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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, *et al.*,

Plaintiffs,

v.

KENNETH SALAZAR, Secretary of the Interior, *et al.*,

Defendants.

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

PLAINTIFF UAIC'S REPLY TO DEFENDANTS' OPPOSITION TO UAIC'S MOTION FOR A TRO

DATE: March 20, 2013

TIME: 9:30 a.m.

COURTROOM: 6, 14th Floor

Ten years. That is how long it has been since the Enterprise Rancheria of Maidu Indians of California ("Enterprise") filed its application for the Secretary of the Interior to take a 40-acre parcel of fee land in Yuba County (the "Yuba Site" or "Site") into trust for the tribe. Now, Defendants say, it is imperative that the conversion occur as soon as possible. The urgency is self-inflicted. The whole ten years, the Secretary had a policy of staying fee-to-trust conversions pending judicial review. Everyone expected the Site would remain in fee throughout this case. Only after the United Auburn Indian Community ("UAIC") filed this case did the Secretary announce that he repudiated the policy and is going to take title on February 1 unless this Court stops him. The ostensible purpose of the retraction is to frustrate meaningful judicial review, if not evade it entirely. There is, accordingly, no good or equitable reason for the Court to withhold a TRO. The Court should take the time it needs to consider the pending motions and should conclude that equity supports staying the conversion of the Yuba Site until this case ends.

Before this Court are many challengers pressing similar (though not identical) claims. UAIC's position is unique. Alone among the plaintiffs, UAIC has presented evidence that it will likely suffer irreparable harm *before* Enterprise breaks ground because the tribe's lenders and raters will likely immediately downgrade the tribe's financial standing when the Secretary takes title to the Yuba Site, which in turn will impact all of the tribe's affairs. Also alone among the plaintiffs, UAIC has an interest in the land comprising the Yuba Site—specifically, a cultural interest deeply rooted in the tribe's historical and sovereign ties to the Site. The law is unclear in the aftermath of *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012), and UAIC's interest *might* mean that this case is an action under the Quiet Title Act (not the Administrative Procedure Act), which would be mooted by the fee-to-trust conversion.

To protect UAIC from irreparable injury and prevent UAIC's case from becoming moot, because UAIC is likely to succeed on the merits, and because equity and the public interest demand it, this Court should grant UAIC's request for preliminary relief.

I. *PATCHAK* DOES NOT OBVIATE THE NEED FOR PRELIMINARY RELIEF.

Until last year, courts held that challenges to fee-to-trust conversions arise under the Quiet Title Act ("QTA") and are barred by that Act's waiver of sovereign immunity after the gov-

ernment takes title. Then the Supreme Court held that challenges brought by neighbors with no "competing interest" arise under the Administrative Procedure Act ("APA") and are not barred by sovereign immunity after the government takes title. *Patchak*, 132 S. Ct. at 2206.

UAIC has a congressionally recognized cultural interest in 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. After *Patchak*, it is not clear whether that type of interest is a "competing interest"—in statutory terms, a "right, title, or interest . . . in the real property." 28 U.S.C. § 2409a(d). Thus, it is not clear whether UAIC's challenge arises under the QTA or the APA. *Patchak* did not resolve that question. Indeed, no court has ever resolved that question because, until now, the Secretary has voluntarily stayed *all* fee-to-trust conversions pending litigation.

In its motion, UAIC put this question directly to Defendants. TRO at 6. They did not answer. Opp. at 7. That silence speaks volumes; it implies that Defendants' position is adverse to UAIC and that they will seek to dismiss UAIC's case as moot unless the Court stays the Yuba Site conversion. Preliminary relief therefore is necessary to keep UAIC's case alive. *See Arrow Transp. Co. v. S. Ry. Co.*, 372 U.S. 658, 671 n.22 (1963).

Even if UAIC's case arises under the APA, preliminary relief is needed to ensure that the Secretary's decision is subject to meaningful judicial review. Relief in an APA case is available only if it is equitable. *See Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995). Once conversion of the Yuba Site is complete, Defendants likely will argue for a more deferential standard of review, and the Court ultimately might conclude that it would be inequitable to divest the government of title to the Yuba Site, particularly if Enterprise develops it.

Patchak did not overturn the background rules of equity. Its only concern was whether sovereign immunity moots challenges to completed fee-to-trust conversions, not how principles of equity apply to such challenges. Defendants' quotation of a sentence from the *Patchak* dissent (Opp. at 6) does not show otherwise. After *Patchak*, a person "*may sue* . . . to divest the Federal Government of title to and possession of land held in trust for Indian tribes," 132 S. Ct. at 2212 (Sotomayor, J., dissenting) (emphasis added), but that relief ultimately *may not be awarded*. Defendants also drop the critical qualifying clause from the quotation—"so long as the complaint

does not assert a personal interest in the land," *id.*—which just brings the Court back to the question about the significance *vel non* of UAIC's cultural interest in the Yuba Site.

