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**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA**

COUNTY OF SANTA BARBARA,

Plaintiff,

v.

KEVIN HAUGRUD, in his official capacity as Acting Secretary of the Interior; MICHAEL BLACK, in his official capacity as Acting Assistant Secretary – Indian Affairs; AMY DUTSCHKE, in her official capacity as Director, Pacific Region, Bureau of Indian Affairs; THE UNITED STATES DEPARTMENT OF THE INTERIOR; and THE BUREAU OF INDIAN AFFAIRS,

Defendants.

CASE NO. 2:17-cv-703-SVW-AFM

**DEFENDANTS' OPPOSITION TO PLAINTIFF'S *EX PARTE* APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE**

Judge: Hon. Stephen Wilson
Hearing: February 1, 2017
Time: 10:00 a.m.

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## INTRODUCTION

The County seeks extraordinary relief that would upend the status quo in this Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* ("APA") suit challenging decisions by the United States Department of the Interior ("Interior") to accept approximately 1,400 acres of land ("Property") in trust for housing purposes for the Santa Ynez Band of Chumash Mission Indians ("Tribe"). Interior took this action pursuant to the Indian Reorganization Act, 25 U.S.C. § 5101 *et seq*. ("IRA") and related regulations codified at 25 C.F.R. Part 151. On January 20, 2017, the Pacific Regional Director for the Bureau of Indian Affairs ("BIA"), under 25 C.F.R. § 151.12(c)(2)(iii), accepted title to the Property , placing it in federal trust for the benefit of the Tribe. Now, Plaintiff County of Santa Barbara ("County") seeks to have this Court take the unprecedented step to remove it from trust, through a temporary restraining order or a preliminary injunction, based on the thinnest possible factual record.

The County seeks a mandatory injunction that would require Interior to completely unwind the acceptance of the Property in trust while its challenge to Interior's decision is pending. Plaintiff cannot satisfy the exceptionally high burden necessary for such relief because the current trust status of the Property does not preclude the full adjudication of the merits of the County's lawsuit, including the granting of any remedies to which the County may demonstrate entitlement.

As if that were not enough, in the alternative the County also asks the Court to enjoin defendants from "permitting, authorizing, or continuing to authorize any pre-development or development activities on the Property." Doc. No. 4 at 1. It premises this request solely upon mere speculation regarding language included in a press release issued by the Tribe, rather than identifying likely future action by any of the federal officials or entities it names as defendants (collectively,

"Defendants" or "Interior"). The County, without first taking the simple step of contacting the Tribe for clarification, simply informs this Court that it *construes* the press release as *suggesting* that construction *may* start at some point in the near future, and that this alone somehow warrants a temporary restraining order ("TRO"). Pls. Memo. of Points & Authorities ("Pls. Memo") at 23.

The undersigned counsel contacted the County's counsel, urging her to contact the Tribe prior to filing suit. The County opted instead to immediately file its Complaint and Ex Parte Application. Thereafter, the Tribe represented to the County, and signed a declaration affirming the same, *see* attached Declaration of Chairman Kenneth Kahn,[1] that it has no plans to commence construction on the Property for at least nine months. Despite the fact that no construction is imminent, the County presses forward, seeking to secure a TRO that is wholly unnecessary. This Court should deny the County's request.

## ARGUMENT

### I. Standard of Review

#### A. Mandatory Preliminary Injunctions are Highly Disfavored and are Not Granted Except in Extreme Cases

The County is not seeking emergency relief to preserve the status quo. Instead, it is in part seeking a mandatory injunction that would require the Defendants to convey the Property out of trust. The very purpose of preliminary relief is to preserve the status quo, the last status that preceded the controversy, i.e., the Property held in trust, until the Court can address the merits. *Chalk v. United States Dist. Ct. Cent. Dist. of Calif.*, 840 F.2d 701, 704 (9th Cir. 1988); *GoTo.com*,

[1] For the limited purpose of this proceeding, the Court need not examine the Administrative Record. A decision on the County's Application can be rendered on the basis of the attachments to the Declaration of Rebecca Ross and the documents submitted by the County that are referenced in this Opposition. Interior takes no positon at this time whether any such documents are properly part of the Record.

*Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1210 (9th Cir. 2000). Where "a party seeks mandatory preliminary relief that goes well beyond maintaining the status quo *pendente lite*, courts should be extremely cautious about issuing a preliminary injunction." *Martin v. Int'l Olympic Comm.*, 740 F.2d 670, 675 (9th Cir. 1984); *see also Stanley v. Univ. of S. Cal.*, 13 F.3d 1313, 1319-20 (9th Cir. 1994).

