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**UNITED STATES DISTRICT COURT**

**EASTERN DISTRICT OF CALIFORNIA**

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY, a federally recognized Indian Tribe,

Plaintiff,

vs.

KENNETH SALAZAR, Secretary of the Interior; KEVIN WASHBURN, Assistant Secretary of the Interior Indian Affairs; MICHAEL BLACK, Director, United States Bureau of Indian Affairs; and AMY DUTSCHKE, Director, Pacific Region, Bureau of Indian Affairs,

Defendants

CASE NO. 2:12-CV-03021-JAM-AC

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

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## TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

Colusa's Complaint seeks a declaratory judgment that the September 1, 2011 and November 21, 2012 decisions (collectively "Decisions") of the Assistant Secretary of the Interior Indian Affairs ("AS-IA") to take defectively-described land in Yuba County into trust for the Enterprise Rancheria of Maidu Indians of California ("Enterprise") for use for gaming ("Casino Site") violated the Indian Gaming Regulatory Act, 25 U.S.C.A. § 2701, *et seq.* ("IGRA"), in particular 25 U.S.C.A. § 2719(b)(1)(A), and the National Environmental Policy Act, 42 U.S.C.A. § 4321 ("NEPA"), and implementing regulations and policies, and an injunction against the implementation of the Decisions. Colusa now seeks a preliminary injunction against the implementation of the Decisions pending final resolution of this action.

**DEFENDANTS' DECISIONS TO BE REVIEWED**

**A. Defendants' September 1, 2011 "Two-Part Determination."**

IGRA, 25 U.S.C.A. § 2719(a), prohibits gaming on lands acquired by the Department of the Interior ("DOI") in trust for the benefit of an Indian tribe after October 17, 1988 unless, an exception applies. Because Enterprise already had trust lands on October 17, 1988, IGRA permits gaming on later-acquired lands only if,

> the Secretary, after consultation with the Indian tribe and appropriate State, and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination[.]

25 U.S.C.A. § 2719(b)(1)(A). This process is known as a "Two-Part" or "Secretarial" Determination. 25 CFR Part 292, § 292.13, *et seq.*

Because the Casino Site is nearly 54 road miles from Enterprise's Reservation and never was part of the Enterprise Rancheria, 25 U.S.C. §2719(b)(1)(A) required that defendants' decision to accept the Casino Site into federal trust for Enterprise be preceded by a Secretarial Determination and the concurrence of the Governor of California based upon the consultation process described in that subsection and in 25 C.F.R. Part 292, § 292.13 *et seq.*

Without ever consulting with Colusa about Enterprise's request for a Secretarial Determination regarding the Casino Site despite Colusa's requests to do so, then AS-IA Echo Hawk

signed, but did not publish, the Record of Decision for the Secretarial Determination on September 1, 2011 ("2011 ROD"). A true and correct copy of excerpts of the 2011 ROD are attached as Exhibit 1 to Colusa's Request for Judicial Notice ("RJN") lodged herewith. Simultaneously, defendants send a letter to Governor Brown requesting his concurrence with the Secretarial Determination ("2011 Letter"). RJN Exh. 2. In the 2011 ROD defendants found, in summary, that acquiring the Casino Site for Enterprise would be in the best interest of Enterprise and its members, in that it would be a more lucrative location for a casino than Enterprise's Reservation, and would not be detrimental to the surrounding community, including nearby Indian tribes. *Id.* Defendants made the determination even though most of Enterprise's members living in the vicinity of the Planned Casino site would not be eligible to receive any benefits from the revenues anticipated to be generated by the casino, and even though it would likely devastate Colusa's and other tribal casinos and the tribal governments dependent on their casino revenues to serve their Reservation communities.

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

On November 21, 2012, AS-IA Washburn signed, but did not publish, defendants' "Record of Decision: Trust Acquisition of the 40-acre Yuba County site in Yuba County, California, for the Enterprise Rancheria of Maidu Indians of California," ("2012 ROD").[1] RJN Exh. 2.

In material part, the 2012 ROD stated that,

> With the issuance of this ROD, the Department announces that the action to be implemented is the Preferred Alternative (Alternative A in the FEIS), which includes acquisition in trust of the 40-acre Yuba site and construction of a gaming-resort complex including a 207,760 square foot casino facility, 170-room hotel, surface and structured parking facilities, and corresponding mitigation measures. The Department has determined that this Preferred Alternative will best meet the purpose and need for the Proposed Act, in promoting the long-term economic self-sufficiency, self-determination and self-governance of the Tribe. Implementing this action will provide the Tribe with the best opportunity for attracting and maintaining a significant, stable and long-term source of governmental revenue, and accordingly, the best prospects for maintaining and expanding tribal governmental programs to provide a wide range of health, education, housing, social, cultural, environmental and other programs, as well as employment and career development opportunities for its members.

[1] The Record of Decision ("ROD") does not explain the discrepancy between the legal description of the land in the FEIS and the legal description in the ROD.

> The Department has considered potential effects to the human environment, including potential impacts to local governments and other tribes, has adopted all practicable means to avoid or minimize environmental harm, and has determined that potentially significant effects will be adequately addressed by these mitigation measures, as described in this ROD.
>
> This decision is based on thorough review and consideration of the Tribe's fee-to-trust application and materials submitted therewith; the applicable statutory and regulatory authorities governing acquisition of trust title to land and eligibility of land for gaming; the DEIS; the FEIS; the administrative record; and comments received from the public, Federal, state, and local governmental agencies; and potentially affected Indian tribes.

The ROD did not explain why, despite the devastating impacts that defendants' decision likely will have on Colusa, defendants did not consult with Colusa in the course of making the Secretarial Determination or the November 21, 2012 decision. Neither did the 2012 ROD explain why, under its rationale of maximizing the profitability of an Enterprise casino, the same case could not be made for virtually every other California tribe whose Reservation is located beyond easy driving distance from a large city.

