Case no. B222391

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

MARTHA JAIMES, MICHAEL CORDERO; FRANCES ROSE URBIBE; and JANET DARLENE GARCIA,

Plaintiffs and Respondents

v.

AMERICAN INDIAN HEALTH & SERVICES;MARTIN YOUNG; RUSSELL GRANGER; and LINDA MURRAY,

Defendants and Appellants.

From the Superior Court for the County of Santa Barbara

Honorable James W. Brown, Case No.: 1266707

APPELLANTS' OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL APP-008

COURT OF APPEAL, Second APPELLATE DISTRICT, DIVISION Six	Court of Appeal Case Number: B222391
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	FOR COURT USE ONLY
APPELLANT/PETITIONER: American Indian Health & Services, Inc., et al. RESPONDENT/REAL PARTY IN INTEREST: Martha Jamies, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): All Appellants

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

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Date: August 23 2010

Michelle L. Steinhardt ▶ _____

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I. INTRODUCTION.

This appeal involves construction of provisions of the Indian Health Care Improvement Act, 25 U.S.C. section 1600 et seq.

Defendants / Appellants are American Indian Health & Services, Inc. ("AIHS"), Russell Granger, Linda Murray and Martin Young (collectively "Appellants" or "Defendants"). AIHS is a California non-profit corporation that provides medical services to eligible persons under the Indian Health Care Improvement Act. Individual Appellants Granger, Murray and Young were and are directors of AIHS.

Under AIHS' bylaws, and its federal contract with the Indian Health Service, its board of directors is required to be comprised of 51% urban Indians as that term is defined in 25 U.S.C. section 1603(f).

Plaintiffs / Respondents are Martha Jaimes, Michael Cordero, Francis Uribe, and Janet Garcia (collectively "Respondents" or "Plaintiffs"). All Respondents were former directors of AIHS. All were removed from their unpaid director positions in September 2006 after failing to respond to a request that they submit to AIHS documentation demonstrating their eligibility for board membership as urban Indians under AIHS' bylaws.

Eighteen months after they were removed from the AIHS' board of directors, Respondents filed suit asserting, *inter alia*, discrimination, wrongful termination, and declaratory relief on grounds that they were improperly removed from their unpaid volunteer director positions. The trial court dismissed all of the discrimination and employment claims but, after a bench trial in June 2009, entered judgment on the declaratory relief claim holding that Respondents were (1) eligible to be directors under the AIHS' bylaws because they were urban Indians under the Indian Health Care Improvement Act, (2) that they were improperly removed from their volunteer positions and were to be reinstated for the balance of their

respective terms,[1] and (3) that they were to be provided access to AIHS corporate records, bank accounts, and keys to AIHS' facilities.

AIHS appeals. The trial court erred as a matter of law in entering injunctive relief in favor of Respondents because the trial court erred as a matter of law in construing 25 U.S.C. section 1603(c) and (f) so as to find that the Respondents were urban Indians under the provisions of that statute and eligible to be directors under AIHS' bylaws. Further, the trial court erred because it ordered that Respondents were to be reinstated to serve the balance of their already expired terms. The trial court erroneously employed an overbroad and unlimited construction of the term "Indian" that was not supported by the statutory framework, and improperly interfered with the internal workings of a private corporation.

The facts of this case are not in dispute and, after independently reviewing the facts and the controlling law, this Court should enter an order directing the trial court to reverse the judgment in all respects.

II. STATEMENT OF FACTS.

A. Background Facts.

1. AIHS Is A Non-Profit Corporation and Contractor Of The Federal Government Governed By Its Bylaws.

AIHS is a non-profit corporation organized under California law. AIHS is a federal contractor of Indian Health Service ("IHS"), an agency of the federal government administering a federal health program for American Indians and Alaska Natives pursuant to Title V of the Indian Health Care Improvement Act ("Title V" or the "Act"), 25 U.S.C. section 1600, *et seq*. AIHS provides free or discounted healthcare services to

[1] Each of the Respondents respective two year term of office expired in May 2007.

verified Native Americans and Alaskan Natives who reside within its designated service area consisting of the greater Santa Barbara area. AA 313. AIHS also provides medical services to others in the greater Santa Barbara area for a fee.

Consistent with California law, AIHS has adopted bylaws which govern its corporate structure. Under its bylaws, AIHS' purpose is to, among other things, "provide direct health care and supportive services with a special emphasis on the Urban American Indian," to "promote a whole and healthy American Indian community through health promotion and disease prevention activities," "advocate for the...needs of urban America Indians as local, state and federal levels," and participate in events that contribute to the advancement of American Indian heritage. AA 411-412.[2]

AIHS' bylaws are approved by its board of directors. Under its bylaws, AIHS is governed by a board of directors ("board"). The board is responsible for, among other things, determining the mission of the corporation, selecting the Executive Director and Fiscal Officer, reviewing their performance, and monitoring the performance of the corporation. AA 416.

The 2004 AIHS' bylaws required that the board be comprised of at least three and no more than eleven Directors, and at least 51% of the board members had to be enrolled in and verified members of a federally recognized tribe. The remaining 49% of board members would have to have had demonstrated that they are United States American Indians in one of the following four ways: (1) documentation from the Bureau of Indian

[2] The admitted trial exhibits are included in the Appellants' Appendix at pages 272 through 452. The trial court did not mark the admitted exhibits. Appellants have added the trial exhibit number to each exhibit for reference purposes. A record of exhibits admitted during trial may be found in the Master Index of the Reporter's Transcript.

Affairs; (2) documentation from a federally recognized tribe; (3) documentation from a state recognized tribe; or (4) sworn statements attesting Indian identity from five individuals not immediately related to each other or the applicant, in the Indian community who are themselves enrolled in federally recognized tribes. AA 369-370.

Respondent Garcia was appointed to the board under the 2004 bylaws. The 2004 bylaws provided that directors terms of office were two years, "or until [a] successor is elected." AA 371.

In February of 2005, IHS informed the AIHS board (which then included Respondent Garcia) that AIHS' "...governing body does not meet the criteria stated in Title V of the Indian Health Care Improvement Act.... At present the board composition does not meet the minimum requirements of 51% documented urban Indians residing within the Santa Barbara community." AA 275. In its program review, IHS warned that AIHS would need to have a board controlled by at least 51% urban Indians in order to be considered for contract renewal. Id.

Thereafter on May 25, 2005, the board amended its bylaws significantly. The board created a voting class comprised of persons who are urban Indians under 25 U.S.C. section 1603(f) who reside in the service area, complete a voting class application, and provide documentation of American Indian status. Satisfactory types of documentation of American Indian status were listed in the bylaws as follows:

> (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. section 1603(c). AA 386-387.

In addition, the 2005 AIHS' bylaws were amended such that they required there be at least three board members, but not more than nine, who were to hold terms of two years. The 2005 bylaws were also amended such that board membership is open to "any qualified community member duly elected" but "no less than 51% of the members shall be documented "urban Indians", as defined in 25 U.S.C. section 1603(f)." AA 388-389.

This new requirement, that the board have a majority of urban Indians, was a direct result of the directive AIHS received from IHS.

The 2006 bylaws were the same as the 2005 bylaws with respect to membership in the voting class, the number of directors, and the requirement that the board be at least 51% urban Indian under 25 U.S.C. section 1603(f). However, the 2006 bylaws provided that directors would serve terms of four years, instead of two. AA 417.

In 2008, the AIHS board of directors approved amendments to AIHS' bylaws that (1) eliminated the voting class, (2) changed from an election system of directors to an appointment system of directors by existing directors, and (3) added an additional requirement that members of the board of directors "shall not be related by blood, [ ] or marriage." AA 440.

2. Respondents Are Members Of The Coastal Band Of The Chumash Nation.

All of the Respondents are members of the Coastal Band of the Chumash Nation ("Coastal Band"). AA 52, ¶ 12. The Coastal Band is not recognized by the federal government,[3] and none of the Respondents are

[3] "Labeling an Indian tribe as federally recognized is a function of the executive branch." *Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal.4th 239, 243 citing *U.S. v. John* (1978) 437 U.S. 634, 652-653. Congress has mandated that the executive branch publish an

members of a federally recognized tribe of Indians. AA 61, ¶ 46. The Coastal Band is a non-profit corporation with members and a governing body.

The Coastal Band is not and has never been recognized as an Indian tribe by the California State legislature. RT 364:21-25. Because of this, Appellants asserted below, and assert in this Court, that the Coastal Band is not a State recognized tribe. Respondents dispute this.

3. Respondents Jaimes, Uribe, And Cordero Became Directors Of AIHS In An Attempt To Fulfill The Requirement That The Board Be Comprised Of 51% Urban Indian.

Respondent Garcia was appointed to the AIHS Board in 2003. AA 272-274. She participated in the approval of the amendments to the bylaws in 2005, which were effective May 25, 2005. RT 274:5-13. At all times relevant, Respondent Garcia did not live in the service area of AIHS. RT 234: 9-13.