Accordingly, preliminary relief like that sought by the County is highly disfavored and subject to considerably heightened scrutiny. *Dahl v. HEM Pharma. Corp.*, 7 F.3d 1399, 1403 (9th Cir. 1993) ("[mandatory] relief . . . should not be issued unless the facts and law clearly favor the moving party.") (emphasis added). Such a TRO or preliminary mandatory injunction is "not granted unless extreme or very serious damage will result." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009) (citations omitted).

**B. Plaintiff Must Demonstrate Irreparable Injury; Mere Speculation About Possible Future Events, and When They Might Occur, is Insufficient**

"Speculative injury does not constitute irreparable injury." *See Colorado River Indian Tribes v. Town of Parker*, 776 F.2d 846, 849 (9th Cir. 1985). A claimed harm must be both irreparable and imminent. *Caribbean Marine Servs. Co., Inc. v. Baldrige*, 844 F.2d 668, 674 (9th Cir. 1988); *Los Angeles Memorial Coliseum v. National Football League*, 634 F.2d 1197, 1201 (9th Cir.1980).[2] see also *Amylin Pharmaceuticals, Inc. v. Eli Lilly and Co.*, 456 Fed. Appx. 676, 679 (9th Cir. Oct. 31, 2011) ("[E]stablishing a threat of irreparable harm in the indefinite future is not enough"); *California Dump Truck Owners Association v.*

[2] See also *Amylin Pharmaceuticals, Inc. v. Eli Lilly and Co.*, 456 Fed. Appx. 676, 679 (9th Cir. Oct. 31, 2011) ("[E]stablishing a threat of irreparable harm in the indefinite future is not enough"); *California Dump Truck Owners Association v. Nichols*, No. 11–cv–00384–MCE–GGH, 2012 WL 273162, *3 (E.D. Cal. Jan. 30, 2012) (quoting *Amylin*).

*Nichols*, No. 11–cv–00384–MCE–GGH, 2012 WL 273162, *3 (E.D. Cal. Jan. 30, 2012) (quoting *Amylin*). Speculative injury can never constitute irreparable injury sufficient to warrant granting a preliminary injunction. *Caribbean Marine Servs.*, 844 F.2d at 674 (citing *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir.1984)).

Applying these standards, a party seeking injunctive relief must present, when it seeks relief, evidence of likely irreparable harm and cannot rely on "unsupported and conclusory statements regarding harm [the plaintiff] might suffer." *Herb Reed Enterprises, LLC v. Florida Entertainment Management, Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013), *cert. denied*, 135 S. Ct. 57 (2014).[3]

**C. The Plaintiff Bears the Burden of Showing That an Injunction is in the Public Interest and That Interest is a Factor to be Considered When the Interests of Third Parties are Affected**

In addition, the plaintiff "bear[s] the initial burden of showing that [issuance of an] injunction is in the public interest." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1139 (9th Cir. 2009) (citing *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 30 (2008). The district court, however, "need not consider public consequences that are 'highly speculative.'" *Id.* (quoting *Golden Gate Restaurant Ass'n v. City & Cnty. of San Francisco*, 512 F.3d 1112, 1126 (9th Cir. 2008)). "In other words, the court should weigh the public interest in light of the likely consequences of the injunction. Such consequences must not be too remote,

[3] *See, e.g., Titaness Light Shop, LLC v. Sunlight Supply, Inc.*, 585 Fed. Appx. 390, 391 (9th Cir. Oct. 8, 2014) ("To establish a likelihood of irreparable harm, conclusory or speculative allegations are not enough. *Herb Reed Enterprises, LLC*, 736 F.3d at 1251 ("Those seeking injunctive relief must proffer evidence sufficient to establish a likelihood of irreparable harm"); *Caribbean Marine Servs.*, 844 F.2d at 674 ("A plaintiff must do more than merely allege imminent harm . . .; a plaintiff must demonstrate immediate threatened injury as a prerequisite to preliminary injunctive relief").

insubstantial, or speculative and must be supported by evidence." *Id.* "When the reach of the injunction is narrow, limited only to the parties, and has no impact on non-parties, the public interest will be 'at most a neutral factor in the analysis rather than one that favor[s] [granting or] denying the preliminary injunction.'" *Stormans*, 586 F.3d at 1138-39 (quoting *Bernhardt v. Los Angeles Cnty.*, 339 F.3d 920, 931 (9th Cir. 2003)). "If, however, the impact of an injunction reaches beyond the parties, carrying with it a potential for public consequences, the public interest will be relevant to whether the district court grants the preliminary injunction." *Id.* at 1139 (citing *Sammartano v. First Judicial District Court*, 303 F.3d 959, 965 (9th Cir. 2002)).

