PERKINS COIE LLP
TYLER WELTI (Bar No. 257993)
TWelti@perkinscoie.com
JENA A. MACLEAN*
JMacLean@perkinscoie.com
BENJAMIN SHARP*
BSharp@perkinscoie.com
700 Thirteenth Street, N.W., Suite 600
Washington, D.C. 20005-3960
Telephone: (202) 654-6200
Facsimile: (202) 654-6211

JOSHUA A. REITEN (Bar No. 238985)
JReiten@perkinscoie.com
Four Embarcadero Center, Suite 2400
San Francisco, CA 94111
Telephone: (415) 344-7000
Facsimile: (415) 344-7050

**Pro Hac Vice*

Attorneys for Plaintiffs 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

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA,

Plaintiff,

v.

KENNETH LEE SALAZAR, et al.,

Defendants.

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.

Case No. 2:12-cv-3021-JAM-AC

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR TEMPORARY RESTRAINING ORDER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

RULES AND REGULATIONS

Defendants' opposition brief confirms that the Department of the Interior ("the Department") made multiple errors in deciding to take land into trust for the Enterprise Rancheria of Maidu Indians ("Enterprise"). These errors are not harmless, as the Department contends. Instead, they corrupted the Department's decision-making processes and the decisions rendered, which threaten immediate, irreparable harm to Plaintiffs if not enjoined.

I. THE SECRETARY MUST STAY THE TRUST TRANSFER TO PERMIT JUDICIAL REVIEW ON THE ADMINISTRATIVE RECORD.

The Department agrees that the "original purpose of 25 C.F.R. § 151.12 was to permit judicial review prior to a fee-to-trust transaction." Defs.' Opp., Case 2:13-cv-64, ECF No. 57 at 15; Defs. Consol. Opp., ECF No. 41 at 7, n.2 ("Consol. Opp.").[1] Indeed, the Department has consistently recognized and implemented this purpose since the regulation's inception. 61 Fed. Reg. 18,082 (Apr. 24, 1996) (explaining that the rule's purpose is to "permit[] judicial review before transfer of title to the United States"); Pls.' Mem., ECF. No. 24-1, 18-19 ("Mem.") (collecting Departmental authorities and representations to the Supreme Court regarding the rule's intent).[2] Yet Defendants now ask the Court to interpret Section 151.12 to ignore its undisputed intent. It argues that the rule's text only requires notice, not an opportunity for judicial review. But while a law's text is the primary tool employed to understand and effectuate a law's intent, text cannot be used to negate that intent. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (a regulation must be read to effectuate "the Secretary's intent at the time of the regulation's promulgation"); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982) (courts may not allow a "literal application of a statute to produce a result demonstrably at odds with the intentions of its drafters, [] those intentions must be controlling").[3]

The Department nonetheless argues that reading Section 151.12 to produce a result at odds with its purpose is permissible because "the rationales for that purpose . . . have [] been abrogated" by a recent Supreme Court case. Opp. 16-17; Consol. Opp. 9-13 (citing *Match-E-Be-*

[1] All page citations are to the ECF pages as opposed to the page numbers at each page's bottom.
[2] The suggestion that the rule's purpose was only to provide discretion to permit judicial review renders the rule superfluous of the Department's inherent discretion to stay implementation.
[3] *See also Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984) ("If the intent of Congress is clear, that is the end of the matter."); *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).

Nash-She-Wish Band of Pottawatomi Indians v. Salazar, 132 S. Ct. 2199 (2012) ("*Patchak*")). The contention is not relevant or correct. Even assuming that a problem that Section 151.12 was promulgated to solve is no longer of concern, the regulation is still on the books, applicable to the challenged trust transfer, and thus controlling. No cannon of construction allows courts to read into a law a sunset provision keyed to the ongoing validity of concerns that animated the law.[4]

Further, the regulation's purpose remains compelling after *Patchak*. Aside from obviating the need to burden courts and litigants with emergency briefing, staying implementation prevents immediate injury to plaintiffs inherent in trust transfers, including the evaporation of environmental protections under state and local laws, the intrusion of the federal government's jurisdictional shadow over one's land and community, the probability of ground-disturbing activities during judicial review, and immediate economic harm suffered by competing interests. Additionally, Section 151.12's intent to permit APA judicial review before trust transfer must mean review on an administrative record, 5 U.S.C. § 706, not an emergency hearing without a record of the sort the Department has necessitated in this case. Moreover, weighty concerns about the Court's jurisdiction and the ability to unwind a trust transfer do persist after *Patchak*. *See* Pls. Mem. 14-15, n.3, 27.

