Judge Coughenour

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON, et al.,

Plaintiffs,

v.

ROB FAIRWEATHER, etc., et al.,

Defendants.

CASE NO. C21-0002JCC

CONSOLIDATED MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR PRELIMINARY INJUNCTION AND IN SUPPORT OF CROSS-MOTION TO DISMISS PURSUANT TO RULES 12(B)(1) AND 12(B)(6), F.R.CIV.P.

ORAL ARGUMENT REQUESTED

INTRODUCTION

After waiting for over eight months to file this action, plaintiffs have invented a *faux* emergency as an excuse to peremptorily seek a preliminary injunction upon minimum notice in a bid to block a proposed sale of a warehouse facility operated by the National Archives and Records Administration (NARA) in Seattle. Plaintiffs' lead counsel, the Washington Attorney General, was aware of this proposed sale in February 2020, engaged in negotiations with Federal government counsel through April 2020, and then inexplicably disappeared from discussions without explanation, only to reappear in January 2021 when this lawsuit seeking a preliminary injunction was filed. Plaintiffs' requested relief is in direct contravention of the statutory purposes of the Federal Assets Sale and Transfer Act of 2016, Pub. L. No. 114-287, 130 Stat. 1463 ("FASTA"), and is barred by the statute's provisions, which expressly preclude judicial review.[1]

While plaintiffs claim to be acting in the public interest, they are doing the opposite. The Federal government is not closing the Seattle NARA facility without reason. The facility is inadequate to the task of permanently preserving the archival records to which plaintiffs would prefer to have direct access, and it is simply uneconomical to suitably retrofit the facility to provide these precious records with the protections needed for permanent preservation. Moreover, even if it made economic sense to do so (and it does not), funding to undertake a retrofit of the facility or to build or move to a new suitable location in the Seattle area is simply not available. Consequently, if the ultimate goal of protecting these historical records for future generations is given the degree of importance it deserves, then it should be recognized that the prospect of indefinite storage at the Seattle NARA facility is simply not in the public interest. Thus, even if plaintiffs are successful in their effort to stop or delay the sale of the facility in this lawsuit, it still will be necessary for NARA, in its discretion as the responsible custodian of these precious records, and as practical conditions (including available funding) permits, to remove them to other, safer NARA locations, as NARA deems necessary for their safety.

1 A true and correct copy of the Federal Assets Sale and Transfer Act of 2016, Pub. L. No. 114-287, 130 Stat. 1463, is attached to the Declaration of Brian C. Kipnis. Decl. of Kipnis, ¶ 2, Exh. A.

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Because this lawsuit is without any legal basis, defendants' cross-motion for dismissal pursuant to Rules 12(b)(1) and 12(b)(6) should be granted. And, whether or not defendants' motion to dismiss is granted, plaintiffs' motion for a preliminary injunction should be denied.

REGULATORY SCHEME

In 2016, FASTA was enacted to address the sense of Congress that the federal government maintains "too much excess and underutilized property." H. R. Rep. No. 114-578, Part 2, 114th Cong., 2d Sess., 13 (2016).[2] Congress recognized that "[m]ore effective management of federal property would offer improved opportunities for the federal government to right-size its real estate portfolio, reduce costs, and achieve savings through the sale of unneeded properties." *Id.* at 13-14. Indeed, it was contemplated that "[t]he federal government could realize billions of dollars in savings by disposing of unneeded or underutilized property, as well as consolidating and co-locating properties to realize cost efficiencies." *Id.* at 14. This was believed to be necessary because, "[g]iven current fiscal realities, the federal government can no longer afford to pay to operate and maintain vacant buildings and unneeded or underutilized properties." *Id.* The impetus behind the enactment of FASTA, therefore, was "to decrease the deficit by consolidating and selling Federal buildings." *Id.* at 1.[3]

To accomplish the purposes of the Act, the Public Buildings Reform Board (PBRB), a six-year independent board, was established to identify opportunities for cost savings and deficit reduction by reducing the federal government's inventory of civilian real property. The PBRB is composed of experts in fields such as commercial real estate, development, space optimization, and utilization. This Board was given the responsibility of taking a fresh look at what should be done to drive out waste and maximize efficiencies in the government's real property portfolio. *Id.* at 14; *and see* FASTA § 4. The statute contemplates that the PBRB will make recommendations to the Office of Management and Budget (OMB) on properties that can be sold, consolidated, leased, co-located,

2 A true and correct copy of this House Report is attached to the Declaration of Brian C. Kipnis. Decl. of Kipnis, ¶ 3, Exh. B.

3 The specific purposes of FASTA are enumerated in Section 2 of the Act.

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reconfigured, or even transferred. *Id.* If approved by OMB, the PBRB's recommendations are required to be implemented by Federal agencies in an expeditious and efficient manner with the goal of maximizing savings to the taxpayer. *Id.*

The most important sections of the statute for resolving plaintiffs' motion for a preliminary injunction and defendants' cross-motion to dismiss are as follows:

(i) Section 11:

Under FASTA § 11, the head of each federal agency is required to annually submit to GSA and OMB specific information about every Federal property under their control and make recommendations of properties that should be considered for sale or other disposition. FASTA § 11(a). Under this Section 11 process, OMB and GSA are required to develop "consistent standards and criteria" for the evaluation of the Federal agency recommendations made pursuant to Section 11(a), incorporating enumerated statutory factors, and apply those standards and criteria in order to jointly develop recommendations on the Federal agency submissions for consideration by the PBRB. FASTA § 11(b) and (c). OMB is then expected to submit its standards, criteria, and recommendations, together with all supporting information to the PBRB. FASTA § 11(d).

(ii) Section 12:

Under FASTA § 12, the PBRB is required to "identify opportunities for the Government to reduce significantly its inventory of civilian real property and reduce costs." FASTA § 12(a). To that end, the PBRB, in the High Value Asset round of the process, was required to identify not fewer than five Federal civilian properties with a total fair market value of not less than $500 million and not more than $750 million and to transmit that list to OMB and Congress as PBRB recommendations for approval by OMB under FASTA § 13. FASTA § 12(b)(1)(A) and (B).

In developing the foregoing list, nowhere in FASTA is there a provision that mandates that the PBRB draw from the list of properties identified by Federal agencies in the Section 11 process, nor does FASTA require that the PBRB follow, or even consider, OMB's and GSA's Section 11 recommendations based on those Federal agency submissions. To the contrary, the statute provides:

> The Board shall perform an independent analysis of the inventory of Federal civilian real property and the recommendations submitted pursuant to section 11. *The Board*

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> *shall not be bound or limited by the recommendations submitted pursuant to section 11*.

FASTA § 12(c) (emphasis added). Indeed, FASTA specifically authorizes the PBRB to base its recommendations on other sources of information. Specifically, FASTA § 12(d)(1) provides that, "[n]otwithstanding any other provision of law, the [PBRB] may receive and consider proposals, information, and other data submitted by State and local officials and the private sector."

