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STAND UP CALIFORNIA!; PATTY JOHNSON;
7 And JOE TEIXEIRA

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA

9 COUNTY OF SACRAMENTO

10 STAND UP CALIFORNIA!; PATTY
11 JOHNSON; and JOE TEIXEIRA,

Case No. 34-2016-80002493

12 Petitioners and Plaintiffs,

13 v.

14 CITY OF ELK GROVE,

15 Respondent and Defendant.

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT EX PARTE
APPLICATION FOR ORDER TO SHOW
CAUSE RE PRELIMINARY INJUNCTION
AND TEMPORARY RESTRAINING
ORDER

16 _____ /
ELK GROVE TOWN CENTER, LP;
17 HOWARD HUGHES CORPORATION;
and DOES 1-20,

Date: December 22, 2016
Time: 9:00 am
Ex parte calendar: Dept. 24

18 Real Parties in Interest and
19 Defendants.
20 _____ /

Verified Petition Filed: November 23, 2016
Trial Date: None

TABLE OF CONTENTS

PAGE

I. INTRODUCTION AND FACTUAL BACKGROUND 1

II. A TEMPORARY RESTRAINING ORDER SHOULD BE GRANTED REGARDING THE 2ND CAUSE OF ACTION, AS GREAT AND IRREPARABLE INJURY WILL RESULT TO PLAINTIFFS IF THE RELIEF REQUESTED IS NOT GRANTED 8

III. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERIS OF THEIR CLAIM AT TRIAL 10

IV. AN ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION SHOULD ALSO ISSUE 13

V. EX PARTE RELIEF IS PERMITTED UNDER THESE CIRCUMSTANCES AND PLAINTIFF HAS COMPLIED WITH CALIFORNIA RULES OF COURT 14

 Notice Requirement 14

VI. CONCLUSION 15

TABLE OF AUTHORITIES

PAGE(S)

CASES:

Block v. North Dakota
461 U.S. 273, 280-81 (1983)5, 6

Church of Christ in Hollywood v. Superior Court
99 Cal. App. 4th 1244, 1251 (2d Dist. 2002)8

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.
523 U.S. 751 (1998)10

Littlefield v. DOI
Case No. 1:16-cv-10184-WGY, D. Mass. Filed 6/17/1610

Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak
132 S. Ct. 2199 (2012).....6

Midway Orchards v. County of Butte
220 Cal. App. 3d 765, 773, 781 (1990)10, 12, 13

STATUTES:

California Rules of Court, Rule 3.1150(a)13

California Rules of Court, Rule 3.1150(b)13

California Rules of Court, Rule 3.120115

California Rules of Court, Rule 3.1202(c)14

California Rules of Court, Rule 3.1204(a)15

Code of Civil Procedure §527(c)(1)8

Elections Code §923511

Elections Code §9235.211

Elections Code §92374

Government Code §3693711

Government Code §65867.511, 13

Government Code §65867.5(a)11, 12

Government Code §6586811, 12, 13

25 C.F.R. §151.12(c)10

25 C.F.R. §151.12(c)(2)5

25 C.F.R. §151.12(c)(2)(iii)6

25 C.F.R. §151.13(b)3, 4

1	25 C.F.R. §151.14	6, 10
	25 C.F.R. §152.22(b)	5
2	40 C.F.R. §1506.10	5
3	78 Fed. Reg. 72928	2
4	81 Fed Reg. 90379	2
5	25 U.S.C. §177	5
	25 U.S.C. §2703(4)	5
6	25 U.S.C. §5108	3, 5
7	28 U.S.C. §2409a	5
	28 U.S.C. §2409a(a)	4, 5
8	31 U.S.C. §1341	4

9		
10	CONSTITUTIONS:	
11	California Constitution, Article II, Section 9	10

12
13
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17
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1 **I. INTRODUCTION AND FACTUAL BACKGROUND**

