A. Barry Cappello (SBN 037835)
abc@cappellonoel.com
Lawrence J. Conlan (SBN 221350)
lconlan@cappellonoel.com
Wendy D. Welkom (SBN 156345)
wwelkom@cappellonoel.com
CAPPELLO & NOËL LLP
831 State Street
Santa Barbara, California 93101
Telephone: (805) 564-2444
Facsimile: (805) 965-5950

Attorneys for Plaintiffs
Anne Crawford-Hall, San Lucas Ranch, LLC,
And Holy Cow Performance Horses, LLC

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ANNE CRAWFORD-HALL; SAN LUCAS RANCH, LLC; HOLY COW PERFORMANCE HORSES, LLC,

Plaintiffs,

v.

UNITED STATES OF AMERICA; U.S. DEPARTMENT OF THE INTERIOR; U.S. BUREAU OF INDIAN AFFAIRS, a division of the United States Department of the Interior; RYAN ZINKE, in his official capacity as Secretary of the Interior; MICHAEL BLACK, in his official capacity as Acting Assistant Secretary – Indian Affairs; JOHN TAHSUDA III, in his official capacity as Principal Deputy Assistant Secretary; AMY DUTSCHKE, in her official capacity as Director, Pacific Region, Bureau of Indian Affairs; and DOES 1 through 100,

Defendants.

Case No.: 2:17-cv-1616-SVW

PLAINTIFFS' OPPOSITION TO MOTION FOR PARTIAL DISMISSAL

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I. INTRODUCTION

This motion seeks dismissal of Plaintiffs' Second and Fifth Claims for Relief.[1] Plaintiffs' Second Claim asserts that the Defendants lacked authority to take land into trust for the Santa Ynez Band of Mission Indians ("Band"). The claim is pled under the Indian Reorganization Act ("IRA") and the Administrative Procedure Act ("APA") and controlling case law, *Carcieri v. Salazar*, 555 U.S. 379 (2009). Defendants do not address the merits of this claim. Rather, they contend that Plaintiffs – who were not parties in a prior agency case involving a separate real property acquisition – did not appeal from the prior 2012 decision and therefore failed to exhaust their administrative remedies. This argument is wrong. It mistakenly attempts to foist an obligation to exhaust remedies on non-parties who had no opportunity to litigate, and the Defendants' contention that the 2012 decision was "final" as to Plaintiffs is unsupported. This argument should be rejected.

In the Fifth Claim, Plaintiffs seek mandamus. Plaintiffs ask this Court to grant a remedy which the Defendants have admitted this Court can do – *i.e.*, unwind the Bureau of Indian Affairs' ("BIA's") acceptance of conveyance of the land into trust. In attacking this claim, Defendants misconstrue the law on "status quo;" ignore the factual allegations demonstrating that the transfer was illegal, null and void; and ignore that Plaintiffs have alleged facts that would support a preliminary injunction to unwind the deed acceptance should the Band start construction on the real property and the Court find that Plaintiffs are likely to prevail.

The Second and Fifth Claims are properly pled, and this Motion should be denied in its entirety.

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[1] Defendants Ryan Zinke and John Tahsuda III, new successor officer and appointee, are substituted in for and automatically replace Kevin Haugrud and Lawrence Roberts. Fed. R. Civ. P., Rule 25(d).

II. FACTUAL STATEMENT

A. The First Case Sought BIA Approval for a Fee-To-Trust Transfer of 6.9 Acres. Plaintiffs Were Not Parties in the 6.9 Acre Case

In or before 2001, the Band applied to the BIA for a fee-to-trust transfer of 6.9 acres of real property in Santa Barbara, California. On January 14, 2005, the Bureau of Indian Affairs ("BIA" or "Bureau") issued a Notice of Decision ("2005 NOD") decision stating its intent to accept 6.9 acres of real property in Santa Ynez (the "6.9 Acre Case") in trust for the "Santa Ynez Band of Mission Indians" (the "Band")." Defs' RJN, Exh. B, Dkt. No. 29-2, p. ID # 423.

The instant Plaintiffs, *i.e.*, Anne Crawford-Hall, San Lucas Ranch LLC ("San Lucas"), and Holy Cow Performance Horses LLC ("Holy Cow"), were not involved in the 6.9 Acre Case. Indeed, when the 6.9 Acre Case began, neither San Lucas nor Holy Cow were in existence. Declaration of Anne Crawford-Hall ("Crawford-Hall Decl."), ¶¶ 3-5.

B. The Supreme Court Decided *Carcieri* in 2009. In 2012, an Assistant Solicitor's Memorandum Opinion on *Carcieri* Was a Basis for the 2012 BIA Decision on the 6.9 Acres

The Supreme Court decided *Carcieri v. Salazar*, 555 U.S. 379 (2009) while the 2005 NOD was on appeal filed by others. The IBIA had remanded the 6.9 Acre proceeding to BIA to evaluate whether *Carcieri* or *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009), limited the Secretary of the Interior's authority to take land into trust for the Santa Ynez Band. Defs' RJN, Exh. B, Dkt. No. 29-2, p. ID # 401.