**D. A Plaintiff Seeking Preliminary Relief Who Cannot Demonstrate Concrete, Imminent Harm Lacks Article III Standing**

"To establish Article III standing, an injury must be 'concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling.'" *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138, 1147 (2013) (quoting *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743, 2752 (2010)). "Although imminence is concededly a somewhat elastic concept," as the Supreme Court has explained, "it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes--that the injury is certainly impending." *Id.* (citation omitted). Indeed, the Supreme Court has "repeatedly reiterated that 'threatened injury must be certainly impending to constitute injury in fact,' and that '[a]llegations of possible future injury' are not sufficient." *Id.*

**E. Even as to Non-Mandatory Aspects of an Injunction Request, an Injunction is a Drastic Remedy that Requires Proof that the Defendant Has a Future Responsibility or Obligation that can be Enjoined**

As to the non-mandatory aspect of Plaintiff's request for preliminary relief, an injunction is "a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co.*, 561 U.S. at 165.

> [A] plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

*Id.* at 156-57 (quoting *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). "The traditional four-factor test applies when a plaintiff seeks a permanent injunction to remedy a NEPA violation." *Id.* at 157 (citing *Winter*, 555 U.S. at 30) (applying the four factors to preliminary injunctions). Under this standard, "[i]t is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should not issue; rather, a court must determine that an injunction should issue." *Id.* at 158, 162 (an injunction should only issue if it is "needed to guard against any present or imminent risk of likely irreparable harm"). Accordingly, an injunction should issue only where a plaintiff makes a "clear showing" and presents "substantial proof" that an injunction is warranted, *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam), and does "more than merely allege imminent harm sufficient to establish standing," *Associated Gen. Contractors v. Coal. for Econ. Equity*, 950 F.2d 1401, 1410 (9th Cir. 1991).

Thus, an injunction will not follow automatically even upon a finding of likelihood of success on the merits. *Winter*, 555 U.S. at 32 ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course"); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982)

("[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." (citation omitted)). Instead, a plaintiff must also show that it is likely to suffer irreparable harm, that the balance of equities tips in its favor, and that an injunction is in the public interest. The Ninth Circuit employs a "sliding scale" formulation of the preliminary injunction test under which an injunction could be issued where, for instance, "the likelihood of success is such that serious questions going to the merits [are] raised and the balance of hardships tips sharply in plaintiff's favor[,]" *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (internal quotation marks and brackets omitted), provided the other elements of the *Winter* test are met, *Angelotti Chiropractic, Inc. v. Baker*, 791 F.3d 1075, 1081 (9th Cir. 2015) ("Serious questions going to the merits and hardship balance that tips sharply towards plaintiffs can also support issuance of a preliminary injunction, so long as there is a likelihood of irreparable injury and the injunction is in the public interest.") (internal quotation marks and brackets omitted).

Plaintiff must also demonstrate, at the outset, that any individual or entity under the control of the Defendants has any ongoing or future obligation with regard to "permitting, authorizing, continu[ing] to permit or authoriz[ing] any pre-development or development activities on the Property." Doc. No 4. at 1. Mere speculation in this regard is insufficient.

### F. With Regard to NEPA Claims, Injunctive Relief is Never Presumed

And even if this Court were to be concerned about the possibility of a NEPA violation, an injunction can never automatically issue on such basis; "injunctive relief is an equitable remedy, requiring the Court to engage in the traditional balance of harms analysis even in the context of environmental litigation." *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1496 (9th Cir. 1995).

The Supreme Court made this clear in *Monsanto Co. v. Geertson Seed Farms*, *supra*. The Ninth Circuit itself has never adopted a rule that even an unambiguous NEPA violation automatically requires injunctive relief. *See Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1158 (9th Cir. 1988) (a procedural shortcoming under an environmental statute does not create any presumption in favor of a substantive injunction).[4]

## II. Plaintiff is Not Entitled to a Mandatory Injunction

The County claims that a mandatory injunction is available when "a prohibitory injunction is inadequate or ineffective." Pls. Memo. at 4. The extraordinary request it seeks, however, is entirely unprecedented and certainly unwarranted. It would upset the status quo and grant the County complete relief under the APA without it having met its burden of demonstrating entitlement to any relief whatsoever. Prior to judicial review of an administrative record, the County asks the Court to rule on the ultimate factual and legal issues in this case and then impose an injunction that would require Interior to provide the very same relief that the County is ultimately seeking through its complaint. Because the County is seeking expansive affirmative relief, that would require Interior to completely unwind a final agency action by removing the Property from trust status, the County must show "the facts and law clearly favor" its position in order to satisfy the heightened scrutiny test for mandatory injunctions. *Dahl*, 7 F.3d at 1403 (emphasis added). The County has failed to do so.

[4] *See also Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1299 (9th Cir. 2003) ("the Supreme Court has held that insufficient evaluation of environmental impact under NEPA does not create a presumption of irreparable injury"); *National Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995) (court "is not required to set aside every unlawful agency action").

