The Honorable John C. Coughenour

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WASHINGTON**
**AT SEATTLE**

| | |
|---|---|
| STATE OF WASHINGTON, et al.<br><br>Plaintiffs,<br><br>v.<br><br>ROB FAIRWEATHER, et al.<br><br>Defendants. | NO. 2:21-cv-00002-JCC<br><br>PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION<br><br>NOTED ON MOTION CALENDAR: FEBRUARY 12, 2021 AT 9:00 AM<br><br>WITH ORAL ARGUMENT |



ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

## I. INTRODUCTION

Unable to overcome the plain meaning of federal law and the overwhelming evidence of irreparable harm Plaintiffs have presented, Defendants respond by mischaracterizing the facts and the law in an effort to avoid this Court's review. The Court should see through Defendants' meritless arguments and grant the requested preliminary injunction.

Defendants first offer a meritless challenge to Plaintiffs' standing. But the 49 plaintiffs here submitted 80 unrebutted declarations vividly demonstrating the Seattle Archives facility's profound significance to Tribes, community and cultural organizations, universities, State and local governments, historians, and residents of this region, and the irreparable harm that will occur if the property is sold and its records scattered.

Defendants next ignore the text of FASTA and their own prior interpretation of it. They claim that the Archives facility is not "used in connection with Federal programs for agricultural, recreational, or conservation purposes," but their argument ignores the plain meaning of these terms and Plaintiffs' extensive evidence that the facility is used in connection with many qualifying Federal programs. And Defendants' claim that the decision to sell the Archives facility has "nothing at all to do with" Section 11 contradicts their own statements and records.

Finally, Defendants fail to demonstrate that an unlawful expedited sale with profound long-term consequences serves the public interest. Plaintiffs' evidence demonstrates the grave harms that will occur absent injunctive relief. Defendants' primary response is that the Washington Attorney General should have sued them sooner. This bizarre claim ignores not only the other 48 plaintiffs, but also that the Washington Attorney General *did* sue them many months ago to obtain illegally withheld documents about the sale decision—documents they are only now producing under court order. Defendants' utter lack of transparency throughout the pre-sale process culminated in their surprise announcement that they would bring a bundle of FASTA properties to market in "early 2021," prompting Plaintiffs to file this lawsuit. The bottom line is that the equities and public interest strongly favor Plaintiffs, and an injunction is warranted.

## II. ARGUMENT[1]

### A. Plaintiffs Have Standing

Plaintiffs have constitutional and statutory standing, and Defendants' muddled standing analysis fails to show otherwise. *See* Opp'n at 9–13. There are 49 impacted Plaintiffs here, but "the presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld v. Forum Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006).

Constitutional standing consists of three elements: (1) injury in fact, (2) causation, and (3) redressability. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560–61 (1992). Notably, Defendants do not contest Plaintiffs' constitutional standing for Count I of their complaint, which alleges the Archives facility is exempt from sale under FASTA. *See* Opp'n at 10 (challenging constitutional standing only as to Counts II and III). Nor do Defendants dispute that Plaintiffs' injuries are sufficient for standing and redressable; Defendants argue only that there is an insufficient causal link between their failure to follow FASTA Section 11 and Plaintiffs' harm. *See id.*; *see also id.* at 12–13. Defendants' argument is based solely on their erroneous assertion that they were not required to comply with Section 11's mandatory requirements, which is incorrect. *See* Section II.B.2, *infra*. And while the procedural violations were certainly harmful on their own, they also render the sale unlawful—and the unlawful *sale* of the Archives facility, which will mean moving its records thousands of miles away,[2] is the direct and obvious cause of Plaintiffs' loss of access to those records.

In addition to having constitutional standing, Plaintiffs also fall within FASTA's zone of interests.[3] *Contra* Opp'n at 10–12. The purpose of the zone-of-interests test is to "exclude those

[1] Plaintiffs submit that the Court can and should deny Defendants' motion to dismiss Counts I–III based on the briefing on the instant Motion. The Count IV Tribal Plaintiffs will address the motion to dismiss Count IV on the schedule established by the local rules. *See* LCR 7(d)(3); Dkt. #36; Opp'n at 19–21. If necessary, additional briefing on the motion to dismiss Counts I-III will be submitted on that schedule.

[2] Defendants offer no evidence refuting the agencies' publicly announced plan to ship the records to facilities in Missouri and Southern California after the Seattle Archives facility is sold. *See* Mtn. at 10; Dkt. #30 (First Amended Complaint (FAC) ¶10 & n.2.

[3] Because the APA provides a basis for judicial review, 5 U.S.C. §§ 701–706, it is irrelevant whether

plaintiffs whose suits are more likely to frustrate than to further statutory objectives." *Clarke v. Sec. Indus. Ass'n*, 479 U.S. 388, 397 (1987). Thus, "[t]he test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 225 (2012) (internal quotation omitted). In the APA context, the test is particularly "lenient" and "not especially demanding." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130 (2014) (internal quotation omitted); *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1270 (9th Cir. 2020). It requires no "indication of congressional purpose to benefit the plaintiff," and is satisfied if the plaintiff's interests are "arguably" protected or regulated. *Match-E-Be-Nash-She-Wish*, 567 U.S. at 224, 225 (internal quotation omitted). The word "arguably" "indicate[s] that the benefit of any doubt goes to the plaintiff." *Id.* at 225. This lenient standard reflects Congress's intent that the APA provide "omnibus" judicial review of agencies' violation of statutes "that do not themselves include causes of action for judicial review." *Lexmark*, 572 U.S. at 130; *see also Bennett v. Spear*, 520 U.S. 154, 174–77 (1997). Courts have recognized that the zone of interests generally includes "parties whose interests, while not in any specific or obvious sense among those Congress intended to protect, coincide with the protected interests." *Hazardous Waste Treatment Council v. Thomas*, 885 F.2d 918, 922 (D.C. Cir. 1989); *see E. Bay Sanctuary Covenant*, 950 F.3d at 1270 (non-profit organization offering asylum-related services was within zone of interests of statute establishing asylum eligibility requirements).