On June 13, 2012, the BIA issued a Notice of Decision affirming its 2005 NOD on the 6.9 Acre Case (the "2012 NOD"). *Id*. at pp. ID ## 401-442. The BIA had asked the appellants in the 6.9 Acre Case and the Band – *i.e.*, *not the instant Plaintiffs* -- to provide supplemental evidence and argument on the *Carcieri* issue, and these materials were considered by an Associate Solicitor, Division of Indian Affairs. *Id*. at

pp. ID ## 401-402. The Associate Solicitor issued a non-binding memorandum opinion on May 23, 2012 ("Berrigan Opinion").[2] That opinion was attached to the 2012 NOD, without any of the supporting evidence on which it presumably relied, and formed a basis for the BIA to reaffirm its 2005 decision on the 6.9 Acre Case. *Id.* at pp. ID ## 427-442.

C. Plaintiff Crawford-Hall, as Publisher of a Local Paper, Reports on the 6.9 Acre Case and the 2012 NOD.

When the 2012 NOD was issued by BIA, Ms. Crawford-Hall was the manager of the publisher of a local newspaper, the *Santa Ynez Valley Journal* ("*Journal*"). The *Journal* published news of interest to the Santa Ynez Valley. This included publishing news of the 6.9 Acre Case and the 2012 NOD. These news reports included urging Santa Ynez Valley residents to turn out and make their voices heard in meetings with the Santa Barbara County ("County") Board of Supervisors ("Board"), as the Board was considering whether to appeal the 2012 NOD. Defs' RJN, Exhs. D-J, Dkt Nos. 29-4 to 29-10, pp. ID ## 456-482.

Neither Ms. Crawford-Hall, nor the *Journal*, nor San Lucas, nor Holy Cow, indicated by any statement that any of the Plaintiffs thought they were obligated to file an appeal in the 6.9 Acre Case in 2012. Rather, the statements from the *Journal* and/or Ms. Crawford-Hall showed their understanding that the Plaintiffs had not been parties to or in the 6.9 Acre Case, and that only the County, the citizens' groups or others who had participated in the 6.9 Acre Case, were parties who could appeal from the June 2012 decision. The news reports also noted that the County's refusal to appeal meant that the appeal fell on the shoulders of the residents and/or citizens, *i.e.*, the community groups that had appealed originally. Crawford-Hall Decl. ¶¶ 6-8; Defs' RJN Exhs. D-J, Dkt. Nos. 29-2 to 29-10, pp. ID # 456-482.

[2] The Berrigan Opinion was not an "M" opinion, which the Department considers binding on it. Complaint, Exh. C, Dkt. No. 1-3, pp. ID ## 107-108

D. The Camp 4 Fee-To-Trust Proceeding and the 2014 NOD

In 2013, the Band filed another fee-to-trust application, this time for the approximately 1400 acres of land known as Camp 4, which was a part of Ms. Crawford-Hall's family's history (the "Camp 4 Case"). Camp 4 is located directly across the street from Plaintiffs San Lucas and Holy Cow. All of the Plaintiffs commented appropriately on the Camp 4 application and environmental assessments. Answer ¶¶ 47, 49, Dkt. No. 30, p. ID # 504; Crawford-Hall Decl. ¶ 9.

One of Plaintiffs' arguments in the Camp 4 Case was that the BIA lacked authority to take land into trust for the Band, based on *Carcieri*. Complaint, Exh. B, Dkt. No. 1-2, pp. ID ## 65-66. The Regional Director relied on the Berrigan Opinion and stated that the Department of the Interior ("Department") had "already determined that the Tribe was 'under Federal Jurisdiction in 1934'" and that the "Tribe participated in IRA elections and voted to accept coming under the provisions of the IRA, which the IBIA has held to be dispositive of the fact." *Id*. at p. ID # 70.

The Regional Director approved the Camp 4 fee to trust application in her December 24, 2014 Notice of Decision (the "Camp 4 2014 NOD"). *Id.* at p. ID # 82. Following the Camp 4 2014 NOD, Plaintiffs timely filed an appeal to the Interior Board of Indian Appeals ("IBIA"). Complaint, Exh. C, Dkt. No. 1-3, p. ID # 92.

E. The Administrative Appeal Is Decided by the Principal Deputy Assistant Secretary – Indian Affairs on January 19, 2017

Kevin Washburn, then the Assistant Secretary-Indian Affairs ("AS-IA") assumed jurisdiction over the administrative appeal. Plaintiffs' RJN, Exh. A at p. 2. Defendants argued in the administrative appeal that the AS-IA should affirm the Regional Director in finding that any argument based on *Carcieri* was already finally determined administratively in the 2012 NOD in the 6.9 Acre Case, and was beyond the scope of further administrative review. *Id.* at pp. 6-8. Defendants did not assert that the instant Plaintiffs, who had not been involved in the 6.9 acre fee to trust process, had failed to exhaust remedies.