The County's reference to statements made by the United States in other cases is of no assistance to their cause. Pls. Memo at 4. Both statements were made to explain to the reviewing court that it need not enjoin the transfer of the subject property into trust because full adjudication of the suit could proceed regardless of the trust status of the property. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2208 (2009) (suits challenging Interior's decision to acquire land in trust for an Indian tribe described as a "garden-variety APA claim" that can proceed regardless of the trust status of the subject property). Prior to *Patchak*, several circuit courts of appeal had held that once the land was held in trust, a reviewing court lost jurisdiction over the case. That is not the case post-*Patchak*, which held that APA review was available to plaintiffs regardless of the trust status of the property, thereby obviating the need for Interior to stay the transfer of property in trust for the duration of a lawsuit. Accordingly, Interior amended its regulations to remove a requirement that final decisions to acquire land in trust be stayed for a thirty-day period to allow for the filing of lawsuits. *See* 78 Fed. Reg. 67,928, 67,928-97,929 (Nov. 13, 2013) (explaining the basis for amending Interior regulations in response to the *Patchak* decision).

The County utterly fails to explain how Interior's compliance here with duly-enacted promulgated regulations constitutes the type of "extreme" circumstance that could warrant, much less require, the granting of such drastic relief. The County's request must be rejected.

**III. The County Cannot Show Irreparable Injury**

The County is not entitled to a TRO or the other injunctive relief it seeks, as the injury it alleges is reparable, speculative, and far from imminent. Should the County ultimately succeed in this suit, and should the Court order Interior to unwind the transfer of the Property into trust, Interior will comply with that order,

following the exhaustion of all appeals and requests for relief. 78 Fed. Reg. at 67,934. Accordingly, any harm stemming from the trust status of the Property is reparable and cannot form the basis for emergency injunctive relief.

The County alleges injury based on the speculative "threat" that Interior may take some unidentified action with regard to construction on the Property at some unknown date in the future before the environmental impacts of the proposed development on the Property are "carefully considered" or other agency requirements are met. The burden is on the County to demonstrate entitlement to the relief it seeks; unsupported, conclusory statements that speculate about, rather than establish any harm—such as those the County offers here—fall far short of the evidentiary burden it must meet. Moreover, to the extent the County relies on the speculation that the Tribe will imminently commence construction on the Property, such reliance is wholly undermined by the representations the Tribe has made to the County and in the Declaration attached hereto. There is simply no emergency here.

There is simply no immediate, irreparable threat of injury to the County if this case proceeds in the normal course. The Court should therefore deny the County's TRO request.

## IV. The County Has Failed to Demonstrate a Likelihood of Success on the Merits.

### A. Interior Did Not Violate NEPA

#### i. Interior's Environmental Assessment Cannot be Set Aside Unless the Court Concludes that They Were Arbitrary and Capricious

Though the County argues otherwise, a determination about compliance with NEPA does not hinge on Interior's adherence to environmental standards, but instead, NEPA "establishes 'action-forcing' procedures that require agencies to take a 'hard look' at environmental consequences." *Metcalf v. Daley*, 214 F.3d

1135, 1141-42 (9th Cir. 2000) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989)). Specifically, for claims brought under the "APA, the Ninth Circuit employs a standard of whether the agency's action in engaging in the environmental review under the Act was "arbitrary and capricious." *Jones v. Nat'l Marine Fisheries Serv.*, 741 F.3d 989, 996 (9th Cir. 2013) (quoting *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (internal quotations omitted)); *Nw. Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1132–33 (9th Cir. 2006). In other words, an agency's action in finding no significant impact after conducting an environmental assessment ("EA") will be upheld unless the plaintiff can establish that the it relied on factors that Congress intended it not to consider, entirely failed to consider an important aspect of the problem, offered an explanation that runs counter to the evidence, or is so implausible that it could not be ascribed to a difference in viewpoint or is not otherwise the product of agency expertise. Here, the County disagrees with Interior's decision, but wholly fails to establish that Interior's environmental reviews were arbitrary or capricious.

In conducting an EA prior to placing the land into trust, Interior acted reasonably and fully complied with NEPA. Interior identified and analyzed the impacts on land resources, water resources, air quality, biological resources, cultural resources, socioeconomic conditions, traffic and circulation, land use, public services, noise, hazardous materials, and visual resources potentially stemming from the Tribe's development of the Property. *See* FEA, at 194.00036-119 (Affected Environment; 194.00120-176 (Environmental Consequences). As more fully recounted in the following subsections, the EA amply satisfied the requirements of NEPA.

