cessation of all construction and other activities with respect to the project until the parties

mutually agree that the Tribe has complied with its Compact obligations. Please also note that a judicial determination that the Tribe has materially breached the Compact after receiving this notice and failing to cure within said 60 day period allows the State to "unilaterally terminate" the Compact under Compact section 11.2.1(c).

We look forward to your prompt response to this letter.

Sincerely,

ANDREA LYNN HOCH
Legal Affairs Secretary

cc. Eugene Madrigal, Esq.
28581 Old Town Front Street, Suite 208
Temecula, CA 92590

OFFICE OF THE GOVERNOR

April 5, 2007

John J. Sansone, Esq.
County Counsel, County of San Diego
County Administration Center
1600 Pacific Highway, Room 355
San Diego, CA 92101-2469

Re: Jamul Indian Village

Dear Mr. Sansone:

Thank you for your letter of March 19, 2007, requesting assistance in enforcing the terms of the Tribal-State Compact between the State of California and the Jamul Indian Village ("Tribe"). You ask that the State take steps to terminate the Tribe's Compact in order to prevent the Tribe from constructing a class II gaming facility and later commencing class III gaming without complying with the environmental provisions required in its Compact.

We have reviewed this matter to determine what, if any, state action is appropriate at this time. Enclosed for your information is a copy of a letter sent to the Tribal Chairman and the Tribe's attorney regarding Compact compliance and related matters.

Sincerely,

ANDREA LYNN HOCH
Legal Affairs Secretary

Enclosure

cc: Honorable Leon Acebedo, Chairman, Jamul Indian Village
Mr. Eugene Madrigal, Attorney at Law

OFFICE OF THE GOVERNOR

April 2, 2007

Via Facsimile (619) 669-4817 & U.S. Mail

The Honorable Leon Acebedo
Chairman, Jamul Indian Village
P.O. Box 612
Jamul, California 91935-0612

Via Facsimile (951) 695-7081 & U.S. Mail

Mr. Eugene Madrigal, Esq.
28581 Old Town Front Street, # 208
Temecula, California 92590

Dear Chairman Acebedo and Mr. Madrigal:

We received Mr. Madrigal's March 19 letter advising that the General Membership of the Jamul Indian Village at its General Council meeting on March 17, 2007, determined to proceed with a class II gaming facility and therefore, no class III machines will be operated. Please provide our office with a copy of the General Council resolution or the meeting minutes that sets forth the official General Council decision.

You requested assistance in establishing a consistent line of communication with the California Department of Transportation (Caltrans) in order to work with them on access issues. I have contacted Caltrans, and the District Director for District 11 in San Diego and other Caltrans officials will be contacting you (if they have not done so already).

Although Mr. Madrigal's letter states that no class III machines will be operated, a March 26 article in the San Diego Union-Tribune quotes Mr. Madrigal as saying the Tribe would look to operate class III machines in the future. As we have previously stated, while the Indian Gaming Regulatory Act limits the State's ability to regulate by compact a tribe's class II gaming, should the Tribe commence class III gaming at any time without first having complied with all

the requirements of the applicable Compact, the State will consider the Tribe to be in breach of the Compact and will pursue all appropriate remedies under the Compact. These requirements, in particular those contained in Sections 4.2, 10.1, 10.2, 10.4, and 10.8 of the Tribe's existing Compact, would govern the construction, operation, and any subsequent expansion, modification or alteration of any facility used to house the operation of any class III devices to which the Tribe is entitled under its Compact.

Also, as we have previously noted, the Tribe is required to meet the requirements of the Streets and Highways Code. Those requirements include obtaining applicable encroachment permits from Caltrans and are equally applicable to both class II and class III gaming facilities.

If you wish to discuss these matters further or require additional assistance in your efforts to work with Caltrans and other State agencies to reach agreement on appropriate mitigation for the project, please do not hesitate to contact me.

Sincerely,

Andrea Lynn Hoch

ANDREA LYNN HOCH
Legal Affairs Secretary

EXHIBIT O

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

Date: 06/07/2010 Time: 08:45:00 AM Dept: C-68

Judicial Officer Presiding: Judith F. Hayes
Clerk: Sheryl Alyea
Reporter/ERM: Marvel S. Votaw CSR# 2817
Bailiff/Court Attendant: Rene De La Cruz

Case No: **37-2010-00093203-CU-TT-CTL** Case Init. Date: 06/01/2010
Case Title: **VIEJAS BAND OF KUMEYAAY INDIANS vs. Padre Dam Municipal Water District**

Case Category: Civil - Unlimited Case Type: Toxic Tort/Environmental

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EVENT TYPE: Ex Parte

APPEARANCES
STEVEN MCDONALD, counsel, present for Petitioner(s).

Ex-parte application for Temporary Restraining Order requested by Plaintiff.

James Bell Gilpin and Lindsay Puckett appear on behalf of defendant, Padre Dam
Kimberly Mettler appears on behalf of plaintiff, Viejas Bank of Kumeyaay Indians
Antonette Cordero appears on behalf of Native American Heritage Com'n.
Courtney Ann Coyle appears on behalf of plaintiff, Viejas Bank of Kumeyaay Indians

After lengthy oral argument the Court orders the parties to meet and confer regarding removal of the soils in the Blue Area; the soils are not to be compacted and the area is to be kept secure. No parties are to impede the construction area. A 24-hour notice to be given to the parties from anyone wanting to go onto the property. The public hearing currently scheduled for June 17, 2010 to go forward. The Court sets the Motion for Preliminary Injunction for the date of 6/25/2010 @ 1:30p.m.

The Motion Hearing (Civil) is scheduled for 06/25/2010 at 01:30PM before Judge Judith F. Hayes.

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Court orders construction halt on Viejas sacred site

GALE COUREY TOENSING | 6/17/10

SAN DIEGO – A state superior court has issued a restraining order to stop construction on a $20 million water project after human remains were found in an area that the Viejas Band of Kumeyaay Indians says is a sacred burial ground and ceremonial place of their ancestors.

In a June 7 hearing, San Diego Superior Court Judge Judith Hayes ordered the Padre Dam Municipal Water District to avoid construction on around two-thirds of the two-and-a-half acre site where it is building a new reservoir and pumping station. The restraining order extends to June 25.

Attorneys for the Viejas Band sought the restraining order against the Padre Dam Municipal Water District to halt construction until the matter is decided by the Native American Heritage Commission.

On June 17, the commission will continue a hearing that began in April and hear testimony from both sides. If the commission finds that the site is a sanctified cemetery that will be harmed or destroyed by the water project, it will issue recommendations to mitigate damages or even avoid the site altogether.

The water district is building the reservoir as part of a second pipeline system to the district's eastern service area. The existing pipeline is 50 years old and would leave 30,000 customers without water if it broke, according to water district officials.

Although the new pipeline would benefit the Viejas Band, protecting the tribe's cultural patrimony is essential and the entire site must be surveyed before further disturbance occurs, Viejas Tribal Chairman Bobby L. Barrett said.

"To move forward and desecrate this sacred burial ground would dishonor those who have been laid to rest there. It would also dishonor their living relatives and everyone in San Diego County who appreciates the cultural and historical significance of this site."

The water district will be required to abide by the NAHC's recommendations or face legal action requested by the commission and initiated by the state attorney general, who was present at the June 7 court hearing and spoke in favor of the restraining order.

The water district was alerted early about the potential cultural value of the site, Barrett said. Qualified Native American monitors and experts hired by the water district in 2007 said that significant tribal cultural resources were present and recommended the water district avoid construction on the site. But the water district approved the project without revealing this information to tribes and the

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public, and said the project would not have any potentially significant negative effect on cultural resources, the Viejas leader said.

Human remains and a high density of burned pottery shards were later uncovered at the site, indicating a sacred burial ground and ceremonial place where cremated Native Americans were buried in sacred pottery urns.

The Viejas Band of Kumeyaay Indians, whose ancestors have lived in the area for 10,000 years, were designated as the most likely descendents of the people buried there.

Although only around 6 percent of the site was recovered, the Padre Dam Water District's Data Recovery Report of August 2009 details the extent and significance of the discovery.

Fourteen human bones belonging to at least three to eight individuals have been positively identified by the Medical Examiner's Office, dating to A. D. 780 – 1910.

The excavation also recovered 204 other bone fragments, which are characteristic of traditional cremation practices of local indigenous bands.

The human remains were mostly "burned during cremation" and the "calcined bones may have come from human cremations given the large amounts of burned pottery and other burial artifacts that may have been grave goods," the report said.

The Viejas Band asked the water district to fully assess the site and construction plans in order to prevent further desecration before proceeding and also agreed to work with the water district to review alternative sites. The water district agreed to stop construction in February while the two sides negotiated.

But in May, the water district said it would not wait for the NAHC ruling but instead would immediately resume construction, the Viejas leader said. Viejas then filed for a restraining order to stop the project from moving forward until the commission's determination.

Padre Dam General Manager Doug Wilson told San Diego Union-Tribune online that the district's experts had determined that the site contained kitchen pottery and wasn't a burial site.

He said the construction delay is costing the district $150,000 per month, and that would add $10 million to the cost, and the district would probably drop the project.

"We've done everything by the book. If we get stopped, then no public agency can be comforted to know that they can also be stopped."

But Barrett said protecting the ancestors is more important than finances.

"This site is sacred to our people, and it is culturally and historically significant for all residents of San Diego County and southern California."

The chairman said the band had asked Padre Dam Municipal Water District to conduct a full assessment of cultural resources to help the tribe understand the cultural resources that may be present throughout the site.

"This would seem entirely reasonable given that the district's own report recognizes the immense historic and cultural significance of what has already been discovered – and that report only covers a six percent sample of the site," Barrett said. "Until there's a full assessment, we don't know what, if any, other options exist for onsite project redesign. The district also previously considered three other alternative sites, and we continue to offer to work with them to further assess those and other sites as possible options."

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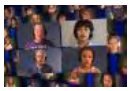
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Viejas ceremonial sanctified burial site to be protected 'in perpetuity'

By Gale Courey Toensing Indian Country Today: Jul 8, 2010

SAN DIEGO – California Attorney General Jerry Brown filed a lawsuit June 24 against a water district which continued construction on a site that has been determined to be sacred to the Viejas Band of Kumeyaay Indians and should be permanently protected.

The lawsuit was filed in the Superior Court of California in San Diego central division on behalf of the Native American Heritage Commission. The lawsuit says construction of Padre Dam Municipal Water District's $20 million reservoir and pumping station project would violate state law by causing severe or irreparable damage to the Viejas Band's sacred site.

In a rare victory for indigenous religious rights, NAHC voted unanimously June 17 to declare the 2.5 acre site in San Diego County a ceremonial site and sanctified cemetery. Excavation there has uncovered human remains and hundreds of burned pottery shards and other items, indicating a ceremonial place and cemetery where cremated Native Americans were buried in sacred pottery urns.

The Viejas Band of Kumeyaay Indians, whose ancestors have lived in the area for 10,000 years, was designated as the most likely descendents of the people buried there.

Commission members acted after hearing oral arguments and taking written testimony at the special hearing. They ordered Padre Dam to halt construction and work with the Viejas Band to find an alternate site for the project. They also called on the state attorney general's office to take legal action to halt further desecration, should the Padre Dam Municipal Water District ignore the mitigation measures recommended by the NAHC and resume construction at the site.

The next day, the water district resumed construction on the site, Viejas spokesman Robert Scheid said.

"We were stunned. And we let the commission know what was happening and it immediately sent a letter out to the water district telling them they needed to abide by the NAHC ruling or we would seek legal action from the attorney general, and even that didn't stop the project," Scheid said.

"They just kept going, and I think the attorney general sent a letter that night or the next day saying they intended to file legal action and that stopped them. They definitely were thumbing their nose at everyone. It took the attorney general to get their attention."

Scheid hesitated in calling the events a victory, however.

"But it definitely is rare to come this far in the process and really have a good chance to protect these cultural resources. We feel we've got some momentum in that direction and the involvement of the attorney general has helped a lot."

In early June, San Diego Superior Court Judge Judith Hayes issued a temporary restraining order to the water district to halt construction on around two-thirds of the two-and-a-half acre site pending the outcome of the June 17 NAHC hearing. The restraining order was extended until June 25 when the same judge was scheduled to consider Viejas' request to make the restraining order permanent, but Viejas and the water district agreed to postpone the hearing, which is now scheduled for July 24.

The significance of the site was documented by the water district's own Data Recovery Report of August 2009, in which one of its experts called the discovery "unparalleled" in the San Diego region and said the site contained "one of the highest densities of Native American ceramic shards ever found in San Diego County," which has 19,000 recorded archaeological

sites.

Fourteen human bones belonging to at least three to eight individuals have been positively identified by the Medical Examiner's Office, dating to A. D. 780 – 1910.

The excavation also recovered 204 other bone fragments, which are characteristic of traditional cremation practices of local indigenous bands.

The items are being curated with the Barona Cultural Center & Museum, Scheid said.

"The items are not appropriate for display. They are just being held at this point."

The water district was building the reservoir as part of a second pipeline system to the district's eastern service area. The existing pipeline is 50 years old and would leave 30,000 customers without water if it broke, according to water district officials.

The water district bought the property for $409,000 in April 2006. It wasn't listed as a sacred site by the Native American Heritage Commission at the time.

Padre Dam General Manager Doug Wilson told the San Diego Union Tribune there are no other suitable places for the reservoir that would connect with another water district plant via a two-mile pipeline. He said the delay is costing the district $150,000 per month, and finding another site would add $10 million to the cost, which would likely force the district to drop the project.

Although the new pipeline would benefit the Viejas Band, protecting the tribe's cultural patrimony is more important, Viejas Tribal Chairman Bobby L. Barrett said.

"To move forward and desecrate this sacred burial ground would dishonor those who have been laid to rest there."

Scheid said Viejas has made its position clear to Padre Dam.

"We're calling on them to do what the NAHC said to do – find a different location and work with Viejas on protecting this sacred site in perpetuity."

EXHIBIT P

The News Tribune

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Puyallup Tribe, city working toward cemetery solution

By LARRY LARUE

larry.larue@thenewstribune.comDecember 2, 2013

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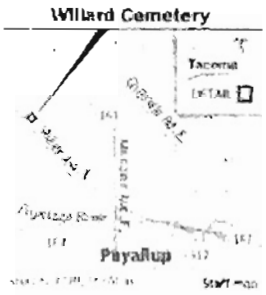

Ryan Conway grew up across the street from the Indian Willard Cemetery in Puyallup, visiting ancestral graves and living in what was then called the "Blue House."

Today, the Blue House is Blue Sky Landscape Services and Conway, for the past six years, has been the caretaker in that cemetery, which dates back more than 200 years.

"I tell people I treat each grave as if it were your mother's," Conway said. "That way anyone who comes to visit a family member can see every grave site has been treated the same, with respect."

Early last month, Conway was working and found between the cemetery fence and Valley Avenue, a flurry of red-flagged stakes.

"It was the first I knew that there was work scheduled," Conway said.

It was also the first the Puyallup Tribe had heard of the city's plan to trench the road for new sewer and water lines for two new businesses across Valley Avenue.

Why did that horrify tribe elders and others?

"We don't know the boundaries of the cemetery, because it dates back to the early 1800s, maybe earlier," tribe archaeologist Brandon Reynon said. "We do know it extends well beyond the fenced area."

Fearing ancestral remains might be disturbed, the tribe notified the city, pointing out laws and agreements that required Puyallup to notify the tribe before beginning any onsite construction. City planners were stunned.

"The city was aware of the tribal cemetery but we were unaware until two weeks ago of contention that the area of the cemetery included a larger area outside the fence," said Tom Utterback, the city director of development services.

Ex. J

A stop order was issued for all work in front of the cemetery.

"That cemetery is sacred to us, it's where our families are," tribal Police Chief Joe Duenas said. "I remember visiting it as a boy. It's an active cemetery – I buried my mother, Jody Wright, there last year."

The first concern of the tribe, then the city and construction company, Trammell Crow, was not to disturb human remains.

"The developer has hired a Seattle archaeologist and he's working out there," Utterback said. "We heartily go along with this. We want to know the issues out there."

Reynon, representing the tribe, will also be part of the cultural assessment of the dig.

One question raised by all this is how did the paved road, in the 1100 block of Valley Avenue, come to cross land that was part of the tribal graveyard? No one involved is certain.

Neither the city nor the tribe was sure whether the fence surrounding the 1.27-acre cemetery or the road came first. The road was built by Pierce County – Utterback believes that was in the 1930s or 1940s – and Puyallup annexed the land in the 1990s.

There are gravestones in the cemetery dating back to the mid-1800s, but that wasn't when burials first occurred there.

"There are sites without stones, where families couldn't afford one," Conway said. "There are stones with entire family's names on them, covering multiple sites. There's no way to tell how many are buried within the fences."

And no certainty on how far beyond those fences grave sites might exist.

It's no surprise that history never recorded such information. Though the tribe simply calls it Willard Cemetery, it has been known on state and county records as the Firwood Cemetery, the Firwood Indian Cemetery and the Firwood (Willard) Cemetery.

The land is owned by the federal Bureau of Indian Affairs.

When the city was in the permitting process 18 months ago, Utterback said environmental reports were sent to two representatives of the tribe. Tribal attorney Lisa A. Brautigam said that was the critical mistake.

"Two individuals involved with water quality and fisheries did receive the state environmental checklist but they are in individual departments not even located at the Tribal Government Headquarters," she said. "And they only deal with fisheries and water quality issues."

Archaeologist Reynon shook his head.

"If we had known about the issue, we would have worked with them on alternatives," he said. "And we should have known. Now, we'd like to go back to the beginning."

Utterback does not disagree, but insists there was never an intent to keep the tribe in the dark.

"If we were doing it again, we'd do it differently," Utterback said. "We didn't realize we should have sent it to others. We thought it would be shared by those we did send it to."

For now, work in front of the cemetery has halted, and the city and tribe will have meetings this week to discuss alternatives.

"We're not obstructionists. This is a matter of respect," said Tribal Council member Lawrence LaPointe "These are our ancestors, our families."

Larry LaRue: 253-597-8638 larry.larue@thenewstribune.com

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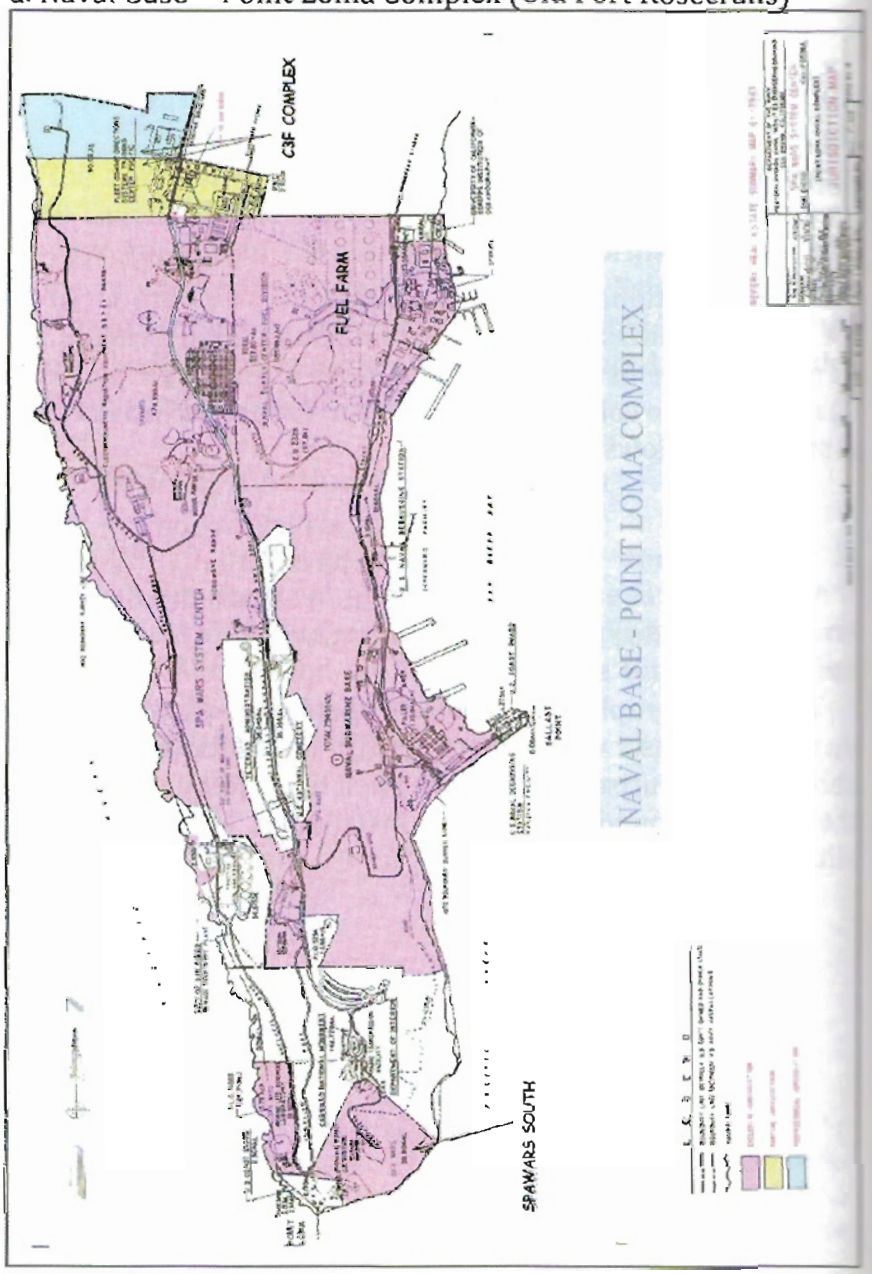
EXHIBIT Q

Appendix—Navy Jurisdictional Maps for S.D. California

a. Naval Base—Point Loma Complex (Old Fort Rosecrans)



Append

b. North Island

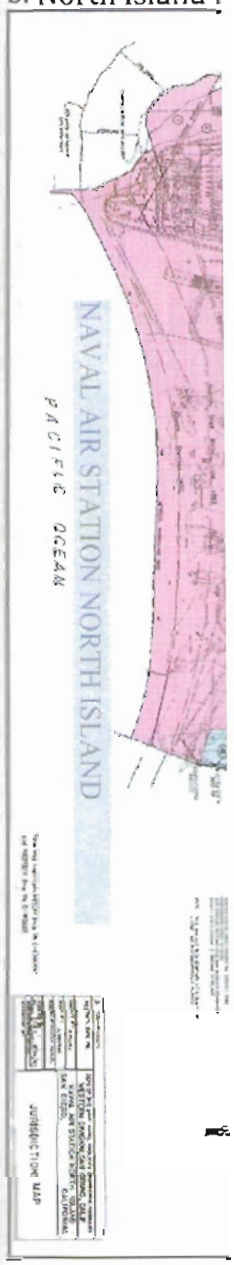


EXHIBIT R

California Indian Burial Ground Paved Over for Bay Area Housing

Added by Alana Marie Burke *on April 27, 2014*
Saved under Alana Marie Burke, California, U.S.
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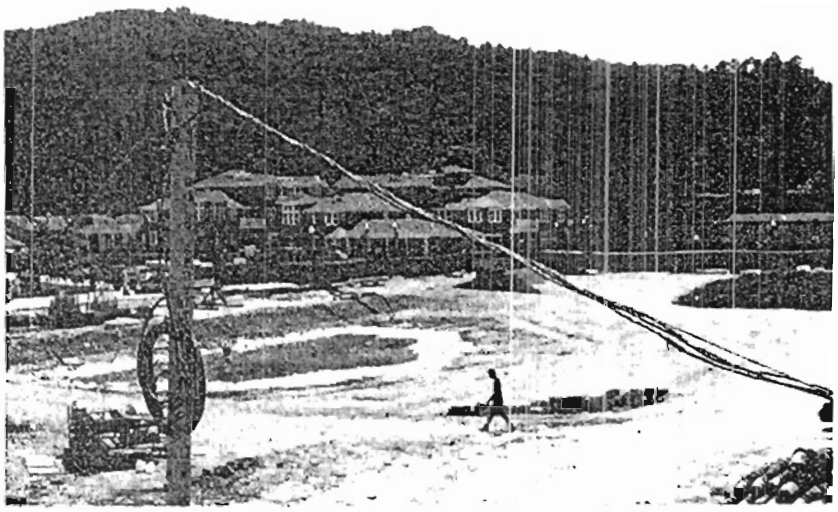
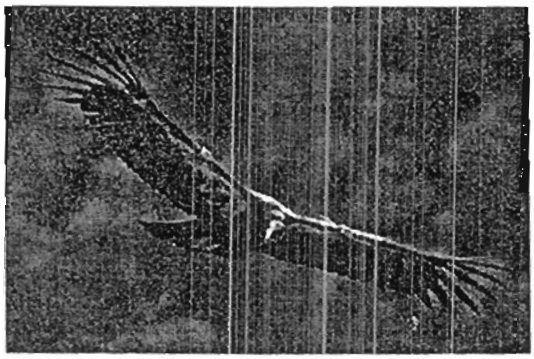


California's Bay Area real estate is considered exceptionally prime, so prime in fact, that what has been described by archaeologists as a 4,500-year-old "treasure trove" of Coast Miwok Indian artifacts has been paved over in the name of a multi-million dollar housing development in the town of Larkspur. What was a historically rich American Indian burial ground home to, by some estimates, the remains of at least 600 Coast Miwok Indians, has been legally decimated and the Indian remains have been reburied at another site at the request of the Federated Indians of Graton Rancheria (FIGR).

In accordance with the California Environmental Quality Act, archaeologists were brought in to consult on the $55 million Rose Lane Development and they are publicly lamenting the loss of the historical treasure. The common regret is that they were not provided the opportunity to catalog the find before the artifacts were relocated and buried at another site that was then graded and paved over. Any historical evidence in the Larkspur site soil will be effectively obliterated by the construction of the new development thus the context of the artifacts - an important element of the American Indian archaeological find – is also lost forever.



Endangered California condor

In addition to human remains, the abundance of artifacts at the site included weapons, tools, household implements, and over 7,200 animal bones from at least 50 different animal species. Included were the bones of black and grizzly bears and even the remains of a rare California condor, a bird which some have speculated may have actually been a ceremonial "pet" that was honored by the burial. In just the small area that archaeologists were allowed to excavate, they discovered the bones of sea otters, ducks, bat-rays and sturgeon. According to archaeologist Dwight Simons, because this was just a small sampling of the historical site, there were likely, "millions of bones and bone fragments" that could have been cataloged for study.

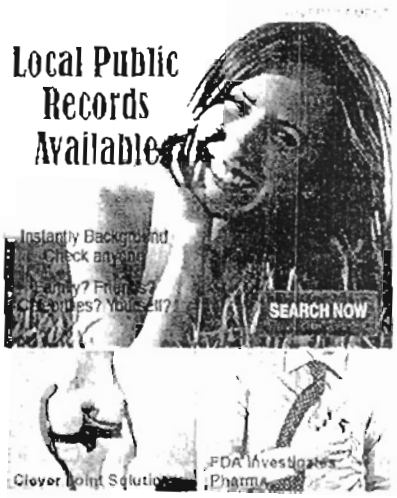
Consulting archaeologist Al Schwitalla believes that the Indians that called Larkspur, which is a small town in the Bay Area, their home, were "very wealthy." This is based upon his analysis of a small portion of the artifacts, which included over 42,000 shell beads and the remnants of abalone shells. Prehistorically this indicates that these Coast Miwok Indians were well off, much like the majority of residents that live in the very affluent Bay Area now. The Larkspur housing development will be built on the unusual foundation of soil strata that for thousands of years held the history and the ancestors of the Coast Miwok Indians.

The FIGR, with a population that are the most likely descendants of the Coast Miwok Indians expressed that they wanted their ancestral remains relocated and that they did not want to become the subject of an archaeological study. The chairman of the FIGR is quoted as saying that no one has the right to dig up the skeletal remains of the Indian ancestors for examination and he wonders, "How would Jewish or Christian people feel?" if they were in the FIGR's position.

Coast Miwok Indian Artifacts

Yet, senior archaeologist of the California State Parks, E. Breck Parkman says that in his four decades long career, he has never experienced an "archaeological site quite like this one" and his regret over the loss of the artifacts is apparent. Further, Jelmer Eerkens who is a professor of archaeology at the University of California, Davis, states that while the developers "have a right to develop their land" they could have at the very least allowed the artifacts to have been protected so that they could have "been studied in the future."

However, the developers did not make the decision to remove and rebury the artifacts found at the Bay Area site, the American Indian leaders ultimately made that choice. Nick Tipon of the FIGR stated that it is the philosophy of the tribe to



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protect their "cultural resources" and to "leave them as is." He also stated that the notion that the artifacts belong to the public is a "colonial view."

The archaeological and historically valuable American Indian remains and artifacts uncovered by the California Bay Area housing developers have been relocated. What many archaeologists called a "treasure trove" has been paved over and the artifacts are lost to any further study. However, Larkspur Land 8 Owner LLC's construction on the site includes senior housing units, townhouses and single-family dwellings with real estate values between $1.9 and $2.5 million. While the archaeological wealth may be lost, the wealth of those invested in the housing development is going to grow exponentially.

By Alana Marie Burke
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Sources:

San Jose Mercury News
San Francisco Chronicle
Gizmodo

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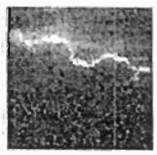
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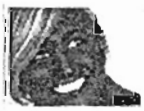
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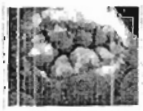
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EXHIBIT S

The INTER-TRIBAL COUNCIL of the FIVE CIVILIZED TRIBES

Bill John Baker
Principal Chief

Bill Anoatubby
Governor

Gregory Pyle
Principal Chief

George Tiger
Principal Chief

Leonard M. Harjo
Principal Chief

October 12, 2012

A Resolution to Save Ocevpofv (Hickory Ground)-Wetumpka, Alabama of the Five Civilized Tribes

Resolution No. 12-08

WHEREAS, the Inter-Tribal Council of the Five Civilized Tribes (ITCFCT) is an organization that unites the tribal governments of the Chickasaw, Choctaw, Cherokee, Muscogee (Creek), and Seminole Nations, representing over 750,000 blood descendants of Aboriginal people from the Southeastern United States; and,

WHEREAS, Ocevpofv (Hickory Ground) Ceremonial Grounds/Tribal Town located in Wetumpka, Alabama is a traditional tribal town and the Ocevpofv (Hickory Ground) Tribal Town in Oklahoma are lineal descendants and citizens of the Muscogee (Creek) Nation; and,

WHEREAS, Ocevpofv (Hickory Ground) Ceremonial Grounds/Tribal Town of Oklahoma continues the ceremonial traditions of their lineal ancestors; and,

WHEREAS, the Poarch Band of Creek Indians, a recent federally recognized tribe, is currently occupying the Historic and Sacred original site of Ocevpofv Hickory Ground Ceremonial Grounds/Tribal Town; and,

WHEREAS, the Poarch Band of Creek Indians have desecrated the original location of the Ocevpofv (Hickory Ground) Ceremonial Grounds/Tribal Town, and are currently in violation of Federal Historic Preservation laws, as well as violating Muscogee (Creek) traditions; and,

WHEREAS, the Poarch Band of Creek Indians have excavated over 60 human remains (men, women and children) and associated funerary objects, including the remains of seven Mekkos (Chiefs) that were buried in the arbors of the original ceremonial ground; and,

WHEREAS, the Poarch Band of Creek Indians are expanding their casino including a high rise hotel, casino parking lot, retail shops, lounge, museum, and further economic development on these sacred grounds. It is anticipated during this development that there will be a high probability of encountering additional human remains and associated funerary objects; and,

NOW THEREFORE BE IT RESOLVED, The Inter-Tribal Council of Five Civilized Tribes supports the lawful efforts of the lineal descendants of Ocevpofv (Hickory Ground) Ceremonial Ground/Tribal Town to halt the desecration and all future desecrations of Ocevpofv (Hickory Ground) Ceremonial Ground/Tribal Town located in Wetumpka, Alabama, as should be afforded protection under Federal Laws.

CERTIFICATION

The foregoing resolution was adopted by the Inter-Tribal Council of the Five Civilized Tribes meeting in Tulsa, Oklahoma on this 12th day of October, 2012, by a vote of 5 for 0 against and 0 abstentions.

Bill Anoatubby, Governor
The Chickasaw Nation

George Tiger, Principal Chief
Muscogee (Creek) Nation

Gregory E. Pyle, Chief
Choctaw Nation of Oklahoma

for Leonard M. Harjo, Principal Chief
Seminole Nation of Oklahoma

Bill John Baker, Principal Chief
Cherokee Nation

EXHIBIT T

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Poarch Creeks Should Reconsider Digging Up Graves to Build a Casino

DAN JONES | 8/20/12

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"YOU'LL MOCK DEATH BUT ONCE!"

I ask the Muscogee Creek Nation of Oklahoma to excuse me for speaking about your relatives. I was asked by Indian Country Today Media Network, and I am moved to do so prayerfully. The act of tampering with the graves of your ancestors affects us as well, and we support you. I am deeply bothered by it, I want to know things and I want to say some things from what I heard and read.

Why are the Poarch Creek Indians of Alabama digging up Creek graves at Hickory Ground so they can build a casino? This is an insult to everything we stand for as American Indians, and it affects my people in in its insensitivity and ignorance. It gives our enemies the ammunition they need to discredit all of us and our attempts to preserve and protect our sacred graves. When the Creek Nation were forced out of Alabama onto their Trail Of Tears, like many tribes, groups of them scattered and were not removed, but had to fend for themselves and hide from the government. To their credit, after many years they held together and fought the government in court and reclaimed federal recognition against all odds in 1982. The toll this takes on a tribe cannot be fully understood by most of us until something like this happens.

When is an Indian no longer an Indian? When he no longer hears his past relatives speaking in his own language, when the music of his people past has been replaced with the noise of another culture, when he has replaced the bones of his own people with a casino! Where are your voices of reason? Have you not noticed there is a huge movement in Indian country now to save sacred sites? How could you not know that the graves of your ancestor go to the heart of your culture? They tell you who you are, they tell your children who they are, and they are the key to your ties to this earth, to the past and the future. They are literally the identity of your nation, those who fought to keep their way of life together and sacred for you. These are not hollow words—these are the very beliefs that make us unique people.

How does your action affect my tribe and culture? Our enemies will only credit one tribe for anything they consider a good deed, mainly if it affects them in a positive light. On the other hand they will condemn all tribes when one tribe does something they consider respectable or normal to them. When one tribe blows it, they blow it for all of us. That's how it works. Now they will use you as the example of what all tribes do. When we tell them our graves are sacred they will turn to us and say, Well why did the Poarch Creek tribe dig up their ancestors and move them to build a casino? Yes, you become the standard they will judge us by.

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If you have lost the voices of reason in your own tribe to do what is best for your own culture, then it becomes our responsibility to inform you that what you are doing is wrong and unacceptable for the best interest of all of us

The Muscogee Creek Nation of Oklahoma are telling you to stop moving their relations from their resting grounds. You are making old wounds new again. But now I am here to tell you stop it on behalf of my loved ones as it is also insulting to our culture and counter to the struggles we are now having to preserve the dignity of our loved ones and their graves. You don't live in a vacuum and your actions hurt all of us.

I see a greater problem related to these casinos when it come to preserving our culture and making the all-mighty dollar. Too many are being operated by non-Indians who have no understanding of our cultures Too many times decisions are being made that should impact Indians but don't because the decisions are being made by non-Indians. But the worst case scenario would be if non-Indians are making decisions that could negatively impact a tribe to other governments Even to degrade their culture because these decisions were made by non-Indians under the nose of who are supposed to be Indian and the watchdogs of a culture. Where is your cultural conscience and cultural integrity? I believe the Muskogee Creek of Oklahoma have full right, a moral authority and a responsibility to stop you from yourself. Don't you know that even the trees and the grass that grow where we bury the dead are full of the life force of the forefathers? We believe and know that when you walk on ground you carry the ghosts of your past into your homes on the soles of your shoes. Be responsible to them for us and mainly for yourselves for your future lies in the graves you disrespect.

Dan (SaSuWeh) Jones is the former chairman of the Ponca Tribe of Oklahoma. He is a filmmaker and former vice chairman of the Oklahoma Indian Affairs Commission, appointed by former Oklahoma Governor, Brad Henry.

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Monday, August 20, 2012 - 11:23

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Great article Dan Jones, and great words. Considering all that has happened to Indians in Alabama, you would think this would not even be contemplated (hopefully it won't be). When I was young my grandmother once said "You'll know they are Indian by their stance", and I thought she was talking about their legs. I know better now.

Monday, August 20, 2012 - 14:46 SIGN IN/REGISTER FACEBOOK CONNECT

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EXHIBIT U

Ritual flames honor Kumeyaay matriarch

By Roxana Popescu (/staff/roxana-popescu/) 7 a.m. June 17, 2013

Near the fire, a line of men, boys, and female birdsong dancers from different reservations of the Kumeyaay people sang about safe travels to a better world, and the ocean, mountains and desert during the burning ceremony for Ida Brown, the eldest elder of the Viejas Band of Kumeyaay Indians, who passed away June 11 at the age of 90. During the ceremony, her personal possessions were burned, sending them on their way to the next life. — *Howard Lipin*

When dusk's shadow fell across the Viejas Reservation, the burning began.

A man holding a drip torch ignited a pile of household objects that had been thrown into a deep pit. In minutes, monstrous flames leapt toward the crescent moon. A column of smoke curled upward, transparent at first, but soon thick and dark and powerful as grief. Near the fire, a line of men from different reservations of the Kumeyaay people sang about safe travels to a better world, and the ocean, mountains and desert.

"These songs they're singing are as old as our people," said Manuel Hernandez, sitting off to one side, watching and listening.

This burning ceremony, which traditionally happens when a tribe member dies, was for Ida Brown, 90, a Kumeyaay matriarch who died June 11 from complications of a stroke. In her nine decades, Brown saw dramatic changes within her tribe and in the world beyond it, but she maintained the same values -- respect for nature, humanity and history -- throughout her life, her family said.

Brown had unique status on the reservation. She was the oldest of the Kumeyaay elders, a role that came with responsibility and prestige. "We treated her with more respect because she was the eldest in the reservation," her son, Charlie Brown, said. People offered their seats and sought her advice, and she was known for her ceremonial dancing. "She was, in a sense, a leader."

She was revered as a participant in tribal traditions and an educator who passed down vital ancestral knowledge to the next generations. Viejas Chairman Anthony Pico said she led by example and "provided the values of traditional ceremonies and the participation in such to the younger generation like myself and others."

Friday evening all her possessions were burned, and the evening ended with a pot luck meal. More than 150 people attended, the majority members of her extensive family, her son said. A wake is tonight and she will be buried Tuesday morning. At least 300 people from around Southern California are expected to come and pay their respects.

Wild swings of fortune

Born in La Mesa on April 6, 1923, Brown grew up farming and gathering. In those days the Kumeyaay led a semi-nomadic life, and they relished the freedom to fish in the ocean, and hunt or gather acorns in the mountains and desert, depending on the season. In what is now Mission Valley, "the grass was three feet tall. There were deer, there were wild pigs. She talked about how she used to go to the ocean and fish. And then go up to where Presidio Park is and eat the fish. ... They had the best of three different worlds," said her son.

Brown's fortune took a turn for the worse when she and the rest of her tribe were told to leave their ancestral lands, to make way for what is now El Capitan Reservoir. The city paid them for the relocation, and in 1934 several dozen tribe members pooled their funds

and bought what is now the Viejas Reservation. Her son said she was among those founders.

Life became a daily struggle. Some people died from exposure during the harsh highland winters. The survivors had to start from scratch, learning how to plant in the different soil, where to find water and the acorns they ground for cooking.

She attended Sherman Indian Institute, a boarding school for Indian children (now Sherman Indian High School). During World War II she worked as a riveter. That's how she met her future husband, Charles Brown, who was serving in the Army at the time. They were married in 1951 and had two sons and a daughter. Those children gave them more than 20 grandchildren and several great-grandchildren.

The family struggled -- her son remembers receiving donated clothes that didn't always fit -- but unlike others on the reservation, Brown and her husband both worked. She became a home aide nurse and her husband was a firefighter. They had a better lifestyle than many.

Every weekend they piled into the family's 1950 Chevy and headed to powwows. She made it a point to introduce her children to different kinds of people. She taught them to respect all humans equally. "She always instilled that in us. 'There's nobody better than you. We're all brothers and sisters. We all bleed the same,' " her son quoted Brown as saying

When the Viejas band came into wealth through gaming, she tried to make sure their values didn't slip away. She was too familiar with poverty from the early days of the reservation, but she also understood the freedom that comes from relying on nature and taking only what is needed. She warned others to be responsible and not become burdened by material excess.

Financial privilege came with another price, she felt: The tribe grew apart. "The elders ... felt we lost a lot. Instantly. .. We lost the tightness with the community we had," her son said.

Release

After death, the spirit stays on earth for a year, the Kumeyaay believe. Sending personal belongings to the sky as smoke makes the afterlife more welcoming for the spirit. Traditionally, they burned clothes and willow dwellings. Today, some even burn cars and motorcycles. Archaeological artifacts show they have been doing this for hundreds of years (http://www.escholarship.org/uc/item/55k3s7j6#page-1). Some Kumeyaay say the practice stretches back to prehistoric times.

Another purpose is to prevent disputes about inheritances and help the family begin to say goodbye. "They're missing her," said Viejas Vice Chairman Robert Cita Welch, who attended the ceremony. "They'll see stuff they bought her or gave her, that's going to go to her, and they'll feel for happy for that."

Friday evening, everyone gathered at her daughter Hazel Talamantez's house, where Brown spent her final years. A line of male prayer singers shook halymaas, or gourd rattles, and a line of female birdsong dancers moved rhythmically, left right, left right.

And the fire raged.

Up in flames went Ida Brown's green sofa, where she'd knit and sew. That was where she watched her favorite channel, Court TV. Up in flames went her bright blue towel with the starfish design, her Tupperware, the motorized wheelchair she hated having to use.

"Everything goes," her son said. "It makes it a lot easier."

Up in flames went her books and jewelry, her bed and the books she read. So did the refrigerator that kept the pork chops she savored.

"It's a release," he said.

Up in flames went her favorite outfit, a pink blouse, black pants and her soft, comfy grandma shoes. Pink was her color of choice, and dancing at tribal gatherings just like this one was her passion.

"She danced until she was probably 80 years old, to the Kumeyaay singers," her son said. "She's probably dancing now."

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PHOTO

Men, boys, & birdsong dancers from Kumeyaay reservations sang about safe travels to a better world, ocean, mountains & desert at the burning ceremony for Ida Brown, eldest elder of the Viejas Band of Kumeyaay Indians, who died June 11.
— *Howard Lipin / U-T San Diego*

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Members of the Viejas Fire Dept. add personal belongings of Ida Brown, the eldest elder of the Viejas Band of Kumeyaay Indians, Ida Brown, who passed away June 11 at the age of 90, to the fire. — *Howard Lipin / U-T San Diego*

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Gilbert Hill, grandson of Ida Brown, eldest elder of the Viejas Band of Kumeyaay Indians, who died June 11, at 90, watches & reflects during the burning ceremony where her possessions were burned, sending them to the next life. — *Howard Lipin / U-T San Diego*

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Charlie Brown, the son of the eldest elder of the Viejas Band of Kumeyaay Indians, Ida Brown, holds a photo of his mother who passed away June 11 at the age of 90. — *Howard Lipin / U-T San Diego*

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Men & boys from different Kumeyaay reservations sang about safe travels to a better world, the ocean, mountains & desert during the burning ceremony for Ida Brown. — *Howard Lipin / U-T San Diego*

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INDIAN NOTES AND MONOGRAPHS

EDITED BY F. W. HODGE

A SERIES OF PUBLICATIONS RELATING TO THE AMERICAN ABORIGINES

EARLY CREMATION CEREMONIES OF THE LUISEÑO AND DIEGUEÑO INDIANS OF SOUTHERN CALIFORNIA

BY

EDWARD H. DAVIS

NEW YORK
MUSEUM OF THE AMERICAN INDIAN
HEYE FOUNDATION
1921

W

THE CREMATION CEREMONY

On the death of an Indian, or when a death was imminent, a long, shallow pit was dug, about two feet deep and in the direction of north and south. The implements used in the digging were sticks of sycamore, sharpened at both ends and charred in fire to harden them. These, together with flat stones, were used to pick the earth loose, which was then scooped out with the hands and laid to one side. As soon as a person was dead, the ceremony was begun. The pit which had been prepared was filled with dried grass and brush, upon which dried logs were placed and built up about three feet. The body of the deceased was then carried out and laid upon the funeral pyre, head to the north and face upward. One man was appointed to superintend the burning of the body, while the members of the immediate family and other relatives sat near and wept and wailed. When the pyre was lighted and the flames reached the body, great

ashes and charcoal were scraped into the pit, and the whole leveled with the ground, so that all traces of the cremation were obliterated. Sometimes a broken metate was inverted over the spot where the olla had been deposited, as a marker. It should here be mentioned that the custom of depositing the incinerated remains in ollas is confined to the Diegueños—among the Luiseños they were merely placed in the pit and covered.

The next day the father and mother, or other near relatives of the deceased, repaired to the spot and, while sitting over the place where the olla was buried, the women had their hair cut off even with the ears. This hair was saved for the *Mono*, or Image, ceremony, and was used to supply the front and back hair of the image of the dead.[1]

The man who superintended the gathering of the bones went to the *temescal*, or tribal sweat-house, and took a sweat, followed by a bath before the final rites, thus purifying himself. Cremation so soon after the person was thought to be

dead sometimes revealed the fact that life still remained. Several such instances were related by the older Indians. It is related by an old Indian of the desert that many years ago an Indian died, his body was placed on the funeral pyre, and the fire started. When the flames reached the body the man returned to consciousness. Those present became greatly frightened. They attacked the man with clubs and beat him to death, and then completed the cremation according to custom.

Mr Landis, the government farmer at Martinez, in 1917 repeated to the writer a story related to him by the Indians at Mojave. A supposed corpse had been prepared and laid on the pyre; when the flames reached the body the man recovered consciousness and climbed down from the burning mass. The relatives, in amazement, ran away, leaving the intended victim unharmed. The man lived for years after.

In cases where there was a village, there was one general location for crema-

tions, corresponding to a cemetery. One such place lay a little north of the old rancheria of Los Coyotes, a Cahuilla settlement, where the wind sometimes blows the sand from the shallow graves, exposing the burned bones.

Santiago Segundo, an old medicine-man of Los Coyotes, living at San Ygnacio, twenty-five miles northeast of Mesa Grande, San Diego county, related an occurrence which he experienced. When a young man he and a companion were hunting wood-rats on the lower Coyote, when he was struck by a rattle-snake on the calf of the leg. His companion killed the reptile and carried Santiago to the house; his leg swelled, his throat almost closed, and his eyes became swollen and shut, as nothing was done to counteract the effects of the poison. All night long he lay as dead, and the relatives prepared to cremate his body. He lay on the earth, face upward, his legs tied together, and his arms fastened to his sides ready for cremation. While in this condition he said he had

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THE RELIGIOUS PRACTICES OF THE DIEGUEÑO INDIANS

BY

T. T. WATERMAN

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which is very long, and on the head. The people, especially the relatives of the initiates, then gather around the pit. One by one the boys are placed in the pit, their feet resting on the first stone. Each boy's sponsor stands behind him and takes him under the armpits. According to one account, the boy also steadies himself by placing his hands on the sides of the pit. The kwaipai, when all is ready, pronounces "mwau." The people give three answering grunts, and at the third the boy jumps on to the next stone. At another grunt he jumps to the next, and so on. Should he miss landing fairly on one of the stones, his relatives all begin to wail, in the belief that he will die before long. When each candidate has passed through the pit in this way, they all gather about, each with his sponsor beside him. Some old man then takes out the flat stones, since they are preserved with the other ceremonial objects in the kwusitenyawa. At a signal from the kwaipai, the whole company then "grunt" three times. At the third, the boys and their sponsors push the dirt in from all sides, filling the trench and burying the netting figure. If any of the dust rises from this "grave" and gets in a boy's nostrils, he will die.[71] As it is almost dark by this time, they begin the war dance at once, on top of the grave where the figure is buried. They dance all night, and at daybreak dance the fire out.[72] This ends the ceremony.

MOURNING CEREMONIES.

Quite as significant as the adolescence ceremonies are the mourning rites. Mourning for a relative usually lasts among the Diegueño for one year. The hair of both men and women was formerly cut short during this period, and the face sometimes painted black. Cremation was universally practiced by the Diegueño until they came under the influence of the missions. As far as can be learned, each body was burned without any rites other than the one mentioned above,[73] the purpose of

[71] Cf. the Chaup Myth by Miss DuBois, Journ. Am. Folk-Lore, XIX, 163, 1906.

[72] See the account of the Fire ceremony.

[73] See page 279.

which was to make the spirit done with it.[74] The clothing and other property was laid aside for use in the Mourning ceremony. Whatever ashes remained after the cremation were gathered up and placed in a small-mouthed jar of pottery, of the type used for carrying water on the desert (pl. 40).[75] This jar was then put away in some hidden place among the rocks, or buried on a hillside.

The funerary or mourning ceremony occurs on the anniversary of the death. At this time the clothing and personal property of the deceased person is publicly burned amid appropriate ceremonies. This burning is made the occasion of a large gathering. As usual in California, the family who gives the ceremony is at the total expense of entertaining all the visitors, and in addition to this, considerable property in the form of baskets, of late replaced in large degree by money and calico, is given away and burned on the funerary fire. If difficulty is experienced by the family in getting together sufficient property, the festival may be postponed for two and even three years.

THE CLOTHES-BURNING CEREMONY.

At the appointed time word is sent to the neighboring villages and families, and a large assembly drawn together. According to invariable custom, both for this and kindred ceremonies, the head of the family passes over the management of everything to a friend or visitor. Both he and his family carefully refrain from even tasting any of the food gathered for the festival.

The first night is passed by the relatives of the deceased in wailing. On the following night a great fire is built and all the people, men and women, dance around it, circling alternately in each direction. The man who has charge of proceedings, assisted by one or two others, carries the dead person's clothes. The songs sung at this time are the regular songs of the Fire dance.[76] At the close of each song all the dancers together make

[74] This is performed also in the Eagle ceremony, the account of which see below.

[75] Cf. C. G. DuBois, "Diegueño Mortuary Ollas," Am. Anthr., n. s. IX, 484, 1907, pl. 29.

[76] The account of which see below.

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the deep grunting sound: "mwau——u," and motion upward in the air. At the completion of three or four songs, all pause and face toward the fire, repeating the grunting sound three times. Then the sound is repeated once more, and all the clothes are thrown at the same time on the fire. While the garments, together with numerous baskets and other property, burn, they sing this song:

menai dispa tcawai tcawi	now dead I-begin-to-sing[77]
menai dispa tcawai tcawi	now dead I-begin-to-sing
xitoL kawak enyak awik	North, South, East, West
amai amut	up, down

Following this they dance several times around the fire, singing Fire songs, then throw on more clothes and sing:

mawi-a!	mawi-a!	what-for?	ah!	what-for?	ah!
moyo-o!	mawi-a!	you-dead,	oh!	what-for?	ah!

Anyone of the strangers who wants a little money takes a long stick and turns over the clothes so they will burn better. The relatives of the dead person then come around and give him small jars, baskets, and other "little things."

When the clothes are completely burned they sing as follows:

apamsi penoxi inyoxo

The rites are completed by dancing the fire out, singing meanwhile the songs which belong to that ceremony.[78]

THE FEATHER CEREMONY.

A distinctive mortuary ceremony is performed after the death of each toloache initiate. Among the Diegueño it is called "otcam", and seems to coincide with the unish matakish ceremony of the Luiseño.[79] It is said by the Diegueño to take place

[77] Part of the myth which tells of the origin of the ceremony is as follows: "The first man who performed the ceremony reached his hand to the North and brought a red rock, from the East a gleaming white rock, from the South a green rock, and from the West a black rock because the sun sets there. Then he blew in all four directions and sang, 'My father and grandfather are dead, so now I sing.'" The remainder of the narrative concerning the origin of the ceremony could not be obtained.

[78] See below, the account of the Fire ceremony. The Luiseño Clothes-Burning is described in present series, VIII, 180, 226.

[79] DuBois, p. 92.

THE NORTH AMERICAN INDIAN

BEING A SERIES OF VOLUMES PICTURING AND DESCRIBING

THE INDIANS OF THE UNITED STATES, THE DOMINION OF CANADA, AND ALASKA

WRITTEN, ILLUSTRATED, AND PUBLISHED BY
EDWARD S. CURTIS

EDITED BY
FREDERICK WEBB HODGE

FOREWORD BY
THEODORE ROOSEVELT

FIELD RESEARCH CONDUCTED UNDER THE PATRONAGE OF
J. PIERPONT MORGAN

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ALPHABET USED IN RECORDING INDIAN TERMS

[The consonants are as in English, except when otherwise noted]

a	as in father	ḳ	a non-aspirated k
ȧ	as in cat	k̇	velar k
â	as in awl	q	as kw
ai	as in aisle	ḷ	the lateral surd of l
e	as in they	ñ	as in cañon
ȅ	as in net	ṇ	as ng in sing
i	as in machine	ⁿ	nasal, as in French dans
ɨ	as in sit	ṗ	a non-aspirated p
o	as in old	ṭ	a non-aspirated t
ô	as in how	r	alveolar
ö	rounded e as in German böse	ṡ	approaching s
oi	as in oil	th	as in thin
u	as in ruin	sh	as in shall
ů	as in nut	ʻ	a glottal pause
ü	rounded ů as in French peu	ˈ	stresses enunciation of the preceding consonant
ṵ	as in push		superior vowels are voiceless, almost inaudible
ẖ	as ch in German Bach		
gh	the sonant of ẖ		

from theft by a shaman, who might desire it for use in bewitching its owner.

It is believed that the soul flies through the air to the place where people were created, that is, the mountain Wikami in southern Nevada.

The mourning rites usually occurred a year after the death of him whose spirit was thus to be sent permanently away, and the families of all persons deceased within the past year joined in the ceremony, unless some of them had not the necessary supplies of food; in which case they might subsequently accumulate food and repeat the ceremony later in the year. The first feature of the rites was the burning of the clothing of the deceased persons, which occurred at night, following a prior night of lamentation. On the next morning, and again in the late afternoon, provided one of the lamented had been a toloache initiate, occurred Ṭâpakwîrp ("whirling"), which might be repeated on the two following days before the people dispersed. This was the dance known to the Luiseños as Mârahîsh and to local white residents as tatahuila.[1] At the close of the afternoon performance of the whirling dance the old toloache initiates entered the ceremonial enclosure one by one, imitated the action of their lamented comrade, and passed out. Then all together returned, crawling like animals and imitating the sound of the animals of which they severally had dreamed while intoxicated with toloache at their initiation. They formed a circle about a bunch of feathers, the dead man's insignia of initiation, which they proceeded with ceremonial gestures and upward expulsions of breath to bury.

This might be followed by the so-called war-dance, Hârñloï, which however was not restricted to such occasions. Participation was a prerogative of toloache initiates. Although the Diegueños did not practise organized warfare and their logical right to a war-dance is therefore open to question, it must be noted that Hârñloï is said to have been danced repeatedly after the killing of certain Cahuilla who attempted to destroy the mission establishment at Santa Ysabel. The numerous songs of this dance consist of Shoshonean words, and it is clearly a component part of the toloache cult. Each of the dancers wore a head-band of owl-feathers, in which he inserted his feather insignia of initiation, and at certain times they shook their raised fists in a gesture apparently threatening.

When effigies representing the dead were to be burned, a small hemispherical booth, open to the east, the direction of the spirit world, was built for housing them. The effigies were made by clanswomen

[1] For a description of the whirling dance see page 15.

EXHIBIT V

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Memorandum of Agreement

For Consultations, Treatment and Disposition of Human Remains and Cultural Items That May Be Discovered Inadvertently During Planned Activities at Statue of Liberty National Monument

May 1, 2003

This Agreement is entered into by and between the U.S. Department of Interior, National Park Service, and the following parties: the Delaware Nation, the Delaware Tribe of Indians, and the Stockbridge-Munsee Community of Wisconsin.

Purpose

The purpose of this Memorandum of Agreement is to describe the procedures that will be followed by the National Park Service, Statue of Liberty National Monument, in the event there is an inadvertent discovery of human remains, funerary objects, sacred objects and objects of cultural patrimony within the Park. These procedures carry out the provisions of the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. 3001 et seq.) and its implementing regulations (43 CFR Part 10) regarding consultation, treatment and disposition of human remains and cultural items that are inadvertently discovered in the course of planned activities in the Park.

During 2003, the Statue of Liberty National Monument plans to conduct maintenance and [illegible]ization activities that will involve ground disturbances within the Park. In addition, the Park plans to conduct preliminary archeological investigations at specified localities within the Park. This Agreement has been written to comply with the requirements of NAGPRA and the Archeological Resources Protection Act (ARPA) in the case that inadvertent discovery does occur.

Definitions

All definitions in NAGPRA are incorporated into and apply to the terms used in this Agreement. The term 'cultural items' shall refer to funerary objects, sacred objects and objects of cultural patrimony as defined in NAGPRA. National Park Service policy states, "Inadvertent discovery means the unanticipated encounter or detection of human remains, funerary objects, sacred objects, or objects of cultural patrimony found under or on federal or tribal lands" (Cultural Resource Management Guideline (DO 28), Appendix R: NAGPRA Compliance, p. 325).

Cultural Affiliation

The preponderance of geographical, archeological, linguistic, folklore, oral tradition and historical evidence identifies the following tribes as most likely to have a shared group identity with (be culturally affiliated with) an earlier group who occupied and used this unit of the national park system in past centuries: the Delaware Nation, the Delaware Tribe of Indians, and the Stockbridge-Munsee Community of Wisconsin.

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Identification of Human Remains as Native American

In the event that human remains are encountered, all work will cease pending notification of the Superintendent, U.S. Park Police, Chief of Museum Services Division, Park Archeologist, Criminal Investigator, local law enforcement official, the County Medical Examiner/Coroner, and a forensic anthropologist. These officials will make an on-site determination whether the location is a crime scene or an archeological discovery. Upon notification that law enforcement has no further interest in the matter and the remains are determined to be Native American, the procedures outlined below shall be implemented.

Notification and Consultation in the Case of an Inadvertent Discovery

If Native American human remains or cultural items are inadvertently discovered, the NPS will cease activity in the immediate area of the human remains and objects, protect the remains and cultural items from further disturbance, and consult with the Tribes in keeping with 43 CFR Sections 10.4 – 10.6 and as outlined below.

1. Notification of NPS: The person who has identified the Native American human remains or cultural items shall provide immediate verbal or telephone notification of the discovery to the Superintendent of the Park. This notification shall be followed by formal written notification.

2. Cease Activity: The NPS shall immediately stop the activity in the area of the inadvertently discovered Native American human remains and cultural items and take action to secure and protect the human remains and cultural items. The action shall be directed at stabilizing and covering the discovered objects, as well as maintaining the sanctity of the site. The appropriate actions shall include covering the human remains and cultural items with a natural fiber cloth such as cotton or muslin and placing tobacco near the remains. No photographs will be taken.

3. Notification of Tribes: The Superintendent, as soon as possible but no later than three days after receiving notification of the discovery, shall notify the Tribes by telephone. Each Tribe's officially designated NAGPRA Representative shall be notified, or in the case the tribe has no NAGPRA Representative, notification shall be given to the Tribal Chief. This notification shall include information about the kinds and condition of human remains and cultural items, the circumstances under which they were discovered, and the measures taken to secure the area and protect the objects. Written notification shall follow the telephone notification.

4. Consultation with Tribes: The Superintendent shall initiate consultations with the Tribes. He or she shall provide written notice that proposes a time and place for meetings or consultations to further consider the inadvertent discovery, the Park's proposed treatment of the human remains and cultural items that may be excavated, and the proposed disposition of such remains and items.

Treatment and Disposition of Human Remains and Cultural Items

The Park and the Tribes agree that the preferred treatment of inadvertently discovered human remains and cultural items is to leave the human remains and cultural items in-situ and protect

DRAFT

them from further disturbance. Non-destructive "in-field" documentation of the remains and cultural items will be carried out in consultation with the Tribes, who may stipulate the appropriateness of certain methods of documentation. If the remains and cultural items are left in-situ, no disposition takes place and the requirements of 43 CFR 10 Sections 10.3-10.6 will have been fulfilled. The specific locations of discovery shall be withheld from disclosure (with the exception of local law enforcement officials and tribal officials as described above) and protected to the fullest extent allowed by federal law.

Written Plan of Action

If the human remains and cultural items cannot otherwise be left in place, the Superintendent shall, following consultations with the Tribes, prepare, approve and sign a written Plan of Action as described in 43 CFR Section 10.5(e) prior to excavation and removal. He or she will provide a copy to each of the Tribes. The NPS will remove them for disposition to the culturally affiliated Tribes (which may include reburial elsewhere within the Park). A determination of cultural affiliation will be required prior to disposition in keeping with 43 CFR Section 10.6, Custody. The preponderance of geographical, archeological, linguistic, folklore, oral tradition and historical evidence will be used for the determination of custody of the discovered items.

Public Notice

Following a determination of cultural affiliation, if the culturally affiliated Tribes request the disposition of cultural items to tribal custody, upon receipt of a written request by the Tribes the NPS, in compliance with Section 10.6(c), shall publish a general notice of the proposed disposition in the New York Times, the Anadarko Daily News, the Bartlesville Examiner Enterprise, and the Shawano Evening Leader. The notice will provide information as to the nature and affiliation of the cultural items and solicit further claims to custody. The notice will be published at least two times at least a week apart and final disposition will not take place until at least 30 days after publication of the second notice to allow additional claimants to come forward. A copy of the newspaper notices along with information on when and in what newspaper it was published will be sent by the Park to the Departmental Consulting Archeologist.

If no other claimants come forward, the Park will prepare transfer of custody papers and obtain signatures from the culturally affiliated Tribes prior to final disposition.

Term and Amendment

From the date of the last signature, this MOA shall remain in effect for one year and may be amended only with the written consent of all parties hereto at the time of such amendment. Any signatory party may terminate their participation in this MOA upon 60 days written notice to the other signatories.

TOTAL P.13

DRAFT

Signatures

National Park Service

By:_____ Date:_____

Title:_____

Delaware Tribe

By:_____ Date:_____

Title:_____

Delaware Tribe of Indians

By:_____ Date:_____

Title:_____

Stockbridge-Munsee Community of Wisconsin

By:_____ Date:_____

Title:_____

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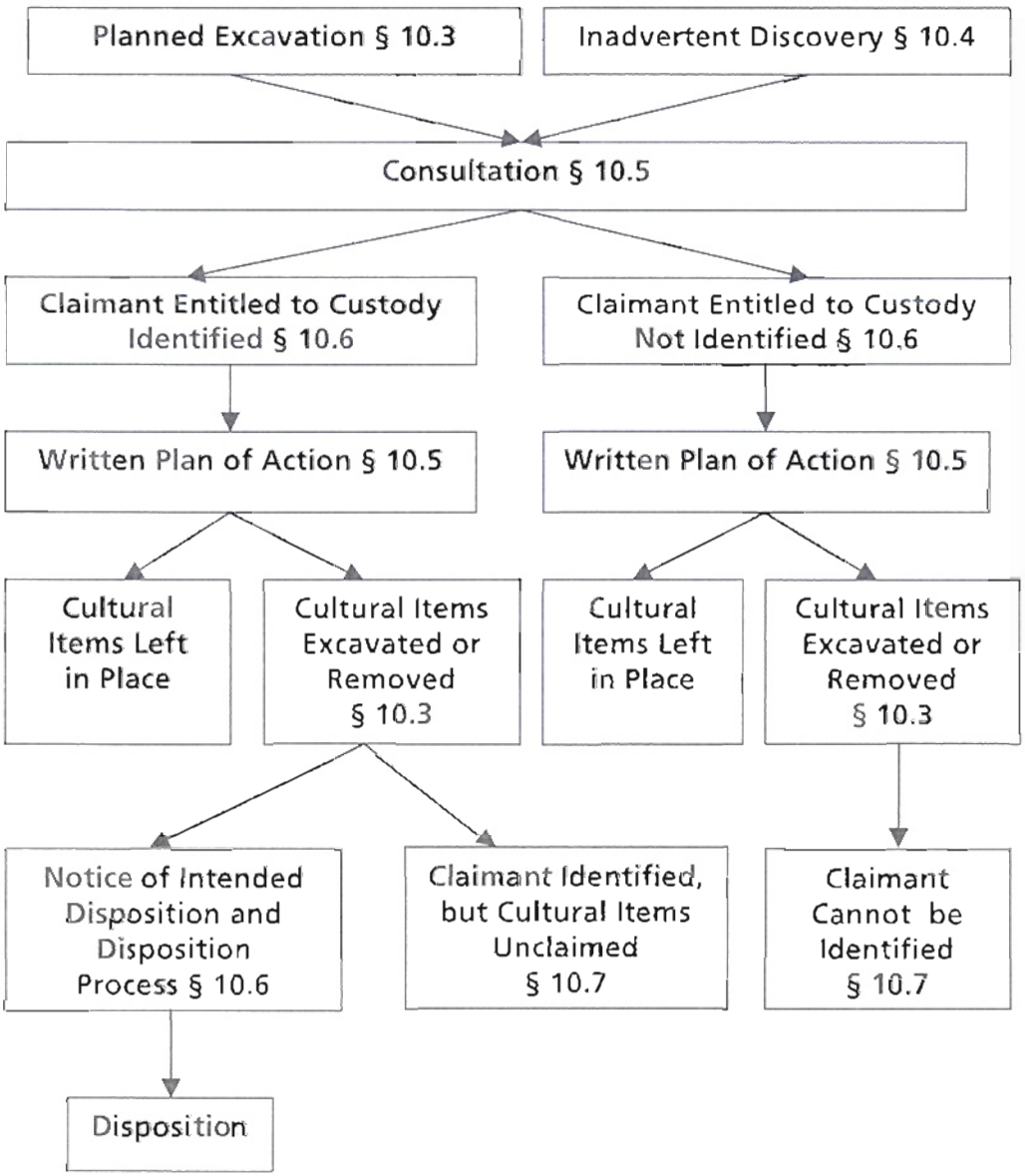
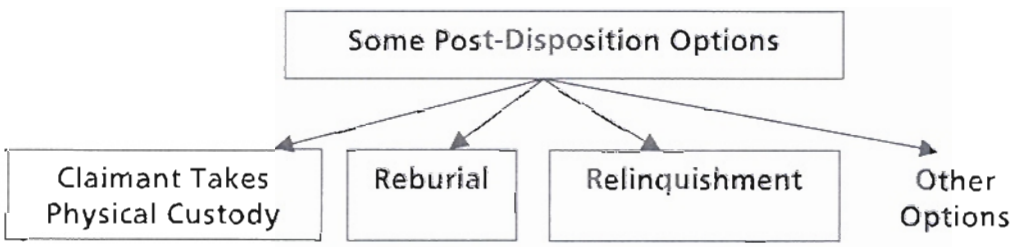
EXHIBIT W

National Park Service
U.S. Department of the Interior

National Center for Cultural Resources
National NAGPRA

43 CFR 10, Subpart B Overview





Inadvertent Discoveries on Federal Lands After November 16, 1990

An *inadvertent* discovery is one for which no plan of action was developed prior to the discovery

Notification

The person who makes the discovery must **immediately notify the responsible Federal official** by telephone and provide written confirmation to the responsible Federal official.

Stop Work

If the inadvertent discovery occurred in connection with an on-going activity, the person must **cease the activity** in the area of the inadvertent discovery and **make a reasonable effort to protect the human remains and other cultural items.**

Initiating Consultation

No later than three working days after receiving written confirmation of the notification, the responsible Federal agency official must **certify receipt of the notification**, and take immediate steps, if necessary, to **further secure and protect the human remains and other cultural items. NOTE:** activity that resulted in the discovery may resume thirty days after the Federal agency official certifies receipt of the notification.

The responsible Federal agency official must also **notify by telephone** (with written confirmation) and **initiate consultation** with **any known lineal descendant** and the **Indian tribes and Native Hawaiian organizations –**

- **who are or are likely to be culturally affiliated with the human remains and other cultural items;**
- **on whose aboriginal lands the remains and cultural items were discovered; and**
- **who are reasonably known to have a cultural relationship to the human remains and other cultural items.**

Consultation is initiated with a written notification. The written notification must propose a time and place for meetings or consultation.

During Consultation

The **purpose** of consultation is to **help the Federal agency determine who is entitled to custody** of the human remains and other cultural items under NAGPRA so that the disposition process can be completed, and **to discuss the Federal agency's proposed treatment** of the human remains and other cultural items pending disposition.

The Federal agency official must **provide in writing –**

- a list of all lineal descendants, Indian tribes, or Native Hawaiian organizations that are being, or have been, consulted; and
- an indication that additional documentation will provided on request.

The Federal agency official **must request, as appropriate –**

- names and addresses of the Indian tribe official who will act as the tribe's representative in consultation,
- names and appropriate methods to contact lineal descendants;
- recommendations on how consultation should be conducted; and
- the kinds of cultural items that are considered to be unassociated funerary objects, sacred objects, or objects of cultural patrimony

After Consultation – Written Plan of Action

The Federal agency official must prepare, approve, and sign a written plan of action. The plan of action must document the kinds of objects to be considered as cultural items; the planned treatment, care, and handling, including traditional treatment, of human remains and other cultural items; the planned archeological recording of the human remains and other cultural items; the kinds of analysis planned for each kind of object; and the nature of reports to be prepared.

The written plan of action must also include --

- the **specific information used to determine custody** of the human remains and other cultural items; and
- the **planned disposition** of the human remains and other cultural items.

Custody must determined in accordance with 25 USC 3002 (a), "Priority of Ownership," and 43 CFR 10.6, "Priority of Custody."

(over)

Will the human remains and other cultural items be left in place?

Yes
The Federal agency secures the site of discovery, and the disposition process does not continue further.

OR

No
Excavation or removal of the human remains and other cultural items must take place following the requirements of the Archeological Resources Protection Act (ARPA) (16 U.S.C. 470aa et seq.) and its implementation regulations. This includes issuance of an excavation permit by the cognizant Federal agency where required by ARPA.

Prior to Disposition – Notice of Intended Disposition

At least 30 days prior to transferring the human remains and other cultural items to the claimant entitled to custody, the responsible Federal agency must first publish a **Notice of Intended Disposition.** The Notice must –

- be published two times (at least a week apart) in a newspaper of general circulation in the area in which the human remains and other cultural items were discovered;
- be published two times (at least a week apart) in a newspaper of general circulation in the area or areas in which the affiliated Indian tribes or Native Hawaiian organization members now reside;
- provide information as to the nature and affiliation of the human remains and other cultural items; and
- solicit further claims to custody.

The Federal agency official must send a copy of the notice and information on when and where it was published to the National NAGPRA program.

Disposition

Disposition is the formal transfer of Native American human remains and other cultural items excavated or inadvertently discovered on Federal or tribal lands after November 16, 1990, to the lineal descendants, Indian Tribes, or Native Hawaiian organizations that have been determined to be the legitimate claimants.

In completing the disposition, the claimant formally accepts custody (ownership). Disposition should be documented, must be consistent with 25 USC 3002 (a), "Priority of Ownership," and 43 CFR 10.6, "Priority of Custody." Physical transfer may take place 30 days after the publication of the second Notice of Intended Disposition, as agreed upon by the claimant and the Federal agency official.

Some Disposition Options

Claimant Takes Physical Custody
The legitimate claimant takes physical possession of the human remains and other cultural items. Where allowable, and upon agreement with the claimant, the Federal agency may provide temporary care until the claimant is able to take physical custody.

Reburial on Federal Land
The human remains and other cultural items may be reburied on Federal land, if the agency's policies and procedures permit such activities.

Relinquishment
Under NAGPRA [25 USC 3002(e)], the governing body of an Indian tribe or Native Hawaiian organization may expressly relinquish control over any Native American human remains, or title to or control over any funerary object or sacred object.

EXHIBIT X

National NAGPRA

National Park Service

[Federal Register: October 18, 1999 (Volume 64, Number 200)]
[Notices]
[Page 56219-56221]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr18oc99-66]

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items in the Possession of the San Diego Museum of Man, San Diego, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is hereby given under the Native American Graves Protection and Repatriation Act, 43 CFR 10.10 (a)(3), of the intent to repatriate cultural items in the possession of the San Diego Museum of Man which meet the definition of ``unassociated funerary object'' under Section 2 of the Act.

The 60 cultural items consist of a plummet stone, pendants, projectile points, sherds, and beads.

During the 1930s, these cultural items were removed from burials at site C-16, East Blake Sea, eastern Imperial County, CA during legally authorized excavations conducted by Malcom Rogers of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The 311 cultural items consist of an awl, a necklace, a pendant, beads, and sherds.

During the 1930s, these cultural items were removed from burials at site C-19, East Blake Sea, eastern Imperial County, CA during legally authorized excavations conducted by Malcom Rogers of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The six cultural items consist of a bead and projectile points.

During the 1930s, these cultural item were removed from burials at site C-92, East Blake Sea, eastern Imperial County, CA during legally authorized excavations conducted by Malcom Rogers of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The five cultural items consist of a medicine slab, conus tinklers, a pendant, and a doll's eye.

During the 1930s, these cultural items were removed from burials at site C-144, a general area at Mason Valley, San Diego County, CA during legally

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authorized excavations conducted by Malcolm Rogers of the San Diego

Museum of Man. The human remains interred with these cultural items were not collected.

The 259 cultural items consist of cook pots, jars, bowls, clay billets, pipes, shells, projectile points, an iron knife blade, a brass button, arrow straighteners, digging weights, animal bones, glass beads, shell beads, a basket fragment, shell buttons, and pendants.

During the 1930s, these cultural items were removed from burials at site C-144 Cemetery A at Mason Valley, San Diego County, CA during legally authorized excavations by Malcolm Rogers of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The 503 cultural items consist of a scoop, a bowl, bones, glass beads, sherds, shell beads, lithic flakes, cook pots, fibers, metal fragments, and pestles.

During the 1930s, these cultural items were recovered from burials at site C-144 Cemetery C at Mason Valley, San Diego County, CA during legally authorized excavations conducted by Malcolm Rogers of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The 52 cultural items consist of sherds, a glass jar neck, a metal pull, canteens, shell beads, a pestle, ollas, a cup, bowls, a rabbit net fragment, a bone pendant, a sherd disc, jars, a mano, an arrow straightener, anvils, and a brass button.

During the 1930s, these cultural items were recovered from burials at site C-151, McCain Valley, San Diego County, CA during legally authorized excavations conducted by Malcolm Rogers of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The 101 cultural items consist of basket fragments, lithic flakes, beads, sherds, a brass button, a ceramic disk, shell beads, shell, and projectile points.

During the 1930s, these cultural items were recovered from burials at site C-164, Vallecito Wash, east-central San Diego County, CA during legally authorized excavations conducted by Malcolm Rogers of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The 32 cultural items consist of a brass button, a jar, bowls, a canteen, discs, pendants, shell, projectile points, anvils, a rabbit net, a glass bead, an olla, a mano, sherds, and pestles.

During the 1930s, these cultural items were recovered from burials at site C-165, Vallecitos, San Diego County, CA during legally authorized excavations conducted by Malcolm Rogers. The human remains interred with these cultural items were not collected.

The four cultural items are pottery jars.

Between 1929-1968, these cultural items were recovered from burials at site C-651, Earthquake Valley, San Diego County, CA by Carl Harkleroad. The human remains interred with these cultural items were not collected.

The 11 cultural items consist of canteens, a sherd, an arrow straightener, a blade, a cobble tool, lithic flake tool fragments, and an abalone shell.

During the 1930s, these cultural items were recovered from burials at site W-205, Cottonwood Valley, San Diego County, CA by Malcolm Rogers of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The 43 cultural items consist of a pot, a bowl, arrowshaft straighteners, scrapers, bone fragments, sherds, projectile points, flaked stone, and flaking hammers.

During the 1930s, these cultural items were recovered from burials at site W-206, Santa Maria Valley, San Diego County, CA by Malcolm

Rogers of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The one associated funerary object is a point fragment.

During the 1930s, this cultural item was recovered from a burial at site W-245, Dulzura, San Diego County, CA during legally authorized excavations conducted by Malcolm Rogers of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The ten associated funerary objects consist of a metate, shell pendants, projectile points, a sherd, and a bone pendant.

During the 1930s, these cultural items were recovered from burials at site W-254, Cemetery A, Laguna Mountain, San Diego County, CA during legally authorized excavations conducted by Malcolm Rogers of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The 104 cultural items consist of urns, projectile points, and sherds.

During the 1930s, these cultural items were recovered from burials at site W-262, Cuyamaca Peak, San Diego County, CA during legally authorized excavations conducted by Malcolm Rogers of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The 38 cultural items are stones.

During 1950-1951, these cultural items were recovered from a burial at site W-330, Poway, San Diego County, CA during legally authorized excavations conducted by Clark Evernham of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The one cultural item is a cremation urn.

During the 1930s, this cultural item was recovered from a burial at site at Olive Springs, Ramona, San Diego County, CA during legally authorized excavations conducted by Malcolm Rogers of the San Diego Museum of Man. The human remains interred with this cultural item were not collected.

Based on ceramic material, types of projectile points, and types of shell beads, these cultural items have been dated to the late prehistoric period, c. 750 A.D. to the 19th century. Continuities of material culture and technologies provide a clear continuum for native cultures in this area from this late precontact period into the time of European contact. Historic documents from the Spanish expeditions document Diegueno and Kumeyaay peoples through this area. Consultation information provided by the Kumeyaay Cultural Repatriation Committee supports the recognition of this area of San Diego County as an ancestral homeland.

Based on the above mentioned information, officials of the San Diego Museum of Man have determined that, pursuant to 43 CFR 10.2 (d)(2)(ii), these 1,509 cultural items are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of an Native American individual. Officials of the San Diego Museum of Man have also determined that, pursuant to 43 CFR 10.2 (e), there is a relationship of shared group identity which can be reasonably traced between these items and the Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, the Capitan Grande Band of Diegueno Mission Indians of California, the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, the Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, the Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, the Jamul Indian Village of

California, the La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, the Manzanita

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Band of Diegueno Mission Indians of the Manzanita Reservation, the Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, the San Pasqual Band of Diegueno Mission Indians of California, the Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, the Sycuan Band of Diegueno Mission Indians of California, and the Cuyapaipe Community of Diegueno Mission Indians of the Cuyapaipe Reservation.

This notice has been sent to officials of the Kumeyaay Cultural Repatriation Committee, the Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, the Capitan Grande Band of Diegueno Mission Indians of California, the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, the Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, the Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, the Jamul Indian Village of California, the La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, the Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, the Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, the San Pasqual Band of Diegueno Mission Indians of California, the Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, the Sycuan Band of Diegueno Mission Indians of California, and the Cuyapaipe Community of Diegueno Mission Indians of the Cuyapaipe Reservation. Representatives of any other Indian tribe that believes itself to be culturally affiliated with these objects should contact Ken Hedges, Curator of California Collections, San Diego Museum of Man, 1350 El Prado, San Diego, CA 92101; telephone: (619) 239-2001 before November 17, 1999. Repatriation of these objects to the Kumeyaay Cultural Repatriation Committee on behalf of the Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, the Capitan Grande Band of Diegueno Mission Indians of California, the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, the Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, the Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, the Jamul Indian Village of California, the La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, the Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, the Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, the San Pasqual Band of Diegueno Mission Indians of California, the Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, the Sycuan Band of Diegueno Mission Indians of California, and the Cuyapaipe Community of Diegueno Mission Indians of the Cuyapaipe Reservation may begin after that date if no additional claimants come forward.

Dated: October 4, 1999.

Francis P. McManamon,

Departmental Consulting Archeologist, Manager, Archeology and Ethnography Program.

[FR Doc. 99-27125 Filed 10-15-99; 8:45 am]

BILLING CODE 4310-70-F

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indicates that the human remains are from a 25–30–year-old male. The condition of the skull indicates that it was obtained shortly after death. Measurements of the skull are nearly identical to the measurements for Path. Series 7023 in the Army Medical Museum archives. Comparison of measurements from the skull with measurements from skulls from several Plains tribes indicates that the Cheyenne and Sioux are the most likely groups for biological affinity. A discriminant analysis of the measurements indicates that the skull is much more similar to the Sioux group, but a Cheyenne affiliation cannot be excluded. The human remains are currently in the possession of the Smithsonian Institution, National Museum of Natural History, Repatriation Office.

Representatives of the Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota; Flandreau Santee Sioux Tribe of South Dakota; Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota; Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota; Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota; Santee Sioux Tribe of the Santee Reservation of Nebraska; Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Reservation, South Dakota; Spirit Lake Tribe, North Dakota; Standing Rock Sioux Tribe of North & South Dakota; and Yankton Sioux Tribe of South Dakota have agreed to the repatriation of the human remains to the Cheyenne-Arapaho Tribes of Oklahoma and Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana.

Officials of the Bureau of Indian Affairs have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of one individual of Native American ancestry. Officials of the Bureau of Indian Affairs have determined that, pursuant to 25 U.S.C. 3003 (d)(2)(B), there is a relationship of shared group identity that can be clearly traced between the Native American human remains and the Cheyenne-Arapaho Tribes of Oklahoma and Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana. Officials of the Bureau of Indian Affairs also have determined that, pursuant to 25 U.S.C. 3003 (d)(2)(C), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota; Flandreau Santee Sioux Tribe of South Dakota; Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota; Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota; Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota; Santee Sioux Tribe of the Santee Reservation of Nebraska; Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Reservation, South Dakota; Spirit Lake Tribe, North Dakota; Standing Rock Sioux Tribe of North & South Dakota; and Yankton Sioux Tribe of South Dakota.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Carolyn McClellan, National Collections Manager and NAGPRA Coordinator, Bureau of Indian Affairs, 1849 C Street NW, MS–2472–MIB, Washington, DC, telephone (202) 208–4401, before March 1, 2004. Repatriation of the human remains to the Cheyenne-Arapaho Tribes of Oklahoma and Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana may proceed after that date if no additional claimants come forward.

The Bureau of Indian Affairs is responsible for notifying the Cheyenne-Arapaho Tribes of Oklahoma; Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota; Flandreau Santee Sioux Tribe of South Dakota; Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota; Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana; Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota; Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota; Santee Sioux Tribe of the Santee Reservation of Nebraska; Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Reservation, South Dakota; Spirit Lake Tribe, North Dakota; Standing Rock Sioux Tribe of North & South Dakota; and Yankton Sioux Tribe of South Dakota that this notice has been published.

Dated: December 8, 2003.

John Robbins,

Assistant Director, Cultural Resources.

[FR Doc. 04–1884 Filed 1–28–04; 8:45 am]

BILLING CODE 4310–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: San Diego Museum of Man, San Diego, CA, and California Department of Parks and Recreation, Sacramento, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession of the San Diego Museum of Man, San Diego, CA, and in the control of the California Department of Parks and Recreation, Sacramento, CA. The human remains and cultural items were removed from Cuyamaca Rancho State Park, Descanso, San Diego County, CA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations within this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations within this notice.