Here, Plaintiffs easily meet this "lenient" standard. Defendants fail to mention FASTA's multiple provisions recognizing that selling a particular federal property may affect the public, and establishing procedural mechanisms to protect and account for the public interest (which

---

Plaintiffs have an independent cause of action under FASTA. *See Sierra Club v. Trump*, 929 F.3d 670, 698 (9th Cir. 2019); *Washington v. U.S. Dep't of Homeland Sec.*, No. C19-2043 TSZ, 2020 WL 1819837, at *9 (W.D. Wash. Apr. 10, 2020); FAC Counts I–III (asserting APA causes of action); *contra* Opp'n at 9–11.

were not followed here). For example, the PBRB's meetings "shall be open to the public," FASTA § 5(a),[4] and in recommending properties for expedited sale, the PBRB "shall conduct public hearings," *id.* § 12(f), and "shall consider" factors including "[t]he extent to which a civilian real property aligns with the current mission of the Federal agency" and "[t]he extent to which public access to agency services is maintained or enhanced." *Id.* §§ 12(b)(3), 11(b)(3)(F), (J). And State and local officials are permitted to submit information to the PBRB and the PBRB is required to consult with them if they do. *Id.* § 12(d). Here, the evidence overwhelmingly demonstrates a strong public interest in the Archives records remaining in the Pacific Northwest. If the facility is unlawfully sold, and its records shipped thousands of miles away, many of the Tribal, State, and organizational Plaintiffs and their members will lose meaningful access to records of paramount importance to them, contrary to NARA's mission of providing public access to these records.[5] *See* Mtn. at 18–23. Indeed, if the 49 Plaintiffs here—who all use and rely on the Archives records, *see* FAC ¶¶17–66—are not within the zone of interests regarding the sale of the facility and consequent removal of its records from this region, it is difficult to imagine who would be. Plaintiffs' interests are certainly not "marginally related to" or "inconsistent" with FASTA: rather, Plaintiffs are seeking to *enforce* FASTA's procedural requirements and its exemption for properties like the Archives facility, the violations of which directly harm their interests. By contrast, Defendants' plan to unlawfully sell an exempt property does not "further" FASTA's objectives. *Contra* Opp'n at 12. For all of these reasons, Plaintiffs' interest is more than sufficient to enable them to challenge Defendants' violations of FASTA.

**B. Plaintiffs Have Demonstrated They Are Likely to Succeed on the Merits**

**1. The Archives facility is exempt from FASTA (Count I)**

The planned sale of the Archives facility under FASTA is unlawful *ab initio* because the

[4] Congress intended for the PBRB to "utilize regional public meetings" to seek public input on potential property sales. Fraas Ex. 15 at 12. Here, Defendants do not dispute that they failed to conduct any public hearings in Washington, Idaho, Oregon, or Alaska. *See* Mtn. at 9.

[5] *See, e.g.*, https://www.archives.gov/seattle ("About Us: We maintain and provide access to permanent records created by Federal agencies and courts" in AK, ID, OR, and WA) (last visited Feb. 11, 2021).

facility is exempt from FASTA under Section 3(5)(B)(viii). Mtn. at 3–6, 11–13. Yet Defendants argue that FASTA Section 18's limited bar on judicial review—which applies only to "actions of the Board" and "actions taken pursuant to sections 12 and 13"—somehow prevents this Court from enforcing the exemptions Congress established in Section 3. Opp'n at 17. Defendants offer no authority for the remarkable claim that Section 18 should bar judicial review as to provisions of FASTA that Congress chose *not* to leave to the agencies' discretion.[6] *See id.* Nor could they. The APA supplies a "'strong presumption that Congress intends judicial review of agency action,'" such that "'only upon a showing of "clear and convincing evidence" of a contrary legislative intent should the courts restrict access to judicial review.'" *Allen v. Milas*, 896 F.3d 1094, 1103 (9th Cir. 2018) (quoting, first, *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 670 (1986), and second, *Abbott Labs. v. Gardner*, 387 U.S. 136, 140–41 (1967)). As such, jurisdiction-stripping provisions must be construed narrowly: "Our Circuit has applied this admonition to conclude that a 'jurisdictional bar is not to be expanded beyond its precise language.'" *ANA Int'l, Inc. v. Way*, 393 F.3d 886, 891 (9th Cir. 2004) (citation omitted).[7] Defendants' proposed expansion of FASTA's judicial-review limitations is unjustifiable under these precedents. Congress surgically limited FASTA's judicial-review bar, choosing *not* to preclude review of violations of Section 3. *Cf. In re Border Infrastructure Envtl. Litig.*, 915 F.3d 1213, 1222 (9th Cir. 2019) (reviewing claims not subject to statute's limited judicial-review bar, under which the "predicate legal question of statutory authority" was "not committed to agency discretion"). Thus, FASTA's exemptions are judicially reviewable and enforceable.[8]

---

[6] Defendants appear to ask the Court to infer that OMB's "approval" of the sale under Section 13 included a "determination" that the exemption at issue does not apply. Opp'n at 17. This is based on several unfounded assumptions: (1) that Defendants affirmatively "determined" that the exemption does not apply (they did not: *see* Mtn. at 9; Fraas Ex. 5 at 30); (2) that such a "determination," articulated for the first time in litigation, is entitled to deference (it is not: *see* Mtn. at 13 n.13); and (3) that the purported "determination" occurred under Section 13 (it did not: Section 13 does not mention FASTA's exemptions, which are instead found in Section 3).