**ii. Interior Completed the Necessary "Hard Look."**

NEPA outlines the process federal agencies must follow to ensure that the environmental consequences of a proposed action are examined. *Jones*, 741 F.3d at 997 (9th Cir. 2013) (citing *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1070 (9th Cir. 2002)). Should an agency action "significantly affect the quality of the human environment," 42 U.S.C. § 4332(C), an agency is required to prepare an Environmental Impact Statement (EIS). In the alternative, an agency may prepare a more limited document, known as an EA, a "concise public document" that "[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]." 40 C.F.R. § 1508.9(a); *see also Jones*, 741 F.3d at 997. *See also Ctr. For Biological Diversity v. Kempthorne*, 588 F.3d 701, 712 (9th Cir. 2009) (an EIS is not required "anytime there is some uncertainty, but only [where] the effects of the project are highly uncertain.").

The County argues that because the development of the property will convert agricultural uses to residential, event, and other uses and bring additional residents, employees, and visitors to an area that is currently rural, the BIA was required to prepare an EIS. But the fact is that Interior carefully considered the potential environmental consequences of its actions, and properly concluded that those actions would not "significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

Interior is afforded discretion in the determination of potential effects. *Kern v. U.S. Bureau of Land Mgmt*., 284 F.3d 1062, 1070 (9th Cir. 2002) ("An agency's decision not to prepare an EIS once that agency has prepared an EA is reviewed for abuse of discretion, and will be set aside only if it is 'arbitrary and capricious'") (quoting *Marsh v. ONRC*, 490 U.S. 360, 376–77 (1989)). Here, Interior properly weighed a host of potential environment effects, including:

- impacts to land resources, namely, the impacts to agricultural and grazing resources stemming from the decision and the development

of the property (Finding of No Significant Impact ("FONSI"), at 237.00091-92, 237.00060-131, 136-37, 187-92; Final Environmental Assessment ("FEA"), at 194.01725-27);

- impacts to water resources, including impacts to neighboring wells and groundwater (FEA, at 194.00033, 43-53, 122-26, 154-57, 173, 753-54, 1696-99; FONSI, at 237.00006, 8, 431-32);
- impact on air quality (FEA, at 194.00033, 53-63, 126-30, 157-59, 173, 577-722, 1692-93, 1723-24);
- the impacts to biological resources, including impacts to protected species and other wildlife, wildlife habitat, oak trees, and oak savannah (FEA, at 194.00033, 63-78, 130-33, 159-61, 164-65, 173, 1693-95; FONSI, at 237.00006, 14-18, 430, 432-34);
- impacts to traffic stemming from the proposed development of the property (FEA, at 194.00034, 90-94, 137-40, 163-65, 174, 786-1047; FONSI, at 237.00019-20, 430);
- impacts to land use, including impacts stemming from conflicts between existing land use restrictions; the change in jurisdictional control that will occur following the trust acquisition of the property, the compatibility of the proposed development under Alternatives A and B with existing land use restrictions, and the significance of any impacts stemming from any development conflicts (FEA at 194.00034, 94-101, 140-43, 165-68, 1700-02, 1709-10, 1720-22, 1838);
- impacts to noise levels (FEA at 194.00035, 106-114, 147-51, 170-72, 175, 1700-02, 1799, 1801, 1829, 1841, 1857; FONSI, at 237.00021, 429-30, 477);

- impacts to public services (FEA, at 194.00034, 1010-06, 143-47, 168-70, 175, 1705-05, 1720-22, 1729-30; FONSI, at 237.00007, 20-21, 430, 434, 452); and
- impacts to visual resources (FEA, at 194.00035, 117-19, 151-52, 172, 176, 1700-02, 1708-10, 1720, 1736, 1772, 1781, 1800, 1842, 1846, 1856, 1861; FONSI, at 237.00010, 21, 447.

Time and space constraints do not allow a more detailed review of Interior's NEPA compliance, but even a quick review of the EA demonstrates that it is not possible to conclude that Interior's actions violated the standards of the APA.

**iii. Interior's Consideration of Mitigation Factors Was Appropriate.**

In determining the potential environmental effects of the proposed agency action, Interior also properly considered mitigation measures in connection with the FA and FONSI. *See Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1016 (9th Cir. 2006) (environmental assessment for forest management project which contained specific and detailed information on how effects to wildlife and the watershed would be minimized, cross-referenced detailed best management practices which were described in an attached appendix, and incorporated concurrent monitoring of effectiveness and implementation of those practices, was adequate to satisfy agency's responsibility to take a "hard look" and supported conclusion that effects would not be significant); *Friends of the Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 993 (9th Cir. 1993) (finding that that the Corp's conclusion that the wetlands would not be affected significantly was not arbitrary and capricious. The Corps' mitigation measures required a mitigation plan to create new wetlands through the use of water channels, grass seeding, and tree and shrub planting, in addition to monitoring and supplemental mitigation measures if goals were not met, was significant). Here, Interior

discussed these mitigation measures as part of the inherent design and planning for the proposed development, with respect to the consideration of impacts stemming from each Alternative considered in the FEA, thus fulfilling its NEPA mandate. Specifically, Interior considered land resources, water resources, air quality, biological resources, cultural resources, socioeconomic conditions/environmental justice, transportation and circulation, land use, public services, noise, hazardous materials, and visual resources as mitigation measures. FEA, at AR0194-204; FONSI at AR0237.00001-22.