A detailed assessment of the human remains was made by the San Diego Museum of Man and the California Department of Parks and Recreation professional staff in consultation with the Kumeyaay Cultural Repatriation Committee, authorized representative of the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of California; Sycuan Band of Diegueno Mission Indians of California; and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California. The San Diego Museum of Man and the

California Department of Parks and Recreation also consulted with Kwaaymii elder Carmen Lucas.

In the 1930s, Malcolm Rogers and fellow associates of the San Diego Museum of Man conducted excavations at several sites in Cuyamaca Rancho State Park, Descanso, San Diego County, CA. Unassociated funerary objects removed from the park are described in a companion notice.

Human remains representing a minimum of two individuals were removed from cremation site SDM-W-211, West Mesa. No known individuals were identified. The 19 associated funerary objects are 1 bead, 12 projectile points, 2 ollas, 1 pipe, 1 abalone pendant, 1 cook pot, and 1 container of groundstone fragments.

Human remains representing a minimum of seven individuals were removed from site SDM-W-247 between Cuyamaca Lake and Stonewall Peak near today's Los Caballos Campground. No known individuals were identified. The 444 associated funerary objects are 11 projectile points, 2 spear points, a minimum of 347 loose sherds, 1 bag of uncounted sherds, 1 box of uncounted sherds, 1 unidentified groundstone, 1 groundstone fragment, 2 rock fragments, 1 scraper, 2 lithic flakes, 17 pieces of charcoal and chalkstone, 1 bag of red ochre, 1 piece white marl, 2 fragments of arrow straightener, 4 bone pendants, 1 bone flaker, 2 burned shell fragments, 11 bone fragments, 5 bead waste fragments, 2 awls, 1 bone tool fragment, 4 rocks, 1 piece of white ochre, 2 olivella bead fragments, 4 cremation urns (1 broken into 72 pieces), 1 burned wood fragment, 1 crab claw fragment, 6 animal teeth, and 9 animal bones.

Human remains representing a minimum of 15 individuals were removed from site SDM-W-263 near today's Paso Picacho Campground. No known individuals were identified. The 2,068 associated funerary objects are 11 cremation urns and cremation covers, a minimum of 1,048 olivella beads, 1 olivella disc, 2 fish vertebrae beads, 17 shell fragments, a minimum of 544 sherds, 9 fish vertebrae, 1 rock spall, 19 pieces of animal bone, 3 pieces of fired clay, 25 pieces of charcoal and earth fragments, 2 bags of charcoal and earth fragments, 1 tarring pebble, 1 bone pipe, 2 bone awls, 2 ceramic bases, 16 samples of bead waste, 4 flakes, 3 rocks, 2 dome scrapers, 15 ochre fragments, 3 ceramic pendants, 1 knife, 2 seeds, 52 projectile points, 1 glass tool fragment, 2 textile fragments, 1 pine cone spine, 1 quartz tool fragment, a minimum of 221 glass and 27 shell beads, 6 biface fragments, 2 arrow straightener fragments, 14 burned earth clumps, 1 piece of serpentine, 1 polished stone, and 5 stone fragments.

The human remains and associated funerary objects removed by Malcolm Rogers and his associates date from the Late Prehistoric to the Historic period, (A.D. 500 to A.D. 1800). Archeological investigation in the western San Diego County area dates the Kumeyaay (Diegueno) occupation of the region to the Late Prehistoric period. Geographic affiliation is consistent with historically documented Kumeyaay territory. Therefore, the California Department of Parks and Recreation Committee on Repatriation has determined that there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and present-day Federally recognized Kumeyaay Indian tribes represented by the Kumeyaay Cultural Repatriation Committee.

Officials of the California Department of Parks and Recreation have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of 24 individuals of Native American ancestry. Officials of the California Department of Parks and Recreation also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the 2,531 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the California Department of Parks and Recreation have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of California; Sycuan Band of Diegueno Mission Indians of California; and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with these human remains and associated funerary objects should contact Paulette Hennum, NAGPRA Coordinator, Cultural Resources Division, California Department of Parks and Recreation, 1416 9th Street, Room 902, Sacramento, CA 95814, telephone (916) 653–7976, before March 1, 2004. Repatriation of the human remains and associated funerary objects to the Kumeyaay Cultural Repatriation Committee may proceed after that date if no additional claimants come forward.

The California Department of Parks and Recreation is responsible for notifying the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of California; Sycuan Band of Diegueno Mission Indians of California; Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California; Kumeyaay Cultural Repatriation Committee; and Kwaaymii elder Carmen Lucas that this notice has been published.

Dated: December 16, 2003.

John Robbins,

Assistant Director, Cultural Resources.

[FR Doc. 04–1883 Filed 1–28–04; 8:45 am]

BILLING CODE 4310–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items: San Diego Museum of Man, San Diego, CA, and California Department of Parks and Recreation, Sacramento, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves

National NAGPRA

National Park Service

FR Doc 04-1883
[Federal Register: January 29, 2004 (Volume 69, Number 19)]
[Notices]
[Page 4315-4316]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr29ja04-64]

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: San Diego Museum of Man, San Diego, CA, and California Department of Parks and Recreation, Sacramento, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession of the San Diego Museum of Man, San Diego, CA, and in the control of the California Department of Parks and Recreation, Sacramento, CA. The human remains and cultural items were removed from Cuyamaca Rancho State Park, Descanso, San Diego County, CA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations within this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations within this notice.

A detailed assessment of the human remains was made by the San Diego Museum of Man and the California Department of Parks and Recreation professional staff in consultation with the Kumeyaay Cultural Repatriation Committee, authorized representative of the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of California; Sycuan Band of Diegueno Mission Indians of California; and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California. The San Diego Museum of Man and the

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California Department of Parks and Recreation also consulted with Kwaaymii elder Carmen Lucas.

In the 1930s, Malcolm Rogers and fellow associates of the San Diego Museum of Man conducted excavations at several sites in Cuyamaca Rancho State Park, Descanso, San Diego County, CA. Unassociated funerary objects removed from the park are described in a companion notice.

Human remains representing a minimum of two individuals were removed from cremation site SDM-W-211, West Mesa. No known individuals were identified. The 19 associated funerary objects are 1 bead, 12 projectile points, 2 ollas, 1 pipe, 1 abalone pendant, 1 cook pot, and 1 container of groundstone fragments.

Human remains representing a minimum of seven individuals were removed from site SDM-W-247 between Cuyamaca Lake and Stonewall Peak near today's Los Caballos Campground. No known individuals were identified. The 444 associated funerary objects are 11 projectile points, 2 spear points, a minimum of 347 loose sherds, 1 bag of uncounted sherds, 1 box of uncounted sherds, 1 unidentified groundstone, 1 groundstone fragment, 2 rock fragments, 1 scraper, 2 lithic flakes, 17 pieces of charcoal and chalkstone, 1 bag of red ochre, 1 piece white marl, 2 fragments of arrow straightener, 4 bone pendants, 1 bone flaker, 2 burned shell fragments, 11 bone fragments, 5 bead waste fragments, 2 awls, 1 bone tool fragment, 4 rocks, 1 piece of white ochre, 2 olivella bead fragments, 4 cremation urns (1 broken into 72 pieces), 1 burned wood fragment, 1 crab claw fragment, 6 animal teeth, and 9 animal bones.

Human remains representing a minimum of 15 individuals were removed from site SDM-W-263 near today's Paso Picacho Campground. No known individuals were identified. The 2,068 associated funerary objects are 11 cremation urns and cremation covers, a minimum of 1,048 olivella beads, 1 olivella disc, 2 fish vertebrae beads, 17 shell fragments, a minimum of 544 sherds, 9 fish vertebrae, 1 rock spall, 19 pieces of animal bone, 3 pieces of fired clay, 25 pieces of charcoal and earth fragments, 2 bags of charcoal and earth fragments, 1 tarring pebble, 1 bone pipe, 2 bone awls, 2 ceramic bases, 16 samples of bead waste, 4 flakes, 3 rocks, 2 dome scrapers, 15 ochre fragments, 3 ceramic pendants, 1 knife, 2 seeds, 52 projectile points, 1 glass tool fragment, 2 textile fragments, 1 pine cone spine, 1 quartz tool fragment, a minimum of 221 glass and 27 shell beads, 6 biface fragments, 2 arrow straightener fragments, 14 burned earth clumps, 1 piece of serpentine, 1 polished stone, and 5 stone fragments.

The human remains and associated funerary objects removed by Malcolm Rogers and his associates date from the Late Prehistoric to the Historic period, (A.D. 500 to A.D. 1800). Archeological investigation in the western San Diego County area dates the Kumeyaay (Diegueno) occupation of the region to the Late Prehistoric period. Geographic affiliation is consistent with historically documented Kumeyaay territory. Therefore, the California Department of Parks and Recreation Committee on Repatriation has determined that there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and present-day Federally recognized Kumeyaay Indian tribes represented by the Kumeyaay Cultural Repatriation Committee.

Officials of the California Department of Parks and Recreation have determined that, pursuant to 25 U.S.C. 3001 (9-10), the human remains described above represent the physical remains of 24 individuals of Native American ancestry. Officials of the California Department of Parks and Recreation also have determined that, pursuant to 25 U.S.C.

3001 (3)(A), the 2,531 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the California Department of Parks and Recreation have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of California; Sycuan Band of Diegueno Mission Indians of California; and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with these human remains and associated funerary objects should contact Paulette Hennum, NAGPRA Coordinator, Cultural Resources Division, California Department of Parks and Recreation, 1416 9th Street, Room 902, Sacramento, CA 95814, telephone (916) 653-7976, before March 1, 2004. Repatriation of the human remains and associated funerary objects to the Kumeyaay Cultural Repatriation Committee may proceed after that date if no additional claimants come forward.

The California Department of Parks and Recreation is responsible for notifying the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of California; Sycuan Band of Diegueno Mission Indians of California; Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California; Kumeyaay Cultural Repatriation Committee; and Kwaaymii elder Carmen Lucas that this notice has been published.

Dated: December 16, 2003.
John Robbins,
Assistant Director, Cultural Resources.
[FR Doc. 04-1883 Filed 1-28-04; 8:45 am]

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[DOCID:fr29ja04-65]

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items: San Diego Museum of Man, San Diego, CA, and California Department of Parks and Recreation, Sacramento, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves

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Protection and Repatriation Act (NAGPRA), 43 CFR 10.8 (f), of the intent to repatriate cultural items in the possession of the San Diego Museum of Man, San Diego, CA, and in the control of the California Department of Parks and Recreation, Sacramento, CA, that meet the definition of unassociated funerary objects under 25 U.S.C. 3001. The human remains and cultural items were removed from Cuyamaca Rancho State Park, Descanso, San Diego County, CA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations within this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural items. The National Park Service is not responsible for the determinations within this notice.

In the 1930s, Malcolm Rogers and fellow associates of the San Diego Museum of Man conducted excavations at several sites in Cuyamaca Rancho State Park, Descanso, San Diego County, CA. The human remains and associated funerary objects removed from the park are described in a companion notice. The 169 unassociated funerary objects removed from Site SDM-W-211.1-A, West Mesa, are 168 potsherds and 1 lithic flake. One box of sherds cannot be located.

The unassociated funerary objects date from the Late Prehistoric to the Historic period (A.D. 500 to A.D. 1800). Archeological investigation in the western San Diego County area dates the Kumeyaay (Diegueno) occupation of the region to the Late Prehistoric period. Geographic affiliation is consistent with historically documented Kumeyaay territory. Therefore, the California Department of Parks and Recreation Committee on Repatriation has determined that there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary objects and present-day Federally recognized Kumeyaay Indian tribes represented by the Kumeyaay Cultural Repatriation Committee.

Officials of the California Department of Parks and Recreation have determined that, pursuant to 25 U.S.C. 3001(3)(B), the cultural items

described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual. Officials of the California Department of Parks and Recreation also have determined that, pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary objects and the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, California; Sycuan Band of Diegueno Mission Indians of California; and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the unassociated funerary objects should contact Paulette Hennum, NAGPRA Coordinator, Cultural Resources Division, California State Parks, 1416 9th Street, Room 902, Sacramento, CA 95814, telephone (916) 653-7976, before March 1, 2004. Repatriation of the unassociated funerary objects to the Kumeyaay Cultural Repatriation Committee on behalf of the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, California; Sycuan Band of Diegueno Mission Indians of California; and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California may proceed after that date if no additional claimants come forward.

The California Department of Parks and Recreation is responsible for notifying the Kumeyaay Cultural Repatriation Committee, Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, California; Sycuan Band of Diegueno Mission Indians of California; and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California that this notice

has been published.

Dated: December 16, 2003.
John Robbins,
Assistant Director, Cultural Resources.
[FR Doc. 04-1885 Filed 1-28-04; 8:45 am]

EXHIBIT Y

FILED

APR 23 1992

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS, et al.,

Plaintiffs,

v.

HAROLD BURRIS, et al.,

Defendants.

NO. CIV. S-90-993 LKK

O R D E R

This matter is before the court on defendants' motion for summary judgment or to dismiss, and plaintiffs' motion to file an amended complaint. For the reasons I now explain, plaintiffs' motion to file an amended complaint is GRANTED. The federal defendants' motion for summary judgment on plaintiffs' amended complaint is GRANTED. The individual non-federal defendants' motion for summary judgment or to dismiss is DENIED.

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I

PROCEDURAL HISTORY AND BACKGROUND FACTS

Sometime in the early 1970's, some of the plaintiffs[1] and some of the defendants[2] in the case now before the court, William Villa and "other members of the Ione Band of Indians" filed a quiet title action in the Superior Court of the State of California for the County of Amador pursuant to Cal. Civ. Pro. Code § 751. Plaintiffs sought to quiet title to a 40-acre parcel of land known as the Jackson Valley Rancheria. On October 31, 1972, the Amador County Superior Court issued an order adjudging plaintiffs to be the owners in fee simple absolute of the 40-acre parcel of land at issue in this case.

In December 1988, Harold E. Burris, Esther Burris, Callie Allen, Carol Boring, Pamela Burris, Harold Burris, Jr. and Jeanette Allen (defendants in the case before the court, along with Frank Pinion and Frank Villa) filed a complaint for declaratory relief

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[1] The plaintiffs in the case before the court who also were plaintiffs in the state court quiet title action are Nicolas Villa, Sr., Barbara E. Hill, Fred Mike, Muriel Mike, Bernice Villa, Donald Villa, and Glen Villa. Additional plaintiffs in this case and not specifically named in the state court action are Nicolas Villa, Jr., Geraldine Burris, Adeline Ybright and "members of the Ione Band of Miwok Indians."

[2] The defendants in the case before the court who were plaintiffs in the state court quiet title action are Effie Burris, Esther Burris, Harold E. Burris, and Frank Pinion.

Additional defendants in the case before the court and not specifically named in the state court action are Callie Allen, Carol Boring, Pamela Burris, Jeanette Allen, Frank Villa, Harold Burris, Jr., "and all other persons unknown, claiming any right, title, estate, lien, or interest in the real property described in the complaint adverse to the ownership or any cloud upon the title of Ione Band of Miwok Indians and the United States of America."

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and partition of the 40-acre parcel of land in Amador County Superior Court. Plaintiffs in that action alleged that the property is private land subject to taxation by Amador County because it is not located on a rancheria, reservation, public domain allotment, or any other type of trust land of the United States. Defendants demurred, arguing that the land is under the jurisdiction of the Secretary of the Interior or the California Bureau of Indian Affairs, and that the state court lacks subject matter jurisdiction over plaintiffs' claims. On February 20, 1991, the superior court denied defendants' demurrer.

On August 1, 1990, some of the defendants in the state court quiet title action filed this lawsuit in federal court. In their original complaint, plaintiffs allege a variety of claims against various individuals and the United States seeking, in essence, a declaration of plaintiffs' status as a federally-recognized Indian tribe and an order quieting title to the 40-acre parcel of land in the name of the Ione Band of Miwok Indians, to be held in trust by the federal government. The United States and the individual defendants moved for summary judgment or to dismiss plaintiffs' complaint on the ground that the court lacks subject matter jurisdiction over plaintiffs' claims because plaintiffs have not exhausted their administrative remedies. Defendants also moved for summary judgment on the ground that plaintiffs' facial challenge to the Bureau of Indian Affairs' (BIA) tribal recognition regulations is time-barred. At the hearing on the motions, counsel for plaintiffs conceded that plaintiffs had not applied for federal

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recognition of tribal status as provided in the acknowledgment regulations, but argued that the regulatory process is not the only mechanism for tribal recognition. I gave plaintiffs additional time to conduct discovery concerning the exclusivity of the tribal acknowledgment regulations. I ordered further briefing and again set the matter for hearing.

On November 18, 1991, after supplemental briefing had been filed, plaintiffs filed a motion to amend their complaint, pursuant to Fed. R. Civ. P. 15(a), seeking to add the Secretary of the Interior, the Treasurer-Tax Collector of Amador County and the Amador County Superior Court as defendants. Plaintiffs also seek to add claims against the individual non-federal defendants under the Indian Nonintercourse Act and the doctrine of aboriginal title enunciated in Cramer v. United States, 261 U.S. 219 (1923). The United States does not oppose plaintiffs' motion to amend; the individual non-federal defendants oppose the granting of the motion.

On November 19, 1991, the day after plaintiffs filed their motion to amend, the Third District Court of Appeal for the State of California issued a writ of prohibition directing the trial court to dismiss the state court apportionment action for lack of subject matter jurisdiction on the ground that 28 U.S.C. § 1360(b) precludes state courts from adjudicating the ownership or right to possession of property belonging to any Indian tribe that is held

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in trust by the United States.[3] Relying on Boisclair v. Superior Court, 51 Cal. 3d 1140 (1990), the Third District concluded that the state court complaint and answer "unequivocally raise, as essentially the sole dispute submitted to respondent court for resolution, the issue of whether the subject property is Indian trust land." Slip op. at 4.

II

STANDARDS

A. Summary Judgment

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Poller v. Columbia Broadcast System, 368 U.S. 464, 467

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[3] Section 1360(a) provides that California state courts shall have jurisdiction over,

> civil causes of action between Indians or to which Indians are parties which arise in [Indian country] to the same extent that [California] has jurisdiction over other civil causes of action, and those civil laws of [California] that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within [California].

28 U.S.C. § 1360(a).

However, section 1360(b) provides that state courts do not have jurisdiction to "adjudicate, in probate proceedings or otherwise, the ownership or right to possession of" any real property, or interest therein, "belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States." 28 U.S.C. § 1360(b).

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(1962); Jung v. FMC Corp., 755 F.2d 708, 710 (9th Cir. 1985); Loehr v. Ventura County Community College Dist., 743 F.2d 1310, 1313 (9th Cir. 1984).

Under summary judgment practice, the moving party

> [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Id. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." Id. at 323.

If the moving party meets its initial responsibility, the

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burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968); Ruffin v. County of Los Angeles, 607 F.2d 1276, 1280 (9th Cir. 1979), cert. denied, 455 U.S. 951 (1980).

In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Rule 56(e); Matsushita, 475 U.S. at 586 n.11; First Nat'l Bank, 391 U.S. at 289; Strong v. France, 474 F.2d 747, 749 (9th Cir. 1973). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, Anderson, 242 U.S. 248-49; Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to

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resolve the parties' differing versions of the truth at trial." First Nat'l Bank, 391 U.S. at 290; T.W. Elec. Serv., 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments); International Union of Bricklayers v. Martin Jaska, Inc., 752 F.2d 1401, 1405 (9th Cir. 1985).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c); Poller, 368 U.S. at 468; SEC v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th Cir. 1982). The evidence of the opposing party is to be believed, Anderson, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, Matsushita, 475 U.S. at 587 (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam)); Abramson v. University of Hawaii, 594 F.2d 202, 208 (9th Cir. 1979). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical

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doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (citation omitted).

B. Motion to Amend

Fed. R. Civ. P. 15(a) provides,

> [A] party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

The Ninth Circuit recently provided guidance for district courts applying this rule.

Although Rule 15(a) should be interpreted with "extreme liberality, . . . leave to amend is not to be granted automatically." Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir. 1990). The court may deny the motion if amendment would prejudice the opposing party, produce an undue delay in the litigation, or result in futility for lack of merit. Id. (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).

The burden of demonstrating undue delay, prejudice or futility sufficient to justify denial of a leave to amend is on the party opposing amendment. Kiser v. General Electric Corp., 831 F.2d 423, 428 (3d Cir. 1987). The court's "outright refusal to grant the leave without any justifying reason" is an abuse of discretion. Foman, 371 U.S. at 182.

Prejudice to the opposing party is the most important factor to consider in determining whether a party should be granted leave

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to amend. Jackson, 902 F.2d at 1387 (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330-31 (1971)). Prejudice may be found where additional discovery would be required because the new claims are based on different legal theories or where an amendment would permit the plaintiff to relitigate a portion of the action. Jackson, 902 F.2d at 1387-88.

Undue delay is determined in part by looking to whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading. Id. at 1388 (citing EEOC v. Boeing Co., 843 F.2d 1213, 1222 (9th Cir.), cert. denied, 488 U.S. 889 (1988)); Jordan v. Los Angeles County, 669 F.2d 1311, 1324 (9th Cir.), vacated on other grounds, 459 U.S. 810 (1982). However, delay alone is insufficient to support denial of leave to amend. Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990).

The test for futility "is identical to the one used when considering the sufficiency of a pleading challenged under Rule 12(b)(6)." Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988). Accordingly, "a proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." Id.

III

ANALYSIS

In their original complaint, plaintiffs allege claims against the United States as follows: (1) mandamus, requiring the United

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States to recognize them as a tribe; (2) agency action in excess of jurisdiction; (3) violation of due process; (4) unlawful rulemaking; (5) denial of equal protection; (6) breach of fiduciary duty and trust; and (7) constructive trust. Plaintiffs allege claims against the individual defendants as follows: (1) constructive trust; (2) breach of fiduciary duty; and (3) quiet title. In their first amended complaint, plaintiffs reallege their claims against the United States and the individual non-federal defendants. In addition, plaintiffs add claims against the individual non-federal defendants for violation of the Indian Nonintercourse Act, 25 U.S.C. § 177, and the doctrine of aboriginal title enunciated in Cramer v. United States, 261 U.S. 219 (1923). Plaintiffs also allege a claim for declaratory relief against the Amador County Treasurer-Tax Collector that the 40-acre parcel is not subject to taxation, and a claim for declaratory and injunctive relief barring the Amador County Superior Court from exercising jurisdiction over the private defendants' partition action, in violation of 28 U.S.C. § 1360(b).

A. Federal Defendants' Motion for Summary Judgment or to Dismiss

Because the United States does not oppose the granting of the motion to amend, the motion is GRANTED as to plaintiffs' claims against the United States and the Secretary of the Interior. I turn now to analysis of the federal defendants' motion for summary judgment or to dismiss plaintiffs' amended complaint.

Until 1978, the means by which an Indian tribe received

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federal recognition was unstructured. Recognition could be shown by Congress or the executive branch creating a reservation for the group by a treaty, agreement, statute, executive order or valid administrative action and by the United States having had some continuing political relationship with the group, such as providing services through the Bureau of Indian Affairs. F. Cohen, Handbook of Federal Indian Law at 6 (1982). In 1978, the Secretary promulgated regulations describing "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe." 25 C.F.R. §§ 83.1-83.11. The authority for these acknowledgment regulations is found at 25 U.S.C. §§ 2 and 9.[4] Pursuant to these new regulations, the BIA promulgated a list of those tribes which were already federally-recognized and a second list of those tribes with a recognition petition on file with the BIA. The Ione Band of Miwok Indians was placed on the second list.

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[4] Section 2 provides,

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

25 U.S.C. § 2. Section 9 provides,

> The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of accounts of Indian affairs.

25 U.S.C. § 9.

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The Ione Band did not pursue the administrative federal recognition process. In their original and amended complaints, plaintiffs seek, among other things, an order compelling the United States to recognize the Ione Band. The United States moves for summary judgment on the ground that the United States has not waived its sovereign immunity from suit on plaintiffs' claims, and on the ground that plaintiffs' claims are time-barred.

1. **Waiver of Sovereign Immunity**

In their first claim, plaintiffs seek an order compelling the United States to recognize them as a tribe, and in their sixth and seventh claims, plaintiffs allege that the federal defendants' failure to recognize and protect them amounts to a breach of fiduciary duty and trust, and that the 40-acre parcel of land is held in trust for the tribe by the United States.

In the absence of an explicit waiver, claims against the United States are barred by sovereign immunity. North Side Lumber Co. v. Block, 753 F.2d 1482, 1484 (9th Cir.), cert. denied, 474 U.S. 931 (1985). Plaintiffs assert that the government has waived its sovereign immunity over these claims by virtue of the Administrative Procedure Act. See 5 U.S.C. § 702.[5] In order for

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[5] It appears that plaintiffs' Indian Nonintercourse Act, aboriginal title, and quiet title claims are directed only to the nonfederal defendants. The United States has not waived its sovereign immunity from suit on claims brought under the INA, Narragansett Tribe of Indians v. Southern Rhode Island Land Dev. Corp., 418 F. Supp. 798, 810 (D. R.I. 1976); Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899 (D. Mass. 1977), or quiet title actions involving trust or restricted Indian land, Newman v. United States, 504 F. Supp. 1176, 1178 (D. Ariz. 1981). And although plaintiffs might bring a federal common law claim under the doctrine of aboriginal title if an executive official or agency

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plaintiffs to take advantage of the APA waiver, however, there must be a "final agency action" that is ripe for judicial review. White Mountain Apache Tribe v. Hodel, 840 F.2d 675, 677 (9th Cir. 1988). Plaintiffs' failure to apply for recognition through the administrative process described in the acknowledgment regulations bars their claims because there is no final agency action yet ripe for review.

The D.C. Circuit's decision in James v. United States Dept. of Health and Human Services, 824 F.2d 1132 (D.C. Cir. 1987), is directly in point. In James[6], a faction of the Gay Head tribe sued the Department of the Interior seeking an order requiring the Secretary to add them to the Department's list of federally-recognized Indian tribes. Plaintiffs argued that it would be redundant for them to exhaust administrative remedies in an

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attempts to extinguish aboriginal title without congressional authorization, see United States v. Dann, 873 F.2d 1189, 1196 n.5 (9th Cir.), cert. denied, 493 U.S. 890 (1989), presumably the APA waiver of sovereign immunity and its requirements of finality and timeliness would govern plaintiffs' claims.

[6] Plaintiffs attempt to distinguish James on the ground that in James there were two competing groups of Gay Head Indians, one that had already been recognized, and plaintiffs, who had not. Plaintiffs point out that in the case before the court defendants specifically disavow that a Miwok tribe exists. Plaintiffs do not explain why this distinction is relevant.

Second, the plaintiffs in our case say that in James the documents which plaintiffs relied on to demonstrate recognition were scholarly, not the product of government action. And third, in James the documents were older, from the 19th century, while in our case the documents purportedly demonstrating federal recognition are from the 20th century. Neither distinction is relevant. As explained herein, the Bureau of Indian Affairs is best equipped to evaluate all the evidence concerning the plaintiffs' status, whether historical, scholarly, or produced by the agency itself, no matter how old or new.

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attempt to obtain federal recognition because the Gay Heads had previously been recognized by the Executive Branch. Id. at 1137. The D.C. Circuit ruled that the determination whether documents offered by plaintiffs in support of their claim of federal recognition are sufficient, and

> should be made in the first instance by the Department of the Interior since Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations. 25 U.S.C. §§ 2 & 9. The purpose of the regulatory scheme set up by the Secretary of the Interior is to determine which Indian groups exist as tribes. 25 C.F.R. § 83.2. That purpose would be frustrated if the Judicial Branch made initial determinations of whether groups have been recognized previously or whether conditions for recognition currently exist.
>
> In cases such as this, where Congress has delegated certain initial decisions to the Executive Branch, exhaustion of available administrative remedies is generally a prerequisite to obtaining judicial relief for an actual or threatened injury, provided that the purposes of the exhaustion doctrine are furthered.

Id. at 1137. The James court concluded that exhaustion of the Department's procedures for tribal recognition serves the four purposes of exhaustion, id. at 1137-38, and that exhaustion would not be futile, because there was no evidence that "denial of relief would result from a prior indication from that agency that it does not have jurisdiction over the matter or it has evidenced a strong position on the issue together with an unwillingness to reconsider," id. at 1139.

At the first hearing on defendants' motion for summary judgment or to dismiss, I gave plaintiffs additional time to

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conduct discovery to determine whether there are mechanisms, other than the regulations, by which plaintiffs could be "recognized" by the federal government. In its supplemental motion to dismiss, the United States acknowledges that Congress could by statute recognize plaintiffs as a tribe, see, e.g., 25 U.S.C. § 1300b-11, et seq.; id. § 1300f, et seq., but that Congress has not done so. This plaintiffs concede. Plaintiffs also concede that they are not a "treaty tribe." See United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976), approved by Washington v. Washington State Commercial Passenger Fishing Vessel Assoc., 443 U.S. 658, 685 (1979).

The United States also demonstrates in its supplemental brief that the government's resolution of 12 tribal acknowledgment petitions "outside the regulatory process" and the "wholesale listing of Alaska native entities" in the 1988 Federal Register do not establish another mechanism for tribal recognition. See United States' further memo in support at 5-9 (Oct. 22, 1991). Plaintiffs also apparently concede that even if such a mechanism were demonstrated, they could not benefit from it.

Plaintiffs do argue that the government's settlement of litigation arising out of termination of the federal recognition status of many California tribes in the 1950's and 1960's somehow demonstrates another "non regulatory" recognition mechanism. Plaintiffs do not assert, however, that they are subject to the termination legislation or that they are beneficiaries of the

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settlement.[7]

Plaintiffs' argument appears to be that these non-regulatory mechanisms for tribal recognition demonstrate that "the Secretary may acknowledge tribal entities outside the regulatory process," plaintiffs' supplemental brief at 17:7-9 (Nov. 8, 1991), and that the court, therefore, should accept jurisdiction over plaintiffs' claims compelling such recognition. I cannot agree. Because plaintiffs cannot demonstrate that they are entitled to federal recognition by virtue of any of the above mechanisms, and because they have failed to exhaust administrative remedies by applying for recognition through the BIA's acknowledgment process, the United States' motion for summary judgment on these claims must be GRANTED.

2. <u>Statute of Limitations</u>

In the second through fifth claims in their amended complaint, plaintiffs allege that the federal acknowledgment regulations are facially invalid because they deny them equal protection and due process of law, constitute unlawful rulemaking, and that the Secretary acted in excess of his jurisdiction in placing the Ione Band on the second list. The United States moves for summary judgment on these claims on the ground that they are barred by the six-year statute of limitations applicable to claims against the United States, 28 U.S.C. § 2401.

Plaintiffs' facial challenge to the regulations accrued in

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[7] Indeed, if they had made such an argument, plaintiffs' remedy might lie with the district court in which that litigation was commenced and settled.

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1979, when the regulations became final and when the Ione Band of Miwok Indians was placed on the second list indicating that their application for recognition was pending. Plaintiffs had notice of the regulations by virtue of their publication in the Federal Register. Moreover, the injury suffered by plaintiffs is the same as that suffered by all unrecognized Indian tribes at the time the regulations were promulgated, and lack of standing has been held not to bar the running of the limitations period. See Shiny Rock Mining Corp. v. United States, 906 F.2d 1362 (9th Cir. 1990); Sierra Club v. Penfold, 857 F.2d 1307 (9th Cir. 1988). Thus plaintiffs' facial challenge to the regulations is barred by the six-year statute of limitations applicable to claims against the government, 28 U.S.C. § 2401.

Because plaintiffs have failed to exhaust administrative remedies by applying for federal recognition through the BIA's acknowledgment process, and because plaintiffs' remaining claims are time-barred, the federal defendants' motion for summary judgment on plaintiffs' amended complaint is GRANTED.

B. Individual Non-federal Defendants' Motion for Summary Judgment or to Dismiss

In their original complaint, plaintiffs allege claims against the individual non-federal defendants for constructive trust, breach of fiduciary duty, and quiet title. The individual nonfederal defendants filed a notice of joinder in the United States' motion for summary judgment or to dismiss plaintiffs' complaint, but offered no argument as to why summary judgment

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should be granted as to the claims directed only to them.

Plaintiffs move to amend their complaint to add claims against the individual non-federal defendants for violation of the Indian Nonintercourse Act, 25 U.S.C. § 177, and the doctrine of aboriginal title enunciated in Cramer v. United States, 261 U.S. 219 (1923). Although the individual non-federal defendants oppose the motion to amend, in their brief defendants make only conclusory allegations of delay, prejudice and futility. As I have explained, the burden of demonstrating undue delay, prejudice or futility sufficient to justify denial of leave to amend is on defendants. Defendants assert that they will be prejudiced by plaintiffs' delay in moving to amend the complaint. Delay alone is insufficient to justify denial of leave to amend. Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990). In addition, the individual non-federal defendants assert that the addition of claims under the Indian Nonintercourse Act and the doctrine of aboriginal title significantly alters the course of this litigation so that leave to amend should be denied. Although this case has been pending for some time, the parties have only conducted limited discovery on the question of alternative mechanisms for tribal recognition, and the court has only considered defendants' motions for summary judgment. No scheduling dates have been set, and no other discovery has taken place. And although plaintiffs' amended complaint alleges new claims, the relatively embryonic status of this litigation suggests that those additions are not unfairly prejudicial. Thus,

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the court cannot accept the individual non-federal defendants' assertion that they will be unfairly prejudiced by amendment.

The individual non-federal defendants have offered no argument to support their assertion that plaintiffs' claims under the Indian Nonintercourse Act and the doctrine of aboriginal title are futile, that is, that "no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim . . . . " Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988). Because it appears to the court that plaintiffs' amended complaint states a claim under those sections, as I now explain, plaintiffs' motion to amend their complaint to allege additional claims against the individual non-federal defendants is GRANTED.[8]

1. Indian Nonintercourse Act

Plaintiffs seek to amend their complaint to allege a claim against the individual non-federal defendants under the Indian Nonintercourse Act (INA), which provides,

> No purchase, grant, lease, or other conveyance of lands, or any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. § 177.

Plaintiffs allege that without the consent of the United

[8] Because the individual non-federal defendants failed to provide the court with any guidance concerning whether plaintiffs' INA and aboriginal title claims were sufficient, the court's conclusion that the complaint states a claim is not immune from a future motion practice.

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States, the state court partition action brought by the individual nonfederal defendants violates the INA. Amended complaint ¶¶ 57-58. Although that action has been dismissed by order of the Third District Court of Appeal, plaintiffs seek a declaratory judgment as to their rights should defendants refile the action.

To state a claim under the INA, plaintiffs must allege that: (1) they are or represent an Indian tribe within the meaning of the Act; (2) the parcels of land at issue are covered by the Act as tribal land; (3) the United States has never consented to the alienation of the tribal land; and (4) the trust relationship between the United States has never been terminated or abandoned. Cayuga Indian Nation of New York v. Cuomo, 667 F. Supp. 938, 941 (N.D.N.Y. 1987); Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899, 902 (D. Mass. 1977); see also United States v. Dann, 873 F.2d 1189, 1195 (9th Cir. 1989) (individual Indians do not have standing to contest a transfer of tribal lands under the INA); James v. Watt, 716 F.2d 71 (1st Cir. 1983) (same), cert. denied, 467 U.S. 1209 (1984).

It appears to the court that plaintiffs have alleged the necessary four elements to state a claim under the INA. Although the Ione Band of Miwok Indians has not been recognized through the federal acknowledgment process, courts considering the meaning of "tribe" under the INA have not limited their examination to the question whether the plaintiff tribe has been recognized through that process. See Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 580-81 (1st Cir.) (upholding district court order declining

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to stay INA action pending Department of the Interior's consideration of plaintiff's application for federal recognition under newly proposed acknowledgment regulations), cert. denied, 444 U.S. 866 (1979); Cayuga Indian Nation of New York v. Cuomo, 667 F. Supp. 938, 942-43 (N.D. N.Y. 1987) (even if court is not bound by federal government recognition of tribe in claim under INA, recognition should be given great weight in determination of tribal status). Cf. Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 376-79 (1st Cir. 1975) (rejecting argument that under INA a tribe is limited to a community of Indians which at some point the federal government has specifically recognized).

In Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 580-81 (1st Cir. 1979) (Mashpee I), the First Circuit upheld the district court's order refusing to stay plaintiff's INA action pending resolution of its application for federal recognition through the acknowledgment process. The court noted, however, that "in another case, once the Department has finally approved the regulations and developed special expertise through applying them, we might arrive at a different answer." Id. at 581. In Mashpee Tribe v. Secretary of the Interior, 820 F.2d 480, 483 (1st Cir. 1987), however, the court followed Mashpee I, and concluded that certain documents offered by plaintiffs did not establish them as a tribe within the meaning of the INA. Thus, the First Circuit did not defer to the regulatory process in determining whether plaintiffs were a tribe for purposes of a claim under the INA.

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In James v. Department of Health and Human Services, 824 F.2d 1132 (D.C. Cir. 1987), a case not brought under the INA, the D.C. Circuit distinguished Mashpee I, noting that "the time for a different conclusion has come; the Department has been implementing its regulations for eight years and, as noted, it employs experts in the fields of history, anthropology and genealogy, to aid in determining tribal recognition." Id. at 1138. Although the James court was not presented with the question whether deference to the Secretary of the Interior was justified with respect to a claim brought under the INA, together James and Mashpee I might stand for the proposition that in order to maintain a claim under the INA, plaintiff must be a "tribe" recognized by the Secretary of the Interior pursuant to the acknowledgment regulations.

The court is disinclined to decide this question in the present posture of the case. The individual non-federal defendants did not make this argument in opposing plaintiffs' motion to file an amended complaint, and plaintiffs have not been given the opportunity to respond to such an argument. The court will consider this issue when and if the individual non-federal defendants move to dismiss plaintiffs' claims.

2. **Aboriginal Rights**

Plaintiffs seek to amend their complaint to allege a claim against the individual non-federal defendants pursuant to the doctrine of aboriginal title enunciated in Cramer v. United States, 261 U.S. 219 (1923). Under that doctrine, an Indian tribe

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or individual Indians may assert aboriginal title to land deriving from their continued occupation of the land from "time immemorial." The Trade and Intercourse Acts, of which the Indian Nonintercourse Act is one, are "[a]mong the most important protections of aboriginal title." United States v. Dann, 873 F.2d 1189, 1195 (9th Cir. 1989). Plaintiffs are not limited, however, to seeking relief under the Indian Nonintercourse Act for unlawful conveyances of Indian land. See Oneida County v. Oneida Indian Nation of New York, 470 U.S. 226, 236-40 (1985) (Trade and Intercourse Acts do not preempt federal common law remedies).

In their amended complaint, plaintiffs allege that the "Ione Band of Miwok Indians" has occupied the "subject land" "since time immemorial and has been fully enclosed," and the individual non-federal defendants are "barred from interfering with the rights of the Ione Band of Miwok Indians to use and possess the subject land." Amended complaint ¶¶ 59-60. It is not clear whether plaintiffs assert a claim for individual aboriginal rights in the property, i.e., a Cramer claim, see United States v. Dann, 873 F.2d 1189, 1193 (9th Cir. 1989), or for tribal aboriginal rights, id. at 1194-95. Nonetheless, it appears to the court that plaintiffs have stated a claim, and that the court has jurisdiction over plaintiffs' claim under 28 U.S.C. § 1331 because it arises under the federal common law of the United States.

Plaintiffs' motion to amend their complaint to allege additional claims against the individual non-federal defendants is

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GRANTED.[9]

D. Plaintiffs' Claims Against the Treasurer-Tax Assessor and Superior Court of Amador County

Plaintiffs seek to amend their complaint to allege a claim for declaratory relief that the Amador County Treasurer-Tax Assessor may not assess property taxes on the 40-acre parcel because it is owned by a "sovereign Indian nation." Amended complaint ¶¶ 61-62.[10] Plaintiffs also seek to amend their complaint to allege a claim for a declaratory relief to the effect that the Superior Court for the State of California of Amador County is barred under 28 U.S.C. § 1360(b) from assuming jurisdiction over defendants' partition action. In essence, plaintiffs seek a declaration that the 40-acre parcel of land at issue in this case belongs to an Indian tribe or community, and is "held in trust by the United States or is subject to a restriction against alienation imposed by the United States." Id. The court would appear to have jurisdiction over plaintiffs' claims pursuant to 28 U.S.C. § 1331. Accordingly, plaintiffs' motion to amend their complaint to state claims for declaratory relief against the Treasurer-Tax Assessor and Superior Court of Amador County is

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[9] The court would appear to have supplemental jurisdiction, 28 U.S.C. § 1367, over plaintiffs' state law claims for constructive trust, breach of fiduciary duty, and quiet title.

[10] "[A]bsent cession of jurisdiction or other federal statutes permitting it," a state may not tax Indian reservation lands and reservation Indians. County of Yakima v. Yakima Nation, 116 L.Ed.2d 687, 697 (1992) (quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973); see also McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973) (same).

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GRANTED.

IV

ORDER

In sum, IT IS HEREBY ORDERED as follows:

(1) Plaintiffs' motion to amend their complaint is GRANTED;

(2) The federal defendants' motion for summary judgment on plaintiffs' amended complaint is GRANTED;

(3) The individual non-federal defendants' motion for summary judgment or to dismiss plaintiffs' amended complaint is DENIED;

(4) Plaintiffs shall file an amended complaint consistent with the terms of this order no later than thirty (30) days from the effective date of this order; and

(5) A status conference is hereby SET in this case for June 1, 1992, at 2:30 p.m. The parties shall file status reports no later than seven (7) days before the date set for status.

IT IS SO ORDERED.

DATED: April 22, 1992.

LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

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EXHIBIT Z

FILED
MAY 31 1996
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

United States District Court

EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS,

Plaintiff,

v.

HAROLD E. BURRIS, et al.,

Defendants.

AND CONSOLIDATED ACTION

CIV S-90-0993-LKK-PAN

Findings and Recommendation re Dismissal

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In 1990, a group of ten persons calling themselves the Ione Band of Miwok Indians, including Nicholas Villa Sr. and Nicholas Villa, Jr. commenced this action claiming that about 40 acres in Amador County that the plaintiffs and defendants occupied is Indian Country. Amador County filed a separate action against all record title holders, including all the individual plaintiffs and defendants, for a declaration that certain real property in Amador County is not tribal land is subject to exercise of the County's police powers. The defendants in the original action, including Harold E. Burris, crossclaimed and counterclaimed to partition the land; they claimed that the land was private property owned by plaintiffs and defendants as tenants in common. All claims have been consolidated.

No progress has been made toward resolving the competing claims initially because the plaintiff Indians could not proceed as individuals but only as a tribe, then, when the tribe obtained federal recognition and the tribe was substituted as plaintiff, because there was no tribal government authorized to pursue the tribe's claims.

On March 11, 1996, Judge Karlton referred this matter to me for an evidentiary hearing to determine the existence and identity of a tribal government authorized to proceed upon behalf of the tribe. I made a pre-hearing order and reserved ten court days for the hearing. The various participants lodged lists of over 120 witnesses to be called. At this juncture, there were three more-or-less distinct groups vying for recognition as the tribal government: the Villa faction, the Hill faction and the Burris faction.

On April 16, 1996, the morning the hearing was scheduled to commence, all parties lodged a stipulation requesting that the hearing be continued for four months in order to permit the competing factions to form a permanent tribal roll and tribal government. I rejected the stipulation but after meeting with all parties throughout the day eventually continued the hearing on specific terms and conditions that I understood all parties explicitly agreed to and that, in any event, all parties implicitly agreed to by retiring instead of going forward with the hearing.

My conditions for continuing the hearing consisted of procedural rules for a Bureau of Indian Affairs sponsored effort to compile a tribal membership roll and form a government capable of acting for the tribe within four months. Attorneys representing the Villa faction of the tribe objected to my April 18 order setting forth the conditions for continuing the hearing upon the ground that they had not agreed to the specified terms. No other party then replied to that objection although now the other participants insist there was unanimous agreement.

On May 13 I vacated my April 18 order and required any putative plaintiff to show cause why this action should not be dismissed upon the ground that by the terms of their stipulation to continue the hearing, the putative plaintiffs had admitted there was no tribal roll or government. The time for response has now expired.

In the meanwhile, continuing attempts by the Bureau of Indian Affairs, Hill and Burris factions to form a tribal government appear to have been sabotaged by the Villa faction. See Attachment "A."[1]

The "Hill" faction does not oppose dismissal of all claims without prejudice.

The "Villa" faction contends that the tribe has an interim government, if not a permanent government, and resists dismissal in favor of judicial intervention to supervise proceedings to form a permanent government, which the "Villa" factions contends has run amok. The "Villa" faction does not identify the interim government that it claims exists nor suggest that such interim government was authorized to commence or maintain this action. All other putative plaintiffs contest the claims of the "Villa" faction.

Amador County does not oppose dismissal of the tribe's claims but contends that it would be unjust to dismiss the County's claims to establish its sovereignty over the property after such prolix and costly proceedings. Amador County overlooks that by dismissing the action for want of a plaintiff to assert the tribe's claims, Amador has in effect prevailed in establishing its sovereignty over the property.

The Burris faction contends that the Indians' claims should be dismissed but that the County's claims and the Burris' claims should not be. The Burris' claim is for partition of real property in Amador County and absent an Indian tribe authorized by tribal government to defend that claim the action does not belong in federal court. The Burrises will not be prejudiced because there is no tribal government authorized to resist its claims in state court.

The United States has not taken any position.

For all of the foregoing reasons, I recommend that this action be dismissed upon the ground that there is no tribal government authorized to initiate and conduct proceedings upon

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[1] Attachment "A" is a letter from Nicholas Villa, Jr., claiming the title of "traditional chief" of two entities new to the dispute: the "Ione Band of Miwok Indians of California" and the "Miwok Tribal Enterprise Corporation." The letter is addressed to the City of Ione Chief of Police and implicitly threatens violence beyond the means of Ione's police department to control if the City allows a BIA-sponsored meeting at an Ione town hall tomorrow.

behalf of an Indian tribe and without such participation there is no federal interest in the other parties' claims.

Dated: May 31, 1996.

Peter A. Nowinski
United States Magistrate Judge

FILED
AUG - 6 1996
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS,

Plaintiff,

v.

HAROLD E. BURRIS, et al.,

Defendants.

_____/

AND CONSOLIDATED ACTIONS.

_____/

NO. CIV. S-90-993 LKK

O R D E R

On May 31, 1996 the assigned magistrate judge in the above-captioned matter recommended that this case be dismissed because plaintiff does not have an identifiable government capable of suing or being sued. The County defendants filed objections to these Findings and Recommendations on June 18, 1996. The Burris defendants filed objections on June 11, 1996.

Neither set of defendants challenge the magistrate judge's recommendation concerning dismissal of plaintiffs' claims.

Both sets of defendants, however, assert that dismissal of the counter-claims that have been filed in this action is inappropriate. The Burris defendants argue that without a specific ruling on the question of whether the land is Indian Country or Indian Trust Land, they will not be permitted to bring their claim for partition of the land in either state or federal court. Similarly, the County defendants contend that the decision to dismiss leaves open the question of whether the County has jurisdiction over the land -- a question which the County asserts will be without a forum to resolve upon dismissal of the matter at bar. The County stresses that it has patiently waited for years to have a determination concerning jurisdiction reached and should not now be prejudiced by the fact that the tribe has no government. The County thus argues that its claims concerning whether the land is Indian Country should be resolved in these proceedings.

It is not disputed by the defendants and counter-claimants that the plaintiff tribe is without a legitimate government and that therefore there is no individual with authority to act on its behalf.[1] See County's Objections to the Findings & Recommendations filed June 27, 1996 at 5. The County's counter-claim, however, is directed to the individuals who claim to have membership in the tribe. See Order Re: Motions to Consolidate filed herein January

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[1] Indeed, no counsel can be retained in the absence of a contract with the U.S. Government, on approval from the tribal government. See 25 U.S.C. § 81; 25 C.F.R. §§ 88.1, 89.1 and 89.7. Thus, in the absence of a ruling governmental body or individual, the tribe is not authorized to be represented in this suit.

21, 1994. The question then is whether or not a claim under the Declaratory Judgment Act can be maintained under these pleadings.[2]

Two elements must be satisfied for the court to enter a Declaratory Judgment. First, there must be an actual and live controversy over which the court has independent jurisdiction and for which the declaratory relief will serve as a remedy. See Fusco v. Rome Cable Corp., 859 F. Supp. 624 (N.D.N.Y. 1994); Cok v. Forte, 877 F. Supp. 797, 802 (D.R.I. 1995), affirmed, 69 F.3d 531 (1st Cir. 1995). Second, the court must determine whether, in its discretion, the Declaratory Judgment Act should be invoked. See Employers Reinsurance Corp. v. Karussos, 65 F.3d 796, 798 (9th Cir. 1995).

The County seeks a declaration that it may assert jurisdiction over land which some claim as Indian Country. This suffices to raise a federal question. See 18 U.S.C. § 1151. It is also clear from the years of litigation over this land, that there is a live controversy concerning the nature of the land. There exists, however, a real question as to whether any of the parties named as defendants to the counter-claim have standing to challenge the County's jurisdiction over the subject property. Standing is of course a question of Article III jurisdiction, and in its absence

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[2] The counter-claim brought by the County was in fact a complaint in a related case, originally denominated CIV-S-92-1652 LKK. The posture of the claim changed when the actions were consolidated.

this court cannot act.[3]

The record reflects that the Burris defendants do not challenge the County's right to assert jurisdiction over the land. While it is true that the Villa defendants, asserting that they are the tribal government, have claimed that the land is Indian Country the magistrate judge's conclusion that there is no tribal government is clearly correct. Thus, it is uncertain whether anyone other than the United States may represent the interests of the Tribe or hold property in the name of the tribe.[4]

Whatever the correct view is concerning whether this court has jurisdiction over the question of the underlying character of the land in issue under the present pleadings, it would appear that the court has jurisdiction to determine that the Villas are not the government of the tribe, and if it follows, that neither they nor anyone besides the United States presently has a basis for resisting the County's exercise of jurisdiction over the land until such time as a government is formed. I thus conclude that the

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[3] It may be that rather than a question of standing, the issue should be viewed as raising questions concerning whether suit is brought by the real party in interest. What consequences follow if that is the correct characterization has not been addressed by the parties.

[4] While it seems relatively clear that the United States government could challenge the jurisdiction of the County by asserting that the land is Indian Country, it has made no such representation, and to date has not been named as a defendant in the declaratory relief action.

first prong of the test for declaratory relief is satisfied.[5]

The discretionary prong gives the court some pause. Recently the Supreme Court reminded us that "district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit satisfies subject matter jurisdictional prerequisites." Wilton v. Seven Falls Co., __ U.S. __, 132 L.Ed.2d 214,221 (1995)(referring to Brillhart v. Excess Ins. Co., 316 U.S. 491 (1942)). The status of the parties and the confusion concerning who has authority to speak on behalf of tribal interests all suggest caution in declaring anything about the land. On the other hand, given that it appears that there is no other forum in which this matter can be adjudicated, it may well be that the court should invoke its jurisdiction to render a judgment in this case.

From the above, it appears that this court has the jurisdiction to declare that there is no tribal government, and that under the Declaratory Judgment Act, this court should enter judgment declaring the power of the County to assume jurisdiction until challenged by either the United States or a recognized tribal government.

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[5] As to the Burris defendants' partition claim, there appears to be no basis for the court to entertain that which is inherently a state court cause of action. The court appreciates that these partied are trapped between two unaccepting fora. Nonetheless, if there is no jurisdiction, this court cannot maintain the action.

Accordingly, for all the reasons stated above, the court now ORDERS as follows:

1. The magistrate judge's recommendation of dismissal is ADOPTED insofar as it recommends dismissal of all of plaintiff's claims;

2. The counter-claim of the Burris defendants is also DISMISSED for want of jurisdiction;

3. The counter-claim of the County is MAINTAINED, and shall not be dismissed at this time; and

4. All parties are ordered to show cause in writing not later than twenty (20) days from the effective date of this order, why a declaratory judgment should not be entered noting the power of the County to exercise jurisdiction over the land in issue pending challenge by either the United States or a properly constituted and recognized tribal government.

IT IS SO ORDERED.

DATED: August 5, 1996.

LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

FILED
SEP - 4 1996
CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS,

Plaintiff,

v.

HAROLD E. BURRIS, et al.,

Defendants.

AND CONSOLIDATED ACTIONS.

NO. CIV. S-90-993 LKK

O R D E R

On August 6, 1996, this court issued an order directing all parties to show cause in writing within twenty (20) days, why the entire case save and except the County's cross-complaint for declaratory relief should not be dismissed and declaratory judgment entered in favor of the County of Amador. The two plaintiff factions filed responses to this order to show cause on August 26, 1996.

The response filed by the law firm of Peebles & Evans on behalf of the individuals which it represents, addresses the merits

of the Indian Country issue. These individuals argue that declaratory judgment cannot be entered in favor of Amador County because the land is Indian Country within the meaning of 18 U.S.C. § 1151. Such argument does not address the concern articulated in the August 6, 1996, order as to whether any party currently a defendant to the County's counter-claim has standing to assert that the land is Indian Country. In the August 6 order, the court suggested that the proper course was to declare that there is a presumption that land lying within a county is subject to County jurisdiction, and thus until the United States or a duly recognized tribal government properly challenged such jurisdiction the County was free to exercise its presumed authority. See Order filed herein August 6, 1996, at 5. The Peebles & Evans group baldly asserts that "[t]he law does not require the Tribe to have a recognized government in order to have a land base." Reply to Order to Show Cause filed August 26, 1996, at 9. This assertion, made without citation, is non-responsive to the question of who may properly present the question of whether the land in issue is Indian Country. Because it is nonresponsive, the reply filed by the Peebles & Evans group does not persuade the court to alter its August 6, 1996, determination concerning dismissal and entry of judgment.

The response filed by Jory, Peterson, Watkins & Smith, on behalf of the Nicolas Villa group, concerns this court's failure to address the possible conflict of interest problem with the continued representation of some members of the putative tribe by

Peebles & Evans. The document also complains of the inconsistencies and historic failures of the federal government in its dealings with Indians residing on the parcel at issue in this litigation. The Villa group's response, however, concludes that given the history of the process with the federal government and the conflict between the potential members of the tribe, "[t]here is no argument which can be presented at this time which will deter the Court's entry of the proposed Declaratory Judgment." Nicolas Villa Group's Response to Order filed August 6, 1996.

This court has not hitherto addressed the asserted conflict of interest because it appears irrelevant to the issue before the court. Neither Peebles & Evans nor Jory, Peterson, Watkins & Smith have been granted approval by the United States government under 25 U.S.C. § 81 to represent the Ione Band of Miwok Indians. Insofar as the Villa group challenges the propriety of the representation by Peebles & Evans of one faction of the tribe, the validity of its representation is also called into question. This court has treated both sets of counsel as representing individual groups of potential tribal members. Whatever conflict may exist, it does not appear to concern the issue tendered by the court's order to show cause. Put another way, whether Nicolas Villa's decision to leave one group and retain new counsel deprives the remaining individuals who appear to have been continuously represented by Peebles & Evans of their counsel is a complex issue which need not be resolved in order to address the issue before the court.

In sum, it appears that this court's August 6, 1996, order should be fully implemented. The claims of the plaintiffs in this case are DISMISSED and Declaratory Judgment is ENTERED in favor of the County of Amador consistent with the Order filed August 6, 1996. The Clerk is directed to CLOSE the case.

IT IS SO ORDERED.

DATED: August 28, 1996.

LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

FILED
SEP - 4 1996
CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY
DEPUTY CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

Ione Band of Miwok Indians

v. CASE NUMBER: CIV S-90-993 LKK

Harold E Burris, et al

XX -- **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF SEPTEMBER 4, 1995.

Jack L. Wagner,
Clerk of the Court

ENTERED: September 4, 1996

by: G Miyasato, Deputy Clerk

gm

United States District Court
for the
Eastern District of California
September 4, 1996

* * CERTIFICATE OF SERVICE * *

2:90-cv-00993

Ione Band of Miwok

v.

Villa

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on September 4, 1996, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

SJ/LKK

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FILED

NOV - 3 1998

CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

NICOLAS VILLA, JR. and THE IONE BAND OF MIWOK INDIANS, Plaintiffs, v. COUNTY OF AMADOR; OFFICE OF CODE ENFORCEMENT OF COUNTY OF AMADOR; LINDA VAN VLECK; and JIMMIE SIDES, Defendants.	CIV-S-97-0531 DFL JFM ORDER [illegible] the annexed [illegible] copy of [illegible] ATTEST [illegible] Clerk, U. S. [illegible] Eastern District of California By [signature] Deputy Clerk Dated FEB 2 8 2000

Plaintiffs Nicolas Villa, Jr. and the Ione Band of Miwok Indians move for a temporary restraining order under Federal Rule of Civil Procedure 65(b) to prevent defendants from coming onto tribal land, conducting building inspections, condemning property, evicting occupants, confiscating personal property, and removing children from their homes. The County has stated their intention to inspect tribal property on November 3, 1998. In support of their motion, plaintiffs argue that the County inspection violates

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this court's January 9, 1998 Order, which they contend limits the County's jurisdiction to providing police and fire protection on tribal property.

Plaintiffs misread the January 9 Order. During the January 9 hearing, the court ordered that the County provide police and fire protection on tribal property until February 20, 1998. (See Transcript of January 9, 1998 Hearing at 37:24-38:2.) The court made no order, however, that limited the County's jurisdiction to providing only those services, and nothing in the January 9 Order should be construed as limiting the County's jurisdiction to take appropriate regulatory action on tribal property. That Order does not support the issuance of a temporary restraining order here.

Moreover, the question of whether the county has jurisdiction over tribal property in this case has already been settled. By order filed August 5, 1996 in a previous action involving the parties to this motion, Ione Band of Miwok Indians v. Burris, No. CIV-S-90-0993 LKK, Judge Lawrence K. Karlton of this District held that, because the Ione Band has no recognized tribal government, no one "besides the United States presently has a basis for resisting [Amador] County's exercise of jurisdiction over the land until such time as a government is formed." (August 5, 1996 Order at 4:15-17.) The August 5 Order specifically held that Villa and his supporters did not constitute the government of the Ione Band. (See id. at 4:2-9.)

Under the August 5 Order, Judge Karlton "enter[ed] judgment

declaring the power of the County to assume jurisdiction until challenged by either the United States or a recognized tribal government." (August 5, 1996 Order at 5:17-20.) Plaintiffs have not introduced any evidence showing that they are the recognized government of the Ione Band. They are thus barred from contesting the County's jurisdiction over tribal land under the August 5 Order. Accordingly, the motion for a temporary restraining order is DENIED.

IT IS SO ORDERED.

Dated: 3 November 1998.

DAVID F. LEVI
United States District Judge

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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WALTER ROSALES AND KAREN TOGGERY, ESTATE OF HELEN CUERRO, ESTATE OF WALTER ROSALES' UNNAMED BROTHER, ESTATE OF DEAN ROSALES, ESTATE OF MARIE TOGGERY, ESTATE OF MATTHEW TOGGERY, APRIL LOUISE PALMER, and ELISA WELMAS Plaintiffs, v. **AMY DUTSCHKE, Regional Director, BIA; JOHN RYDZIK, Chief, Environmental Division, BIA; KENNY MEZA; CARLENE A. CHAMBERLAIN; ERICA M. PINTO; ROBERT W. MESA; RICHARD J. TELLOW; PENN NATIONAL GAMING INC.; SAN DIEGO GAMING VENTURES, LLC; and C.W. DRIVER,** Defendants.	Civ. No. **COMPLAINT DEMANDING TRIAL BY JURY**

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NATURE OF THE ACTION

1. Plaintiffs, WALTER ROSALES and KAREN TOGGERY are Native American residents of San Diego County of one-half or more degree of California Indian blood, and former leaders of the half-blood Indian community, known as the Jamul Indian Village, "JIV," who until recently lived on the Indian cemetery in Jamul, where their families have lived since the late 1800's. Rosales and Toggery own and control their families' human remains and funerary objects that were interred in burial sites below, on, and above the Indian cemetery. Those remains and objects have been feloniously disinterred and desecrated by the Defendants in a race to illegally build a casino on the U.S. government's portion of the Indian cemetery property before they are stopped and the law is enforced.

2. The executive council members of the JIV, along with the complicity of the other Defendants, have committed some of the most heinous and grisly of crimes in their headlong rush to illegally build a casino on the U.S. government's portion of the Jamul Indian cemetery. The Defendants have intentionally and feloniously disinterred and desecrated Rosales and Toggery's families' human remains and funerary objects, and unceremoniously dumped them on a CalTrans highway construction site. These crimes are felonies, and Defendants have no immunity for having committed them.

3. Alleged members of the JIV have repeatedly and falsely testified concerning these crimes. They first claimed that there weren't any interments on the government's portion of the Indian cemetery. Then they admitted that they learned of the interments, but denied any knowledge of the interments at the time that Rosales and Toggery's families remains were dug up and dumped on CalTrans construction site. Now, their most recent declarations under oath admit that they began construction, with knowledge of the interment of Rosales and Toggery's families remains and funerary objects on the government's portion of the Indian cemetery, and intentionally had them excavated and removed.[1]

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[1]See for e.g., Defendant and one time JIV chairman, Kenny Meza's admission in the January 2003 *California Lawyer*: "All the stuff that my brother, parents, godparents, and uncles once owned has been burned and buried on this land. And when the bulldozers come, they're going to dig it all up."

4. Rosales and Toggery, along with Plaintiffs, APRIL PALMER and ELISA WELMAS, hereby sue two federal agency officials, the executive officers of the half-blood community, and their contractors for their continuing personal injuries arising from this desecration of their families' human remains and funerary objects, pursuant to this Court's concurrent jurisdiction over the federal Defendants and the government's portion of the Jamul Indian cemetery property on which Rosales and Toggery's families' remains and funerary objects were desecrated, and from which they were illegally excavated and removed. See, *Michigan v. Bay Mills Ind. Community ("Bay Mills")* (2014) 134 S.Ct. 2024, 2035, discussed further herein.

PARTIES

5. Plaintiffs, WALTER J. ROSALES, and KAREN TOGGERY, are Native American residents of San Diego County of one-half or more degree of California Indian blood.

6. Plaintiff, WALTER J. ROSALES, is also a lineal descendant and son of Native American, Helen Cuerro, the personal representative of his mother's estate, the ESTATE OF HELEN CUERRO, his son's estate, the ESTATE OF DEAN ROSALES, his unnamed brother's estate, the ESTATE OF WALTER ROSALES' UNNAMED BROTHER, and a lienal descendant with ownership and control of their human remains and Native American cultural items, as set forth in Cal. Pub. Res. C. 5097.9-5097.99 and Health & Safety C. 7001 and 7100. "[T]he next of kin...have property rights in the body which will be protected, and for a violation of which they are entitled to indemnification." *Christensen v. Sup. Ct.* (1991) 54 Cal.3d 868, 890, citing *O'Donnell v. Slack* (1899) 123 Cal. 285, 289.

7. Plaintiff, KAREN TOGGERY, is also a lineal descendant and daughter of Native American, Marie Toggery, and the personal representative of her mother's estate, the ESTATE OF MARIE TOGGERY, as well as the mother of her son Matthew Toggery, and the personal representative of the ESTATE OF MATTHEW TOGGERY, and a lineal descendant with ownership and control of their human remains and Native American cultural items, as set forth in Cal. Pub. Res. C. 5097.9-5097.99 and Health & Safety C. 7001 and 7100.

8. Plaintiff APRIL LOUISE PALMER, is the sister of DEAN ROSALES, and the daughter of WALTER ROSALES, and the granddaughter of HELEN CUERO, and a resident of Riverside

County.

9. Plaintiff ELISA WELMAS is the mother of DEAN ROSALES, the former wife of WALTER ROSALES, and the daughter-in-law of HELEN CUERO, and a resident of Riverside County.

10. Defendant AMY DUTSCHKE is Regional Director for the Pacific Region of the Bureau of Indian Affairs, "BIA," with an office in Sacramento, California.

11. Defendant JOHN RYDZIK is the Chief of the Environmental Division of the BIA, with an office in Sacramento, California.

12. These individual federal Defendants are being sued both in their official and personal capacities for decisions for which they bear the responsibility and allowing and facilitating the desecration of Plaintiffs' families human remains and funerary objects by causing the construction of an illegal casino on the portion of the Jamul Indian cemetery owned by the U.S, in violation of federal and state law, including Constitutional violations. Each individual Defendant has acted, or threatened to act, under the color of federal governmental authority to the injury of Plaintiffs in violation of federal law and in excess of federal limitations upon their power and authority. *Ex parte Young* (1908) 209 U.S. 123; *Michigan v. Bay Mills Indian Community* (2014) 134 S.Ct. 2024, 2035; *Salt River Project Agricultural Improvement and Power District v. Lee* (9th Cir. 2012) 672 F.3d 1176, 1177.

13. Defendants KENNETH MEZA, CARLENE A. CHAMBERLAIN, ERICA M. PINTO, ROBERT W. MESA, and RICHARD J. TELLOW, are current and/or former officials of the JIV.

14. These individual non-federal Defendants are being sued in their personal capacities for allowing and facilitating the desecration of Plaintiffs' families human remains and funerary objects by causing the construction of an illegal casino on the portion of the Jamul Indian cemetery owned by the U.S, in violation of federal and state law, including Constitutional violations. Each individual Defendant has acted, or threatened to act, under the color of federal governmental authority to the injury of Plaintiffs in violation of federal law and in excess of federal limitations upon their power and authority. *Ex parte Young* (1908) 209 U.S. 123; *Michigan v. Bay Mills Indian Community* (2014) 134 S.Ct. 2024, 2035; *Salt River Project Agricultural Improvement and Power District v. Lee* (9th

Cir. 2012) 672 F.3d 1176, 1177.

15. The JIV is not a party to this action, and is not a federally recognized tribe under the Indian Reorganization Act, "IRA," 25 U.S.C. 461 et seq., has no sovereign immunity, and has no right, title or interest in Plaintiffs' families' human remains and funerary objects, or in the government's portion of the Jamul Indian cemetery.

16. Defendant PENN NATIONAL GAMING, INC. (PENN NATIONAL) is a corporation doing business in California. Penn National signed management and development contracts with the JIV, and is implementing them by constructing or managing the construction of the illegal casino on that portion of the Indian cemetery owned by the U.S.

17. Defendant SAN DIEGO GAMING VENTURES, LLC (SDGV) is a corporation doing business in California, and is a subsidiary affiliate of Penn National, that was identified in the Federal Register as seeking approval of a Gaming Management Contract as the corporate entity proposing a gaming management contract with JIV for the management of the illegal casino on the portion of the Indian cemetery owned by the U.S.

18. Defendant C.W.DRIVER, is a corporation and contractor doing business in California. Plaintiffs are informed and believe, and on that basis allege that C.W.DRIVER has been retained by JIV council members, Penn National and/or SDGV to construct, and is currently constructing, the illegal Indian casino on the portion of the Indian cemetery owned by the U.S.

19. The true names and capacities, whether individual, corporate, associate or otherwise, of DOES 1-20, are unknown to Plaintiffs at this time, who, therefore, sue said Defendant by said fictitious names. Plaintiffs are informed and believe, and based thereon allege, that DOES 1-20 are responsible in some measure for the actions, events and happenings herein alleged, and was the legal cause of injury and damages to the Plaintiffs as herein alleged, and thereby causing irreparable damage to Native American human remains, along with the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in Cal. Pub. Res. C. 5097.9-5097.99, by knowingly and/or willfully mutilating, disinterring, wantonly disturbing, excavating and willfully removing them to state property without authority of law. When the true names and capacities of

said Defendants are ascertained by Plaintiffs, Plaintiffs will seek leave to amend this complaint to insert their true names and capacities, and will serve said Doe Defendants when they become known.

20. At all times herein mentioned, Defendants, and each of them, were the agent, employee and/or joint venturer of their co-defendants, and were acting within the course and scope of such agency, employment and/or joint venture, with the permission and consent of their co-defendants and defendants. Furthermore, that at all times herein mentioned, Defendants, while acting as principals, expressly directed, consented to, approved, affirmed and ratified each and every action taken by the other herein alleged. Each reference to one defendant is also a reference to each and every other defendant. Plaintiffs are informed and believe and thereon allege that the defendants, and each of them, conspired with each other, to engage in acts in furtherance of a conspiracy to wrongfully and illegally violate the Plaintiffs' rights, rendering each of the defendants jointly and severally liable for all resulting and irreparable personal injury and damage to Plaintiffs.

JURISDICTION AND VENUE

21. The jurisdiction of this Court is invoked pursuant to 5 U.S.C. §§701 -706, 18 U.S.C. §§ 1151, 1162 and 1166, 25 U.S.C. §465 et seq., 2700 et seq., 3001-13, 28 U.S.C. §§ 1131 et seq., 1343, 1360, and 2201-2202.

22. Plaintiffs' claims also arise under California common and statutory law, to the same extent that any California court has jurisdiction over other civil and criminal causes of action, and those civil laws of California that are of general application to private persons or private property shall have the same force and effect, as they have elsewhere within California., as held for e.g., in *People v. Van Horn* (1990) 218 Cal. App.3d 1378, and *Christensen v. Sup. Ct.* (1991) 54 Cal.3d 868, 887.

23. The Defendants do not have immunity from suit.

24. An actual case and controversy exists among the parties, warranting the Court's declaration pursuant to 28 U.S.C. § 2201 of the rights, remedies and relations of the parties with respect to the Plaintiffs' ownership and control of their families' human remains and funerary objects, the portion of the Indian cemetery owned by the U.S., and whether or not it qualifies as land eligible for gambling under the Indian Gaming Regulatory Act, "IGRA." 25 U.S.C. 2014 et seq.

25. All applicable federal administrative remedies have been exhausted prior to initiating this

lawsuit against the Defendants as required by 5 U.S.C. §704. This action arises under federal law, including IRA, 25 U.S.C. §§ 465 *et. seq.* IGRA, 25 U.S.C. §§ 2700 *et seq.* and 18 U.S.C. § 1166, the Native American Graves Protection Act, "NAGPRA," 25 U.S.C. 3001 et seq., the Archaeological Resources Protection Act, "ARPA," 16 U.S.C. §470aa et seq., the U.S. Constitution, the California Admissions Act of 1850, and principles of federalism.

26. Venue is proper in the District Court for the Eastern District of California under 28 U.S.C. §§1391(b) and (e) and 5 U.S.C. § 703 . Venue is proper in this judicial district because at least one defendant resides or has an office in this judicial district, and because a substantial portion of the events giving rise to the Plaintiffs ' claims occurred in this district.

27. The Plaintiffs have standing to pursue the claims asserted in this complaint. *Bond* v. *United States* 131 S.Ct. 2355 (20 11), *Match -E-Be-Nash-She-Wish Bandv. Patchak* 132 S.Ct. 2 199 (2012), *Michigan v. Bay Mills Indian Community* (20 14) 134 S.Ct. 2024, 2035, *Christensen v. Sup. Ct.* (1991) 54 Cal.3d 868, 887, and *Palmquist v. Standard Acc. Ins. Co.*, 3 F.Supp. 358 (S.D. Cal. 1933).

GENERAL ALLEGATIONS

1. Walter Rosales and Karen Toggery Own and Control Their Families Human Remains and Funerary Objects

A. History of the Jamul Indian Cemetery and Remnants of Capitan Grande Band

28. Since the community of Jamul was a part of the Republic of Mexico, the Native American families of which Walter Rosales and Karen Toggery are the lineal descendants have inhumed, interred, deposited, and dispersed more than a hundred of their deceased family members' human remains, and items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in NAGPRA, 25 U.S.C. 3001-2, 43 C.F.R. 10.1-17, and Cal. Pub. Res. C., "P.R.C.," 5097.9-5097.99, according to their religious beliefs in burial sites below, on, and above the ground at the Indian cemetery in Jamul.[2]

[2]"'[B]urial site' means any natural or prepared physical location, whether originally below, on, or above the surface fo the earth, into which as a part of the death rite or ceremony of a culture, individual human remains are deposited." 25 U.S.C. 3001(1). California law further protects lawfully interred cremations. "'Human remains' or 'remains' means the body of a deceased person, regardless of its state of decomposition, and cremated remains," Cal. Health & Safetey Code, "H.S.C.," 7001,

29. These Indians have lived on an acre of private land that has been dedicated as an Indian cemetery, in Jamul, California, since at least the latter part of the Nineteenth Century. See, Exs. A, B, C, E, and F. The BIA Director of Tribal Government Services further stated on July 1, 1993: "The Jamul Indians lived on one acre of private land and on land deeded to the Diocese of San Diego as an Indian cemetery." Ex. I, at 3.

30. According to the federal government, these Indians are the remnants of the Capitan Grande tribe, and thus have not been, and are not subject to being, recognized as a separate tribe under the IRA. 25 U.S.C. 461, et seq. On January 18, 1982, the California Program Office of the Indian Health Service found: "Sometime in the 1800's, Indians from the nearby El Capitan Grande area settled adjacent to an existing cemetery near the village of Jamul." FONSI for Domestic Water Supply & Waste Disposal Facilities, Project No. CA 79-719. The Capitan Grande tribe was divided into the Barona and Viejas bands, when the San Diego River was dammed, and El Capitan Reservoir was created and allowed to flood the Capitan Grande village in the 1930's.

31. When California was a part of the Republic of Mexico between 1823 and 1846, all Indians living in and around the Indian cemetery in Jamul had already become full citizens of the Republic of Mexico on February 4, 1821, pursuant to the Plan of Iguala, which was one of the charter documents of the Mexican Republic.[3] Thereby, they were no longer treated as members of separate tribes, they had the right to own land, and subject to a property qualification, could vote.

32. Between 1846 and 1850, California was governed by several United States Military Governors. The territory that was to become California, including the Jamul cemetery, was ceded to the United States by Mexico in 1848 pursuant to the Treaty of Guadalupe Hidalgo. 9 Stats.922

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since "'interment; means the disposition of human remains...in the case of cremated remains, by inurnment, [or] placement below, on, or above the surface of the earth," in a cemetery, H.S.C. 7009, and constitutes a protected "burial site," H.S.C. 8012, which is defined as the "process of placing human remains in a grave," H.S.C. 7013, which is further defined as "a space of earth in a burial park, used or intended to be used, for the disposition of human remains," H.S.C. 7014, which in turn is defined as "a tract of land for the burial of human remains in the ground, used, or intended to be used, and dedicated, for cemetery purposes." H.S.C. 7004. See, Ex. U, as to the religious beliefs and burial practices of the Kuymeyaay from whom Rosales and Toggery have descended.

[3] Therein the charter provides: "All the inhabitants of New Spain, without distinction, whether Europeans, Africans or Indians, are citizens fo the monarchy, with the right to be employed in any post, according to their merits and virtues."

(1850). The treaty provided for the protection of public and private property rights. Specifically property rights "of every kind," (including Indian property rights in their dead) that were respected under Mexican law were also to be respected by the United States. *Id.*

B. Creation of the Sanctified Indian Cemetery, Place of Worship, and Religious Ceremonial Site in Jamul

33. "It is a universally held belief among Indians that if the dead or the funeral goods interred with them are disturbed, their spirits will wander, and in the words of [Supreme Court Justice of the Pawnee Nation]Walter Echo-Hawk, that 'restless spirits will bring evil to those who allowed their graves to be disturbed.'... While actual practices and religious beliefs may vary widely between cultures, and even within ethnic groups, the concern for the dead and the sensibilities of the living is a universal value held by all societies in all ages. The sepulture of the dead has, in all ages of the world, been regarded as a religious rite. The place where the dead are deposited, in all civilized nations and many barbarous ones is regarded in some measure at least, as consecrated ground... Consequently, the normal treatment of a corpse, once it is decently buried, is to let it lie. This idea is so deeply woven into our legal and cultural fabric that it is commonplace to hear it spoken of as a 'right.'" Thomas, "Indian Burial Rights Issues: Preservation or Desecration," Spring 1991, 59 *U.M.K.C. Law Review* 747.[4]

34. "Burial rites or their counterparts have been respected in almost all civilizations from time immemorial. [Citations.] They are a sign of the respect a society shows for the deceased and for the surviving family members. … [For example] The outrage at seeing the bodies of American soldiers mutilated and dragged through the streets is … a[n] … instance of the … understanding of the interests decent people have for those whom they have lost. Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own. In addition this well-established cultural tradition

[4] See the universal condemnation of the Poarch Creek Band of Creek Indians desecration of the Hickory burial ground to build a casino, by the Inter-Tribal Council of the Five Civilized Tribes of the Chickasaw, Choctaw, Cherokee, Muscogee (Creek) and Seminole Nations, representing 750,000 blood descendants, in Ex. S, and former Vice Chair Okla. Indian Affairs Comm., Dan Jones,' "You'll Mock Death But Once," *Indian Country Today*, 8- 20- 2012, Ex. T.

acknowledging a family's control over the body and death images of the deceased has long been recognized at common law." *National Archives and Records Admin. v. Favish*,541 U.S. 157, 167-68 (2004).

35. "[T]he next of kin...have property rights in the body which will be protected, and for a violation of which they are entitled to indemnification." *Christensen v. Sup. Ct.*. 54 Cal.3d 868, 890 (1991), citing *O'Donnell v. Slack*, 123 Cal. 285, 289 (1899), finding violation of the Health & Safety Code to be *per se* negligent under Evid. C. 669. "A surviving spouse, entitled to custody and possession of a deceased person for the purposes of preservation and burial, may maintain an action for damages against anyone who unlawfully and without authority mutilates or destroys such body." *Palmquist v. Standard Acc. Ins. Co.*, 3 F.Supp. 358 (S.D. Cal. 1933). Cal. H.S.C. 8301.5 further evidences Rosales and Toggery's interest in the proper disposition of their families' remains: "The Legislature recognizes... The urge to associate even after death also stems from an intense social and cultural need to ensure that people are connected with their past, and also to ensure that the graves and surrounding grounds are kept, tended, adorned, and embellished according to the desires and beliefs of the decedent, family, or group."

36. From their birth, Rosales and Toggery have been the lineal descendants of the Native American families that have lived and have inhumed, interred, deposited, and dispersed more than a hundred of their deceased family members' human remains, and items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in P.R.C. 5097.9-5097.99, H.S.C. 7001 and 7100, and NAGPRA, 25 U.S.C. 3001-2, 43 C.F.R. 10.1-10.17, according to their religious beliefs in burial sites below, on, and above the Jamul Indian cemetery for more than a hundred years. Recently, the San Diego Museum of Man repatriated a significant collection of Native American human remains and funerary objects, which have also been inhumed, interred, deposited, dispersed, and placed, in burial sites below, on, and above, the cemetery.

37. Rosales and Toggery have personal knowledge of more than 20 of the hundreds of Native Americans whose human remains, and items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of

cultural patrimony, as defined in P.R.C. 5097.9-5097.99, H.S.C. 7001 and 7100, and NAGPRA, 25 U.S.C. 3001-2, 43 C.F.R. 10.1-10.17, have been interred and deposited in burial sites below, on, and above the Indian cemetery in Jamul.

38. Walter Rosales was personally present when his un-named younger brother's human remains and his mother, Helen Cuerro's human remains, and his son, Dean Rosales' human remains, were inhumed, interred, and deposited, along with the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in P.R.C. 5097.9-5097.99, H.S.C. 7001 and 7100, and NAGPRA, 25 U.S.C. 3001-2, 43 C.F.R. 10.1-10.17, in burial sites below, on and above the ground on the portion of the Indian cemetery of which Rosales and Toggery are the beneficial owners and the U.S. holds title.

39. Karen Toggery was personally present when her mother, Marie Toggery's human remains and her son, Matthew Tinejero Toggery's human remains, were inhumed, interred and deposited, along with the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in P.R.C. 5097.9-5097.99, H.S.C. 7001, 7100, and NAGPRA, 25 U.S.C. 3001-2, 43 C.F.R. 10.1-10.17, in burial sites below, on and above the ground at the Indian cemetery.

40. The interments of Rosales and Toggery's families' remains and funerary objects are further corroborated by the Cal. Dept. Of Health Permits for Disposition of Human Remains, San Diego and Riverside County Death Certificates, and the San Diego Rural Fire Prot. Dist. Daily Logs of the cremated funerary objects. Ex. K.

41. Rosales and Toggery are the lineal descendants that own and control their predecessors' human remains and Native American and associated cultural items, which are personal rights, as set forth in P.R.C. 5097.9-5097.99, H.S.C. 7001, 7100, and 25 U.S.C. 3001-2, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, which have been inhumed, interred, deposited, dispersed, and placed, in burial sites below, on and above the cemetery over the last 100 years.

42. By virtue of these acts, a Native American sanctified cemetery, place of worship, religious

and ceremonial site, and sacred shrine, as defined by P.R.C. 5097.9, H.S.C. 7003-4, 8558, 8560, 8580, NAGPRA, 25 U.S.C. 3001, and 43 C.F.R. 10.2, have been located at the cemetery, which dedication to cemetery purposes all of its landowners are estopped to deny by their acquiescence in such use for more than 100 years. This dedication to cemetery use also means that the government's portion of the Indian cemetery is not a reservation. *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1268 (10th Cir. 2001), *cert. denied*, 534 U.S. 1078 (2002); *Mechoopda Indian Tribe of Chico Rancheria v. Schwarzenegger*, 2004 WL 1103021, *12 (E.D. Cal. 2004).

43. Property so dedicated to cemetery purposes shall be held and used exclusively for cemetery purposes, unless and until the dedication is removed from all or any part of it by an order and decree of the superior court of the county in which the property is situated, pursuant to H.S.C. 8580. Moreover, after such dedication by use and as long as the property remains dedicated to cemetery purposes, no road, alley, pipe line, pole line, or other public thoroughfare or utility shall be laid out, through, over, or across any part of it without the consent of not less than two-thirds of the owners of those interred there, pursuant to H.S.C. 8560.

C. The Indian Cemetery Property Has Always Been Private Property

44. The Indian cemetery in Jamul has been private property since before California became a State. It covers more than 7 acres and at least 3 parcels of property according to San Diego County Recorders' parcel maps, and probably extends onto what is now a California ecological reserve.[5] Exs. A-F. Native American families and their lineal descendants occupied and possessed that cemetery and the property contiguous to that Indian graveyard in Jamul, California, since the private property was owned at various times by Mexican Governor and Don, Pio Pico, U.S. General Henry S. Burton and his widow Maria Amparo Ruiz de Burton, John D. Spreckel's Coronado Beach Company, the Lawrence and Donald Daley families, the Catholic Diocese, and by the U.S. as trustee for the beneficial ownership of "Jamul Indians of one-half degree or more Indian blood," as reflected

[5] Historical cemeteries are often subsequently discovered to extend beyond later erected temporal fencing, as in Pallyup, Washington, and San Diego's El Campo Santo Cemetery, where many graves have been discovered beneath what is now San Diego Ave. See Ex. P.

in Exs. A-F.[6]

45. On September 26, 1912, J.D. Spreckel's Coronado Beach Company deeded a portion of the cemetery in Jamul to the Roman Catholic Bishop of Monterey and Los Angeles, a corporate in sole of the State of California, "to be used for the purposes of an Indian graveyard and approach thereto," "to have and to hold the above granted and described premises unto the said Grantee, his successors and assigns forever for the purpose above specified," as set forth in Exs. A, B, C, and E. In 1912, Father LaPointe and the Catholic church erected a chapel at the cemetery. Since 1956 the diocese of St. Pius X has maintained the chapel, for the purpose of ministering at the Indian cemetery.

