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VIA HAND DELIVERY AND EMAIL

Mr. Larry Roberts
Acting Assistant Secretary, Indian Affairs
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Ms. Hilary Tompkins
Solicitor, U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240

Re: Land-into-Trust Application of Wilton Rancheria to the Bureau of Indian Affairs

Dear Mr. Roberts and Ms. Tompkins:

Pursuant to 5 U.S.C. § 705, Stand Up for California!, Patty Johnson, Joe Teixeira, and Lynn Wheat (collectively, "Citizens") respectfully request that the Department of the Interior ("Interior") and Bureau of Indian Affairs ("BIA") (collectively, "Department") postpone the effective date of any decision the Department may issue on behalf of the Wilton Rancheria to acquire land in trust. This request pertains specifically to BIA's November 17, 2016 Notice of (Gaming) Land Acquisition Application related to an approximately 36-acre parcel of land in Elk Grove, known as the "Elk Grove Mall site."

Because this request and the justification set forth herein identifies issues that directly pertain to the Department's consideration of the pending application under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*. ("NEPA"), the Indian Reorganization Act, 25 U.S.C. § 5103 *et seq*. ("IRA"), and the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* ("IGRA"), we submit this request in response to BIA's December 14, 2017, Notice Final Environmental Impact Statement (final "EIS") and a Revised Draft Conformity Determination for the Proposed Wilton Rancheria Fee-to-Trust and Casino Project, Sacramento County, California.[1]

[1] The BIA will issue a Record of Decision ("ROD") on the proposed action no sooner than 30 days after the date EPA publishes its Notice of Availability in the Federal Register. 81 Fed. Reg. 90379-01 (Dec. 14, 2016). EPA published notice on December 16, 2016. 81 Fed. Reg. 91169-01 (Dec. 16, 2016). The BIA must receive any comments on the FEIS on or before January 17, 2017.

For the reasons set forth below, Citizens believes postponement of the effective date of a decision to acquire the 36-acre parcel of land located in Elk Grove, California in trust for the Wilton Rancheria is warranted and respectfully request that the Department respond to the issues set forth below in formulating its trust decision and request for postponement.

JUSTIFICATION FOR REQUEST

A. Standard Governing Interior's Consideration of Citizens' Request

Under the Administrative Procedure Act, 5 U.S.C. § 501 *et seq.* ("APA"), "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." 5 U.S.C. § 705. The APA gives agencies broad authority to stay the effect of agency action.

1. Meaning of "when justice so requires"

The Department has not had the occasion to consider when "justice [may] so require[]" it to "postpone the effective date of action taken by it, pending judicial review" in a trust acquisition case. It has not promulgated regulations for implementing 5 U.S.C. § 705 in this (or any other) context. It is clear from the face of the statute, however, that "irreparable injury" is not necessary for an agency to postpone the effective date of agency action. Section 705 authorizes agencies to postpone agency action when "justice so requires"; by contrast, courts can enjoin agency action "to the extent necessary to prevent irreparable injury." When Congress uses different language in the same provision of a statute, it is presumed that the difference is intentional and that the different language has a different meaning. *See Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). Thus, the authority Congress granted agencies to "postpone the effective date of action taken by it" is broader than the authority it granted courts "to issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."

Federal courts have interpreted the phrase "justice so requires" in the context of the Federal Rules very broadly. Under Rule 15(a) of the Federal Rules of Civil Procedure, for example, courts "freely" grant leave to amend a complaint "*when justice so requires*." Fed.R.Civ.P. 15(a) (emphasis added). In fact, the grounds for denying leave to amend include "undue delay, bad faith, dilatory motive ... repeated failures to cure deficiencies by [previous] amendments, undue prejudice to the opposing party ... [or] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962) (citing 3 Moore, Federal Practice (2d ed. 1948), 15.08, 15.10); *see also James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1098 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 1077 (1997).

Borrowing from existing law, Congress granted agencies broad power to postpone the effective date of agency action, subject to general APA principles. *See* 1947 Attorney General's Manual on the Administrative Procedure Act at 105 (stating the first sentence of section 705 restates existing law). An agency cannot arbitrarily or capriciously refuse a request for postponement under 5 U.S.C. § 705.[2] *See* 5 U.S.C. § 706(2)(a); *see, e.g., Chicago, B. & Q. R. Co. v. Illinois Commerce Commission,* 82 F. Supp. 368, 377 (N.D. Ill. 1949) (finding state administrative agency refusal to postpone effective date of order unreasonable and arbitrary given severe penalties for violation of order).