After developing its recommendations, the PBRB is directed to transmit those recommendations to OMB for approval. FASTA § 12(g).

iii. Section 13:

Following its receipt of the PBRB recommendations, OMB is required to conduct a review and, within 30 days, either approve or disapprove the PBRB recommendations. FASTA § 13(a).[4]

iv. Section 18:

Judicial review of any action taken under sections 12 and 13 of FASTA is expressly precluded. FASTA § 18(1). The preclusion of judicial review does not depend on the agency taking the action under the identified sections. Additionally, judicial review of actions taken by the PBRB are expressly precluded. FASTA § 18(2).

STATEMENT OF FACTS[5]

On May 28, 2018, before the PBRB was up and running, GSA awarded a contract to the private real estate firm of Coldwell Banker Richard Ellis (CBRE). Declaration of Dugan, ¶ 5. The purpose of this contract was to provide independent third-party analysis of the federal real property inventory across the entire Federal Government. *Id.* CBRE was selected for this task for, among other reasons, its private sector expertise and its in-depth knowledge of the local conditions in discrete real estate markets. *Id.*

4 If OMB approves the PBRB recommendations, implementation of those recommendations is governed by the procedures set forth in FASTA § 14.

5 In this memorandum, defendants Office of Management and Budget and its Acting Director, Rob Fairweather, will be collectively referred to as "OMB," defendants General Services Administration and its Acting Administrator, Katy Kale, will be collective referred to as "GSA," defendants Public Buildings Reform Board, and its Executive Director, Adam Bodner, will be collectively referred to as "PBRB," and defendants National Archives and Records Administration, and David S. Ferriero, Archivist of the United States, will be collectively referred to as "NARA."

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Among the tasks assigned in the contract to CBRE was to use existing government real property databases and market knowledge to identify high value disposal candidates for consideration by the PBRB. *Id.* at ¶ 6. The Seattle NARA facility was one of the properties identified by CBRE pursuant to this contractual assignment. *Id*. at ¶ 7. The CBRE report, identifying the Seattle NARA facility as a high value disposal candidate among other Federal properties was provided directly to the PBRB. *Id.* at ¶ 8.

Importantly, the Seattle NARA facility was not identified and transmitted by GSA pursuant to its responsibility under FASTA § 11(a) to identify candidate properties within its portfolio and recommended them to OMB for vetting and recommendation to the PBRB. *Id.* at ¶¶ 8-9. In other words, there was no connection between the process established by FASTA § 11 and the PBRB's consideration and ultimate recommendation of the Seattle NARA facility.

After assessing the facility under the FASTA factors, the PBRB determined that a sale of the Seattle NARA facility was a good fit with the purposes of FASTA.[6] Accordingly, in a letter dated October 31, 2019, the PBRB, pursuant to FASTA, § 12(b), included the Seattle NARA facility amongst a list of fourteen federal civilian properties that PBRB recommended to the OMB for disposal pursuant to FASTA and submitted for approval under FASTA § 12(b)(1).

On December 27, 2019, the PBRB submitted a High Value Assets Report to OMB, containing additional information about the 12 properties ultimately recommended for disposition, dkt. # 16-1, pp. 17-124, including the NARA facility in Seattle, *id.* at pp. 110-115. On January 24, 2020, OMB approved the PBRB recommendations pursuant to FASTA 13(a), (b) and (c).

In a letter dated February 5, 2020, addressed to the former OMB Director and the members of the PBRB, the Attorney General of Washington, requested that the decision to sell the Seattle NARA facility be "reconsidered." Decl. of Kipnis, ¶ 4, Exh. C. In his letter, the Washington Attorney General states, "[a]lthough I hope to avoid litigation, my team is preparing to take legal action to defend access to these important historical records and prevent your agency's unlawful

6 The factors considered by the PBRB in deciding to include the Seattle NARA facility in its selection of high value properties are summarized in the PBRB's High Value Assets Report. Dkt. # 16-1, p. 112.

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decision from taking effect." *Id.* Thereafter, a series of communications ensued between the Attorney General's Office and the United States Attorney's Office. *Id.* at ¶ 5. In a letter dated April 6, 2020, the Washington Attorney General wrote to express his appreciation for the willingness of counsel for the Federal government to engage in continuing discussions regarding the necessary elements of a potential resolution of this dispute. *Id.* To "facilitate further discussions," the Washington Attorney General asked that he be provided with additional information. *Id.* A response to this letter providing the requested information was promptly sent to the Washington Attorney General on April 21, 2020. *Id.*

Nothing more was heard from the Washington Attorney General after he was provided with the requested information. *Id.* at ¶ 6. To this day, the Washington Attorney General has never expressed any dissatisfaction with the information that was provided, but the Washington Attorney General also did not engage in "further discussions" as represented. *Id.* Instead, approximately eight months later, without any advance notice, plaintiffs filed their 188-paragraph complaint in this action.

The filing of the complaint was followed three days later by the precipitous filing of a motion for a preliminary injunction. In support of this motion, plaintiffs lodged 169 pages of exhibits (Dkt. # 16-1) and 586 pages of declarations (Dkt. # 17-1) with the Court. The preliminary injunction motion was noted on the Court's motion calendar for the very minimum amount of notice permitted by the local rules, affording defendants a mere 18 days to respond. Dkt. # 16.

Plaintiffs' now-amended complaint asserts that they will be irreparably harmed by a loss of local access to archival records. *See*, *e.g.*, Dkt # 30, ¶ 92 ("tribal governments rely on physical access to critical historical documents and, as a result, sale of the Seattle facility will have a 'profound, negative, and irreparable impact'"). However, the sale of the Seattle NARA facility would not occur, at the earliest, until July 1, 2021. And, apart from closures made necessary by the current coronavirus epidemic, NARA has no plans to deny physical access to critical historical documents to anyone prior to the sale of the facility. Declaration of Quigley, ¶ 8.

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STANDARDS OF REVIEW

i. Motion to Dismiss for Lack of Subject Matter Jurisdiction:

"A Rule 12(b)(1) jurisdictional attack may be facial or factual. In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) (citations omitted).

In a facial attack, the Court takes "the allegations in the plaintiff's complaint as true." *Whisnant v. United States*, 400 F.3d 1177, 1179 (9th Cir. 2005). In a factual attack under Rule 12(b)(1), courts "need not presume the truthfulness of the plaintiffs' allegations." *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000). Instead, a district court may look beyond "the face of the pleadings, [and] review any evidence, such as affidavits and testimony, to resolve factual disputes concerning the existence of jurisdiction." *McCarthy v. United States*, 850 F.2d 558, 560 (9th Cir. 1988).

ii. Motion to Dismiss for Failure to State a Claim Upon Which Relief can be Granted:

Federal Rule of Civil Procedure 12(b)(6) permits a motion to dismiss if the complaint fails to state a claim upon which relief can be granted. A motion to dismiss focuses on the allegations in the complaint. The Court examines whether a plaintiff has alleged sufficient facts that if taken as true, entitle him to relief. *See*, *e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). When reviewing a motion to dismiss under Rule 12(b)(6), a court must accept as true all factual allegations—but not legal conclusions. *See Iqbal*, 556 U.S. at 678.

iii. Motions for Preliminary Injunctions on Claims under the Administrative Procedure Act:

A preliminary injunction, like all injunctions, is a matter of equitable discretion; it does not follow as a matter of course, even where the party seeking the injunction has fully prevailed on the merits. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 32 (2008). And, a time-honored consideration in the equitable calculus is the maxim of equity that holds that "one who seeks equity must do equity." *Koster v. (Am.) Lumbermens Mut. Cas. Co.*, 330 U.S. 518, 522 (1947).

