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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

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. 12-CV-03021-JAM-AC

PROPOSED INTERVENOR'S [PROPOSED] OPPOSITION TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER

Date: None set
Time:

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I. INTRODUCTION AND BRIEF STATEMENT OF RELEVANT FACTS

The Estom Yumeka Maidu Tribe of the Enterprise Rancheria, a federally-recognized Indian tribe listed in the Federal Register as the Enterprise Rancheria of Maidu Indians of California (hereinafter, the "Tribe") hereby opposes Plaintiff's Motion for a Temporary Restraining Order ("TRO Motion"). If granted, the TRO Motion would prevent the United States from acquiring land in trust for the Tribe, thereby perpetuating a 47-year-old injustice.

The Tribe has lived in and around the area now known as Yuba County from time immemorial. Declaration of Glenda Nelson in Support of [Proposed] Opposition to TRO Motion ("Nelson Dec.") at ¶1. In 1915 and 1916, the United States acquired two 40-acre parcels of land for the Tribe's benefit. Id. at ¶ 2. Those two parcels became known as Enterprise 1 and Enterprise 2. *Id*. at ¶ 2.

Enterprise 1 is located on a steep, remote hillside and is accessible only by a dirt road. It is unsuitable for building due to the steepness of the terrain and the significant cultural resources located on the property. *Id*. at ¶ 4. As a result of these constraints, the only structures on Enterprise 1 are two small homes. *Id*.

A number of current tribal members, including members of the Tribal Council,[1] were born and/or raised on Enterprise 2. *Id*. at ¶ 5. In 1965, however, the Department of the Interior transferred Enterprise 2 to the State of California for use in the construction of Oroville Dam. Enterprise 2 is now submerged beneath Lake Oroville. *Id.* Members of the Tribe lost their homes, their community, and their land base, and they were dispersed throughout the Sacramento Valley. *Id.* The Tribe never received land replacing Enterprise 2. *Id.*

Since the loss of Enterprise 2, the Tribe has been unable to exercise many of its sovereign governmental powers or pursue economic opportunities that would allow it to improve services to tribal members. *Id.* at ¶ 7. As a result, the Tribe's 900 members suffer from high unemployment and poverty: More than 40% of the Tribe's labor force is either

[1] The Tribal Council is one of the Tribe's governing bodies.

unemployed or earning less than $9,048 per year. *Id.* at ¶ 11. Tribal members are forced to rely heavily on state and federal benefits programs. *Id.*

In an effort to remedy this situation, the Tribe has steadfastly pursued land on which it can establish a seat of tribal government and seek economic self-sufficiency. *Id*. at 7. To that end, in 2002, the Tribe acquired rights to purchase approximately 40 acres of land in an unincorporated area of Yuba County, within the Tribe's aboriginal territory. *Id.* The 40-acre property (the "Yuba Site") is well-suited for economic development; among other things, it lies within a 900-acre "Sports and Entertainment Zone" approved by the voters of Yuba County. *Id.*

In 2002, the Tribe applied to the United States Department of the Interior to have the Yuba Site acquired in trust for the Tribe's benefit. *Id*. at ¶ 8. Trust status would allow the Tribe to exercise its sovereignty over the property.

The Tribe has proposed to develop a gaming facility and resort on the Yuba Site (the "Project"), as authorized by the Indian Gaming Regulatory Act ("IGRA") and California's Proposition 1A. *Id*. at ¶ 8. Consistent with IGRA's strict requirements, revenues from the Project would be used to fund tribal government and tribal services, thereby fostering economic self-sufficiency and governmental self-determination. *Id.* In so doing, the Project would allow the Tribe to generate jobs, educational opportunities, and a sense of community in its aboriginal territory. *Id.* at ¶ 11.

Because the Project required federal approval, it triggered the environmental review requirements of the National Environmental Policy Act ("NEPA"). *See* 42 U.S.C. § 4332(2). Pursuant to NEPA, the Bureau of Indian Affairs ("BIA"), a federal agency within the Department of the Interior, prepared an Environmental Impact Statement ("EIS") identifying the Project's environmental consequences and evaluating potential Project alternatives. *Id.* at ¶ 10.

The Project also required a so-called "two-part determination" under IGRA. *See* 25 U.S.C. § 2719(b)(1)(A). The two-part determination requires (1) that the Secretary of the Interior issue a favorable decision with respect to the Project and (2) the Governor of California concur in the Secretary's decision. *Id*. The Secretary of the Interior issued a favorable decision on September 1, 2011, and the Governor of California concurred on August 30, 2012. Nelson

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Dec. at ¶ 9. On November 21, 2012, the Assistant Secretary - Indian Affairs made a final determination (in the form of a Record of Decision or "ROD") to acquire the Yuba Site into trust for the Tribe. *Id*. BIA plans to complete the acquisition on February 1, 2013. *Id*. at ¶ 12.

Plaintiff, an Indian tribe with an existing casino, filed this suit on December 14, 2012. *See, e.g.,* Complaint (ECF No. 1) at 4-9. Plaintiff alleges that its existing casino will be damaged by the Tribe's Project. *Id*.; *see also* Plaintiff's Memorandum of Points and Authorities in Support of Motion for Preliminary Injunction (ECF No. 8-1) ("Pl. Memo.") at 19.[2] Plaintiff has filed a motion for preliminary injunction that is set to be heard on March 20, 2013.

On January 3, 2013, the Tribe filed with the Court a sworn affidavit (from the Tribe's chairwoman) stating that (1) construction of the Project is not imminent, (2) the Tribe will provide at least 30 days of notice prior to beginning construction of the Project, and (3) if BIA acquired the Yuba Site in trust for the Tribe on February 1, it will be at least 120 days (*i.e.,* May at the earliest) before construction of the Project begins. Declaration of Glenda Nelson in Support of Motion to Intervene (ECF No. 13-3) at 4-5. Plaintiff was immediately served with an electronic copy of the affidavit. *Id*.