**iv. Interior's Cumulative Impacts Analysis was Appropriate.**

As an additional basis for relief, the County argues that Interior, in its final EA, did not properly account for the environmental impacts of the proposed development of the Property when considered in connection with past, present, and reasonably foreseeable future development activities occurring around the Property. Pls. Memo at 14. The final EA demonstrates the contrary, however, as Interior properly considered the cumulative impacts to land resources, water resources, air quality, biological resources, cultural resources, socioeconomic conditions, transportation and circulation, land use, noise, public services and utilities, hazardous materials, and visual resources in light of proposed and ongoing development on the Tribe's other trust lands, as well as other proposed development in the surrounding community. FEA at 194.00176-90. Interior specifically addressed the County's concerns with regard to the cumulative impact analysis, FEA at 194.01722, 194.01736-40. As was true in the County's administrative appeal, the County here again fails to identify any error in Interior's responses. The County's assertions that the BIA's analysis was "unclear," therefore, is completely unfounded and unsupported by the record evidence.

**v. Interior Properly Considered the Alternatives.**

The County misstates the appropriate standard for Interior's consideration of alternatives. The agency is not required to consider all alternatives; instead, it is only required to consider "appropriate" and "reasonable" alternatives. *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2015) (consideration of a preferred alternative and no action alternative on a forest project to reduce fire risk was adequate.). "[T]he statutory and regulatory requirement that an agency must consider 'appropriate' and 'reasonable' alternatives does not dictate the minimum number of alternatives that an agency must consider." "Rather, the substance of the alternatives has been a focus, not the sheer number of alternatives considered." Also,"an agency's obligation to consider alternatives under an EA is a lesser one than under an EIS." *Id.*

Here, Interior considered a reasonable range of alternatives. Two alternatives contemplated the subject property being acquired in trust and developed: "Alternative A:" which contemplated the construction of 143 homes on five-acre plots; and "Alternative B" which contemplated the construction of 143 homes on one-acre plots and the development of a tribal facility. FEA at 194.00017-35. Interior also considered a "no action" alternative, "Alternative C," that evaluated impacts stemming from a decision not to acquire the property in trust. Interior's analysis of alternatives was careful, thorough, and complied with NEPA. *See Jones*, 741 F.3d at 1001-02 ("an alternative is practicable if it is 'available and capable of being done after taking into account consideration cost, existing technology, and logistics in light of overall project purposes.'") (citing 40 C.F.R. § 230.10(a)(2)).

**vi. Interior is Not Required to Supplement the EA.**

CEQ regulations state that supplementation is not required when (1) the new alternative is "a minor variation of one of the alternatives discussed in the draft EIS" and (2) the new alternative is "qualitatively within the spectrum of

alternatives that were discussed in the draft [EIS]." Forty Most Asked Questions Concerning CEQ's NEPA Regulations, Question No. 29b, 46 Fed. Reg. 18,026, 18,035 (March 23, 1981). The three suggestions presented by the County (Pls. Memo. at 16) —the evaluation of development of a tract of land the tribe purchased six months after the Agency's decision, the State's imposition of additional water restrictions, and the Tribe's completion of its build-out plan—fit within the ambit contemplated where supplementation is not required. Specifically, it is not the Tribe's desire to place the 350-acre parcel of land in trust, nor has the County explained how the subsequent acquisition serves the purpose and need for the project/action at issue. *Nat. Res. Def. Council, Inc. v. U.S. Forest Serv.*, 634 F. Supp. 2d 1045, 1059 (E.D. Cal. 2007) ("The purpose and need of a project determines the range of alternatives that an agency must consider") (citations omitted). Second, Plaintiff provides no basis for concluding that the Tribe cannot or will not fully comply with additional water restrictions, or provide any other basis for concluding that the new restrictions justify supplementing the EA. Finally, Plaintiff's unsupported assertion that the Tribe's development plan is more intensive than that studied in the EA (Pls. Memo. at 17) is far too generalized to support a finding that NEPA was violated, and the equally unsupported assertion that more intensive development "would impact the resource analysis" (*id.*) is pure speculation. Thus, the County has failed to establish that supplementation is required.

**B. Interior Complied with Other Statutory and Regulatory Requirements**

**i. The Indian Reorganization Act**

The IRA authorizes the Secretary of the Interior ("Secretary"), through his delegees, to acquire land in trust for Indian tribes. 25 U.S.C. § 5108 ("Section 5"). The IRA was enacted in 1934 as part of the federal government's shift from a policy of paternalism and assimilation of Indian tribes to a policy promoting

"principles of tribal self-determination and self-governance[.]" *Cnty. of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 255 (1992). Described as the "capstone" of the land acquisition provisions,[5] Section 5 promotes tribal self-determination and self-governance by restoring or reestablishing tribal land bases upon which such self-governance can occur.

