Thomas F. Gede (Cal. Bar. No. 99295)
tom.gede@bingham.com
BINGHAM MCCUTCHEN LLP
980 9th Street, Suite 2140
Sacramento, CA 95814
–AND–
3 Embarcadero Center
San Francisco, CA 94111
Telephone: 415.393.2132
Facsimile: 415.262.9213

Counsel for Plaintiff United Auburn Indian Community of the Auburn Rancheria

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA, *et al.*,

Plaintiffs,

v.

KENNETH LEE SALAZAR, Secretary, U.S. Department of the Interior, *et al.*,

Defendants.

CASE NO. 2:13-CV-00064-JAM-AC

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

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REGULATIONS

I. INTRODUCTION

This case challenges interrelated actions that the Secretary of the Interior has taken in connection with a 40-acre portion of a more than 80-acre parcel in Yuba County, California (the "Yuba Site" or the "Site"). The Secretary has decided to take the Yuba Site into trust for the Enterprise Rancheria of Maidu Indians of California ("Enterprise") and to allow Enterprise to construct and operate a resort and casino there. Many federal laws—including the National Environmental Policy Act ("NEPA"), the Indian Reorganization Act ("IRA"), the Indian Gaming Regulatory Act ("IGRA"), and the Secretary's own regulations—require the Secretary to consult with neighboring Indian tribes before taking land into trust, then seriously examine the impacts of the fee-to-trust conversion and ensuing development on the neighboring tribes. But here, as defects in the process reveal, the Secretary acted arbitrarily and capriciously to reach unlawful foregone conclusions.

The United Auburn Indian Community ("UAIC") is the tribe nearest to the Yuba Site in all senses. The Yuba Site is geographically closer to UAIC's reservation than to Enterprise's and is part of UAIC's service area, as Congress recognized in UAIC's restoration act. *See* Auburn Indian Restoration Act, Pub. L. No. 103-434, 108 Stat. 4533, *codified at* 25 U.S.C. §§ 1300l-1300l-7; Keyser Aff. at ¶ 6 (Exhibit 3 hereto). Development of the Yuba Site will irreparably alter a landscape that is closely tied to UAIC's history and culture, and the operation of a resort and casino on the Site will affect UAIC's nearby resort and casino and threaten the social services UAIC provides to its members.

Despite those interests and impacts, the Secretary failed to consult with UAIC as required. UAIC pressed its concerns nonetheless. The Secretary then inadequately responded to UAIC and, in a Notice of Intent published in the Federal Register on December 3, 2012, announced his decision to take the Yuba Site into trust on or after January 2, 2013, after which construction can begin. Land Acquisitions; Enterprise Rancheria of Maidu Indians of California, 77 Fed. Reg. 71,483, 71,612 (Dec. 3, 2012). The Notice of Intent is itself defective on its face. It erroneously orders the conversion of the entire 82+-acre parcel, not the 40-acre portion that was the subject of Enterprise's application and all subsequent regulatory review.

So UAIC filed this action. The longstanding policy of the Bureau of Indian Affairs ("BIA") is that, when a party files an action for judicial review of a fee-to-trust conversion, the Secretary halts the conversion "until the judicial review process has been exhausted." DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, FEE-TO-TRUST HANDBOOK, VERSION II, at 15 (July 13, 2011), *available at* http://www.bia.gov/cs/groups/xraca/documents/text/idc-002543.pdf. The Secretary has consistently stayed fee-to-trust conversions in recognition of their significance. Once converted to trust, land can be developed immediately and irrevocably; undoing a fee-to-trust conversion is not a remedy courts are simply free to order.

In an extraordinary move, the Secretary has informed UAIC and other plaintiffs that it is henceforth abandoning its voluntary stay policy. On December 18, 2012, the Secretary's attorneys at the Department of Justice stated that:

> Interior is willing to delay taking the land into trust for the Tribe for a temporary period of time in order to allow an orderly process for a district court to adjudicate a motion for a preliminary injunction. In that regard, we are willing to delay the transfer of the land into trust for the Tribe until February 1, 2013, if a plaintiff in a challenge to the land-into-trust decision files a preliminary injunction motion on or before January 2, 2013, and the United States has at least a week following January 2 to oppose the motion. This should give the district court sufficient time to adjudicate requests for preliminary relief.

See Exhibit 1 to Young Decl. (Exhibit 4 hereto) (Letter from Michael Berrigan, Associate Solicitor - Indian Affairs, to Craig Alexander, U.S. Department of Justice, dated December 18, 2012).

According to the Secretary, this policy change is precipitated (though not necessitated) by the Supreme Court's recent decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012). *Patchak* rejected the government's contention that the Quiet Title Act preserves federal sovereign immunity to suits challenging the lawfulness of a fee-to-trust conversion after it has taken place. The Supreme Court held that the Administrative Procedure Act ("APA") waives the government's sovereign immunity to such suits. In deciding only that question of sovereign immunity, *Patchak* said nothing about what remedies are available in an APA challenge to a completed fee-to-trust conversion, and *Patchak* did not purport to upend the settled expectation that fee-to-trust conversions, once completed, are

permanent, or at least difficult to undo. Given the legal flaw at the heart of the Secretary's reasoning for abandoning the self-stay policy, the Court should enforce the policy and order the Secretary to hold off converting the Yuba Site during the pendency of this case. That is the only course that preserves the status quo while the Court resolves the merits of the challenge to the fee-to-trust conversion.

To our knowledge, because of the self-stay policy, no court has had to issue a preliminary injunction under circumstances like these. But while UAIC's request may in that sense be unprecedented, it is necessitated by the Secretary's unprecedented abandonment of the agency's self-stay policy, and the motion itself easily satisfies the familiar requirements for a preliminary injunction. *See Ellipso, Inc. v. Mann*, 480 F.3d 1153, 1157 (D.C. Cir. 2007). UAIC is likely to succeed on the merits of its challenges to the Secretary's actions, and without immediate relief, UAIC likely will suffer irreparable harm—culturally, environmentally, economically, and socioeconomically. That harm far exceeds any harm to the defendants, and an injunction maintaining the status quo is in the public interest. All of these points are developed more fully below.

In addition to requesting a preliminary injunction, UAIC alternatively requests a temporary restraining order. UAIC asks for that alternative relief only to ensure that the Court has as much time as it needs to resolve UAIC's request for a preliminary injunction. By refusing to agree to the briefing schedule the Court offered and by refusing to self-stay beyond February 1, 2013, even if UAIC's request for a preliminary injunction is still pending at that time, the Secretary has imposed a wholly arbitrary deadline on these proceedings that the Court is under no obligation to accept. The Secretary has provided no reason for why February 1 is talismanic or why the government will not wait for the Court to resolve UAIC's preliminary injunction motion in the normal course. UAIC has no objection to a prompt resolution of the preliminary injunction request and has filed as early as possible to provide the Court with the maximum time before the Secretary's artificial February 1 deadline. It requests a temporary restraining order only in the event the Court prefers a more orderly and considered resolution of the preliminary

injunction request without the threat of unilateral agency action that could forever change the legal relationships and rights of the interested parties.

II. LEGAL STANDARD

UAIC seeks preliminary relief for its "usual role . . . to preserve the status quo pending the outcome of litigation." *Dist. 50, United Mine Workers of Am. v. Int'l Union, United Mine Workers of Am.*, 412 F.2d 165, 168 (D.C. Cir. 1969). As explained below, UAIC demonstrates that it "is likely to succeed on the merits, that [it] is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [its] favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted).

