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**Pro Hac Vice* Application Forthcoming

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA, Plaintiff, v. KENNETH LEE SALAZAR, et al., Defendants.	Case No. 2:13-cv-0064-MCE-KJN **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER**
CITIZENS FOR A BETTER WAY, STAND UP FOR CALIFORNIA!, GRASS VALLEY NEIGHBORS, WILLIAM F. CONNELLY, JAMES M. GALLAGHER, ANDY VASQUEZ, DAN LOGUE, ROBERT EDWARDS, and ROBERTO'S RESTAURANT, Plaintiffs, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., Defendants.	

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I. INTRODUCTION

More than 15 years ago, the Department of the Interior ("Department" or "Secretary") promulgated a rule, 25 C.F.R. § 151.12(b), providing for 30 days' public notice of a decision to take land into trust for an Indian tribe. The purpose of the rule, the Department explained, was to "ensure the opportunity for judicial review of administrative decisions to acquire title to lands for Indian tribes" by "permit[ting] judicial review *before* transfer of title to the United States." 61 Fed. Reg. 18,082 (Apr. 24, 1996) (emphasis added). The Department has consistently construed the rule to require that it "take no further action until the judicial review process has been exhausted," if a case is filed within 30 days.[1]

This case involves the Department's decision to transfer land in Yuba County ("Yuba site") into trust for the Enterprise Rancheria of Maidu Indians ("Enterprise"). After the Department gave public notice of its decision, Plaintiffs brought this lawsuit within the 30-day period contemplated by Section 151.12(b). Yet notwithstanding that rule, the Department now says that unless this Court orders otherwise by February 1, it will take the land into trust while this lawsuit is pending – even if doing so leaves Plaintiffs with no remedy despite having valid legal claims.[2] That cannot be the law.

The Department's reason for insisting on the February 1 deadline? It doesn't have one. The Department took a *decade* to make a decision, on a schedule that was convenient to it – it has no basis for claiming urgency now. Nor will Enterprise be harmed by delay, since it states it does not intend to initiate the work that requires trust transfer for at least 120 days. By contrast, transferring land into trust would immediately deprive Plaintiffs of the protections that state and local laws provide. Moreover, the trust transfer would raise unanswered questions about the authority of the Court to undo a trust conveyance. The Department should not be permitted to eliminate a century and a half of state and local jurisdiction when serious questions regarding the

[1] DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, FEE-TO-TRUST HANDBOOK, VERSION II ("2011 FEE-TO-TRUST HANDBOOK"), at 15 (July 13, 2011), *available at* http://www.bia.gov/cs/groups/xraca/documents/text/idc-002543.pdf.

[2] Plaintiffs here are Citizens for a Better Way, Stand Up For California!, Grass Valley Neighbors, Dan Logue, Robert Edwards, Bill Connelly, James Gallagher, Andy Vasquez, and Roberto's Restaurant.

legality of its actions remain unresolved, particularly given that neither the Department nor Enterprise would be harmed by a few months delay.

Plaintiffs respectfully request that the Court mandate that the Department comply with 25 C.F.R. § 151.12(b), as it has done for the last 16 years, and stay the title transfer to permit the Court to consider the challenges to the trust decision. The Department can offer no compelling justification for violating 25 C.F.R. § 151.12(b) or for jeopardizing the availability of the judicial review the regulation was designed to permit. Alternatively, Plaintiffs ask the Court to issue a temporary restraining order ("TRO") enjoining the trust transfer of the Yuba site until judicial review is complete or, alternatively, until the Court has addressed Plaintiffs' motions for preliminary injunction at a time convenient to the Court's schedule. As shown below, such temporary relief is appropriate because Plaintiffs are likely to prevail on their claims that the Department's decisions are arbitrary, capricious, and contrary to law, Plaintiffs stand to be irreparably harmed absent a TRO, and the balance of equities and public interest favor issuance of a TRO. In particular, Federal Defendants: (1) repeatedly used erroneous property descriptions, making it impossible to determine what parcel of land was assessed, approved, or planned to be taken into trust, negating a range of statutory and regulatory requirements for trust transfers; (2) lack authority to acquire the land in any case under the Indian Reorganization Act, 25 U.S.C. § 465 ("IRA"); (3) failed to consider Plaintiffs' concerns under the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(b)(1)(A) ("IGRA"); (4) violated the National Environmental Policy Act, 42 U.S.C. § 4321 ("NEPA"); and (5) violated the Clean Air Act, 42 U.S.C. § 7506(c)(1)(B) ("CAA").

If the Department were to comply with its regulation, this Court would have the time to resolve those issues in an orderly fashion. But the Department refuses, even after it successfully transferred the action to the Eastern District knowing that the Court's schedule cannot accommodate the Department's unreasonable deadline. Pursuant to Fed. R. Civ. P. 65(b) and Loc. R. Civ. P. 231(a), the Court should respond to the Department's ultimatum by staying the ministerial act of title transfer pursuant to its authority under the All Writs Act, 28 U.S.C. § 1651, 5 U.S.C. § 705, and/or its inherent authority to manage its docket until judicial review is complete

or, alternatively, until it has addressed Plaintiffs' motions for preliminary injunction at a time convenient to the Court's schedule.

II. THE CHALLENGED DECISIONS

Enterprise proposes to develop a class III, off-reservation casino on land located in rural Yuba County, California. *See* Att. 1 to Request for Judicial Notice ("RJN") (Ex. 2 hereto) (Enterprise Rancheria Environmental Impact Statement (May 2009) ("EIS"); Exec. Summ.). The Department made two central decisions in response to Enterprise's application, memorialized in Records of Decision ("ROD"), both of which Plaintiffs challenge as violating the APA and other statutes. A third decision – the Secretary's refusal to comply with his regulation requiring him to stay trust transfers while this litigation is pending – is what necessitates this emergency motion/application.

A. Federal Defendants' December 1, 2011, "Two-Part Determination"

Under Section 20 of IGRA, a tribe cannot conduct class III gaming on newly-acquired trust lands unless an exemption applies. 25 U.S.C. § 2719(a). None applies to the Yuba site. The only legal means for Enterprise to conduct class III gaming at the Yuba site is through the "two-part determination," *id.* § 2719(b)(1)(A); 25 C.F.R. § 292.13-24, which requires, among other things, that the Secretary determine that gaming on the proposed site will not be detrimental to the surrounding community. A "no detriment" finding is made in consultation with state and local officials and nearby Indian tribes. 25 C.F.R. § 292.19.

The Secretary initiated consultation on January 16, 2009. Att. 2 to RJN (Ltr. Re: Sec. 20 Consultation (Jan. 16, 2009)). He issued a formal "no detriment" determination under Section 20 on September 1, 2011, based substantially on the recommendation of the Regional Office. *See* Att. 3 to RJN (ROD Secretarial Determination Pursuant to the IGRA (Sept. 1, 2011) ("2011 ROD")). *See also* Att. 4 to RJN (2010 Regional Office Recommendation Memo). On September 1, 2011, the Secretary requested the Governor of California's concurrence. Att. 5 to RJN (2011 Ltr. L. Echo Hawk, AS-IA to Governor J. Brown (Sept. 1, 2012). On August 31, 2012, Governor Brown issued his concurrence. *See* http://gov.ca.gov/news.php?id=17699.