For these reasons, the Court should decline the Department's extraordinary request to ignore Section 151.12(b)'s undisputed intent, seventeen years of agency practice, and the agency's own Fee-to-Trust-Handbooks. Plaintiffs are entitled to an order mandating that the Secretary adhere to the law by staying the challenged trust transfer. Plaintiffs' claim against transfer of the Yuba Site is clear and certain, the Secretary's duty is ministerial and plainly prescribed by Section 151.12's undisputed intent, and Plaintiffs have no other adequate remedy that would provide the interlocutory relief that Section 151.12 demands. *Legal Aid Soc'y of Alameda Cnty. v. Brennan*, 608 F.2d 1319, 1331 (9th Cir. 1979) (finding that plaintiffs were entitled to "relief in the nature of mandamus . . . . requir[ing] officers . . . to perform the ministerial duty of complying with their own regulations").

[4] To the contrary, Section 151.12's Preamble states that, notwithstanding the ongoing validity of the ruling in *South Dakota v. U.S. Dep't of the Interior*, 69 F.3d 878 (8th Cir. 1995), the "today's rule . . . will apply to all pending and future trust acquisitions." 61 Fed. Reg. 18,083.

II. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF.

A. Plaintiffs have Shown a Likelihood of Success on the Merits.

1. The Department's Repeated Misidentification of the Yuba Site Renders the Challenged Decisions Unlawful.

The Department admits that it repeatedly misidentified the most fundamental aspect of the challenged decisions: the land at issue. Consol. Opp. at Ex. T, ECF No. 51, Decl. of Asst. Sec. K. Washburn ¶ 7 ("[A] description of an 80-acre parcel was at times distributed to or by the Department during the 10-year period the application was pending."). The Department shrugs off these errors as harmless or already remedied. Opp. 16-17; Consol. Opp. 15-16.

But the errors are not trivial—they clouded several of the most critical decision-making documents, including notices to the Governor, the State, local governments, and Indian tribes. *See* Pls. Br. 17−18. Indeed, while the new Assistant Secretary claims that the Department knew all along that a 40-acre parcel was at issue, Washburn Decl. ¶ 7,[5] key documents and controlling "legal descriptions" show otherwise. A November 14, 2008 BIA memorandum (ECF No. 31-8),[6] Enterprise's amended Section 20 application (ECF No. 31-10), and a February, 9, 2010 Recommendation Memorandum to the Assistant Secretary (ECF No. 31-4 at 38, 49) all include a "legal description" of an 82.64-acre parcel. This "legal description"—set forth in metes and bounds—is a required, legally controlling element of the Tribe's application. 25 C.F.R. § 292.16(b). The Assistant Secretary then included this same legal description in his concurrence letter (ECF No. 31-5 at 6−7 & n.5) and his Federal Register notice of the final fee-to-trust decision. 77 Fed. Reg. 71,612 (Dec. 3, 2012). A Plaintiff in this case and a Yuba County Supervisor believed that 82 acres were involved. ECF No. 31-1 at 213. The extent and effect of confusion demands further inquiry and the sunlight of a full administrative record.

The errors raise substantial questions about compliance with IGRA, NEPA, Departmental regulations, and the APA. Under 25 C.F.R. § 292.16, the Tribe's amended Application under IGRA was invalid because it included an incorrect "legal description." *See id.* § 292.16(b). By

[5] It is unclear how Assistant Secretary Washburn could have sufficient knowledge to make this statement given that he took office two months before signing the ROD to transfer the Yuba Site into trust and a year *after* the former Assistant Secretary's determination under Section 20.

