UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS

RECEIVED

FEB 21 2017

OFFICE OF HEARINGS AND APPEALS
BOARD OF INDIAN APPEALS

IN RE: JANUARY 19, 2017 DECISION TO ACCEPT INTO TRUST 35.92+/- ACRES OF LAND IN THE CITY OF ELK GROVE, CALIFORNIA, FOR THE WILTON RANCHERIA AND FEBRUARY 10, 2017 ACTION TO PLACE SAID LAND INTO TRUST BEFORE FINAL DECISION	**IBIA No.** ______________

PETITION FOR PRELIMINARY RELIEF ON AN EXPEDITED BASIS AND STATEMENT OF REASONS

This appeal addresses two key issues and is accordingly divided in two parts. First, BIA violated its regulations by acquiring title to the Elk Grove Site in trust on the basis of a non-final agency action, without complying with the notice requirements and without waiting the mandatory 30-day period to allow Citizens to file their administrative appeal. Citizens respectfully request that the Board immediately order BIA to remove title to the Elk Grove Site from trust while Citizens pursue this appeal. BIA's acquisition of title to the Elk Grove Site violated unambiguous agency regulations and is adversely affecting the ability of Citizens to pursue State law remedies to vindicate the public rights protected by the restrictive covenants that run with the land BIA illegally acquired.

Second, BIA failed to comply with applicable legal standards, including the California Rancheria Act of 1958 ("CRA"), the Indian Reorganization Act of 1934 ("IRA"), the Indian Gaming Regulatory Act ("IGRA"), the National Environmental Policy Act ("NEPA"), and the Administrative Procedure Act ("APA"). BIA does not have authority under the CRA or the IRA to acquire land in trust for Wilton. In addition, BIA cannot acquire the Elk Grove Site for use by Wilton as a casino site because the lands do not qualify for gaming under the "restored lands" exception and cannot qualify as "Indian lands"

under IGRA, due to the restrictive covenants that run with the land. BIA also violated NEPA by failing to prepare a supplemental environmental impact statement ("EIS"), when it changed the proposed project from a 282-acre site in Galt, which was under review for nearly three years, to a 36-acre site in Elk Grove in November of 2016. BIA's cursory consideration of a 28-acre site in Elk Grove, which the public understood to be legally encumbered for development as an outlet mall by a third party, is not sufficient under NEPA regulations. The EIS itself fails to adequately address the impacts of the new project proposal and contains multiple material errors and inconsistencies. Finally, the EIS and ROD both violate fundamental APA requirements.

The combination of BIA's legal violations in this case underscores that the Wilton fee-to-trust application was not resolved on its merits; rather, it was resolved with unprecedented speed despite numerous legal barriers, including the agency's own regulations. Agency officials cannot be allowed to ignore the rule of law.

A. Because BIA violated its regulations in acquiring land in trust, the Board should order the immediate removal of the land from trust.

BIA disregarded virtually every regulatory requirement for implementing decisions. Agency regulations clearly state that "a decision made by a Bureau of Indian Affairs official pursuant to delegated authority is not a final agency action … until administrative remedies are exhausted under part 2 of this chapter or until the time for filing a notice of appeal has expired and no administrative appeal has been filed." 25 C.F.R. § 151.12(d). Only a decision made "by the Secretary, or the Assistant Secretary–Indian Affairs pursuant to delegated authority, is a final agency action under 5 U.S.C. 704 upon issuance." 25 C.F.R. § 151.12(c).