The final administrative decision in this matter was issued in the waning hours of the Obama administration by a Principal Deputy Assistant Secretary ("PDAS"), not by an AS-IA. The opinion did *not* hold that Plaintiffs had failed to exhaust administrative remedies as to their *Carcieri* argument. Rather, the PDAS determined, consistent with the Camp 4 2014 NOD, that the 2012 NOD on the 6.9 Acre Case had finally determined the matter and that the issue was "now final for the Department and not subject to additional administrative review by [Camp 4] Appellants." Complaint, Exh. C, Dkt. No. 1-3, p. ID #107 (the "2017 Camp 4 Decision"). It also explicitly *excluded* Plaintiffs when it identified those of the Camp 4 parties who had also been in the 6.9 Acre Case as parties but had untimely appealed from the 2012 NOD: "Although some of the parties here, namely NMS, POLO, and SYVCC, attempted to appeal the 2012 decision, the Board dismissed their appeal, finding that none of those appellants filed a timely appeal." *Id*. The Defendants thus did not consider Ms. Crawford-Hall, San Lucas, and Holy Cow to have been parties in the 6.9 Acre Case, unlike NMS, POLO, and SYVCC.

F. Plaintiffs Are Separate Individual and Entities Who Were Not Part of the 6.9 Acre Fee to Trust Proceeding and Had No Obligation to Appeal from the 2012 NOD.

Plaintiffs in this Camp 4 Case are Anne Crawford-Hall, San Lucas, and Holy Cow. None of these separate parties participated in the 2005 6.9 Acre Case; none was asked to submit evidence and argument on the *Carcieri* issue for use by the Assistant Solicitor in the Berrigan Opinion. Crawford-Hall Decl. ¶ 8; Defs' RJN, Exh. 2, Dkt. No. 29-2, p. ID # 427.

Defendants have provided no evidence to suggest that any of the instant separate Plaintiffs were parties in the 6.9 Acre Case or were under any obligation to file an administrative appeal from the 2012 NOD on the 6.9 Acres. All they have proffered is evidence that Ms. Crawford-Hall and the *Journal* knew of the 2012 NOD, urged citizen participation to get the Board – a party in the 6.9 Acre Case – to appeal

administratively, and disagreed with the Board's vote, which left the appeal to fall on the shoulders of the "residents" *i.e.*, the community groups that also were parties in the 6.9 Acre Case. Defs' RJN, Exhs D-J, Dkt. Nos. 29-4 to 29-10, pp. ID ## 456-482; Crawford-Hall Decl. ¶¶ 7-8.

By contrast, the instant Plaintiffs have participated in this Camp 4 Case from the outset, via comment letters and administrative appellate briefs, and have fully exhausted any obligation to proceed through the BIA/IBIA/AS-IA process. Crawford-Hall Decl. ¶ 9; Answer ¶¶ 47, 49, 64, Dkt. No. 30, pp. ID ## 504, 508.

G. Defendants Accepted Camp 4 Into Trust Immediately After the Camp 4 Decision Was Issued. The Band Has Not Agreed to Step Down From Development Pending The Resolution of This Case.

The PDAS' opinion authorized the Regional Director to accept Camp 4 into trust immediately upon issuance of the 2017 Camp 4 Decision. BIA, through its Regional Director, immediately did so. Answer ¶ 68, Dkt. No. 30, p. ID # 509.

Plaintiffs' Complaint alleges that the PDAS had no authority to issue the 2017 Camp 4 Decision or direct acceptance of Camp 4 into trust, rendering the decision and transfer into trust null and void. Complaint ¶¶ 79-97, Dkt. No. 1, pp. ID ## 24-27. Plaintiffs also allege a lack of authority to take land into trust, violations of NEPA, and violations of the IRA regulations. *Id*. at ¶¶ 98-131, Dkt. No. 1, pp. ID ## 27-33.

The Band, through its Chairman, Kenneth Kahn, has provided declarations to the County, but *not* to the instant Plaintiffs. These declarations stated (1) that the Band had no intention of constructing development on Camp 4 until October, 2017 (Complaint, Exh. D at ¶¶ 4-5, Dkt. 1-4, pp. ID ## 138-139) and (2) that the Band will notify the County, *not* the instant Plaintiffs, if the Band does start development (Defs' RJN Exh. K at ¶ 5, Dkt No. 29-11, p. ID # 485). This provides no assurances that Plaintiffs will have notice of any development being undertaken, or that the Band will agree to stand down until this case is resolved.

Plaintiffs also seek mandamus, in the event that the Band goes forward with development, in Count Five of the Complaint. Complaint ¶¶ 132-137, Dkt No. 1, p. ID # 33.

III. ARGUMENT

A. Plaintiffs Are Not Precluded From Challenging the *Carcieri* Analysis in the Final Camp 4 Decision.

The Defendants' argument that the Plaintiffs failed to exhaust administrative remedies is pure fiction. It is predicated on improper legal analysis and seeks to obfuscate the fact that these Plaintiffs did not participate in the 6.9 Acre Case. BIA additionally should be barred from challenging Plaintiffs' appeal to this Court because it did not rely on this exhaustion argument in rejecting Plaintiffs' administrative appeal of the 2017 Camp 4 Decision.