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Plaintiffs' preliminary injunction motion rests on the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq*. (APA). Thus, the motion requires the Court to meld the requirements for preliminary injunctions with the standard of review applicable to final agency actions under the APA. First, the party seeking a preliminary injunction must establish that he or she is likely to succeed on the merits; that he or she is likely to suffer irreparable harm in the absence of preliminary relief; that the balance of equities tips in his or her favor; and that an injunction is in the public interest. *Winter,* 555 U.S. at 20. Second, insofar as the movant contends that a final agency action is "arbitrary and capricious," the movant must show that he or she is likely to prevail within the discretionary framework of the arbitrary and capricious standard. *See, Lands Council v. McNair (Lands Council II)*, 537 F.3d 981, 987 (9th Cir. 2008) (*en banc*).

The arbitrary and capricious standard of review is "highly deferential," and an agency action may not be set aside unless "there is no rational basis for the action." *Friends of the Earth v. Hintz*, 800 F.2d 822, 831 (9th Cir. 1986). Under this standard, "[t]he court is not empowered to substitute its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971); *Lands Council II*, 537 F.3d at 987. Under Congress's general formulation in the APA of the basic criteria for review of administrative agency determinations, agency action is presumed to be valid in the absence of a substantial showing to the contrary. *Environmental Defense Fund, Inc. v. Costle*, 657 F.2d 275, 283 n.28, 292 (D.C. Cir. 1981). Review is generally confined to the administrative record before the Court. *Florida Power and Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). While the level of review is not to be perfunctory, it is relatively narrow and designed only to ensure that the agency's decision is not contrary to law, is rational, has support in the record, and is based on a consideration of the relevant factors. *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 803 (1978). A "heavy burden" rests on the party who seeks to demonstrate that, regarding the agency action which it disputes, the agency acted unlawfully. *Enos v. Marsh*, 616 F. Supp. 32, 58 (D. Haw. 1984), aff'd, 769 F.2d 1363 (9th Cir. 1985) (quoting *Short Haul Survival Committee v. United States*, 572 F.2d 240, 244 (9th Cir. 1978)).

In summary, plaintiffs' task is to convince the Court that they are likely to prevail on the

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merits of their claim that some final agency action of defendants was unlawfully irrational. In addition, plaintiffs must convince the Court that they are likely to suffer irreparable injury, that the balance of hardships tips in their favor, and that the public interest favors the issuance of an injunction. As set forth below, plaintiffs' motion fails to meet these criteria.[7]

ARGUMENT

I. PLAINTIFFS LACK STANDING TO PURSUE COUNTS I, II AND III OF THEIR AMENDED COMPLAINT[8]

The Supreme Court has "repeatedly held that an asserted right to have the Government act in accordance with [the] law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen v. Wright*, 468 U.S. 737, 754 (1984). A party must also have standing to bring the claim and is obligated "to demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

For purposes of standing analysis with respect to Counts I, II and III of plaintiffs' amended complaint, plaintiffs' injury (if any), is purely statutory in nature in that it exists (if at all) by virtue of the violation of a particular statute, *i.e.*, FASTA. *See*, *e.g.*, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 578 (1992) ("[t]he . . . injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing") (internal quotations omitted); *see also Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.") Standing analysis with respect to such a claim proceeds at two separate levels. First, plaintiff must pass muster under Article III. Second, plaintiff must establish that he or she has "statutory standing." *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014).

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7 A stricter standard applies to plaintiffs' motion to compel agency action under 5 U.S.C. § 706(1). See footnote 24, *infra (citing Tanner Motor Livery, Ltd v. Avis, Inc.,* 316 F.2d 804, 808-809 (9th Cir. 1963)*, cert. denied,* 375 U.S. 821 (1963).

8 Defendants reserve on the question of the Tribal plaintiffs' standing to pursue their claims under Count IV of the Amended Complaint. However, standing aside, as forth in section V of this argument, Count IV of the Amended Complaint fails to state a claim upon which relief can be granted as to all defendants.

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As set forth previously, the Seattle NARA facility was not placed on the High Value Asset list because of the Section 11 process. In other words, the proposed sale of the facility has nothing at all to do with the Section 11 process. Thus, insofar as plaintiffs' Counts II and III allege that they will be injured by the proposed sale of the facility because thereafter they will be denied access to original historical records in Seattle, their complaint fails to allege any sufficient injury for Article III purposes resulting from the alleged failure of OMB or GSA to fulfill their statutory obligations under FASTA § 11. A plaintiff seeking relief in federal court must establish the three elements that constitute the "irreducible constitutional minimum" of Article III standing, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992), namely, that the plaintiff has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision," *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S.Ct. 1540, 1547, 194 L.Ed.2d 635 (2016). Because plaintiffs cannot show that there is any connection between the alleged failure of OMB and GSA to fulfill their statutory responsibilities under FASTA § 11 and plaintiffs' claimed injury, plaintiffs lack Article III standing for Counts II and III of their Amended Complaint.

Moreover, apart from constitutional requirements, at the statutory level of standing analysis, the Court must determine "whether a legislatively conferred cause of action encompasses [a party's] claim." *Id*. at 127. At this level of analysis, the question is whether the plaintiff "has a cause of action under the statute." *Id*. at 128. This determination is a "straightforward question of statutory interpretation," operating under the presumption that a plaintiff must allege interests that "fall within the zone of interests protected by the law invoked," *id*. at 129 (internal quotation marks omitted), and an injury that was "proximately caused by [the alleged] violations of the statute," *id*. at 132. As the Supreme Court has explained, "[e]ssentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth v. Seldin*, 422 U.S. 490, 500 (1975).

Plaintiffs contend that OMB's approval of the PBRB's recommendation to include the

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Seattle NARA facility in the high value asset round was arbitrary and capricious because the facility is exempt from FASTA (Count I). Dkt. # 30, ¶¶ 165-174. Plaintiffs' Counts II and III allege in substance that the failure of OMB to fulfill a statutory duty under FASTA § 11 to develop consistent standards and criteria against which the Federal agency FASTA §11(a) recommendations would be reviewed amounted to an "agency action unlawfully withheld or unreasonably delayed" (Count II), or resulted in an "arbitrary and capricious" final agency action (Count III) within the meaning of the APA, and that they have standing to compel the development of those standards, and/or enjoin a sale of the Seattle NARA facility in the absence of those standards. *Id.*, ¶¶ 175-186, 187-192. FASTA does not impose any substantive requirements; rather, it mandates only a process that the agencies must follow. Moreover, no private right of action is provided under FASTA to enforce its requirements. Thus, plaintiffs must necessarily rely on the provisions of the APA that confer "standing to an 'aggrieved party' within the meaning of the substantive statute upon which the claim is based." *Stratford v. FAA,* 285 F.3d 84, 88 (D.C. Cir. 2002); *see also* 5 U.S.C. § 702; *Clarke v. Securities Industry Association*, 479 U.S. 388, 394-396 (1987).