**ii. Interior Regulations**

Interior's regulations implementing Section 5, codified at 25 C.F.R. Part 151, set forth the procedures and substantive criteria governing the Secretary's decision-making on a tribe's request to have land acquired in trust. These regulations establish Interior policy for exercising the Secretary's discretionary authority to acquire land in trust, including when the acquisition facilitates "tribal self-determination, economic development, or Indian housing." 25 C.F.R. § 151.3. The regulations also require that the Secretary consider several factors, including the need for the land, the purpose for which it will be used, the impact on state and local governments stemming from removal of the land from the tax rolls, potential jurisdictional problems and conflicts over land use, the BIA's ability to discharge additional responsibilities attendant to Indian trust land, and compliance with NEPA. *Id.* §§ 151.10(a)-(c), (e)-(h). When the land to be acquired is not within the exterior boundaries of a tribe's existing reservation or contiguous to it, the Secretary then considers additional factors, including the relative distance among the subject property, the tribe's reservation, and state borders; as well as the economic benefits anticipated from the acquisition. *Id.* § 151.11.

**iii. The County's Claims that Interior Failed to Comply with its Regulations Are Certain to Fail**

**1. APA Standard of Review**

[5] *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2211 (2012).

Under the APA, the reviewing court may only set aside an agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This standard is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric.*, 499 F.3d 1108, 1115 (9th Cir. 2007) (quoting *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000)). An agency decision is arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 962 (9th Cir. 2006) (internal quotation marks, brackets, and citations omitted). In keeping with this standard, "[w]here a court reviews an agency action involv[ing] primarily issues of fact, and where analysis of the relevant documents requires a high level of technical expertise, [it] must defer to the informed discretion of the responsible federal agencies." *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1206 (9th Cir. 2004) (quotation and citation omitted); *Arizona Cattle Growers Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010). Thus, "[t]he ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); see also *Davis v. EPA*, 348 F.3d 772, 781 (9th Cir. 2003) (citing *Arizona v. Thomas*, 824 F.2d 745, 748 (9th Cir. 1987)).

Agency interpretations of its own implementing regulations are typically accorded heightened deference and are controlling unless clearly erroneous or inconsistent with relevant regulations. *Auer v. Robbins*, 519 U.S. 452, 461 (1997);

Lyng v. Payne, 476 U.S. 926, 939 (1986) (agency's construction of its own regulation is entitled to substantial deference). These limitations on judicial review of agency decision-making are grounded in the separation of powers doctrine and the recognition that Congress has conferred certain discretionary decision-making powers to federal agencies equipped with special expertise. *Cronin v. U.S. Dep't of Agric.*, 919 F.2d 439, 444 (7th Cir. 1990). For the same reasons, a reviewing court should accord deference to agency interpretation and implementation of statutes the agency is charged with administering. *Chevron, U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

**2. The County's Conclusory Assertions that Interior Failed to Comply with its Regulations Fails to Satisfy its Burden under the APA**

Interior fully considered the County's objections to the Tribe's request to place the Property in trust, including those comments concerning Interior's compliance with its regulations. The County simply recycles the same comments it submitted twice before the agency, ignores the thorough consideration Interior gave such comments, and argues, in a conclusory fashion, that Interior violated its regulations. Such effort fails to establish the County's burden under the APA.

The County sets forth a laundry list of complaints concerning Interior's consideration of the Tribe's application under agency regulations, Pls. Memo at 24-26, but none demonstrate that Interior acted arbitrarily and capriciously in approving the Tribe's request. Despite the County's arguments to the contrary, Interior need not justify why all of the land must come into trust. *See Cnty. of Charles Mix v. U.S. Dep't of Interior*, 799 F. Supp. 2d 1027, 1045 (D.S.D. 2012), *aff'd*, 674 F.3d 898 (8th Cir. 2012); *City of Yreka v. Salazar*, No. 2:10-cv-1734, 2011 WL 2433660, at *9 (E.D. Cal. June 14, 2011). Thus, Interior was under no obligation to justify, on an acre-by-acre basis, the acquisition of all of the acreage in trust. The County establishes no error in Interior's decision-making.

Likewise, the County's assertion that Interior failed to discuss all of the current and proposed uses of the Property is not supported by the case they cite, or the decisions it references. Apart from extensive discussion in the administrative record about the current and proposed uses of the Property, the Regional Director summarized the findings made by the agency and discussed the ongoing operations on the land in the context of her decision. Holderness Declaration at Ex. F. The Regional Director need not have repeated all of the voluminous information in the administrative record in the Notice of Decision, and the County offers no support for such an assertion. The Regional Director issued a reasonable decision including on this factor.