2. Because 25 C.F.R. § 151.12(c) creates substantial problems with judicial review, Interior should grant relief under 5 U.S.C. § 705 liberally

In the context of trust decisions, the issues are uniquely complicated and significant. The acquisition of land in trust implicates fundamental federalism concerns by disrupting long-established jurisdictional relationships and the expectations based thereon. The Department should consider the importance of this concern, as well as the various issues not addressed in the rulemaking for 25 C.F.R. § 151.12(c) in framing its analysis. These issues are for the Department to liberally grant relief under 5 U.S.C. § 705.

The history of 25 C.F.R. § 151.12(c) is important to understanding the legal problems the rule creates and why Interior should invoke its authority under 5 U.S.C. § 705. Between 1994 and 2012, Interior voluntarily stayed the effective date of all transfers of title to land into trust, pending judicial review of the underlying trust decision. By regulation, the Department implemented a 30-day waiting period to permit judicial review before transfer of title to the United States. *See* 61 Fed. Reg. 18082 (Apr. 24, 1996) (citing *South Dakota v. Dep't. of Interior*, 69 F.3d 878 (8th Cir. 1995)). Interior established this rule after the Eighth Circuit held that the IRA violated the non-delegation doctrine to persuade the United States Supreme Court to vacate the Eighth Circuit's decision. *See Dep't. of Interior v. South Dakota*, 519 U.S. 919, 919-20 (1996). The purpose of the voluntary stay was to prevent the Quiet Title Act, 86 Stat. 1176, from precluding judicial review upon transfer of title.

[2] Judicial review of agency action under the APA applies to agency procedures and the substantive reasonableness of their decisions. *James Madison Ltd*., 82 at 1098 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (stating that section 706 "require[s] the reviewing court to engage in a substantial inquiry")). Courts must conduct a "'thorough, probing, in-depth review' to determine if the agency has considered the relevant factors or committed a clear error of judgment." *Id.* (quoting *Overton Park,* 401 U.S. at 415-16). Thus, courts will consider the procedure that the Department will adopt to address requests under 5 U.S.C. § 705, as well as the substantive reasonableness of its decision in the context of trust decisions and the specifics of a particular case.

In 2012, however, the Supreme Court held that the Quiet Title Act did not bar challenges arising under the APA. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012). Parties having property rights in acquired land—such as an easement or a restrictive covenant—however, could not vindicate those interests because the Quiet Title Act does not include a waiver of sovereign immunity for such rights in Indian lands. *Id.* at 2209.

Following that decision, the Secretary determined that staying the effect of every trust decision was no longer required, and the Secretary eliminated the 30-day rule. *See* 78 Fed. Reg. 67928, 67937-938 (Nov. 13, 2013). In its place, the Secretary promulgated 25 C.F.R. § 151.12(c), which requires the Assistant Secretary to "[i]mmediately acquire the land in trust under § 151.14 on or after the date such decision is issued and upon fulfillment of the requirements of § 151.13 and any other Departmental requirements." *Id.*

Commenters identified a number of problems with the rule. *See e.g.*, Ex. 1 (City of Medford); Ex. 2 (Forest County Potawatomi Community); Ex. 3 (Oregon League of Cities); Ex. 4 (City and County of Milwaukee); Ex. 5 (Citizens Against Reservation Shopping). First, commenters noted the problem raised by the immediate transfer of title. For example, by eliminating the 30-day window, "[t]he Proposed Rule … will force a party seeking a preliminary injunction to anticipate the [Notice of Final Agency Decision] and file in advance. *The United States will likely claim that such a complaint is premature, because no final agency action has been taken*. The plaintiff will then explain the dilemma caused by the lack of a 30-day window. The court will be needlessly dragged into an inefficient use of judicial resources because of the emergency created by this rule change." Ex. 2 at 6 (emphasis added). Interior only responded that "a party can seek judicial review of a final decision … regardless of the trust status of the land at issue," and that they must determine "whether pursuing an injunction is an efficient use of resources in any particular case." 78 Fed. Reg. at 67932-33. That is precisely the problem created in this case. Because of the potential immediacy of the transfer of title, parties cannot know when that will occur and must necessarily seek relief before agency action. The simple solution to that problem was to provide for the transfer of title in 30 days, yet the Department did not consider that simple expedient.