III. *PATCHAK* DID NOT CHANGE THE NECESSITY FOR PRELIMINARY RELIEF IN A CASE CHALLENGING A FEE-TO-TRUST CONVERSION.

The fee-to-trust conversion of land is a milestone for an Indian tribe. As soon as a conversion is complete, the tribe may alter the land and construct improvements, such as hotels, resorts and golf courses. With certain regulatory approvals, it may operate Class II gaming on the land, 25 U.S.C. § 2710(b), and may seek approval of a management contract and a tribal-state compact, which would allow more lucrative Class III gaming on the land, 25 U.S.C. § 2710(d)(9). Given the significance and consequences of a fee-to-trust conversion, particularly for neighbors who must endure the brunt of the impacts, and local governments whose tax base shrinks, the Secretary historically has accommodated judicial review by voluntarily refraining from taking title to land until the conclusion of proceedings challenging a fee-to-trust conversion.

Originally, the Secretary linked the self-stay policy with the Quiet Title Act, reasoning that a challenge to the lawfulness of a *completed* fee-to-trust conversion was, in effect, a quiet title action. *See* Bureau of Indian Affairs, Final Rule—Land Acquisitions, 61 Fed. Reg. 18,082 (Apr. 24, 1996) (hereinafter "1996 Rule"). Because the Quiet Title Act expressly retains the United States' sovereign immunity in suits to quiet title to Indian lands, *see* 28 U.S.C. § 2409a(a), the Secretary believed that completing a fee-to-trust conversion before the conclusion of judicial review would strip courts of subject-matter jurisdiction and moot pending challenges. *See* 1996 Rule, 61 Fed. Reg. at 18,082. Thus, to accommodate judicial review and

the legitimate interests of those who oppose fee-to-trust conversions, the Secretary adopted the self-stay policy.

The Secretary now contends that *Patchak* has eroded the foundation of its self-stay policy and made the policy unnecessary. That contention lacks merit. In *Patchak*, the Supreme Court held that a challenge to a fee-to-trust conversion brought by a neighbor without an ownership interest in the land falls within the general waiver of sovereign immunity in the APA, not the narrower waiver in the Quiet Title Act. *See* 132 S. Ct. at 2204–10. The upshot of that holding is that the United States' sovereign immunity to such a challenge is waived whether or not the government takes title to the land. *See id.* at 2210.

The Secretary stretches *Patchak* beyond that holding. According to the Secretary, *Patchak* held that completing a fee-to-trust conversion poses no threat whatsoever to a case challenging the conversion. But there are many ways government action can frustrate judicial review, and *Patchak* narrowly holds that one government action (the act of taking title to land) does not foreclose judicial review in one particular way (by interposing a sovereign immunity bar). The act of taking title to land might defeat a challenge to a fee-to-trust conversion in other ways. It might, for instance, limit the type of relief a court can order—particularly if a tribe, in reliance upon the conversion, develops the land. *Cf. Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) ("The court's decision to grant or deny injunctive or declaratory relief under [the] APA is controlled by principles of equity.") (citations omitted).

What's more, it is not clear that the Secretary believes his over-reading of *Patchak* applies to all plaintiffs. *See* Exhibit 1 to Young. Decl. (Exhibit 4 hereto) ("[T]he district court in a challenge to the Assistant Secretary's decision to take land into trust *likely* would not lose jurisdiction . . . .") (emphasis added) (Letter from Michael Berrigan, Associate Solicitor - Indian Affairs, to Craig Alexander, U.S. Department of Justice, dated December 18, 2012). *Patchak* held that Mr. Patchak had not brought a forbidden quiet title action because he was not an adverse claimant asserting a superior right to land in the government's possession. *See* 132 S. Ct. at 2207. Mr. Patchak was just a concerned neighbor. Like him, UAIC claims no *property right* in the land at issue, but as Congress has affirmed, UAIC does have an *interest* in Yuba

County, including the Yuba Site. *See* Auburn Indian Restoration Act, Pub. L. No. 103-434, 108 Stat. 4533, *codified at* 25 U.S.C. §§ 1300l-1300l-7. Indeed, one of UAIC's contentions in this case is that the fee-to-trust conversion of the Yuba Site is unlawful, arbitrary, and capricious because the Secretary has not adequately accounted for UAIC's congressionally approved interests in the Site. UAIC does not believe that its interests in the Yuba Site make this case a quiet title action, but if they do, then preliminary relief preventing the case from becoming moot by a conversion indisputably is necessary. *See Arrow Transp. Co. v. S. Ry. Co.*, 372 U.S. 658, 671, n.22 (1963).

There are other sound reasons for holding the Secretary to the self-stay policy. As the Supreme Court noted in *Patchak*, parties challenging a fee-to-trust conversion do so to defend their "economic, environmental, and aesthetic" interests. 132 S. Ct. at 2210. Unlike UAIC, some plaintiffs' interests are harmed only by a *tribe's* development of converted land, not by the *government's* completion of the fee-to-trust conversion. (As explained below, UAIC's interests will be irreparably injured by both.) Without recourse to preliminary relief barring the government from completing a fee-to-trust conversion, those other plaintiffs will have no meaningful opportunity to protect their interests, unless they can concoct a claim that a tribe's *lawful* development of converted land can be stopped because the government *unlawfully* took that land into trust beforehand. Because of the Secretary's longstanding self-stay policy, there is no precedent for such a claim.

In the end, the Secretary has not provided UAIC or the Court with adequate assurances that preliminary relief truly is unnecessary. Will the Secretary object to unwinding the fee-to-trust conversion if UAIC prevails on the merits—even if Enterprise has begun to develop the Yuba Site? Will the Secretary argue that UAIC's suit is a quiet title action from which the government will be immune after converting the Yuba Site to trust? If the answer to any of these questions is "Yes," a preliminary injunction must issue.

IV. UAIC WILL SUFFER IRREPARABLE HARM.

UAIC will suffer irreparable socio-economic, aesthetic, cultural, and environmental harm if the Secretary takes Yuba Site into trust for gaming purposes on February 1, 2013. Despite the

several laws directing the Secretary to take account of all interests of neighboring tribes, the Secretary failed to do so adequately here. The interests that UAIC details below, therefore, are within the zone of interests at stake in UAIC's claims on the merits.

A. UAIC Will Suffer Irreparable Harm If The Unique Yuba Site Is Taken Into Trust For Gaming Purposes.

Real property "valued for its uniqueness" is "irreplaceable," and harm to the property "cannot be remedied with monetary damages alone, and is thus irreparable." *Monument Realty LLC v. Wash. Metro. Area Transit Auth*., 540 F. Supp. 2d 66, 75–76, 83 (D.D.C. 2008) (citation omitted) (granting motion for a preliminary injunction); *see also Patriot-BSP City Ctr. II v. U.S. Bank Nat'l Ass'n,* 715 F. Supp. 2d 91, 96, 99 (D.D.C. 2010) (stating that"'[i]t is settled beyond the need for citation . . . that a given piece of property is considered to be unique, and its loss is always an irreparable injury'") (citation omitted) (granting motion for a temporary restraining order).