On January 11, 2013, approximately one week after receiving notice that construction of the Project is not imminent, Plaintiff filed the TRO Motion.

II. STANDARD FOR TEMPORARY RESTRAINING ORDER

Plaintiff seek injunctive relief (in the form of a TRO) immediately preventing BIA from taking any action to implement the ROD.[3] Injunctive relief is an "extraordinary remedy, never awarded as of right." *Winter v. Nat'l Res. Def. Council, Inc*., 555 U.S. 7, 24 (2008). It is warranted only "upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 22; *see also Earth Island Inst. v. Carlton*, 626 F.3d 462, 469 (9th Cir. 2010).

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[2] Plaintiff did not file a memorandum of points and authorities with its TRO Motion. It appears to be relying on the arguments in a (previously-filed) memorandum of points and authorities in support of a motion for preliminary injunction.

[3] The requirements for a TRO are the same as those for a preliminary injunction, and courts normally review them using the same standard. *See Stuhlberg Int'l Sales Co. v. John D. Brush & Co*., 240 F.3d 832, 839 n.7 (9th Cir. 2001); *California Natural Products v. Illinois Tool Works, Inc*., 2012 U.S. Dist. LEXIS 35373, *2-3 (E.D. CA, March 14, 2012).

In considering a request for injunctive relief, "[i]t is not enough for a court…to ask whether there is a good reason why an injunction should ***not*** issue; rather, a court must determine that an injunction ***should*** issue under the traditional four-factor test." *Monsanto v. Geertson Seed Farms*, __ U.S. __, 130 S.Ct. 2743, 2757 (2010) (emphasis original). Thus, the party seeking an injunction must demonstrate that (1) it is likely to prevail on the merits of its claims, (2) it is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in its favor, and (4) an injunction is in the public interest. *Id*.; *see also Winter*, 555 U.S. at 20.

Plaintiff accurately notes that the Ninth Circuit employs a "sliding scale" test in which a stronger showing on one of the four elements may offset a weaker showing on another. Pl. Mem. at 3-4 citing *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-1132 (9th Cir. 2011). But Plaintiff has neglected to mention a critical aspect of the test: the sliding scale does not excuse the moving party from satisfying all four *Winter* elements. *Alliance for the Wild Rockies*, 632 F.3d at 1135; *see also Monsanto*, 130 S. Ct. at 2757 (2010).

Thus, the sliding scale test does not excuse Plaintiff from its burden of demonstrating "that irreparable harm is ***likely***, not just possible" in the absence of the requested relief. *Center for Food Safety v. Vilsack*, 636 F.3d 1166, 1172 (9th Cir. 2011) (emphasis original). That issue is particularly important here, since a TRO is "an emergency measure, intended to preserve the status quo pending a fuller hearing on the injunctive relief requested, and the irreparable harm must therefore be clearly immediate" as well as likely. *See California Natural Products*, 2012 U.S. Dist. LEXIS 35373 at *2-3; Fed. R. Civ. Proc. 65(b)(1).

Finally, and in addition to satisfying the four-part test for injunctive relief (whether by virtue of the sliding scale or otherwise), Plaintiff must demonstrate that its requested relief is properly tailored. *Monsanto*, 130 S.Ct. at 2757-58, 2760-61. As the Supreme Court recently cautioned, injunctive relief must be no broader than absolutely required to avoid irreparable harm. *Monsanto*, 130 S.Ct. at 2760-61; *see also Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991) (injunctive relief "must be tailored to remedy the specific harm alleged [and] [a]n overbroad injunction is an abuse of discretion").

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In sum, Plaintiff must make a "clear showing" (1) that it meets the four-part test for injunctive relief; (2) that if a TRO is not issued, irreparable harm will occur before a noticed hearing on a preliminary injunction can be held; and (3) that its requested TRO is not over-broad. *See Winter*, 555 U.S. at 20 ("clear showing"; four-part test); *California Natural Products*, 2012 U.S. Dist. LEXIS 35373 at *2-3 (immediate irreparable harm); *Monsanto*, 130 S.Ct. at 2757-58, 2760-61 (relief must be narrowly tailored). As explained below, Plaintiff has not even come close to satisfying these requirements. Accordingly, the Tribe respectfully requests that Plaintiff's TRO Motion be denied.

III. FIRST *WINTER* ELEMENT: PLAINTIFF IS NOT LIKELY TO SUCCEED ON THE MERITS

Plaintiff alleges that it is likely to succeed on four claims under IGRA and/or the Indian Reorganization Act ("IRA") (Pl. Memo at 4-9, arguments A.1 through A.4), and four others under NEPA (Pl. Memo at 10-15, arguments A.5 through A.8). It is mistaken. For the reasons set forth below, none of the eight claims is likely to succeed on the merits.

A. Standard Of Review Applicable To Merits Of Plaintiff's Claims

Plaintiff has challenged agency action under the Administrative Procedure Act. Therefore, the merits of its claims are subject to the "arbitrary and capricious" standard. *See* 5 U.S.C. § 706(1). The arbitrary and capricious standard is "highly deferential, presuming the agency action to be valid and affirming the [] action if a reasonable basis exists." *Pacific Coast Federation of Fishermen's Associations v. Blank*, 693 F.3d 1084, 1091 (9th Cir. 2012) (citation omitted); *see also Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008) (en banc). The arbitrary and capricious standard requires an inquiry into "whether [agency action] was based on a consideration of the relevant factors and whether there has been a clear error of judgment," but the courts are "not empowered to substitute [their] judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971).