1. The ROD was <u>not</u> final for the Department.

Larry Roberts issued the ROD on the evening of January 19, 2017. He did so in his capacity as Principal Deputy Assistant Secretary. He did not purport to act, and could not have legally acted, as Acting Assistant Secretary, pursuant to the Vacancies Reform Act, 5

U.S.C. § 3346(a). Under that Act, Mr. Roberts, who assumed the role of Acting Assistant Secretary on or about January 1, 2016, was prohibited from serving as Acting Assistant Secretary for more than 210 days.[1] Accordingly, any authority Mr. Roberts may have had under 25 C.F.R. Part 151 to take final agency action for purposes of 5 U.S.C. § 704 terminated on or about August 3, 2016.[2]

The limits on Mr. Roberts' authority to issue final agency action are clear under at least two provisions: a) 25 C.F.R. § 2.6; and b) 25 C.F.R. § 151.12. First, 25 C.F.R. § 2.6 expressly states, "Decisions made by the *Assistant Secretary – Indian Affairs* shall be final for the Department and effective immediately." (Emphasis added.) Section 2.6(a) states, "No decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. 704." This Board has express authority to decide appeals of decisions made by a Deputy to the Assistant Secretary–Indian Affairs. 25 C.F.R. § 2.4. Only after *this* Board has decided an appeal from within the Department is that decision "final agency action" for the Department. 43 C.F.R. § 4.1(b)(1).

Second, 25 C.F.R. § 151.12 unequivocally establishes that the only trust decisions that are final for the Department are those made by the Secretary or the Assistant Secretary. Section 151.12(c) provides, "A decision made by the Secretary or the Assistant Secretary–Indian Affairs pursuant to delegated authority is a final agency action under 5 U.S.C. 704 upon issuance." By contrast, "A decision made by a Bureau of Indian Affairs official

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[1] *See* https://www.bia.gov/cs/groups/public/documents/text/idc1-032765.pdf.

[2] Larry Roberts reached his 210 days sometime on or about August 3, 2016, and returned to his prior position as Principal Deputy Assistant Secretary in the Office of the Assistant Secretary – Indian Affairs. His last press release as Acting Assistant Secretary was issued on August 2, 2016. *See* https://www.bia.gov/cs/groups/public/documents/text/idc2-040011.pdf. His last Federal Register notice as Acting Assistant Secretary, however, was signed July 11, 2016; his next Federal Register publication was signed August 1, 2016 as Principal Deputy. *Cf.* 81 Fed. Reg. 47817 (July 22, 2016) *with* 81 Fed. Reg. 51927 (August 5, 2016).

pursuant to delegated authority is not final agency action of the Department under 5 U.S.C. 704 until administrative remedies are exhausted under part 2 of this chapter or until the time for filing a notice of appeal has expired and no administrative appeal has been filed." 25 C.F.R. § 151.12(d).

There is no ambiguity as to the limits on Mr. Roberts' authority. The ROD was not final agency action. Therefore, the process set forth in 25 C.F.R. § 151.12(d) applied. BIA did not comply with applicable regulations.

2. BIA's notices are legally deficient.

BIA did not publish a Notice of Decision ("NOD") in the Federal Register or in a newspaper of general circulation. Rather, Analytical Environmental Services uploaded a NOD on its website.[3] Analytical Environmental Services mailed a copy of a NOD to counsel for Citizens, which counsel received on February 2, 2017. Attachment 2.

The NOD is legally deficient for several reasons apart from the publication requirement:

1. The Notice states that it "is published to comply with the requirements of 25 C.F.R. § 151.12(c)(2)(ii) that notice of the decision to acquire land in trust be promptly provided in the Federal Register."

   Section § 151.12(c)(2)(ii) applies to decisions made by the Secretary or the Assistant Secretary, not the Principal Deputy Assistant Secretary. In addition, 25 C.F.R. § 151.12(c)(2)(ii) requires publication in the Federal Register, not a third party contractor's website.

2. The Notice of Decision states that the "Principal Deputy Assistant Secretary–Indian Affairs, on behalf of the Secretary of the Interior, will immediately acquire title to the Site in the name of the United States of America in trust for the Tribe upon fulfillment of Departmental requirements."

   The regulations do not permit the Principal Deputy Assistant Secretary to immediately acquire title to the Site. Rather, the appeal provisions set forth in 25 C.F.R. § 151.12(d) govern.

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[3] http://www.wiltoneis.com/ (last visited February 16, 2017).