Second, commenters noted that the new rule eliminated their ability to seek injunctive relief before the trust transfer is effectuated, potentially causing irreparable harm, cutting off rights, and raising the same concerns the Eighth Circuit identified in *South Dakota*. *See* Ex. 1 at 2-3; Ex. 2 at 1-4; Ex. 3 at 5; Ex. 4 at 1; Ex. 5 at 1-2. BIA only responded that there was no legal or practical basis for retaining the 30-day rule. 78 Fed. Reg. at 67933. That is incorrect. The legal and practical basis for retaining the 30-day rule was clearly stated in commenters' letters—i.e., to allow parties to seek injunctive relief before title to land was transferred.

Third, commenters identified as a potential problem tribes deciding not to intervene in a judicial action. Commenters noted that "[o]nce land is in trust, a tribe is free to begin development immediately. Tribes may seek to develop their land as quickly as possible, while litigation is pending, so that the remedies that challengers seek become unavailable." Ex. 1 at 4; *see also* Ex. 3 at 5. Interior responded that that concerns were "speculative," and that the comments raised "hypothetical scenarios and potential outcomes." 78 Fed. Reg. at 67933. Given that the purpose of commenting on a proposed rule is to identify potential problems, which necessarily requires some speculation, dismissing comments as "speculative" does not meet basic APA requirements. Moreover, that speculation was precisely the strategy adopted by the Mashpee Tribe, which began building on a site in Taunton and only stopped after a federal court held that the underlying trust decision was arbitrary, capricious, and contrary to law. Ex. 6 (Tennant Declaration).

Fourth, commenters objected that it was unclear whether land could be transferred out of trust. One commenter stated, "The position of the Department of Interior that the Secretary has authority in all cases to take land out of trust is clearly a new and untested theory." Ex. 2 at 5. In addition, the commenter noted that "[t]he *Patchak* decision did not decide, or even consider, the question of whether the Secretary is authorized, or under what circumstances the Secretary is authorized, to take land out of trust." *Id.* Interior responded only that "if a court determines that the Department erred in making a land-into-trust decision, the Department will comply with a final court order and any judicial remedy that is imposed." 78 Fed. Reg. at 67934. That comment does not address the legal uncertainty identified. A decision is arbitrary or capricious under the APA if an agency failed to provide a reasoned explanation, failed to address reasonable arguments, or failed to consider an important aspect of the case. *See Pettiford v. Sec'y of the Navy*, 774 F. Supp. 2d 173, 181–82 (D.D.C. 2011).

Finally, commenters raised concerns about the possibility of title to land being transferred before individuals with a property interest could be identified. *See, e.g.*, Ex. 1 at 5; Ex. 3 at 6. Interior responded, "the exhaustive nature of the title examination process and the limitations of judicial remedies on persons who do not record their property interests, the likelihood that a person with a valid competing interest in the property will not be identified is too low to justify delaying implementation of every final decision." 78 Fed. Reg. at 67934.

Since then, however, Interior has eliminated the requirement that applicants comply with the Department of Justice's Standards for the Preparation of Title Evidence in Land Acquisitions by the United States. *See* 81 Fed. Reg. 30173 (May 16, 2016). Applicants now furnish a deed evidencing that they have ownership, or a written sales contract or written statement from the transferor that they will have ownership and a current title insurance commitment or a policy of title insurance. *Id.* Thus, the nature of the title examination is no longer as "exhaustive," making

the allowance of at least 30 days far more important. Moreover, BIA did not consider how its decision to eliminate federal title standard compliance could interact with its decision to immediately acquire land in trust under 25 C.F.R. § 151.12(c). Given that BIA has not always adequately accounted for property interests in proposed trust land, its response that its "exhaustive review" will protect property interests is no longer sound. *See e.g. Crest-Dehesa-Granite Hills-Harbison Canyon Subregional Planning Group v. Acting Pacific Regional Director*, 61 IBIA 208, 216 (2015) (remanding decision for failure to consider the effect of acquisition on easements).

Thus, under 25 C.F.R. § 151.12(c), potentially aggrieved parties do not know when BIA will conduct its review of title, nor how a particular encumbrance may affect the acquisition of the land. Aggrieved parties do know when to move for emergency relief because these processes are not public. Interior does not have a process for removing land from trust, in the event a decision is vacated, and has not indicated whether is has authority to do so. Aggrieved parties cannot know whether the applicant tribe will intervene in a particular suit, and if they do not, courts cannot enjoin their construction activities. The rule ultimately does nothing to solve the problem *Patchak* purportedly created, but does create serious issues for judicial review and the availability of complete relief.

