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TULE LAKE COMMITTEE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

TULE LAKE COMMITTEE,

Plaintiff,

vs.

CITY OF TULELAKE, et al.,

Defendants.

Case No.

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

Date:
Time:
Location: Robert T. Matsui U.S. Courthouse
501 I Street
Sacramento, California 95814
Courtroom:
Judge:

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I. INTRODUCTION

Tule Lake Committee seeks a temporary restraining order to enjoin the City of Tulelake, by and through the City Council of the City of Tulelake, from taking any steps to effectuate the motion passed and the ordinance adopted at its meeting of July 31, 2018, in favor of an offer to purchase by the Modoc Tribe of Oklahoma.

II. STATEMENT OF RELEVANT FACTS

Tule Lake was one of ten American concentration camps created during World War II to imprison innocent citizens and immigrants for no reason except their Japanese ancestry. In 1943, a misconceived and ineptly administered "loyalty" questionnaire caused more than 12,000 individuals to dissent from their mistreatment. For their dissent, they were governmentally classified as "disloyal" and were sent to Tule Lake, which became a maximum-security prison, the largest of the concentration camps at over 18,000 souls. Tule Lake was the last of the ten to close, in March 1946. (Verified Complaint, ECF No. 1 ("V.Compl."), ¶9.)

With the war's end, Japanese Americans sought acceptance in a country that had been racially hostile. Those who had dissented were still stigmatized as "disloyal" within the Japanese American community. They were purged from the Japanese American narrative. (V.Compl., ¶10.)

In 1951 the federal government, ignoring the concentration camp's historic significance, disposed of 358 acres of it to the City of Tulelake ("City") to use as an airport. In the Tule Lake basin, an area proudly claimed in the 1940s to be "White man's country," the Bureau of Reclamation granted homesteads to veterans, but not veterans of color. (V.Compl., ¶11.)

In the 1950s and 1960s, the African American civil rights movement challenged legal racism in the nation's institutions including schools, employment, public accommodations, housing loans, and voting. The movement encouraged Japanese Americans to challenge the injustice of their wartime incarceration. These challenges culminated in the Civil Liberties Act of 1988, where Congress found that the incarceration resulted not from military necessity but from racism, wartime hysteria, and failure of political leadership. With the Civil Liberties Act came individual Presidential apologies, token redress payments, and a promise to educate the nation about the wrongful incarceration. (V.Compl., ¶12.)

The government's findings and apologies helped transform Japanese Americans from a state of

shame and guilt at being imprisoned, to one of hope and healing. The places of incarceration are now sacred sites and places for personal and national remembrance. Governmental efforts to preserve Japanese American incarceration sites manifest a genuine national remorse at having stripped an unpopular racial minority of the rights, freedoms, and dignity that Americans cherish, and a desire to educate the nation on the history. (V.Compl., ¶13.)

Survivors and descendants of the incarceration seek healing through pilgrimages to the incarceration sites. Pilgrimages to Tule Lake began as solitary visits, with individuals seeking solace at the place that had caused them deep psychic wounds. Organized pilgrimages to Tule Lake now occur every two years, as 4-day events that accommodate hundreds of pilgrims who come to honor the memory of those who were imprisoned and those who died there. (V.Compl., ¶14.)

More than 331 persons died in the Tule Lake camp—some by suicide or murder, many from poor medical care, and others from depression and stress. Many were babies, and many were elderly and infirm. (V.Compl., ¶15.)

The trauma experienced at Tule Lake makes this historic site hallowed ground to Japanese Americans. Tule Lake's preservation is part of the healing made possible when the government acknowledged what President Reagan described as a "great wrong." (V.Compl., ¶16.)

The State of California designated the Tule Lake concentration camp as a State Historic Landmark in 1975. In 2006, a 37-acre portion of the site was designed as the Tule Lake Segregation Center National Historic Landmark. Landmark status is the highest level of recognition our nation grants to a historic place. The National Park Service undertook management of the 37-acre portion. In December 2008, President Bush created the WWII Valor in the Pacific National Monument, and included the Tule Lake Unit. (V.Compl., ¶17.)