3. The appeal process in 25 C.F.R. § 151.12(d) incorporates by reference 25 C.F.R. Part 2. Under 25 C.F.R. § 2.7(c), all notices are required to "include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be appealed and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal."

   The Notice of Decision on Analytical Environmental Services' website does not include any of the required information.

Accordingly, BIA did not properly publish a notice of the decision, did not include the applicable legal process, and misrepresented both the extent of Mr. Roberts' authority and the consequence of his decision.

BIA repeated this error on the Notice of Availability of the ROD, also on Analytical Environmental Services' website. The Notice of Availability states, "The Principal Deputy Assistant Secretary–Indian Affairs made *a final agency determination* to acquire 35.92 acres, more or less, in the City of Elk Grove, Sacramento County, California (Site) in trust for the Wilton Rancheria for gaming and other purposes on January 19, 2017." Attachment 3 (emphasis added). As explained above, that is legally inaccurate and contravenes agency regulations.

3. BIA illegally acquired title to the Elk Grove Site in trust on February 10, 2017.

On February 10, 2017, BIA acquired title to the Elk Grove Site, at least 20 days before the expiration of the earliest possible deadline. BIA's action violates agency regulations, thwarts this Board's clear authority to resolve Citizens' claims and provide continuity in agency decision-making, violates Citizens' due process rights, and is ultra vires.

Agency regulations do not authorize BIA to acquire land in trust prior to the expiration of the appeal period. "A decision made by a Bureau of Indian Affairs official pursuant to delegated authority *is not a final agency action* of the Department under 5 U.S.C. 704 until administrative remedies are exhausted under part 2 of this chapter or until the time for filing a notice of appeal has expired and no administrative appeal has been

filed." 25 C.F.R. § 151.12(d) (emphasis added). Aggrieved parties have 30 days from notice of the decision to file an appeal before this Board. 25 C.F.R. § 151.12(d)(2)(ii) (citing 25 C.F.R. Part 2); *see also* 25 C.F.R. §§ 2.7, 2.9. During that time, BIA does not have authority to acquire title to land in trust. *See* 25 C.F.R. § 151.12(d)(2)(iv). To the contrary, BIA cannot acquire land until after the expiration of the time for filing a notice of appeal. *Id.* And if an appeal is filed, BIA cannot acquire land in trust until administrative remedies under 25 C.F.R. Part 2 are exhausted—i.e., not until this Board has the opportunity to resolve Citizens' appeal. *Id.*

In promulgating this rule, BIA was specific about the necessity of delaying the acquisition of title to land in trust until administrative appeals were resolved. The agency explained, "The new rule retains the existing administrative appeal process for BIA officials' decisions. Administrative review of BIA officials' trust acquisition decisions *before land is taken into trust* is appropriate because it ensures consistency in the decision-making across BIA regions and addresses any procedural errors before the decision becomes final for the Department." 78 Fed. Reg. 67928, 67933 (Nov. 13, 2013) (emphasis added).

BIA ignored these clear limits on its authority to acquire land in trust before Citizens had a chance to file a notice of appeal, consistent with 25 C.F.R. § 151.12(d). Moreover, BIA violated its regulations, with full knowledge of Citizens' concerns regarding that very action and its effect on Citizens' rights, which are protected by restrictive covenants running with the Elk Grove Site. Citizens filed suit in federal district court against Secretary of the Interior Sally Jewell and Acting Assistant Secretary Larry Roberts, among others, on January 11, 2017, to challenge 25 C.F.R. § 151.12 and sought a temporary restraining order for the purpose of allowing Citizens to seek emergency relief under 5

U.S.C. § 705 before title was transferred.[4] *Stand Up for California! v. Dep't of the Interior*, No. 1:17-cv-00058 (D.D.C. Jan. 11, 2017). The court denied Citizens' motion, in part because of Citizens' inability to demonstrate that a decision was imminent or that the decision would be adverse. *Id.*, Minute Order (Jan. 13, 2017). Rather than continue with preliminary injunction proceedings, on January 17, 2017, Citizens—at Defendants' invitation—filed a request pursuant to 5 U.S.C. § 705 with Mr. Roberts and Hilary Tompkins, the Solicitor for the Department of the Interior, seeking a stay of the effective date of a trust decision, if any, to allow Plaintiffs opportunity to seek preliminary injunctive relief from the court under the same statute. Attachment 4.