2 This Motion for OSC Re: Preliminary Injunction and TRO (the “Motion”) seeks
3 immediate enforcement of the Second Cause of Action included in Plaintiffs’ VERIFIED
4 PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND
5 INJUNCTIVE RELIEF (the “Petition”), filed on November 23, 2016, which is attached to the
6 Declaration of Brigit S. Barnes in Support and Declaration of Notice (“Barnes decl.”) as Exhibit
7 1. No prior ex-parte motions or motion for TRO/OSC re: Preliminary Injunction has been filed
8 in this action. (Barnes decl. ¶4.) The Petition challenges a decision by the City to adopt the
9 Ordinance approving the First Amendment to the 2014 Development Agreement governing
10 certain property that is now proposed for an Indian gaming casino (the “Casino”) as described
11 below, and for this motion, the recordation by the City before the requisite 30 days had expired
12 of notice of adoption of the Amendment to the Development Agreement, removing lands from
13 the Development Agreement to facilitate the Wilton Rancheria taking the land into trust for
14 development as a casino.

15 As background, the actions complained of relate to certain entitlements originally granted
16 by the City in 2001 for the Lent Ranch Special Planning Area (“Lent Ranch SPA”). These
17 entitlements, including a detailed Development Agreement, were supported by the mandatory
18 mitigation measures included in the 2001 EIR, which are extensive in this particular case. The
19 Lent Ranch SPA included an area which was known as the “Regional Mall” site, identified as
20 District “A” of the Lent Ranch SPA. In 2007, the City entered into an agreement regarding mall
21 fees and infrastructure. Since then the project has stalled, and ownership has changed after
22 bankruptcy to ELK GROVE TOWN CENTER, L.P. (a subsidiary of the Howard Hughes
23 Corporation) (“EGTC”) as successor developers. At the present time, the project is undeveloped
24 but for some partially built and unused buildings and parking areas intended for the Regional
25 Mall.

26 Between 2007-2009, a native-Californian Indian tribe, the Wilton Rancheria (the
27 “Tribe”), sued the Bureau of Indian Affairs (“BIA”) to have its status as a federally recognized
28 tribe restored, which occurred in 2009 as a result of a settlement. (RJN No. 4.) Thereafter, the

1 Tribe began efforts to locate a site for an Indian gaming casino and initially identified a site in
2 the City of Galt as a preferred location. Thereafter, on December 4, 2013, the BIA/Department of
3 Interior held requisite scoping sessions and published in the Federal Register a notice of intent to
4 prepare an EIS under the National Environmental Policy Act (“NEPA”), identifying as the
5 project proposal the trust acquisition of 282 acres in Galt for a casino project, with the Galt
6 location as the Preferred alternative, and the Elk Grove site as Alternative 6 [78 Fed. Reg.
7 72928]. (RJN Nos. 6, 7, & 8.)

8 In 2014, EGTC, the successor developer, requested revisions to the financial structure for
9 the Mall. The City enacted Ordinance 29-2014, which approved and authorized the City to enter
10 into a 2014 Development Agreement regarding the Regional Mall portion of the Lent Ranch
11 SPA (the “2014 DA”). (Declaration of Ashlee Titus in Support (“Titus decl.”) ¶2, Ex. 1; RJN
12 No. 1.) The findings for the Ordinance identify a bi-furcation of the Mall site into Phase I – to
13 become the “Outlet Mall” – and Phase 2 in the north which was not evaluated. The 2014 DA
14 also provided for reimbursement to EGTC of \$15,900,000 through parking fees to be collected
15 from the public’s parking in the Mall. (Titus decl. Ex. 1; RJN No. 1.)

16 The Tribe originally proposed that the Casino would be located in the City of Galt; the
17 EIS prepared on the Federal level focused on the Galt site, and all public outreach efforts and
18 environmental analysis was focused on the Galt site. Petitioners allege that the Tribe changed its
19 mind in early 2016 relative to the preferred location, and changed the Casino site to the northern
20 portion, Phase 2, of the Regional Mall site in the Lent Ranch SPA, Regional Mall Site¹. (RJN
21 Nos. 6, 7, & 8.) The draft EIS identified the Elk Grove Mall site as an alternative, despite its
22 being a tenth of the size of the Galt site, and the fact that the Elk Grove property was subject to
23 the 2014 DA. In May 2016, some or all of the Real Parties in Interest entered into an option
24 agreement for the sale of Phase 2 of the Regional Mall site to the Tribe. (Verified Petition ¶17;
25 RJN No. 4.) On June 9, 2016, the Tribe announced its intention to transfer its focus for gaming

26
27 ¹ The December 14, 2016 Federal Register notice referenced (81 Fed. Reg. 90379) (RJN No. 12) is the first official
28 public notice that identifies the Regional Mall site as the preferred alternative. The Tribe announced its new
preference for the Regional Mall site in early June 2016, as was widely reported at the time.