## ARGUMENT

### I. THE COURT HAS ORIGINAL JURISDICTION OVER COLUSA'S ACTION.

Colusa's Complaint invokes the Court's jurisdiction under 5 U.S.C.A. § 701 *et seq.*, 25 U.S.C.A. § 2710(d)(7)(A)(ii), 28 U.S.C. §§ 1331, 1362 and 28 U.S.C. § 2201. The United States has waived its sovereign immunity from suit under 5 U.S.C. § 702.

### II. COLUSA IS ENTITLED TO ISSUANCE OF A PRELIMINARY INJUNCTION.

A party applying for a preliminary injunction "must establish [1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008). "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Amoco Production Co. v. Gambell*, 480 U.S. 531, 544 (1987). "[T]he elements of the preliminary injunction test are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir.

2011). A plaintiff may show a combination of "serious questions going to the merits[,] a balance of hardships that tips sharply towards the plaintiff[,] . . . likelihood of irreparable injury and that the injunction is in the public interest." *Id.* at 1135; *accord Klamath-Siskiyou Wildlands Ctr. v. Grantham*, Case No. 2:10-CV-02350-GEB-CMK, 2010 WL 3958640 (E.D. Cal. Oct. 8, 2010), *affirmed* 2011 WL 1097749 (9th Cir. Mar. 25, 2011).

**A. Colusa Is Likely to Succeed on the Merits.**

**1. DOI Must Stay its Acquisition of the Proposed Casino Parcel Pursuant to its Long-Standing Practice under Part 151.**

In early December 2012, defendants informed prospective plaintiffs in lawsuits concerning the Decisions that it would not stay its acquisition of the land in trust past February 1, 2013 based on the fact that APA review *may* be available to plaintiff after the land is taken in trust. RJN Exh. 6; *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199 (2012). Defendants' position, which ignores the fact that the primary purpose of a preliminary injunction is to preserve the status quo pending the outcome of the litigation, necessitated the filing of this action on an urgent basis. Defendants' refusal to institute a stay pending the outcome of litigation is an about-face for the agency. In 1996, DOI amended 25 CFR Part 151 to add a new Section 151.12(b) requiring DOI not to take land into trust until at least 30 days following publication of the Final Agency Determination. 61 Fed. Reg. 18082 (1996). DOI's position consistently had been that because federal sovereign immunity under the Quiet Title Act for Indian trust lands precluded review of the acquisition notwithstanding the waiver of the government's waiver of its sovereign immunity in the APA, *id.*, the purpose of the 1996 amendment to Part 151 to take land into trust at any point during litigation would be defeated.

Defendants consistently have interpreted 25 CFR Part 151.12(b) in that manner. DOI BIA Division of Real Estate Services, Fee-to-Trust Handbook; Version II (July 13, 2011) ("2011 Fee-to-Trust Handbook") at 15 & 21 ("[i]f an action is filed, take no further action until the judicial review process has been exhausted." (underlining in original)) RJN Exh. 7; *Id.* at 68-69 (If "any legal action is filed," the Office of Indian Gaming ("OIG") "[n]otify the Regional Director to take no further action."); DOI BIA Division of Real Estate Services, 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.") RJN Exh. 8. Given that the 1996 amendment to Part 151 is a substantive rule published pursuant to the APA, its rescission would likewise require notice and comment rulemaking. *Friends of the River v. USACE*, 870 F.Supp.2d 966, 979 (E.D. Cal. 2012) (quoting *Sacora v. Thomas*, 628 F.3d 1059, 1069 (9th Cir.2010)).

**2. Defendants' Incorrect Identification of the Land in Question and Determination to Acquire Twice as Much Land in Trust for Enterprise as Described in the EIS and RODs Were Arbitrary and Capricious.**

On December 3, 2012, the AS-IA announced that he had made "a final agency determination to acquire approximately 40 acres of land in trust for gaming purposes" for Enterprise nearly two weeks earlier. 77 Fed. Reg. 71612 ("2012 FRN"). The legal description of the parcel published in the Federal Register and included in the 2011 Letter to Governor Brown describes a slightly irregular quadrilateral encompassing approximately 82.65 acres, not 40 acres. *Id.*; 2011 ROD 5-6; Jeffrey R. Keohane Declaration ("Keohane Dec.") Exh. 1. Both the 2011 letter and the 2012 FRN describe the parcel with great specificity: "Said land is also shown as Parcel 'C' on Certificate of Lot Line Adjustment 2002-07 recorded June 26, 2002, Instrument No. 2002-08119, Official Records. [APN]: 014-280-095." 2012 FRN; 2011 Letter at 5-6. The 2011 Letter also referenced and included a commitment for title insurance describing the 80-acre parcel. *Id.* at 6; Keohane Dec. Exh. 3B at 6.

The 2012 FRN, 2011 Letter, EIS, and both RODs, however, describe the parcel as only including *40* acres. EIS at 1-1; 2011 ROD at 1; 2012 ROD at 1. Moreover, although Governor Brown was asked to concur in the acquisition of an 80-acre parcel, his concurrence referred to it as a *40*-acre parcel. RJN Exh. 9. DOI's own regulations require that it closely examine title to proposed trust acquisition. 25 CFR Part151.13. DOI guidance, which effectively has the force of law, requires that the Office of Indian Gaming "will review the description to verify that the description accurately describes the subject property, and that it is consistent throughout the application." 2011 Fee-to-Trust Handbook at 65, RJN Exh. 7. Further, if the Governor of a state does not concur with the Secretarial determination under Part 292 within one year, the determination is no longer valid, calling into question the validity of the 2011 ROD. 25 CFR Part 292.23.

Defendants' violation of DOI's regulations and lack of attention to the question of what land

is at issue, is by definition arbitrary and capricious. The "agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 50 (1983). Moreover, because the analysis of the EIS was predicated on acquisition of a 40-acre parcel, not the over 80-acre parcel described in the 2012 FRN, DOI has also violated NEPA by not taking a hard look at the actual land it was planning to take in trust. *Pacific Coast Fed'n of Fishermen's Ass'ns v. Blank*, 693 F.3d 1084, 1100 (9th Cir. 2012).