The Yuba Site is a unique parcel of land, with tangible historic and traditional connections to UAIC. Many of today's UAIC members are descendants of the Nisenan Indians. Guerrero Aff. ¶ 7 (Exhibit 1 hereto). Ancestral and aboriginal Nisenan lands in Yuba and Sutter Counties include those areas along the Sacramento, Bear, Yuba, and Feather Rivers, and the broader Nisenan territory includes all of Yuba County. *Id.* at ¶ 8. In Yuba County, the northwest Nisenan territories spanned from a point more than 10 miles north of Yuba City/Marysville to several miles south, past the town of Nicolaus. *Id.* at ¶ 11. Today, the modern communities of Yuba City, Marysville, Plumas Lake, and Nicolaus represent areas where major Nisenan villages once stood. *Id.* at ¶ 13. For example, Yu'bah is the Nisenan name for which the Yuba River and the present-day town of Yuba City are named. *Id.* at ¶ 14. The Yu'bah village was important and valuable for its location on navigable waters and accessibility to riparian resources. *Id.* The southern, eastern, and western UAIC territorial boundaries are well defined because occupation continued well into colonization. *Id.* at ¶ 12.

On July 18, 1851, the Nisenan chiefs, captains, and headmen, to whom present-day UAIC members have lineal lines, agreed with United States Treaty Commissioner O.M. Wozencraft to

sign the Camp Union treaty near the Yuba River. *Id.* at ¶ 15. Although the Senate refused to ratify the treaty, the treaty provided for the establishment of a reservation that would have included present-day tribal and aboriginal lands near the town of Sheridan, just south of Camp Far West. *Id.* at ¶ 15. Archaeological reports indicate that the entire Feather River Valley district, including Yuba County, is culturally affiliated with the Nisenan, led by Chief Oite. *Id.* at ¶ 22. Elders in the UAIC remember visiting their relatives in Marysville and Yuba City. *Id.* at ¶ 21.

The UAIC, as descendants of the Nisenans, have strong cultural ties to Yuba County. *Id.* at ¶ 9. The UAIC tribal resources inventory database lists more than 22,000 known cultural resources within the tribe's service area, which includes Yuba County. *Id.* at ¶ 27. More than 50 known ethnographic Nisenan villages are located in Yuba and Sutter Counties. Several of these ethnographic villages are near the Yuba Site. *Id.* at ¶ 10. Some of the UAIC's sacred sites in Yuba County that are known to contain human remains include Bauka, Holloh, Lelikian, Yamanhu, Yukulme, and Rio Oso in Yuba County. *Id.* Given the Yuba Site's historic and traditional connection to the UAIC, the Yuba Site is "irreplaceable."

B. UAIC Will Suffer Irreparable Harm Because of Irreparable Environmental And Aesthetic Damage To The Yuba Site.

"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. If such injury is sufficiently likely . . . the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco Prod. Co.* v. *Vill. of Gambell*, 480 U.S. 531, 545 (1987).

Environmental injury likely will result if the Yuba Site is taken into trust for gaming purposes and the casino complex begins to be developed. UAIC members currently gather a variety of natural resources—including elderberries, elderberry wood, basketry materials, and acorns—along Hutchinson Creek and its tributaries, one of which extends onto the Yuba Site. Guerrero Aff. ¶ 29 (Exhibit 1 hereto). Elderberries are used for consumption, particularly in syrups and teas. *Id.* Branches of elderberry wood are used to make clapper sticks, which are used in dedication and termination rituals, songs and dances, and ancestral veneration. *Id.* at ¶

30. The increased air pollution from the proposed casino complex likely will negatively impact the availability of the Hutchinson Creek procurement corridor. *Id.* at ¶ 31.

Further, the project's proposed secondary wastewater treatment and disposal system likely would adversely affect the local water table. Patrons traveling to the casino complex from Sacramento, and as far as San Francisco, would create increased traffic, with a consequent detriment to air quality in the area. The casino project also would create increased noise levels in the area. In addition, the construction of a roadside ditch along Forty Mile Road likely would negatively affect the habitat of the giant garter snake, vernal pool tadpole shrimp, and vernal pool fairy shrimp—all federally threatened species. *See* Exhibit 12 to Young Decl. (Exhibit 4 hereto) (U.S. Department of Interior, Bureau of Indian Affairs, 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 (Nov. 21, 2012) ("Part 151 ROD") at Attachment 2 §§ 4.3, 4.4, 4.5, 4.10). Upon taking the Yuba Site into trust, it will be developed for gaming purposes, and these irreparable environmental harms likely will occur.

UAIC also will suffer irreparable harm because the proposed casino development will irreparably alter the aesthetics of UAIC's viewshed. If Enterprise is permitted to construct a casino on the Yuba Site, the UAIC's viewshed will be compromised. Guerrero Aff. ¶ 35 (Exhibit 1 hereto). A viewshed is a natural environment that is visible from a fixed vantage point in a cultural landscape. *Id.* at ¶ 34. Currently, the UAIC's viewshed from its Sheridan Trust Lands, which are located east of the Yuba Site, includes a direct line of sight to the Sutter Buttes. *Id.* The construction of the gaming complex would create light pollution and interfere with the UAIC's viewshed of the Sutter Buttes. *Id.* at ¶ 35. At night, tribal members would no longer be able to see the outline of the Sutter Buttes in the night sky under full moon from the Sheridan Property. *Id.* Members of the UAIC will suffer injury to their "aesthetic interest" in "viewing" their traditional viewshed. *Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 149 (D.D.C. 1993). "Such injury is not compensable in money damages because, while the injury threatened to [UAIC's] aesthetic interests would be palpable and concrete, they are not ownership interests in property susceptible to monetary valuation." *Id.* at 151; *see also Fund for Animals v. Norton*,

281 F. Supp. 2d 209, 220–22, 238 (D.D.C. 2003) (granting a preliminary injunction where plaintiffs would suffer "substantial irreparable harm" to their "aesthetic" interests in their "ability to view, interact with, study, and appreciate mute swans").

C. UAIC Will Suffer Irreparable Harm Because Of The Socio-Economic And Cultural Impacts That Will Result From Taking The Yuba Site Into Trust For Gaming Purposes.

The proposed casino development will have a substantial, negative financial impact on the UAIC, resulting in significant socio-economic and cultural impacts on UAIC. Because sovereign immunity prevents UAIC from recovering monetary damages from the United States, *Cal. Pharm. Ass'n v. Maxwell-Jolly*, 563 F.3d 847, 851–52 (9th Cir. 2009), *vacated and remanded on other grounds by Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204 (2012), UAIC will suffer immediate irreparable economic harm if the Yuba Site is taken into trust.

1. UAIC will suffer irreparable harm because of the socio-economic impact that will result from taking the Yuba Site into trust for gaming purposes.

UAIC operates the Thunder Valley Casino, which is located at 1200 Athens Avenue, Lincoln, CA 95648—approximately 20 miles from the proposed Yuba Site. Keyser Aff. at ¶ 11 (Exhibit 3 hereto); Wood Aff. ¶ 6 (Exhibit 2 hereto). UAIC built the Thunder Valley Casino within its federally recognized service area (rather than in a more commercially favorable location outside of its territory) and away from areas that would adversely impact cultural or aesthetic resources. Keyser Aff. ¶ 12 (Exhibit 3 hereto); *see also* Guerrero Aff. ¶ 42 (Exhibit 1 hereto). The taking of the Yuba Site into trust for Enterprise is likely to affect Thunder Valley and cause UAIC irreparable financial harm, as UAIC relies on proceeds from the Thunder Valley Casino to support governmental operations and tribal member services. Keyser Aff. at ¶ 13 (Exhibit 3 hereto).

