

Case No. B222391

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In Re The Matter of the

MARTHA JAIMES; MICHAEL CORDERO; FRANCES ROSE
URIBE; and JANET DARLENE GARCIA

Plaintiffs and Respondents

vs.

AMERICAN INDIAN HEALTH & SERVICES;
MARTIN YOUNG; RUSSELL GRANGER; LINDA MURRAY AND
DOES 1 THROUGH 25, INCLUSIVE.

Defendants and Appellants

Appeal from County of Santa Barbara Superior Court

Honorable James W. Brown

Case No.: 1266707

RESPONDENTS' OPENING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, Rule 8.208(e)(3), Appellants represent that they know of no entity or person that must be listed per Rules 8.208(e)(1) or Rule 8.208(e)(2).

Dated: January 27, 2011

LAW OFFICE OF ERIC A. WOOSLEY

By:



ERIC A. WOOSLEY
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I. INTRODUCTION

Respondents MARTHA JAIMES, MICHAEL CORDERO, FRANCES ROSE URIBE, and JANET DARLENE GARCIA were all directors on appellant American Indian Health & Services, Inc.'s ("AIHS") board of directors. AIHS is a California non-profit organization. All respondents are Coastal Band Chumash.

AIHS provides health care for Indians who reside in urban locations under the Indian Health Care Improvement Act ("IHCA"). AIHS' service area is southern Santa Barbara County, from Carpinteria to Gaviota. Members of the Coastal Band of the Chumash Nation ("Coastal Band Chumash"), a non-federally recognized Indian tribe, received free health care services from AIHS since its inception in the mid-1990's until September 2006. The overwhelming majority of AIHS free health services were received by Coastal Band members.

In September 2006, the executive director of AIHS, Alfred Granados, sent letters to each of the respondents, as well as to the Coastal Band patients of AIHS, claiming that federal documentation was now required for AIHS to determine eligibility for the receipt of free medical services at AIHS as a documented Indian. Granados issued another letter to the respondents claiming the same federal documentation was now required for them to serve on AIHS' board of directors. In both letters, Granados claimed that the documentation was required by 25 U.S.C. § 1603. The matter was set for discussion at the next board meeting. Neither Granados nor Young attended that meeting. Instead, the respondents board positions were vacated by appellant Martin Young, and the Coastal Band patients were undocumented as Indians eligible for free services by appellant AIHS.

At issue was AIHS' interpretation of its bylaws, which called for a

board of directors composed of 51% urban Indians as defined by 25 U.S.C. § 1603(f). Urban Indians are entitled to receive free health care at AIHS pursuant to section 1603. However, section 1603 is absolutely silent on the documentation required to establish urban Indian status. Rather, the documentation required to establish urban Indian status is defined by the AIHS bylaws, and the AIHS contract with Indian Health Services.

Respondents provided all necessary documentation of their urban Indian status to AIHS when they were elected to the board in May 2005. The documentation requirements of the AIHS bylaws did not change between the 2005 bylaws, the 2006 bylaws, or the 2008 bylaws. 25 U.S.C. § 1603, although amended after the trial in this matter, had not changed during the any relevant time, and the amendment did not change the substantive law with respect to this appeal. The criteria for receipt of free health care as an urban Indian, and to qualify as part of the 51% urban Indian controlled board at AIHS, are one and the same. These facts are in dispute.

Appellants' now concede that the respondents are Indians eligible for services at AIHS. (AOB, p. 40.) Indeed, during the pendency of the underlying case, AIHS began to provide free medical services Coastal Band members. However, the appellants continue to maintain the fiction that criteria for receipt of services is separate from the criteria for the board of directors as part of the 51% urban Indian majority. In addition the various iterations of the AIHS bylaws introduced at trial, and the 2009 AIHS contract all specifically state that the criteria for receipt of free health care as an urban Indian, and to criteria for the board as part of the 51% urban Indian controlled board at AIHS are one and the same. These facts are in dispute.

This matter went to trial in June 2009 on respondents' claim for declaratory relief. The trial court ruled that the respondents were Indians by virtue of their membership in the Coastal band, that the Coastal Band is recognized now by the State of California, that respondents were Indians because each was an Indian of California, that respondents Cordero, Jaimes, and Uribe were urban Indians qualified to sit on the board of AIHS, that respondent Garcia was an Indian qualified to sit on the board of AIHS, that each of the respondents were improperly removed from the board, and that each of the respondents be reappointed to fulfill the terms of their board tenure, with access to the necessary records to fulfill their board duties.

The appeal raises four issues: 1) whether the trial court erred in determining the State of California currently recognizes the Coastal Band; 2) whether the trial court erred in determining the respondents are urban Indians within the meaning of 25 U.S.C. § 1603, despite appellants concession that they are entitled to free health care at AIHS, and are therefore *de facto* urban Indians; 3) whether the order reappointing the respondents to the board was in error; and 4) and whether the order that certain amendments to the 2008 AIHS bylaws were unlawful was in error.

There was no abuse of discretion with respect to the court's ruling on issues 1, 3, and 4. Issue 2 presents a mixed question of law and fact, in particular with respect to the documentation required by the AIHS bylaws to support the AIHS' determination of urban Indian status pursuant to 25 U.S.C. § 1603. The substantial evidence supports the trial court's ruling on this issue as well. Accordingly, the judgment below must be affirmed in its entirety.

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II. STATEMENT OF FACTS

A. Background Facts

1. The 2005 Elections to the AIHS Board of Directors

In early 2005, Indian Health Services (“IHS”) conducted a program review of AIHS, and determined that “[i]n order to comply with the terms of the contract or before consideration may be made for a contract renewal; the organization must be an urban Indian controlled board of directors (at least 51% American Indian/Alaska Native) from the urban Indian community being served.” (AA 275.) There had been significant turmoil on the board, directors came and went, and at one point there was only one board member. (RT 310:14-17.) To that end, IHS instructed AIHS to “[p]repare an immediate plan of action to meet the requirement of a community based urban Indian controlled board.” (AA 276.) IHS desired a minimum of four directors, preferred nine directors, and indicated that in order to receive funding for the coming year, AIHS was required to hold an election for the board of directors involving the community being served. (RT 310:18-25.) The vast majority of the urban Indian community served by AIHS is the Coastal Band of the Chumash Nation. (RT 298:18-28; 299:1.)

Richard Anderson was the fiscal officer for AIHS during the time the elections were held. (RT 307:12-22.) Anderson was responsible for coordinating the board elections with Indian Health Services. Among his responsibilities was to determine what the criteria would be for the election and what the requirements would be. (RT 309:20-28; 310:1-9.) The election was advertised in the local newspaper, in Coastal Voices, the AIHS newsletter, and by a letter sent to the Indian community served by AIHS. (RT 311:5-21; 312:10-19.)

The criteria for the election was that a candidate or a voter was eligible based upon the California Judgment Roll¹ and/or a tribal affiliation card, and specifically a Coastal Band card was considered appropriate.² (RT 312:3-9.) Anderson worked with Arvada Nelson from IHS to determine this criteria, and Ms. Nelson was present at the election. (RT 310:2-9; 312:20-24.) At the election, Anderson and the AIHS attorney, Lindsey Naas, confirmed that people seeking to vote or run for the board were on the California Judgment Roll.³ (RT 312: 25-28.) Anderson confirmed Coastal Band cards with a photo identification at the election. (RT 314:18-24.) When it came time for nominations, Anderson verified that those persons nominated had been validated. (RT 315:4-7.) Anderson obtained all of the appropriate documentation from everybody that was elected to the board of directors. (RT 315:13-16.)

Respondent Michael Cordero participated in the May 2005 election, and was elected to the AIHS board of directors at that election. (RT 72:13-28; 73:1-18; 74:1.) Cordero is a member of the Coastal Band who resides in Carpinteria, and had previously served on the AIHS board of directors in the mid-1990s. (RT 55:14-15, 56:3-6, 58:23-25.) Cordero's board

1

Appellants' expert, Dennis Whittlesey testified that inclusion on the judgment roll is conclusive as to an individual tracing their lineage back to an Indian living in 1852. (RT 379:1-13.)

2

In 2005, Coastal Band members were receiving free primary care at AIHS, and the only documentation required to receive those services was the presentation of the Coastal Band card. (RT 316:6:20.)

3

AIHS maintains a copy of the California Judgment Roll for purposes of determining Indian status. (RA 190-220; RT 313:1-28; 314: 1-2.)

application identified him as a member of the Coastal Band, and identified his service in the Indian community, as well as his prior service on the AIHS board. (RT 76:5-27; RA 165-166.) That application, as well as his personal genealogy and Coastal Band card were submitted to AIHS. (RT 68:25-28, 77:20-22; RA 159-163, RA 169.)

Respondent Martha Jaimes also participated in the May 2005 election, filled out a application, made a speech, and was elected by the community. (RT 135:19-28; 136:1-8.) She is a retired nurse who has lived in the City of Santa Barbara for more than forty years. (RT 135:1-14.) Jaimes filled out a board application and included her documentation, which consisted of her Coastal Band card. (RT 137:15-28; 138:1-27; RA 170-171.) Jaimes executed an agreement to serve on the board, and was later asked to sign another form because the original was lost. She was not asked to provide any additional documentation during the IHS program review in mid 2006. (RT 145:24-28, 146:1-13.)