Late on January 19, 2017, Plaintiffs learned that Mr. Roberts issued the ROD that same evening. Plaintiffs immediately contacted counsel for Defendants to request a copy of the ROD and to confirm of the status of title. Attachment 5. Defendants provided Plaintiffs the ROD (without attachments) on January 19, 2017 and responded that "the land will not formally go into trust at least until they provide you a response to the 705 stay request." Defendants were not able to indicate when that might occur. Attachment 6. On January 23, 2017, Plaintiffs contacted Defendants to discuss amending their complaint and the possibility of expedited review or of reaching an agreement regarding the transfer of title. Attachment 7. On January 24, 2017, Defendants informed Plaintiffs that they would consider their request "to discuss a possible agreement to alleviate the need for emergency or expedited proceedings," without providing any clarification as to their timing. Attachment 8.

On January 26, 2017, Plaintiffs formally requested a meeting with Defendants "as soon as possible" to discuss concerns regarding the "unprecedented nature of the decision" and a reasonable approach for resolving Plaintiffs' challenge. Attachment 9. On February 6,

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[4] As is evident from the caption, Citizens were not aware that Mr. Roberts was the Principal Deputy Assistant Secretary, not the Acting Assistant Secretary. Defendants did not correct Citizens.

2017, Plaintiffs contacted Defendants regarding their January 26, 2017 request for a meeting. Counsel for Defendants informed Plaintiffs "I believe that they are still considering it but I will ask them if they can tell me something definite." Attachment 10. Defendants informed Plaintiffs on Friday evening, February 10, 2017, that they denied Plaintiffs' 5 U.S.C. § 705 request for a stay and that they declined Plaintiffs' request for a meeting. Attachments 11, 12. Defendants acquired title to the Elk Grove Site in trust the same evening, preventing Plaintiffs from seeking emergency relief from the court pursuant to 5 U.S.C. § 705. On February 15, 2017, counsel for Citizens contacted counsel for Defendants to ask about how the agency could have acquired title to land for an apparently non-final action. As of the date of this filing, Citizens have received no response.

Defendants' denial of Citizens' request that BIA itself stay the effect of agency action was signed by Michael Black as "Assistant Secretary–Indian Affairs." Mr. Black's denial was arbitrary and capricious. Because the ROD was not final agency action, Mr. Black should have denied Citizens' request as premature, due to the agency appeal process set forth in 25 C.F.R. § 151.12(d). He did not. Instead, he treated the ROD as final agency action, denied the request, and directed BIA to acquire the land in trust, also ignoring agency regulations.[5]

In fact, when Mr. Black signed the February 10, 2017 denial letter as Acting Assistant Secretary, he had no authority to do so. On January 20, the Acting Secretary for the Department—Kevin Haugrud—issued a memorandum purporting to temporarily delegate the authority of the Assistant Secretary–Indian Affairs to Mr. Black. Order No. 3345. He issued the Order pursuant to Section 2 of the Reorganization Plan No. 3 of 1950

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[5] Pursuant to the Vacancies Reform Act, Principal Deputy Roberts served as acting Assistant Secretary–Indian Affairs until approximately August 3, 2016. Since then, the position of Assistant Secretary has been vacant.