46. Subsequently, the Catholic Diocese has retained title, ownership and control of a portion of the cemetery granted by the Coronado Beach Company. The Catholic Diocese also explicitly maintained for "[itself and its] successors or assigns an easement for (1) utility service lines and (2) ingress and egress over the existing well-traveled road," which the San Diego County tax assessor's maps continue to describe as "the Indian cemetery," as set forth in Exs. B & E.

47. The remaining portion of the private Indian cemetery property, where Appellants' families' remains were originally interred, but from which they have been illegally disinterred, excavated and removed, is now owned by the United States, Ex. D, jurisdiction over which has never been ceded by the State under 40 U.S.C. 255 and Government Code 127.

48. In 1924, Congress conferred citizenship on all Indians born in the United States including the Indians of San Diego County. 8 U.S.C. § 1401(b). And, by reason of the 14th amendment, the grant of federal citizenship had the additional effect of making Indians citizens of the states where they resided. State citizenship bestows rights and corresponding duties which one is not free to selectively adopt or reject. Included with a citizen's rights and duties is the obligation to comply with State and local laws and regulations and pay appropriate taxes for the support of State and local governments. The Defendants attempt to use an illegal April 10, 2013 Indian Lands decision to insulate the government's portion of the Indian cemetery from state and local laws, regulations and

[6]See also, *United States v. Pio Pico,* 27 F.Cas. 537 (1870); *Estate of Burton*, 63 Cal. 36 (1883); *G.W.B.McDonald, Administrator v. Burton,* 68 Cal. 445 (1886); *Henry H. Burton v. Maria A. Burton,* 79 Cal. 490 (1889); *In re Burton's Estate,* 93 Cal. 459 (1892); and *McDonald v. McCoy*, 121 Cal. 55 (1898), tracing the history of the private ownership of the property.

taxation is unconstitutional, violates equal protection, and therefore is arbitrary, capricious and against the law.

49. The Indian cemetery has never ceased to be private property. The cemetery was never part of, nor reserved or withdrawn from, public domain lands. It has always been privately owned; first within Mexico, then the Republic of California, then within the United States when acquired from Mexico by way of the Treaty of Guadalupe Hidalgo, 9 Stat. 922 (1850), and now within the State of California, since the United States ceded jurisdiction over all such private property acquired from Mexico to the State of California, when it was admitted to the Union on an "equal footing," with the same jurisdiction over all private property, as all other States, per Article IV, Section 3 of the U.S. Constitution. Thereby, California received regulatory and police power jurisdiction over all private property within the State, including the Jamul Indian cemetery.

D. A Portion of the Indian Cemetery is Gifted to the United States for the Beneficial Ownership of Individual Half-Blood Indians in Jamul

50. Sometime after September 26, 1912, J.D. Spreckel's Coronado Beach Company and its successors transferred the remaining portion of the cemetery in Rancho Jamul to the Daley family, and on December 12, 1978, Lawrence and Donald Daley gifted a 4.66 acre portion of the cemetery by recording a grant deed of what is now known by the San Diego County recorder's parcel number, 597-080-04, to "the United States of America in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." Ex. D. This land was conveyed to the United States as trustee for its beneficial owners, "Jamul Indians of one-half degree or more Indian blood," including Rosales and Toggery's families, the ownership and possession being that of ordinary proprietors. *Paul v. United States*, 371 U.S. 245, 264 (1963).

51. The Daley families agreed to convey title to the land then occupied by the Plaintiffs' families to the United States under California trust law for the explicit benefit of those half-blood Jamul Indians then occupying the property. The Daley families specifically agreed to this form of conveyance in order to provide a place protected by the United States as a trustee to protect the living and the dead against all forms of alienation, trespass, desecration, mutilation, disinterment, and any other infringement. This conveyance constitutes a donation of property for the benefit of Indians, pursuant to 25 U.S.C. 451.

52. Thus, the government's portion of the Indian cemetery remains in a California trust for the benefit of the half-blood Jamul Indians described on the face of the deed. *Coast Indian Community v. U.S.* ("*Coast*"), 550 F.2d 639 (Fed. Cl. 1977); *United States v. Assiniboine Tribe* ("*Assiniboine*"), 428 F.2d 1324, 1329-30 (Fed. Cl. 1970); *Chase v. McMasters* ("*Chase*"), 573 F.2d 1011, 1016 (8th Cir. 1978), cert. denied, 439 U.S. 965 (1978); *United States v. State Tax Comm.*, 535 F.2d 300, 304 (5th Cir. 1976); *City of Shakopee v. United States*, 1997 U.S. Dist. LEXIS 2202, *19-20 (D. Minn. 1997); and as recognized by *Carcieri v. Salazar,* 555 U.S. 379, 382-83, 388-90, 394-95, 398-99 (2009), citing *Opinions of the Solicitor* at 668, 724, 747, and 1479 (1979), attached hereto as Ex. H.

53. The BIA Director of Tribal Government Services further admits: "On June 28, 1979, the United States acquired from Bertha A. and Maria A. Daley [Lawrence and Donald's wives] a portion of the land known as 'Rancho Jamul' which it took 'in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate.' ...The United States accepted these conveyances of land in accordance with the authority contained in Sections 5 and 19 of the Indian Reorganization Act of 1934." Exhibit I, at 3. Section 5 of the IRA, 25 U.S.C. § 465, permits the U.S. to take land into trust for "Indians." Section 19 of the IRA in turn defines "Indians" to include: "all other persons of one-half or more Indian blood." 25 U.S.C. § 479. The text of Section 19 has not changed since its enactment in 1934.

54. Congress specifically enacted the IRA, 25 U.S.C. 465, to ensure that land acquired in trust for individual Indians would not be alienated by anyone without the government's express approval. In fact, the IRA continues to specifically provide for the acquisition of land by the United States for the benefit of individual Indians "through purchase, relinquishment, gift, exchange, or assignment...for the purpose of providing land for Indians." 25 U.S.C. 465, as acknowledged by the Supreme Court in *Carcieri v. Salazar* ("*Carcieri*"), 555 U.S. 379, 399 (2009).

55. [T]itle shall be taken in 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).

56. "Section 5 [25 U.S.C. 465] authorizes the Secretary of the Interior to purchase or otherwise acquire land for landless Indians," and not just for "recognized Indian tribes now under Federal jurisdiction," at the time of the enactment of the IRA in 1934. H.R. Rep. No.

1804, 73d Cong., 2d Sess. 6-7 (1934).

57. The Federal government's *Handbook of Federal Indian Law*,[7] provides that "...[A] number of statutes have allowed individual Indians to obtain trust or restricted parcels out of the public domain and not within any reservation. ..." *Id.*, (DOI 1982) Ch. 1, Sec. D3c, p. 40-41, and (DOI 2005) §3.04 (n114) Fn 443, citing *City of Tacoma v. Andrus*, 457 F. Supp. 342 (D.D.C. 1978), and *Chase*, 1016.

58. The government's *Handbook* also admits that: "The Secretary may exercise this authority for all individuals of one-half or more Indian blood.... This approach has also been used for the Quartz Valley Indians, Duckwater Shoshone Indians, Yomba Shoshone Indians, Port Gamble Band of Clallam Indians, and Sokaogan Chippewa Indians (Mole Lake Band)... This procedure has been suggested for other Indian groups as well. *E.g.*, May 1, 1937, *reprinted in Opinions of the Solicitor*, *supra* not 76, at 1479 (status of Nahma and Beaver Island Indians)." *Handbook* (DOI 1982) Ch.1, Sec. B2e, pp.15-16, fn. 86, and (DOI 2005) § 3.02, 146 (n99) Fn105.

59. The acquisition and designation of these Jamul Indians of one-half degree or more Indian blood as the beneficial owners of the cemetery property, follows the history, custom and practice of similar acquisitions and designations of other half-blood communities after June of 1934. "The Secretary has long exercised his §465 trust authority [to] take land into trust for...individual Indians who qualified for federal benefits by lineage or blood quantum. For example,...the Mole Lake Chippewa Indians of Wisconsin,...the Shoshone Indians of Nevada, the St. Croix Chippewa Indians of Wisconsin, and the Nahma and Beaver Inland Indians of Michigan. See 1 DOI, *Opinions of the Solicitor*, pp. 706-707, 724-725, 747-748 (1979)," *Carcieri*, J. Stevens dissenting at 406-7; Ex. H, and also includes the Mississippi Choctaws.

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[7] Congress directed the Secretary of Interior to revise and republish Cohen's *Handbook* in 25 U.S.C. 1341(a)(2), thereby binding the U.S. by its admissions with regard to the lands held in trust for individual Indians.

E. The United States Designated the Individual Half-Blood Indians in Jamul as the Beneficial Owners of the Government's Portion of the Indian Cemetery

60. The United States Department of Interior, Bureau of Indian Affairs, August 3, 2000 response to a Freedom of Information Act (FOIA) request, confirms that the "current trust parcel was accepted into trust in 1978 for Jamul Indians of ½ degree (4.66 acres)," and that there is "no record of the 1978 trust parcel being known as the Jamul Village," as reflected in Ex. F.

61. This is consistent with the half-blood community's constitution, Article II, Territory, which does not identify the 4.66 acre cemetery parcel, as within the territory of the Jamul Indian Village in Ex. G. It is also consistent with Cal. Dept. of Fish & Game, May 21, 2007 Map of Watershed, Wildlife and Creek Beds Surrounding JIV and Lakes Entertainment Properties, Ex. L; Governor Gray Davis' Director of Community and Intergovernmental Relations letter of July 17, 2001, finding JIV's proposed need to acquire and use trust land as inconsistent with the Rancho Jamul Ecological Reserve and the Multiple Species Conservation Plan established by U.S. Dept. of Fish & Wildlife Service, Cal. Dept. Fish & Game, and the County of San Diego, due to "significant and potentially unmitigable adverse impacts," and a "paradigm for the kind of land use conflicts the BIA should not permit," Ex. M, and Governor Arnold Schwarzenegger's Legal Affairs Secretary's letters of August 29, 2005 and December 20, 2005, April 2, 2007, and April 5, 2007, finding the JIV to be in breach of the Compact for proposing, among other violations, to operate Class III gambling on land that does not qualify for such gambling. Ex. N.

62. Therefore, when the U.S. accepted the deed for the portion of the cemetery on which Rosales and Toggery lived, the U.S. thereby designated the individual Indian families then possessing and residing thereon as the beneficial owners under California trust law. Similar forms of the Jamul grant deed have long been accepted by the BIA and similar designations of individual Indians' beneficial ownership have long been made by the BIA, and enforced by the courts. *Coast* at 651 n32; *Assiniboine*, at 1329-30; *State Tax Comm.*, at 304, *Chase* at 1016, and as recognized by *Carcieri* at 382-83, 388-90, 394-95, 398-99 (2009), citing *Opinions of the Solicitor* at 668, 724, 747, and 1479 (1979), Ex. H.

63. *Coast*, held on nearly identical facts, that the parcel in question, "was not acquired for a tribe, leaving only the possibility under the [Indian Reorganization] Act that it was purchased for

individual Indians. The deed and proclamation say nothing to contradict this. Thus, the land was taken in trust for the individual Coast Indian Community members. *Coast*, 550 F.2d 639, 651, n32."

64. The *Coast* deed "was conveyed to the United States: ...'in Trust for such Indians of Del Norte and Humboldt Counties, in California, eligible to participate in the benefits of the [Indian Reorganization] Act of June 18, 1934, as shall be designated by the Secretary of the Interior...'" 550 F.2d 641-41.

65. The Jamul deed was conveyed to the United States "in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." See, Ex. D. There, as here, "the United States acquired the [land]...pursuant to ... 25 U.S.C. 465, which provided that the title to land acquired under it 'shall be taken in the name of the United States in trust for the...individual Indian for which the land is acquired...'" *Coast*, 651, n32.

66. This is consistent with the federal regulations for then unorganized groups of individual Indians, whereby such designation of such individual Indians as beneficial owners was accomplished by: (1) locating the individual Indians on the parcel, (2) providing for their needs, (3) acquiescing in their continued presence on, and use of, the parcel for more than 28 years, (4) building houses for them on the parcel, (5) providing them with services usually accorded to Indians living on such property, (6) allowing them to inhume, inter, deposit, disperse and place the human remains and funerary objects of their dead, below, on, and above the property, and further (7) providing strong and uncontroverted evidence of their designation as the beneficial owners of that portion of the Indian cemetery, parcel 597-080-04, as a matter of law, within the meaning of the grant deed, as in *Coast*, *Assiniboine*, *State Tax Comm* and *Chase*.

67. In *Chase v. McMasters* ("*Chase*") 573 F.2d 1011, 1016 (8th Cir. 1978), the court enforced an individual Indian's beneficial ownership of trust land acquired for her benefit under the IRA, stating: "The Secretary may purchase land for an individual Indian and hold title to it in trust for him...Section 465 lists gifts among the means by which the Secretary may acquire land, and it was amended to authorize acquisition of land in trust for individual Indians... See 78 Cong. Rec. 11126 (1934)... The land acquired may be located... without a reservation." *Chase*, at 1016. "The Act not only authorized the Secretary to acquire land for Indians, 25 U.S.C. 465, but continued the trust

status of restricted lands indefinitely, 25 U.S.C. 462..." *Chase*, at 1016.

68. "[I]t is now firmly established that the Indian title is equivalent to beneficial ownership." *In re Fredenberg*, 65 F.Supp.4, 6 (D. Wis. 1946). See also, *Choctaw & Chicasaw Nations v. Seitz*, 193 F.2d 456 (10th Cir. 1951), *cert. denied*, 343 U.S. 919 (1952); *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049 (1984); *Narragansett Tribe of Indians v. So. R.I. Land Dev. Corp.*, 418 F.Supp. 798 (D.R.I. 1976).

69. Therefore, the government's portion of the Indian cemetery was taken in trust for the individual half-blood Native American families then possessing and residing on the cemetery parcel, including Rosales and Toggery and their families, pursuant to 25 U.S.C. 465, as held in *Coast*, *Assiniboine Tribe*, *State Tax Comm., Chase*, and acknowledged in *Carcieri*, citing the *Opinions of the Solicitor*, Ex. H.

F. California Retains Concurrent Jurisdiction over the Jamul Indian Cemetery, and Finds Gambling on the Government's Portion of the Indian Cemetery Would be Detrimental to the Surrounding Community

70. The state of California retains full police power jurisdiction over the government's portion of the Jamul Indian Cemetery, beneficially owned by the individual half-blood Jamul Indians, just as any state does with many federal cemeteries, like Fort Rosecrans in San Diego or Arlington National Cemetery.[8] "Such [proprietorial] ownership and use without more do not withdraw the lands from the jurisdiction of the state." *Surplus Trading Co. v. Cook*, 281 U.S. 647, 650 (1930).

71. The cemetery has always been privately owned; first within Mexico, then the Republic of California, then within the United States when acquired from Mexico by way of the Treaty of Guadalupe Hidalgo of 1848, 9 Stat. 926, and now within the State of California, since the United States ceded jurisdiction over all such private property acquired from Mexico to the State of California, when it was admitted to the Union. On September 9, 1850, when California was admitted to the Union, 9 Stats. 452 (1850), California entered the Union on an "equal footing" with, and with the same jurisdiction and regulatory authority over all private property, as all other States, per Article IV, Section 3 of the U.S. Constitution.

[8] See the Navy Jurisdictional Maps for San Diego, depicting federal ownership of Fort Rosecrans National Cemetery, in Haines, *Federal Enclave Law*, (Atlas 2011) at 266. Ex. Q.

72. Thereby, California received regulatory and police power jurisdiction over all public domain property not reserved to the United States, and all private property within the State, including the Indian cemetery in Jamul.

73. The Constitution places the authority to dispose of public land exclusively in the Congress and executive power to convey any interest in these lands must be traced to some Congressional delegation of its authority. *Sioux Tribe v. United States*, 316 U.S. 317, 326 (1942); *Donahue v. Butz*, 363 F.Supp. 1316, 1321 (N.D. Cal. 1973). Here, no portion of the cemetery was ever part of, reserved or withdrawn from, public domain lands by any act of Congress or delegation of its authority. Once public domain lands are conveyed to the State or into private ownership, the United States retains no regulatory authority over such lands. *Hawaii* v. *Office of Hawaiian Affairs, 556* U.S. 163, 176 (2009); *Kleppe v. New Mexico* 426 U.S. 529, 540 (1976). After public domain property is conveyed to the State, or into private ownership, the United States no longer has authority to acquire non-public domain lands, nor can they be restored to federal jurisdiction by a unilateral federal act that purports to change the nature of the original grant of jurisdiction to the State, without condemnation or consent of the State by a majority of its legislature. *Hawaii v. Office of Hawaiian Affairs,* 556 U.S. 163, 176 (2009), "Congress cannot, after statehood, reserve or convey. ...lands that have already been bestowed upon a state..." As confirmed in several recent Supreme Court decisions, including *Carcieri v. Salazar* and *Hawaii v. Office of Hawaiian Affairs*, and *City of Sherrill v. Oneida Indian Nation*, 544 U..S. 197 (2005), the federal government has had no authority to create a reservation or Indian lands on public domain lands within the exterior boundaries of the State of California, since well before the government's portion of the Indian cemetery was gifted to the U.S. in 1978.

74. Though the Federal government has the power under Article I, Section 8 of the U.S. Constitution to acquire land within a State: "To exercise exclusive legislation in all cases whatsoever,... over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards and other needful buildings;" and to thereby acquire the "special maritime and territorial jurisdiction," under 18 U.S.C. 7, it may only do so "by consent of the legislature of the State in which the same shall be." "Without the

State's consent" the United States does not obtain the benefits of Art. I, § 8, cl. 17, its possession being simply that of an ordinary proprietor. *James v. Dravo Contracting Co.*, 302 U.S. 134, 141-142 (1937)." *Paul v. United States* 371, US 245, 264 (1963). Here, there is no evidence that California has ever consented to cede its concurrent jurisdiction over the government's portion of the Indian cemetery, as required by 40 U.S.C. 255 and Cal. Govt. C. 127.

75. Upon such land acquisitions by the Federal government as an ordinary proprietor, the United States does not have exclusive jurisdiction over the property. "The Constitution does not command that every vestige of the laws of the former sovereignty must vanish. On the contrary its language has long been interpreted so as to permit the continuance until abrogated of those rules existing at the time of the surrender of sovereignty which govern the rights of the occupants of the territory transferred. This assures that no area however small will be left without a developed legal system for private rights." *Paul v. United States*, 371, US 245, 264-65 (1963).

76. Hence, if an Indian reservation were to be lawfully created, unlike here where no reservation has been created, "an Indian reservation is considered part of the territory of the State." *Nevada v. Hicks,* 533 U.S. 353, 361-62 (2001). "It is not unusual for the United States to own within a State lands which are set apart and used for public purposes. Such ownership and use without more do not withdraw the lands from the jurisdiction of the State....Such reservations are part of the State within which they lie..." *Surplus Trading Co. v. Cook*, 281 U.S. 647, 650 (1930). This is the reason that lawfully created " Indian reservations, however, are not [exclusive] federal enclaves," and are a subset of partial federal enclaves where the State has never consented to cede its jurisdiction over the land to the United States. *Carcieri v. Norton* (1st Cir. 2005) 398 F.3d 22, 31-32. "State sovereignty does not end at a reservation's border." *Nevada v. Hicks,* 533 U.S. 353, 361 (2001), quoting *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561(1832).

77. Therefore, when the State of California entered the Union the Jamul Indian cemetery was private property and remains within the concurrent jurisdiction of the State of California today. Moreover, the State of California has never ceded its concurrent jurisdiction over the cemetery. This is confirmed by the lack of any "notice of such acceptance" of the "cession of such jurisdiction, exclusive or partial," having been filed with the Governor of the State of California, as required by

40 U.S.C. 255, and the lack of any entry in the "index of record of documents with description of the lands over which the United States acquired jurisdiction," required by Cal. Govt. Code 127.

78. California's general consent to the acquisition of state lands by the United States is limited to lands lawfully purchased or condemned, as set out in Government Code §110, and does not apply to gifts, as made by the Daleys here. 25 U.S.C. 451. Thus, the portion of the cemetery owned by the U.S. remains within the concurrent jurisdiction of the State of California today. See for e.g., *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), "state laws may be applied unless such application would ...impair a right granted or reserved by federal law;" and *Acosta v. County of San Diego,* 126 Cal. App. 2d 455 (1954). Moreover, the Supreme Court has acknowledged that Congress' power to exercise control over Indian affairs, still has "constitutional limits" if its Indian legislation "interferes with the power or authority of any State." *United States v. Lara*, 541 U.S. 193, 205, (2004); *Gila River Indian Cmty. v. United States*, 2013 U.S. App. LEXIS 10056, *91, (9th Cir. 2013) J. Smith, dissenting.

79. Moreover, since the government's portion of the Indian cemetery was never conveyed to the JIV, any subsequent acquisition of the land by an I.R.A. tribe must comply with the after 1988 acquired provisions of IGRA in 25 U.S.C. 2719. "Therefore, while the Secretary of the Interior investigates whether gaming on the proposed trust land... 'would not be detrimental to the surrounding community,' the proper spokesperson for the land in question is necessarily a representative of the state where the land is located.""Unless and until the appropriate governor issues a concurrence, the Secretary of the Interior has no authority under 25 U.S.C. 2719(b)(1)(A) to take land into trust for the benefit of an Indian tribe for the purpose of the operation of a gaming establishment." *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 367 F.3d 650, 656 (7th Cir. 2004); see also, *Confederated Tribes of Siletz Indians v. United States*, 841 F.Supp. 1479, 1486 (D. Ore. 1994).

80. Here, both California Governors, Davis and Schwarzenegger, have already determined that the proposed gambling establishment would be "detrimental to the surrounding community," and no subsequent governor has determined that it would not be detrimental to the surrounding community. As catalogued in former Governor Davis' July 17, 2001 letter, Ex. M, to the Acting

Superintendent of the BIA, and Governor Schwarzenegger's September 10, 2004, Ex. N, letter to Clayton Gregory, Pacific Regional Director of the BIA, their determination that such a gaming establishment would be detrimental to the surrounding community is also shared by the local government officials, including United States Representative Duncan Hunter, then California State Senator David G. Kelley, then State Assemblyman, now Senator Jay La Suer, the County of San Diego Board of Supervisors, Otay Water District, the Jamul/Dulzura Planning Group, the Sierra Club, the Endangered Habitats League, the Back Country Coalition, not to mention several thousand residents of Jamul. See, Ex. AA.

81. As both Governors Davis and Schwarzenegger inescapably concluded: the "proposal is inconsistent with the Multiple Species Conservation Plan, established by the United States Fish and Wildlife Service, the State Department of Fish and Game and the County of San Diego, restrictions on development and presents a serious threat to the viability of a significant portion of the State's recently acquired ecological reserve." "...here, there are significant potentially unmitigable adverse impacts on sensitive State resources..." "...The Bureau's own rules, likewise, compel rejection of this application. In this case, the ...proposed use represents a paradigm for the kind of land use conflicts which the Bureau should not permit to occur..." "...it unnecessarily threatens to degrade significant State environmental resources and is thus inimical to the public health and welfare. We believe that a fair balancing of ...interests in this instance requires that the Bureau deny the... application at this time." Exs. M & N.

82. Therefore, since the government's portion of the Indian cemetery has never been taken into trust for any tribe, nor transferred to any tribe, any subsequent acquisition by the United States, through purchase or condemnation of the property, in trust for a tribe, will be after October 17, 1988, and does not have the state's consent to cede jurisdiction to the United States, the land still will not qualify for gambling under IGRA, since, as noted above, the Governor has not concurred in a Secretarial determination that "a gaming establishment on newly acquired lands would not be detrimental to the surrounding community." 25 U.S.C. 2719(b)(1)(A).

83. California's trust law and concurrent jurisdiction also govern the enforcement of Rosales and Toggery's beneficial interest in the grant deed for the government's portion of the Indian cemetery.

84. The power of the State to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a ...disposition of it may be exercised by its owners, is undoubted. It is an established principle of law, everywhere recognized, arising from the necessity of the case, that the disposition of immovable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated...The title and modes of disposition of real property within the State, whether *inter vivos* or testamentary, are not matters placed under the control of Federal authority. Such control would be foreign to the purposes for which the Federal government was created, and would seriously embarrass the landed interests of the State." *United States v. Fox*, 94 U.S. 315, 320-21 (1877).

85. "The *Fox* case is only one of a long line of cases which have consistently held that part of the residue of sovereignty retained by the states, a residue insured by the Tenth Amendment, is the power to determine...who may be made beneficiaries," of a deed to the United States. *United States v. Burnison*, 339 U.S. 87, 91-92 (1950).

86. Hence, Rosales and Toggery's beneficial interest in the government's portion of the Indian cemetery remains subject to California's trust and estates law, particularly since it is undisputed that the Secretary of the Interior has yet to approve the acquisition of the property in trust for the JIV, pursuant to the government's land acquisition regulations. 25 C.F.R. 151.3. which provide: "No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary."

87. Moreover, since the Indian cemetery remains within the concurrent jurisdiction of the State of California today, and was never reserved from the public or private domain, California retains State and local police power over the cemetery pursuant to the 10th Amendment of the U.S. Constitution and Pub. Law 280, 18 U.S.C. 1162 and 28 U.S.C. 1360.

88. Criminal conduct by Indians which causes injury remains within California jurisdiction, 18 U.S.C. 1162, 28 U.S.C. 1360, and will be deemed the proximate cause of an injury, thereby superseding any prior negligence which might otherwise be deemed a contributing cause. *Koepke v. Loo,* 18 Cal.App.4th 1444, 1449 (1993). This is the same criminal jurisdiction California has if one of the columbariums at Fort Rosecrans Nat'l Cemetery was vandalized and disinterred a veteran's remains from its niche.

89. Thus, the Cal. Pub. Res., Health & Safety Codes and CEQA, concurrently govern the use of the Jamul Indian cemetery, along with the federal NAGPRA, 25 U.S.C. 3001 et seq., which defines

the portion of the cemetery in which the U.S. holds title, as "Federal lands other than tribal lands which are controlled or owned by the United States." 25 U.S.C. 3001(5) and 43 C.F.R. 10.2(f)(1) and 10.4(d).

90. Furthermore, federal regulations, 25 C.F.R. 1.4(b), and the DOI July 2, 1965 Secretarial Order, 30 F.R. 8722, adopted and made applicable "all of the laws, ordinances, codes, resolutions, rules or other regulations of the State of California, now existing or as they may be amended or enacted in the future, limiting, zoning, or otherwise governing, regulating or controlling the use or development of any real or personal property, including water rights, leased from or held or used under agreement with and belonging to any Indian...that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States and located within the State of California."

G. Defendants' Desecration of Rosales & Toggery's Families' Human Remains and Funerary Objects

91. More than 20 eyewitnesses have testified to Rosales and Toggery's families' interment on the cemetery property, and the undeniable evidence that the Defendants have illegally disinterred and dumped Rosales and Toggery's families' human remains and funerary objects on a State highway project at the juncture of State Routes 11-125-905 on the Mexican border, in declarations on file in *Rosales et al. v. CalTrans et al.,* San Diego Superior Court Case No. 2014-00010222.

92. Before any excavation of the cemetery parcel, Rosales and Toggery continuously and repeatedly put all persons, including the Defendants, the California Attorney General, the Native American Heritage Commission, the San Diego County Coroner, the California Victim Compensation and Government Claims Board, U.S. District Courts for the District of Columbia and So. California, and the San Diego Superior Court, on written notice of:

(A) Their ownership and control, as lineal descendants, of their deceased Native American family members' human remains, and the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in P.R.C. 5097.9-5097.99, NAGPRA, 25 U.S.C. 3002, and its regulations, 43 C.F.R. 10.1-10.17, that for more than 100 years have been inhumed, interred and deposited in burial sites below, on and above, the Indian cemetery on which they lived; and

(B) Their preference, as lineal descendants, to leave their families' human remains and funerary objects in place, as required by P.R.C. 5097.98, the CEQA Guidelines, 14 Cal. Code Regs. 15126.4 (b)(3), and NAGPRA, 25 U.S.C. 3002, and its regulations at 43 C.F.R. 10.1-10.17.

93. On March 10, 2014, the California Victim Compensation and Government Claims Board received Plaintiffs claims, and on March 11, 2014, notified Plaintiffs that the Board found: "Based on its review of [Plaintiffs'] claim, Board staff believes that the court system is the appropriate means for resolution of these claims, because the issues presented are complex and outside the scope of analysis and interpretation typically undertaken by the Board...The Board's rejection of your claim will allow you to initiate litigation should you wish to pursue this matter further."

94. Such notice has been published in the records of the Catholic Diocese, newspapers of general circulation, letters to CalTrans, the records and files of the San Diego Superior Court and in the Public Access to Court Electronic Records. In addition, the recorded declaration by the Coronado Beach Company and the Catholic Diocese provided constructive notice to all persons of the dedication of the cemetery property to cemetery purposes, pursuant to H.S.C. 8551-8558, which dedication shall not be affected by any alienation of the property or nonuse, except as provided by H.S.C. 8550-8561, which has not occurred here.

(1) California Health & Safety, Public Resources and Penal Code Violations

95. Despite such express notice, Defendants commenced operations on February 10, 2014, and conducted grading, operation of heavy equipment, moving and hauling dirt and/or gravel and other construction activities, excavated and removed Rosales and Toggery's families' human remains and funerary objects, causing them to be illegally dug up and deposited on state property owned and controlled by CalTrans in violation of the following California statutes:

Health and Safety Code, "H.S.C.," §§:

> 7050.5 & 7052, both provide that mutilation, disinterment, and wrongful removal of human remains is a **felony**, and prohibit further excavation or disturbance of the site or any nearby area reasonably suspected to overlie adjacent remains until the lineal descendants preference for "preservation of the Native American human remains and associated items in place," has "been made to the person responsible for the excavation, in the manner provided in Section 5097.98 of the Public Resources Code,"

7054, providing that disposal of human remains in any place except a cemetery is a misdemeanor,

7054.6, prohibiting removal of cremated human remains kept in or on the property owned and occupied by anyone who is a person in control of the disposition of remains without their consent, and without the authority of a permit for disposition granted under Section 103060,

7054.7, prohibiting commingling remains without express written consent of the lineal descendants,

7055, prohibits removal of remains out of the district in which the death occurred without a permit,

7500, prohibiting removal of remains without an order of the health dept. or superior court,

8011, without applying state's **repatriation** policy with NAGPRA,

8015-16, requiring upon demand the agency **shall repatriate** human remains,

Public Resources Code, "P.R.C.":

5097.5 prohibiting excavation of historic burial grounds,

5097.7 providing for forfeiture of vehicle and equipment used to excavate historic burial grounds,

5097.9 prohibiting public agency from interfering with Plaintiffs' free exercise of religion, and damage to a sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property,[9]

5097.94 mandatorily providing that **the court shall issue an injunction** to prevent irreparable damage to and assure access to a sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, unless there is clear and convincing evidence, that the public interest and necessity require otherwise,

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[9] Here, by virtue of the Plaintiffs' families' burials and the landowners' acquiescence for more than 100 years, the Church, the State and the federal government are estopped to deny that a Native American sanctified cemetery, place of worship, religious and ceremonial site, and sacred shrine, as defined by P.R.C. 5097.9, and H.S.C. 7003-4, and 8558, 8560, 8580, have been located at the cemetery, now on State property partially owned by the federal government as a private proprietor, and within the concurrent jurisdiction of both California and the U.S.

5097.94(k) providing for **mediation**, **upon application of either of the parties**, disputes arising between landowners and known descendents relating to the treatment and disposition of Native American human burials, skeletal remains, and items associated with Native American burials. The agreements shall provide protection to Native American human burials and skeletal remains from vandalism and inadvertent destruction and provide for sensitive treatment and disposition of Native American burials, skeletal remains, and associated grave goods consistent with the planned use of, or the approved project on, the land.

5097.97 providing for investigation of any Native American's claim that a sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property has been irreparably damaged,

5097.98 providing upon the discovery of Native American human remains, which may be an **inhumation or cremation and in any state of decomposition** or skeletal completeness, and any items associated with the human remains, **the landowner shall ensure that the immediate vicinity** according to generally accepted cultural or archaeological standards or practices where the Native American human remains are located, **is not damaged or disturbed** by further development activity and shall confer with the most likely descendants as to their preference to **preserve the remains "in place,"** and that **any items associated** with the human remains that are placed or buried with the Native American human remains are **to be treated in the same manner as the remains**.

5097.98(e)(f) Where the parties are unable to agree on the appropriate treatment measures, the human remains and items associated and buried with Native American human remains **shall be reinterred** with appropriate dignity...**in a location not subject to further and future subsurface disturbance**.

5097.99 providing that **possession of Native American human remains without an agreement** treating or disposing, with appropriate dignity, of the human remains and any items associated with Native American burials is a **felony**,

5097.991 providing it is the policy of the state that Native American remains and associated grave artifacts shall be **repatriated**,

5097.993 providing that anyone unlawfully excavating upon, removing, destroying, injuring, or defacing a Native American burial ground on public or private land is guilty of a misdemeanor and subject to a fine of $50,000 for each violation;

and Penal Code section 487, grand theft.

96. No permit has been posted by Defendants to excavate soil from the cemetery and deposit it on state property owned and controlled by CalTrans; nor have they notified the San Diego County coroner of their intent to disturb human remains on the site and any nearby area reasonably suspected to overlie adjacent human remains, as required by H.S.C. 7050.5, and ARPA, 16 U.S.C. 470aa et

seq., and 43 C.F.R. 10.3(b)(1).

97. No permit required by H.S.C. 7500 et seq., has been posted at the cemetery or the state property owned and controlled by CalTrans on which excavated soil from the cemetery has been deposited, for anyone to grade, excavate, damage, disinter, remove or otherwise alter or deface, or attempt to grade, excavate, damage, disinter, remove or otherwise alter or deface, human remains or funerary objects from the cemetery. Nor can any such permit be granted, without the consent of the closest lineal descendants owning and controlling the human remains and funerary objects, which consent Rosales and Toggery, who are the owners of their families' human remains and funerary objects, have not granted.

98. Furthermore, no permit required by Title 25 U.S.C. 3002(c) and 16 U.S.C. 470cc has been posted by any federal land manager on the property for anyone to grade or excavate the Indian cemetery parcel upon which a casino is illegally being built. Nor can any such permit be granted by any federal land manager under 16 U.S.C. 470cc, without the consent of all of the Indian beneficial owners, which consent Rosales and Toggery have not granted.

99. Defendants also failed to obtain the appropriate permits from the San Diego Coroner and/or obtain the necessary judgment from a Superior Court authorizing the removal and disposition of Rosales and Toggery's families' remains, and any disuse of the government's portion of the Indian cemetery, required by H.S.C. 7050.5, 7500 and 8580, and P.R.C. 5097.98 and 5097.99.

100. Furthermore, Defendants' knowing mutilation, disinterment, wanton disturbance, excavation and willful removal of such human remains by grading, operation of heavy equipment, moving dirt and/or gravel, and other construction activities, and dumping of the excavated soils from the cemetery on state property owned and controlled by CalTrans, without authority of law is a crime, under H.S.C. 7050.5, and any person willfully mutilating or disinterring any remains known to be human without authority of law is guilty of a felony, under H.S.C. 7052, as is anyone obtaining or possessing, or who removes with malice or wantonness, and without authority of law, any Native American artifacts or human remains from a Native American grave or cairn, pursuant to P.R.C. 5097.99, and any person who deposits or disposes of any human remains in any place, except in a

cemetery, is guilty of a misdemeanor, pursuant to H.S.C. 7054.

101. P.R.C. 5097.98, further provides that upon notice and recognition of the presence of Native American human remains, which may be an inhumation or cremation, and in any state of decomposition or skeletal completeness, the landowner is obligated to ensure that the immediate vicinity, according to generally accepted cultural or archaeological standards or practices where the Native American human remains are located, is not damaged or disturbed by further development activity, so long as the lineal descendants' preferences are to preserve the Native American human remains and associated items in place, and that any items associated with the human remains that are placed or buried with the Native American human remains are to be treated in the same manner as the remains.

102. Here, Rosales and Toggery's preferences are to preserve their families' Native American human remains and associated cultural items "in place," as the lineal descendants' with ownership and control of their predecessors' human remains and associated cultural items, pursuant to NAGPRA, 25 U.S.C. 3002, 43 C.F.R. 10.1-10.17, and the directives of the National Center for Cultural Resources and the National NAGPRA Program, Ex. W, P.R.C. 5097-5097.994, H.S.C. 7100, and CEQA and its *Guidelines*. Cal. Code Regs., tit. 14, § 15000 et seq., developed by the Office of Planning and Research and adopted by the Resources Agency. P.R.C. 21083; *id.*, former 21087. "[C]ourts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA." *Laurel Heights Improvement Assn. v. Regents of University of California,* 47 Cal.3d 376, 391, fn.2 (1988).

103. The Defendants have violated the CEQA Guidelines and the directives of the National Center for Cultural Resources and the National NAGPRA Program, as published on its website, http://www.cr.nps.gov/nagpra/, copies of which are attached as Exhibit W, and Cal. Pub. Res. Code 5097.98, as amended September 30, 2006, since the U.S. is the undisputed title owner of the land where the Native American human remains (which may be an inhumation or cremation and in any state of decomposition or skeletal completeness) were discovered, identified, excavated and removed, and since they have failed to stop work and ensure that the immediate vicinity, according to generally accepted cultural or archaeological standards or practices where the Native American

human remains are located, is not damaged or disturbed by further development activity, where, as here, the lineal descendants' preferences are to preserve the Native American human remains and any items associated with the human remains that are placed or buried with the Native American human remains, in place.

104. The California Environmental Quality Act Guidelines also provide that preservation in place is the preferred manner to mitigate impacts on historic archaeological resources, including human remains and their associated funerary objects, since preservation in place maintains the relationship between artifacts and the archaeological context, and avoids conflict with religious or cultural values of groups associated with the site. 14 Cal. Code Regs. 15126.4(b)(3). Preservation in place is accomplished by planning construction to avoid archaeological sites and deeding the site into a permanent conservation easement. 14 Cal. Code Regs. 15126.4(b)(3)(B)1 and 4; see also 14 Cal. Code Regs. 15064.5(e).

(2) NAGPRA Violations

105. The Defendants have also violated NAGPRA, 25 U.S.C. 3001 et seq., and its regulations, 43 C.F.R. 10.1-17, by failing to cease all forms of construction activity in connection with an on-going activity, where there has been a discovery, identification, excavation and removal of Native American human remains and funerary objects, as here, without a prior written plan of action on Federal lands. The Defendants have also violated the statute and its regulations by failing to cease all activity in the area of the identification of the human remains, failing to make reasonable efforts to protect the items discovered before resuming such activity, and failing to provide written notice to the lineal descendants, consultation with known lineal descendants, and a written plan of action for disposition and repatriation, including the kinds of objects considered cultural items; the planned treatment, care, and handling, including traditional treatment, of human remains and other cultural items; the place and manner of delivery of Plaintiffs' families' human remains and funerary objects, as required by 25 U.S.C. 3002(d) and 43 C.F.R. 10.2(f), 10.2(g)(4), 10.4(b), 10.4(c), 10.4(d) and (e), 10.5, 10.6 and 10.10.

106. Here, where "the discovery [of human remains] occurred in connection with an activity,

including (but not limited to) construction, mining, logging, and agriculture," the Defendants have failed to "cease the activity in the areas of the discovery, make a reasonable effort to protect the items discovered before resuming such activity, and provide notice under this subsection," in violation of 25 U.S.C. 3002(d)(1). Moreover, the work may not resume, until the remains and funerary objects are properly protected as required by section 43 C.F.R. 10.4(d) and 10.6, where, as here, the Defendants have failed to secure and protect the human remains and funerary objects, including stabilizing and covering them, in the first place. *San Carlos Apache Tribe v. U.S.*, 272 F. Supp. 2d 860, 888-90 (D. Ariz. 2003), and *Yankton Sioux Tribe v. U. S.(Army Corps of Engineers)*(*Yankton Sioux I*), 83 F.Supp.2d 1047, 1057 (D. S.D. 2000), *Yankton Sioux II*, 209 F. Supp.2d 1008, 1021-22 (D.S.D. 2002), and *Yankton Sioux III*, 258 F. Supp.2d 1027, 1032-5 (D.S.D. 2003).

> 107. The [Army] Corps [of Engineers] was required to comply with the notice, certification, and consultation provisions of the NAGPRA regarding the discovery of the cemetery and its contents...As the federal agency responsible for managing the site, it must 'further secure and protect the inadvertently discovered human remains, including where necessary, stabilizing and covering.' *Yankton Sioux I,* at 1057.

108. In the *Yankton Souix* trilogy, the State of South Dakota and its contractors were developing 100 camping spots, new roads, comfort stations, parking lots and dumping stations at the North Point Public Recreation Area at Lake Francis Case.

> 109. The Court notes that all persons conducting construction activities at North Point must comply with NAGPRA as to *each* inadvertent discovery of Native American human remains [and] funerary objects...In addition, *each* inadvertent discovery of Native American cultural items will require compliance with the protection, notification, certification and consultation duties imposed by NAGPRA and its implementing regulations. *Yankton Sioux II*, 209 F Supp.2d 1008, 1025-26.

110. Here, Defendants knew that Rosales and Toggery's families' human remains and funerary objects were being unlawfully and intentionally excavated and removed from the cemetery parcel, and the Defendants failed to: (a) obtain the required Archaeological Resources Protection Act (ARPA) permit from the Deputy Commissioner of Indian Affairs at the BIA, as required by 43 C.F.R. 10.3(b) and 10.4(d)(1)(v), *San Carlos Apache Tribe v. U.S.* 272 F. Supp. 2d 860, 888-90, citing *Yankton Sioux I* 83 F. Supp.2d at 1057; (b) provide written notice to, consult with or, obtain

the consent of, the lineal descendants to the Federal agency's proposed treatment of the human remains, funerary objects, sacred objects, or objects of cultural patrimony to be excavated, and the proposed disposition of any human remains, funerary objects, sacred objects, or objects of cultural patrimony, and failed to provide a list of all lineal descendants that are being, or have been, consulted regarding the particular human remains, funerary objects, sacred objects, or objects of cultural patrimony, pursuant to 43 C.F.R. 10.5; (c) prepare and provide a written plan of action to the lineal descendants that establishes custody, treatment, care, and handling of human remains and funerary objects, and disposition of the remains and objects consistent with their custody as required by 43 C.F.R. 10.5 and 10.6; and (d) prove the consultation or consent was shown to the Federal agency official responsible for the issuance of the required permit, in violation of 43 C.F.R. 10.3(b), 10.4(d)(1)(v) and 10.4(e)(iii), and 43 C.F.R. 10.4(d)(1)(vi) and 10.4(e)(iv).[10]

111. Here, the Defendants further failed to comply with 43 C.F.R. 10.4(c), which provides, where the federal official is given notice of the Native American human remains and funerary objects, for which no plan of action was developed prior to the discovery, in connection with an on-going activity on Federal lands, the person in addition to providing the notice required by 25 U.S.C. 3002(d)(1), must stop the activity in the area and make a reasonable effort to protect the human remains, funerary objects, sacred objects, or objects of cultural patrimony.

112. The Defendants further failed to comply with 43 C.F.R. 10.4(d)(1), and (ii) and (e)(1) and (ii), which provides, as soon as possible, but no later than three days after receipt of the written confirmation of notification of the Native American human remains by the federal official, for which no plan of action was developed prior to the notification, the responsible Federal agency official must take immediate steps, if necessary, to further secure and protect the human remains, funerary

[10] *Yankton Sioux II & III*' injunctions were based upon 43 C.F.R.: "10.4 governing inadvertent discoveries explicitly incorporates the requirements of 10.3(b) [which requires an ARPA permit, notification of, and consultation with, lineal descendants and a written plan for disposition and repatriation] if the inadvertently discovered remains must be excavated or removed. See 43 C.F.R. 10.4(b)(1)(v);" 209 F. Supp.2d 1008, 1021. *Yankton Sioux II* reserved judgment for a permanent injunction, and a continuing injunction against construction was granted as to the site where the human remains were interred in *Yankton Sioux III*, "the Court will order that no further excavation, building or other construction activities be conducted in Area A..." 258 F. Supp.2d at 1034.

objects, sacred objects, or objects of cultural patrimony, including, as appropriate, stabilization or covering on Federal lands. See, *San Carlos Apache Tribe v. U.S.* 272 F. Supp. 2d 860, 888-9 (D. Ariz. 2003).

113. None of this was done. No federal agency official has taken any steps, let alone immediate steps, to protect Rosales and Toggery's families' human remains and funerary objects. The Defendants have further failed to provide written notice and a plan of action that documents the traditional treatment of human remains and other cultural items; the planned treatment, care, and handling, including the nature of reports to be prepared, as required by 43 C.F.R. 10.3(b)(1) for a permit to be issued by the Bureau of Indian Affairs under 16 U.S.C. 470aa et seq.; and the planned disposition of human remains, funerary objects, sacred objects, or objects of cultural patrimony as required by 43 C.F.R. 10.6. The "...lack of [written] notice may [alone] support the issuance of a permanent injunction regarding the notice requirements." *Yankton Sioux II* , 209 F. Supp.2d 1008, 1020 (D.S.D. 2002).[11]

114. The Defendants failed to initiate the consultation with the lineal descendants required in 43 C.F.R. 10.4(d)(iv). As noted in *Yankton Sioux I* at 1055-58, no one is allowed to conduct construction activity in the area of a discovery, identification, excavation and removal of human remains, until the federal agency "has consulted with possible lineal descendants and other tribes whose members might be buried at the site, and used that consultation to develop a written plan of action. See 43 C.F.R. 10.3(b); 43 C.F.R.10.4(d)(1)(v)."

115. The Defendants further failed to comply with 43 C.F.R. 10.6, by failing to transfer physical custody of the discovered human remains, funerary objects, sacred objects, or objects of cultural

[11] See for e.g., the May 1, 2003 Draft Agreement for Consultation, Treatment and Disposition of Human Remains and Cultural Items that may be Discovered Inadvertently During Planned Activities at the Statute of Liberty between DOI, National Park Service and the Delaware Nation and the Stockbridge-Munsee Community of Wisconsin, at 2-3, which states: "The Park and the Tribes agree that the preferred treatment of inadvertently discovered human remains and cultural items is to leave the human remains and cultural items *in-situ* and protect them from further disturbance...If the remains and cultural items are left *in-situ*, no disposition takes place and the requirements of 43 C.F.R. 10.3-10.6 will have been fulfilled. The specific locations of discovery shall be withheld from disclosure (with the exception of local law enforcement officials and tribal officials as described above) and protected to the fullest extent allowed by federal law." Ex. T.

patrimony to Rosales and Toggery as the lineal descendants, following appropriate procedures, which must respect traditional customs and practices, after thirty days notice to the lineal descendants. They further failed to publish the required notices two times at least a week apart, of the proposed disposition in a newspaper of general circulation in the area in which the human remains, funerary objects, sacred objects, or objects of cultural patrimony were discovered, and failed to solicit further claims to custody, prior to disposition. The Federal agency official then failed to send a copy of the notice and information on when and in what newspaper(s) the notice was published to the Manager of the National NAGPRA Program.

116. The federal Defendants have also violated the directives of the National Center for Cultural Resources and the National NAGPRA Program, as published on its website,[12] along with P.R.C. 5097.98, since the U.S. is the undisputed title owner of the land where the Native American human remains (which may be an inhumation or cremation and in any state of decomposition or skeletal completeness) were interred, and since they have failed to stop work and ensure that the immediate vicinity, according to generally accepted cultural or archaeological standards or practices where the Native American human remains are located, is not damaged or disturbed by further development activity, where, as here, the lineal descendants' preferences are to preserve the Native American human remains and any items associated with the human remains that are placed or buried with the Native American human remains, in place.[13]

117. The Defendants further failed to comply with 43 C.F.R. 10.10, by failing to repatriate Rosales and Toggery's lineal descendants' human remains and associated funerary objects as they have requested. The repatriation of human remains, funerary objects, sacred objects, or objects of cultural patrimony must be accomplished by the Federal agency in consultation with the requesting lineal

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[12] http://www.nps.gov/nagpra/MANDATES/INDEX.HTM; see for e.g.: http://www.nps.gov/nagpra/TRAINING/SubpartB_Overview.pdf; http://www.nps.gov/nagpra/TRAINING/Discovery_Tribal_Lands.pdf. Ex. W.

[13] See for e.g., the May 1, 2003 Draft Agreement for Consultation, Treatment and Disposition of Human Remains and Cultural Items that may be Discovered Inadvertently During Planned Activities at the Statute of Liberty between DOI, National Park Service, the Delaware Nation and the Stockbridge-Munsee Community of Wisconsin, at 2-3, maintaining the lineal descendants' preferences that the human remains and associated items remain in place. Ex. V.

descendants, as appropriate, to determine the place and manner of the repatriation. 43 C.F.R. 10.10. None of which has been done here.[14]

> 118. ...[T]he regulations' concern for the traditional treatment of Native American human remains and funerary objects, see 43 C.F.R. 10.5(e)(7), and (g), suggests that the [Army] Corps should be sensitive to any desire of the...members to perform the actual recovery of the remains and the ...requests for treating the remains with dignity until final custody of the remains can be determined. *Yankton Sioux I* at 1059.

> 119. The process necessary for legally and culturally proper reburial should be continuing even as this lawsuit progresses, and no further excavation, building or other construction activities [shall] be conducted...until...the human remains and funerary objects inadvertently discovered...are properly buried according to law and the customs of the peoples culturally affiliated with those remains and objects...The other issues raised in this litigation can be decided after the human remains and funerary objects have been properly reburied. *Yankton Sioux II* at 1025.

120. The government's fiduciary duty and general trust responsibility over Native Americans compels the enforcement of the NAGPRA regulations against any third parties who are mutilating, desecrating, disinterring, excavating and removing Rosales and Toggery's families' human remains and funerary objects, and further compels restraining such third parties from excavation, operation of heavy equipment, movement and hauling of dirt and gravel, or any other construction activities on the site of all burial grounds, human remains, and associated funerary objects, until the remains and funerary objects are properly protected as required by NAGPRA and its regulations. *Yankton Sioux I,* at 1057, *Yankton Sioux II*, at 1021-22, and *Yankton Sioux III*, at 1032-5; *San Carlos Apache Tribe v. U.S.* 272 F. Supp. 2d 860, 888-90 (D. Ariz. 2003).

121. The government's trust responsibility over Native Americans ensures that federal law protects both the majority and minority of a half-blood Indian community's members. "The Secretary of the Interior is charged not only with the duty to protect the rights of any tribe, but also the rights of individual members. And the duty to protect these rights is the same whether the infringement is by nonmembers or by members of the tribe." *Seminole Nation of Okla. v. Norton*, 223 F. Supp.2d

[14] See, the detailed descriptions required for the human remains and cultural items being repatriated in the Notice of Intent to Repatriate Cultural Items in the Possession of the San Diego Museum of Man, published in 64 Fed. Reg. 56,219 (October 18, 1999), 69 Fed. Reg. 4315 (January 29, 2004), 69 Fed. Reg. 4316 (January 29, 2004), at Ex. X. Currently, the National NAGPRA Program of the National Park Service has published 50,518 such notices of repatriated human remains and 1,185,948 repatriated associated funerary objects, since NAGPRA was adopted in 1990. http://www.nps.gov/nagpra/FAQ/INDEX.HTM#Discovery.

122, 137-38, 146-47 (D.D.C. 2002); *Milam v. United States*, 10 Indian Law Reporter ("ILR") 3013, 3017 (D.D.C. Dec. 23, 1982).[15] The government is not allowed "to be guided by the results it favors in its relationship with Indian tribes..." *Seminole* at 137-38, 146-47; *Milam*, at 3017. See also, *Thomas v. United States*, 141 F. Supp.2d 1185, 1203 (W.D. Wisc. 2001).

122. In discharging this trust duty, federal courts hold the United States to the highest fiduciary standard to take "all appropriate measures for protecting" individual Indian interests. *U.S. v. Creek Nation,* 295 U.S. 103, 109-10 (1935); *Osage Tribe of Indians of Okla. v. U.S.*, No. 99-550 L, (Ct. Fed. Cl. 2006), quoting *Coast Indian Cmty. v. U.S.*, 550 F2d 639, 652 (Ct. Cl. 1977)("the United States must be held to the 'most exacting fiduciary standards' in its relationship with the Indian beneficiaries." "The 'standard of duty for the United States...is not mere 'reasonableness' but the highest fiduciary standards.'" *Minn. Chippewa Tribe v. U.S.*, 14 Cl. Ct. 116, 130 (1987); *U.S. v. Mason*, 412 U.S. 391, 398 (1973); *Duncan v. U.S.*, 667 F.2d 36, 45 (Fed. Ct. Cl. 1981)(citing *Coast, supra*).

(3) Plaintiffs' Continuing Irreparable Damage

123. Defendants' knowing and wilful grading, excavation, demolition, operation of heavy equipment, moving dirt and/or gravel, and other construction activities, have been mutilating, disinterring, wantonly disturbing, intentionally excavating, willfully removing Rosales & Toggery's families' human remains and funerary objects, and dumping them on state property owned and controlled by CalTrans, in breach of their duty of care, have thereby caused, and will continue to cause, unless enjoined, severe and irreparable physical and bodily injury, including severe emotional distress and personal injury damages to Rosales and Toggery and their families' human remains, along with the items associated therewith, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in, and

[15] Thus here, where both the propriety of non-tribal third parties efforts to co-opt an Indian community's affairs and "the acts of federal officials in approving" such an action," are in question, the matter is not insulated from federal court review. *Milam*, at 3015, citing *Harjo v. Kleppe*, 420 F. Supp. 1110, 1117 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978); *U.S. v. Pawnee Business Council*, 382 F. Supp. 54, 59 (N.D. Okla 1974). "As trustee, the United States is charged with the responsibility of safeguarding, from both external and internal threats...the political rights of Indians." *Milam* at 3015.

prohibited by, H.S.C. §§7050.5, 7052, 7054, 7054.6, 7054.7, 7055, 7500, 8011, 8015-16, P.R.C. 5097.9-5097.99, Penal Code 487, NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, and the general trust responsibility of the federal Defendants over Indians, in an amount in excess of $4 million, subject to proof at trial.

124. Defendants' knowing and wilful grading, excavation, demolition, operation of heavy equipment, moving dirt and/or gravel, and other construction activities, have been mutilating, disinterring, wantonly disturbing, intentionally excavating, and willfully removing Rosales & Toggery's families' human remains and funerary objects, and dumping them on state property owned and controlled by CalTrans, in breach of their duty of care, has also caused and will continue to cause, unless enjoined, irreparable damage to, and interference with, the Plaintiffs' free expression and exercise of Native American religion as provided in the United States Constitution and the California Constitution, and has caused and shall continue to cause, unless enjoined, severe and irreparable damage to the Plaintiffs' Native American sanctified cemetery, place of worship, religious or ceremonial site, and sacred shrines located on said parcels, in an amount in excess of $4 million dollars, subject to further proof at trial.

125. Such acts will also unduly interfere with the Plaintiffs' civil rights to due process and equal protection of the laws. Plaintiffs will be greatly and irreparably damaged by reason of Defendants' infringement and violation of these civil rights, and unless Defendants are enjoined by this court, said acts will further violate Plaintiffs' civil rights, and further irreparably harm the Plaintiffs.

126. Defendants' conduct has created what the California Supreme Court describes as "liability for the serious emotional distress caused by such egregious, but clandestine, misconduct," which caused "Plaintiffs to suffer physical injury, shock, outrage, extreme anxiety, worry, mortification, embarrassment, humiliation, distress, grief and sorrow." *Christensen v. Sup. Ct.* (1991) 54 Cal.3d 868, 887.

127. These "statutes governing the disposition of human remains exist not only to ensure removal of dead bodies and protect public health, but also to prevent invasion of the religious, moral, and esthetic sensibilities of the survivors. These laws were enacted to prevent the type of harm alleged

here to the statutory rights holders, and create a duty to those persons....If, under the circumstances, [one Defendant] should have foreseen that the [other defendants] would violate the law, then its conduct may be found to be negligent per se." These statutes "reflect a policy of respecting the religious, ethical, and emotional concerns of close relatives and others having an interest in assuring that the disposition of human remains is accomplished in a dignified and respectful manner." "A policy of respecting religious beliefs with regard to the disposition of human remains is manifest." *Christensen v. Sup. Ct.* (1991) 54 Cal.3d 868, 893-94, 896, 897.

128. "Similar recognition that the sensibilities of all survivors merit protection is found in...[H.S.C.] Section 7050.5 [which] prohibits desecration of human buried remains, and makes special provision for proper disposition of Native American remains discovered during an excavation. The Legislature's findings include express recognition of Native American 'concerns regarding the need for sensitive treatment and disposition' of such remains. (Stats. 1982, ch. 1492, §1. Subd. (2) p. 5778)." *Christensen v. Sup. Ct.* (1991) 54 Cal.3d 868, 897.

129. Breach of these statutory duties "cause[s] mental anguish to the decedent's bereaved relations...in their most difficult and delicate moments...[t]he exhibition of callousness or indifference, the offer of insult and indignity, can of course...visit agony akin to torture on the living....The tenderest feelings of the human heart center around the remains of the dead." *Christensen* at 895, citing *Allen v. Jones*, 104 Cal.App.3d 207, 211 (1980).[16]

(4) Plaintiffs' Irreparable Damage Will Continue Unless Enjoined

130. To prevent such wrongful conduct of the defendants as herein alleged, Plaintiffs are entitled to a temporary, preliminary and permanent injunction to prevent great and irreparable injury resulting from the infringement and violation of these personal and civil rights, from the likelihood that damages cannot properly compensate Plaintiffs for such irreparable personal harm, and that

[16] See for e.g., The Inter-Tribal Council of the Five Civilized Tribes of the Chickasaw, Choctaw, Cherokee, Muscogee (Creek) and Seminole Nations, representing 750,000 blood descendants condemning the Poarch Creek Band of Creek Indians' desecration of the Hickory burial ground, and the former Vice Chair of the Okla. Indian Affairs Comm., Dan Jones,' "You'll Mock Death But Once," *Indian Country Today*, August 20, 2012. Exs. S and T.

Defendants will be unable to respond in damages, and from the difficulty or impossibility to ascertain the exact amount of personal bodily injury and personal property damage Plaintiffs have sustained, and will in the future sustain. These ongoing and continuing injuries sustained by Plaintiffs cannot be fully compensated in damages and Plaintiffs are without an adequate remedy at law without the imposition of the requested equitable injunctive relief.

131. In *Yankton Sioux II and III*, the Courts granted both a preliminary and permanent injunction to maintain the status quo, which included "that the Court order defendants to cease all construction activity at location A [the site of the human remains]," based upon: (1) the threat of irreparable harm to the plaintiffs' human remains and funerary objects from construction activities at the site of their discovery; (2) the balance of harm tipping in favor of the plaintiffs given the inherently sensitive nature of the human remains and funerary objects, and the minimal harm to the third party State contractors, and the fact that there could be no harm to the Federal defendants since they were already compelled to comply with NAGPRA; (3) the fact that it was probable that plaintiffs would prevail "on at least some of their NAGPRA claims," since, as here, the government was wrong to assert that it need not comply with the requirements of 10.3(b) with regard to discoveries of human remains, which ultimately supported a permanent injunction restraining construction at the site of the human remains; and (4) the public interest, since Congress directed the protection of such Native American cultural items in NAGPRA, given the plaintiffs' beliefs about how disturbance of the families' remains affects plaintiffs' lives. 209 F. Supp.2d 1008, 1022-24, and 258 F. Supp.2d 1027, 1032-34.

132. See also, *Center for Biological Diversity v. Dept. of Fish & Wildlife,* 2014 Cal.App. LEXIS 256 (2014), DFW and the developer were enjoined until an environmental impact report was prepared and complied with the CEQA *Guidelines*, 14 Cal. Code Regs. §15126.4(b)(3)(A), (b)(3)(B)1 and 4, and 15064.5(e), requiring the preservation of human remains "in place." There, development was barred within a 100 foot buffer around the remains preserved in place, and there was an "immediate cessation of grading," and the human remains were required to be "handled or treated consistent with §5097.98 and *Guidelines* §15064.5(e)." *Id.,* *117. In *Ballona Wetlands Trust v. City of Los Angeles*, 201 Cal.App.4th 455, 469 (2011), a writ of mandate vacated the City's

certification of the EIR and its project approvals and ordered the EIR revised for failure to discuss preservation "in place" as a means to mitigate the significant effects on human remains.

133. San Diego Superior Court Judge Judith Hayes granted similar injunctive relief against Padre Dam Municipal Water District's $20 million reservoir and pumping station project because it would violate the P.R.C. and H.S.C., and was needed to prevent severe irreparable damage and desecration to the original Capitan Grande Band's sacred burial site. The water district was ordered to find an alternative site for the project, despite the fact that delay was costing $150,000 per month, and finding another site would add $10 million to the cost, and would likely force the district to drop the project. Although the pumping station would have benefitted the Band, the balance of hardships was in favor of protecting the Native Americans' cultural patrimony, according to the Band's Tribal Chairman Bobby L. Barrett: "To move forward and desecrate this sacred burial ground would dishonor those who have been laid to rest there." See, Case No. GIC 2010-00093203, Ex. O.

134. Similarly, in Puyallup, Washington, a stop work order was recently issued for all work by Trammel Crow in front of the Indian Willard Cemetery, which is 200 years old, fearing ancestral remains might be disturbed, and where tribal archaeologist Brandon Renyon stated: "We don't know the boundaries of the cemetery, because it dates back to the 1800's, maybe earlier." There the city was unaware until recently that anyone contended that the area of the cemetery included a larger area outside the existing fence. "There's no way to tell how many are buried within the fences, and no certainty on how far beyond those fences grave sites might exist." LaRue, *The News Tribune*, December 2, 2013, Ex. P.

135. In San Diego's Old Town, the fence also does not enclose all of the grave sites at El Campo Santo Cemetery beneath San Diego Ave. www.oldtownsandiegoguide.com. The most likely descendents of Graton Rancheria also obtained an order repatriating Coast Miwok Indian remains and artifacts for reinterment pursuant to CEQA *Guidelines*, **before** construction of the $55 million Rose Lane housing development on San Francisco Bay. Ex. R.

136. The desecration of Rosales and Toggery's families' remains and funerary objects also requires Defendants to be enjoined due to their failure to complete the Supplemental Environmental

Impact Statement that must be prepared, reviewed, and given a public hearing, concerning their violations of Cal. P.R.C., H.S.C. Penal Codes, and NAGPRA, before construction is allowed. See for e.g., *Quechan Indian Tribe v. U.S.* 535 F.Supp.2d 1072, 1106, 1121-22 (S.D. Cal. 2008), finding Western Area Power Admin. agency *per se* liable for inflicting severe and irreparable damage to the cultural sites in violation of P.R.C. 5097.5, 5097.9, and Pen. C. 622.5, which were also alleged to have violated NEPA; *Crow Creek Sioux Tribe v. Brownlee*, 331 F.3d 912, 914 (D.C. Cir. 2003), finding the Army Corps of Engineers Environmental Impact Statement complied with NEPA's requirement to take a hard look at Indian "burial remains and cultural artifacts on the transferred lands;" and *Slockish v. U.S.F.H.A.*, 2012 U.S. Dist. LEXIS 118718, *41 (D. Ore. 2012), finding that the administrative record should be supplemented, under the NEPA exception for administrative review, to further develop the government's prior knowledge of cairns and burial sites on the project property, and to determine whether the agency "neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative or otherwise swept stubborn problems or serious criticism . . . under the rug," citing *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir. 1988).

137. Defendants' grading, operation of heavy equipment, moving and hauling dirt and/or gravel, and other construction activities, excavation and removal of Rosales & Toggery's families' human remains and funerary objects, and dumping them on state property owned and controlled by CalTrans has also caused and will continue to cause, unless enjoined, irreparable damage to, and interference with, the Native American sanctified cemetery, place of worship, religious and ceremonial sites, sacred shrines located on federal lands, and the free expression and exercise of Native American religion as provided in the United States and the California Constitutions, in violation of Pub. Res. C. 5097.9-5097.994. Defendants' conduct has barred and will continue to bar appropriate access by Native Americans to the Native American sanctified cemetery, place of worship, religious and ceremonial sites, sacred shrines located on federal lands.

138. Where, as here, adequate and appropriate mitigation is not available, and since there is no clear and convincing evidence that the public interest and necessity require otherwise, the Court is required to issue an injunction, to prevent severe and irreparable damage to, and to assure

appropriate access for Native Americans to, the Native American sanctified cemetery, place of worship, religious and ceremonial sites, and sacred shrines located on the federal lands, as required by P.R.C. 5097.94, NAGPRA, 25 U.S.C. 3001 et seq., and 43 C.F.R. 20.1-17.

2. JIV Has No Right, Permit or Authorization to Desecrate Plaintiffs' Families Remains to Build a Casino on the Jamul Indian Cemetery

139. The JIV does not have any right, authorization or permit to construct, what after all these years, remains an illegal casino, on the portion of the Jamul Indian cemetery, beneficially owned by Rosales and Toggery, and titled in the U.S. Moreover, the JIV has no standing to oppose Plaintiffs' claims before this federal court, because the JIV has no cognizable interest in Rosales and Toggery's families' human remains and funerary objects or the government's portion of the Jamul Indian Cemetery, and because the JIV has failed to exhaust its administrative remedies before coming to Court. The JIV did not exist when the U.S. acquired the portion of the Indian cemetery for the individual half-blood Indians in Jamul, and has never acquired nor exercised governmental power over that portion of the Indian cemetery on which it is illegally building a casino.

140. The land does not qualify for Indian gambling because it was not acquired by the JIV, nor taken into trust for the JIV, since the JIV was not recognized under federal jurisdiction in 1934, *Carcieri v. Salazar*, 555 U.S. 379 (2009), and the JIV has never been recognized by the federal government as a "tribe" under the Indian Reorganization Act, 25 U.S.C. 479. It has only been recognized as a "half-blood Indian community," which has no right to build a casino on the cemetery parcel under IGRA, since the Indian cemetery is not held in trust for a tribe, and no tribe lawfully exercises governmental power over the cemetery property. 25 U.S.C. 2701 and 2703(4); *La Courte Oreilles Band of Lake Superior Chippoewa Indians v. United States* 367 F.3d 650, 657 (7th Cir. 2004); *Confederated Tribes of Siletz Indians v. United States*, 841 F.Supp. 1479, 1486 (D. Ore. 1994).

A. JIV was not Recognized Under Federal Jurisdiction in 1934

141. It is undisputed that because the JIV did not then exist, it could not be, and was not, recognized under federal jurisdiction when the IRA was adopted on June 18, 1934. "Congress has

restricted the eligibility for... "organizing" under the IRA to "tribes" recognized under federal jurisdiction in 1934. *Sandy Lake Band of Miss. Chippewa ("Sandy Lake") v. United States*, 2012 U.S. Dist. LEXIS 63458, *3-4 (D. Minn. 2012), citing *Carcieri*. As with the Ukiah Valley Pomo Indians, "the IRA dictates which tribes are eligible to invoke the IRA, and plaintiffs cannot satisfy that definition." *Allen v. United States*, 871 F.Supp.2d 982, 993 (N.D. Cal. 2012). "Congress delegated to the Secretary the authority to promulgate rules and regulations governing Secretarial elections," under the IRA, 25 U.S.C. 479, and the regulations are codified in 25 C.F.R. Part 83. *Sandy Lake*, 2012 U.S. Dist. LEXIS 63458, *3; *Muwekma Ohlone Tribe v. Salazar*, 813 F.Supp.2d 170, 173 (D.D.C. 2011).

142. "Congress has specifically authorized the Executive Branch to prescribe regulations...to determine which Indian groups exist as tribes," and the BIA has prescribed regulations to determine which Indian groups may qualify to "organize" or "reorganize" as tribes, under the IRA. *James v. HHS*, 824 F.2d 1132, 1137 (D.C. Cir. 1987); *Miami Nation of Indians of Indiana v. U.S.D.O.I.*, 255 F.3d 342, 350-51 (7th Cir. 2001), finding the Miami Nation failed to satisfy DOI's regulations for recognition as a tribe.

143. The Department of Interior promulgated regulations in 1978, establishing a uniform procedure for "recognizing" American Indian tribes, known as Part 83. 25 C.F.R. 83.1-83.13. *Allen*, 871 F.Supp.2d 982, 990. To obtain federal recognition, a tribe must demonstrate that it's "membership consists of individuals who descend from a historical Indian tribe or from historical Indian tribes which combined and functioned as a single autonomous political entity." 25 C.F.R. 83.7(c): Ex. I, at1. *Sandy Lake* went on to hold:

144. ...by requiring an entity seeking an IRA election to first request federal acknowledgment, the regulations ensure that the evidence the Sandy Lake Band offers in support of its claim that it qualifies as an Indian tribe under Section 479 will be presented to the appropriate agency with the requisite expertise and established regulatory process. ...

Carcieri v. Salazar, 555 U.S. 379 (2009) held that the term "now under Federal jurisdiction" refers to Indian tribes under Federal jurisdiction in 1934. The effect of this holding is that the Secretary may not expand the definition of Indian tribes eligible for an IRA election to include those not under Federal jurisdiction in 1934. *Id.*, at *9-10, and repeating its holding for emphasis again at *25-26.

145. The Supreme Court "has long made clear that Congress and therefore the Secretary-lacks constitutional authority to 'bring a community or body of people within [federal jurisdiction] by arbitrarily calling them an Indian tribe.'" *Carcieri*, at 412, J. Stevens, dissenting, and citing *United States v. Sandoval*, 231 U.S. 28, 46 (1913). Moreover, a tribe cannot establish governmental jurisdiction through its unilateral actions. *City of Sherrill v. Oneida Indian Nation* (*Sherrill*), 544 U.S. 197, 203, 219-20 (2005); *Citizens Against Casino Gambling in Erie Co. v. Stevens* (*CACGE*), 945 F.Supp. 2d 391, 401 (W.D.N.Y. 2013).

B. JIV Never Acquired Nor Exercised Governmental Power Over the Government's Portion of the Jamul Indian Cemetery On Which It is Illegally Building a Casino

146. Since the JIV did not exist when the IRA was enacted on June 18, 1934, it was not under federal jurisdiction and the federal government could not recognize a government to government relationship with the JIV, nor allow the JIV to acquire or exercise governmental power over the government's portion of the Jamul Indian cemetery. *Carcieri v. Salazar* (2009) 555 U.S. 379, 382-84, 395 (2009). At most, JIV was a community of individual Indians not affiliated with a tribe. Consequently, the federal government was without the legal authority to acquire or hold, and did not acquire or hold, any portion of the Indian cemetery in trust for the JIV. The IRA only authorizes the Secretary of the Interior to take land in trust for "any recognized Indian tribe now under Federal jurisdiction," in 1934. 25 U.S.C. § 479.

147. The Supreme Court further holds that the IRA does not allow the Secretary to lawfully take land into trust for a tribe, that was not "now under Federal jurisdiction," when the IRA was enacted on June 18, 1934. *Carcieri v. Salazar*, 555 U.S. 379, 382-3 (2009): "Because the record in this case establishes that the [] Tribe was not under federal jurisdiction when the IRA was enacted, the Secretary does not have the authority to take the parcel at issue into trust." See also, *United States v. John*, 437 U.S. 634, 650 (1978).

148. Various federal documents admit that the JIV was not named among the tribes listed as receiving services from the federal government in 1934, as shown in the government's Haas Report entitled Ten Years of Tribal Government under the IRA. The JIV is not named in the BIA's list of Governing Bodies of Indian Groups Under Federal Supervision in 1965. Further, Senate Report No.

1874, dated July 1958, notes that the JIV had never received any social services from the BIA due to the status of its members as Indians. As Justice Breyer acknowledges in *Carcieri*, at 398, the JIV is not among the list of 258 tribes compiled by the DOI following enactment of the IRA, citing the *amicus* Brief for Law Professors Specializing in Federal Indian Law, at App. 2, No. 12, 2008 WL 3991411.

149. Consequently, because the JIV had never previously existed, and was not a recognized tribe under federal jurisdiction in June of 1934, the JIV never acquired, nor has been transferred, nor has ever lawfully exercised governmental power over that portion of the Indian cemetery on which the individual half-blood Jamul Indians resided, and which was gifted to the U.S. by the Daleys in 1978. Therefore, the U.S. was without the legal authority to acquire this land, and did not acquire this land, in trust for the JIV, and only acquired this land in trust for the individual half-blood Jamul Indians, including Walter Rosales and Karen Toggery's families, who were then living at the Indian cemetery.

C. JIV Has Never Been Recognized as an IRA Tribe

150. The law governing Federal recognition of an Indian tribe is universally clear. The JIV has failed to have been federally recognized as a tribe, as opposed to a half-blood Indian community, by any of the three means of recognition: (1) an act of Congress, (2) the administrative procedures set for in Part 83 of the Code of Federal Regulations,[17] or (3) a decision of a United States court.[18] *Allen v. United States* (*Allen*), 871 F.Supp.2d 982, 994 (N.D. Cal. 2012), citing *David Laughing Horse Robinson v. Salazar* (*Robinson*), 838 F.Supp.2d 1006, and later at 885 F.Supp.2d 1002, 1024-26 (E.D. Cal. 2012); *Cherokee Nation of Okla. v. Norton* (*Cherokee Nation*), 2005 U.S. Dist. LEXIS 2773, *3-4, *34 (10th Cir. 2005), reversing the "listing" of the Delaware Tribe, because it "never

[17] For example, the mandatory criteria for Federal acknowledgment includes that: "The petitioner has been identified as an American Indian entity on a substantially continuous basis since 1900," 25 C.F.R. 83.7, which the government concedes JIV cannot establish here. Ex. I; see also, *Price v. Hawaii*, 764 F.2d 623, 627 (9th Cir. 1985) finding the *Houohana* did not "satisfy the historical requirement for tribal status implicit in 83.7(a)," because it was founded in 1974.

[18] None of Rosales and Toggery's prior litigation was decided on the merits; all of their lawsuits were procedurally dismissed for lack of jurisdiction, and therefore produced no final judgments that the JIV was ever recognized as an IRA tribe.

formally petitioned for acknowledgment," and reversing the DOI's recognition as arbitrary, capricious and against the law for "failing to follow the Part 83 procedures for recognizing an Indian tribe;" *United Tribe of Shawnee Indians v. United States* (*Shawnee*), 253 F.3d 543, 547-48 (10th Cir. 2001); and *James v. HHS* (*James*), 824 F.2d 1132, 1137 (D.C. Cir. 1987).

151. The Supreme Court also holds that "Congress did not intend to delegate interpretive authority to the Department [of Interior, as to when a tribe was recognized under Federal jurisdiction]." *Caricieri* at 397. J. Breyer, concurring. The Supreme Court "has long made clear that Congress and therefore the Secretary-lacks constitutional authority to 'bring a community or body of people within [federal jurisdiction] by arbitrarily calling them an Indian tribe'." *Carcieri* at 413, J. Stevens, dissenting, citing *United States v. Sandoval*, 231 U.S. 28, 46 (1913). As noted above, a tribe cannot establish jurisdiction through its unilateral actions. *Sherrill* at 203, 219-20; *CACGE* at 401.

152. The court in *Allen* also notes that the government's *Handbook of Federal Indian Law* provides "that there are several federal statutes that specifically define the term 'Indian tribe,' and these statutes reveal that tribes 'cannot be neatly divided into 'recognized' and 'non-recognized' tribes for all purposes; rather, a tribe may be a legal entity for some federal purposes, but not for others.'" 871 F.Supp.2d 982, 991, citing 3.02(6)(a) (2005 ed.). "The term 'Indian tribe' has distinct and different meanings for native people and for federal law." *Id.*, at 992, citing 3.02(2) (2005 ed.).

153. Here, it is undisputed that JIV has yet to be federally recognized under any of the three means: (1) Congress has never recognized the JIV, (2) the JIV has admittedly failed to petition for, and has never received, recognition under Part 83, and (3) no court has, or had, jurisdiction to decide whether the JIV qualifies for federal recognition as a tribe, since the JIV never exhausted the administrative recognition procedure Congress delegated to the Executive branch. *Allen*, at 991-94; *Robinson* at 1024-26, citing *Shawnee*, at 547-48; *Cherokee Nation*, at *2-*3, *34; *James*, at 1137.

154. Here, the JIV voluntarily elected not to seek recognition under the Part 83 IRA regulations, 25 C.F.R. 83.1-83.13, as a federally recognized "tribe,"when they only petitioned for recognition as a "half-blood dependent Indian community." BIA's Tribal Government Services July 1,1993 letter to Raymond Hunter, Ex. I. In fact, JIV purposefully elected not to petition for administrative

recognition as an IRA tribe, because they thought it would take too long, and they didn't want to wait for dispersal of the federal benefits which they have been receiving as a half-blood Indian community, since 1981. Ex. I. Therein, the federal Defendants are bound by their admission that:

155. The origin of the Jamul Indian Village is different from that of an historic tribe. The term 'tribe' as used in Federal Indian affairs generally refers to a community of people who have continued as a body politic without interruption since time immemorial and retain powers of inherent sovereignty.... Ex. I, 1.

156. You will recall that prior to 1980, the Jamul Indian Village was not a federally recognized tribal entity. During the 1970's representatives of the Village explored with the Bureau of Indian Affairs (Bureau) means whereby it could obtain Federal recognition and were variously advised the only avenues open to them were to seek a legislative solution, go through the Federal acknowledgment process, or the more limiting action of recognition by the Secretary as a half-blood organization. It was pointed out that acknowledgment of existence as an Indian tribe and of existence as a half-blood community are two different things. Ex. I, 2.

157. In order for the Secretary to acknowledge the Jamul community as a tribe under 25 C.F.R. Part 83, previously 25 C.F.R. 54, it would have to submit a detailed petition and undergo a lengthy process of consideration. Several years would have been required to complete this. If the community was not determined to exist as a tribe after this consideration, it would still have the option to organize as a half-blood community under the IRA. Representatives of the Village opted to seek recognition as a half-blood Indian community even though they were aware of the limitations that result from organizing as a half-blood community. Ex.I, 2.

158. ...on November 7, 1975, the Commissioner of Indian Affairs...notified the Area Director that pursuant to Section 19 of the Indian Reorganization Act (IRA) of June 18, 1934 (25 U.S.C. 479), certain benefits of that Act are available to persons of one-half or more Indian blood even though they lack membership in a federally recognized tribe. **The Commissioner found that while those individuals at Jamul of one-half degree or more Indian blood do not now constitute a federally recognized entity and do not possess a land base**, they are entitled to services provided by the Bureau to individual Indians pursuant to Section 19 of the IRA. The Commissioner further held that should these Jamul half-bloods secure, in trust status, the tract of land on which they reside they would be eligible to organize as a community of adult Indians of one-half degree or more Indian blood under Section 16 of the IRA. Ex. I, 2.

159. On July 12, 1979, the Commissioner of Indian Affairs in response to an inquiry advised the Sacramento Area Director [of the BIA] that: 'To be created as a community of persons of one-half degree or more Indian blood, the Jamul Inidans must first organize under the Indian Reorganization Act...When this proposal has been adopted by the community in an election called by the Secretary, and has been approved by the Secretary, the Jamul Indians will be able to receive services as [such] a community. Ex. I, 3.

160. In approving the IRA constitution, the Village was authorized to exercise those self-

> governing powers that have been delegated by Congress or that the Secretary permits it to exercise...For example, some IRA entities availed themselves of the opportunity to adopt an IRA constitution...However, they are composed of remnants of tribes who were gathered onto trust land. Those persons had no historical existence as self-governing units. They now possess only those powers set forth in their IRA constitution. **They are not an inherent sovereign...Such is the case with Jamul Indian Village.** Ex. I, 3.[19] (emphasis added)

161. Here, JIV is a dependent half-blood Indian community, and not a federally recognized tribe. As conceded by the federal government, the JIV are the remnants of the Capitan Grande tribe, and thus are not subject to being recognized as a separate tribe. On January 18, 1982, the California Program Office of the Indian Health Service stated: "Sometime in the 1800's, Indians from the nearby El Capitan Grande area settled adjacent to an existing cemetery near the village of Jamul." FONSI for Domestic Water Supply & Waste Disposal Facilities, Project No. CA 79-719.

D. A Half-Blood Indian Community is Not an IRA Tribe and has No Inherent Sovereignty

162. The U.S. Supreme Court and the Ninth Circuit in compliance therewith, hold that a half-blood dependent Indian community of individual Indians is not a federally recognized Indian tribe. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998); *United Sates v. McGowan*, 302 U.S. 535, 539 (1938); *United States v. Sandoval*, 231 U.S. 28, 47 (1913); *Nisqually Ind. Tribe v.Gregoire*, 623 F.3d 923, 927 (9th Cir. 2010), "the [Frank's Landing] Community is not a federally-recognized Indian tribe; rather, it is a 'self-governing dependent Indian Community;'" see also, *United States v. Arrieta*, 436 F.3d 1246, 1249 (10th Cir. 2006) finding the assault on Shady

[19] It should be noted that though the term "created tribe" has fallen into disuse upon the adoption of the 1994 amendments to the Part 83 recognition procedures, however, "the 94 amendments do not appear to prohibit the BIA from requiring a tribe to trace its roots to a historic Indian tribe in order to attain federal recognition." *United Houma Nation v. Babbit*, 1996 U.S. Dist. LEXIS 16437, *8 (D.D.C. 1996). "As evidence that Congress has forbidden making any distinction between historic and non-historic tribes in the administrative acknowledgment process, the plaintiffs point to the 94 Amendments. However, the test of these amendments does not provide compelling support that Congress has spoken directly to this issue. While both amendments, codified at 25 U.S.C. 476 (f) and (g), prohibit making distinctions among those Indian tribes that have attained federal recognition, neither section addresses the process by which Indian tribes actually achieve federally recognized status." *Id.*, at *9. "...[A]t least at this stage of the case, the argument is unpersuasive. ...there appears to be scant, if any, evidence that Congress intended the same prohibitions to apply to the process by which tribes achieve federal recognition." *Id.*, at *10.

Lane was not within a reservation or allotment, but was within the Pojoaque Peublo dependent Indian community.

163. When the United States designated the individual half-blood Indians in Jamul as the beneficial owners of that portion of the Indian cemetery in which they were in possession in 1978, they became eligible to organize, and were subsequently organized, as a community of adult Indians of one-half degree or more Indian blood under Section 16 of the IRA. But this did not recognize the community as an IRA tribe.

164. The Federal government's *Handbook of Federal Indian Law*, authorized and funded by Congress in the Indian Civil Rights Act of 1968, 25 U.S.C. 1341(a)(2), admits that "[p]ersons of one-half or more Indian blood...but not residing on a reservation cannot organize under the IRA, but are nevertheless eligible to enjoy some of its provisions." *Id.*, Ch.1, Sec. B2e, at 15-16 (1982 Ed.), citing *Maynor v. Morton*, 510 F.2d 1254, 1256-57 (D.C. Cir. 1975), upholding the DOI's finding that: "These people" [the Siouan or Lumbee Indians] did "not obtain tribal status or any rights or privileges in any Indian tribe." In *Maynor*, the D.C. Circuit specifically found:

165. ...the IRA was primarily designed for tribal Indians, and neither Maynor nor his relatives had any tribal designation, organization, or reservation at that time, it is clear from the language of the statute that some benefits of the Act were also open to any nonreservation Indian who could prove that he possessed at least one-half Indian blood. Among these benefits was the right to petition the Secretary to establish a reservation for such individuals, which, if granted, would afford them access to a wide range of federal Indian services (as members of a recognized Indian group on a reservation). *Maynor* at 1256-57.