No matter Defendants' position on these issues, Enterprise doubtlessly will oppose any effort to undo conversion of the Yuba Site. It likely will argue that UAIC's case arises under the QTA. And it likely will object to divestiture of land it develops, arguing that equity abhors forfeiture. *See Idaho v. Hodel*, 814 F.2d 1288, 1292–93 (9th Cir. 1987).

There is only one sure way to prevent UAIC's case from becoming moot and to preserve for UAIC the full panoply of equitable remedies the APA allows: the Court must enjoin the Secretary from taking title on February 1. That outcome is equitable and in the public interest, just as it would have been had the Secretary not suddenly abandoned his self-stay policy.

II. UAIC WILL SUFFER OTHER IRREPARABLE INJURY UPON CONVERSION OF THE YUBA SITE AND DURING THE PENDENCY OF THIS CASE.

1. Socio-Economic Harm.—Immediately upon conversion of the Yuba Site, Thunder Valley's financing arrangements likely will change and cause UAIC socio-economic harm. *See* TRO at 9–11. That harm is "irreparable *per se*" because UAIC "cannot recover damages from [Defendants] due to [their] sovereign immunity." *Feinerman v. Bernardi*, 558 F. Supp. 2d 36, 51 (D.D.C. 2008) (citations omitted); *see Bowen v. Massachusetts*, 487 U.S. 879, 893–94 (1988).

Aside from mischaracterizing that injury as lost revenues, Opp. at 9, Defendants do not contest the truth of UAIC's evidence but instead urge the Court to ignore it. Citing only *prudential standing* cases applying the familiar "zone of interests" test, Defendants contend that economic injuries cannot justify staying conversion of the Yuba Site because "neither NEPA nor IGRA protects UAIC from economic competition." *Id.* That contention fails for two reasons. *First*, *Patchak* held that a neighbor-plaintiff's economic interests are within the zone of interests of federal laws that regulate converting fee land into trust for gaming purposes. *See* 132 S. Ct. at 2210–12. And notwithstanding *Patchak*, if IGRA protects *Enterprise's* tribal economic interests, it also must protect *UAIC's* identical interests. Sauce for the goose is sauce for the gander. *Second*, Defendants cite no case denying preliminary relief to a party whose prudential standing is undisputed; indeed, UAIC is aware of no case denying preliminary relief to a party simply be-

cause he sought to protect interests that were not "arguably within the zone of interests to be protected or regulated by the statute" he claimed was violated. *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). As "frequently reiterated," the relevant question is whether a party can demonstrate "that irreparable injury is *likely* in the absence of an injunction." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (emphasis in original) (citations omitted). The Court should reject Defendants' novel effort to modify the familiar standard.

2. Cultural Harm.—UAIC will suffer irreparable cultural harm if the Yuba Site is taken into trust for Enterprise. *See* TRO at 11–12. In response, Defendants contend that Enterprise is more "closely connected" with the Site. Opp. at 9 n.10. That contention is irrelevant; whatever the strength of UAIC's ties to the land, they will be irreparably severed by conversion. That contention is wrong, too. Congress designated Yuba County as part of UAIC's service area. *See* Auburn Indian Restoration Act, *supra*. And the unrebutted evidence proves that UAIC's ancestors have the strongest ties to Yuba County. *See* Guerrero Aff. ¶¶ 6–27, 44–49 (Ex. 1 to TRO).

Defendants argue that UAIC cannot rely upon cultural injuries for preliminary relief because UAIC supposedly did not raise its cultural injuries during the administrative process. *See* Opp. at 9. The lone case Defendants cite repeats the familiar rule of error preservation that a court reviews *the merits* of agency action on only those grounds that were raised during the administrative process; it does not hold that a court deciding whether to issue preliminary relief can consider only *the irreparable injuries* raised during the administrative process. *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004). Defendants' attempt to penalize plaintiffs for failing to complain about irreparable injuries during the administrative process is especially galling here, for throughout the entire ten-year process, the Secretary's announced policy was to stay any conversion *voluntarily* and *automatically* upon initiation of judicial review.