After the Yuba Site is taken into trust, Thunder Valley's lenders are likely to make several significant changes to Thunder Valley's credit facility. Wood Aff. ¶ 7 (Exhibit 2 hereto). Lenders usually view the taking of nearby land into trust as the first step towards the construction of competing casino. *Id.* In light of the fee-to-trust conversion, lenders are likely to increase

Thunder Valley's risk profile, which will lead lenders to increase interest rates on funds loaned to Thunder Valley. *Id.* at ¶ 8. Thunder Valley, then, likely will have to refinance, make new arrangements with lenders, and pay higher interest on borrowed funds. *Id.* at ¶¶ 8, 9. Furthermore, lenders are likely to place more limitations on Thunder Valley's distributions (UAIC's main source of revenue) and earmark more cash flow to reduce debt. *Id.* at ¶ 10.

Clark Wood, the Vice President of Finance for the Thunder Valley Casino, avers that he "expect[s] that lenders will place more limitations on Thunder Valley's distributions and capital spending because of the fee-to-trust conversion of the Yuba Site and the Enterprise project, as those limitations will give lenders more comfort about continued debt repayment from Thunder Valley. I expect some additional limitations to be imposed immediately after the Yuba Site is taken into trust for Enterprise." *Id.* at ¶ 11. Mr. Wood also expects that, after the Yuba Site is taken into trust, Thunder Valley's lenders are likely to implement a cash flow sweep feature upon the next refinance or amendment credit action, thereby preventing Thunder Valley from using excess cash to fund UAIC's government operations. *Id.* at ¶ 12.

The new casino's likely impact on Thunder Valley will in turn negatively impact UAIC's governmental operations and tribal member services. Keyser Aff. ¶ 16 (Exhibit 3 hereto). The UAIC likely will be forced to consider closing several grade levels at the tribal school, ceasing to pay college tuition for members, reducing or eliminating community services that help tribal members overcome disproportionately high levels of substance abuse and other personal problems, closing two tribally operated foster care homes, and eliminating or reducing the UAIC's cultural resources protection program. *Id.* at ¶ 17. UAIC likely also will be forced to consider eliminating or reducing the tribe's personal care program for tribal elders, eliminating nutritional programs, after-school tutoring, and community events for tribal members that are intended to strengthen the traditional cohesiveness and unity of the historic Auburn Rancheria, and eliminating native language and culture classes, adult GED assistance, and financial literacy classes. *Id.* at ¶ 18. The economic impact on UAIC likely would significantly impair UAIC's ability to broaden and diversify its economic base beyond class III gaming. *Id.* at ¶ 19. By decreasing UAIC's revenues from the Thunder Valley Casino, the proposed casino development

will directly impact all UAIC members, each of whom receives a per capita distribution from Thunder Valley. *Id.* at ¶ 20.

2. UAIC will suffer irreparable harm from the cultural impact of taking the Yuba Site into trust for gaming purposes.

Taking the Yuba Site into trust for gaming purposes will irreparably impact UAIC's cultural practices. As Nisenan Indians, UAIC has historic and traditional ties to the Yuba Site. Guerrero Aff. ¶ 9. Enterprise is a Konkow group, not a Nisenan group. *Id.* at ¶ 44. The Konkow ancestral lands were located below the high Sierra, as well as upper Butte and Chico Creeks, just below the snow line. *Id.* at ¶ 45. This made the Konkow a sedentary group, not a migratory group. *Id.* The Nisenan and Konkow Indians had distinct languages and cultures and migrated to the Central Valley separately. *Id.* at ¶ 46. They rarely interacted. *Id.* The Konkow people, who are ancestors of the lineal descendant members of Enterprise, lived on a ridge in Butte County, about 10 miles east of Oroville, near the town of Enterprise. *Id.* at ¶ 47.

Pursuant to its tribal constitution, Enterprise is also comprised of "adopted" tribal members, who were added to the tribal roll to enable them to qualify for federal benefits. *Id.* at ¶ 48. These members are not descendants of the Konkow, yet they are the basis for Enterprise's claim that the tribe has a historic identification with Yuba County. *Id.* As descendants of the Nisenan, UAIC's historical and cultural ties to the Yuba Site are much stronger than any ties that Enterprise may have. *Id.* at ¶ 49.

Taking the Yuba Site into trust for gaming purposes on behalf of Enterprise will have significant cultural impacts on UAIC. For example, within the next two months, through February 2013, new plant cycles will begin, and the UAIC plans to hold ceremonies near the Yuba Site within the viewshed and landscape to encourage new plants to grow, including willows and elderberries. *Id.* at ¶ 32. This is an important aspect of UAIC culture and the transmission of knowledge. *Id.* The first greens generally come out in February, and people who have subsisted on dry food through the winter can once again eat fresh food. *Id.*

The construction of the casino complex on the Yuba Site would interfere with the UAIC's cultural practices, including the new plant cycle ceremonies this spring, and likely

would irreparably harm these important natural resources. *Id.* at ¶ 33. These natural resources would be affected by the infrastructure, traffic, and pollution associated with the Enterprise casino complex at the Yuba Site, and the construction of the casino would severely restrict the UAIC's ability to gather and collect natural resources there. *Id.*

Additionally, as discussed above, the construction of the proposed casino complex on the Yuba Site would irreparably harm the UAIC's view of the Sutter Buttes. The Sutter Buttes are known for their spiritual value among members of the UAIC. *Id.* at ¶ 36. When an individual passes away, his spirit travels to the Sutter Buttes. *Id.* There, his spirit passes from this world into the next. *Id.* A set of rocks located in the Sutter Buttes is referred to as a "roundhouse" or "ceremonial house" because the rocks resemble houses in UAIC villages. *Id.* at ¶ 37. These natural "roundhouses" have metaphorical and political significance for all of the tribes around the Buttes. *Id.*

UAIC schoolchildren take annual field trips to visit and view the Sutter Buttes, which are located approximately 45 minutes from their school. *Id.* at ¶ 38. The schoolchildren are currently planning to visit the Sutter Buttes next semester, in spring 2013. *Id.* This annual trip is considered a rite of passage for UAIC children. *Id.* At the Sutter Buttes, the children learn about myths associated with their culture and experience the view of and from the Buttes up close. *Id.* at ¶ 39. UAIC members also attend cultural dances with a view of the Sutter Buttes. *Id.* The construction of a casino on the Yuba Site would forever alter this view and the myths and cultural practices associated with them. *Id.* at ¶¶ 40–41. If the Yuba Site is constructed, the Konkow cultural traditions of Enterprise will permanently consume this significant Nisenan historical district and its sacred places. *Id.* at ¶ 43.

D. UAIC Will Suffer Irreparable Harm Because Of Procedural Violations Of NEPA And Its Implementing Regulations And IGRA And Its Implementing Regulations.

UAIC will suffer irreparable procedural injury from the Defendants' failure to comply with NEPA and its implementing regulations and IGRA and its implementing regulations. "[T]he combination of the injury suffered by [UAIC] due to federal defendants' procedural failure to comply with NEPA" and IGRA, and the concrete environmental, aesthetic, socio-

economic, and cultural injuries that will result from the taking of the Yuba Site into trust for gaming purposes, "demonstrat[es] the presence of an irreparable harm should the court not grant injunctive relief." *Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 14 (D.D.C. 1998).