The Tule Lake Committee ("Committee"), was incorporated as a California non-profit public benefit corporation in 1981 to represent the survivors and descendants of those incarcerated at Tule Lake during World War II. The Committee's purposes are (a) to educate the general public about the forced and unconstitutional imprisonment of over 120,000 men, women, and children of Japanese ancestry into ten concentration camps in the United States in the 1940s; (b) to recognize the unique role of the Tule Lake concentration camp, which became a segregation center housing inmates incarcerated in all ten

camps who resisted their false imprisonment and were stigmatized as "disloyal"; and (c) to preserve the history and experiences of the inmates of the Tule Lake Segregation Center and their struggles to cope with their isolation under harsh conditions. Tule Lake Committee supporters include citizens with a deep connection to the historic importance of the Tule Lake Segregation Center. (V.Compl., ¶3.)

The Committee raised money to assist the Park Service's efforts to preserve the site and tell the story. To date, the Committee has raised over $850,000 to help the Park Service. The Committee also does advocacy to protect the site from incompatible activities that threaten to destroy the historic fabric. (V.Compl., ¶18.)

In derogation of the emotional, historical and spiritual meaning the land has to Japanese Americans and the site's significance in American history, certain persons bulldozed the concentration camp's cemetery for postwar construction projects. The cemetery cremains were used to fill ditches on the airport site. (V.Compl., ¶19.)

The County of Modoc ("County"), as the airport's sponsor, has taken steps to expand the airport. In January 2010 the County submitted two consultant reports to the FAA, claiming that the concentration camp lands occupied by the airport were not eligible for listing on the National Register of Historic Places. The State Historic Preservation Officer (SHPO) wrote to the County to disagree. The FAA and the SHPO concurred that the airport was part of a historic site that was eligible for listing on the National Register of Historic Places. (V.Compl., ¶20.)

In 2014, the County proposed a multi-year, $3.5 million airport improvement plan that included construction of a massive 3-mile-long, 8-foot-high fence, topped with barbed wire, which would close off most of the concentration camp land where Japanese Americans had lived and died. (V.Compl., ¶21.)

The County also sought to extend its 40-year 1974 lease to 2044. No environmental impact report, or EIR, had ever been done for any of the airport's construction projects. The Committee protested the lease extension and the multi-year construction plan as needing an EIR before decision. There was no effort at an EIR, and the Committee filed a CEQA mandamus action in Superior Court that named the City as the airport's owner and lessor and the County as the lessee and initiator of the construction plan, and sought an EIR. (V.Compl., ¶22.)

The County withdrew language in the lease extension to cease referring to the construction plan.

The County, however, still failed to address its multi-year construction plan and the CEQA concerns it raised. The failure prompted a second CEQA mandamus action, based on the new lease extension and the construction plan, seeking an EIR. (V.Compl., ¶23.)

The Committee is currently engaged in settlement discussions with the County for the CEQA actions. The City and Nick Macy, who operates the crop dusting business based at the airport, have not discussed settlement. (V.Compl., ¶24.)

In late 2017, the City considered selling the Tulelake airport. In November 7, 2017, the City discussed hiring Michael Colantuono to represent the City in negotiations with the Modoc Tribe of Oklahoma ("Tribe") and Macy's Flying Service. (Declaration of Yoshinoro H. T. Himel ("Himel Decl."), Ex. 2; V.Compl., ¶25.)

On January 26, 2018, the Committee wrote to the City Council and Mayor Hank Ebinger stating its desire to be considered as the airport's purchaser. (Himel Decl., Ex. 2A.) The Committee's inquiry received no response. (V.Compl., ¶26.)

A month later, on February 28, 2018, the Committee re-emailed its letter expressing its desire to purchase the airport. The Committee again requested that its inquiry be acknowledged. The City, through Michael Colantuono, replied, "Your email is received. No decisions have been made." (Himel Decl., Ex. 4.) No further communications were received from the City or its representatives responding to the Committee's inquiry about purchasing the airport. (V.Compl., ¶27.)

The Committee was alarmed to learn on July 12, 2018, from an unofficial source, that the City had proposed Ordinance No. 2018-16-01 on July 3, 2018, to authorize the sale of the Tulelake airport land to the Modoc Tribe of Oklahoma for the low figure of $17,500. (Himel Decl., Ex. 11.) The Committee sent a letter on July 13 to Mayor Ebinger and the City Council expressing its interest in purchasing the airport and offered to purchase the airport for $40,000. (Himel Decl., Ex. 12.) The Committee's offer was reported in a news article the following day in the local Klamath Falls newspaper, the Herald and News. The Committee received no acknowledgement or response from the City. (V.Compl., ¶28.)