At the May 2005 elections, Respondent Frances Rose Uribe was nominated and elected to the AIHS board. (RT 194:26-28; 195:1-13.) She has lived in City of Santa Barbara for forty years, and she works as a day care provider. (RT 192:7-16.) Uribe is a member of the Coastal Band, serving the group as its elder representative and genealogist. (RT 193:4-5; 196:6-8.) In order to be elected as an Indian, Uribe provided her Coastal Band card to AIHS, and filled out paperwork after the election. (RT 195:14-17.) Uribe is also on the California Judgment Roll. (RT 196:6-10; RA 218.)

Respondent Janet Garcia was on the AIHS board of directors at the time of the elections. (RT 257:17-25.) Garcia was not part of the 51% urban Indian majority on the AIHS board of directors during her time there,

because she lives in Lompoc, outside of the AIHS service area, does not qualify as “urban” with respect to the urban Indian criteria. (RT 234:9-25.) Garcia provided her documentation of tribal affiliation to the AIHS board of directors when she was appointed, in the form of her tribal enrollment card and she is listed on the California Judgment Roll. (RT 253:16-28; RA 202.)

2. The 2005 AIHS Bylaws

Ahead of the 2005 elections, the AIHS bylaws were amended to create a voting class in the community, and to define the documentation required to qualify as an urban Indian within the meaning of 25 U.S.C. § 1603(f), for the purpose of serving as part of an urban Indian majority board of directors. (AA 386-389.)

The voting class was defined as:

documented ‘urban Indians’ as defined in 25 U.S.C. § 1603(f) over eighteen (18) years of age residing in the Corporation’s service area

...

(b) the following documentation will be deemed to satisfy the documentation of urban Indian status:

(i) Documentation from the Department of the Interior Bureau of Indian Affairs, i.e. Certificate of Degree of Indian Blood;

(ii) Documentation of membership from a federally-recognized Indian tribe;

(iii) Documentation of membership from a state-recognized tribe;

(iv) proof of descendency from individual on the California Judgment Rolls; or

(v) other documentation of status within the meaning of 25 U.S.C. § 1603(c) (AA 386-387.)

The documentation accepted by AIHS at the election included descendency from the California Judgment Rolls, and Coastal Band cards with photo identification. (RT 312: 25-28; RT 314:18-24.)

The 2005 bylaws established that “[m]embership on the Board of Directors shall be open to any qualified community member duly elected to serve on the Board of Directors, provided however, that no less than 51% of the members shall be documented “urban Indians”, as defined in 25 U.S.C. § 1603(f).” (AA 388-389.) Respondents Cordero, Jaimes, and Uribe were documented by AIHS as urban Indians at the May 2005 election. (RT 315:13-16.)

The 2005 bylaws also provided that Respondent Garcia’s (née Hall)⁴ term held over for one year until May 31, 2006. (AA 389.)

Involuntary termination from the AIHS board required a 2/3 vote of the directors for cause, defined as three unexcused absences, dishonesty or offensiveness to the general public, conviction of a felony while serving as a member of the board of directors, embezzlement, fraud or misuse of corporate funds, falsely accepting gratuities, misrepresenting the Corporation, or conduct which is determined to be detrimental to the welfare, standing or best interest of the Corporation. (AA 395-396.) When involuntary termination from the board was contemplated, the 2005 bylaws required fifteen days written notice prior to the vote of the board on the termination, and the opportunity to be heard, within five days after termination. (AA 396.)

Appellant Martin Young was appointed to the AIHS Board in

4

Respondent Garcia’s maiden name was Hall, and her name appears on the Judgment Roll at page 13. (RT 331:5-6; 15-18; RA 202.)

January 2006. (RT 440:9-12.) These are the bylaws in effect when respondents Cordero, Jaimes, and Uribe, and appellant Young, were elected or appointed to the board.

3. The 2006 AIHS Bylaws

The board of directors again amended the bylaws on April 25, 2006. (AA 409.) The 2006 amendments made no change to the composition of the voting class, no change to the composition or qualifications of the board members, and the involuntary termination provisions, and attendant notice requirements are also unchanged. (AA 414-415, 417, 425.)

The 2006 amendments did change the term of office for board members to four years, beginning June 1, and continuing to May 31 of the year in which the Director's term expires. (AA 417.) Only respondent Garcia, whose prior term expired on May 31, 2006, was affected by this change. These bylaws were in effect with respect only to respondent Garcia.

4. The AIHS Board Begins to Have Problems with Executive Director Alfred Granados in Summer 2006

By summer 2006, the board was having problems with the manner in which its Executive Director, Alfred Granados, was running AIHS. The problems with Granados included a high turnover in staff, budget items presented by Granados that were constantly in the red, and that he was cutting funding in programs serving the Native American community. (RT 83:24-28; 84:1-19.) Further, Granados had cancelled several programs, including the mental health program, the elders program, as well as cultural gatherings where health needs assessments were held, without informing the board. (RT 85:20-28, 86:1-7; 199:9-28; 200:1-16)

Granados' practice of doing things first, and then seeking board

approval after the fact became a major point of contention in the summer of 2006. (RT 186:18-20; 270:1-3.) Granados' contract was extended after the fact: it has already been signed by the board chair, but without presentation to the full board, and without board approval until well after it went into effect. (RT 122:8-18.) Granados hired consultants, the Dizons, and entered into contracts with them without board approval. (RT 123:22-24; RT 186:2-17.) When the board questioned Granados about the Dizons' contracts, they did not get a satisfactory answer, and before the board could act on the issue, Granados stopped coming to meetings and stopped communicating with the board. (RT 124:16-28; 125:1-4.)

Granados was giving the board the run around with respect to questions concerning finances. (RT 146:22-28; 147:1.) And when the board questioned Granados about renting offices with no one in them, he accused the board of micro-management. (RT 197:1-15.)

On July 22, 2006, the AIHS board held a strategic long-range plan meeting, to discuss keeping the clinic on sound financial footing, evaluating programs based on the health needs of the clients, and maintaining cultural activities to serve clients' health needs among other things. (RT 88:11-28; 89:1-8; AA 296-298.) Granados was not invited to the meeting. During the meeting, the respondent board members realized that they were all feeling uneasy about the way Granados was evading their questions. They decided to tour the facility to determine for themselves what Granados was talking about in his presentations to the board. (RT:147:15-28; 148: 1-23.) Granados reacted poorly to the respondent board members' walkthrough, became irate, and asserted that the walkthrough was inappropriate. (RT 148:28, 149:1-10.)

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5. Granados Responds to the Board's Exercise of Oversight by Imposing Exclusive Eligibility Requirements Demanding Federal Documentation for Receipt of Free Health Care Services and to Serve on the Board of Directors

At the July 2006 board meeting, shortly after the respondent board members had attended long range meeting, and conducted their walk-through, Granados suggested charging Coastal Band patients a co-pay to use the clinic: (RT 108:24-28; 109:1-8.) The board responded for asking for more information about Granados' proposal to charge Indians for services. (Ibid.)

Granados responded on August 19, 2006, with an Executive Director report, included as part of the board packets prepared in advance of the next board meeting, asserting that, because of Medi-Cal and Medicare reimbursements, the following legal documentation was required to receive free or discounted services from AIHS:

- Certification as a documented member of a Federally-Recognized Tribe
- Possesses a Certified Degree of Indian Blood (CDIB) from the Bureau of Indian Affairs (BIA)
- Listed on the California Judgment Rolls with Certification from BIA
- Be a descendant of any of the above (limited) to two (2) generations (AA 299 RT 91:2-5.)

Granados also asserted that “[p]ursuant to his authority as Executive Director, American Indian Health & Services will require such documentation before any discussion of Free/Discounted Fee.” (AA 299.) Granados did not possess such authority and the board never granted Granados authority to act in the manner represented in his August 2006 report. (RT 151:13-17; AA 299.)

The board was shocked, as his proposal raised concerns with the

board about excluding people who were not a member of a federally recognized tribe, such as the Coastal Band. (RT 91:15-17.) The largest group of Indians served by AIHS were members of the Coastal Band. (RT 142:19-28; RT 237:12-16; RT 328:19-23.) Up to this time, AIHS accepted Coastal Band cards as documentation for free health services, as well as inclusion on the California Judgment Roll, without additional certification. (RT 330:3-6 RT 326:18-26.)

Board discussion of the issue followed about whether this information was needed. No requirements were ever found that these criteria needed to be met. (RT 92:12-20.) The issue was to be discussed at the September 2006 board meeting, but Granados did not attend and would not otherwise respond to the respondent board members. (RT 93:3-11.) The board was further puzzled because it was never informed by IHS that it was out of compliance with documentation requirements, nor was loss of funding threatened because of noncompliance with the documentation requirements. (RT 129:25-28, 130:1-7.)

Unbeknownst to the respondent board members, Granados had been trying to charge Coastal Band members for services since he started his employment at AIHS in early 2005. (RT 308:4-10.) Richard Anderson met with Granados frequently, if not daily, to discuss business operations of the agency as well as other administrative matters. (RT 308:8-13.) Immediately after Granados came on board in 2005, he discussed charging Coastal Band members for health services. (RT 308:14-18.) Anderson informed him that, because AIHS received federal money it was required that it treat Indians in the Santa Barbara area for free and not as if they were any other group. Granados disagreed with that position. (RT 309:12-19.)

Granados expressed his dislike for the Coastal Band Chumash in his

discussions with Anderson. (RT 316:26-28; 317:3.) On multiple occasions, Granados told Anderson that felt the Coastal Band members were not real Indians, that they were not entitled to free services at AIHS, and that they were ignorant and stupid. (RT 317:5-14.)