1. The Plaintiffs Were Not Parties in the 6.9 Acre Case and Are Not Precluded From Arguing the Merits of the *Carcieri* Issue in this Camp 4 Case.

An agency decision is only given preclusive effect when the agency decided issues properly before it "which the parties have had an adequate opportunity to litigate." See, *University of Tennessee v. Elliot*, 478 U.S. 788, 799 (1986). Here, however, the Plaintiffs had no opportunity to litigate the *Carcieri* (or any other) part of the 6.9 Acre Case. Defendants have not shown that either Ms. Crawford-Hall, San Lucas, or Holy Cow participated in the 6.9 Acre Case. In fact, none of them did. Crawford-Hall Decl. ¶¶ 5, 8.

The 6.9 Acre Case began prior to April 12, 2001 (Defs' RJN, Exh. B, Dkt. No. 29-2, p. ID # 417), thus pre-dating both San Lucas' and Holy Cow's existence. Crawford-Hall Decl. ¶¶ 3, 4. After *Carcieri* came down during the convoluted appeal process of the 6.9 Acre Case, BIA asked for argument and evidence to be submitted related to *Carcieri*. It asked for this argument and evidence, however, *only* from the appellants in the 6.9 Acre Case, *not* the instant Plaintiffs.

As explained by BIA in the 2012 NOD:

> "In response to the IBIA's remand Order, the Bureau *requested the Appellants and the Tribe* to provide supplemental evidence and argument analyzing whether the Secretary may acquire land in trust for the Tribe. The supplemental evidence, briefs, and other documentation was referred to the Associate Solicitor, Division of Indian Affairs, for an opinion. Based upon the Associate Solicitor's memorandum opinion of May 23, 2012 (enclosed), the Bureau again affirms its previous decision of January 14, 2005 to take the land into trust for the Tribe." Defs' RJN, Exh. B, Dkt No. 29-2, pp. ID ## 401-402, emphasis added.

The 2012 NOD was thus based on a record exclusively limited to submissions and argument from the 6.9 Acre Case appellants, in the context of the 6.9 Acre Case. The "enclosed" memorandum opinion also apparently did not include the evidence on which Associate Solicitor Berrigan relied. Crawford-Hall Decl. ¶ 6.

Defendants have provided no authority under which Plaintiffs here would be bound by a non-precedential memorandum opinion enclosed in a separate case decision in which they did not participate, on a separate piece of property. Nor have defendants proffered authority to show that, even if the 2012 6.9 Acre Case NOD was final for those 6.9 Acre Case appellants who did not timely appeal, it is also final for the instant Plaintiffs who were not part of the prior case and had no chance to contribute to the administrative record. The Defendants' argument is flatly belied by the rule that a plaintiff must have had an opportunity to litigate the issues. See, *Elliot*, 478 U.S. at 799 (preclusion only applies to parties who had an opportunity to litigate).

Similarly, Defendants have not provided authority to show that the Associate Solicitor's memorandum was even binding on the BIA or the Department. To the contrary, this was not an "M-Opinion;" and legal opinions (including those of an Associate Solicitor) are not necessarily judicially deferred to as they do not have the force of law. See, e.g., *Christensen v. Harris County*, 529 U.S. 576, 586-587 (2000).

In other words, the Berrigan Opinion could have been withdrawn or modified at any time. Indeed, an agency has authority to reconsider its own decisions. *Trujillo v. Gen. Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980).

Finally, Defendants have not offered case law to support the premise that an agency can completely withdraw a key issue from scrutiny. To the contrary, even if an agency has already issued a prior decision or reached a prior policy position, it must still defend that position and "always stand ready 'to hear new argument' and 'to reexamine the basic propositions' undergirding the policy." See *Bechtel v. F.C.C.*, 10 F.3d 875, 878 (D.C. Cir. 1993).

This last point is particularly apt here, because there was new legal analysis inserted into the 2017 Camp 4 Decision, issued some four and one-half years after the 2012 6.9 Acre NOD. The 2017 Camp 4 Decision stated without authority that the 2012 NOD "is now final for the Department and not subject to additional administrative review by Appellants [*i.e.*, the Plaintiffs]." Complaint, Exh. C, Dkt. 1-3, p. ID # 107. It then went further, however. It bolstered its unsupported conclusion that Plaintiffs could not obtain additional administrative review with additional "controlling law" in the form of a Solicitor's M-Opinion (from 2013) on the meaning of "under federal jurisdiction," and further explained that M-Opinions are binding on the Department. *Id*. at pp. ID ## 107, 108 and fn. 97.

The 2017 Camp 4 decision therefore includes *new* legal argument which was *not* part of the decision in the 6.9 Acre Case. The instant Defendants raised arguments based on this new M-Opinion in the underlying Camp 4 administrative appeal. See, *id.*; see also, Pltf's RJN Exh. A at pp. 6-8 and fn 41.