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B. Plaintiff Is Not Likely To Succeed On The Merits Of Its IRA And IGRA Claims

1. BIA Was Not Required To Issue A Stay

Plaintiff contends that it is likely to succeed on the merits because BIA is required to stay the February 1 trust acquisition until this litigation is complete. Pl. Mem. at 4-5 (argument A.1). But the only authorities on which Plaintiff relies are a series of informal, internal guidance documents. Pl. Mem. at 4-6. None of these guidance documents has the force of law, and none is judicially enforceable. *See, e.g.*, *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1072 (9th Cir. 2010) (Park Service internal policies do not create enforceable rights or obligations); *W. Radio Servs. Co. v. Espy*, 79 F.3d 896, 901 (9th Cir. 1996) *cert denied* 519 U.S. 822 (1996) (Forest Service manuals and handbooks "do not have the independent force and effect of law" and are not enforceable against the agency). Plaintiff has failed to identify any legal authority requiring BIA to stay the trust acquisition.[4]

Although BIA was not required to stay the trust acquisition, it (voluntarily) agreed to a schedule designed to allow Plaintiff to seek a stay from this Court. But, as noted above, injunctive relief staying agency action is an "extraordinary remedy, never awarded as of right." *Winter*, 555 U.S. at 24. Unless Plaintiff can satisfy the traditional four-factor test for injunctive relief, BIA's trust acquisition cannot be stayed. *Monsanto*, 130 S. Ct. 2743, 2757 (2010); *Winter*, 555 U.S. at 20. Plaintiff's descriptions of informal, non-binding guidance documents are not sufficient to meet any of the four factors. Indeed, for all of the reasons set forth herein, Plaintiff has fallen far short of satisfying the four-factor test.

Finally, it is worth noting that Plaintiff's "mandatory stay" argument (argument A.1) appears unrelated to the "merits" of its claims. Plaintiff's Complaint alleges two claims for

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[4] Plaintiff references 25 C.F.R. § 151.12(b). *See* Pl. Memo. at 4. But Plaintiff's argument is based on non-binding guidance which references 25 C.F.R. § 151.12(b), not on the regulation itself. *Id*. at 4-5. Indeed, 25 C.F.R. § 151.12(b) says nothing about a stay pending resolution of litigation. *See* 25 C.F.R. § 151.12(b). The regulation only requires that BIA provide a 30-day notice period between the agency's determination to take the land into trust and the actual trust acquisition. *Id*. BIA has clearly satisfied the 30-day notice period (BIA issued its Notice of Intent on December 3, 2012 and plans to complete the trust acquisition on February 1, 2013), and Plaintiff does not allege otherwise. *See* 77 Fed. Reg. 71612 (Dec. 3, 2012) (Notice of Intent); Nelson Dec. at ¶ 12 (February 1 acquisition).

relief. Complaint (ECF No. 1) at 13-16. The first claim for relief alleges various violations of NEPA. *Id*. at 13-15. It has nothing to do with Plaintiff's "mandatory stay" argument. *Id.* The second claim for relief alleges violations of IGRA. *Id*. at 15-16. It, too, says nothing about a mandatory stay. *Id*. Therefore, even if Plaintiff's "mandatory stay" argument had merit (and, as explained above, it most certainly does not), it would not establish that Plaintiff has a "likelihood of success on the merits" of the case. *See Winter*, 555 U.S. at 20.

2. BIA Properly Addressed Plaintiff's Claims Regarding The Legal Description Of The Yuba Site

Next, Plaintiff complains about a discrepancy between the legal description of the Yuba Site in the Tribe's application for a trust acquisition and the legal description of the Yuba Site in the BIA's Notice of Intent to take the site into trust. Pl. Motion at 5-6. The discrepancy identified in Plaintiff's Motion apparently resulted from different title companies using different language. *See* Declaration of Matthew Adams in Support of [Proposed] Opposition to TRO Motion ("Adams Dec.") at ¶ 2. As soon as BIA was made aware of the issue, it published a Federal Register notice resolving the discrepancy and correcting the Notice of Intent. *See* 78 Fed. Reg. 114 (Jan. 2, 2013) (notice of correction).

BIA published the Federal Register notice correcting the discrepancy on January 2, 2013, more than a week before Plaintiff filed its TRO Motion. The Memorandum of Points and Authorities on which Plaintiff's TRO Motion is based does not address (or even disclose) BIA's correction. Pl. Mem. at 5-6. But Plaintiff appears to have had actual knowledge of the correction before filing the Motion. *See, e.g.*, Plaintiff's Notice of Motion and Motion for Temporary Restraining Order/Order to Show Cause (ECF Doc. 18) ("Pl. TRO Notice") at 2 (noting existence of January 2, 2013 Federal Register notice).

In short, the discrepancy about which Plaintiff complains was an inadvertent technical error that was immediately and publicly corrected. Plaintiff had actual knowledge of the correction, has suffered no prejudice,[5] and cannot prevail on the merits of its claim.

[5] To the extent that anyone has been prejudiced here, it is the Federal Defendants and the Tribe, both of which have been forced to respond, on shortened time, to an argument which Plaintiff knew (but did not disclose) to have been mooted.

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3. BIA Followed The IGRA Regulations Governing Notice And Comment, And, In Any Event, Plaintiff Had Ample Notice Of And Ability To Comment On The Project

Plaintiff also contends that the Federal Defendants violated IGRA by arbitrarily and capriciously failing to "consult[]…with officials of other nearby Indian tribes" pursuant to 25 U.S.C. § 2719(b)(A). Pl. Mem. at 6-8 (argument A.3). More specifically, Plaintiff claims that it should have been classified as a "nearby Indian tribe" entitled to consultation. *Id*. That claim lacks any chance of success on the merits.