To narrow the wide range of potential plaintiffs who may assert a "procedural injury" under the APA, the Supreme Court adopted the "zone of interests" test. *Clarke*, *supra*, 479 U.S. at 397 n.12 (stating that the purpose of the zone of interests test is "to exclude those plaintiffs whose suits are more likely to frustrate than to further statutory objectives"). This test imposes the requirement, beyond constitutional standing requirements, that a plaintiff assert an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Nevada Land Action Association v. United States Forest Service*, 8 F.3d 713, 715-716 (9th Cir. 1993).

As in the *Lexmark* case, which dealt with the Lanham Act, identifying the interests protected or regulated by FASTA "requires no guesswork" since the Act includes a detailed statement of the statute's purposes. 527 U.S. at 131. FASTA § 2 provides:

> The purpose of this Act is to reduce the costs of Federal real estate by—
> (1) consolidating the footprint of Federal buildings and facilities;
> (2) maximizing the utilization rate of Federal buildings and facilities;
> (3) reducing the reliance on leased space;

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> (4) selling or redeveloping high value assets that are underutilized to obtain the highest and best value for the taxpayer and maximize the return to the taxpayer;
> (5) reducing the operating and maintenance costs of Federal civilian real properties;
> (6) reducing redundancy, overlap, and costs associated with field offices;
> (7) creating incentives for Federal agencies to achieve greater efficiency in their inventories of civilian real property;
> (8) facilitating and expediting the sale or disposal of unneeded Federal civilian real properties;
> (9) improving the efficiency of real property transfers for the provision of services to the homeless; and
> (10) assisting Federal agencies in achieving the Government's sustainability goals by reducing excess space, inventory, and energy consumption, as well as by leveraging new technologies.

This itemization of purposes is consistent with the overriding purpose of the Act which, as recognized by the accompanying report of the House Committee on Oversight and Government Reform, is to "reduce the costs of managing the federal government's real property portfolio . . . [through] identifying opportunities for cost savings and deficit reduction by reducing the federal government's inventory of civilian real property." H. R. Rep. No. 114-578, Part 2, 114th Cong., 2d Sess., 13 (2016). Decl. of Kipnis, ¶ 3., Exhibit B. A claim within the zone of interests of FASTA might seek to foster these purposes by, for example, moving to compel OMB to develop FASTA § 11 standards to hasten Federal property sales or broaden the portfolio of properties available for sale, rather than, as here, to delay or prevent the sale of a particular property for reasons that have absolutely nothing to do with the purposes of FASTA. In other words, plaintiffs are the very persons who the zone of interest test seeks to exclude, *i.e.*, those "whose suits are more likely to frustrate than to further statutory objectives." *See Clarke*, 479 U.S. at 397 n.12.

Moreover, regarding Counts II and III of plaintiffs' amended complaint, OMB's and GSA's alleged violation of FASTA § 11 is not the proximate cause of plaintiffs' injury. *Lexmark*, 572 U.S. at 132 ("[W]e generally presume that a statutory cause of action is limited to plaintiffs whose injuries are proximately caused by violations of the statute."). Because plaintiffs' alleged injuries result not from any violation of FASTA § 11, but from an independently based recommendation of the PBRB under FASTA § 12 to include the Seattle NARA facility in the first High Value Asset round, and the approval of that recommendation by OMB under FASTA § 13, those injuries are not

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proximately connected to OMB's alleged violation of FASTA § 11(a).

For the foregoing reasons, plaintiffs' claims I, II, and III should be dismissed for lack of standing.

II. THE DISTRICT COURT LACKS SUBJECT MATTER JURISDICTION OVER PLAINTIFFS' CLAIMS AGAINST THE PBRB

Plaintiffs' amended complaint seeks judicial review of the actions of the PBRB taken under FASTA with respect to the proposed sale of the Seattle NARA facility under the APA, 5 U.S.C. §§ 701–706. Dkt. # 30, ¶¶ 165-174, 175-186, 187-192, 193-200. Moreover, their preliminary injunction motion, insofar as its seeks an injunction *pendente lite* against the PBRB, rests principally on the theory that they have made a sufficient preliminary showing on the merits that the decision of the PBRB to recommend a sale of the Seattle NARA facility was an arbitrary and capricious final agency action within the meaning of the APA. Dkt. # 15, p. 16, *ll.* 14-24 [9] However, as set forth below, FASTA expressly precludes judicial review of the actions of the PBRB. Thus, insofar as plaintiffs' lawsuit seeks a determination by this Court that any of the PBRB's actions were unlawful, those claims are not within the subject matter jurisdiction of the Court and the PBRB should be dismissed from the action. Moreover, insofar as plaintiffs' motion for a preliminary injunction seeks an injunction against the PBRB, they have requested relief that the Court lacks subject matter jurisdiction to grant. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (Absent jurisdiction, "'the only function remaining to the court is that of announcing the fact and dismissing the cause.'").

The APA does not waive sovereign immunity for judicial review of the actions of a Federal agency under a particular statute where judicial review is expressly precluded. 5 U.S.C. § 701(a)(1).[10] FASTA expressly precludes judicial review of the actions of the PBRB. Section 18

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9 Apart from the fact that judicial review of PBRB actions is precluded by FASTA § 18, it should also be noted that a recommendation of the PBRB is not a "final agency action" under the APA. *See Rell v. Rumsfeld*, 423 F.3d 164, 165 (2d Cir. 2005) (citing *Dalton v. Specter*, 511 U.S. 462, 469–70 (1994); *and see*, *Ecology Ctr., Inc. v. U.S. Forest Serv.*, 192 F.3d 922, 925 (9th Cir. 1999) ("[C]ourts have recognized that agency recommendations are not reviewable as final agency actions . . .") Thus, even without judicial review preclusion, there can be no judicial review of the PBRB's recommendations under the APA.

10 5 U.S.C § 701(a) provides:

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of FASTA provides:

> SEC. 18. PRECLUSION OF JUDICIAL REVIEW.
>
> The following actions shall not be subject to judicial review:
> (1) Actions taken pursuant to sections 12 and 13.
> *(2) Actions of the Board.*[11]

(Emphasis added.)

Plaintiffs' complaint seeks judicial review of actions of the PBRB taken under FASTA, and plaintiffs' preliminary injunction motion is premised upon those claims. Because FASTA § 18 precludes this Court from exercising subject matter jurisdiction over plaintiffs' claims against the PBRB, the motion for a preliminary injunction against PBRB should be denied and PBRB should be dismissed from the action. *See Pal v. United States Citizenship & Immigration Servs.*, No. C20-0775RSL, 2021 WL 100734, at *2 (W.D. Wash. Jan. 12, 2021) (dismissing claim seeking review of USCIS asylum determination and expedited removal order under APA because 8 U.S.C. § 1252 of the Immigration and Nationality Act (INA) expressly precludes judicial review of those actions).

