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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED AUBURN INDIANCOMMUNITY OF THE AUBURN RANCHERIA,

Plaintiff

v.

KENNETH LEE SALAZAR, et al.

Defendants

CITIZENS FOR A BETTER WAY, et al.

Plaintiffs

v.

UNITED STATES DEPARTMENT OF INTERIOR, et al.,

Defendants

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY,

Plaintiff,

v.

KENNETH LEE SALAZAR, et al.,

Defendants

Civil Action No. 2:12-CV-3021-JAM-AC
(Consolidated)

DEFENDANTS' CONSOLIDATED OPPOSITION TO THE MOTIONS FOR TEMPORARY RESTRAINING ORDER BY CITIZENS FOR A BETTER WAY AND UNITED AUBURN INDIAN COMMUNITY

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Background

The Decisions at Issue. By a final Record of Decision[1] issued on November 21, 2012 ("ROD"), the Assistant Secretary-Indian Affairs approved the acquisition of land (the "Yuba Site") into trust for the benefit of the Yumeka Maidu Tribe of the Enterprise Rancheria ("Enterprise"), which plans to develop a gaming facility and related amenities. ROD (Exhibit A) at 2.[2] Notice was published on December 3, 2012. 77 Fed. Reg. 71612, 71612. Under 25 C.F.R. § 151.12(b) the Yuba Site may be acquired in trust as of January 2, 2013. DOI has, however, agreed to delay acquisition until February 1, 2013.[3] Because the legal description of the Yuba Site in the original Notice contained an error, a Revised Notice was published on January 2, 2013. *See* 78 Fed. Reg.114 (attached as Exhibit D).

The Instant Action. On December 12 Plaintiff United Auburn Indian Community of Auburn Rancheria ("UAIC") filed suit in the District of Columbia (D.C. No. 1:12-cv-1988); on December 20, 2012, three local advocacy groups, five local residents, and a local restaurant (collectively "Citizens") did likewise (D.C. No. 1:12-cv-2052). The cases were consolidated and transferred to this Court. By Order dated January 23 this Court ordered that *Citizens/UAIC* be consolidated with *Cachil Dehe Band of Wintun Indians of the Colusa Indian Community v. Salazar et al* (2:12-cv-

[1] References to Exhibit A use the consecutive pagination that has been added to the ROD in the format "Exhibit A page _". On the merits, the Court's review of Plaintiffs' challenge will be limited to the administrative record ("AR") of the agency's decisions. *Sw. Ctr. for Biological Diversity v. United States Forest Service*, 100 F.3d 1443, 1450 (9th Cir. 1996). The exhibits filed with this brief (except for Exhibits B, C, E, F, G, and U) will be components of that AR.

[2] Under Section 20 of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2719(b)(1)(A), on September 1, 2011, the Assistant Secretary determined that gaming on the proposed site in Yuba County would be in the best interest of Enterprise and its citizens and would not be detrimental to the surrounding community. The IGRA requires that the Governor concur in the determination which he did by letter dated August 30, 2012. Exh. B. The land can, therefore, be acquired in trust for the Tribe for gaming purposes under Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. § 465, as amended by the Indian Land Consolidation Act of 1983, 25 U.S.C. § 2202.

[3] *See* December 18, 2012 letter from Michael J. Berrigan to Craig Alexander (Exhibit C).

3021-JAM-AC). Citizens filed their motion for a TRO, and request for a writ of mandamus (ECF 24) on January 15; UAIC filed its motion for a TRO on January 18. This Court (ECF 40) ordered that Defendants file a consolidated Opposition to the two motions by 12:00 pm on January 25.

ARGUMENT

Citizens cannot satisfy any one of the three requirements for issuance of a writ of mandamus: that movant's entitlement be clear and certain; that defendant officials' duty be ministerial and free from doubt; and that no other adequate remedy be available. Indeed, the regulatory "duty" that Citizens want compelled simply does not exist.

Similarly, Plaintiffs fail satisfy any of the requirements for a TRO. Plaintiffs cannot establish the likelihood of irreparable injury or that they are likely to prevail on the merits, and both the balance of equities, and the public interest, lean heavily against a TRO. The gaming development will give Enterprise badly needed revenues and employment opportunities, inuring to the benefit not only of Enterprise but also of the larger community and of the State of California, as the Governor has himself recognized. Exh. B (Governor's Concurrence).

I. CITIZENS' REQUEST FOR A WRIT OF MANDAMUS SHOULD BE DENIED

A writ of mandamus is the affirmative corollary of a writ of injunction. *Koehler v. Barin*, 25 F. 161 (C.C. Or.1885). Like an injunction, "mandamus is an extraordinary remedy. . ." *Miller v. French*, 530 U.S. 327, 3396 (2000). When sought to compel an administrative official to perform an act, "three elements must be satisfied: '(1) the plaintiff's claim is clear and certain; (2) the [defendant official's] duty is ministerial and so plainly prescribed as to be free from doubt; and (3) no other adequate remedy is available.'" *Johnson v. Reilly*, 349 F.3d 1149, 1154 (9th Cir. 2003), *quoting R.T. Vanderbilt Co. v. Babbitt*, 113 F.3d 1061, 1065 n. 5 (9th Cir.1997). Citizens cannot satisfy even one of these requirements.

Citizens' request for a writ of mandamus presumes that 25 C.F.R. § 151.12(b) says something it simply does not say. 25 C.F.R. § 151.12(b) requires the Secretary to publish notice of a decision to acquire land in trust at least 30 days before the transaction takes effect. Citizens, in effect, ask the Court to replace this "30 days" delay with a requirement that acquisitions be deferred "indefinitely" – i.e., until any lawsuits are resolved. But this Court cannot rewrite the plain wording of a regulation. *GCB Commc'ns, Inc. v. U.S. South Commc'ns, Inc.*, 650 F.3d 1257, 1265-66 & n. 12 (9th Cir. 2011). Compelling, by mandamus, that DOI comply with a requirement that the regulation plainly does not impose cannot meet the test that "the plaintiff's claim [be] clear and certain" and that the compelled duty be "plainly prescribed." *Johnson*, 349 F.3d at 1154.