IGRA provides that the Secretary of the Interior must consult with "officials of [] nearby Indian tribes" before allowing gaming on land (such as the Yuba Site) acquired after October, 1988. 25 U.S.C. § 2719(b)(A). The purpose of the consultation is to determine the extent to which the proposed gaming activities would adversely affect the "nearby Indian tribes." *Id*. The statute does not define the term "nearby Indian tribes." *Id*.; *see also* 25 U.S.C. § 2703 (definitions do not include "nearby Indian tribes").

The Secretary of the Interior has authority to promulgate regulations implementing IGRA. *See* 5 U.S.C. § 301, 25 U.S.C. §§ 2, 9; *see also Redding Rancheria v. Salazar*, 2012 U.S. Dist. Lexis 19781, * 16-25 (N.D. Cal. Feb. 16, 2012) (explicitly upholding Secretary's authority). In 2008, the Secretary used that authority to promulgate a series of regulations addressing two-part determinations. *See* 25 C.F.R. part 292. One of the 2008 regulations provides a definition of "nearby Indian tribe": "an Indian tribe with tribal lands located within a 25-mile radius of the location of the proposed gaming establishment, or, if the tribe has no trust lands, within a 25-mile radius of its government headquarters." *See* 25 C.F.R. § 292.2.

The Yuba Site (the "location of the proposed gaming facility") is more than 25 miles from Plaintiff's tribal land. Maier Dec. ¶ 4. Indeed, Plaintiff does not even bother to allege otherwise. Pl. Mem. at 6-8; Complaint at 1-16 (failing to allege that Plaintiff's lands are within 25 miles of the Yuba Site). Recognizing that undisputed fact, BIA properly determined (on the basis of the 2008 IGRA regulations) that Plaintiff does not meet the definition of a "nearby Indian tribe" under IGRA. *See* Maier Dec. ¶ 4; 25 C.F.R. § 292.2 (definition).

Although BIA determined that Plaintiff is not a "nearby Indian tribe," the agency did ***not*** preclude Plaintiff from submitting comments on the Project. On the contrary, BIA explicitly invited Plaintiff to share its concerns about the Project. Adams Dec. at ¶ 3, Ex. 1. The agency extended that invitation more than three years before the Project was approved. *Id.*

Plaintiff nonetheless complains that it did not have notice of the Project until it was too late for effective participation. Pl. Mem. at 8. If that is true, Plaintiff has no one to blame but itself. BIA properly provided public notice of all opportunities for participation in the agency's review of the Project. A few examples:

- On May 20, 2005, BIA published a Federal Register notice announcing its intent to prepare an EIS on the Project and inviting comments on the proper scope of the document. 70 Fed. Reg. 29363 (May 20, 2005).
- On July 9, 2005, the agency held a public meeting in Marysville, California to discuss the scope of the document. Adams Dec. at ¶ 4, Ex. 2, p 47. Advance notice of the meeting was published in the Federal Register. 70 Fed. Reg. 29363 (May 20, 2005).
- On March 21, 2008, BIA published a Federal Register notice inviting comments on the Draft EIS for the Project. 73 Fed. Reg. 15191 (March 21, 2008). Notice was also published in *The Sacramento Bee*, the *Chico Enterprise-Record*, the *Oroville Mercury-Register*, and a local newspaper called the *Appeal-Democrat*. Adams Dec. at ¶ 4, Ex. 2, p 47.
- The Draft EIS was available for review and comment for 45 days. *Id.* BIA received nearly 100 comments. *Id.*
- On April 9, 2008, BIA held a public hearing on the Draft EIS. *Id.* Advance notice of the hearing was published in the Federal Register, as well as *The Sacramento Bee*, the *Chico Enterprise-Record*, the *Oroville Mercury-Register*, and the *Appeal-Democrat*. *Id.*
- Throughout the review process, BIA maintained a website (www.EnterpriseEIS.com) at which interested persons could obtain and review documents related to the Project. *See* 73 Fed. Reg. 15191 (March 21, 2008).

Plaintiff implausibly claims it did not receive notice of the Project until after the above-listed events and notifications. Pl. Mem. at 8 (asserting that Plaintiff received notice of the Project in 2009, from another Indian tribe). But each and every notice, hearing, and/or meeting met (and, in many cases, exceeded) applicable notice and comment requirements. *See, e.g.*, 40 C.F.R. § 1501.7 (scoping); 40 C.F.R. §§ 1506.6(b), 1506.6(c) (identifying acceptable methods of notifying and involving interested parties); 40 C.F.R. § 1506.10(c) (comment period for Draft

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EIS). Therefore, even in the unlikely event that Plaintiff was truly unaware of any of the listed notices and meetings, it cannot prevail on the merits.

4. BIA Properly Evaluated The Tribe's Need For Additional Trust Land

Plaintiff also alleges that the Federal Defendants arbitrarily and capriciously concluded that the Tribe has a need for additional trust land. Pl. Mem. at 9 (argument A.4). Specifically, it contends that the Tribe does not need additional trust land because it can rely on other resources to provide housing for tribal members. *Id*. Plaintiff's argument ignores the fact that the Tribe's need for trust land is not limited to housing. The Tribe also lacks suitable land for tribal government and for economic development. Adams Dec. at ¶ 4, Ex. 2, p 44. The Tribe's existing trust land consists of a single remote, steeply-sloped property that is accessible only by a dirt road. *Id*. The property is "not appropriate for housing ***or other buildings***." *Id*. (emphasis added). Therefore, it cannot serve as a seat of tribal government, is unsuitable for housing, and has no economic development potential. *Id*. These facts — each of which is explicitly identified in the ROD — are more than enough to support BIA's finding that the Tribe needs additional trust land. *See, e.g., City of Yreka v. Salazar*, 2011 U.S. Dist. Lexis 62818, *20-27 (E.D. Cal. June 13, 2011) (upholding BIA finding of need and noting deference to agency); *South Dakota v. U.S. Department of Interior*, 775 F. Supp. 2d 1129, (D.S.D. 2011) (upholding BIA finding of need where agency "addressed the Tribe's need" and provided "a reasonable basis" for decision). Therefore, Plaintiff's claim will not succeed on the merits.