III. THE DISTRICT COURT LACKS SUBJECT MATTER JURISDICTION OVER ALL CLAIMS AGAINST ALL DEFENDANTS THAT CONCERN ACTIONS TAKEN BY THEM UNDER SECTIONS 12 AND 13 OF FASTA

FASTA § 18 does not simply preclude judicial review of actions of the PBRB but also precludes all of plaintiffs' claims against all defendants. Although plaintiffs challenge the sale of the Seattle NARA facility, the sale of the facility was triggered by the recommendations of the PBRB and OMB pursuant to FASTA Section 12 and 13. And FASTA § 18 precludes judicial review of actions "taken pursuant to Section 12 and 13" of FASTA. Thus, plaintiffs' motion for a preliminary injunction should be denied and plaintiffs' claims based on those actions should be dismissed for lack of subject matter jurisdiction.

> (a) This chapter applies, according to the provisions thereof, except to the extent that--
> (*1) statutes preclude judicial review*; or
> (2) agency action is committed to agency discretion by law.

(Emphasis added.)

11 The term "Board" is defined in FASTA to mean the Public Building Reform Board. FASTA § 3(2).

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To avoid this straightforward conclusion, plaintiffs attempt to characterize their suit as challenging OMB's and GSA's alleged conduct pursuant to FASTA § 11 (which is not subject to the jurisdiction-stripping provision in FASTA § 18). Specifically, plaintiffs complain that the PBRB's decision under FASTA § 12 to seek OMB approval under FASTA § 13 for the sale of the Seattle NARA facility to OMB as a high value asset was flawed because it was made without the benefit of OMB recommendations developed under FASTA § 11. *See e.g.*, dkt. 15, p. 10, *ll.* 7-8 ("OMB approved the PBRB's recommendation to sell the Archives facility, without having completed Section 11's procedural requirements."). This argument is both factually and legally incorrect. It misapprehends the purpose of the FASTA § 11 recommendations and the relationship of those recommendations to the PBRB's inclusion of the Seattle NARA facility on its list of recommended high value assets under FASTA § 12, as well as OMB's approval of those recommendations pursuant to FASTA § 13. In short, there is no connection between PBRB's recommendation under Section 12 and OMB's and GSA's alleged omissions under Section 11.

Under FASTA § 11, Federal agencies are required to make recommendations of, *inter alia,* properties under the control of that agency that can be "sold for proceeds or otherwise disposed of, reported as excess, declared surplus, outleased, or otherwise no longer meeting the needs of the agency . . ." FASTA, § 11(a)(2). Thereafter, OMB is required by the statute to review those agency recommendations. FASTA, § 11(b)(1)(A). The review is to be undertaken according to "consistent standards and criteria" that OMB was required to develop in consultation with GSA. FASTA § 11(b)(1)(B). Applying those consistent standards and criteria, OMB and GSA were required to jointly make recommendations to the PBRB on the properties reported to them by Federal agencies pursuant to FASTA § 11(a). FASTA, § 11(d).

Importantly, the PBRB is not required by FASTA to follow the OMB/GSA recommendations submitted to them pursuant to FASTA § 11(d). FASTA expressly provides that the PBRB is *not* required to follow those recommendations, nor are its actions under FASTA § 12 limited by them in

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any way. FASTA § 12(c). To the extent plaintiffs argue in favor of the contrary proposition, they are certainly wrong under the plain wording of the statute.[12]

Moreover, in formulating its recommendations to the OMB under Section 12, the PBRB is not limited to the recommendations obtained from Federal agencies made under FASTA § 11(a), vetted by OMB and GSA pursuant to FASTA § 11(b), and transmitted to the PBRB pursuant to FASTA § 11(d). Indeed, FASTA does not require the PBRB to use them at all. Instead, FASTA 12(d)(1) provides that "[n]otwithstanding any other provision of law, the Board may receive and consider proposals, information, and other data submitted by State and local officials and the private sector."

The recommendation to place the Seattle NARA facility on PBRB's list of recommended high value assets for disposal came from the private sector; specifically, the proposal came from a private entity, Coldwell Banker Richard Ellis (CBRE), working under a contract with GSA. Decl. of Dugan, ¶¶ 5-7. The proposal was brought directly to the PBRB. *Id.* at ¶ 8. It did not come through OMB pursuant to the FASTA § 11 process. *Id.* at ¶ 9. The proposal was then independently reviewed by the PBRB as contemplated by FASTA § 12(c) and (d), and recommended to OMB for approval pursuant to FASTA § 12(g) to be included in the First Round of high value asset disposals (FASTA § 12(g)(2)(A)).[13]

In summary, the PBRB's placement of the Seattle NARA facility on the list of high value assets for approval by OMB was made entirely under the authority of FASTA § 12 and was unconnected to the process set forth in FASTA § 11. The recommendation was approved by OMB

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12 FASTA § 12(c) provides, in pertinent part:

> The Board shall perform an independent analysis of the inventory of Federal civilian real property and the recommendations submitted pursuant to section 11. *The Board shall not be bound or limited by the recommendations submitted pursuant to section 11.*

(Emphasis added.)

13 In making this recommendation, the PBRB evaluated the factors listed in FASTA § 11(b)(3) as required by FASTA § 12(b)(3). Dkt. 16-1, p. 112. Plaintiffs' motion implies that FASTA § 12(b)(3) bound the PBRB to make its § 12(g) recommendations based on the OMB/GSA Section 11(d) recommendations. See dkt # 15, p 15, *l.* 21 - p. 16, *l.* 6. This is a misapplication of the statute, which contains no such requirement. To the contrary, as noted above, the PBRB is authorized under FASTA § 12(c) to perform an "independent analysis," unbound by the OMB/GSA Section 11(d) recommendations.

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under FASTA §13. Judicial review of OMB's decision to approve the sale of the facility pursuant to FASTA § 13, like the PBRB's recommendation to OMB pursuant to FASTA § 12, is expressly precluded by FASTA § 18. Accordingly, the preliminary injunction should be denied and all claims against all defendants should be dismissed for lack of subject matter jurisdiction.

IV. THE SEATTLE NARA FACILITY WAS NOT EXEMPT FROM FASTA AND THE PBRB'S DECISION TO THE CONTRARY IS NOT SUBJECT TO JUDICIAL REVIEW.