(64 Stat. 1262), in compliance with the Vacancies Reform Act. Section 2 of the Reorganization Plan No. 3 of 1950 (64 Stat. 1262), however, is a general statutory authority to delegate duties, which is not sufficient under the Vacancies Reform Act. *See* 5 U.S.C. § 3347(b). Without statutory authority expressly designating or authorizing the designation of an official to perform the functions of a specified office temporarily in an acting capacity, "Sections 3345 and 3346 are the *exclusive* means for temporarily authorizing an acting officer to perform the functions and duties of any office of an Executive agency" for which Presidential appointment and Senate confirmation are required. 5 U.S.C. § 3347(a). Neither Section 3345 nor 3346 authorizes the Acting Secretary to delegate the duties of the Assistant Secretary-Indian Affairs to Mr. Black, who did not serve as first assistant to any Senate-confirmed official.[6] Accordingly, under 5 U.S.C. § 3348(b)(1), the office is to remain vacant. Thus, apart from being arbitrary and capricious, Mr. Black was and is not authorized to perform the functions of the Assistant Secretary, and his performance of any function or duty of that vacant office "shall have no force or effect" and "may not be ratified." 5 U.S.C. § 3348(d).

4. The Board should order the immediate removal of title from trust.

Under 43 C.F.R. § 4.312, this Board has the authority to "adopt, modify, reverse, or set aside" any order of a BIA official. The power to modify and reverse agency action is broader than the power to affirm or vacate and remand. More importantly, except as

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[6] Mr. Haugrud's authority to issue Order No. 3345 is also uncertain. Under 200 DM 1.3, delegations of the Secretary's authority can only be signed and issued by the Secretary, Acting Secretary, or Deputy Secretary. Mr. Haugrud purported to do so as "Acting Secretary," but, as Principal Deputy Solicitor, he did not qualify as "first assistant" to the Secretary at the time of Secretary Jewell's resignation. 5 U.S.C. § 3346(a); *see also* Office of Legal Counsel, *Guidance on Application of Federal Vacancies Reform Act of 1998*, at 63 (March 22, 1999) (Question 11: Who is the first assistant to the office?), available at: https://www.justice.gov/sites/default/files/olc/opinions/1999/03/31/op-olc-v023-p0060_0.pdf .. If the office of Secretary was vacant, then the Order has "no force and effect" and "may not be ratified." 5 U.S.C. §§ 3348(d).

specifically limited by regulation, the Board has the discretion to exercise the full authority of the Secretary "to correct a manifest injustice or error where appropriate." 43 C.F.R. § 4.318. BIA had no discretion under 25 C.F.R. § 151.12(d); its obligations are mandatory. The Board should exercise its authority to correct this clear error and prevent further injustice.

BIA acquired title to a parcel of land that is burdened by multiple encumbrances, including a Development Agreement Between the City of Elk Grove and Elk Grove Town Center, LP, executed in 2014. Attachment 13. Those agreements, which create restrictive covenants that run with the land, protect the public's interest by reserving to the City various rights, including the right to grant or deny land use approvals; adopt, increase, and impose regular taxes, utility charges, and permit processing fees; adopt and apply regulations necessary to protect public health and safety; adopt increased or decreased fees, charges, assessments, or special taxes; adopt and apply regulations relating to the temporary use of land, control of traffic, regulation of sewers, water, and similar subjects and abatement of public nuisances; adopt laws not in conflict with the terms and conditions for development established in prior approvals; and exercise the power of eminent domain with respect to any part of the property. Citizens likely cannot vindicate those rights while the land is in trust, or sue to require Elk Grove to comply with the law, because the Quiet Title Act, 28 U.S.C. § 2409a, bars title challenges to trust lands. *See Block v. North Dakota*, 461 U.S. 273 (1983).

Indeed, it is inexplicable how BIA determined that it could acquire title at all, given that Section 10.3 of the Development Agreement states, "*no assignment shall be effective* until the City, by action of the City Council, approves the assignment." The City has not formally approved the assignment from Elk Grove Center L.P. to any party, including Wilton. In fact, the City of Elk Grove informed Citizens on February 15, 2017, that it "has not received a request from Elk Grove Town Center, L.P. for an assignment of rights, interests, or obligations under the Development Agreement." Attachment 14.