In any event, UAIC repeatedly presented its cultural concerns to Defendants. *See* Letter from UAIC Chair to BIA Regional Director, dated Mar. 12, 2009, at 3 ("To encroach on [UAIC's] historical lands would be unfair to [UAIC] and infringe on the cultural heritage and sovereignty of [UAIC].") (Ex. 1 to Killian Decl.); Letter from UAIC Chair to BIA Regional Director, dated May 11, 2009, at 4–5 (Ex. 2 to Killian Decl.) (stating that the Yuba Site is located

"within [UAIC's] ancestral lands," and that permitting Enterprise "to encroach on [UAIC's] historical lands would be detrimental to [UAIC]"); *see also* FEIS Peer Review at Comment Letter G-4, Comment G4-1 (Rec. Doc. 41-3 at 15) (Letter from UAIC Chair to BIA Regional Director, dated Sept. 6, 2010) (stating that the Yuba Site is located "well within the undisputed historical territorial limit of the Nisenan Indians, people who are part of the [UAIC]"); Letter from UAIC Chair to BIA Regional Director, dated Nov. 3, 2010 (Ex. 3 to Killian Decl.). And Defendants responded, albeit perfunctorily. *See, e.g.*, Response to Comment G-4.1 (Rec. Doc. 41-3 at 100).

3. Environmental Harm.—Arguing that UAIC's irreparable environmental harms will not occur for about four months when construction on the Yuba Site begins, Defendants contend that the question of preliminary relief should wait for Enterprise to give 30 days' notice ahead of commencing construction. *See* Opp. at 7–8. The promise of Enterprise (a nonparty) to alert its adversaries is not binding, let alone credible. Even so, because preliminary relief can be based on any irreparable injury likely to occur "before judgment," *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1422 (9th Cir. 1984), the Court should decline Defendants' invitation to re-brief UAIC's motion in three months under a similarly tight timetable.

Furthermore, environmental harm can seldom be remedied, which weighs in favor of an injunction. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 235 F. Supp. 2d 1143, 1161 (W.D. Wash. 2002). The harms here are not due just to construction, but to setting in motion the construction of a massive complex without taking into account environmental harms as required under NEPA. *See Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 404 F. Supp. 2d 1352, 1362–63 (S.D. Fla. 2005); *see also W. Land Exch. Project v. U.S. BLM*, 315 F. Supp. 2d 1068 (D. Nev. 2004) (enjoining BLM proposal to privatize desert lands). UAIC's only recourse is to stop Defendants from converting the Site in the first place. Conversion is the first domino to fall. Once it does, the rest inevitably follow. *See Patchak*, 132 S. Ct. at 2211–12 (rejecting government's argument that land acquisition and land use are distinct under federal Indian laws).

III. UAIC LIKELY WILL SUCCEED ON THE MERITS.

1. IGRA and BIA Regulations.—Before finding Enterprise eligible for gaming, the Secretary was required to determine that a gaming establishment would be in Enterprise's best inter-

est and would not be detrimental to the community. 25 U.S.C. § 2719(b)(1)(A); 25 C.F.R. § 292.2; 25 C.F.R. Part 292 Subpart C. Defendants failed to do so.

Defendants violated their duty to consult with UAIC, a "nearby Indian tribe," and to solicit UAIC's input. 25 C.F.R. §§ 292.13, 292.19. Defendants do not deny the violation, but argue only that the "omission was harmless" because "UAIC submitted comments." Opp. at 17 n.22. "The failure to consult was not some technical error, but resulted in a decision-making process that was contrary to that mandated" and "was not harmless error." *Cal. Wilderness Coal. v. U.S. DOE*, 631 F.3d 1072, 1095 (9th Cir. 2011) (holding that, although plaintiffs eventually submitted comments, the failure to consult was not harmless); *Confederated Tribes & Bands of Yakima Indian Nation v. FERC*, 746 F.2d 466, 475 (9th Cir. 1984) ("It is not enough the FERC gave notice . . . [to] Indian tribes. The consultation obligation is an affirmative duty."). The case Defendants cite, *Cal. Cmtys. Against Toxics v. U.S. EPA*, 688 F.3d 989 (9th Cir. 2012), is distinguishable because it did not involve an affirmative duty to consult or solicit comments.

Defendants argue that "the 2011 ROD demonstrates that DOI consulted with all relevant entities and considered their comments." Opp. at 17. The ROD is inaccurate. It lists "Auburn" as an entity that "received letters providing notice of the consultation process." Part 292 ROD at 58 (Ex. J to Opp., Rec. Doc. 43-4). Yet UAIC received no such letter. *See* Ex. 1 to Killian Decl. at 1–2. The inaccuracy further demonstrates that Defendants acted arbitrarily and capriciously.