C. Plaintiff Is Not Likely To Succeed On The Merits Of Its NEPA Claims

1. BIA Properly Considered A Range Of Reasonable Alternatives

NEPA sets out a process requiring federal agencies to consider alternatives to their proposed actions. *See* 42 U.S.C. §§ 4332(2)(C), 4332(2)(E); *see also* 40 C.F.R. § 1502.14. But that requirement is procedural, not substantive. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-51 (1989); *Lands Council*, 537 F.3d at 1000. NEPA does not dictate the results of agency decisionmaking. *Id*.; *see also Morongo Band of Mission Indians v. Federal Aviation Administration*, 161 F.3d 569, 575 (9th Cir. 1998) ("NEPA exists to ensure a process, not a result").

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Plaintiff alleges that BIA violated NEPA by failing to consider an appropriate range of alternatives to the Project. Pl. Motion at 10-11 (argument A.5). Such claims are governed by a deferential "rule of reason." *Westlands Water Dist. v. United States*, 376 F.3d 853, 866 (9th Cir. 2004); *City of Carmel-By-The-Sea v. U.S. Department of Transportation*, 123 F.3d 1142, 1155 (9th Cir. 1997). In this context, the "rule of reason" provides that an EIS must evaluate sufficient alternatives to permit a reasoned choice, but need not contain detailed analysis of alternatives which are infeasible, ineffective, or inconsistent with project purposes. *See, e.g.*, *Vermont Yankee Nuclear Power Corp. v. Natural Resource Defense Council*, 435 U.S. 519, 551 (1978) (choice of alternatives "bounded by some notion of feasibility"); *Blank*, 693 F.3d 1084, 1099 (9th Cir. 2012) (EIS need only set forth "those alternative necessary to permit a reasoned choice"); *Westlands*, 376 F.3d at 868 ("the EIS need not consider an infinite range of alternatives, only reasonable or feasible ones").

BIA's analysis of alternatives went well beyond the requirements of the rule of reason. The agency began its evaluation by considering a wide variety of different land uses and properties throughout the Tribe's aboriginal territory. Adams Dec. at ¶ 5, Ex. 4, pp. 2-45 to 2-46. After conducting a preliminary analysis of the feasibility of various options (and combinations of options), BIA focused its attention on five particularly promising properties. *Id*. Ultimately, the agency carried forward five alternatives for detailed analysis in the EIS. *Id*., pp. 2-1 to 2-45. Those five alternatives include different properties, different land uses (both gaming and non-gaming), different development configurations, and the alternative of taking no action whatsoever. *Id*.; *see also* Adams Dec. at ¶ 4, Ex. 2, pp. 4-10. In short, BIA considered a reasonable range of feasible ways to accomplish the purposes of the Project, and the EIS provides a clear basis for choice among them. *Id*. at pp. 4-19; *see also* Adams Dec. at ¶ 5, Ex. 3, pp. 2-46 to 2-48. Accordingly, the agency's alternatives analysis satisfies NEPA. *See Blank*, 693 F.3d at 1099-1101; *Westlands*, 376 F.3d at 868-872.

Plaintiff also contests BIA's statement of the purpose and need for the Project. Pl. Mem. at 10. This claim, too, has no chance of success on the merits. Agencies have "considerable discretion to define the purpose and need of a project." *Westlands*, 376 F.3d at

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866 citing *Angoon v. Hodel*, 803 F.2d 1016 (9th Cir. 1986). A statement of purpose and need must be upheld "so long as the objectives that the agency chooses are reasonable." *Citizens Against Burlington v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991). Here, the objectives selected by BIA (restoration of a tribal land base, employment opportunities for tribal members, economic self-sufficiency, and a revenue stream capable of supporting tribal government and services) were perfectly reasonable.[6] Adams Dec. at ¶ 4, Ex. 2, p. 2. Therefore, the statement of purpose and need must be upheld. *Westlands*, 376 F.3d at 866-68; *Citizens Against Burlington*, 938 F.2d at 196.

2. BIA Took A Hard Look At The Environmental Impacts Of The Proposed Project

Plaintiff alleges that the EIS fails properly to evaluate the environmental consequences of the Project. Such claims are subject to the "hard look" test. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). The hard look test does not mandate perfection; consistent with NEPA's procedural focus, it simply requires that an EIS "contains a reasonably thorough discussion of the significant aspects of [a project's] probable environmental consequences." *League of Wilderness Defenders - Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010). In other words, an EIS must be upheld as long as it "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Id.* A reviewing court "may not flyspeck an EIS or substitute its judgment for that of the agency concerning the wisdom or prudence of a proposed action." *Half Moon Bay Fisherman's Marketing Ass'n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988); *see also Theodore Roosevelt Conservation Partnership v. Salazar*, 661 F.3d 66, 75 (D.C. Cir. 2011) ("We have consistently declined to flyspeck an agency's environmental analysis, looking for any deficiency no matter how minor").

[6] Contrary to Plaintiff's assertions, the objectives are also consistent with the purposes of IGRA and the IRA. *See, e.g., Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151-52 (1973) (purpose of IRA is tribal economic development and self-government); *City of Roseville v. Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003) (purpose of IGRA is "promoting tribal economic development and self-sufficiency"); 25 U.S.C. § 2701 (Congressional findings wih respect to IGRA).