**3. DOI Arbitrarily and Capriciously Failed to Consult with Colusa as Required by IGRA and DOI Regulations and Failed to Find Detriment to Colusa Despite Clear Evidence of Detriment in the Record.**

Pursuant to IGRA, before taking newly acquired land into trust for gaming purposes, defendants must "consult[] with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes," to evaluate the detriment to the surrounding community of the proposed casino. 25 USC § 2719(b)(A). In 2009, Colusa requested in writing that BIA consult with it concerning the impacts on tribe of the proposed fee to trust acquisition pursuant to 25 CFR Part 292.2, but was simply invited to comment. Keohane Dec. Exh. 2 & 3. Despite the fact that the significant, adverse impacts of the Proposed Casino on Colusa should have been clear to DOI from 2002, the RODs both ignored Colusa, finding UAIC to be the only "nearby Indian tribe". 2012 ROD at 40; 2011 ROD at 64.

Defendants' limitation of "nearby Indian tribe" to tribes within a 25-mile radius of a proposed acquisition is arbitrary and capricious because it is not based on a reasoned analysis and violates the intent of IGRA. During the first decade following passage of IGRA, defendants interpreted "nearby" to include all Indian tribes within 100 miles of a proposed gaming establishment, but in 1997 reduced the distance to 50 miles. 73 Fed. Reg. 29354, 29357 (discussing DOI's history of consultation with Indian tribes and other governments). In 2000, DOI proposed to codify the 50-mile threshold, and maintained the use of that threshold until May 2008. 65 Fed. Reg. 55471, 55473 (2000); Office of Indian Gaming, Checklist for Gaming Acquisitions at 7 (2007) RJN Exh. 10. In 2008, DOI promulgated regulations implementing 25 USC § 2719 and reduced the consultation threshold for "nearby" tribes to 25 miles, but provided that local governments, including tribes, could rebut the presumption that they were not entitled to consultation as "nearby" governments under 25 §

USC 2719(b)(A) by showing that their "governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment." 25 CFR Part 292.2 (definition of "surrounding community"); 73 Fed. Reg 29354, 29357 (2008). Thus, DOI admitted that the meaning of "nearby Indian tribes" must be understood in light of the effects, not distance. Although DOI established the 25-mile threshold for consulting non-Indian governments after finding that 50 miles included too many non-Indian governments, and 10 miles included too few, 73 Fed. Reg. at 2957, DOI gave no rationale for reducing the area including "nearby tribes" from a circle with a 50-mile radius, encompassing 7,857 square miles to one with a 25-mile radius, encompassing just 1,964 square miles. *Id.*

Given that the purpose of consultation is to determine whether "a gaming establishment on newly acquired lands ... would not be detrimental to the surrounding community," and defines that community by reference to state, local, and tribal officials, it follows that consultation should address those tribes, cities, and towns affected by the new casino, not just those playing host to the casino. 25 USC § 2719(b)(A). In its 2008 rulemaking, DOI admitted that "the purpose of consulting with nearby Indian tribes is to determine whether a proposed gaming establishment will have detrimental impacts on a nearby Indian tribe that is part of the surrounding community." 73 Fed. Reg. at 29356. As demonstrated by the discussion of "cannibalization" in the FEIS and in Enterprise's original application, a 25-mile threshold is far too small to include those tribes affected by a new casino. FEIS Appendix M, RJN Exh. 5; Keohane Dec. Exh. 3A. Because DOI did not supply a reasoned independent judgment in choosing the 25-mile threshold, and ignored evidence that such a threshold was an absurdly small driving distance particularly in the Sacramento Valley, the rule is arbitrary and capricious. *State Farm*, 463 U.S. 29, 43 (1983).

Even if the 2008 regulation itself did not violate the APA, defendants' implementation of it with regard to Colusa has been arbitrary and capricious. Enterprise's application materials and the FEIS prepared at its behest acknowledged that it would "cannibalize" other tribal casinos. FEIS, Appendix M at 128; Keohane Dec. Exh. 3A (discussing the amount of business Proposed Casino would draw away from existing tribal casinos). Despite the fact that DOI policy until 2008 was to consult with tribes within 50 miles of the newly acquired lands, during the decade-long process of

reviewing the application to have Enterprise's land taken into trust for gaming, defendants entirely failed to consult with even those nearby Indian tribes that Enterprise's initial application identified as direct competitors. Keohane Dec., Exh. 3A at 20. The failure to consult with Colusa was particularly egregious, because Enterprise identified it as the "closest competitor for the proposed Marysville casino." AES began preparing the EA for Enterprise at least as early as 2002, and completed and published the final version in July 2004. 70 Fed. Reg. 29363 (2005), during which time AES also worked with Colusa on the expansion of Colusa's casino.

BIA never contacted Colusa despite DOI's rule at the time that all tribes within 50 miles were to be consulted. Declaration of Bonnie Pullen ("Pullen Dec.") ¶8; 73 Fed. Reg. at 29357; Checklist for Gaming Acquisitions at 7 (2007). Although the DEIS was completed and defendants published its notice of availability in early 2008, Colusa was only informed of the DEIS and the opportunity to comment a year later and by another tribe, not by BIA. Colusa immediately requested that BIA consult pursuant to the new regulations, to which BIA responded that the Tribe could submit comments, but did not offer to consult. Keohane Dec. Exh. 2 & 3. As BIA has interpreted it, "[c]onsultation does not mean merely the right of tribal officials, as members of the general public, to be consulted, or to provide comments, under the Administrative Procedures Act or other Federal law of general applicability." BIA Government-to-Government Consultation Policy (2000) at 2 RJN Exh. 11. As BIA admits, "[w]ithout early consultation, the Bureau may develop proposals based on an incomplete and anecdotal understanding of the issues that surround a particular matter. As a result, Bureau proposals often create severe unintended consequences for tribal governments." *Id* at 3. That is exactly what happened here: Colusa was not consulted about the persistent errors of fact and methodology in the FEIS and supporting documents that have now been adopted by the RODs, "creating severe unintended consequences" for Colusa. *Id.* Because defendants found that the Proposed Casino would not have a detrimental impact on Colusa as part of the surrounding community, despite the clear evidence in the record that the Enterprise casino will cannibalize the Colusa Casino, even using the flawed analysis in Appendix M, it has "offered an explanation that runs counter to the evidence before the agency," and must be rejected. *State Farm* at 43 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971)).