In this motion, Defendants have not demonstrated that the M-Opinion would be binding on Plaintiffs, even if it is binding on the Department. Indeed, legal arguments are generally reviewed *de novo* by the Interior Board of Indian Appeals ("IBIA"). *Jackson County, Kansas, et al., v. Southern Plains Regional Director, et al.*, 47 IBIA 222, 227-228; 2008 I.D. LEXIS 145, *12 (Sept. 10, 2008). The BIA's revisiting of its

prior decision based on a newer M-Opinion, that was not issued until *after* the 2012 NOD, demonstrates that the 2012 NOD was not a decision that would be forever binding on application(s) for fee to trust. Plaintiffs could not have challenged the opinion on which Defendants now rely and therefore cannot be accused of failing to exhaust. Plaintiffs manifestly should not be precluded by any alleged failure to appeal the 2012 NOD. They should be allowed to raise arguments now, in this Camp 4 proceeding, challenging the analyses in this new M-Opinion.

2. Plaintiffs Fully Exhausted Any Administrative Remedy in the Camp 4 Case

Plaintiffs filed comment letters and took a timely administrative appeal from the 2014 Camp 4 NOD. Answer ¶¶ 47, 49, 64, Dkt. No. 30, pp. ID ## 504, 508; Crawford-Hall Decl. ¶ 9. Plaintiffs presented their arguments and the agency had a full opportunity to decide the issues Plaintiffs raised in challenging the Camp 4 transfer. Plaintiffs therefore complied with any administrative exhaustion obligation in this Camp 4 case.

Defendants' sole argument against the Plaintiffs' Second Claim under *Carcieri* is that the 2012 6.9 Acre Case NOD is "final" for the Department. Indeed, the 2014 Camp 4 NOD, and Defendants' subsequent arguments to the PDAS on the Camp 4 administrative appeal, were not failure to exhaust, but that the *Carcieri* issues were all *removed* from review solely because the 6.9 Acre Case appellants (*not* these Plaintiffs) had not timely appealed. See, Complaint, Exh. B, Dkt. No. 1-2, p. ID # 70; Pltfs' RJN, Exh. A, pp. 6-8. The PDAS agreed, holding in his opinion that the *Carcieri* question was "settled" for the Department. Complaint, Exh. C, Dkt. 1-3, p. ID # 107. As shown above, however, Defendants offer no law to support a finding that this issue is settled or "final" as to *Plaintiffs*. The later M-Opinion shows it was not.

It has long been the law that a court cannot affirm the decision of an agency on a ground that the agency did not invoke in making its decision. See, *SEC v. Chenery*

Corp., 332 U.S. 194, 196 (1947); *Pinto v. Massanari*, 249 F.3d 840, 847 (9th Cir. 2001). Here, the agency's only "ground" for refusing to consider Plaintiffs' *Carcieri* arguments below (and the basis for their motion to dismiss now) is their improper and unsupported "removal" of such issues from the scope of the Camp 4 administrative appeal. But this reliance on the "removal" ignores that the exhaustion requirement applies only to those who were parties in an administrative case and failed to appeal administratively before seeking judicial review, or appealed prematurely from an administrative decision to the federal court.

The Defendants' cases prove the point – they only apply the exhaustion rule to plaintiffs who have avoided review of direct actions they were involved in. See, e.g., *Stock West Corp. v. Lujan*, 982 F.2d 1389, 1391-1393 (9th Cir. 1993) (plaintiff had failed to appeal from two prior agency decisions addressing its contracts with a tribe, in which it had been a party, so it could not obtain review of those decisions on the merits when it later again sought review of those prior agency decisions); *Joint Bd. Of Control of Flathead, Misson & Jocko Irr. Dists. v. United States*, 862 F.2d 195, 199-201 (9th Cir. 1988) (Joint Board's lawsuit was dismissed without prejudice pending completion of the agency process in which the Joint Board was still participating); *Faras v. Hodel*, 845 F.2d 202, 204 (9th Cir. 1988) (plaintiff could not pursue her complaint in federal court when she had not sought initial administrative review previously under prior administrative procedural rules); *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677-78 (9th Cir. 1988) (tribe had not pursued any administrative remedies whatsoever from BIA's alleged decisions which mismanaged the tribe's natural resources); *Woodford v. Ngo*, 548 U.S. 81, 89 (2006) (prisoner who alleged mistreatment failed to timely file initial administrative grievance so could not file federal case); *Amerco v. N.L.R.B.*, 458 F.3d 883, 888 (9th Cir. 2006) (corporation in the process of NLRB hearings could not seek injunctive relief from court until agency proceedings were completed). These cases provide no support for any finding

that the instant Plaintiffs, who were not parties in the 6.9 Acre Case, failed to exhaust administrative remedies in that case.

3. The Exhaustion Policies Support Plaintiffs, Not Defendants.

Defendants make much of the two policies which support imposing an exhaustion requirement on Plaintiffs in this case. They have misunderstood those policies.

First, Defendants' argument that preclusion would show a deference due to the Department on issues of tribal recognition and land acquisitions is simply wrong. Indeed, the case Defendants rely on for this proposition, *McCarthy v. Madigan*, 503 U.S. 140 (1992), found that a prisoner *need not* exhaust his administrative remedies before seeking judicial relief where the agency had no specific expertise in the issues raised, and the administrative procedure/remedy could not provide the relief requested. Here, the agency may have expertise in such things as the regulations it developed for tribal recognition, but its lawyers' opinions are no better than any other lawyers' opinions – *i.e.*, they are only as good as they are persuasive. *Christensen*, 529 U.S. 576 at 587. And there is no reason to defer to the agency action of claiming "finality" of the 6.9 Acre Case as against Plaintiffs, which the agency has yet to explain or support.