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Nor, for that matter, may the courts "impose themselves as a panel of scientists that instructs the agency, chooses among scientific studies, and orders the agency to explain every possible scientific uncertainty." *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012). Indeed, the Supreme Court has been clear that federal agencies "must have discretion to rely on the opinions of [their] own qualified experts even if, as an original matter, a court mind find contrary views more persuasive." *Marsh v. Oregon Natural Resource Council*, 490 U.S. 360, 378 (1989).

Plaintiff nonetheless makes three narrow, hyper-technical complaints about the scientific judgments expressed in the EIS. *See* Pl. Mem. at 11-13 (argument A.6). None of Plaintiff's arguments is valid, and none is likely to succeed on the merits.

First, Plaintiff finds fault with one of the technical reports appended to the EIS evaluated socioeconomic issues. Pl. Mem. at 12. The technical report in question was prepared by Gaming Market Advisors, experts on the economic impacts of the gaming and hospitality industry. Adams Dec. at ¶ 6, Ex. 4, pp. 131-33. The technical report thoroughly and responsibly considered the possibility that the Project might negatively impact revenues at other casinos in the region (including Plaintiff's casino), using reasonable models to test three different economic scenarios. *Id*. at pp. 116-130. The report concluded that while some casinos might be affected by the Project, none would face severe hardship or closure. *Id*. Plaintiff may believe that the preparers of the technical report should have reached a different conclusion. But BIA has discretion to rely on the opinions of its own qualified experts. *Marsh*, 490 U.S. at 378. And it cannot be said that the EIS failed to provide "a reasonably thorough discussion of…probable environmental consequences" related to economic impacts. *Allen*, 615 F.3d at 1130. That is all the "hard look" standard requires. *Id.*

Second, Plaintiff alleges that the EIS improperly ignores data suggesting that the Project will exceed certain air quality targets. Pl. Mem. at 12. But those allegations ignore the fact that BIA adopted mitigation measures that will reduce the Project's air quality impacts to less-than-significant levels. The EIS clearly explains that fact, thereby providing the required "hard look" at the issue. Adams Dec. at ¶ 7, Ex. 5, p 4.4-10 ("implementation of [m]itigation

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[m]easures…would result in a less than significant effect"); Adams Dec. at ¶ 4, Ex. 2, p. 19 (confirming that BIA adopted mitigation measures).

Third, Plaintiff takes issue with BIA's evaluation of "six fish species of concern." Pl. Mem. at 12. Tellingly, Plaintiff never bothers to identify the six species by name. *Id*. at 12-13. But the gist of its claim seems to be that the Project has the potential to impact critical fish habitat. *Id*. BIA took a careful hard look at that very issue. After reviewing federal endangered species databases and visiting the Yuba Site, the agency found that the (few) aquatic habitats near the Yuba Site — essentially, agricultural irrigation ditches — do not provide appropriate habitat for any endangered fish species. Adams Dec. at ¶ 8, Ex. 6, p. 3.1.5-18. BIA also evaluated the possibility that wastewater or stormwater runoff from the Yuba Site could find its way into critical fish habitat elsewhere in the region, ultimately concluding that on-site wastewater and stormwater treatment would eliminate any risk of adverse effects to fish. Adams Dec. at ¶ 9, Ex. 7, p. 16. These scientific determinations represent a hard look at potential impacts to fish habitat, and are entitled to deference. *Allen*, 615 F.3d at 1130 (hard look); *Marsh*, 490 U.S. at 378 (deference); *Weldon*, 697 F.3d at 1051 (deference).

3. BIA Properly Considered All Reasonably Foreseeable Future Impacts

Plaintiff contends that BIA's EIS should have included an analysis of the Tribe's use of (anticipated) casino revenues to develop a housing project. Pl. Mem. at 13-14. But the Tribe has yet to design, propose or seek approval for such a housing project (after all, construction on the Tribe's casino has not yet started!). The scope of the EIS was perfectly appropriate.

4. BIA And Its Environmental Consultants Complied With NEPA's Conflict-Of-Interest Requirements

Next, Plaintiff alleges that BIA violated the conflict-of-interest provisions of CEQ's NEPA regulations. Pl. Mem. at 14-15 (argument A.8). This claim, too, has no chance of success on the merits. CEQ's NEPA regulations impose three conflict-of-interest requirements, and BIA satisfied each of them. *See* 40 C.F.R. § 1506.5(c) (requirements); *Communities Against Runway Expansion v. Federal Aviation Administration*, 355 F.3d 678, 686-87 (D.C. Cir. 2004) (identifying and discussing three requirements).

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First, the regulations provide that EISs must be prepared either by the lead federal agency or by a consultant selected by the lead federal agency. 40 C.F.R. § 1506.5(c). The material attached to Plaintiff's own affidavits demonstrates that the EIS was prepared by Analytical Environmental Services (or "AES"), a consultant selected by BIA. *See* Declaration of Jeffrey Keohane (ECF No. 8-6), Exhibit 5, page 1 of 5 ("AES is the environmental consulting firm that BIA selected in accordance with 40 C.F.R. section 1506.5(c)").

Second, the regulations require that a contractor preparing an EIS execute "a statement...specifying that they have no financial or other interest in the outcome of the project." 40 C.F.R. § 1506.5(c). The material attached to Plaintiff's own affidavits clearly shows that AES executed the required conflict-of-interest statement. *See* Declaration of Jeffrey Keohane (ECF No. 8-6), Exhibit 5, page 1 of 5 (certification).