Plaintiffs contend that the Seattle NARA facility is "excluded" from the process established by FASTA because it is a "[property] used in connection with Federal programs for agricultural, recreational, or conservation purposes, including research in connection with the programs." FASTA § 3(5)(B)(viii). Under FASTA § 18, the Court is without subject matter jurisdiction to review the PBRB's determination, correct or not, that the Seattle NARA facility is not excluded by FASTA § 3(5)(B)(viii). *See* Dkt. 16-1, p. 31 (Noting that "[o]ne of the first steps in reviewing this dataset was to remove properties excluded by statute from consideration for disposal under FASTA."). For the same reason, the Court is also without subject matter jurisdiction to review OMB's approval of the PBRB's recommendation under FASTA § 13. *Id.*

Moreover, plaintiffs' construction of FASTA § 3(5)(B)(viii) is simply wrong. Plaintiffs' argument that the exemption encompasses any facility that has the remotest connection to "conservation" in the very broadest sense of the term is wholly inconsistent with the rule that statutory exemptions are to be construed narrowly. *E.E.O.C. v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458, 460 (9th Cir. 1993), as amended on denial of reh'g. (May 10, 1993); *Korherr v. Bumb*, 262 F.2d 157, 162 (9th Cir. 1958) (citations omitted) ("[W]here words of exception are used, they are to be strictly construed to limit the exception.").

Plaintiffs' interpretation of FASTA § 3(5)(B)(viii) is also contrary to the well-established maxim *noscitur a sociis.* This maxim, literally translated as "'it is known by its associates,'" Black's Law Dictionary (11th ed. 2019), counsels lawyers reading statutes that "a word may be known by the company it keeps," *Russell Motor Car Co. v. United States,* 261 U.S. 514, 519 (1923). While not an inescapable rule, *noscitur a sociisis* is "often wisely applied where a word is capable of many

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meanings in order to avoid the giving of unintended breadth to the Acts of Congress.'" *Gutierrez v. Ada*, 528 U.S. 250, 255, (2000) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)).

Here, the immediate proximity of "agricultural" and "recreational" suggests that "conservation" should be read, like its neighbors, as referring to buildings belonging to agencies that have a purpose related to natural resources, and the word "conservation" should be understood in that context.[14] Such agencies include the U.S. Department of Agriculture that operates, for example, the U.S. Forest Service and the Natural Resource Conservation Service, and the U.S. Department of the Interior that operates, for example, the U.S. Park Service, and the Bureau of Land Management. These agencies operate facilities that are specifically dedicated to the conservation of natural resources and research as part of their mission.[15]

For example, in Portland, Oregon, the U.S. Forest Service operates the Pacific Northwest (PNW) Research Station. The PNW Research Station describes itself as "a leader in the scientific study of natural resources," with the mission of "generat[ing] and communicat[ing] impartial knowledge to help people understand and make informed choices about natural resource management and sustainability."[16] The Station has 11 laboratories and research centers in Alaska,

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14 The term "conservation" is defined in Black's Law Dictionary to mean "[t]he supervision, management, and maintenance of natural resources such as animals, plants, forests, etc., to prevent them from being spoiled or destroyed; the protection, improvement, and use of natural resources in a way that ensures the highest social as well as economic benefits." Black's Law Dictionary (11th ed. 2019). This definition of conservation is consistent with the terms surrounding it in the statute.

15 For example, the Forest Service operates under the Organic Act, 16 U.S.C. §§ 473–482, 551, which establishes "a limited multiple-use mandate for management of the National Forests," including such purposes as "improv[ing] and protect[ing] the forest[s]," "securing favorable conditions of water flows," and "furnish[ing] a continuous supply of timber for the use and necessities of citizens of the United States," 16 U.S.C. § 475, and the Multiple Use Sustained Yield Act (MUSYA), 16 U.S.C. §§ 528–31, which codified the multiple-use mandate first articulated in the Organic Act, directing the Forest Service to "administer the renewable surface resources of the national forests for multiple use and sustained yield," including for the purposes of "outdoor recreation, range, timber, watershed, and wildlife and fish purposes." Id. §§ 528, 529. In the case of the National Park Service, its overriding purpose is "to conserve the scenery, natural and historic objects, and wild life in the System units and to provide for the enjoyment of the scenery, natural and historic objects, and wild life in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." 54 U.S.C. § 100101(a). The Bureau of Land Management also operates under a multiple use mandate which requires it to manage public lands to accommodate, inter alia, "recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values; and harmonious and coordinated management of the various resources without permanent impairment of the productivity of the land and the quality of the environment." 43 U.S.C. § 1702.

16 https://www.fs.usda.gov/pnw/page/about-station

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Oregon, and Washington as well as 12 active experimental forests, ranges, and watersheds. Numerous examples of Federal buildings like these, which are the type most naturally contemplated by a reasonable construction of this exemption, could be cited.

Adopting a commonsense interpretation of the statutory exemption, *i.e.,* one that does not equate the purposes of the PNW Research Station to that of the Seattle NARA facility, is required by the plain language of the statute. Although the Seattle NARA facility houses permanently valuable archival records, and people may go to the facility to engage in research projects, it is not a property used in connection with Federal agricultural, recreational or conservation programs, nor is its purpose to provide research in support of those programs. A plain reading of the statute makes clear that the Seattle NARA facility is not the type of facility contemplated by the FASTA § 3(5)(B)(viii) exemption.

V. PLAINTIFFS' ALLEGATION THAT DEFENDANTS FAILED TO CONSULT WITH TRIBAL ENTITIES DOES NOT STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Plaintiffs allege, and assert in their motion for a preliminary injunction, that defendants violated Executive Order 13175 by "fail[ing] to notify and/or consult with tribal leaders or other stakeholders in the Pacific Northwest regarding the Archives facility's potential sale." Dkt. # 15, p. 11, l. 19 – p. 12, l. 8. This argument fails for many reasons.[17]

i. The only violation of law alleged against NARA is a failure to consult under Executive Order 13175

First, this alleged violation of Executive Order 13175 is the *only* purported violation of law alleged in plaintiffs' amended complaint against NARA.

But NARA has no role in the FASTA process. It took no final agency action, and none is alleged in the complaint. NARA is merely the present occupant of the GSA-owned facility that is the subject of this action. Nothing alleged in plaintiffs' complaint nor proffered in support of plaintiffs' preliminary injunction motion shows otherwise. Thus, the final agency action necessary

17 While plaintiffs complain in their motion for a preliminary injunction about defendants' failure to honor their supposed obligation to consult with Tribes about the proposal to sell the Seattle NARA facility, they insist that their motion for a preliminary injunction does not rest on that claim. Dkt. # 15, p. 13, *ll.* 8.

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to state a claim under the APA is absent in the case of NARA. *See Rattlesnake Coal. v. U.S. E.P.A.*, 509 F.3d 1095, 1104 (9th Cir. 2007) (Absent final agency action district court lacked jurisdiction.). Instead, plaintiffs' amended complaint basically assumes that they may state a claim against NARA for its alleged failure to consult with Indian Tribes based on Executive Order 13175. As established below, that assumption is faulty.

ii. The PBRB, as an independent agency, is not required to adhere to Executive Order 13175.