[7] Defendants' cited authority is inapposite: neither *Kamehameha* nor *Korherr* concerned a statutory jurisdiction-stripping provision. *See* Opp'n at 17; 990 F.2d 458 (9th Cir. 1993); 262 F.2d 157 (9th Cir. 1958).

[8] For the same reasons, it is appropriate for the Court to enjoin the PBRB from taking any action to further a FASTA sale of the Archives facility. While "actions of the Board" *pursuant to FASTA* (e.g., recommending

Practically speaking, Defendants' theory leads to absurd results. If their overly broad reading of Section 18 were adopted, then the agencies could sell any exempt property—such as a military base, or a property held in trust for a tribe, *see* FASTA §§ 3(5)(B)(i), (ii), (v)—with no judicial oversight whatsoever. There is no indication that Congress intended to give this much unchecked power to agencies lacking expertise in national security or government-to-government tribal relations. Again, FASTA's judicial-review bar is narrow: while it effectively gives the agencies discretion to decide which properties to sell pursuant to FASTA, it does not foreclose judicial review of property sales that are *exempt* from FASTA under Section 3.

Defendants' argument that the Section 3(5)(B)(viii) exemption does not apply to the Archives facility fares no better. Their myopic statutory analysis, which selectively invokes a single statutory construction canon without addressing Plaintiffs' cited authority, is fatally flawed in several respects. *See* Opp'n at 17–18. First, Defendants fail to address or distinguish the ample authority supporting a plain-text reading of the statute, which demonstrates that the Archives facility is exempt from FASTA because it is "used in connection with Federal programs for agricultural, recreational, or conservation purposes." *See* Mtn. at 3–6, 11–13; FASTA § 3(5)(B)(viii). Second, even if Defendants' invocation of the *noscitur a sociis* canon could support a narrow reading of "conservation" to relate exclusively to "natural resources," Opp'n at 18—a dubious proposition, given the broad meanings of both "conservation" and "recreation," Mtn. at 12—Plaintiffs have provided extensive, unrebutted evidence that the Archives facility is, in fact, "used in connection with" numerous Federal programs related to conservation of natural resources. *See* Mtn. at 3–5. These include programs of the very agencies Defendants mention: the Department of Agriculture, U.S. Forest Service, Bureau of Land Management, and National Park Service—as well as programs administered by Tribes under ISDEAA, among others. *Id.*; *see* Opp'n at 18 & n.15; *see also* Amicus Br. at 6–9. Moreover, Defendants do not

properties for sale) are not reviewable, Defendants offer no reason to read Section 18 so broadly as to make the Board's *violations* of FASTA (e.g., selling an exempt property) unreviewable. *See* Opp'n at 13–14.

dispute that use of the Archives facility in connection with a *single* agricultural, recreational, *or* conservation program exempts it from FASTA—and Plaintiffs have offered evidence as to all three program types. *See* Mtn. at 3–5. Third, in asking the Court to read the exemption to apply only to "buildings belonging to" federal agencies with a natural-resource conservation mission, Defendants read language into the exemption that is not there. Opp'n at 18. The statute exempts properties that are "used in connection with" certain Federal programs—not properties "belonging to" certain agencies. FASTA § 3(5)(B)(viii); Mtn. at 12–13. Moreover, it expressly exempts properties used for "research" in connection with such programs, a provision Defendants ignore. *See id.* at 3–5 (discussing research at Archives facility for relevant federal programs). In any case, while the facility is owned by GSA, it has long been occupied and operated by NARA, which undisputedly uses the facility for its own self-described "conservation" activities. Mtn. at 6; FAC ¶9; *see also* Dkt. #35 (Quigley Decl.) ¶4 (describing NARA document-conservation protocols); Amicus Br. at 3–6.

The fact that the Archives facility is exempt from FASTA is sufficient, on its own, to render the forthcoming sale unlawful and demonstrate a likelihood of success on the merits.

**2. Defendants admittedly bypassed Section 11 requirements (Counts II, III)**

As a threshold matter, Defendants misstate the nature of Counts II and III and the applicable standard. Plaintiffs do not challenge the "rationality" of Defendants' actions under an "arbitrary and capricious" theory. *Contra* Opp'n at 8–9, 13; *see also id.* at 11 (misquoting Count III, which does not contain the phrase "arbitrary and capricious"). Rather, Counts II and III allege that Defendants committed procedural errors and omissions, violating FASTA and tainting the entire decision-making process. *See* Mtn. at 8–9, 13–18; FAC ¶¶175–92. The Court owes no "deferen[ce]" to these violations under an inapplicable "arbitrary and capricious" rubric. *Contra* Opp'n at 8. Nor do Plaintiffs seek to "compel" agency action by way of this Motion. *Contra* Opp'n at 9 n.7, 25 & n.21. Rather, Plaintiffs are seeking a prohibitory injunction *pendente lite* to prevent an unlawful sale. Mtn. at 15 n.14, 24; *infra* at 12; *see Ariz. Dream Act Coal. v. Brewer*,

757 F.3d 1053, 1060 (9th Cir. 2014) (a "prohibitory injunction prohibits a party from taking action and preserves the status quo pending a determination of the action on the merits").

As Plaintiffs established in their Motion, Section 11 specifically and unequivocally requires OMB and GSA to take a number of discrete, nondiscretionary actions to assist the PBRB in identifying federal properties eligible for sale under FASTA. Mtn. at 14–15. Defendants do not—because they cannot—dispute that OMB and GSA failed to fulfill these duties. *See* Opp'n at 16. Nor do they dispute that Section 11 of FASTA—unlike Sections 12 and 13—is subject to judicial review. Mtn. at 17; Opp'n at 16. Instead, Defendants attempt to sidestep the issue by showing that the Archives facility was recommended and approved for sale by "the private sector" under a process that it contends is completely unrelated to Section 11, repeatedly claiming that the sale has "nothing at all to do with the Section 11 process." Opp'n at 10; *see also id.* at 15–16, 25. But the evidence shows otherwise and, in any event, the PBRB has admitted that OMB's failures to follow Section 11's mandates were not harmless here.