It would be manifestly unjust to prevent Citizens from vindicating these rights under State law, particularly when the action taken by BIA plainly violated agency regulations. The Board should order the removal of the land from trust immediately, or if the Board determines that it is not able, it should issue a declaration that BIA violated its regulations so that Citizens may seek an appropriate order from the federal court.

B. BIA failed to comply with the IRA, IGRA, NEPA and the APA.

The ROD itself is arbitrary, capricious and contrary to law and should be vacated. Citizens will set forth their arguments in detail on the merits of the decision during briefing. For purposes of the Statement of Reasons, Citizens state:

1. The ROD does not adequately address its conclusion that BIA has the authority to acquire land in trust for Wilton under the IRA or the CRA.

BIA lacks authority to take land into trust for Wilton under 25 U.S.C. § 5108. As set forth in *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Secretary's authority only extends to a recognized Indian tribe under federal jurisdiction in 1934. Wilton was not a recognized tribe in 1934. The ROD's treatment of this issue is arbitrary, capricious and contrary to law. The record evidence establishes that, in 1928, the Secretary purchased approximately 37.88 acres to establish the Wilton Rancheria "for use by the landless California Indians." The Superintendent Lafayette A. Dorrington of the Sacramento Indian Agency selected the Wilton Rancheria the year before for the approximately 33 families of 150 homeless Indians residing in the vicinity. The original residents of the Rancheria had different ethnological backgrounds. Only one of the original residents is identified as Miwok. The other residents of the Rancheria identified as Concow, Yuki, "Digger" (a generic and usually negative term for Native Americans in California), and the San Juan Pueblo of New Mexico. At no point prior to 1936 did the United States "recognize" the Indians living on the Wilton Rancheria as a tribe, as the IRA requires. Thus, the Secretary lacks authority to acquire land in trust for Wilton.

The Secretary lacks authority by virtue of the California Rancheria Act of 1958, pursuant to which members of Wilton received a portion of Rancheria land. Under Section 10 of that Act, "[a]fter the assets of a rancheria or reservation have been distributed pursuant to this Act, the Indians who receive any part of such assets, and the dependent members of their immediate families, shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians shall be inapplicable to them." P.L. 85-671 (72 Stat. 619). The assets of the Wilton Rancheria were distributed in 1964. Some of the members of Wilton unequivocally received Rancheria assets. They are therefore not entitled to any benefits or services based on their status as Indians. The ROD did not adequately address this issue.

2. The ROD fails to adequately address jurisdictional issues under 25 C.F.R. Part 151.

The ROD did not properly consider whether the Elk Grove Site met various requirements for the acquisition in trust of land under 25 C.F.R. §§ 151.10-11, including but not limited to, failing to consider the encumbrances on title to the Elk Grove Site.

Under 25 C.F.R. § 151.10(f), BIA must consider "jurisdictional problems and potential conflicts of land use which may arise" from the land being taken into trust. BIA's consideration of the encumbrances on title, however, is grossly inadequate. First, the ROD erroneously states that, pursuant to an October 26, 2016 City ordinance amending the Development Agreement, "the land is no longer encumbered by the existing development agreement." ROD Attachment II (Response to Comment 7-2). That ordinance, however, was suspended under State law by the November 21, 2016 filing of a successful referendum petition signed by approximately 14,000 citizens of Elk Grove.[7]

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[7] The City of Elk Grove verified the referendum on January 6, 2017, and has since voted to rescind the ordinance, rather than conduct the referendum election.

Second, the Secretary concluded in the ROD that the Development Agreement, even if ultimately not amended, was not a bar to Interior acquiring the land into trust because "activities on trust land are regulated by the Tribe and Federal government, and not local governments." Attachment 1 at 83. The ROD thus fails to acknowledge that the restrictions of the Development Agreement are covenants running with the land, and not simply the exercise of the regulatory authority of the local government. They are effectively contractual provisions, and nothing in 25 U.S.C. § 5108 authorizes the Secretary to abrogate a contract, nor could Congress authorize the Secretary to do so.