Notably, the PBRB was established by FASTA as an "independent board." FASTA § 4(a). Under Section 8 of the Executive Order, independent agencies are only "encouraged," but not required to comply with its provisions. Moreover, as set forth above, FASTA § 18(2) precludes judicial review of actions of the PBRB. Thus, no subject matter jurisdiction exists to review the actions of the PBRB regarding any alleged failure to engage in tribal consultation in any event.

iii. By its express terms, Executive Order 13715 creates no right, benefit, or trust responsibility, substantive or procedural, and is not "enforceable at law by a party against the United States, its agencies, or any person."

Executive Order 13715 provides:

> Sec. 10. Judicial Review. This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person.

65 FR 67249, 67252. This section of the Executive Order has been universally construed by federal courts to mean precisely what it says. Thus, Federal courts have uniformly rejected claims against the Government based upon an alleged violation of this Executive Order. *See*, *e.g.*, *Navajo Nation v. United States Dep't of Interior*, No. CV-03-00507-PCT-GMS, 2018 WL 6506957, at *4–5 (D. Ariz. Dec. 11, 2018) ("Executive Order 13,175 does not create judicially enforceable rights."); *Sisseton-Wahpeton Oyate of the Lake Traverse Reservation v. United States Corps of Engineers*, No. 3:11-CV-03026-RAL, 2016 WL 5478428, at *10 (D.S.D. Sept. 29, 2016), *aff'd. sub nom., Sisseton-Wahpeton Oyate of Lake Traverse Reservation v. United States Corps of Engineers*, 888 F.3d 906 (8th Cir. 2018) ("[T]he Executive Order does not create a private right of action . . .."); *N. Arapaho*

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Tribe v. Burwell, 118 F. Supp. 3d 1264, 1281 (D. Wyo. 2015) ("[T]he plain language of Executive Order 13175 does not provide any right enforceable in this judicial action alleged by the Tribe."); *Fritcher v. Armento*, No. 1:12-CV-02033-LJO, 2013 WL 1896303, at *3 (E.D. Cal. May 6, 2013) (same); *Carattini v. Salazar*, No. CIV-09-489-D, 2010 WL 4568876, at *7 (W.D. Okla. Nov. 3, 2010) (same).

For the foregoing reasons, plaintiffs' claims against all defendants based on an alleged violation of Executive Order 13715 should be dismissed for failure to state a claim upon which relief can be granted.[18]

VI. PLAINTIFFS HAVE FAILED TO "DO EQUITY" BY INEXPLICABLY DELAYING THEIR ACTION AND BY PRECIPITOUSLY SEEKING A PRELIMINARY INJUNCTION WITHOUT SUFFICIENT JUSTIFICATION

Plaintiffs' lead counsel, the Washington Attorney General, has been aware of the proposed sale of the Seattle NARA facility since, at the latest, February 25, 2020. In a letter of that date, the Washington Attorney General demanded that the decision be "reconsidered," complaining about the same alleged misdeeds that form the basis of the Amended Complaint. Decl. of Kipnis, ¶ 4, Exh. C. When discussions with Federal Government counsel about the matter ensued after the February 25, 2020, letter was received, the Washington Attorney General sought and obtained information from the Federal Government's counsel on the basis that the information was necessary to "facilitate further discussions." Then, inexplicably, nothing more was heard from the Washington Attorney General.[19]

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18 Defendants' reject the proposition that anything having to do with the inclusion of the Seattle NARA facility in PBRB's high value assets recommendations, and OMB's approval thereof under FASTA, constituted "actions that have substantial direct effects on one or more Indian tribes" within the meaning of the Executive Order, but it unnecessary for the Court to resolve that question because plaintiffs have no cause of action against defendants under the express terms of the Executive Order in any event.

19 Defendants are aware that the State of Washington has been seeking records related to the sale of the Seattle NARA facility under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. However, those efforts provide no justification for plaintiffs' delay in filing this lawsuit. The only relevant interest in disclosure under FOIA is the public's, and not the plaintiff's particular interest in the requested information. *See United States Department of Defense v. F.L.R.A.*, 510 U.S. 487, 495 (1994). In other words, FOIA was "not intended to function as a private discovery tool." *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *and see The Renegotiation Board v. Bannercraft Clothing Company, Inc.*, 415 U.S. 1, 24 (1974) ("Discovery for litigation purposes is not an expressly indicated purpose of the Act."). Moreover, APA cases are decided based on an administrative record and not extra-record materials. Thus, while plaintiffs were certainly within their rights to seek information under FOIA, those efforts cannot serve as an excuse for delay. As concerns FOIA, a party's rights are not "in any way diminished by its being a private litigant, but neither are

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More than eight months later, plaintiffs filed their 188 paragraph complaint in this lawsuit together with a preliminary injunction motion, 169 pages of exhibits and 586 pages of declarations. After delaying more than eight months in bringing this action, plaintiffs apparently thought it was equitable to afford defendants a scant 18 days to respond.

It would be one thing if a true emergency existed. But plaintiffs seek this extraordinary relief even though they have made absolutely no showing that this case cannot be decided on the merits before the irreparable injury that they claim they will suffer will occur. Indeed, as defendants have represented, and continue to represent, no sale of the Seattle NARA facility will occur before July 1, 2021.[20] And, aside from measures made necessary by the present coronavirus pandemic, plaintiffs' access to the facility will not be restricted before then. Decl. of Quigley, ¶ 8.

The equities weigh against plaintiffs' prayer for a preliminary injunction. According to the venerable maxims of equity, "equity favors the diligent and not those who sleep on their rights." *Nordling v. Carlson*, 265 F.2d 507, 510 (9th Cir. 1958) (citation omitted). A delay in requesting equitable relief is inconsistent with a claim of irreparable injury. *Shaffer v. Globe Protection, Inc.*, 721 F.2d 1121, 1123 (7th Cir.1983); *Utah Gospel Mission v. Salt Lake City Corp.*, 316 F. Supp. 2d 1201, 1221 (D. Utah 2004), *aff'd*, 425 F.3d 1249 (10th Cir. 2005) (internal quotation omitted) ("Any unnecessary delay in seeking relief may be viewed as inconsistent with a claim that plaintiff is suffering great injury or, in the case of preliminary injunctive relief, that there is an urgent need for immediate relief and that a judgment would be rendered ineffective unless some restraint is imposed on defendant pending an adjudication on the merits."); *and see Helena Rubinstein, Inc. v. Frances Denney, Inc.*, 286 F. Supp. 132, 134 (S.D.N.Y. 1968) ("[P]laintiff waited nearly two years before seeking immediate injunctive relief for what now is pictured as an urgent need.").

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they enhanced by [the party]'s particular, litigation-generated need . . ." *Robbins Tire & Rubber Co.*, 437 U.S. at 242, n.23.

20 Confronted with this information during a status conference in this case on January 13, 2021, plaintiffs' counsel countered with supposedly "new information" concerning defendants' intent to solicit bids for the purchase of the facility as early as March 2021. Plaintiffs' counsel insisted that relief was needed before this occurred. However, plaintiffs have never explained how a mere solicitation of bids results in irreparable harm to plaintiffs. Indeed, there is nothing about a bid solicitation that impairs plaintiffs' access to the facility or harms them in any tangible way.