[6] All citations to Plaintiffs' RJN and attachments are to ECF No. 31 in Case No. 2:13-cv-0064.

describing the wrong parcel in multiple documents, the Department violated its regulations and title review requirements. 25 C.F.R. §§ 151.12, 151.13; *see also* Pls. Br. at 16 & n.4 (referencing additional applicable standards). The errors also raise questions about the adequacy of consultation with state and local officials and the validity of their concurrences. *See generally* 25 C.F.R. § 292.13-24. The errors raise questions about the integrity of the NEPA process, including whether the public was sufficiently informed and meaningfully participated. *See Balt. Gas & Electr. v. Natural Res. Defense Council, Inc.*, 462 U.S. 87 (1983) (recognizing that one of NEPA's "twin aims" is to " inform the public"). The lack of informed public participation during the NEPA process, in turn, casts doubt on the legality of Department's no-detriment determination, which by regulation is grounded on adequate NEPA review. 25 C.F.R. § 292.18(a); ECF No. 31-3 at 10 (2011 ROD, stating that the decision is based on NEPA review and public comments); ECF No. 31-7 at 10 (2012 ROD).

The errors go to the heart of the Department, State, and public's abilities to understand the decisions and their detriment to the local community and the environment.[7] The errors cannot be made harmless by a post-decisional Federal Register notice or internal memorandum either. *Cal. Wilderness Coal. v. U.S. Dept. of Energy*, 631 F.3d 1072, 1089 (9th Cir. 2011) (9th Cir) (holding that an agency's "post-study release of the information does not excuse its failure to consult with the affected States in preparing the Congestion Study"); *Confederated Tribe & Bands of Yakima Indian Nation v. FERC*, 746 F.2d 466, 475 (9th Cir. 1984).

[7] The Department's counsel does not cite to any evidence for the contention that the public's "mistaken notion that DOI planned to take the entire tax parcel into trust" was harmless because "an overbroad analysis would still necessarily encompass impacts derived from placing the forty acre parcel in trust." Such a conclusion regarding environmental significance must be made by the agency with the benefit of informed public input. Indeed, concentrating impacts in an area half the size of the larger parcel necessarily would change the significance of environmental effects. 40 C.F.R. § 1508.27(a) ("Significance varies with the setting of the proposed action."); *see also Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1049 (9th Cir. 2011) ("[T]he modified dispersed camping rule has the potential to concentrate motorized travel in a smaller area, which could theoretically pose different or additional impacts relative to the 300-foot rule."). A smaller area also may change environmental significance by limiting the Government's ability to require on-site wetland and other environmental mitigation.

2. The Challenged Decisions Violated IGRA, NEPA, and the APA by Relying on Non-Existent and Unenforceable Mitigation.

The Department also violated IGRA, NEPA, and the APA by predicating its decisions and environmental analysis on non-existent and unenforceable mitigation agreements. The Department asserts that its no-detriment determination only "relie[d] upon existing MOUs [Memoranda of Understanding] (with Yuba County and the City of Marysville) and does not mention tribal commitments to negotiate additional agreements in the future." Opp. 29; Consol. Opp. 22. This is false. The 2011 ROD concludes any detriment to community emergency services would be mitigated because "[t]he Tribe would contract with the Wheatland Fire Authority for fire protection and emergency medical services." ECF No. 31-4 at 14; *see also id.* at 43. The Department's determination that unspecified mitigation measures under a *still* non-existent agreement will ensure that the casino will not detriment community emergency services is plainly arbitrary and capricious. The determination is also unlawful because existing mitigation agreements are unenforceable. ECF No. 31-16 at 11 (Yuba County MOU, waiving sovereign immunity only "in favor of the County, but not as to any other person or entity"); ECF No. 31-17 at 12 (Marysville MOU, same). The Ninth Circuit similarly rejected an agency's project approval and associated no jeopardy determination under the Endangered Species Act because they were predicated on an unenforceable mitigation agreement. *Ctr. for Biological Diversity v. Bur. of Land Mgmt.*, 695 F.3d 893 (9th Cir. 2012).