All of these reasons weigh heavily in favor of Interior postponing the effective date of agency action under 5 U.S.C. § 705 when a potentially aggrieved party applies for such relief. Moreover, doing so would encourage parties to identify issues with clarity before final agency action, as well as reduce the likelihood that they might delay for an extended period of time before filing suit.

B. Citizens should be granted relief under 5 U.S.C. § 705

As set forth above, Citizens need not establish irreparable harm before being entitled to relief under 5 U.S.C. § 705. Nonetheless, they are facing irreparable harm if Interior does not postpone the effective date of any trust decision it may grant on behalf of the Wilton Rancheria. This application is highly unusual because of the substantial encumbrances that exist on the property.

1. The land is heavily encumbered and cannot be used for the purposes of the proposed acquisition

As set forth by the Interior Board of Indian Appeals, "[t]he only interests that will or can be conveyed by the Tribe and acquired by the United States in trust for the Tribe are the property interests already owned by the Tribe." *Crest-Dehesa-Granite Hills-Harbison Canyon*, 61 I.B.I.A. at *7; *see also David J. Bartoli*,123 I.B.L.A. 27, 40 (1992) (noting agency had "no grant of

authority to declare adverse claims of ownership invalid"). Thus, the Secretary can only acquire proposed trust land subject to these restrictive covenants, which prevent the Rancheria from being able to acquire marketable title.

The proposed trust land is subject to the Lent Ranch Marketplace Special Planning Area ("SPA"), as amended in 2014 for purposes of building an outlet center. The SPA is regulatory in nature, and serves as zoning for the entire site, including the proposed trust land. The SPA, as amended, includes a reservation of rights by the City, including:

- Grant or deny applications for land use approvals for the Project and the Property, provided such grant or denial is consistent with this Agreement;
- Adopt, increase and impose regular taxes applicable on a City- wide basis;
- Adopt, increase and impose utility charges applicable on a City- wide basis;
- Adopt, increase and impose permit processing fees, inspection fees and plan check fees applicable on a City-wide basis;
- Adopt and apply regulations mandated by Law or necessary to protect the public health and safety. To the extent that such regulations affect the Developer, the City shall apply such ordinance, resolution, rule, regulation or policy uniformly, equitably and proportionately to Developer and the Property and all other public or private owners and properties affected thereby. For purposes of this Agreement, any Law with respect to flood protection shall be deemed necessary to protect the public health and safety;
- Adopt, increase or decrease the amount of, fees, charges, assessments or special taxes, except to the extent restricted by this Development Agreement; provided, however, that Developer may challenge the imposition of any newly imposed fee solely on the grounds that such fee was not properly established in accordance with applicable law;
- Adopt and apply regulations relating to the temporary use of land, the control of traffic, the regulation of sewers, water, and similar subjects, and the abatement of public nuisances;
- Adopt and apply City engineering design standards and construction specifications;
- Adopt and apply the various building standards codes, as further provided in Section 4.6;
- Adopt Laws that are not in conflict with, or that are less restrictive than, the terms and conditions for development of the Project established by this Agreement; and
- Exercise its power of eminent domain with respect to any part of the Property.

In addition, the 2014 amendment provides that the City will compensate the Applicant for unreimbursed off-site improvements and the public parking and access license in an amount totaling $15,581,689. Funding that is to come from sales taxes generated at the mall development.

Finally, the Agreement expressly provides:

> The parties intend and determine that *the provisions of this Agreement shall constitute covenants which shall run with said Property, and the burdens and benefits hereof shall bind and inure to all successors in interest to the parties hereto*. All of the provisions of this Agreement shall be enforceable during the Term as equitable servitudes and constitute covenants running with the land pursuant to applicable law, including, but not limited to Section 1468 of the Civil Code of the State of California. Each covenant to do or refrain from doing some act on the Property hereunder, or with respect to any City owned property or property interest, (i) is for the benefit of such properties and is a burden upon such property, (ii) runs with such properties, and (iii) is binding upon each party and each successive owner during its ownership of such properties or any portion thereof, and each person or entity having any interest therein derived in any manner through any owner of such properties, or any portion thereof, and shall benefit each party and its property hereunder, and each other person or entity succeeding to an interest in such properties.