Finally, the ROD asserts that any potential jurisdictional conflicts that may result from the Development Agreement are "resolvable and outweighed by the other benefits associated with the trust acquisition" and that "the City's efforts to amend the development agreement reflects its desire to resolve land use conflicts, if any, posed by the development agreement, even if the City faces opposition to its efforts." *Id.* The ROD, however, fails to evaluate, or even identify, the specific conflicts posed by the Development Agreement encumbrances. Without any evaluation of these conflicts, the ROD's conclusory assertions are unsupported by any reasoned decisionmaking.

3. The ROD does not adequately address how the Elk Grove Site qualifies for gaming under IGRA.

Citizens commented that the title encumbrances prevent the Elk Grove Site from qualifying as "Indian lands" eligible for gaming under IGRA, because the rights reserved to the City under the Development Agreement—including the right to tax, regulate, and condemn the land—are incompatible with the requirement that a tribe exercise governmental authority over the land. 25 U.S.C. § 2703(4). The ROD's only response was to claim—erroneously, as previously explained—that the Development Agreement no longer encumbers the land. That response is insufficient under IGRA and the APA.

The ROD also determined that the Wilton Rancheria meets the requirements of the "Restored Land Exception" because the Wilton Rancheria "qualifies as a 'restored tribe'"

and the Elk Grove site "qualifies as 'restored lands.'" *Id.* at 4. Citizens submitted a detailed report of the Rancheria's history, demonstrating the Rancheria does not derive from any historical sovereign entity at all, but rather began in 1928 as a group of homeless Indians from disparate and unknown tribal origins that were gathered by BIA onto land purchased for the purpose of providing land to indigent Indians in the vicinity of Sacramento, California. This report establishes that the Rancheria can neither meet the regulatory and judicial criteria for acknowledgment as a tribe, nor demonstrate the requisite "significant historical connection" to establish that the Elk Grove Site qualifies for the "restored lands" exception. The ROD fails to adequately address this evidence.

4. BIA failed to comply with NEPA.

On December 4, 2013, BIA published a Notice of Intent to Prepare an EIS for the proposed acquisition in trust of the Galt Site for a casino. 78 Fed. Reg. 72928-01 (Dec. 4, 2013). The Notice identifies as the proposed action the Wilton Rancheria's application to have "approximately 282 acres of fee land ... located within the City of Galt Sphere of Influence Area" acquired "in trust in Sacramento County, California, for the construction and operation of a gaming facility." BIA held a public scoping meeting in the City of Galt on December 19, 2013, seeking public comment on the application for purposes of identifying issues to consider in the NEPA analysis. *Id.* It did not hold a public scoping meeting in the City of Elk Grove. BIA invited the City of Galt to participate as a cooperating agency. It did not invite the City of Elk Grove to participate.

In February 2014, BIA issued an EIS Scoping Report identifying the "proposed action" as consisting of "the transfer of a 282-acre parcel from fee to trust status" and "the subsequent development of a casino, hotel, and associated facilities." The Scoping Report identified as "Alternative F" an approximately 28-acre site in the City of Elk Grove, a site that is 8 acres smaller than the Elk Grove Site and already committed to be developed by Elk Grove Town Center LP as part of a larger open-air mall project.

BIA published a Notice of Availability of the draft EIS on the proposed Galt acquisition on December 29, 2015. 80 Fed. Reg. 81,352 (Dec. 29, 2015). The draft EIS Notice identifies the Galt Site as the proposed project. On June 9, 2016, however, the Wilton Rancheria announced that it would prefer to have Alternative F acquired in trust for its casino instead. BIA did not publish notice of a change in application or seek public comment. Citizens asked BIA to prepare a supplemental EIS, but received no response.