The Department also violated NEPA by assessing the significance of environmental impacts on the basis of mitigation measures that are unenforceable, unspecified, and non-existent. The Department concluded that impacts to fire protection, emergency medical service, transportation, resource use patterns/traffic, and waters impacts are only less than significant given mitigation. ECF No. 31-1 at 8-115. For example, the FEIS concludes that impacts to public services, fire protection, and emergency medical assistance will be addressed by an agreement that Enterprise will enter into with another yet-to-be determined entity to provide yet-to-be determined mitigation. This is plainly not the hard look, "informed decision making," *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003) (citation

omitted), and "reasoned discussion [of mitigation] required by NEPA." *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998).

3. Plaintiffs are Likely to Prevail on their NEPA And Executive Order 11988 Claims.

It is readily apparent that the Department violated Executive Order ("EO") 11988, 42 Fed. Reg. 26951 (1977), and NEPA's alternatives requirement. The Department concedes that it failed to address EO 11988 but contends that "[t]his argument has been waived, however, because neither Plaintiffs, nor any other participant, invoked EO 11988 in response to either the draft, or final, EIS." Opp. 19. In support, the Department cites to cases addressing the NEPA waiver doctrine. But there is no such doctrine under EO 1198, which was issued pursuant to the President's authority under substantive statutes, not just NEPA. 42 Fed. Reg. at 26951. In any case, in DEIS comments, the EPA did object that "[t]he project will be located in a floodplain." ECF No. 35-1 at 17. As Plaintiffs have explained, the Department violated EO 11988 by failing to make a determination that no practicable alternative to siting in a floodplain exists. Instead, the Department only analyzed *two* locations, refusing to analyze several others for inadequately explained and internally inconsistent reasons. *See* Mem., ECF No. 24-1 at 17.

4. Plaintiffs are Likely to Prevail on their Claim that the Secretary's Trust Decision is Not Authorized by Law.

The Secretary premised his trust authority on the fact that Enterprise rejected the IRA in 1935. *See* Opp. 24; Consol. Opp. 17. That single, conclusory statement is insufficient for APA purposes and Defendants' post hoc explanation in briefs cannot salvage it. *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 539−40 (1981) ("[P]ost hoc rationalizations of the agency . . . cannot serve as a sufficient predicate for agency action.").

In addition to the fact that the Secretary never included them as rationales for his decision, there are two fundamental problems with the Department's arguments. The fact that Congress established two rancherias for Indians is not evidence that those occupying the Rancherias were, together or individually, a tribe. Indeed, the Department's chief legal officer, the Solicitor, made clear in 1960 that the Indians of Central California—i.e., those for whom rancherias were established—"had not at first been regarded as subject to Federal guardianship because they were

not members of a tribe having treaty relations . . . , did not live on reservations, and held no restricted allotments." Sol. Op. at 1883 (Aug. 1, 1960)) *available at* (http://thorpe.ou.edu/sol_opinions/p1876-1900.htm) (attached as Ex. A).[8] The establishment of two parcels of land is not evidence that Enterprise was under federal jurisdiction.

A Section 18 election does not "conclusively" demonstrate the Secretary's trust authority either. ECF No. 31-7 at 50. Section 18 does not refer to a "tribe," but to "a majority of the adult Indians." 25 U.S.C. § 478.[9] A Solicitor Opinion issued the year that Congress passed the IRA concluded that resident Indians without tribal affiliation may still vote under the IRA, directly contradicting the Department's argument. *See* Sol. Op. M-27810 (Dec. 13, 1934) *available at* http://thorpe.ou.edu/sol_opinions/p776-800.html) (attached as Ex. B). The Solicitor explained that there are "two distinct and alternative types of tribal organization" under Section 16 of the IRA: (1) by tribal membership without regard to residency; or (2) by residency "without regard to past tribal affiliations." *Id.* at 487. In the first situation, "tribal affiliation is essential, and residence is immaterial in the determination of voting rights." In the second, "residence is a necessary condition of the right to vote, and *tribal affiliation is not necessary*." *Id.*

Section 16 reflects this distinction by granting organizational rights when approved "by a majority vote of the adult members of the tribe, *or of the adult Indians residing on such reservation*" to ratify a constitution. 25 U.S.C. § 476. Section 18 employs only the latter phrase, "the majority of adult Indians." *Id*. at § 478. The Solicitor concluded that "when the residents of a reservation are organized under section 16, the qualifications for voting upon the constitution of such organization will be identical with the qualifications for voting upon the referendum under section 18," 1934 Solicitor Op. at 487—i.e., residency, not tribal affiliation. A Section 18