166. There, the Court further found that the North Carolina Lumbee Indians were not a recognized IRA tribe, and though entitled to petition for recognition and the proclamation of a reservation, they did not petition for either, and like the JIV here, were content to receive the federal monetary benefits accorded their recognition as a half-blood dependent Indian community. "This and other benefits available under the IRA to non-reservation Indians were first detailed in a memorandum, dated 8 April 1935, to [John Collier] the Commissioner of Indian Affairs from then Assistant Solicitor Felix S. Cohen, who later authored the treatise Federal Indian Law (1942)." *Maynor* at 1256, fn. 7. Cohen's memo stated:

> 167. "Clearly, this group [Siouan Indians of North Carolina, now known as the Lumbee Indians] is not a recognized Indian tribe 'now under federal jurisdiction' within the language of section [479]. Neither are the members of this group residents of an Indian reservation (as of June 1, 1934).These Indians, therefore, like many other Eastern groups, can participate in the benefits of the [IRA] only in so far as individual members may be one half or more Indian blood."[20]

168. Cohen's memo goes on to point out just what the IRA then stated: that if such landless half-blood Indians petition for the proclamation of a reservation, and such a reservation is proclaimed and they reside thereon, they will then qualify under 25 U.S.C. 476 to reorganize and adopt a constitution, when recognized as a tribe for the purposes of the IRA. 25 U.S.C. 476 as it existed from when it was enacted in 1934, until it was first amended in 1988, provides:

> Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe.

169. However, qualifying to become recognized, is not automatic recognition. The formerly landless Indians must still comply with the regulations mandated by Congress and prescribed by the Secretary to become recognized as a an IRA tribe. 25 C.F.R. 83 et seq. These Part 83 regulations for recognition as an IRA tribe were finally put in place in 1978. Thus, a half-blood dependent Indian community must still go through the Part 83 recognition process, to become recognized as an IRA tribe, even when they have been allowed to adopt a constitution and bylaws as a dependent half-blood Indian community. This, the JIV has voluntarily chosen not to do. BIA's Tribal Government Services July 1,1993 letter to Raymond Hunter, Ex. I, 1-3.

170. A group of non-tribal landless Indians cannot simply acquire land and unilaterally declare themselves an IRA tribe, without complying with the federal regulations for such recognition; a tribe cannot establish jurisdiction through its unilateral actions. *Sherrill* at 203, 219-20; *CACGE* at 401.

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[20] Brownell, Who is an Indian? Searching for an Answer to the Question at the Core of Federal Indian Law, 34 U. Mich. J.L. Reform 275, 287 (2001), citing article quoting unpublished memorandum from Cohen to Collier of April 8, 1935; the full memo can be found in the Collections of the Manuscript Division, Justice Blackmun Papers on *U.S. v. John*, 437 U.S. 634, Library of Congress.

171. Therefore, here, as in *Maynor*, where such landless Indians failed to petition for the proclamation of a reservation, and were not under federal jurisdiction in 1934, like the JIV, they remain a half-blood dependent Indian community, and did not become a federally recognized IRA tribe. Based upon Cohen's 1935 memo, the *Maynor* court concluded:

> Following enactment of the IRA in 1934, plaintiff Maynor and 208 other persons residing in Robeson County petitioned the Secretary for recognition as persons of one-half or more Indian blood. The Department of the Interior sent a team of anthropologists and other specialists to determine the quantum of Indian blood of each applicant. After extensive study, in 1938 a total of only 22 applications including Maynor's, were approved.
>
> Maynor and the other 21 were informed by the Department that they were "entitled to benefits established by the Indian Reorganization Act. Please note that no other benefits are involved. These people do not obtain tribal status or any rights or privileges in any Indian tribe." *Maynor* at 1256-57.

172. Here, the governmental Defendants are also estopped to deny that the Director of Tribal Government Services has further stated on July 1, 1993: "The Constitution of the Jamul Indian Village was approved by the Deputy Assistant Secretary-Indian Affairs on July 7, 1981. In approving the IRA Constitution, the Village was authorized to exercise those self-governing powers that have been delegated by Congress or that the Secretary permits it to exercise... For example, some IRA entities availed themselves of the opportunity to adopt an IRA constitution... However, they are composed of remnants of tribes who were gathered onto trust land. Those persons had no historical existence as self-governing units. They now possess only those powers set forth in their IRA constitution. **They are not an inherent sovereign**... **Such is the case with Jamul Indian Village**." Ex I, 3 (emphasis added).

173. [T]he term "dependent Indian communities"...refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements–first, they must have been set aside by the Federal Government for the use of the Indians as Indian land, second, they must be under federal superintendence. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 (1998).

174. "Frank's Landing is a geographic location consisting of three parcels of land, none of which is located on the Nisqually or Squaxin Reservations. The parcels are instead held in trust by the United States for the benefit of individually named Indians. The three parcels were set aside for these individuals in 1918. The people, society, and government located at and associated with Frank's Landing are referred to as the "Community." The Community is not a federally-recognized Indian tribe; rather, it

> is a "self-governing dependent Indian Community." *Nisqually Ind. Tribe*, 623 F.3d 923, 927.

175. In *United Sates v. McGowan*, 302 U.S. 535, 537, 539 (1938), Justice Black held that the Reno Indian Colony was a dependent Indian community, because the Federal government held the Colony's land in trust for the benefit of the individual Indians residing there:

> The Reno Indian Colony is composed of several hundred Indians residing on a tract of 28.38 acres of land owned by the United States and purchased out of funds appropriated by Congress in 1925 and 1926...The policy of Congress, uniformly enforced through the decisions of this Court, has been to regulate the liquor traffic with Indians occupying such a settlement. This protection is extended by the United States 'over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state.' *United States v. Sandoval*, 231 U.S. 28, 46...Congress alone has the right to determine the manner in which this country's guardianship over the Indians shall be carried out...The federal prohibition against taking intoxicants into this Indian colony does not deprive the state of Nevada of its sovereignty over the area in question. The federal government does not assert exclusive jurisdiction within the colony. Enactments of the federal government passed to protect and guard its Indian wards only affect the operation, within the colony, of such state laws as conflict with the federal enactments. *McGowan*, 302 U.S. 535, 538-39.

176. The Ninth Circuit further holds that whether "a group of citizens of Indian ancestry...has maintained an organized tribal structure...is a factual question which a district court is competent to determine." *United States v. Washington*, 641 F.2d 1368, 1371, 1373 (9th Cir. 1981), finding that "the appellants had not functioned since treaty times as 'continuous separate, distinct and cohesive Indian cultural or political communities;" *Native Village of Tyonek v. Puckett*, 957 F.2d 631, 632 (9th Cir. 1992). Where those facts are in conflict, as here, a trial is required before the Court may determine the status of the dependent Indian community, presuming the group of Indians has exhausted its administrative remedies, has standing, and has become a party to the action. None of which the JIV has done.

177. [W]e have not addressed the question whether any Alaskan native village constitutes an Indian tribe for the purpose of sovereign immunity. We cannot reach this question because, as noted above, the district court failed to enter express findings of fact or develop a record to support its conclusion that the Native Village of Tyonek is an Indian tribe protected by sovereign immunity. Accordingly, we must remand so that an adequate record can be prepared so that we may review this 'complex factual question.'" *Tyonek*, at 635.

178. Here, the Ninth Circuit holds that the JIV can't have any Court finally determine the half-blood Indian community's status, without a trial and without having exhausted the administrative remedies under 25 C.F.R. Part 83 with the BIA. See, Section 3 below; *Alaska v. Native Village of Venetie*, 856 F.2d 1384, 1388 (9th Cir. 1988) *reversed on other grounds*, 522 U.S. 520 (1998), "As we have outlined, not all Indian communities are considered tribes and therefore sovereign powers. The community in this case may not be sovereign. Until that uncertainty is resolved, amici's contention is premature...[T]he ultimate conclusion as to whether an Indian community is Indian country is quite factually dependent. It is also dependent on whether the inhabitants constitute a tribe for legal purposes, which, as we discussed earlier, is another complex factual question." *Id.*, 1388, 1391. Ultimately, the Supreme Court found that the Native Village of Venetie was not a sovereign, and was not even a dependent Indian community, unlike here, primarily because the U.S. was no longer the title holder and the land was not under the superintendence of the Federal government. 522 U.S. 520, 532.

179. The Tenth Circuit has held in *United States v. Martine*, 442 F.2d 1022, 1023-24 (10th Cir. 1971) that the "proper approach" to the determination of the status of a dependent Indian community is to hold a trial as to any conflicting facts: There:

> 180. The term "Indian country' as used in section 1151 includes Indian reservations, dependent Indian communities, and all Indian allotments. The particular place where the accident took place was neither on an Indian reservation nor on an allotment. It was in an area known as the Ramah community and on land owned by the Navajo Tribe, it having been purchased with tribal funds from a corporate owner. Jurisdiction therefore rests on the claim that the area in question is a dependent Indian community.
>
> 181. The trial court received evidence as to the nature of the area in question, the relationship of the inhabitants of the area to Indian Tribes and to the federal government, and the established practice of government agencies toward the area....Only after considering all of the various factors we have noted, as well as any other relevant factors, can the trial court determine the status of a particular area. The mere presence of a group of Indians in a particular area would undoubtedly not suffice. *Martine*, 442 F.2d 1022, 1023-24.

182. Similarly, the Eighth Circuit holds in *United States v. South Dakota*, 665 F.2d 837, 839-43 (8th Cir. 1981) that the "proper approach" in determining the status of a dependent Indian community is to hold a trial of any conflicting facts concerning the following factors:

> 183. [W]hether a particular geographical areas is a dependent Indian community depends on a consideration of several factors. These include: (1) whether the United States has retained 'title to the lands which it permits the Indians to occupy' and 'authority to enact regulations and protective laws respecting this territory,' 636 F2d at 212, citing *United States v. McGowan*, 302 U.S. 535, 539, 58 S. Ct. 286, 288, 82 L. Ed. 410 (1938); (2) 'the nature of the area in question, the relationship of the inhabitants of the area to Indian tribes and to the federal government, and the established practice of government agencies toward the area,' 636 F.2d at 212, citing *United States v. Martine*, 442 F.2d 1022, 1023 (10th Cir. 1971); (3) whether there is 'an element of cohesiveness ... manifested either by economic pursuits in the area, common interests, or needs of the inhabitants as supplied by that locality,' 636 F.2d at 212-13, citing *United States v. Morgan*, 614 F.2d 166, 170 (8th Cir. 1980); and (4) 'whether such lands have been set apart for the use, occupancy and protection of dependent Indian peoples,' 636 F.2d at 213, citing *United States v. Mound*, 477 F. Supp. 156, 158 (D.S.D. 1979), citing *Youngbear v. Brewer*, 415 F.Supp. 807, 809 (N.D. Iowa 1976), *aff'd*, 549 F.2d 74 (8th Cir. 1977).

184. There, the Court declared that the housing project located within the City of Sisseton to be a "dependent Indian community" within the meaning of the federal statute defining "Indian country," 18 U.S.C. 1151(b), and held that the fact that the State had asserted jurisdiction over the housing project did not necessarily defeat the finding that the project was a dependent Indian community. *United States v. South Dakota.*, at 841-42. There, as here, the grant deed explicitly conditioned the transfer to the United States: "The land so transferred by this Corporation will be used exclusively for a Low Rent Housing Project and will not be used for any other purpose." *Id.*, 839-41. The Court also found that: "The test for determining what is a dependent Indian community must be a flexible one, not tied to any single technical standard such as percentage of Indian occupants." *Id.,* 842. There, as here, many of the "programs provided to the project residents are provided under contract with the federal government, through the BIA and the IHS [Indian Health Service]."

185. Thus, JIV's Secretarial election only adopted a constitution for a half-blood Indian community and not an IRA tribe. The JIV was never a body politic that continued without interruption since time immemorial, never had powers of inherent sovereignty, and was not a single identifiable group that historically governed itself or functioned as a single autonomous political entity.

186. When the half-blood community, known as Jamul Indian Village, was created and first recognized, it was not, and subsequently has never been an IRA tribe. More importantly, it was a landless entity. To date, no branch of the United States government has set aside or created an

Indian reservation or taken the government's portion of the cemetery into trust for the half-blood Indian community known as the Jamul Indian Village. The government's portion of the Indian cemetery was not acquired for any Indian tribe, and has never been recognized by any branch of the federal government as being land subject to the lawful exercise of any tribal governmental power, including the half-blood Indian community known as the Jamul Indian Village.

E. Listing of a Half-Blood Indian Community Does Not Create or Recognize an IRA Tribe

187. There is no "listing" of the JIV as a recognized IRA tribe in any of the three ways in which such recognition can be made: (1) Congress has not recognized the JIV, (2) the executive branch has not conducted the required review in the administrative procedures set forth in Part 83 of the C.F.R.,, and (3) there is no final decision on the merits by any U.S. court with jurisdiction to decide the merits of the JIV status. *Allen*, at 991-94; *Robinson* at 1024-26, citing *Shawnee*, at 547-48; *James*, at 1137; *Cherokee Nation*, at *2-3, *34, twice reversing the "listing" of a tribe, finding, as here, "the Delawares never formally petitioned for acknowledgment," and reversing the DOI's recognition as arbitrary, capricious and against the law for "failing to follow the Part 83 procedures for recognizing an Indian tribe."

188. While such "listing" was once held to "generally," but not always, constitute recognition as a tribe, see for e.g., *Larimer v. Konocti Vista Casino*, 814 F.Supp.2d 952, 955 (N.D. Cal. 2011) and *Ingrassia v. Chicken Ranch Bingo & Casino*, 676 F.Supp.2d 953, 957 (E.D. Cal. 2009), the decision upon which these cases rely, *Cherokee Nation of Okla. v. Norton*, 117 F.3d 1489, actually holds that the DOI's listing "cannot be dispositive of the sovereign immunity issue," *Id.*, 1499, and has twice been upheld by the Tenth Circuit. There, the Court of Appeal explicitly found that a listing on the *Federally Recognized Indian Tribe List Act of 1994* is not dispositive of tribal status. *Cherokee Nation* at *3-4, *34. There, as here, the DOI's "listing" of the Delaware Tribe was found to be arbitrary, capricious and against the law for "failing to follow the Part 83 procedures for recognizing an Indian tribe," where the Delawares "never formally petitioned for acknowledgment." There, as here, the purported tribe was also not an indispensable party because it was not a recognized tribe. *Id.*

189. Thus, contrary to the false public statements by the JIV, being "listed" pursuant to the *Federally Recognized Indian Tribe List Act of 1994*, does not necessarily mean that the "entity" is a federally recognized tribe or that the entity has any inherent sovereignty, because the list includes entities that are not tribes, have no inherent sovereignty, and only possess limited powers delegated by Congress, such as half-blood Indian communities. The "list used the term 'entities' in the preamble and elsewhere to refer to and include all the various anthropological organizations, such as bands, pueblos and villages," 60 F.R. 9250, see also 44 F.R. 7235, many of which are dependent Indian communities, and not tribes. *Alaska v. Native Village of Venetie Tribal Gov't.,* 522 U.S. 520 (1998); see for e.g., *Nisqually Ind. Tribe v.Gregoire*, 623 F.3d 923, 927 (9th Cir. 2010). In fact, the federal government has long conceded that the subsequent "wholesale listing of Alaska native entities" therein is strong evidence that not every entity "listed" is a recognized tribe. See, Judge Karlton's discussion at 16, in his April 23, 1992 Order granting the federal defendants' motion for summary judgment, *Ione Band of Miwok Indians v. Burris*, Civ. No. S-90-993 LKK (E.D. Cal. 1992), Ex. Y & Z.

190. The original "list" published by the BIA in 1978 did not list the Jamul Indian Village. 44 F.R. 7235. The original list also is more accurately titled "*Indian Tribal Entities that Have a Government-to-Government Relationship with the United States*," since "[t]he United States recognizes its trust responsibility to these Indian entities and, therefore, acknowledges their eligibility for programs administered by the Bureau of Indian Affairs." 44 F.R. 7235. JIV was not "listed" therein, until November 24, 1982, following its election to become a "half-blood dependent Indian community." 47 F.R. 53130-33.

191. Moreover, the 1995 preamble to the list continues to state: **"Inclusion on the list does not resolve the scope of powers of any particular tribe over land or non-members."** 60 F.R. 9251 (emphasis added). Hence, even the subsequent lists after 1994 by their own terms only include: "Indian Tribal Entities Within the Contiguous 48 States Recognized and Eligible to Receive Services From the Bureau of Indian Affairs." 60 F.R. 9250; compare the original 1979 listing of "tribal entities." 44 F.R. 7235. Being on the list says nothing about exercising governmental power over land, nor whether the entity was qualified to organize or reorganize as a tribe under the IRA. Here,

the JIV was only recognized to be a "half-blood dependent Indian community" in 1981, and is not, and never was, recognized as a tribe under federal jurisdiction in 1934, or thereafter.

192. Hence, the JIV's inclusion on this administrative list of entities and groups entitled to receive federal services is with the caveat that the JIV has never petitioned or received recognition as an IRA tribe from the executive branch of the United States under 25 CFR Part 83, and that Congress, as the legislative branch, has yet to recognize the JIV, and thus the United States has yet to lawfully exercise federal jurisdiction over any tribe, known as the JIV.

193. Therefore, any listing of the JIV's eligibility to receive federal monetary benefits, does not create, nor recognize the entity as an IRA tribe, and only acknowledges its existence as a half-blood dependent Indian community. Moreover, "[a]dministrative actions taken in violation of statutory authorization or requirement are of no effect." *City of Santa Clara v. Andrus*, 572 F.2d 660, 677 (9th Cir. 1978), citing *Utah Power & Light Co. v. United States*, 243 U.S. 389, 392 (1917), and "unauthorized agency action may be disregarded as null and void." See, e.g., *Employers Ins. Of Wassau v. Browner* , 52 F.3d 656, 665 (7th Cir. 1995); *N.L.R.B. Union v. Federal Labor Relations Auth.*, 834 F.2d 191, 196 n. 6 (D.C. Cir. 1987); *Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286, 293 (2d Cir. 2006).

F. The State Compact Does Not Create Nor Recognize an IRA Tribe, Nor Allow JIV to Exercise Governmental Power over any portion of the Jamul Indian Cemetery and Further Requires That Construction Be Enjoined Until the Compact is Amended

194. The fact that the JIV entered into a Compact with the State of California along with 65 other entities claiming to be tribes, on October 18, 1999, does not indicate, nor create, a recognized IRA tribe in any of those entities. Nor does it allow gambling on, or allow the JIV to exercise governmental power over, any specific parcel of land or any portion of the Jamul Indian Cemetery. The JIV Compact is silent as to the location of any proposed gambling site. http://www.cgcc.ca.gov/documents/compacts/original_compacts/Jamul_Compact.pdf. Similarly, JIV's Gaming Ordinances are also silent as the location of any proposed gambling site.

195. There was intense political pressure to execute these Compacts, and the State did not require that each Indian entity establish by a preponderance of the evidence that it had been lawfully

recognized by the United States, or that it lawfully exercised governmental power over any land proposed for Indian gambling. Instead the State accepted the entities' representations on faith, subject to disavowal if, as here, the representations turned out not to be true.

196. Moreover, the Ninth Circuit has specifically found that non-site-specific gaming ordinances and compacts, like JIV's, do not authorize gambling on any particular parcel of land, and only upon subsequent acquisition or identification of the parcel on which gambling is proposed, will the NIGC be required to determine whether the specific parcel of land qualifies for Indian gambling; until the specific parcel of land is identified upon which gambling is proposed there is nothing to approve or disapprove under 25 U.S.C. 2710(b)(1). *North Co. Community Alliance v. Salazar* 573 F.3d 738, 747 (9th Cir. 2009), "IGRA does not require a tribe to submit a site-specific proposed ordinance as a condition of approval by the NIGC under 2710(b)," and "the NIGC was not required in 1993, when it approved the Nooksacks' non-site-specific Ordinance to make an Indian lands determination for the parcel on which the Casino is located."

197. Hence, until construction of a casino was located on the portion of the Indian cemetery beneficially owned by the individual half-blood Indians, including Rosales and Toggery, in the NIGCs April 10, 2013 notice of intent to prepare a Supplemental Environmental Impact Statement, there was no Indian lands decision, and the Compact, like JIV's original gambling ordinances, was silent as to where any gambling facility was going to be constructed.

198. Because the State recognized that it was being asked to accept the 65 entities' representations on their face, in haste, and without any evidence or hearing to determine the true facts, the State made the enforceability of the Compact contingent upon the terms of Section 15.6 of the Compact, wherein each entity is limited to the facts as represented, many of which have subsequently been found, as here, not to be true. Therein the Compact further states: "In entering into this Compact, the State expressly relies upon the forgoing representations of the Tribe [that it is a federally recognized tribe with Indian land as defined by IGRA], and the State's entry into the Compact is expressly made contingent upon the truth of those representations as of the date of the Tribe's execution of this Compact." Hence, where the representations that the JIV is a federally recognized tribe with Indian

land as defined by IGRA have turned out not to be true, the JIV's Compact is expressly unenforceable and void *ab initio*.

199. Section 4.2 of the Compact further limits proposed gambling to only those lands authorized under IGRA: "The Tribe may establish and operate not more than two Gaming Facilities, and only on those Indian lands on which gaming may lawfully be conducted under the Indian Gaming Regulatory Act." Here also, since the JIV has no land over which it lawfully exercises governmental power, the Compact does not authorize any gambling on the government's portion of the Indian cemetery.

200. When on May 5, 2000, the DOI approved the 1999 JIV Compact, the DOI also expressly conditioned its approval as follows: "The terms of the Compact are approved only to the extent that they authorize gaming on 'Indian Lands' as defined by IGRA, now or hereafter acquired by the Tribe." Hence, neither the Compact, nor the JIV gaming ordinances, constitute any approval of gambling on the government's portion of the Indian cemetery beneficially owned by the individual half-blood Indians, nor do they constitute any Indian Lands decisions by the state government. There never was an Indian Lands decision, as to the government's portion of the Indian cemetery, until the NIGC issued its April 4, 2013 Notice of Intent to Prepare a Supplemental Environmental Impact Statement, which remains an abuse of discretion, arbitrary, capricious and against the law.

201. In further recognition of the haste in which the State was being asked to negotiate the 65 compacts, and the then proven inadequacy of Section 10.8, to protect the off-Reservation environment from significant adverse impacts, the State further protected the communities in the neighborhoods of the proposed gambling facilities by specifically providing that all construction of such gambling facilities shall cease, after the Governor calls for the amendment of Section 10.8 to further prevent significant adverse environmental effects from the construction and operation of a casino, until Section 10.8 was so amended.

202. Therein the Compact further provides in Section 10.8.3(b): "On or after January 1, 2003, but not later than March 1, 2003, the State may request negotiations for an amendment to this Section 10.8 on the ground that, as it presently reads, the section has proven to be inadequate to protect the

off-Reservation environment from significant adverse impacts resulting from Projects undertaken by the Tribe or to insure adequate mitigation by the Tribe of significant adverse off-Reservation impacts."

203. Section 10.8.3(c) of the Compact further provides: "If the State has requested negotiations pursuant to subdivision (b) but, as of January 1, 2005, there is neither an agreement nor an order against the State...then, on that date, the Tribe shall immediately cease construction and other activities on all projects then in progress that have the potential to cause adverse off-Reservation impacts, unless and until an agreement to amend this Section 10.8 has been concluded between the Tribe and the State."

204. As the JIV concedes in its *amicus* brief, AB 4:25, the portions of the Compact that survive the JIV's misrepresentations, are both federal law and a binding contract on the JIV. *Cuyler v. Adams*, 499 U.S. 433, 440 (1981); See also, *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1056 (9th Cir. 1997) and IGRA, 25 U.S.C. 2710(d)(1)(c) and (d)(3).

205. On February 28, 2003, Governor Davis served the state's notice triggering the amendment process of Section 10.8 on all of the 65 Compact tribes, including the JIV. *Rincon Band of Luiseno Mission Indians of Rincon Reservation v. Schwarzenegger*, No. 04CV1151, 2008 WL 6136699, *3 (S. D. Cal. Apr. 29, 2008), *aff'd,* 602 F.3d 1019 (9th Cir. 2010). The JIV ignored the Governor's request and did not negotiate an amendment of Section 10.8. Nor did the JIV obtain a Court order against the state that it need not renegotiate Section 10.8 of the Compact with the State. California further failed to withdraw this request to renegotiate Section 10.8 prior to March 1, 2003, as conceded by the JIV. In the meantime, 13 of the now 73 Compact tribes negotiated amended compacts with the State. See, http://www.cgcc.ca.gov/?pageID=compacts. [21]

206. Therefore, on January 1, 2005 the JIV was required by the terms of the Compact to immediately cease construction and other activities on their proposed casino projects on the government's portion of the Indian cemetery unless and until JIV reaches an agreement with the

[21] Thus, after Gov. Davis was recalled, his later attempt to withdraw his demand to renegotiate Section 10.8 on his way out of office in November of 2003, was too late to prevent the agreed upon January 1, 2005 injunction of all casino construction projects without an amended compact.

State to amend this Section 10.8, and until JIV establishes a preponderance of evidence that JIV lawfully has exhausted its administrative remedies and demonstrated pursuant to the Part 83 regulations that it was under federal jurisdiction as of June 18, 1934, and has lawfully been permitted to exercise governmental power over the government's portion of the Indian cemetery. None of which has yet been established.

G. Because the IRA Bars Transfer of the Government's Portion of the Indian Cemetery to the JIV, the JIV has Never Lawfully Exercised Governmental Power over that parcel.

(1) The Individual Half-Blood's Beneficial Ownership of their Families' Final Resting Place Was: Never Transferred to the JIV, Never Taken into Trust for the JIV, and JIV Has Never Exercised Governmental Power over that Cemetery Property.

207. The Jamul Indians of one-half degree or more Indian blood, including Rosales and Toggery, have never attempted to transfer, nor lawfully transferred, their individual beneficial interest in the government's portion of the cemetery property to the JIV, because such a transfer is barred by the IRA, as confirmed in *Carcieri*. Moreover, the JIV never applied to have that portion of the cemetery taken into trust for the JIV, nor has the DOI Secretary taken that portion of the cemetery into trust for the JIV, and the JIV has never exercised governmental power over that portion of the cemetery.

208. Just as the JIV never applied for, or obtained, recognition as an IRA tribe under 25 C.F.R. 83 et seq., or applied for, or had a reservation proclaimed under 25 U.S.C. 467, the JIV has never applied for, or acquired, the government's portion of the Indian cemetery to be taken into trust under 25 C.F.R. 151 et seq.[22] *City of Shakopee v. United States*, 1997 U.S. Dist. LEXIS 2202, *19-20 (D. Minn. 1997). There still must be: (1) a formal application to have land taken into trust, (2) findings by the Secretary either denying the application or intending to take the land into trust, (3) a notice of appeal rights to all interested parties, including state and local governments, (4) an opportunity for administrative appeal, (5) a notice of final agency decision published in the Federal Register or newspaper of general circulation for 30 days, and (6) the opportunity for review in the appropriate

[22] 25 C.F.R. 151.3, provides: "No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary."

federal district court under 25 C.F.R. 151.12(b). *City of Shakopee v. United States*, 1997 U.S. Dist. LEXIS 2202, *19-20 (D. Minn. 1997). None of the six required procedures have occurred here.

209. This is confirmed by the absence of any grant deed purporting to make such a transfer. Just as the IRA bars the government from taking the portion of the Indian cemetery into trust for the JIV, the IRA also bars the individual Indians of one-half degree or more Indian blood living in Jamul that have been designated the beneficial owners of that parcel, from lawfully transferring their beneficial interest and trust status to the JIV, since it was not under federal jurisdiction in June of 1934. *Carcieri* at 382-3. Thus, the government's portion of the Indian cemetery held in trust for the individual half-blood Indians in Jamul has never been transferred to the JIV, and the JIV has never lawfully exercised governmental power over that portion of the Indian cemetery.

210. This is further confirmed by the United States Department of Interior, Bureau of Indian Affairs, August 3, 2000 response to a Freedom of Information Act (FOIA) request, confirms that the "current trust parcel was accepted into trust in 1978 for Jamul Indians of ½ degree (4.66 acres)," and that there is "no record of the 1978 trust parcel being known as the Jamul Village," as reflected in Ex. F. This is consistent with the half-blood community's constitution, Article II, Territory, which does not identify the 4.66 acre cemetery parcel, as within the territory of the Jamul Indian Village. Ex. G. It is also consistent with Governor Arnold Schwarzenegger's Legal Affairs Secretary's letters of August 29, 2005 and December 20, 2005 to the Jamul Indian Village in Ex. N.

211. This is further confirmed by the fact that during 1996 a faction of individuals, who were not all Jamul Indians of one-half degree of Indian blood, claims to have admitted Jamul Indians, who were only one-quarter Indian blood, as members of the community, and now comprise more than a majority of the members of the community. Thus, the JIV is further legally precluded by the 1978 grant deed from claiming any beneficial ownership interest in the cemetery parcel, since JIV now claims to be comprised of a majority of members who are, admittedly, not one-half degree or more of Indian blood.

212. The JIV therefore has never had jurisdiction over, nor lawfully exercised governmental power over the cemetery parcel, and there has never been a transfer of the parcel to the subsequently

organized half-blood community, nor has the Secretary of the Interior ever lawfully designated the subsequently organized half-blood community to be a beneficiary of the grant deed for the cemetery property, nor has the Secretary ever taken that portion of the cemetery property into trust for the JIV.

(2) The U.S. Never Transferred the Beneficial Ownership of the Cemetery Property from the Individual Indians to the Half-Blood Community

213. Where, as here, no subsequent grant deed for the cemetery parcel was ever recorded, the individual beneficial ownership of the trust property was not, as a matter of law, transferred to any subsequently recognized half-blood community, including the JIV. *Coast*, 550 F.2d 639, 651; *United States v. Assiniboine Tribe* ("*Assiniboine*"), 428 F.2d 1324, 1329-30 (Fed. Cl. 1970); *United States v. State Tax Comm.*, 535 F.2d 300, 304 (5th Cir. 1976); and *Opinions of the Solicitor* at 668, 724, 747, and 1479; Exhibit H.

214. The U.S. has no evidence that the subsequently created half-blood community, known as the "Jamul Indian Village," was ever designated as the beneficiary of the cemetery parcel, nor that any grant deed ever transferred the cemetery property to the half-blood community. In fact, the only evidence is that the Secretary of the Interior designated the individual "Jamul Indians of one-half or more Indian blood" to be the beneficiaries of the cemetery property, by allowing them to reside upon the California trust land for 28 years, just as occurred in *Coast*, 550 F.2d at 651, n32; Ex. F.

215. Since Congress never granted the half-blood community known as the Jamul Indian Village "jurisdiction" over the cemetery parcel to which the U.S. holds title, the express beneficiaries of the deed to the United States for the cemetery parcel were, and still are, the individual half-blood Jamul Indians who were allowed to reside on the property since 1978, and not the half-blood community that was subsequently recognized by an acting deputy assistant secretary of the BIA in 1982. *United States v. Sandoval* (1913) 231 U.S. 28, 46, citing *United States v. Holliday*, 70 U.S. 407, 418 (1865); see also, *Kansas v. Norton*, 249 F.3d 1213, 1229-31 (10th Cir. 2001).

216. Thus, the government is estopped to deny, that the "only possible" beneficial owners of the cemetery property and designation that exists in the 1978 grant deed, as a matter of law, is that the cemetery parcel was taken in trust for the "individual" "Jamul Indians of one-half degree or more

Indian blood," as was held in *Coast*, 550 F.2d at 651, n32, *Assiniboine*, 428 F.2d 1324, 1329-30 and *State Tax Comm.*, 535 F2d. at 304, and acknowledged by the Supreme Court in *Carcieri* at 382-83, 388-90, 394-95, 398-99.

217. The Government further admits that it failed to follow its own guidelines for recording a grant deed to a subsequently recognized half-blood community, and therefore the existing grant deed for the cemetery parcel, as a matter of law, only created a beneficial interest in the individual Jamul Indians of one-half degree or more Indian blood. *Opinions of the Solicitor*, at 668, 724, 747, and 1479; Exhibit H. There, the Solicitor of the Interior specifically advised the field personnel of the BIA that any transfer of the individual Indians' designated beneficial interest to any subsequently recognized tribe, must still be accomplished the old fashioned way by recording a grant deed.

218. Here, no grant deed ever transferred the individual Indians' designated beneficial interest in the cemetery parcel to any tribe. Following the recording of the original 1978 grant deed there is no subsequent record of any transfer of the parcel from the United States' trust on behalf of the individual half-blood Jamul Indians designated by the Secretary to the JIV.

219. The U.S. is estopped to deny that its own *Handbook of Federal Indian Law*, (DOI 1982) Ch. 11, B3, pp. 615-16, and (DOI 2005) §16.03, p. 883, concedes that all individual designated beneficiaries are cotenants in the trust land held by the U.S., and have equal rights to possession of the property, and no single cotenant has the right to exclude any other cotenant from the property. Cal. Civil Code 685-86; *Zaslow v. Kroenert*, 29 Cal.2d 541, 548 (1946). Therefore, all of the individual cotenants must consent to any transfer of their individual beneficiaries' designation to a subsequently recognized "tribe," before the subsequently recognized "tribe" may lawfully be designated as the beneficiary and acquire "jurisdiction" over the cemetery parcel. *Id.*

220. Here, Rosales and Toggery have not consented to any transfer of their beneficial interest in the cemetery parcel. Nor is there evidence of any such consent by any, let alone all, of the individual Indian co-tenants to transfer their beneficial interest in the cemetery parcel. Quite simply, the government never recorded a subsequent grant deed, transferring the individual Indian beneficiaries' interest in the cemetery parcel to the half-blood community known as Jamul Indian Village.

221. Here, it is no wonder that the "Jamul Indians of one-half degree or more Indian blood" have never consented to transfer their individual designation as beneficial owners to any subsequently created half-blood community, since the Interior Board of Indian Appeals found non-members participating in the half-blood Indian community, perhaps from the time the entity was first created in 1982. 32 IBIA 166.

222. The government's *Handbook of Federal Indian Law* further explains the significant distinction between (1) taking land into trust for "individual" Indians, before they are allowed to become a half-blood community under the IRA, as here, and (2) recognizing a landless half-blood community and requiring the Secretary to transfer the land in trust from the individual Indians, with their consent, to the half-blood community, after it was recognized. *Id.*, (DOI 2005) §3.02, p. 135. Here, after the half-blood community was finally recognized in 1982, the government never obtained the consent of the individual Indians to transfer the cemetery parcel into trust for the half-blood community. Nor did the government ever convey title to the cemetery parcel in trust for the half-blood community known as the JIV.

223. For example, the DOI Solicitor's Memorandum concerning the St. Croix Chippewas, *Opinions of the Solicitor*, at 724, Ex. H, cited by both the *Handbook*, (DOI 2005) § 3.02, 146 (n99) Footnote 105, and Justices Breyers at 398-99, and Stevens, at 407, in *Carcieri*, confirms that where the grant deed, Ex. D, fails to contain the final phrase, "until such time as they organize under section 16 of the [IRA] and then for the benefit of such organization," the property remains in trust for the individual Indians, who have never decided to transfer their beneficial interest to any subsequently recognized half-blood community.

224. This is exactly what happened here. The original grant deed, Ex. D, did not contain the phrase transferring the beneficial interest in the property to the subsequently recognized half-blood community known as the JIV. It is undisputed that the half-blood Indian community did not exist and was not under federal jurisdiction in 1934, and was not organized until 1982. The half-blood community known as the JIV still has not been recognized by Congress, has not completed the

administrative remedies to become recognized under the Part 83 regulations, and has not been finally determined to be a recognized tribe by any court.

225. There is also no dispute that the Government failed to follow its own guidelines in recording the grant deed. *Opinions of the Solicitor* at 668, 724, 747, and 1479, attached in Ex. H. Hence, for there to be any subsequent transfer of the individual Jamul Indians' designated beneficial interest in the cemetery parcel to any subsequently recognized half-blood community, such a transfer must still be accomplished the old fashioned way by recording a grant deed. Here, no grant deed ever transferred the individual Indians' designated beneficial interest in the government's portion of the cemetery parcel to the half-blood community known as the JIV.

226. These Solicitors' memoranda also admit that the 1978 trust acquisition cannot be made for a half-blood community that did not then exist. For example, with regard to the Mississippi Choctaw, the Solicitor found that a grant deed simply cannot "designate" a community that doesn't exist as a beneficiary, since "there is in fact no existing tribe of Indians in Mississippi known as the Choctaw Tribe." *Opinions of the Solicitor*, at 668, Ex.H. There, Solicitor Margold describes how the grant deed should have been prepared to put the property in trust for the Mississippi Choctaws: "The United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior, **until such time as the Choctaw Indians of Mississippi shall be organized as an Indian tribe** pursuant to the act of June 18, 1934 (48 Stat. 984), and **then in trust for such organized tribe**." *Opinions of the Solicitor*, at 668 (emphasis added), Ex. H. Similarly here, no such language appears in the 1978 Jamul grant deed. Ex. D.

227. There, the individual Choctaws had to consent and the deed had to be amended and re-recorded to designate any subsequently recognized community a beneficiary. Since the deed did not contain the words: **"until such time as the Choctaw Indians of Mississippi shall be organized as an Indian tribe**" or "**then in trust for such organized tribe**," the property remained in trust for the individual Indians, and not a tribe, as held in *Coast*, 550 F.2d at 651, and *State Tax Comm.*, 535 F.2d 300, 304, where the court held that the absence of the words "then in trust for such organized tribe" in a relief act designating individual Choctaw beneficiaries meant that "only those individuals

designated by the Interior Secretary were to have the benefit of this" designation, since "[n]either a tribe nor a reservation is mentioned."

228. The government's own Solicitor's written instructions to its BIA field superintendents states: "In all of those cases where the title papers have already been returned to the field, instructions should be given to the field agents to have the deeds corrected before they are recorded. In that case where the deed has already been recorded and accepted, it will be necessary to secure a new deed. The necessary corrections will be made in the other cases which are now pending in this office. The error...arises perhaps out of unusual circumstances, but its one that might have been avoided." *Opinions of the Solicitor*, at 668, Ex.H.

229. Here, the consent of the individual half-blood Jamul Indians, including Rosales and Toggery, has never been obtained, and the original deed has never been changed, altered, or re-recorded. The 1978 grant deed does not contain the words, "until such time as they organize," proscribed by the U.S. Solicitor to put the property into trust for a subsequently recognized half-blood community, after it was organized. Ex. D. Nor does it state: "and then in trust for such organized tribe." Moreover, it is undisputed that there was no transfer of the designation of the individual Indian beneficiaries to any subsequently recognized half-blood community, since no subsequent grant deed has ever been recorded.

230. Therefore, as a matter of law, the government Defendants are estopped by its own Solicitor's memoranda and the failure to record any subsequent grant deed transferring the government's portion of the Indian cemetery to deny that it is still held in trust for the designated individual half-blood Jamul Indian beneficiaries, since the government concedes that the "Jamul Indians of one-half degree or more Indian blood,"did not exist as a tribe, and were not recognized as a tribe in 1978, let alone in 1934. *Opinions of the Solicitor* at 668, 724, 747, 1479, Ex. H, and Ex. I.

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(3) JIV Has No Right, Permit or Authorization to Build a Casino on the portion of the Indian Cemetery Beneficially Owned by Individual half-blood Indians and Under the Concurrent Jurisdiction of California, Because No Grant Deed Ever Transferred Governmental Control over the Cemetery Property to JIV

231. Since there was never a subsequent transfer of the individual Indians' beneficial interest in the cemetery parcel to the subsequently organized half-blood community, the individual beneficial ownership of the cemetery parcel has never been under the governmental power of the Jamul Indian Village, and as such, is federal private property, not tribal lands, and does not qualify for gambling under 25 U.S.C. 2703, remains subject to California's concurrent jurisdiction and law, including, but not limited to, Public Law 83-280, Cal. Pub. Res. Code and Cal. Health & Safety Codes, CEQA and NAGPRA, 25 U.S.C. 3002, as further required by 25 C.F.R. 1.4(b), and the DOI July 2, 1965 Secretarial Order, 30 F.R. 8722, and remains in trust for the beneficial use and quiet enjoyment of the individuals of one-half or more degree of Indian blood, including Rosales and Toggery, who then resided on the property.

232. Therefore, since the government and the individual half-blood Indians living in Jamul are barred from lawfully transferring their beneficial interest and trust status to the JIV, and since the JIV was not under federal jurisdiction in June of 1934, the JIV has never lawfully exercised governmental power over the parcel, which thereby precludes the parcel from qualifying for gambling under IGRA, since IGRA only permits gambling on "Indian lands," "over which an Indian tribe exercises governmental power." 25 U.S.C. 2703(4)(B). "The Secretaries of the Interior [and the NIGC] have no authority to permit gaming on after acquired trust lands absent the power delegated by Congress in IGRA." *La Courte Oreilles Band of Lake Superior Chippoewa Indians v. United States,* 367 F.3d 650, 657 (7th Cir. 2004).

233. Since the government's portion of the Indian cemetery was never transferred to the JIV and remains within the concurrent jurisdiction of the State of California today, and was never reserved from the public or private domain, California retains State and local police power over the cemetery

pursuant to the 10th Amendment of the U.S. Constitution and Pub. Law 280, 18 U.S.C. 1162 and 28 U.S.C. 1360.

234. Thus, the Cal. Pub. Res., and Health & Safety Codes, concurrently govern the use of the Jamul Indian cemetery, pursuant to 25 C.F.R. 1.4(b), and the DOI July 2, 1965 Secretarial Order, 30 F.R. 8722, along with the federal NAGPRA, 25 U.S.C. 3001 et seq., which defines the portion of the cemetery in which the U.S. holds title, as "Federal lands other than tribal lands which are controlled or owned by the United States." 25 U.S.C. 3001(5) and 43 C.F.R. 10.2(f)(1) and 10.4(d).

3. JIV has No Standing as a Required or Indispensable Party or an *amicus curiae,* Because it has Failed to Exhaust its Administrative Remedies and is Not a Recognized IRA Tribe

A. JIV Failed to Petition for Recognition as an IRA Tribe

235. The federal government admits that the JIV never petitioned under the Part 83 regulations to be recognized as an IRA "tribe," before it attempted to utilize the IRA to adopt its constitution as a "half-blood dependent Indian community" to obtain federal benefits. Ex. I. Having failed to petition for recognition as an I.R.A. tribe, the JIV has no standing to seek to have its status determined in this action, because it has failed to exhaust its administrative remedies to lawfully obtain recognition as an IRA tribe. *Nisqually Indian Tribe v. Gregoire* (*"Nisqually"*) 623 F.3d 923, 927 (9th Cir. 2010); *White Mountain Apache Tribe v. Hodel* (*White Mountain Apache Tribe*), 840 F.2d 675, 677 (9th Cir. 1988); *Allen v. United States*, 871 F.Supp.2d 982, 991-93 (N.D. Cal. 2012) "'[F]ederal courts may not assert jurisdiction to review agency action until the administrative appeals are complete,' [citing] *White Mountain Apache Tribe*;" *Cherokee Nation of Okla. v. Norton*, 2005 U.S. Dist. LEXIS 2773, *3-4, *34 (10th Cir. 2005), reversing the "listing" of the Delaware Tribe, because it "never formally petitioned for acknowledgment, and reversing the DOI's recognition as arbitrary, capricious and against the law for failing to follow the Part 83 procedures for recognizing an Indian tribe;" *Butte Co. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010), DOI's arbitrary and capricious refusal to consider evidence why Tribe's land was not Indian lands remanded to exhaust administrative remedies; *Sandy Lake Band of Miss. Chippewa ("Sandy Lake") v. United States*, 2012 U.S. Dist. LEXIS 63458, *10 (D. Minn. 2012) dismissing plaintiffs' action for lack of subject matter

jurisdiction and failure to engage in the Federal acknowledgment process and failing to exhaust administrative remedies; and *United Houma Nation v. Babbit*, 1996 U.S. Dist. LEXIS 16437, *4, *8 (D.D.C. 1996), denying an injunction to freeze the administrative review process, where the group "failed to satisfy the historic criterion of 25 C.F.R. 83.7(e), and related provisions of 25 C.F.R. 83.7(a) and (b)."

236. See also, *Ione Band of Miwok Indians v. Burris*, Civ. S-90-993 LKK, (E. D. Cal. 1996), Exs. Y & Z, granting the governmental defendants summary judgment, finding "the Ione Band did not pursue the administrative federal recognition process," and "Plaintiffs' failure to apply for recognition through the administrative process described in the acknowledgment regulations bars their claims because there is no final agency action yet ripe for review," citing *White Mountain Apache Tribe*, and *James v. HHS*, 824 F.2d 1132 (D.C. Cir. 1987), dismissing plaintiffs' claims for lack of jurisdiction and failure to exhaust administrative remedies under 25 C.F.R. 83, which was followed most recently by *Mackinac Tribe v. Jewell*, 1:14-cv-0456 KBJ, Document 19, 25-28 of 29 (D.D.C. March 31, 2015); *David Laughing Horse Robinson v. Salazar*, 885 F.Supp.2d 1002, 1031-32 (E.D. Cal. 2012), finding the Court had no jurisdiction to determine "whether the Kawaiisu are the present day embodiment of the alleged historical tribe," because to do so "would infringe upon the role committed to the other two branches and violate separation of powers," where plaintiffs failed to exhaust administrative remedies for acknowledgment under 25 C.F.R. 83, citing *Shinnecock Ind. Nat. v. Kempthorne*, 2008 WL 4455599, *1 (E.D.N.Y. 2008), finding such a "quintessentially political decision must be left to the political branches of government and not the courts."

237. In *Allen*, the Ukiah Valley Pomo Indians were not a federally recognized tribe. They sought to organize under the IRA, but the court found that "before plaintiffs can invoke the provisions of the IRA, they must first complete acknowledgment proceedings before the BIA and become federally recognized." 871 F.Supp.2d 982, 991. Since "the IRA provides a definition of the term 'tribe,' ...as the government contends...recognition as a 'tribe' is a prerequisite to invoking the provisions of the IRA....the group seeking to organize must make a 'prima facie' showing that they are a 'tribe' within the meaning of the IRA," and not just a half-blood Indian community. *Id.*, at 991-92.

238. Here, the the government concedes that the JIV voluntarily elected not to make such a prima facie showing and did not petition for recognition as an IRA tribe, and merely sought recognition as a "half-blood dependent Indian community," even though they were fully "aware of the limitations that result from organizing as a half-blood Indian community." Ex. I at 2. The JIV half-blood Indian community has never initiated or completed an application to be formally recognized as an IRA tribe under 25 C.F.R. Part 83. Therefore, JIV, like the Ukiah Pomos, Franks Landing Indian Community and the Sandy Lake Band, never became a federally recognized tribe, even though they have been recognized as a half-blood dependent Indian community, and have been "listed" on the Tribal Entities that have a Government-to-Government Relationship with the United States. 44 F.R. 7235, as noted above.

239. Hence, not only does the executive branch "listing" of the JIV as an entity entitled to limited federal benefits not constitute recognition of the JIV as a tribe under the IRA, but the executive branch is not authorized to create a tribe by recognizing JIV as a tribe without JIV exhausting the administrative acknowledgment procedures in compliance with the government's Part 83 regulations. *James v. HHS* 824 F.2d 1132, 1139 (D.C. Cir. 1987); *David Laughing Horse Robinson v. Salazar*, 885 F.Supp.2d 1002, 1031-32 (E.D. Cal. 2012); *Shinnecock Ind. Nat. v. Kempthorne*, 2008 WL 4455599, *1 (E.D.N.Y. 2008).

240. As noted above, the Supreme Court "has long made clear that Congress and therefore the Secretary-lacks constitutional authority to 'bring a community or body of people within [federal jurisdiction] by arbitrarily calling them an Indian tribe'." *Carcieri* at 413, J. Stevens, dissenting, citing *United States v. Sandoval*, 231 U.S. 28, 46 (1913).

241. [I]n respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts. *Id.*, 47.

242. A tribe cannot establish jurisdiction through its unilateral actions. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203, 219-20 (2005). "Where no expression of congressional intent or purpose exists, a tribe cannot establish jurisdiction through its unilateral actions." *Citizens Against Casino Gambling in Erie Co. v. Stevens*, 945 F.Supp. 2d 391, 401 (W.D.N.Y. 2013), landless

Kialagee Tribal Town did not obtain jurisdiction over a restricted allotment owned by members of the Muscogee Nation through unilateral act of leasing the land.

243. Having failed to petition for recognition as an I.R.A. tribe under the Part 83 regulations, the JIV therefore has no standing to appear as *amicus curiae*, or otherwise in this action.

B. JIV Failed to Petition for Proclamation of a Reservation

244. There is no dispute that the JIV has never applied for, nor had proclaimed, a reservation under 25 U.S.C 467. Moreover, the JIV has never been qualified to be "organized" or "reorganized" as a "tribe," under the Indian Reorganization Act, since it has never resided on a reservation. *Coast Indian Community v. U.S.* ("*Coast*"), 550 F.2d 639 (Fed. Cl. 1977), 550 F2.d 639, 651, n. 32; *Handbook of Federal Indian Law*, Ch.1, Sec. B2e, at 15-16 (1982 Ed.), citing *Maynor v. Morton*, 509 F.2d 1254 (D.C. Cir. 1975); Ex. I, at 3.

245. Neither Congress, nor the Secretary of the Interior under the delegated power of 25 U.S.C. 467, ever proclaimed an Indian reservation in Jamul, since Congress specifically limited California to four Indian reservations in 1864, pursuant to The Four Reservations Act § 2, ch. 48, 13 Stat. 39, 40. *Mattz v. Arnett*, 412 U.S. 481, 489-91 (1973). These four reservations, the Round Valley, the Mission, the Hoopa Valley, and the Tule River, do not include one for the JIV. Moreover, the government has conceded that the Mission Reservation's 19 tracts in So. California did not include any land in Jamul, California, nor even mention any tribe in Jamul. See, *Mattz v. Arnett*, 412 U.S. 481, 493, n. 15, 494 (1973).

246. Moreover, the dedication of the government's portion of the cemetery to cemetery use also confirms that it is not a reservation. *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1268 (10th Cir. 2001), *cert. denied*, 534 U.S. 1078 (2002), "Although the Huron Cemetery was reserved by the federal government in the 1855 treaty, it is uncontroverted that the reservation was made strictly for purposes of preserving the tract's status as a burial ground. For these reasons, we conclude the Secretary's determination that the Huron Cemetery is a "reservation" for purposes of IGRA, and his resulting determination that the Shriner Tract can be used by the Wyandotte Tribe for gaming purposes under the IGRA (25 U.S.C. 2719(a)(1)), was incorrect;" *Mechoopda Indian Tribe of Chico*

Rancheria v. Schwarzenegger, 2004 WL 1103021, *12 (E.D. Cal. 2004), finding "It is hard to believe that the Tribe really wants to negotiate to build a gambling casino on their burial ground, but that is what they argue...[However] the Tribe can prove no set of facts establishing that it has Indian land eligible for a gaming facility under the IGRA," due to the use restriction on the cemetery parcel.

247. An Indian tribe's jurisdiction and authority to exercise governmental power over particular property derives from the will of Congress. *United States v. Sandoval* 231 U.S. 28, 46 (1913), citing *United States v. Holliday*, 18 L.Ed. 182, 186; see also, *Kansas v. Norton*, 249 F.3d 1213, 1229-31 (10th Cir. 2001). Here, since Congress never granted the JIV "jurisdiction" over the portion of the cemetery to which the U.S. holds title, and has never created a reservation for the JIV, the express beneficiaries of the grant deed were and still are, the individual half-blood Jamul Indians who were allowed to reside on the property since 1978, including Rosales and Toggery, and not the half-blood Indian community, known as the JIV.

248. At one time, "[a]n Indian reserveration...may be set apart by an act of Congress, by treaty, or by executive order." *Peters v. Pauma School Dist.*, 91 Cal.App. 792, 794 (1928), holding, "the

249.facts set forth in the findings do not establish that petitioner resides upon an Indian reservation." However, However, at no time has Congress, a treaty, or an executive order, created a reservation for the JIV.

250. A reservation cannot be established by "custom or prescription." *Id.*, citing 31 Corpus Juris, 499. "The fact that a particular tribe or band of Indians have for a long time occupied a particular tract of country does not constitute such tract an Indian reservation." *Peters,* at 794, quoting the *Matter of Forty-Three Cases Cognac Brandy*, 14 F. 539 (D.Minn. 1882).

251. Here, not only is there no act of Congress, treaty, or executive order, creating a reservation in Jamul, there is no administrative Secretarial "proclamation" or "application for a proclamation" of any reservation over non-public domain land in Jamul, as required by 25 U.S.C. 467, as a matter of law. *Peters v. Pauma School Dist.*, 91 Cal.App. 792, 794 (1928); *Citizens Exposing Truth About Casinos v. Kempthorne,* 492 F.3d 460, 469 (D.C. Cir. 2007), "the Sackrider property would not qualify as a reservation until the Band applied for and obtained a reservation proclamation under 25

U.S.C. 467;" *Donahue v. Butz*, 363 F.Supp. 1316, 1323 (N.D. Cal. 1973), finding executive officials have no "trust responsibility, right or duty to set aside reservation lands."

252. Here, just as with the JIV's express election not to exhaust its administrative remedies and to forgo applying for recognition as an IRA tribe under the Part 83 regulations, the JIV has similarly failed to apply for a proclamation of any reservation under 25 U.S.C. 467, and neither the Congress, nor the Secretary of the DOI, has proclaimed any reservation for the JIV.

253. "During the 1850's, the modern meaning of Indian reservation emerged, referring to land set aside under federal protection for the residence or use of tribal Indians, regardless of origin...This definition of the term 'reservation' has since been generally used and accepted." *Handbook of Federal Indian Law*, §3.04[c][ii] p. 165 (DOI 2005). However, the creation of a reservation still requires there to be "tribal" Indians of a federally recognized tribe, which JIV is not, and an act of Congress to lawfully create or authorize setting aside such a reservation, and it can no longer be created by the mere acceptance of a grant deed under the IRA. *Id.*; 43 U.S.C. 150; see for example, *Sac & Fox Tribe of the Mississippi in Iowa v. Licklider*, 576 F.2d 145, 149-50 (8th Cir. 1978), creation of any reservation still required the property to be beneficially held for a federally recognized treaty tribe, the Sac & Fox Tribe of the Mississippi in Iowa.

254. The government's regulations for Indian land acquisitions further defines and limits a reservation to: "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction." 25 C.F.R. 151.2(f) (45 F.R. 62036, Sept. 18, 1980). Therefore here, the government's portion of the Indian cemetery is not a reservation, since the JIV has never applied for, and has yet to be recognized by the United States as having, governmental jurisdiction over any portion of the Indian cemetery.

255. Though the Executive Branch once had its own authority to withdraw public lands to create Indian reservations, which the Supreme Court had previously affirmed in *U.S. v. Midwest Oil Co.*, 236 U.S. 459 (1915), and acknowledged in *Minnesota v. Hitchcock*, 185 U.S. 373, 390 (1902), Congress explicitly eliminated that authority in 1919. 43 U.S.C. 150: "No public lands of the United States shall be withdrawn by Executive Order, proclamation or otherwise, for or as an Indian

reservation except by act of Congress." (June 30, 1919, ch. 4, §27, 41 Stat. 34.); *Handbook of Federal Indian Law*, §1.04, p. 81, n498 (DOI 2005).

256. The Government's *Handbook of Federal Indian Law* (DOI 1982) declares: "Any implication that lands purchased [or acquired] for tribes under section 5 of the IRA [25 U.S.C. 465] would constitute a reservation is negated by section 7 of that Act, 25 U.S.C. 467..." Ch. 1, Sec. D5, page 45, fn. 158. Thus, the Government's mere acquisition of the land in trust for the benefit of half-blood individual Jamul Indians did not create a reservation. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), acquisition of federal forest lands under the IRA did not create, nor become part of, a reservation; *Sac & Fox Nation v. Norton*, 240 F.3d 1250, 1257 (10th Cir. 2001); *Wisconsin v. Stockbridge-Munsee Community* 67 F.Supp. 2d 990, 1003 (E.D. Wis. 1999), granting preliminary injunction prohibiting Defendants from conducting Class III games on trust land not within any reservation.

C. JIV Has Failed to Exhaust its Administrative Remedies, and Has No Standing To Seek a Determination as to Whether It Qualifies to be Recognized as an IRA Tribe

257. JIV is barred from seeking JIV's status from the court, because JIV has failed to exhaust its administrative remedies to lawfully obtain federal recognition as an IRA tribe. Therefore, JIV has no standing as either a necessary or indispensable party, nor by way of an *amicus curiae*, or otherwise.

258. Thus, the Court must await JIV's completion of the formal application for recognition under the Part 83 administrative procedure, which JIV hasn't even commenced, before the Court will have jurisdiction to decide whether the JIV has been lawfully recognized by the federal government. *James v. HHS* 824 F.2d 1132, 1139 (D.C. Cir. 1987).

259. In the meantime, JIV has no standing in this action, since it is neither a required nor an indispensable party to this action. *Michigan v. Bay Mills Ind. Cmty.("Bay Mills"),*134 S.Ct. 2024, 2035 (2014); *Salt River Project Agric. Imp. & Power Dist. v. Headwaters Resources Inc.*, 672 F.3d 1176, 1177 (9th Cir. 2012), finding "the tribe is not a necessary party because the tribal officials can be expected to adequately represent the tribe's interests in this action and because complete relief

can be accorded among the existing parties without the tribe;" *Thomas v. United States*, 189 F.3d 662, 664 (7th Cir. 1999), which specifically holds that the Lac Courte Orielles Band of Lake Superior Chippewa Indians was not a required or indispensable party to an action alleging that the federal defendants had failed to follow the administrative procedures for Secretarial elections.

260. For example, "[W]hether the Kawaiisu are entitled to such acknowledgment is a non-justiciable political question and thus beyond the purview of the court...This court's determination of whether the Kawaiisu are the present day embodiment of the alleged historical tribe, would infringe upon the role committed to the other two branches and violate separation of powers...Here, the proper resolution of the claim is to proceed first through the administrative process because recognition is the issue. Recognition requires the DOI's special expertise to determine tribal status...the plaintiffs claim would be dismissed for failure to exhaust administrative remedies because those remedies have not been exhausted." *David Laughing Horse Robinson v. Salazar*, 885 F.Supp.2d 1002, 1031-32 (E.D. Cal. 2012).

261. "The key distinction is that the land claims may be justiciable, but the tribal status is not....it is undisputed that the Kawaiisu has never been recognized under the DOI/BIA's acknowledgment regulations, the executive-not the courts-must make the recognition determination...Where tribal status is at issue, the issue requires exhaustion of administrative remedies." *Id.*, 1032-33.

262. "[T]he court concludes that the district court was correct in ruling that appellants were required to exhaust administrative channels concerning the issue of tribal recognition prior to seeking judicial review." *James v. HHS* 824 F.2d 1132, 1139 (D.C. Cir. 1987), and followed by *Mackinac Tribe v. Jewell*, 1:14-cv-0456 KBJ, Document 19, 25-28 of 29 (D.D.C. March 31, 2015). "In this case, requiring exhaustion of the Department of the Interior's procedures for tribal recognition, before permitting judicial involvement, serves the purposes of the exhaustion doctrine." *Id.*, at 1137, citing *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 50-51 (1938). "[R]equiring exhaustion allows the Department of the Interior the opportunity to apply its developed expertise in the areas of tribal recognition. The Department of the Interior's Branch of Acknowledgment and Research was established for determining whether groups seeking tribal recognition actually constitute Indian tribes and presumably to determine which tribes have previously obtained federal recognition. See,

25 C.F.R. 83.6(b)...It is apparent that the agency should be given the opportunity to apply its expertise prior to judicial involvement." *Id.*, at 1138, citing *Runs After v. United States*, 766 F.2d 347, 351-52 (8th Cir. 1985).

263. In *Shinnecock Ind. Nat. v. Kempthorne*, 2008 WL 4455599, *1 (E.D.N.Y. 2008) the court dismissed the recognition claims as a matter of law finding: "The issue of federal recognition of an Indian tribe is a quintessential political question that, in the first instance, must be left to the political branches of government and not to the courts." "As *James* and *Shawnee* demonstrate, historical recognition by the Executive Branch does not allow... an entity to completely bypass the BIA's recognition process." *Id.,* 1034.

264. Hence, the JIV has no lawfully recognized sovereignty, and exercises no lawful governmental power over any land that qualifies for Indian gambling. Thus, it has no protectable interest justifying participation in this action, nor can it be an indispensable party, since the executive council members have been named as Defendants and can adequately represent the JIV's alleged interests, as held in *Michigan v. Bay Mills Indian Community,* 134 S.Ct. 2024 (2014)*, Thomas v. United States*, 189 F.3d 662, 664 (7th Cir. 1999), and *Salt River*, *supra*, at 1177. Here, just as in *Thomas*, the JIV has been "trying to leverage its failure to follow the prescribed statutory procedures into an unreviewable decision," as to its status as a half-blood dependent Indian community, "by taking advantage of Rule 19. We cannot condone this kind of ploy." *Id.*, at 669. Neither can this Court.

4. There Has Been No Prior Final Adjudication of any Issue in this Action

265. Contrary to the public statements by the JIV, the merits of Rosales and Toggery's prior litigation have never been found lacking, abusive, or to have deprived the JIV of any rights as a half-blood Indian community. Similarly, JIV has failed to demonstrate that any prior litigation was ever decided on the merits, or that any prior procedural dismissal of Rosales and Toggery's prior claims without a decision on the merits has any *res judicata* or collateral estoppel affect on any issue pending in this action.

266. There can be no issue preclusion without a final adjudication in the prior action. Here, there are no prior final adjudications of any issue pending in this case.

267. Since the JIV is not a party to this action, and has not properly supported its erroneous public assertions with the requisite "sufficient record," including complete copies of the prior complaints, answers, and orders in the prior litigation, there is no record of any issue preclusion in this action. *United States v. BaslerTurbo-67 Conversion DC-3 Air*, 1996 U.S. LEXIS 4685, *7-8 (9th Cir. 1996), the seeker of issue preclusion "must introduce a sufficient record to clearly demonstrate the fact that the very issues have been previously litigated between its opponent and someone else;" *Frankfort Digital Servs. v. Kistler*, 477 F3d. 1117, 1123 (9th Cir. 2007), "[a]ny reasonable doubt as to what was decided by a prior judgment should be resolved against giving it [issue preclusion] effect."

> 268. It is not enough that the party introduce the decision of the prior court; rather, the party must introduce a sufficient record of the prior proceeding to enable the trial court to pinpoint the exact issues previously litigated. *Id.* Where the record before the district court was inadequate for it to determine whether it should apply the doctrine of collateral estoppel, we will not consider the issue on appeal. *Clark v. Bear Stearns & Co*., 966 F.2d 1318, 1321 (9th Cir. 1992).

269. Plaintiffs are not collaterally estopped by any of the prior litigation among Rosales, Toggery, the federal and state agencies, since none of those cases decided any of the merits of the claims in this action. Here, there will be no re-litigation because the substantive issues weren't litigated in any of the prior litigation. Most importantly, none of those cases ever decided the merits of the fact that the JIV was never under federal jurisdiction in 1934, and that Rosales and Toggery's families remains are to be protected on the government's portion of the Indian cemetery.

270. All of the prior litigation among the members of the JIV were dismissed on procedural grounds, due to a lack of jurisdiction to decide the merits in the absence of an indispensable party, claiming, albeit falsely, sovereign immunity, all of which have been superceded by subsequent Supreme Court opinions. Therefore, none of those decisions have any issue preclusive effect under the doctrines of *res judicata* or collateral estoppel, having been "dismissed without prejudice," per both F.R.C.P. or F.C.F.C., Rule 19, and C.C.P. 389(b). *Costello v. United States*, 365 U.S. 265, 286-87 (1961); *United States v. Hatter*, 532 U.S. 557, 566, (2001), no issue preclusion where the court did not reach the merits of the Cherokee Nation's claim; *Wilson v. Bittick*, 63 Cal.2d 30,

35-36 (1965), "the involuntary dismissal which terminated that proceeding was in no sense a ruling on the substance of the plaintiff's claim."[23]

271. Dismissal under F.R.C.P. Rule 12(b)(7) due to an absent required party under federal Rule 19 is without prejudice, and therefore is not an adjudication on the merits, and thus does not have claim preclusive effect. *Followay Productions Inc. v. Maurer*, 603 F.2d 72, 76 (9th Cir. 1979); *Univ. of Pittsburgh v. Varian Medical Systems, Inc.*, 569 F.3d 1328, 1332 (Fed. Cir. 2009), citing *Hughes v. United States*, 71 U.S. (4 Wall.) 232, 237 (1866), and 18A Charles A. Wright, *Federal Practice and Procedure* § 4438 (2d ed. 1987).

272. Issue preclusion applies only to preclude litigation of issues "actually and necessarily decided at the previous proceeding [that are] identical to the one which is sought to be relitigated, and where "the first proceeding ended with a final judgment on the merits;" *Syverson v. IBM*, 472 F.3d 1072, 1078 (9th Cir. 2007); *Whelan v. Abell*, 48 F.3d 1247, 1255-56 (D.C. Cir. 1995); and "must be confined to situations where the matter raised in the second suit is identical in all respects with that decided in the first proceeding." *Commissioner v. Sunnen*, 333 U.S. 591, 599-600 (1948). If it is "uncertain whether [an] issue was actually and necessarily decided in [prior] litigation, then relitigation of the issue is not precluded." *Next Wave Personal Comm. Inc. v. F.C.C.*, 254 F.3d 130, 147 (D.C. Cir. 2001).

273. For example, in *United States v. Washington*, 641 F.2d 1368, 1374 (9th Cir. 1981), the appellants claimed that the court was bound by decisions of the Indian Claims Commission and the Court of Claims in which the appellants were allowed to pursue claims on behalf of members.

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[23] The fact that there has been a lot of litigation among the members of the JIV is merely a testament to the procedural hurdles that must be overcome in finally reaching a decision on the merits, now that *Carcieri v. Salazar*, 555 U.S. 379 (2009), and *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199 (2012), and *Michigan v. Bay Mills Ind. Cmty.,*134 S.Ct. 2024 (2014) have cleared the procedural underbrush, and established that the land doesn't qualify for gambling, Plaintiffs have standing, and the JIV is not an indispensable party, when its executive officers are sued in their individual capacity for violating the law. Like the 58 years it took for *Brown v. Board of Education*, 347 U.S. 483 (1954) to repudiate *Plessy v. Ferguson*, 163 U.S. 537 (1896), and the decades of litigation to establish the Tobacco Companies' liability, many disputes take years before a final decision on the merits may be entered. Rosales and Toggery, have laudably persisted in the assertion of the truth, despite the fact that the merits of Plaintiffs' claims have never been decided in any of the prior litigation.

"Those claims, however, involved compensation for individuals, not fishing rights for tribal units. The causes of action and factual issues litigated were different, and the doctrines of res judicata and collateral estoppel are therefore inapplicable." *Id.*, 1374, citing 1B Moore's Federal Practice, P0.405(1), (3).

274. Neither *res judicata* nor collateral estoppel bars the re-litigation of an issue, unless the issue was "necessary to support the judgment entered in the prior proceeding." *Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd.*, 475 F.3d 1060, 1086 (9th Cir. 2007); *Knox Co. Educ. Assn. v. Knox Co. Bd. Educ.*, 156 F.3d 361, 376 (6th Cir. 1998); *Anthan v. Prof. Air Traffic Controllers Org.*, 672 F.2d 706, 710 (8th Cir. 1982). A decision has precedential value only as to "the precise issues necessarily presented and necessarily decided." *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). A summary disposition on appeal affirms only the judgment of the court below, and no more may be read into the summary disposition on appeal than was essential to sustain that judgment. *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 182-183 (1979).

275. Here, contrary to public statements by the JIV, no court has made a final decision on the merits as to the identical issues, as for whom the United States holds the portion of the Indian cemetery in trust, and the fact that the JIV was not under federal jurisdiction in 1934:

276. *Rosales v. Kean Argovitz Resorts*, No. 00cv1910 (S.D. Cal. 2000), was dismissed for failure to state a claim under the Civil Rights Acts for invidious discrimination against Native Americans by Lakes Gaming, and reached no final decision as to whether the JIV was under federal jurisdiction in 1934, or the merits of the beneficial ownership of the government's portion of the Indian cemetery.

277. *Rosales VII*, Case No. 01cv951 (S.D. Cal. 2001) was appealed,[24] and the Ninth Circuit affirmed a procedural dismissal for lack of an indispensable party. Hence, any dicta concerning for

[24] Rosales and Toggery adopt JIV's roman numeral naming convention when referring to the prior lawsuits.

whom the cemetery parcel was held in trust is not a final decision on the merits and can provide no basis for *res judicata* or collateral estoppel.[25]

278. *Rosales IX*, No. 3:07cv624 (S.D. Cal. 2007), was dismissed as premature since the court found a lack of subject matter jurisdiction since then, unlike here and now, there had not yet been an actual discovery of desecrated human remains, and due to the absence of an indispensable party. Again, such procedural dismissal is not a final decision on any of the merits as to whether the JIV was under federal jurisdiction in 1934 or the ownership of the government's portion of the Indian cemetery.

279. *Rosales X*, No. 1:08cv512, 89 Fed. Cl. 565 (Ct. Fed. Cl. 2008), claim for damages arising from their wrongful eviction was similarly dismissed for lack of jurisdiction under the Indian Tucker Act, and due to an absent indispensable party. Neither jurisdictional ruling decided the merits of any claim by Plaintiffs here. The JIV is no longer an indispensable party following *Michigan v. Bay Mills Ind. Commty,* 134 S.Ct. 2024 (2014), and Plaintiffs naming of the executive council members of the JIV as Defendants. Moreover here, Plaintiffs' personal injury claims arising from the desecration of Plaintiffs' families' remains did not accrue under the Indian Tucker Act, until excavation began on or about February 10, 2014.

280. In none of Rosales and Toggery's prior actions were their claims the same as Plaintiffs raise here. None of those claims were premised upon the 2014 desecration of their families' human remains and funerary objects, obviously because it had not yet occurred. Most importantly, the

[25] Moreover, since the Ninth Circuit in *Rosales VII* ordered the So. Dist. of Cal. not to exercise its jurisdiction in equity and good conscience under F.R.C.P. Rule 19, and in *Rosales IX*, the So. Dist. of Cal. followed that order, there still has been no decision on the merits as to the beneficial ownership of the cemetery parcel, and the So. Dist. Cal.' statements concerning such ownership are not binding on this Court, nor do they preclude any of Plaintiffs' claims here. "When a judgment is based upon alternative grounds or multiple grounds, and on appeal it is affirmed on only one ground, without reaching the others, only the issue reached on appeal is a basis for collateral estoppel." *Janicki Logging Co. Inc. v. U.S.*, 36 Fed. Cl. 338, 340 (Ct. Cl. 1996), *aff'd* 124 F.3d 226 (Fed. Cir. 1997)(table); *see also*, *Trauma Service Group, Ltd. v. United States*, 33 Fed. Cl. 426, 433, fn. 5 (CFC 1995). No more may be read into summary disposition on appeal than is essential to sustain that judgment. *Illinois Elections Bd. v. Socialist Workers Party*, 440 U.S. 173, 182-183 (1979). Thus, the Ninth Circuit's final decision was that the federal court did not have jurisdiction to decide the beneficial ownership of the cemetery parcel, which as noted above is a procedural dismissal without prejudice, and not a final decision on the merits.

Plaintiffs here, do not seek allotments or land patents, for loss of the beneficial interest in the government's portion of the Indian cemetery, as Rosales and Toggery did in *Rosales VII, IX* and *X.*

281. No court has finally determined that Plaintiffs' claims accrued more than 6 years before this action was filed. Plaintiffs' claims here do not arise from the date of the grant deed for the government's portion of the Indian cemetery, but from the 2014 desecration of their families' remains and funerary objects. Moreover, until April 10, 2013, 78 F.R. 31398, though the individual and corporate Defendants had been threatening to build a casino for almost 20 years, and had made applications to acquire other trust lands, no tribal, state or federal action had ever identified the government's portion of the Indian cemetery as being qualified for Indian gambling.

282. Moreover, since the individual members' prior lawsuits were all dismissed for lack of jurisdiction, the procedural findings therein are not final decisions on the merits as to who are the beneficial owners of the cemetery parcel. As to this issue, even if the half-blood dependent Indian community, known as the JIV, may have been mistakenly assumed to be the beneficial owner of the government's portion of the cemetery parcel in some of the prior litigation, there was never a final adjudication of that fact, or whether anyone other than the U.S. lawfully exercised governmental control over the government's portion of the cemetery parcel.

283. Thus, the status of the government's acquisition has never been finally decided, and Plaintiffs' claims are not barred by any statute of limitation, since Plaintiffs are well within six years of the government first asserting that it made an Indian Lands Decision on April 10, 2013. *Wind River Mining Corp. V. United States*, 946 F.2d 710 (9th Cir. 1991). Moreover, as noted above, "administrative actions taken in violation of statutory authorization or requirement are of no effect," *City of Santa Clara v. Andrus*, 572 F.2d 660, 677 (9th Cir. 1978), citing *Utah Power & Light Co. v. United States*, 243 U.S. 389, 392 (1917), and "unauthorized agency action may be disregarded as null and void," without regard to any statute of limitations. See, e.g., *Employers Ins. Of Wassau v. Browner* , 52 F.3d 656, 665 (7th Cir. 1995); *N.L.R.B. Union v. Federal Labor Relations Auth.*, 834 F.2d 191, 196 n. 6 (D.C. Cir. 1987); *Schiller v. Tower Semiconductor Ltd.*, 449 F.3d 286, 293 (2d Cir. 2006), "The D.C. Circuit has explained that ...substantive challenges to agency action–for example, claims that agency action is unconstitutional, that it exceeds the scope of the agency's

substantive authority, or that it is premised on an erroneous interpretation of a statutory term–have no time bars..."

5. There Has Been No Prior Final Adjudication that JIV was an Indispensable Party, all of which have been Superceded by Recent United States Supreme Court Decisions

284. There has been no prior final decision on the merits as to whether JIV is either a required or an indispensable party in any action–all such prior procedural dismissals being without prejudice, and the law having been fundamentally changed in the meantime. *Costello v. United States*, 365 U.S. 265, 286-87 (1961)*; Followay Productions Inc. v. Maurer*, 603 F.2d 72 (9th Cir. 1979); *Wilson v. Bittick*, 63 Cal.2d 30, 35-36 (1965).

285. As noted above, procedural dismissals under both federal and state rules due to a lack of subject matter jurisdiction or an absent required party are without prejudice, as a matter of law (even if mistakenly delineated with prejudice by the trial court), and therefore are not an adjudication on the merits, and thus do not have claim preclusive effect. *Dredge Corp. v. Penny*, 338 F.2d 456, 463 (9th Cir. 1964); *Univ. of Pittsburgh v. Varian Medical Systems, Inc.*, 569 F.3d 1328, 1332 (Fed. Cir. 2009), citing *Hughes v. United States*, 71 U.S. (4 Wall.) 232, 237 (1866); *Northern Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1284 (10th Cir. 2012) and 18A Charles A. Wright, *Federal Practice and Procedure* § 4438 (2d ed. 1987).

286. Any prior procedural dismissal based upon alleged indispensability has also been superceded by the United States Supreme Court decisions in *Carcieri v. Salazar*, 555 U.S. 379 (2009), finding the JIV has no protectable interest in the government's portion of the cemetery parcel, since the JIV was not under federal jurisdiction in 1934, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199 (2012), finding that neighbors have standing to challenge Indian lands decisions under the A.P.A., and *Michigan v. Bay Mills Ind. Cmty.("Bay Mills"),*134 S.Ct. 2024 (2014), which holds that even if the JIV, were a federally recognized tribe in 1934, which it isn't, it would not be either a required, nor an indispensable, party to this action, since the JIV executive council members have been named as individual Defendants, and since they have no

immunity for violating IGRA, failing to comply with the IRA, and violating NAGPRA and California's public nuisance statutes. Therein, the Supreme Court holds:

> And if Bay Mills went ahead anyway, [and operated a illegal casino] Michigan could bring suit against tribal officials or employees (rather than the Tribe itself) seeking an injunction for, say, gambling without a license. See §432.220; see also §600.3801(1)(a) (West 2013) (designating illegal gambling facilities as public nuisances). As this Court has stated before, analogizing to *Ex parte Young, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908)*, **tribal immunity does not bar such a suit for injunctive relief against *individuals*, including tribal officers, responsible for unlawful conduct**. See *Santa Clara Pueblo*, *436 U.S. at 59, 98 S. Ct. 1670, 56 L. Ed. 2d 106*...In short (and contrary to the dissent's unsupported assertion, see *post,* at 11), the panoply of tools Michigan can use to enforce its law on its own lands–no less than the suit it could bring on Indian lands under §2710(d)(7)(A)(ii)–can shutter, quickly and permanently, an illegal casino. *Bay Mills*, 134 S. Ct. 2024, 2035. (emphasis added).[26]

287. Since these decisions have so fundamentally changed the law, the Supreme Court's intervening decisions also create an exception to any issue preclusion under the doctrine of collateral estoppel or otherwise. "[E]ven if the core requirements for issue preclusion are met, [which have not been met here] an exception to the doctrine's application would be warranted due to [the Supreme] Court's intervening decision...", citing the RESTATEMENT (SECOND) OF JUDGMENTS, §28, Comment *c* (1982), which also states: "where the core requirements of issue preclusion are met, an exception to the general rule may apply when a 'change in [the] applicable legal context' intervenes." *Bobby v. Bies*, 556 U.S. 825, 836, (2009); *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 362-63 (1984); *Montana v. United States,* 440 U.S. 147, 162 (1979); *Commissioner v. Sunnen*, 333 U.S. 591, 599 (1948); *Burlington N. Santa Fe R.R. v. Assiniboine & Sioux Tribes of the Fort Peck Reservation*, 323 F.3d 767, 770 (9th Cir. 2003). "Courts have crafted an exception to the collateral estoppel principle when there has been a change in the applicable law between the time of the original decision and the subsequent litigation in which collateral estoppel is invoked." *Bingaman v. Department of the Treasury*, 127 F.3d 1431, 1437 (Fed. Cir. 1997).

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[26] It should be noted that the Supreme Court has also recently held in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2212 (2012), that a neighboring citizen or group of citizens, like the Plaintiffs here, have standing to challenge the illegal acts of such executive council members, and their contractors, just as any State was held to have standing to sue the executive council members for violating the IRA, IGRA, NAGPRA or any of the State's laws in *Bay Mills.*

6. JIV Remains an Unessential Third Party to this Action and is Adequately Represented by the Named Defendant Executive Council Members who have No Immunity for Violating California and Federal law

288. Now that the U.S. Supreme Court has resolved the split among the Circuits in *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024 (2014), JIV is not an indispensable party to this action, as a matter of law, where it is adequately represented by its executive council members, as here, who are named defendants, and are not immune for their violations of the IRA, IGRA, NEPA, NAGPRA and California's P.R.C., H.S.C. and Penal Codes. By eliminating the prior split in the circuits, the Supreme Court has also eliminated the grounds for the prior procedural dismissals that prevented the merits of Rosales and Toggery's claims arising from the desecration of their families' remains and the beneficial ownership of the government's portion of the Indian cemetery from being finally adjudicated, until now.[27]

289. "Nor does the immunity extend to members of the tribe just because of their status as members. ...When tribal officials act outside the bounds of their lawful authority, however, most courts would extend the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to allow suits against the officials, at least for declaratory or injunctive relief." *Agua Caliente Band of Cahuilla Indians v. Superior Court*, 40 Cal.4th 239, 248 (2006), citing *Ex parte Young*, 209 U.S. 123 (1908); *Boisclair v. Sup. Ct.* 51 Cal.3d 1140, 1157-58 (1990). See also, *Salt River Project Agricultural Improvement and Power District v. Lee*, 672 F.3d 1176, 1177 (9th Cir. 2012).

290. In sum, we hold that (1) the Navajo Nation is not a necessary party under Rule 19(a)(2)(A) because the plaintiffs seek relief only against the current Navajo officials; (2) the Navajo nation is not a necessary party under Rule 19(a)(1)(B)(I) because the officials adequately represent the tribe's interests, and (3) the Navajo Nation is not a necessary party under Rule 19(a)(1)(B)(ii) because its absence will not risk subjecting the plaintiffs to inconsistent obligations.

Indeed, a contrary holding would effectively gut the *Ex parte Young* doctrine. That doctrine permits actions for prospective non-monetary relief against state or tribal officials in their official capacity to enjoin them from violating federal law, without

[27] Compare *Burlington Northern Railroad Co. v. The Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991), "tribal sovereign immunity does not bar a suit for prospective relief against tribal officers allegedly acting in violation of federal law," with *Shermoen v. United States*, 982 F2d 1312, 1319-20 (9th Cir. 1992), attempting to create an exception to *Burlington Northern* for "relief requiring affirmative action by a sovereign or the disposition of unquestionably sovereign property," neither of which can be found in the enforcement of NAGPRA and California's H.R.C. and P.R.C., after the holding in *Bay Mills*.

> the presence of the immune State or tribe. *See Ex parte Young*, 209 U.S. 123 (1908). *Salt River Project Agricultural Improvement and Power District v. Lee,* 672 F.3d 1176, 1181 (9th Cir. 2012).

291. *Thomas v. United States*, 189 F.3d 662, 664 (7th Cir. 1999), also specifically holds that the Lac Courte Orielles Band of Lake Superior Chippewa Indians was not a required or indispensable party to an action alleging that the federal defendants had failed to follow the administrative procedures for Secretarial elections.

292. Even if *Bay Mills* had not held that a tribe is not an indispensable party, where its non-immune executive council members have been sued, the JIV also has no "legally protected interest" to be an indispensable party, because its "claimed" interest is "patently frivolous." *Davis v. United States*, 192 F.3d 951, 958-59 (10th Cir. 1999), reversing the dismissal of plaintiffs' Certificates of Degree of Indian Blood (CDIB) claims, finding the Tribe was not an indispensable party, since the Tribe's claim to a protected interest was patently frivolous, since there was no evidence in the record that the Tribe had "a legitimate claimed interest in Plaintiffs' CDIB claim."

293. Here, the JIV's claim to exercise governmental power over the U.S. government's portion of the Indian cemetery is just as patently frivolous, since there simply is no evidence disputing the fact that the JIV was not under federal jurisdiction in 1934, and therefore has never lawfully exercised governmental power over the government's portion of the Indian cemetery.