On November 17, 2016, BIA issued a Notice of (Gaming) Land Application for the 36-acre Elk Grove Site. Citizens informed BIA that the land was subject to a development agreement. On December 14, 2016, BIA published a notice of the final EIS, identifying the 36-acre Elk Grove Site as the Rancheria's proposed project. *See* 81 Fed. Reg. 90379-01 (Dec. 14, 2016). EPA published a Notice of Availability of the final EIS in the Federal Register on December 16, 2016. *See* 81 Fed. Reg. 91169 (Dec. 16, 2016). The final EIS comment period closed on January 17, 2017. *Id.* Less than two days later, Interior issued the 90-page ROD. Interior did not prepare a supplemental EIS.

In defending the environmental review of the project, the ROD asserts that even though the casino project had changed between the issuance of the draft EIS and the final EIS—including increasing the size of the site from 28 to 36 acres, and adding project components, such as a new three-story parking garage—the changes did not impact the conclusions of the final EIS. The ROD also concluded, in denying commenters' request to prepare a supplemental EIS, that the selected alternative was included in and adequately analyzed in the draft EIS. The ROD concludes that the Secretary had given adequate opportunities for public comment. However, the ROD does not address all comments and new information provided to the Secretary during the final EIS comment period.

NEPA regulations explicitly require agencies to prepare supplemental EISs when there is a change in a project proposal with environmental implications. Here, BIA not only changed the project from one City to another, it also added project components and increased the size of the alternative. BIA's analysis was not adequate. For example, the

draft EIS does not acknowledge the encumbrances on the land, which should have made the site an unreasonable alternative in the first place.

The EIS is deficient for a variety of other reasons, including, but not limited to, BIA's failure to provide adequate public notice and opportunity for public comment on the alternative selected, BIA's failure to consider new information directly related to public safety concerns, and BIA's failure to consider the direct, indirect and cumulative effects of the trust acquisition, including—but not limited to—issues related to the encumbrances on the land, and the enforceability of mitigation measures.

For example, the ROD entirely fails to consider new information regarding the public safety risks of the nearby Suburban Propane storage facility (the target of a 1999 terrorist plot foiled by the FBI), including the reevaluation of terrorism risks after 9/11, and a 2015 report detailing a previously unconsidered mechanism for catastrophic explosion at the Suburban Propane facility. The ROD instead relies exclusively on an Environmental Impact Report issued in February 2001.

As an additional example, the final EIS states that water supply service needs would result in a significant impact to local water supply infrastructure, but simply asserts that an adequate supply will be ensured by a mitigation measure that says Wilton will enter into an agreement with the local service provider, Sacramento County Water Agency (SCWA) to pay for new facilities, and that the SCWA has sufficient capacity. Despite Citizens' comments and requests for further analysis, the EIS does not analyze the SCWA distribution system to determine whether sufficient capacity is indeed available, and to evaluate the feasibility of infrastructure upgrades. In fact, such an analysis shows that no feasible present capacity exists, and that the only conceivable alternative available any time within the next several years is a well system utilizing groundwater and providing for

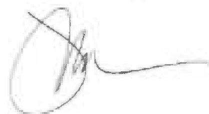
wastewater using a packaged plant—an alternative not evaluated in the EIS.[8] *See* Attachment 15. This analysis was not completed until shortly after the ROD was issued, underscoring the significant deficiencies resulting from the lack of adequate public review and comment opportunities, and BIA's refusal to issue a supplemental EIS, as required by the NEPA regulations.

These are only a few of the deficiencies in the NEPA analysis. BIA's unprecedented rush to issue a final decision prevented it from engaging in the informed consideration the law requires.

CONCLUSION

For the foregoing reasons, Citizens respectfully request that the Board immediately order BIA to remove title to the Elk Grove Site from trust, and vacate and remand the ROD.

Respectfully Submitted,



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[8] On-site groundwater pumping and wastewater treatment and disposal raise a host of issue that have not been considered, including impacts to nearby water supply wells from a local lowering of the water table; and the reliability of the wastewater treatment method, especially given that bioreactors fail fairly frequently, the Elk Grove Site is located in a floodplain, and the footprint of the site is relatively small, with extensive commercial and residential development and water supply wells nearby.