Once UAIC learned that BIA had solicited comments on Enterprise's application, DOI and BIA gave short shrift to UAIC's concerns and listed its comments without adequate response. Although Defendants assert that "UAIC, as a nearby Indian tribe, received specific consideration," Opp. at 17, the citations to the Part 292 ROD that Defendants provide in fact demonstrate that DOI and BIA failed to address UAIC's concerns adequately. *Id.* (citing Part 292 ROD at 57, 64–65). For instance, the Part 292 ROD states that "[UAIC] has not provided any information indicating that development of the Resort would have a negative impact on its asserted cultural connection to the Site." Part 292 ROD at 57. Yet, as discussed above, UAIC repeatedly said otherwise. The Part 292 ROD also summarily dismisses UAIC's economic concerns, stating that "[m]ere competition from the Tribe's proposed gaming facility in an overlapping gaming

market is not sufficient, in and of itself, to conclude that it would result in a detrimental impact on [UAIC]." *Id.* at 64. It is common sense that a new casino built about 20 miles from UAIC's established casino will have a significant impact on UAIC's revenue and on UAIC's ability to provide resources and services to tribe members. Defendants argue that "DOI is not required to speculate as to what issues UAIC has with its analysis."[1] Opp. at 17. Defendants miss the point. Because they arbitrarily and capriciously failed to solicit and consider UAIC's concerns, UAIC cannot provide a detailed critique of an analysis that was not done.

Turning to their violation of the Part 151 regulations, Defendants respond that the "Department's analysis of the need and purpose for the present trust acquisition is memorialized in the ROD." Opp. at 14. That "analysis" is inadequate. Defendants failed adequately to consider whether Enterprise could conduct gaming on lands that it currently possesses and whether gaming on the Yuba Site would detrimentally impact the surrounding community. Thus, they failed adequately to consider the "purposes for which the land will be used." 25 C.F.R. §§ 151.10, 151.11; *see* Part 292 ROD at 2–3; Part 151 ROD at 2 (Ex. A to Opp., Rec. Doc. 41-1).

As UAIC argued, Defendants failed to support the RODs' conclusion that transferring *the Yuba Site into trust* is necessary to satisfy Enterprise's self-determination goal. *See* TRO at 24. Now, Defendants mischaracterize that argument as challenging DOI's failure "to explain how *placing land in trust* furthers tribal self-determination for Enterprise." Opp. at 15 (emphasis added). UAIC's primary concern is more specific: Defendants failed adequately to consider and explain how taking the Yuba Site, located within UAIC's historic territory, is necessary and appropriate to further Enterprise's self-determination, when doing so will have significant, detrimental impacts on UAIC.

2. APA.—Defendants' approval of the RODs and the Secretarial Determination to take the Site 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 law. Defendants' violations are exemplified by their failure to ac-

[1] *San Luis Obispo Mothers for Peace v. U.S. Nuclear Regulatory Comm'n*, 789 F.2d 26 (D.C. Cir. 1986) is inapposite, as it does not address Defendants' position that the government "is not required to speculate."

curately identify and describe the land to be taken into trust. Defendants concede that, in "a number of documents," "the legal description for the 40-acre parcel [was] confused with the legal description for the entire 82.64 acres." Opp. at 10. Defendants assert that "it is not plausible that the administrative process was premised on an incorrect understanding of the land at issue." *Id.* It is completely plausible. Defendants cannot erase the arbitrary and capricious actions that characterized the Secretarial Determination to take the Yuba Site into trust by belatedly attempting to "correct[] its error." *Id.* UAIC likely will succeed on the merits in showing that Defendants' actions were arbitrary, capricious, and otherwise not in accordance with law.

3. NEPA.—From selecting a consultant, to considering alternatives and environmental impacts, to the ultimate decision by BIA, the process here was skewed and resulted in uninformed and arbitrary decision-making in violation of NEPA. The violations were not harmless. They rendered the NEPA process a formality and allowed significant impacts to remain unexplored, particularly those impacts that will directly affect UAIC.

Enterprise had a significant role in selecting the consultant (AES) and preparing the EIS, and BIA unlawfully "failed to take sufficient steps to insulate the final resulting documentation from [the consultant's] tainted analysis." *Davis v. Mineta*, 302 F.3d 1104, 1113 (10th Cir. 2002) (citation omitted). On this issue, Defendants' opposition to UAIC's motion merely cross-references their opposition to the Colusa TRO motion (Rec. Doc. 24, "Colusa Opp."). *See* Opp. at 21 n.27. That other opposition does not dispute UAIC's evidence that BIA did not comply with 40 C.F.R. § 1506.5(c) and retain adequate oversight. *See* TRO at 16–20. The evidence shows that Enterprise participated in selecting the consultant and controlled the consultant, going so far as to propose changes during the preparation of the EIS. *See, e.g.*, E-mail from Chad Broussard (AES) to Erin Quinn (AES) Re: Enterprise FEIS, dated Jan. 16, 2009 (Ex. 4 to Killian Decl.) (indicating that AES "made some changes" to the Enterprise EIS "at the suggestion of Nick Yost," counsel for Enterprise). Nor does the other opposition, *see* Colusa Opp. at 15–16, address UAIC's argument that it was arbitrary for BIA to rely on the consultant's unsupported and unsworn statement that it had no conflict of interest. *See* TRO at 20–22.