Citizens' implicit argument for this Court's rewriting the regulation is the fact that, when first adopted, one purpose of the 30-day delay was to allow lawsuits to be filed, at which point DOI, as a discretionary matter, would delay acquisition until the suits were resolved. But that purpose is now wholly obsolete. The rationale for DOI's "self-stay" was the understanding at the time, supported by decisions from multiple circuits, that "[t]he Quiet Title Act (QTA), 28 U.S.C. 2409a, precludes judicial review after the United States acquires title." 61 Fed. Reg. 18,082 (Apr. 24, 1996) (citations omitted). But last year the Supreme Court rejected that view and held that an APA suit seeking to compel the Secretary to take tribal land out of trust is *not* barred by the Quiet Title Act. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012) ("*Patchak*").[4] Thus the rationale for delaying trust acquisition is no more, and Citizens' request here that the Court compel defendants to take that action is not only unsupported by the regulation invoked but it is also unsupported by the rationale that originally inspired that

[4] *State of South Dakota* was vacated on appeal (on other grounds), *Department of Interior v. South Dakota*, 519 U.S. 919 (1996), and has been widely repudiated. *See Citizens Exposing Truth About Casinos v. Norton*, No. 02-745, 2004 WL 5238116 at *3 (D.D.C. 2004) (*aff'd*, 492 F.3d 960 (2007) (collecting cases).

regulation. The availability of APA review, as established in *Patchak*, is fatal to Citizens' mandamus request for the additional reason that it precludes a finding that "no other adequate remedy is available." *Johnson*, 349 F.3d at 1154.

Finally, Citizens invoke BIA's Fee-to-Trust Handbook; Version II (Jul. 13, 2011), (attached as Exhibit E), but that Handbook does not, as Citizens assert, have the force of law. In the Ninth Circuit, the law is well established that agency guidelines and handbooks are not binding unless two very specific requirements are met, namely:

> [T]he agency pronouncement must (1) prescribe substantive rules - not interpretive rules, general statements of policy or rules of agency organization, procedure or practice - and, (2) conform to certain procedural requirements. To satisfy the first requirement the rule must be legislative in nature, affecting individual rights and obligations; to satisfy the second, it must have been promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress.

W. Radio Serv.s Co., Inc. v. Espy, 79 F.3d 896, 901 (9th Cir. 1996), *quoting United States v. Fifty-Three (53) Eclectus Parrots*, 685 F.2d 1131, 1136 (9th Cir.1982) ("*53 Parrots*"). The rule of *53 Parrots* has been consistently followed.[5]

The Handbook meets neither of these standards. First, it does not "prescribe substantive rules"; rather, it lays out "general statements of policy" and "rules of agency organization, procedure [and] practice." *53 Parrots*, 685 F.2d at 1136. It confers no rights and imposes no obligations on private parties. It does not constrain the Secretary's discretion. Second, the Handbook was not "promulgated pursuant to a specific statutory grant of authority and in conformance with the procedural requirements imposed by Congress." *Id.* It is not published in

[5] *See, e.g., River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1072 (9th Cir. 2010); *United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1168 (9th Cir. 2000); *James v. U.S. Parole Comm'n*, 159 F.3d 1200, 1205-06 (9th Cir. 1998).

the Federal Register or Code of Federal Regulations. Here, again, issuing a writ of mandamus compelling adherence to the Handbook would be wholly inconsistent with the requirements that "the plaintiff's claim [be] clear and certain" and that "the [defendant official's] duty [be] ministerial and so plainly prescribed as to be free from doubt." *Johnson*, 349 F.3d at 1154. And, as discussed, *Patchak* has eliminated the rationale for the self-stay provisions of the Handbook.[6]

II. PLAINTIFFS' REQUEST FOR A TRO SHOULD ALSO BE DENIED

A. Governing Legal Standard

An injunction is "an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22, 31-32 (2008)); *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008). In *Winter*, the Supreme Court clarified that a plaintiff must "demonstrate that irreparable injury is *likely* in the absence of an injunction" and that a mere finding of "possibility of irreparable harm," was "too lenient." 555 U.S. at 8; *see Am. Trucking Ass'ns v. City of L.A.*, 559 F.3d 1046, 1052 (9th Cir. 2009); *Alliance for Wild Rockies v. Cottrell*, 622 F.3d 1045, 1052 (9th Cir. 2010) ("[a] preliminary injunction is [also] appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor" but "plaintiffs must also satisfy the other *Winter* factors, including the likelihood of irreparable harm.") (citation omitted).[7]

[6] For all the same reasons, UAIC's argument (ECF 52-1 at 1-3) that DOI actionably failed to comply with its fee-to-trust handbook is unlikely to prevail.

[7] The same test is applied to a request for a TRO as is applied to a request for a preliminary injunction. *See Stein v. Dowling*, 867 F. Supp. 2d 1087, 1095 (S.D. Cal. 2012); *Jones v. H.S.B.C. (USA)*, 844 F. Supp. 2d 1099, 1100 (S.D. Cal. 2012).

B. Plaintiffs Have Not Shown Irreparable Injury

1. Acquiring The Yuba Site In Trust Will Not Injure Plaintiffs

There is no need to act on either TRO request because no irreparable harm is imminent. Acquiring the Yuba Site in trust on February 1 can be undone by this Court on resolution of the merits and thus not irreparable. *Patchak*, 132 S.Ct. at 2203-04.

Plaintiffs raise several arguments to the effect that passing title to the Yuba Site will cause irreparable injury, but none survives scrutiny. Citizens emphasize that, prior to *Patchak*, the United States argued that the Quiet Title Act barred litigation (and remedial orders) once land is taken into trust. ECF 24-1 at 19-20. But the Court in *Patchak* rejected that argument.

UAIC (ECF 52-1 at 2) argues that "*Patchak* said nothing about what remedies are available in an APA challenge to a completed fee-to-trust conversion." This is incorrect: as the dissent in *Patchak* emphasized, "[a]fter today, any person may sue under the [APA] to divest the Federal Government of title to and possession of land held in trust for Indian tribes." 132 S. Ct. at 2212 (Sotomayor, Dissenting).

Citing language from the United States' brief in *Patchak*, Citizens also speculate that if the land is taken out of trust the developer who purchased the land may have no means of recovering its investment. Citizens offer at least three variations on this argument. ECF 24-1 at 20, 21. The first answer is that, by all appearances, the Supreme Court found the United States' position unpersuasive. Also, if the developer provided itself no protection against the ever-present possibility that the land would not be approved for trust status and gaming, that is a risk the developer knowingly assumed. Finally, Citizens offer no reason to think that, if this wholly hypothetical scenario develops, it would cause any injury **to Citizens**.