According to Defendants, "[t]he recommendation to place the Seattle NARA facility on PBRB's list of recommended high value assets for disposal came from a private entity, Coldwell Banker Richard Ellis (CBRE), working under a contract with GSA." Opp'n at 16. Defendants contend that this means the recommendation came from "the private sector" pursuant to FASTA Section 12(d)(1). Not so. A contractor hired *by GSA* to analyze properties *for GSA* and who makes recommendations that are submitted to PBRB *by GSA* is not "the private sector." Indeed, documents recently produced by the PBRB pursuant to a Court order[9] indicate that GSA adopted the recommendations of its contractor as its own recommendations. Specifically, a GSA "Scope of Work" document dated July 16, 2019 includes two lists of federal properties submitted to the PBRB for consideration pursuant to FASTA: (1) properties "submitted by LHAs [Land Holding Agencies]" and (2) properties "identified by GSA." Fraas Ex. 13 at 2–4. The second list, captioned "Additional Recommendations Identified by GSA for Board Consideration," includes

[9] *State of Washington v. Public Buildings Reform Board*, No. 2:20-cv-01362-RSL, Dkt. #18 (Jan. 5, 2021).

the Archives facility. *Id.* at 4 ("Federal Archive & Records Center Warehouse – Seattle WA"). The PBRB's own High-Value Assets Report also indicates that it understood the additional recommendations to be coming from GSA—not the private sector—based on its description of GSA's role in its "methodology for identifying properties for disposal." *See* Fraas Ex. 5 at 29 (describing GSA's "identification of additional FASTA candidates through analysis of the FRPP database"); *id.* at 25 (discussing GSA's "additional in-depth analysis of [the Federal Real Property Database] data to identify other potential FASTA candidates"). And while Defendants try to divorce CBRE's identification of properties for GSA entirely from Section 11, the PBRB's July 16, 2019 Meeting Minutes tell a different story. *See* Fraas Ex. 14 at 26:18–29:4 (PBRB Board Member explaining that two of GSA's Contractors from CBRE had been invited to speak at the meeting because "part of our legislation says that GSA and the Public Building Service [of GSA] in particular and OMB are supposed to come up with a list of recommendations to give to us," and "the Public Building Service [of GSA] . . . was taking real hours," so GSA "hired CBRE to take a look at the database and to come up with a methodology for narrowing down the properties in that database" and then assisted GSA in "helping reach a list of potential recommendations that would then be given to us"). Thus, Defendants' own documents belie their litigation-driven attempt to portray the identification of the Archives facility as a recommendation made "by the private sector" wholly unconnected to Section 11.[10]

In any event, regardless of exactly how the Archives facility was identified for sale under FASTA, the fact remains that the process required by Congress in Section 11 of FASTA—which was to occur *prior* to the PBRB's development of its recommendations (Section 12) and OMB's review of those recommendations (Section 13)—was not followed here. Defendants contend that this failure doesn't matter because "the PBRB is not required by FASTA to follow the OMB/GSA recommendations submitted to them pursuant to FASTA § 11(d)," Opp'n at 15, but

[10] Had CBRE's recommendations truly come from the "private sector," the PBRB was required to make those recommendations "publicly available," FASTA, § 12(d)(3), which would have then entitled "State and local officials" to submit information on those recommendations and consult with the PBRB on them. *Id.* § 12(d)(1)–(2).



ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

this argument misses the point. As Defendants themselves acknowledge elsewhere in their brief, "FASTA does not impose any substantive requirements; rather, *it mandates [] a process that the agencies must follow*." *Id.* at 11 (emphasis added). Thus, whether or not the recommendations had to be followed does not excuse OMB and GSA's failure to develop, submit, publish, and transmit to Congress the recommendations, standards, and criteria, as required by Section 11(d).

The consequences of OMB flouting its responsibilities under Section 11 are made clear by the PBRB's own complaints that it lacked the guidance it needed: "[u]nfortunately, the PBRB did not benefit from the Section 11 FASTA directive that OMB, in consultation with GSA, develop standards and criteria to use in evaluating agency submissions and making recommendations to the PBRB." Fraas Ex. 5 at 33; *see also id.* at 35 ("defined standards, criteria, and recommendations would have significantly reduced the PBRB's challenges"); *id.* (admitting "[t]he PBRB faced, and continues to face, challenges in gathering the data needed to support decision making"). Because OMB and GSA's failures to fulfill their Section 11 duties were not harmless, as the PBRB has admitted, Plaintiffs are likely to succeed on the merits of Counts II and III. *See, e.g.*, *California Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1090–91 (9th Cir. 2011) (reviewing cases and discussing the Ninth Circuit's "consistent case law holding that 'harmless error' requires a determination that the error 'had no bearing on the procedure used or the substance of [the] decision reached'").

### C. Plaintiffs Have Demonstrated a Likelihood of Irreparable Harm and That the Equities and Public Interest Weigh in Their Favor

Defendants do not seriously contest Plaintiffs' showing that irreparable harm is likely absent injunctive relief. They fail to rebut the dozens of declarations attesting to the range of harms Plaintiffs and their members will suffer if the Archives facility is sold—ranging from Tribes' inability to access records necessary to establish tribal membership, enforce treaty rights, and engage in cultural and historical preservation; to Asian-American communities' loss of access to key records related to historical tragedies and injustices that echo into the present day;

to state and local governments' impaired ability to perform governmental functions that depend on access to the records, among others. Mtn. at 18–23. Rather than addressing these profound harms, Defendants focus instead on the *Winter* test's equity and public interest factors.