1 approvals to the Elk Grove Mall site, shown as Phase 2 in the 2014 DA, which was hitherto not
2 reviewed in the 2014 DA or for this purpose by the City of Elk Grove nor the public. (RJN Nos.
3 7, & 8.)

4 In order to continue Indian gaming approvals, the Tribe needs to have the preferred site
5 taken into "Trust" pursuant to Section 5 of the Indian Reorganization Act of 1934, 25 U.S.C.
6 §5108, by the BIA/Department of the Interior. In addition, the land must qualify as "Indian
7 lands" under the Indian Gaming Regulatory Act (IGRA) at 25 U.S.C. §2703(4), for gaming to be
8 permissible. The 2014 DA for the Mall site imposed an impediment to moving forward with the
9 plan to develop the Casino, because the encumbrances associated with the 2014 DA preclude the
10 Secretary from acquiring the land in trust (*see* 25 C.F.R. 151.13(b)), and the Tribe from
11 exercising the "governmental authority" over the property necessary for the land to qualify as
12 "Indian Lands" under IGRA. (Titus decl. ¶5; RJN No. 9; Verified Petition ¶18.) Accordingly,
13 the City and the Real Parties in Interest pursued the First Amendment to remove Phase 2 from
14 the 2014 DA. The Amendment was proposed, considered, and approved for the sole purpose of
15 making a casino possible. No other purpose was mentioned in the project staff report before the
16 City Council. (Titus decl. ¶4; Verified Petition ¶22; RJN No. 9.) As stated in the City staff
17 report, "the BIA will not allow the [casino property] to be removed from fee to trust for the
18 Wilton Rancheria unless the encumbrances such as the Development Agreement are removed
19 from Title". (RJN No. 9; Verified Petition ¶22.) The City continues to take the position that no
20 environmental review under CEQA was required. (RJN No. 9.)

21 Section 1, Purpose, of the Ordinance provides as follows: "The purpose of the Ordinance
22 is to adopt amendments to the Development Agreement with EGTC for the project commonly
23 known as the "The Outlet Collection at Elk Grove." The findings section of the Ordinance
24 provides, in relevant part, that:

25 The proposed Development Agreement amendment will modify the
26 application of the existing Development Agreement by narrowing the scope of
27 these agreements to include only the area covered by the 2014 approvals for the
28 Outlet Collection at Elk Grove Project. **The amendment does not change the
characteristics of the approved development. No specific development of the
Phase 2 area is approved by the Development Agreement amendment.**
Therefore, there are not substantial changes in the project approvals from that

1 analyzed in the 2001 EIR and no new significant environmental effects, or
2 substantial increase in the severity of previously identified significant effects. **No
3 new information of substantial importance has been identified.** (Bold added.)

4 Based on the above finding, the City refused to evaluate potential impacts of the
5 Ordinance. (Ordinance attached to Titus. decl. as Ex. 1; RJN No. 1.) However, at the time this
6 Ordinance was drafted and approved, the City knew that the Phase 2 portion was now the
7 preferred location for the Casino, contrary to all prior scoping meetings for the EIS identifying
8 Galt as the preferred location. (RJN Nos. 8 & 9.) Thus, the City's statement that No new
9 information of substantial importance has been identified is false. The City knew that the Tribe
10 had recently changed its preferred Casino site from Galt to Elk Grove. The City's own published
11 "FAQ" acknowledges as much. (RJN No. 8.)