Immediately after the AIHS bylaws were amended in May 2005, and in order to constitute a board comprised of 51% urban Indians pursuant to the demand of IHS, AIHS held a meeting at which it conducted board elections. Richard Anderson, then Chief Financial Officer of AIHS, testified that if it did not have a board election in 2005, IHS would pull

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official list of all federally recognized tribes in the Federal Register. *Id.* citing 25 U.S.C section 479a-1. "Appearance on the list grants the tribes immunities and privileges, including immunity from unconsented suit, by virtue of their relationship with the United States. *Id.* citing 67 Fed. Reg. 46,328 (July 12, 2002). The Department of the Interior must acknowledge tribal existence as a prerequisite to the protection, services and benefits available to Indian tribes from the federal government. *Wanomi P. v. Mary P.* (1989) 216 Cal.App.3d 156, 166, review denied (1990); 25 C.F.R. Part 83.2. The procedure to obtain federal recognition is contained 25 C.F.R. Part 83. *Id.* at 166-168.

AIHS' funding. RT 307:12-22; 309:20-311:2.

As a result of the election, Respondents Uribe, Jaimes and Cordero, all of whom resided in the AIHS service area, were elected to the board of directors, as well as Barbara Barbere and Juan Calderon. AA 280, 313.[4] Respondents Jaimes, Uribe, and Cordero provided their Coastal Band membership card as documentation that they met the criteria for board membership. RT 68:25-27; 137:20-138:8; 195:14-17.

In January 2006, Appellant Young, a member of a federally recognized Indian tribe, was appointed to the AIHS Board of Directors. RT 440:9-12; 441:10-11. At all times relevant, Martin Young resided outside of the AIHS service area. RT 449:13-20.

In April 2006, the Board, which included Appellant Young, Respondents, and at least three other directors not parties to this case, adopted the amended and restated bylaws for AIHS ("2006 Bylaws"). AA 409-437. No change was made to the requirement that at least 51% of the board members be qualified as "urban Indian" pursuant to 25 U.S.C. section 1603(f). AA 417.

In July of 2006, then AIHS' Executive Director, Al Granados advised the board that it was required to be composed of 51% urban Indian pursuant to 25 U.S.C. section 1603(f) which meant that 51% of the Board had to meet one of the following criteria and live in the AIHS service area:

1. Certification as a documented member of a Federally-Recognized Tribe
2. Possess a Certified Degree of Indians Blood (CDIB) from the

[4] Under the 2005 bylaws in effect when these directors were elected, their terms were to be two years, or until May 31, 2007. AA 00389. Under the 2006 bylaws which were adopted by a board that included all Respondents, directors terms were to last four years. AA 00417. The 2006 amended bylaws are silent as to the term of office of the then existing directors, including the Respondents' respective terms of office.

Bureau of Indian Affairs (BIA)

3. Listed on the California Judgment Rolls with Certification from BIA
4. Be a descendant of any of the above (limited) to two (2) generations. AA 299; RT 149:11-150:18.

In preparation for an upcoming IHS audit, Granados requested that each board member, including each Respondent, provide documentation in one of the foregoing categories in order to maintain compliance with Title V and the IHS contract and grant. AA 300-302.

On September 5, 2006, Granados sent a letter to each board member, including each of the Respondents and board members Babatunde Folayemi, Barbara Barbere, and Elvira Quiroga, again requesting that they provide documentation of urban Indian status sufficient to satisfy 25 U.S.C. section 1603(c) and the bylaws. AA 300-303; RT 102:24-103:4. Granados also requested that each board member, including each of the Respondents, provide him with a piece of mail addressed to their current address to demonstrate residence within AIHS' service area. AA 300-302.

Granados requested that the verifying documentation be provided by September 15, 2006. Id.

None of the Respondents or the other board members provided the requested documentation or responded to Granados' request in any way. RT 112:23-28; 177:20-27; 216:9-217:6; 286:21-23.

4. Respondents Positions As Directors Are Vacated Because They Fail To Respond To AIHS' Request For Documentation Of Their Qualifications.

On September 25, 2006, Appellant Young, in his capacity as a director, prepared a memorandum to Granados acknowledging that no documentation of urban Indian status had been provided by the Respondents, or any of the other board members. AA 303. Based upon the

lack of any response, Young believed that the board was not properly constituted under its bylaws [Article IV, section 4] and in jeopardy of losing its IHS contract. AA 302. Based upon his good faith belief that Respondents were not qualified to be board members because of their failure to respond, Young requested that Granados notify each Respondent and each of the other board members who had failed to respond that their director positions were vacated effective immediately. Id.; RT 481-482.

On the same date, each of the Respondents were sent letters advising them that their board positions had been vacated, that the positions of all non-qualifying board members had been vacated, and that two qualified persons were being immediately appointed to the board such that the board was qualified under the bylaws and Title V in order to remain eligible for federal funding. AA 304-306. These letters, dated September 25, 2006 from Granados, explained that each of the Respondents had failed to provide any documentation in support of their individual status as "urban Indian," and also stated that each Respondent was welcome to re-apply to serve on the AIHS board upon providing documentation of their tribal affiliation. Id.

After the Respondents' positions on the board were vacated, Respondents met with Steve Riggio of IHS and requested IHS intervene on their behalf. RT 296:3-15. IHS refused stating the removal was an "in-house" matter. RT 296:3-15.

Thereafter, a successor board of directors was established consisting of Martin Young, Russell Granger and Linda Murray, all of whom are federally recognized Indians (and also individual Appellants in this matter). RT 441:10-11; 453:2-4; 487:18-23. Both Russell Granger and Linda Murray also reside within the AIHS service area and are urban Indians under 25 U.S.C. section 1603(f). AA 50; RT 453:5-6.

None of the Respondents ever reapplied for board membership or

provided documentation of eligibility to AIHS. RT 112:23-28; 117:20-27; 216:9-217:6; 286:21-23.

The successor board comprised of the individual Appellants adopted new bylaws on May 27, 2008 which still required that 51% of the directors be urban Indian as defined under the Indian Health Care Improvement Act at 25 U.S.C.A section 1603(f) and as required by subsection 1603(h). AA 440. However, the 2008 bylaws did not provide for a voting class or for elections of directors, and instead provided that directors would be appointed. The 2008 bylaws also included a provision which prohibited directors from being related by blood or marriage. Id.

B. Procedural History

1. Plaintiffs' File This Action Eighteen Months After Their Board Positions Are Vacated.

On March 14, 2008, Plaintiffs filed a Complaint for Damages against AIHS, Martin Young, Linda Murray, Russell Granger and Al Granados.[5] AA 1-22.

Defendants demurred to, *inter alia*, the declaratory relief claim on grounds that the trial court lacked the jurisdiction to determine whether the individual Respondents were members of the Coastal Band. AA 23-46. Although sustained on other grounds, the trial court overruled the demurrer as to the declaratory relief claim. AA 47-48.

On June 25, 2008, Plaintiffs' filed a Verified First Amended Complaint ("VFAC") alleging: (1) discrimination; (2) harassment; (3) wrongful termination; and (4) declaratory relief. AA 49-83. In their declaratory relief claim Respondents requested, among other things, that the Court recognize that members of the Coastal Band are "Indians" and "Urban Indians" within the meaning of Title V of the Indian Health Care

[5] Granados was served by publication; he never submitted a response to the Court or appeared in this action.

Improvement Act. AA 71-73, ¶¶ 80-86.

On August 7, 2008, AIHS, Young, Granger, and Murray filed their verified Answer to the VFAC. AA 84-110.

On August 20, 2008, the Plaintiff board members filed a Motion for Preliminary Injunction seeking an order that they be reappointed to their positions as board members of AIHS. AA 598-599. Defendants opposed. AA 599-600. On November 19, 2008 the trial court denied Respondents' Motion for Preliminary Injunction in its entirety. AA 600.

On January 16, 2009, Appellants filed a Motion for Summary Adjudication as to all four causes of action. On May 12, 2009, the trial court granted summary adjudication of Respondents' claims for discrimination, harassment and wrongful termination, but denied summary adjudication of the declaratory relief claim. Following summary adjudication, the only claim left for trial was Respondents' fourth cause of action for declaratory relief.

2. Trial Proceeds On The Limited Issue Of Whether Respondents Were Urban Indian And Qualified To Hold Positions As AIHS Directors.

A four day bench trial commenced on June 29, 2009 and concluded on July 6, 2009. At trial, each of the Plaintiffs /Respondents claimed that they were qualified as urban Indian under 25 U.S.C. section 1603(f) and were wrongfully removed from their positions as directors of AIHS.

Defendants responded that Plaintiffs, as individuals, lacked standing to bring the action on behalf of the Coastal Band.

At trial, Plaintiffs each testified that they were members of the Coastal Band and provided proof of Coastal Band membership to AIHS to demonstrate proof of descendency when they applied for membership. Jaimes, Cordero, and Uribe testified that they lived in the service area of AIHS; Garcia testified that she did not live in the service area.

Jaimes admitted she is not a member of a federally recognized tribe, she does not have certified degree of Indian Blood from the Bureau of Indian Affairs; she is not listed on the California Judgment Rolls and is not a descendant within two generations of any of the foregoing. RT 149:16-151:10; 176:28-177:13.

Jaimes also testified that after she was asked to provide documentation of her urban Indian status, she contacted the deputy director of the IHS to find out if the board eligibility requirements provided by Granados were accurate. She was advised not only that they were accurate but that, as a Coastal Band member, she was required to obtain documentation from the Bureau of Indian Affairs ("BIA") in order to be eligible to receive services at AIHS. AA 307; RT 173:18-174:2; 175:20-176:27.