Second, while Defendants tout the rule requiring exhaustion as more likely to produce a useful record for the trial court, this argument fails here, for several reasons already identified above. That is, the Plaintiffs here had *no* opportunity to contribute to the record in the 6.9 Acre Case. In fact, they were excluded from contributing to the record, since only the parties to the 6.9 Acre Case were asked to provide materials for the Associate Solicitor to consider. Defs' RJN, Exh. B, Dkt No. 29-2, pp. ID ## 401-402. Plaintiffs cannot be tasked with failing to exhaust with respect to a record which Plaintiffs were barred from making.

Additionally, on the key *Carcieri* issues, the "record" is essentially the Regional Director's purported adoption of the Berrigan Opinion in the 2012 NOD, nothing

more: "Based upon the Associate Solicitor's memorandum opinion of May 23, 2012 (enclosed), the Bureau again affirms its previous decision of January 14, 2005 to take the land into trust for the Tribe." *Id.* at p. ID # 402. Yet the Berrigan Opinion was *not* binding on the Department, the IBIA, or the BIA; it was not an "M-Opinion;" and it could be withdrawn or modified at any time.

Finally, the decision Plaintiffs challenge in this Camp 4 case has new *Carcieri* law in the new M-Opinion, which Plaintiffs should be able to contest under any analysis. And, as in normal appeals, appellate review is typically only afforded to issues raised below. See, e.g., *Sims v. Apfel*, 530 U.S. 108, 109 (2000). The agency practice is the same: "Unless manifest error or injustice is evident, the Board is limited in its review to those issues raised before the Regional Director." *Jackson County*, 47 IBIA 222 at 228, 2008 I.D. LEXIS 145 at *13. Defendants should not be able to subvert Plaintiffs' claims for judicial review, by ducking the fact that they failed to argue exhaustion below.

The subtext of Defendants' motion is that Plaintiffs should be collaterally estopped from asserting any *Carcieri* issue, notwithstanding the fact that they were not involved in the 6.9 Acre Case, and notwithstanding their insertion of "new" law in the 2014 NOD on Camp 4 that was not in the 2012 NOD. This far-reaching argument would impose an unwarranted exhaustion requirement on nonparties, and would require non-parties like publishers to take action whenever they hear of any potential issue that could affect them. Defendants have provided no case support for such a wide-ranging concept, and it should be rejected.

B. The Fifth Claim for Mandamus Is Properly Pled

Defendants ignore the well-pled allegations and misconstrue the law of status quo in arguing that Plaintiffs' Fifth Claim should be dismissed. Defendants' standing and mandamus arguments are wrong for at least the following reasons.

1. Plaintiffs Have Properly Pled that the Transfer of Land Into Trust Caused Them Harm

This entire case is about Defendants' decision to take agricultural property across the road from Plaintiffs' property out of County jurisdiction, where it is subject to County regulations that prevent the property from being used for anything but agriculture, and placing it into trust where it will be exempt from any such regulations. The Band's intent to develop Camp 4 is not hypothetical—to get the land put into trust, it publicly explained (albeit inadequately) the development it intends to construct. Significant evidence adduced during the BIA process showed that the intended developments would impact Plaintiffs' community and have direct, physical impacts on Plaintiffs' property. See, Complaint ¶¶ 45, 46, 51-56, 75-78, Dkt. No. 1, p. ID # 14-18, 22-24. There is no doubt that the land will be developed at least as heavily as was already described.

By contrast, if Camp 4 remained in fee, it would be subject to County regulations and left as undeveloped agricultural land. There is therefore no doubt that the intended development could not occur without Defendants' actions, so those actions are "'fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)).

Defendants' argument that Mr. Kahn has said there are no plans to begin construction is a red herring and misleading. *See* Mot. at 13:2-4. The chairman says that there are "[a]t present" "no plans for any construction," but the proposed multiple types of development are already accepted as part of the 2017 Camp 4 Decision. Complaint ¶ 70, Dkt. No. 1, pp. ID ## 21-22; Defs' RJN, Exh. K, Dkt. No. 29-11, p. ID # 485. Further, Mr. Kahn is negotiating an agreement with the County to develop Camp 4. Plaintiffs' RJN Exh. B. Finally, the chairman recognizes that the intent in August 2017 may change, in which case he will give notice to the *County* but not to

Plaintiffs. Defs. RJN Exh. K at 2:18-21, Dkt. No. 29-11, p. ID # 485. Absent notice and opportunity to seek relief, Plaintiffs are patently exposed to likely harm.