12 Ordinance No. 23-2016, regarding the First Amendment to the DA, was approved on
13 October 26, 2016. Under state law, the City must wait 30 days to adopt the Ordinance, to allow
14 the citizens the right to referend. (Elections Code § 9237.) The Ordinance itself provides that,
15 "This Ordinance shall take effect thirty (30) days after its adoption." Instead of waiting the
16 required 30 days, the City recorded the First Amendment to the DA on November 9, 2016, 14
17 days after adoption. (RJN No. 10.)

18 The effect of recording the First Amendment to the DA prematurely, and of the City's
19 refusal to expunge the First Amendment after receiving the Referendum, has been to effectively
20 eliminate an encumbrance on title that would prevent BIA from acquiring the Mall lands into
21 trust. BIA regulations require the elimination of any encumbrance – such as the 2014 DA – that
22 makes title to the land unmarketable. (25 C.R.F. §151.13(b).) The 2014 DA also gives the City
23 of Elk Grove the right to impose regular and special taxes. The BIA could not acquire land in
24 trust subject to that right, because the Anti-Deficiency Act prohibits federal agencies from
25 incurring financial obligations in excess of appropriated funds. (31 U.S.C. §1341.) The Anti-
26 Deficiency Act would also be violated because the 2014 DA also gives the City the right to
27 condemn the property. The exercise of this right, however, would be barred by the Quiet Title
28 Act, 28 U.S.C. §2409a(a), which preserves the sovereign immunity of the United States from

1 suits involving title disputes to Indian lands. Acquisition of the land into trust subject to this
2 encumbrance would thus violate the Anti-Deficiency Act, because the City could bring suit for
3 just compensation (*see Block v. North Dakota*, 461 U.S. 273, 280-81 (1983)), exposing the
4 United States to liability for which funds have not been appropriated.

5 Furthermore, the City's retained rights of taxation and eminent domain arguably render
6 the property ineligible for trust acquisition under 25 U.S.C. §5108 because these rights preclude
7 the central purposes of trust acquisitions under that authority: exemption from state and local
8 taxation, and the restriction on alienation that is the quintessence of trust status. (25 U.S.C.
9 §§177, 5108; 25 C.F.R. §152.22(b).) Finally, without the elimination of the 2014 DA, the
10 Casino Property would not qualify as "Indian lands" under IGRA, 25 U.S.C. §2703(4), because
11 the rights the City enjoys under the 2014 DA – including broad powers of taxation, land use
12 regulation, eminent domain, and the protection of the public health and safety – prevent the
13 Rancheria from exercising sufficient "governmental control" over the Casino Property.

14 In fact, the Notice of (Gaming) of Land Acquisition Application was issued by the BIA
15 on November 17, 2016, commencing the "fee to trust" process. (RJN No. 5.) BIA also issued
16 notice of the final EIS on December 14, 2016 (RJN No. 12), triggering the 30-day period before
17 final decision.² (See 40 C.F.R. § 1506.10.) The final EIS identifies the Elk Grove site as the
18 preferred alternative. Once approved, BIA regulations require the Secretary to immediately
19 acquire the land in trust upon making a positive determination. (25 C.F.R. § 151.12(c)(2).) All
20 evidence indicates that BIA will be issuing a final decision to acquire the land in trust by January
21 13, 2017.

22 The acquisition of land in trust would eliminate the right of the residents to referend the
23 Ordinance due to the sovereign status of the trust property. The Quiet Title Act, 28 U.S.C. §
24 2409a, is the exclusive means to bring a quiet title suit against the United States, and the Act
25 expressly excludes disputes involving "trust and restricted Indian lands" from the Act's waiver
26 of the sovereign immunity of the United States. (28 U.S.C. § 2409a(a); *see Block v. North*

27
28 ² The Notice also states that "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." (See RJN No. 12.)

1 *Dakota*, 461 U.S. 273, 280-81 (1983).) Citizens might be able to challenge the acquisition of the
2 land in trust under the Administrative Procedure Act (APA), see *Match-E-Be-Nash-She-Wish*
3 *Band of Pottawatomis Indians v. Patchak*, 132 S. Ct. 2199 (2012), but there is no case law
4 regarding whether acquiring land where a deed does not reflect encumbrances would be held
5 arbitrary and capricious under the APA, the applicable standard of review. There are no
6 regulations for removing land from trust, once the United States has acquired the land on behalf
7 of a tribe. Thus, the ability of California citizens to exercise their constitutional right to referend
8 in this case depends on this Court expunging the First Amendment from title to prevent the BIA
9 from acquiring the land. (Barnes decl. ¶6.)