The Committee's CEQA attorney spoke with the City's sale negotiator, Mr. Colantuono, on July 13. The Committee's CEQA attorney emailed a letter on July 26, 2018, that offered, in addition to

$40,000, all of the terms Mr. Colantuono had suggested, including the offer to dismiss the City from the CEQA actions, and to waive costs of suit. (Himel Decl., Ex. 16.) Neither the Committee nor its attorney received acknowledgement of the letter. (V.Compl., ¶29.)

The Committee telephoned and sent the City a request form on July 25 asking to be placed on the July 31 Agenda to present and discuss its offer to purchase the airport. (Himel Decl., Ex. 14.) However, the Committee's request to be included on the 4:15 PM Agenda was described as "not … appropriate" by the City Hall Administrator, Jenny Coelho, who explained that the City would not discuss the airport sale before the 5:30 meeting. Her emailed response to the Committee is quoted below with emphasis added:

> "It will **not be necessary or appropriate to separately agendize your proposal** for that sale. You will have opportunity to speak in the hearing. If you have a proposal to present, you may wish to submit it in writing to our attorney, Mr. Colanuono, in advance of the meeting to ensure the Council and its legal counsel are able to review it fully.
>
> "**There will be a special meeting at 4:15 pm** before the regular meeting at 5:30 pm for which the possible sale is noticed. If so, **that meeting will be limited to a closed session**. While public comment before the closed session will of course be welcome **no public discussion of the airport sale by the City Council will be appropriate** earlier than the time of which the City has given published notice of 5:30 pm."

(Himel Decl., Ex. 15; V.Compl., ¶30.)

The 4:15 PM Agenda contained an item 5: "Conference with Real Property Negotiator(s) for the possible transfer of the Tulelake Airport." The negotiating parties were listed as "Modoc Tribe of Oklahoma; Tule Lake Committee; County of Modoc." (Himel Decl., Ex. 17.) The administrator's communication chilled the Committee from participating in this closed meeting where the City Council was to discuss the "terms and price" of the airport sale. (V.Compl., ¶31.)

The public meeting to consider the proposed Ordinance for sale to the Tribe took place at 5:30 PM on July 31, 2018. (Himel Decl., Ex. 18.) The Mayor announced a 3-minute time limit for speakers. (V.Compl., ¶24.)

Mr. Colantuono, as negotiator for the City, gave what he called "in effect a staff report." He outlined some terms of the City's fee ownership, except that he never mentioned the site's historic importance. Instead, he minimized the site as a "piece of dirt under an airport." He outlined the Tribe's $17,500 offer, characterized it as "the terms that've been negotiated with the Tribe," and compared the terms offered by the Committee and by the County. He defended the low dollar amount as being enough

to pay his own fee to "close this deal," and said that if the City made "a nickel on that transaction" the amount would go "back into the airport" since "anything we make off of Uncle Sam's investment has to be used for airport use." (V.Compl., ¶32.)

A rough transcription of the negotiator's remarks is:

> Good evening everyone. Michael Colantuono, I'm a local government lawyer, and the town has hired me to assist with this transaction, and so I'm giving what's in effect a staff report on this item. The town owns the land under the airport, because at the end of World War II the federal government gave it to the town conditioned that it used for an airport. And the title that the town holds provides that if it ever stops being an airport, the land goes back to Uncle Sam. The County of Modoc is the sponsor of the airport, that's a status under the FAA's rules, you need a Mother May I from the FAA to be a sponsor, and they are also the grant recipient with respect to the airport, which means they signed a contract by which they get to spend money from the FAA grant funds. You fly, you see that little $3 charge on your airline ticket. That money goes into a fund to maintain airports. That fund generates grants for all airports including airports like this one. So the County's a grant recipient. That's also a regulatory category with some obligations to Uncle Sam. The town is neither of those things. They just own the dirt. They have leased the dirt to the County of Modoc; the County of Modoc is the airport sponsor, is the grant recipient, and it has subleased the field to a fixed base operator, FBO, Macy's Flying Services, which provides the economic activity that's actually using the airport. The airport is now on a lease that has another 24 years to go. Nobody can disturb that lease; the County's rights are good for another 24 years. Macy's has a sublease under that agreement. Nobody can disturb those rights. Those rights remain as well. The question is whether the town continues in this role of being the nominal owner of the piece of dirt under an airport that so far has gotten them sued a couple of times. So the transaction is proposed to sell that land to the Modoc Tribe of Oklahoma for $17,500. And people wonder, why that price, why so little, what's that about. That's basically my fees; it's covering the cost to close this deal so that the city can get out from under the burden of owning that land at no cost. If we made as a community a nickel on that transaction we'd be required to put the money back into the airport. We got the land from Uncle Sam for use as an airport, anything we make off of Uncle Sam's investment has to be used for airport use. So there's no way for the town to sell it for more and to make more money for the community's general fund. One of the conditions of this sale if the town approves it, it's up to the City Council, is that the Modoc Tribe has to get the FAA's consent to the transaction, or has to prove to the city attorney's satisfaction that that's not required. That clause that says the City Attorney might decide it's not required is really about if the FAA refuses to exercise their jurisdiction, if they say you're not a grant sponsor, you're not an airport sponsor, you're not a grant recipient, and we don't have any relationship with you, and we're not going to do a Mother May I for you. Then we're not going to get a Mother May I from them and the transaction can conclude. But unless they say that, we need their approval for the transaction and if we don't get it, the deal doesn't close on the terms that are in front of the Council for tonight. It has to be used as an airport, under this deal and the underlying fee, and if that cease to happen Uncle Sam gets the land back and will have to figure out what to use with it, and importantly to the community, another aspect of the agreement is that if the Modoc Tribe takes the land they have to defend and pay the lawyers for any lawsuits that the City might be involved in with respect to the airport going forward. After we released the agenda showing this transaction, we received two other offers, one from the Tule Lake Committee, which is essentially the same the same terms as the tribe with

> two differences, one is it's $40,000, the other says no promise to indemnify but there is a promise to dismiss us from the existing lawsuit, which you might view as effectively the same thing. And we have an oral offer that's not been reduced to writing, from the County of Modoc, to match the terms that've been negotiated with the Tribe. We met in closed session earlier this evening, I provided a little bit of legal advice to the City Council about all three of those proposals, no action was taken because any action will be taken in open session after the Council hears from the public tonight. And with that, Mr. Mayor, Council members, that's all I have for you unless you have questions for me.

(V.Compl., ¶33.)

No other information was presented about any criteria the City would use to guide its decision over which offer, if any, to accept. The Mayor and City Council said nothing by way of deliberation, and with an exception noted below, they asked nothing. In particular, they failed to discuss the comparative merits of the offers. (V.Compl., ¶34.)

The Committee made its three-minute presentation. The Mayor and City Council had no questions to the Committee and no comments concerning its offer. (V.Compl., ¶35.)

On information and belief, the County had reached out to the City to discuss purchase by the County, but the City had not discussed the matter with the County. At the meeting, although representatives from the County attended, they made no presentation. The Mayor and City Council failed to ask them any questions, and failed to discuss the merits of the County's offer to match the Tribe's offer. The City Council voted unanimously for the pre-drawn Ordinance naming the Tribe. (V.Compl., ¶36.)

The City's only questioning to any of the three parties seeking to purchase the airport was directed to the Tribe. Mayor Hank Ebinger asked if the Tribe could enlighten everyone on what sort of businesses the Tribe would bring into the area. Blake Follis, the Tribe's chief's grandson and spokesman, replied, "it's anything to support aviation." He added, "The whole thing here, again, an airport the FAA requires you to have aviation-supportive businesses, so, that's indeed the type of enterprises that we look to help put in to the Tulelake Municipal Airport down there." (V.Compl., ¶37.)

The Committee believes that adding airport enterprises (such as those alluded to in the preceding paragraph) should be studied with care, because, among other reasons, they could damage the historic resources. (V.Compl., ¶38; Declaration of Barbara Takei ("Takei Decl."), ¶¶3-14.)

In previous communications, tribal representative Blake Follis had dismissed the Japanese

American community's historic preservation concerns. He had minimized the wartime incarceration as a time when "Japanese Americans had it much better than we did." (V.Compl., ¶39.)