Defendants spend a substantial portion of their brief arguing that "Plaintiffs have failed to 'do equity'" because, in their opinion, the State of Washington (one plaintiff among 49) should have sued them earlier. Opp'n at 21. First and foremost, this argument fails to take responsibility for Defendants' utter lack of transparency throughout the entire pre-sale process. Defendants undisputedly failed to consult with Tribes, failed to hold any public hearings in this region, and broke their promise to digitize Alaska records that were moved to Seattle in 2014—even as the sale of the Seattle facility will move those records even farther away from Alaska, while also severing the entire Pacific Northwest's connection to its own regional records. *See* Mtn. at 23-24. Defendants' inequitable treatment of Tribes and the public at large carries far more weight than their bitterness over this timely and procedurally proper lawsuit.

In any case, Defendants' claim that they were surprised by this lawsuit rings hollow, as they have spent the last six months litigating with the State of Washington over its FOIA requests concerning the Archives sale, and never reconsidered their decision to sell the Archives facility to which the State objected nearly one year ago.[11] The State spent most of the last year attempting to obtain responses to its February 2020 FOIA requests seeking information about how and why Defendants decided to sell the Archives facility under FASTA. Last summer, having received no responsive documents, the State sued NARA, GSA, OMB, and the PBRB. Last month, the PBRB was ordered to complete its FOIA response (which largely consisted of documents the agency identified, but failed to produce, back in July) by February 4, 2021. *See supra* n.9. While Defendants contend in a footnote that "those efforts provide no justification for plaintiffs' delay in filing this lawsuit," Opp'n at 21 n.19, the State's attempt to investigate and gather information

[11] In fact, the State publicly announced its intention to file this lawsuit the same week it learned that the PBRB planned to bring the property to market in "early 2021." *See* Fraas Ex. 16.

*that Defendants were improperly withholding* before filing suit is hardly an "inexplicabl[e] delay[]." *Id*. To the contrary, it is a delay of Defendants' own making that tips the scales of equity sharply against them.[12] Nor do Defendants offer any reason why a purported "delay" by the State of Washington should be held against the other 48 Plaintiffs.

Finally, without disputing the "significant public interest" in having access to this region's historical records, Defendants argue there is a "paramount" public interest in "the long-term preservation" of these records, which they claim is furthered by a sale. Opp'n at 23. Long-term preservation is undoubtedly critical, but it has no bearing on this dispute, which concerns an *unlawful* property sale. There is no evidence that an unlawful FASTA sale is necessary for long-term preservation, or that there is any immediate need to relocate the records. *Id*. at 23–24. To the contrary, even if the sale proceeds, NARA undisputedly plans to keep the records at the Seattle facility for three years under a leaseback option. *See* Quigley Decl. ¶8.

**D. The Requested Preliminary Injunction Is Appropriately Tailored**

Plaintiffs have shown that all four *Winter* factors weigh in favor of a preliminary injunction to preserve the status quo pending resolution of the merits. Defendants disagree, arguing that they should be permitted to take actions "'to facilitate or effectuate a sale of Seattle Archives property'" even if they cannot proceed with the sale itself. Defendants offer no authority for this request, which flatly contradicts the well-established purpose of a preliminary injunction: to preserve "the last, uncontested status which preceded the pending controversy." *N.D. v. Hawaii Dep't of Educ.*, 600 F.3d 1104, 1112 n.6 (9th Cir. 2010). Defendants should be preliminarily enjoined from taking *any* further steps to facilitate or effectuate the unlawful sale.

## III. CONCLUSION

For the reasons above and in the Motion, the Court should preliminarily enjoin the sale.

[12] Defendants' authority is, once again, inapposite. Opp'n at 22; *see, e.g., Nordling v. Carlson*, 265 F.2d 507, 510 (9th Cir. 1958) (action for possession of real property in which purchaser failed to record a deed for four years after purchase); *Shaffer v. Globe Prot., Inc.*, 721 F.2d 1121, 1123 (7th Cir. 1983) (pro se plaintiff "made a cursory, pro forma request for injunctive relief without any showing of irreparable harm," then delayed appeal).



ATTORNEY GENERAL OF WASHINGTON
Complex Litigation Division
800 5th Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7744

DATED this 11th day of February, 2021.

ROBERT W. FERGUSON
Washington State Attorney General

*/s/ Lauryn K. Fraas*
LAURYN K. FRAAS, WSBA #53238
NATHAN BAYS, WSBA #43025
KRISTIN BENESKI, WSBA #45478
SPENCER COATES, WSBA #49683
Assistant Attorneys General
Lauryn.Fraas@atg.wa.gov
Nathan.Bays@atg.wa.gov
Kristin.Beneski@atg.wa.gov
Spencer.Coates@atg.wa.gov
*Attorneys for Plaintiff State of Washington*

ALEUTIAN PRIBILOF ISLANDS ASSOCIATION, INC.

*/s/ Geoffrey D. Strommer*
GEOFFREY D. STROMMER, WSBA #43308
Hobbs Straus Dean & Walker, LLP
215 SW Washington Street, Suite 200
Portland, OR 97214
503.242.1745
GStrommer@hobbsstraus.com
*Attorney for Plaintiff Aleutian Pribilof Islands Association, Inc.*

AMERICAN HISTORICAL ASSOCIATION

*/s/ Harry H. Schneider, Jr.*
HARRY H. SCHNEIDER, JR., WSBA #9404
Perkins Coie LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
206.359.8000
hschneider@perkinscoie.com

*/s/ Alison M. Dreizen*
ALISON M. DREIZEN, *admitted pro hac vice*
Carter Ledyard & Milburn LLP
Two Wall Street
New York, NY 10005
212.238.8855
dreizen@clm.com
*Attorneys for Plaintiff American Historical Association*