Also unknown to the respondents at this time was that Granados had ordered an audit, conducted by Margie Lopez, an AIHS employee, on the board members concerning their documentation, including a review of the board members files, their medical charts, and determined the board members did not have the proper documentation pursuant to Granados' new requirements. (RT 431:17-26; RT 433:1-11.) AIHS also went through the patient files at AIHS, and undocumented the AIHS' Coastal Band patients. (RT 333:10-15.) At this time AIHS, at the direction of Granados, no longer considered Coastal Band members to be documented Indians. (RT 413:21-28; 525:1-8.)

Granados afterwards refused to respond to the board's meeting requests, and refused to appear at the next board meeting. (RT 92:28; 93:1-13.)

6. Granados and Young Vacate the Board Positions Concurrently with the September 2006 Board Meeting

Granados sent letters to each of the board members informing them that he determined their documentation was insufficient, and that they needed to provide additional documentation within ten days of those September 5, 2006 letters. (AA 301-302.)

The board member verification now required was:

- Certification as a documented member of a Federally-Recognized Tribe
- Possesses a Certified Degree of Indian Blood (CDIB) from the Bureau of Indian Affairs (BIA)

- Listed on the California Judgment Rolls with Certification from BIA
- Be a descendant of any of the above (limited) to two (2) generations (AA 301-303.)

Granados claimed these forms of verification were necessary to satisfy 25 U.S.C. § 1603(c). (AA 301-303.) Contrary to the representation in the letter, Granados had not requested verification from the board. (RT 154:2-15.) Prior to the letter being sent, the board had not discussed the requirements with Granados. (RT 203:7-13.) These facts are in dispute.

Two days later, Granados sent a similar letter addressed to AIHS clients. (RA 187.) The September 7, 2006 letter repeats the verification requirements verbatim, and includes that directive that AIHS “need[s] to verify and document your eligibility for services before your next visit.” (RA 187.) The board did not approve Granados sending this letter prior to September 7, 2006. (RT 203:2-6; RA 164.)

After receiving the September 5, 2006 letter from Granados, the respondent board members sought to speak with Granados and determine how this purported change in the requirements occurred, and scheduled a Board meeting at AIHS, followed by another meeting at AIHS shortly thereafter. The next scheduled board meeting after the September 5, 2006 letter was the 25th of September. However, Granados had demanded documentation before the next board meeting. (RT 154:21-28; 155:1-6; AA 301-302.) Martin Young was not present at the September 25, 2006 Board meeting. Neither was Granados. The Board agenda for that meeting including discussing with Granados the eligibility requirements. When Granados did not show, the respondents attempted to contact his cell phone, but could not reach him. (RT 95:19-28; 96:10-25;. 160:19-28; 161:1-16.)

On September 25, 2006, Granados sent letters to Cordero, Jaimes, Uribe, and Garcia vacating their board positions immediately. (AA 304-306.) The sole grounds listed for their involuntary termination was that they had not provided the federal verification that Granados had demanded. (Ibid.) Yet, the board members had all provided the necessary documentation when they were elected to the board. (RT 315:13-16.)

The Board attempted to meet with Granados a few days later, but he refused. (RT 162:3-20.) That was supposed to be another board meeting at AIHS, but when Uribe arrived, the meeting had been cancelled, and the community, who had also received Granados' letter, was expected at the meeting. Uribe refused to leave while waiting for the community. AIHS called the police, and she was threatened with arrest. (RT 206:4-28; RT: 207:1-28; RT 208:1-5.) Afterwards, when the respondents went to the clinic to speak to Granados, the doors to the administration office were locked, and nobody would open it. (RT 101:17-28, RT 208:6-19.)

Attached to Granados' September 25, 2006 letter was a memo of the same date, signed by Martin Young. (AA 303.) By that memo, Young claimed to be the sole qualified board member, vacated the respondents' board positions, and directed Granados to notify the respondents that their positions had been vacated. (AA 303.) Granados had gone to Young's house, presented the memo to Young and told him he had to sign it, and told him that the other Board members needed to be relieved of their positions in order for the clinic to survive. (RT 159:26-28; 160:1-13, 444:2-10, 459:17-28.) Prior to signing the letter, Young had no discussion with Granados about removing the other Board members. (RT 462:104.) Young signed the memo vacating the Board positions, and returned it to Granados to send. (RT 441:12-28; 442:1-9.)

Young admitted that when he vacated the board positions, AIHS was no longer in compliance with its bylaws. (RT 443:5-8.) Young further admitted that because he lives in Ojai, outside of the AIHS service area, and does not meet the definition of urban for the purpose of the 51% Board majority. (RT 449:13-28; 450:1.) Young also admitted that the respondents did not have to be federally recognized under the bylaws in existence at the time they were vacated. (RT 498:11-13.) At the time the Board positions were vacated, no new members were on the board. (RT 469:25-28; 470: 1.) His action of vacating the Board positions placed the Board out of compliance with the bylaws and AIHS requirements. (RT 450:2-6.)

7. Members of the Coastal Band are Denied Services at AIHS

Several Coastal Band members were denied service after September 2006. (RT 169:12-22.) John Morales⁵ is a member of the Coastal Band, and was the community health representative (“CHR”) at AIHS from 1996 to October 2006. (RT 325:4-17.) His duties included working with the Indian community, making home visits, providing transportation, health education, HIV counseling and phlebotomy for the HIV program, and flowed patients in the clinic and did phlebotomy for the clinic. (RT 325:18-25.) Home visits included providing the care that was established with the doctor, transportation of patients to the clinic from their home, and to other doctor appointments. The transportation program was IHS funded, and only documented Indians were served by that program. (RT 326:3-17.) CHR duties also included documenting patients as Indians, largely using the

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John Morales was a plaintiff in the underlying manner. He had asserted several FEHA causes of action based on his October 2006 discharge from AIHS. Those claims settled before the trial.

California Judgment Roll at AIHS. (RT 326:18-26.)

Between 1996 and October 2006, the largest Indian group served by AIHS was the Coastal Band. (RT 328:19-23.) During the time Morales was the CHR, AIHS accepted Coastal Band cards as documentation for free health services. (RT 330:3-6.) Morales received his health care from the clinic for free, based on his documentation as an Indian, both on the California Judgment roll, as well as by virtue of his Coastal Band card. (RT 329:18-28; 330:1-2.)

Granados' September 2006 eligibility letter to AIHS clients eliminated virtually all of AIHS' Indian clients. (RT 332:15-19; RA 190.)

Joanne Garcia worked at AIHS as its diabetes coordinator between 2003 and 2007. (RT 410:10-21.) AIHS had a grant from IHS to provide a diabetes program for documented Native Americans only. (RT 410:25-28; 411:11-14.) Native Americans who participated in the program were tracked on a database at AIHS, and reports and statistics were provided to IHS. (RT 411:2-10; 15-24.) Joanne Garcia estimated that eighty-five to ninety percent of the people on the AIHS diabetes registry were members of the Coastal Band. (RT 412:9-25; 413:1-4.) In the Fall of 2006, AIHS, at the direction of Granados, no longer considered Coastal Band members to be documented Indians for the diabetes program. (RT 413:21-28; 525:1-8.) Prior to Fall of 2006, Coastal Band members were considered Indians, and were reported as Indians to IHS for the diabetes grant. (RT 414:18-27.) An AIHS employee went into the computer registry and changed Coastal Band members status, resulting in the weekly diabetes program declining from 40 participants to 5 or 6 participants. (RT 415:2-5.)

Respondents Jaimes and Cordero, as well as Cordero's children, received services at AIHS prior to September 2006. (RT 83:1-14, 152:18-

25.) Uribe's granddaughters, who are Coastal Band members, were denied services at AIHS, even though they were on MediCal. (RT 209:18-28; 210:1-12.) Scott Black, the current executive director of AIHS, admitted that AIHS lost several Native American clients because it had undocumented them. (RT 549:6-18.) This situation continued until several months after the underlying lawsuit was initiated.

8. The Subsequent Board Ratifies Granados' Actions and Rewards Him

Young subsequently appointed Russell Granger and Linda Murray to the board of directors. (RT 445:3-8.) Granados continued as the executive director. Young knew that AIHS stopped serving Coastal Band members, and discussed this with the new board members. (RT 450:7-17-23.) In November 2007, AIHS sent out another letter to its clients, reiterating the federal documentation requirements imposed by Granados. (RA 188.)

Additionally, Young gave Granados a \$20,000 bonus, signed off on a 10% raise for Granados, as well as \$750/month to rent an RV space, each of these acts occurring after the board positions were terminated. (RT 472:17-28; 473:1-7 476:3-10.)

9. May 2008 Amendments to the AIHS Bylaws

The instant lawsuit was initiated on March 14, 2008. (AA 1-22.) Shortly thereafter, on May 27, 2008, AIHS amended its bylaws. (AA 438-452.) Those bylaws amendments are significant for several reasons: 1) in Article 2, Section 1, it identifies the purpose of AIHS is to provide "health care for eligible urban Indians as defined under the Indian Health Care Improvement Act, 25 U.S.C.A., Section 1603(f)" (AA 438); 2) in Article 6, Section 4, it provides that "fifty-one percent (51%) of the directors must be Urban Indians as defined under the Indian Health Care Improvement Act,

25 U.S.C.A., Section 1603(f)”(AA 440); 3) in the same section it imposes a restriction that “members of the Board of Directors shall not be related by blood [or] marriage...” (AA 440); and 4) completely eliminates the entire voting class established by the 2005 bylaws. (AA 438-452.) Vacancies on the AIHS board of directors can only be filled by a vote of the majority of the directors then in office. (AA 441.)