As discussed below, Defendants violated NEPA, 40 C.F.R. §§ 1500 *et seq.*, by failing to take a "hard look" at the impacts of taking the land into trust for gaming purposes, failing to consider reasonable alternatives, and violating 40 C.F.R. § 1506.5. Defendants violated IGRA, 25 C.F.R. Part 151, and 25 C.F.R. Part 292 by failing adequately to consider the need of Enterprise for additional land for gaming, and by failing to solicit and adequately consider UAIC's input into the proposed taking of the Yuba Site into trust for gaming purposes. Both NEPA and IGRA, with their respective implementing regulations, are intended "to insure that Federal decisionmakers give adequate consideration to the . . . effects of their actions and to involve the public in such consideration. The harm of [Defendants'] failure to do so is also a harm that is serious—and obviously irreparable once the contemplated action becomes a *fait accompli*." *Fund for Animals v. Espy*, 814 F. Supp. 142, 151 n.10 (D.D.C. 1993). Without emergency relief, there will be no opportunity for Defendants to cure their flawed decisions before the environmental, aesthetic, socio-economic, and cultural damage has been done.

V. UAIC IS LIKELY TO SUCCEED ON THE MERITS.

UAIC is likely to succeed on the merits of its claims. Defendants have violated NEPA, IGRA, and the APA. Under the APA, a reviewing court must "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," as well as agency action that was taken "without observance of procedure required by law." 5 U.S.C. § 706(2).

A. Defendants Violated The National Environmental Policy Act.

Defendants violated NEPA and its implementing regulations, 40 C.F.R. §§ 1500 *et seq.*, when they certified the Final Environmental Impact Statement ("FEIS"). U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, FINAL ENVIRONMENTAL IMPACT STATEMENT: ENTERPRISE RANCHERIA GAMING FACILITY AND HOTEL FEE-TO-TRUST ACQUISITION (May 2009),

available at http://www.enterpriseeis.com/documents/final_eis/report.htm (hereinafter "FEIS"). Defendants issued the final Record of Decision ("ROD") approving the proposed casino development pursuant to 25 C.F.R. Part 292 and the final ROD approving the taking of land in trust pursuant to 25 C.F.R. Part 151 (together, the "RODs"), approved the fee-to-trust transfer, and made a Secretarial Determination of gaming eligibility on the basis of a flawed and inadequate FEIS. *See* Exhibit 11 to Young Decl. (Exhibit 4 hereto) (U.S. Department of Interior, Bureau of Indian Affairs, Record of Decision: Secretarial Determination Pursuant to the Indian Gaming Regulatory Act for the 40-acre Yuba County site in Yuba County, California, for the Enterprise Rancheria (Sept. 1, 2011) ("Part 292 ROD"); Exhibit 12 to Young Decl. (Part 151 ROD).

1. Defendants failed to take a "hard look."

Defendants failed to take a "hard look" at the impacts of the proposed action, as 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). "[T]he critical judicial task is 'to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious' . . . Since NEPA requires the agency to 'take a "hard look" at the environmental consequences before taking a major action' . . . the judiciary must see that this legal duty is fulfilled." *Found. on Econ. Trends v. Heckler*, 756 F.2d 143, 151 (D.C. Cir. 1985) (citations omitted).

Defendants failed to take a "hard look" at the ways in which the proposed casino project approved as part of the RODs will negatively impact the UAIC's cultural, socio-economic, and historic ties to the Yuba Site. Guerrero Aff. ¶¶ 27–41 (Exhibit 1 hereto). Although the Department of Interior ("DOI") has represented that it "will not approve a tribal application for

off-reservation gaming where a nearby Indian tribe demonstrates that it is likely to suffer a detrimental impact as a result," the irreparable injuries of UAIC discussed at length above were barely acknowledged by Defendants in the decisionmaking process. Exhibit 11 to Young Decl. (Part 292 ROD at 64). For example, although the FEIS purports to analyze the potential economic impacts on the casinos (*i.e.*, potential loss in revenues), it concludes, with no support, that the reduced revenues "would not be directed at any one Tribe," and "a disproportionate and adverse effect to Tribes would not occur (although a nominal impact would occur) and a less than significant impact would result." FEIS at 4.7-26. The BIA relied on a study prepared by Analytical Environmental Services ("AES") that expected that the Thunder Valley Casino would "experience the greatest levels of decline" but then simply states that, given its overall revenues, this loss would have a "nominal impact." FEIS App'x M at 129. BIA appears to simply have adopted this finding. FEIS at i, 6-1 to 6-2. This failure to look under the covers violated the "hard look" requirements of NEPA.

The BIA's failure to take a "hard look" in the FEIS is reflected in the dismissive treatment of the UAIC's concerns in the RODs. The Part 292 ROD includes a truncated list of concerns raised by the UAIC in a footnote, but essentially ignores these concerns. Exhibit 11 to Young Decl. (Part 292 ROD at 49 n.5). The RODs do not include adequate analysis of UAIC's concerns or adequately address the negative impacts to the UAIC. *See id.* at 49 n.5, 57, 64; Exhibit 12 to Young Decl. (Part 151 ROD at Attachment 2). Defendants improperly minimized the negative side-effects of the proposal on the UAIC. *See Kempthorne*, 457 F.3d at 975.

The regulatory and cumulative impacts of removing significant acreage from the sovereign control of state and local governments were not adequately addressed by Defendants. The inadequate FEIS also failed to provide support for the RODs' conclusion that transferring the Yuba Site into trust is necessary to satisfy Enterprise's goal of self-determination and other similar needs. For example, the Defendants inadequately considered that Enterprise already has existing ancestral lands in another part of California in trust on which gaming can occur. FEIS at § 2.2.4; *see also* Exhibit 11 to Young Decl. (Part 292 ROD at 3–10); Exhibit 12 to Young Decl. (Part 151 ROD at 3–10, 44). Defendants also failed adequately to assess the impact that this

determination will have on local communities, as required by 25 C.F.R. § 151.10(e) and the NEPA analysis. Exhibit 12 to Young Decl. (Part 151 ROD at 14–17, 45).

2. Defendants failed adequately to consider reasonable alternatives.

Defendants failed adequately to consider alternatives to taking the Yuba Site into trust for gaming purposes, as required by 40 C.F.R. § 1502.14. FEIS at §§ 2.2.2–2.2.5; *see also* Exhibit 11 to Young Decl. (Part 292 ROD at 3–10); Exhibit 12 to Young Decl. (Part 151 ROD at 3–10). The alternatives identified in the FEIS were biased to steer the decisionmaker to development of the Yuba Site, as the only viable alternative for the stated purpose and need. Defendants were required to "[r]igorously explore and objectively evaluate all reasonable alternatives . . . ." 40 C.F.R. § 1502.14. Yet the Defendants failed adequately to consider even whether Enterprise could develop gaming on the land it already possesses. FEIS at § 2.2.4.

The Butte Site considered was not a reasonable alternative because it would not improve the socioeconomic status of Enterprise, establish self-sufficiency for Enterprise, or provide employment opportunities for Enterprise or the surrounding community. FEIS at § 2.2.4; *see also* Exhibit 11 to Young Decl. (Part 292 ROD at 9–10); Exhibit 12 to Young Decl. (Part 151 ROD at 9–10). As stated in the FEIS, "this alternative would be very difficult for the Tribe to finance and even if financing was obtained would result in minimal to no profits, especially in the near term." FEIS at § 2.2.4 at 2-47. While the FEIS may appear to evaluate fairly an alternative to the Yuba Site, in fact, the FEIS failed to consider a reasonable off-site alternative. Additionally, certain alternatives were dismissed prematurely for issues which may be overcome or mitigated. *Id.* at § 2.3. Indeed, Enterprise appears to have chosen the alternative sites. *Id.* at § 2.3 at 2-45. The ability to obtain financing appeared to be a determinative factor. *Id.* at § 2.3. BIA merely asserted that these sites did not meet the purpose and need and/or did not reduce the environmental impacts, but the failure to adequately consider the impacts on surrounding communities renders these determinations arbitrary. *See id.* at § 2.3 at 2-46; Exhibit 12 to Young Decl. (Part 151 ROD at Attachment 2, Response to FEIS Comments at 4).