B. Federal Defendants' November 21, 2012 Fee-to-Trust Decision

On November 21, 2012, the Secretary approved the acquisition of land in trust for Enterprise under the IRA, 25 U.S.C. § 465, and the implementing regulations, 25 C.F.R. part 151. *See* Att. 6 to RJN (ROD: Trust Acquisition of the 40-acre Yuba County site in Yuba County ("2012 ROD")). On December 2, 2012, the Secretary published notice of his final decision, setting forth the legal description of the land to be transferred into trust. *Notice of Final Agency Determination*, 77 Fed. Reg. 71,612 (Dec. 3, 2012) ("Final Notice"). On December 24, another plaintiff challenging the trust decision noted that though the Secretary purported to be acquiring a 40-acre parcel of land in trust, the metes and bounds description described a parcel more than twice as large. *See United Auburn Indian Community of the Auburn Rancheria v. Salazar et al.*, 1:12-cv-01988-RBW (filed D.D.C. Dec. 12, 2012) (Dkt. No. 7). The Department published a notice, stating that "[a]s published, the land description in the December 3, 2012, notice contains an error." *Notice of Final Agency Determination: Correction*, 78 Fed. Reg. 114-01 (Jan. 2, 2013) ("Correction Notice").

C. The Department's Decision Not to Stay the Transfer in Violation of its Regulation

On December 4, 2012, Plaintiffs contacted counsel for the Department stating that they intended to challenge to the Department's decision within the 30-day window set forth in 25 C.F.R. § 151.12(b), and to request written confirmation of the Secretary's stay of the trust transfer pending judicial resolution of the challenge. Declaration of Jena MacLean ("MacL. Decl.") ¶¶6, 7, Ex. 1. Two weeks later, the Department stated that the Secretary would not comply with his regulation. *Id*. ¶9, Ex. 2. (Ltr. M. Berrigan, AS-IS, to C. Alexander, U.S. DOJ (Dec. 18, 2012) ("Berrigan Ltr.")).

On December 20, 2012, Plaintiffs filed a complaint in the District of Columbia. *See Citizens for a Better Way v. U.S. Dep't Interior*, 1:12-cv-02052-RBW (Walton, J.). At Plaintiffs' request (Dkt. No. 6), the Court ordered expedited briefing to proceed as follows: January 7, 2013 for preliminary injunction motion; January 14, 2013 for Federal Defendants' Opposition; and January 18, 2013 for reply. (Dkt. No. 7). On December 24, 2012, Federal Defendants filed a motion to consolidate *Citizens for a Better Way et al.* with a *United Auburn Indian Community of*

the Auburn Rancheria v. Salazar et al., 1:12-cv-01988-RBW (filed Dec. 12, 2012). (Dkt. No. 12). At the same time, Federal Defendants filed an opposed motion to transfer venue to this Court. *Id.* On December 27, 2012, the court consolidated the two cases. Over the opposition of all Plaintiffs, *see* (1:12-cv-01988-RBW (Dkt. No. 13)), the court transferred both cases on an "expedited" basis and ordered that United Auburn's December 24 motion for emergency relief (Dkt. No. 7) be reserved for resolution by this Court. (1:12-cv-01988-RBW (Dkt. No. 14)).

Upon receipt of the transfer order, counsel for Citizens again contacted the Department for relief from the February 1 deadline for trust transfer in light of the Court's schedule and the delay caused by the motion to transfer venue. MacL. Decl. ¶¶17-18, Exs. 4, 5. On Friday, January 11, 2013, Defendants contacted Plaintiffs by phone after the close of business to inform them that they would not stay the transfer. *Id*. ¶19.

III. ARGUMENT

The Court has broad authority to issue writs necessary or appropriate to aid in its jurisdiction or in the nature of a writ of mandamus. 28 U.S.C. §§ 1361, 1651. The Court also has authority to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705. The exercise of that authority is warranted here, in light of the Department's arbitrary deadline for transferring land into trust, the Secretary's threatened violation of 25 C.F.R. § 151.12(b), the seriousness of the Department's legal errors in the review of the Enterprise application, and the strong interests of Plaintiffs and the public in preserving the existing jurisdictional framework and protections provided thereby. Staying the trust transfer for a few months to allow for judicial review on the Court's schedule, and to preserve the Court's jurisdiction and the availability of a remedy, does not harm Federal Defendants or Enterprise. Alternatively, Plaintiffs are clearly entitled to injunctive relief. Plaintiffs are likely to succeed on the merits, and the substantial possibility that the Court will lose jurisdiction or will otherwise be unable to remedy the Department's violations is the sort of irreparable injury that cannot be permitted.

A. Plaintiffs are Entitled to an Order Mandating that the Secretary Adhere to His Regulation and Stay the Trust Transfer During the Pendency of the Case.

The Department's regulation requires it to stay the transfer of title to the Yuba site pending judicial challenge. The Department's current repudiation of that regulation violates a clear duty and therefore justifies the issuance of an injunction in the nature of mandamus. In 1995, the Eighth Circuit Court of Appeals held that 25 U.S.C. § 465, the statute authorizing trust acquisitions of land, was an unconstitutional delegation of legislative powers because the Secretary was foreclosing judicial review of his decisions by immediately transferring title. *See State of South Dakota v. U.S. Dep't of the Interior*, 69 F.3d 878 (8th Cir. 1995). In response to that decision, the Department promulgated 25 C.F.R. § 151.12(b) to allow judicial review before land is taken into trust.

As set forth in the preamble, the express purpose in promulgating 25 C.F.R. § 151.12(b) is to "permit[] judicial review *before* transfer of title to the United States." 61 Fed. Reg. 18,082 (Apr. 24, 1996) (emphasis added). Immediately after promulgating the regulation, the government filed a petition for a writ of certiorari seeking vacatur of the Eighth Circuit's decision. In the petition, the government noted that "[t]he court of appeals premised its decision on the assumption that the Secretary's decision to acquire land in trust is not subject to judicial review," and it explained that "[s]ince the court rendered its decision… the Secretary has issued a regulation that acknowledges the availability of judicial review of such decisions and affords an opportunity for judicial review to be instituted *before the land is actually taken in trust*." Pet. for Writ of Cert. in *U.S. Dep't of the Interior v. State of South Dakota*, No. 95-1956 (June 3, 1996), 1996 WL 34432929, at *15 (emphasis added); *see id*. at *24 n.3 ("As explained in the preamble, the regulation ensures that [judicial] review is available before formal conveyance of title to land to the United States, when the QTA's bar to judicial review becomes operative.").