10. AIHS Begins Providing Health Services to Coastal Band Members Again in late 2008 During the Pendency of the Lawsuit

AIHS partially changed its course during the pendency of the lawsuit. By time of trial in June 2009, AIHS was again seeing Coastal Band members, so long as Uribe confirmed that the person was a member of the Coastal Band. (RT 210:27-28; 211:1-20.) Why this happened is not precisely clear. Martin Young admitted that stopping service to Coastal Band member should never have happened, and that IHS grants were received by AIHS for the purpose of providing health care to the Native American population in Santa Barbara, including Chumash. (RT 450:24-28; 451:1-15.) Scott Black, who took over as executive director of AIHS in June 2008, did not agree with Granados’ eligibility criteria. (RT 501:19-24, 519:4-6.)

John Morales went to AIHS in December 2008, and received free medical services, the only documentation needed to receive those services being his Coastal Band card. (RT 334:15-27.) By December 2008, AIHS did not require any of the documentation listed in the September 6, 2006 letter. (RA 187; RT 335:1-11.) Morales was given an AIHS flyer by AIHS’ diabetes coordinator during his December 2008 visit. (RT 335:20-28; 336:1-12; RA 221-222.) AIHS’ tribal affiliation requirements listed on that flyer, as of December 2008, were the same requirements during the time

Morales was a CHR at AIHS between 1996-2006.

Those requirements include any of the following: 1) be a recognized member of a tribe, band, or other organized group of Indians, including those terminated since 1940 and those recognized by the State in which they reside; 2) being a descendant of an Indian who was residing in the State of California on 06/01/1952⁶ and is now residing in California; 3) Be considered by the Secretary of the Department of the Interior to be an Indian for any purpose; 4) Be listed on the California Judgment Roll; 5) be a descendant of any of the above (limited to 2 generations) 5) Be determined to be an Indian under regulations pertaining to the Urban Indian Health Program, among others. (AA 224.)

Scott Black insisted that there are no plans to change these eligibility requirements. (RT 518:24-27.) This is belied by the position the appellants took during the litigation, including the following assertion in their reply to the opposition to motion for summary adjudication that respondents' allegation that defendants, by treating Coastal Band members, they had admitted Coastal Band members were entitled to services: "**Plaintiffs are wrong.** AIHS has treated certain members of the Coastal Band during the pendency of this litigation while awaiting the Court's determination as to Plaintiffs' declaratory relief requests (A) through (C)."⁷ (RA 69.) (Emphasis

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Scott Black agreed that this should read 1852, rather than 1952. (RT 540:5-14.)

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Witkin notes that "[w]hile briefs and argument are outside the record, they are reliable indications of a party's position on the facts as well as the law, and a reviewing court may use statements in them as admissions against the party. (See, e.g. *Browne v. Superior Court* (1940) 16 Cal.2d 593, 599; *Kashow v. Plant* (1929) 97 Cal.App. 696, 697; *Alkus v. Johnson-Pac*.

in the original.)

11. The 2009 AIHS Contract Plainly States the Eligibility Criteria to Serve on the Board of Directors and to Receive Free Health Care are One and the Same

The definition of eligibility in the 2009 AIHS Contract was basically the same as it was in the 2005 and 2006 bylaws. At Section C.1 of the contract, the definition of an urban Indian eligible for services is an individual who resides in the urban area serve, and “who meets of or more of the following criteria: (AA 313)

- (A) Irrespective of whether he or she lives on or near a reservation, is a member of a tribe, band, or other organized group of Indians, including: (i) those tribes, bands, or groups terminated since 1940, and (ii) those recognized now or in the future by the State in which they reside; or
- (B) Is a descendant, in the first or second degree, of any such member described in (A); or
- ...
- (D) Is the descendant of an Indian who was residing in the State of California on June 1, 1852, so long as the descendant is now living in said State; or
- (E) Is considered by the Secretary of the Department of the Interior to be an Indian for any purpose; or
- (F) Is determined to be an Indian under regulations pertaining to the Urban Indian Health Program that are promulgated by the Secretary of HHS.

Co. (1947) 80 Cal.App.2d 1, 16; *DeRose v. Carswell* (1987) 196 Cal.App.3d 1011, 1019, fn 3.)” (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 335, p. 386.) The subject of this appeal is the trial court’s determination of declaratory relief requests (A) through (C). Respondents request this court treat these statements as an admission against the appellants.

(AA 313.)

Governance of AIHS is described at section C. 13 of the 2009 contract, and provides that AIHS “shall appoint or elect a Board of Directors (BOD) having the expertise to establish organization policy. The board shall be comprised of a minimum of 51% documented eligible (AI/AN) who reside in the defined service area and meet the eligibility requirements is C.1 above.” (AA 326.)

B. The Trial

1. The Trial Proceeds on the Issues 1) the Respondents’ Qualifications to Serve on the AIHS Board, 2) the Propriety of Their Termination from the AIHS Board; and 3) and Whether the Respondents Should be Reappointed

Jaimes, Cordero, and Uribe submitted evidence that they were urban Indians, qualified to serve as part of the 51% urban Indian majority, within the meaning of the 2005 AIHS bylaws, as well as 25 U.S.C. § 1603(f), and 25 U.S.C. § 1567(b). (RT 68:25-28, 77:20-22, 195:14-17, 196:6-10; RA 159-163, 170-171, 218.) Garcia submitted evidence that, while she was an Indian within the meaning of the of the 2006 AIHS bylaws as well as 25 U.S.C. 1603(f), and 25 U.S.C. 1679(b), she was not an urban Indian because she lived outside of the AIHS service boundary. (RT 234:9-25; 253:16-28; RA 102.)

The respondents did not claim that their Indian status was based upon being members of a federally recognized tribe, or that the Coastal Band is a federally recognized tribe.

The 2005 AIHS bylaws established that “[m]embership on the Board of Directors shall be open to any qualified community member duly elected to serve on the Board of Directors, provided however, that no less than 51%

of the members shall be documented "urban Indians", as defined in 25 U.S.C. § 1603(f)." (AA 388-387.) The documentation deemed to satisfy the documentation of urban Indian status included "[d]ocumentation of membership from a state-recognized tribe... proof of descendency from individual on the California Judgment Rolls; or ... other documentation of status within the meaning of 25 U.S.C. § 1603(c)." (AA 386-387.)

At the time of trial, section 1603 of Title 25 of the United States Code defined an "Indian" "unless otherwise designated as... any individual who, (1) irrespective of whether he or she lives on or near a reservation, is a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the State in which they reside, or who is a descendant, in the first or second degree, of any such member...(3) is considered by the Secretary of the Interior to be an Indian for any purpose, or (4) is determined to be an Indian under regulations promulgated by the Secretary." (25 U.S.C. § 1603(c).)

More particularly, section 1679 of Title 25 of the United States Code defines the eligibility of "California Indians" for Indian Health Services as follows:

[T]he following California Indians shall be eligible for health services provided by the Service:

- (2) Any descendent of an Indian who was residing in California on June 1, 1852, but only if such descendant-
 - (A) is living in California
 - (B) is a member of the Indian community served by a local program of the Service, and
 - (C) is regarded as an Indian by the community in which such descendant lives.

(25 U.S.C. § 1679(b).)

By the language of section 1603(c), the definition of Indian in this matter is otherwise designated by section 1679. Further, any person who qualifies as a “California Indian” pursuant to 25 U.S.C. § 1679(b) is necessarily “considered by the Secretary of the Interior to be an Indian” for IHCA purposes, and is “determined to be an Indian under the regulations promulgated by the Secretary.” (25 U.S.C. § 1603(c)&(d).) Additionally, the definition broadly includes those who are “a member of a tribe, band, or other organized group of Indians...including [but not limited to] those recognized now or in the future by the State in which they reside.” (25 U.S.C. § 1603(c)(3).)⁸

These statutes are absolutely silent on the documentation required to satisfy their criteria. The documentation requirements were established by the 2005 and 2006 AIHS bylaws, with the approval of IHS. (RT 310:2-9; 312:20-24; AA 387, 415.)

Additionally, the Eligibility Statement for Indian Health Services states that “[t]he eligibility regulation does not require a particular degree of Indian ancestry and does not define the term ‘Indian community.’ Therefore, the regulation has been construed liberally to include anyone who can reasonable be regarded as an Indian regardless of degree of Indian

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25 U.S.C. section 1603 was amended effective March 2010. While new provisions were added, and the statute was renumbered, the language of the statute has not changed with respect to the issues on this appeal. Indeed, a new subsection (3) was added defining the term California Indian. This is not a change in the law, rather a reorganization and clarification of existing law. Per the practice of the appellants, respondents also refer to the subsection numbering of section 1603 as it existed at the time of trial.

ancestry or tribal affiliation.” (AA 204.) The Eligibility Requirements for Health Services from the Indian Health Service, Indian Health Service Manual, Part 2, Chapter 1, Section 2-1.2 states that “A person may be regarded as within the scope of the Indian Health program if he is not otherwise excluded therefrom by provision of law, and ...Is an Indian...as evidenced by one or more of the following factors: (1) Is regarded by the community in which he lives as an Indian...(4) Actively participates in tribal affairs; [or] (5) Any other reasonable factor indicative of Indian descent. (AA 247.)⁹

Richard Anderson testified that the criteria for the election was that a candidate or a voter was eligible based upon the California judgment roll and/or a tribal affiliation card, and specifically a Coastal Band card was considered appropriate. (RT 312:3-9.) When it came time for nominations, Anderson verified that those persons nominated had been validated. (RT 315:4-7.) Anderson obtained all of the appropriate documentation from everybody that was elected to the board of directors. (RT 315:13-16.)