As with Jaimes, Cordero admitted that he is not a member of a federally recognized tribe; he does not have certified degree of Indian Blood card from the Bureau of Indian Affairs; he is not listed on the California Judgment Rolls; and he is not a descendant within two generations of any of the foregoing. RT 110:3-21; 111:12-112:21.

As with Jaimes and Cordero, Uribe is not a member of a federally recognized tribe and does not possess a certified degree of Indian Blood card. RT 219:4-6; 216:13-217:23. However, Uribe's name does appear on the California Judgment Roll, but she does not have a certification from the BIA in this regard. RT 216:13-217:23; 228:23-25. Uribe testified that she knew it was possible to obtain such a certificate but has taken no action to actually obtain the certification. RT 216:13-217:23. Uribe testified that although she believes she is eligible for BIA certification, she chose not to apply for it because she disagreed with the criteria set forth by AIHS and Granados for board membership. RT 228:3-22. Uribe attempted to discuss her opinion of the criteria with IHS, but IHS advised her it was not

interested in getting involved in what it deemed an internal matter of AIHS. RT 225:14-24.

As with the others, Garcia admitted that she is not a member of a federally recognized tribe and does not possess a certified degree of Indian Blood card. Although she is also on the California Judgment Roll, she does not possess certification from the Bureau of Indian Affairs. RT 286:1-9; 290:26-297:1.

Because she does not live within the AIHS service area, Garcia agreed that she does not meet the "urban" requirement of the definition of "urban Indian" under the AIHS bylaws and 25 U.S.C. section 1603(f). RT 234:9-25.

In addition, Garcia testified that she has a felony conviction for welfare fraud. RT 295:16-26; AA 215.

Respondents also offered testimony of John Ruiz, a member of the Coastal Band since the early 1960's and cultural resource coordinator for the Coastal Band for the last 35 years. RT 389:5-21. As the cultural resource coordinator, his responsibilities include communicating with the county, city, state, and federal governments on Coastal Band cultural resource programs and in the protection of cultural resources for and on behalf of the tribe. RT 389:22-27.

Ruiz testified that he believes the Coastal Band is recognized by the State of California based upon his communications with city, county, and state government agencies. For example, on the city level, the Coastal Band works with a local city to preserve a Native American cemetery that at one time had a motorcycle track on top of it. RT 405:11-406:22. On the county level, Ruiz has helped the county draft resource policies and develop programs that assess county parcels for Native American sites, then catalog and inventory these sites. RT 390:11-391:6.

On the state level, Ruiz helped to create the Native American

Heritage Commission ("NAHC" or "Commission") in the early '70s. Since its inception, he has been in contact with the NAHC as the cultural resource coordinator for Coastal Band. RT 390:11-391:22. Recently, a tribal consultation list for NAHC was created. RT 396:6-24. The Coastal Band is on this list. RT 259:17-260:24. Ruiz also works with the State Parks Department concerning reburials of Chumash people in state parks. RT 401:12-403:14.

Ruiz testified that the Coastal Band has never requested that the state legislature enact a resolution officially recognizing it as a tribe. RT 408:10-28.

Defendants offered testimony of an expert in Indian Affairs, Dennis Whittlesey, a licensed attorney with thirty-eight years experience in Indian law. RT 344:2-28. Whittlesey has testified before Congress three times on subjects involving Indian affairs. RT 350:10-352:9. Whittlesey has worked with congressional committees in both the House and Senate to draft federal statutes concerning Indian law over the last twenty years, including but not limited to the Indian Self Determination Act and the Land Consolidation Act. RT 346:7-12; 348:5-349:1. Whittlesey has also consulted with other agencies within the federal government regarding Indian issues such as the Senate Indian Committee on Indian Affairs, the Bureau of Reclamation, and the Bureau of Indian Affairs in the Department of the Interior. RT 349:4-23.

For more than twenty-five years, Whittlesey has assisted Indian tribes in their quest for federal recognition, advised other lawyers on the procedures and strategies for obtaining recognition as well as consulted with Indian tribes concerning other areas of federal law. RT 346:18-349:23. Whittlesey has assisted five Indian tribes in obtaining federal recognition. RT 346:18-27. Whittlesey has also consulted with state governments on Indian issues, including the State of California. RT

349:24-350:9 Whittlesey has represented tribes in California which has allowed him to thoroughly understand why California Indian law is so unique compared to the rest of the country. RT 353:14-358:21.

Whittlesey's scope of testimony during trial concerned the federal and state tribal recognition processes generally; the history of complexities facing California Indians with regard to recognition; California's formal recognition process of Indian tribes and the tribes that have completed this process; the development of the California judgment rolls; the scope and significance of the judgment rolls; the history and significance of the California Native American Heritage Commission and Repatriation Commission in California; the historical context and significance of the term "urban Indian"; and historically why differences exist in the requirements under the Indian Health Care Improvement Act for recognition purposes versus eligibility for services. RT 346:18-385:24.

The trial court accepted him as an expert on these topics. RT 21:2-18.

Whittlesey testified that placement on the California judgment rolls **does not** mean that the a person is a member of a tribe recognized by the State of California or that the individual is a member of a federally recognized tribe. RT 362:9-14; 363:3-5. All the judgment roll means is that the individual can trace his/her ancestry to a Native American residing in California in 1852 who lost land. RT362:9-14. This testimony was also supported by a form letter from the United States Department of the Interior, Bureau of Indian Affairs, which included the following statement:

> Please Note: the 1972 Judgment roll is only considered as a payment list and inclusion on the payment list does not denote tribal membership nor does the possession of California Indian blood necessarily entitle the above named person to BIA benefits.

AA 363.

Whittlesey testified as to the methods in which a tribe may become recognized by a State. These include (a) state enacts a state law or legislative resolution recognizing the tribe as a state recognized tribe or (b) a state law similar to the acknowledgement law of the federal government is created whereby an administrative process is established for state recognition of Indian tribes. RT 352:10-26. He testified that California has no administrative process, but has used the resolution approach (legislative action) on two separate occasions. RT 352:10-21.

Whittlesey testified that only two California tribes that have received such enactments: (1) Juaneno Band of Indians received legislative enactment by resolution in 1993 extending state recognition to that tribe as part of that tribe's attempt to receive federal acknowledgement through the administrative process, and (2) the Gabrielino tribe received state recognition through a resolution recognizing the tribe and supporting its bid for federal recognition. RT 364:21-365:15.

Whittlesey testified there is presently no other mechanism to achieve state recognition in California. RT 366:5-8.

Whittlesey testified that the NAHC is not a body that *recognizes* Indian tribes, and that placement on the NAHC contact sheet is not tantamount to State recognition. Whittlesey explained that the NAHC is an advisory group that provides guidance when a ground disturbance occurs and artifacts or human remains are discovered. The NAHC's job is to consult with local interests, including Indian groups, to determine the proper way to handle the remains and artifacts. RT 366:9-28.

The NAHC contact sheet is used to determine which group of Native Americans should be contacted when an artifact or remains are unearthed. RT 367:1-10. In order to be listed on the contact sheet, all a group has to do is request inclusion. RT 381:8-10.

In response to the assertion that the Repatriation Oversight

Commission may also be another way to achieve recognition, Whittlesey testified that the Repatriation Oversight Commission has never been funded and it has never prepared a list of contact persons or tribes. RT 369:19-370:2. Whittlesey testified that since a list was never created, it does not make a difference one way or the other that a tribe is on the list because the list does not exist. RT 383:1-5.

Whittlesey testified from a historical context, the term "urban Indian" is defined as members of federally recognized tribes who were no longer residing on federally recognized reservations. RT 370:8-371:26. He testified that the IHS was created to provide medical services for Native Americans who moved from the federally recognized reservations to other areas. *Id.*

Whittlesey testified that membership in the Coastal Band does not mean the person is urban Indian, and additional documentation is required to demonstrate eligibility as an urban Indian over and above a Coastal Band membership card. RT 373:14-16.

Defendants / Appellants also offered the testimony of individual respondent Martin Young. Young testified that at the time of trial he comprised the 49% minority of the Board because he lived outside the service area of AIHS and was not within an urban center under section 1603(g), and not "urban" under section 1603(f). He testified that when he vacated the Respondents director positions, he believed he had the authority to do so and that it was in the best interests of AIHS as AIHS could not operate without federal funding. RT 449:13-450:1.

Young testified that the clinic is operating smoothly, the number of patients AIHS is seeing has grown, the administration is effective, and the patients are pleased with the services offered. RT 490:25-491:22. Young testified that he believed reinstating Respondents to the Board would cause disruption and would be detrimental to AIHS. RT 476:18-477:23.

Defendants / Appellants also offered the testimony of Scott Black, the executive director of AIHS since June 1, 2008. RT 501:19-24. Black testified that as the executive director of AIHS, he is in contact with the IHS on a monthly basis concerning how AIHS spends the contract money it provides as well as to provide a status update on this matter. RT 516:23-517:4. Black stated that the clinic has a very good relationship with IHS, that IHS is no longer preparing to pull funding, and the contract with IHS has been renewed. RT 517:20-518:6. Black testified that IHS seems pleased with the current management and operations of the clinic. RT 519:9-14. Black received a letter from IHS wherein IHS stated that it is "concerned about this lawsuit and the potential outcome...[is] threatening renewal of...[the IHS] contract and the continuing viably of the Santa Barbara urban program." AA 308-309.