ASSOCIATION OF KING COUNTY HISTORICAL ORGANIZATIONS, HISTORIC SEATTLE, HISTORYLINK, MUSEUM OF HISTORY AND INDUSTRY, and WASHINGTON TRUST FOR HISTORIC PRESERVATION

*/s/ Paul J. Lawrence*

PAUL J. LAWRENCE, WSBA #13557
ALANNA E. PETERSON, WSBA #46502
Pacific Law Group
1191 2nd Avenue, Suite 2000
Seattle, WA 98101-3404
206.245.1700
alanna.peterson@pacificalawgroup.com
paul.lawrence@pacificalawgroup.com
*Attorneys for Plaintiffs Association of King County Historical Organizations, Historic Seattle, HistoryLink, Museum of History and Industry, and Washington Trust For Historic Preservation*

CENTRAL COUNCIL OF TLINGIT & HAIDA INDIAN TRIBES OF ALASKA, DOYON, LTD., and TANANA CHIEFS CONFERENCE

*/s/ Richard D. Monkman*

LLOYD B. MILLER, *admitted pro hac vice*
RICHARD D. MONKMAN, WSBA #35481
Sonosky, Chambers, Sachse, Miller & Monkman, LLP
725 East Fireweed Lane, Suite 420
Anchorage, AK 99503
907.258.6377
lloyd@sonosky.net
rdm@sonosky.net
*Attorneys for Plaintiffs Doyon, Ltd., Tanana Chiefs Conference, and Central Council of Tlingit & Haida Indian Tribes of Alaska*

CHINESE AMERICAN CITIZENS ALLIANCE

*/s/ Darin Sands*
DARIN SANDS, WSBA #35865
HEIDI B. BRADLEY, WSBA #35759
Bradley Bernstein Sands
P.O. Box 4120, PMB 62056
Portland, OR 97208-4120
503.734.2480
dsands@bradleybernsteinllp.com
hbradley@bradleybernsteinllp.com
*Attorneys for Plaintiff Chinese American Citizens Alliance*

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION

*/s/ Ethan Jones*
ETHAN JONES, WSBA #46911
ANTHONY ARONICA, WSBA #54725
Yakama Nation Office of Legal Counsel
P.O. Box 151, 401 Fort Road
Toppenish, WA 98948
509.865.5121
ethan@yakamanation-olc.org
anthony@yakamanation-olc.org
*Attorneys for Plaintiff Confederated Tribes and Bands of the Yakama Nation*

THE CONFEDERATED TRIBES OF THE CHEHALIS RESERVATION

*/s/ Harold Chesnin*
HAROLD CHESNIN, WSBA #398
Office of Tribal Attorney
Confederated Tribes of the Chehalis Reservation
420 Howanut Road
Oakville, WA 98568
360.529.7465
hchesnin@chehalistribe.org
*Attorney for Plaintiff The Confederated Tribes of the Chehalis Reservation*

CONFEDERATED TRIBES OF THE COLVILLE RESERVATION

*/s/ Marty M. Raap*
MARTY M. RAAP, WSBA #27962
Office of the Reservation Attorney
Confederated Tribes of the Colville Reservation
P.O. Box 150
Nespelem, WA 99155
509.634.2533
Marty.Raap.ORA@colvilletribes.com
*Attorney for Plaintiff Confederated Tribes of the Colville Reservation*

CONFEDERATED TRIBES OF COOS, LOWER UMPQUA AND SIUSLAW INDIANS, and SPOKANE TRIBE OF INDIANS

*/s/ Richard K. Eichstaedt*
RICHARD K. EICHSTAEDT, WSBA #36487
SCOTT WHEAT, WSBA #25565
Wheat Law Offices
P.O. Box 9168
Spokane, WA 99209
509.209.2604
rick@wheatlawoffices.com
scott@wheatlawoffices.com
*Attorneys for Plaintiffs Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians, and Spokane Tribe of Indians*

CONFEDERATED TRIBES OF THE GRAND RONDE COMMUNITY OF OREGON

*/s/ Nathan Alexander*
NATHAN ALEXANDER, WSBA #37040
Dorsey & Whitney, LLP
701 Fifth Avenue, Suite 6100
Seattle, WA 98104-7043
206.903.8791
alexander.nathan@dorsey.com
*Attorney for Plaintiff Confederated Tribes of The Grand Ronde Community of Oregon*

CONFEDERATED TRIBES OF SILETZ INDIANS, HOH INDIAN TRIBE, and SAMISH INDIAN NATION

*/s/ Craig J. Dorsay*

CRAIG J. DORSAY, WSBA #9245
LEA ANN EASTON, WSBA #38685
KATHLEEN GARGAN, WSBA #56452
Dorsay & Easton LLP
1737 Northeast Alberta Street, Suite 208
Portland, OR 97211
503.790.9060
craig@dorsayindianlaw.com
leaston@dorsayindianlaw.com
katie@dorsayindianlaw.com
*Attorneys for Plaintiffs Hoh Indian Tribe, Samish Indian Nation, and Confederated Tribes of Siletz Indians*

CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION

*/s/ Naomi Stacy*

NAOMI STACY, WSBA #29434
Lead Attorney, Office of Legal Counsel
46411 Timíne Way
Pendleton, OR 97801
541.429.7400
naomistacy@ctuir.org
*Attorney for Plaintiff the Confederated Tribes of the Umatilla Indian Reservation*

THE CONFEDERATED TRIBES OF THE WARM SPRINGS RESERVATION OF OREGON

*/s/ Tyler J. Moore*

TYLER J. MOORE, WSBA #39598
Karnopp Petersen, LLP
360 SW Bond Street, Suite 400
Bend, Oregon 97702
541.382.3011
tjm@karnopp.com
*Attorneys for Plaintiff The Confederated Tribes of the Warm Springs Reservation of Oregon*