3. Plaintiff is likely to succeed on the merits of its claim that the FEIS was prepared in violation of conflict of interest provisions of 40 C.F.R. § 1506.5.

The purpose of NEPA is to ensure informed and objective decision-making by federal agencies. 42 U.S.C. § 4332. Thus, although NEPA allows for delegation of preparation of an Environmental Impact Statement ("EIS") to a third-party, the federal agency is ultimately responsible for the content of the EIS and is obligated to review and independently evaluate the EIS. 40 C.F.R. § 1506.5(c). The "evil" an agency must ensure against is "the preparation of the EIS by a party . . . with an individual 'axe to grind', i.e., an interest in seeing the project accepted and completed in a specific manner as proposed. Authorship by such a biased party might prevent the fair and impartial evaluation of a project envisioned by NEPA." *NRDC, Inc. v. Callaway*, 524 F.2d 79, 87 (2d Cir. 1975). That is exactly what occurred here—the FEIS was prepared by a consultant (AES) selected by and under the control of the project proponent (Enterprise), whose sole objective was to seek rapid approval of the transfer to develop a casino.

Although Enterprise is listed as a "cooperating agency" for purposes of NEPA, 40 C.F.R. § 1508.5, Council on Environmental Quality ("CEQ") regulations make clear that its role must be limited to "avoid any conflict of interest," 40 C.F.R. § 1506.5(c). Enterprise's participation in the process and control over AES, however, create a conflict of interest and violated NEPA. Moreover, there is no indication that the BIA independently investigated AES's potential conflict of interest; rather, BIA appears to have relied entirely on AES's self-serving assertion that none existed. *See* Exhibit 2 to Young Decl. at § 3.0 (Exhibit 4 hereto) (Professional Services Third Party Agreement, effective January 6, 2005) (hereinafter "Third-Party Agreement"). But without any record evidence to support that assertion, BIA's reliance upon it was arbitrary and capricious.

a. Enterprise's control over AES in the preparation of the FEIS violated NEPA.

NEPA does not prohibit an agency from using a third-party contractor to prepare an EIS on its behalf. *See* 40 C.F.R. § 1506.5(c). CEQ regulations provide that the agency must select the contractor, and such selection may be done in concert with the cooperating agency. *Id.* Here, notwithstanding the apparent conflict with the applicable CEQ regulations, Enterprise was

designated a cooperating agency. FEIS at i (Executive Summary). That delegation required BIA to avoid all conflicts of interest. 43 C.F.R. § 46.105. BIA also "remain[ed] responsible for: (a) Preparation and adequacy of the environmental documents; and (b) Independent evaluation of the environmental documents after their completion." *Id.*; *see also* 40 C.F.R. § 1506.5(c). Because the "legal responsibilities for carrying out NEPA's objectives rest solely with [BIA] . . . if any delegation of work is to occur, it should be arranged to be performed in as objective a manner as possible." Guidance Regarding NEPA Regulations, 48 Fed. Reg. 34,263, 34,266 (July 28, 1983). Such was not the case here.

The purpose of transferring the 40-acre parcel in Yuba County into federal trust status is solely for the construction of Enterprise's proposed casino and hotel project. Notice of Intent To Prepare an Environmental Impact Statement for the Proposed Enterprise Rancheria Fee-to-Trust Transfer and Casino-Hotel Project, Yuba County, CA, 70 Fed. Reg. 29,363 (May 20, 2005). The purpose and need of the action is to allow Enterprise to "conduct Class III gaming," and the acquisition of the site into federal trust land status would "greatly enhance the Tribe's economic development potential, which is the paramount objective of the Tribe." FEIS at 1-8. The Tribe is to team with a casino management company to develop and manage the hotel and casino resort. *Id*. Assuming, arguendo, that Enterprise could be a cooperating agency with respect to a fee-to-trust transfer that it has proposed, BIA itself had to choose the third-party consultant preparing the EIS.

Here, AES was initially retained by Enterprise in 2002 to conduct an environmental assessment for the project. Exhibit 3 to Young Decl. (Exhibit 4 hereto) (Consulting Services Agreement by and between Analytical Environmental Services and Enterprise Rancheria, entered Aug. 12, 2002). The assessment was prepared for the tribe and submitted to BIA. Exhibit 4 to Young Decl. at 7, 10 (Exhibit 4 hereto) (Estom Yumeka Maidu Tribe Enterprise Rancheria Fee to Trust Application, dated Aug. 13, 2002). Yet in response to comments in the FEIS, BIA indicated that it selected AES. Exhibit 12 to Young Decl. (Part 151 ROD at Attachment 2, Response to FEIS Comments at 13). The contract between Enterprise and AES apparently then evolved into a contract to prepare an EIS, which reflects that Enterprise either

solely selected the third-party contractor or at least significantly influenced the decision. *See* Exhibit 2 to Young Decl. at § 1.0 (Exhibit 4 hereto) ("To expedite the preparation of the EIS and other required project approvals, the Tribe and the BIA have agreed to use third-party consultants to prepare the technical studies, the EIS, and other project-related analyses and documents."); *see also* Exhibit 5 to Young Decl. at 1–2 (Exhibit 4 hereto) (e-mail from Chad Broussard, AES, to John Maier, Alan Waskin, et al., regarding Enterprise EIS Contracting, dated Oct. 13, 2005) ("we of course have now shifted to an EIS. We will send the contract modification out . . . ."); Exhibit 6 to Young Decl. (Exhibit 4 hereto) (facsimile cover transmittal from David Zweig, AES, to John P. Rydzik, BIA, dated Jan. 10, 2005) (purportedly attaching the EIS "3-party agreement" already signed by Enterprise and AES and requesting BIA's signature). But, under the CEQ regulations, BIA should have "*solely*" selected the contractor "to avoid any conflict of interest." 40 C.F.R. § 1506.5(c) (emphasis added); *see also Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 202 (D.C. Cir. 1991) (finding Federal Aviation Administration's failure to select the consultant that prepared EIS in violation of CEQ regulations).

Given its financial interest in the casino project and its role as the proponent of the federal action, Enterprise had a conflict of interest. The Third-Party Agreement recognizes the potential conflict, but essentially left it up to AES to determine if and when a conflict arises. Exhibit 2 to Young Decl. at § 5.0 (Exhibit 4 hereto). This raises a substantial question whether AES could objectively review and assess negative environmental impacts while avoiding a conflict. Under the circumstances, BIA was required to select the third-party contractor, but instead abdicated that role to Enterprise.

Enterprise's participation in selection of AES was not trivial and raises substantial questions about the objectivity of the entire EIS process. The ultimate question for the Court is whether the breach compromised the objectivity and integrity of the NEPA process. *See Citizens Against Burlington*, 938 F.2d at 202. The control Enterprise retained shows that BIA had insufficient oversight. For example, the tribe was to review all work performed by AES and had authority to unilaterally initiate changes to the scope of work in preparation of the EIS and the

general special conditions under the Third-Party Agreement. *See* Exhibit 2 to Young Decl. at §§ 7.0, 8.0 (Exhibit 4 hereto). In addition, AES held monthly meetings with Enterprise's counsel to discuss strategy for "pushing the NOA through." Exhibit 7 to Young Decl. (Exhibit 4 hereto) (e-mail from Chad Broussard, AES, to Tribe counsel and members, dated Sept. 14, 2007); *see also* Exhibit 10 to Young Decl. (Exhibit 4 hereto) (e-mail from Chad Broussard, AES, to Tribe counsel and members, dated April. 16, 2007) (suggesting monthly meeting to go over comments and discuss changes).