Citizens also speculate that, if the Court orders the land taken out of trust, the United States might seek to retain an interest in the land, in effect stealing property from Enterprise. ECF 24-1 at

20, 21. The notion is unrealistic because: (a) it assumes, contrary to strong and well-established presumptions,[8] that the United States would violate its responsibilities to the Tribe; (b) this Court has broad and ample equitable powers to ensure that its orders have the desired consequences; and (c) Citizens again give no reason to believe that their hypothetical entails injury **to Citizens**.

UAIC argues (ECF 52-1 at 5) that *Patchak* would not apply at all were Plaintiff to bring a quiet title action claiming ownership of the Yuba Site: "UAIC does not believe that its interests in the Yuba Site make this case a quiet title action, but if they do, then preliminary relief preventing the case from becoming moot by a conversion indisputably is necessary." In other words, if this lawsuit were something that it is not, and if UAIC were asserting rights that it does not believe it possesses, Plaintiff might face irreparable injury. Merely to state this argument is to refute it.

This court cannot issue a TRO unless the threatened injury is irreparable. *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir.1985) (*per curiam*) (*affirmed in part, remanded in part*, 770 F.2d 1199 (1985)) ("The key word in this consideration is *irreparable*") (*quoting Va. Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir.1958)); *see also Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 725-26 (9th Cir. 1999) (injunction properly denied where Plaintiff's injury, "irrespective" of its "magnitude," is reparable); *Big Country Foods, Inc. v. Bd. of Educ. of Anchorage School Dist., Anchorage, Alaska*, 868 F.2d 1085, 1088 (9th Cir. 1989) (same). Because DOI's acquisition of the Yuba Site in trust is reparable, a restraining order cannot issue.

2. Development of the Yuba Site will not occur for several months

Citizens (ECF 24-1 at 23) and UAIC (ECF 52-1 at 8, 14-15) both provide laundry lists of alleged environmental harms that will result from gaming at the Yuba Site. But Enterprise will not be ready to begin construction of any gaming facility for at least four months, and has agreed to

[8] *See, e.g., U.S. Postal Serv. v. Gregory*, 534 U.S. 1, 10 (2001) ("[A] presumption of regularity attaches to the actions of Government agencies . . .") (internal quotation marks omitted).

give this Court thirty days' notice before commencing construction. Also, under 25 C.F.R. § 559.2(a), Enterprise must give the Gaming Commission "at least 120 days" notice before opening any new gaming facility. Enterprise has not given notice under 25 C.F.R. § 559.2(a). Exh. F (Declaration of Dena C. Wynne). The potential harms Plaintiffs allege therefore are not imminent.

Before Enterprise can commence Class III gaming, it will have to: (a) secure NIGC approval of a facility management contract (or a finding that approval is unnecessary) (*see* 25 U.S.C. § 2710(d)(9)); (b) secure approval by the California Legislature and DOI of the Compact between California and Enterprise (*see* 25 U.S.C. § 2710(d)); (c) select an architect; (d) select a general contractor; and (e) arrange financing. Exh. G (Declaration of Enterprise Chairwoman Glenda Nelson) ¶ 13. In sum, no construction will commence until at least four months from February 1, (the date the Yuba Site will be acquired in trust) and Enterprise has committed to provide the parties and the Court at least thirty days notice before any construction commences. *Id.* ¶ 3 at p. 5.[9] Finally, no gaming can commence until after 120 days' notice. 25 C.F.R. § 559.2(a).

Plaintiffs must demonstrate a "likelihood of *substantial and immediate* irreparable injury." *City of L.A. v. Lyons*, 461 U.S. 95, 111 (1983) (*quoting O'Shea v. Littleton*, 414 U.S. 488, 502 (1974)) (emphasis added); *see also Associated Gen. Contractors of Cal., Inc. v. Coal. for Econ. Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991) ("A plaintiff must . . . demonstrate immediate threatened injury") (*citing L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1201 (9th Cir.1980)); *Caribbean Marine Servs. Co., Inc. v. Baldridge*, 844 F.2d 668, 674 (9th Cir.1988) (same); *Easyriders Freedom F.I.G.H.T. v. Hannigan*, 92 F.3d 1486, 1495 (9th Cir.1996) (plaintiff must demonstrate "the likelihood of *substantial and immediate* irreparable injury and the

[9] The reference is to the penultimate paragraph of the Nelson Declaration, which was mis-numbered as paragraph 3. The Nelson Declaration was submitted in support of the Enterprise Tribe's Motion to Intervene on January 3, 2013 (ECF 13-3).

inadequacy of remedies at law") (emphasis added). Regardless of whether this case will be decided before Enterprise obtains funding and a compact with California, Enterprise's notice commitments give assurance that the Court will be able to protect the *status quo* if appropriate. *See, e.g.*, *Haskell v. Sec'y of Army*, No. 93-1148, 1993 WL 260690 at *1-2 (D.D.C. 1993) (denying injunction where, *inter alia*, Plaintiff's anticipated discharge would not occur without six months' notice); *Simula*, 175 F.3d at 725-26 (District Court properly denied preliminary injunction where Plaintiff's injury could be avoided through alternative procedures).

3. UAIC's remaining allegations of harm do not suffice

UAIC alleges that its traditions will be upset by the casino, but because UAIC did not "provide[] any information indicating that development of the Resort would have a negative impact on its asserted cultural connection to the Site" (Exh. K at 25; see also Exh. J at 57), the argument is not preserved. *Dep't of Transp. v. Pub. Citizen*, 23 541 U.S. 752, 764, (2004). [10] UAIC also argues that operation of the gaming facility will reduce revenues at UAIC's Thunder Valley Casino (ECF 52-1 at 12-14) but none of this alleged harm is imminent and, as explained in our Opposition to the Colusa TRO motion (ECF 24 at 10-11), neither NEPA nor IGRA protects UAIC from economic competition. *See also Sokaogon Chippewa Community v. Babbitt*, 214 F.3d 941, 947 (7th Cir. 2000).