Since then, the Department has consistently applied 25 C.F.R. § 151.12(b) by staying trust transfers until the conclusion of judicial proceedings, where, as here, a challenge is filed during the 30-day period. *See, e.g.*, 2011 FEE-TO-TRUST HANDBOOK, VERSION II, *supra* note 1, at 15 (stating that if a lawsuit is filed in the 30-day period, the Department will "take no further action

until the judicial review process has been exhausted"); *see also id.* at 68-69 (If "any legal action is filed," the Office of Indian Gaming ("OIG") will "[n]otify the Regional Director to take no further action."); DOI BIA Div. of Real Estate Serv., Acquisition of Title to Land Held in Fee or Restricted Fee (May 20, 2008) ("2008 Fee-to-Trust Handbook") at 57 ("If someone files a lawsuit, BIA must cease all work until the court decides the case."). Less than a year ago, the Department confirmed the practice, stating that "the purpose of the 30-day window is to permit judicial review before transfer of title to the United States." Br. for Fed. Pet. at 23, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Salazar*, 132 S. Ct. 2199 (2012) (Nos. 11-246, 11-247) ("*Patchak*") (internal quotation marks and brackets omitted).[3] These authorities make plain that the Department has long interpreted 25 C.F.R. § 151.12(b) to require a stay if a challenge is filed during the 30-day period. *See, e.g., Talk Am., Inc. v. Michigan Bell Tel. Co.*, 131 S. Ct. 2254, 2261 (2011) ("[W]e defer to an agency's interpretation of its regulations, even in a legal brief."); *Auer v. Robbins*, 519 U.S. 452, 462 (1997) (same).

In this case, however, the Department announced by letter that it will no longer follow its policy, agreeing only to stay the acquisition long enough for Plaintiffs to file – but apparently not for the Court to hear – a motion for preliminary relief. MacL. Decl. ¶9, Ex. 2. This unjustified policy change is contrary to law, will irreparably harm Plaintiffs, and must be enjoined.

The Department's new interpretation of 25 C.F.R. § 151.12(b) is impermissible. While an agency's interpretation of its own regulation is generally entitled to deference, deference does not apply when "an alternative reading is compelled by … other indications of the Secretary's intent at the time of the regulation's promulgation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994); *accord Alaska Trojan P'ship v. Guttierez*, 425 F.3d 620, 627-28 (9th Cir. 2005) (setting aside an agency's interpretation of a regulation because the interpretation was

[3] The Secretary has claimed that the DOI has not always self-stayed until *the judicial process was exhausted*, but can site to only two exceptions over the past sixteen years. In *Patchak v. Salazar*, 632 F.3d 702, 703 (D.C. Cir. 2011), Patchak did not file during the 30-day window, but much later after the stay entered in a prior suit expired when that suit was dismissed. In *City of Roseville v. Norton*, 219 F. Supp. 2d 130, 137-38 (D.D.C. 2002), the Secretary self-stayed long enough for a ruling on the merits, but not until the judicial process was exhausted. These instances do not qualify as exceptions to an otherwise uniform policy.

inconsistent with that expressed in the preamble to the final rule). The Department promulgated section 151.12(b) to avoid the Eighth Circuit's opinion that 25 U.S.C. § 465 constituted an unconstitutional delegation of legislative authority because the Department's rapid conveyance of land into trust precluded judicial review. It does not matter that the Supreme Court has since rejected one of the Department's reasons for believing that such decisions were unreviewable. *See Patchak*, 132 S. Ct. 2199. What matters is the Department's "intent at the time of the regulation's promulgation" (*see Thomas Jefferson Univ*, 512 U.S. at 512), which was clearly to stay trust conveyances while judicial challenges are pending. That is how the Department described the rule in the preamble, and that is what the Department represented to the Supreme Court. Under the Department's new interpretation, the rule would be largely pointless, since judicial review could never be *completed* within 30 days of the Department's notice of his intent to take land into trust. Because the Department's new position "is inconsistent with the intent of the . . . regulations as expressed by the Secretary at the time of final promulgation" of Section 151.12(b), it should be rejected. *Alaska Trojan P'ship*, 425 F.3d at 631. This Court should enjoin the Department from ignoring its regulation and taking the Yuba site into trust before this case is resolved on the merits.

B. Plaintiffs are Entitled to Injunctive Relief.

Plaintiffs seeking a preliminary injunction must establish that: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest." *Dev. Serv. Network v. Douglas*, 666 F.3d 540, 544 (9th Cir. 2011); *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008). The Ninth Circuit has taken a "'sliding scale' approach" to that standard, such that a strong showing as to one factor may compensate for a weaker showing as to another. *Dev. Serv. Network*, 666 F.3d at 544 (citing *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011)). Separate and apart from the illegality of the Department's abandonment of 25 C.F.R. § 151.12(b), Plaintiffs are likely to succeed on the merits of their challenge to the Department's trust decision. That decision, if not enjoined, will cause

irreparable harm, and the equities and public interest weigh in favor of preliminary injunctive relief.

1. Plaintiffs Are Likely to Succeed on the Merits.

The Department's trust process was fraught with discrepancies calling into question the integrity of the process. From its repeated incorrect property descriptions to the Department's failure to address concerns regarding the impacts of the project and the status of Enterprise, this decision does not comport with basic APA requirements.

a. The Department's Ongoing Misidentification and/or Mischaracterization of the Yuba Site is Arbitrary and Capricious.

The Department's systematic failure to identify correctly the property in question – a central element of every trust acquisition – violates the APA, IGRA, NEPA, and other authorities. Although the Department now says that it has decided to take a 40 acre parcel into trust, at key stages in the review process, the Department set out the metes and bounds, maps, and assessor parcel number for a property twice as large. Indeed, the Federal Register notice of the Secretary's final decision referred to that larger parcel, 77 Fed. Reg. 71,612, and the later "correction" describing the smaller one provided no explanation for the change, 78 Fed. Reg. 114-01. The inconsistencies are so pervasive as to make it impossible to determine what, exactly, the Department thought it was reviewing. There is no principled basis for determining whether a 40-acre or an 82-acre parcel was under consideration in the trust decision under Part 151, the "no detriment" finding under Part 292, or what the Governor actually reviewed in his concurrence.

The Department's regulations require the Secretary to review title evidence before publishing a notice in the Federal Register. *See* 25 C.F.R. §§ 151.12, 151.13. The review the Secretary is required to conduct is not a trivial exercise. The Department of Justice's *Standards For The Preparation of Title Evidence In Land Acquisitions by the United States* set forth in 52 pages the numerous requirements the Secretary must meet.[4] Either the Secretary did not conduct

[4] *See* http://www.fws.gov/refuges/realty/pdf/DOJ_2001.pdf. *See also id.* at 1 (explaining that "the Title Standards replace the Standards for the Preparation of Title Evidence in Land Acquisitions by the United States (1970)").

the required review under § 151.13 – before publishing the wrong description – or he did – and knowingly published the wrong description. Either way, his actions are contrary to law.

The Secretary's Correction Notice states that "[a]s published, the land description in the December 3, 2012, notice contains an error" because it described an 82.64 acre parcel rather than the 40-acre parcel the Secretary now says he intends to acquire. 78 Fed. Reg. 114-01. In fact, it is not clear whether the Correction Notice "corrected" an error or whether it simply reflected a change of heart by the Secretary. Significantly, an internal 2008 BIA memorandum suggests the Secretary intended to take the larger parcel all along:

> I have reviewed the land description of the 82.64 acres to be deeded to the United States in trust for the Enterprise Rancheria. The parcel is APN 014-280-095 of Yuba County. An ALTA Survey was performed in 2003 but it applies to land with a different land description (probably the original 40 acres) and only partially covers the land being conveyed by this transaction.