There are several substantive deficiencies with the EIS, indicating that the selection of AES prejudiced the agency's review of the proposed project. *See* Section V(A)(1)–(2), *supra*. The limited range of alternatives and myopic focus on the Yuba County location evidences bias in favor of Enterprise's preferred location. *See* Section V(A)(2), *supra*. Comparing the consideration of the benefits for Enterprise to the short shrift given to the potential impacts on nearby tribes further evidences the bias. *See* Section V(A)(1), *supra*. BIA failed to meet its obligations under NEPA, and there is a strong indication that the outcome in this case was preordained. *See Sierra Club v. Sigler*, 695 F.2d 957, 962 n.3 (5th Cir. 1983). As a result of Enterprise's role as a cooperating agency, its selection of its contractor AES to prepare the EIS, and its control over AES and the preparation of the EIS, UAIC is likely to succeed on the merits of its claim that BIA violated 40 C.F.R. § 1506.5(c), and that the EIS fails to comply with NEPA.

b. The delegation of authority to prepare the EIS to a third party without ensuring against a conflict of interest was arbitrary and capricious.

An agency action is arbitrary and capricious if, among other things, the agency "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). BIA failed to consider the potential conflicts of interest in allowing AES to complete the EIS. BIA's determination was arbitrary and capricious because it failed to ensure the integrity of the NEPA process.

As discussed above, the relationship between AES and Enterprise raises substantial questions as to the objectivity of AES. When an agency delegates preparation of an EIS to a third-party contractor, the contractor is required to "execute a disclosure statement prepared by the lead agency, or where appropriate the cooperating agency, specifying that they have no financial or other interest in the outcome of the project." 40 C.F.R. § 1506.5(c). "The purpose of the disclosure statement requirement is to avoid situations where the consultant has an interest in the outcome of the proposal . . . This requirement also serves to assure the public that the analysis in the environmental impact statement has been prepared free of subjective, self-serving research and analysis." 48 Fed. Reg. at 34,266; *see also Sierra Club v. Marsh*, 714 F. Supp. 539, 553 (D. Me. 1989) ("The conflict of interest regulation is intended to preserve the 'objectivity and integrity of the NEPA process.'") (quoting Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18031 (Mar. 23, 1981)). BIA's failure to ensure against a conflict of interest raises substantial questions as to the objectivity of the EIS and whether it represents the independent judgment of the BIA. *See Sierra Club*, 695 F.2d at 963 n.3.

The only record evidence that AES has no conflict of interest with respect to the BIA's decision is a provision in the Third-Party Agreement that simply states: "AES represents that AES has no financial interest in the results of the environmental analysis or the BIA's decision regarding the approvals for the project." Exhibit 2 to Young Decl. at § 3.0 (Exhibit 4 hereto). There is no evidence that BIA undertook any investigation of or even questioned this self-serving statement. For example, it is apparent that BIA did not even review the consulting agreement between Enterprise and AES to determine whether it included any guarantees or other financial incentives that would disqualify it from being a third-party contractor. The Third-Party Agreement simply references a "Consulting Contract" between the Tribe and AES that outlines "payment of all fees" to AES. *Id.* at § 2.0. The Third-Party Agreement provides only that, "[s]hould the BIA request it, the Tribe will provide copies of the Consulting Contract, all invoices, and status reports to the BIA's representative with reasonable assurances of confidentiality from the BIA." *Id.* There is no evidence that BIA ever received or reviewed this

contract. It is unclear how BIA can make any assessment as to the truthfulness of the disclosure statement without even reviewing the terms of the agreement between Enterprise—the project proponent—and AES. Indeed, the disclosure statement was not even made "under oath," as required by BIA's NEPA handbook. *See* U.S. DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS, INDIAN AFFAIRS NATIONAL ENVIRONMENTAL POLICY ACT (NEPA) GUIDEBOOK, 59 IAM 3-H, at App'x 11 (Aug. 2012), *available at* http://www.bia.gov/cs/groups/xraca/documents/text/idc009157.pdf.

Moreover, it is now abundantly clear that BIA did not consider numerous documents that should have been part of the administrative record. Records of contractual work, among other things, are required to be part of the administrative record. *See id*. at 44; *see also Burka v. U.S. Dept. of Health and Human Servs.*, 87 F.3d 508, 515 (D.C. Cir. 1996) (finding contractor's records agency records). Yet, in this case, the public has had to resort to filing a lawsuit to obtain records addressing the third-party contractor selection process and the preparation and review of the EIS. *See* Complaint, *Schmit v. Salazar*, Case No. 1:12-cv-00784, Docket No. 1 (D.D.C. May 15, 2012). BIA, however, contrary to established case law, indicated in its initial response to a Freedom of Information Act request that it "lacks control and custody over the documents in the possession of AES." Exhibit 8 to Young Decl. at 1 (Exhibit 4 hereto) (letter from Regional Director of BIA to Cheryl Schmit (Stand Up for California), dated Dec, 20, 2011). After an administrative appeal and the filing of a judicial complaint, BIA finally sought documents relating to the AES contract with Enterprise in September of 2012 from AES, which initially refused to provide any of the requested documents. Exhibit 9 to Young Decl. (Exhibit 4 hereto) (letter from Regional Director of BIA to David Zweig (AES), dated Sept. 5, 2012). This is three years after the FEIS was issued. In late 2012, BIA produced some documents that it had obtained from AES's possession. Still, none of the documents provided in response to the lawsuit to date reflect any consideration by BIA of AES's potential conflicts in this case.

BIA's failure to evaluate and ensure against a conflict of interest, other than a self-serving statement by AES to the contrary, was arbitrary and capricious. The representation by AES is "ipse dixit" and insufficient to "reassure" the Court and the public that no conflict exists.

Citizens Against Burlington, 938 F.2d at 202. Thus, the record, or lack thereof, evidences that BIA wholly failed to ensure against contracting with a third party that may have "an axe to grind." Under these circumstances, its decision to allow AES to prepare the EIS and its reliance on the EIS was arbitrary and capricious.

B. Defendants Violated IGRA, 25 C.F.R. Part 151, And 25 C.F.R. Part 292.

In order to acquire land in trust for the Enterprise Rancheria, Defendants were required to comply with the regulations set forth in 25 C.F.R. Part 151. Defendants' failures to comply included failure adequately to consider the need of Enterprise "for additional land" and "[t]he purposes for which the land will be used." 25 C.F.R. §§ 151.10, 151.11; *see* Exhibit 11 to Young Decl. (Part 292 ROD at 2–3); Exhibit 12 to Young Decl. (Part 151 ROD at 2).