294. In *Yellowstone County v. Pease,* 96 F.3d 1169, 1172 (9th Cir. 1996), the Ninth Circuit found that a tribal court had no legally protected interest, where the Tribe had no legal interest in the tax to be collected from the defendant.

> Pease's contention that the tribal court has a legally protected interest in maintaining a court system that adjudicates property rights is also without merit. First, this case is not about the Tribe's right to tax reservation lands; rather, this action arose from Pease's claim that the *County,* a political subdivision of the State of Montana, is powerless to tax his fee-patented property...unlike other cases where courts have concluded that tribes are necessary parties under Rule 19(a), ...the tribal court does not have a legally protected interest that would be impaired or impeded by the County's suit. *Id.*

295. In *Citizen Band Potawatomi Indian Tribe of Okla. v. Collier*, 17 F.3d 1292, 1294 (10th Cir. 1994), the United States failed to show that the Absentee-Shawnee tribe had a "legally protected interest," since the tribe had never been granted an "undivided trust or restricted interest" in the land.

> The 1872 Act does not create any "undivided trust or restricted interest" of the Absentee-Shawnee tribe in the Potawatomi tribe's land ....this "interest" is merely an expectation...This expectation is not a legally protected interest for purposes of 12(b)(7) necessary party analysis. *Potawatomi*, 17 F.3d 1292, 1294.

296. Similarly here, the JIV has no legally protected interest in the U.S. government's portion of the Indian cemetery. At best, it has an expectation that someday it might be recognized as an IRA tribe under federal jurisdiction in 1934, and that it might lawfully acquire land that qualifies for Indian gambling, with the concurrence of the Governor that such acquisition and use would not be detrimental to the community. But until both of these requirements are met, JIV has no legally protectable interest in the government's portion of the cemetery property, and remains an unessential third party to Plaintiffs' action.

297. Moreover, where, as here, "plaintiffs' action focuses solely on the propriety of [governmental action], the absence of a Tribe does not prevent the plaintiffs from receiving their requested declaratory relief." *Sac & Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1258 (10th Cir. 2001); *Kansas v. United States,* 249 F.3d 1213, 1226 (10th Cir. 2001), "although the tribe had an economic interest in the suit's outcome," its gaming interest was not a sufficiently direct interest to make the tribe an indispensable party, since "the Federal Defendants' interests, considered together, are substantially similar, if not identical, to the Tribe's interests...;" *Antoine v. United States,* 637 F.2d 1177, 1181-82 (8th Cir. 1981),"the government [and its employees] may be held liable... regardless of the presence or absence of other potential parties."

298. Enjoining the Defendants from violating IRA, IGRA, NAGPRA and California's P.R.C., H.S.C. and Penal Codes will not invalidate any lawful ordinances, rules, regulations or practices of the JIV half-blood Indian community. Nor will such an injunction impair JIV's ability to exhaust its administrative remedies. Nor will it impair the negotiation, adoption, and enforcement of JIV's compact, ordinances, rules, regulations or contracts in compliance with the IRA and IGRA. Plaintiffs' relief does not seek to, and would not, invalidate any lawful compact or contract; while

any unlawful portion of any compact or contract entered by or among the Defendants is void and unenforceable in any event.

299. The fact that the named Defendants have no sovereign immunity for violating these laws, and all have the same interest as does the JIV in defending against these violations, the JIV is precluded from erroneously asserting any sovereign impairment under *E.E.O.C. v. Peabody W. Coal Co.*, 619 F.3d 1070, 1082 (9th Cir. 2010), or *Greyhound Racing, Inc. V. Hull*, 305 F.3d 1015, 1024 (9th Cir. 2002), *Pit River Home v. United States*, 30 F.3d 1088, 1092 (9th Cir. 1994), *Conf. Tribes of Chehallis Reservation v. Lujan*, 928 F.2d 1496, 1497 (9th Cir. 1991), *Dawavendewa v. Salt River Project Agric. Imprv. and Power Dist.*, 276 F.3d 1150 (9th Cir. 2002), and *Shermoen v. United States*, 982 F.2d 1312, 1320 (9th Cir. 1992). None of these cases are apposite, since the non-immune individual government office holders were not named Defendants, as they are here, under the *Ex parte Young* doctrine reaffirmed in *Bay Mills*, and available to adequately represent the absent immune governmental entities.

300. *Shermoen* and *Dawavendewa* are also limited to their facts, and only apply where the "relief cannot be granted by merely ordering the cessation of the [illegal] conduct complained of," as here, where Plaintiffs' relief requires no "affirmative action by the sovereign or the disposition of unquestionably sovereign property." *Id.*, 1320. Here, Plaintiffs merely seek damages and an injunction based upon the Defendants' violation of the law, and do not seek the disposition of any unquestionably sovereign property.

301. Hence, Plaintiffs' injunctive relief will not prevent the half-blood JIV Indian community from exercising any sovereignty, since the government's portion of the Indian cemetery has never been lawfully subject to JIV's governmental power. Moreover, since *Bay Mills* holds that JIV is adequately represented by its executive council members and contractors, who are named Defendants in this action, JIV therefore cannot be prejudiced, as a matter of law, by a decision on the merits that it was not recognized under federal jurisdiction in 1934, and therefore cannot lawfully exercise governmental power over that portion of the Indian cemetery.

302. Neither the half-blood JIV Indian community, nor any other community of citizens, has the right to plant a flag in the U.S. government's portion of a privately owned Indian cemetery in California, and falsely claim sovereignty over it, and prevent the lineal descendants from protecting their families' remains against their false claims. A half-blood community of Indians simply cannot establish jurisdiction through its unilateral actions. *Sherrill* at 203, 219-20; *CACGE* at 401.

303. Thus, JIV is neither a required nor indispensable party to this action, since the executive council members have been named as Defendants and can adequately represent the JIV's alleged interests, as held in *Bay Mills, Thomas, supra*, at 664, and *Salt River*, *supra*, at 1177. As noted above, and just as in *Thomas*, the JIV is "trying to leverage its failure to follow the prescribed statutory procedures into an unreviewable decision," as to its status as a half-blood dependent Indian community, "by taking advantage of Rule 19. We cannot condone this kind of ploy." *Id.*, at 669. Neither can this Court.

304. This action may now finally decide the merits of Plaintiffs' claims for the desecration of their families' remains on the government's portion of the Indian cemetery property. JIV is not a required or indispensable party to this action, as a matter of law, since none of the federal, corporate or individual Defendants have any immunity for their violations of IRA, IGRA, NAGPRA and the California P.R.C., H.S.C. and Penal Codes, after *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2035 (2014), and since they have been named as Defendants.

FIRST CAUSE OF ACTION

(Tortious Violation of Statute and Negligence Against All Defendants)

305. Plaintiffs incorporate by reference each and every allegation contained in paragraphs 1 through 303, inclusive, of this complaint as though fully set forth herein.

306. The Defendants owe a duty of care to the Plaintiffs to exercise reasonable care and comply with the law in the performance of the work they perform, including, but not limited to, complying with the U.S. Constitution, particularly Amend. 1, 4, 5, and 14, NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, Article I, Sections. 1, 2, 3, 4, 7, 13, 19, 24 and 31 of the California Constitution, the California Environmental Quality Act, Cal. Health & Safety Code §§7050.5, 7052, 7054, 7054.6,

7054.7, 7055, 7500, Public Res. Code 5097.9-5097.99, and Penal Code 487, and not violating the Plaintiffs' civil rights, as are enjoyed by California citizens, due to their age, ancestry and their political and religious beliefs.

307. Plaintiffs are informed and believe and thereon allege, that Defendants both intentionally and negligently breached their duty to Plaintiffs by failing to use reasonable care to protect the interests of, and prevent personal injury to, the Plaintiffs, by violating the law, and by negligently acting in the manner set forth in the allegations incorporated herein.

308. These acts include, but are not limited to: mutilating, disinterring, wantonly disturbing, demolishing, excavating, willfully removing, and permitting the dumping of the Plaintiffs' families' human remains and funerary objects on federal and state property, causing severe bodily injury, emotional distress, and irreparable damage to the Plaintiffs and their personal property, Native American human remains, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in, and prohibited by, NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, the California Environmental Quality Act, Cal. Pub. Res. Code §§21000-21177, 14 C.C.R. 15000-15387, Cal. Health & Safety Code §§7050.5, 7052, 7054, 7054.6, 7054.7, 7055, 7500, 8011, 8015-16, and Cal. Pub. Res. Code §§ 5097.9-5097.99, and Penal Code 487.

309. These acts have caused Plaintiffs' severe personal, physical and bodily injury, including severe emotional distress, and irreparable damage to themselves and their personal property, Native American human remains, along with the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, and Cal. Pub. Res. Code 5097.9-5097.99, by knowingly and/or willfully mutilating, disinterring, wantonly disturbing, and willfully removing, damaging, or otherwise altering or defacing, them without authority of law, in an amount in excess of $4 million, subject to further proof at trial.

310. These acts have also caused substantial emotional distress and personal injury and irreparable damage to, and interference with, the Plaintiffs' free expression and exercise of Native American religion as provided in the United States Constitution and the California Constitution, and has caused

and shall further cause severe and irreparable damage to the Plaintiffs' Native American sanctified cemetery, place of worship, religious or ceremonial site, and sacred shrines, in an amount in excess of $4 million, subject to further proof at trial.

311. Such acts will also unduly interfere with the Plaintiffs' civil rights to due process and equal protection of the laws. Plaintiffs will be greatly and irreparably damaged by reason of Defendants' infringement and violation of these civil rights, and unless Defendants are enjoined by this court, said acts will further violate Plaintiffs' civil rights, and further irreparably harm the Plaintiffs. Plaintiffs have therefore suffered general and consequential damages proximately caused by the Defendants' negligence in an amount subject to proof at the time of trial.

SECOND CAUSE OF ACTION

(For Declaratory and Injunctive Relief against all Defendants)

312. Plaintiffs incorporate by reference each and every allegation contained in paragraphs 1 through 310, inclusive, of this complaint as though fully set forth herein.

313. Plaintiffs are the lineal descendants' with ownership and control of their predecessors' human remains and Native American associated cultural items, as set forth in NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, Cal. Pub. Res. Code 5097.9-5097.99, and Cal. Health & Safety Code 7100, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony.

314. Plaintiffs' preferences are to preserve their families' Native American human remains and associated cultural items in place, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in, and required by, NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, Cal. Pub. Res. Code 5097.9-5097.99, and the CEQA Guidelines, 14 Cal. Code Regs.15126.4 (b)(3).

315. Pursuant to NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, Cal. Public Resources and Health & Safety Codes and the regulations adopted pursuant thereto, Plaintiffs are entitled to;

(A) an injunction preventing Defendants from any further knowing and/or willful mutilation, disinterment, wanton disturbance, excavation, and willful removal of Plaintiffs' Native

American human remains, along with the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, without authority of law, and permitted dumping of the Plaintiffs' families' human remains and funerary objects on state property owned and controlled by CalTrans, which have caused, and will continue to cause, irreparable damage to the Plaintiffs' Native American human remains, along with the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in Cal. Pub. Res. Code 5097.9-5097.99 and NAGPRA 25 U.S.C. 3001 et seq., and 43 C.F.R. 10.1-17;

(B) a written plan of action specifically including Plaintiffs' ownership, custody and control of, and the kind of traditional and planned treatment, care and handling of, and the disposition and repatriation of, any of their human remains, funerary objects sacred objects, or objects of cultural patrimony which have been, or may be, recognized pursuant to Cal. Pub. Res. Code 5097.98, and NAGPRA, 25 U.S.C. 3001 et seq., and 43 C.F.R. 10.1-17;

(C) transfer of custody to Plaintiffs any of their Native American human remains and funerary objects that have been disturbed, excavated and otherwise removed from where they were originally interred, pursuant to Cal. Pub. Res. Code 5097.98, and NAGPRA, 25 U.S.C. 3001 et seq., and 43 C.F.R. 10.1-17;

(D) repatriation of Plaintiffs' families' Native American human remains and funerary objects that have been disturbed, excavated and otherwise removed from where they were originally interred, pursuant to Cal. Pub. Res. Code 5097.98, H&S Code 8015-16, and NAGPRA, 25 U.S.C. 3001 et seq., and 43 C.F.R. 10.1-17; and

(E) prevention of further disturbance of Plaintiffs' human remains and funerary objects until the Plaintiffs' preference for the preservation of their Native American human remains and associated items in place, and that any items associated with the human remains that are placed or buried with the Native American human remains are to be treated in the same manner as the remains,

is carried out pursuant to Cal. Health and Safety Code 7050.5 and Cal. Pub. Res. Code 5097.98, and NAGPRA, 25 U.S.C. 3001 et seq., and 43 C.F.R. 10.1-17.

316. Cal. Pub. Res. Code 5097.95 and NAGPRA, 25 U.S.C. 3009, provide that all government agencies shall cooperate in carrying out their duties under the California Native American Graves Protection Act, as codified in Cal. Pub. Res. Code 5097.9-5097.99, H&S Code 8100 et seq., and NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17. Therefore, since the personal rights of the Plaintiffs, as the lineal descendants of their Native American ancestors, cannot be adequately protected without preventing the unlawful excavation, removal and dumping of their families' human remains and funerary objects on state property owned and controlled by CalTrans, Plaintiffs are entitled to an injunction to preserve their preference that their families' human remains and associated cultural items remain "in place," as called for in Cal. Pub. Res. Code 5097.9-5097.99, and NAGPRA, 25 U.S.C. 3001 et seq., and 43 C.F.R. 10.1-17, and which have been inhumed, interred, and deposited in burial sites below, on and above the cemetery over the last 100 years.

317. If the Defendants are not enjoined from knowingly and wilfully grading, operating heavy equipment, moving dirt and/or gravel, and other construction activities, and otherwise mutilating, disinterring, wantonly disturbing, demolishing, excavating, willfully removing, and causing irreparable damage to, the Plaintiffs' personal property, Native American human remains, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in, and prohibited by, NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, Cal. Health & Safety Code §§7050.5, 7052, 7054, 7054.6, 7054.7, 7055, 7500, Public Res. Code 5097.9-5097.99, and Penal Code 487, the Plaintiffs will continue to suffer severe and irreparable personal injury, physical and bodily injury, including severe emotional distress.

318. Cal. Pub. Res. Code 5097.97 also provides that since the Native American individual Plaintiffs have advised the California Native American Heritage Commission that a proposed action by a government agency may cause severe or irreparable damage to a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, or may bar appropriate access thereto by Native Americans, and the proposed action would result in such damage or interference, and the government agency fails to accept the mitigation measures

recommended, Plaintiffs' action is further authorized by Cal. Pub. Res. Code 5097.94 to prevent severe and irreparable damage to, and to assure appropriate access for Native Americans to, the Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property.

319. Plaintiffs are also entitled to a temporary, preliminary and permanent injunction to prevent the Defendants' further violation of Cal. Pub. Res. Code 5097.9, and to prevent any government agency, and any private party from using or occupying government owned property, or operating on government owned property, under a public license, permit, grant, lease, or contract made on or after July 1, 1977, in any manner whatsoever to interfere with the free expression or exercise of Native American religion as provided in the United States Constitution and the California Constitution; and to prevent any such agency or party from causing severe or irreparable damage to any Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property, where, as here, there is no clear and convincing showing that the public interest and necessity so require.

320. Cal. Pub. Res. Code 5097.94 further provides that where, as here, severe and irreparable damage will occur, appropriate access will be denied, appropriate mitigation measures are not available, and there is no clear and convincing evidence that the public interest and necessity require otherwise, the court shall issue an injunction, to prevent severe and irreparable damage to, and to assure appropriate access for Native Americans to, the Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property. The California legislature specifically provided, in enacting the 1982 amendments to Cal. Pub. Res. Code 5097.94, that: "The purpose of the act is: To provide protection to Native American human burials and skeletal remains from vandalism and inadvertent destruction."

321. Similarly, Cal. Pub. Res. Code 5097.98, as amended, provides that upon the recognition of Native American human remains, which may be an inhumation or cremation, and in any state of decomposition or skeletal completeness, the Plaintiffs are entitled to a temporary, preliminary and permanent injunction to prevent the government landowner from failing to ensure that the immediate vicinity, according to generally accepted cultural or archaeological standards or practices where the

Native American human remains are located, is not damaged or disturbed by further development activity, so long as the lineal descendants' preferences are to preserve the Native American human remains and associated items in place, and that any items associated with the human remains that are placed or buried with the Native American human remains are to be treated in the same manner as the remains.

322. Therefore, since the individual Plaintiffs, lineal descendants of the Native Americans whose human remains, and the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in NAGPRA, 25 U.S.C. 3001 et seq., and Cal. Pub. Res. C. 5097.9-5097.99, have been inhumed, interred, and deposited in burial sites below, on and above the cemetery over the last 100 years, seek to preserve these Native American human remains and associated items in place, the court is required to issue an injunction to prevent their further mutilation, disinterment, disturbance, excavation, removal, and severe and irreparable damage on both federal and state property in violation of NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, the California Constitution, the California Environmental Quality Act, Cal. Health & Safety Code §§7050.5, 7052, 7054, 7054.6, 7054.7, 7055, 7500, Public Res. Code 5097.9-5097.99, and Penal Code 487.

323. An actual controversy has arisen and now exists between Plaintiffs and Defendants regarding their respective rights, duties and obligations in that Plaintiffs contend that Defendants are liable to Plaintiffs for the statutory, contractual, and tortious personal injuries and deprivations of their civil rights alleged herein, and defendants deny such liability to Plaintiffs.

324. Plaintiffs desire a judicial determination of the respective rights of Plaintiffs and Defendants.

325. Such a declaration is necessary and appropriate at this time so that the parties may ascertain their rights and duties with respect to each other.

326. Plaintiffs have been greatly and irreparably damaged by reason of said Defendants' statutory and tortious deprivations of Plaintiffs' personal and civil rights alleged herein, and unless Defendants are enjoined by this court, they will continue the violation of Plaintiffs' rights further irreparably harming the Plaintiffs.

327. As a result of the wrongful conduct of said defendants as herein alleged, Plaintiffs are entitled to a temporary, preliminary and permanent injunction to prevent great and irreparable injury resulting from the infringement and violation of their personal and civil rights, from the likelihood that damages cannot properly compensate Plaintiffs for such irreparable personal harm, from the likelihood that Defendants will be unable to respond in damages, and from the difficulty or impossibility to ascertain the exact amount of personal bodily injury and damage Plaintiffs have sustained, and will in the future sustain. These ongoing and continuing injuries sustained by Plaintiffs cannot be fully compensated in damages and Plaintiffs are without an adequate remedy at law without the imposition of the requested equitable injunctive relief.

WHEREFORE Plaintiffs pray for judgment as follows:

1. General and compensatory damages according to proof;

2. That the Defendants, and their officers, agents, servants, employees and attorneys and all persons in active concert with them, or any of them, be temporarily, preliminarily and permanently enjoined from permitting dumping, grading, excavating, removal, operating heavy equipment, moving dirt and/or gravel, or any other construction activities, involving any portion of the Jamul Indian cemetery in violation of NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, the California Constitution, the California Environmental Quality Act, Cal. Health & Safety Code §§7050.5, 7052, 7054, 7054.6, 7054.7, 7055, 7500, Public Res. Code 5097.9-5097.99, and Penal Code 487, and otherwise mutilating, disinterring, removing, excavating, and disturbing in any way, any Native American human remains, and the items associated with their human remains, including, but not limited to grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in NAGPRA, 25 U.S.C. 3001 et seq., 43 C.F.R. 10.1-17, and Cal. Pub. Res. C. 5097.9-5097.99.

3. That Plaintiffs be awarded punitive damages;

4. That Plaintiffs be awarded their reasonable attorneys' fees, costs, and expenses in this action; and

5. That Plaintiffs be awarded such other and further equitable and legal relief as this court may deem just and proper.

JURY DEMAND

Plaintiffs hereby demand trial by jury.

Dated: May 26, 2015 **WEBB & CAREY**

/s/Patrick D. Webb
Attorneys for Rosales and Toggery

Patrick D. Webb, Esq. State Bar No. 82857
WEBB & CAREY
402 West Broadway Ste 1230
San Diego CA 92101
Tel 619-236-1650
Fax 619-236-1283

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

WALTER ROSALES AND KAREN TOGGERY, ESTATE OF HELEN CUERRO, ESTATE OF WALTER ROSALES' UNNAMED BROTHER, ESTATE OF DEAN ROSALES, ESTATE OF MARIE TOGGERY, ESTATE OF MATTHEW TOGGERY, APRIL LOUISE ROSALES, and ELSA WELMAS Plaintiffs, v. **AMY DUTSCHKE, Regional Director, BIA; JOHN RYDZIK, Chief, Environmental Division, BIA; KENNY MEZA; CHARLENE CHAMBERLAIN; ROBERT MESA; RICHARD TELLOW; PENN NATIONAL INC.; SAN DIEGO GAMING VILLAGE, LLC; and C.W. DRIVER INC.,** Defendants.	Civ. No. **INDEX OF EXHIBITS TO COMPLAINT DEMANDING TRIAL BY JURY**

INDEX OF EXHIBITS TO COMPLAINT

1. Exhibit A is a copy of the recorded September 26, 1912, J.D. Spreckel's Coronado Beach Company deed of a portion of the cemetery in Jamul, California, to the Roman Catholic Bishop of Monterey and Los Angeles, a corporate in sole of the State of California, "to be used for the purposes of an Indian graveyard and approach thereto," "to have and to hold the above granted and described premises unto the said Grantee, his successors and assigns forever for the purpose above specified," which was recorded in Book 361.

2. Exhibit B is a copy of the 1931 Map of Survey of Rancho Jamul, L.S. 430.

3. Exhibit C is a copy of the August 7, 1971 Union Tribune article, "Cemetery Houses the Living," by Ernesto Flores.

4. Exhibit D is a copy of the recorded December 22, 1978 deed from Donald and Lawrence Daley of the remainder of the Indian cemetery to "such Jamaul Indians of one-half degree or more Indian blood."

5. Exhibit E is a copy of Bureau of Indian Affairs, Sacramento, Carmen Facio's May 9, 2000 memo to Bureau of Indian Affairs, Washington D.C., Nancy Pierskalla.

6. Exhibit F is a copy of the July 13, 1993, Indian cemetery map recorded with the San Diego County Recorder.

7. Exhibit G is a copy of the original May 9, 1981 Jamul Indian Village half-blood community constitution.

8. Exhibit H is a copy 1 *Opinions of the Solicitor of the Department of Interior Relating to Indian Affairs 1917-1974* ("*Opinions of the Solicitor*") at 668, 724, 747, and 1479 (1979).

9. Exhibit I is a copy of the July 1, 1993 BIA Tribal Government Services letter to Raymond Hunter.

10. Exhibit J is a copy of the May 25, 1982 grant deed containing the easement for the cemetery road retained by the Catholic Dioscese.

11. Exhibit K is a copy of State of California, Department of Health Services, Office of State Registrar's September 10, 1996 Application and Permit for Disposition of Human Remains for Helen Cuerro and Dean Rosales on 14191 Highway 94, Jamul, CA 91935, and the County of San Diego and Riverside, Certificates of Death for Helen Cuerro, Marie Toggery, Mathew Tinaojheda Toggery, and Dean Rosales, and a copy of the Daily Log Records By Date for San Diego Rural Fire Prot. Dist., dated June 30, 2002.

12. Exhibit L is a copy Cal. Dept. of Fish & Game, May 21, 2007 Map of Watershed, Wildlife and Creek Beds Surrounding JIV and Lakes Entertainment Properties.

13. Exhibit M is a copy of Governor Gray Davis' letter of July 17, 2001 letter to the Acting Superintendent of the BIA.

14. Exhibit N is a copy of Governor Arnold Schwarzenegger's Legal Affairs

Secretary's letters of August 29, 2005 and December 20, 2005, April 2, 2007 to the Jamul Indian Village, and April 5, 2007 to John Sansone, San Diego County Counsel.

15. Exhibit O is a copy of the temporary restraining order in *Viejas Band of Kumeyaay Indians v. Padre Dam Municipal Water District*, Case No. GIC 2010-00093203, and Gale Toensing's June 17, 2010 article in Indian Country Today, "Court Orders Construction Halt on Viejas Sacred Site," and her July 8, 2010 article in Indian Country Today, "Viejas ceremonial sanctified burial site to be protected 'in perpetuity.'"

16. Exhibit P is a copy of Larry Larue's December 2, 2013 article in the News Tribune, "Puyallup Tribe, City Working toward cemetery Solution."

17. Exhibit Q is a copy of the Navy Jurisdictional Maps for San Diego, depicting federal ownership of Fort Rosecrans National Cemetery, in Haines, *Federal Enclave Law*, (Atlas 2011) at 266.

18. Exhibit R is a copy of A. Burke's "California Indian Burial Ground Paved Over for Bay Area Housing," *Liberty Voice*, (April 28, 2014).

19. Exhibit S is a copy of The Inter-Tribal Council of the Five Civilized Tribes of the Chickasaw, Choctaw, Cherokee, Muscogee (Creek) and Seminole Nations Resolution, representing 750,000 blood descendants, condemning the Poarch Creek Band of Creek Indians' desecration of the Hickory burial ground.

20. Exhibit T is a copy of former Vice Chair of the Okla. Indian Affairs Comm., Dan Jones,' "You'll Mock Death But Once," *Indian Country Today*, August 20, 2012.

21. Exhibit U is a copy of "Ritual Flames Honor Kumeyaay Matriarch," *U.T. San Diego.com*, June 17, 2013; E. Davis, *Early Cremation Ceremonies of the Lusieno and Digueno Indians of So. California*, Indian Notes and Monographs, New York Museum of the American Indian (1921) 95-99; T. Waterman, *The Religious Practices of the Digueno Indians*, University of California Publications in American Archaeology and Ethnology (March 30, 1910, Vol. 8, No. 6, pp.305-7; E. Curtis, *The North American Indian* (1926) Vol 15/20, page 50.

22. Exhibit V is a copy of the May 1, 2003 Draft Agreement for Consultation, Treatment and Disposition of Human Remains and Cultural Items that may be Discovered Inadvertently During Planned Activities at the Statute of Liberty between DOI, National Park

Service and the Delaware Nation and the Stockbridge-Munsee Community of Wisconsin,

23. Exhibit W is a copy of the directives of the National Center for Cultural Resources and the National NAGPRA Program.

24. Exhbit X is a copy of the detailed descriptions required for the human remains and cultural items being repatriated in the Notice of Intent to Repatriate Cultural Items in the Possession of the San Diego Museum of Man, published in 64 Fed. Reg. 56,219 (October 18, 1999), 69 Fed. Reg. 4315 (January 29, 2004), 69 Fed. Reg. 4316 (January 29, 2004)

25. Exhibit Y is a copy of Judge Karlton's April 23, 1992 Order granting the federal defendants' motion for summary judgment in *Ione Band of Miwok Indians v. Burris*, Civ. No. S-90-993 LKK (E.D. Cal. 1992), see particularly page 17.

26. Exhibit Z is a copy of U.S. Magistrate Judge, Peter Nowinski's May 31, 1996 Findings and Recommendation Re: Dismissal, U.S. District Judge Lawrence Karlton's August 6, 1995 and September 4, 1996 Orders dismissing Plaintiffs' action, and U.S. District Judge David Levi's November 3, 1998 Order denying Plaintiffs' Temporary Restraining Order in *Ione Band of Miwok Indians v. Burris*, Civ. S-90-993 LKK, (E. D. Cal. 1996).

27. Exhibit AA is a copy of more than three thousand petitions that were signed by residents of Jamul against the casino.

EXHIBIT A

Photographed by T. FADER, Deputy Recorder

State of California }
County of San Diego }

On this 20th day of September AD 1912 before me, Lou B. Mathews a Notary Public in and for said County, residing therein, duly commissioned and sworn, personally appeared Ed. Fletcher, personally known to me to be the person described in and whose name is subscribed to the within instrument, as the attorney in fact of Charles B Gould, and acknowledged to me that he subscribed the name of Charles B Gould, thereto as principal, and his own name as attorney in fact.

In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year in this Certificate first above written.

Lou B. Mathews
Notary Public in and for the County of San Diego, State of California

Recorded at Request of R. C. Sparks (S. D. Webber) Sep 26 1912 at 15 Min Past 10 Oclock A. M.

John H. Ferry County Recorder
Fee $ 10 COMPARED: Harold T. Angier by W. Howard Ferry Deputy Recorder

---

Coronado Beach Company, a corporation of the City of San Diego County of San Diego, State of California,

For and in consideration of the sum of One Dollar, Does Hereby Grant to The Roman Catholic Bishop of Monterey and Los Angeles, a corporation sole, of the State of California to be used for the purposes of an Indian graveyard and approach thereto, all that Real Property situated in the County of San Diego, State of California, bounded and described as follows:

Commencing at a point on the north boundary line of the Rancho Jamul distant 648.5 feet east from the Rancho Jamul corner No 16; thence east along said north boundary line 1383.0 feet to a point on the Westerly line of County Road; thence South 49° 13' east along said westerly line of County Road 26.2 feet to a point; thence west 594.7 feet to a point; thence south 58.0 feet to a point; thence south 86° 45' west 704.0 feet to a point; thence south 43° 35' west 88.5 feet to a point; thence south 59.9 feet to a point; thence west 44.2 feet to a point; thence north 239.0 feet to the point of beginning, containing 2.21 acres.

To have and to hold the above granted and described premises unto the said Grantee, his successors and assigns forever, for the purposes above specified.

In Witness Whereof, said corporation has caused this deed to be signed by its Vice President, and Secretary and its corporate seal to be affixed hereto this 11th day of July 1912.

Coronado Beach Company

Signed and executed in presence of Bernice Brace Bombay } By W. Clayton Vice President and Harry L. Titus Secretary

State of California } ss.
County of San Diego }

On this 11th day of July in the year one thousand nine hundred and twelve before me Fred G. Whitehead, a Notary Public in and for said County, personally appeared W. Clayton known to me to be the Vice President, and Harry L. Titus, known to me to be the Secretary of the Corporation that executed the within instrument, known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

Fred G. Whitehead
Notary Public in and for the County of San Diego, State of California

Recorded at Request of Father E. Lapointe. Sep 26 1912, at 30 Min. Past 10 O'clock A. M.

John H. Ferry County Recorder
Fee $.90 COMPARED: Harold I. Angier By Harold Angier Deputy Recorder

---

This Indenture made this 27th day of August 1912, Between Chase & Lindington, a Corporation, duly organized existing and doing business under and by virtue of the laws of the State of California and having its principal place of business at the City of San Diego, County of San Diego, State of California, the party of the first part, and L. May Faber party of the second part, Witnesseth:-

That said party of the first part, pursuant to a resolution duly passed at a meeting of its Board of Directors held at their office on August 27th 1912, and of record in Minute Book # 1 at pages 59 et seq. for and in consideration of Ten ($10.00) Dollars, Gold Coin of the United States of America to it in hand paid by said party of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey unto the said party of the second part, her heirs and assigns forever, subject however to the County and State taxes of 1912 and the covenants and conditions hereinafter named, all that certain real property situate in the City of San Diego, County of San Diego, State of California, bounded and described as follows, to-wit:

Lots Nine (9) and Ten (10) Block Forty-three (43) of La Jolla

EXHIBIT B

L.S. NO. 430

MAP OF SURVEY OF

RANCHO JAMUL

SAN DIEGO COUNTY - CALIFORNIA

Surveyed May, 1931 Scale - 1 inch = 1000 feet

3 SHEETS - SHEET 1

Total Area - 8886.77 Acres

Meridian determined by solar observation

Surveyed for G.R. Daley, San Diego, California

Survey by Hugo Kuehmsted, Licensed Surveyor

I hereby certify that I am a Licensed Surveyor, and that this survey was made under my supervision as shown on this map, and that the monuments were set as shown hereon.

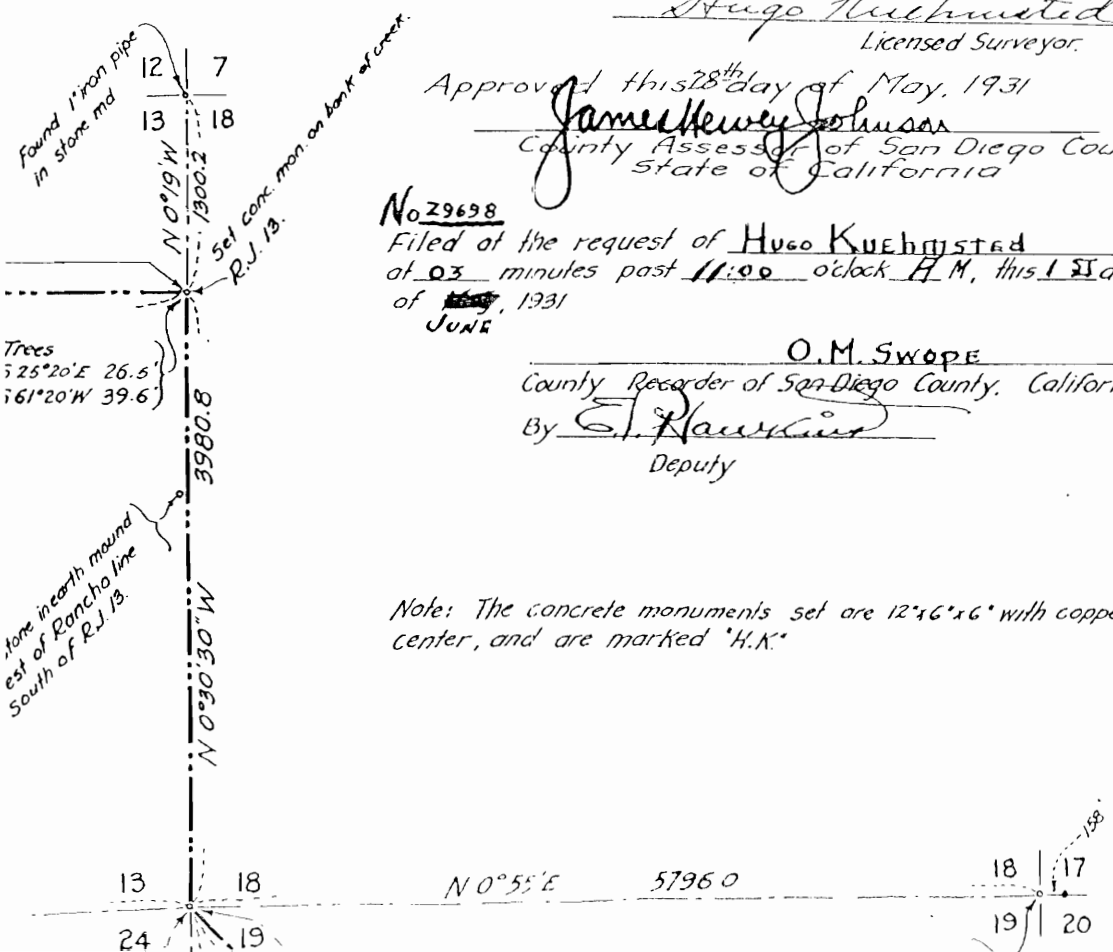
Hugo Kuehmsted
Licensed Surveyor.

Approved this 28th day of May, 1931

James Harvey Johnson
County Assessor of San Diego County.
State of California

No 29698
Filed at the request of Hugo Kuehmsted
at 03 minutes past 11:00 o'clock A M, this 1 st day
of ~~May~~ JUNE, 1931

O.M. SWOPE
County Recorder of San Diego County, California.
By G. Hawkins
Deputy



Note: The concrete monuments set are 12"x6"x6" with copper center, and are marked "H.K."

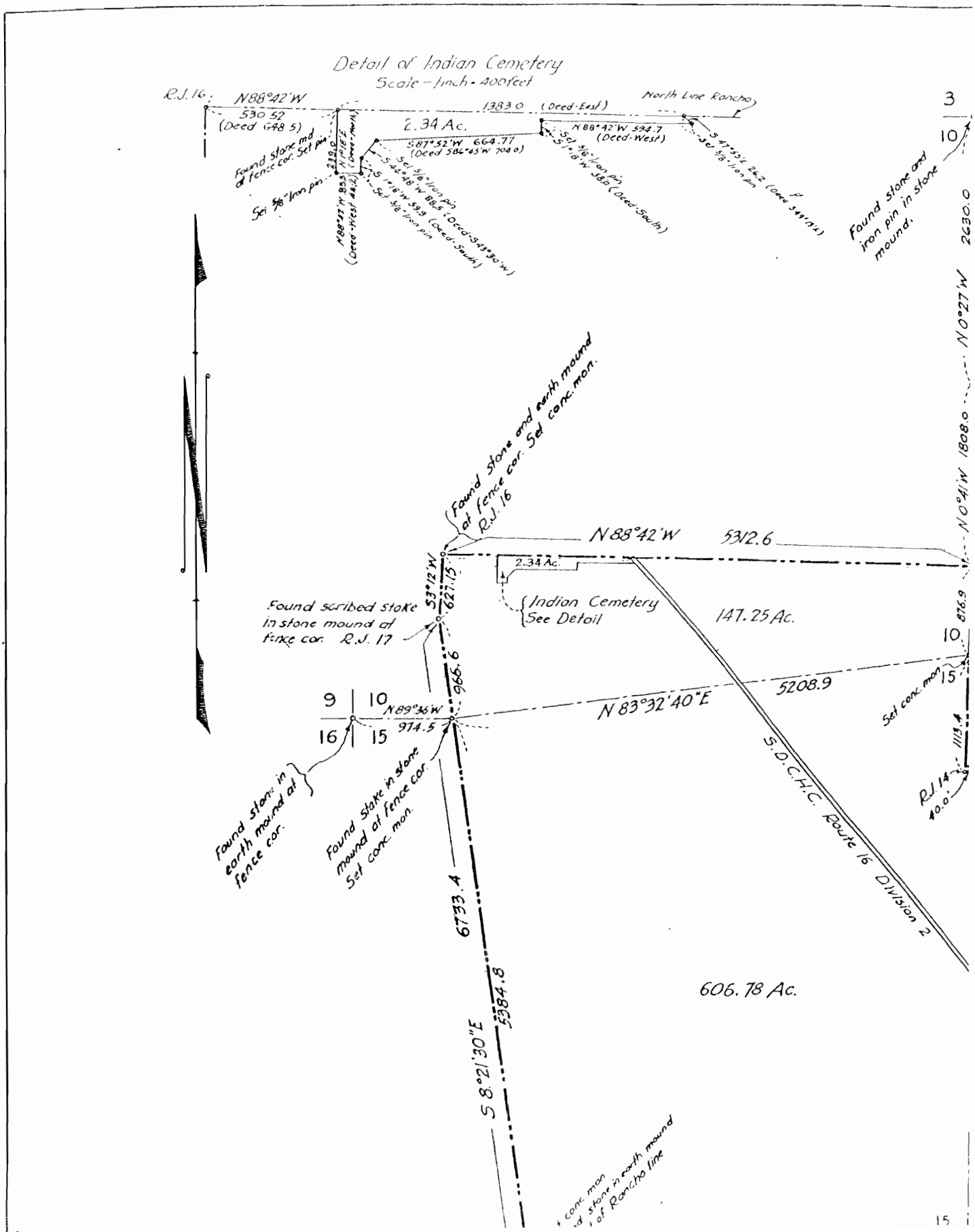

Detail of Indian Cemetery
Scale - 1 inch = 400 feet
R.J. 16
N88°42'W
530.52
(Deed 648.5)
1383.0 (Deed-East)
North Line Rancho
2.34 Ac.
S87°52'W 664.77
(Deed S86°45'W 704.0)
N88°42'W 594.7
(Deed-West)
Found stone and at fence cor. Set pin
Set 5/8" iron pin
Found stone and iron pin in stone mound.
Found stone and earth mound at fence cor. Set conc. mon.
R.J. 16
N88°42'W
5312.6
2.34 Ac.
Indian Cemetery
See Detail
147.25 Ac.
Found scribed stake in stone mound at fence cor. R.J. 17
S3°12'W
627.15
966.6
9
10
16
15
N89°36'W
974.5
N83°32'40"E
5208.9
Set conc. mon.
Found stone in earth mound at fence cor.
Found stake in stone mound at fence cor. Set conc. mon.
S.D.C.H.C. Route 16 Division 2
6733.4
5384.8
S8°21'30"E
606.78 Ac.
N0°27'W
N0°41'W
1808.0
2630.0
876.9
1113.4
R.J. 14
40.0
3
10
15

EXHIBIT C

Frank Lechappa, upper right, a Barona Indian, inspects well tended graves at Indian Catholic Cemetery in Jamul. One grave is that of veteran Daniel Aldamas lower left. Lower right is home of Pattie family that has lived in area for [illegible]

Rabbi Attracts Youth With Rock Service

By DIANA DIMARCO

PITTSBURGH (AP) — Rabbi Fredric S. Pomerantz is a round little man with longish red hair and a throbbing drive who looks more like a musician than a rabbi. He's both.

He worked his way through college playing drums in a band.

Now, at 31, he is associate rabbi of one of the country's largest Jewish congregations, the 1,900-family Temple Rodef Shalom. And he has set out on a course heretofore generally uncharted in Judaism.

It involved setting the traditional Hebrew prayer service to a rock beat, and organizing two coffeehouses for young people — gentile as well as Jewish.

IN SHARING

approach, common in Christian youth activities but still rare in Jewish worship, helps young people share mutual interests, Rabbi Pomerantz says, and adds: "It's the sharing that's important, the entertainment is secondary."

A restless, energetic man, he also is Jewish chaplain at Western Psychiatric Hospital, rabbinic advisor to the Pennsylvania Federation of Temple Youth, and originator of a free, informal education program that opened for high school students two years ago. It now also includes college students and adults.

The two coffeehouses, "The Back Door" for university students and "The Exit" for high schoolers, are open every weekend to all comers.

NEEDS CITED

"Kids need to feel part of a group and they also need someone to show them they have responsibilities," he says.

The title of the "rock" service, Sim Shalom, means "grant us peace," and that is [illegible] message, says Rabbi [illegible]ntz, who did the up[illegible] arrangement for brass, guitar, organ and drums.

"You've got to listen to the ideas and questions of the prayers," he says. "Yet if its the beat and the music that draws you into the meaning there's nothing wrong with that."

JAMUL INDIAN FAMILIES

Cemetery Houses The Living

By ERNESTO FLORES

In 1912, when San Diego was still a part of the Roman Catholic Diocese of Monterey, about three acres of hilly land in Jamul was turned over to the church by a realty company for use as a cemetery for Indians.

To fulfill that stipulation, the church for years has buried hundreds of Indians in the cemetery. It also erected a small chapel where services for the dead are held.

That the church regards the property as simply a place of burial was confirmed by administrators of the San Diego Roman Catholic Diocese. "As far as we are concerned the land is a cemetery and it will remain that way," they said.

SOME LIVE THERE

Actually, only a small portion of the land has been used as a burial ground. The church, for years, has allowed Indians to live on the open areas. Today about seven families make their homes on the cemetery land.

The families, who come from various tribes in the county, live under extremely poor conditions. Having no plumbing, they get their supply from a lone well pump at the bottom of a dry wash.

They have no electricity, no sewage system and no transportation except one or two dilapidated autos. Their houses are wooden shacks surrounded by piles of junk and garbage.

In spite of these problems, however, many of them express a desire to live and die there as their parents and grandparents before them.

Church authorities are not particularly happy with the activities of various groups taking an interest in the Indians at Jamul. Because of such activities, publicity has been given the plight of the Indians.

A church spokesman said he hopes the publicity about the Indians living in the cemetery will not reflect adversely on the church. He added, "we have tried our best to help them. They should do something to help themselves, too."

Mrs. Isabel Rosales, 77, is the oldest resident of the place. She said she has lived there all her life and she remembers the time when there were more Indians living there.

"Many of them are buried in that cemetery," she said pointing work-gnarled fingers at the rows of wooden crosses on a hill about 500 yards away. "Others left and didn't come back."

Mrs. Rosales' three surviving children all are married and live in other areas of the county. She lives alone. She said she has no place to go and intends to end her days there.

WON'T MOVE

This thinking is shared by Mrs. Marie Toggery, 50, whose husband died recently. She said her three children may not think as she, but as far as she is concerned, she is not going to live anywhere else.

Mrs. Toggery's son, Jessie, 19, wants to be a lawyer. His sister, Connie, 18, studies at Grossmont Continuation School and hopes to go to college next year. The other daughter, Karen 17, is a student at Granite Hills high school but wants to drop out and work.

Having experienced a marginal existence all their lives, the Toggerys seem to have developed an immunity to suffering. They could even laugh at the thought of death.

Mrs. Toggery was seriously ill for some time.

"I told my mother that if she dies, we just have to bury her in the cemetery," said Jessie jocularly. Mrs. Toggery joined her daughter in laughter.

NO EVICTION

The family's only means of income is a Veterans Administration benefit for the late Mr. Toggery, who was a veteran. Their monthly check formerly was $291, but this has been reduced to $287 for no apparent reason, said Mrs. Toggery.

With this amount they buy food, clothing and other necessities and send the children to school.

The Indians at Jamul have one consolation, however. According to church officials, the diocese has no plan to evict the families.

"Although technically they have no business being there, we can't remove them just like that," a diocesan spokesman said.

Nevertheless, officials have a few complaints. Although the San Diego Gas & Electric Co. has agreed to extend electric lines to that part of Jamul, the residents, except for one family, refuse to spend money to bring power to their homes.

GROUPS VISIT THEM

The diocese built a small chapel on a slope of a hill. The Rev. J. Walshe Murray, pastor of St. Pius X Church in Jamul under whose jurisdiction the cemetery falls, said he officiates in most of the funeral services. The church also erected a community house which the families use for meeting.

For years the Indian families have been left largely to their own devices. Lately, however, some concerned groups have visited them and asked about their welfare.

One such group is the Grassroot Indian Association which has the objective of "improving the living conditions of Indians in the county by peaceful and legal means."

Frank LaChappa, 22, a Barona Indian from Poway and the association's vice chairman, said his group has met in Jamul twice.

"We are a new group and our first task is to find out the condition of living in various Indian communities. That's why we come here as often as we can," he said.

Earl Ridenhour, himself a part Indian from Oklahoma and a member of the association, said the conditions in which most local Indians live "are so deplorable, we just have to do something to help them."

Younger Upholds Tax For Cable TV

SAN FRANCISCO (AP) — Atty. Gen. Evelle Younger has ruled that California's 332 general law cities can build and run their own cable television systems and tax citizens to fund the operation.

In the opinion requested by Senate President pro tem James Mills of San Diego, Younger said such a system is "a public work" and could be run as a public utility.

The state's 75 charter cities, including most major cities, were not covered by the ruling. Most cable television systems built to-date have been private ventures.

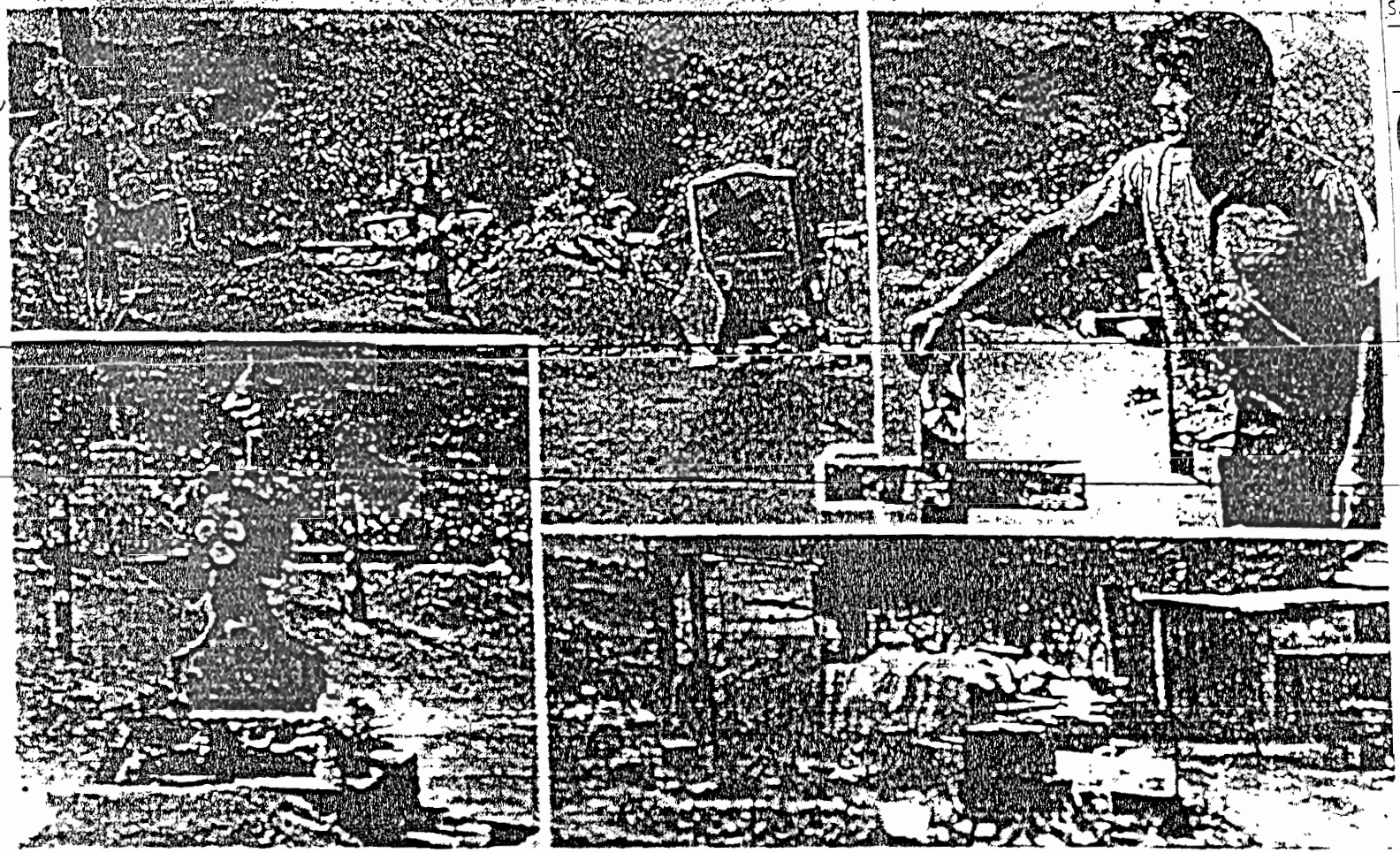
Revenues for the system could come from general obligation bonds and available tax money, Younger said.

IN EL CAJON
CALVARY BAPTIST CHURCH
10:15 a.m. —
Rev. DAVE MARSTELLER
7:00 p.m. — BROADCAST — KECR-FM
LINCOLN

FIRST CHU
RELIGIOUS
3795 GEORGIA STRE
CHET CASTE
9:30 THE WEAKNESS
AND THE STRENG
11:00 GOD POWER, T
EQUALIZER

THE EV
PRESBYTE
of San
HWY
WILLIAM O. LIVINGSTON
"HEATHI
HER HA
ADULT CLASSES
SUNDAY SCHOOL
Morning Worship
Church Office

Saturday, August 7, 1971



Frank Lechappa, upper right, a Barona Indian, inspects well tended graves at Indian Catholic Cemetery in Jamul. One grave is that of veteran Daniel Aldamas, lower left. Lower right is home of Indian family that has lived in area for years.

RELIGION

Child Worship Needs Stressed In New Book

WASHINGTON, UPI. — One of the most difficult [illegible] parents, Sunday [illegible] teachers and pastors [illegible] the experience [illegible] meaningful [illegible] children.

Adult worship [illegible] oriented and [illegible] spectators [illegible] pants. All [illegible] worship [illegible] insipid and [illegible] of adult [illegible]

Fortunat[illegible] the situation [illegible]

Not ong[illegible] Conference [illegible] sociation [illegible] newal of the [illegible] the Christian [illegible] ed a 200 page [illegible] called [illegible]

What [illegible] turgies" so potentially useful is the way it capitalizes both on children's wonder and awe about the world and their sometimes aggravating inability to sit still for any length of time.

Now the conference has issued a supplement to the book [illegible] children's [illegible]

[illegible]

Rabbi Attracts Youth With Rock Service

By DIANA DOMARCO

[illegible]

JAMUL INDIAN FAMILIES

Cemetery Houses The Living

By ERNESTO FLORES

[illegible] when San Diego [illegible] a part of the Roman [illegible] Diocese of Monterey [illegible]

Church authorities are not particularly happy with the activities of various groups [illegible] an interest in the Indians at Jamul. Because of such activities, publicity has been given the plight of the [illegible] next year. The other daughter, Karen [illegible] is a student at Granite Hills high school but wants to drop out and work.

Having experienced a [illegible]

[illegible] meetings.

For years the Indian families have been left largely [illegible] some concerned [illegible]

EXHIBIT D

RECORDING REQUESTED BY 358

AND WHEN RECORDED MAIL TO

Name Bureau of Indian Affairs
Street Southern California Agency
Address 5750 Division Street, Suite 201
City & State Riverside, California 92506

FILE/PAGE NO. 78-554597
FEB 1978
RECORDED REQUEST OF
GRANTEE
DEC 27 1 49 PM '78
OFFICIAL RECORDS
RECORDER
SAN DIEGO COUNTY, CALIF.

SURVEY MONUMENT PRESERVATION USER FEE
$10.00

$5.00

SPACE ABOVE THIS LINE FOR RECORDER'S USE

TAX ROLL PARCEL NO. 597-080-01

GRANT DEED

DOCUMENTARY TRANSFER TAX $ -0-
COMPUTED ON FULL VALUE OF PROPERTY CONVEYED.
OR COMPUTED ON FULL VALUE LESS LIENS AND ENCUMBRANCES REMAINING AT TIME OF SALE.
William H. Gravelle Agency Reacty Off
Bureau of Indian Affairs
Signature of Declarant or Agent determining tax. Firm Name

THIS INDENTURE made the _____ day of _____ 19__

BETWEEN Donald L. Daley and Lawrence A. Daley

, the parties of the first part

and The United States of America in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate

, the parties, of the second part,

WITNESSETH: That the said parties of the first part, ~~[illegible]~~ do _____ by these presents, GRANT for a valuable consideration unto the said parties of the second part, and to their heirs and assigns forever, all that certain ~~[illegible]~~ or parcel of land, situate, lying and being in the _____ County of San Diego and State of California and bounded and particularly described as follows, to-wit: SEE EXHIBIT "A" ATTACHED HERETO AND MADE A PART HEREOF.

ACCEPTANCE OF CONVEYANCE BY THE UNITED STATES IS TO BE ATTACHED HERETO AS EXHIBIT "B" AND RECORDED WITH THIS DEED.
THIS CONVEYANCE IS MADE IN ACCORDANCE WITH SECTIONS 5 AND 19 OF THE INDIAN REORGANIZATION ACT OF JUNE 18, 1934 (48 Stat. 985 and 988; 25 U.S.C. 465 and 479) AND MADE SUBJECT TO EASEMENTS AND RIGHTS-OF-WAY OF RECORD IN FAVOR OF THE PUBLIC OR THIRD PARTIES.

TOGETHER with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof.

TO HAVE AND TO HOLD, all and singular the said premises, together with the appurtenances, unto the said parties of the second part, and to their heirs and assigns forever.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set their hand and seals the day and year first above written.

X [signature]
X Donald L. Daley
Donald L. Daley and Lawrence A. Daley

STATE OF CALIFORNIA,
County of San Diego } ss.

On December 12, 1978, before me, the undersigned, a Notary Public in and for said State, personally appeared Lawrence A. Daley and Donald L. Daley

known to me to be the persons whose names are subscribed to the within instrument and acknowledged that they executed the same.

WITNESS my hand and official seal.

CHARLOTTE L. D. ARTHUR
NOTARY PUBLIC
SAN DIEGO COUNTY
My Commission Expires April 9, 1982

L. D. Arthur
Notary Public in and for said State

Title Order No. _____

Escrow or Loan No. _____

MAIL TAX STATEMENTS TO _____
NAME ADDRESS ZIP

78-554597

DEED—GRANT—WOLCOTTE FORM 778
REV. 5-70

This standard form covers most usual problems in the field indicated. Before you sign, read and make changes proper to your transaction. Consult a lawyer if you doubt the form's fitness.

LEGAL DESCRIPTION

All that portion of Rancho Jamul, in the County of San Diego, State of California, according to L.S. Map thereof No. 430, filed in the Office of the Recorder of said San Diego County, May 28, 1931, more particularly described as follows:

Beginning at corner R.J. 16 as shown on said L.S. Map No. 430; thence along the Northerly line of said Rancho Jamul S. 88°42'00" E., 529.24 feet (record N. 88°42' W., 530.52 feet) to the Westerly line of that certain parcel of land noted Indian Cemetery on said L.S. Map No. 430; thence along said Westerly line S. 01°20'53" W., 239.66 feet (record N. 01°18' E., 239.0 feet) to the Southwest corner of said Indian Cemetery; thence along the Southerly line of said Indian Cemetery S. 88°39'07" E., 83.55 feet (N. 88°42' W., 83.5 feet) to the TRUE POINT OF BEGINNING; thence continuing along said Southerly line as follows: N. 01°20'53" E., 59.94 feet (record S. 01°18' W., 59.9 feet); N. 44°50'53" E., 88.55 feet (record S. 44°48' W., 88.5 feet); N. 87°54'53" E., 665.17 feet (record S. 87°52' W., 664.77 feet); N. 01°20'53" E., 58.04 feet (record S. 01°18' W., 58.0 feet); S. 88°42'00" E., 598.46 feet to the Southwesterly line of Campo Road said point being on a 555.59 foot radius curve concave Southwesterly, a radial line from said points bears S. 47°16'18" W.; thence Southeasterly along the arc of said curve, through a central angle of 03°29'08" a distance of 33.80 feet; thence leaving said Southwesterly line N. 88°42'00" W., 338.54 feet; thence S. 21°58'02" E., 257.03 feet; thence N. 86°48'26" W., 721.24 feet; thence N. 86°21'37" W., 388.78 feet to the TRUE POINT OF BEGINNING, said described land consisting of 4.66 acres, more or less.

EXHIBIT "A" TO DEED FROM DONALD L. DALEY AND LAWRENCE A. DALEY DATED DECEMBER 12, 1978.

78-554597

IN REPLY REFER TO

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
Sacramento Area Office
2800 Cottage Way
Sacramento, California 95825

ACCEPTANCE OF CONVEYANCE

The United States of America, acting through the undersigned, an authorized representative of the Secretary of the Interior, does hereby accept the conveyance made by Donald L. Daley and Lawrence A. Daley in that certain Grant Deed dated December 12, 1978. Said Grant Deed, with this Acceptance of Conveyance attached, shall be recorded in the Official Records of San Diego County, California.

Date: DEC 21 1978

Charles L. Toyebo Jr.
ACTING Area Director

Gregory

Pursuant to the authority delegated by 230 DM 1, 10 BIAM 2 (39 F.R. 32166) and 10 BIAM 3.1 (34 F.R. 637).

State of California)
) SS.
County of Sacramento)

On this 21st day of December, 1978, before me, the undersigned, a Notary Public in and for said State, personally appeared Charles L. Toyebo Jr., known to me to be the person whose name is subscribed to the within Acceptance of Conveyance and acknowledged to me that he executed the same for the United States of America.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this date.

CARMEN G. FACIO
NOTARY PUBLIC
My Commission Expires August 19, 1981

Carmen D. Facio

EXHIBIT "B" TO DEED FROM
DONALD L. DALEY AND
LAWRENCE A. DALEY DATED
DECEMBER 12, 1978.

On _____, before me, the undersigned, a Notary Public in and for said State, personally appeared Lawrence A. Daley and Donald L. Daley

known to me to be the person s whose names are subscribed to the within instrument and acknowledged that they executed the same.

WITNESS my hand and official seal.

OFFICIAL SEAL
L. D. ARTHUR
NOTARY PUBLIC
SAN DIEGO COUNTY
My Commission Expires April 9, 1982

L. D. Arthur
Notary Public in and for said State

Title Order No. _____

Escrow or Loan No. _____

MAIL TAX STATEMENTS TO _____
NAME ADDRESS ZIP

78-554597

DEED—GRANT—WOLCOTT FORM 778
REV. 2-70

This standard form covers most usual problems in the field indicated. Before you sign, read it, fill in all blanks, and make changes proper to your transaction. Consult a lawyer if you doubt the form's fitness for your purpose.

EXHIBIT E

Carmen Facio
05/09/00 11 34 AM

To Nancy Pierskalla/DC/BIA/DOI@BIA

cc George Skibine/DC/BIA/DOI@BIA

Subject Re Gaming in San Diego

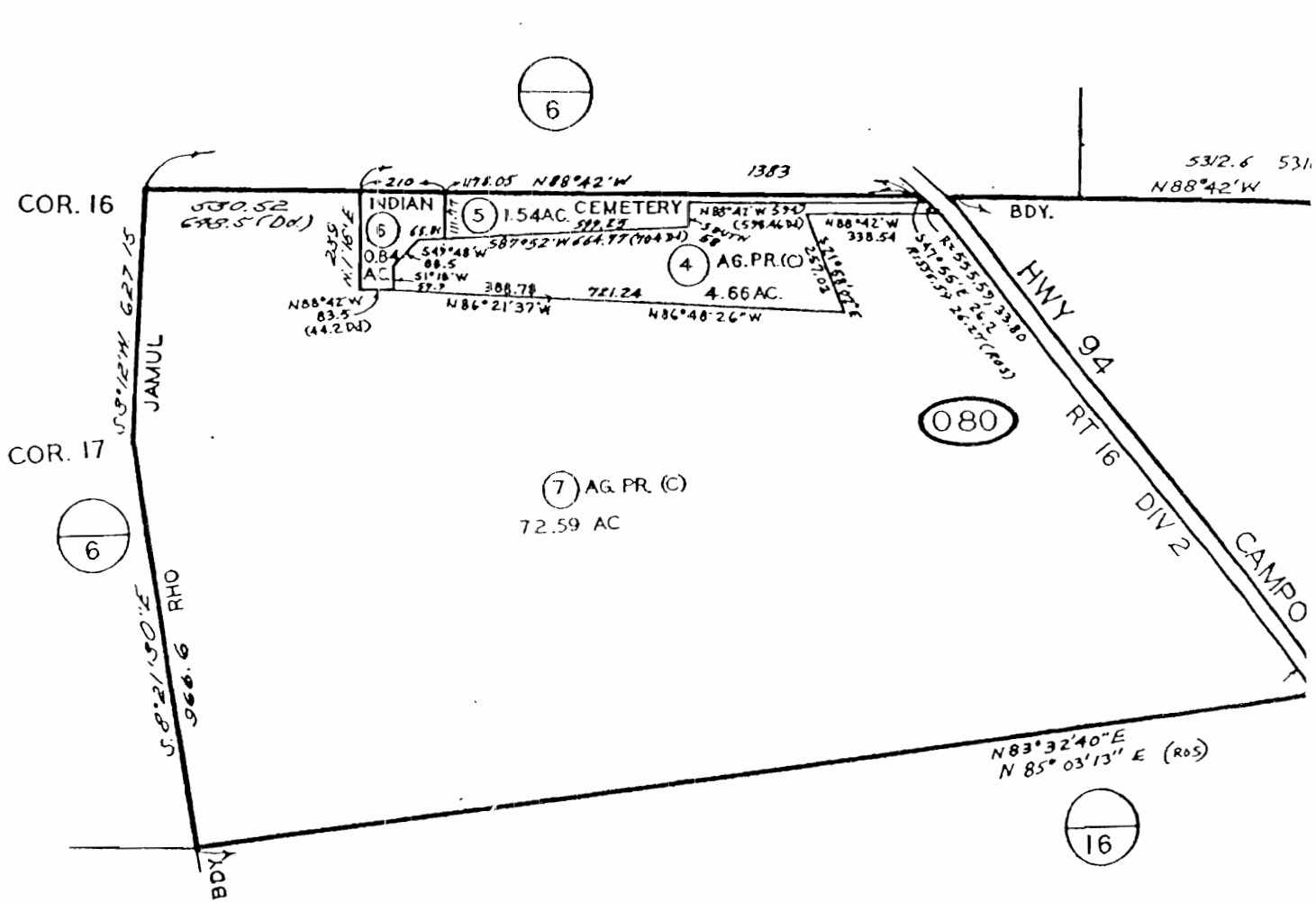
I forwarded your inquiry down to the SCA Supt. I currently have nothing on . We'll let you know.

For several years now, Jamul has been talking about getting the contiguous property - @ one point for a casino, and then again, just for a parking lot.

The current trust parcel was accepted into trust in 1978 for Jamul Indians of 1/2 degree (4.66 acres). They've expanded their membership, but the constitution states thay have jurisdiction over the Jamul Indian Village. I have no record of the 1978 trust parcel being known as the Jamul Village. There was also a small parcel accepted into trust in 1982 by the SCA Supt. for the Jamul Indian Village (1.37 acre).

Cuyapaipe has a reservation land base that there is no legal access to. They have an off-reservation piece that is leased to the So. Calif. Indian Health Council for 50 years. There's talk that they want the Health Council to move to another location so that Cuyapaipe can use the off-reservation tract for gaming. This tract is about 8.7 acres. An addition to this 8.7 acres was made in 1997 (1.43 acre) & its purpose was as the site of the Pinto Home for Girls and it's also under a 50-year lease. Of course, there's talk about putting more land in trust for Cuyapaipe for relocation of the health facility.

EXHIBIT F



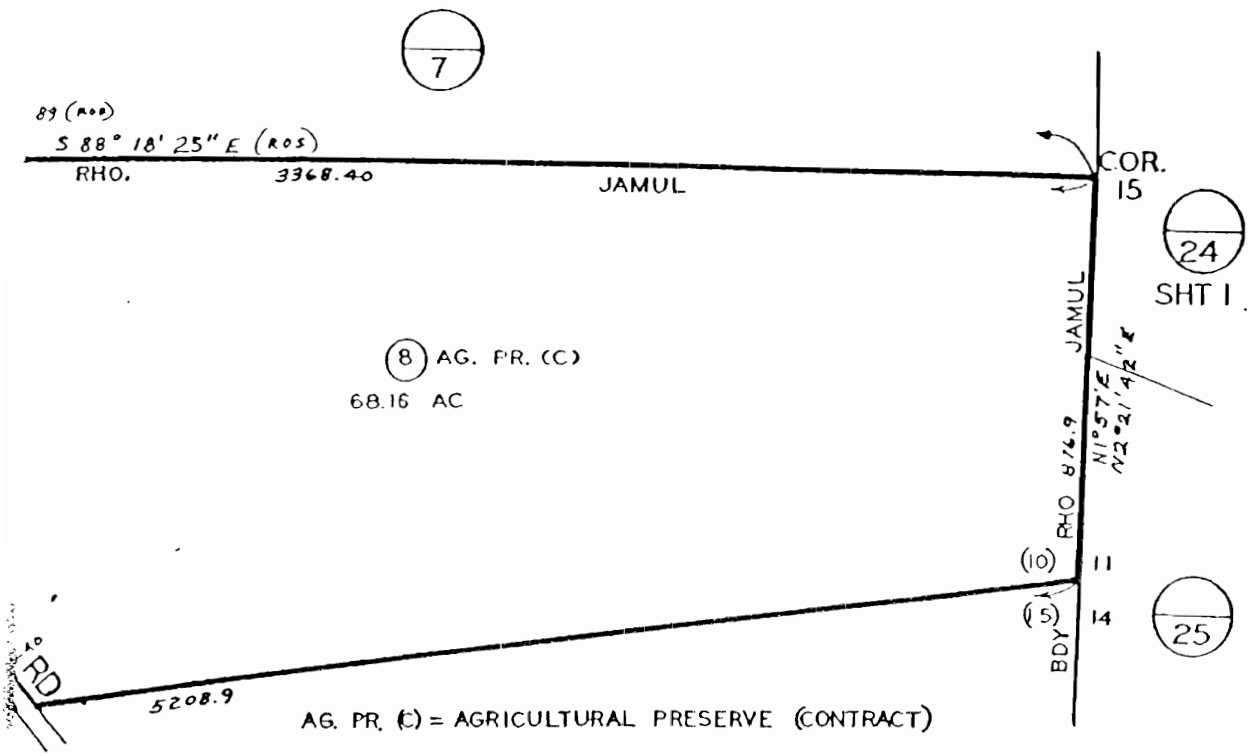
BERGGREN 9-28-75

THIS MAP WAS PREPARED FOR ASSESSMENT PURPOSES ONLY. NO LIABILITY IS ASSUMED FOR THE ACCURACY OF THE DATA SHOWN. ASSESSOR'S PARCELS MAY NOT COMPLY WITH LOCAL SUBDIVISION OR BUILDING ORDINANCES.

AGRICULTURAL PRESERVE
597-08

7-13-5

CHANGES					
BLK	OLD	NEW	YR	CUT	
080	PICK-UP	2	76	11014	PA
	1	3&4	79	4400	CAP
	2	5&6	82	2864	
	5	A-CHANGE	83	6165	
	3	7&8	94	1131	



LS 430 - RHO JAMUL SURVEY (SEC-10-T17S-R1E)
ROS 8756, 8961, 9173

EXHIBIT G

CONSTITUTION
OF THE
JAMUL INDIAN VILLAGE
SAN DIEGO COUNTY
JAMUL, CALIFORNIA

PREAMBLE

We the half blood members of the Jamul Indian Village, in order to form a better community government, to establish a formal organization, to promote our common welfare, and to secure the privileges and powers provided by the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) do hereby ordain and establish this constitution and bylaws.

ARTICLE - NAME

The name of this organization shall be the Jamul Indian Village, hereinafter referred to as the "village".

ARTICLE II - TERRITORY

The jurisdiction of Jamul Indian Village shall extend to all lands now within the confines of the Jamul Indian Village and to such other lands as may hereafter be added thereto.

ARTICLE III - MEMBERSHIP

Section 1. The members of the Jamul Indian Village shall consist of those persons who file applications for membership with and are found qualified by the executive committee under one of the following categories:

(a) Persons of 1/2 or more degree of California Indian Blood who filed as Jamul Indians and were listed on the September 21, 1968 Judgement Roll of Certain Indians of California.

(b) Persons of 1/2 or more degree of California Indian blood who reside in the Jamul Indian Village, Jamul, California, at the time of the adoption of this constitution.

(c) Persons of 1/2 or more degree of total California Indian blood whose ancestors meet the requirements of Sections 1 (a) or 1 (b) regardless of whether the ancestors are living or deceased.

(d) Persons who have been adopted by the village in accordance with an adoption ordinance approved by the Secretary of the Interior or his authorized representative, provided they are not less than 1/2 degree Indian blood.

EXHIBIT S

Sec. 2 No persons shall be a member of the Jamul Indian Village if he:

(a) Has been allotted on another reservation or on the public domain.

(b) Is officially enrolled with or has received a land use assignment or payments by reason of membership in another tribe, band, rancheria or village. Land or money received through inheritance shall not be a bar to enrollment as a member of the Jamul Village.

(c) Has relinquished in writing his membership in the Jamul Indian Village.

(d) Is less than one-half (1/2) degree Indian blood.

Sec. 3. The governing body shall adopt an enrollment ordinance, subject to the approval of the Secretary of the Interior, governing loss of membership and the enrollment of new members and prescribe rules and procedures by which the membership roll shall be prepared and thereafter kept current.

ARTICLE IV - GOVERNING BODY

Section 1. The governing body of the Jamul Indian Village shall be the general council composed of all qualified voters of the village who are eighteen (18) years of age or older. All actions of the general council shall be determined by the majority of the membership present, provided that a quorum is present.

Sec. 2. The general council shall elect from its members, by secret ballot, an executive committee consisting of a chairman, vice-chairman, and three (3) committee members who shall hold office for two (2) years or until their successors are duly elected and installed. The executive committee shall select a secretary-treasurer to assist them in the administration of tribal affairs. The secretary-treasurer may or may not be a member of the Jamul Indian Village, but shall not be entitled to vote as an officer.

Sec. 3. The general council may also appoint or elect such other committees as are deemed necessary or the chairman may be delegated the authority to appoint such committees if in the opinion of the general council it becomes necessary.

ARTICLE V - ELECTIONS

Section 1. The officers of the executive committee in office at the time of approval of this constitution by the Secretary of the Interior or his authorized representative shall continue in office until their successors are duly elected and installed in office. The first regular election of officers under this constitution shall be held in June of 1981. Thereafter elections shall be every two years. Regular elections of officers shall be conducted at the Jamul Tribal Hall in accordance with an election ordinance.

Sec. 2. An election ordinance shall be developed by the executive committee and adopted by the general council within six (6) months following the effective date of this constitution. Such ordinance shall include but not be limited to provisions for a fair election, secret balloting, nomination of candidates, absentee balloting and procedures

for handling protests and resolving election disputes. Provisions shall also be included regarding the conduct of recall and referendum elections and a uniform procedure for submitting petitions. Elections to amend this constitution shall be conducted in accordance with Article XVI of this constitution.

Sec. 3. All enrolled members of Jamul Village who are eighteen (18) years of age or older shall be entitled to vote in tribal elections.

Sec. 4. A candidate for a position on the executive committee must be a qualified voter of Jamul Village eighteen (18) years of age or older. No person who has been convicted of a felony or who within the last year preceding has been convicted of a crime involving dishonesty shall be eligible to hold office on the executive committee.

Sec. 5. All elections of tribal officers shall be by secret ballot.

Sec. 6 The time, place and manner of nominations shall be specified in the election ordinance adopted pursuant to Section 2 of this article.

ARTICLE VI - REMOVAL, RECALL AND FORFEITURE

Section 1. Not more than ten (10) days after receipt of a petition signed by thirty percent (30%) of the qualified voters requesting the removal from office of an elected official, the executive committee shall call a special general council meeting to hear the charges against the official. The petition must set forth the specific reasons for which removal is sought. Such general council meeting shall be held not less than ten (10) days nor more than twenty (20) of the date that a valid petition for removal action is filed with the executive committee. It shall at the same time notify the accused in writing of the charges against him and of the date, hour and place of the general council meeting at which time he may appear and answer those charges. After the accused has had full opportunity to be heard by the general council, a secret ballot vote for or against removal shall be conducted. The decision of a majority of those present and voting shall govern, provided that at least fifty percent (50%) of those eligible to vote shall vote. If the official is found guilty by such vote, his office shall be automatically vacated and the general council shall proceed to nominate candidates and elect a replacement official who shall serve the unexpired term of office.

Sec. 2. Recall. Upon receipt of a petition signed by at least thirty percent (30%) of the qualified voters requesting the recall of any member of the executive committee, the exective committee shall call a special general council meeting within ten (10) days of receipt of the petition. Such general council meeting shall be held not less than ten (10) days nor more than twenty (20) days of the date that a valid petition is filed with the executive committee. The general council shall vote by secret ballot whether to recall the member or members named in the petition. If a majority of the voters vote to recall a member, the position shall immediately be declared vacant. Once an individual has been subjected to recall proceedings, he or she shall not again be subject to such action during the balance of his or her term of office. No cause is required for recall action.

Sec. 3. If any officer shall die, resign, be removed or recalled from office, permanently leave the community, or shall be found guilty in any Federal or State Court of a felony while in office or of a crime involving dishonesty, that office shall automatically be declared vacant.

ARTICLE VII - VACANCIES

Except as provided in Section 1 of Article VI, any office which has been vacated, shall be filled by election of the general council at its next meeting and such replacement shall serve the unexpired term of office.

ARTICLE VIII - POWERS

Section 1. The general council of the Jamul Indian Village shall exercise the following powers subject to any limitations imposed upon such powers by Federal law and the Constitution of the United States:

(a) To negotiate with Federal, State and local governments;

(b) To retain legal counsel, the choice of counsel and the fixing fees to be subject to the approval of the Secretary of the Interior or his authorized representative so long as such approval is required by law;

(c) To prevent the sale, disposition, lease or encumbrance or tribal lands, interests in lands or other tribal assets without the consent of the village;

(d) To advise the Secretary of the Interior with regard to all appropriation estimates for Federal projects for the benefit of the Jamul Indian Village prior to the submission of such estimates to the Office of Management and Budget and to Congress;

(e) To establish ordinances governing the conduct of tribal members; providing for the maintenance of law and order and the administration of justice by establishing a tribal court and defining its powers and duties subject to the approval of the Secretary of the Interior where such approval is required by law.

(f) To establish or join such housing and other authorities as are necessary to promote the welfare of the village.

(g) To promote and protect the peace, health, morals, education and general welfare of the village and its members.

(h) To administer tribal assets and manage all economic affairs of the village.

(i) To borrow money from any source whatsoever without limit as to amount, and on such terms and conditions and for such consideration and periods of time as the general council shall determine; to use all funds thus obtained to promote the welfare and betterment of the village and its members; to finance tribal enterprises; or to lend money thus borrowed.

(j) To adopt any ordinances and resolutions necessary or incident to the exercise of any of the foregoing powers and duties.

(k) To levy and collect taxes and raise revenue to meet the needs of the tribe or to support tribal government operations.

(l) To cultivate and preserve native arts and crafts, culture and ceremonials.

(m) To establish ordinances, subject to approval by the Secretary of the Interior, providing for the manner of making, holding and revoking of assignments of village lands or interests therein, and to make leases of village lands in accordance with applicable laws.

Sec. 2. The executive committee shall have the following powers, but shall not commit the Jamul Indian Village to any contract, lease or other transaction unless it is authorized in advance by a duly enacted ordinance or resolution of the general council;

(a) To carry out all ordinances, resolutions or other enactments of the general council;

(b) To represent the Jamul Indian Village in all negotiations with Federal, State and local government and advise the general council of the results of all such negotiations.

Sec. 3. Any rights or powers heretofore vested in the Jamul Indian Village, but not expressly referred to in this constitution, shall not be lost by their omission but may be exercised by the adoption of appropriate amendments to this constitution.

ARTICLE IX - TRIBAL ENACTMENTS

Section 1. Ordinances. All final decisions on matters of general and permanent interest to members of the community shall be embodied in ordinances, such as an enrollment or an election ordinance. Such enactments shall be available for inspection by members of the general council during normal office hours.

Sec. 2. Resolution and Motions. All final decisions on matters of short term or one time interest where a formal expression is needed shall be embodied in resolutions. Other decisions of a temporary nature or relating to particular individuals, officials or committees shall be put in the form of motions and noted in the minutes and shall be available for inspection by members of the tribal council during normal office hours.

Sec. 3. All ordiances and resolutions shall be dated and numbered and shall include a certification showing the presence of a quorum and the number of members voting for or against the proposed enactment.

Sec. 4. No enactment of the Jamul General Council shall have any validity or effect in the absence of a quorum of the membership thereof at a legally called session.

Sec. 5. Approval of Tribal Enactments. Any resolution or ordinance which by the terms of this constitution or Federal law requires the approval of the Secretary of the Interior must be received by the local Bureau Superintendent no later than ten (10) days following its enactment in order to be considered for approval. It shall be the duty of the Secretary's local representative to issue acknowledgement of receipt of such enactment within five (5) working days of his receipt thereof. If timely filed, that enactment shall not become effective until it is approved by the Secretary's authorized representative, provided that if such enactment is not disapproved within ninety (90) days from the date it is timely received by the Secretary's local representative, it shall on the ninety-first (91st) day automatically become effective.

ARTICLE X - BILL OF RIGHTS

Section 1. All members of the community shall enjoy without hindrance, freedom of worship, conscience, speech, press, assembly and association.

Sec. 2. This constitution shall not in any way alter, abridge, or otherwise jeopardize the rights and privileges of the members of the community as citizens of the State of California or the United Sates.

Sec. 3. The individual property rights of any member of the Jamul Community shall not be altered, abridged or otherwise affected by the provisions of this constitution.

Sec. 4. Community members shall have the right to review all tribal records, including financial records, at any reasonable time in accordance with procedures established by the executive committee.

Sec. 5. In accordance with Title II of the Indian Civil Rights Act of 1968(82 Stat. 77), the Jamul Community in exercising its powers of self-government shall not:

(a) Make or enforce any law prohibiting the full exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;

(b) Violate the right of the people to be secure in their persons, houses, papers and effects against unreasonable search and seizure, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;

(c) Subject any person for the same offenses to be twice put in jeopardy;

(d) Compel any person in any criminal case to be a witness against himself;

(e) Take any private property for a public use without just compensation;

(f) Deny to any person in a criminal proceeding the right to a speedy trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, at his own expense, to have the assistance of counsel for his defense;

(g) Require excessive bail, impose execessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six (6) months or a fine of $500.00 or both;

(h) Deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of laws;

(i) Pass any bill of attainder or ex post facto law;

(j) Deny to any person accused of imprisonment the right, upon request, to a trial by jury of not less than six (6) persons.

ARTICLE XI - MEETINGS

Section 1. Regular meetings of the general council shall be held on the third (3rd) Saturday of each month at 12:00 p.m. at a place designated by the executive committee.

Sec. 2. Special meetings may be called at any time by the chairman and shall be called by him upon the written request of the majority of the executive committee or upon the written request of eight (8) members of the general council provided that at least ten (10) days written notice shall be given in advance of the meeting in each instance.

Sec. 3. Thirty percent (30%) of the qualified voters shall constitute a quorum at all meetings of the general council. Notices of all general council meetings shall be given in writing at least ten (10) days in advance of the meeting.

Sec. 4. Regular meetings of the executive committee shall be called by the chairman or, in his absence, by the vice-chairman when deemed necessary.

Sec. 5. Special meetings of the executive committee may be called by the chairman at his discretion, and shall be called by him upon the written request of three (3) members of the executive committee.

Sec. 6. Three (3) members of the executive committee shall constitute a quorum for the conduct of its business.

ARTICLE XII - DUTIES OF OFFICERS

Section 1. The chairman shall preside at all meetings of the general council and of the executive committee. The chairman shall also be the chief executive officer of the village and exercise any authority delegated to him by the general council, such as to execute on behalf of the village all contracts, leases or other documents approved by the general council. When neither the general council nor the executive committee are in session the chairman shall be the official representative of the village. The chairman shall vote only in the case of a tie vote in either the general council or executive committee meeting.

Sec. 2. The vice-chairman, in the absence of the chairman, shall have the power and authority of the chairman and may, if authorized by the chairman, assist the chairman in the performance of his duties.

Sec. 3. The secretary-treasurer shall keep the minutes of both the general council and executive committee meetings. The secretary-treasurer shall certify the enactment of all ordinances or resolutions of both the general council and executive committee. The secretary-treasurer shall attend to the giving of all notices required by this document.

The secretary-treasurer shall have care and custody of all valuables for the village and deposit all money in an approved despository. The secretary-treasurer shall disburse all funds as ordered by the general council by check to be co-signed by the chairman. The secretary-treasure shall maintain all financial accounts, receipts and records which shall be available for inspection by officers of the general council. All financial records of the village shall be audited at least once each year and such other times as may be directed by the general council.

The secretary-treasurer shall notify by mail all members of the coming meetings or any special meetings at least ten (10) days prior to their occurance.

Also the secretary-treasurer will be expected to give a financial report at each general council meeting. All financial records shall be available for inspection by any member of the community through apoointment according to procedures established by the executive committee, and shall be open at all times for audit and inspection by representatives of the Bureau of Indian Affairs. At the expiration of the term of office, all the records and papers in the possession of the secretary-treasurer shall be turned over to the successor or the executive committee.