Blake Follis had complained in writing against the Park Service that "the Tribe receives no payment, and has never received a payment, from the Monument or the National Park Service for their actions in appropriating our history for financial gain." (V.Compl., ¶40.)

The City's secretive closed meetings, its non-responses to the Committee's inquiries and offers, its negotiations exclusively with the Tribe, its refusal to allow the Committee to have an agenda item to discuss its purchase offer, and its Ordinance that designated the Tribe as the purchaser, suggest that the vote on July 31 was a mere formality for an already-made decision. The City gave the Committee scant notice and no meaningful opportunity to be heard. (V.Compl., ¶41.)

The Tribe has been making, on information and belief, millions of dollars by peddling its sovereignty for use in various "rent a tribe" schemes. The Tribe's websites market its sovereign immunity as a way to escape the "burdens of regulations that can impede progress and economic development." Entities such as www.EagleTG.com, a company that "helps" users avoid cumbersome government regulations by using the tribe's sovereign status, markets itself as one of the Tribe's businesses. About SBA programs, the Tribe promises a "significantly accelerated procurement timeline, without the disruptions and delays resulting from complex evaluations and resulting protests"; "Elimination of pre-award schedule risk due to the non-protestable nature of Native American sole source procurements"; and a "virtually unlimited sole source ceiling," i.e., no-bid federal contracts in significantly larger amounts. (V.Compl., ¶42.)

In a 214-page report in November 2017, the Public Justice Foundation examined online payday lenders related to Native American tribes and operating in California, as an unregulated and largely unexamined billion-dollar industry that harms consumers, many of whom are poor and minority. The report identified the Tribe and several internet payday loan businesses. One, www.500FastCash.com, markets itself as owned by the Tribe, and claims that State laws do not apply to its loan agreements:

> "Federally recognized Indian Tribes are sovereign and possess sovereign immunity and are not subject to state law absent congressional authorization. Our loan applications and loan agreements state that the laws of your state of residence and/or the state where you apply for a short term loan will not apply to any agreement you enter into with us."

(V.Compl., ¶43.)

The report points out that such tribal enterprises, by abusing tribal sovereign immunity, threaten the viability of tribal sovereign immunity and ultimately of tribal self-governance. As an example of States scrutinizing assertions of tribal sovereign immunity, the California Supreme Court has assigned those asserting tribal sovereign immunity the burden of proving factually that they are "arms of the tribe," in *People ex rel. Owen v. Miami Nation Enterprises,* 2 Cal. 5th 222 (2016). (V.Compl., ¶44.)

The Tribe's abuse of its sovereign status has drawn the attention of the Federal Trade Commission, the IRS, the FBI, at least one United States Attorney, and U.S. District Courts in Las Vegas and Manhattan. (V.Compl., ¶45.)

In 2015, the FTC obtained a judgment in the District of Nevada that restrained the Tribe's Red Cedar Services entity (doing business as 500FastCash) in its payday loan activity, extinguished consumer debts, stopped debt collection, and fined the tribe $2.2 million. (Himel Decl., Ex. 1; V.Compl., ¶46.)

This year, some two and one-half years after the FTC judgment, the U.S. Attorney's office for the Southern District of New York, in connection with the criminal payday loan fraud prosecution of Scott Tucker, obtained a civil forfeiture of another $2 million against the same Red Cedar tribal entity. In the forfeiture and cooperation agreement, the Red Cedar entity admitted that it was controlled by the Tribe. It also admitted that a representative of the Tribe submitted affidavits for state court litigation about the payday lending business, and that the Tribe's affidavits were false. The U.S. Attorney's Office's news release about the forfeitures reflected that the Tribe allowed Tucker to claim tribal sovereign immunity and to set up bank accounts to launder billions of dollars, and that the Tribe received payments that typically were one percent of the payday loan revenues. (Himel Decl., Ex. 6A & 9A; V.Compl., ¶48.)

Even though the Tribe has paid penalties totaling $4.2 million dollars to date, the Tribe continues to publicize its involvement in the internet payday loan business. (V.Compl., ¶49.)