**4. Defendants Failed to Adequately Analyze Enterprise's Need for Land Pursuant to 25 CFR Part 151.**

Although 25 CFR Part 151.10(b) requires that DOI find that the tribe has a "need" for the land, the AS-IA did not find that the tribe has a "need" for the land so much as a "desire" for it. *E.g.*, 2012 ROD at 44. The FEIS analysis does not find that Enterprise could not generate tribal income at a location other than the Casino Site, just that it would be far less lucrative. *E.g.*, EIS at 4.7-17 to 4.7-28; EIS Appendix M. The ROD relies upon the fact that Enterprise 1 purportedly could not accommodate the 823 Enterprise tribal members to demonstrate the need for the Yuba parcel.[2] *Id.* Among the purposes of the fee-to-trust acquisition are to replace the "Enterprise No. 2 Parcel" of the Enterprise Reservation, formerly used for tribal homes, that the United States sold to the State of California in 1965 to accommodate creation of Lake Oroville, and to provide for tribal housing. EIS at 1-2, 1-9, 3.2.6-4; 2012 ROD at 44. At no point has Enterprise proposed to use the Casino Site for housing, however. Immediately after using the tribe's need for land for housing as a "need" to take the Casino Site in trust, DOI acknowledges that the land to be acquired will be used solely for gaming, not housing. 2012 ROD at 44. In their Amended and Restated Application, Enterprise's lawyers admitted that the tribe had purchased 63 acres of land in Butte County with funds granted by HUD, and that the tribe had not applied to have it taken into trust. Keohane Dec. Exh. 3C at 4-5. Enterprise also owns more than 10 other parcels in and around Oroville, near the Enterprise Reservation in Butte County, not around the Casino Site. *Id.*; *Id.* Exh. 4; *e.g.*, 62 Fed. Reg. 52348 (1997) (notice of award of $2.3 million to Enterprise for Indian housing). Defendants simply have ignored the fact that Enterprise now owns more land than it lost to Lake Oroville and that the land is dedicated to housing purposes, which is one of the primary justifications for the acquisition of the Casino Site for Enterprise. 2012 ROD at 44. Defendants' inconsistency in rationales is arbitrary and capricious in light of the requirement that it present a reasoned decision based on the facts before it. *State Farm*, 463 U.S. at 43.

/ / /

[2] Many of those members are denied full membership in the tribe and may not be eligible anyway. Enterprise Constitution at 6 (2003), Keohane Dec. Exh. 3C.

**5. The EIS Failed to Address an Adequate Range of Alternatives.**

The alternatives analysis is the "heart" of an FEIS. 40 CFR 1502.14; *Ctr. for Biological Diversity v. DOI*, 623 F.3d 633, 642 (9th Cir. 2010). NEPA requires study of "enough alternatives 'to permit a reasoned choice.'" *Pacific Coast Fed'n of Fishermen's Ass'ns v. Blank*, *supra*, at 1100 (9th Cir. 2012). Because the alternatives are based on the Purpose and Need statement, it must not be drafted too narrowly. *Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1070-72 (9th Cir. 2010). The Council on Environmental Quality's ("CEQ's") regulations require that an FEIS "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. § 1502.13. "[T]he statutory objectives of the project serve as a guide by which to determine the reasonableness of objectives outlined in an FEIS." *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 866 (9th Cir.2004). In *Simmons* the Seventh Circuit required the Army Corps of Engineers to "exercise a degree of skepticism in dealing with self-serving statements from a prime beneficiary of the project," and to look more broadly at the general purpose of the project rather than the alternatives identified by the applicant to meet its narrow goals, rather than "contriv[ing] a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence)." *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 666 & 669 (7th Cir.1997). As admitted in both the 2011 and 2012 RODs, Congress in IGRA intended confine tribal casinos to pre-1988 Indian Lands with extremely limited exceptions. 25 USC § 2719; 2011 ROD at 60; *compare* 25 USC § 2701(4) (finding that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government"). Rather than draft a P&N directed at the BIA's congressionally mandated purposes, or the general needs of the Enterprise Rancheria, the FEIS's P&N is drafted to require the construction of as large a casino as possible, essentially unchanged in configuration from the one proposed in 2002. EIS 1-2 & 1-8.

Defendants were required to "Rigorously explore and objectively evaluate all reasonable alternatives." 40 CFR 1502.14. Just as the P&N is tailored to require only one type of development, the alternatives stack the deck in favor of Alternative A, undermining the action-forcing purpose of NEPA. Since the P&N requires building a casino, only a casino alternative could satisfy the P&N.

Thus, Alternatives C and E were disfavored as not meeting the P&N. Since the P&N requires generating revenue, the larger the casino, the better it fits the P&N. Thus, Alternatives B and D were discarded because, while they would meet the "need" to build a casino, they were assumed to be smaller and therefore would not make as much money. The reasoning behind making Alternative D a small casino is obscured by general statements about lower profits of an Oroville casino and the high expense of construction, but neither the FEIS or Appendix M quantify those effects. Since only Alternative A included a large casino, the FEIS did not seriously propose any other alternatives for consideration. The FEIS, therefore, completely failed to address the question of whether another location would have been more appropriate because the only alternative in another location, Alternative D, was a smaller casino. Being smaller, Alternative D could not address the revenue maximizing purpose of the overly narrow P&N. As the Ninth Circuit has held, "[t]he existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Alaska Wilderness Recreation & Tourism v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995) (citation omitted). Because the FEIS presented a false choice of locations, the obvious missing alternative is another site, perhaps through an exchange of land with the federal government near the site of the inundated Enterprise No. 2 parcel.[3]

**6. DOI Failed to Take a "Hard Look" at the Environmental Impacts of the Proposed Casino.**

DOI failed to take the "hard look" at the impacts of the proposed action required by NEPA. 40 C.F.R. § 1502.16. Impacts include "ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8. Taking a "hard look" requires "considering all foreseeable direct and indirect impacts" and a "discussion of adverse impacts that does not improperly minimize negative side effects." *N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 975 (9th Cir. 2006) (citations and internal quotation marks omitted). Among other areas where the hard look was missing were the socioeconomic, air quality,

[3] Under defendants' rationale, the casino should be built in downtown Sacramento as an even more profitable location.

and biological resources sections of the FEIS.