Black also testified that IHS would not permit Respondent Garcia to sit on the board because of her felony conviction for welfare fraud. AA 308-309; RT 527:6-17.

In closing, AIHS argued the following: (1) that Respondents, as individuals, lacked standing to seek State recognition of or on behalf of the Coastal Band, (2) that Respondents failed to demonstrate grounds for declaratory relief under Code of Civil Procedure section 1060, (3) that injunctive relief was improper, (4) that Respondents' positions were properly vacated for failing to provide the requested information, and (5) that Respondents were not qualified to sit on the board as urban Indians under 25 U.S.C. section 1603(f). RT 589:19-611:22.

3. Judgment Is Erroneously Entered In Favor Of Respondents.

On October 5, 2009, Judge Brown issued his tentative decision. AA 453-461. Respondents' counsel prepared a proposed judgment and statement of decision. AA 488-515. Appellants objected to both on

numerous grounds. AA 462- 486. On February 5, 2010, a judgment was entered in Respondent's favor granting declaratory relief on several grounds. AA 488- 495. On the same date the Statement of Decision was also entered. AA 497-515.

The court erroneously found in its Statement of Decision that each of the Respondents met the definition of urban Indian set forth in 25 U.S.C. section 1603(c) and (f) because they met the definition of "Indians of California" under 25 U.S.C. section 651 and because they were members of the Coastal Band which the trial court determined was a tribe recognized by the State of California. AA 505-506.

With respect to the issue of state recognition, the trial court found that "the California Legislature is not the only way the State of California has chosen to recognize California Indian tribes. ... Among the State agencies recognizing the Coastal Band as a California Indian Tribe is the State Department of Transportation [Caltrans], California State Parks, and the California Native American Heritage Commission."

The trial court further found as follows:

> The Coastal Band Chumash, of which all plaintiffs are members, constitutes a "band ... or other organized group or community," regardless of any lack of federal recognition. As enrolled members of the Coastal Band of the Chumash, the plaintiffs are also "members of a tribe, band, or other organized group of Indians" within the meaning of 25 U.S.C., section 1603(c). Therefore, all Coastal Band members are "Indians" for the purpose of the IHCIA.

On the basis of its finding that the Plaintiffs were urban Indian under section 1603(c), the trial court determined that each of the Plaintiffs were qualified to hold board positions in AIHS and were improperly removed from the board of AIHS. The trial court also found that Garcia's felony conviction did not render her disqualified from holding a board position.

Even further, although not requested in the VFAC, the trial court

found that the May 2008 amendments to the AIHS bylaws which eliminated the AIHS voting class, provided for appointed directors instead of elected directors, and prohibited directors who were related by blood or marriage, were unlawful and ordered they be rescinded.

On the basis of the findings in its Statement of Decision, on February 5, 2010, the trial court entered judgment in which it declared, *inter alia*, the following:

- That the Coastal Band is a tribe recognized by the State of California (AA 489, no. 1);
- That all Plaintiffs were urban Indians under the Act and qualified to sit on the AIHS board (AA 489-490, 492-494, nos. 2-14, 34, 35, 43, 44, 46, 56);
- That all Plaintiffs were improperly removed from the board and "shall be re-appointed ... to fulfill the balance of their term" (AA 491, 493, nos. 15-22, 37);
- That all Plaintiffs shall have access to AIHS financial records, contracts, keys and employee lists (AA 491, 493-495, nos. 23-26, 47-51, 56);
- That the May 27, 2008, amendments to the AIHS bylaws are declared unlawful and rescinded (AA 491-492, no. 27);
- That each Plaintiff has a right pursuant to common law or statute, but not pursuant to a written instrument or contract, to hold a volunteer board position in AIHS (AA 492, nos. 28-29);
- That Plaintiff Garcia's criminal record did not render her disqualified to hold a position as director of AIHS (AA 493, nos. 39-41);
- That reappointing the Plaintiffs to the board of directors is in

the best interest of AIHS (AA 493, no. 45); and

- That a mandatory injunction is proper. (AA, 494-495, no. 56)

Appellants timely appealed and seek reversal of the judgment.

III. ISSUES ON APPEAL.

1. Whether the trial court erred as a matter of law and acted in excess of its jurisdiction in finding that the Coastal Band is a tribe recognized by the State of California.

2. Whether the trial court erred as a matter of law finding that the Respondents met the definition of urban Indian set forth in 25 U.S.C. section 1603(f) where they are not members of a federally recognized Indian tribe and have never received State recognition.

3. Whether the trial court erred as a matter of law and in entering a mandatory injunction directing reappointment of Respondents to AIHS' the Board.

4. Whether the trial court erred as a matter of law and in excess of its jurisdiction in finding that the 2008 amendments to the AIHS' bylaws were unlawful and must be rescinded.

IV. ARGUMENT.

A. Standards of Review.

It is axiomatic that issues of statutory interpretation are issues of law subject to independent, *de novo* review by this Court. *Barner v. Leeds* (2000) 24 Cal.4th 676, 683; *see also Harustak v. Wilkins* (2000) 84 Cal.App.4th 208, 212 (when the outcome of an appeal turns upon the meaning of statutory phrases, and where there are no facts in dispute, the matter must be decided as a pure issue of law.)

Where, as here, there is a statement of decision, "any conflict in the evidence or reasonable inferences to be drawn from the facts will be

resolved in support of the determination of the trial court decision" unless the appealing party files timely objections." *See In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358; *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134. However, where, as here, appellant timely objects to findings in a statement of decision, it "shall not be inferred on appeal ... that the trial court decided in favor of the prevailing party as to those facts or on that issue." *In re Marriage of Arceneaux*, at 1134, citing Cal. Code Civ. Proc., section 634.

Also relevant here is the standard for deference to be afforded the internal workings of a private corporation. Where the bylaws of a private organization are at issue, a court may only review the interpretation of straightforward bylaw language if the interpretation of the private organization is unreasonable. *Hard v. California State Employees Assn.* (2003) 112 Cal.App.4th 1343, 1347. Even in the case where the private organization's interpretation is unreasonable, the judiciary may only intercede in the private dispute where the interests of the party challenging the interpretation of the private organization outweigh the burden on the judiciary and the autonomy of the private organization. *Id.*

B. Legal Background Relating To The IHS and Federal and State Recognition Processes.

1. The IHS.

The IHS is an agency within the Department of Health and Human Services created to provide federal health services to American Indians and Alaska Natives. "The IHS is the principal federal health care provider and health advocate for Indian people, and its goal is to raise their health status to the highest possible level. The IHS provides a comprehensive health service delivery system for approximately 1.9 million American Indians and Alaska Natives who belong to 564 federally recognized tribes in 35 states." (http://www.ihs.gov/PublicInfo/PublicAffairs/Welcome_Info/IHSintro.asp).

The enabling statute for the IHS is 25 U.S.C. section 1601, *et seq.*

2. Federal Recognition.

Article I of the U.S. Constitution provides that Congress shall have the power "[t]o regulate Commerce ... with the Indian Tribes." U.S. Const., Art. I, section 8, cl. 3. The Supreme Court has explained that "in 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." *United States v. Sandoval* (1913) 231 U.S. 28, 46; see also *United States v. Holliday* (1865) 70 U.S. 407, 419 (stating that in regard to the recognition of Indian tribes, "it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs.")

Consequently, "the action of the federal government in recognizing or failing to recognize a tribe has traditionally been held to be a political one not subject to judicial review." *Miami Nation of Indians of Ind. v. U.S. Dep't of Interior* (7th Cir.2001) 255 F.3d 342, 347, citing William C. Canby, Jr., *American Indian Law in a Nutshell* 5 (3d ed.1998).

"Federal recognition" is a term used to identify those Native American tribes that have established a special government to government relationship with the United States. Historically, Native American tribes have obtained federal recognition through treaties with the United States government or through the administrative decisions within the executive branch of the government. Mather, *Old Promises: The Judiciary and the Future of Native American Federal Acknowledgement Litigation* (2003) 151 U. Pa. L.Rev. 1827, 1832, 1837-1841.

In 1978, the Department of Interior, pursuant to congressional authority, established the Federal Acknowledgement Process by which non-

recognized tribes could become "acknowledged" and thereby eligible to receive federal services and protections. Procedures for Establishing that an American Indian Group Exists as an Indian Tribe, 43 Fed. Reg. 39,361 (September 5, 1978); 25 C.F.R. section 83.1, *et seq.* "Acknowledgment of tribal existence by the Department is a prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes." 25 C.F.R. section 83.2. Without acknowledgement, numerous tribes or other groups, including the Coastal Band, do not qualify for federal services and protections.[6]

The primary purpose of federal recognition is to attain quasi-sovereignty as a domestic dependent nation and the ability to acquire land. See 25 C.F.R. section 151.3-4; *see also Agua Caliente Band of Cahuilla Indians v. Superior Court* (2006) 40 Cal.4th 239, 246-248 (acknowledging that federally recognized Indian tribes are, among other things, immune from state jurisdiction.) Federally recognized tribes are exempt from the jurisdiction of state governments and enjoy significant economic and social benefits. Mather, 151 U. Pa. L.Rev. at 1833. Federal benefits include for example, social services such as medical treatment, education from elementary though post secondary school, water resources, parks, roads, housing, law enforcement, and economic assistance. *Id.*

3. State Recognition.

The term 'state-recognized tribe' refers to tribes that are not federally recognized, but have been acknowledged by some action taken by a state's legislature. 1-3 Cohen's Handbook of Federal Indian Law section 3.02, subsection 9 (Nell Jessup Newton Ed., 2005.) The purpose of State recognition is to effect a "government to government" relationship between

[6] Members of non-recognized groups such as the Coastal Band may on an individual basis qualify for health services under the Indian Health Care Improvement Act.

the State and the tribe. There are approximately fifteen states, including California, that have some sort of state recognition process. Koenig and Stein, *Federalism and the State Recognition of Native American Tribes: A Survey of State Recognized Tribes and State Recognition Processes Across The United States* (2008) 48 Santa Clara L.Rev. 79, 112; Koenig and Stein, *Lost in The Shuffle: State Recognized Tribes and The Gaming Industry* (2006) 40 U.S.F. L.Rev.327, 328.