2014 Development Agreement at 6 (§ 2.3).

The legislative body of a city may enter into a development agreement for the development of real property in order to vest certain rights in the developer and to meet certain public purposes of the local government. Cal. Gov. Code, §§ 65864 *et seq*. The general plan provisions, ordinances, rules, regulations and official policies that govern are those that were in effect as of the date of the development agreement. *Id.* Local governments cannot authorize developers to engage in uses of the land that are unauthorized under the agreement. *Neighbors in Support of Appropriate Land Use v. County of Tuolumne*, 157 Cal.App.4th 997 (2007).

2. These encumbrances are still in place and subject to referendum and CEQA litigation

Although the City of Elk Grove held a hearing on a proposal to eliminate the encumbrances on the proposed trust land, that effort is not legally effective. On October 26, 2016, Elk Grove approved an amendment to the 2014 Development Agreement ("2016 Amendment") via Ordinance No. 23-2016.

Under California law, however, an ordinance adopting or modifying a development agreement is a legislative act subject to referendum. For that reason, "No ordinance shall become effective

until 30 days from and after the date of its final passage." Cal. Elections Code § 9235. "If a petition protesting the adoption of an ordinance . . . is submitted to the elections official of the legislative body of the city in his or her office during normal office hours, as posted, within 30 days of the date the adopted ordinance is attested by the city clerk or secretary to the legislative body, and is signed by not less than 10 percent of the voters of the city . . . *the effective date of the ordinance shall be suspended and the legislative body shall reconsider the ordinance*." *Id.* § 9237 (emphasis added).

Elk Grove disregarded Cal. Elections Code § 9235 by prematurely executing and recording the 2016 Amendment to the 2014 Development Agreement on November 9, 2016, only 14 days after adopting Ordinance No. 23-2016. On November 21, however, approximately 14,800 citizens of Elk Grove signed a petition to submit to referendum Ordinance No. 23-2016, suspending its effective date. Under State law, the City lacked the authority to execute the 2016 Amendment and its recordation is of no legal effect.

On December 12, 2016, the City provided comments in response to BIA's Notice of (Gaming) Acquisition Application, but it did not acknowledge in response to the inquiry about jurisdictional impacts that the proposed land was still subject to the development agreement. Of course, the Department is aware that Elk Grove implicitly acknowledged on December 16, 2016 that its execution of the 2016 Amendment violated State law when it recorded an acknowledgment that the proposed trust land is still encumbered by the 2014 Development Agreement. The City's acknowledgment states that, "pending the disposition of the referendum petition, the effectiveness of the Ordinance and the Development Agreement Amendment is suspended." *Id.* Thus, to the extent that title may have transferred between November 9, 2016 and December 16, 2016, that transfer was without legal effect. Under the 2014 Development Agreement, the owner of the property may sell the land only with approval by City Council, and the encumbrances run with the land.

The City certified the petition in January. *See* Cal. Elections Code §§ 9239, 9240. Under State law, the City can repeal the ordinance or submit it to the voters at the next regular municipal election (November 2018) or at a special election called for the purpose, not less than 88 days after the order of the legislative body. *See id.* § 9241. The statute also provides that "[t]he ordinance shall not become effective until a majority of the voters voting on the ordinance vote in favor of it." *Id.* In addition, "[i]f the legislative body repeals the ordinance or submits the ordinance to the voters, and a majority of the voters voting on the ordinance do not vote in favor of it, the ordinance shall not again be enacted by the legislative body for a period of one year after the date of its repeal by the legislative body or disapproval by the voters." *Id.* Transferring title to land now cuts off this process, with the result that the ordinance would be indefinitely suspended.

The pending suit against the City of Elk Grove under the California Environmental Quality Act ("CEQA") compound the jurisdictional problems. That suit was filed on November 23, 2016, and challenges the City's failure to prepare an Environmental Impact Report evaluating the effects of the 2016 Development Agreement before approving Ordinance No. 23-2016. *See Stand Up California!, et al. v. City of Elk Grove, et al.*, No. 32-2016-80002493 (Cal. Super. Ct. Nov. 23, 2016). If the land is transferred into trust, the court is highly likely to dismiss the case. Those claims—which still have force if the majority of voters vote in favor of the ordinance—cannot be revived.