The City maintained a narrow focus on selling the historic site to the Tribe only. This focus was despite considerable negative reporting and a cascade of information about the $4.2 million dollars in penalties that the Tribe paid for its involvement in fraud, money laundering and perjury. (V.Compl., ¶51.)

III. ARGUMENT

A temporary restraining order may issue without notice to the adverse party if, in an affidavit or verified complaint, the movant "clearly show[s] that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition." Fed. R. Civ. P. 65(b)(1)(A). The purpose in issuing a temporary restraining order is to preserve the *status quo* pending a fuller hearing. The standard for issuing a temporary restraining order is essentially the same as that for issuing a preliminary injunction. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 839 n.7 (9th Cir.2001) (stating that the analysis for temporary restraining orders and preliminary injunctions is "substantially identical").

In order to prevail on a motion for injunctive relief, the moving party must demonstrate that (1) it is likely to succeed on the merits; (2) it is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in its favor; and (4) that the relief sought is in the public interest. *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). Injunctive relief may issue, even if the moving party cannot show a likelihood of success on the merits, if "'serious questions going to the merits' and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). "[A] court is permitted to consider inadmissible evidence at the preliminary injunction stage." *Cazorla v. Hughes*, 2014 U.S. Dist. LEXIS 188404, at *13-15 (C.D. Cal. Apr. 7, 2014) (collecting cases).

A. MERITS

1. Procedural Due Process (Fourteenth Amendment and Cal. Const., Art. XVI § 6)

The Due Process Clause of the Fourteenth Amendment protects individuals against deprivations of "life, liberty, or property." "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). But "unlike some legal rules, [due process] is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961). "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

a. Property Interest

Property interests "can be defined by state law," *Marsh v. County of San Diego*, 680 F.3d 1148, 1155-56 (9th Cir. 2012), and "[t]he property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money," *Newman v. Sathyavaglswaran*, 287 F.3d 786, 790 (9th Cir. 2002). "A state official's failure to comply with state law that gives rise to a … property interest may amount to a procedural (rather than substantive) due process violation, which can be vindicated under 42 U.S.C. § 1983." *Marsh*, 680 F.3d at 1155-56. (citing *Carlo v. City of Chino*, 105 F.3d 493, 497-500 (9th Cir. 1997)). "State law can create a right that the Due Process Clause will protect only if the state law contains '(1) substantive predicates governing official decisionmaking, and (2) explicitly mandatory language specifying the outcome that must be reached if the substantive predicates have been met.'" *James v. Rowlands*, 606 F.3d 646, 656 (9th Cir. 2010) (quoting *Bonin v. Calderon*, 59 F.3d 815, 842 (9th Cir. 1995)). In order to contain the requisite "substantive predicates," "the state law at issue must provide more than merely procedure, it must protect some substantive end." *Bonin*, 59 F.3d at 842 (internal citations and quotation marks omitted).

The California Constitution commands that no "county, city and county, city, township or other political corporation or subdivision of the State now existing, … shall [] have power to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever…" Cal. Const., art. XVI § 6. "The decisional law interpreting the constitutional prohibition against legislative 'gifts' has defined the term 'gift,' as employed in the constitutional context, to mean not only a transfer of property without adequate consideration but a transfer made for a private as opposed to a public purpose." *Post v. Prati*, 90 Cal. App. 3d 626, 635 (Cal. Ct. App. 1979).

Cal. Const., art. XVI § 6 creates a right protected by the Fourteenth Amendment's Due Process Clause because it contains "substantive predicates governing official decisionmaking" and "explicitly mandatory language specifying the outcome that must be reached if the substantive predicates have been met.'" *See Bonin*, 59 F.3d at 842. Specifically, it expressly prohibits a municipal entity from "mak[ing] any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever," Cal. Const., art. XVI § 6, which encompasses "a transfer of

property without adequate consideration" as well as "for a private as opposed to a public purpose." *See Post*, 90 Cal. App. 3d at 635.

b. Process Due

"Once it is determined that due process applies, the question remains what process is due." *Ass'n for L.A. Deputy Sheriffs v. County of Los Angeles*, 648 F.3d 986, 991 (9th Cir. 2011). To determine "what process is due," courts balance three factors:

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Brewster v. Bd. of Educ., 149 F.3d 971, 983 (9th Cir. 1998) (quoting *Mathews*, 424 U.S. at 335). The procedural due process inquiry is made "case-by-case based on the total circumstances." *California ex rel. Lockyer v. F.E.R.C.*, 329 F.3d 700, 711 (9th Cir. 2003).