State recognition can take a variety of forms; (1) a direct state law, (2) administrative process, (3) legislative, and (4) executive. Koenig and Stein, 48 Santa Clara Law Rev. at 103.

"Members of state-recognized Indian tribes also receive some measure of federal protection and benefits for education, for general economic development and social self-sufficiency, and to secure interests in Indian-produced arts and crafts. Members of non-federally recognized tribal groups are typically outside the purview of even these benefits." 1-3 Cohen's Handbook of Federal Indian Law section 3.02, subsection 9 (internal citations omitted).

4. California's Tribal Recognition Process.

While some states have an administrative or other similar process through which tribes can secure "state recognition," California does not. See, e.g., 12 Ala. Admin Code 475-X-3-.01 et seq. (establishing Alabama's procedures and criteria for state recognition of an Indian tribe.) California "does not have a formal system of recognizing state Indian tribes, such as that of federal law." AA 193-194, 196-197, 199-204. As a result, non-federally recognized tribes seeking state recognition have to pursue state recognition through legislation. The only method to receive state recognition in California is to obtain a Joint Resolution from the Legislature. Koenig and Stein, 48 Santa Clara L. Rev. at 112. "Joint resolutions are initiated when the Legislature wants to comment to

Congress and/or the President on a federal matter of concern to the state. These resolutions require a majority vote in both houses. Joint resolutions neither need the signature of the Governor nor have the force of law. They take effect upon their being filed with the Secretary of State." Id. at 106. Joint resolutions are used to express the will of both houses for certain purposes. Id. at 113.

Only two tribes have been recognized by the State of California. Koenig and Stein, 48 Santa Clara L. Rev. at 112; see also AA 193-194; 196-197, RT 352:10-21. The Juaneno Band of Indians was recognized by an Assembly Joint Resolution of the California State Legislature in 1993 in Joint Resolution 48. AA 193-194. The resolution specifically declared that the Juaneno Band of Mission Indians Acjachemen Nation is recognized as the aboriginal tribe of Orange County. Id. The following year, in 1994, the Gabrielino Band became a state recognized tribe pursuant to the Assembly Joint Resolution 96 which declared that this "...measure would recognized the Gabrielinos as the aboriginal tribe of the Los Angeles Basins..." AA 196.

There have been no further Assembly Joint Resolutions creating state recognition in California nor is there any record of any California tribe gaining state recognition through any non-legislated action.

Like many states, California has enacted laws to protect Native American religion and traditional tribal cultural places. *See* Public Resources Code section 5097.9, et seq. Section 5097.91 establishes the Native American Heritage Commission ("NAHC"). Under section 5097.94, the NAHC has specific powers and duties; those include identification and cataloguing of "places of special religious or social significance to Native Americans, and known graves and cemeteries of Native Americans on private lands;" and to "bring an action to prevent severe and irreparable damage to, or assure appropriate access for Native

Americans to, a Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine located on public property." *See* section 5097.94(a) and (g). Further, the implementing Act for the NAHC, Public Resources code section 5097.9, et seq., uses the term "Native American" and not "Indian."

A primary function of the NAHC is to provide notification to descendants when Native American human remains are discovered on private property and to repatriate such remains and associated grave artifacts. *See* sections 5097.97 and 5097.991. To carry out its mission, the NAHC maintains a contact sheet used to determine which "Native American" organization, tribe, group or individual should be contacted when an artifact is unearthed. RT 366:9-369:18. On request, any group can be added to the list. RT 381:8-10.

C. Tribal Recognition Is Non-Justiciable And The Trial Court Had No Jurisdiction To Grant State Recognition of The Coastal Band.

In its judgment, the first finding of the trial court, which was a primary finding underlying the balance of its findings, was that the "Coastal Band of the Chumash Nation is a tribe, band, nation, or other organized group or community of Indians, recognized now by the State of California." This erroneous finding formed the basis for the trial court's findings that the Respondents were qualified to hold positions as directors pursuant to AIHS' bylaws which required that they fall within the definition of urban Indian as set forth in 25 U.S.C. section 1603(f).

As in the federal constitution, California's constitution states "[t]he powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." California Constitution, Art. III, section 3.

"The political question doctrine is a species of the separation of powers doctrine and provides that certain questions are political as to opposed to legal, and thus, must be resolved by the political branches rather than by the judiciary." *Native Village of Kivalina, et al. v. ExxonMobil Corporation* (N.D. Cal. 2009) 663 F. Supp.2d 863, 871-872. The "questions whether, to what extent, and for what time [Indian tribes] shall be recognized ... [is] to be determined by Congress, and not by the courts." *United States v. Sandoval* (1913) 231 U.S. 28; *see also United States v. Holliday* (1866) 70 U.S. 407, 419 (With regard to tribal recognition, "...it is the rule of this court to follow the executive and other political departments of the Government, whose more special duty it is to determine such affairs."); *In re Heff* (1905) 197 U.S. 488, 498, overruled on other grounds in *United States v. Nice* (1916) 241 U.S. 591, 600, ("Plenary authority over the tribal relations of the Indians has been exercised by Congress from the beginning, and the power has always been deemed a political one, not subject to be controlled by the judicial department of the Government.")

The political question doctrine that prevents federal courts from deciding matters that are non-justiciable is equally applicable in the state context when the court cannot adjudicate without intruding on another branch of government. *See Scharbarum v. California Legislature* (1998) 60 Cal.App.4th 1205, 1213-1214 ("The political question doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the legislative and executive branches.")

The trial court's declaration that the Coastal Band is recognized by the State of California was inappropriate because a court may not recognize a body of people as an Indian tribe, and the determination of whether the Coastal Band is State recognized is a non-justiciable controversy over which the trial court had no jurisdiction. Accordingly, its finding that the

Coastal Band is a "tribe, band, or other organized group" recognized by the State of California was in excess of its jurisdiction and must be reversed.

D. The Trial Court Erred As A Matter Of Law In Determining That The Individual Respondents Were "Urban Indians" Under 25 U.S.C. Section 1603(c) and (f).

The AIHS bylaws dictate the manner in which AIHS shall operate. *See Bornstein v. District Grand Lodge No. 4, Independent Order B'nai B'rith* (1906) 2 Cal. App. 624, 627; *see also* Cal. Code Corp. sections 5150-5151.

1. Statutory Framework of 25 U.S.C. Section 1603.

Under the 2005 AIHS bylaws, the AIHS board was required to be comprised of "no less than 51% ... documented "urban Indians", as defined in 25 U.S.C. section 1603(f). At the time of trial, section 1603[7] contained the "Definitions" for Title V and stated in pertinent part as follows:

> For purposes of this Act--
>
> (a) 'Secretary', unless otherwise designated, means the Secretary of Health and Human Services.
>
> (b) 'Service' means the Indian Health Service.
>
> (c) 'Indians' or 'Indian', unless otherwise designated, means any person who is a member of an Indian tribe, as defined in subsection (d) hereof, except that, for the purpose of sections 102 and 103, such terms shall mean any individual who (1), irrespective of whether he or she lives on or near a

[7] 25 U.S.C. section 1603 was amended effective March 2010. The statute was renumbered and new provisions were added. The provisions at issue here, subsections (c) and (f), were renumbered as subsections (13) and (28) but otherwise unchanged. A new subsection (3) was added defining the term "California Indian." All references to section 1603 are to the subsection numbering in effect at the time of trial (and at the time the Respondents were removed from their director positions).

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, or (2) is an Eskimo or Aleut or other Alaska Native, or (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.

(d) 'Indian tribe' means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or group or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688) [43 U.S.C. 1601 et seq.], which is recognized as eligible for the special programs and services provided by the United States to **Indians** because of their status as **Indians**.

...

(f) 'Urban Indian' means any individual who resides in an urban center, as defined in subsection (g) hereof, and who meets one or more of the four criteria in subsection (c)(1) through (4) of this section.

...

(g) 'Urban center' means any community which has a sufficient urban Indian population with unmet health needs to warrant assistance under title V, as determined by the Secretary.

...

(h) 'Urban Indian organization' means a nonprofit corporate body situated in an urban center, governed by an urban Indian controlled board of directors, and providing for the maximum participation of all interested Indian groups and individuals, which body is capable of legally cooperating with other public and private entities for the purpose of performing the activities described in section 503(a).

...

(m) 'Service area' means the geographical area served by each area office.