The respondents presented evidence that, at all times, they were Indians within the meaning of the 2005 and 2006 AIHS bylaws and 25 U.S.C. § 1603(c) & (f) because they were Indians of California, and on the additional grounds that they were members of the Coastal Band, an

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These documents were the subject of the respondents June 29, 2009 Amended Request for Judicial Notice (AA 231-266), granted by the trial court. (RT 22:3-28; RT 23:1-12.) Respondents have renewed their Request for Judicial Notice of these documents pursuant to Rules of Court, rule 8.252 and Evidence Code sections 452, 453, and 459, and filed concurrently with respondent’s opening brief.

organized band of Indians.¹⁰

The 2008 AIHS bylaws referenced the same eligibility requirements, with the exception of the blood and marriage restrictions. (AA 4.) Unlike the 2005 and 2006 bylaws, the 2008 bylaws are silent on documentation. However, the 2008 bylaws establish that the requirement to qualify for health care as an eligible Indian and to serve as part of the 51% urban Indian majority is one and the same. (AA 438, 440.)

The 2009 AIHS contract with IHS provides a more expansive definition of urban Indian than the 2008 bylaws, and incorporates 25 U.S.C. § 1603(c)(1) at section C.1(A), 25 U.S.C. § 1679(b) at section C.1(D), and 25 U.S.C. § 1603(c)(3)&(4), as well as the definitions from the Indian Health Manual, at section C.1(E). (AA 313.) Like the 2005, 2006, and 2008 AIHS bylaws, section C.13 of the 2009 AIHS contract provides that the eligibility requirements for urban Indian for purpose of service on the board of directors are the same as the eligibility requirements to receive free health care. (AA 326.)

None of the bylaws, nor the 2009 contract, impose any restriction on who can be part of the other 49%. Those positions can be filled by anyone, irrespective of Indian status. Notably, neither respondent Garcia, nor appellant Young were ever part of the 51% urban Indian majority, despite their status as Indians, because they lived outside of AIHS' service area.

2. Membership in the Coastal Band and California's Recognition of the Coastal Band

In addition to presenting evidence that they were Indians because of

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Again, appellants' now concede that the respondents are Indians eligible for services at AIHS. (AOB, p. 40.)

their status as Indians of California, the respondents also presented evidence that they were Indians by virtue of their membership in the Coastal Band.

A person is an Indian if they are “a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940 and those recognized now or in the future by the State in which they reside.” The evidence at trial was that Cordero, Jaimes, Uribe, and Garcia were members of the Coastal Band. (RT 55:14-15; 138:1-27; 193:4-5; 239:3019; RA 169, 171)

At the 2005 election, AIHS considered voters and candidates eligible based upon the California judgment roll and/or a tribal affiliation card, and specifically a Coastal Band card was considered appropriate. (RT 312:3-9.) All of the appropriate documentation, generally copies of Coastal Band cards, was obtained from everybody that was elected to the board of directors. (RT 315:13-16.)

Between 1996 and 2006, AIHS accepted Coastal Band cards as documentation for free health services. (RT 330:3-6.) By December 2008, accepted Coastal Band cards as documentation proving eligibility. (RT 334:15-27; RA 221-222.) Scott Black only requires that “the tribe of the Coastal Band recognize their own members.” (RT 537:11-14.)

With the exception of the time period between September 2006 and the end of 2008, AIHS has considered membership in the Coastal Band as proof of eligibility for the receipt of medical care. This is consistent with the approach established in IHS’ Indian Health Manual. (AA 247.)

To establish that California has recognized the Coastal Band as a California Indian Tribe for the past 35 years, the respondents offered the testimony of Janet Garcia and John Ruiz.

At the time of trial, Garcia was the tribal chair of the Coastal Band.

(RT 239:3-8.) Garcia has been worked with California's Native American Heritage Commission ("NAHC") off and on over the past 26 years, as a tribal consultant for cultural resources monitoring on behalf of the Coastal Band, and the Coastal Band has been receiving notices from the NAHC since the early 1980's. (RT 243:12-19; 244:5-12.)

The Native American Heritage Commission was established to make sure that developers encroaching on cultural sites, prehistoric and historic sites, follow CEQA guidelines. (RT 243:6-11.) At least 40 different government agencies notify the Coastal Band of things that might affect the Native American community, including U.S. Forestry, State of California Advisory Committee, Native American Heritage Commission, Santa Barbara County, City of Santa Barbara, City of Goleta, the City of Lompoc, County of Los Angeles. (RT 259:2-14.) The Coastal Band is on the NAHC's Tribal Consultation List. (RA 189, 223.)

Garcia has been working with Santa Barbara County for the more than 20 years that the Coastal Band has been on the consultation list, and the Coastal Band helped establish the criteria for the county's guidelines for cultural reasons. (RT 259: 23-28; 260:1-6.)

The Coastal Band has also been consulted by the Federal Parks Service on human remains found on San Miguel Island. The Coastal Band has been consulted hundreds of times by various governmental agencies with respect to remains. (RT 261:23-28; 262:1-24; AA 241.) On a weekly basis, Garcia receives 10-15 notifications to the Coastal Band concerning developments. (RT 263:24-28; 264:1-15.) At trial, examples of such notices included an April 21, 2008 letter from the Santa Barbara Planning Division notifying the Coastal Band of a development for 24 units. (RA 224); a September 28, 2008 letter from the City of Goleta, notifying the

Coastal Band of a proposed change to its general plan (RA 225-230); and an August 19, 2008 letter from the Department of the Army concerning impacts to cultural sites at its project. (RA 232-235.) The Coastal Band has consulted with the Department of Army or the Corps of Engineers long before 2008 because it is involved in cultural resource management, and now because it is on the SB 18 consultation list. (RT 268:25-28; 269:1-4; 13-22.) Prior to passage of SB 18, the Coastal Band was receiving notices from the Native American Heritage Commission regarding projects. (RT 396:23-28.)

California's recognition of the Coastal Band for purposes of cultural resource management is not limited to the past few years. John Ruiz has been a member of the Coastal Band for decades, and acted for more than 35 years as its resources coordinator. (RT 389:10-21.) In that roll, Ruiz helped Santa Barbara County write the resource policies that it has today. (RT 390:22-24.) He also catalogued all county parcels in the County of Santa Barbara for Chumash sites, inventoried them, and put them on file. (RT 390:24-28; 391:1-6.)

Ruiz also helped organize California's Native American Heritage Commission, and John Sespe, a Coastal Band member, served on that commission for 14 years as the commissioner from the Santa Barbara area. (RT:8-21.)

The Coastal Band worked with the Air Force at Vandenberg, inventorying the archaeological sites on the base when there was the proposal to put the shuttle craft program there. (RT 392:9-10.) As far back as the 1980's Santa Barbara County would notify the Coastal Band about proposed projects affecting Chumash sites. (RT 395:4-18.)

Other subdivisions of the state have also recognized the Coastal

Band for decades. Examples of this long standing recognition included 1) the April 22, 1992 letter to the United Chumash Council¹¹ from Caltrans, consulting with the Coastal Band as part of the ongoing 101 widening project from Santa Barbara to Carpinteria (RT 400:1-16; RA 125-238); 2) July 9, 1987 correspondence with California State Parks concerning reburials of Chumash remains when the Vista Del Mar School was being relocated during the Chevron project (RT 401:14-28; 402:1-10; RA 239); and, 3) January 28, 1995 letter from the Santa Barbara County Resources Management letter concerning the ARCO project. (RA 240.)

Additionally, the Coastal Band has an agreement with the City of Santa Barbara involving a lease for \$1 of a Chumash cemetery on City land, for the purpose of protecting the site. That agreement was made in the 1970s. (RT 405:11-28; 406:1-22.)

The appellants offered Dennis Whittlesey as an expert on Indian affairs. He opined that there is no vehicle for state recognition in California. (RT 382:20-24.) Further, he testified that he believed there are only two vehicles for state recognition: direct law recognizing a tribe, and state law similar to federal acknowledgment law: in the past, California has used direct law on two occasions¹², Vermont on one occasion, and only

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The United Chumash Council is the central council for the Coastal Band. (RT 398:21-28; 399:1-10.)

¹²

Both legislative enactments were passed in the early 1990s, whereby the California Legislature recognized the Juaneno and Gabrieleno bands for limited purpose of supporting their applications for federal recognition. Appellants sought and received judicial notice of those enactments from the trial court (RT 29:14-17), but have not requested judicial notice on appeal. Respondents have Requested Judicial Notice of those enactments pursuant to Rules of Court, rule 8.252 and Evidence Code sections 452, 453, and

Georgia and Alabama utilize a state law. (RT:352:15-28; 353:1-6.)

He argued, and it was his opinion was that inclusion on the Native American Heritage Commission does not amount to state recognition. (RT 367:22-24.) The basis for this opinion was Whittlesey's speculation that all it takes to get on the list, is for a group to request to be on the list. (RT 381:2-21.) The balance of Whittlesey's testimony concerned federal recognition of tribes, and the history of California Indian tribes. (RT 346:18-395:24.)