The enforcement of CEQA "involve[s] important rights affecting the public interest." *Ctr. for Biological Diversity v. Cnty. of San Bernardino*, 185 Cal.App.4th 866, 892-893, 895 (2010) (citations omitted); *see also Healdsburg Citizens for Sustainable Sols. v. City of Healdsburg*, 206 Cal.App.4th 988, 993 (2012). Thus, immediate acquisition of the proposed trust land—cutting off those rights under CEQA—would constitute irreparable harm, as well.

3. The transfer of title would jeopardize public rights in the land

As noted above, Interior has eliminated the requirement that applicants comply with the Department of Justice's Standards for the Preparation of Title Evidence in Land Acquisitions by the United States, but it has not eliminated the requirement of marketability. 81 Fed. Reg. 30173 (May 16, 2016). The encumbrances on the proposed trust land prevent Interior from acquiring title, and it is critical that Interior address this issue in its decision.

As Interior explained in the rulemaking, "[t]he rule also continues the practice of requiring the elimination of any legal claims, including but not limited to liens, mortgages, and taxes, determined by the Secretary to make title unmarketable, prior to acceptance in trust." *Id.* at 30174. Importantly, Interior did not change the meaning of "unmarketable."

Given that Interior relied on the Department of Justice's Standards for the Preparation of Title Evidence in Land Acquisitions by the United States from 1980 until 2016, the meaning of "marketability" comes from those standards. *See* 45 Fed. Reg. 62034, 62035 (Sept. 18, 1980) (originally codified at 25 C.F.R. § 120a.12). Under 40 U.S.C. § 3111(a), reviewing attorneys were required to "compare the title evidence with the requirements of the project for which a property is needed. Conflicts may arise for example, from limitations imposed by restrictive covenants or by rights associated with outstanding mineral interests." https://www.justice.gov/enrd/page/file/922431/download at 25. The regulations establish that "[n]o outstanding rights may be approved that could foreseeably prevent the acquiring agency's intended land use." *Id.*

Here, the proposed use of the land—the acquisition of land in trust for a tribal casino—conflicts with virtually all of the covenants on the land. State law prohibits casino gaming. California Constitution, Art. IV, Sec. 19. The development restrictions—which are limited to a regional mall—conflict with the Rancheria's proposed development. In addition, the City's authority over the proposed trust land conflicts with the requirement that land be "Indian lands" over which the Rancheria exercises governmental authority in the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2703 (defining "Indian lands" as "all lands within the limits of any Indian reservation" and trust lands "over which an Indian tribe exercises governmental power"). "[I]t is not enough that restricted fee land is Indian country over which a tribe *can* exert primary jurisdiction; to be 'Indian land,' the tribe *must* affirmatively exercise its governmental power." *Citizens Against Casino Gambling in Erie County v. Hogen*, 704 F. Supp. 2d 269, 276 (W.D.N.Y 2010).

Under the restrictive covenants, the City of Elk Grove will continue to exercise primary jurisdiction, preventing the land from being marketable for the proposed purpose. Interior has denied trust requests when local governments exercised far less authority over the proposed trust land. In 2011, the Secretary denied the Pueblo of Jemez's application for land into trust because the Tribe was not actually controlling the exercise of governmental power over the proposed trust lands. Letter from Assistant Secretary-Indian Affairs to Governor, Pueblo of Jemez (Sept. 1, 2011). The Secretary also determined that the intergovernmental agreement interfered with tribal governance under 25 C.F.R. § 151.11(b).

It is imperative, however, that Interior address these issues. Interior stated in its 2013 rule that "[l]and acquisitions completed pursuant to 25 U.S.C. § 465 are voluntary transactions and do not involve the exercise of the eminent domain authority of the United States." 78 Fed. Reg. at 67934. In addition, the rules explains that "[t]he Department takes all reasonable and necessary steps to identify and resolve competing claims on the property before issuing a decision to acquire the land in trust and completing such trust transfer." Nonetheless, Interior would not address comments from several parties raising concerns regarding the ''substantial uncertainty'' as to the application of the Quiet Title Act and *Patchak* in specific fact situations, involving State or local governments, refusing "to speculate on how a court may apply *Patchak* in hypothetical fact situations."

This, however, is one of those "hypothetical situations." Here, the encumbrances on the proposed trust lands are actual rights and interests in land, vindication of which would be barred by the Quiet Title Act if title is transferred. A development agreement is enforceable by the parties to the agreement. Cal. Gov. Code, § 65865.4. Citizens have the right to enforce compliance with development agreements under California's a taxpayer standing statute that authorizes suits. *See* Cal. Civ. Pro. § 526a. Its purpose is to "'enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged in the courts because of the

standing requirement.' California courts have consistently construed section 526a liberally to achieve this remedial purpose." *Blair v. Pitchess,* 5 Cal.3d 258, 267-268 (1971).