Appendix M, upon which the FEIS relies for its socioeconomic data, was completed in 2006 based upon statistics from 2005 and even earlier. It analyzes what it calls the projected "cannibalization" of other tribal casino businesses by an Enterprise casino. *E.g.*, Appendix M at 129. Enterprise's contractors analyzed the economics of a casino well before the economic downturn that began in earnest in 2008, and made rosy projections of economic activity in 2009. In addition to being out-of-date, the study relies upon bogus conjecture rather than data. *E.g.*, *Id.* at 128 ("Colusa likely focuses its marketing efforts on different markets" from other local tribal casinos); *compare* Fernandez Dec. ¶5. Although the EIS was not updated to consider the recession (or higher gas prices), defendants relied upon the downturn to support the proposed casino as a source of jobs in the area, but did not address the effect of the downturn on the potential profits from the casino and the impacts on nearby tribes in light of the downturn. 2011 ROD at 43.

Under NEPA, BIA must analyze the impact of its activities on the State's ability to meet its goals in the State Implementation Plan under the Clean Air Act to clean up the air in the Sacramento, Chico. *See*, *e.g.*, 40 CFR 1502.16(c) & 1508.27(b)(10). The EIS merely asserted that the emissions from the Proposed Casino would conform to the state plan, but did not give the figures that would support that assertion. EIS 4.4-12. Based on Table 4.4-3, however, it appears that NOx emissions may exceed EPA's *de minimis* threshold for both ozone and PM2.5 emissions and require offsets or other actions by BIA to conform to the California State Implementation Plan. *E.g.*, 40 CFR 93.158. The FEIS briefly acknowledged that six fish species of concern, of which five are listed under the Endangered Species Act, may exist in the vicinity. EIS 3.1.5-18. Acknowledging that the nearby rivers are essential to survival of the listed species, NMFS and FWS designated critical habitat for all of them. 58 Fed. Reg. 33212 (1993); 59 Fed. Reg. 65256 (1994); 65 Fed. Reg. 7764 (2000); 70 Fed. Reg. 52488 (2005); 74 Fed. Reg. 52300 (2009). All but one of the critical habitat designations preceded publication of the draft EIS, and that one preceded the final EIS. Critical habitat for all five listed species includes the Sacramento River, and several include the nearby Feather, Yuba, and Bear Rivers. The EIS acknowledged that natural and artificial waterways surround both the Enterprise and WWTP properties, although it does not explain how they are connected to one another or to the

nearby rivers. The FEIS excuses its failure to consider the effect on the six fish species on the ground that they "do not have the potential to occur within the study area, as the only aquatic habitats within the study area are agricultural irrigation ditches and canals or receive water supply from these ditches or canals." EIS 3.1.5-18. The danger posed to fish species, particularly the anadromous species, by canals and ditches is significant enough, however, that screening their points of diversion from, and their drains into, rivers is a major component of the federal government's recovery strategy for the listed fish species. *See*, *e.g.*, 70 Fed. Reg. 37160 (2005); 65 Fed. Reg. 42422 (2000); NMFS, Fish Screening Criteria for Anadromous Salmonids (1997). The EIS does not discuss whether the local canals are screened.

**7. The EIS Failed to Analyze All Foreseeable Impacts of Taking the Proposed Casino Site into Trust for Enterprise.**

The EIS is deficient in that it mentions many laudable goals that Enterprise purportedly will pursue with its casino wealth, EIS 1-2, 3rd bullet, but if those were indeed reasonably likely outcomes of the Proposed Casino, then NEPA required that the EIS analyze their impacts. 40 CFR 1502.16 & 1508.8. NEPA does not permit defendants to "defer consideration of cumulative impacts to a future date. 'NEPA requires consideration of the potential impact of an action before the action takes place.'" *Neighbors of Cuddy Mtn. v. USFS*, 137 F.3d 1372, 1380 (9th Cir. 1998) (quoting *Tenakee Springs v. Clough*, 915 F.2d 1308, 1313 (9th Cir. 1990)). Tellingly, the FEIS analyzed neither the "variety of ... services to improve the quality of life of tribal members" that Enterprise "could" provide if the casino were built, nor how any of the alternatives would meet the objective of providing such services.

The FEIS and the RODs based on it identify tribal member housing as an important need of the tribe. *E.g.*, 2012 ROD at 44. Among other things, the FEIS identified one of the purposes of the project as replacing the Enterprise No. 2 Parcel of the Enterprise Rancheria, which the United States set aside to provide homes for the Enterprise Rancheria Indians in 1915 and then sold to the State of California to facilitate creation of Lake Oroville in 1964. EIS 1-2, 1st bullet, & 3.2.6-4. The EIS then avoided discussing the impacts of tribal housing, perhaps because Enterprise already owns a 63-acre parcel and several other housing parcels purchased with several million dollars of HUD

grants. Keohane Dec. Exh. 3C at 4-5; e.g., 77 Fed. Reg. 67386, 67387 (2012) (announcing award of $595,000 Indian Community Development Block Grant to Enterprise for housing); 62 Fed. Reg. 52348 (1997) (notice of award of $2.3 million to Enterprise for Indian housing). Even without the tribe's purchase of over 63 acres of land dedicated to housing, it was reasonably foreseeable that one of the effects of casino wealth would be to build housing since that is part of the P&N, but with the addition of the fact that the tribe already has the land in hand, it is inescapable, and the FEIS was required to analyze its environmental impacts. 40 CFR 1502.16 & 1508.8.