Whittlesey offered no opinion about whether any plaintiff is entitled to sit on the board of AIHS, or about whether any particular member of the Coastal Band is entitled to services at AIHS. (RT 373:26-28; 374:1-6.) Moreover, his testimony before Congress concerned federal recognition for tribes, he had offered no congressional testimony concerned urban Indian health services, and he had never previously advised any Native American health agency. (RT 375:28; 376:1-9.) And, other than advising the California Attorney General's office about state recognitions on a couple of occasions, he had not been involved in state recognitions beyond that. (RT 353:10-13.)

3. Respondents' Termination from the AIHS Board

Appellants factual recitation of the events culminating to the termination of the respondents' board membership is incomplete. (AOB 7-10.) The evidence at trial was that Granados introduced exclusive eligibility criteria for AIHS patients, requiring various forms of federal documentation, for the first time in his August 19, 2006 report. (AA 299.) Granados also asserted that “[p]ursuant to his authority as Executive

459, and filed concurrently with respondent's opening brief.

Director, American Indian Health & Services will require such documentation before any discussion of Free/Discounted Fee.” (AA 299.) In other words, he would not discuss the matter with the board absent federal documentation.

When Granados came on board in 2005, he wanted to charge Coastal Band members for health services. (RT 308:14-18.) Granados repeatedly expressed his dislike for the Coastal Band Chumash in his discussions with Anderson. (RT 316:26-28; 317:3.) On multiple occasions, Granados told Anderson that he felt the Coastal Band members were not real Indians, that they were not entitled to free services at AIHS, and that they were ignorant and stupid. (RT 317:5-14.)

Granados introduced the exclusive federal documentation criteria immediately after the respondents had conducted a walk through of the clinic, and at a time when they were critical of Granados’ performance. (RT 147:15-28; 148:1-23, 28; 149:1-10.)

Board discussion of the issue followed about whether this information was needed. No requirements were ever found that these criteria needed to be met. (RT 92:12-20.) The issue was to be discussed at the September 2006 board meeting, but Granados did not attend and would not otherwise respond to the respondent board members. (RT 93:3-11.)

Granados had ordered an audit conducted by Margie Lopez, an AIHS employee, on the board members concerning their documentation, including a review of the Board members files, and medical charts, and determined the Board members did not have the proper documentation pursuant to Granados’ new requirements. (RT 431:17-26; RT 433:1-11.)

Granados next sent letters to each of the board members informing them that he determined their documentation was insufficient, and that they

needed to provide additional documentation within ten days of the September 5, 2006 letter. (AA 301-302.) Prior to the letter being sent, the board had not discussed the requirements concerning the board with Granados. (RT 203:7-13.)

After receiving the September 5, 2006 letter from Granados, the respondent board members sought to speak with Granados and determine how this purported change in the requirements occurred, and scheduled a Board meeting at AIHS, followed by another meeting at AIHS shortly thereafter. The next scheduled board meeting after the September 5, 2006 letter was the 25th of September. Granados was demanding documentation before the next board meeting. (RT 154:21-28; 155:1-6.) Martin Young was not present at the September 25, 2006 Board meeting. Neither was Granados.

What followed was the termination of the respondents' board positions on September 25, 2006. (AA 304-306.) The sole grounds listed for their involuntary termination was that they had not provided the federal verification that Granados had demanded. (Ibid.) Yet, the board members had all provided the necessary documentation when they were elected to the board. (RT 315:13-16.) And, Granados required that 100% of the board provide proof of urban Indian status. There was no requirement in the bylaws that those board members who were not part of the 51% percent urban Indian majority be urban or Indian at all. (AA 388-389; 417.) They could be any qualified community member. (Ibid.) Janet Garcia, who did not live in the AIHS service area, was never an urban Indian for board composition purposes.

While the federal documentation demanded by Granados would qualify the board members as urban Indians, it was not the only

documentation criteria to establish those qualifications. The 2005 and 2006 AIHS bylaws established that criteria. (AA 387, 415.) The 2009 AIHS contract included eligibility criteria of urban Indian status substantially the same as the 2005 and 2006 AIHS bylaws. (AA 313.) Other than Granados' unilateral demands for federal documentation, there was no evidence that the criteria had ever changed.

The involuntary termination provisions of the 2005 and 2006 AIHS bylaws required a 2/3 vote of the directors for cause, but did not authorize involuntary termination for some failure to provide federal documentation. (AA 395-396.) When involuntary termination from the board was contemplated, the 2005 bylaws required fifteen days written notice prior to the vote of the board on the termination, and the opportunity to be heard was to be provided, within five days after termination. (AA 396.)

Young admitted that the respondents did not have to be federally recognized under the bylaws in existence at the time they were vacated. (RT 498:11-13.) His action of vacating the Board positions placed the Board out of compliance with the bylaws and AIHS requirements. (RT 450:2-6.) Scott Black, who took over as executive director of AIHS in June 2008 did not agree with Granados' eligibility criteria. (RT 501:19-24, 519:4-6.)

Black also testified extensively about a letter he had received from IHS, as well as IHS' views concerning the outcome of the litigation, as well as IHS' position that it would not permit Garcia to serve on the board because of a 22 year old nolo contendere plea to welfare fraud. (RT 527:6-17; AA 308-309) Testimony from IHS, and in particular testimony concerning that letter was the subject of plaintiffs' Motion in Limine 1, granted by the court. (RT RT 19:21-28; 20:1-28) Plaintiffs had attempted to subpoena the writer of the letter to appear at trial, but IHS refused to

produce her. The letter was admitted over plaintiffs' objections. (RT 525:22-28.)

4. Judgment is Properly Entered in Favor of Respondents

The court entered judgment in favor of the respondents on February 5, 2010. The court found that the Coastal Band is a tribe of Indians recognized now by the State of California, and the respondents are Indians¹³ within the meaning of the Indian Health Care Improvement Act ("IHCA") because they are members of the Coastal Band. (AA 489:6-20.) However, this was not the sole basis on which the court determined the respondents were Indians within the meaning of the IHCA. The court further found that each of the respondents were an Indian of California and were therefore Indians within the meaning of the IHCA as well.¹⁴ (AA 489:21-490:6.) The court further ruled that respondents Uribe and Garcia are Indians of California because they are listed on the California Judgment Roll, and are therefore Indians within the meaning of the IHCA. (AA 490:4-10.)

The court further ruled that each of the respondents was qualified to sit on the AIHS board, that they were improperly removed from the board, and ordered them reappointed to fulfill the balance of their board terms. (AA 490:11-491:17.) The court also found that Garcia's 22 year old nolo contendere plea did not disqualify her from holding a board position. (493:11-14.) And, the court ruled the 2008 amendments to the AIHS bylaws removing the voting class, and imposing marriage and blood

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The court ruled that respondents Jaimes, Cordero, and Uribe were urban Indians, and that Garcia was an Indian in each instance.

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Appellants contend this ruling was in error (AOB 19) but then concede that the respondents are Indians of California. (AOB 40.)

restrictions were unlawful and rescinded. (AA 491:26-492:2.)

III. LEGAL ARGUMENT

A. Standards of Review

“Generally, the trial court's decision to grant or deny such [declaratory and injunctive] relief will not be disturbed on appeal unless it is clearly shown its discretion was abused. (*Salazar v. Eastin* (1995) 9 Cal.4th 836, 849-850, 39 Cal.Rptr.2d 21, 890 P.2d 43 [injunctive relief]; *Dolan-King v. Rancho Santa Fe Assn.* (2000) 81 Cal.App.4th 965, 974, 97 Cal.Rptr.2d 280 (*Dolan-King*) [declaratory relief].)” (*Ekstrom v. Marquesa at Monarch Beach Homeowners Ass'n* (2008) 168 Cal.App.4th 1111, 1121.)

Accordingly, appellants' first, third, and fourth issues of appeal are reviewed for abuse of discretion.

The appellants have styled their second issue on appeal as an erroneous interpretation of 25 U.S.C. § 1603 by the trial court, calling for *de novo* review. “A trial court's interpretation of a statute is reviewed *de novo*. (*Citations.*) Similarly, the application of a statutory standard to undisputed facts is reviewed *de novo*. (*Citations.*) The *de novo* standard of review also applies to mixed questions of law and fact when legal issues predominate. (*Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 888 [264 Cal.Rptr. 139, 782 P.2d 278].) As the California Supreme Court explained: “If the pertinent inquiry requires application of experience with human affairs, the question is predominantly factual and its determination is reviewed under the substantial-evidence test. If, by contrast, the inquiry requires a critical consideration, *in a factual context*, of legal principles and their underlying values, the question is predominantly legal and its determination is reviewed independently.” (*Harustak v. Wilkins* 84 (2002) Cal.App.4th 208, 212.)