C. Plaintiffs Are Unlikely to Prevail on the Merits of Their IGRA/IRA Claims

1. Any errors in the legal description of the subject parcel were harmless

The subject parcel consists of a 40-acre portion of Assessor Parcel Number ("APN") 014-280-095. Exh. H (2012 Schubert Memo). APN 014-280-095 consists, in its entirety, of 82.64

[10] In any event, as noted by BIA, the Corps of Engineers and the State of California have determined that **Enterprise** is "the Indian tribe or Native American group most closely connected with Yuba County, including the area surrounding the Site." Exh. K at 14.

acres. 2008 Schubert Memo (Attachment 7 to Pl. Request for Judicial Notice; ECF 31-8). Citizens (ECF 24-1 at 9-11) and UAIC (ECF 52-1 at 23-24) identify a number of documents where the legal description for the 40-acre parcel were confused with the legal description for the entire 82.64 acres. None of this, however, supports a legal claim. First, DOI corrected its error (Exh. D) and, Citizens' contrary allegations notwithstanding, DOI's title work, in compliance with 25 C.F.R. § 151.13, was based on the correct legal description of the 40-acre subject parcel.[11]

Also, it is not plausible that the administrative process was premised on an incorrect understanding of the land at issue. The ROD refers to the "40-acre" site no less than eighteen times (Exh. A); the IGRA ROD nineteen times (Exh. J); the Secretary's Determination Letter eight times. Exh. K. The DEIS (*see* Exh. L) and FEIS refer to the 40-acre tract scores of times. As UAIC emphasizes, it was "the 40-acre portion *that was the subject of Enterprise's application and all subsequent regulatory review*." ECF 52-1 at 1 (emphasis added).

Finally, if any commenter mistakenly believed that DOI planned to acquire the entire tax parcel in trust, that commenter would *over*estimate the scope and impacts of the fee-into-trust transaction. And there was no ambiguity as to the size and location of the facilities to be built. The error was therefore harmless. *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) ("APA requires courts to take 'due account' of harmless error"; agency error is harmless where the "mistake had no bearing on the procedure used or the substance of the decision"); *Cal.Comtys. Against Toxics v. E.P.A.*, 688 F.3d 989, 993 (9th Cir. 2012).

2. DOI properly and correctly considered its statutory authority to take land in trust under the IRA.

[11] *See* Exh. I (Declaration of Karen D. Koch). Also, title work is undertaken for the protection of the United States, to ensure it acquires good, unencumbered title when it acquires land in trust, so Plaintiffs would lack standing to question DOI's compliance with 25 C.F.R. § 151.13.

Citizens argue, based on *Carcieri v. Salazar*, 555 U.S. 379 (2008), that DOI has not adequately considered whether Enterprise was under federal jurisdiction in 1934. ECF 24-1 at 11-13. In *Carcieri*, the Court was "asked to interpret the statutory phrase 'now under Federal jurisdiction'" in the IRA's definition of Indian, 25 U.S.C. § 479. 555 U.S. at 382. The Court held that "[Section] 479 limits the Secretary's authority to taking land into trust for the purpose of providing land to members of a tribe that was under federal jurisdiction when the IRA was enacted in June 1934." *Id.* The Supreme Court noted that Section 479 has "three discrete definitions [of the term Indian]":

> '[1] members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and ... [3] all other persons of one-half or more Indian blood.'

Id. at 391-92.

The Secretary correctly determined that Enterprise was "under Federal jurisdiction" in 1934, based on the historical fact that, on June 12, 1935, DOI held a vote among the members of the Tribe on whether to reject the application of the IRA's provisions to the Rancheria pursuant to Section 18 of the Act. Exh. A at 49. Interpreting the IRA contemporaneously with its passage, DOI concluded that Enterprise was under federal jurisdiction and therefore eligible to conduct a vote on whether to accept the Act's benefits. The "Department's contemporaneous construction [of a statute] carries persuasive weight." *Watt v. Alaska*, 451 U.S. 259, 272-273 (1981). This vote, as noted by the Assistant Secretary, is documented in a 1947 report prepared by Theodore H. Haas, Chief Counsel, United States Indian Service, entitled, "Ten Years of Tribal Government Under I.R.A." Exh. M; *see* Exh. A at 49. This report contains several tables regarding the organization of tribes under the IRA. Table A lists the tribes that voted on whether to reject the IRA, and Enterprise is listed in that table. *See* Exh. M. at 15 (noting election results and election date); Exh.

A at 49. As DOI explained, "[t]he calling of a Section 18 election at the Tribe's Reservation conclusively establishes that the Tribe was under federal jurisdiction for *Carcieri* purposes." *Id.* [12]

Citizens fail to understand that Section 478 of the IRA provides that it "shall be the duty of the Secretary of the Interior, within one year after the passage and approval of this Act, to call such an election." 25 U.S.C. § 478. [13] The statute required the Secretary to conduct such votes "within one year after June 18, 1934," *id.*, although Congress subsequently extended the deadline until June 18, 1936. *See* Act of June 15, 1935, 49 Stat. 378. Thus, immediately after enactment of the IRA, DOI was tasked by Congress to hold elections for all reservations containing "Indians" as that term is defined by the IRA. Simply put, if the Enterprise Rancheria was not composed of "Indians" "now under Federal jurisdiction," residing on a "reservation," the Secretary would not have called a Section 18 election for it. 25 U.S.C. §§ 478-79. As explained by the DOI Board of Indian Appeals ("IBIA"), "the Secretary's act of calling and holding this election for the Tribe informs us that the Tribe was deemed to be 'under Federal jurisdiction' in 1934. That is the crux

[12] The vote reflects that Enterprise was under active federal jurisdiction. In any event, the fact that in 1915 the United States established the Enterprise Rancheria, a type of reservation comprised of land held in trust for the Tribe by the United States, in itself demonstrates federal jurisdiction over the Tribe. The residents of the Enterprise Rancheria also satisfy the second definition of Indians in Section 19 because they were "persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation." 25 U.S.C. § 479.

[13] Enterprise voted against application of the IRA to itself, but the result of the vote is irrelevant because the vote could not be called in the first place unless Enterprise met the IRA's definition of "Indian." Congress amended the IRA in the Indian Land Consolidation Act to allow the Secretary to acquire land in trust for tribes that voted against the application of the IRA to their reservation in the 1930s. 25 U.S.C. § 2202; Exh. A at 49 ("Despite the vote to reject the IRA at such election, the later-enacted amendment to the IRA makes clear that Section 5 applies to Indian tribes whose members voted to reject the IRA."). As the Supreme Court explained, "§ 2202 provides additional protections to *those who satisfied the definition of 'Indian' in § 479 at the time of the statute's enactment*, but opted out of the IRA shortly thereafter." *Carcieri*, 555 U.S. at 395.

of our inquiry and we need look no further to resolve the issue." *Shawano Cnty. v. Acting Midwest Reg'l Dir., BIA*, 53 IBIA 62, 72 (Feb. 28, 2011).[14]