**8. DOI Arbitrarily and Capriciously Failed to Exercise Sufficient Independent Oversight Over Preparation of the FEIS.**

The CEQ regulations and BIA policy both recognize that project proponents may pay a contractor to prepare an EIS for the agency, but only if the agency chooses the contractor and the contractor certifies that it has no conflict of interest, which must be part of the administrative record. 40 CFR 1506.5; BIA NEPA Guidebook at 39-40 & Appendix 11, RJN Exh.12. AES prepared the draft and final EISes pursuant to a "consulting agreement" with Enterprise and a "third-party agreement" with Enterprise and BIA. Keohane Dec. Exh. 5 & 6. In addition to the preparation of an FEIS, the third-party agreement provided that AES would "assist with obtaining permit approvals necessary to construct the project." *Id.* Since permit approvals would not be required unless the application is approved, AES had a clear conflict of interest under NEPA. 40 CFR 1506.5(c). Such a conflict clearly violates the regulations, and unless DOI can demonstrate that it exercised independent review, injunctive relief is warranted. *Utahns for Better Transp. v. DOT*, 319 F.3d 1207, 1210 (10th Cir. 2003) (citing *Davis v. Mineta*, 302 F.3d 1104, 1112-13 (10th Cir 2002)). Although the BIA is required to exercise its independent judgment, the Pacific Regional Office provides guidance that it will "generally review environmental documents for thoroughness and accuracy," and require that three bound copies of an EA or FEIS accompany a tribal application, despite the fact that the NEPA review is to be initiated by BIA only *after* it deems the tribal application complete. Pacific Regional Office Land Acquisition Requirements at 3 & 4 (2010), RJN Exh. 13. The lack of BIA oversight over the process is arbitrary and capricious, because it leaves to the applicant tribe and its contractor the analysis that is supposed to drive the agency's decisions by

ensuring that "agency decisionmakers have before them and take into proper account all possible approaches to a particular project." *Alaska Wilderness Recreation and Tourism Ass'n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995) (quoting *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir.1988)); *Utahns for Better Transp. v. DOT*, 319 F.3d 1207, 1210 (10th Cir. 2003).

**B. Colusa Is Likely to Suffer Irreparable Harm in the Absence of Preliminary Relief.**

The United States holds legal title to two parcels of land on the west bank of the Sacramento River in Colusa County in trust for Colusa, having accepted the northern and southern parcels in trust for Colusa 70 and 40 years prior to October 17, 1988, respectively. The Colusa Casino Resort ("Colusa Casino") is located on the southern parcel, and is approximately three miles north of the City of Colusa, directly accessible only via Princeton Road State Route ("SR") 45.

Under Colusa's compact with the State of California, the Colusa Casino, wholly owned and operated by Colusa, offers 1,273 Class III slot machines, 10 table (card) games, a 750-seat bingo hall in which high-stakes bingo games are conducted five days per week, a variety of food service and entertainment venues, and a newly remodeled hotel with 55 guest rooms, modest conference facilities and other amenities. Declaration of Victor Fernandez ("Fernandez Dec.") ¶3.

Via California State Highways 45 and 20, the Colusa Casino is only about 30 miles from the Casino Site, which is in the heart of the Colusa Casino's primary market. *Id.*, ¶8. SR 20 is the only practical road connection between the city of Colusa and the Casino Site, and the lands through which Highway 20 passes between Colusa and Marysville-Yuba City, being almost entirely devoted to agriculture, is sparsely populated,. *Id.*, ¶8.

The declarations of Colusa Casino General Manager Victor Fernandez and Colusa CFO Bonnie Pullen submitted herewith erase any doubt that without temporary, preliminary and permanent injunctive relief, Colusa is not merely likely to suffer irreparable harm, but virtually certain to suffer devastating harm to both its governmental and proprietary interests.

The FEIS mentioned Colusa, but dismissed the possibility of any significant adverse impacts on Colusa and its surrounding non-tribal community without actually inquiring into the nature, magnitude and likelihood of those impacts. Instead, the FEIS relied on a consultant's guesstimate

that Colusa would suffer only negligible impacts from an Enterprise casino at the Casino Site, literally based on Newton's theory of gravity, rather than any actual knowledge or even inquiry about the Colusa Casino's revenues, debt, customer base or costs, or the budgetary needs of Colusa's tribal government. Appendix M to FEIS, at *.

Had defendants taken the "hard look" at the likely impacts on Colusa of a casino on the Casino Site that NEPA requires, they would have learned why such a casino would pose an existential threat to the Colusa Casino and the gaming revenues on which Colusa's tribal government depends to benefit its members, the surrounding non-tribal community and even Enterprise. When Colusa first explored possible expansion of its original gaming facility and the addition of a hotel in early 2003, Colusa considered existing and reasonably foreseeable competition from other tribes that already were operating gaming facilities, or that might be expected to do so in the future. Fernandez Dec., ¶3. The Enterprise Rancheria was among the potential tribal competitors assessed, but because Enterprise already had trust lands eligible for gaming in Butte County, California and is farther than Colusa from Marysville-Yuba City and Sacramento, from which Colusa draws much of its patronage, Enterprise was not considered a significant competitive threat.

In 2003, the United Auburn Indian Community ("UAIC") opened its Thunder Valley Casino 59 miles from the Colusa Casino, after which the Colusa Casino experienced an immediate drop in revenue and patronage, and lost about 7% of its workforce to Thunder Valley. This, coupled with the inability to add more slot machines due to the way the State interpreted Colusa's Compact, forced Colusa to scale back its previous expansion plans, although it still had to add facilities and amenities so as to remain at least somewhat competitive. Fernandez Dec., ¶7.