---

[8] Enterprise No. 1 was not terminated in the California Rancheria Act of 1959, 72 Stat. 619, but the basis for its creation is the same as the Solicitor describes in his opinion: "From 1914 to 1929, and again in 1937, Congress made small appropriations, designating them substantially as follows: 'for the purchase of lands for the homeless Indians in California, including improvements thereon . . . .'" Sol. Op. at 1882. *C.f.* Act of August 1, 1914, 38 Stat. 582, 589 ("For the purchase of lands for the homeless Indians in California, including improvements thereon . . . .").

[9] Section 18 provides: "This Act shall not apply to any reservation wherein a *majority of the adult Indians*, voting at a special election duly called by the Secretary of the Interior, shall vote against it application." *Id.* (emphasis added).

election therefore only shows that a majority of adult Indians, regardless of tribal affiliation, living on Enterprise Nos. 1 and 2 in 1935, rejected the IRA.

Nor does the Indian Lands Consolidation Act ("ILCA") save Enterprise, as Defendants suggest. *See* Opp. at 12, n.13. Section 2202 does not "alter the definition of 'Indian' in § 479, *which is limited to members of tribes that were under federal jurisdiction in 1934*." *Carcieri v. Salazar*, 555 U.S. 379, 395 (2009) (emphasis added). The Secretary has not sufficiently demonstrated that he has the authority to acquire land because he has not shown that Enterprise was a recognized tribe under federal jurisdiction in 1934.[10]

5. The Challenged Decisions Violated the Clean Air Act.

Defendants admit that, absent mitigation, NOx emissions caused by the proposed casino would exceed permissible thresholds and violate the Clean Air Act ("CAA"). Opp. 22. Accordingly, the CAA required the Department to conduct a conformity review. 40 C.F.R. § 93.153(b)(1). The Department did not and thus violated the CAA.

Defendants' argument that conformity review was not required to develop mitigation that would achieve conformity with the State Implementation Plan defies all logic. Identifying mitigation and offsets, and assessing their adequacy, is *part of* the conformity determination, not a way of avoiding making one in conformance with the CAA. *See* 40 C.F.R. §§ 93.154, 93.158; *see also* 58 Fed. Reg. 63,214, 63,224 (Nov. 30, 1993) ("If an action does not initially conform with the applicable SIP, then a plan for mitigation or for finding offsets could be pursued."); *id.* at 63212−24 (examples of conformity being triggered by a project's initial emissions regardless of mitigation/offsets). Defendants appear to conflate an "applicability analysis" with a "conformity evaluation." 40 C.F.R. § 93.152. By Defendants' own admission, a conformity analysis is necessary because the casino will violate NOx standards without mitigation. Accepting

[10] The Department now offers another theory that Enterprise qualifies for trust land: Enterprise satisfies 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.'" Opp. at 18 n.20. First, the Secretary did not premise his trust authority on the second definition. Second, that claim is absurd on its face. Enterprise—through its constitution—has both "lineal" and "non-lineal" members; Enterprise is thus not comprised of "persons who are descendants of such members" living on Enterprise Nos. 1 and/or 2, but rather a (heavily diluted) mix. They cannot possibly satisfy the second definition of Section 19.

Defendants' contrary reading—that development of mitigation and offsets may precede and obviate conformity review—would render the EPA's conformity regulations a dead letter.

The Department's NEPA review did not and cannot substitute for conformity review, as the Department suggests. Conformity review involves detailed procedural and substantive requirements. *See, e.g.*, 5 U.S.C. § 7506(c)(1); 40 C.F.R. §§ 93.158− 93.160.[11] The Department simply did not comply with any of these requirements. Indeed, its "mitigation" measures are largely unspecified, unenforceable, and unquantifed. For example, to mitigate air quality impacts, the Department states that Enterprise might help repave old roads, buy low emission school buses, purchase some form of renewable energy, contribute a "fair share" to traffic signal improvement, or purchase "emission reduction credits" in an unspecified amount if they are "available." EIS pp. 5-12, 5-13, *available at* http://enterpriseeis.com/documents/final_eis/files/Section_5.pdf. In fact, the Department concludes its NEPA analysis of air emissions without requiring enforceable mitigation at all: "If [the listed mitigation measures are] not available, not technologically or economically feasible, and/or if implementation of mitigation is beyond the control of the Tribe; then air quality impacts would be significant and unavoidable." *Id.* at 5−13. The decisions thus violated the CAA.