ARTICLE XIII - OATH OF OFFICE

Section 1. Each officer, elected or appointed hereunder, shall take an oath of office prior to assuming the duties thereof, by which oath he shall pledge himself to support and defend the Constitution of the United States and this constitution. Oath: I,_____do solemnly swear that I will support and defend the Constitution of the United States against all enemies; that I will carry out, faithfully and impartially, the duties of my office to the best of my ability; that I will promote and protect the best interests of my village in accordance with the Constitution of the Jamul Indian Village.

ARTICLE XIV - ORDER OF BUSINESS

Section 1. The following order of business is hereby established for all meetings:

(1) Call to order by the chairman.

(2) Roll Call.

(3) Ascertainment of a quorum.

(4) Reading of the minutes of the last meeting.

(5) Adoption of the minutes by voice vote.

(6) Treasurer's Report.

(7) Unfinished business.

(8) Reports.

(9) New Business.

(10) Adjourmment.

ARTICLE XV - SEVERABILITY

If any provision of this constitution shall, in the future, be declared invalid by a court of competent jurisdiction, the invalid provision shall be severed and the remaining provisions shall continue in full force and effect.

ARTICLE XVI - AMENDMENTS

Section 1. This constitution may be amended by a majority vote of the qualified voters of the Jamul Village voting in an election called for that purpose by the Secretary of the Interior or his authorized representative, provided that at least fifty-one percent (51%) of those entitled to vote shall vote in such election, but no amendment shall become effective until approved by the Secretary of the Interior or his duly authorized representative.

Sec. 2. It shall be the duty of the Secretary of the Interior or his authorized representative to call an election on any proposed amendment at the request of the general council or upon receipt of a petition signed by at least thirty percent (30%) of the qualified voters of the Jamul Village.

ARTICLE XVII - ADOPTION

Section 1. This constitution when adopted by a majority vote of the qualified voters of the Jamul Village, voting at an election called for that purpose by the Secretary of the Interior or his authorized representative in which at least fifty-one percent (51%) of those entitled to vote shall vote, shall be submitted to the Secretary of the Interior for his approval, and shall be effective from the date of his approval.

CERTIFICATE OF RESULTS OF ELECTION

Pursuant to an order issued on December 16, 1980, by William E. Hallett, Commissioner of Indian Affairs, the foregoing Constitution of the Jamul Indian Village, San Diego County, Jamul, California was submitted for ratification to the qualified voters of the village and was on May 9, 1981, duly ratified by a vote of 16 for, and 0 against, in an election in which at least fifty-one percent (51%) of the 23 (number) entitled to vote cast their ballots in accordance with Section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984) as amended by the Act of June 15, 1935 (49 Stat. 378).

Chairman, Election Board

Election Board Member

Election Board Member

APPROVAL

I, M. W. Bobby, Acting Deputy Assistant Secretary - Indian Affairs (Operations) by virture of the authority granted to the Secretary of the Interior by the Act of June 18, 1934 (48 Stat. 984), as amended, and delegated to me by 209 D.M. 8.3, do hereby approve the Constitution of the Jamul Indian Village, San Diego County, Jamul, California.

M. W. Bobby

Acting Deputy Assistant Secretary -
Indian Affairs (Operations)

Washington, D. C.

Date: July 7, 1981

EXHIBIT H

PURCHASES UNDER WHEELER-HOWARD ACT

August 31, 1936.

Memorandum for the Office of Indian Affairs.

The Office of Indian Affairs has submitted several titles for examination covering land in Mississippi being purchased under authority granted by the Wheeler-Howard Act (48 Stat. 984). Several opinions have been rendered and in one case the deed has been recorded and accepted. In every case submitted, the deed designates the grantee as the United States in trust for the Choctaw Tribe of Mississippi.

A further examination reveals that this designation is incorrect because there is in fact no existing tribe of Indians in Mississippi known as the Choctaw Tribe. The Choctaw tribe or nation of Indians, formerly of Mississippi, removed to Oklahoma and became one of the Five Civilized Tribes. Certain members of the tribe remained in Mississippi, taking allotments there and becoming citizens of the State, in accordance with the Dancing Rabbit Creek Treaty concluded September 27, 1830 (7 Stat. 333). Thereafter, when Oklahoma lands were allotted, some of the Indians remaining in Mississippi were permitted to enroll as citizens of the Choctaw nation in Oklahoma provided they removed to the Choctaw country. Those who remained, already citizens of Mississippi, thereby severed their relations with the Choctaw tribe. They therefore cannot now be regarded as a tribe.

The Wheeler-Howard Act, however, authorizes the purchase of land for Indians and defines the term "Indian" to include those persons of one half or more Indian blood regardless of membership in a recognized Indian tribe under Federal jurisdiction and regardless of residence on an Indian reservation. (Sec. 19 of the act of June 18, 1934, *supra.*) In so far as the Indians in Mississippi fall within this definition as to degree of blood, purchases may be made for their benefit. Moreover, these Indians may be organized under the provisions of the Wheeler-Howard Act after land has been acquired for them. Therefore, I suggest that the titles now being acquired be taken as follows:

> "The United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in Mississippi, as shall be designated by the Secretary of the Interior, until such time as the Choctaw Indians of Mississippi shall be organized as an Indian tribe pursuant to the act of June 18, 1934 (48 Stat. 984), and then in trust for such organized tribe."

Several titles have already been examined, as I noted above, and no objection was made to the designation of the grantee there employed. In all of those cases where the title papers have already been returned to the field, instructions should be given to the field agents to have the deeds corrected before they are recorded. In that case where the deed has already been recorded and accepted, it will be necessary to secure a new deed. The necessary corrections will be made in the other cases which are now pending in this office.

The error discussed herein arises perhaps out of unusual circumstances, but is one that might have been avoided. I suggest that further difficulties of this kind can be reduced or eliminated by having the Indian Organization Unit of your office formally approve the designation of the grantee in each project undertaken. This formal approval should be recited in each title case submitted for my examination.

NATHAN R.

MARGOLD,

Case 2:15-cv-01145-KJM-KJN Document 1-1 Filed 05/27/15 Page 37 of 53

Solicitor

ISLETA AND SANTO DOMINGO PUEBLOS-
RIGHTS-OF-WAY

September 2, 1936

Memorandum for the Commissioner of Indian Affairs.

I am returning for further consideration your letters of July 28 and August 26, dealing with grants of rights of way over lands of the Isleta and Santo Domingo Pueblos in New Mexico to the A. T. & S. F. Railway Company and the Postal Telegraph-Cable Company.

While I agree with your conclusion that these grants may be made under authority of the acts of Congress cited in your letters I do not agree with the statement that the agreements entered into between the respective pueblos and the companies named above, are in violation of the restrictive provisions contained in the Indian Reorganization Act of June 18, 1934 (48 Stat. 984). The restrictive provisions to which you refer are contained in section 4 of the Reorganization Act and declare, with exceptions not here material, that "No sale, devise, gift, exchange or other transfer of restricted Indian lands * * * shall be made or approved." The right conveyed by these right of way grants is in interest in land and if the conveyance of such

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an interest is prohibited by the provision just quoted the conveyance cannot be made or approved whether it be in the form of an agreement between the Indians and the companies or is accomplished by approval of a map of definite location under the acts of Congress cited in your letters.

In my memorandum of September 6, 1934, I had occasion to consider the restrictive provisions contained in section 4 of the Reorganization Act and, after pointing out that such provisions had no application to conveyances of estates less than the fee, such as grants of rights of way in the nature of easements, held that such rights of way might be granted where there was a specific act of Congress so authorizing. Such acts of Congress are not superseded or repealed by anything contained in the Reorganization Act. The only limitations which the Reorganization Act imposes upon the exercise of authority conferred by such specific acts of Congress are: (a) a tribe organized under section 16 may veto the grant under the broad power given it by that section "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe" and (b) a tribe incorporated under section 17 may be given the power to make such grants without restriction.

Inasmuch as the Santo Domingo and Isleta Pueblos have not as yet organized or incorporated, limitations (a) and (b) above, are without application. The easement in each case, however, has received the approval of the pueblo. Approval may be given under the acts cited in your letters, but such letters should be revised to eliminate the erroneous statements referred to above.

NATHAN R.

MARGOLD,

viding for departmental approval may therefore be omitted

(3) Paragraph C (2d) , page 8, fails to take into consideration the possibility that Mose Daniels may predecease the grantor. The paragraph should be amended to cover this contingency.

(4) The provision on page 2 of the trust agreement amounts to a conveyance in trust of the mineral estate whereas there is equally a conveyance in trust under the mineral grant. In other words, under the present set-up there are two instruments conveying the same property to the same person. It seems to me that the artistic and lawyer-like way of accomplishing the desired result would be to convey the property by separate deed, subject to the terms of the trust agreement, and then to provide in the trust agreement that this property, when conveyed, shall be subject to the same conditions as the cash and Government bonds, except as otherwise provided. It seems to me that the trust agreement should be changed so as to negative the possibility that it will be construed as a second conveyance.

(5) Paragraph 11, page 15, dealing with the fees to be collected by the trustee may not be seriously objectionable but I doubt if the provisions of the paragraph are stated with clarity sufficient to avoid misunderstanding in the future. For one thing, it is not clear whether the trustee expects to receive a final distribution fee based upon the mineral rights as a part of the corpus of the trust. In view of the substantial payments otherwise provided for the paragraph may well be reworded to preclude such a payment.

Solicitor.

Approved and referred to the Commissioner of Indian Affairs for appropriate action.
Assistant Secretary.

STATUS OF ST. CROIX CHIPPEWAS

February 8, 1937.

Memorandum to the Commissioner of Indian Affairs:

The Solicitor's Office has been requested to determine the status of the St. Croix Chippewa Indians in Wisconsin for the purpose of determining their eligibility to organize under the Reorganization Act and of determining the beneficiary to be designated in the Trust Title of various camp site areas being purchased for these Indians from reorganization act funds.

This group of Indians numbers about 500 and are scattered in at least five counties in Wisconsin, frequently in clusters of 5 to 25 families. They have no reservation and those who have not established homes in white communities live as squatters on land to which they have no ownership rights. These Indians are commonly referred to by the Indian Office and by themselves as the "St. Croix Band of Lake Superior Chippewa Indians."

The question whether or not these Indians are a separate band of Indians or absentee members of one of the other bands of Lake Superior Chippewa Indians has already been finally decided by the Department and by Congress. The act of August 1, 1914 (38 Stat. 582, 606), directed the Secretary of the Interior to determine the status and tribal rights of these Indians and what benefits they would have received if they had removed to one of the reservations in Wisconsin and to make a roll of the Indians

entitled to benefits. Pursuant to this act Mr. Wooster was detailed to make this study. He submitted a report on December 1, 1914, which found that these Indians were absentee members of the Lac Courte Oreille Band and that out of some 800 possible members of this group of Indians only 95 were entitled to be enrolled for the purpose of receiving compensation in lieu of the allotments which they might have obtained. He based his finding of fact upon extensive testimony indicating that the Lac Courte Oreille Indians admitted that the chief of the St. Croix Indians and his followers were members tribe and belonged on the Lac Courte Oreille Reservation. A further indication was that this chief of the St. Croix Indians signed the treaty of September 30, 1854 (10 Stat. 1109), as a Lac Courte Oreille Indian. Mr. Wooster based his legal conclusion that only 95 persons were entitled to enrollment for compensatory benefits on the ruling of the Oakes case (172 Fed. 305), and the Kadrie case (281 U.S. 206), which cases are to the effect that absentee members of a tribe who have severed their tribal relations are still entitled to tribal rights but that their children born away from the tribe are not so entitled. Among the pertinent facts shown in his report are the high degree of intermarriage with white people, and of departure from Indian culture and their scattered condition. A second report was submitted by him on January 13, 1915, in which he submitted a roll of these 95 selected persons which show them to be members of the Lac Courte Oreille and certain other tribes and suggested that these persons be compensated by Congress with the approximate value of an allotment.

These reports were submitted by the Department of the Interior to Congress on December 7, 1914 (H.D. No. 1253 63d Cong., 3d Sess.) and on March 3, 1915 (H.D. No. 1663 63d Cong., 3d Sess.). Copies of these reports are attached for your information. Expressly referring to these reports Congress has passed statutes providing funds for distribution among the enrolled Indians or for land purchases for them for their relief and compensation. See act of February 14, 1920 (41 Stat. 432, 433); and the act of March 3, 1921 (41 Stat. 1246). These acts did not refer to these Indians as a band but designated them as "St. Croix Chippewa Indians" and were designed expressly to benefit those Indians found to be members of the Lac Courte Oreille Band and other tribes.

In view of the foregoing only one conclusion is possible and that is that the St. Croix Indians cannot now be recognized as a band. Congress has closed the question after a departmental investigation and finding. It is noted that the Interior Department appropriation act for the fiscal year 1937 (act of June 22, 1936, 49 Stat. 1757, 1729), in making available the unexpended balances of appropriations for the St. Croix Indians made under the act of February 14, 1920 above referred to, speaks of the "care of aged and indigent Indians of the band." I do not think the use of the word "band" here is sufficient to reverse the former deliberate finding, especially as the previous appropriations now revived were only for the Indians enrolled by Mr. Wooster.

Accordingly, benefits under the Indian Reorganization Act must be limited to those Indians who are in fact of one half Indian blood or more. In providing land for these Indians it is not necessary to restrict beneficial rights to those Indians who were placed on the roll by Mr. Wooster, as that roll represents an entirely different class of persons from those who can receive benefits under the Indian Reorganization Act, namely, those Indians of the half blood or more. However, Mr. Wooster's roil may be of assistance in determining the degree of blood as this roll does indicate the quantum of blood of the Indians placed upon it.

My conclusion is different from that reached in the case of the Mole Lake Indians who are also commonly considered a "lost band" in Wisconsin who received no reservation under the 1854 treaty. However, the St. Croix situation is not similar to that of the Mole Lake Indians as the question of the status of the Mole Lake Indians was never definitely decided by the Department or by Congress and as the facts in the two cases are quite different. The Mole Lake Indians live in one principal Indian community which is looked upon as their band home, whereas the St. Croix Indians live in numerous white villages and towns throughout Wisconsin. Moreover, the St. Croix Indians are highly assimilated into the white population, whereas, the Mole Lake Indians are principally full bloods and near full bloods who have kept distinct from the white population. The testimony available in connection with the Mole Lake Indians shows that the other bands recognize them as a separate band, whereas in the case of the St. Croix Indians the Lac Courte Oreille Indians admitted the St. Croix Indians to be members of the Lac Courte Oreille Band. While the St. Croix Indians have inhabited certain areas on the St. Croix River for numerous generations and might have been recognized as a separate band at the time of the 1854 treaty, they now present no characteristics entitling them to recognition as a band, particularly as there exists no form of band organization, as there does in the Mole Lake group. The difference between these two groups is also found in the report of the anthropologist who investigated these Indians in 1936. He states, "The St. Croix are a completely disorganized and deculturated group. The only cohesion they have as a social entity is based solely on the possession of a common language and a common racial type. Even these are disappearing, * * *".

In view of the conclusion which I reached I suggest that the procedure for extending benefits to these Indians under the Reorganization Act be as follows: the title to the land purchases being made in certain of the larger Indian groupings should be taken for the St. Croix Chippewa Indians of the half blood or more who may be designated by the Secretary of the Interior until such time as they organize under section 16 of the Reorganization Act and then for the benefit of such organization. After the land purchase is completed the Indians who come to reside upon this land would then be entitled to organize as Indians residing on a reservation. No other organization of these Indians is now possible.

NATHAN R.

MARGOLD,

Solicitor.

in those acts of providing equal fishing opportunities to all citizens.

FREDERIC L.

KIRGIS,

Acting Solicitor.

Approved: April 19, 1937.

OSCAR L. CHAPMAN, *Assistant* Secretary.

STATUS OF NAHMA AND BEAVER INDIANS

May 1, 1937.

Memorandum to the Commissioner of Indian Affairs.

The Organization Division requested an examination in this office of the status of the Nahma and Beaver Island Indians in Michigan, with a view to determining their opportunities for organization under the Indian Reorganization Act. In the memorandum presented by the Organization Division the following information on these groups is given:

> "1. The Nahma Indians are located at Nahma, Michigan in Delta County Upper Peninsula). I am advised that they are members of the Ottawa Tribe but are today inter-married with the Chippewa Tribe. The exact number is not known, but there are about 90 children from one group attending school.
>
> "2. The Beaver Island Indians are located on Beaver, North Fox, South Fox, Hog and High Islands in Lake Michigan within the territorial jurisdiction of the State of Michigan. They are descendants of the Chippewa Tribe and number between 200 and 300 persons. Mr. Cavill visited these islands in 1918 and compiled an appraisal and estimate of some 30 allotments."

Aside from this information there appears to be very little material available in the Interior Department bearing upon their band status. The Indian Office Mails and Files Division reported that they have no files on these groups. A search of the files on the Ottawa and Chippewa Indians generally for the last 20 years reveals no material on these Indians. The only evidence on the status of these Indians is the last treaty made with the Ottawa and Chippewa Indians, that of July 31, 1855 (11 Stat. 621), and the interpretations put upon it by the Department.

The treaty of 1855 provided that various sections of land in Michigan should be set aside for a number of different bands. The third paragraph reads as follows:

> "For the Beaver Island Band-High Island, and Garden Island, in Lake Michigan, being fractional townships 38 and 39 north, range 11 west-40 north, range 10 west, and in part 39 north, range 9 and 10 west."

The fourth paragraph provides as follows:

> "For the Cross Village, Middle Village, L'Arbrechroche and Bear Creek bands, and of such Bay du Noc and Beaver Island Indians as may prefer to live with them, townships 34

to 39, inclusive, north, range 5 west-townships 34 to 38, inclusive, north, range 6 west-townships 34, 36, and 37 north, range 7 west, and all that part of township 34 north, range 8 west, lying north of Pine River."

There is no mention of the Nahma Indians as such but it may be that the reference to the "Bay du Noc" Indians refers to the Nahma Indians since the Town of Nahma is situated on the Big Bay due Not In any case the Bay du Not Indians are not referred to as a band. This treaty was signed by five-groups of bands, namely, the Sault Ste. Marie Bands, Grand River Bands, Grand Traverse Bands, Little Traverse Bands, and Mackinac Bands. These five groups were composed of numerous subbands, each with a chief and his following. Possibly, the Nahma and Beaver Island Indians were such subbands. But neither in the signature to the treaty nor in the band rolls made for the payment of treaty annuities are these subbands designated by name.

Article V of the 1855 treaty provides that the tribal organization of the Ottawa and Chippewa Indians "is hereby dissolved" and that future negotiations in reference to any matters contained in the treaty should be carried on only with those Indians locally interested. This article has been consistently interpreted by the Interior Department, for as far back as the available files go, as providing for the dissolution of all tribal relations, including band relations, and the Interior Department has refused to recognize any of the Ottawa and Chippewa groups as bands. A sample of this attitude, which is repeated in innumerable instances of correspondence with Ottawa and Chippewa Indians, in the letter of February 15, 1917, to Mr. Eugene Hamlin concerning his credentials as a representative of Ottawa and Chippewa Indians near Harbor Springs, Michigan:

"Receipt is acknowledged of your letter of February 9, 1917, in which you say that you have been chosen as a delegate by certain of the Ottawa and Chippewa Indians of Michigan, and ask whether or not your credentials will be properly recognized to the end that you may be accorded a hearing when you visit this city.

"In answer you are advised that the Ottawa and Chippewa tribes of Indians many years ago became citizens of the United States and of the state in which they reside and are now not under the jurisdiction and control of the Government. The Office could not, therefore, save in a merely advisory capacity, interfere in any of your personal matters, nor could it approve your appointment or selection by a number of your people as a delegate. * * *"

"Of course it is to be understood that you or any of your people who may visit this city do so on their own responsibility and must look to their own resources for their expenses, etc."

The most recent test of the attitude of the Interior Department on the band status of the Ottawa and Chippewa groups occurred with relation to the Sault Ste. Marie Bands of Chippewa. A thorough investigation of the history of these bands was undertaken in an effort to prove their band status. It was found that a separate treaty was entered into with these bands subsequent to the July 31, 1855 treaty; that they were enrolled as separate bands in the money payment rolls of Ottawas and Chippewas from 1857

to 1867; that they retained their formal band organization down to the present time and continuous correspondence had been carried on between their band representatives and the Indian Office. However, in spite of this evidence tending to show their actual band status the Interior Department refused to accord them legal recognition as a band, in view of the dissolution of the Ottawa and Chippewa Tribe under the 1855 treaty and the cessation of the exercise of guardian over these Indians for nearly half a century.

If the Sault Ste. Marie Bands were not in a position to be recognized as a band by the Interior Department it is out of the question to establish any existing band status for the Mahna and Beaver Island Indians in view of the paucity of any evidence on the subject and in view of the fact that there is no showing in any treaty that the Nahma Indians were even recognized originally as a band.

There is no possibility of approaching organization for these Indians through their present land status as there are not existing reservations for these Indians. The land set aside under the third and fourth paragraphs of the 1855 treaty, quoted above, was entirely allotted and fee patented to individual Indians under other provisions of that treaty. The Executive order of August 9, 1855, provided for the withdrawal from sale of a number of sections and townships in Michigan to carry out the 1855 treaty, in which order High Island and Garden Island are named. However, all this land was disposed of by fee patenting in the manner provided by the treaty. No land of these Indians remains in trust status.

Accordingly I am of the opinion that the Nahma and Beaver Island Indians do not enjoy a status either as recognized bands or as Indians on a reservation entitling them to be organized under the Indian Reorganization Act and .that the only method of providing benefits is through the selection of those Indians among them who are of one half or more Indian blood and the purchase of land for them and their subsequent organization.

FREDERIC L.

KIRGIS,

Acting Solicitor.

War Assets Administration: equipment, materials, and supplies of all kinds, with an appraised value of not to exceed $6,300,000 from the surplus stores of these agencies, for use in the schools, hospitals, and agencies, or by any operating division of the Bureau of Indian Affairs in the United States and Alaska * * *." I understand that several million dollars' worth of surplus property may still be obtained under this authorization. Such property could doubtless be used to provide a considerable amount of relief for the Navajo Indians. To the extent provided by this statutory authorization, the use of surplus property could be made an element of the Navajo program.

MASTIN G. WHITE,
Solicitor.

ORGANIZATION 0F THE NOOKSACK INDIANS
UNDER THE INDIAN REORGANIZATION ACT

M-35013
December 9, 1947.

For Indians to be able to organize under section 16 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 987, 25 U.S.C. sec. 476), they must constitute a "tribe, or tribes, residing on the same reservation," Therefore. the Nooksack Indians of the State of Washington, for whom no reservation has ever been set aside and who possess no recognized tribal status, are not eligible to organize under this provision of the Indian Reorganization Act.

1480 **DEPARTMENT OF THE INTERIOR**
DECEMBER 9, 1947

MASTIN G. W HITE , Solicitor:

Memorandum
To: The Commissioner of Indian Affairs.
From: The Solicitor. Subject: Proposed constitution for the Nooksack Indians.

I am returning to you the proposed constitution for the Nooksack Indians of the State of Washington, together with the covering letter to the Superintendent of the Tulalip Agency calling an election for the purpose of enabling these Indians to vote on the proposed constitution.

For Indians to be able to organize under section 16 of the Indian Reorganiztion Act of June 18, 1934 (48 Stat. 987, 25 U.S.C. sec. 476) , they must constitute a "tribe, or tribes, residing on the same reservation." The Nooksack Indians do not fit this description.

The Nooksack Indians hold no tribal land. No reservation has ever been set apart for them by treaty, act of Congress, or Executive order. Some of them received homestead allotments on the public domain, but apparently these are noncontiguous. Although they all live in Whattcomb County, they do not live in any one locality. No lands appear to have been purchased for them pursuant to the acquisition

provisions of the Indian Reorganization Act.

The Nooksack Indians were included in the enumeration of ,the tribes or bands of nontreaty Indians who were authorized to sue the United States in the jurisdictional act of February 12, 1925 (43 Stat. 886)) and, pursuant to that act, they asserted a claim against the United States based on aboriginal occupancy of lands alleged to have been taken from them by the United States. In the subsequent litigation, however, the Court of Claims found that the lands claimed by the Nooksack Indians were ceded to (the United States by the Indians who were parties to the Point Elliott Treaty of January 22, 1855 (12 Stat. 927)) and that on the basis of the evidence there was no possibility "of definitely determining the exact status of the Indians and ,the relationship between them and the Government." *Duwamish, et al. Indians* v. *United* States, 79 Ct. Cl. 530, 606, cert. denied 295 U.S. *755.*

The Court stated in the *Duwamish* case: *"There* is no doubt that after the execution of the Point Elliott Treaty they [the Nooksack Indians] were placed under the charge of an Indian agent, and after the ratification of the treaty came under the charge of the Indian agent for the Lummi Reservation, and participated in the distribution of benefits set forth in the treaty." In this connection, the court cited the Report of the Commissioner of Indian Affairs for the year 1877, p. 198. Earlier reports of the Commissioner indicate, that while the Nooksack Indians probably constituted at one time a separate tribe or band in contact with the Lummi Indians, they later became allied with the Lummi Tribe (1854, p. 257; 1857, p. 326; 1858, p. 223; *1867,* p. *59; I870,* p. 17). The *Handbook of American Indians* (Bureau of American Ethnology, Bulletin 30, Part 2) gives the following information with respect to the Nooksack Indians:

> "Nooksack (Mountain men). The name given by the Indians on the coast to a Salish tribe, said to be divided into three small bands, on a river of the same name, in Whatcomb Co., Wash. About 200 Nooksack were officially enumerated in 1906, but Hill-Tout says there are only about 6 true male Nooksack. They speak the same dialect as the Squawmish, from whom they are said to have separated."

On the basis of the existing authorities, and in the absence of other evidence, it is not possible for me to conclude that the Nooksack Indians constitute a "tribe, or tribes, residing on the same reservation," which may adopt a constitution pursuant to the provisions of the Indian Reorganization Act.

MASTIN G. WHITE ,
Solicitor

EXHIBIT I

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240

IN REPLY REFER TO:

Tribal Government Services - TR
2611 MS/MIB

JUL 1 1993

Honorable Raymond Hunter
Chairman, Jamul Indian Village
P. O. Box 612
Jamul, California 91935

Dear Chairman Hunter:

We have completed our legal and technical review of the proposed revised Constitution of the Jamul Indian Village submitted by the Sacramento Area Director by memorandum of September 18, 1992. The proposed revised constitution was accompanied by an unnumbered resolution adopted by the Jamul General Council on August 15, 1992, requesting that the Secretary of the Interior (Secretary) call and conduct an election to permit the qualified voters of the Village to vote on the adoption or rejection of the proposed revised document. The resolution complies with Article XVI of the Village constitution.

As a result of our review, we recommend modification to it. The changes in the enclosed version are to make the document legally and technically sufficient, that is not contrary to Federal law. Other modifications are to clarify the apparent intent of the drafters. The modifications are discussed below.

While many of the proposed changes are merely cosmetic, the primary thrust of the revision deals with the membership portion of the constitution. The Village proposes to revise the constitution by lowering the blood quantum from one-half (1/2) or more California Indian blood to one-quarter (1/4) degree. Lowering of the blood quantum would affect the very basis and foundation of the recognition of the Jamul Indian Village and could jeopardize continued recognition.

The origin of the Jamul Indian Village is different from that of an historic tribe. The term "tribe" as used in Federal Indian affairs generally refers to a community of people who have continued as a body politic without interruption since time immemorial and retain powers of inherent sovereignty. When such a tribe is organized pursuant to the Indian Reorganization Act (IRA), its governing authority is derived from acknowledgment of the fact that as a single identifiable group, it has historically governed itself. By adopting an approved IRA constitution, the historic tribe enters into a government-to-government relationship with the United States whereby the Federal Government agrees to acknowledge that the tribe possesses inherent powers of self-government as modified by applicable Federal law.

EXHIBIT C 25

You will recall that prior to 1980, the Jamul Indian Village was not a federally recognized tribal entity. During the 1970's representatives of the Village explored with the Bureau of Indian Affairs (Bureau) means whereby it could obtain Federal recognition and were variously advised the only avenues open to them were to seek a legislative solution, go through the Federal acknowledgment process, or the more limiting action of recognition by the Secretary as a half-blood organization. It was pointed out that acknowledgment of existence as an Indian tribe and of existence as a half-blood community are two different things. In order for the Secretary to acknowledge the Jamul community as a tribe under 25 CFR Part 83, previously 25 CFR 54, it would have to submit a detailed petition and undergo a lengthy process of consideration. Several years would have been required to complete this. If the community was not determined to exist as a tribe after this consideration, it would still have the option to organize as a half-blood community under the IRA. Representatives of the Village opted to seek recognition as a half-blood Indian community even though they were aware of the limitations that result from organizing as a half-blood Indian community.

On April 23, 1975, the Sacramento Area Director submitted 23 uncertified family tree charts of Jamul Indians who filed for the California judgment awards to be included with their request for Federal recognition. Consequently, on November 7, 1975, the Commissioner of Indian Affairs, in response to the Area Director's assertion that 20 of the 23 Indians who reside in the Jamul community possess one-half or more degree of Indian blood, notified the Area Director that pursuant to Section 19 of the Indian Reorganization Act (IRA) of June 18, 1934 (25 U.S.C. §479), certain benefits of that Act are available to persons of one-half or more Indian blood even though they lack membership in a federally recognized tribe. The Commissioner found that while those individuals at Jamul of one-half degree or more Indian blood do not now constitute a federally recognized entity and do not possess a land base, they are entitled to services provided by the Bureau to individual Indians pursuant to Section 19 of the IRA. The Commissioner further held that should these Jamul half-bloods secure, in trust status, the tract of land on which they reside they would be eligible to organize as a community of adult Indians of one-half degree or more Indian blood under Section 16 of the IRA.

On July 12, 1979, the Commissioner of Indian Affairs in response to an inquiry advised the Sacramento Area Director that:

> [A]cknowledgment of existence as an Indian tribe and of existence as a half-blood community are two different processes. In order for the Secretary to acknowledge the Jamul community as a tribe under 25 CFR 54 as requested by Superintendent Tomhave, it would have to submit a detailed petition and undergo a lengthy process of consideration. Several years would probably be required

complete this. If the community was not determined to exist as a tribe after this consideration, it would still have the option to organize as a half-blood community under the Indian Reorganization Act.

The Jamul community has already been determined to be eligible to organize as a community of persons of one-half degree or more Indian blood. To be treated as such a community, however, the Jamul Indians must first organize under the Indian Reorganization Act. We understand that the community is currently working on a proposed organizational document. When this proposal has been adopted by the community in an election called by the Secretary, and has been approved by the Secretary, the Jamul Indians will be able to receive services as a community.

The Jamul Indians lived on one acre of private land and on land deeded to the Diocese of San Diego as an Indian cemetery. On June 28, 1979, the United States acquired from Bertha A. and Maria A. Daley a portion of the land known as "Rancho Jamul" which it took "in trust for such Jamul Indians of one-half degree or more Indian blood as the Secretary of the Interior may designate." Subsequently on May 25, 1982, the Roman Catholic Bishop of San Diego conveyed to the United States in trust for the Jamul Indian Village 1.372 acres. The United States accepted these conveyances of land in accordance with the authority contained in Sections 5 and 19 of the Indian Reorganization Act of 1934.

On December 16, 1980, in response to a petition submitted by the half-blood Indian community of Jamul requesting an IRA election, the Commissioner of Indian Affairs authorized the Superintendent, Southern California Agency, to call and conduct a Secretarial election to permit the qualified voters of the community to vote on the adoption or rejection of the proposed IRA constitution. The Commissioner noted in his letter that membership in the community was limited to individuals possessing one-half degree or more California Indian blood. The Constitution of the Jamul Indian Village was approved by the Deputy Assistant Secretary - Indian Affairs on July 7, 1981. In approving the IRA Constitution, the Village was authorized to exercise those self-governing powers that have been delegated by Congress or that the Secretary permits it to exercise. A number of "tribes" have been created, from communities of adult Indians, or expressly authorized by Congress under provisions of the IRA and other Federal statutes. For example, some IRA entities availed themselves of the opportunity to adopt an IRA constitution and are considered to be IRA "tribes." However, they are composed of remnants of tribes who were gathered onto trust land. These persons had no historical existence as self-governing units. They now possess only those powers set forth in their IRA constitution. They are not an inherent sovereign. Rather, that entity is a created tribe exercising delegated powers of self-government. Such is the case with Jamul Indian Village.

It has been the longstanding policy of the Bureau to require that organizational documents adopted by half-blood communities contain a membership requirement of one-half degree Indian blood or more. Consistent with the intent of Section 19 of the IRA, the Department of the Interior has over the more than 50 years since the passage of the IRA interpreted Section 19 to mean that those who seek recognition as a half-blood Indian community and subsequently organize under the IRA are forever restricted in their membership. In other words, once a half-blood Indian community, always a half-blood community. Therefore, the Village's proposal to lower the blood quantum from one-half degree California Indian blood to one-quarter or more degree is contrary to applicable Federal law and if adopted we would disapprove the constitution or any amendment that contained such language or intent. Any departure from the limitations imposed by Section 19 of the IRA could jeopardize the Village's continued right to Federal recognition and the rights of its members to Federal benefits and services. Further, since the United States acquired the Village's land in trust for Jamul Indians of 1/2 or more Indian blood, any action by the Secretary to approve membership of less than 1/2 degree Indian blood could be viewed as a breach of trust owed to those of 1/2 degree or more and thus a violation of applicable Federal law. Accordingly, we recommend you continue with the language as it now appears in the Village's existing constitution. The language was developed specifically to comply with the law.

We might also point out that even if it were possible to lower the blood quantum, the Council's proposal to amend each and every subsection of Section 1 of Article III is flawed. If it were possible to lower the blood quantum, which it is not, it could only be prospective in nature. That is, only persons of one-quarter degree California Indian blood born after the date of the adoption of an approved amendment would be eligible for enrollment. Thus, subsections (a), (b), (c) and (d) would remain as is with the addition of a new subsection to provide for those quarter bloods born after the adoption of the amendment.

The Village proposes to amend Section 4 of Article V - Elections by adding a proviso that the general council may waive the prohibition against convicted felons and those convicted of misdemeanors holding office in those instances it determines involve mitigating circumstances. In the first place constitutional prohibitions are not subject to waiver and in the second place, even if they were, in those instances where discretion is involved, the potential for unequal treatment exists. We recommend against this proposed amendment.

The Village proposes to amend Sections 1 and 2 of Article VI - Removal, Recall and Forfeiture by altering the timeframes within which to call a general council meeting from receipt of a petition for removal. If the executive committee takes the full 30 days to call the meeting, sufficient time will not be available to notice the meeting. We recommend the Village consider modifying the number of days by either reducing the number of days to call the meeting or extending the timeframe to hold the meeting.

Regarding the addition of the phrase "unless the general council waives this provision for mitigating circumstances" in Section 3, we recommend against this proposal as discussed above with reference to Section 4 of Article V because it creates the potential for unequal treatment.

Article VIII, Subsection 1(k) authorizes the Village to "levy and collect taxes and raise revenue." As we noted earlier, Jamul as a created entity is not an inherent sovereign and can exercise only those powers of self-government delegated to it. Those powers not within the power of a community include the power to condemn land of members of the village community, the regulation of inheritance of property of community members, the levying of taxes upon community members or others, and the regulation of law and order. It is within the community's authority to levy assessment and fees upon its members for the use of community property and privileges as these assessments would be incidental to the ownership of the property. The village community may also levy assessments on non-members coming or doing business on village lands. However, such assessments would be levied in its exercise of the community's powers as a land owner, not some historical, inherent power to tax.

NO TRIBAL FORUM

Article X - Tribal Enactments. The Village proposes to amend Section 2 by including a reference to "tribal council". We believe this is an inaccurate reference since the constitution does not provide for a tribal council but rather a general council. We believe the appropriate reference should therefore be the general council and recommend accordingly.

Section 5 proposes to increase the timeframe from ten (10) days to twenty (20) for submission of tribal enactments to the local Bureau Superintendent. It also provides that such enactments will become effective when approved by the Secretary or automatically at the expiration of ninety (90) days from submission. While we have no objection to the proposal, we note for the record that the timeframes imposed in Section 5 do not apply to actions provided for in Article XVI - Amendments. Federal law controls actions taken in Article XVI.

We note the omission of the phrase "an offense punishable by" in Section 5 (j) of Article X - Bill of Rights. Section 5(j) should read:

> (j) Deny to any person accused of <u>an offense punishable by</u> imprisonment the right, upon request, to a trial by jury of not less than six (6) persons.

Article XI - Meetings. The Village proposes to amend Article XI by changing the numerical requirement for requesting special meetings by the general membership from "8 members" to "twenty-five percent" in Section 2 and by changing the quorum in Section 3 from "thirty percent" to "twenty-five percent." We have no objections to these changes.

The Village proposes to eliminate from Section 3 of Article XII - Duties of Officers the requirement for an annual audit and the provision that financial records should be open at all times for inspection by the Bureau. We have no objection to this proposal. However, this does not preclude the Bureau from auditing and inspecting these records when required by Federal law.

The Village proposes to amend Articles XVI and XVII to provide that amendments to the constitution are automatically effective after ninety (90) days have elapsed from the date of submittal of such amendments. These proposals are contrary to Federal law, specifically the requirements of the Indian Reorganization Act of June 18, 1934, as amended by the Act of November 1, 1988, and, if adopted, the Secretary could not approve a constitution or an amendment which contained the proposed language. We, therefore, recommend the deletion of the phrase "or after ninety (90) days have elapsed from the date of submittal it shall become automatically effective" from both Articles XVI and XVII. Since specific duties were imposed upon the Secretary by Congress in the 1988 amendments to the IRA, it is not necessary to include time limitations. However, Article XVI could be amended as follows to reflect the statutory basis of these duties. The last sentence of Article XVI could read as follows:

> The amendment shall become effective when approved by the Secretary of the Interior or his duly authorized representative <u>or when deemed approved by the Secretary by operation of law</u>.

This concludes our technical comments. Please review and consider them and advise us accordingly. Should the Village have any questions about our comments or recommended modifications, we will be glad to discuss them with you in order to resolve any differences prior to the election. Should the Village agree with our recommendations, in accordance with Part III of the Secretary's Revised Guidelines for the Review of Proposed Constitutions, Revisions and Amendments dated March 4, 1988, please make a final written request accompanied by a resolution and the Secretary will issue an authorization letter to the Superintendent, Southern California Agency, to call and conduct an election consistent with the Secretary's election regulations found in Title 25 of the Code of Federal Regulations, Part 81.

Should the Village decide not to adopt any or all of the Bureau's modifications, the Village should submit a final written request accompanied by an appropriate resolution together with a copy of the document upon which the Secretarial election shall be called and an explanation as to why our modifications were not accepted. Such submission will ensure that all parties are agreed upon the document that is the subject of the Secretarial election. The Village's final request for a Secretarial election should be made directly to the BIA's Washington Office, Division of Tribal Government Services, MIB-2611, 1849 C Street N.W., Washington, D.C. 20240, to expedite action.

Upon receipt of the Village's final request for a Secretarial election, the election will be authorized without delay. However, such authorization does not carry with it the presumption of Secretarial approval should the constitution be adopted. Further, if adopted it will not be effective under Federal law until it is approved by the Secretary. Copies of the Village's final request should be furnished to the Superintendent, Southern California Agency, and to the Sacramento Area Director.

Sincerely,

/S/ CAROL A. BACON

Director, Office of Tribal Services

cc: Area Director, Sacramento
Superintendent, Southern California Agency
Regional Solicitor, Sacramento

EXHIBIT J

TAX ROLL PARCEL NO.
597-080-02 Code Area #79019

DOCUMENTARY TRANSFER TAX $ 0
Wilhelm H. Gianelli
TAX SIGNATURE

GRANT DEED

I, The Roman Catholic Bishop of San Diego, hereby grant to the United States of America in trust for the Jamul Indian Village all that land situated in the County of San Diego, California, more particularly described as follows:

All that portion of Rancho Jamul described in Deed to the Roman Catholic Bishop of Monterey and Los Angeles recorded September 12, 1912 in Book 567, Page 332, in the Office of the County Recorder of San Diego County, California; EXCEPTING THEREFROM a piece of of land described as follows: Commencing at Rancho Jamul Corner No. 16; thence N. 88°42' E., 739.37 feet to the true point of beginning as shown on Record of Survey Map No. 8138, filed December 2, 1976 in the Office of said County Recorder; thence S. 1°18' W., 111.77'; thence S. 87°55'38" W., 65.81'; thence S. 44°51'28" W., 88.60'; thence S. 1°19'25" W., 59.80'; thence N. 88°41'06" W., 83.66'; thence N. 1°24'08" E., 239.63'; thence N. 88°42' E., 210 feet to the True Point of Beginning, containing 0.838 acre, more or less. The parcel granted to the Jamul Indian Village contains 1.372 acres, more or less.

The grantor reserves to himself and his successors or assigns an easement for (1) utility service lines and (2) ingress and egress over the existing well-traveled road, or over any road that subsequently is built to replace the existing one.

IN WITNESS WHEREOF, The Roman Catholic Bishop of San Diego, grantor, herein have hereunto affixed his name this 25th day of May, 1982.

82-229256

RECORDED IN OFFICIAL RECORDS OF SAN DIEGO COUNTY, CA.
1982 JUL 27 AM 9 41
VERA L. LYLE COUNTY RECORDER

RF 4
MG
TXPD 10
UF —

ROMAN CATHOLIC BISHOP OF SAN DIEGO
a corporation sole,

Leo T. Maher
Incumbent

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

On this 25th day of May, 1982, before me Ch. Quittard, a Notary Public in and for said County and State, personally appeared LEO T. MAHER, known to me to the Roman Catholic Bishop of San Diego and to be the Incumbent of the corporation sole that executed the within instrument and acknowledged to me that said corporation sole executed the same.

WITNESS my hand and official seal.

Ch Quittard
Notary Public in and for said County and State

OFFICIAL SEAL
C.H. QUITTARD
NOTARY PUBLIC-CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Expires Aug 27, 1984

ACCEPTANCE OF CONVEYANCE BY THE UNITED STATES IS TO BE ATTACHED HERETO AS EXHIBIT "A" AND RECORDED WITH THIS DEED. THIS CONVEYANCE IS MADE IN ACCORDANCE WITH SECTIONS 5 and 19 OF THE INDIAN REORGANIZATION ACT OF JUNE 18, 1934 (48 Stat. 985 and 988; 25 U.S.C. 465 and 479).

82-
Nº 229256

53

TAX ROLL PARCEL NO.

54

IN REPLY REFER TO:

Att No. 1

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS
SOUTHERN CALIFORNIA AGENCY
5750 DIVISION STREET, SUITE 201
RIVERSIDE, CALIFORNIA 92506-3286

ACCEPTANCE OF CONVEYANCE

The United States of America, acting through the undersigned, an authorized representative of the Secretary of the Interior, in accordance with Sections 5 and 19 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 985 and 988; 25 U.S.C. 465 and 479), does hereby accept the conveyance made by The Roman Catholic Bishop of San Diego in that certain Grant Deed dated May 25, 1982.

Said Grant Deed, with this Acceptance of Conveyance attached, shall be recorded in the Official Records of San Deigo, California.

Date: July 2, 1982

Frank L. Haggerty Jr.
Acting Superintendent
Pursuant to the authority delegated by 230 DM 1, 10 BIAM 2 (39 F.R. 32166) and 10 BIAM 3.1 (34 F.R. 637), and Sacramento Area Office Redelegation Order 1 (43 F.R. 30131).

STATE OF CALIFORNIA)
) SS.
COUNTY OF RIVERSIDE)

On this 2nd day of July, 1982, before me, the undersigned, a Notary Public in and for said State, personally appeared Frank L. Haggerty, Jr., known to me to be the person whose name is subscribed to the within Acceptance of Conveyance and acknowledged to me that he executed the same for the United States of America.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal this date.

Arlene J. Lacy
Notary Public in and for said State

EXHIBIT "A" TO DEED FROM THE ROMAN CATHOLIC BISHOP OF SAN DIEGO DATED May 25, 1982.

OFFICIAL SEAL
ARLENE J. LACY
NOTARY PUBLIC
RIVERSIDE CO., CALIF.
My commission expires 10-27-83

Return to:
RECORDING REQUESTED BY
MAIL TAX STATEMENT TO:
(Please print name & address)

DEPARTMENT OF THE INTERIOR
[illegible] SUITE 201
RIVERSIDE CA 92506

My Commission Expires Aug. 27, 1984

No. 229256 -82-

ACCEPTANCE OF CONVEYANCE BY THE UNITED STATES IS TO BE ATTACHED HERETO AS EXHIBIT "A" AND RECORDED WITH THIS DEED. THIS CONVEYANCE IS MADE IN ACCORDANCE WITH SECTIONS 5 and 19 OF THE INDIAN REORGANIZATION ACT OF JUNE 18, 1934 (48 Stat. 985 and 988; 25 U.S.C. 465 and 479).

EXHIBIT K

00737

APPLICATION AND PERMIT FOR DISPOSITION OF HUMAN REMAINS

USE BLACK INK ONLY—MAKE NO ERASURES, WHITEOUTS OR OTHER ALTERATIONS

1A. NAME OF DECEDENT—FIRST (GIVEN)	1B. MIDDLE	1C. LAST (FAMILY)	2. DATE OF BIRTH MONTH, DAY, YEAR	3. DATE OF DEATH MONTH, DAY, YEAR	4. SEX
Helen	Serafina	Cuerro	08/16/1932	09/05/1996	F

5A. CITY OF DEATH	5B. COUNTY OF DEATH—OUTSIDE CALIF., ENTER STATE	6. NAME, RELATIONSHIP, FULL MAILING ADDRESS AND ZIP CODE OF INFORMANT
El Cajon	San Diego	Walter Rosales - Son P O Box 85 Jamul, CA 91935

7A. TYPED NAME AND ADDRESS OF CALIFORNIA—FUNERAL DIRECTOR OR PERSON ACTING AS SUCH	7B. CALIF. LICENSE NUMBER —IF APPLICABLE	8A. SIGNATURE OF APPLICANT—Person taking permit	8B. DATE SIGNED
El Cajon Mortuary 684 S Mollison Ave El Cajon, CA. 92020	FD-1022	[signature]	09/10/96

ACKNOWLEDGMENT OF APPLICANT — I hereby acknowledge as applicant that the proposed disposition stated herein is one of the dispositions authorized by Section 10376 of the Health and Safety Code, and was authorized pursuant to Section 7100 of the Health and Safety Code.

PERMIT

AUTHORIZATION OF LOCAL REGISTRAR

THIS PERMIT IS ISSUED IN ACCORDANCE WITH PROVISIONS OF THE CALIFORNIA HEALTH AND SAFETY CODE AND IS THE AUTHORITY FOR THE DISPOSITION SPECIFIED IN THIS PERMIT.
NOTE: THIS PERMIT GIVES NO RIGHT OF DISPOSAL OUTSIDE OF CALIFORNIA.

9A. AMOUNT OF FEE PAID	9B. DATE PERMIT ISSUED	9C. SIGNATURE OF LOCAL REGISTRAR ISSUING PERMIT
$7.00	09/10/1996	9612803 ROETTA TYER

ANY CHANGE IN DISPOSITION REQUIRES A NEW PERMIT TO SHOW FINAL DISPOSITION.

9D. ADDRESS OF REGISTRAR OF DISTRICT OF DEATH— IF DEATH OCCURRED IN CALIFORNIA	9E. ADDRESS OF REGISTRAR OF DISTRICT OF DISPOSITION— IF DISPOSITION IS TO OCCUR IN ANOTHER DISTRICT IN CALIFORNIA
P.O. Box 85222 San Diego, Ca. 92186-5222	—

10. AUTHORIZED DISPOSITION(S) CHECK APPLICABLE ITEMS

- [ ] A. BURIAL (INCLUDES ENTOMBMENT)
- [X] B. CREMATION
- [X] C. DISPOSITION OF CREMATED REMAINS OTHER THAN IN A CEMETERY
- [ ] D. SCIENTIFIC USE
- [ ] E. TEMPORARY ENVAULTMENT
- [ ] F. DISINTERMENT
- [ ] G. SHIP IN TO CALIFORNIA
- [ ] H. TRANSIT TO OUTSIDE OF CALIFORNIA

FOR CORONER'S USE ONLY

- [ ] I. DISPOSITION PENDING—REMAINS LOCATED AT (Name and Address)

COMPLETE ALL APPLICABLE ITEMS

BURIAL	11A. NAME AND ADDRESS OF CALIFORNIA CEMETERY N/A	11B. DATE BURIED	11C. SIGNATURE OF PERSON IN CHARGE OF BURIAL	
CREMATION	12A. NAME AND ADDRESS OF CALIFORNIA CREMATORY Greenwood Crematory/4300 Imperial Ave San Diego, CA 92102	12B. DATE CREMATED 9-10-96	12C. SIGNATURE OF PERSON IN CHARGE OF CREMATION [signature]	
SCIENTIFIC USE	13A. NAME AND ADDRESS OF CALIFORNIA FACILITY RECEIVING REMAINS N/A	13B. DATE RECEIVED	13C. SIGNATURE OF PERSON IN CHARGE OF FACILITY	
TRANSIT	14A. NAME AND ADDRESS IN RECEIVING STATE OR COUNTRY WHERE REMAINS OR CREMATED REMAINS ARE TO BE SHIPPED N/A	14B. DATE SHIPPED	14C. ADDRESS AND SIGNATURE OF PERSON IN CHARGE OF PLACING WITH THE CARRIER	
SCATTERING AT SEA OR DISPOSITION OTHER THAN IN A CEMETERY	15A. ADDRESS, NEAREST POINT ON SHORELINE, OR OTHER DESCRIPTION SUFFICIENT TO IDENTIFY FINAL PLACE AND CA DISTRICT OF DISPOSITION RES-Walter Rosales/14191 Highway 94 Jamul, CA 91935	15B. DATE OF DISPOSITION	15C. SIGNATURE OF PERSON IN CHARGE OF DISPOSITION	15D. LICENSE NUMBER OF CREMATED REMAINS DISPOSER —IF APPLICABLE

COPY 1 OF THE PERMIT ACCOMPANIES THE REMAINS TO THE STATED PLACE OF DISPOSITION. THE PERSON IN CHARGE OF DISPOSITION IS RESPONSIBLE FOR COMPLETING AND FORWARDING THE PERMIT WITHIN 10 DAYS OF DISPOSITION TO THE REGISTRAR OF THE DISTRICT IN WHICH DISPOSITION OCCURRED OR THE DISTRICT NEAREST THE POINT WHERE THE CREMATED REMAINS WERE SCATTERED AT SEA. THE LOCAL REGISTRAR MAY DESTROY ANY ORIGINAL OR DUPLICATE PERMIT AFTER ONE YEAR FROM ISSUE DATE.

AUTHORIZATION FOR CREMATION & DISPOSITION

Cremation #: _____

Cremation Date: _____

- ☐ 82-975 Requa Avenue, Indio, California 92201 FE-967
- ☐ 51-990 South Jackson, Coachella, California 92236 FE-640 / CR-76
- ☐ 44-635 San Rafael Avenue, Palm Desert, California 92260 FE-1571

I authorize Fitzhenry Desert Chapel Crematory (the "Crematory") to cremate the body of Dean J. Rosella, deceased (the "Decedent") in accordance with the Crematory's rules and regulations and State laws and regulations. I certify that I have the legal right to authorize the cremation and control the disposition of the Decedent's remains. [NOTE: California law provides "Any person signing any authorization for the interment or cremation of any remains warrants the truthfulness of any fact set forth in the authorization, the identity of the person whose remains are sought to be interred or cremated, and his or her authority to order interment or cremation. ***He or she is personally liable for all damage occasioned by or resulting from the breach of such warranty.***"]

1. **Cremation Container ~** The Crematory will not accept the remains of the Decedent for cremation unless they are in a leak resistant, rigid combustible container. I authorize the Crematory to remove and dispose of handles, ornaments or other noncombustible parts of the cremation container and to lawfully dispose of the noncombustible casket or other container in any manner it deems appropriate.

2. **Mechanical or Radioactive Devices ~** Mechanical or radioactive devices, such as pacemakers, may be a hazard if placed in the cremation chamber. The Crematory will therefore not knowingly cremate any remains which contain such device.

I certify that the remains of the Decedent DO ____ DO NOT X *contain a mechanical or radioactive device.* (Place initials next to the correct statement)

If the decedent's remains do contain such a device, I authorize the Crematory to arrange for the removal of the device prior to the cremation. I further authorize the Crematory or its agent to dispose of any such device as it deems appropriate, unless other instructions are given here:

_____

_____

3. **Mementos, Jewelry, Dental Gold/Silver & Other Foreign Materials ~** Items such as personal mementos, jewelry, dental gold and silver, prostheses other foreign materials placed in the cremation chamber with the Decedent will either be destroyed or rendered unrecognizable. If any such items are recovered from the cremation chamber I authorize the Crematory to dispose of them.

4. **The Cremation Process ~** I acknowledge the following: The human body burns with the casket, container, or other material in the cremation chamber. Some bone fragments are not combustible at the incineration temperature and, as a result, remain in the cremation chamber. During the cremation, the contents of the chamber may be moved to facilitate incineration. The chamber is composed of ceramic or other material which disintegrates slightly during each cremation and the product of that disintegration is commingled with the cremated remains. Nearly all of the contents of cremation chamber, consisting of the cremated remains, disintegrated chamber material, and small amounts of residue from previous cremations, are removed together and crushed, pulverized, or ground to facilitate inurnment or scattering. Some residue remains in the cracks and uneven places of the chambers. Periodically, the accumulation of this residue is removed and interred in a dedicated cemetery property, or scattered at sea.

5. **Time of Cremation ~** The cremation will take place after all required permits are obtained, this completed and signed Authorization is received by the Crematory and after any scheduled funeral ceremony at which the decedent's body is to be present has been concluded. The Crematory will perform the cremation according to its schedule, and at its discretion, without obtaining any further authorization or instructions, unless the right of the person signing this document to authorize the cremation is contested by someone. In that event the Crematory may delay the cremation while it determines whether and how to proceed.

6. **Disposition ~** I authorize you to take the action I've indicated below with respect to the cremated remains of the Decedent. ***I understand that unless a suitable container is purchased or provided by me for the cremated remains, the Crematory will place such remains in a container which is designed for short term use and not recommended for any type of shipment.***

____ Deliver the remains to _____ (Name)

_____ (Address)

✓ Release the remains to: _____ (Name of Person) _____ (Relationship)

who will call for them at the funeral home.

IF PERMANENT ARRANGEMENT FOR FINAL DISPOSITION OF THE CREMATED REMAINS ARE TO BE CARRIED OUT BY THE UNDERSIGNED (OR THEIR DULY AUTHORIZED REPRESENTATIVE) AND HAVE NOT BEEN COMPLETED WITHIN 30 DAYS AFTER THE DATE OF THEIR AVAILABILITY FOR FINAL DISPOSITION, I/WE AUTHORIZE THE CREMATORY TO LAWFULLY SCATTER THE REMAINS AT SEA OR CHARGE A FEE FOR DELIVERY.
INITIALS ____

____ Mail the remains to _____ (Name)

_____ (Address)

[NOTE: Remains will be mailed via U.S. Postal Service, registered with return receipt requested. I understand that the Crematory is acting solely as my agent in mailing the remains, and I agree that the Crematory shall not be liable if the remains are lost or damaged while in the custody of the U.S. Postal Service.]

____ Scatter at sea via: _____ (Name of Service)

Witnesses (Name, Address, Phone) _____ _____ _____

_____ _____ _____

_____ _____ _____

[NOTE: I understand that the Crematory is acting solely as my agent as an accommodation to me in arranging for the scattering of the remains. I agree that the Crematory shall not be liable for any failure by the services named above to properly scatter the remains.]

7. **Special Instructions ~** Indicate special instructions below: _____

Take to Tribal Indian Village.

Container: B.C. Urn: _____

SIGNATURES ~ The following persons authorize the cremation and disposition of the Decedent named above:

Date:	✓	Walter Rosella	
Signature:	✓		
Print Name:	✓		
Address:	✓ P.O. Box 1472 Valley Center, Ca.		
Relationship to Decedent	✓ Mother	Father	

Name of Referring Mortuary: Indio

For more information about funeral, cemetery and cremation matters, contact:
Department of Consumer Affairs, Cemetery/Funeral Program, 400 R Street, Sacramento, California 95814: (800) 952-5210

STATE OF CALIFORNIA

CERTIFICATION OF VITAL RECORD

COUNTY OF SAN DIEGO

ASSESSOR/RECORDER/COUNTY CLERK

3 051996 | 48902 — STATE FILE NUMBER

CERTIFICATE OF DEATH

STATE OF CALIFORNIA

USE BLACK INK ONLYING PRESSURE, WHITEOUTS OR ALTERATIONS

VS-11 (Rev. 7/93)

3963701311 4 — LOCAL REGISTRATION NUMBER

0742

DECEDENT PERSONAL DATA

1. NAME OF DECEDENT—FIRST (GIVEN): Helen
2. MIDDLE: Serafina
3. LAST (FAMILY): Cuerro
4. DATE OF BIRTH MM/DD/CCYY: 08/16/1932
5. AGE YRS.: 64
6. IF UNDER 1 YEAR: MONTHS / DAYS; IF UNDER 24 HOURS: HOURS / MINUTES
8. SEX: F
7. DATE OF DEATH MM/DD/CCYY: 09/05/1996
8. HOUR: 0910
9. STATE OF BIRTH: CA
10. SOCIAL SECURITY NO.: [redacted]
11. MILITARY SERVICE: 19 ___ TO 19 ___ ☐ None
12. MARITAL STATUS: Never Married
13. EDUCATION—YEARS COMPLETED: 4
14. RACE: American Indian 30
15. HISPANIC—SPECIFY: ☐ YES ☒ NO
16. USUAL EMPLOYER: Self-Employed
17. OCCUPATION: Homemaker
18. KIND OF BUSINESS: Own Home
19. YEARS IN OCCUPATION: 40

USUAL RESIDENCE

20. RESIDENCE—STREET AND NUMBER OR LOCATION: 14191 Highway 94
21. CITY: Jamul
22. COUNTY: San Diego
23. ZIP CODE: 91935
24. YRS IN COUNTY: 64
25. STATE OR FOREIGN COUNTRY: CA

INFORMANT

26. NAME, RELATIONSHIP: Walter Rosales - Son
27. MAILING ADDRESS (STREET AND NUMBER OR RURAL ROUTE NUMBER, CITY OR TOWN, STATE, ZIP): P O Box 85/Jamul, CA 91935

SPOUSE AND PARENT INFORMATION

28. NAME OF SURVIVING SPOUSE—FIRST: –
29. MIDDLE: –
30. LAST (MAIDEN NAME): –
31. NAME OF FATHER—FIRST: Lawrence
32. MIDDLE: –
33. LAST: Cuerro
34. BIRTH STATE: CA
35. NAME OF MOTHER—FIRST: Louise
36. MIDDLE: –
37. LAST (MAIDEN): Calles
38. BIRTH STATE: CA

DISPOSITION(S)

39. DATE MM/DD/CCYY: 09/11/1996
40. PLACE OF FINAL DISPOSITION: RES-Walter Rosales/14191 Highway 94/Jamul, CA 91935

FUNERAL DIRECTOR AND LOCAL REGISTRAR

41. TYPE OF DISPOSITION(S): CR/RES
42. SIGNATURE OF FUNERAL DIRECTOR: [redacted]
43. LICENSE NO.: 800
44. NAME OF FUNERAL DIRECTOR: El Cajon Mortuary
45. LICENSE NO.: FD-1022
46. SIGNATURE OF LOCAL REGISTRAR: [redacted]
47. DATE MM/DD/CCYY: 09/10/1996

PLACE OF DEATH

101. PLACE OF DEATH: Madison Care
102. IF HOSPITAL OR NOTIFY ONE: ☐ ER ☐ EF/DOP ☐ DOA
103. FACILITY WITHIN HOSPITAL: ☒ CONV. ☐ MORT. ☐ REF. ☐ OTHER
104. COUNTY: San Diego
105. STREET ADDRESS—STREET AND NUMBER OR RURAL ROUTE: 1391 E Madison Ave
106. CITY: El Cajon

CAUSE OF DEATH

107. DEATH WAS CAUSED BY (ENTER ONLY ONE CAUSE PER LINE FOR A, B, C, AND D):

IMMEDIATE CAUSE (A): Cardiopulmonary Arrest — TIME INTERVAL BETWEEN ONSET AND DEATH: Hrs

DUE TO (B): Chronic Obstructive Pulmonary Disease — Yrs

DUE TO (C):

DUE TO (D):

108. DID DEATH REPORTED TO CORONER? ☐ YES ☒ NO — REFERRAL NUMBER
109. DID NOPSY PERFORMED? ☐ YES ☒ NO
110. AUTOPSY PERFORMED? ☐ YES ☒ NO
111. USED IN DETERMINING CAUSE? ☐ YES ☐ NO

112. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RELATED TO CAUSE GIVEN IN 107: None

113. WAS OPERATION PERFORMED FOR ANY CONDITION IN 107 OR 112? IF YES, LIST TYPE OF OPERATION AND DATE: No

PHYSICIAN'S CERTIFICATION

114. I CERTIFY THAT TO THE BEST OF MY KNOWLEDGE DEATH OCCURRED AT THE HOUR, DATE AND PLACE STATED, FROM THE CAUSES STATED.
PRESENT AT TIME OF DEATH MM/DD/CCYY: 05/22/1996
LAST SEEN ALIVE MM/DD/CCYY: 08/18/1996
115. SIGNATURE AND TITLE OF CERTIFIER: [redacted]
116. LICENSE NO.: A44411
117. DATE MM/DD/CCYY: 09/09/1996
118. TYPE ATTENDING PHYSICIAN'S NAME, MAILING ADDRESS + ZIP: John Gaidry, MD/4501 Mission Bay Dr/San Diego, CA 92109

CORONER'S USE ONLY

I CERTIFY THAT IN MY OPINION DEATH OCCURRED AT THE HOUR, DATE AND PLACE STATED FROM THE CAUSES STATED.

119. MANNER OF DEATH: ☐ NATURAL ☐ SUICIDE ☐ HOMICIDE ☐ ACCIDENT ☐ PENDING INVESTIGATION ☐ COULD NOT BE DETERMINED
120. INJURY AT WORK? ☐ YES ☐ NO
121. INJURY DATE MM/DD/CCYY
122. HOUR
123. PLACE OF INJURY
124. DESCRIBE HOW INJURY OCCURRED (ENTER INJURY RELATED IN INJURY)
125. LOCATION (STREET AND NUMBER OR LOCATION AND CITY AND ZIP CODE)
126. SIGNATURE OF CORONER OR DEPUTY CORONER: [redacted]
127. DATE MM/DD/CCYY
128. TYPED NAME, TITLE OF CORONER OR DEPUTY CORONER

STATE REGISTRAR

A: 4 | B: X | C: 2 | D | E | F | G | H | FAX AUTH. #: 9612803 | CENSUS TRACT

NOT A VALID DOCUMENT TO ESTABLISH IDENTITY
INFORMATIONAL, NOT A LEGAL DOCUMENT

This is a true and exact reproduction of the document officially registered and placed on file in the office of the San Diego County Recorder/Clerk.

June 6, 2014

Ernest J. Dronenburg, Jr.
Assessor/Recorder/County Clerk

This copy is not valid unless prepared on an engraved border displaying date, seal and signature of the Recorder/County Clerk

Ex. MM

003724619

STATE OF CALIFORNIA

CERTIFICATION OF VITAL RECORD

COUNTY OF SAN DIEGO

ASSESSOR/RECORDER/COUNTY CLERK

3 052001 091925 — STATE FILE NUMBER

CERTIFICATE OF DEATH

STATE OF CALIFORNIA

USE BLACK INK ONLY/NO ERASURES, WHITEOUTS OR ALTERATIONS

VS-11 (REV. 1/00)

3 200137 009167 — LOCAL REGISTRATION NUMBER

1075

DECEDENT PERSONAL DATA

1. NAME OF DECEDENT—FIRST (GIVEN): Marie
2. MIDDLE: Adelina
3. LAST (FAMILY): Toggery
4. DATE OF BIRTH MM/DD/CCYY: 08/04/1921
5. AGE YRS.: 79
IF UNDER 1 YEAR: MONTHS / DAYS
IF UNDER 24 HOURS: HOURS / MINUTES
6. SEX: F
7. DATE OF DEATH MM/DD/CCYY: 06/03/2001
8. HOUR: 1230
9. STATE OF BIRTH: CA
10. SOCIAL SECURITY NO.: [redacted]
11. MILITARY SERVICE: ☐ YES ☒ NO ☐ UNK
12. MARITAL STATUS: Widow
13. EDUCATION—YEARS COMPLETED: 6
14. RACE: American Indian/Kumayaay 30
15. HISPANIC—SPECIFY: ☐ YES ☒ NO
16. USUAL EMPLOYER: Self Employed
17. OCCUPATION: Homemaker
18. KIND OF BUSINESS: Own Home
19. YEARS IN OCCUPATION: 65

USUAL RESIDENCE

20. RESIDENCE—(STREET AND NUMBER OR LOCATION): 14191 Hwy 94 #14
21. CITY: Jamul
22. COUNTY: San Diego
23. ZIP CODE: 91935
24. YRS IN COUNTY: 79
25. STATE OR FOREIGN COUNTRY: CA

INFORMANT

26. NAME, RELATIONSHIP: Karen Toggery - Daughter
27. MAILING ADDRESS (STREET AND NUMBER OR RURAL ROUTE NUMBER, CITY OR TOWN, STATE, ZIP): 14191 Hwy 94 #14, Jamul, CA 91935

SPOUSE AND PARENT INFORMATION

28. NAME OF SURVIVING SPOUSE—FIRST: -
29. MIDDLE: -
30. LAST (MARIED NAME): -
31. NAME OF FATHER—FIRST: Pablo
32. MIDDLE: -
33. LAST: Tumpo
34. BIRTH STATE: CA
35. NAME OF MOTHER—FIRST: Ramona
36. MIDDLE: -
37. LAST (MAIDEN): Mesa
38. BIRTH STATE: CA

DISPOSITION(S)

39. DATE MM/DD/CCYY: 06/09/2001
40. PLACE OF FINAL DISPOSITION: Jamul Indian Reservation Cemetery/14191 Hwy 94/Jamul, CA 91935

FUNERAL DIRECTOR AND LOCAL REGISTRAR

41. TYPE OF DISPOSITION(S): BU
42. SIGNATURE OF EMBALMER: [redacted]
43. LICENSE NO.: 2808
44. NAME OF FUNERAL DIRECTOR: El Cajon Mortuary
45. LICENSE NO.: FD-1022
46. SIGNATURE OF LOCAL REGISTRAR: [redacted]
47. DATE MM/DD/CCYY: 06/07/2001

PLACE OF DEATH

101. PLACE OF DEATH: Madison Care Center
102. IF HOSPITAL, SPECIFY ONE: ☐ IP ☐ ER/ER ☐ OP ☒ CONV HOSP ☐ RES CARE ☐ OTHER
103. FACILITY OTHER THAN HOSPITAL: COUNTY: San Diego
105. STREET ADDRESS—(STREET AND NUMBER OR LOCATION): 1391 E Madison Ave
106. CITY: El Cajon

CAUSE OF DEATH

E149
E149

107. DEATH WAS CAUSED BY: (ENTER ONLY ONE CAUSE PER LINE FOR A, B, C, AND D)

		TIME INTERVAL BETWEEN ONSET AND DEATH
IMMEDIATE CAUSE	(A) Cardiopulmonary Arrest	15 Hrs
DUE TO	(B) End Stage Renal Disease	Yrs
DUE TO	(C) Diabeles Mellitus	Yrs
DUE TO	(D)	

108. DEATH REPORTED TO CORONER: ☐ YES ☒ NO — REFERRAL NUMBER
109. AUTOPSY PERFORMED: ☐ YES ☒ NO
110. AUTOPSY PERFORMED: ☐ YES ☒ NO
111. USED IN DETERMINING CAUSE: ☐ YES ☐ NO

112. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RELATED TO CAUSE GIVEN IN 107: None

113. WAS OPERATION PERFORMED FOR ANY CONDITION IN ITEM 107 OR 112? IF YES, LIST TYPE OF OPERATION AND DATE: No

PHYSICIAN'S CERTIFICATION

114. I CERTIFY THAT TO THE BEST OF MY KNOWLEDGE DEATH OCCURRED AT THE HOUR, DATE AND PLACE STATED FROM THE CAUSES STATED. DECEDENT (TYPE OR PRINT) MM/DD/CCYY: 05/13/2001 — DECEDENT LAST SEEN ALIVE MM/DD/CCYY: 06/03/2001
115. SIGNATURE AND TITLE OF CERTIFIER: [redacted]
116. LICENSE NO.: A50756
117. DATE MM/DD/CCYY: 06/05/2001
118. TYPE ATTENDING PHYSICIAN'S NAME, MAILING ADDRESS, ZIP: Tu Truong, MD, 5577 University Ave, San Diego, CA 92105

CORONER'S USE ONLY

119. I CERTIFY THAT IN MY OPINION DEATH OCCURRED AT THE HOUR, DATE AND PLACE STATED FROM THE CAUSES STATED.
120. INJURY AT WORK: ☐ YES ☐ NO
121. INJURY DATE MM/DD/CCYY
122. HOUR
123. PLACE OF INJURY
124. DESCRIBE HOW INJURY OCCURRED (EVENTS WHICH RESULTED IN INJURY)
110. MANNER OF DEATH: ☐ NATURAL ☐ SUICIDE ☐ HOMICIDE ☐ ACCIDENT ☐ PENDING INVESTIGATION ☐ COULD NOT BE DETERMINED
125. LOCATION (STREET AND NUMBER OR LOCATION AND CITY, ZIP)
126. SIGNATURE OF CORONER OR DEPUTY CORONER: [redacted]
127. DATE MM/DD/CCYY
128. TYPED NAME, TITLE OF CORONER OR DEPUTY CORONER

STATE REGISTRAR

A	B	C	D	E	F	G	H	FAX AUTH. #	CENSUS TRACT
4	X	2						2109896	

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June 6, 2014

Ernest J. Dronenburg, Jr.
Assessor/Recorder/County Clerk

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003724617

STATE OF CALIFORNIA

CERTIFICATION OF VITAL RECORD

COUNTY OF SAN DIEGO

ASSESSOR/RECORDER/COUNTY CLERK

3052004085026 — STATE FILE NUMBER

CERTIFICATE OF DEATH
STATE OF CALIFORNIA
USE BLACK INK ONLY. NO ERASURES, WHITEOUTS OR ALTERATIONS
(REV. 10/97)

3200437 009234 — LOCAL REGISTRATION NUMBER

DECEDENT'S PERSONAL DATA

1. NAME OF DECEDENT — FIRST: MATTHEW
2. MIDDLE: ROBERT
3. LAST: TINAOJHEDA
4. DATE OF BIRTH: 06/23/1985
5. AGE: 18
6. SEX: M
8. BIRTHPLACE: CA
9. SOCIAL SECURITY NUMBER: [redacted]
11. EVER IN U.S. ARMED FORCES? [ ] YES [X] NO [ ] UNK
12. MARITAL STATUS: NEVER MARRIED
7. DATE OF DEATH: 05/31/2004
8. HOUR: 1320
13. EDUCATION: HS GRADUATE
14. WAS DECEDENT SPANISH/HISPANIC/LATINO? [X] YES SPANISH [ ] NO
16. DECEDENT'S RACE: KUMEYAAY
17. USUAL OCCUPATION: SECURITY OFFICER
18. KIND OF BUSINESS OR INDUSTRY: CASINO
19. YEARS IN OCCUPATION: 0

USUAL RESIDENCE

20. DECEDENT'S RESIDENCE: 14191 HWY 94 #14
21. CITY: JAMUL
22. COUNTY/PROVINCE: SAN DIEGO
23. ZIP CODE: 91935
24. YEARS IN COUNTY: 18
25. STATE/FOREIGN COUNTRY: CA

INFORMANT

26. INFORMANT'S NAME, RELATIONSHIP: KAREN TOGGERY - MOTHER
27. INFORMANT'S MAILING ADDRESS: 14191 HWY 94 #14, JAMUL, CA 91935

SPOUSE AND PARENT INFORMATION

28. NAME OF SURVIVING SPOUSE — FIRST: –
29. MIDDLE: –
30. LAST: –
31. NAME OF FATHER — FIRST: JOSE
32. MIDDLE: –
33. LAST: TINAOJHEDA
34. BIRTHPLACE: MX
35. NAME OF MOTHER — FIRST: KAREN
36. MIDDLE: JEAN
37. LAST: TOGGERY
38. BIRTHPLACE: CA

FUNERAL DIRECTOR/LOCAL REGISTRAR

39. DISPOSITION DATE: 06/12/2004
40. PLACE OF FINAL DISPOSITION: JAMUL INDIAN RESERVATION CEMETERY, 14191 HWY 94, JAMUL, CA 91935
41. TYPE OF DISPOSITION(S): BU
42. SIGNATURE OF EMBALMER: [redacted]
43. LICENSE NUMBER: 8839
44. NAME OF FUNERAL ESTABLISHMENT: EL CAJON MORTUARY
45. LICENSE NUMBER: FD-1022
46. SIGNATURE OF LOCAL REGISTRAR: [redacted]
47. DATE: 06/07/2004

PLACE OF DEATH

101. PLACE OF DEATH: Highway
102. IF HOSPITAL, SPECIFY ONE: [ ] ER/OP [ ] DOA
103. IF OTHER THAN HOSPITAL, SPECIFY ONE: [ ] Hospice [ ] Nursing Home [ ] Decedent's Home [X] Other
104. COUNTY: San Diego
105. FACILITY NAME OR LOCATION WHERE FOUND: W/B ISR8, .1 mi E of Victoria Bridge
106. CITY: Alpine

CAUSE OF DEATH

107. CAUSE OF DEATH (Enter the chain of events — diseases, injuries, or complications that directly caused death. DO NOT enter terminal events such as cardiac arrest, respiratory arrest, or ventricular fibrillation without showing the etiology. DO NOT ABBREVIATE.)
IMMEDIATE CAUSE: Blunt impact injuries of head — (a) Rapid
(b)
(c)
(d)
108. DEATH REPORTED TO CORONER? [X] YES [ ] NO — REFERRAL NUMBER: 04-01098
109. BIOPSY PERFORMED? [ ] YES [X] NO
110. AUTOPSY PERFORMED? [X] YES [ ] NO
111. USED IN DETERMINING CAUSE? [X] YES [ ] NO
112. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RELATED TO THE UNDERLYING CAUSE GIVEN IN 107: None
113. WAS OPERATION PERFORMED FOR ANY CONDITION IN 107 OR 112? No
113A. IF FEMALE, PREGNANT IN LAST YEAR? [ ] YES [ ] NO [ ] UNK

PHYSICIAN'S CERTIFICATION

114. I CERTIFY THAT TO THE BEST OF MY KNOWLEDGE DEATH OCCURRED AT THE HOUR, DATE, AND PLACE STATED FROM THE CAUSES STATED. Decedent Attended Since: ___ Decedent Last Seen Alive: ___
115. SIGNATURE AND TITLE OF CERTIFIER: [redacted]
116. LICENSE NUMBER:
117. DATE:
118. TYPE, ATTENDING PHYSICIAN'S NAME, MAILING ADDRESS, ZIP CODE:

CORONER'S USE ONLY

119. I CERTIFY THAT IN MY OPINION DEATH OCCURRED AT THE HOUR, DATE, AND PLACE STATED FROM THE CAUSES STATED
MANNER OF DEATH: [ ] Natural [X] Accident [ ] Homicide [ ] Suicide [ ] Pending Investigation [ ] Could not be determined
120. INJURED AT WORK? [ ] YES [X] NO [ ] UNK
121. INJURY DATE: 05/31/2004
122. HOUR: 1320
123. PLACE OF INJURY (e.g., home, construction site, moving vehicle, etc.): Highway
124. DESCRIBE HOW INJURY OCCURRED (Give one which caused the injury): Driver, sport utility vehicle, ran off roadway, overturned
125. LOCATION OF INJURY (Street and number, or location, and city, and ZIP): W/B ISR8, .1 mi E of Victoria Bridge, Alpine, 91901
126. SIGNATURE OF CORONER / DEPUTY CORONER: [redacted]
127. DATE: 06/03/2004
128. TYPE NAME, TITLE OF CORONER / DEPUTY CORONER: Steven C. Campman, M.D. D.M.E.

STATE REGISTRAR: A 9 B X C 1 D E
FAX AUTH. #: 2410198
CENSUS TRACT:

5099 V485 0746 38 2

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Ernest J. Dronenburg, Jr.