After UAIC entered into an amended Class III gaming compact in 2004, UAIC could operate an unlimited number of slot machines, it expanded its casino and Colusa experienced another major drop in gaming revenue, patronage and workforce; the combined reductions in patronage and revenue following the opening and later expansion of the Thunder Valley Casino was more than 45% and this was in a time of general prosperity. Fernandez Dec., ¶7. The Colusa Casino lost more employees to Thunder Valley, and had to spend an average of $5,000 to train each replacement employee. *Id.* ¶6. The Colusa Casino's revenues and patronage remain far below what they were

before the Thunder Valley Casino intercepted such a large portion of Colusa's patrons from the Sacramento area. *Id.*, at ¶7.

As the casino market has become increasingly competitive, Colusa has needed to incur substantial additional debt to upgrade its facilities to attract customers to its rural location. The introduction of further, wholly-unforeseeable competition within the Colusa Casino's prime market area threatens Colusa's ability to meet its debt service obligations and still provide essential governmental services and programs for its Reservation and surrounding community, and will impair Colusa's ability to obtain additional long-term financing for the further upgrades and improvements to its existing facilities that will be needed to continue to be a viable competitor in the Sacramento Valley gaming market. Fernandez Dec. at ¶11; Pullen Dec. ¶7.

As challenging as this competitive gaming market may have been until now, at least Colusa was able to identify its existing and potential competitors based on pre-existing ownership of trust lands eligible for gaming. Colusa could not have predicted that defendants, without consulting Colusa at all, would enable Enterprise, a tribe that Colusa reasonably had discounted as a significant competitive threat, to leapfrog over Colusa, acquire new trust lands and build a very large casino in the heart of Colusa's prime market area. Pullen Dec., at ¶6. Had such information been available to Colusa when it was planning to go into debt to finance its expansion and modernization, it probably could not have obtained financing, and would not have incurred the substantial initial debt required to finance the original expansion of the Colusa Casino and its appurtenant facilities, or the debt with which Colusa has funded the subsequent remodeling and improvement of its facilities needed to remain viable. Pullen Dec., at ¶8.

Because of Colusa's rural location, the Colusa Casino must draw patrons from areas far from the Colusa Reservation. For that reason, as would and should have been obvious to defendants, the Colusa Casino's market area has always included the greater Sacramento area, the Marysville-Yuba City area in which the Casino Site is located, and other more distant cities and communities, including Rancho Cordova, North Sacramento, Sacramento itself, Roseville, Wheatland, Linda, Marysville, Yuba City, Elk Grove, Woodland, San Francisco, South San Francisco, Daly City, Colma, San Bruno, San Mateo, Union City, Emeryville, Richmond, Vallejo,

Fairfield, Vacaville, Hayward, Alameda, Tracy, Lathrop, Stockton, East Palo Alto, Santa Clara, San Jose, Pleasanton, Pleasant Hill, Redding, Anderson, Cottonwood, Red Bluff, Los Molinos, Chico and Gridley. Fernandez Dec., at ¶5. Every one of the foregoing cities and communities is more than 25 miles from Colusa's casino. *Id.*, at ¶4. The scope of Colusa's market area should have been even more apparent to AES, because AES conducted environmental analyses in connection with the Colusa Casino even as it was working on the Enterprise FEIS. Fernandez Dec., at ¶7.

The Colusa Casino's rural location also requires its management to look beyond 25 miles for sufficient qualified employees. More than 150 of the Colusa Casino's 444 current employees live closer to the Casino Site than to the Colusa Casino, and of those, more than 140 live within about ten miles of the Casino Site. Fernandez Dec., at ¶6. If Enterprise opens its casino on the Casino Site, many Colusa Casino employees will leave their current jobs for employment with the Enterprise casino; not only would this force the Colusa Casino to recruit and train scarce replacement workers at an average of $5,000 per employee, but also it would give Enterprise a pre-trained workforce, thus accelerating Enterprise's ability to take even more patrons away from the Colusa Casino. Fernandez Dec., at ¶9.

Under its Compact, Colusa has paid $1,135,808 directly into the Indian Gaming Revenue Sharing Trust Fund, from which Enterprise has received $11,963,385 since that fund's inception. *See* California Gambling Control Commission, "Revenue Sharing Trust Fund Report of Distribution of Funds to Eligible Recipient Indian Tribes for the Quarter Ended September 30, 2012".[4] Pullen Dec., at ¶2, Colusa also pays into the Indian Gaming Special Distribution Fund ("SDF"), which helps backfill shortfalls in the RSTF. To date, Colusa has paid about $10,000,000 into the SDF.

In addition to backfilling shortfalls in the RSTF, the Legislature also appropriates funds from the SDF to regulate tribal government gaming, fund gambling-addiction programs and return a portion of the SDF to the counties in which tribal government gaming facilities are located for the purpose of making grants to local governments to mitigate impacts from tribal government gaming. Colusa County has received an average of more than $625,000 per year from Colusa's payments into

[4] Available at http://www.cgcc.ca.gov/documents/rstfi/2012/RSTF Distrib 44th CommStaffReport FINAL.pdf.

the SDF, from which grants have been made to Colusa County, the City of Colusa, the City of Williams, the City of Maxell and various special districts in Colusa County to mitigate the off-Reservation impacts of Colusa's Casino and otherwise to benefit the general citizenry of Colusa County. Pullen Dec., at ¶4. As revenues from the Colusa Casino decline, so will funds available for grants from the SDF.