Again, the County elevates form over substance by claiming that the Regional Director failed to consider the County's comments on tax impacts; the Notice of Decision, as well as the Assistant Secretary – Indian Affairs' ("Assistant Secretary") decision affirming it, addressed the County's concern about tax impacts and concluded that the impacts are not assessed based on hypothetical figures over decades, but instead based on actual data of current tax rates. The County identifies no error with this analysis and instead repeats their same complaints, which have been considered and addressed by the agency. That is all this is required.

With regard to jurisdictional and land use conflicts, the Regional Director is required to consider, but does not have to resolve, any conflicts that are identified. Here, the Regional Director and the Assistant Secretary fully considered the County's objections, acknowledged the zoning restriction on the Property prior to it being acquired in trust, and reasonably concluded, relying on extensive analysis prepared in connection with NEPA, that the Tribe's proposed development was not so inconsistent with the surrounding community such that the County and the Tribe

could not reach agreement to mitigate such conflicts. Holderness Declaration at Ex. F. Nothing more is required.

Finally, the County's allegation that the Tribe had to submit a business plan was addressed by Interior; as the Regional Director explained and the Assistant Secretary affirmed, a business plan is required when the Tribe anticipates future economic benefits from the property; Interior fully evaluated the proposed uses of the Property and concluded that a business plan was not required; the County's speculation that a tribal facility, if constructed, would garner future economic benefits is not a basis upon which the Tribe was required to submit a business plan.

The County cannot meet its burden under the APA by simply repeating the objections it made to Interior in multiple, coupled with a conclusory assertion that the agency erred. The County must instead articulate why the agency's responses to and consideration of the County's comments and objections were inadequate such that, under the highly deferential APA standard, the agency acted in an arbitrary and capricious manner. The County has completely failed to meet this burden and thus, the County's claims must fail.

## V. The Balance of Equities and the Public Interest Weighs Against an Injunction

When considering the extraordinary remedy of an emergency injunction, "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief. In exercising their sound discretion, courts of equity should pay particular regard for the public consequences . . ." *Winter*, 555 U.S. at 24 (internal quotations and citations omitted). When the Government is an opposing party, those two inquiries merge. *See Nken v. Holder*, 556 U.S. 418, 435 (2009).

The County readily dismisses any injury resulting from the issuance of a TRO or injunction that either compels Interior to convey the Property out of trust,

or otherwise enjoins Interior from engaging in unidentified, speculative future activity on the Property, when in fact the public interest favors denial of the County's request. Interior's decisions for the Tribe serve the long-recognized policy of "furthering Indian self-government." *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974). In analyzing whether injunctive relief would advance the public interest, the courts properly consider whether an injunction would further this policy. *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1253 (10th Cir. 2001) (finding that "tribal self-government may be a matter of public interest"); *Seneca-Cayuga Tribe of Okla. v. Okla.*, 874 F.2d 709, 716 (10th Cir. 1989) (affirming grant of injunction where "injunction promotes the paramount federal Indian policy that Indians develop independent sources of income and strong self-government"); *Bowen v. Doyle*, 880 F. Supp. 99, 137 (W.D.N.Y. 1995), *aff'd*, 230 F.3d 525 (2d Cir. 2000) (finding "the public's interest and interests of [an Indian tribe] coincide" insofar as "there is a strong federal policy favoring tribal self-government [and] tribal self-sufficiency").

The County does not address at all how an order compelling Interior to convey the Property out of trust would impact the Tribe, which has a vested interest in the trust status of the Property and has affirmed that there is no threat of imminent construction on the Property. *See* Declaration of Kenneth Kahn. An order directing Interior to convey the Property out of trust, in the absence of the full adjudication of this case on the merits and the County's successful demonstration of entitlement of such relief, would certainly work to injure Interior and the Tribe, and would imprudently reverse an administrative process that complied with all applicable statutory and regulatory requirements. In this way, the TRO or injunction would impede the orderly administration of a governmental responsibility intended to serve the public interest, *Comm. of Cent. Am. Refugees v. INS*, 795 F.3d 1434, 1441 (9th Cir. 1986), all without the County having to make

the effort of meeting its burden of demonstrating entitlement to such complete relief. The issuance of an order compelling Interior to remove the Property from trust would undermine and undercut the public policies concerning the promotion of tribal self-governance and self-determination. Not only would an injunction require Interior to take steps to undo an action that was already taken on behalf of the Tribe, but it would undermine the Department's efforts to assist the Tribe in its self-governance goals of providing much needed housing to its members. The harm to the public if an injunction is issued is concrete and clear.

## CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court deny Plaintiff's Application.

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