Citizens argue that Enterprise was not a tribe and was likely homeless when the United States took action on its behalf in 1915 to acquire land on which the Enterprise Indians could live. ECF 24-1 at 12.[15] The IRA defines tribe as "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. § 479. Regardless of the status of the Enterprise Indians when the United States set land aside for their use and benefit, by 1934 they were "Indians residing on one reservation" and thus a "tribe" under the IRA which is why the Secretary regarded himself as obliged to hold a tribal vote. [16]

[14] Plaintiffs argue that DOI has used a different approach in other cases. ECF 24-1 at 12. In the wake of *Carcieri*, the Department has elaborated a two-part inquiry to determine whether a tribe is "under federal jurisdiction" at the time of the IRA's enactment. Elaboration under the two-step inquiry is not necessary for all tribes, however, because for "some tribes, evidence of being under federal jurisdiction in 1934 will be unambiguous (e.g. tribes that voted to reorganize under the IRA in the years following the IRA's enactment, etc.), thus obviating the need to examine the tribe's history prior to 1934. For such tribes, there is no need to proceed to the second step of the two-part inquiry." Cowlitz ROD at 95 n.98 (Exh. 11 to Pl. Request for Judicial Notice; ECF 31-13). Many tribes, like the one that was the subject of the Supreme Court's *Carcieri* decision, did not vote in elections called pursuant to the IRA in the years immediately following the statute's passage, and for them an inquiry may need to address in detail both parts of the Cowlitz two-part inquiry. Enterprise, however, exemplifies a tribe for which further analysis under the two step inquiry is not needed.

[15] *Carcieri* addressed "under federal jurisdiction," not the term "tribe" or federal recognition. Justice Breyer notes in his concurring opinion that the IRA does not require a tribe to be federally recognized in 1934, because the word "now" in the IRA modifies "under Federal jurisdiction," not "recognition," and concluded that the IRA "imposes no time limit upon recognition." *Carcieri*, 555 U.S. at 397-98. There is no doubt that the Enterprise Rancheria currently is a federally recognized tribe. Indian Entities Recognized and Eligible to Receive Services From the Bureau of Indian Affairs, 77 Fed. Reg. 47868, 47869 (August 10, 2012).

[16] Moreover, as courts have recognized, Rancherias of California are effectively Indian reservations if not expressly called that. *Duncan v. United States*, 667 F.2d 36, 38 (Ct. Cl. 1981) ("Rancherias are numerous small Indian reservations or communities in California, the lands for which were purchased by the Government (with Congressional authorization) for Indian use from time to time in the early years of this century – a program triggered by an inquiry (in 1905-06) into the landless, homeless or penurious state of many California Indians"); *Governing Council of*

Finally, Plaintiffs argue that DOI has not considered comments suggesting that "this current group was not the historical Enterprise Rancheria, including evidence that Federal supervision over Enterprise's current leadership was Congressionally terminated." ECF 24-1 at 12-13. In fact, the contentions raised in cursory fashion here have been exhaustively explored and rejected by DOI in its resolution of an administrative action challenging the United States' recognition of the Enterprise tribal leadership. *See Robert Edwards v. Pacific Reg'l Dir., BIA*, 45 IBIA 42 (May 17, 2007) (rejecting notion that there are two Enterprise tribes, one for each parcel purchased in 1915, rejecting the notion that the sale of one of the two parcels amounted to a termination of the Tribe, and further noting that Edwards' challenge to the legitimacy of the tribal government is undercut by his own past participation in the tribal leadership he now disavows). The comment letters authored by Edwards and offered by Plaintiffs to rehash the issues are actually directed to other aspects of the administrative process and provide no basis for alleging that DOI lacks statutory authority to accept land into trust for Enterprise.[17]

3. UAIC will not prevail on its claims under Part 151.

UAIC alleges in conclusory fashion that DOI has failed to consider Enterprise's need for land and the purpose for which the land will be used, in violation of the Interior's fee-to-trust regulations, 25 C.F.R. § 151.10(b), (c).[18] ECF 52-1 at 22. The Department's analysis of the need and purpose for the present trust acquisition is memorialized in the ROD. Exh. A at 44. It is

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Pinoleville Indian Cmty. v. Mendocino Cnty., 684 F. Supp. 1042, 1043 n.1 (N.D. Cal. 1988) (same).

[17] *See* Edwards Letter of April 25, 2008, (DEIS comments) and DOI response at FEIS, Appendix T (Exh. N) at 34-36; Edwards Letter of March 12, 2009, ECF 26-2 (commenting on Enterprise application for off-reservation gaming).

[18] 25 C.F.R. §151.10 (b) requires DOI to consider the need for land, while 151.10(c) requires consideration of the purpose for which the land will be used. These provisions concern on-reservation trust acquisitions but 25 C.F.R. § 151.11(a) makes them equally applicable to off-reservation acquisitions.

Plaintiff's burden under the APA to establish that agency action is arbitrary and capricious. *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26, 37 (D.C. Cir. 1986). UAIC does not explain how the Department's analysis is so wanting as to be arbitrary and capricious, and thus fails to carry its burden.

Perfunctorily, UAIC also alleges DOI failed to explain how placing land in trust furthers tribal self-determination for Enterprise. ECF 52-1 at 24. The sole purpose of Enterprise's application is that -- the gaming parcel will provide Enterprise with a deeply needed revenue stream that can be used to achieve tribal objectives. See Exh. A at 40 (explaining that IGRA requires gaming revenues "to fund tribal government operations or programs . . . to provide for the general welfare of the tribe and its citizens, and to promote tribal economic development," and concluding that the acquisition will therefore support "self-sufficiency, and strong tribal government") (internal quotations and brackets omitted).[19]

4. DOI properly determined that gaming would not be detrimental to the surrounding community

Under IGRA DOI was required to "consult[] with . . . appropriate State and local officials, including officials of other nearby Indian tribes" as part of the process to determine whether gaming is appropriate on the subject parcel and to conclude that "a gaming establishment . . . would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community." 25 U.S.C. § 2719(b)(1)(A). The Secretary's determination that a gaming establishment on the subject lands is in accord with IGRA is memorialized in a September 2011 Record of Decision. Exh. J at 39-65.

[19] And, contrary to UAIC's assertion, DOI *extensively* "consider[ed] the impacts on surrounding communities" (ECF 52-1 at 16) -- see Exh. R (FEIS socioeconomic analysis).