Third, the regulations mandate that the lead federal agency participate in the preparation of the EIS, independently evaluate the EIS prior to approval, and take responsibility for the EIS' scope and contents. 40 C.F.R. § 1506.5(c). Even the limited administrative record documents available at this early date (essentially, the EIS, the ROD, and the agreement between BIA and AES) are sufficient to demonstrate that BIA exercised independent oversight and responsibility for the EIS. The agreement between BIA and AES clearly states that BIA (not AES or the Tribe) was responsible for providing "technical direction, review, and quality control for the preparation of the…EIS, technical studies, and other NEPA-related documents." Declaration of Jeffrey Keohane (ECF No. 8-6), Exhibit 5, page 2 of 5. BIA carried out these responsibilities by (among other things) overseeing the preparation of the Draft EIS, overseeing the preparation of the Final EIS, and selecting EIS Alternative A as the preferred alternative. *See, e.g.*, Adams Dec. at ¶ 4, Ex. 2, p.1 (summarizing BIA's role). The BIA officials directly responsible for overseeing preparation of the EIS are clearly identified in the "list of preparers" in chapter 7 of the EIS. *See* Adams Dec. at ¶ 10, Ex. 8, p. 7-1; *see also Center for Food Safety v. Vilsack*, 844 F.Supp. 2d 1006, 1022-23 (N.D. Cal. 2012) (relying on "list of preparers" to reject conflict-of-interest claim).

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Finally, it bears noting that there is no evidence that AES exhibited any bias against Plaintiff or Plaintiff's interests during the preparation of the EIS. On the contrary, during the same period in which AES was preparing the NEPA documents at issue in this case, Plaintiff hired AES to prepare a NEPA document for a different project. Adams Dec. ¶ 11, Ex. 9. If Plaintiff intends to prove that AES lacked the objectivity necessary to prepare a proper NEPA analysis, it must first explain why (presumably knowing this "fact") it decided to hire AES for its own NEPA projects.

IV. SECOND *WINTER* ELEMENT: PLAINTIFF WILL NOT SUFFER IMMEDIATE, IRREPARABLE HARM

The Ninth Circuit has made it quite clear that Plaintiff must demonstrate "that irreparable harm is ***likely***, not just possible" in the absence of a TRO. *Center for Food Safety v. Vilsack*, 636 F.3d 1166, 1172 (9th Cir. 2011) citing *Alliance for the Wild Rockies*, 632 F.3d at 1131 (emphasis in original). Because a TRO is "an emergency measure, intended to preserve the status quo pending a fuller hearing on the injunctive relief requested," Plaintiff must also demonstrate that irreparable is "clearly immediate." *See California Natural Products*, 2012 U.S. Dist. LEXIS 35373 at *2-3; Fed. R. Civ. Proc. 65(b)(1).

Plaintiff has not come close to meeting that burden. It claims that a TRO is necessary to prevent BIA's February 1 acquisition of the Yuba Site in trust for the Tribe. But Plaintiff's injury allegations center something else entirely: The potential economic impacts of the Tribe's proposal to operate a casino on the Yuba Site. None of those economic impacts will occur unless and until the Tribe is actually operating a casino on the Yuba Site. There is no possibility that the Tribe's proposed casino will begin operation prior to the March 20, 2013 hearing on Plaintiff's preliminary injunction motion. There is not even any possibility that construction of the Tribe's proposed casino will begin prior to March 20. Moreover, the act of taking the Yuba Site into trust for the Tribe does not authorize operation of the proposed casino; additional regulatory steps[7] and preparatory work[8] are required. In short, Plaintiff has utterly failed to

[7] For example: ratification of a gaming compact by the California Legislature, approval of the ratified compact by the Secretary of the Interior, approval of a facility license by the National Indian Gaming Commission. *See* Nelson Dec. at ¶¶ 13-14; 25 C.F.R. part 559.

demonstrate the "clearly immediate" harm necessary to justify a TRO. *See California Natural Products*, 2012 U.S. Dist. LEXIS 35373 at *2-3 ("clearly immediate" harm); *see also Center for Food Safety*, 636 F.3d at 1174 (reversing grant of preliminary injunction where "allegations of harm hinge entirely on ***later*** actions" and "future" decisions) (emphasis original).

It is also worth noting that Plaintiff's alleged injuries are monetary, not environmental. *See* Pl. Mem. at 15-20 (decreased revenues, increased employee training costs, impacts on various state funds). As such, they are not "irreparable" and do not justify preliminary injunctive relief. Plaintiff has tried to sidestep this issue by citing environmental case law. *See, e.g.*, Pl. Mem. at 3 (arguing that environmental injury is, by its nature, irreparable). But the relevant question is whether Plaintiff's alleged injuries (not the cases cited in Plaintiff's brief) involve irreplaceable environmental resources. As explained above, they do not. *See, e.g.*, Pl. Mem. at 19 (list of injuries fails to mention environmental damage).

V. THIRD *WINTER* ELEMENT: THE BALANCE OF EQUITIES WEIGHS AGAINST A TRO

To obtain injunctive relief, Plaintiff must demonstrate that "the balance of the equities tips in [its] favor." *Winter*, 555 U.S. at 20. It cannot do so. As explained below, (a) the equities do not favor an injunction protecting Plaintiff's casino business from competition, (b) injunctive relief would inequitably delay the Tribe , and (c) Plaintiff's decision to file an unnecessary motion for a temporary restraining order is itself inequitable.

A. The Equities Do Not Favor An Injunction Protecting Plaintiff's Existing Casino Business From Competition

Plaintiff is an Indian tribe which is fortunate enough to operate an existing casino in Colusa County. *See* Pl. Mem. at 15-16. Apparently, Plaintiff enjoyed a near-monopoly on that market for a long time. *Id*. at 16. More recently, however, Plaintiff has faced competitive pressure from other casinos. *Id*. at 16-17. Plaintiff fears that if the Tribe develops a casino, competition will become still more intense. *Id*. at 17-20. In essence, Plaintiff seeks to use federal environmental and Indian law to protect its business from further competition.

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[8] For example: selection of an architect, development and approval of final architectural plans, selection of a general contractor, and project financing. *See* Nelson Dec. at ¶ 13.