First, the Committee has an interest in bidding for property offered for sale by the City, without the bidding process being predetermined and the subsequent sale being tainted by unlawful preference and constituting an unlawful gift where other and more substantial offers were available. *See*, *e.g.*, *Three Rivers Cablevision, Inc. v. City of Pittsburgh*, 502 F. Supp. 1118, 1131-33 (W.D. Pa. 1980) (property interest in "non-arbitrary" awarding of contract, where selection of the winning bidder was "predetermined and unlawful preference").

Second, and "perhaps most important," is the risk of erroneous deprivation and the probable value of additional procedural safeguards. *See Humphries v. County of Los Angeles*, 554 F.3d 1170, 1194 (9th Cir. 2009). The inquiry "requires an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards." *Cox v. Yellowstone County*, 795 F. Supp. 2d 1128, 1138 (D. Mont. 2011). "[D]ue process requires both notice *and* an opportunity to be heard," which "undeniably reduces the risk of an erroneous deprivation of property based on information received from only one of the parties involved." *Id*. Here, the City maintained a narrow focus on selling the historic site to the Tribe only (V.Compl., ¶51), as reflected by the City's secretive closed meetings, its non-responses to the Committee's inquiries and offers, its negotiations exclusively with the Tribe, its refusal to allow the Committee to have an agenda item to

discuss its purchase offer, and its Ordinance that designated the Tribe as the purchaser. (V.Compl., ¶¶26-41.)

Third, the government's interest in selecting a bidder, while perhaps entitled to some weight, is nonetheless overcome by the tainted process employed to accomplish that task. In other words, there is no government interest in violating the law or depriving private parties of their constitutional rights to due process.

2. Equal Protection (Fourteenth Amendment)

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *Serrano v. Francis*, 345 F.3d 1071, 1081 (9th Cir. 2003). "Denials [of the equal protection of the laws] by any person acting under color of state law are actionable under [42 U.S.C.] §1983." *Dyess v. Tehachapi Unified Sch. Dist.*, 2010 U.S. Dist. LEXIS 82653, at *19 (E.D. Cal. Aug. 6, 2010).

An equal protection claim can lie where plaintiff can establish that he is a "class of one" in that he "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). An Equal Protection claim based on a "class of one" requires a plaintiff to allege that she has been (1) intentionally treated differently from others similarly situated; and (2) that there is no rational basis for the difference in treatment. *Id.*; *see also Gerhart v. Lake County*, 637 F.3d 1013, 1022 (9th Cir. 2011). The rationale is that, "[w]hen those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference, to assure that all persons subject to legislation or regulation are indeed being 'treated alike, under like circumstances and conditions.'" *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 602 (2008).

c. Intentional Act

"No one has ever doubted … that a municipality may be liable under [42 U.S.C.] § 1983 for a single decision by its properly constituted legislative body—whether or not that body had taken similar action in the past or intended to do so in the future—because even a single decision by such a body unquestionably constitutes an act of official government policy." *Pembaur v. City of Cincinnati*, 475 U.S.

469, 480 (1986). Here, the City's actions were intentional, as reflected by the motion and ordinance to enter into contract for sale of the property. (Himel Decl., Ex. 11; V.Compl., ¶28.)

d. Similarly Situated

"In this context, 'similarly situated' means that in all relevant respects, the comparators are 'alike,' 'arguably indistinguishable,' or 'identical.'" *Hardesty v. Sacramento Metro. Air Quality Mgmt. Dist.*, 2016 U.S. Dist. LEXIS 75552, at *60 (E.D. Cal. June 8, 2016) (internal citations omitted). Here, in addition to the Committee, there are two "comparators," for purposes of this analysis: the Tribe and the County. These parties are "similarly situated" to the Committee by virtue of the fact that those parties submitted offers to purchase the same property as the Committee. (V.Compl., ¶¶32-33.) The Committee's offer was for $40,000; the County's offer was for $17,500; and the Tribe's offer was also for$17,500. The City's representative characterized these offers as "essentially the same terms," except for the dollar amounts involved. (V.Compl., ¶33.)