Citizens complain that DOI failed to address numerous comments directed towards the Secretarial determination, including their own. ECF 24-1 at 13. However, DOI's regulations only require consultation with "[a]ppropriate State and local officials" as well as "[o]fficials of nearby Indian tribes." 25 C.F.R. § 292.19. That is what DOI did. Exh. J at 58-59. Citizens, a collection of citizens groups, several individuals, and a restaurant, do not qualify as either. Other portions of the administrative process involved here (like the NEPA work) provide for widespread public participation, but that is not the case with the Section 292 consultation process.

In terms of substantive objections, Citizens complain that DOI relied on Enterprise's commitments to negotiate agreements with its neighbors in arriving at a finding of no detrimental impact. ECF 24-1 at 14-15 & n 9. Yet DOI's actual analysis of that question only relies upon existing MOUs (with Yuba County and the City of Marysville) and does not mention tribal commitments to negotiate additional agreements in the future. Exh. J at 62-64. In any event, Citizens' assumption that Enterprise will fail to honor all commitments to negotiate agreements – many of which, like a fire services agreement, Enterprise needs as much as its neighbors -- is wholly speculative.

Finally, the 2011 ROD notes that California's Office of the Governor responded to DOI's notice of consultation by explaining that it relied upon prior letters, including a January 30, 2009 letter sent to the Department. Exh. J at 58. Citizens argue that the January 30, 2009 letter raises unanswered questions about whether gaming will cause detrimental impacts on the surrounding community. ECF 24-1 at 15. Those questions, however, do not relate to the IGRA consultation process but are instead directed to whether acquiring land in trust is warranted under DOI's fee-to-trust regulations, 25 C.F.R. § 151. January 30, 2009 Letter (Attachment 16 to Request for Judicial

Notice, ECF 31-19) at 6.[20] Moreover, the questions Citizens identify relate to impacts affecting Enterprise, not the surrounding community, and thus provide no basis for overturning the Secretary's finding of no detrimental impact.[21]

UAIC alleges that DOI failed to consult with it as required by 25 U.S.C. § 2719(b)(1)(A) and 25 C.F.R. § 292.19 (ECF 52-1 at 23), but the 2011 ROD demonstrates that DOI consulted with all relevant entities and considered their comments. Exh. J at 58-59 (identifying entities consulted and summarizing comments). While all comments submitted by consulted entities became part of the record considered by DOI in making its determination, UAIC, as a nearby Indian tribe, received specific consideration. Exh. J at 64-65 (considering impact on UAIC's gaming facility, UAIC's historical ties to the parcel to be taken in trust, and potential negative environmental impacts); 57 (addressing UAIC historical connection with trust parcel). Once again, UAIC characterizes DOI's response to its comments as inadequate but fails to offer specifics on why it is inadequate. ECF 52-1 at 23. DOI is not required to speculate as to what issues UAIC has with its analysis. *San Luis Obispo Mothers*, 789 F.2d at 37.[22] Similarly, UAIC assertion that the administrative record fails to support DOI's decision is too conclusive and vague for DOI to respond. Such bare assertions cannot support a finding of any likelihood of success on the merits.

[20] The letter specifically refers to a DOI "Guidance Memorandum" (which has since been withdrawn) addressing how much scrutiny DOI should apply to off-reservation trust acquisitions when implementing its fee-to-trust regulations. *Id*. at 4.

[21] A discussion of the effects gaming will have on tribal unemployment, tribal members, and the current tribal reservation land appears at 41-42 of the 2011 ROD (Exh. J).

[22] Plaintiff also alleges DOI failed to solicit comments from it. 52-1 at 23. However, UAIC submitted comments and they were heard, so even if there is somehow merit to this claim, the omission was harmless. *Cal.Comtys. Against Toxics v. E.P.A.*, 688 F.3d 989, 993 (9th Cir. 2012) (harmless error in spite of mistake "a party has actual notice and was able to submit its views to the agency prior to the challenged action").

D. Plaintiffs Have Not Shown Any Likelihood of Success on the Merits of Their NEPA Claim

Citizens take issue with DOI's rejection of the alternatives analyzed. Notably, Citizens do not suggest that DOI should have considered additional alternatives. Also, Citizens do not appear to question DOI's rejection of the "Butte Site" (see ECF 24-1 at 17).[23] For its part, UAIC does complain that more alternatives were not considered (ECF 52-1 at 16), but because UAIC does not identify any such alternatives (other than Enterprise land – *see* fn. 23), the argument fails. *Morongo Band of Mission Indians v. F.A.A.*, 161 12 F.3d 569, 576-77 (9th Cir. 1998) ("[T]o succeed on its claim [Plaintiff] must make some showing that feasible alternatives exist. Absent such a showing [Plaintiff] asks this court to presume that an adequate alternate site exists somewhere and that the government did not try hard enough to find this site") (*quoting Olmsted Citizens for a Better Community v. United States*, 793 F.2d 201, 209 (8th Cir.1986)).

Citizens ((ECF 52-1 at 16) and UAIC (ECF 52-1 at 19) fault DOI for basing its rejection of the Highway 65 and Highway 99 sites, in part, on Enterprise's inability to secure investors. Citing *dicta* in *Van Abbema v. Fornell*, 807 F.2d 633 (7th Cir. 1986), Citizens claim that "the fact that an applicant does not own a parcel of land has been considered 'only marginally relevant' to defining reasonable alternatives.'" ECF 24-1 at 17, *quoting Van Abbema*, 807 F.2d at 638. The relevance of this *dicta* is obscure. The purpose of the project is to provide Enterprise an "opportunity for attracting and maintaining a significant, stable, long-term source of governmental revenue." Exh. A (ROD) at 2. Because Enterprise itself is quite poor (*see* Exh. G ¶ 11; Exh. K at 9), a substantial development will not be possible absent external investment. The government need not consider

[23] UAIC's position on the Butte alternative is confusing. On the one hand UAIC asserts that the Butte site was completely infeasible (ECF 52-1 at 16); on the other, UAIC faults DOI for failing "adequately to consider even whether Enterprise could develop gaming on the land it already possesses." *Id*. But the Butte site *is* the land that Enterprise "already possesses." Exh. O at 39.

alternatives that "are unrealistic," *Hells Canyon Alliance v. U.S. Forest Service*, 227 F.3d 1170, 1180-81 (9th Cir. 2000), nor need it consider alternatives "that would not serve [its] reasonable purpose." *Akiak Native Comty v. U.S. Postal Serv.*, 213 F.3d 1140, 1148 (9th Cir. 2000).