In order for Enterprise to conduct gaming on the Yuba Site, IGRA requires that the Secretary make a Secretarial Determination of gaming eligibility. 25 U.S.C. §§ 2701 *et seq.* To make such a determination, the Secretary must determine both that (1) a gaming establishment would be in the best interest of Enterprise and its members, and (2) that it would not be detrimental to the surrounding community. 25 U.S.C. § 2719(b)(1)(A); 25 C.F.R. § 292.2; 25 C.F.R. Part 292 Subpart C. In order to make the determination that gaming "would not be detrimental to the surrounding community," Defendants were first required to comply with 25 C.F.R. Part 292. But Defendants failed to consult with neighboring tribes and consider comments from officials, citizens, and neighboring tribes. 25 C.F.R. §§ 292.13, 292.20. For example, the DOI and BIA failed to solicit UAIC's input, even though UAIC is a "nearby Indian tribe[] . . . ." 25 C.F.R. §§ 292.2, 292.13(b), 292.19, 292.20. Furthermore, once UAIC learned that the BIA had solicited comments on Enterprise's application to have the Yuba Site taken into trust, the DOI and BIA gave short shrift to UAIC's concerns and basically listed UAIC's comments without adequate response. 25 C.F.R. § 292.20; *see* Exhibit 11 to Young Decl. (Part 292 ROD at 49 n.5, 57, 64).

By failing to comply with the procedures set forth in 25 C.F.R. Part 151 and 25 C.F.R. Part 292, Defendants' actions were arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, in violation of the APA. 5 U.S.C. §§ 702, 704, 706. Furthermore,

the administrative record is insufficient to support the Defendants' approval of the RODs or the Secretarial Determination to take the Yuba Site into trust for gaming purposes.

C. Defendants Violated the Administrative Procedure Act.

Defendants' approval of the RODs and Secretarial Determination to take the land into trust for gaming purposes were arbitrary and capricious, unsupported by the administrative record, arbitrarily reliant on documents developed without required guidance, and otherwise not in accordance with the law.

The Defendants failed even to accurately identify and describe the land to be taken into trust by the Secretary. The Notice of Intent describes the parcel to be taken into trust with an entirely different description than the Enterprise application description above, and appears instead to describe the 80+-acre parcel, described as Parcel "C" from which the 40 acres was to be cleaved, and nonetheless describes it as a 40-acre parcel, known as Parcel "C." The description in the Final Notice states:

> The 40 acres are located approximately 4 miles southeast of the community of Olivehurst, near the intersection of Forty Mile Road and State Route 65 in Yuba County, California, described as: A portion of the East half of Section 22, Township 14 North, Range 4 East, 2 M.D.B.&M., described as follows: Commence at the North quarter corner of said Section 22 and being marked by 2 brass monument stamped LS3341 in a monument well as shown on Record of Survey No. 2000-15 filed in Book 72 of Maps, Page 34, County Records; thence South 0° 28' 11" East along the line dividing said Section 22 into East and West halves 2650.73 feet to a brass monument stamped LS3341 in a monument well as shown on said Record of Survey No. 2000-15 and marking the center of said Section 22; thence North 89° 31' 24" East 65.00 feet to a point on the East right of-way line of Forty Mile Road; thence North 0° 28' 11" West along said East right-of-way line of Forty Mile Road 45.53 feet to a ½ inch rebar with LS3751 marking the point of beginning thence from said point of beginning continue along said East right-of-way line of Forty Mile Road the following courses and distances: North 0° 28' 11" West 1133.70 feet; thence North 5°14' 27" East 50.25 feet; thence North 0° 28' 31" West 750.00 to a ½ inch rebar with LS3751; thence leaving said East right-of-way line of Forty Mile Road run North 88° 00' 51" East 1860.00 feet to a ½ inch with LS3751; thence South 0° 28'11" East 1932.66 feet to a ½ inch rebar with LS3751; thence South 87° 59' 10" West 1865.03 feet to the point of beginning. [¶] Said land is also shown as Parcel "C" on Certificate of Lot Line Adjustment. 2002-07 recorded June 26, 2002, Instrument No. 2002-08119.

Land Acquisitions; Enterprise Rancheria of Maidu Indians of California, 77 Fed. Reg. 71,483, 71,612 (Dec. 3, 2012).

The mismatch of property descriptions between the application, the RODs, and the Final Notice results in the Final Notice providing either a defective description of the wrong parcel or an unexplained substitution of a parcel not adequately considered by the BIA and the Secretary. Indeed, this is further evidence that Defendants failed to take a "hard look," as required by NEPA. This is exacerbated by BIA's failure to consult with the UAIC—which is closer to the subject property and has recognized interests therein. Defendants also failed to provide support for the RODs' conclusion that transferring the Yuba Site into trust is necessary to satisfy Enterprise's goal of self-determination and other similar needs. UAIC likely will succeed on the merits in demonstrating that the Defendants' actions were arbitrary and capricious and otherwise not in accordance with law.

VI. THE BALANCE OF HARDSHIPS FAVORS ENTRY OF A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION.

In this case, the balance of harms weighs heavily in favor of granting an injunction. Defendants cannot establish any harm that counterbalances the potential damage that will occur here. A temporary restraining order and preliminary injunction will simply halt the taking of the land into trust until this Court has time to review the UAIC's claims. On the other hand, if the DOI proceeds to take the Yuba Site into trust for gaming purposes, UAIC will suffer immediate, irreparable environmental, aesthetic, socio-economic, and cultural harms. *See Citizen's Alert Regarding the Env't v. U.S. Dept. of Justice*, 1995 WL 748246, at *11 (D.D.C. Dec. 8, 1995) (finding that local economic concerns did not outweigh "permanent destruction of environmental values that, once lost, may never again be replicated"); *Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 151–52 (D.D.C. 1993) (granting preliminary injunction to prevent environmental harm).

VII. EMERGENCY INJUNCTIVE RELIEF IS IN THE PUBLIC INTEREST.

Because UAIC seeks to compel the Defendants to follow federal laws designed to protect the environment and to ensure that impacts on tribes are solicited and considered, and because the issuance of an emergency injunction would in fact prevent irreparable injury from environmental, aesthetic, socio-economic, and cultural impacts prior to this Court's review, the

granting of this injunction would clearly serve the public interest. *See S. Fork Band Council of W. Shoshone v. U.S. Dept. of the Interior*, 588 F.3d 718, 728 (9th Cir. 2009) ("As to the public interest, Congress's determination in enacting NEPA was that the public interest requires careful consideration of environmental impacts before major federal projects may go forward. Suspending a project until that consideration has occurred thus comports with the public interest."). As this Court has stated, an emergency injunction would "serve the public by protecting the environment from any threat of permanent damage . . . While granting the preliminary injunction would inconvenience defendants and those parties holding specific interests in the lands at issue, denying the motion could ruin some of the country's great environmental resources—and not just for now but for generations to come." *Nat'l Wildlife Fed'n v. Burford*, 676 F. Supp. 271, 279 (D.D.C. 1985), *aff'd*, 835 F.2d 305 (D.C. Cir. 1987). Accordingly, UAIC respectfully submits that this Court should issue a temporary restraining order and preliminary injunction.

VIII. CONCLUSION

For the foregoing reasons, UAIC respectfully requests that this Court issue a preliminary injunction (or a temporary restraining order, if necessary) precluding the taking of the Yuba Site into trust for gaming purposes, pending this Court's decision on the merits in this case.

DATED: January 18, 2013

Respectfully submitted,

/s/ *Thomas F. Gede*
Thomas F. Gede (Cal. Bar. No. 99295)
tom.gede@bingham.com
BINGHAM MCCUTCHEN LLP
980 9th Street, Suite 2140
Sacramento, CA 95814
–AND–
3 Embarcadero Center
San Francisco, CA 94111
Telephone: 415.393.2132
Facsimile: 415.262.9213

Counsel for Plaintiff United Auburn Indian Community of the Auburn Rancheria