Att. 7 to RJN (Memorandum, "*Land Description Review – Enterprise Rancheria – 82.64 acres*" (Nov. 14, 2008) ("2008 Schubert Memo") (emphasis added)).[5]

Since 2008, the Department, while sometimes saying that it was considering taking title to a 40-acre parcel, incorporated a description of the larger parcel – by metes and bounds, by map, by referring to APN 014-280-095 in its entirety, or by some combination thereof – in critical notices to the Governor, the State, local governments and Indian tribes, including:

- November 26, 2008, Notice of (Gaming) Land Acquisition Application: Notice to the State and jurisdictional governments seeking input on the tax, land use and jurisdictional impacts of taking the Yuba site into trust to satisfy 25 C.F.R. §§ 151.10, 151.11. The notice includes the metes and bounds for the 40-acre parcel,[6] but attaches a map delineating the 82.64-acre parcel. Att. 8 to RJN.

[5] A plaintiff in this case even raised the question of the acreage during the NEPA process. On May 8, 2008, Citizens for a Better Way questioned the acreage involved in comments on the draft EIS: "Yuba County Supervisor Don Schrader commented that the actual land acquisition proposal is currently over 80 acres." Att. 1 to RJN (Final EIS, App. T, May 8, 2008 Citizens Comment Ltr. I-12, 2). The August 6, 2010 final EIS, however, states: "Section ES.1 of the [Draft EIS] confirms that the Tribe proposes to have 40 acres of land transferred into federal trust status." *Id.* (App. T, *Response to Comments*, 30).

[6] The metes and bounds description for the 40-acre parcel identified in the document is the same set forth in Enterprise's 2002 Tribal Resolution. *See* Att. 9 to RJN (Tribal Resolution No. 02-08, included with tribal application). *See also* Att. 10 to RJN (Baker-Williams Letter.)

- January 16, 2009, Letter Initiating Consultation under Section 20 of IGRA: Letter refers to the Yuba site as the parcel "commonly referred to as Assessor's Parcel Number 014-280-095," which is an 82-acre parcel. Att. 2 to RJN.

- 2010 Regional Office Recommendation Memorandum to the Assistant Secretary – Indian Affairs: Incorporates the metes and bounds description of the 82-acre parcel and attaches the 2008 Schubert Memorandum as the proper Legal Description. Att. 4 to RJN at 37 (metes and bounds of 82-acre parcel); *id.* at 48 (citing as Exhibit 3: Legal Description Review (Nov. 14, 2008)); *id.* at 47 (stating that "the legal description described in Section V above was reviewed by the Regional Geographer and was found to be adequate *(Exhibit 3)*).

- September 1, 2011 Letter to Honorable Jerry Brown from Assistant Secretary: Indian Affairs Echo Hawk – Includes metes and bounds describing 82.64-acre parcel and attaches 2008 Schubert Memorandum. Att. 5 to RJN at 5 n.5 and 5-6.

Enterprise's amended 2009 application for approval under Section 20 also describes the 82.64-acre parcel. Att. 9 to RJN. The 2008 Schubert Memorandum explicitly approves an 82.64-acre conveyance in lieu of a parcel 40 acres. The Department incorporated descriptions of the larger property in varying forms in multiple notices, rendering each of those notices deficient, but it did not modify the EIS. Property is unique; errors in property descriptions running through multiple public notices and federal decisions cannot be remedied by a post hoc 2013 Correction Notice. To the contrary, this is a systemic problem, the origin and intent of which demands further inquiry. At a minimum, the Secretary can hardly be said to have articulated a "rational connection between the facts found and the choice made," when it is unclear what facts he found or what choice he thought he was making. *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted). The Secretary's failure to correctly identify the land that is the subject of his decision makes that decision arbitrary, capricious and contrary to law.

b. The Secretary Violated the IRA and the APA by Acquiring Land in Trust for Enterprise and Failing to Explain his Decision to Do So.

The IRA authorizes the Secretary to take land into trust "for the purpose of providing land for Indians." 25 U.S.C. § 465; *see also Carcieri v. Salazar*, 555 U.S. 379 (2009). The term "Indians" is defined, in relevant part, as "persons of Indian descent who are members of any recognized Indian tribe *now* under Federal jurisdiction." 26 U.S.C. § 479 (emphasis added).

Under *Carcieri*, an Indian tribe must have been "under federal jurisdiction" in 1934, when the IRA was enacted, to qualify for trust land. 555 U.S. at 382-83.

Here, there is no evidence that Enterprise qualifies as an Indian tribe that was under federal jurisdiction in 1934. In fact, the evidence shows that it was not. The Department's decision to the contrary violates the IRA and APA in three respects. First, the ROD does not identify the standard the Secretary applied to conclude that Enterprise qualified for trust land. The Secretary was required to "examine the relevant data and articulate a satisfactory explanation for [his] action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). "[T]hat explanation must be sufficient to enable the Court 'to conclude that the agency's action was the product of reasoned decision-making.'" *Id.* at 48, 52; *see also* 5 U.S.C. §§ 702, 704, 706.

Here, the only discussion of the tribe's status in 1934 in the ROD is a single illogical sentence: "[t]he calling of a Section 18 election [on June 12, 1935] conclusively establishes that the Tribe was under federal jurisdiction for *Carcieri* purposes [in 1934]." Att. 6 to RJN (2012 ROD 44). There is no hint of how a single 1935 event demonstrates Enterprise's status in 1934, and this is certainly not the evidence of federal jurisdiction that the Secretary has required in other cases. *See* Att. 11 to RJN (Cowlitz ROD, Dec. 17, 2010); *see also* Att. 12 ((DOI Response to Questions (Oct. 24, 2011) (stating that "a fact-intensive analysis" was necessary). The 2012 ROD falls far short of the reasoned decision-making the APA requires.

Second, the sparse evidence available suggests that Enterprise does not qualify. The record shows that two parcels were established for two separate families, not a tribe or even two tribes. *See* Att. 13 to RJN (2002 App.) at 2-3; *see also Williams v. Gover*, 490 F.3d 785, 787 (9th Cir. 2007) (*citing Duncan v. United States*, 667 F.2d 36, 38 (1981)) (explaining that "rancherias," were established for *homeless* Indians). The Department was required to explain how Enterprise qualifies for trust land based on the provision of land to two families in 1915.

Third, the Secretary did not address evidence in the record showing that this current group was not the historical Enterprise Rancheria, including evidence that Federal supervision over

Enterprise's leadership was Congressionally terminated, leaving the Secretary without authority to acquire land on its behalf. *See generally* Declaration of Robert Edwards ("Edwards Decl."). This is not permissible. *See Butte Cnty., Cal. v. Hogen*, 613 F.3d 190 (D.C. Cir. 2010) (remanding decision because of Secretary's failure to consider evidence that a group of Indians seeking a restored lands determination was not the same as the group that had occupied the proposed site).

c. The Secretary Violated IGRA and the APA in Making his No Detriment Finding.