With respect the appellants' second issue on appeal the facts are in dispute. The trial court evaluated evidence and the credibility of witnesses as to AIHS' shifting application of the requirements of section 1603 with respect to its determination that respondents, and others were Indians within the meaning of the statute. A further issue was the documentation required to establish eligibility under the statute, section 1603 being silent on the subject, the only criteria being established and enforced by AIHS. The court received evidence that the documentation required was established by the 2005 and 2006 AIHS bylaws, the manner in which AIHS enforced those requirements until 2006, and after 2008, as well as the requirements of the 2009 AIHS contract. The appellants make reference to AIHS' interpretation of its bylaws, and assert that this court can only review its interpretation if it is unreasonable. (*Hard v. California State Employees Assn.* (2003) 112 Cal.App.4th 1343, 1347; See also, *Horsemen's Benevolent & Protective Assn. v. Valley Racing Assn.* (1992) 4 Cal.App.4th 1538, 1539 [In determining mixed questions of law and fact with respect to interpretation of a writing it is a question of law where extrinsic evidence is unnecessary, and a question of fact where parol evidence is necessary.]) And, appellants concede that each of the respondents are Indians eligible to receive services under Title V. (AOB 40.) Under these circumstances, the issue is predominantly factual in nature, reviewed under the substantial evidence test with respect to determination pursuant section 1603, and is reviewed for reasonableness with respect to AIHS' interpretation of its bylaws.

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B. The Trial Court Has Jurisdiction to Declare the Coastal Band is a Tribe, Band, Nation, or Other Organized Group of Indians Recognized Now by the State of California

Appellants assert for the first time on appeal that political question doctrine applies to this determination and that this matter is a non-justiciable controversy over which the court had no jurisdiction. The political question doctrine has no application to this case. "In its narrow sense the political question rule relates to the dismissal of lawsuits without reaching the merits of the dispute. The rule compels dismissal of a lawsuit when complete deference to the role of the legislative or executive branch is required and there is nothing upon which a court can adjudicate without impermissibly intruding upon the authority of another branch of government. This is usually expressed with such phrases as 'a textually demonstrable constitutional commitment of the issue to a coordinate political department'..." (Schabarum v. California Legislature (1998) 60 Cal.App.4th 1205, 1214.)

The fundamental flaw in the argument is that appellants have not identified any textually demonstrable constitutional commitment of the issue of state recognition of California Indian tribes, because there is none. Rather, the appellants make a leap from the United States Constitution's commitment to the Congress the power to regulate commerce with Indian tribes, and apply that as proof that the California legislature is constitutionally committed to recognizing California Indian tribes. This is not the case and there is no such provision in the California Constitution. Rather, as appellants' expert, Dennis Whittlesey testified, "[t]here is no vehicle for state recognition in California." (RT 382:20-24.) State recognition of California Indian tribes is not constitutionally committed

anywhere, there is no intrusion by the trial court into the authority of any other branch of California's government, and the political question doctrine does not apply.

1. The Court Properly Found that the Coastal Band is an Indian Tribe Recognized Now by the State of California

Appellants point out that state recognition can be achieved in a variety of forms, including (1) a direct state law, (2) administrative process, (3) legislative, and (4) executive. (Koenig and Stein, 48 Santa Clara Law Rev. at 103.)

State recognition

operates as a means for states to acknowledge the longstanding existence of tribes within their borders and to establish a government-to-government relationship to coordinate and communicate with tribes. State recognition is also a prerequisite to certain federal and state benefits meant to foster and preserve indigenous communities and to facilitate mutually beneficial relationships following centuries of conflict.

While state recognition offers several benefits, the powers granted through state recognition are quite limited. State-recognized tribes do not generally have the same immunities from state law that federal tribes enjoy. Instead, they are endowed only with those sovereign characteristics recognized by that state's laws, legislative resolutions, administrative regulations and other documents that collectively define the government-to-government relationship. Thus, the rights tribes do enjoy vary dramatically between states, ranging from powers of self-government such as the right to operate a police force, to exemptions from paying state and local taxes, to primarily symbolic acknowledgment of a tribe's longstanding presence within a state. (Id. at 86-87.)

California's legislative has twice passed enactments, both in the

early 1990s, whereby the California Legislature recognized the Juaneno and Gabrieleno bands for limited purpose of supporting their applications for federal recognition. However, California also has enacted legislation acknowledging the California Indian tribes', including the Coastal Band's, longstanding presence within the State of California to facilitate a mutually beneficial relationship with it and other California Indian tribes.

Specifically, those enactments include:

There is in state government a Native American Heritage Commission.

(Pub. Resources Code, § 5097.9.)

During the preparation or amendment of the general plan, the planning agency shall provide opportunities for the involvement of... California Native American Indian tribes.

(Govt. Code, § 65351.)

Prior to action by a legislative body to adopt or substantially amend a general plan, the planning agency shall refer the proposed action to all of the following entities... a California Native American tribe, that is on the contact list maintained by the Native American Heritage Commission, with traditional lands located within the city or county's jurisdiction. (Govt. Code, § 65352(a)(9).)

...[T]he office (of Planning and Research) shall develop and adopt guidelines for the preparation of and the content of the mandatory elements required in city and county general plans... the guidelines shall contain advice, developed in consultation with the Native American Heritage Commission, for consulting with California Native American tribes for all of the following... [p]rocedures for identifying through the Native American Heritage Commission the appropriate California Native American tribes." (Govt. Code, § 65040.2(g).)

Prior to the adoption or any amendment of a city or county's

general plan, proposed on or after March 1, 2005, the city or county shall conduct consultations with California Native American tribes that are on the contact list maintained by the Native American Heritage Commission for the purpose of preserving or mitigating impacts to places, features, and objects described in Sections 5097.9 and 5097.993 of the Public Resources Code that are located within the city or county's jurisdiction." (Govt. Code, § 65352.3.)

By implementation of the California Native American Graves Protection and Repatriation Act of 2001, the Legislature intended to "[p]rovide a mechanism whereby California tribes that are not federally recognized may file claims with agencies and museums for repatriation of human remains and cultural items." (Health & Safety Code, §§ 8010, 8011(f).)¹⁵

Only the following entities or organizations may acquire and hold conservation easements...[a] federally recognized California Native American tribe or a nonfederally recognized California Native American tribe that is on the contact list maintained by the Native American Heritage Commission to protect a California Native American prehistoric, archaeological, cultural, spiritual, or ceremonial place, if the conservation easement is voluntarily conveyed. (Civ. Code, § 815.3.)

In each instance, these statutes recognize California Native American tribes, and directs state agencies, counties, and cities to recognize and consult with those tribes. This is state recognition. The overwhelming and undisputed evidence at trial was that the Coastal Band had worked with the Native American Heritage Commission for years, as well as the Santa Barbara County, the Cities of Santa Barbara and Goleta, the State Parks

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As in the trial court, respondents admit that the listing required by the Bureau of Indian affairs that would give effect to the act has never been published. (Health & Safety Code, § 8012(j)(2)(A).)

Department, and the State Department of Transportation. This recognition was the result of the Coastal Band being recognized as a California Indian tribe by the Native American Heritage Commission on its contact lists, both before and after the passage of SB 18. Without dispute, this recognition is limited in nature to only “those sovereign characteristics recognized by [California’s] laws, and other documents that collectively define the government-to-government relationship”, but it is state recognition nonetheless. (Koenig and Stein, 48 Santa Clara Law Rev. at 86.) This is not a matter of cities, counties, or state agencies whimsically granting state recognition on an ad hoc and random basis. Rather, this was the result of the state recognizing the long standing existence of nonfederally recognized California Native American tribes, acting to facilitate mutually beneficial relationships between those tribes and the state by enacting legislation to that effect. In ruling that the Coastal Band was recognized now by the State of California, the court did not intrude into the authority of any other branch of California’s government. Rather, it simply ruled that the State of California has recognized the Coastal Band for several years, through its laws, and its agencies charged with recognizing the Coastal Band for certain limited purposes under those laws. That ruling was not an abuse of discretion and was supported by substantial evidence.

C. Members of the Coastal Band Meet the Requirements of 1603(c)(1) Because the Coastal Band is Recognized by the State of California

A person is an Indian eligible for free health care pursuant to 25 U.S.C. § 1603(c)(1) if they are “a member of a tribe, band, or other organized group of Indians, including those tribes, bands, or groups terminated since 1940, and those recognized now or in the future by the

State in which they reside...” Respondents established that they are members of the Coastal Band and further established the Coastal Band is recognized by the State of California. Moreover, the evidence at trial established that under AIHS’ interpretation of section 1603, through its bylaws, the IHS contract, and its practices, Coastal Band members were considered by AIHS to Indians eligible for services because of their membership in the Coastal Band. At the May 2005 election, candidates and voters were eligible based a tribal affiliation card, and specifically a Coastal Band card was considered appropriate. (RT 312:3-9.) The documentation required by the 2005 and 2006 AIHS bylaws for proof of urban Indian status included “[d]ocumentation of membership from a state-recognized tribe.” (AA 386-387.) Again AIHS deemed Coastal Band cards as such proof. Indeed, between 1996 and 2006, AIHS accepted Coastal Band cards as documentation for free health services. (RT 330:3-6.) When AIHS began serving Coastal Band members again in late 2008, the only documentation to receive those services was a Coastal Band card. (RT 334:15-27.) At that time, Scott Black only required that “the tribe of the Coastal Band recognize their own members” for its members to receive free health care. (RT 537:11-14; RA 221.) The 2009 AIHS contract is also in accord. (AA 313.) Accordingly, it was not error for the court rule that each of the respondents was an Indian within the meaning of Title V of the Indian Health Care Improvement Act.

D. The Respondents Are Indians under Title V of the Indian Health Care Improvement Act for All Purposes

Appellants assert that California Indians pursuant to 25 U.S.C. section 1679 are not Indians within the meaning of any section of 25 U.S.C. section 1603. At the same time, they concede that each of the respondents is a

California Indian eligible to receive services under Title V. However, appellants ignore the both the plain statutory language of section 1603, as well as their own interpretation and application of that statute in determining urban Indian status to serve on the AIHS board.