AIHS is an Urban Indian organization under subsection 1603(h) and, consistent with its bylaws, was required by the terms of that subsection to be governed by an urban Indian controlled board of directors. Moreover, Respondent board members Jaimes, Cordero, and Uribe were elected in 2005 so that the AIHS board would meet the IHS requirement that the board be under urban Indian control. AA 275, 388-389; RT 309:20-311:2.

To be urban Indian under the terms of section 1603(f), a person must "reside in" an "Urban center" as defined in subsection (g) of 1603, and meet "one or more of the four criteria in subsection (c)(1) through (4)."

It is undisputed that the urban center at issue in this case is the urban center area served by AIHS, which includes Carpentaria, Isla Vista, Montecito, Summerland, Santa Barbara (city) and Goleta. AA 313. It is also undisputed that Respondent Garcia did not reside in this Urban center. Thus, as to Respondent Garcia, it is undisputed that she is not an "urban Indian" under section 1603. RT 234:9-25.

With respect to Respondents Jaimes, Cordero, and Uribe, they contended they were urban Indian because they lived within the service area and met the requirements of subsection (c)(1) and/or (c)(3). This claim was wrong.

Under well settled principles of statutory interpretation, the court should determine whether the statute is plain and unambiguous; if it is, the statute must be applied according to its terms. *Carcieri v. Salazar* (2008) 129 S.Ct. 1058, 1063-1064. In construing a statute's terms, words of the statute should be accorded their ordinary meaning as understood at the time the statute was enacted. *See Id.* at 1065. In *Carcieri*, the issue before the Court was whether the word "now" in the definition of Indian in 25 U.S.C. section 465 meant at the time the statute was enacted or some later time. Based on the plain and unambiguous language of the statute and the plain meaning of the word "now," the Court determined that the word "now"

referred to the time the statute was enacted. *Id.*

Here, the first clause of subsection (c), before (c)(1), defines the term **Indian** as any person who is a member of an "Indian tribe" under subsection (d). Subsection (d) defines Indian tribe to include only those tribes that are "eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 25 U.S.C. section 1603.

Under federal regulations, Indians "eligible for services" are those Indians identified by the Secretary of the Interior annually in "Indian Tribal Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs." *See* 25 C.F.R. section 83.6(b) (the Secretary of the Interior is required to publish in the Federal Register a list of all Indian tribes which are recognized and receiving services from the Bureau of Indian Affairs, and to update and publish that list annually); *See In re Wanomi P.* (1989) 216 Cal.App.3d 156, 166-167. It is undisputed that the Coastal Band are not on this list. Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 73 Fed. Reg. 18,553-18,556 (April 4, 2008).

Thus, as a preliminary matter, subsection 1603(c) by its own terms defines the word "**Indian**" only to include members of federally recognized tribes, bands, or groups.

To meet the requirements of subsection (c)(1) (3) or (4), Respondents must have demonstrated that they were (1) "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," or (3) "considered by the Secretary of the Interior to be an **Indian** for any purpose," or (4) "determined to be an **Indian** under regulations promulgated by the Secretary." (Emphasis

added.)

Where the word **Indian** is initially defined to mean a member of a federally recognized tribe, the statute is plain that qualification under subsection (c)(1) requires that a person be (i) either a member of a federally recognized tribe, including a terminated tribe, or a descendant within two degrees of such a member, or (ii) be a member of a State recognized tribe, or a descendant within two degrees of such a member. The construction of the trial court, that the first clause of (c)(1) includes *any* group of Indians and not just federally recognized Indians, renders the reference to State recognition in the second clause meaningless and does not give effect to each part of the statute. Thus, the plain terms of (c) must be read such that the first clause of (c)(1) means only federally recognized tribes (including terminated tribes).

It was undisputed that none of the Respondents are members of a federally recognized tribe; therefore, the only way they qualified under subsection 1603(c)(1) is if they were members of a State recognized tribe. Respondents claimed below, and the trial court erroneously found, that Respondents were members of a tribe, band or group that was recognized by the State of California.

In addition, to qualify under subsection (c)(3) and (4), a person must be considered by the Secretary of the Interior to be an Indian for any purpose, or be determined to be an Indian under federal regulations. As will be discussed *infra*, the trial court also erroneously found that the Respondents were "considered by the Secretary of the Interior to be an **Indian** for any purpose," because it found they were California Indians under 25 U.S.C. section 1679.

2. Respondents Have Never Met The Requirements Of Subsection 1603(c)(1) Because The Coastal Band Is Not Recognized By The State.

Respondents incorrectly asserted in the trial court that as members of the Coastal Band they are members of a State recognized tribe. Specifically, Respondents claim that they are members of a tribe recognized by the State of California based upon the following: (1) the Coastal Band's correspondence with local, county, state and federal governments; (2) the Coastal Band's listing on the contact sheet for the NAHC; (3) the Repatriation Act, Health & Safety Code section 8010; and (4) by virtue of Civil Code section 815.3(c).

As discussed above, California has no statutory or administrative process for recognition of a tribe. Historically, the only means for State recognition is through the state legislature by joint resolution. Koenig and Stein, 48 Santa Clara L.Rev. at 112; Koenig and Stein, 40 U.S.F. L. Rev. 327, 336. While there may be State mandated means for protection of Native American remains and artifacts, such means are not themselves meant to be tantamount to "recognition" of an Indian tribe. If this were the case, then every group within the State that claimed Native American status would be a State recognized tribe.

At trial, Garcia, as the Coastal Band's current tribal chair, admitted that the Coastal Band has never attempted to obtain State recognition through the California State Legislature. RT 280:9-19. Instead, Respondents asserted that the Commission "recognizes" the Coastal Band because Government Code section 65352.3 "requires local governments to consult with California Native American tribes identified by the Commission for the purposes of protecting and/or mitigating impacts to cultural places."

Respondents are correct that section 65352.3 was created for the purposes of protecting cultural places and states in pertinent part as follows:

> 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. (emphasis added.)

However, section 65352.3 has nothing to do with State recognition, as is shown by its plain language, nor does it even include the term "Indian."

The NAHC enabling statutes, Public Resources Code section 5097.9 through 5097.99, only relate to preservation of lands and artifacts. Nothing in that statute indicates that tribes listed on contact list are "recognized" by the State of California as sovereign governments, nor are they. Such a notion is an enormous leap in logic not supported by the plain language of Public Resources Code sections 5097.9, et seq., Govt. Code section 65352.3, or the evidence. [8]

Respondents offered testimony at trial that if a group wants to be placed on the contact sheet, all they have to do is ask. RT 222:20-27. Appellants' expert Dennis Whittlesey confirmed Respondent Uribe's understanding of how easy it is for tribes to be placed on the contact sheet – all they have to do is ask. RT 381:2-10. There is no vetting process to determine if the group is even an Indian tribe, where the tribe is located, the number of members, or even the tribe's history. RT 367:1-369:18. Such information would surely be required before the State officially recognized a tribe that would enjoy substantial economic and social benefits.

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[8] In addition, as with the Government Code section cited above, the Public Resources Code does not use the term "Indian" as used in the federal statute and instead uses the term "Native American tribes" which are not the same as Indian tribes under the federal scheme.

Accordingly, mere inclusion on the contact sheet simply cannot mean that a tribe is State recognized for the purpose of section 1603(c) recognition, and the trial court was wrong in concluding that it did.

Instead, it is clear that the purpose of the NAHC contact list was to create a way for the Commission to carry out its defined mission, which includes "...providing protection to Native American burials from vandalism and inadvertent destruction, provide a procedure for the notification of most likely descendants regarding the discovery of Native American human remains and associated grave goods,...to prevent severe and irreparable damage to sacred shrines, ceremonial sites, sanctified cemeteries and place of worship on public property, and maintain an inventory of sacred places." Public Resources Code section 5097.993. The Commission, in pursuit of its mission, has never been given any power to "recognize" tribal governments as sovereign governmental entities.

Respondents next asserted that the Coastal Band is a California Indian Tribe pursuant to Health and Safety Code section 8010, et seq. for purposes of the California Native American Graves Protection and Repatriation Act of 2001. RT 574:16-575:3. This assertion also fails. The Repatriation Commission in California was designed to assist in implementing the state equivalent of the federal Native America Graves and Repatriation Act. RT 369:19-370:7. Health and Safety Code section 8012(j)(2)(A) & (B) defines "California Indian tribe," as any tribe located in California that is

> not recognized by the federal government, but is indigenous to the territory that is now known as the State of California, and [is] both (A)... listed in the BIA Branch of Acknowledgement and Research petitioner list ... [and] (B)... determined by the [Repatriation Oversight] commission to be a tribe that is eligible to participate in the repatriation process....

The code mandates that the Repatriation Oversight Commission ("Oversight Commission") publish a document listing the California tribes that the Oversight Commission determines meet certain criteria [See Cal. Health and Safety Code section 8012(j)(2)(A) & (B)] and are therefore eligible to participate in the repatriation process. The Respondents here claim that they meet the criteria of this law, but ignore that the Repatriation Oversight Commission has never published a document listing the California Indian Tribes that meet the criteria established by section 8012(j)(2)(B). In fact, the Repatriation Oversight Commission created by the Act was never funded and the list was never prepared. RT 369:19-370:7. Thus, where there is no record of any Commission determination pursuant to section 8012(j)(2)(B) of any tribal eligibility to participate in repatriation, Respondents have no basis to rely upon the Repatriation Oversight Commission for the proposition that the Coastal Band is recognized by the State of California.