e. No Rational Basis

"As for the third element, if the plaintiffs show the defendants treated them differently than others in the same situation, they must prove the defendants had no legitimate reason to make this distinction." *Hardesty*, 2016 U.S. Dist. LEXIS 75552, at *60. Evidence of the defendants' "malice, arbitrariness, or irrationality" is necessary. *Id.*, at *61. Here, the City maintained a narrow focus on selling the historic site to the Tribe only (V.Compl., ¶51), as reflected by the City's secretive closed meetings, its non-responses to the Committee's inquiries and offers, its negotiations exclusively with the Tribe, its refusal to allow the Committee to have an agenda item to discuss its purchase offer, and its Ordinance that designated the Tribe as the purchaser. (V.Compl., ¶¶26-41.)

B. IRREPARABLE HARM

To obtain injunctive relief, a plaintiff need only demonstrate "that irreparable injury is *likely* in the absence of an injunction." *Winter*, 555 U.S. at 20. Injunctive relief is appropriate "to prevent a substantial risk of serious injury from ripening into actual harm…" *Farmer v. Brennan*, 511 U.S. 825, 845 (1994). The culturally and historically significant Tulelake Segregation Center will be unalterably exposed to ruinous development. (V.Compl., ¶¶26-41; Takei Decl., ¶¶3-14.)

C. BALANCE OF EQUITIES

A court weighing the balance of the equities "must identify the possible harm caused by the preliminary injunction against the possibility of the harm caused by not issuing it." *Univ. of Hawai'i Prof'l Assembly v. Cayetano*, 183 F.3d 1096, 1108 (9th Cir. 1999). At this stage of the inquiry, "balancing the injury of a third party against plaintiff's" is inappropriate. *L.A. Memorial Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1203 (9th Cir. 1980). There is little to no harm in preserving the *status quo* and delaying finalization of the sale of the property until the Court has an opportunity to hold a preliminary injunction hearing and issue a decision. *See*, *e.g.*, *Jones v. Bd. of Governors of Univ. of N.C.*, 704 F.2d 713, 716 (4th Cir. 1983) (injunctive relief "entirely proper" when plaintiff presents "'grave or serious questions' of procedural due process").

D. PUBLIC INTEREST

"The public interest inquiry primarily addresses impact on non-parties rather than parties." *Sammartano v. First Judicial Dist. Court*, 303 F.3d 959, 974 (9th Cir. 2002). "Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005). "[H]aving government officials act in accordance with law . . . invokes a public interest of the highest order." *Seattle Audubon Soc. v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991). Here, the public's interest is not only support by the issuance of temporary injunctive relief because allegedly-unlawful government conduct is at issue, but also because the Committee's interest align with the public's interest in preservation of land of historical significance. (Takei Decl., ¶¶3-14.)

E. BOND

The Rules requires that an applicant for a temporary restraining order provide security against the potential effects of a wrongly-issued injunction. *See* Fed. R. Civ. P. 65(c). "The Ninth Circuit has no steadfast rule as to the amount of a bond as a result of the issuance of a preliminary injunction." *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043, 1059 (S.D. Cal. 2006). "The district court has discretion to dispense with the security requirement, or to request mere nominal security, where requiring security would effectively deny access to judicial review." *Cal. ex rel. Van De Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325 (9th Cir. 1985) (finding proper the district court's exercise of discretion in

allowing environmental group to proceed without posting a bond). Here, the amount of the security bond required by the Court, if any, should be nominal so as not to "thwart citizen actions." *See Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1126 (9th Cir. 2005). Further, no bond may be necessary, where no harm will result, if the Court is able to schedule a preliminary injunction hearing before the date that the disputed sale in this action is completed. *See Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills*, 321 F.3d 878, 882 (9th Cir. 2003) ("The bond amount may be zero if there is no evidence the party will suffer damages from the injunction.").

IV. CONCLUSION

The Tule Lake Committee respectfully requests that a temporary restraining order issue to enjoin the City of Tulelake, by and through the City Council of the City of Tulelake, from taking any steps to effectuate the motion passed and the ordinance adopted at its meeting of July 31, 2018, in favor of an offer to purchase by the Modoc Tribe of Oklahoma.

Dated: August 21, 2018

Respectfully Submitted,

By: _____

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