B. Plaintiffs have Established Irreparable Harm, and that the Balance of Equities and Public Interests Favors Maintaining the Status Quo.

The Department improperly relies on dicta in the lone dissent in *Patchak* as evidence that injury will not be irreparable. But *Patchak* did not explore remedy, it only concluded: (1) *Patchak* had standing; and (2) a challenge to a trust decision is not under the Quiet Title Act. The Department also argues that any consequences of a premature trust transfer on the investor and Enterprise will not injure Plaintiffs. Again, the Department ignores the real issue: equitable and other considerations may prevent the Court from ordering the land out of trust due to detrimental

[11] For example, if an agency intends to rely on mitigation measures, those measures must be identified in detail before a conformity determination is made, be coupled with an enforceable commitment to implement them (to which all persons and agencies responsible must consent in writing), include a precise implementation schedule, and be analyzed for efficacy in accordance with stringent informational requirements. 40 C.F.R. §§ 93.158(d), 93.159, 93.160; 5 U.S.C. § 7506(c)(1). Any offsets must be quantifiable. 40 C.F.R. § 93.152 (defining emissions offsets). The public must be allowed to comment on a draft conformity analysis. *Id.* at § 93.156(c).

reliance. *See* Mem. 27, 28 (*citing Prieto v. United States*, 655 F. Supp. 1187 (D.D.C. 1987)). In conjunction with the multiple procedural and substantive harms discussed above and the opening brief, this "difficulty of stopping a bureaucratic steam roller, once started . . . [is] a perfectly proper factor for a district court to take into account . . . on a motion for a preliminary injunction." *Sierra Club v. Marsh*, 872 F.2d 72 F.2d 497, 504 (1st Cir. 1989) (Breyer, J.).

"Bureaucratic steamrolling" appears to be the Department's goal, in fact. Defendants cite to a declaration that explains that without the land going into trust, the California legislature will not ratify its gaming compact, a prerequisite to gaming. Consol. Opp. at 14 (citing Nelson Decl. ¶ ¶ 13). Nor will the National Indian Gaming Commission ("NIGC") approve a gaming management agreement. *Id.* There is no need for these approvals at this stage—they are only needed before Enterprise operates class III gaming, which could be years away, if allowed at all. Ratification, however, could not be undone. *See* 25 U.S.C. § 2710(d)(3)(B). And Plaintiffs would likely not be able to challenge NIGC's approval of the management agreement.

Perhaps most importantly, Enterprise is not a party to the case.[12] If the land is transferred into trust, Enterprise can build whatever it wishes on the land, and Plaintiffs and the Court are powerless to enjoin them, given sovereign immunity. The Department only has enforcement authority through NIGC to prevent gaming, not construction. By that time, many of the environmental impacts—which the Department does not dispute will occur and thus concedes—will have irreparably harmed Plaintiffs. In such circumstances, a sufficient probability of irreparable harm exists to merit preliminary injunctive relief, particularly given that Plaintiffs show a high likelihood of success on the merits and an injunction will not harm the Department.

IV. CONCLUSION

For these reasons, Plaintiffs respectfully request that the Court order the Secretary to comply with Section 151.12(b) and enjoin the Secretary from transferring the Yuba site into trust.

[12] The Department has imposed an unreasonable schedule on the Court. Thus, the Court concluded that it would not hear Enterprise's motion to intervene until March. If the land is transferred into trust, Enterprise may withdraw its motion to intervene, so that the Court will not have the power to enjoin it. If Enterprise does intervene, it is unclear if its waiver of sovereign immunity will be sufficient to enjoin construction. *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).

DATED: January 29, 2013

PERKINS COIE LLP

By: /s/ Tyler Welti

Attorneys for Plaintiffs 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