Once the land is in trust, however, the Quiet Title Act would bar any citizen action asserting that the development agreement encumbers the federal government's title. *See McKay v. United States,* 516 F.3d 848, 850 (10th Cir. 2008) (Quiet Title Act applies to title disputes involving estates less than fee simple, such as easements or rights-of-way). Thus, if the federal court were to uphold the trust acquisition upon APA review, despite the encumbrances, Citizens would be unable to enforce their rights under the development agreement, resulting in irreparable harm.

Interior is aware of this problem, given that it argued in 1992 that:

> [U]pon acquisition of title by the United States, existing liens survive but cannot be enforced against the United States because of sovereign immunity. *United States v. Alabama,* 313 U.S. 274 (1941). [However,] the loss of enforcement remedies for an existing lien because of the acquisition of title by the United States is a destruction of a property right which constitutes a compensable taking under the Fifth Amendment. *Armstrong v. United States*, 364 U.S. 40, 48 (1960); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602 (1935).

Tohono O'Odham Nation v. Acting Phoenix Area Director, BIA, 22 I.B.I.A. 220 (1992).

The Quiet Title Act, enacted in 1972, is the *exclusive* means to bring suit against the United States to resolve a title dispute, *Block v. North Dakota,* 461 U.S. 273, 286 (1983), but it expressly excludes "trust and restricted Indian lands." 28 U.S.C. § 2409a(a). This limitation remains even after *Patchak*. *See* 132 S.Ct. at 2206-08. Thus, the encumbrances on the proposed trust lands will become unenforceable upon trust acquisition, causing irreparable harm.[3]

4. The immediate transfer of title could result in irreparable harm if the Rancheria does not intervene in the suit

Although Interior refused to address concerns commenters in the rulemaking process raised about the ability to enjoin construction if a tribe does not intervene in a judicial action, the Department is now aware that this concern is not speculative. This precise situation arose in Massachusetts in *Littlefield v. Dep't of Interior,* Case No. 1:16-CV-10184. Interior has the power to postpone the effective date of agency action in situations such as this and make the transfer of title during the pendency of litigation contingent on intervention, a limited waiver of sovereign

[3] As noted, the loss of enforcement remedies is a compensable taking. Trust acquisition would therefore be in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341.

immunity, or an enforceable agreement not to initiate construction without providing a litigant the opportunity to seek injunctive relief.

Without such measures, transferring title could result in irreparable harm. As stated above, there is a pending CEQA case against the City of Elk Grove regarding its attempt to eliminate the proposed trust land from the 2014 Development Agreement, which includes a variety of land use restrictions, mitigation requirements, and other safeguards that are critical to protecting the environment and the public interest. Citizens are very concerned about the environmental impacts associated with the proposed project, including the inadequate environmental review process conducted by BIA in the case.

The application has been formally pending for only two months. *See* November 17, 2016 Notice of (Gaming) Acquisition Application. The affected community—the residents of Elk Grove, including Citizens—learned that the Wilton Rancheria was interested in acquiring land in Elk Grove in trust in June. BIA did not engage with Elk Grove or the affected community following the Rancheria's announcement. The review period for this application is unheard of—fee to trust applications for gaming typically take years of review before moving to final decision.

Although BIA has been considering a different application since 2013—one for a 282-acre site located 12.5 miles away in Galt, California—it cannot approve a different proposal without first complying with the National Environmental Policy Act. Since December 4, 2013, BIA, the State of California, Sacramento County, Galt, Elk Grove, and the public understood that the Wilton Rancheria was proposing that BIA acquire 282 acres of land in Galt for a casino. *See* Notice of Intent To Prepare an Environmental Impact Statement for the Proposed Wilton Rancheria Fee-to-Trust and Casino Project, Sacramento County, California, 78 Fed. Reg. 72928 (Dec. 4, 2013); *see also* 40 C.F.R. § 1502.4 ("Agencies shall make sure the proposal which is the subject of an environmental impact statement is properly defined.").