10 Immediately upon approval of the Ordinance, a referendum effort was commenced by the
11 residents of Elk Grove, the requisite number of signatures were obtained, and all necessary steps
12 have been taken to take this matter to the voters. (Titus decl. ¶¶5-10.) The effect of the City's
13 early filing of the First Amendment is to deny Petitioners, and the citizens of Elk Grove, their
14 constitutional and statutory right to referend the Ordinance, which can be decided at the earliest
15 next April, or thereafter at regularly scheduled elections. However, the City's refusal to expunge
16 the Notice of First Amendment of the DA, unless reversed by this Court, will permit the
17 BIA/DOI to take the Mall property into trust in mid-January, long before a referencum election
18 can be held. (25 C.F.R. 151.12(c)(2)(iii) and 151.14.)

19 By this Motion, Petitioners request that the City be compelled to follow state law and
20 take all necessary actions, including but not limited to, removing the recorded First Amendment
21 of DA and allowing the citizens of Elk Grove to referend the Ordinance approving the First
22 Amendment.

23 The relevant time-line related to this Motion is as follows:

- 24 • June 27, 2001 Lent Ranch Special Planning Area (SPA), EIR, and
25 Development Agreement approved by City of Elk Grove, 295
26 acre future commercial area at Grant Line and 99.
(Verified Petition ¶13.)
- 27 • May 21, 2007 Wilton Rancheria files lawsuit against Bureau of Indian Affairs
28 (BIA) to restore tribal status. (RJN No. 4.)

- 1 • Nov. 14, 2007 The City and developer enter into an Agreement Regarding
2 Mall Fees and Infrastructure. (Titus decl. Ex. 2; RJN No. 2.)
- 3 • June 8, 2009 Settlement Order approved by Judge Jeremy Fogel dismissing
4 lawsuit and restoring tribal status to the Wilton Rancheria.
(RJN No.4.)
- 5 • Oct. 22, 2014 Ordinance 29-2014 approved and authorized the City of Elk
6 Grove to enter into a new Development Agreement (“2014
7 DA”) with EGTC regarding the Regional Mall Site, District “A”
8 of the Lent Ranch SPA, to be known as the “The Outlet
9 Collection at Elk Grove”. (Titus decl. ¶2, Ex. 1; RJN No. 1.)
- 10 • June 9, 2016 Tribe announces Elk Grove site, EIS alternative F, as the new
11 preferred site, replacing the previous identified preferred site in
12 the City of Galt. (RJN No. 7.)
- 13 • June 30, 2016 Tribe files Land into Trust Application for Gaming Purposes.
14 (RJN No. 4.)
- 15 • Sept. 28, 2016 The City passed resolution 2016-183 approving a Memorandum
16 of Understanding with the Tribe for mitigation funding related
17 to a proposed entertainment and gaming facility.
18 (Titus decl. ¶4, Ex. 3; RJN No. 3.)
- 19 • Oct. 26, 2016 City Council adopted Ordinance 23-2016 approving the First
20 Amendment to the 2014 DA, which removes a portion of the
21 Regional Mall property known as “Phase 2” from the legal
22 description of the 2014 DA, and the City Clerk attested this
23 Ordinance on the same date. (Titus decl. ¶3, Ex. 2; RJN No. 2.)
- 24 • Oct. 27, 2016 City files Notice of Determination that the “Outlet Collection”
25 would not generate any new environmental impacts other than
26 those studied in the 2001 EIR. (Verified Petition ¶21.)
- 27 • Nov. 9, 2016 First Amendment to the 2014 DA filed with the Recorder’s
28 Office. (RJN No. 10.)
- Nov. 17, 2016 Notice of (Gaming) Land Acquisition Application to take
Casino site into trust for the benefit of the Wilton Rancheria for
gaming purposes. (RJN No. 5.)
- Nov. 21, 2016 Petition to referend Ordinance No. 23-2016 filed with Elk
Grove City Clerk containing 14,800 signatures. (Titus decl.
¶¶5,10, Exs. 4, 5, & 6.)
- Nov. 23, 2016 Plaintiffs’ Verified Petition filed.