COW CREEK BAND OF UMPQUA TRIBE OF INDIANS

*/s/ Gabriel S. Galanda*

GABRIEL S. GALANDA, WSBA #30331
ANTHONY S. BROADMAN, WSBA #39508
RYAN D. DREVESKRACHT, WSBA #42593
Galanda Broadman PLLC
P.O. Box 15416
8606 35th Avenue NE, Suite L1
Seattle, WA 98115
206.557.7509
gabe@galandabroadman.com
anthony@galandabroadman.com
ryan@galandabroadman.com
*Attorneys for Plaintiff Cow Creek Band of Umpqua Tribe of Indians*

DUWAMISH TRIBE

*/s/ Bart J. Freedman*

BART J FREEDMAN, WSBA #14187
BENJAMIN A. MAYER, WSBA #45700
ENDRE M SZALAY, WSBA #53898
NATALIE J. REID, WSBA #55745
ADAM N. TABOR, WSBA #50912
THEODORE J. ANGELIS, WSBA #30300
K&L Gates LLP
925 Fourth Avenue, Suite 2900
Seattle, WA 98104
206.370.7580
bart.freedman@klgates.com ben.mayer@klgates.com
endre.szalay@klgates.com
natalie.reid@klgates.com
adam.tabor@klgates.com
theo.angelis@klgates.com
*Attorneys for the Duwamish Tribe*

JAMESTOWN S'KLALLAM TRIBE

*/s/ Lauren P. Rasmussen*

LAUREN P. RASMUSSEN, WSBA #33256
Law Offices of Lauren P. Rasmussen, PLLC
1904 Third Avenue, Suite 1030
Seattle, WA 98101-1170
206.623.0900
lauren@rasmussen-law.com
*Attorney for Plaintiff Jamestown S'Klallam Tribe*

KALISPEL TRIBE OF INDIANS

*/s/ Lorraine A. Parlange*
LORRAINE A. PARLANGE, WSBA #25139
Senior Tribal Attorney
934 Garfield Road
Airway Heights, WA 99001
509.789.7603
lparlange@kalispeltribe.com
*Attorney for Plaintiff Kalispel Tribe of Indians*

THE KLAMATH TRIBES

*/s/ Edmund Clay Goodman*
EDMUND CLAY GOODMAN, WSBA #37347
Hobbs Straus Dean & Walker, LLP
215 SW Washington Street, Suite 200
Portland, OR 97214
503.242.1745
egoodman@hobbsstraus.com
*Attorney for Plaintiff The Klamath Tribes*

METLAKATLA INDIAN COMMUNITY

*/s/ Geoffrey D. Strommer*
GEOFFREY D. STROMMER, WSBA #43308
Hobbs Straus Dean & Walker, LLP
215 SW Washington Street, Suite 200
Portland, OR 97214
503.242.1745
GStrommer@hobbsstraus.com
*Attorney for Plaintiff Metlakatla Indian Community*

MUCKLESHOOT INDIAN TRIBE

*/s/ Mary M. Neil*
MARY M. NEIL, WSBA #34348
ROBERT L. OTSEA, JR., WSBA #9367
DANIELLE BARGALA, WSBA #52718
39015 172nd Avenue S
Auburn, WA 98092
253.939.3311
rob@muckleshoot.nsn.us
mary.neil@muckleshoot.nsn.us
danielle.bargala@muckleshoot.nsn.us
*Attorneys for Plaintiff Muckleshoot Indian Tribe*

NEZ PERCE TRIBE

*/s/ Julie S. Kane*
JULIE S. KANE, WSBA #19138
Office of Legal Counsel
P.O. Box 305
Lapwai, ID 83540
208.843.7355
juliek@nezperce.org
*Attorney for Plaintiff Nez Perce Tribe*

NOOKSACK INDIAN TRIBE

*/s/ Charles N. Hurt, Jr.*
CHARLES N. HURT, JR., WSBA #46217
Office of Tribal Attorney
Senior Tribal Attorney
5047 Mt. Baker Hwy, P.O. Box 63
Deming, WA 98244
360.598.4158
churt@nooksack-nsn.gov
*Attorney for Plaintiff Nooksack Indian Tribe*

NISQUALLY INDIAN TRIBE

*/s/ Heidi Petersen*
HEIDI PETERSEN, WSBA #43413
Attorney, Nisqually Indian Tribe
4820 She-Nah-Num Drive SE
Olympia, WA 98513
360.456.5221
petersen.heidi@nisqually-nsn.gov
*Attorney for Plaintiff Nisqually Indian Tribe*

OCA ASIAN PACIFIC ADVOCATES – GREATER SEATTLE

*/s/ Bernadette Connor*
BERNADETTE CONNOR, WSBA #45844,
*application for admission forthcoming*
1800 Cooper Point Road SW, Suite 12
Olympia, WA 98502
206.552.9666
byconnor@gmail.com
*Attorney for Plaintiff OCA Asian Pacific Advocates – Greater Seattle*

ELLEN F. ROSENBLUM
Attorney General of Oregon

*/s/ Carla A. Scott*
CARLA A. SCOTT WSBA #54725
Senior Assistant Attorney General
Trial Attorney
100 SW Market Street,
Portland, OR 97201
Tel (971) 673-1880
Fax (971) 673-5000
Carla.A.Scott@doj.state.or.us
*Attorneys for Plaintiff State of Oregon*

PORT GAMBLE S'KLALLAM TRIBE

*/s/ Rogina D. Beckwith*
ROGINA D. BECKWITH, WSBA #36241
Port Gamble S'Klallam Tribe Legal Department
31912 Little Boston Road NE
Kingston, WA 98346
360.297.6242
ginab@pgst.nsn.us
*Attorney for Plaintiff Port Gamble S'Klallam Tribe*