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In that respect, Plaintiff's position is fundamentally inequitable. The Tribe, through no fault of its own, has been isolated, impoverished, and deprived of economic opportunities for decades. Hoping to regain a tiny fraction of its aboriginal lands, it patiently waited for more than ten years while BIA and the Department of the Interior considered whether to acquire the Yuba Site in trust (a period marked by the passing of many tribal elders). It has never had the benefit of the same land base or economic opportunities enjoyed by Plaintiff. But while the two tribes have different histories, Congress has declared that they are both entitled to economic self-determination, they are both entitled to exercise sovereignty over trust land, and they are both entitled to participate in the gaming business. 25 U.S.C. § 2701 (Congressional findings regarding IGRA); 25 U.S.C. § 465 (trust acquisitions under IRA). That being so, there is no equitable basis for the Court to protect Plaintiff's business at the expense of the Tribe's interests. Indeed, such an outcome would be profoundly inequitable.

B. "Project Momentum" Does Not Provide An Equitable Basis For Issuing An Injunction

Plaintiff contends that the balance of equities favors a TRO because "[o]nce 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." Pl. Mem. at 21. This statement seems to confirm that Plaintiff is not threatened by any imminent, irreparable harm — instead, it is concerned about future developments. Moreover, the Supreme Court has clearly and firmly stated that "project momentum" does not provide grounds for injunctive relief. *See Monsanto*, 130 S.Ct. at 2759 ("Nor can the District Court's injunction be justified as a prophylactic measure…"); *see also Center for Food Safety*, 636 F.3d at 1174 (same). For both reasons, Plaintiff's fear of changing "facts on the ground" cannot justify a TRO.

C. Plaintiff's Insistence On Filing An Unnecessary Motion For Temporary Restraining Order Is Inequitable In And Of Itself

Plaintiff seeks a TRO preventing BIA from taking the Yuba Site into trust for the Tribe. But, as explained above, it has not provided any evidence that the trust acquisition will cause immediate, irreparable injury. Instead, its allegations of harm are entirely focused on the

potential economic impacts associated with the Tribe's operation of a casino project — a project that is nowhere close to breaking ground, let alone commencing operation. *See* Nelson Dec. at ¶¶ 13-14 (casino development schedule).

Plaintiff's failure to present evidence of immediate, irreparable harm is particularly egregious because Plaintiff ***knew***, prior to filing its TRO Motion, that the Tribe's proposed casino will not be built or operated prior to the March 20, 2013 hearing on Plaintiff's request for a preliminary injunction. *See* Declaration of Glenda Nelson in Support of Motion to Intervene (ECF No. 13-3) at 4-5 (filed on January 3, 2011 and simultaneously served electronically on Plaintiff's counsel). More than a week prior to the TRO Motion, the Tribe's chairwoman submitted a sworn affidavit clearly stating that (1) even if the Yuba Site is acquired in trust for the Tribe on February 1 (as planned), the Tribe will not commence construction of its proposed casino project for a minimum of 120 days and (2) the Tribe will provide a minimum of 30 days notice prior to commencing construction activities.[9] *Id.* Under these circumstances, Plaintiff could not have had any reasonable expectation that casino-related harm was imminent. And, lacking such an expectation, Plaintiff had no reasonable basis to file its January 11 TRO motion. Such gamesmanship is fundamentally inequitable, and should not be rewarded with injunctive relief.

VI. FOURTH *WINTER* ELEMENT: A TRO WOULD NOT SERVE THE PUBLIC INTEREST

Plaintiff bears the burden of demonstrating that a TRO is in the public interest. *Winter*, 555 U.S. at 20. It has attempted to do so by asserting a general public interest in ensuring the legality of agency action. Pl. Mem. at 21. But Plaintiff has not demonstrated that any laws have been (or will be) broken; as explained above, Plaintiff is not likely to succeed on its claims that the Defendants acted illegally.

In fact, a TRO preventing the Federal Defendants from acquiring the Yuba Site in trust for the Tribe would run counter to the public interest. The trust acquisition implicates the IRA

[9] The Tribe is also willing to provide the Court (and all parties) with advance notice prior to applying for a gaming facility license. *See* 25 C.F.R. part 559.

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and IGRA. Adams Dec. at ¶ 4, ex. 2, p. 1. In enacting those two statutes, Congress declared a strong public interest in promoting tribal self-sufficiency, self-government, and economic development. *See, e.g.*, *Mescalero Apache Tribe*, 411 U.S. at 151-52 (purpose of IRA is tribal economic development and self-government); *City of Roseville*, 348 F.3d at 1030 (purpose of IGRA is "promoting tribal economic development and self-sufficiency"); *Seneca-Cayuga Tribe of Oklahoma v. Oklahoma ex rel. Thompson*, 874 F.2d 709, 716 (10th Cir. 1989) (noting "paramount federal policy that Indians develop independent sources of income and strong self-government"). After a thorough administrative process lasting more than a decade, the Federal Defendants determined that acquiring the Yuba Site in trust for the Tribe would promote the public interests expressed in the IRA and IGRA. Adams Dec. at ¶ 4, ex. 2, p. 1. The Governor of California also concluded that the Tribe's proposal is in the public interest. *Id*. The Federal Defendants and the Governor of California are the public officials to which Congress assigned responsibility for identifying and protecting the public interest on matters involving tribal gaming and land acquisition. *See* 25 U.S.C. § 2710(b)(A); 25 U.S.C. § 465. The Tribe respectfully requests that the Court defer to their judgment. *See Golden Gate Restaurant Ass'n v. City of San Francisco*, 512 F.3d 1112, 1127 (9th Cir. 2008) (deferring to consideration of public interest by the responsible public officials).

Dated: January 18, 2013

Respectfully Submitted,

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