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Another important maxim of equity holds that "he who seeks equity must do equity." *Koster* 330 U.S. at 522. For unexplained reasons, plaintiffs waited more than eight months to file their action, only to then seek a response to their massive filing within 18 short days, without having made any demonstration that if their motion for a preliminary injunction was not granted within that highly expedited timeframe they would be likely to suffer irreparable harm before a decision on the merits could be rendered.

This is not "doing equity." Only when the threatened harm would impair the court's ability to grant an effective remedy is there really a need for preliminary relief. Therefore, if the merits can be determined before the injury would occur there is no need for interlocutory relief. *See Matos ex rel. Matos v. Clinton Sch. Dist.*, 367 F.3d 68, 74 (1st Cir. 2004).

As of the date this opposition is being filed, there are approximately six months remaining before any sale of the Seattle NARA facility will occur and the *possibility* first presents itself that plaintiffs will be denied access to the facility. There is no reason to believe that this action, which raises only questions of law under the APA, and does not involve discovery or a trial, cannot be briefed, heard, and adjudicated on the merits well before then. Moreover, if plaintiffs were so concerned about the timing of things, they should not have waited eight months before springing their lawsuit on defendants.

VII. THE PUBLIC INTEREST IN PRESERVING THE ARCHIVAL RECORDS FROM DAMAGE IS PARAMOUNT AND OUTWEIGHS PLAINTIFFS' CONVENIENCE INTEREST.

Plaintiffs insist that there is a significant public interest in their continuing convenient access to historical record in Seattle. Be that as it may, their interest must be weighed against other public interests. There are, of course, the public interests which FASTA is intended to achieve: *i.e.,* decreasing the deficit by consolidating and selling federal buildings and to obtain the highest and best value for the taxpayer. H. R. Rep. No. 114-578, Part 2, 114th Cong., 2d Sess., 13 (2016).

However, the paramount public interest here, as plaintiffs presumably would agree, is the long-term preservation of the historical records housed in the Seattle NARA facility. And, as set forth in the Declaration of Frank Quigley, the facility is inadequate to the task:

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> A Facility Condition Assessment conducted by GSA in 2017 identified a wide-range of deficiencies that included life-safety issues and critical concerns with seismic performance. Specifically, the assessment identified the following issues: the original wooden roof requires replacement; the fire alarm and sprinkler systems need upgrades; the heating, plumbing, and electrical systems must be replaced; and the facility needs a seismic upgrade to prevent partial or total collapse of portions of the roof if there were a major seismic event. When assessing the condition of properties, GSA will assign a facility a Facility Condition Index (FCI). The FCI provides a numerical indicator or rating of the condition of the facility for comparisons with other facilities. The higher the FCI, the worse the condition. Generally, 0% to 2% is considered "excellent," 2% to 4% is "very good," 4% to 6% is "good," 6% to 10% is "fair," and anything greater than 10 percent is "poor." In the Fiscal Year 2017, GSA rated the Seattle Facility 91.08%. Given these serious structural issues, the Seattle Facility cannot continue to meet NARA's storage standards and requirements without significant investment.

Decl. of Quigley, ¶ 5. NARA and GSA have worked together for years to try to find solutions to this unacceptable situation. The estimated cost to renovate the facility to bring it up to standards ranges from $52 million to $71 million, not counting the cost to relocate and store the records during renovation. *Id.* at ¶ 6. The estimate for a "build-to-suit facility" at an alternate location in the Seattle region on government owned land was estimated at $90 to $92 million, not counting the cost to move the records. *Id.* The funding necessary for these options is simply not available in the foreseeable future. *Id.* at ¶ 7. Thus, NARA believes its best feasible option to ensure the long-term protection of these invaluable archival records is to move them to another NARA location where the records can be stored according to NARA standards that are intended to ensure their longevity and to transfer non-archival temporary Federal records to a more cost efficient space. *Id.*

A sale of the Seattle NARA facility pursuant to FASTA promises to hasten the day when these archival records will receive the protection they deserve. Under FASTA § 20(a), authority to use the proceeds of the sale to fund the cost of moving the archival records to a safer NARA facility exists. Thus, given the paramount public interest in the long-term safety and preservation of these historical records, the preliminary injunction should be denied.

VIII. ANY REMEDY MUST BE NARROWLY TAILORED

While defendants do not believe plaintiffs are entitled to any remedy, if the Court is inclined to issue relief, the relief must be narrowly tailored to address the specific injury that the Court concludes is deserving of a remedy. *See E. Bay Sanctuary Covenant v. Barr*, 934 F.3d 1026, 1029 (9th Cir. 2019).

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Plaintiffs' Count II, regarding agency action alleged to be unlawfully withheld or unreasonably delayed pursuant to 5 U.S.C. § 706(1), seeks an order from the Court mandating the development of FASTA § 11(b) standards by OMB and GSA. The remedy sought by such a claim is in the nature of mandamus, *i.e.*, an order directed to the agency official or officials who have a clear legal duty to perform the act that has been allegedly delayed or withheld. *See Ctr. for Biological Diversity v. Zinke*, 260 F. Supp. 3d 11, 20 (D.D.C. 2017). A narrowly tailored remedy to address this allegedly lawful conduct does not justify a preliminary injunction enjoining the sale of the NARA facility because there is no connection between the Section 11 process and the recommendation of the PBRB pursuant to FASTA § 12 and the decision of OMB pursuant to FASTA § 13 to include the Seattle NARA facility in the High Value Asset round.[21]

Moreover, because plaintiffs' claims are all based on alleged illegality under FASTA, if the Court is inclined to grant a preliminary injunction, the injunction should not include any provision that prevents preparations to offer the Seattle NARA facility for sale, or to sell the facility, under other legal authorities available to defendants. Insofar as plaintiffs' proposed preliminary injunction asks the Court to enjoin defendants "from selling the Seattle Archives property, and from taking any actions to facilitate or effectuate a sale of the Seattle Archives property," dkt. # 15-1, p. 2, *ll*. 8-10, it is overbroad.

Finally, because plaintiffs have shown no legal basis to preclude defendants from removing records from the Seattle NARA facility to other locations, and because the decision to move such records is legally within the discretion of NARA, no remedy issued by the Court should place any constraint on NARA's ability to relocate records from its facility in Seattle to other locations as it deems appropriate.

21 Moreover, an order of this nature prior to a determination on the merits is in the nature of a mandatory injunction providing complete relief before the merits have been adjudicated, and therefore plaintiffs' claim must be adjudged according to the more exacting standards applicable to such a remedy. *See Tanner Motor Livery, Ltd v. Avis, Inc.*, 316 F.2d 804, 808-809 (9th Cir. 1963), *cert. denied*, 375 U.S. 821 (1963).

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CONCLUSION

For the foregoing reasons, defendants OMB, GSA, PBRB and NARA respectfully request that their motion to dismiss be granted, and plaintiffs' motion for a preliminary injunction be denied.

DATED this 3rd day of February 2021.

Respectfully submitted,

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