Any quibbles with these facts that Defendants raise in their reply are unavailing because on a motion to dismiss, "the district court must accept [Plaintiffs'] material allegations . . . as true and construe them in the light most favorable to" Plaintiffs. *In re Toyota*, 890 F. Supp. 2d. 1210, 1217 (2011). Further, at this stage, Plaintiffs do not have to prove injury or causation conclusively; "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [the court] 'presumes that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan*, 504 U.S. 555, 561. Here, the allegations of the Complaint demonstrate the standing factors and defeat this motion to dismiss.

2. Defendants' Section 705 Argument Fails Because It Relies on a Non-Existent and Mistaken Definition of "Status Quo"

Defendants mistakenly argue, with no support, that the "status quo" is determined as of some date *after* the decision being appealed. Mot. at 13.[3] That is wrong, and has been since before the Constitution was adopted. *See Detroit & M. R. Co. v. Mich. R. Com.*, 240 U.S. 564, 572 (1916). The status quo, whether called "status quo" or "status quo ante," preserves "the last, uncontested status which *preceded the pending controversy*". *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (emphasis added) (quoting *Regents of Univ. of Cal. v. Am. Broad. Cos.*, 747 F.2d 511, 514 (9th Cir. 1984)). This line of reasoning dates back at least to 1897, at which time the doctrine was already "not new," and has been confirmed by the Supreme Court. *Fredericks v. Huber*, 180 Pa.

[3] Defendants' only purported support is a 1947 Attorney General Manual on the APA that addresses a court's inability *to allow* a party to use a newly acquired power pending judicial review of the decision granting that new power. *See* Mot. at 13-14. That example has no relevance to requiring Defendants *to prevent* the Band from using its newly acquired power over the land pending judicial review.

572, 575, 37 A. 90, 91 (1897) ("the status quo which will be preserved by preliminary injunction is the last actual, peaceable, noncontested status which preceded the pending controversy. . . ."); [4] *Nken v. Holder*, 556 U.S. 418, 426 & 429 (2009) (court's ability to hold order in abeyance is part of inherent power preserved in All Writs Act and status quo is "the state of affairs before the [contested] order was entered.") The relevant date for determining the status quo is therefore the last day before the PDAS issued the 2017 Camp 4 Decision and authorized the Regional Director to accept Camp 4 into trust.

The purpose of preserving the status quo is especially relevant here: "equity will not permit a wrongdoer to shelter himself behind a suddenly or secretly changed status, though he succeeded in making the change before the chancellor's hand actually reached him." *Fredericks*, 180 Pa. at 575, 37 A. at 91. The key reason that Plaintiffs need to seek mandamus relief is that in late 2013, Defendant Department altered its process for approving fee-to-trust applications so that the Secretary would complete the trust acquisition "immediately after the decision to acquire land in trust is final." Land Acquisitions: Appeals of Land Acquisition Decisions, 78 Fed. Reg. 67928, 67930 (Nov. 13, 2013). Prior to then, Defendants' regulations required the Secretary to wait 30 days after notice was published to complete the acquisition. *Id.* at 67929. The waiting period was to allow parties to seek judicial review of the Secretary's decision, which was stayed if a party sought judicial review. *Id.* at 67929-30.

The change in regulations followed the Supreme Court decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012) where the Supreme Court determined that a 6-year statute of limitations applied to appeals of fee-to-trust decisions. 78 Fed. Reg. 67298, 67930. The longer statute of limitations

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[4] *Regents* quotes *Westinghouse Elec. Corp. v. Free Sewing Mach. Co.*, 256 F.2d 806, 808 (7th Cir. 1958), which in turn cites *Warner Bros. Pictures, Inc. v. Gittone*, 110 F.2d 292, 293 (3d Cir. 1940), which in turn cites *Fredericks*, 180 Pa. 572.

did not, however, extend the time a tribe had to wait after the Secretary took the land into trust before beginning to alter the in-trust land. Here, after the Band transforms Camp 4, no order from any court will return Camp 4 to its pristine condition before it was put into trust, thereby causing irreparable harm. Not requiring the Defendant Department to prevent development pending judicial review would forestall meaningful judicial review, effectively turning the process into an unconstitutional delegation of legislative powers. *See State of South Dakota v. U.S. Dep't of the Interior*, 69 F.3d 878 (1995) (Secretary's practice at the time of immediately transferring title was an unconstitutional delegation because it foreclosed judicial review).

Plaintiffs' claim for mandamus is necessary in response to Defendants' attempt to "shelter behind a . . . changed status . . . [it] succeeded in making . . . before the [court's] hand actually reached [it]." *Fredericks*, 180 Pa. at 575, 37 A. at 91. The Court is therefore authorized to "issue all necessary and appropriate process . . . to preserve status or rights pending conclusion of the review proceeding." 5 U.S.C. § 705 (2016).

3. Plaintiffs Do Not Assert the All Writs Act as an Independent Basis for Federal Subject Matter Jurisdiction

Defendants incorrectly argue that Plaintiffs rely on the All Writs Act as an independent basis for federal subject matter jurisdiction. *See* Mot. at 15-16. A cursory review of the Complaint demonstrates that Plaintiffs allege federal subject matter jurisdiction under, *inter alia*, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701, *et seq.* and the Declaratory Judgment Act, 28 U.S.C. §§ 2201, *et seq.* *See*, *e.g.*, Complaint at ¶¶ 22-24, Dkt No. 1, p. ID # 9. Nothing in the "Jurisdiction" section of the Complaint asserts jurisdiction under the All Writs Act. *Id.* at ¶¶ 22-25.