Next, Respondents asserted that the Coastal Band is recognized by the State of California *for all purposes* because it has and does correspond with local, state and federal governments. Their evidence consisted of testimony from Respondent Garcia, who is also the Coastal Band tribal chair, and John Ruiz, Coastal Band resource coordinator, that the Coastal Band frequently corresponds with city, county, state and federal governments on cultural resource programs to protect cultural resources for and on behalf of the Coastal Band.

This contention should have been rejected as there was no legal authority for the proposition that such correspondence reflects State recognition. Further, the assertion that recognition is obtained via correspondence is illogical. If Respondents' recognition theory were correct, any time a state or even a local city or county agency corresponded with a non-recognized tribe, that tribe would thereafter be able to claim

State recognition. In addition to recognition as a government, a tribe that is recognized by a state within the United States obtains substantially more benefits for its members than members of a non-recognized tribe. See e.g. 25 U.S.C. section 4103 [providing housing services to State recognized tribes]; 20 U.S.C. section 7491[providing education benefits to State recognized tribes]; 18 U.S.C. section 1159 [state-recognized tribes are provided the protections of the Indian Arts and Crafts Act].

Thus, the concept of State recognition is not to be whimsically granted as there are substantial economic ramifications of State recognition, and a limited amount of financial resources available to tribes receiving aid. If mere correspondence were tantamount to State recognition, available resources would be quickly depleted and spent on individuals not contemplated as potential beneficiaries. The intended beneficiaries then would suffer greatly as the resources they depend upon for education, security and economic assistance would disappear.

In addition, state, city or county agencies would be recognizing tribes on behalf of the state without any set criteria or discussion with other agencies. This ad hoc and random basis for recognition is baseless, and there is no evidence or law to support Respondents' claim that state recognition is afforded for all purposes by merely corresponding with a city, county, state or federal agency concerning protection of cultural resources.

Finally, if corresponding with governmental agencies, listing a Native American tribe on the NAHC contact list or being on the nonexistent Repatriation Oversight Committee's list of "California Indian Tribes" constituted State recognition of that Indian tribe, then state action to obtain recognition would be superfluous, as would the many statutes that afford benefits and protections to Indians. AA 193-194, 196-197.

Thus, this Court should determine that State recognition is not so

randomly or freely given as Respondents assert. Accordingly, this Court should find that the trial court erred in finding that the Coastal Band is a State recognized tribe, and that finding should be reversed.

3. The Trial Court Erred In Finding the That The Respondents Are "Considered By The Secretary To Be Indians."

Respondent asserted below that as members of Coastal Band they are "California Indians" pursuant to 25 U.S.C. section 1679, making them "**Indians**" within the meaning of 25 U.S.C. section 1603(c)(1) or (3). As a matter of statutory interpretation, this is wrong, and the trial court erred in concluding that "California Indians" are within the section 1603(c) definition.

At the time of trial, 25 U.S.C. section 1679 provided as follows:

> (a) Report to Congress
> (1) In order to provide the Congress with sufficient data to determine which Indians in the State of California should be eligible for health services provided by the Service, the Secretary shall, by no later than the date that is 3 years after November 23, 1988, prepare and submit to the Congress a report which sets forth -
> (A) a determination by the Secretary of the number of Indians described in subsection (b)(2) of this section, and the number of Indians described in subsection (b)(3) of this section, who are not members of an Indian tribe recognized by the Federal Government,
> (B) the geographic location of such Indians,
> (C) the Indian tribes of which such Indians are members,
> (D) an assessment of the current health status, and health care needs, of such Indians, and
> (E) an assessment of the actual availability and accessibility of alternative resources for the health care of such Indians that such Indians would have to rely on if the Service did not provide for the health care of such Indians.
> (2) The report required under paragraph (1) shall be prepared by the Secretary -

(A) in consultation with the Secretary of the Interior, and

(B) with the assistance of the tribal health programs providing services to the Indians described in paragraph (2) or (3) of subsection (b) of this section who are not members of any Indian tribe recognized by the Federal Government.

(b) Eligible Indians

Until such time as any subsequent law may otherwise provide, the following California Indians shall be eligible for health services provided by the Service:

(1) Any member of a federally recognized Indian tribe.

(2) Any descendant 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.

(3) Any Indian who holds trust interests in public domain, national forest, or Indian reservation allotments in California.

(4) Any Indian in California who is listed on the plans for distribution of the assets of California rancherias and reservations under the Act of August 18, 1958 (72 Stat. 619), and any descendant of such an Indian.

(c) Scope of eligibility

Nothing in this section may be construed as expanding the eligibility of California Indians for health services provided by the Service beyond the scope of eligibility for such health services that applied on May 1, 1986.

There is no dispute that each of the Respondents meets the criteria set forth in subsection (b)(2) above, and that each of the Respondents are "California Indians" eligible to receive services under Title V.

However, on its face section 1679 only provides that California Indians are eligible for services; in fact, section 1679 implicitly recognizes exactly what is at issue here—that there are Indians in California that lack the recognition, whether federal or state, that is required for them to qualify as urban Indians under section 1603(c) and (f) such that they may receive services under Title V. Thus, section 1679 creates an additional means by

which a person may be qualified *to receive services* under Title V. This is all it does, and it does nothing to alter the plain terms of subsection 1603(c)(1) to (4) and/or AIHS bylaws.

Stated another way, nothing in section 1679 changes the definition of "urban Indian" under section 1603(f) and (c). Section 1679 does not bestow federal recognition, it does not bestow state recognition, and it does not bestow recognition by the Secretary of the Interior. Section 1679 is relevant only to whether healthcare services are provided under the Title V and inapplicable in the instant inquiry regarding eligibility to hold a position on the board of directors under AIHS bylaws and section 1603(c).

Moreover, if section 1603(c)(1) to (4) was intended to include "California Indians," section 1679 would be entirely superfluous. This is clearly not what the drafters intended, and it is clear that the trial court interpretation of section 1679 was wrong.

Finally, it should also be noted that prior to the passage of section 1603 in its current (renumbered) form in March 2010, the House of Representatives attempted to expand the definition of "urban Indian" to include California Indians in its version of the amendment to the Indian Health Care Improvement Act. H.R. 2708, 111th Cong. section 4 (2009).[9] The House of Representative proposed bill H.R. 2708 was never passed. Instead, the Senate version of the Indian Health Care Improvement Act was enacted. S. 1790, 111th cong. section 104 (2010); enacted as 25 U.S.C section 1603. The Senate version of the bill does not include an expanded definition of urban Indian to include California Indians (see 25 U.S.C. section 1603(13) and (28) as the renumbered sections (c) and (f)), and instead includes the definition of California Indian in a separate subsection. This demonstrates that the Senate had an opportunity to expand the

[9] http://thomas.loc.gov/cgi-bin/query/F?c111:1:./temp/~c111nsV7eq:e18529

definition of urban Indian, but specifically chose not to include such a definition.

The trial court also erred when it ordered that Respondents be provided access to AIHS financial records, contract and keys to its facilities. As discussed in detail above, Respondents are not entitled and/or qualified to be AIHS Board members, and are therefore certainly not entitled to receive all AIHS financial information, contracts, keys to the facility, or dictate who shall have signing privileges.

E. The Trial Court Erred As A Matter Of Law In Ordering That Respondents Be Re-Appointed To AIHS' Board Of Directors And Granting Respondents' Access To AIHS' Financial Records And Property.

The trial court's judgment on Respondents' declaratory relief claims is in many respects a mandatory injunction that was improper in these circumstances and an interference with the corporations right to govern its internal affairs.

1. Injunctive Relief Was Not Proper In These Circumstances Because The Alleged Harm Was Neither Great nor Irreparable.

The trial court erred in entering what is effectively a mandatory injunction requiring (1) reappointment of Respondents to the board, (2) access to books, records, and facilities of AIHS, and (3) rescission of the 2008 amendments to AIHS bylaws.

An injunction is mandatory if it compels performance of an affirmative act that changes the position of the parties. *Davenport v. Blue Cross of California* (1997) 52 Cal.App.4th 435, 446.

"The propriety of issuing a mandatory injunction is determined according to the particular circumstances and rests in the sound discretion of the court; *however that discretion is not arbitrary, and it must be*

exercised in accordance with fixed principles and precedents of equity jurisprudence." 38 Cal.Jur.3d (2010) Injunctions, section 15 (emphasis added). Only a "strong and urgent case" justifies a mandatory injunction. *Id.*

Remedy by injunction is summary, peculiar, and extraordinary, and it ought not to be issued except for prevention of great and irreparable injury. *Pellissier v. Whittier Water Co.* (1922) 59 Cal.App 1, 6. Essential features marking injury as irreparable are: (1) injuries that are a serious change of, or is destructive to, property it affects, either physically or in character in which it has been held and enjoyed, and (2) that property must have some peculiar quality or such use that its pecuniary value, as estimated by jury, will not fairly recompense owner for its loss. *Helms Bakeries v. State Board of Equalization* (1942) 53 Cal.App.2d 417, 426 cert denied (1943) 318 U.S. 756. An injunction will not issue merely for enforcement of right or prevention of wrong in abstract, or where it will retard instead of promote justice. *Lowe v. Copeland* (1932) 125 Cal.App. 315, 323.