- 1 • Nov. 25, 2016 Deadline to file referendum petition. (Titus decl. ¶7.)
- 2 • Dec. 14, 2016 Notice of final EIS, which is effective January 13, 2017. (RJN
- 3 No. 12).
- 4 • Jan. 6, 2017 Deadline for verification of the signatures on the petition for
- 5 referendum. (Titus decl. ¶12.)
- 6 • Jan. 11, 2017 The next City Council meeting after the deadline on the petition
- 7 for referendum. (Titus decl. ¶14.)
- 8 • April 11, 2017 Earliest an election could be held on the referendum.
- 9 (Titus decl. ¶16.)

10 **II. A TEMPORARY RESTRAINING ORDER SHOULD BE GRANTED**
 11 **REGARDING THE 2ND CAUSE OF ACTION, AS GREAT AND IRREPARABLE**
 12 **INJURY WILL RESULT TO PLAINTIFFS IF THE RELIEF REQUESTED IS**
 13 **NOT GRANTED**

14 A TRO may issue when “[i]t appears from the facts shown by affidavit or by the verified
 15 complaint that great or irreparable injury will result to the applicant before the matter can be
 16 heard on notice...” (Code Civ. Proc. § 527(c)(1).) The court should grant the TRO where the
 17 likelihood is that the plaintiff will prevail on the merits at trial, and where the interim harm to the
 18 plaintiff without the TRO outweighs the likely harm to the defendant if the order is issued.

19 *Church of Christ in Hollywood v. Superior Court*, 99 Cal. App. 4th 1244, 1251 (2d Dist. 2002).

20 The referendum petition protesting the Ordinance approving the First Amendment was
 21 filed with the City Clerk on November 21, 2016. (Titus decl. ¶10.) Approximately 14,800
 22 citizens filed with the City Clerk’s office a referendum petition protesting the Ordinance
 23 authorizing the amendment. (Titus decl. ¶10.) The City has until January 6, 2017, to complete
 24 an initial verification of their signatures, during which time the effective date of the Ordinance is
 25 suspended. (Titus decl. ¶¶10, 11.) If the petition is verified, the Ordinance will not go into effect
 26 until such time as a majority of the voters in Elk Grove approve that Ordinance, which cannot
 27 happen until April 11, 2017 at the earliest. (Titus decl. ¶16.) Accordingly, the City was without
 28 authority to execute and record the amendment. The First Amendment is not legally in effect,
 and may remain ineffective until an election is held. The City’s recording of the Notice of

1 Adoption of First Amendment of the DA gives the world, including BIA, the idea that the
2 property legally has been removed from the DA. This referendum process is devalued to the
3 extent that this Notice remains of record. This referendum must be allowed to continue as
4 guaranteed by law.

5 On the other hand, the Defendants are not likely to suffer any damages if the TRO is
6 granted because Defendants will simply be compelled to follow the law and allow the citizens of
7 Elk Grove the right to referend the approved Ordinance and First Amendment. The City violated
8 its legal obligations to recognize that the Ordinance approving and authorizing the First
9 Amendment could not take effect for thirty days after enactment. The City instead entered into
10 the First Amendment without an effective Ordinance in place, and recorded an Amendment that
11 stated it was executed "as of" the date of its enactment. (Verified Petition ¶30.) In taking these
12 actions the City violated constitutional law, statutory law, and the 2014 DA. It was and is also
13 taking actions to thwart the right reserved to the voters of Elk Grove in the California
14 Constitution to referend the Ordinance approving the First Amendment, before that Ordinance is
15 given effect.