Citizens complain that "BIA also rejected the Highway 65 site because it is zoned for agriculture," ECF 24-1 at 17, but the government "must, of course, consider zoning and land-use issues." *Van Abbema*, 807 F.2d at 638. Zoning and local governmental land use planning actually shows how appropriate the Yuba Site is. Exh. K (Secretarial Determination) at 19:

> The Sports and Entertainment Zone is a 900 acre area zoned for purposes of sports and entertainment purposes, including a NASCAR racetrack, outdoor amphitheater, hotels, and other compatible uses. The proposed Resort is compatible with the other contemplated uses, and will cover only 40 acres of the 900 acre Zone.

The zoning and contemplated use of the 900-acre tract also undermines UAIC's suggestion that the Enterprise facility will compromise an environmentally pristine area. ECF 52-1 at 7-8.

Citizens also fault DOI for noting that rejected alternatives contain "numerous biologically sensitive resources," ECF 24-1 at 17, suggesting that the Yuba Site has similar resources. But Citizens nowhere offer any basis for concluding that DOI's determination that selection of the Yuba Site would occasion fewer environmentally adverse impacts was arbitrary or capricious.

Citizens accuse DOI of failing to comply with Executive Order ("EO") 11988, 42 Fed. Reg. 26951 (1977), which requires the government to "think twice" before approving developments in floodplains. *City of Carmel–by–the–Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1166 (9th Cir. 1997). ECF 24-1 at 17-18. This argument has been waived, however, because neither Citizens, nor any other participant, invoked EO 11988 in response to either the draft, or final, EIS. Exh.s A-2; N. *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F3d 957, 965 (9th Cir. 2002); *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir.1991); *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 623 F. Supp. 2d 1015, 1030 (D. Ariz. 2009) (*citing Dep't of Transp.*

v. Public Citizen, 541 U.S. 752, 764-65 (2004)); *High Sierra Hikers Ass'n v. U.S. Forest Service*, 436 F. Supp. 2d 1117, 1147-48 (E.D. Cal. 2006).

Citizens' claim that DOI failed to determine that no practicable alternative (to siting in a floodplain) exists is also incorrect. DOI did in fact find that each of the alternatives proposed was impractical. Exhibit O (FEIS Section 2 ("Alternatives")) at 2-47 – 2-47. Thus, while EO 11988 may not have been invoked, its requirements were satisfied, making any alleged error harmless. *See Coal. For Canyon Pres., Inc. v. Hazen*, 788 F. Supp. 1522, 1530 (D. Mont. 1990). Citizens also overlook the fact that DOI extensively considered floodplain issues (*see, generally*, FEIS Appendix F (Grading and Drainage) (Exh. P)), and required, *inter alia*, that all building pads be elevated at least 3.5 feet above the 100-year-flood level. Exh. O (FEIS Section 2) at 2-15 – 2-17.

Space does not permit point-by-point rebuttal of Plaintiffs' Gatling gun approach to alleging environmental harms (ECF 24-1 at 23; ECF 52-1 at 8, 14-15)[24], but an example should suffice. Citizens asserts that negative "traffic impacts" and "[i]ncreased crime" will harm the community, but the only back-up offered is the totally unsupported assertions of declarant Cheryl Schmit (ECF 30 ¶ 17), who claims no expertise or special knowledge on the subjects raised. And nowhere do Citizens, or Ms. Schmit, offer any reason to question the thoroughness and accuracy of DOI's analysis of these issues,[25] or the effectiveness of the mitigation measures adopted,[26] -- let

[24] *See, e.g., Mason v. Geithner*, 811 F. Supp. 2d 128, 190 (D.D.C. 2011), *aff'd*, No. 11-5305, 2012 WL 5894872 (D.C. Cir. Nov. 16, 2012) ("[C]ourts need not resolve arguments raised in a cursory manner and with only the most bare-bones arguments in support.").

[25] *See* Exh. Q (FEIS Appendix N (Traffic Impact Analyses for the Yuba Site and 2008 Addendum)); Exh. R (FEIS Appendix M (Socioeconomic Impacts)) at 1, 26-28, 44-45, 61-62 (crime).

[26] See Exh. S at 5-7, 5-10 – 5-12, 5-25-29 (traffic); Exh. S at 5-24 – 5-25 (crime prevention).

alone establishing that DOI failed to take a "hard look" at these issues, which it plainly did. Plaintiffs remaining allegations of environmental harms are similarly unsupported.[27]

E. Plaintiffs Have Not Shown Any Likelihood of Success on the Merits of Their Clean Air Act Claim

The Clean Air Act ("CAA") establishes a joint state and federal program to control the nation's air pollution. Section 109 of the CAA requires EPA to establish national ambient air quality standards ("NAAQS") for certain pollutants to protect public health and welfare. 42 U.S.C. § 7409. Among the pollutants for which EPA has established a NAAQS is particulate matter with a diameter less than 2.5 microns, generally referred to as "PM2.5." Each state is divided into "air quality control regions," which are classified as "attainment," "nonattainment," or "unclassifiable" with respect to each pollutant for which there exists an air quality standard. *Id.* § 7407(d). Yuba County is designated as nonattainment for PM2.5.

CAA Section 110(a)(1) requires each State to adopt and submit to EPA for approval a state implementation plan ("SIP") that provides for the implementation, maintenance and enforcement of the NAAQS in designated regions. 42 U.S.C. § 7410(a)(1). CAA Section 176(c)(1) provides that no federal agency shall "engage in, support in any way or provide financial assistance for, license or permit, or approve, any activity which does not conform to [a SIP]." 42 U.S.C. § 7506(c)(1). This is the "general conformity" requirement.[28] The Act requires EPA to "promulgate . . . criteria and procedures for determining conformity." *Id.* § 7506(c)(4). These regulations provide that "a conformity determination is required for each criteria pollutant or precursor where the total of direct and indirect emissions of the criteria pollutant or precursor in a

[27] UAIC also argues (ECF 52-1 at 16-22) that the contractor who assisted with the EIS had a conflict of interest. But as shown in our Opposition to the Colusa TRO motion (ECF 24 at 15-16) there was no conflict and, if there were, it was harmless.

[28] For transportation plans and projects, the Act imposes additional requirements for "transportation conformity." *Id.* § 7506(c)(2).

nonattainment or maintenance area caused by a Federal action would equal or exceed any of the rates in paragraphs (b)(1) or (2) of this section." 40 C.F.R. § 93.153(b). Of relevance here, the *de minimis* values specified in paragraph (b)(1) for emissions of PM2.5 and nitrogen oxides ("NOx"), a precursor to PM2.5, are 100 tons per year. *Id.* § 93.153(b)(1).