Defendants' acceptance of the Casino Site into trust for gaming and the subsequent opening of Enterprise's proposed casino will inflict the following severe, adverse and irreparable impacts, among others, on Colusa and surrounding communities:

(a) Colusa Casino's revenues likely will decline by 40% or more (Fernandez Dec., at ¶7);

(b) At least 30% of the Colusa Casino's existing employees are likely to leave the Colusa Casino and seek work at the new Enterprise Casino (Fernandez Dec., at ¶9);

(c) The Colusa Casino may have to lay off as many as 100 of its existing employees, and due to normal employee turnover, will have great difficulty recruiting an adequate number of suitable replacement employees from the thinly-populated rural area in which Colusa is located, at an average training cost of about $5,000 per new employee (Fernandez Dec., at ¶6);

(d) Colusa's tribal government is likely to receive as much as 50% less in Casino revenues with which to fund tribal governmental programs and services that are essential to the health, safety and welfare of Colusa's tribal members and others residing or working on or visiting Colusa's trust lands (Pullen Dec., at ¶6);

(e) If patronage declines as projected, Colusa may have to return some of its slot machine licenses to the statewide gaming device license pool, reducing RSTF receipts (Fernandez Dec., at ¶); and

(f) Colusa's payments into the SDF likely will decline by at least 40%, thereby reducing the amount available to reimburse the State of California for its tribal gaming regulatory costs and treatment of gambling addiction, reducing funds otherwise available to backfill RSTF shortfalls, and similarly reducing disbursements from the SDF to Colusa's Individual Tribal Casino Account for grants to local non-tribal governments on which those governments depend in part to provide services and programs to better serve their respective constituent communities and protect the public

health, safety and welfare. Pullen Dec. at ¶7.

Both defendant Regional Director's "consultation" upon which the September 1, 2011 ROD was based, and the November 21, 2012 BIA ROD simply and altogether ignored Colusa, and thus ignored the obvious catastrophe that authorizing the acquisition of the Casino Site would visit not just on Colusa, both as a government and as the operator of a modest casino heavily dependent on patronage from the very area in which Enterprise proposes to build its casino, but also on the surrounding non-tribal community that receives financial support and employment from Colusa's gaming operation.

Colusa has no cognizable remedy in money damages against defendants for any of these harms that it is likely to suffer if defendants are not enjoined from implementing their intended decision. Accordingly, Colusa has met its burden under this element of the test for issuing a preliminary injunction.

**C. The Balance of Equities Tips in Colusa's Favor.**

As noted above, given how rare two-part determinations have been since 1988, Colusa could not reasonably have anticipated that defendants would permit a tribe such as Enterprise, which already possessed pre-1988 trust lands, to leapfrog over Colusa and establish a much larger casino that would be located not only in the heart of Colusa's nearest major market, but also where more than 30% of its employees reside, thus destroying not only the Colusa Casino's customer base but also its workforce. Yet, defendants arbitrarily decided not even to consult with Colusa about the proposed acquisition, much less to consider the devastating impacts that the acquisition likely will have on Colusa.

If a preliminary injunction is granted, defendants will suffer no harm or disadvantage whatsoever. In the absence of an injunction, Colusa likely will be devastated. Any additional delay in defendants' acceptance of the Casino Site would be minimal in light of the decade-long decision process, and the public interest in a lawful trust-acquisition process far outweighs the purely commercial interests of the casino's promoters. Defendants only recently have abandoned their policy of staying fee-to-trust actions pending the outcome of litigation, RJN Exh. 6 and Exh. 7 at 65, 68-69, thus reinforcing the lack of adverse impact on defendants of granting injunctive relief pending

final determination of this action and precluding defendants from legitimately claiming an prejudice from an injunction or stipulation preventing it from taking the Casino Site into trust during the pendency of this action.

Defendants will contend that because of the Supreme Court's decision in *Patchak*, 132 S.Ct. 2199 (2012), judicial review of their Decisions would remain available even after they have accepted the Casino Site into trust. However, that contention ignores the purpose of an injunction: to maintain the status quo while the merits of the dispute are litigated. Moreover, as a practical matter, as soon as title to the land passes into trust, Enterprise will be free to start operating electronic Class II games in a temporary facility even as it seeks legislative ratification of a Class III compact, and then commence Class III gaming while construction proceeds on its permanent facility. This will irreversibly alter the site despite inadequate environmental review and failure to comply with the requirements of 25 U.S.C. § 2719(b)(1)(A). Once Enterprise starts construction and spending money, it will create "facts on the ground" that will introduce new equitable factors that will make undoing the transaction much more difficult and costly.

Thus, enjoining defendants from accepting the land into trust before the merits of this action have been adjudicated is the only practical way to avoid irreversible changes to the status quo, and Colusa has satisfied this element of the test for issuing a preliminary injunction.

**D. An Injunction Is in the Public Interest.**

Because defendants, Colusa, Enterprise and the general public all have an interest in administrative processes conforming to applicable laws and regulations, *see*, *e.g.*, *Makah Tribe v. Verity*, 910 F.3d 555, 559 (9th Cir. 1990), the public's interest would best be served by enjoining defendants from accepting the Casino Site into federal trust until the legality of that action has been determined on the merits. Granting an injunction also would serve the interests of the public in Yuba County, a majority of whose voters expressed their opposition to the proposed casino in a 2005 vote, the significance of which defendants appear to have all but ignored in favor of an inchoate "engage[ment] in a relationship with the Tribe." 2011 ROD at 57, 63-64; Yuba County Letter at 3, RJN Exh. 14. It would also serve the interests of the local governments and people of Colusa County, who otherwise would lose all or a large portion of the funding currently available to them

from grants from the SDF. Pullen Dec., at ¶7. Finally, the public interest is served by requiring that defendants adhere to their statutory obligations under NEPA and IGRA. *Small v. Avanti Health Systems*, LLC, 661 F.3d 1180 (9th Cir. 2011) ("the public interest favors applying federal law correctly") (citing *N.D. v. Hawaii Dep't of Ed.*, 600 F.3d 1104, 1113 (9th Cir. 2010)).

**CONCLUSION**

Colusa having shown a likelihood of success on the merits of its action or at the least that it has raised serious questions that warrant litigation, that it will suffer severe and irreparable harm in the absence of injunctive relief, that the balance of equities tips sharply in Colusa's favor and away from defendants, and that the public interest would be served by enjoining defendants from accepting the Casino Site into federal trust status before Colusa's action can be determined on the merits, the Court should grant Colusa's motion for preliminary injunction as prayed.

Dated: December 28, 2012

FORMAN & ASSOCIATES

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