PUYALLUP TRIBE OF INDIANS

*/s/ Alec S. Wrolson*
ALEC S. WROLSON, WSBA #54076
FELECIA L. SHUE, WSBA #49911
LOIS Y. BOOME, WSBA #54883
LISA A.H. ANDERSON, WSBA #27877
3009 E. Portland Avenue
Tacoma, WA 98404
253.573.7877
alec.wrolson@puyalluptribe-nsn.gov
felecia.shue@puyalluptribe-nsn.gov
lois.boome@puyalluptribe-nsn.gov
lisa.anderson@puyalluptribe-nsn.gov
*Attorneys for Plaintiff Puyallup Tribe of Indians*

THE QUILEUTE TRIBE OF THE QUILEUTE RESERVATION

*/s/ Lauren J. King*
LAUREN J. KING, WSBA #40939
Foster Garvey, P.C.
1111 Third Ave., Suite 3000
Seattle, WA 98101
206.447.6286
lauren.king@foster.com
*Attorney for Plaintiff Quileute Tribe*

QUINAULT INDIAN NATION

*/s/ Karen Allston*
KAREN ALLSTON, WSBA #25336
LORI BRUNER, WSBA #26652
Senior Assistant Attorneys General
Quinault Indian Nation Office of Attorney General
P.O. Box 613
Taholah, WA 98587
360.276.8211, ext. 1400
lbruner@quinault.org
kallston@quinault.org
*Attorneys for Plaintiff Quinault Indian Nation*

SAUK-SUIATTLE INDIAN TRIBE

*/s/Jack W. Fiander*
JACK W. FIANDER, WSBA #13116
General Counsel
Sauk-Suiattle Indian Tribe
5318 Chief Brown Lane
Darrington, WA 98241
360.436.0139
towtnuklaw@msn.com
*Attorney for Plaintiff Sauk-Suiattle Indian Tribe*

CITY OF SEATTLE

*/s/ Jeremy F. Wood*
JEREMY F. WOOD, WSBA #51803
Assistant City Attorney
Seattle City Attorney's Office
701 Fifth Avenue, Suite 2050
Seattle, WA 98104
206.684.8200
jeremy.wood@seattle.gov
*Attorney for Plaintiff City of Seattle*

SHOALWATER BAY TRIBE

*/s/ Geoffrey D. Strommer*
GEOFFREY D. STROMMER, WSBA #43308
Hobbs Straus Dean & Walker, LLP
215 SW Washington Street, Suite 200
Portland, OR 97214
503.242.1745
GStrommer@hobbsstraus.com
*Attorney for Plaintiff Shoalwater Bay Tribe*

SKOKOMISH INDIAN TRIBE

*/s/ Earle David Lees, III*
EARLE DAVID LEES, III, WSBA #30017
Director of the Skokomish Legal Department
Skokomish Indian Tribe
N. 80 Tribal Center Road
Skokomish Nation, WA 98584
360.877.2100
elees@skokomish.org
*Attorney for Plaintiff Skokomish Indian Tribe*

SNOQUALMIE INDIAN TRIBE

*/s/ Rob Roy Smith*
ROB ROY SMITH, WSBA #33798
RACHEL B. SAIMONS, WSBA #46553
Kilpatrick Townsend & Stockton, LLP
1420 Fifth Avenue, Suite 3700
Seattle, WA 98101
206.467.9600
rrsmith@kilpatricktownsend.com
rsaimons@kilpatricktownsend.com
*Attorneys for Plaintiff Snoqualmie Indian Tribe*

SQUAXIN ISLAND TRIBE

*/s/ David Babcock*
DAVID BABCOCK, WSBA #31737
Attorney, Squaxin Island Tribe
3711 SE Old Olympic Hwy
Shelton, WA 98584
360.432.1771
dbabcock@squaxin.us
*Attorney for Plaintiff Squaxin Island Tribe*

SUQUAMISH TRIBE

*/s/ James Rittenhouse Bellis*
JAMES RITTENHOUSE BELLIS, WSBA #29226
Director, Office of Tribal Attorney
Suquamish Tribe
P.O. Box 498
Suquamish, WA 98392
360.394.8501
Shelton, WA 98584
360.432.1771
rbellis@suquamish.nsn.us
*Attorney for Plaintiff Suquamish Tribe*

SWINOMISH INDIAN TRIBAL COMMUNITY

*/s/ Emily Haley*
EMILY HALEY, WSBA #38284
Office of the Tribal Attorney
11404 Moorage Way
La Conner, WA 98257
360.466.3163
ehaley@swinomish.nsn.us
*Attorney for Plaintiff Swinomish Indian Tribal Community*

UPPER SKAGIT INDIAN TRIBE

*/s/ David S. Hawkins*
DAVID S. HAWKINS, WSBA #35370
General Counsel
Upper Skagit Indian Tribe
25944 Community Plaza Way
Sedro-Woolley, WA 98284
360.854.7016
dhawkins@upperskagit.com
*Attorney for Plaintiff Upper Skagit Indian Tribe*

WING LUKE MEMORIAL FOUNDATION d/b/a WING LUKE MUSEUM

*/s/ Gloria Lung Wakayama*

GLORIA LUNG WAKAYAMA, WSBA #11892
Harris & Wakayama, PLLC
601 Union Street, Suite 2600
Seattle, WA 98101
206.621.1818
glwakayama@hmwlaw.com
*Attorney for Plaintiff Wing Luke Memorial Foundation d/b/a Wing Luke Museum*

**DECLARATION OF SERVICE**

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will send notification to all counsel of record.

DATED this 11th day of February, 2021, at Seattle, Washington.

*/s/ Lauryn K. Fraas*
LAURYN K. FRAAS, WSBA #53238
Assistant Attorney General