It makes no difference that BIA was involved *before* the preparation of the EIS and that BIA chose the preferred alternative in the Record of Decision *after* the EIS. *See* Colusa Opp. at 16. NEPA requires informed decision-making. "A fundamental purpose of NEPA is to 'ensure that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.'" *Fla. Wildlife Fed'n*, 404 F. Supp. 2d at 1362 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)).

Citing *Associations Working for Aurora's Residential Environment v. Colorado Department of Transportation*, 153 F.3d 1122 (10th Cir. 1998), Defendants argue that oversight can counteract a conflict of interest. *See* Colusa Opp. at 16. But BIA provided no oversight here; Enterprise did. And because Enterprise's participation is part of the problem, it cannot be Defendants' saving grace. BIA's abdication of control is not trivial. The bias that permeated the preparation of the EIS precluded informed decision-making, risked "real environmental harm" due to "inadequate foresight and deliberation," and started the bureaucratic steamroller down a predetermined path. *Sierra Club v. Marsh*, 872 F.2d 497, 504 (1st Cir. 1989).

Defendants argue that the public must identify a "feasible" alternative. Opp. at 18. On the contrary, it is incumbent on BIA to "[r]igorously explore and objectively evaluate all reasonable alternatives" and present a "clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. § 1502.14. The alternatives in the EIS were chosen by Enterprise and seemingly designed to find the Yuba Site to be the only "feasible" site, largely due to lack of investors. FEIS at 2-45 to 2-46, *available at* http://www.enterpriseeis.com/documents/final_eis/report.htm.[2] The limited alternatives skewed the analysis, particularly the analysis comparing the benefits to Enterprise against the impacts on local communities, such that the EIS "did not provide a 'full and fair' discussion" of possible alternatives. *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 965 (9th Cir. 2005) (citations omitted); *see Ocean Mammal Inst. v. Gates*, 546 F. Supp. 2d 960, 976–77 (D. Haw. 2008) (finding alternatives analysis inadequate when end result was predetermined).

[2] Extant contracts between Enterprise and Yuba County played a significant role in identifying alternatives. *See* FEIS at 2-7 to 2-10, 2-24, 2-39, 2-41.

Given the proximity of the Yuba Site to other tribes and the historical and cultural significance of the Site, BIA had to consider additional sites beyond the Butte Site, which was obviously unsuitable. Yet Defendants discarded possible alternatives because Enterprise said they were not suitable. FEIS at 2-45. Alternatives may not be disregarded "'merely because they do not offer a complete solution to the problem.'" *Nat'l Wildlife Fed'n*, 235 F. Supp. 2d at 1154 (citation omitted). Nor should BIA have taken Enterprise's word about other sites' feasibility. *See S. Utah Wilderness Alliance v. Norton*, 237 F. Supp. 2d 48, 53 (D.D.C. 2002) (finding alternatives analysis inadequate when agency relied on "admittedly self-serving statements" by project proponents without adequate independent review).

Finally, it is also incumbent on BIA to take a hard look at potential adverse effects of the proposed project. Defendants contend that UAIC's claim that BIA failed to take a hard look are "unsupported." Opp. at 21. Again, Defendants ignore the evidence cited in UAIC's motion, including the disproportionate impacts of the proposed project on UAIC. The focus of the FEIS on the economic benefits of the casino presents an incomplete picture. "An EIS that relies upon misleading economic information may violate NEPA if the errors subvert NEPA's purpose of providing decisionmakers and the public an accurate assessment upon which to evaluate the proposed project." *Nat'l Wildlife Fed'n*, 235 F. Supp. 2d at 1157 (citing *Or. Envtl. Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987)). Indeed, as noted above, BIA provides no evidence that it actually considered these issues, rather than simply rubberstamping the analysis of a consultant that had clear conflicts of interest.

IV. CONCLUSION

For the foregoing reasons, and the reasons stated in its motion for a TRO, UAIC respectfully requests that this Court issue a temporary restraining order, 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 29, 2013

Respectfully submitted,

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