In this case, injunctive relief was improper because at all times the Respondents were able to reapply for board membership upon showing documentation of their qualifications. Thus, the "harm" claimed by respondents was not "great," it was not "irreparable," and it operates to retard instead of promote justice. Accordingly, the trial court abused its discretion in granting injunctive relief.

2. The Trial Court's Judgment Invaded AIHS' Right Of Self Governance.

The rights and duties of members of a private voluntary association, and the management of its internal affairs, are measured in terms of the association's bylaws. *California Dental Assn. v. Amer. Dental Assn.* (1979) 23 Cal.3d 346, 353.

> In many disputes in which such rights and duties are at issue, however, the courts may decline to exercise jurisdiction. Their determination not to intervene reflects their judgment that the resulting burdens on the judiciary outweigh the interests of the parties at stake. One concern in such cases is that judicial attempts to construe ritual or obscure rules and laws of private organizations may lead the courts into what Professor Chafee called the "dismal swamp." (Chafee, *The Internal Affairs of Associations Not for Profit* (1930) 43 Harv. L.Rev. 993, 1023-1026.) Another is with preserving the autonomy of such organizations. (Note, *Developments in the Law – Judicial Control of Actions of Private Associations* (1963) 76 Harv. L.Rev. 983, 990-991.) We stated in *Pinsker v. Pacific Coast Society of Orthodontists* (1969) 12 Cal.3d 541, 558, that "in adjudicating a challenge to the society's rule as arbitrary a court properly exercises only a limited role of review. As the Arizona Supreme Court observed in *Blende v. Maricopa County Medical Society* (1964) 96 Ariz. 240, 245: "In making such an inquiry, the court must guard against unduly interfering with the Society's autonomy by substituting judicial judgment for that of the Society in an area where the competence of the court does not equal that of the Society . . . ."

Id., at 353-354.

Courts should only accept jurisdiction over disputes within private voluntary organizations when the aggrieved party can demonstrate "an abuse of discretion, and a clear, unreasonable and arbitrary invasion of private rights." *Id.*, at 354. Even then, it should only do so when the burden on the court is not outweighed by the organizations interest in its own autonomy. *Id.*

Here, there was no abuse of discretion or arbitrary invasion of private rights in the action taken by AIHS, and the trial court should not have accepted jurisdiction over this dispute. AIHS was obligated to abide by its bylaws that required it to have a board constituted of 51% urban Indians pursuant to 25 U.S.C. section 1603(f). AIHS was vested with the authority to use reasonable means to ensure that it carried out its mission,

and maintained eligibility for federal funding in order to do so.

AIHS acted reasonably and in accord with its bylaws in requesting that Respondents provide documentation sufficient to demonstrate that they were urban Indians under section 1603(f) and (c). Having failed to respond to this request in any manner, AIHS acted reasonably in declaring them disqualified and vacating their positions under Corporations Code section 5221(b) where he believed the action to be in the best interests of AIHS.

For the same reasons, the court's order rescinding the amendments to the 2008 bylaws was error and should be reversed.

3. There Was No Actual Controversy, and No Basis For Declaratory Relief, Where No Right Exists to be a Volunteer Board Member and Where Respondents' Terms Had Expired By the Time They Filed Suit.

Declaratory relief may not issue unless there is a showing of (1) an actual controversy (2) relating to an individual's right(s) pursuant to a written instrument. See Code of Civ. Proc., section 1060. Although the trial court correctly found a written instrument did not exist to support a declaration of Respondents' alleged right and duties, it erroneously determined that Respondents have a right to hold a volunteer board position pursuant to some unidentified statute or common law. AA 492, nos. 28-29. At no time in the court below did Respondent identify a specific statute or common law right by which they were entitled to hold volunteer board of director positions, nor does any exist. Thus, declaratory relief was not proper in this case.

In addition, at the time the complaint was filed, there was no actual controversy because (1) the Respondents lacked authority to assert rights on behalf of the Coastal Band and the Coastal Band was not a party to this case, and (2) all of the Respondents' terms of office had expired before they

filed their complaint.

Under Corporations Code section 5220(a), "[n]o amendment of the articles or bylaws may extend the term of a director beyond that for which the director was elected, nor may any bylaw provision increasing the terms of directors be adopted without approval of the members."

Specifically, Respondent Garcia's term of office was originally set to expire on May 31, 2006 and the remaining Respondents terms of office were scheduled to expire on May 31, 2007.[10] As of March 14, 2008, the date Respondents complaint was filed, **all Respondents terms of office had long expired**. Thus, there was no actual controversy as to whether they had a right to reappointment where their terms had expired nearly a year before they sought relief.

The trial court also erred in striking portions of the amended 2008 bylaws because the Respondents lack standing to seek rescission of these amendments. "Standing is a threshold issue, because without it no justiciable controversy exists." *Iglesia Evangelica Latina, Inc. v. Southern Pacific Latin America District of the Assemblies of God* (2009) 173 Cal.App.4th 420, 445. To have standing to sue, "a person ... or those whom he properly represents, must 'have a real interest in the ultimate adjudication because [he has suffered or] is about to suffer any injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented.'" *Schmier v. Supreme Court* (2000) 78 Cal.App.4th 703, 707.

Here, Respondents asserted that the amendments to the 2008 bylaws which eliminated the AIHS voting class, provided for appointed directors

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[10] Respondents incorrectly assert that they properly extended their board terms from two years to four years. Respondents' erroneous theory that their board terms expire on May 31, 2009 does not take into consideration the constriction of circumstances under which board terms can be extended under Corporation Code section 5220.

instead of elected directors, and prohibited directors who were related by blood or marriage, were unlawful. They lacked standing to assert these claims for several reasons. First, as noted above, their director terms expired in May 2007, and they have not shown that they have suffered any injury as a result of these amendments made after their terms expired.

Second, Respondents have not filed a representative suit on behalf of AIHS membership, and they only have standing to assert claims on behalf of themselves. Thus, they lack standing to assert claims on behalf of the membership generally. Finally, as a non-profit organization, AIHS is not, as a matter of law, required to have members in the first instance. Cal. Corp. Code section 5310.

4. Respondents Were Properly Removed From Their Positions Under Corporations Code Section 5221 and AIHS Bylaws.

Corporations Code section 5221(b) provides that a corporation's bylaws may provide for the qualifications of its directors, and that the board may declare vacant the office of a director who fails to meet a qualification that was in effect at the "at the beginning of that director's current term of office."

Sections 18 of AIHS bylaws (both 2005 and 2006 contained the same provision) provide that a director position was subject to involuntary termination for "conduct which is determined to be detrimental to the welfare, standing or best interests of the Corporation." AA 396; 425.

Section 19 of the bylaws provided that notice of termination of a director's position be provided 15 days prior to the vote of the board on such action, and the member "shall have the opportunity to be heard, orally or in writing, not less than 5 days before" the termination. AA 425-426.

During the August 29, 2006 board meeting, the board members discussed the requirement that the board be comprised of least 51% urban

Indians per the bylaws. AA 300-302. On September 5, 2006, Respondents were advised in writing that they were required to provide documentation demonstrating that each member individually met the definition of urban Indian. *Id.* The letter provided several documentation options that would satisfy the urban Indian requirement set forth in 25 USC section 1603(f). Respondents were asked to provide the requested documentation by September 15, 2006. Respondents admittedly failed to provide any response to this request despite being aware that failure to demonstrate a properly constituted board jeopardized AIHS' federal contract with IHS. On September 25, 2006, Respondents board positions were vacated by the only remaining board member, Young. AA 303.

AIHS complied with section 5221(b) when Young, who believed himself to the only remaining qualified director as the sole director that is a member of a federally recognized tribe, vacated the positions of the Respondents because he believed they were not qualified according to the bylaws in effect in 2005 when they were elected and that their continued membership on the board was detrimental to AIHS.[11]

AIHS also complied with its own bylaws when it gave notice to provide required documentation on September 5, 2005, and then took action to vacate the Respondents' positions 20 days later. Accordingly, the trial court's finding that Respondents were improperly removed was error.

IV. CONCLUSION.

Based upon the foregoing, AIHS requests that the judgment be reversed and the trial court be directed to enter a new judgment dismissing

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[11] IHS requires that each board member have a satisfactory record of integrity and business ethics, which Garcia lacks based upon her past undisputed felony conviction for welfare fraud. RT 295:16-296:2; *See* 28 C.F.R. 90104-1(d).

Respondents claims in all respects. In the alternative, AIHS requests that the judgment be reversed and the matter be remanded to the trial court for further proceedings.

Dated: August 23, 2010

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CERTIFICATE OF WORD COUNT

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

The text of this brief contains 13,877 words, as counted by the Microsoft Word program used to generate the brief.

Dated: August 23, 2010

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: Gordon & Rees LLP 633 West Fifth Street, Suite 4900, Los Angeles, CA 90071. On **August 23, 2010**, I served the within documents:

(1) APPELLANTS' OPENING BRIEF
(2) APPELLANTS' APPENDIX (VOL. 1 OF 2)
(3) APPELLANTS' APPENDIX (VOL. 2 OF 2)

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

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☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in United States mail in the State of California at Los Angeles, addressed as set forth below.

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Judge James W. Brown
Case No.: 1266707

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I declare that I am employed in the office of a member of the Bar of this court at whose direction the service was made.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **August 23, 2010**, at Los Angeles, California.

SUSANA M. TELLO