BIA conducted a thorough analysis of the air quality impacts of the proposed project and concluded that emissions from the project, including the required mitigation, would not exceed the *de minimis* thresholds for any of the PM2.5-related pollutants, including NOx. Exh. S at 4.4-8 to 4.4-10; Exh. T at 5-7 to 5-14; Exh. A-2 at 114-16. Specifically, BIA determined that emissions of PM2.5 would not exceed the 100 ton per year threshold even without mitigation. FEIS at 4.4-10. While emissions of NOx would exceed the threshold without mitigation, *id.*, the required mitigation reduces the emissions associated with the project to 25 pounds per day. Exh. T at 5-13. This corresponds to 4.56 tons per year (25 pounds/day x 365 days/year x 2000 pounds/ton), well below the *de minimis* threshold. Thus, BIA properly determined that no further conformity analysis was required.

Citizens' contrary claim must be rejected because they consider only the project without the required mitigation. ECF 24-1 at 18-19. Because the mitigation requirements are adopted in the ROD as part of BIA's decision, Exh. A at 19, the relevant federal action includes the mitigation measures, and the emissions resulting from that action that must be considered for purposes of conformity are the emissions after mitigation, which fall below the *de minimis* thresholds.

Nor is there any basis to Citizens' claim that BIA failed to comply with applicable procedural requirements, ECF 24-1 at 19. The applicable regulations provide that public notice may be given in conjunction with the NEPA process. 40 C.F.R. § 93.156(b). Both the draft and final EIS contained a discussion of air quality issues, including the conformity requirement, *see*

Exh. S at 4.4-8 to 4.4-10; Exh. T at 5-7 to 5-14. Both the draft and final EIS were made available for public comment prior to BIA's decision. Moreover, any claim by Citizens that they lacked adequate notice is belied by the fact that at least one plaintiff, Grass Valley Neighbors, submitted comments on the air quality analysis and conformity in response to the final EIS. Exh. A-2 at 51-62. BIA responded to those comments. Exh. A-2 at 113-16. Thus, BIA fully complied with the Clean Air Act conformity requirements, including the public participation requirements.

F. The Balance of Equities Weighs Heavily Against a TRO

"A plaintiff seeking a preliminary injunction must establish . . . that the balance of equities tips in his favor." *Winter*, 555 U.S. at 20. In assessing whether Plaintiff have met this burden, the Court "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 542 (1987). Plaintiffs have not met this burden.

This Court should consider the economic plight of Enterprise. As Chairwoman Nelson explains, "the Tribe suffers from very high unemployment and the Tribe's average household income is very low. Over 40 percent of the Tribe's labor force is unemployed or employed but earning below $9,048 per year." Exh. G ¶ 11. The Assistant Secretary confirms the grimness of the situation: "According to the 2010 [DOI] American Indian Population and Labor Force Report, more than 50 percent of the Tribe's potential labor force is unemployed, with an additional 8 percent who are employed, but whose income is below the Federal poverty guidelines." Exh. K at 9. The proposed development promises greatly to alleviate these conditions. As Chairwoman Nelson states, the "proposed project would allow the Tribe to generate not only jobs and educational opportunities for its citizens, but also to purchase additional residential land to create a tribal community in its aboriginal territory." Exh. G ¶ 11. The Assistant Secretary elaborates on

this point, noting that the facility would allow Enterprise to provide employment to its members, and also "to significantly expand its governmental services including those focused on improving the health, education and welfare of the Tribe." Exh. K (Secretarial Determination) at 9.

It is inevitable that an injunction, by casting a cloud over the prospects for the project, will make it more difficult to move the project forward, as by arranging financing, locating contractors, and retaining an architect. Any delay caused by such difficulties must be viewed as a serious matter, given the urgency of the Tribe's needs. Because the injury to Plaintiffs is negligible, the balance of equities tips decidedly against the injunction Plaintiffs seek.

Citizens (ECF 24-1 at 24) and UAIC (ECF 52-1 at 3) both hypothesize that if the land is acquired in trust Enterprise might immediately undertake development. But the only development under consideration is Enterprise's gaming and related facilities, which cannot be built for at least several months; Plaintiffs identify no other planned "development," and obviously cannot demonstrate how they would be injured by an entirely hypothetical "development" whose size, nature, and location are unknown. "Conjecture" will not support a TRO. *Lydo Enterprises, Inc. v. City of Las Vegas*, 745 F.2d 1211, 1214 (9th Cir. 1984).

G. The Public Interest Weighs Against a TRO

"[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982). The agency action at issue in this appeal serves the long-recognized policy of "furthering Indian self-government." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). In analyzing whether injunctive relief would advance the public interest, the courts properly consider whether an injunction would further this policy. *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1253 (10th Cir. 2001) (finding that "tribal self-government may be a matter of public

interest"); *Seneca-Cayuga Tribe of Okla. v. Okla.*, 874 F.2d 709, 716 (10th Cir. 1989) (affirming grant of injunction where "injunction promotes the paramount federal policy that Indians develop independent sources of income and strong self-government"); *Bowen v. Doyle*, 880 F. Supp. 99, 137 (W.D.N.Y. 1995) (finding "the public's interest and the interests of [an Indian tribe] coincide" insofar as "there is a strong federal policy favoring tribal self-government [and] tribal self-sufficiency.").

An injunction will do more than just prolong Enterprise's economic hardship, and its dependence on public support, while the case is resolved (Exh. G ¶ 11); an injunction will undermine DOI's efforts to assist the Tribe in securing an independent source of income to support its self-governance. *See* Exhibit U (Declaration of Kevin K. Washburn, Assistant Secretary – Indian Affairs). In sum, the Court should hold that the public interest weighs in favor of denying injunctive relief.

Citizens argue (ECF 24-1 at 24-25) that a TRO would serve the public interests of preventing (a) unlawful government action, and (b) environmental harm. But Plaintiffs have completely failed to demonstrate that DOI's actions are in any way unlawful, and Plaintiffs' allegations of likely environmental harms are factually unsupported and relate to events that lie several months in the future.

CONCLUSION

Plaintiffs' requests for a writ of mandamus, and a temporary restraining order, should be denied.

Respectfully submitted this 25rd day of January, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2013 I electronically filed the foregoing Defendants' Consolidated Opposition To The Motions For Temporary Estraining Order By Citizens For A Better Way And United Auburn Indian Community with the Clerk of the Court using the CM/ECF system which will send notification of such to counsel of record.

/s/*Peter Kryn Dykema*
PETER KRYN DYKEMA