Congress directed that Indian gaming take place only upon a determination that gaming "would not be detrimental to the surrounding community." 25 U.S.C. 2719(b)(1)(A). It follows that the Secretary was required to evaluate the effect of gaming on the community as part of the trust-acquisition process.

The Secretary failed to comply with that obligation, however, because he ignored numerous comments in the record about the detrimental effects of the casino on the community. Enterprise argued that BIA need not consider the critical comments of the California Tribal Business Alliance, Denis O'Connor, Robert Edwards, Citizens for a Better Way, Stand Up for California!, and various churches because these entities are not formal consulting parties under 25 C.F.R. § 292.19. Att. 4 to RJN (2010 Recommendation Memo. at 4, 5, 7, 10-11, 12, 13). The Regional Office appears to have accepted that premise, and dismissed all of their comments by claiming that their concerns are answered by the EIS. *Id.* at 36 ("There appears to be some concerns from the local community…, they are all mitigated through a MOU or the Final EIS.").

The 2011 ROD perpetuates that error by failing to address Plaintiffs' comments directly and by treating the mitigation measures set forth in the EIS and two intergovernmental agreements as generally answering all of the opposing comments.[7] Att. 3 to RJN (2011 ROD at

[7] Enterprise executed an agreement with Yuba County in 2002, which requires Enterprise to make a series of payments to the County in exchange for the County's support for the casino. *See* Att.14 to RJN (Memorandum of Understanding Between the Estom Yumeka Maidu Tribe, Enterprise Rancheria and the County of Yuba ("Yuba MOU") (Dec. 17, 2002)). Enterprise also executed an agreement with Marysville, California in 2005, in which Enterprise promised to pay the City $4,822,977 over a 15-year period in exchange for its promise to support the casino. *See* Att. 15 to RJN (Memorandum of Agreement between the Estom Yumeka Maidu Tribe of the

56,57,59,62). By contrast, the Department specifically identifies supporters, including several that do not qualify for formal consultation under 25 C.F.R. § 292.19, as evidence of the "strong support" for the project. *Id.* at 57-58. Indeed, the only opposition the 2011 ROD refers to is a brief mention that the *majority* of Yuba County voters *oppose* the casino. *Id.* at 57.

The Secretary appears to have assumed that because IGRA specifies that he must consult "with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes," 25 U.S.C. 2719(b)(1)(A), that he need only consider comments received from such entities, or worse, only weigh those that have expressed support for the proposal. But nothing in IGRA's consultation requirement modifies the Secretary's general APA obligation to take account of comments—from any source—that raise significant issues pertaining to the statutory factors he is required to consider. It is not permissible for the Secretary to dismiss all opposing comments as addressed "through a MOU or the Final EIS," while highlighting all supporting comments as evidence of "strong support," particularly where the Secretary has an obligation to the Governor to objectively represent the impacts on the surrounding community. An evaluation of the impact on the surrounding community necessarily requires a fair and objective consideration of the comments of members of that surrounding community.

Indeed, the Secretary went so far as to premise his "no detriment finding" in part on agreements that *do not exist*. The Secretary found that the project would not be detrimental to the surrounding community because Enterprise "has worked with the local communities to identify and mitigate any environmental impacts of the proposed Resort." *Id.* at 63. In a decade, Enterprise negotiated only two such mitigation agreements, one of which was insufficient to convince Yuba County voters to support the project. Att. 3 to RJN (2011 ROD at 57) (citing the results of a November 2005 vote with 51.8% opposing the development of gaming at the Yuba site). The Secretary cannot reasonably premise a no detriment finding on Enterprise's unenforceable "promises" to negotiate mitigation agreements. But that is precisely what the Secretary did. Enterprise "shall enter into a binding agreement with the Wheatland Fire Authority

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Enterprise Rancheria and the City of Marysville, California ("Marysville MOA") (Aug. 16, 2005)).

and another fire protection district located with Yuba County." *Id.* at 54. It hasn't.[8] Enterprise "*intends* to pay Yuba County for any traffic impact fees . . . [and] for improvements by Yuba County of pedestrian and bike facilities . . . " *Id.* at 55. Who knows if it will? Enterprise "intends to enter into MOUs or other agreements with various additional governmental entities, such as the California Department of Transportation and other nearby towns . . . " *Id.* When? Under what terms?[9] There is no guarantee – indeed, there is substantial doubt – that any of those supposed future agreements will come to pass. This is not "heavy scrutiny to tribal applications for off-reservation gaming" (*see id.* at 60) that IGRA requires.

Moreover, the Department failed to credit comments from the Governor, instead only noting that "The Governor's office stated that the earlier comment contained sufficient information for the Secretary to determine whether the proposed gaming development would or would not be detrimental to the surrounding communities." Att. 3 to RJN (2011 ROD at 58). But the Governor's January 30, 2009 letter poses a number of questions regarding the unemployment rate on the reservation, the number of tribal members likely to leave the reservation, the effects of the relocation on long-term tribal identification, and the specifically identified on-reservation benefits from the facility. Att. 16 to RJN (Ltr. Gov.'s Off. to Dep't. Interior (Jan. 30, 2009) at 6-7). The 2011 ROD does not address these questions.[10]

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[8] There is substantial basis to find that an agreement with Wheatland regarding fire improvements is not likely. Counsel for Enterprise acknowledged in 2009 email to AES that while an agreement makes "the most sense, *the current politics in the City of Wheatland may not allow it*." MacL. Decl. at Ex. 6 (Jan. 20, 2009 email from J. Maier, counsel for Enterprise to C. Broussard, AES) (emphasis added).

[9] Similarly, in response to queries from M. Wiseman in the Solicitor's Office, counsel for Enterprise stated, "I don't know of any pending discussions regarding police cooperation." He explained that Enterprise had not negotiated agreements with traffic officials: "With that said, I don't think that there has been any agreement with Caltrans or the County in reference to specific improvements." MacL. Decl. at Ex. 7 (Jan. 30, 2009 Email from N. Yost to J. Maier and C. Broussard). Any reliance on agreements that had not been negotiated or a tribal-state compact that did not yet exist cannot serve as the basis for concluding that impacts were mitigated or that the project would not be detrimental.

[10] The Department apparently took Enterprise's recommendation for how to address comments: "Should be in the administrative record somewhere. The ROD is fine *but will need a sentence of two saying considered the state's letter*…. [T]here must be some other public written process acknowledging all those letters and stating that they were considered." MacL. Decl. at Ex. 8 (Mar. 13, 2009 Email from N. Yost, Enterprise, to C. Broussard, AES) (emphasis added). *See also* MacL. Decl. at Ex. 9 (Mar. 17, 2009 Email from N. Yost to C. Broussard, AES et al.).

Because the Secretary failed to comply with his obligations under IGRA and the APA, his action is arbitrary and capricious and should be set aside.

d. The Department Violated NEPA.

NEPA requires federal agencies to take a "hard look" at the environmental consequences of their actions *before* taking action. 42 U.S.C. § 4332(C); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 374 (1989). That "hard look" must be done "objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000).