June 6, 2014

Ernest J. Dronenburg, Jr.
Assessor/Recorder/County Clerk

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003724616

STATE OF CALIFORNIA

CERTIFICATION OF VITAL RECORD

COUNTY OF RIVERSIDE

RIVERSIDE, CALIFORNIA

CERTIFICATE OF DEATH

STATE OF CALIFORNIA
USE BLACK INK ONLY NO ERASURES, WHITEOUTS OR ALTERATIONS
VS-11 (REV. 10/4)

STATE FILE NUMBER: 3052006058890

LOCAL REGISTRATION NUMBER: 3200633008186

DECEDENT'S PERSONAL DATA

1. NAME OF DECEDENT — FIRST (Given): DEAN
2. MIDDLE: JOSEPH
3. LAST (Family): ROSALES
AKA ALSO KNOWN AS — Include full AKA (FIRST, MIDDLE, LAST):
4. DATE OF BIRTH mm/dd/cccy: 03/27/1974
5. AGE Yrs: 32
If UNDER ONE YEAR: Months / Days; If UNDER 24 HOURS: Hours / Minutes
6. SEX: M
9. BIRTH STATE/FOREIGN COUNTRY: CA
10. SOCIAL SECURITY NUMBER: [redacted]
11. EVER IN U.S. ARMED FORCES? YES [X] NO UNK
12. MARITAL STATUS (at Time of Death): MARRIED
7. DATE OF DEATH mm/dd/cccy: 08/09/2006
8. HOUR (24 hours): 0930
13. EDUCATION — Highest Level Completed (see worksheet on back): 09
14/15. WAS DECEDENT HISPANIC/LATINO(A)/SPANISH? (If yes, see worksheet on back) YES [X] NO
16. DECEDENT'S RACE — Up to 3 races may be listed (see worksheet on back): AMERICAN INDIAN, CABAZON TRIBE
17. USUAL OCCUPATION — Type of work for most of life. DO NOT USE RETIRED: INVESTOR
18. KIND OF BUSINESS OR INDUSTRY (e.g. grocery store, road construction, employment agency, etc.): CASINO
19. YEARS IN OCCUPATION: 10

USUAL RESIDENCE

20. DECEDENT'S RESIDENCE (Street and number or location): 85-780 APACHE TRAIL
21. CITY: COACHELLA
22. COUNTY/PROVINCE: RIVERSIDE
23. ZIP CODE: 92236
24. YEARS IN COUNTY: 14
25. STATE/FOREIGN COUNTRY: CA

INFORMANT

26. INFORMANT'S NAME, RELATIONSHIP: ELISA WELMAS, MOTHER
27. INFORMANT'S MAILING ADDRESS (Street and number or rural route number, city or town, state, ZIP): P.O. BOX 1472, VALLEY CENTER, CA 92082

SPOUSE AND PARENT INFORMATION

28. NAME OF SURVIVING SPOUSE — FIRST: JENNIE
29. MIDDLE: MARIE
30. LAST (Maiden Name): GONZALES
31. NAME OF FATHER — FIRST: WALTER
32. MIDDLE: JOSEPH
33. LAST: ROSALES
34. BIRTH STATE: CA
35. NAME OF MOTHER — FIRST: ELISA
36. MIDDLE: -
37. LAST (Maiden): WELMAS
38. BIRTH STATE: CA

FUNERAL DIRECTOR/ LOCAL REGISTRAR

39. DISPOSITION DATE mm/dd/cccy: 08/16/2006
40. PLACE OF FINAL DISPOSITION: JAMUL INDIAN VILLAGE CEMETERY, 14151 HWY 95, JAMUL, CA 91935
41. TYPE OF DISPOSITION(S): CR/BU
42. SIGNATURE OF EMBALMER: [redacted]
43. LICENSE NUMBER: -
44. NAME OF FUNERAL ESTABLISHMENT: FITZHENRY FUNERAL HOME
45. LICENSE NUMBER: FD-967
46. SIGNATURE OF LOCAL REGISTRAR: [redacted]
47. DATE mm/dd/cccy: 08/16/2006

PLACE OF DEATH

101. PLACE OF DEATH: IN FRONT OF A RESIDENCE — Hospital / Inpatient / Emergency Room / Dead on Arrival / Nursing Home / Residence / Other — SPECIFY ONE: Decedent's Home [X] Other
104. COUNTY: RIVERSIDE
105. FACILITY ADDRESS OR LOCATION WHERE FOUND: 85-650 AVENIDA DE LA ROSA
106. CITY: COACHELLA

CAUSE OF DEATH

107. CAUSE OF DEATH — Enter the chain of events — diseases, injuries, or complications — that directly caused the death. Do not enter terminal events such as cardiac arrest, respiratory arrest, or ventricular fibrillation without stating the underlying cause.
IMMEDIATE CAUSE (Final disease or condition resulting in death): (a) GUNSHOT WOUND TO HEAD
(b)
Sequentially list conditions, if any, leading to cause on Line A. Enter UNDERLYING CAUSE (disease or injury that initiated the events resulting in death) LAST: (c) (d)
Type of Medical Death Certificate: Coroner's Case
Case No.: SECS.
108. DEATH REPORTED TO CORONER? [X] YES [ ] NO — Inquiry Number: 2006-05525
109. (e) (f)
109. AUTOPSY PERFORMED? [ ] YES [X] NO
110. (g) (h)
110. AUTOPSY PERFORMED? [X] YES [ ] NO
111. (i) (j)
111. USED IN DETERMINING CAUSE? [X] YES [ ] NO
112. OTHER SIGNIFICANT CONDITIONS CONTRIBUTING TO DEATH BUT NOT RESULTING IN THE UNDERLYING CAUSE GIVEN IN 107: NONE
113. WAS OPERATION PERFORMED FOR ANY CONDITION IN ITEMS 107 OR 112? (If yes, state condition and date): NO
113A. IF FEMALE, PREGNANT IN LAST YEAR? YES [ ] NO [ ] UNK

PHYSICIAN'S CERTIFICATION

114. I CERTIFY THAT TO THE BEST OF MY KNOWLEDGE DEATH OCCURRED AT THE HOUR, DATE, AND PLACE STATED FROM THE CAUSES STATED. SIGNATURE AND TITLE OF CERTIFIER: [redacted]
Decedent Attended Since (a) mm/dd/cccy; Decedent Last Seen Alive (b) mm/dd/cccy
116. LICENSE NUMBER:
117. DATE mm/dd/cccy:
118. TYPE ATTENDING PHYSICIAN'S NAME, MAILING ADDRESS, ZIP CODE:

CORONER'S USE ONLY

119. I CERTIFY THAT IN MY OPINION DEATH OCCURRED AT THE HOUR, DATE, AND PLACE STATED FROM THE CAUSES STATED
MANNER OF DEATH: [ ] Natural [ ] Accident [ ] Homicide [X] Suicide [ ] Pending Investigation [ ] Could not be determined
120. INJURED AT WORK? [ ] YES [X] NO [ ] UNK
121. INJURY DATE mm/dd/cccy: 08/09/2006
122. HOUR (24 Hours): 0910
123. PLACE OF INJURY (e.g. home, construction site, wooded area, etc.): IN FRONT OF A RESIDENCE
124. DESCRIBE HOW INJURY OCCURRED (Events which resulted in injury): SHOT SELF WITH 9MM HANDGUN
125. LOCATION OF INJURY (Street and number or location, and city, and ZIP): 85-650 AVENIDA DE LA ROSA, COACHELLA, CA 92236
126. SIGNATURE OF CORONER/DEPUTY CORONER: [redacted]
127. DATE mm/dd/cccy: 08/15/2006
128. TYPE NAME, TITLE OF CORONER / DEPUTY CORONER: STEVE L ALBERT, DEPUTY CORONER

STATE REGISTRAR

A | B | C | D | E | "0120060002999 02" | FAX AUTH # | CENSUS TRACT

INFORMATIONAL, NOT A VALID DOCUMENT TO ESTABLISH IDENTITY

* 0 3 4 3 9 0 4 6 0 *

CERTIFIED COPY OF VITAL RECORDS
STATE OF CALIFORNIA, COUNTY OF RIVERSIDE

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DATE ISSUED JUN 09 2011

This copy is not valid unless prepared on engraved border displaying date, seal and signature of the Assessor-County Clerk-Recorder

LARRY W. WARD
ASSESSOR COUNTY CLERK-RECORDER
RIVERSIDE COUNTY, CALIFORNIA

Daily Log Records By Date
San Diego Rural Fire Prot. Dist.
Log Date in 6/29/2002 to 6/29/2002

Date: 6/30/2002

Log Date: 6/29/2002

Time Out: 08:00
Time In: 08:00 **Date In:** 6/30/2002
Station: Station 66 **Shift:** A
Type: DAILY LOG
Description: A Shift
Notes:

08:00 A SHIFT ON DUTY
K.COX(OIC) R.ANDERSON(W/W)
D.ARGAN(R) E.FAULK(R)
B-705 W/DUTY NO BURN DAY
08:30 MORNING CHECK OFF

08:41 MED-AID 20967 BARRETT SMITH RD
09:30 AVALI INC#228216 DEPT#66-400

10:30 CLEAN DAY ROOM
12:00 LUNCH
13:00 CLEAN APP BAY'S AND OUTSIDE OF STA
15:00 ASSEMBLE STRIKE TEAM FOR LAKESIDE
17:00 CANCEL STRIKE TEAM
17:30 TOOK E-64 TO STA 64
18:00 DINNER

20:47 LEGEL FIRE 14191 HWY 94
20:55 AVALI INC#228313 DEPT#66-401

06:00 FF ANDERSON TO LAKESIDE FIRE TO RELEAVE
CAPT PHELPS
07:00 MORNING CLEAN UP

07:58 MED-AID 3255 AVA LOMA RD
08:30 AVALI INC#228368 DEPT#66-400

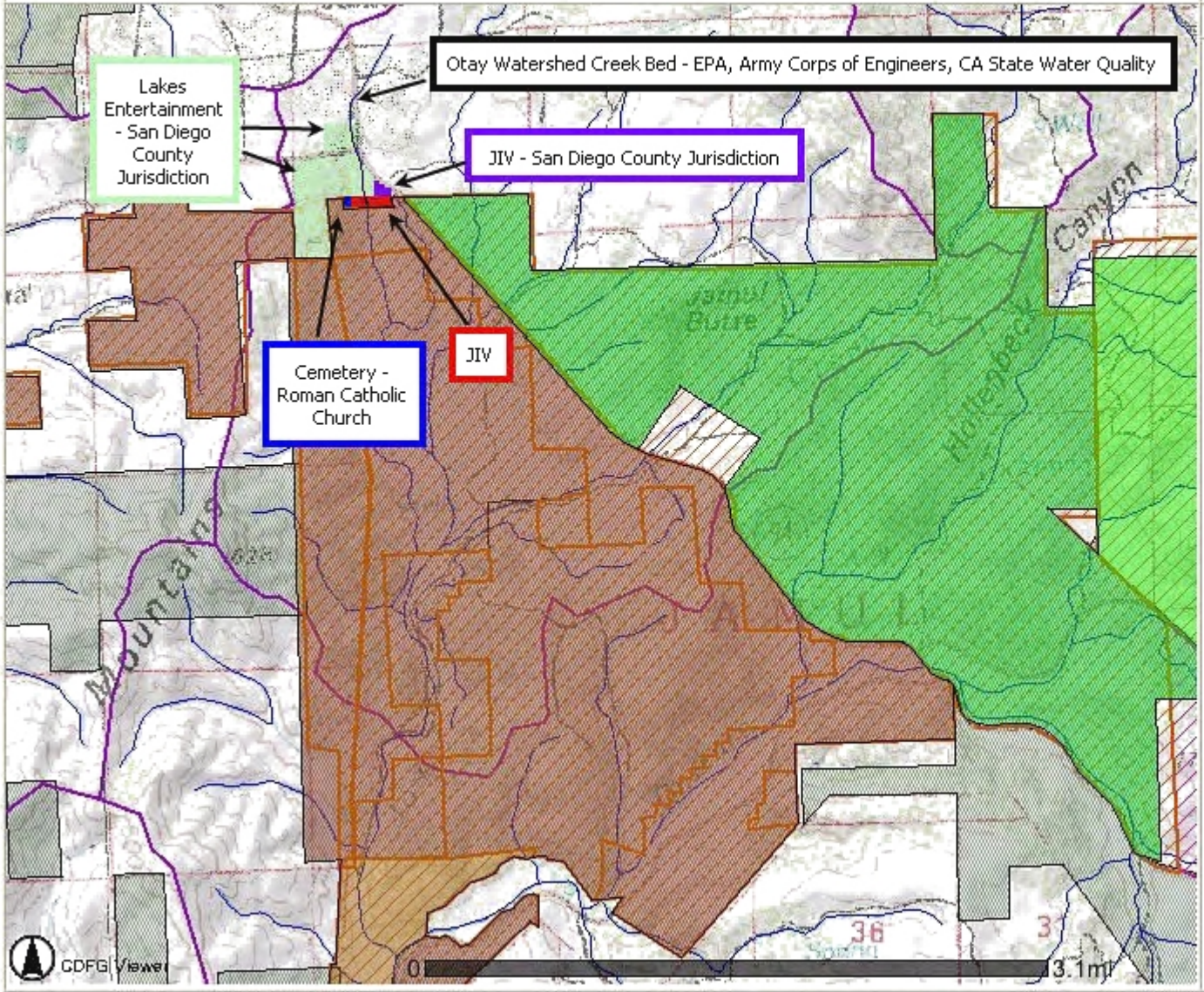
08:45 OFF SHIFT

EXHIBIT L

Jamul, CA - Dept. of Fish & Game

Watershed, Wildlife and Creek Beds surrounding Jamul and Lakes Entertainment properties

Date: 5/21/2007



Map Legend

DFG Lands

- Ecological Reserve
- Fish Hatchery
- Miscellaneous
- Public Access
- Undesignated
- Wildlife Area

Wildlife Conservation Board Projects

- Conservation Easement
- Fee Title
- Public Access
- Restoration/Enhancement
- Other or Multiple Functions

Hydrography 100k

Calwater Watersheds

Public and Conservation Lands

- LOCAL
- STATE
- FEDERAL
- NGO/Other

EXHIBIT M

OFFICE OF THE GOVERNOR

RECEIVED
JUL 18 2001
GOVERNOR'S OFFICE
LEGISLATIVE UNIT

July 17, 2001

Mr. Virgil Townsend, Acting Superintendent
U.S. Department of the Interior
Bureau of Indian Affairs
2038 Iowa Avenue, Suite 101
Riverside, California 92507-2471

Re: Jamul Indian Village Amended Notice of Fee to Trust Application for Assessor's Parcel Nos.597-060-04, 05 and 597-042-13

Dear Mr. Townsend:

The Governor's Office has reviewed the Jamul Indian Village's land acquisition application and supporting environmental assessment (hereafter "EA") seeking acceptance of title to the above described parcels of property in trust by the United States of America. We have also had the opportunity to review reports submitted by various State regulatory departments and agencies and have read letters submitted in opposition to that application by California State Senator David G. Kelley, United States Representative Duncan Hunter, the County of San Diego and County Supervisor Dianne Jacob, the Jamul/Dulzura Planning Group, the Endangered Habitats League and the Back Country Coalition as well as numerous letters from affected adjacent residents.

The application seeks to add approximately 101 acres of land (consisting of a 4.35 acre parcel, an 86 acre parcel and a 10 acre parcel) to the jurisdiction of the Tribe. The purpose of the proposed acquisition is to facilitate the demolition of the existing Tribal village on the Tribe's current 6 acre trust property and the construction on that site of a multilevel casino/parking structure. The newly acquired 4.35 acre property would provide access to the casino. The 86 acre parcel would provide space for an employee parking lot, a warehouse, a sewage treatment facility for the casino and a receptor site for an existing fire station which sits on land needed for the access road to the casino. The 10 acre parcel would serve as a receptor site for the relocation of existing tribal housing and tribal services offices currently located on the Tribe's 6 acre site.

The property at issue is located immediately north of the 3700 acre Rancho Jamul Ecological Reserve administered by the California Department of Fish and Game which itself is part of a larger 4800 acre reserve. The proposed acquisition is connected to that reserve by an intermittent stream over which the Tribe proposes to construct its casino. The 101 acres are currently subject to development restrictions pursuant to the Multiple Species Conservation Plan (hereafter "MSCP") established by the United States Fish and Wildlife Service, the State Department of Fish and Game and the County of San Diego. These restrictions are designed as part of a comprehensive habitat conservation planning program that attempts to preserve native habitats for a multitude of sensitive species.

Our review of the above mentioned materials leads to the inescapable conclusion that the Tribe's proposal is inconsistent with MSCP restrictions on development and presents a serious threat to the viability of a significant portion of the State's recently acquired ecological reserve. Consideration of the Tribe's application must have the benefit of a properly prepared environmental impact statement not simply an EA. In addition, the Bureau should view this as gaming rather than a non-gaming acquisition. The significant environmental impacts identified below compel preparation of an environmental impact statement. Similarly, the fact that the proposed gaming facility could not exist without this acquisition make it clear that the Tribe's application should be considered a gaming acquisition. As a result, we oppose the Tribe's application at this time.

Our opposition to the application is not based on the fact that gambling will occur on the Tribe's trust property per se. Rather, it is based on the size and extent of the operation envisioned by the Tribe and its adverse impacts to significant State resources. As the application notes, the Governor has executed a class III Tribal-State Gaming Compact with the Jamul Indian Village and obviously expected that some gaming devices would be operated on the property. When the Compact was executed, however, it was not anticipated that the entire existing village would be demolished and replaced with a casino and support facilities stretching over an additional 100 acres not then or now part of the Jamul trust property. The obvious constraints on the current trust property reasonably suggested that the Tribe would operate a smaller casino, perhaps with less than 350 gaming devices, along side the existing uses on the Tribe's present 6 acre site, possibly supplementing the income from that lesser number of machines with monies from the Revenue Sharing Trust Fund. Such a facility was not anticipated to represent a significant threat to the surrounding environment.

Environmental considerations have played and will continue to play an important role in the Governor's decision to approve a compact. Where, as here, there are significant potentially unmitigable adverse impacts on sensitive State resources from a casino project, that project should not be allowed to proceed until it can be conclusively demonstrated through enforceable mitigation measures that those impacts have been eliminated. In this case, no such showing has been made. As a result, because the purpose of this trust acquisition is to facilitate a casino project which has not provided sufficient assurance that its potential for environmental harm has been eliminated, it should be rejected. The Bureau's own rules, likewise, compel rejection of this application.

Under 25 C.F.R. section 151.10, in determining whether to approve an application to have lands taken into trust, the Secretary is required to consider, among other things, the tribe's need for the land, the purposes for which the land will be used, the impact on the State and its political subdivisions of the removal of the land from tax rolls and jurisdictional problems and potential land use conflicts which may arise as a result of the acquisition.

In this case, the Tribe's proposed use represents a paradigm for the kind of land use conflicts which the Bureau should not permit to occur as a result of a fee to trust proposal. As currently designed, the casino project is inconsistent with the County's land use plan for the area and is incompatible with the State's adjacent ecological reserve.

The Tribe's proposal is inconsistent with the County's land use regulations for the area, among other reasons, because it proposes to place access roads for the casino on the 4.35 acre parcel despite the fact that portions of this parcel are designated as mitigation land for development elsewhere. It is also inconsistent because its buffer zones from wetland areas on the site are smaller than required under the County's plan. Similarly, the casino proposal site plans fail to avoid the Gabbro soil types on the property to the extent necessary to avoid significantly impacting them and the sensitive plants and animals which depend on these soils for their existence. Moreover, though the Tribe's proposal includes conservation easement areas they do not meet County requirements in that they are not contiguous with each other or with the State's ecological reserve, are smaller than the County's plan requires and are limited to only 20 years rather than restricting development in perpetuity. The County's letter provides numerous other areas in which the Tribe's planned use of the acquisition property is inconsistent with the County's land use and public health and safety requirements.

Mr. Virgil Townsend
July 17, 2001
Page Four

The principal threats to the State's adjacent ecological reserve from the Tribe's proposed use of the trust acquisition property come from the proposed channelization of the intermittent stream which runs through the subject property and into the reserve, from road improvements generated by increased traffic on Highway 94 and from the effects associated with placing parking lots, lighting, exotic plant species and noise generating developments next to a sensitive habitat area.

Stream channelization under the Tribe's proposal does not appear to be limited to the acquisition but may impermissibly extend onto State property. Moreover, the plan does not describe the nature of its impacts on stream hydrology including increases or decreases in runoff rates. Such changes could damage riparian systems and alter habitat suitability for nesting birds and aquatic life dependent on particular flow levels. Enforceable commitments regarding flows and the nature of the channelization effort must be provided. Similarly, the plan does not include specific enforceable commitments with respect to lighting plans, the type of plant species to be utilized in landscaping, specific fuel modification plans and noise reduction efforts. Absent these commitments there is no assurance that exotic plant species will not invade the reserve, that lighting and noise will not effect species dispersal and survival and that fuel modification efforts will not destroy habitat. Likewise, there is no analysis of the impact road improvements necessitated by increased traffic will have on the reserve either through direct construction impacts, noise, lighting or fragmentation effects.

While we recognize that the Tribe's proposal is intended to improve the economic situation of its members, it unnecessarily threatens to degrade significant State environmental resources and is thus inimical to the public health and welfare. We believe that a fair balancing of State and Tribal interests in this instance requires that the Bureau deny the Tribe's application at this time.

Thank you for the opportunity to comment on this application.

Sincerely,

Dave Rosenberg
Director of Community and Intergovernmental Relations
and Senior Advisor to the Governor

EXHIBIT N

OFFICE OF THE GOVERNOR

August 29, 2005

Via Facsimile & U.S. Mail

Mr. Lee Acebedo
Chairman, Jamul Indian Village
P.O. Box 612
Jamul, California 91935

Re: Potential Compact Violation

Dear Chairman Acebedo:

Recent newspaper accounts indicate that the Jamul Indian Village is proposing to build a 30-story casino and hotel complex on approximately four acres of its roughly six acres of trust land in San Diego County. Because to date the Tribe has not provided the Governor's Office any concrete information regarding the details of this proposed project, we have been obliged to rely upon those newspaper accounts as well as our general knowledge of the Tribe's trust lands and the adjacent surroundings. Those accounts specifically raise troublesome questions about adequate provisions for fire protection, the assurance of appropriate water quality, and the Tribe's commitment to perform the required environmental analyses, as well as the Tribe's position on the use of fee lands for a portion of its Gaming Facility.

While we are mindful that some or all of the circumstances related by the news reports may be mistakenly reported, in the absence of contrary information from the Tribe we have no basis to doubt them. If those accounts are in fact true, we are concerned that the Tribe may be in material breach of its obligation to appropriately analyze, discuss and provide for mitigation of potential adverse off-trust land impacts for the project in conformity with the requirements of section 10.8.2 of its Tribal-State Class III Gaming Compact. It further appears that advancement of the Tribe's plans for construction and operation of the proposed Gaming Facility may additionally place the Tribe in material breach of the Compact for, among other things, failure to meet its duty to "conduct Class III gaming in a manner that does not endanger the public health,

safety, or welfare" (Compact, section 10.1); to operate a Gaming Facility only on its Indian lands (Compact, section 4.2), failure to comply with federal water quality standards applicable in California (Compact, section 10.2(b)); and to operate only those Gaming Devices authorized by the Compact (Compact section 4.0).

In order to provide the State with assurance that the Tribe's proposal will not materially breach its Compact obligations, we invite the Tribe, through an authorized representative, to contact the Governor's Office immediately to arrange a mutually agreeable time and place for the Tribe to provide the State with all pertinent details regarding its proposal. Should the Tribe choose not to accept this invitation to inform the State of its activities and provide assurances of its intent to comply with its Compact obligations, our office will be obliged to take further appropriate action under the Compact.

Please feel free to contact Peter Siggins or Stephanie Shimazu in the Legal Affairs Office at (916) 445-0873. We look forward to your timely response.

Sincerely,

PETER SIGGINS
Legal Affairs Secretary

OFFICE OF THE GOVERNOR

December 20, 2005

Mr. Leon Acebedo
Chairman, Jamul Indian Village
P.O. Box 612
Jamul, California 91935

Re: Compliance with Class III Gaming Compact

Dear Chairman Acebedo:

In a letter addressed to you in August of this year, the State expressed its concern over the Tribe's public pronouncements regarding its goal to construct, build, and operate a 30-story hotel and casino on a site less than five acres in size. The State's review at that time suggested that construction and operation of such a facility might place the Tribe in material breach of its Tribal-State Class III Gaming Compact for a number of reasons including, but not limited to, the failure of the Tribe to meet its duty to "conduct Class III gaming in a manner that does not endanger the public health, safety, or welfare" (Compact, section 10.1), to operate a Gaming Facility only on its Indian lands (Compact, section 4.2), to comply with federal water quality standards applicable in California (Compact, section 10.2(b)), to appropriately analyze, discuss and mitigate potential adverse off trust land impacts of this proposed project in conformity with the requirements of Compact section 10.8.2, and to operate only those Gaming Devices authorized by the Compact (Compact section 4.0).

In response to the August letter, the Tribe met with representatives from this office and provided assurances that it would not commence its proposed casino project until such time as it complied fully with its compact obligations and that its project would be constructed and operated in full accord with the requirements of the Compact. Moreover, the Tribe's counsel advised this office that any related activities conducted on the Tribe's trust lands prior to full compliance with Compact section 10.8.2 would be nothing more than ceremonial in nature and not actual commencement of the project. Recent Tribal activities both on and off of the Tribe's trust lands, however, can only be construed as a violation of the provisions of Compact section 10.8.2 and possibly section 4.2, and a material breach of the Compact.

As of the date of this letter, we are informed that the Tribe has removed at least three existing residential structures from the site and utilized heavy construction equipment to move earth for what appears to be a grading purpose. We regard these activities as the commencement of casino construction prior to the preparation of the required environmental documentation and analysis in violation of Compact section 10.8.2. Our view is informed in part by the Tribe's own official statement regarding its anticipated commencement of its casino project. In a September 9, 2005, statement, the Tribe indicated that the first stage of its project would be to move tribal members "off the reservation, allowing room for bulldozers to begin construction of the new casino." In that announcement, the Tribe stated, "We expect to break ground in December." The Tribe's activities to date are consistent with this statement of intent and constitute a material breach of its obligations to comply with Compact section 10.8.2 and a potential violation of section 4.2.

We do not view the removal of tribal members from their homes on the Tribe's trust lands as a ceremonial act nor is it in any way without environmental significance. Neither is the commencement of grading of the land. Steps as significant as these prior to the preparation of environmental reports and consultation with San Diego County and affected local residents with respect to the identification and mitigation of significant off-reservation environmental impacts indicates that the Tribe is not acting in good faith to meet its environmental obligations under the Compact

For these reasons, we are requesting, pursuant to Compact section 9.1(a) and (b), that the Tribe meet and confer with the State in the Office of the Governor on December 30, 2005, at 10:00 a.m., or at such mutually agreeable later date and time that is not later than January 4, 2006, in an attempt to resolve the issues involved in the Tribe's failure to comply with the Compact. The State further requests that the Tribe—and any individual or entity acting in furtherance of construction of the Gaming Facility and other development associated with it—immediately cease all construction and other activity with respect to that project until the parties have had an adequate opportunity to resolve the issues raised by this letter.

Pursuant to Compact section 9.1, the State specifically reserves the right to seek injunctive relief against further construction efforts by the Tribe with respect to the class III gaming project identified above in the event that the requests set forth in this letter do not receive a satisfactory response from the Tribe.

This letter shall further constitute the sixty (60) day written notice and opportunity pursuant to Compact section 11.2.1 (c) to cure the Tribe's material breach of its Compact obligations. We recognize that restoring the site to its condition prior to the removal of the residential structures is not possible. Therefore, we are requesting the Tribe to cure this breach by cessation of all construction and other activities with respect to the project until the parties

mutually agree that the Tribe has complied with its Compact obligations. Please also note that a judicial determination that the Tribe has materially breached the Compact after receiving this notice and failing to cure within said 60 day period allows the State to "unilaterally terminate" the Compact under Compact section 11.2.1(c).

We look forward to your prompt response to this letter.

Sincerely,

ANDREA LYNN HOCH
Legal Affairs Secretary

cc. Eugene Madrigal, Esq.
28581 Old Town Front Street, Suite 208
Temecula, CA 92590

OFFICE OF THE GOVERNOR

April 5, 2007

John J. Sansone, Esq.
County Counsel, County of San Diego
County Administration Center
1600 Pacific Highway, Room 355
San Diego, CA 92101-2469

Re: Jamul Indian Village

Dear Mr. Sansone:

Thank you for your letter of March 19, 2007, requesting assistance in enforcing the terms of the Tribal-State Compact between the State of California and the Jamul Indian Village ("Tribe"). You ask that the State take steps to terminate the Tribe's Compact in order to prevent the Tribe from constructing a class II gaming facility and later commencing class III gaming without complying with the environmental provisions required in its Compact.

We have reviewed this matter to determine what, if any, state action is appropriate at this time. Enclosed for your information is a copy of a letter sent to the Tribal Chairman and the Tribe's attorney regarding Compact compliance and related matters.

Sincerely,

ANDREA LYNN HOCH
Legal Affairs Secretary

Enclosure

cc: Honorable Leon Acebedo, Chairman, Jamul Indian Village
Mr. Eugene Madrigal, Attorney at Law

OFFICE OF THE GOVERNOR

April 2, 2007

Via Facsimile (619) 669-4817 & U.S. Mail

The Honorable Leon Acebedo
Chairman, Jamul Indian Village
P.O. Box 612
Jamul, California 91935-0612

Via Facsimile (951) 695-7081 & U.S. Mail

Mr. Eugene Madrigal, Esq.
28581 Old Town Front Street, # 208
Temecula, California 92590

Dear Chairman Acebedo and Mr. Madrigal:

We received Mr. Madrigal's March 19 letter advising that the General Membership of the Jamul Indian Village at its General Council meeting on March 17, 2007, determined to proceed with a class II gaming facility and therefore, no class III machines will be operated. Please provide our office with a copy of the General Council resolution or the meeting minutes that sets forth the official General Council decision.

You requested assistance in establishing a consistent line of communication with the California Department of Transportation (Caltrans) in order to work with them on access issues. I have contacted Caltrans, and the District Director for District 11 in San Diego and other Caltrans officials will be contacting you (if they have not done so already).

Although Mr. Madrigal's letter states that no class III machines will be operated, a March 26 article in the San Diego Union-Tribune quotes Mr. Madrigal as saying the Tribe would look to operate class III machines in the future. As we have previously stated, while the Indian Gaming Regulatory Act limits the State's ability to regulate by compact a tribe's class II gaming, should the Tribe commence class III gaming at any time without first having complied with all

the requirements of the applicable Compact, the State will consider the Tribe to be in breach of the Compact and will pursue all appropriate remedies under the Compact. These requirements, in particular those contained in Sections 4.2, 10.1, 10.2, 10.4, and 10.8 of the Tribe's existing Compact, would govern the construction, operation, and any subsequent expansion, modification or alteration of any facility used to house the operation of any class III devices to which the Tribe is entitled under its Compact.

Also, as we have previously noted, the Tribe is required to meet the requirements of the Streets and Highways Code. Those requirements include obtaining applicable encroachment permits from Caltrans and are equally applicable to both class II and class III gaming facilities.

If you wish to discuss these matters further or require additional assistance in your efforts to work with Caltrans and other State agencies to reach agreement on appropriate mitigation for the project, please do not hesitate to contact me.

Sincerely,

Andrea Lynn Hoch

ANDREA LYNN HOCH
Legal Affairs Secretary

EXHIBIT O

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
CENTRAL

MINUTE ORDER

Date: 06/07/2010 Time: 08:45:00 AM Dept: C-68

Judicial Officer Presiding: Judith F. Hayes
Clerk: Sheryl Alyea
Reporter/ERM: Marvel S. Votaw CSR# 2817
Bailiff/Court Attendant: Rene De La Cruz

Case No: **37-2010-00093203-CU-TT-CTL** Case Init. Date: 06/01/2010
Case Title: **VIEJAS BAND OF KUMEYAAY INDIANS vs. Padre Dam Municipal Water District**

Case Category: Civil - Unlimited Case Type: Toxic Tort/Environmental

---

EVENT TYPE: Ex Parte

APPEARANCES
STEVEN MCDONALD, counsel, present for Petitioner(s).

Ex-parte application for Temporary Restraining Order requested by Plaintiff.

James Bell Gilpin and Lindsay Puckett appear on behalf of defendant, Padre Dam
Kimberly Mettler appears on behalf of plaintiff, Viejas Bank of Kumeyaay Indians
Antonette Cordero appears on behalf of Native American Heritage Com'n.
Courtney Ann Coyle appears on behalf of plaintiff, Viejas Bank of Kumeyaay Indians

After lengthy oral argument the Court orders the parties to meet and confer regarding removal of the soils in the Blue Area; the soils are not to be compacted and the area is to be kept secure. No parties are to impede the construction area. A 24-hour notice to be given to the parties from anyone wanting to go onto the property. The public hearing currently scheduled for June 17, 2010 to go forward. The Court sets the Motion for Preliminary Injunction for the date of 6/25/2010 @ 1:30p.m.

The Motion Hearing (Civil) is scheduled for 06/25/2010 at 01:30PM before Judge Judith F. Hayes.

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Court orders construction halt on Viejas sacred site

GALE COUREY TOENSING | 6/17/10

SAN DIEGO – A state superior court has issued a restraining order to stop construction on a $20 million water project after human remains were found in an area that the Viejas Band of Kumeyaay Indians says is a sacred burial ground and ceremonial place of their ancestors.

In a June 7 hearing, San Diego Superior Court Judge Judith Hayes ordered the Padre Dam Municipal Water District to avoid construction on around two-thirds of the two-and-a-half acre site where it is building a new reservoir and pumping station. The restraining order extends to June 25.

Attorneys for the Viejas Band sought the restraining order against the Padre Dam Municipal Water District to halt construction until the matter is decided by the Native American Heritage Commission.

On June 17, the commission will continue a hearing that began in April and hear testimony from both sides. If the commission finds that the site is a sanctified cemetery that will be harmed or destroyed by the water project, it will issue recommendations to mitigate damages or even avoid the site altogether.

The water district is building the reservoir as part of a second pipeline system to the district's eastern service area. The existing pipeline is 50 years old and would leave 30,000 customers without water if it broke, according to water district officials.

Although the new pipeline would benefit the Viejas Band, protecting the tribe's cultural patrimony is essential and the entire site must be surveyed before further disturbance occurs, Viejas Tribal Chairman Bobby L. Barrett said.

"To move forward and desecrate this sacred burial ground would dishonor those who have been laid to rest there. It would also dishonor their living relatives and everyone in San Diego County who appreciates the cultural and historical significance of this site."

The water district will be required to abide by the NAHC's recommendations or face legal action requested by the commission and initiated by the state attorney general, who was present at the June 7 court hearing and spoke in favor of the restraining order.

The water district was alerted early about the potential cultural value of the site, Barrett said. Qualified Native American monitors and experts hired by the water district in 2007 said that significant tribal cultural resources were present and recommended the water district avoid construction on the site. But the water district approved the project without revealing this information to tribes and the

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public, and said the project would not have any potentially significant negative effect on cultural resources, the Viejas leader said.

Human remains and a high density of burned pottery shards were later uncovered at the site, indicating a sacred burial ground and ceremonial place where cremated Native Americans were buried in sacred pottery urns.

The Viejas Band of Kumeyaay Indians, whose ancestors have lived in the area for 10,000 years, were designated as the most likely descendents of the people buried there.

Although only around 6 percent of the site was recovered, the Padre Dam Water District's Data Recovery Report of August 2009 details the extent and significance of the discovery.

Fourteen human bones belonging to at least three to eight individuals have been positively identified by the Medical Examiner's Office, dating to A. D. 780 – 1910.

The excavation also recovered 204 other bone fragments, which are characteristic of traditional cremation practices of local indigenous bands.

The human remains were mostly "burned during cremation" and the "calcined bones may have come from human cremations given the large amounts of burned pottery and other burial artifacts that may have been grave goods," the report said.

The Viejas Band asked the water district to fully assess the site and construction plans in order to prevent further desecration before proceeding and also agreed to work with the water district to review alternative sites. The water district agreed to stop construction in February while the two sides negotiated.

But in May, the water district said it would not wait for the NAHC ruling but instead would immediately resume construction, the Viejas leader said. Viejas then filed for a restraining order to stop the project from moving forward until the commission's determination.

Padre Dam General Manager Doug Wilson told San Diego Union-Tribune online that the district's experts had determined that the site contained kitchen pottery and wasn't a burial site.

He said the construction delay is costing the district $150,000 per month, and that would add $10 million to the cost, and the district would probably drop the project.

"We've done everything by the book. If we get stopped, then no public agency can be comforted to know that they can also be stopped."

But Barrett said protecting the ancestors is more important than finances.

"This site is sacred to our people, and it is culturally and historically significant for all residents of San Diego County and southern California."

The chairman said the band had asked Padre Dam Municipal Water District to conduct a full assessment of cultural resources to help the tribe understand the cultural resources that may be present throughout the site.

"This would seem entirely reasonable given that the district's own report recognizes the immense historic and cultural significance of what has already been discovered – and that report only covers a six percent sample of the site," Barrett said. "Until there's a full assessment, we don't know what, if any, other options exist for onsite project redesign. The district also previously considered three other alternative sites, and we continue to offer to work with them to further assess those and other sites as possible options."

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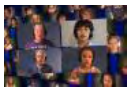
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Viejas ceremonial sanctified burial site to be protected 'in perpetuity'

By Gale Courey Toensing Indian Country Today: Jul 8, 2010

SAN DIEGO – California Attorney General Jerry Brown filed a lawsuit June 24 against a water district which continued construction on a site that has been determined to be sacred to the Viejas Band of Kumeyaay Indians and should be permanently protected.

The lawsuit was filed in the Superior Court of California in San Diego central division on behalf of the Native American Heritage Commission. The lawsuit says construction of Padre Dam Municipal Water District's $20 million reservoir and pumping station project would violate state law by causing severe or irreparable damage to the Viejas Band's sacred site.

In a rare victory for indigenous religious rights, NAHC voted unanimously June 17 to declare the 2.5 acre site in San Diego County a ceremonial site and sanctified cemetery. Excavation there has uncovered human remains and hundreds of burned pottery shards and other items, indicating a ceremonial place and cemetery where cremated Native Americans were buried in sacred pottery urns.

The Viejas Band of Kumeyaay Indians, whose ancestors have lived in the area for 10,000 years, was designated as the most likely descendents of the people buried there.

Commission members acted after hearing oral arguments and taking written testimony at the special hearing. They ordered Padre Dam to halt construction and work with the Viejas Band to find an alternate site for the project. They also called on the state attorney general's office to take legal action to halt further desecration, should the Padre Dam Municipal Water District ignore the mitigation measures recommended by the NAHC and resume construction at the site.

The next day, the water district resumed construction on the site, Viejas spokesman Robert Scheid said.

"We were stunned. And we let the commission know what was happening and it immediately sent a letter out to the water district telling them they needed to abide by the NAHC ruling or we would seek legal action from the attorney general, and even that didn't stop the project," Scheid said.

"They just kept going, and I think the attorney general sent a letter that night or the next day saying they intended to file legal action and that stopped them. They definitely were thumbing their nose at everyone. It took the attorney general to get their attention."

Scheid hesitated in calling the events a victory, however.

"But it definitely is rare to come this far in the process and really have a good chance to protect these cultural resources. We feel we've got some momentum in that direction and the involvement of the attorney general has helped a lot."

In early June, San Diego Superior Court Judge Judith Hayes issued a temporary restraining order to the water district to halt construction on around two-thirds of the two-and-a-half acre site pending the outcome of the June 17 NAHC hearing. The restraining order was extended until June 25 when the same judge was scheduled to consider Viejas' request to make the restraining order permanent, but Viejas and the water district agreed to postpone the hearing, which is now scheduled for July 24.

The significance of the site was documented by the water district's own Data Recovery Report of August 2009, in which one of its experts called the discovery "unparalleled" in the San Diego region and said the site contained "one of the highest densities of Native American ceramic shards ever found in San Diego County," which has 19,000 recorded archaeological

sites.

Fourteen human bones belonging to at least three to eight individuals have been positively identified by the Medical Examiner's Office, dating to A. D. 780 – 1910.

The excavation also recovered 204 other bone fragments, which are characteristic of traditional cremation practices of local indigenous bands.

The items are being curated with the Barona Cultural Center & Museum, Scheid said.

"The items are not appropriate for display. They are just being held at this point."

The water district was building the reservoir as part of a second pipeline system to the district's eastern service area. The existing pipeline is 50 years old and would leave 30,000 customers without water if it broke, according to water district officials.

The water district bought the property for $409,000 in April 2006. It wasn't listed as a sacred site by the Native American Heritage Commission at the time.

Padre Dam General Manager Doug Wilson told the San Diego Union Tribune there are no other suitable places for the reservoir that would connect with another water district plant via a two-mile pipeline. He said the delay is costing the district $150,000 per month, and finding another site would add $10 million to the cost, which would likely force the district to drop the project.

Although the new pipeline would benefit the Viejas Band, protecting the tribe's cultural patrimony is more important, Viejas Tribal Chairman Bobby L. Barrett said.

"To move forward and desecrate this sacred burial ground would dishonor those who have been laid to rest there."

Scheid said Viejas has made its position clear to Padre Dam.

"We're calling on them to do what the NAHC said to do – find a different location and work with Viejas on protecting this sacred site in perpetuity."

EXHIBIT P

The News Tribune

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Puyallup Tribe, city working toward cemetery solution

By LARRY LARUE

larry.larue@thenewstribune.comDecember 2, 2013

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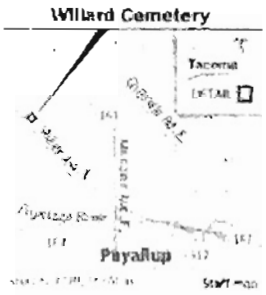

Ryan Conway grew up across the street from the Indian Willard Cemetery in Puyallup, visiting ancestral graves and living in what was then called the "Blue House."

Today, the Blue House is Blue Sky Landscape Services and Conway, for the past six years, has been the caretaker in that cemetery, which dates back more than 200 years.

"I tell people I treat each grave as if it were your mother's," Conway said. "That way anyone who comes to visit a family member can see every grave site has been treated the same, with respect."

Early last month, Conway was working and found between the cemetery fence and Valley Avenue, a flurry of red-flagged stakes.

"It was the first I knew that there was work scheduled," Conway said.

It was also the first the Puyallup Tribe had heard of the city's plan to trench the road for new sewer and water lines for two new businesses across Valley Avenue.

Why did that horrify tribe elders and others?

"We don't know the boundaries of the cemetery, because it dates back to the early 1800s, maybe earlier," tribe archaeologist Brandon Reynon said. "We do know it extends well beyond the fenced area."

Fearing ancestral remains might be disturbed, the tribe notified the city, pointing out laws and agreements that required Puyallup to notify the tribe before beginning any onsite construction. City planners were stunned.

"The city was aware of the tribal cemetery but we were unaware until two weeks ago of contention that the area of the cemetery included a larger area outside the fence," said Tom Utterback, the city director of development services.

Ex. J

A stop order was issued for all work in front of the cemetery.

"That cemetery is sacred to us, it's where our families are," tribal Police Chief Joe Duenas said. "I remember visiting it as a boy. It's an active cemetery – I buried my mother, Jody Wright, there last year."

The first concern of the tribe, then the city and construction company, Trammell Crow, was not to disturb human remains.

"The developer has hired a Seattle archaeologist and he's working out there," Utterback said. "We heartily go along with this. We want to know the issues out there."

Reynon, representing the tribe, will also be part of the cultural assessment of the dig.

One question raised by all this is how did the paved road, in the 1100 block of Valley Avenue, come to cross land that was part of the tribal graveyard? No one involved is certain.

Neither the city nor the tribe was sure whether the fence surrounding the 1.27-acre cemetery or the road came first. The road was built by Pierce County – Utterback believes that was in the 1930s or 1940s – and Puyallup annexed the land in the 1990s.

There are gravestones in the cemetery dating back to the mid-1800s, but that wasn't when burials first occurred there.

"There are sites without stones, where families couldn't afford one," Conway said. "There are stones with entire family's names on them, covering multiple sites. There's no way to tell how many are buried within the fences."

And no certainty on how far beyond those fences grave sites might exist.

It's no surprise that history never recorded such information. Though the tribe simply calls it Willard Cemetery, it has been known on state and county records as the Firwood Cemetery, the Firwood Indian Cemetery and the Firwood (Willard) Cemetery.

The land is owned by the federal Bureau of Indian Affairs.

When the city was in the permitting process 18 months ago, Utterback said environmental reports were sent to two representatives of the tribe. Tribal attorney Lisa A. Brautigam said that was the critical mistake.

"Two individuals involved with water quality and fisheries did receive the state environmental checklist but they are in individual departments not even located at the Tribal Government Headquarters," she said. "And they only deal with fisheries and water quality issues."

Archaeologist Reynon shook his head.

"If we had known about the issue, we would have worked with them on alternatives," he said. "And we should have known. Now, we'd like to go back to the beginning."

Utterback does not disagree, but insists there was never an intent to keep the tribe in the dark.

"If we were doing it again, we'd do it differently," Utterback said. "We didn't realize we should have sent it to others. We thought it would be shared by those we did send it to."

For now, work in front of the cemetery has halted, and the city and tribe will have meetings this week to discuss alternatives.

"We're not obstructionists. This is a matter of respect," said Tribal Council member Lawrence LaPointe "These are our ancestors, our families."

Larry LaRue: 253-597-8638 larry.larue@thenewstribune.com

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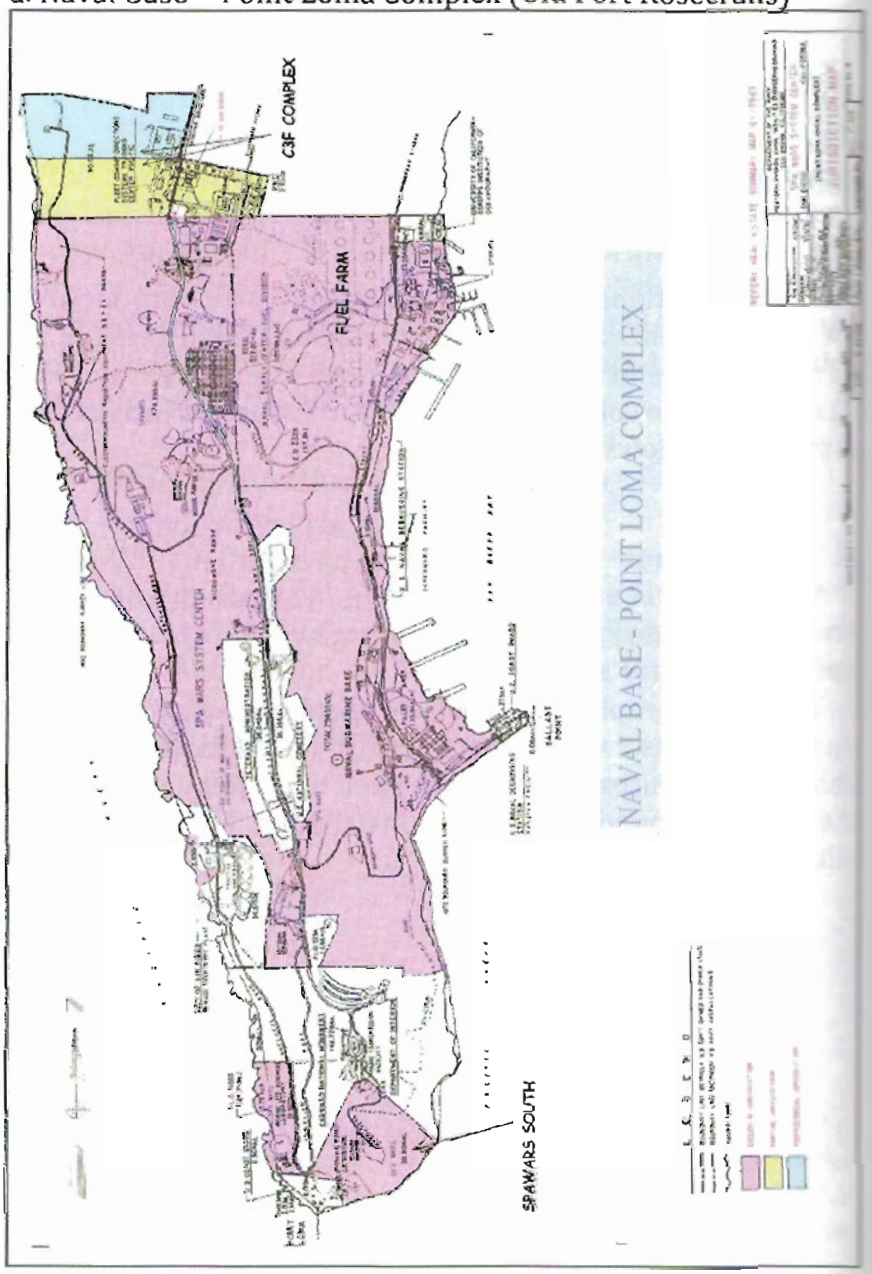
EXHIBIT Q

Appendix—Navy Jurisdictional Maps for S.D. California

a. Naval Base—Point Loma Complex (Old Fort Rosecrans)



Append

b. North Island

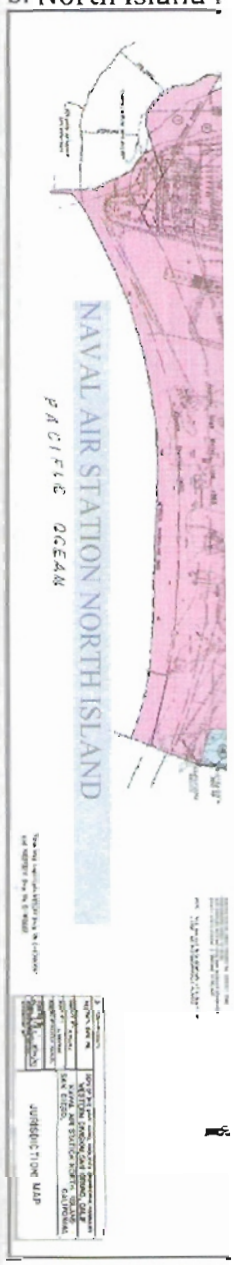


EXHIBIT R

California Indian Burial Ground Paved Over for Bay Area Housing

Added by Alana Marie Burke *on April 27, 2014*
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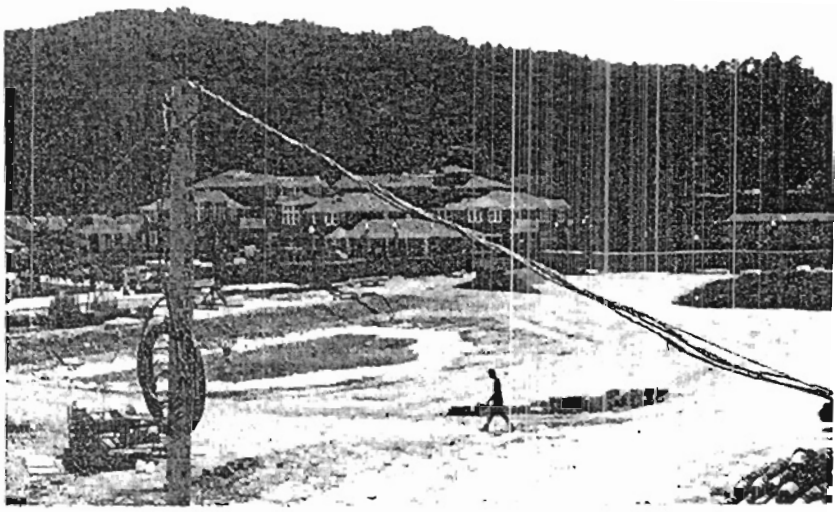
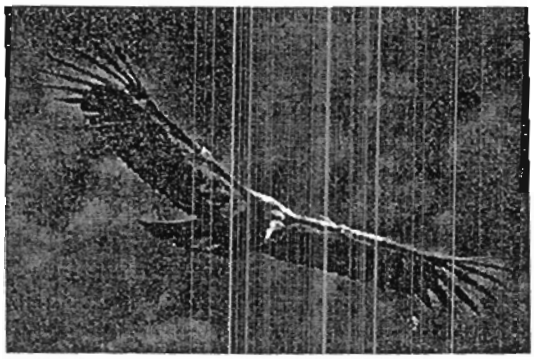


California's Bay Area real estate is considered exceptionally prime, so prime in fact, that what has been described by archaeologists as a 4,500-year-old "treasure trove" of Coast Miwok Indian artifacts has been paved over in the name of a multi-million dollar housing development in the town of Larkspur. What was a historically rich American Indian burial ground home to, by some estimates, the remains of at least 600 Coast Miwok Indians, has been legally decimated and the Indian remains have been reburied at another site at the request of the Federated Indians of Graton Rancheria (FIGR).

In accordance with the California Environmental Quality Act, archaeologists were brought in to consult on the $55 million Rose Lane Development and they are publicly lamenting the loss of the historical treasure. The common regret is that they were not provided the opportunity to catalog the find before the artifacts were relocated and buried at another site that was then graded and paved over. Any historical evidence in the Larkspur site soil will be effectively obliterated by the construction of the new development thus the context of the artifacts - an important element of the American Indian archaeological find – is also lost forever.



Endangered California condor

In addition to human remains, the abundance of artifacts at the site included weapons, tools, household implements, and over 7,200 animal bones from at least 50 different animal species. Included were the bones of black and grizzly bears and even the remains of a rare California condor, a bird which some have speculated may have actually been a ceremonial "pet" that was honored by the burial. In just the small area that archaeologists were allowed to excavate, they discovered the bones of sea otters, ducks, bat-rays and sturgeon. According to archaeologist Dwight Simons, because this was just a small sampling of the historical site, there were likely, "millions of bones and bone fragments" that could have been cataloged for study.

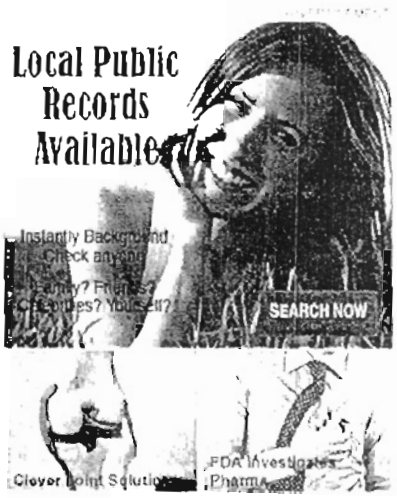
Consulting archaeologist Al Schwitalla believes that the Indians that called Larkspur, which is a small town in the Bay Area, their home, were "very wealthy." This is based upon his analysis of a small portion of the artifacts, which included over 42,000 shell beads and the remnants of abalone shells. Prehistorically this indicates that these Coast Miwok Indians were well off, much like the majority of residents that live in the very affluent Bay Area now. The Larkspur housing development will be built on the unusual foundation of soil strata that for thousands of years held the history and the ancestors of the Coast Miwok Indians.

The FIGR, with a population that are the most likely descendants of the Coast Miwok Indians expressed that they wanted their ancestral remains relocated and that they did not want to become the subject of an archaeological study. The chairman of the FIGR is quoted as saying that no one has the right to dig up the skeletal remains of the Indian ancestors for examination and he wonders, "How would Jewish or Christian people feel?" if they were in the FIGR's position.

Coast Miwok Indian Artifacts

Yet, senior archaeologist of the California State Parks, E. Breck Parkman says that in his four decades long career, he has never experienced an "archaeological site quite like this one" and his regret over the loss of the artifacts is apparent. Further, Jelmer Eerkens who is a professor of archaeology at the University of California, Davis, states that while the developers "have a right to develop their land" they could have at the very least allowed the artifacts to have been protected so that they could have "been studied in the future."

However, the developers did not make the decision to remove and rebury the artifacts found at the Bay Area site, the American Indian leaders ultimately made that choice. Nick Tipon of the FIGR stated that it is the philosophy of the tribe to



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protect their "cultural resources" and to "leave them as is." He also stated that the notion that the artifacts belong to the public is a "colonial view."

The archaeological and historically valuable American Indian remains and artifacts uncovered by the California Bay Area housing developers have been relocated. What many archaeologists called a "treasure trove" has been paved over and the artifacts are lost to any further study. However, Larkspur Land 8 Owner LLC's construction on the site includes senior housing units, townhouses and single-family dwellings with real estate values between $1.9 and $2.5 million. While the archaeological wealth may be lost, the wealth of those invested in the housing development is going to grow exponentially.

By Alana Marie Burke
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San Jose Mercury News
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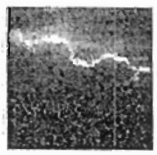
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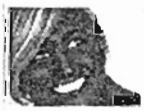
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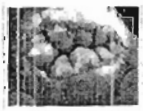
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EXHIBIT S

The INTER-TRIBAL COUNCIL of the FIVE CIVILIZED TRIBES

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Principal Chief

Bill Anoatubby
Governor

Gregory Pyle
Principal Chief

George Tiger
Principal Chief

Leonard M. Harjo
Principal Chief

October 12, 2012

A Resolution to Save Ocevpofv (Hickory Ground)-Wetumpka, Alabama of the Five Civilized Tribes

Resolution No. 12-08

WHEREAS, the Inter-Tribal Council of the Five Civilized Tribes (ITCFCT) is an organization that unites the tribal governments of the Chickasaw, Choctaw, Cherokee, Muscogee (Creek), and Seminole Nations, representing over 750,000 blood descendants of Aboriginal people from the Southeastern United States; and,

WHEREAS, Ocevpofv (Hickory Ground) Ceremonial Grounds/Tribal Town located in Wetumpka, Alabama is a traditional tribal town and the Ocevpofv (Hickory Ground) Tribal Town in Oklahoma are lineal descendants and citizens of the Muscogee (Creek) Nation; and,

WHEREAS, Ocevpofv (Hickory Ground) Ceremonial Grounds/Tribal Town of Oklahoma continues the ceremonial traditions of their lineal ancestors; and,

WHEREAS, the Poarch Band of Creek Indians, a recent federally recognized tribe, is currently occupying the Historic and Sacred original site of Ocevpofv Hickory Ground Ceremonial Grounds/Tribal Town; and,

WHEREAS, the Poarch Band of Creek Indians have desecrated the original location of the Ocevpofv (Hickory Ground) Ceremonial Grounds/Tribal Town, and are currently in violation of Federal Historic Preservation laws, as well as violating Muscogee (Creek) traditions; and,

WHEREAS, the Poarch Band of Creek Indians have excavated over 60 human remains (men, women and children) and associated funerary objects, including the remains of seven Mekkos (Chiefs) that were buried in the arbors of the original ceremonial ground; and,

WHEREAS, the Poarch Band of Creek Indians are expanding their casino including a high rise hotel, casino parking lot, retail shops, lounge, museum, and further economic development on these sacred grounds. It is anticipated during this development that there will be a high probability of encountering additional human remains and associated funerary objects; and,

NOW THEREFORE BE IT RESOLVED, The Inter-Tribal Council of Five Civilized Tribes supports the lawful efforts of the lineal descendants of Ocevpofv (Hickory Ground) Ceremonial Ground/Tribal Town to halt the desecration and all future desecrations of Ocevpofv (Hickory Ground) Ceremonial Ground/Tribal Town located in Wetumpka, Alabama, as should be afforded protection under Federal Laws.

CERTIFICATION

The foregoing resolution was adopted by the Inter-Tribal Council of the Five Civilized Tribes meeting in Tulsa, Oklahoma on this 12th day of October, 2012, by a vote of 5 for 0 against and 0 abstentions.

Bill Anoatubby, Governor
The Chickasaw Nation

George Tiger, Principal Chief
Muscogee (Creek) Nation

Gregory E. Pyle, Chief
Choctaw Nation of Oklahoma

for Leonard M. Harjo, Principal Chief
Seminole Nation of Oklahoma

Bill John Baker, Principal Chief
Cherokee Nation

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Poarch Creeks Should Reconsider Digging Up Graves to Build a Casino

DAN JONES | 8/20/12

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"YOU'LL MOCK DEATH BUT ONCE!"

I ask the Muscogee Creek Nation of Oklahoma to excuse me for speaking about your relatives. I was asked by Indian Country Today Media Network, and I am moved to do so prayerfully. The act of tampering with the graves of your ancestors affects us as well, and we support you. I am deeply bothered by it, I want to know things and I want to say some things from what I heard and read.

Why are the Poarch Creek Indians of Alabama digging up Creek graves at Hickory Ground so they can build a casino? This is an insult to everything we stand for as American Indians, and it affects my people in in its insensitivity and ignorance. It gives our enemies the ammunition they need to discredit all of us and our attempts to preserve and protect our sacred graves. When the Creek Nation were forced out of Alabama onto their Trail Of Tears, like many tribes, groups of them scattered and were not removed, but had to fend for themselves and hide from the government. To their credit, after many years they held together and fought the government in court and reclaimed federal recognition against all odds in 1982. The toll this takes on a tribe cannot be fully understood by most of us until something like this happens.

When is an Indian no longer an Indian? When he no longer hears his past relatives speaking in his own language, when the music of his people past has been replaced with the noise of another culture, when he has replaced the bones of his own people with a casino! Where are your voices of reason? Have you not noticed there is a huge movement in Indian country now to save sacred sites? How could you not know that the graves of your ancestor go to the heart of your culture? They tell you who you are, they tell your children who they are, and they are the key to your ties to this earth, to the past and the future. They are literally the identity of your nation, those who fought to keep their way of life together and sacred for you. These are not hollow words—these are the very beliefs that make us unique people.

How does your action affect my tribe and culture? Our enemies will only credit one tribe for anything they consider a good deed, mainly if it affects them in a positive light. On the other hand they will condemn all tribes when one tribe does something they consider respectable or normal to them. When one tribe blows it, they blow it for all of us. That's how it works. Now they will use you as the example of what all tribes do. When we tell them our graves are sacred they will turn to us and say, Well why did the Poarch Creek tribe dig up their ancestors and move them to build a casino? Yes, you become the standard they will judge us by.

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If you have lost the voices of reason in your own tribe to do what is best for your own culture, then it becomes our responsibility to inform you that what you are doing is wrong and unacceptable for the best interest of all of us

The Muscogee Creek Nation of Oklahoma are telling you to stop moving their relations from their resting grounds. You are making old wounds new again. But now I am here to tell you stop it on behalf of my loved ones as it is also insulting to our culture and counter to the struggles we are now having to preserve the dignity of our loved ones and their graves. You don't live in a vacuum and your actions hurt all of us.

I see a greater problem related to these casinos when it come to preserving our culture and making the all-mighty dollar. Too many are being operated by non-Indians who have no understanding of our cultures Too many times decisions are being made that should impact Indians but don't because the decisions are being made by non-Indians. But the worst case scenario would be if non-Indians are making decisions that could negatively impact a tribe to other governments Even to degrade their culture because these decisions were made by non-Indians under the nose of who are supposed to be Indian and the watchdogs of a culture. Where is your cultural conscience and cultural integrity? I believe the Muskogee Creek of Oklahoma have full right, a moral authority and a responsibility to stop you from yourself. Don't you know that even the trees and the grass that grow where we bury the dead are full of the life force of the forefathers? We believe and know that when you walk on ground you carry the ghosts of your past into your homes on the soles of your shoes. Be responsible to them for us and mainly for yourselves for your future lies in the graves you disrespect.

Dan (SaSuWeh) Jones is the former chairman of the Ponca Tribe of Oklahoma. He is a filmmaker and former vice chairman of the Oklahoma Indian Affairs Commission, appointed by former Oklahoma Governor, Brad Henry.

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Great article Dan Jones, and great words. Considering all that has happened to Indians in Alabama, you would think this would not even be contemplated (hopefully it won't be). When I was young my grandmother once said "You'll know they are Indian by their stance", and I thought she was talking about their legs. I know better now.

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EXHIBIT U

Ritual flames honor Kumeyaay matriarch

By Roxana Popescu (/staff/roxana-popescu/) 7 a.m. June 17, 2013

Near the fire, a line of men, boys, and female birdsong dancers from different reservations of the Kumeyaay people sang about safe travels to a better world, and the ocean, mountains and desert during the burning ceremony for Ida Brown, the eldest elder of the Viejas Band of Kumeyaay Indians, who passed away June 11 at the age of 90. During the ceremony, her personal possessions were burned, sending them on their way to the next life. — *Howard Lipin*

When dusk's shadow fell across the Viejas Reservation, the burning began.

A man holding a drip torch ignited a pile of household objects that had been thrown into a deep pit. In minutes, monstrous flames leapt toward the crescent moon. A column of smoke curled upward, transparent at first, but soon thick and dark and powerful as grief. Near the fire, a line of men from different reservations of the Kumeyaay people sang about safe travels to a better world, and the ocean, mountains and desert.

"These songs they're singing are as old as our people," said Manuel Hernandez, sitting off to one side, watching and listening.

This burning ceremony, which traditionally happens when a tribe member dies, was for Ida Brown, 90, a Kumeyaay matriarch who died June 11 from complications of a stroke. In her nine decades, Brown saw dramatic changes within her tribe and in the world beyond it, but she maintained the same values -- respect for nature, humanity and history -- throughout her life, her family said.

Brown had unique status on the reservation. She was the oldest of the Kumeyaay elders, a role that came with responsibility and prestige. "We treated her with more respect because she was the eldest in the reservation," her son, Charlie Brown, said. People offered their seats and sought her advice, and she was known for her ceremonial dancing. "She was, in a sense, a leader."

She was revered as a participant in tribal traditions and an educator who passed down vital ancestral knowledge to the next generations. Viejas Chairman Anthony Pico said she led by example and "provided the values of traditional ceremonies and the participation in such to the younger generation like myself and others."

Friday evening all her possessions were burned, and the evening ended with a pot luck meal. More than 150 people attended, the majority members of her extensive family, her son said. A wake is tonight and she will be buried Tuesday morning. At least 300 people from around Southern California are expected to come and pay their respects.

Wild swings of fortune

Born in La Mesa on April 6, 1923, Brown grew up farming and gathering. In those days the Kumeyaay led a semi-nomadic life, and they relished the freedom to fish in the ocean, and hunt or gather acorns in the mountains and desert, depending on the season. In what is now Mission Valley, "the grass was three feet tall. There were deer, there were wild pigs. She talked about how she used to go to the ocean and fish. And then go up to where Presidio Park is and eat the fish. ... They had the best of three different worlds," said her son.

Brown's fortune took a turn for the worse when she and the rest of her tribe were told to leave their ancestral lands, to make way for what is now El Capitan Reservoir. The city paid them for the relocation, and in 1934 several dozen tribe members pooled their funds

and bought what is now the Viejas Reservation. Her son said she was among those founders.

Life became a daily struggle. Some people died from exposure during the harsh highland winters. The survivors had to start from scratch, learning how to plant in the different soil, where to find water and the acorns they ground for cooking.

She attended Sherman Indian Institute, a boarding school for Indian children (now Sherman Indian High School). During World War II she worked as a riveter. That's how she met her future husband, Charles Brown, who was serving in the Army at the time. They were married in 1951 and had two sons and a daughter. Those children gave them more than 20 grandchildren and several great-grandchildren.

The family struggled -- her son remembers receiving donated clothes that didn't always fit -- but unlike others on the reservation, Brown and her husband both worked. She became a home aide nurse and her husband was a firefighter. They had a better lifestyle than many.

Every weekend they piled into the family's 1950 Chevy and headed to powwows. She made it a point to introduce her children to different kinds of people. She taught them to respect all humans equally. "She always instilled that in us. 'There's nobody better than you. We're all brothers and sisters. We all bleed the same,' " her son quoted Brown as saying

When the Viejas band came into wealth through gaming, she tried to make sure their values didn't slip away. She was too familiar with poverty from the early days of the reservation, but she also understood the freedom that comes from relying on nature and taking only what is needed. She warned others to be responsible and not become burdened by material excess.

Financial privilege came with another price, she felt: The tribe grew apart. "The elders ... felt we lost a lot. Instantly. .. We lost the tightness with the community we had," her son said.

Release

After death, the spirit stays on earth for a year, the Kumeyaay believe. Sending personal belongings to the sky as smoke makes the afterlife more welcoming for the spirit. Traditionally, they burned clothes and willow dwellings. Today, some even burn cars and motorcycles. Archaeological artifacts show they have been doing this for hundreds of years (http://www.escholarship.org/uc/item/55k3s7j6#page-1). Some Kumeyaay say the practice stretches back to prehistoric times.

Another purpose is to prevent disputes about inheritances and help the family begin to say goodbye. "They're missing her," said Viejas Vice Chairman Robert Cita Welch, who attended the ceremony. "They'll see stuff they bought her or gave her, that's going to go to her, and they'll feel for happy for that."

Friday evening, everyone gathered at her daughter Hazel Talamantez's house, where Brown spent her final years. A line of male prayer singers shook halymaas, or gourd rattles, and a line of female birdsong dancers moved rhythmically, left right, left right.

And the fire raged.

Up in flames went Ida Brown's green sofa, where she'd knit and sew. That was where she watched her favorite channel, Court TV. Up in flames went her bright blue towel with the starfish design, her Tupperware, the motorized wheelchair she hated having to use.

"Everything goes," her son said. "It makes it a lot easier."

Up in flames went her books and jewelry, her bed and the books she read. So did the refrigerator that kept the pork chops she savored.

"It's a release," he said.

Up in flames went her favorite outfit, a pink blouse, black pants and her soft, comfy grandma shoes. Pink was her color of choice, and dancing at tribal gatherings just like this one was her passion.

"She danced until she was probably 80 years old, to the Kumeyaay singers," her son said. "She's probably dancing now."

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PHOTO

Men, boys, & birdsong dancers from Kumeyaay reservations sang about safe travels to a better world, ocean, mountains & desert at the burning ceremony for Ida Brown, eldest elder of the Viejas Band of Kumeyaay Indians, who died June 11.
— *Howard Lipin / U-T San Diego*

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Members of the Viejas Fire Dept. add personal belongings of Ida Brown, the eldest elder of the Viejas Band of Kumeyaay Indians, Ida Brown, who passed away June 11 at the age of 90, to the fire. — *Howard Lipin / U-T San Diego*

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PHOTO

Gilbert Hill, grandson of Ida Brown, eldest elder of the Viejas Band of Kumeyaay Indians, who died June 11, at 90, watches & reflects during the burning ceremony where her possessions were burned, sending them to the next life. — *Howard Lipin / U-T San Diego*

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Charlie Brown, the son of the eldest elder of the Viejas Band of Kumeyaay Indians, Ida Brown, holds a photo of his mother who passed away June 11 at the age of 90. — *Howard Lipin / U-T San Diego*

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BY

EDWARD H. DAVIS

NEW YORK
MUSEUM OF THE AMERICAN INDIAN
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1921

W

THE CREMATION CEREMONY

On the death of an Indian, or when a death was imminent, a long, shallow pit was dug, about two feet deep and in the direction of north and south. The implements used in the digging were sticks of sycamore, sharpened at both ends and charred in fire to harden them. These, together with flat stones, were used to pick the earth loose, which was then scooped out with the hands and laid to one side. As soon as a person was dead, the ceremony was begun. The pit which had been prepared was filled with dried grass and brush, upon which dried logs were placed and built up about three feet. The body of the deceased was then carried out and laid upon the funeral pyre, head to the north and face upward. One man was appointed to superintend the burning of the body, while the members of the immediate family and other relatives sat near and wept and wailed. When the pyre was lighted and the flames reached the body, great

ashes and charcoal were scraped into the pit, and the whole leveled with the ground, so that all traces of the cremation were obliterated. Sometimes a broken metate was inverted over the spot where the olla had been deposited, as a marker. It should here be mentioned that the custom of depositing the incinerated remains in ollas is confined to the Diegueños—among the Luiseños they were merely placed in the pit and covered.

The next day the father and mother, or other near relatives of the deceased, repaired to the spot and, while sitting over the place where the olla was buried, the women had their hair cut off even with the ears. This hair was saved for the *Mono*, or Image, ceremony, and was used to supply the front and back hair of the image of the dead.[1]

The man who superintended the gathering of the bones went to the *temescal*, or tribal sweat-house, and took a sweat, followed by a bath before the final rites, thus purifying himself. Cremation so soon after the person was thought to be

dead sometimes revealed the fact that life still remained. Several such instances were related by the older Indians. It is related by an old Indian of the desert that many years ago an Indian died, his body was placed on the funeral pyre, and the fire started. When the flames reached the body the man returned to consciousness. Those present became greatly frightened. They attacked the man with clubs and beat him to death, and then completed the cremation according to custom.

Mr Landis, the government farmer at Martinez, in 1917 repeated to the writer a story related to him by the Indians at Mojave. A supposed corpse had been prepared and laid on the pyre; when the flames reached the body the man recovered consciousness and climbed down from the burning mass. The relatives, in amazement, ran away, leaving the intended victim unharmed. The man lived for years after.

In cases where there was a village, there was one general location for crema-

tions, corresponding to a cemetery. One such place lay a little north of the old rancheria of Los Coyotes, a Cahuilla settlement, where the wind sometimes blows the sand from the shallow graves, exposing the burned bones.

Santiago Segundo, an old medicine-man of Los Coyotes, living at San Ygnacio, twenty-five miles northeast of Mesa Grande, San Diego county, related an occurrence which he experienced. When a young man he and a companion were hunting wood-rats on the lower Coyote, when he was struck by a rattle-snake on the calf of the leg. His companion killed the reptile and carried Santiago to the house; his leg swelled, his throat almost closed, and his eyes became swollen and shut, as nothing was done to counteract the effects of the poison. All night long he lay as dead, and the relatives prepared to cremate his body. He lay on the earth, face upward, his legs tied together, and his arms fastened to his sides ready for cremation. While in this condition he said he had

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IN
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THE RELIGIOUS PRACTICES OF THE DIEGUEÑO INDIANS

BY

T. T. WATERMAN

BERKELEY
THE UNIVERSITY PRESS

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which is very long, and on the head. The people, especially the relatives of the initiates, then gather around the pit. One by one the boys are placed in the pit, their feet resting on the first stone. Each boy's sponsor stands behind him and takes him under the armpits. According to one account, the boy also steadies himself by placing his hands on the sides of the pit. The kwaipai, when all is ready, pronounces "mwau." The people give three answering grunts, and at the third the boy jumps on to the next stone. At another grunt he jumps to the next, and so on. Should he miss landing fairly on one of the stones, his relatives all begin to wail, in the belief that he will die before long. When each candidate has passed through the pit in this way, they all gather about, each with his sponsor beside him. Some old man then takes out the flat stones, since they are preserved with the other ceremonial objects in the kwusitenyawa. At a signal from the kwaipai, the whole company then "grunt" three times. At the third, the boys and their sponsors push the dirt in from all sides, filling the trench and burying the netting figure. If any of the dust rises from this "grave" and gets in a boy's nostrils, he will die.[71] As it is almost dark by this time, they begin the war dance at once, on top of the grave where the figure is buried. They dance all night, and at daybreak dance the fire out.[72] This ends the ceremony.

MOURNING CEREMONIES.

Quite as significant as the adolescence ceremonies are the mourning rites. Mourning for a relative usually lasts among the Diegueño for one year. The hair of both men and women was formerly cut short during this period, and the face sometimes painted black. Cremation was universally practiced by the Diegueño until they came under the influence of the missions. As far as can be learned, each body was burned without any rites other than the one mentioned above,[73] the purpose of

[71] Cf. the Chaup Myth by Miss DuBois, Journ. Am. Folk-Lore, XIX, 163, 1906.

[72] See the account of the Fire ceremony.

[73] See page 279.

which was to make the spirit done with it.[74] The clothing and other property was laid aside for use in the Mourning ceremony. Whatever ashes remained after the cremation were gathered up and placed in a small-mouthed jar of pottery, of the type used for carrying water on the desert (pl. 40).[75] This jar was then put away in some hidden place among the rocks, or buried on a hillside.

The funerary or mourning ceremony occurs on the anniversary of the death. At this time the clothing and personal property of the deceased person is publicly burned amid appropriate ceremonies. This burning is made the occasion of a large gathering. As usual in California, the family who gives the ceremony is at the total expense of entertaining all the visitors, and in addition to this, considerable property in the form of baskets, of late replaced in large degree by money and calico, is given away and burned on the funerary fire. If difficulty is experienced by the family in getting together sufficient property, the festival may be postponed for two and even three years.

THE CLOTHES-BURNING CEREMONY.

At the appointed time word is sent to the neighboring villages and families, and a large assembly drawn together. According to invariable custom, both for this and kindred ceremonies, the head of the family passes over the management of everything to a friend or visitor. Both he and his family carefully refrain from even tasting any of the food gathered for the festival.

The first night is passed by the relatives of the deceased in wailing. On the following night a great fire is built and all the people, men and women, dance around it, circling alternately in each direction. The man who has charge of proceedings, assisted by one or two others, carries the dead person's clothes. The songs sung at this time are the regular songs of the Fire dance.[76] At the close of each song all the dancers together make

[74] This is performed also in the Eagle ceremony, the account of which see below.

[75] Cf. C. G. DuBois, "Diegueño Mortuary Ollas," Am. Anthr., n. s. IX, 484, 1907, pl. 29.

[76] The account of which see below.

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the deep grunting sound: "mwau——u," and motion upward in the air. At the completion of three or four songs, all pause and face toward the fire, repeating the grunting sound three times. Then the sound is repeated once more, and all the clothes are thrown at the same time on the fire. While the garments, together with numerous baskets and other property, burn, they sing this song:

menai dispa tcawai tcawi	now dead I-begin-to-sing[77]
menai dispa tcawai tcawi	now dead I-begin-to-sing
xitoL kawak enyak awik	North, South, East, West
amai amut	up, down

Following this they dance several times around the fire, singing Fire songs, then throw on more clothes and sing:

mawi-a!	mawi-a!	what-for?	ah!	what-for?	ah!
moyo-o!	mawi-a!	you-dead,	oh!	what-for?	ah!

Anyone of the strangers who wants a little money takes a long stick and turns over the clothes so they will burn better. The relatives of the dead person then come around and give him small jars, baskets, and other "little things."

When the clothes are completely burned they sing as follows:

apamsi penoxi inyoxo

The rites are completed by dancing the fire out, singing meanwhile the songs which belong to that ceremony.[78]

THE FEATHER CEREMONY.

A distinctive mortuary ceremony is performed after the death of each toloache initiate. Among the Diegueño it is called "otcam", and seems to coincide with the unish matakish ceremony of the Luiseño.[79] It is said by the Diegueño to take place

[77] Part of the myth which tells of the origin of the ceremony is as follows: "The first man who performed the ceremony reached his hand to the North and brought a red rock, from the East a gleaming white rock, from the South a green rock, and from the West a black rock because the sun sets there. Then he blew in all four directions and sang, 'My father and grandfather are dead, so now I sing.'" The remainder of the narrative concerning the origin of the ceremony could not be obtained.

[78] See below, the account of the Fire ceremony. The Luiseño Clothes-Burning is described in present series, VIII, 180, 226.

[79] DuBois, p. 92.

THE NORTH AMERICAN INDIAN

BEING A SERIES OF VOLUMES PICTURING AND DESCRIBING

THE INDIANS OF THE UNITED STATES, THE DOMINION OF CANADA, AND ALASKA

WRITTEN, ILLUSTRATED, AND PUBLISHED BY
EDWARD S. CURTIS

EDITED BY
FREDERICK WEBB HODGE

FOREWORD BY
THEODORE ROOSEVELT

FIELD RESEARCH CONDUCTED UNDER THE PATRONAGE OF
J. PIERPONT MORGAN

IN TWENTY VOLUMES

THIS, THE FIFTEENTH VOLUME, PUBLISHED IN THE YEAR NINETEEN HUNDRED AND TWENTY-SIX

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ALPHABET USED IN RECORDING INDIAN TERMS

[The consonants are as in English, except when otherwise noted]

a	as in father	ḳ	a non-aspirated k
ȧ	as in cat	k̇	velar k
â	as in awl	q	as kw
ai	as in aisle	ḷ	the lateral surd of l
e	as in they	ñ	as in cañon
ȅ	as in net	ṇ	as ng in sing
i	as in machine	ⁿ	nasal, as in French dans
ɨ	as in sit	ṗ	a non-aspirated p
o	as in old	ṭ	a non-aspirated t
ô	as in how	r	alveolar
ö	rounded e as in German böse	ṡ	approaching s
oi	as in oil	th	as in thin
u	as in ruin	sh	as in shall
ů	as in nut	ʻ	a glottal pause
ü	rounded ů as in French peu	ˈ	stresses enunciation of the preceding consonant
ṵ	as in push		superior vowels are voiceless, almost inaudible
ẖ	as ch in German Bach		
gh	the sonant of ẖ		

from theft by a shaman, who might desire it for use in bewitching its owner.

It is believed that the soul flies through the air to the place where people were created, that is, the mountain Wikami in southern Nevada.

The mourning rites usually occurred a year after the death of him whose spirit was thus to be sent permanently away, and the families of all persons deceased within the past year joined in the ceremony, unless some of them had not the necessary supplies of food; in which case they might subsequently accumulate food and repeat the ceremony later in the year. The first feature of the rites was the burning of the clothing of the deceased persons, which occurred at night, following a prior night of lamentation. On the next morning, and again in the late afternoon, provided one of the lamented had been a toloache initiate, occurred Ṭâpakwîrp ("whirling"), which might be repeated on the two following days before the people dispersed. This was the dance known to the Luiseños as Mârahîsh and to local white residents as tatahuila.[1] At the close of the afternoon performance of the whirling dance the old toloache initiates entered the ceremonial enclosure one by one, imitated the action of their lamented comrade, and passed out. Then all together returned, crawling like animals and imitating the sound of the animals of which they severally had dreamed while intoxicated with toloache at their initiation. They formed a circle about a bunch of feathers, the dead man's insignia of initiation, which they proceeded with ceremonial gestures and upward expulsions of breath to bury.

This might be followed by the so-called war-dance, Hârñloï, which however was not restricted to such occasions. Participation was a prerogative of toloache initiates. Although the Diegueños did not practise organized warfare and their logical right to a war-dance is therefore open to question, it must be noted that Hârñloï is said to have been danced repeatedly after the killing of certain Cahuilla who attempted to destroy the mission establishment at Santa Ysabel. The numerous songs of this dance consist of Shoshonean words, and it is clearly a component part of the toloache cult. Each of the dancers wore a head-band of owl-feathers, in which he inserted his feather insignia of initiation, and at certain times they shook their raised fists in a gesture apparently threatening.

When effigies representing the dead were to be burned, a small hemispherical booth, open to the east, the direction of the spirit world, was built for housing them. The effigies were made by clanswomen

[1] For a description of the whirling dance see page 15.

EXHIBIT V

DRAFT

Memorandum of Agreement

For Consultations, Treatment and Disposition of Human Remains and Cultural Items That May Be Discovered Inadvertently During Planned Activities at Statue of Liberty National Monument

May 1, 2003

This Agreement is entered into by and between the U.S. Department of Interior, National Park Service, and the following parties: the Delaware Nation, the Delaware Tribe of Indians, and the Stockbridge-Munsee Community of Wisconsin.

Purpose

The purpose of this Memorandum of Agreement is to describe the procedures that will be followed by the National Park Service, Statue of Liberty National Monument, in the event there is an inadvertent discovery of human remains, funerary objects, sacred objects and objects of cultural patrimony within the Park. These procedures carry out the provisions of the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. 3001 et seq.) and its implementing regulations (43 CFR Part 10) regarding consultation, treatment and disposition of human remains and cultural items that are inadvertently discovered in the course of planned activities in the Park.

During 2003, the Statue of Liberty National Monument plans to conduct maintenance and [illegible]ization activities that will involve ground disturbances within the Park. In addition, the Park plans to conduct preliminary archeological investigations at specified localities within the Park. This Agreement has been written to comply with the requirements of NAGPRA and the Archeological Resources Protection Act (ARPA) in the case that inadvertent discovery does occur.

Definitions

All definitions in NAGPRA are incorporated into and apply to the terms used in this Agreement. The term 'cultural items' shall refer to funerary objects, sacred objects and objects of cultural patrimony as defined in NAGPRA. National Park Service policy states, "Inadvertent discovery means the unanticipated encounter or detection of human remains, funerary objects, sacred objects, or objects of cultural patrimony found under or on federal or tribal lands" (Cultural Resource Management Guideline (DO 28), Appendix R: NAGPRA Compliance, p. 325).

Cultural Affiliation

The preponderance of geographical, archeological, linguistic, folklore, oral tradition and historical evidence identifies the following tribes as most likely to have a shared group identity with (be culturally affiliated with) an earlier group who occupied and used this unit of the national park system in past centuries: the Delaware Nation, the Delaware Tribe of Indians, and the Stockbridge-Munsee Community of Wisconsin.

JAN-26-2007 13:07 NATIONAL NAGPRA PROGRAM P.10

Identification of Human Remains as Native American

In the event that human remains are encountered, all work will cease pending notification of the Superintendent, U.S. Park Police, Chief of Museum Services Division, Park Archeologist, Criminal Investigator, local law enforcement official, the County Medical Examiner/Coroner, and a forensic anthropologist. These officials will make an on-site determination whether the location is a crime scene or an archeological discovery. Upon notification that law enforcement has no further interest in the matter and the remains are determined to be Native American, the procedures outlined below shall be implemented.

Notification and Consultation in the Case of an Inadvertent Discovery

If Native American human remains or cultural items are inadvertently discovered, the NPS will cease activity in the immediate area of the human remains and objects, protect the remains and cultural items from further disturbance, and consult with the Tribes in keeping with 43 CFR Sections 10.4 – 10.6 and as outlined below.

1. Notification of NPS: The person who has identified the Native American human remains or cultural items shall provide immediate verbal or telephone notification of the discovery to the Superintendent of the Park. This notification shall be followed by formal written notification.

2. Cease Activity: The NPS shall immediately stop the activity in the area of the inadvertently discovered Native American human remains and cultural items and take action to secure and protect the human remains and cultural items. The action shall be directed at stabilizing and covering the discovered objects, as well as maintaining the sanctity of the site. The appropriate actions shall include covering the human remains and cultural items with a natural fiber cloth such as cotton or muslin and placing tobacco near the remains. No photographs will be taken.

3. Notification of Tribes: The Superintendent, as soon as possible but no later than three days after receiving notification of the discovery, shall notify the Tribes by telephone. Each Tribe's officially designated NAGPRA Representative shall be notified, or in the case the tribe has no NAGPRA Representative, notification shall be given to the Tribal Chief. This notification shall include information about the kinds and condition of human remains and cultural items, the circumstances under which they were discovered, and the measures taken to secure the area and protect the objects. Written notification shall follow the telephone notification.

4. Consultation with Tribes: The Superintendent shall initiate consultations with the Tribes. He or she shall provide written notice that proposes a time and place for meetings or consultations to further consider the inadvertent discovery, the Park's proposed treatment of the human remains and cultural items that may be excavated, and the proposed disposition of such remains and items.

Treatment and Disposition of Human Remains and Cultural Items

The Park and the Tribes agree that the preferred treatment of inadvertently discovered human remains and cultural items is to leave the human remains and cultural items in-situ and protect

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them from further disturbance. Non-destructive "in-field" documentation of the remains and cultural items will be carried out in consultation with the Tribes, who may stipulate the appropriateness of certain methods of documentation. If the remains and cultural items are left in-situ, no disposition takes place and the requirements of 43 CFR 10 Sections 10.3-10.6 will have been fulfilled. The specific locations of discovery shall be withheld from disclosure (with the exception of local law enforcement officials and tribal officials as described above) and protected to the fullest extent allowed by federal law.

Written Plan of Action

If the human remains and cultural items cannot otherwise be left in place, the Superintendent shall, following consultations with the Tribes, prepare, approve and sign a written Plan of Action as described in 43 CFR Section 10.5(e) prior to excavation and removal. He or she will provide a copy to each of the Tribes. The NPS will remove them for disposition to the culturally affiliated Tribes (which may include reburial elsewhere within the Park). A determination of cultural affiliation will be required prior to disposition in keeping with 43 CFR Section 10.6, Custody. The preponderance of geographical, archeological, linguistic, folklore, oral tradition and historical evidence will be used for the determination of custody of the discovered items.

Public Notice

Following a determination of cultural affiliation, if the culturally affiliated Tribes request the disposition of cultural items to tribal custody, upon receipt of a written request by the Tribes the NPS, in compliance with Section 10.6(c), shall publish a general notice of the proposed disposition in the New York Times, the Anadarko Daily News, the Bartlesville Examiner Enterprise, and the Shawano Evening Leader. The notice will provide information as to the nature and affiliation of the cultural items and solicit further claims to custody. The notice will be published at least two times at least a week apart and final disposition will not take place until at least 30 days after publication of the second notice to allow additional claimants to come forward. A copy of the newspaper notices along with information on when and in what newspaper it was published will be sent by the Park to the Departmental Consulting Archeologist.

If no other claimants come forward, the Park will prepare transfer of custody papers and obtain signatures from the culturally affiliated Tribes prior to final disposition.

Term and Amendment

From the date of the last signature, this MOA shall remain in effect for one year and may be amended only with the written consent of all parties hereto at the time of such amendment. Any signatory party may terminate their participation in this MOA upon 60 days written notice to the other signatories.