Consistent with the Rancheria's Galt application, BIA held a scoping meeting at the Chabolla Community Center in Galt. *Id.*; *see also* 40 C.F.R. § 1501.7(b)(4) (stating that "a scoping meeting will often be appropriate when the impacts of a particular action are confined to *specific sites*") (emphasis added). On February 11, 2014, BIA invited the City of Galt to participate as a cooperating agency in the NEPA process." *See* 40 C.F.R. § 1501.7 (requiring agencies, as part of the scoping process, to "invite the participation of affected Federal, State, and local agencies). It also invited Sacramento County, the Wilton Rancheria, and the California Department of Transportation to participate. *See* Draft Environmental Impact Statement (Dec. 15, 2015), Appendix B. BIA circulated a draft environmental impact statement for the Galt proposal in December of 2015. 80 Fed. Reg. 81352-02 (Dec. 29, 2015). Elk Grove was not invited to be a cooperating agency.

The Wilton Rancheria announced in June that it would seek trust land in Elk Grove. BIA did not announce a notice of project change or revise its scoping determinations. *See* 40 C.F.R. § 1501.7 (requiring agencies to "revise the determinations made under paragraphs (a) and (b) of this section if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts"). BIA did not hold a public hearing to scope 40 C.F.R. § 1506.6 (requiring agencies to "[h]old or sponsor public hearings or public meetings whenever appropriate or in accordance with statutory requirements applicable to the agency," including when there is "[s]ubstantial environmental controversy concerning the proposed action or substantial interest in holding the hearing" or to "[s]olicit appropriate information from the public").

BIA did not request that Elk Grove participate as a cooperating agency. The City made its own request on May 13, 2016. BIA did not prepare a supplemental environmental impact statement. *See* 40 C.F.R. § 1502.9 (requiring agencies to prepare "supplements to either draft or final environmental impact statements" if there are "substantial changes in the proposed action that are relevant to environmental concerns" or "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts"). BIA did not prepare a supplement to the draft environmental impact statement—which was all that BIA had completed when the Rancheria changed its proposal—and circulate for public comment. *See* 40 C.F.R. § 1502.9(c) (requiring agencies to "prepare, circulate, and file a supplement to a statement *in the same fashion* (exclusive of scoping) *as a draft and final statement* unless alternative procedures are approved by the Council"). BIA prepared a final environmental impact analysis with several supplemental studies added, which does not comport with NEPA's requirements.

If Interior proceeds to final decision, Citizens believe that its failure to comply with NEPA renders its decision arbitrary and capricious. If the Rancheria can build the casino, shielded by its sovereign immunity, Citizens will suffer irreparable environmental harm and will be left remediless for those injuries. A casino will cause serious disruptions to traffic, causing pollution, noise, increased crime, and other adverse impacts. The development will irreparably change Elk Grove. *See New York v. Shinnecock Indian Nation*, 280 F.Supp.2d 1, 4-5 (E.D.N.Y.2003) (finding irreparable harm from "incredible traffic congestion" and "drastically heighten[ed] air pollution" that would likely be caused by the construction of a casino).

Apart from the harm associated with casino impacts, Citizens' right to judicial review of its NEPA claims would effectively be eliminated. A NEPA claim does not present a controversy when the proposed action has been completed and no effective relief is available. *See Neighborhood Transp. Network, Inc. v. Pena*, 42 F.3d 1169, 1172 (8th Cir. 1994) (holding that

there was no relief available to the plaintiffs when the I–35W high occupancy vehicle lanes were completed while the case was awaiting appeal); *accord Bayou Liberty Ass'n, Inc. v. United States Army Corps of Eng'rs*, 217 F.3d 393, 398 (5th Cir.2000) ("[B]ecause completion of construction of the retail complex has foreclosed any meaningful relief that would flow from granting [the plaintiff's] original requests for relief this action has become moot."); *Knaust v. City of Kingston*, 157 F.3d 86, 88 (2d Cir.1998) (dismissing the NEPA claims as moot when the park project was completed and federal monies disbursed because the plaintiff "seeks to enjoin the future occurrence of events that are already in the past"). As a district court has stated, it is aware of no case where a court in a NEPA case ordered a defendant to dismantle a completed construction project. *See Finca Santa Elena, Inc. v. U.S. Army Corps of Engineers*, 62 F. Supp. 3d 1, 5 (D.D.C. 2014).

CONCLUSION

For the reasons set forth above, Citizens believes that Interior should postpone the effect of any trust decision it might make on behalf of the Wilton Rancheria.

Sincerely yours,

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