As set forth in the United Auburn's Motion, 22-26 (1:12-cv-01988-RBW) (Dkt. No. 7), the EIS was prepared in violation of the conflict of interest provisions of 40 C.F.R. § 1506.5. BIA's failure to supervise properly the EIS is reflected in a number of deficiencies in the docket, including but not limited to the alternatives analysis.

The alternatives analysis "is the heart of the environmental impact statement." 40 C.F.R § 1502.14. Accordingly, agencies cannot give it mere passing attention; instead, they must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R § 1502.14(a). An EIS that fails to include a viable alternative must be found inadequate. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999); *Surfrider Found. v. Dalton*, 989 F. Supp. 1309, 1326 (S.D. Cal. 1998), *aff'd sub nom.* 196 F.3d 1057 (9th Cir. 1999).

BIA dismissed viable alternatives from detailed study for superficially explained and insufficient reasons, while overlooking that fact that similar concerns were also applicable to the proposed casino site. BIA adopted a broad goal for this action as set forth in the EIS purpose and need statement: restore trust land to the Tribe; provide employment; improve the socioeconomic status of the Tribe by providing a new revenue source; allow Tribal members to become economically self-sufficient; fund local government; make donations; and effectuate the Congressional purposes of IGRA. Att. 1 to RJN (Final EIS, at 1-2, 1-8). This purpose and need statement is readily met by alternative sites.

BIA, however, considered only two locations in any detail (*see* Att. 1 to RJN (FEIS, at 2-1 - 2-20, 2-37 - 2-45)), improperly dismissing three reasonable alternatives (Highway 65, Highway

99, and Highway 162) from "further consideration." Where, as here, the range of alternatives considered consists of only variations of a single alternative based on "levels and intensity of use" the range of alternatives considered is not "truly meaningful." *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 746 F. Supp. 2d 1055, 1089 (N.D. Cal. 2009), *vacated in part*, 2011 WL 337364 (N.D. Cal. Jan. 29, 2011).

BIA's improper restriction of alternatives is evident when the reasons for exclusion are considered. BIA rejected Highway 65 and Highway 99 because Enterprise purportedly "was unable to secure investors for development." *Id.* at 2-46. But the fact that an applicant does not own a parcel of land has been considered "only marginally relevant" to defining reasonable alternatives. *Van Abbema v. Fornell*, 807 F.2d 633, 639 (7th Cir. 1986). BIA also rejected all three sites ostensibly because they lacked infrastructure (*i.e.*, wastewater and water). Att. 1 to RJN (Final EIS at 2-46). Yet BIA considered the Butte County alternative, which also lacks infrastructure. *Id*. at 2-41. Moreover, the Yuba County site lacks on-site water and would require a nearby wastewater facility to be doubled in size to accommodate the development, yet was considered viable. *Id*. at 2-12 - 2-14. BIA also rejected the Highway 65 site because it is zoned for agriculture, *id.* at 2-46, but trust status negates the application of state and local laws. Finally, BIA refused to consider in detail the Highway 99 and 162 sites due to "numerous biologically sensitive resources" including wetlands and vernal pools, *id.* at 2-46, despite the fact that the Yuba site has the very same resources, including emergent wetlands, intermittent channels, and a riparian corridor, *id*. 3.1.5, 4.5, 5.2.4.

The Yuba site actually has a very significant negative impact that is not discussed in the EIS and appears to not be present at the alternative sites – a portion of the project will be located in a floodplain. Att. 1 to RJN, FEIS, at Table ES-1, 4.3-1. Executive Order ("EO") 11988, 42 Fed. Reg. 26951 (1977), therefore applies, which requires a detailed evaluation of impacts to such areas, the consideration of alternatives where floodplains would not be affected, and an affirmative conclusion that no practicable alternative exists. Compliance with this EO is subject to judicial review under the APA. *City of Carmel by the Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142 (9th Cir. 1997). An agency "must consider the project effects on the floodplains and

possible alternatives and may proceed only if it finds that the 'only practicable alternative' requires 'sitting in' the floodplain." *Id.* at 1166. Failure to make that finding invalidates the agency decision. *Id.* In this case, the Enterprise FEIS does not even mention the EO, let alone make the "no practicable alternative" finding, thus violating NEPA, the EO, and the APA.

BIA's refusal to consider of reasonable alternatives is arbitrary and capricious and a violation of NEPA, as was its reliance on an EIS that fails to objectively assess the impacts of the proposed casino, including direct, indirect, and cumulative impacts on wetlands, wastewater, traffic, air quality, and other resources.

e. The Secretary Violated the CAA.

BIA committed clear error by failing to conduct the required analysis under the CAA. Federal agencies cannot "engage in, support in any way . . . license or permit, or approve" any activity that does not conform to the applicable state implementation plan ("SIP") to attain and maintain CAA national ambient air quality standards ("NAAQS"). 42 U.S.C. § 7506(c). This "determination of conformity" is the "affirmative responsibility" of the head of the agency. *Id.* The CAA therefore requires the Secretary to find that the proposed casino will not cause or contribute to any new NAAQS violations, exacerbate any existing violation, or delay the time at which any NAAQs will be achieved. *Id.* § 7506 (c)(1)(B).

Conformity requirements apply to activities that will be located in areas that do not attain one or more NAAQS. 40 C.F.R. § 93.153. Yuba County is designated "nonattainment" for the EPA's 24-hour air quality standard for fine particulate matter (PM2.5). *See* 40 C.F.R. § 81.305; 74 Fed. Reg. 58,688 (Nov. 13, 2009). Despite acknowledging that the conformity requirements apply in Yuba County, BIA denies that they apply to the proposed casino project, claiming that "[t]he *de minimus threshold* for [conformity applicability to] PM2.5 is 100 tons per year," and that the PM2.5 emissions will be less than that number. Att. 1 to RJN (EIS at 4.4-12).

BIA erred on both points. Although the relevant regulation – 40 C.F.R. § 93.153(b)[11] does set a *de minimis* level of 100 tons per year of direct PM2.5 emissions as the threshold for

[11] The regulatory citation in the EIS, 40 C.F.R. § 51.853(b)(1) and (2), is incorrect.

conformity determinations, it *also* sets a level of 100 tons per year of nitrogen oxides, *unless* EPA makes an affirmative finding that such emissions do not contribute significantly to PM2.5 levels. But EPA has concluded the opposite. Att. 17 to RJN (Ltr. from EPA Reg. 9 to Gov. Schwarzenegger (Aug. 18, 2008) at 5-6) (finding that the significant emissions of nitrogen oxides are precursors to the formation of PM2.5)).

The EIS projects that the proposed casino will be responsible for 663 pounds a day of nitrogen oxide emissions. Att. 1 to RJN (EIS at 4.4-10; Table 4.4-3). The proposed casino will therefore produce approximately 120 tons per year (663 lbs/day * 365 days * 1 ton/2000 lbs = 120 tons), exceeding the threshold. Because EPA determined that nitrogen oxides do contribute significantly to PM2.5 levels, BIA was required to make a conformity determination. It did not.

The CAA requires BIA to make a conformity determination based on nitrogen oxide emissions through precisely described notice and comment procedures, *see* 40 C.F.R. § 93.156, which must be conducted *before* BIA made its decision, *id.* § 93.150. BIA violated the CAA in approving the trust transfer and casino project based on this inadequate record.