TOTAL P.13

DRAFT

Signatures

National Park Service

By:_____ Date:_____

Title:_____

Delaware Tribe

By:_____ Date:_____

Title:_____

Delaware Tribe of Indians

By:_____ Date:_____

Title:_____

Stockbridge-Munsee Community of Wisconsin

By:_____ Date:_____

Title:_____

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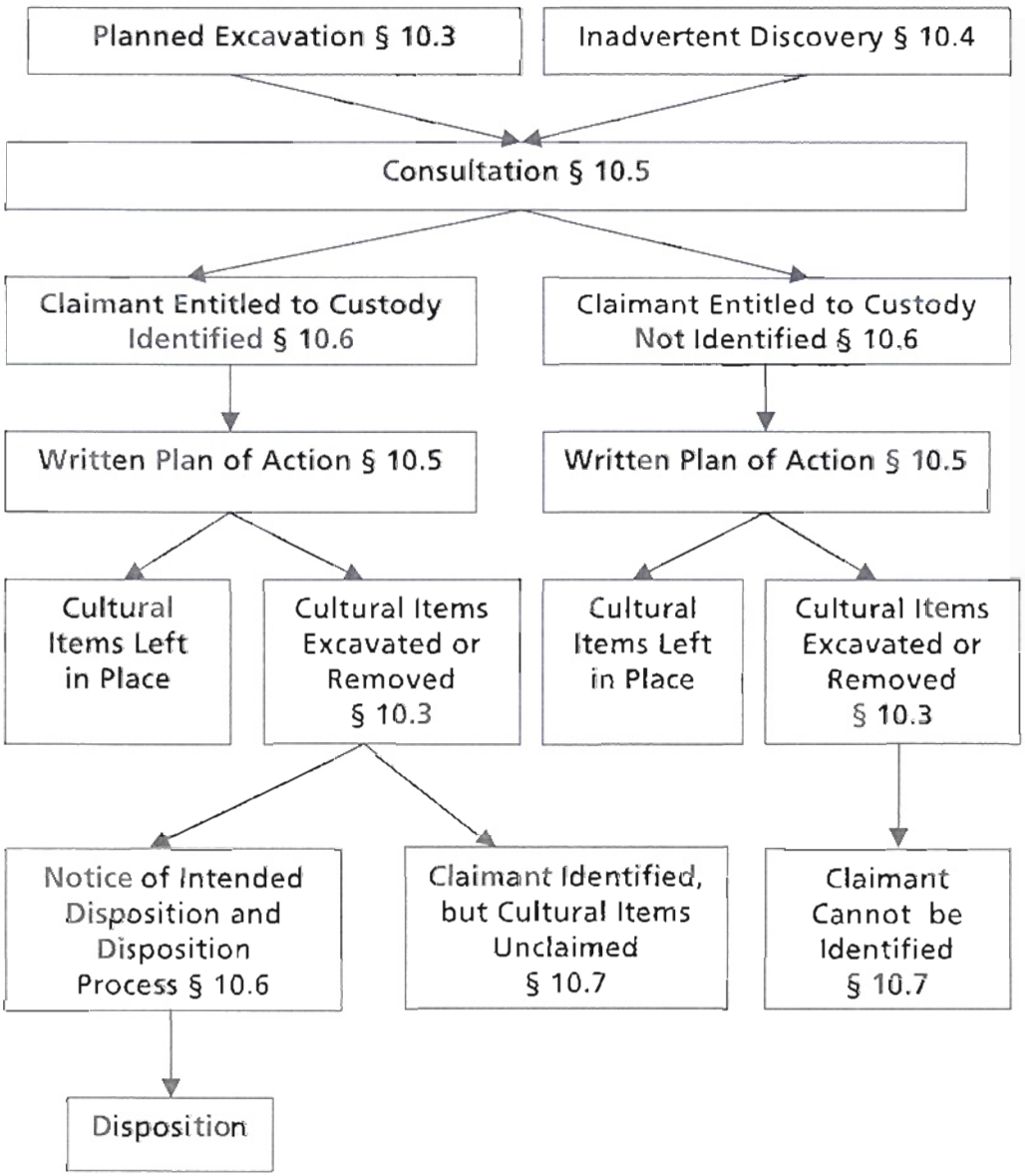
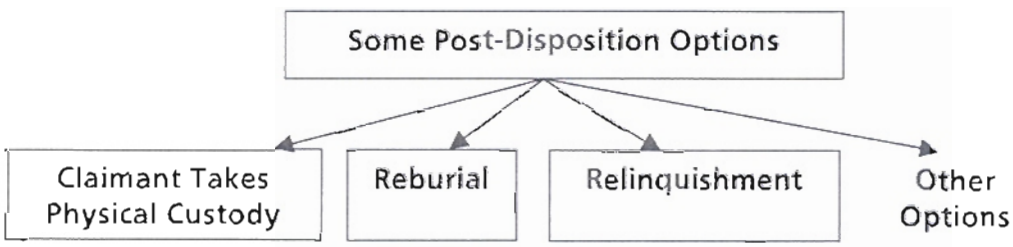
EXHIBIT W

National Park Service
U.S. Department of the Interior

National Center for Cultural Resources
National NAGPRA

43 CFR 10, Subpart B Overview





Inadvertent Discoveries on Federal Lands After November 16, 1990

An *inadvertent* discovery is one for which no plan of action was developed prior to the discovery

Notification

The person who makes the discovery must **immediately notify the responsible Federal official** by telephone and provide written confirmation to the responsible Federal official.

Stop Work

If the inadvertent discovery occurred in connection with an on-going activity, the person must **cease the activity** in the area of the inadvertent discovery and **make a reasonable effort to protect the human remains and other cultural items.**

Initiating Consultation

No later than three working days after receiving written confirmation of the notification, the responsible Federal agency official must **certify receipt of the notification**, and take immediate steps, if necessary, to **further secure and protect the human remains and other cultural items. NOTE:** activity that resulted in the discovery may resume thirty days after the Federal agency official certifies receipt of the notification.

The responsible Federal agency official must also **notify by telephone** (with written confirmation) and **initiate consultation** with **any known lineal descendant** and the **Indian tribes and Native Hawaiian organizations –**

- **who are or are likely to be culturally affiliated with the human remains and other cultural items;**
- **on whose aboriginal lands the remains and cultural items were discovered; and**
- **who are reasonably known to have a cultural relationship to the human remains and other cultural items.**

Consultation is initiated with a written notification. The written notification must propose a time and place for meetings or consultation.

During Consultation

The **purpose** of consultation is to **help the Federal agency determine who is entitled to custody** of the human remains and other cultural items under NAGPRA so that the disposition process can be completed, and **to discuss the Federal agency's proposed treatment** of the human remains and other cultural items pending disposition.

The Federal agency official must **provide in writing –**

- a list of all lineal descendants, Indian tribes, or Native Hawaiian organizations that are being, or have been, consulted; and
- an indication that additional documentation will provided on request.

The Federal agency official **must request, as appropriate –**

- names and addresses of the Indian tribe official who will act as the tribe's representative in consultation,
- names and appropriate methods to contact lineal descendants;
- recommendations on how consultation should be conducted; and
- the kinds of cultural items that are considered to be unassociated funerary objects, sacred objects, or objects of cultural patrimony

After Consultation – Written Plan of Action

The Federal agency official must prepare, approve, and sign a written plan of action. The plan of action must document the kinds of objects to be considered as cultural items; the planned treatment, care, and handling, including traditional treatment, of human remains and other cultural items; the planned archeological recording of the human remains and other cultural items; the kinds of analysis planned for each kind of object; and the nature of reports to be prepared.

The written plan of action must also include --

- the **specific information used to determine custody** of the human remains and other cultural items; and
- the **planned disposition** of the human remains and other cultural items.

Custody must determined in accordance with 25 USC 3002 (a), "Priority of Ownership," and 43 CFR 10.6, "Priority of Custody."

(over)

Will the human remains and other cultural items be left in place?

Yes
The Federal agency secures the site of discovery, and the disposition process does not continue further.

OR

No
Excavation or removal of the human remains and other cultural items must take place following the requirements of the Archeological Resources Protection Act (ARPA) (16 U.S.C. 470aa et seq.) and its implementation regulations. This includes issuance of an excavation permit by the cognizant Federal agency where required by ARPA.

Prior to Disposition – Notice of Intended Disposition

At least 30 days prior to transferring the human remains and other cultural items to the claimant entitled to custody, the responsible Federal agency must first publish a **Notice of Intended Disposition.** The Notice must –

- be published two times (at least a week apart) in a newspaper of general circulation in the area in which the human remains and other cultural items were discovered;
- be published two times (at least a week apart) in a newspaper of general circulation in the area or areas in which the affiliated Indian tribes or Native Hawaiian organization members now reside;
- provide information as to the nature and affiliation of the human remains and other cultural items; and
- solicit further claims to custody.

The Federal agency official must send a copy of the notice and information on when and where it was published to the National NAGPRA program.

Disposition

Disposition is the formal transfer of Native American human remains and other cultural items excavated or inadvertently discovered on Federal or tribal lands after November 16, 1990, to the lineal descendants, Indian Tribes, or Native Hawaiian organizations that have been determined to be the legitimate claimants.

In completing the disposition, the claimant formally accepts custody (ownership). Disposition should be documented, must be consistent with 25 USC 3002 (a), "Priority of Ownership," and 43 CFR 10.6, "Priority of Custody." Physical transfer may take place 30 days after the publication of the second Notice of Intended Disposition, as agreed upon by the claimant and the Federal agency official.

Some Disposition Options

Claimant Takes Physical Custody
The legitimate claimant takes physical possession of the human remains and other cultural items. Where allowable, and upon agreement with the claimant, the Federal agency may provide temporary care until the claimant is able to take physical custody.

Reburial on Federal Land
The human remains and other cultural items may be reburied on Federal land, if the agency's policies and procedures permit such activities.

Relinquishment
Under NAGPRA [25 USC 3002(e)], the governing body of an Indian tribe or Native Hawaiian organization may expressly relinquish control over any Native American human remains, or title to or control over any funerary object or sacred object.

EXHIBIT X

National NAGPRA

National Park Service

[Federal Register: October 18, 1999 (Volume 64, Number 200)]
[Notices]
[Page 56219-56221]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr18oc99-66]

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items in the Possession of the San Diego Museum of Man, San Diego, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is hereby given under the Native American Graves Protection and Repatriation Act, 43 CFR 10.10 (a)(3), of the intent to repatriate cultural items in the possession of the San Diego Museum of Man which meet the definition of ``unassociated funerary object'' under Section 2 of the Act.

The 60 cultural items consist of a plummet stone, pendants, projectile points, sherds, and beads.

During the 1930s, these cultural items were removed from burials at site C-16, East Blake Sea, eastern Imperial County, CA during legally authorized excavations conducted by Malcom Rogers of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The 311 cultural items consist of an awl, a necklace, a pendant, beads, and sherds.

During the 1930s, these cultural items were removed from burials at site C-19, East Blake Sea, eastern Imperial County, CA during legally authorized excavations conducted by Malcom Rogers of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The six cultural items consist of a bead and projectile points.

During the 1930s, these cultural item were removed from burials at site C-92, East Blake Sea, eastern Imperial County, CA during legally authorized excavations conducted by Malcom Rogers of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The five cultural items consist of a medicine slab, conus tinklers, a pendant, and a doll's eye.

During the 1930s, these cultural items were removed from burials at site C-144, a general area at Mason Valley, San Diego County, CA during legally

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authorized excavations conducted by Malcolm Rogers of the San Diego

Museum of Man. The human remains interred with these cultural items were not collected.

The 259 cultural items consist of cook pots, jars, bowls, clay billets, pipes, shells, projectile points, an iron knife blade, a brass button, arrow straighteners, digging weights, animal bones, glass beads, shell beads, a basket fragment, shell buttons, and pendants.

During the 1930s, these cultural items were removed from burials at site C-144 Cemetery A at Mason Valley, San Diego County, CA during legally authorized excavations by Malcolm Rogers of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The 503 cultural items consist of a scoop, a bowl, bones, glass beads, sherds, shell beads, lithic flakes, cook pots, fibers, metal fragments, and pestles.

During the 1930s, these cultural items were recovered from burials at site C-144 Cemetery C at Mason Valley, San Diego County, CA during legally authorized excavations conducted by Malcolm Rogers of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The 52 cultural items consist of sherds, a glass jar neck, a metal pull, canteens, shell beads, a pestle, ollas, a cup, bowls, a rabbit net fragment, a bone pendant, a sherd disc, jars, a mano, an arrow straightener, anvils, and a brass button.

During the 1930s, these cultural items were recovered from burials at site C-151, McCain Valley, San Diego County, CA during legally authorized excavations conducted by Malcolm Rogers of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The 101 cultural items consist of basket fragments, lithic flakes, beads, sherds, a brass button, a ceramic disk, shell beads, shell, and projectile points.

During the 1930s, these cultural items were recovered from burials at site C-164, Vallecito Wash, east-central San Diego County, CA during legally authorized excavations conducted by Malcolm Rogers of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The 32 cultural items consist of a brass button, a jar, bowls, a canteen, discs, pendants, shell, projectile points, anvils, a rabbit net, a glass bead, an olla, a mano, sherds, and pestles.

During the 1930s, these cultural items were recovered from burials at site C-165, Vallecitos, San Diego County, CA during legally authorized excavations conducted by Malcolm Rogers. The human remains interred with these cultural items were not collected.

The four cultural items are pottery jars.

Between 1929-1968, these cultural items were recovered from burials at site C-651, Earthquake Valley, San Diego County, CA by Carl Harkleroad. The human remains interred with these cultural items were not collected.

The 11 cultural items consist of canteens, a sherd, an arrow straightener, a blade, a cobble tool, lithic flake tool fragments, and an abalone shell.

During the 1930s, these cultural items were recovered from burials at site W-205, Cottonwood Valley, San Diego County, CA by Malcolm Rogers of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The 43 cultural items consist of a pot, a bowl, arrowshaft straighteners, scrapers, bone fragments, sherds, projectile points, flaked stone, and flaking hammers.

During the 1930s, these cultural items were recovered from burials at site W-206, Santa Maria Valley, San Diego County, CA by Malcolm

Rogers of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The one associated funerary object is a point fragment.

During the 1930s, this cultural item was recovered from a burial at site W-245, Dulzura, San Diego County, CA during legally authorized excavations conducted by Malcolm Rogers of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The ten associated funerary objects consist of a metate, shell pendants, projectile points, a sherd, and a bone pendant.

During the 1930s, these cultural items were recovered from burials at site W-254, Cemetery A, Laguna Mountain, San Diego County, CA during legally authorized excavations conducted by Malcolm Rogers of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The 104 cultural items consist of urns, projectile points, and sherds.

During the 1930s, these cultural items were recovered from burials at site W-262, Cuyamaca Peak, San Diego County, CA during legally authorized excavations conducted by Malcolm Rogers of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The 38 cultural items are stones.

During 1950-1951, these cultural items were recovered from a burial at site W-330, Poway, San Diego County, CA during legally authorized excavations conducted by Clark Evernham of the San Diego Museum of Man. The human remains interred with these cultural items were not collected.

The one cultural item is a cremation urn.

During the 1930s, this cultural item was recovered from a burial at site at Olive Springs, Ramona, San Diego County, CA during legally authorized excavations conducted by Malcolm Rogers of the San Diego Museum of Man. The human remains interred with this cultural item were not collected.

Based on ceramic material, types of projectile points, and types of shell beads, these cultural items have been dated to the late prehistoric period, c. 750 A.D. to the 19th century. Continuities of material culture and technologies provide a clear continuum for native cultures in this area from this late precontact period into the time of European contact. Historic documents from the Spanish expeditions document Diegueno and Kumeyaay peoples through this area. Consultation information provided by the Kumeyaay Cultural Repatriation Committee supports the recognition of this area of San Diego County as an ancestral homeland.

Based on the above mentioned information, officials of the San Diego Museum of Man have determined that, pursuant to 43 CFR 10.2 (d)(2)(ii), these 1,509 cultural items are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of an Native American individual. Officials of the San Diego Museum of Man have also determined that, pursuant to 43 CFR 10.2 (e), there is a relationship of shared group identity which can be reasonably traced between these items and the Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, the Capitan Grande Band of Diegueno Mission Indians of California, the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, the Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, the Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, the Jamul Indian Village of

California, the La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, the Manzanita

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Band of Diegueno Mission Indians of the Manzanita Reservation, the Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, the San Pasqual Band of Diegueno Mission Indians of California, the Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, the Sycuan Band of Diegueno Mission Indians of California, and the Cuyapaipe Community of Diegueno Mission Indians of the Cuyapaipe Reservation.

This notice has been sent to officials of the Kumeyaay Cultural Repatriation Committee, the Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, the Capitan Grande Band of Diegueno Mission Indians of California, the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, the Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, the Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, the Jamul Indian Village of California, the La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, the Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, the Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, the San Pasqual Band of Diegueno Mission Indians of California, the Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, the Sycuan Band of Diegueno Mission Indians of California, and the Cuyapaipe Community of Diegueno Mission Indians of the Cuyapaipe Reservation. Representatives of any other Indian tribe that believes itself to be culturally affiliated with these objects should contact Ken Hedges, Curator of California Collections, San Diego Museum of Man, 1350 El Prado, San Diego, CA 92101; telephone: (619) 239-2001 before November 17, 1999. Repatriation of these objects to the Kumeyaay Cultural Repatriation Committee on behalf of the Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, the Capitan Grande Band of Diegueno Mission Indians of California, the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, the Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, the Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, the Jamul Indian Village of California, the La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, the Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, the Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, the San Pasqual Band of Diegueno Mission Indians of California, the Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, the Sycuan Band of Diegueno Mission Indians of California, and the Cuyapaipe Community of Diegueno Mission Indians of the Cuyapaipe Reservation may begin after that date if no additional claimants come forward.

Dated: October 4, 1999.

Francis P. McManamon,

Departmental Consulting Archeologist, Manager, Archeology and Ethnography Program.

[FR Doc. 99-27125 Filed 10-15-99; 8:45 am]

BILLING CODE 4310-70-F

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indicates that the human remains are from a 25–30–year-old male. The condition of the skull indicates that it was obtained shortly after death. Measurements of the skull are nearly identical to the measurements for Path. Series 7023 in the Army Medical Museum archives. Comparison of measurements from the skull with measurements from skulls from several Plains tribes indicates that the Cheyenne and Sioux are the most likely groups for biological affinity. A discriminant analysis of the measurements indicates that the skull is much more similar to the Sioux group, but a Cheyenne affiliation cannot be excluded. The human remains are currently in the possession of the Smithsonian Institution, National Museum of Natural History, Repatriation Office.

Representatives of the Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota; Flandreau Santee Sioux Tribe of South Dakota; Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota; Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota; Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota; Santee Sioux Tribe of the Santee Reservation of Nebraska; Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Reservation, South Dakota; Spirit Lake Tribe, North Dakota; Standing Rock Sioux Tribe of North & South Dakota; and Yankton Sioux Tribe of South Dakota have agreed to the repatriation of the human remains to the Cheyenne-Arapaho Tribes of Oklahoma and Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana.

Officials of the Bureau of Indian Affairs have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of one individual of Native American ancestry. Officials of the Bureau of Indian Affairs have determined that, pursuant to 25 U.S.C. 3003 (d)(2)(B), there is a relationship of shared group identity that can be clearly traced between the Native American human remains and the Cheyenne-Arapaho Tribes of Oklahoma and Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana. Officials of the Bureau of Indian Affairs also have determined that, pursuant to 25 U.S.C. 3003 (d)(2)(C), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and the Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota; Flandreau Santee Sioux Tribe of South Dakota; Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota; Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota; Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota; Santee Sioux Tribe of the Santee Reservation of Nebraska; Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Reservation, South Dakota; Spirit Lake Tribe, North Dakota; Standing Rock Sioux Tribe of North & South Dakota; and Yankton Sioux Tribe of South Dakota.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the human remains should contact Carolyn McClellan, National Collections Manager and NAGPRA Coordinator, Bureau of Indian Affairs, 1849 C Street NW, MS–2472–MIB, Washington, DC, telephone (202) 208–4401, before March 1, 2004. Repatriation of the human remains to the Cheyenne-Arapaho Tribes of Oklahoma and Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana may proceed after that date if no additional claimants come forward.

The Bureau of Indian Affairs is responsible for notifying the Cheyenne-Arapaho Tribes of Oklahoma; Cheyenne River Sioux Tribe of the Cheyenne River Reservation, South Dakota; Crow Creek Sioux Tribe of the Crow Creek Reservation, South Dakota; Flandreau Santee Sioux Tribe of South Dakota; Lower Brule Sioux Tribe of the Lower Brule Reservation, South Dakota; Northern Cheyenne Tribe of the Northern Cheyenne Indian Reservation, Montana; Oglala Sioux Tribe of the Pine Ridge Reservation, South Dakota; Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota; Santee Sioux Tribe of the Santee Reservation of Nebraska; Sisseton-Wahpeton Sioux Tribe of the Lake Traverse Reservation, South Dakota; Spirit Lake Tribe, North Dakota; Standing Rock Sioux Tribe of North & South Dakota; and Yankton Sioux Tribe of South Dakota that this notice has been published.

Dated: December 8, 2003.

John Robbins,

Assistant Director, Cultural Resources.

[FR Doc. 04–1884 Filed 1–28–04; 8:45 am]

BILLING CODE 4310–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: San Diego Museum of Man, San Diego, CA, and California Department of Parks and Recreation, Sacramento, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession of the San Diego Museum of Man, San Diego, CA, and in the control of the California Department of Parks and Recreation, Sacramento, CA. The human remains and cultural items were removed from Cuyamaca Rancho State Park, Descanso, San Diego County, CA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations within this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations within this notice.

A detailed assessment of the human remains was made by the San Diego Museum of Man and the California Department of Parks and Recreation professional staff in consultation with the Kumeyaay Cultural Repatriation Committee, authorized representative of the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of California; Sycuan Band of Diegueno Mission Indians of California; and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California. The San Diego Museum of Man and the

California Department of Parks and Recreation also consulted with Kwaaymii elder Carmen Lucas.

In the 1930s, Malcolm Rogers and fellow associates of the San Diego Museum of Man conducted excavations at several sites in Cuyamaca Rancho State Park, Descanso, San Diego County, CA. Unassociated funerary objects removed from the park are described in a companion notice.

Human remains representing a minimum of two individuals were removed from cremation site SDM-W-211, West Mesa. No known individuals were identified. The 19 associated funerary objects are 1 bead, 12 projectile points, 2 ollas, 1 pipe, 1 abalone pendant, 1 cook pot, and 1 container of groundstone fragments.

Human remains representing a minimum of seven individuals were removed from site SDM-W-247 between Cuyamaca Lake and Stonewall Peak near today's Los Caballos Campground. No known individuals were identified. The 444 associated funerary objects are 11 projectile points, 2 spear points, a minimum of 347 loose sherds, 1 bag of uncounted sherds, 1 box of uncounted sherds, 1 unidentified groundstone, 1 groundstone fragment, 2 rock fragments, 1 scraper, 2 lithic flakes, 17 pieces of charcoal and chalkstone, 1 bag of red ochre, 1 piece white marl, 2 fragments of arrow straightener, 4 bone pendants, 1 bone flaker, 2 burned shell fragments, 11 bone fragments, 5 bead waste fragments, 2 awls, 1 bone tool fragment, 4 rocks, 1 piece of white ochre, 2 olivella bead fragments, 4 cremation urns (1 broken into 72 pieces), 1 burned wood fragment, 1 crab claw fragment, 6 animal teeth, and 9 animal bones.

Human remains representing a minimum of 15 individuals were removed from site SDM-W-263 near today's Paso Picacho Campground. No known individuals were identified. The 2,068 associated funerary objects are 11 cremation urns and cremation covers, a minimum of 1,048 olivella beads, 1 olivella disc, 2 fish vertebrae beads, 17 shell fragments, a minimum of 544 sherds, 9 fish vertebrae, 1 rock spall, 19 pieces of animal bone, 3 pieces of fired clay, 25 pieces of charcoal and earth fragments, 2 bags of charcoal and earth fragments, 1 tarring pebble, 1 bone pipe, 2 bone awls, 2 ceramic bases, 16 samples of bead waste, 4 flakes, 3 rocks, 2 dome scrapers, 15 ochre fragments, 3 ceramic pendants, 1 knife, 2 seeds, 52 projectile points, 1 glass tool fragment, 2 textile fragments, 1 pine cone spine, 1 quartz tool fragment, a minimum of 221 glass and 27 shell beads, 6 biface fragments, 2 arrow straightener fragments, 14 burned earth clumps, 1 piece of serpentine, 1 polished stone, and 5 stone fragments.

The human remains and associated funerary objects removed by Malcolm Rogers and his associates date from the Late Prehistoric to the Historic period, (A.D. 500 to A.D. 1800). Archeological investigation in the western San Diego County area dates the Kumeyaay (Diegueno) occupation of the region to the Late Prehistoric period. Geographic affiliation is consistent with historically documented Kumeyaay territory. Therefore, the California Department of Parks and Recreation Committee on Repatriation has determined that there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and present-day Federally recognized Kumeyaay Indian tribes represented by the Kumeyaay Cultural Repatriation Committee.

Officials of the California Department of Parks and Recreation have determined that, pursuant to 25 U.S.C. 3001 (9–10), the human remains described above represent the physical remains of 24 individuals of Native American ancestry. Officials of the California Department of Parks and Recreation also have determined that, pursuant to 25 U.S.C. 3001 (3)(A), the 2,531 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the California Department of Parks and Recreation have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of California; Sycuan Band of Diegueno Mission Indians of California; and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with these human remains and associated funerary objects should contact Paulette Hennum, NAGPRA Coordinator, Cultural Resources Division, California Department of Parks and Recreation, 1416 9th Street, Room 902, Sacramento, CA 95814, telephone (916) 653–7976, before March 1, 2004. Repatriation of the human remains and associated funerary objects to the Kumeyaay Cultural Repatriation Committee may proceed after that date if no additional claimants come forward.

The California Department of Parks and Recreation is responsible for notifying the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of California; Sycuan Band of Diegueno Mission Indians of California; Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California; Kumeyaay Cultural Repatriation Committee; and Kwaaymii elder Carmen Lucas that this notice has been published.

Dated: December 16, 2003.

John Robbins,

Assistant Director, Cultural Resources.

[FR Doc. 04–1883 Filed 1–28–04; 8:45 am]

BILLING CODE 4310–50–S

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items: San Diego Museum of Man, San Diego, CA, and California Department of Parks and Recreation, Sacramento, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves

National NAGPRA

National Park Service

FR Doc 04-1883
[Federal Register: January 29, 2004 (Volume 69, Number 19)]
[Notices]
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From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr29ja04-64]

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Inventory Completion: San Diego Museum of Man, San Diego, CA, and California Department of Parks and Recreation, Sacramento, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves Protection and Repatriation Act (NAGPRA), 25 U.S.C. 3003, of the completion of an inventory of human remains and associated funerary objects in the possession of the San Diego Museum of Man, San Diego, CA, and in the control of the California Department of Parks and Recreation, Sacramento, CA. The human remains and cultural items were removed from Cuyamaca Rancho State Park, Descanso, San Diego County, CA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations within this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the Native American human remains and associated funerary objects. The National Park Service is not responsible for the determinations within this notice.

A detailed assessment of the human remains was made by the San Diego Museum of Man and the California Department of Parks and Recreation professional staff in consultation with the Kumeyaay Cultural Repatriation Committee, authorized representative of the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of California; Sycuan Band of Diegueno Mission Indians of California; and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California. The San Diego Museum of Man and the

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California Department of Parks and Recreation also consulted with Kwaaymii elder Carmen Lucas.

In the 1930s, Malcolm Rogers and fellow associates of the San Diego Museum of Man conducted excavations at several sites in Cuyamaca Rancho State Park, Descanso, San Diego County, CA. Unassociated funerary objects removed from the park are described in a companion notice.

Human remains representing a minimum of two individuals were removed from cremation site SDM-W-211, West Mesa. No known individuals were identified. The 19 associated funerary objects are 1 bead, 12 projectile points, 2 ollas, 1 pipe, 1 abalone pendant, 1 cook pot, and 1 container of groundstone fragments.

Human remains representing a minimum of seven individuals were removed from site SDM-W-247 between Cuyamaca Lake and Stonewall Peak near today's Los Caballos Campground. No known individuals were identified. The 444 associated funerary objects are 11 projectile points, 2 spear points, a minimum of 347 loose sherds, 1 bag of uncounted sherds, 1 box of uncounted sherds, 1 unidentified groundstone, 1 groundstone fragment, 2 rock fragments, 1 scraper, 2 lithic flakes, 17 pieces of charcoal and chalkstone, 1 bag of red ochre, 1 piece white marl, 2 fragments of arrow straightener, 4 bone pendants, 1 bone flaker, 2 burned shell fragments, 11 bone fragments, 5 bead waste fragments, 2 awls, 1 bone tool fragment, 4 rocks, 1 piece of white ochre, 2 olivella bead fragments, 4 cremation urns (1 broken into 72 pieces), 1 burned wood fragment, 1 crab claw fragment, 6 animal teeth, and 9 animal bones.

Human remains representing a minimum of 15 individuals were removed from site SDM-W-263 near today's Paso Picacho Campground. No known individuals were identified. The 2,068 associated funerary objects are 11 cremation urns and cremation covers, a minimum of 1,048 olivella beads, 1 olivella disc, 2 fish vertebrae beads, 17 shell fragments, a minimum of 544 sherds, 9 fish vertebrae, 1 rock spall, 19 pieces of animal bone, 3 pieces of fired clay, 25 pieces of charcoal and earth fragments, 2 bags of charcoal and earth fragments, 1 tarring pebble, 1 bone pipe, 2 bone awls, 2 ceramic bases, 16 samples of bead waste, 4 flakes, 3 rocks, 2 dome scrapers, 15 ochre fragments, 3 ceramic pendants, 1 knife, 2 seeds, 52 projectile points, 1 glass tool fragment, 2 textile fragments, 1 pine cone spine, 1 quartz tool fragment, a minimum of 221 glass and 27 shell beads, 6 biface fragments, 2 arrow straightener fragments, 14 burned earth clumps, 1 piece of serpentine, 1 polished stone, and 5 stone fragments.

The human remains and associated funerary objects removed by Malcolm Rogers and his associates date from the Late Prehistoric to the Historic period, (A.D. 500 to A.D. 1800). Archeological investigation in the western San Diego County area dates the Kumeyaay (Diegueno) occupation of the region to the Late Prehistoric period. Geographic affiliation is consistent with historically documented Kumeyaay territory. Therefore, the California Department of Parks and Recreation Committee on Repatriation has determined that there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and present-day Federally recognized Kumeyaay Indian tribes represented by the Kumeyaay Cultural Repatriation Committee.

Officials of the California Department of Parks and Recreation have determined that, pursuant to 25 U.S.C. 3001 (9-10), the human remains described above represent the physical remains of 24 individuals of Native American ancestry. Officials of the California Department of Parks and Recreation also have determined that, pursuant to 25 U.S.C.

3001 (3)(A), the 2,531 objects described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony. Lastly, officials of the California Department of Parks and Recreation have determined that, pursuant to 25 U.S.C. 3001 (2), there is a relationship of shared group identity that can be reasonably traced between the Native American human remains and associated funerary objects and the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of California; Sycuan Band of Diegueno Mission Indians of California; and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with these human remains and associated funerary objects should contact Paulette Hennum, NAGPRA Coordinator, Cultural Resources Division, California Department of Parks and Recreation, 1416 9th Street, Room 902, Sacramento, CA 95814, telephone (916) 653-7976, before March 1, 2004. Repatriation of the human remains and associated funerary objects to the Kumeyaay Cultural Repatriation Committee may proceed after that date if no additional claimants come forward.

The California Department of Parks and Recreation is responsible for notifying the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of California; Sycuan Band of Diegueno Mission Indians of California; Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California; Kumeyaay Cultural Repatriation Committee; and Kwaaymii elder Carmen Lucas that this notice has been published.

Dated: December 16, 2003.
John Robbins,
Assistant Director, Cultural Resources.
[FR Doc. 04-1883 Filed 1-28-04; 8:45 am]

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[DOCID:fr29ja04-65]

DEPARTMENT OF THE INTERIOR

National Park Service

Notice of Intent to Repatriate Cultural Items: San Diego Museum of Man, San Diego, CA, and California Department of Parks and Recreation, Sacramento, CA

AGENCY: National Park Service, Interior.

ACTION: Notice.

Notice is here given in accordance with the Native American Graves

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Protection and Repatriation Act (NAGPRA), 43 CFR 10.8 (f), of the intent to repatriate cultural items in the possession of the San Diego Museum of Man, San Diego, CA, and in the control of the California Department of Parks and Recreation, Sacramento, CA, that meet the definition of unassociated funerary objects under 25 U.S.C. 3001. The human remains and cultural items were removed from Cuyamaca Rancho State Park, Descanso, San Diego County, CA.

This notice is published as part of the National Park Service's administrative responsibilities under NAGPRA, 25 U.S.C. 3003 (d)(3). The determinations within this notice are the sole responsibility of the museum, institution, or Federal agency that has control of the cultural items. The National Park Service is not responsible for the determinations within this notice.

In the 1930s, Malcolm Rogers and fellow associates of the San Diego Museum of Man conducted excavations at several sites in Cuyamaca Rancho State Park, Descanso, San Diego County, CA. The human remains and associated funerary objects removed from the park are described in a companion notice. The 169 unassociated funerary objects removed from Site SDM-W-211.1-A, West Mesa, are 168 potsherds and 1 lithic flake. One box of sherds cannot be located.

The unassociated funerary objects date from the Late Prehistoric to the Historic period (A.D. 500 to A.D. 1800). Archeological investigation in the western San Diego County area dates the Kumeyaay (Diegueno) occupation of the region to the Late Prehistoric period. Geographic affiliation is consistent with historically documented Kumeyaay territory. Therefore, the California Department of Parks and Recreation Committee on Repatriation has determined that there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary objects and present-day Federally recognized Kumeyaay Indian tribes represented by the Kumeyaay Cultural Repatriation Committee.

Officials of the California Department of Parks and Recreation have determined that, pursuant to 25 U.S.C. 3001(3)(B), the cultural items

described above are reasonably believed to have been placed with or near individual human remains at the time of death or later as part of the death rite or ceremony and are believed, by a preponderance of the evidence, to have been removed from a specific burial site of a Native American individual. Officials of the California Department of Parks and Recreation also have determined that, pursuant to 25 U.S.C. 3001(2), there is a relationship of shared group identity that can be reasonably traced between the unassociated funerary objects and the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, California; Sycuan Band of Diegueno Mission Indians of California; and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California.

Representatives of any other Indian tribe that believes itself to be culturally affiliated with the unassociated funerary objects should contact Paulette Hennum, NAGPRA Coordinator, Cultural Resources Division, California State Parks, 1416 9th Street, Room 902, Sacramento, CA 95814, telephone (916) 653-7976, before March 1, 2004. Repatriation of the unassociated funerary objects to the Kumeyaay Cultural Repatriation Committee on behalf of the Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, California; Sycuan Band of Diegueno Mission Indians of California; and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California may proceed after that date if no additional claimants come forward.

The California Department of Parks and Recreation is responsible for notifying the Kumeyaay Cultural Repatriation Committee, Barona Group of Capitan Grande Band of Mission Indians of the Barona Reservation, California; Campo Band of Diegueno Mission Indians of the Campo Indian Reservation, California; Ewiiaapaayp Band of Kumeyaay Indians, California; Inaja Band of Diegueno Mission Indians of the Inaja and Cosmit Reservation, California; Jamul Indian Village of California; La Posta Band of Diegueno Mission Indians of the La Posta Indian Reservation, California; Manzanita Band of Diegueno Mission Indians of the Manzanita Reservation, California; Mesa Grande Band of Diegueno Mission Indians of the Mesa Grande Reservation, California; San Pasqual Band of Diegueno Mission Indians of California; Santa Ysabel Band of Diegueno Mission Indians of the Santa Ysabel Reservation, California; Sycuan Band of Diegueno Mission Indians of California; and Viejas (Baron Long) Group of Capitan Grande Band of Mission Indians of the Viejas Reservation, California that this notice

has been published.

Dated: December 16, 2003.
John Robbins,
Assistant Director, Cultural Resources.
[FR Doc. 04-1885 Filed 1-28-04; 8:45 am]

EXHIBIT Y

FILED

APR 23 1992

CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS, et al.,

Plaintiffs,

v.

HAROLD BURRIS, et al.,

Defendants.

NO. CIV. S-90-993 LKK

O R D E R

This matter is before the court on defendants' motion for summary judgment or to dismiss, and plaintiffs' motion to file an amended complaint. For the reasons I now explain, plaintiffs' motion to file an amended complaint is GRANTED. The federal defendants' motion for summary judgment on plaintiffs' amended complaint is GRANTED. The individual non-federal defendants' motion for summary judgment or to dismiss is DENIED.

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I

PROCEDURAL HISTORY AND BACKGROUND FACTS

Sometime in the early 1970's, some of the plaintiffs[1] and some of the defendants[2] in the case now before the court, William Villa and "other members of the Ione Band of Indians" filed a quiet title action in the Superior Court of the State of California for the County of Amador pursuant to Cal. Civ. Pro. Code § 751. Plaintiffs sought to quiet title to a 40-acre parcel of land known as the Jackson Valley Rancheria. On October 31, 1972, the Amador County Superior Court issued an order adjudging plaintiffs to be the owners in fee simple absolute of the 40-acre parcel of land at issue in this case.

In December 1988, Harold E. Burris, Esther Burris, Callie Allen, Carol Boring, Pamela Burris, Harold Burris, Jr. and Jeanette Allen (defendants in the case before the court, along with Frank Pinion and Frank Villa) filed a complaint for declaratory relief

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[1] The plaintiffs in the case before the court who also were plaintiffs in the state court quiet title action are Nicolas Villa, Sr., Barbara E. Hill, Fred Mike, Muriel Mike, Bernice Villa, Donald Villa, and Glen Villa. Additional plaintiffs in this case and not specifically named in the state court action are Nicolas Villa, Jr., Geraldine Burris, Adeline Ybright and "members of the Ione Band of Miwok Indians."

[2] The defendants in the case before the court who were plaintiffs in the state court quiet title action are Effie Burris, Esther Burris, Harold E. Burris, and Frank Pinion.

Additional defendants in the case before the court and not specifically named in the state court action are Callie Allen, Carol Boring, Pamela Burris, Jeanette Allen, Frank Villa, Harold Burris, Jr., "and all other persons unknown, claiming any right, title, estate, lien, or interest in the real property described in the complaint adverse to the ownership or any cloud upon the title of Ione Band of Miwok Indians and the United States of America."

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and partition of the 40-acre parcel of land in Amador County Superior Court. Plaintiffs in that action alleged that the property is private land subject to taxation by Amador County because it is not located on a rancheria, reservation, public domain allotment, or any other type of trust land of the United States. Defendants demurred, arguing that the land is under the jurisdiction of the Secretary of the Interior or the California Bureau of Indian Affairs, and that the state court lacks subject matter jurisdiction over plaintiffs' claims. On February 20, 1991, the superior court denied defendants' demurrer.

On August 1, 1990, some of the defendants in the state court quiet title action filed this lawsuit in federal court. In their original complaint, plaintiffs allege a variety of claims against various individuals and the United States seeking, in essence, a declaration of plaintiffs' status as a federally-recognized Indian tribe and an order quieting title to the 40-acre parcel of land in the name of the Ione Band of Miwok Indians, to be held in trust by the federal government. The United States and the individual defendants moved for summary judgment or to dismiss plaintiffs' complaint on the ground that the court lacks subject matter jurisdiction over plaintiffs' claims because plaintiffs have not exhausted their administrative remedies. Defendants also moved for summary judgment on the ground that plaintiffs' facial challenge to the Bureau of Indian Affairs' (BIA) tribal recognition regulations is time-barred. At the hearing on the motions, counsel for plaintiffs conceded that plaintiffs had not applied for federal

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recognition of tribal status as provided in the acknowledgment regulations, but argued that the regulatory process is not the only mechanism for tribal recognition. I gave plaintiffs additional time to conduct discovery concerning the exclusivity of the tribal acknowledgment regulations. I ordered further briefing and again set the matter for hearing.

On November 18, 1991, after supplemental briefing had been filed, plaintiffs filed a motion to amend their complaint, pursuant to Fed. R. Civ. P. 15(a), seeking to add the Secretary of the Interior, the Treasurer-Tax Collector of Amador County and the Amador County Superior Court as defendants. Plaintiffs also seek to add claims against the individual non-federal defendants under the Indian Nonintercourse Act and the doctrine of aboriginal title enunciated in Cramer v. United States, 261 U.S. 219 (1923). The United States does not oppose plaintiffs' motion to amend; the individual non-federal defendants oppose the granting of the motion.

On November 19, 1991, the day after plaintiffs filed their motion to amend, the Third District Court of Appeal for the State of California issued a writ of prohibition directing the trial court to dismiss the state court apportionment action for lack of subject matter jurisdiction on the ground that 28 U.S.C. § 1360(b) precludes state courts from adjudicating the ownership or right to possession of property belonging to any Indian tribe that is held

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in trust by the United States.[3] Relying on Boisclair v. Superior Court, 51 Cal. 3d 1140 (1990), the Third District concluded that the state court complaint and answer "unequivocally raise, as essentially the sole dispute submitted to respondent court for resolution, the issue of whether the subject property is Indian trust land." Slip op. at 4.

II

STANDARDS

A. Summary Judgment

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970); Poller v. Columbia Broadcast System, 368 U.S. 464, 467

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[3] Section 1360(a) provides that California state courts shall have jurisdiction over,

> civil causes of action between Indians or to which Indians are parties which arise in [Indian country] to the same extent that [California] has jurisdiction over other civil causes of action, and those civil laws of [California] that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within [California].

28 U.S.C. § 1360(a).

However, section 1360(b) provides that state courts do not have jurisdiction to "adjudicate, in probate proceedings or otherwise, the ownership or right to possession of" any real property, or interest therein, "belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States." 28 U.S.C. § 1360(b).

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(1962); Jung v. FMC Corp., 755 F.2d 708, 710 (9th Cir. 1985); Loehr v. Ventura County Community College Dist., 743 F.2d 1310, 1313 (9th Cir. 1984).

Under summary judgment practice, the moving party

> [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Id. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." Id. at 323.

If the moving party meets its initial responsibility, the

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burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968); Ruffin v. County of Los Angeles, 607 F.2d 1276, 1280 (9th Cir. 1979), cert. denied, 455 U.S. 951 (1980).

In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. Rule 56(e); Matsushita, 475 U.S. at 586 n.11; First Nat'l Bank, 391 U.S. at 289; Strong v. France, 474 F.2d 747, 749 (9th Cir. 1973). The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, Anderson, 242 U.S. 248-49; Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to

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resolve the parties' differing versions of the truth at trial." First Nat'l Bank, 391 U.S. at 290; T.W. Elec. Serv., 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments); International Union of Bricklayers v. Martin Jaska, Inc., 752 F.2d 1401, 1405 (9th Cir. 1985).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Rule 56(c); Poller, 368 U.S. at 468; SEC v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th Cir. 1982). The evidence of the opposing party is to be believed, Anderson, 477 U.S. at 255, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, Matsushita, 475 U.S. at 587 (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) (per curiam)); Abramson v. University of Hawaii, 594 F.2d 202, 208 (9th Cir. 1979). Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987).

Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical

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doubt as to the material facts. . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (citation omitted).

B. Motion to Amend

Fed. R. Civ. P. 15(a) provides,

> [A] party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.

The Ninth Circuit recently provided guidance for district courts applying this rule.

Although Rule 15(a) should be interpreted with "extreme liberality, . . . leave to amend is not to be granted automatically." Jackson v. Bank of Hawaii, 902 F.2d 1385, 1387 (9th Cir. 1990). The court may deny the motion if amendment would prejudice the opposing party, produce an undue delay in the litigation, or result in futility for lack of merit. Id. (citing Foman v. Davis, 371 U.S. 178, 182 (1962)).

The burden of demonstrating undue delay, prejudice or futility sufficient to justify denial of a leave to amend is on the party opposing amendment. Kiser v. General Electric Corp., 831 F.2d 423, 428 (3d Cir. 1987). The court's "outright refusal to grant the leave without any justifying reason" is an abuse of discretion. Foman, 371 U.S. at 182.

Prejudice to the opposing party is the most important factor to consider in determining whether a party should be granted leave

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to amend. Jackson, 902 F.2d at 1387 (citing Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 330-31 (1971)). Prejudice may be found where additional discovery would be required because the new claims are based on different legal theories or where an amendment would permit the plaintiff to relitigate a portion of the action. Jackson, 902 F.2d at 1387-88.

Undue delay is determined in part by looking to whether the moving party knew or should have known the facts and theories raised by the amendment in the original pleading. Id. at 1388 (citing EEOC v. Boeing Co., 843 F.2d 1213, 1222 (9th Cir.), cert. denied, 488 U.S. 889 (1988)); Jordan v. Los Angeles County, 669 F.2d 1311, 1324 (9th Cir.), vacated on other grounds, 459 U.S. 810 (1982). However, delay alone is insufficient to support denial of leave to amend. Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990).

The test for futility "is identical to the one used when considering the sufficiency of a pleading challenged under Rule 12(b)(6)." Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988). Accordingly, "a proposed amendment is futile only if no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim or defense." Id.

III

ANALYSIS

In their original complaint, plaintiffs allege claims against the United States as follows: (1) mandamus, requiring the United

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States to recognize them as a tribe; (2) agency action in excess of jurisdiction; (3) violation of due process; (4) unlawful rulemaking; (5) denial of equal protection; (6) breach of fiduciary duty and trust; and (7) constructive trust. Plaintiffs allege claims against the individual defendants as follows: (1) constructive trust; (2) breach of fiduciary duty; and (3) quiet title. In their first amended complaint, plaintiffs reallege their claims against the United States and the individual non-federal defendants. In addition, plaintiffs add claims against the individual non-federal defendants for violation of the Indian Nonintercourse Act, 25 U.S.C. § 177, and the doctrine of aboriginal title enunciated in Cramer v. United States, 261 U.S. 219 (1923). Plaintiffs also allege a claim for declaratory relief against the Amador County Treasurer-Tax Collector that the 40-acre parcel is not subject to taxation, and a claim for declaratory and injunctive relief barring the Amador County Superior Court from exercising jurisdiction over the private defendants' partition action, in violation of 28 U.S.C. § 1360(b).

A. Federal Defendants' Motion for Summary Judgment or to Dismiss

Because the United States does not oppose the granting of the motion to amend, the motion is GRANTED as to plaintiffs' claims against the United States and the Secretary of the Interior. I turn now to analysis of the federal defendants' motion for summary judgment or to dismiss plaintiffs' amended complaint.

Until 1978, the means by which an Indian tribe received

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federal recognition was unstructured. Recognition could be shown by Congress or the executive branch creating a reservation for the group by a treaty, agreement, statute, executive order or valid administrative action and by the United States having had some continuing political relationship with the group, such as providing services through the Bureau of Indian Affairs. F. Cohen, Handbook of Federal Indian Law at 6 (1982). In 1978, the Secretary promulgated regulations describing "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe." 25 C.F.R. §§ 83.1-83.11. The authority for these acknowledgment regulations is found at 25 U.S.C. §§ 2 and 9.[4] Pursuant to these new regulations, the BIA promulgated a list of those tribes which were already federally-recognized and a second list of those tribes with a recognition petition on file with the BIA. The Ione Band of Miwok Indians was placed on the second list.

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[4] Section 2 provides,

> The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

25 U.S.C. § 2. Section 9 provides,

> The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of accounts of Indian affairs.

25 U.S.C. § 9.

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The Ione Band did not pursue the administrative federal recognition process. In their original and amended complaints, plaintiffs seek, among other things, an order compelling the United States to recognize the Ione Band. The United States moves for summary judgment on the ground that the United States has not waived its sovereign immunity from suit on plaintiffs' claims, and on the ground that plaintiffs' claims are time-barred.

1. **Waiver of Sovereign Immunity**

In their first claim, plaintiffs seek an order compelling the United States to recognize them as a tribe, and in their sixth and seventh claims, plaintiffs allege that the federal defendants' failure to recognize and protect them amounts to a breach of fiduciary duty and trust, and that the 40-acre parcel of land is held in trust for the tribe by the United States.

In the absence of an explicit waiver, claims against the United States are barred by sovereign immunity. North Side Lumber Co. v. Block, 753 F.2d 1482, 1484 (9th Cir.), cert. denied, 474 U.S. 931 (1985). Plaintiffs assert that the government has waived its sovereign immunity over these claims by virtue of the Administrative Procedure Act. See 5 U.S.C. § 702.[5] In order for

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[5] It appears that plaintiffs' Indian Nonintercourse Act, aboriginal title, and quiet title claims are directed only to the nonfederal defendants. The United States has not waived its sovereign immunity from suit on claims brought under the INA, Narragansett Tribe of Indians v. Southern Rhode Island Land Dev. Corp., 418 F. Supp. 798, 810 (D. R.I. 1976); Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899 (D. Mass. 1977), or quiet title actions involving trust or restricted Indian land, Newman v. United States, 504 F. Supp. 1176, 1178 (D. Ariz. 1981). And although plaintiffs might bring a federal common law claim under the doctrine of aboriginal title if an executive official or agency

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plaintiffs to take advantage of the APA waiver, however, there must be a "final agency action" that is ripe for judicial review. White Mountain Apache Tribe v. Hodel, 840 F.2d 675, 677 (9th Cir. 1988). Plaintiffs' failure to apply for recognition through the administrative process described in the acknowledgment regulations bars their claims because there is no final agency action yet ripe for review.

The D.C. Circuit's decision in James v. United States Dept. of Health and Human Services, 824 F.2d 1132 (D.C. Cir. 1987), is directly in point. In James[6], a faction of the Gay Head tribe sued the Department of the Interior seeking an order requiring the Secretary to add them to the Department's list of federally-recognized Indian tribes. Plaintiffs argued that it would be redundant for them to exhaust administrative remedies in an

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attempts to extinguish aboriginal title without congressional authorization, see United States v. Dann, 873 F.2d 1189, 1196 n.5 (9th Cir.), cert. denied, 493 U.S. 890 (1989), presumably the APA waiver of sovereign immunity and its requirements of finality and timeliness would govern plaintiffs' claims.

[6] Plaintiffs attempt to distinguish James on the ground that in James there were two competing groups of Gay Head Indians, one that had already been recognized, and plaintiffs, who had not. Plaintiffs point out that in the case before the court defendants specifically disavow that a Miwok tribe exists. Plaintiffs do not explain why this distinction is relevant.

Second, the plaintiffs in our case say that in James the documents which plaintiffs relied on to demonstrate recognition were scholarly, not the product of government action. And third, in James the documents were older, from the 19th century, while in our case the documents purportedly demonstrating federal recognition are from the 20th century. Neither distinction is relevant. As explained herein, the Bureau of Indian Affairs is best equipped to evaluate all the evidence concerning the plaintiffs' status, whether historical, scholarly, or produced by the agency itself, no matter how old or new.

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attempt to obtain federal recognition because the Gay Heads had previously been recognized by the Executive Branch. Id. at 1137. The D.C. Circuit ruled that the determination whether documents offered by plaintiffs in support of their claim of federal recognition are sufficient, and

> should be made in the first instance by the Department of the Interior since Congress has specifically authorized the Executive Branch to prescribe regulations concerning Indian affairs and relations. 25 U.S.C. §§ 2 & 9. The purpose of the regulatory scheme set up by the Secretary of the Interior is to determine which Indian groups exist as tribes. 25 C.F.R. § 83.2. That purpose would be frustrated if the Judicial Branch made initial determinations of whether groups have been recognized previously or whether conditions for recognition currently exist.
>
> In cases such as this, where Congress has delegated certain initial decisions to the Executive Branch, exhaustion of available administrative remedies is generally a prerequisite to obtaining judicial relief for an actual or threatened injury, provided that the purposes of the exhaustion doctrine are furthered.

Id. at 1137. The James court concluded that exhaustion of the Department's procedures for tribal recognition serves the four purposes of exhaustion, id. at 1137-38, and that exhaustion would not be futile, because there was no evidence that "denial of relief would result from a prior indication from that agency that it does not have jurisdiction over the matter or it has evidenced a strong position on the issue together with an unwillingness to reconsider," id. at 1139.

At the first hearing on defendants' motion for summary judgment or to dismiss, I gave plaintiffs additional time to

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conduct discovery to determine whether there are mechanisms, other than the regulations, by which plaintiffs could be "recognized" by the federal government. In its supplemental motion to dismiss, the United States acknowledges that Congress could by statute recognize plaintiffs as a tribe, see, e.g., 25 U.S.C. § 1300b-11, et seq.; id. § 1300f, et seq., but that Congress has not done so. This plaintiffs concede. Plaintiffs also concede that they are not a "treaty tribe." See United States v. Washington, 384 F. Supp. 312, 343 (W.D. Wash. 1974), aff'd, 520 F.2d 676 (9th Cir. 1975), cert. denied, 423 U.S. 1086 (1976), approved by Washington v. Washington State Commercial Passenger Fishing Vessel Assoc., 443 U.S. 658, 685 (1979).

The United States also demonstrates in its supplemental brief that the government's resolution of 12 tribal acknowledgment petitions "outside the regulatory process" and the "wholesale listing of Alaska native entities" in the 1988 Federal Register do not establish another mechanism for tribal recognition. See United States' further memo in support at 5-9 (Oct. 22, 1991). Plaintiffs also apparently concede that even if such a mechanism were demonstrated, they could not benefit from it.

Plaintiffs do argue that the government's settlement of litigation arising out of termination of the federal recognition status of many California tribes in the 1950's and 1960's somehow demonstrates another "non regulatory" recognition mechanism. Plaintiffs do not assert, however, that they are subject to the termination legislation or that they are beneficiaries of the

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settlement.[7]

Plaintiffs' argument appears to be that these non-regulatory mechanisms for tribal recognition demonstrate that "the Secretary may acknowledge tribal entities outside the regulatory process," plaintiffs' supplemental brief at 17:7-9 (Nov. 8, 1991), and that the court, therefore, should accept jurisdiction over plaintiffs' claims compelling such recognition. I cannot agree. Because plaintiffs cannot demonstrate that they are entitled to federal recognition by virtue of any of the above mechanisms, and because they have failed to exhaust administrative remedies by applying for recognition through the BIA's acknowledgment process, the United States' motion for summary judgment on these claims must be GRANTED.

2. <u>Statute of Limitations</u>

In the second through fifth claims in their amended complaint, plaintiffs allege that the federal acknowledgment regulations are facially invalid because they deny them equal protection and due process of law, constitute unlawful rulemaking, and that the Secretary acted in excess of his jurisdiction in placing the Ione Band on the second list. The United States moves for summary judgment on these claims on the ground that they are barred by the six-year statute of limitations applicable to claims against the United States, 28 U.S.C. § 2401.

Plaintiffs' facial challenge to the regulations accrued in

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[7] Indeed, if they had made such an argument, plaintiffs' remedy might lie with the district court in which that litigation was commenced and settled.

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1979, when the regulations became final and when the Ione Band of Miwok Indians was placed on the second list indicating that their application for recognition was pending. Plaintiffs had notice of the regulations by virtue of their publication in the Federal Register. Moreover, the injury suffered by plaintiffs is the same as that suffered by all unrecognized Indian tribes at the time the regulations were promulgated, and lack of standing has been held not to bar the running of the limitations period. See Shiny Rock Mining Corp. v. United States, 906 F.2d 1362 (9th Cir. 1990); Sierra Club v. Penfold, 857 F.2d 1307 (9th Cir. 1988). Thus plaintiffs' facial challenge to the regulations is barred by the six-year statute of limitations applicable to claims against the government, 28 U.S.C. § 2401.

Because plaintiffs have failed to exhaust administrative remedies by applying for federal recognition through the BIA's acknowledgment process, and because plaintiffs' remaining claims are time-barred, the federal defendants' motion for summary judgment on plaintiffs' amended complaint is GRANTED.

B. Individual Non-federal Defendants' Motion for Summary Judgment or to Dismiss

In their original complaint, plaintiffs allege claims against the individual non-federal defendants for constructive trust, breach of fiduciary duty, and quiet title. The individual nonfederal defendants filed a notice of joinder in the United States' motion for summary judgment or to dismiss plaintiffs' complaint, but offered no argument as to why summary judgment

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should be granted as to the claims directed only to them.

Plaintiffs move to amend their complaint to add claims against the individual non-federal defendants for violation of the Indian Nonintercourse Act, 25 U.S.C. § 177, and the doctrine of aboriginal title enunciated in Cramer v. United States, 261 U.S. 219 (1923). Although the individual non-federal defendants oppose the motion to amend, in their brief defendants make only conclusory allegations of delay, prejudice and futility. As I have explained, the burden of demonstrating undue delay, prejudice or futility sufficient to justify denial of leave to amend is on defendants. Defendants assert that they will be prejudiced by plaintiffs' delay in moving to amend the complaint. Delay alone is insufficient to justify denial of leave to amend. Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990). In addition, the individual non-federal defendants assert that the addition of claims under the Indian Nonintercourse Act and the doctrine of aboriginal title significantly alters the course of this litigation so that leave to amend should be denied. Although this case has been pending for some time, the parties have only conducted limited discovery on the question of alternative mechanisms for tribal recognition, and the court has only considered defendants' motions for summary judgment. No scheduling dates have been set, and no other discovery has taken place. And although plaintiffs' amended complaint alleges new claims, the relatively embryonic status of this litigation suggests that those additions are not unfairly prejudicial. Thus,

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the court cannot accept the individual non-federal defendants' assertion that they will be unfairly prejudiced by amendment.

The individual non-federal defendants have offered no argument to support their assertion that plaintiffs' claims under the Indian Nonintercourse Act and the doctrine of aboriginal title are futile, that is, that "no set of facts can be proved under the amendment to the pleadings that would constitute a valid and sufficient claim . . . . " Miller v. Rykoff-Sexton, Inc., 845 F.2d 209, 214 (9th Cir. 1988). Because it appears to the court that plaintiffs' amended complaint states a claim under those sections, as I now explain, plaintiffs' motion to amend their complaint to allege additional claims against the individual non-federal defendants is GRANTED.[8]

1. Indian Nonintercourse Act

Plaintiffs seek to amend their complaint to allege a claim against the individual non-federal defendants under the Indian Nonintercourse Act (INA), which provides,

> No purchase, grant, lease, or other conveyance of lands, or any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

25 U.S.C. § 177.

Plaintiffs allege that without the consent of the United

[8] Because the individual non-federal defendants failed to provide the court with any guidance concerning whether plaintiffs' INA and aboriginal title claims were sufficient, the court's conclusion that the complaint states a claim is not immune from a future motion practice.

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States, the state court partition action brought by the individual nonfederal defendants violates the INA. Amended complaint ¶¶ 57-58. Although that action has been dismissed by order of the Third District Court of Appeal, plaintiffs seek a declaratory judgment as to their rights should defendants refile the action.

To state a claim under the INA, plaintiffs must allege that: (1) they are or represent an Indian tribe within the meaning of the Act; (2) the parcels of land at issue are covered by the Act as tribal land; (3) the United States has never consented to the alienation of the tribal land; and (4) the trust relationship between the United States has never been terminated or abandoned. Cayuga Indian Nation of New York v. Cuomo, 667 F. Supp. 938, 941 (N.D.N.Y. 1987); Mashpee Tribe v. New Seabury Corp., 427 F. Supp. 899, 902 (D. Mass. 1977); see also United States v. Dann, 873 F.2d 1189, 1195 (9th Cir. 1989) (individual Indians do not have standing to contest a transfer of tribal lands under the INA); James v. Watt, 716 F.2d 71 (1st Cir. 1983) (same), cert. denied, 467 U.S. 1209 (1984).

It appears to the court that plaintiffs have alleged the necessary four elements to state a claim under the INA. Although the Ione Band of Miwok Indians has not been recognized through the federal acknowledgment process, courts considering the meaning of "tribe" under the INA have not limited their examination to the question whether the plaintiff tribe has been recognized through that process. See Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 580-81 (1st Cir.) (upholding district court order declining

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to stay INA action pending Department of the Interior's consideration of plaintiff's application for federal recognition under newly proposed acknowledgment regulations), cert. denied, 444 U.S. 866 (1979); Cayuga Indian Nation of New York v. Cuomo, 667 F. Supp. 938, 942-43 (N.D. N.Y. 1987) (even if court is not bound by federal government recognition of tribe in claim under INA, recognition should be given great weight in determination of tribal status). Cf. Joint Tribal Council of Passamaquoddy Tribe v. Morton, 528 F.2d 370, 376-79 (1st Cir. 1975) (rejecting argument that under INA a tribe is limited to a community of Indians which at some point the federal government has specifically recognized).

In Mashpee Tribe v. New Seabury Corp., 592 F.2d 575, 580-81 (1st Cir. 1979) (Mashpee I), the First Circuit upheld the district court's order refusing to stay plaintiff's INA action pending resolution of its application for federal recognition through the acknowledgment process. The court noted, however, that "in another case, once the Department has finally approved the regulations and developed special expertise through applying them, we might arrive at a different answer." Id. at 581. In Mashpee Tribe v. Secretary of the Interior, 820 F.2d 480, 483 (1st Cir. 1987), however, the court followed Mashpee I, and concluded that certain documents offered by plaintiffs did not establish them as a tribe within the meaning of the INA. Thus, the First Circuit did not defer to the regulatory process in determining whether plaintiffs were a tribe for purposes of a claim under the INA.

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In James v. Department of Health and Human Services, 824 F.2d 1132 (D.C. Cir. 1987), a case not brought under the INA, the D.C. Circuit distinguished Mashpee I, noting that "the time for a different conclusion has come; the Department has been implementing its regulations for eight years and, as noted, it employs experts in the fields of history, anthropology and genealogy, to aid in determining tribal recognition." Id. at 1138. Although the James court was not presented with the question whether deference to the Secretary of the Interior was justified with respect to a claim brought under the INA, together James and Mashpee I might stand for the proposition that in order to maintain a claim under the INA, plaintiff must be a "tribe" recognized by the Secretary of the Interior pursuant to the acknowledgment regulations.

The court is disinclined to decide this question in the present posture of the case. The individual non-federal defendants did not make this argument in opposing plaintiffs' motion to file an amended complaint, and plaintiffs have not been given the opportunity to respond to such an argument. The court will consider this issue when and if the individual non-federal defendants move to dismiss plaintiffs' claims.

2. **Aboriginal Rights**

Plaintiffs seek to amend their complaint to allege a claim against the individual non-federal defendants pursuant to the doctrine of aboriginal title enunciated in Cramer v. United States, 261 U.S. 219 (1923). Under that doctrine, an Indian tribe

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or individual Indians may assert aboriginal title to land deriving from their continued occupation of the land from "time immemorial." The Trade and Intercourse Acts, of which the Indian Nonintercourse Act is one, are "[a]mong the most important protections of aboriginal title." United States v. Dann, 873 F.2d 1189, 1195 (9th Cir. 1989). Plaintiffs are not limited, however, to seeking relief under the Indian Nonintercourse Act for unlawful conveyances of Indian land. See Oneida County v. Oneida Indian Nation of New York, 470 U.S. 226, 236-40 (1985) (Trade and Intercourse Acts do not preempt federal common law remedies).

In their amended complaint, plaintiffs allege that the "Ione Band of Miwok Indians" has occupied the "subject land" "since time immemorial and has been fully enclosed," and the individual non-federal defendants are "barred from interfering with the rights of the Ione Band of Miwok Indians to use and possess the subject land." Amended complaint ¶¶ 59-60. It is not clear whether plaintiffs assert a claim for individual aboriginal rights in the property, i.e., a Cramer claim, see United States v. Dann, 873 F.2d 1189, 1193 (9th Cir. 1989), or for tribal aboriginal rights, id. at 1194-95. Nonetheless, it appears to the court that plaintiffs have stated a claim, and that the court has jurisdiction over plaintiffs' claim under 28 U.S.C. § 1331 because it arises under the federal common law of the United States.

Plaintiffs' motion to amend their complaint to allege additional claims against the individual non-federal defendants is

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GRANTED.[9]

D. Plaintiffs' Claims Against the Treasurer-Tax Assessor and Superior Court of Amador County

Plaintiffs seek to amend their complaint to allege a claim for declaratory relief that the Amador County Treasurer-Tax Assessor may not assess property taxes on the 40-acre parcel because it is owned by a "sovereign Indian nation." Amended complaint ¶¶ 61-62.[10] Plaintiffs also seek to amend their complaint to allege a claim for a declaratory relief to the effect that the Superior Court for the State of California of Amador County is barred under 28 U.S.C. § 1360(b) from assuming jurisdiction over defendants' partition action. In essence, plaintiffs seek a declaration that the 40-acre parcel of land at issue in this case belongs to an Indian tribe or community, and is "held in trust by the United States or is subject to a restriction against alienation imposed by the United States." Id. The court would appear to have jurisdiction over plaintiffs' claims pursuant to 28 U.S.C. § 1331. Accordingly, plaintiffs' motion to amend their complaint to state claims for declaratory relief against the Treasurer-Tax Assessor and Superior Court of Amador County is

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[9] The court would appear to have supplemental jurisdiction, 28 U.S.C. § 1367, over plaintiffs' state law claims for constructive trust, breach of fiduciary duty, and quiet title.

[10] "[A]bsent cession of jurisdiction or other federal statutes permitting it," a state may not tax Indian reservation lands and reservation Indians. County of Yakima v. Yakima Nation, 116 L.Ed.2d 687, 697 (1992) (quoting Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973); see also McClanahan v. Arizona Tax Commission, 411 U.S. 164 (1973) (same).

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GRANTED.

IV

ORDER

In sum, IT IS HEREBY ORDERED as follows:

(1) Plaintiffs' motion to amend their complaint is GRANTED;

(2) The federal defendants' motion for summary judgment on plaintiffs' amended complaint is GRANTED;

(3) The individual non-federal defendants' motion for summary judgment or to dismiss plaintiffs' amended complaint is DENIED;

(4) Plaintiffs shall file an amended complaint consistent with the terms of this order no later than thirty (30) days from the effective date of this order; and

(5) A status conference is hereby SET in this case for June 1, 1992, at 2:30 p.m. The parties shall file status reports no later than seven (7) days before the date set for status.

IT IS SO ORDERED.

DATED: April 22, 1992.

LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

AO 72
(Rev 8/82)

EXHIBIT Z

FILED
MAY 31 1996
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

United States District Court

EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS,

Plaintiff,

v.

HAROLD E. BURRIS, et al.,

Defendants.

AND CONSOLIDATED ACTION

CIV S-90-0993-LKK-PAN

Findings and Recommendation re Dismissal

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In 1990, a group of ten persons calling themselves the Ione Band of Miwok Indians, including Nicholas Villa Sr. and Nicholas Villa, Jr. commenced this action claiming that about 40 acres in Amador County that the plaintiffs and defendants occupied is Indian Country. Amador County filed a separate action against all record title holders, including all the individual plaintiffs and defendants, for a declaration that certain real property in Amador County is not tribal land is subject to exercise of the County's police powers. The defendants in the original action, including Harold E. Burris, crossclaimed and counterclaimed to partition the land; they claimed that the land was private property owned by plaintiffs and defendants as tenants in common. All claims have been consolidated.

No progress has been made toward resolving the competing claims initially because the plaintiff Indians could not proceed as individuals but only as a tribe, then, when the tribe obtained federal recognition and the tribe was substituted as plaintiff, because there was no tribal government authorized to pursue the tribe's claims.

On March 11, 1996, Judge Karlton referred this matter to me for an evidentiary hearing to determine the existence and identity of a tribal government authorized to proceed upon behalf of the tribe. I made a pre-hearing order and reserved ten court days for the hearing. The various participants lodged lists of over 120 witnesses to be called. At this juncture, there were three more-or-less distinct groups vying for recognition as the tribal government: the Villa faction, the Hill faction and the Burris faction.

On April 16, 1996, the morning the hearing was scheduled to commence, all parties lodged a stipulation requesting that the hearing be continued for four months in order to permit the competing factions to form a permanent tribal roll and tribal government. I rejected the stipulation but after meeting with all parties throughout the day eventually continued the hearing on specific terms and conditions that I understood all parties explicitly agreed to and that, in any event, all parties implicitly agreed to by retiring instead of going forward with the hearing.

My conditions for continuing the hearing consisted of procedural rules for a Bureau of Indian Affairs sponsored effort to compile a tribal membership roll and form a government capable of acting for the tribe within four months. Attorneys representing the Villa faction of the tribe objected to my April 18 order setting forth the conditions for continuing the hearing upon the ground that they had not agreed to the specified terms. No other party then replied to that objection although now the other participants insist there was unanimous agreement.

On May 13 I vacated my April 18 order and required any putative plaintiff to show cause why this action should not be dismissed upon the ground that by the terms of their stipulation to continue the hearing, the putative plaintiffs had admitted there was no tribal roll or government. The time for response has now expired.

In the meanwhile, continuing attempts by the Bureau of Indian Affairs, Hill and Burris factions to form a tribal government appear to have been sabotaged by the Villa faction. See Attachment "A."[1]

The "Hill" faction does not oppose dismissal of all claims without prejudice.

The "Villa" faction contends that the tribe has an interim government, if not a permanent government, and resists dismissal in favor of judicial intervention to supervise proceedings to form a permanent government, which the "Villa" factions contends has run amok. The "Villa" faction does not identify the interim government that it claims exists nor suggest that such interim government was authorized to commence or maintain this action. All other putative plaintiffs contest the claims of the "Villa" faction.

Amador County does not oppose dismissal of the tribe's claims but contends that it would be unjust to dismiss the County's claims to establish its sovereignty over the property after such prolix and costly proceedings. Amador County overlooks that by dismissing the action for want of a plaintiff to assert the tribe's claims, Amador has in effect prevailed in establishing its sovereignty over the property.

The Burris faction contends that the Indians' claims should be dismissed but that the County's claims and the Burris' claims should not be. The Burris' claim is for partition of real property in Amador County and absent an Indian tribe authorized by tribal government to defend that claim the action does not belong in federal court. The Burrises will not be prejudiced because there is no tribal government authorized to resist its claims in state court.

The United States has not taken any position.

For all of the foregoing reasons, I recommend that this action be dismissed upon the ground that there is no tribal government authorized to initiate and conduct proceedings upon

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[1] Attachment "A" is a letter from Nicholas Villa, Jr., claiming the title of "traditional chief" of two entities new to the dispute: the "Ione Band of Miwok Indians of California" and the "Miwok Tribal Enterprise Corporation." The letter is addressed to the City of Ione Chief of Police and implicitly threatens violence beyond the means of Ione's police department to control if the City allows a BIA-sponsored meeting at an Ione town hall tomorrow.

behalf of an Indian tribe and without such participation there is no federal interest in the other parties' claims.

Dated: May 31, 1996.

Peter A. Nowinski
United States Magistrate Judge

FILED
AUG - 6 1996
CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS,

Plaintiff,

v.

HAROLD E. BURRIS, et al.,

Defendants.

_____/

AND CONSOLIDATED ACTIONS.

_____/

NO. CIV. S-90-993 LKK

O R D E R

On May 31, 1996 the assigned magistrate judge in the above-captioned matter recommended that this case be dismissed because plaintiff does not have an identifiable government capable of suing or being sued. The County defendants filed objections to these Findings and Recommendations on June 18, 1996. The Burris defendants filed objections on June 11, 1996.

Neither set of defendants challenge the magistrate judge's recommendation concerning dismissal of plaintiffs' claims.

Both sets of defendants, however, assert that dismissal of the counter-claims that have been filed in this action is inappropriate. The Burris defendants argue that without a specific ruling on the question of whether the land is Indian Country or Indian Trust Land, they will not be permitted to bring their claim for partition of the land in either state or federal court. Similarly, the County defendants contend that the decision to dismiss leaves open the question of whether the County has jurisdiction over the land -- a question which the County asserts will be without a forum to resolve upon dismissal of the matter at bar. The County stresses that it has patiently waited for years to have a determination concerning jurisdiction reached and should not now be prejudiced by the fact that the tribe has no government. The County thus argues that its claims concerning whether the land is Indian Country should be resolved in these proceedings.

It is not disputed by the defendants and counter-claimants that the plaintiff tribe is without a legitimate government and that therefore there is no individual with authority to act on its behalf.[1] See County's Objections to the Findings & Recommendations filed June 27, 1996 at 5. The County's counter-claim, however, is directed to the individuals who claim to have membership in the tribe. See Order Re: Motions to Consolidate filed herein January

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[1] Indeed, no counsel can be retained in the absence of a contract with the U.S. Government, on approval from the tribal government. See 25 U.S.C. § 81; 25 C.F.R. §§ 88.1, 89.1 and 89.7. Thus, in the absence of a ruling governmental body or individual, the tribe is not authorized to be represented in this suit.

21, 1994. The question then is whether or not a claim under the Declaratory Judgment Act can be maintained under these pleadings.[2]

Two elements must be satisfied for the court to enter a Declaratory Judgment. First, there must be an actual and live controversy over which the court has independent jurisdiction and for which the declaratory relief will serve as a remedy. See Fusco v. Rome Cable Corp., 859 F. Supp. 624 (N.D.N.Y. 1994); Cok v. Forte, 877 F. Supp. 797, 802 (D.R.I. 1995), affirmed, 69 F.3d 531 (1st Cir. 1995). Second, the court must determine whether, in its discretion, the Declaratory Judgment Act should be invoked. See Employers Reinsurance Corp. v. Karussos, 65 F.3d 796, 798 (9th Cir. 1995).

The County seeks a declaration that it may assert jurisdiction over land which some claim as Indian Country. This suffices to raise a federal question. See 18 U.S.C. § 1151. It is also clear from the years of litigation over this land, that there is a live controversy concerning the nature of the land. There exists, however, a real question as to whether any of the parties named as defendants to the counter-claim have standing to challenge the County's jurisdiction over the subject property. Standing is of course a question of Article III jurisdiction, and in its absence

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[2] The counter-claim brought by the County was in fact a complaint in a related case, originally denominated CIV-S-92-1652 LKK. The posture of the claim changed when the actions were consolidated.

this court cannot act.[3]

The record reflects that the Burris defendants do not challenge the County's right to assert jurisdiction over the land. While it is true that the Villa defendants, asserting that they are the tribal government, have claimed that the land is Indian Country the magistrate judge's conclusion that there is no tribal government is clearly correct. Thus, it is uncertain whether anyone other than the United States may represent the interests of the Tribe or hold property in the name of the tribe.[4]

Whatever the correct view is concerning whether this court has jurisdiction over the question of the underlying character of the land in issue under the present pleadings, it would appear that the court has jurisdiction to determine that the Villas are not the government of the tribe, and if it follows, that neither they nor anyone besides the United States presently has a basis for resisting the County's exercise of jurisdiction over the land until such time as a government is formed. I thus conclude that the

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[3] It may be that rather than a question of standing, the issue should be viewed as raising questions concerning whether suit is brought by the real party in interest. What consequences follow if that is the correct characterization has not been addressed by the parties.

[4] While it seems relatively clear that the United States government could challenge the jurisdiction of the County by asserting that the land is Indian Country, it has made no such representation, and to date has not been named as a defendant in the declaratory relief action.

first prong of the test for declaratory relief is satisfied.[5]

The discretionary prong gives the court some pause. Recently the Supreme Court reminded us that "district courts possess discretion in determining whether and when to entertain an action under the Declaratory Judgment Act, even when the suit satisfies subject matter jurisdictional prerequisites." Wilton v. Seven Falls Co., __ U.S. __, 132 L.Ed.2d 214,221 (1995)(referring to Brillhart v. Excess Ins. Co., 316 U.S. 491 (1942)). The status of the parties and the confusion concerning who has authority to speak on behalf of tribal interests all suggest caution in declaring anything about the land. On the other hand, given that it appears that there is no other forum in which this matter can be adjudicated, it may well be that the court should invoke its jurisdiction to render a judgment in this case.

From the above, it appears that this court has the jurisdiction to declare that there is no tribal government, and that under the Declaratory Judgment Act, this court should enter judgment declaring the power of the County to assume jurisdiction until challenged by either the United States or a recognized tribal government.

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[5] As to the Burris defendants' partition claim, there appears to be no basis for the court to entertain that which is inherently a state court cause of action. The court appreciates that these partied are trapped between two unaccepting fora. Nonetheless, if there is no jurisdiction, this court cannot maintain the action.

Accordingly, for all the reasons stated above, the court now ORDERS as follows:

1. The magistrate judge's recommendation of dismissal is ADOPTED insofar as it recommends dismissal of all of plaintiff's claims;

2. The counter-claim of the Burris defendants is also DISMISSED for want of jurisdiction;

3. The counter-claim of the County is MAINTAINED, and shall not be dismissed at this time; and

4. All parties are ordered to show cause in writing not later than twenty (20) days from the effective date of this order, why a declaratory judgment should not be entered noting the power of the County to exercise jurisdiction over the land in issue pending challenge by either the United States or a properly constituted and recognized tribal government.

IT IS SO ORDERED.

DATED: August 5, 1996.

LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

FILED
SEP - 4 1996
CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

IONE BAND OF MIWOK INDIANS,

Plaintiff,

v.

HAROLD E. BURRIS, et al.,

Defendants.

AND CONSOLIDATED ACTIONS.

NO. CIV. S-90-993 LKK

O R D E R

On August 6, 1996, this court issued an order directing all parties to show cause in writing within twenty (20) days, why the entire case save and except the County's cross-complaint for declaratory relief should not be dismissed and declaratory judgment entered in favor of the County of Amador. The two plaintiff factions filed responses to this order to show cause on August 26, 1996.

The response filed by the law firm of Peebles & Evans on behalf of the individuals which it represents, addresses the merits

of the Indian Country issue. These individuals argue that declaratory judgment cannot be entered in favor of Amador County because the land is Indian Country within the meaning of 18 U.S.C. § 1151. Such argument does not address the concern articulated in the August 6, 1996, order as to whether any party currently a defendant to the County's counter-claim has standing to assert that the land is Indian Country. In the August 6 order, the court suggested that the proper course was to declare that there is a presumption that land lying within a county is subject to County jurisdiction, and thus until the United States or a duly recognized tribal government properly challenged such jurisdiction the County was free to exercise its presumed authority. See Order filed herein August 6, 1996, at 5. The Peebles & Evans group baldly asserts that "[t]he law does not require the Tribe to have a recognized government in order to have a land base." Reply to Order to Show Cause filed August 26, 1996, at 9. This assertion, made without citation, is non-responsive to the question of who may properly present the question of whether the land in issue is Indian Country. Because it is nonresponsive, the reply filed by the Peebles & Evans group does not persuade the court to alter its August 6, 1996, determination concerning dismissal and entry of judgment.

The response filed by Jory, Peterson, Watkins & Smith, on behalf of the Nicolas Villa group, concerns this court's failure to address the possible conflict of interest problem with the continued representation of some members of the putative tribe by

Peebles & Evans. The document also complains of the inconsistencies and historic failures of the federal government in its dealings with Indians residing on the parcel at issue in this litigation. The Villa group's response, however, concludes that given the history of the process with the federal government and the conflict between the potential members of the tribe, "[t]here is no argument which can be presented at this time which will deter the Court's entry of the proposed Declaratory Judgment." Nicolas Villa Group's Response to Order filed August 6, 1996.

This court has not hitherto addressed the asserted conflict of interest because it appears irrelevant to the issue before the court. Neither Peebles & Evans nor Jory, Peterson, Watkins & Smith have been granted approval by the United States government under 25 U.S.C. § 81 to represent the Ione Band of Miwok Indians. Insofar as the Villa group challenges the propriety of the representation by Peebles & Evans of one faction of the tribe, the validity of its representation is also called into question. This court has treated both sets of counsel as representing individual groups of potential tribal members. Whatever conflict may exist, it does not appear to concern the issue tendered by the court's order to show cause. Put another way, whether Nicolas Villa's decision to leave one group and retain new counsel deprives the remaining individuals who appear to have been continuously represented by Peebles & Evans of their counsel is a complex issue which need not be resolved in order to address the issue before the court.

In sum, it appears that this court's August 6, 1996, order should be fully implemented. The claims of the plaintiffs in this case are DISMISSED and Declaratory Judgment is ENTERED in favor of the County of Amador consistent with the Order filed August 6, 1996. The Clerk is directed to CLOSE the case.

IT IS SO ORDERED.

DATED: August 28, 1996.

LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

FILED
SEP - 4 1996
CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY
DEPUTY CLERK

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JUDGMENT IN A CIVIL CASE

Ione Band of Miwok Indians

v. CASE NUMBER: CIV S-90-993 LKK

Harold E Burris, et al

XX -- **Decision by the Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF SEPTEMBER 4, 1995.

Jack L. Wagner,
Clerk of the Court

ENTERED: September 4, 1996

by: G Miyasato, Deputy Clerk

gm

United States District Court
for the
Eastern District of California
September 4, 1996

* * CERTIFICATE OF SERVICE * *

2:90-cv-00993

Ione Band of Miwok

v.

Villa

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on September 4, 1996, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

SJ/LKK

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CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

NICOLAS VILLA, JR. and THE IONE BAND OF MIWOK INDIANS, Plaintiffs, v. COUNTY OF AMADOR; OFFICE OF CODE ENFORCEMENT OF COUNTY OF AMADOR; LINDA VAN VLECK; and JIMMIE SIDES, Defendants.	CIV-S-97-0531 DFL JFM ORDER [illegible] the annexed [illegible] copy of [illegible] ATTEST [illegible] Clerk, U. S. [illegible] Eastern District of California By [signature] Deputy Clerk Dated FEB 2 8 2000

Plaintiffs Nicolas Villa, Jr. and the Ione Band of Miwok Indians move for a temporary restraining order under Federal Rule of Civil Procedure 65(b) to prevent defendants from coming onto tribal land, conducting building inspections, condemning property, evicting occupants, confiscating personal property, and removing children from their homes. The County has stated their intention to inspect tribal property on November 3, 1998. In support of their motion, plaintiffs argue that the County inspection violates

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this court's January 9, 1998 Order, which they contend limits the County's jurisdiction to providing police and fire protection on tribal property.

Plaintiffs misread the January 9 Order. During the January 9 hearing, the court ordered that the County provide police and fire protection on tribal property until February 20, 1998. (See Transcript of January 9, 1998 Hearing at 37:24-38:2.) The court made no order, however, that limited the County's jurisdiction to providing only those services, and nothing in the January 9 Order should be construed as limiting the County's jurisdiction to take appropriate regulatory action on tribal property. That Order does not support the issuance of a temporary restraining order here.

Moreover, the question of whether the county has jurisdiction over tribal property in this case has already been settled. By order filed August 5, 1996 in a previous action involving the parties to this motion, Ione Band of Miwok Indians v. Burris, No. CIV-S-90-0993 LKK, Judge Lawrence K. Karlton of this District held that, because the Ione Band has no recognized tribal government, no one "besides the United States presently has a basis for resisting [Amador] County's exercise of jurisdiction over the land until such time as a government is formed." (August 5, 1996 Order at 4:15-17.) The August 5 Order specifically held that Villa and his supporters did not constitute the government of the Ione Band. (See id. at 4:2-9.)

Under the August 5 Order, Judge Karlton "enter[ed] judgment

declaring the power of the County to assume jurisdiction until challenged by either the United States or a recognized tribal government." (August 5, 1996 Order at 5:17-20.) Plaintiffs have not introduced any evidence showing that they are the recognized government of the Ione Band. They are thus barred from contesting the County's jurisdiction over tribal land under the August 5 Order. Accordingly, the motion for a temporary restraining order is DENIED.

IT IS SO ORDERED.

Dated: 3 November 1998.

DAVID F. LEVI
United States District Judge