Section 1603 contains the Definitions for Title V, and states “For the purposes of this Act... ‘Indians’ or ‘Indian’, **unless otherwise designated**, means...” In this matter, the term Indian is otherwise designated at 25 U.S.C. section 1679(b), which states “the following California Indians shall be eligible for health services...” followed by several references in the subparagraphs to the term Indian. Section 1603 specifically provides for the designation of Indians provided by 25 U.S.C. section 1679, and does not otherwise render section 1679 superfluous in any way. Additionally, the March 2010 reorganization of section 1603 makes this clear, by including the definition of California Indian as meaning “any Indian who is eligible for health services provided by the Service pursuant to section 1679 of this Title.” (25 U.S.C. § 1603(3) (2010).)

This interpretation is also consistent with the 2005 and 2006 AIHS bylaw, the 2009 AIHS contract, and the practice at AIHS. The primary criteria of section 1679(b)(2) is being a descendant of an Indian living in California on June 1, 1852. Inclusion on the California Judgment Roll is conclusive as to an individual tracing their lineage back to an Indian living in 1852. (RT 379:1-13.) AIHS maintains a copy of the California Judgment roll for purposes of determining Indian status. (RA 190-220; RT 313:1-28; 314: 1-2.) The 2005 and 2006 AIHS bylaws accepted documentation of eligible urban Indian status based on “proof of descendency from individual on the California Judgment Rolls.” (AA 386, 415.) The November 2008 AIHS flyer listed among its eligibility requirements for documented Indians,

“[b]e listed on the California Judgment Roll.” (RA 221.) And, the 2009 AIHS contract lists at section C.1, among its criteria for urban Indians eligible for services: “[i]s the descendant of an Indian who was residing in the State of California on June 1, 1852, so long as the descendant is now living in said State.” (AA 313.) Further, the governance section of that contract provides that “[t]he board shall be comprised of a minimum of 51% documented eligible (AI/AN) who reside in the defined service area and meet the eligibility requirements is C.1 above.” (AA 326.) The evidence at trial was that if a person was an urban Indian eligible for services at AIHS, they were also an urban Indian eligible to serve on the board as part of the 51% majority. Further, this has at all relevant times been the law, before and after the March 2010 reorganization of section 1603. There was neither error, nor abuse of discretion in the court’s ruling that the respondents are Indians within the meaning of Title V.

E. The Court Properly Ordered the Respondents Re-Appointed to the AIHS Board and to Have Access to Those Records Necessary to Fulfill Their Board Duties

Appellants contend injunctive relief was improper because respondents were able to reapply for board membership upon showing documentation of their qualifications, and therefore respondents’ harm is neither great nor irreparable. The entire contention at trial was that the respondents were not Indians eligible for service at AIHS, nor eligible to sit on the Board.

On this appeal, that contention has shifted to a more nuanced approach, asserting instead that respondents are entitled to services, but must provide the federal documentation required by Granados to sit on the board. (AOB 8, 40.) Martin Young testified at trial that it would not be possible or

proper to restore the respondents to the AIHS Board because the other two board members are part of the 51% percent, he was part of the 49%, so additional board members would throw it out of balance. (RT 488:8-14.)

This would only be true if the respondents were not urban Indians.

Appellants contend Granados' four federal documentation requirements still apply with respect to the board members. (RT 498:11-14.) Under this construction, no Coastal Band member could serve on the AIHS board, despite being a member of the largest group of Indians served by AIHS.

This argument is made with full knowledge the respondents do not have the federal documentation demanded by Granados. (RT 431:17-26; RT 433:1-11.) Moreover, the documentation required was established by the 2005 and 2006 AIHS bylaws, and documentation pursuant to those requirements was provided to AIHS by the respondents. (RT 315:13-16; AA 386, 415.) Granados, as executive director, did not have the authority to change the documentation requirements of those bylaws by their very terms. (AA 404 [Two-third vote of the board required to amend bylaws.]) The eligibility requirements for board service as part of the 51% majority in the 2009 contract are substantially the same as the 2005 and 2006 bylaws (AA 313), and AIHS' current documentation requirements for services are likewise the same as the documentation requirements of the 2005 and 2006 bylaws. (RA 221.)

AIHS has maintained that it has treated certain members of the Coastal Band during the pendency of this litigation while awaiting the Court's determination as to Plaintiffs' declaratory relief requests (A) through (C)." (RA 69.) The court's ruling on those requests are the subjects of this appeal. Accordingly, it was not an abuse of discretion for the court to grant injunctive relief.

1. The Trial Court Did Not Improperly Invade AIHS' Right to Self Governance

Notwithstanding the fact that AIHS is not a private, voluntary association, but rather a California non-profit corporation, the trial court properly exercised jurisdiction over AIHS with respect to its ongoing, unreasonable construction of its bylaws, the pertinent parts derived from the United States Code with respect to eligibility of urban Indians in the receipt of health care, as well as eligibility for the same urban community to serve on AIHS' board of directors. Appellants' citation to *California Dental Assn. V. Amer. Dental Assn.* (1979) 23 Cal.3d 346, is inapposite.

2. The Trial Court Properly Found a Basis for Declaratory Relief Existed

Declaratory relief is appropriate when a party seeks a determination of their rights and duties with respect to another in cases of actual controversy relating to the rights and duties of the respective parties. (Code Civ. Pro., § 1060.)

The actual controversy with respect to the rights and duties of these parties exists as a result of the respondents unlawful removal from AIHS board of directors, such removal unsupported by the AIHS' bylaws or the Corporations Code; the disqualification of the plaintiffs, and other Coastal Band members, as urban Indians eligible to receive free health care at AIHS; and the imposition of unreasonable and arbitrary federal documentation requirements, contrary to the AIHS bylaws, AIHS contract, and the United States Code, for eligibility to serve on the AIHS board of directors. Respondents further assert they are entitled to reappointment and access to the AIHS paperwork necessary to fulfill their board duties.

Appellants first contention that no controversy exists because the

respondents lack authority to assert rights on behalf of the Coastal Band is factually incorrect. The respondents have asserted rights on their own behalf, including that they are Indians within the meaning of Title V of the IHCIA by virtue of their membership in the Coastal Band, and Indian tribe recognized by the State of California.

Appellants second contention that no controversy exists because respondents' terms of office expired must be disregarded. This is a statute of limitations argument. Appellants pleaded the statutes of limitation found in section 343 of the Code of Civil Procedure [four years], and sections 12960 and 12965(b) of the Government Code [not applicable] barred respondents claims. (AA 102-103.) If a statute of limitation is not pleaded it is waived. (*Hall v. Chamberlain* (1948) 31 Cal.2d 673, 679.) And, there is no otherwise applicable statute of limitation.

Appellants final contention that respondents lack standing to challenge the 2008 amendments to the bylaws is also incorrect. Respondents were elected to the AIHS board by the community. The AIHS bylaws provided for a voting class of the corporation, consisting of community members. Each of the respondents are part of that voting class. "Bylaws may be adopted, amended or repealed by the board unless the action would materially and adversely affect the rights of members as to voting." (Corp. Code, § 5150(a).) Eliminating the urban Indian voting class from AIHS materially and adversely affects the rights of those members as to voting. Simply, since the respondents' removal, no Coastal Band member has been appointed to the AIHS board, despite the Coastal Band being the largest Indian community serve by AIHS. (RT 328:19-23; 498:18-23.) The Coastal Band has no representation at AIHS.

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3. The Trial Court Properly Determined the Respondents had Been Improperly Removed from the AIHS Board

“The board, by a majority vote of the directors who meet all of the required qualifications to be a director, may declare vacant the office any director who fails or ceases to meet any required qualification **that was in effect at the beginning of the director’s current term of office.**” (Corp. Code, § 5220(b).)

The documentation qualifications for Jaimes, Cordero, and Uribe are governed by the 2005 AIHS bylaws, while the qualifications for Garcia are governed by the 2006 bylaws. Those requirements included “documentation of membership from a state-recognized tribe, proof of descendency from individual on the California Judgment Rolls; or other documentation of status within the meaning of 25 U.S.C. § 1603(c) (AA 386-387, 415-416.)

AIHS obtained all of the appropriate documentation from everybody that was elected to the board of directors. (RT 315:13-16.) Garcia provided her tribal enrollment card and is on the California Judgment Roll. (RT 253:16-28; RA 202.)

Granados’ purported documentation requirements were not qualifications for the board of directors in effect when the respondents joined the board. Granados, as executive director, did not have the authority to change the documentation requirements of those bylaws by their very terms. (AA 404 [Two-third vote of the board required to amend bylaws.]) Further, Martin Young admitted that the respondents did not have to be federally recognized under the bylaws in existence at the time they were vacated. (RT 498:11-13.) Accordingly, the court did not abuse its discretion in determining the respondents had been improperly removed from the

board.

IV. CONCLUSION

Based on the foregoing, Respondents request the judgment be affirmed in all respects.

Dated: January 27, 2011

LAW OFFICE OF ERIC A. WOOSLEY

By:  _____

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CERTIFICATE OF WORD COUNT

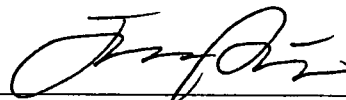
(Cal. Rules of Court, Rules 8.204(c) and Rule 8.490(b)(6))

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Dated: January 27, 2011

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