2. Citizens will be Irreparably Harmed If the Secretary Transfers Land Into Trust for Enterprise.

The removal of land from state and local jurisdiction is an extraordinary act. *See Carcieri v. Kempthorne*, No. 07–526, Oral Arg. Tr. 36:13–17 (Nov. 3, 2008) (Roberts, C.J., describing taking land into trust as "an extraordinary assertion of power"). When serious questions arise as to the legality of a trust decision, as here, the transfer of land from state and local jurisdiction to another sovereign should be stayed.

a. Plaintiffs May Be Deprived of a Remedy if the Transfer is Effected.

The Secretary has long argued that his trustee duties prevent him from removing land from trust once there has been final agency action. *See Big Lagoon Park v. BIA*, 32 IBIA 309, 321, 1998 WL 736001, at *11 (1998) ("Thus, the Board does not view the events in *South Dakota* as evidence … that the Department itself has the authority to rescind a completed trust acquisition. To the contrary, if an inference can be drawn from these events, it is that the Department, at least, considered itself to lack such authority."); *see id.* at 323 ("[T]he Board

concludes that it lacks authority to order the divestiture of title to land held by the United States in trust for an Indian tribe."); *see also Prieto v. United States*, 655 F. Supp. 1187 (D.D.C. 1987) (finding that the Secretary exceeded his authority in revoking trust status based on equitable considerations, including the passage of time from when land was placed in trust and the challenge was brought (9 months), the acquisition of vested rights upon acquisition, and reliance).

In *Patchak*, the Supreme Court held that the sovereign immunity does not bar a challenge to a trust decision after title transfers. Nevertheless, it remains uncertain whether there is a different barrier to an order compelling the Department to remove land from trust. The Department suggested in *Patchak*, for example, that taking land out of trust would potentially present constitutional problems: "[I]f Patchak prevailed in this case, the government would be obliged to give up its trust title to the Bradley Property, without the option of paying compensation to the former owner," who is not a party or entitled to the property, having voluntarily transferred it." Br. Fed. Pet. at 26-27, *Patchak*, 132 S. Ct. 2199 (2012) (Nos. 11-246, 11-247). If a remedy would effect an unconstitutional taking of property without compensation, the Court might lack authority to order it or it might subject the United States to a separate proceeding for compensation under the Tucker Act, 28 U.S.C. § 1346. Indeed, the Department is still not prepared to state that there are no obstacles to the Court ordering the removal of land from trust: "[T]he district court in a challenge to the Assistant Secretary's decision to take land into trust *likely* would not lose jurisdiction to adjudicate the APA claims once the land is acquired in trust." Ex. 2 to MacL. Decl.

In fact, trust transfer will create a number of problems that could argue against the equitable remedy Plaintiffs seek, if not preclude it outright. For example, if the Secretary were to take the land in trust, the owner of the land would first have to transfer it to Enterprise. Only then could Enterprise transfer the land to the Secretary. If the Court were to determine that the acquisition was contrary to law, could it order the transfer between Enterprise and the Secretary undone? That transfer was voluntary and validly done, based on Enterprise's reliance on the supposed legality of the Secretary's decision. Would the Court be limited to ordering that the land not be held in trust? What remedy would Enterprise have against the United States under

those circumstances? Moreover, what remedy would the current owner have against Enterprise, given that Enterprise enjoys sovereign immunity? Would the current owner be deprived entirely of any right or damages for the land transfer? Would equitable principles prevent the Court from granting the remedy that Plaintiffs seek?

The complexities are not limited to the power of the Department to withdraw land from trust or the Court to order it. There no dispute that an Indian tribe enjoys sovereign immunity. If a tribe does not intervene in a trust challenge, a court would be powerless against it. Nor is it clear that a court could order the Secretary to order a tribe to take certain action, given that the Secretary has no apparent enforcement authority. And even where a tribe intervenes in the trust challenge, there is some question whether intervention effects a waiver of sovereign immunity for purposes of injunctive relief. *See Sac and Fox Nation of Mo. v. Babbitt*, 92 F. Supp. 2d 1124 (2000), *rev'd* 240 F.3d 1250, *cert. denied*, 534 U.S. 1078 (2001) (Indian tribe, which had voluntarily intervened as defendant in suit challenging decision of Interior Secretary to take land into trust for benefit of tribe, did not thereby waive its sovereign immunity). As this case well illustrates, the consequences of prematurely transferring land into trust are not clearly defined and are potentially severe, for the Department's trust acquisition decisions routinely generate a multitude of complex legal challenges, often (as here) in several different courts. Litigants may be deprived of judicial review or may be powerless to have the Department's legal violations remedied. Courts and litigants should not be forced to resolve these issues in emergency briefing within 30 days, as the Department now proposes.

Where a plaintiff will have no adequate remedy without preliminary injunctive relief, irreparable harm is present. *See, e.g.*, *Clarke v. Office of Fed. Hous. Enter. Oversight*, 355 F. Supp. 2d 56, 66 (D.D.C. 2004) (finding irreparable harm based on economic losses that would be unrecoverable without preliminary injunctive relief); *Nat'l Trust for Historic Pres. in U.S. v. F.D.I.C.*, CIV. A. 93-0904-HHG, 1993 WL 328134, at *3 (D.D.C. May 7, 1993) (holding that the plaintiffs had established "absolute irreparable harm" because "[n]o remedy at law is available to compensate plaintiffs if the sale proceeds"); *WPOW, Inc. v. MRLJ Enterprises*, 584 F. Supp. 132,

138 (D.D.C. 1984) (finding irreparable harm where denial of preliminary relief would leave plaintiff unable to obtain a remedy).

b. Elimination of State and Local Government Authority.

The impact of trust conveyance on Plaintiffs and surrounding communities is immediate. "When the Secretary takes land into trust on behalf of a tribe pursuant to the IRA, several important consequences follow." *Conn. ex rel. Blumenthal v. U.S. Dep't of the Interior*, 228 F.3d 82, 85 (2d Cir. 2000). "Land held in trust is generally not subject to (1) state or local taxation; (2) local zoning and regulatory requirements; or (3) state criminal and civil jurisdiction, unless the tribe consents to such jurisdiction." *Id*. at 85–86 (*citing* 25 U.S.C. § 465; 25 C.F.R. § 1.4(a); 25 U.S.C. §§ 1321(a), 1322(a)) (citations omitted); *see also City of Sherrill, N.Y. v. Oneida Indian Nation of New York*, 544 U.S. 197, 220 (2005).