United States Code, Section 706(2) authorizes the Court to hold unlawful and set aside an agency action it finds to be, *e.g.*, arbitrary, capricious, in excess of statutory jurisdiction, or unsupported by substantial evidence. 5 U.S.C. § 706(2)

(2016). As part of its authority to review the challenged action, the court may issue "all writs necessary or appropriate in aid of their respective jurisdictions," including a stay of the challenged order while the court "assesses the legality of the [challenged] order". *See Nken*, 556 U.S. at 426 (quoting All Writs Act, 28 U.S.C. § 1651(a)).[5] That is the appropriate and permissible basis on which Plaintiffs assert relief under the All Writs Act.

Because Plaintiffs seek a writ to stay the Defendants' challenged decision and transfer, the elements Defendants cite on page 15 of its motion do not apply. *See* Motion at 15 (incorporating elements from *Cheney v. United States Dist. Ct.*, 542 U.S. 367, 380 (2004)). *Cheney* and its reference to a mandamus as a "drastic and extraordinary remedy" relate to a requested mandamus against a lower court to dissolve, not stay, discovery orders directing the Vice President and other senior officials to produce documents. *See id*. at 372, 380-81.

The proper elements for the writ Plaintiffs claim in the Complaint are the "traditional" factors considered for a stay: (1) likelihood of success, (2) irreparable harm, (3) whether stay will irreparably injure the other parties, and (4) where public interest lies. *See Nken* 556 U.S. at 434*; accord* Mot. at 14 n.8 (citing *Humane Soc'y of the U.S. v. Gutierrez*, 558 F.3d 896, 896 (9th Cir. 2009)). Plaintiffs alleged in the Complaint "enough facts"—accepted for purposes of this motion as true and construed in the light most favorable to Plaintiffs—"to state a claim [for a writ to stay the challenged decision] that is plausible on its face." *In re Toyota*, 890 F. Supp. at 1217.

[5] Defendants also incorrectly assert that the Court's ability to issue a mandamus is pursuant to Section 706(1), which allows the court to "compel agency action." *See* Motion at 15. While that section provides a basis for the court to force the agency to take an action, the court also has the "inherent" authority in the All Writs Act to compel an agency to stay enforcement of its challenged order. *Nken*, 556 U.S. at 426.

As described in Plaintiffs' complaint: (1) Plaintiffs have a strong likelihood of success based on Defendants' violation of the Federal Vacancies Reform Act (First Claim for Relief, Complaint ¶¶ 79-97), failure to comply with NEPA (Complaint ¶¶ 10, 55-56; Third Claim for Relief, Complaint ¶¶ 109-119); (2) Plaintiffs will suffer irreparable harm to their ability to enjoy their property if development on Camp 4 proceeds (Complaint ¶¶ 75-78, 117; Fifth Claim for Relief, Complaint ¶¶ 132-137); (3) a stay will not irreparably harm the other parties since Applicant has stated it has no immediate plans to develop Camp 4 and is constrained by the Williamson Act to refrain from construction until 2022 (Complaint ¶ 56.a, Dkt. No. 1, p. ID # 16; Complaint, Exh. D, Dkt. No. 1-4, pp. ID ## 136-143; Defs' RJN, Exh. K, Dkt. No. 29-11, pp. ID ## 483-486); and (4) the public interest lies in staying Defendants' conveyance of the land into trust so that the reviewing courts can come to a reasoned, not rushed decision. (Complaint ¶¶ 55-56, 109-125, Dkt. No. 1, pp. ID ## 16-18, 29-32). *See Nken* 556 U.S. at 421 ("No court can make time stand still while it considers an appeal . . . and if a court takes the time it needs, the court's decision may in some cases come too late for the party seeking review. That is why it 'has always been held [that] . . . a federal court can stay the enforcement of a judgment pending the outcome of an appeal.")

Finally, as described above, Defendants are incorrect that the Court's ability to overrule the agency's decision provides adequate relief making mandamus unavailable. Mandamus is still required to prevent the harm that will occur when the Band starts developing Camp 4 before the appeals stemming from Defendants' Camp 4 Decision are completed.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court deny Defendants' Motion for Partial Dismissal in its entirety.

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DATED: October 27, 2017

CAPPELLO & NOËL LLP

By: */s/ Wendy D. Welkom*
A. Barry Cappello
Lawrence J. Conlan
Wendy D. Welkom
Attorneys for Plaintiffs,
Anne Crawford-Hall, San Lucas Ranch, LLC, and Holy Cow Performance Horses, LLC

CERTIFICATE OF SERVICE

I, Wendy D. Welkom, hereby certify that on October 27, 2017, I caused the foregoing **PLAINTIFFS' OPPOSITION TO MOTION FOR PARTIAL DISMISSAL** to be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Wendy D. Welkom
Wendy D. Welkom