The removal of local zoning and regulatory requirements deprives Plaintiffs of rights and protections developed through democratic processes. The Department intends to do so without transparency and despite the inadequacy of the intergovernmental agreements to protect local interests. *See* Declaration of Daniels Logue ("Logue Decl.") ¶¶6-9. Once land is in trust, a tribe has sovereign authority to alter the land as it sees fit, even in a manner completely antagonistic to local land use regulations. Taking the Yuba site into trust would free the site from local zoning or other regulatory controls that protect all landowners in the area. *See id.* ¶¶9-10. This loss of regulatory authority – on which Plaintiffs have justifiably relied – will irreparably harm Plaintiffs, who have long opposed the development of the Yuba site for casino gambling and who have invoked state and local laws and regulations to challenge this proposed use. *See* Declaration of Cheryl Schmit ("Schmit Decl.") ¶¶9-14, 17; *see also* Declaration of Sandra Gilbert ("Gilbert Decl.") ¶¶4-8,12-17; Declaration of Steve Enos ("Enos Decl.") ¶13-14. When the consummation of a transaction will remove property from the reach of relevant statutes or regulations, that actuality constitutes irreparable harm. *See, e.g.*, *Nat'l Trust for Historic Pres.*, 1993 WL 328134, at *3, Civ. No. 93-0904-HHG (D.D.C. May 7, 1993) (finding irreparable harm because "the sale of the building to a private agency would remove it from the jurisdictional scope of the [National Historic Preservation Act]"). Moreover, transferring land into trust without resolving the serious

questions regarding tribal leadership will immediately harm Mr. Edwards, whose concerns regarding the legitimacy of the current leadership have gone unaddressed by the Department. Edwards Decl. ¶¶16-19.

c. Plaintiffs Will Suffer Irreparable Environmental Harms.

The proposed casino will have dramatic impacts on the surrounding community, including on traffic, crime, water resources, noise, light, crime, and other resources. The traffic impacts will be particularly problematic here, because they will occur in this rural, agricultural community. *See* Schmit Decl. ¶17. The area has numerous blind intersections, agricultural roads, stream crossings, animal crossings, and other traffic hazards that were not adequately addressed. *See* Gilbert Decl. ¶12. The traffic will cause air pollution on smaller roads and at intersections where traffic has come to a stop, effects that have not been thoroughly addressed. *Id.* ¶13. Nor has the light intrusion on nearby residents and residents located on roads where casino and/or construction activities will take place. *Id.* ¶14. The air impacts will be localized and regional, causing health risks to residents in Yuba and Nevada County, none of which the Department adequately addressed. *See* Enos Decl. ¶¶7-12. Impacts on waste water disposal and water supply were also inadequately considered, which are critical issues for the surrounding farming community. *See* Gilbert Decl. ¶13. The ground water estimates are inaccurate and wastewater disposal issues have not been thoroughly vetted. *Id.* Increased crime associated with drunk driving, compulsive gambling, and other influences will undermine the strong community the residents now enjoy. *Id.* ¶15; Schmit Decl. ¶17.

3. The Balance of the Equities Strongly Favors Plaintiffs.

"[C]ourts 'must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.'" *Winter*, 555 U.S. at 24 (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987)). If the Secretary acquires trust title to the land now, Plaintiffs may be deprived of any remedy if the Court determines that the Department acted unlawfully. Given that the Secretary spent over ten years in reaching a decision and Enterprise has stated to the Court that no development will occur for at least 120 days after February 1, there can be no compelling need to implement this long-awaited

decision immediately. *See generally* Declaration of Glenda Nelson ("Nelson Decl.") in 2:12-cv-03021-JAM-AC (Dkt. No. 13-3). Enterprise states that it cannot begin construction until the National Indian Gaming Commission ("NIGC") approves its management contract or issues a declination letter, *id*. ¶13a; the California Legislature ratifies its compact, *id.* ¶13b; selects an architect, *id.* ¶13c; selects a general contractor, *id.* ¶13d; and makes arrangements for financing construction, *id.* ¶13e. But NIGC's review of a management contract and legislative approval of the Compact pose no legal obstacles to construction.

By contrast, transfer of the land into trust immediately deprives Plaintiffs of the protections state and local authority provide. If any activity were to occur, Plaintiffs would have to seek this Court's intervention, rather than the intervention of those authorities long responsible for the Yuba site. When compared to the immediate impacts to the Plaintiffs that taking trust title will cause, the lack of any harm to Enterprise or the Department causes the balance of the equities to shift sharply in favor of Plaintiffs. The court concluded similarly in *Monument Realty LLC v. Washington Metro. Area Transit Auth.*, 540 F. Supp. 2d 66 (D.D.C. 2008). In that case, the plaintiffs were challenging a decision by a federal agency to sell a bus garage so that a new garage could be built. The agency stated that the delay in selling the existing building would delay construction of the new facility. For Plaintiffs, the "loss of unique and irreplaceable real property is also significant." *Id.* at 81. And while an injunction would delay the purchase of a replacement facility, the federal agency would still be able to sell the garage later, tipping the balance in favor of the plaintiffs. *Id.* Likewise, the Yuba site will remain available to be taken into trust if the Court concludes that the Department's decisions were not arbitrary and capricious. However, if the land is taken into trust, Plaintiffs lose any ability to stop development of the property by Enterprise. The harm to the Plaintiffs thus far outweighs the harm that may result from a delay in taking the land into trust.

4. The Public Interest Strongly Favors Maintaining the Status Quo.

It is well established that there is a strong public interest in ensuring that agency action is consistent with the law. "An administrative agency's failure to comply with the law 'invokes a public interest of the highest order: the interest in having government officials act in accordance

with the law.'" *See City of South Pasadena v. Slater*, 56 F.Supp.2d 1106, 1144 (C.D Cal. 1999) (*citing Hells Canyon Preservation Council v. Jacoby*, 9 F.Supp.2d 1216, 1245 (D. Or. 1998), *quoting*, *Seattle Audubon Soc. v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash.), *aff'd*, 952 F.2d 297 (9th Cir.1991)); *see also N. Mariana Islands v. United States*, 686 F. Supp. 2d 7, 21 (D.D.C. 2009) ("The public interest is served when administrative agencies comply with their obligations under the APA."); *Nat'l Treasury Employees Union v. U.S. Dep't of Treasury*, 838 F. Supp. 631, 640 (D.D.C. 1993) ("The preservation of the rights in the Constitution and the legality of the process by which government agencies function certainly weighs heavily in the public interest.").

In addition, the Ninth Circuit has recognized "the well-established public interest in preserving nature and avoiding irreparable environmental injury." *Alliance for Wild Rockies v. Cottrell*, 622 F.3d 1045, 1056 (9th Cir. 2010) (internal quotations marks and citation omitted). Moreover, "Congress's determination in enacting NEPA was that the public interest requires careful consideration of environmental impacts before major federal projects may go forward." *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dept. of Interior*, 588 F.3d 718, 728 (9th Cir. 2009) (finding that issuance of an injunction pending consideration of environmental impacts under NEPA comported with the public interest).

In this case, an injunction would ensure that the Secretary complies with his own regulations regarding judicial review of trust acquisitions, and it would allow this Court, without loss of jurisdiction or remedy, to determine whether the acquisition itself is consistent with the law. And as explained above, an injunction would cause minimal or no harm to other parties. The public interest therefore strongly favors the issuance of an injunction.

IV. CONCLUSION

For the forgoing reasons, Plaintiffs respectfully request that the Court order the Secretary to comply with 25 C.F.R. § 151.12(b) and not transfer the Yuba site into trust during the pendency of this action or, in the alternative, enter a temporary restraining order and preliminary injunction against the Secretary preventing him from transferring the Yuba site into trust.

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