16 Brigit S. Barnes worked with counsel for the City related to this Motion. Based on
17 conversations with the City Attorney, Barnes received a Notice Re First Amendment to
18 Development Agreement on Friday, December 16, 2016; however, the Notice is not signed or
19 notarized, and is not recorded. (Barnes decl. ¶13, Ex. 4.) As stated in the Declaration of Brigit
20 S. Barnes, if Defendants are not immediately restrained and enjoined from engaging in the
21 aforesaid conduct, Plaintiffs will suffer great and immediate irreparable harm if the First
22 Amendment is allowed to remain on record in such fashion that the BIA considers title free of
23 the encumbrances created by the 2014 DA, because the property may be transferred into Trust as
24 early as mid-January, months before an election can be held. Once taken into Trust, Petitioners
25 will have been denied their statutory and California Constitutional rights to referend the City's
26 adoption of the Ordinance approving the First Amendment.

27 After approval of an application to take land into trust, BIA regulations require the
28 Secretary to acquire the land in trust immediately upon a positive determination of eligibility

1 after a title review. (25 C.F.R. § 151.12(c) and 151.14.) Attached to the Notice of Application
2 (RJN No. 4) is the title insurance summary for the Casino Property, indicating that the Secretary
3 has already conducted the title review and is likely to proceed to decision quickly. The BIA has
4 taken the position in other cases involving similar acquisitions that there is no clear process for
5 removing land from trust. (Maytubby affidavit, Doc. 38-1, *Littlefield v. DOI*, Case No. 1:16-cv-
6 10184-WGY, D. Mass. Filed 6/17/16; RJN No. 11.) Further, tribes are immune from suit and
7 their activities cannot be enjoined. (See *Kiowa Tribe of Oklahoma v. Manufacturing*
8 *Technologies, Inc.*, 523 U.S. 751 (1998).) Thus, the Tribe could immediately commence
9 construction and no court would have jurisdiction to enjoin its activities. Accordingly, Plaintiffs
10 are informed and believe that the imminent transfer of land into trust would prevent Plaintiffs
11 from obtaining relief.

12 **III. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR**
13 **CLAIM AT TRIAL**

14 Plaintiffs seek by this emergency Motion to preserve the rights of the voters as protected
15 by the federal and California Constitutions. Plaintiffs are likely to prevail on this cause of action
16 at trial based on the following authorities: the California Constitution, the Government Code, the
17 Elections Code, the language from the 2014 DA itself, and the case of *Midway Orchards v.*
18 *County of Butte*, 220 Cal. App. 3d 765 (1990). Together, these sources show that the City's
19 recordation of that amendment was premature and of no legal effect, and must be removed.

20 California law requires the City to wait for 30 days before an ordinance goes into effect,
21 which is the source of the City's authority to execute and record the amendment to the
22 development agreement. The purpose of that delay is to allow aggrieved parties to exercise their
23 rights under Section 9, Article II of the California Constitution (i.e., the referendum right) and/or
24 to file claims arising under state law, including the California Environmental Quality Act. The
25 City therefore did not have authority to execute the amendment to the development agreement
26 when it did, nor record that amendment.

27 //

28 //

1 Specifically, with respect to the referendum power, Government Code § 36937³ and
2 Elections Code § 9235.2⁴ provide that an ordinance approving or amending a development
3 agreement will not take effect for thirty days, during which time the voters of a jurisdiction are
4 entitled to exercise their right of referendum by presenting a petition protesting the ordinance.
5 See Government Code §§ 65867.5(a) and 65868⁵, and Elections Code §§ 9235 and following.

6 In fact, the City's own 2014 DA acknowledges the right of the citizens to referend the
7 DA:

8 "Effective Date" means that day on which the Adopting Ordinance shall
9 be effective 30 days after its adoption by the City Council, unless the Adopting
10 Ordinance becomes subject to a qualified referendum, in which case the Effective
11 Date shall be the day after the referendum election, if the Adopting Ordinance is
12 approved by a majority of the voters. Litigation filed to challenge the Adopting
13 Ordinance or this Agreement shall not affect the Effective Date, absent a court
14 order or judgment overturning or setting aside the Adopting Ordinance, or staying
15 the Effective Date, or remanding the Adopting Ordinance to the City." (2014 DA,
16 Titus decl. Ex. 1; RJN No. 1, p. 3, Section 1.6).

17 The First Amendment incorporates the 2014 DA by reference:

- 18 A. The City and Developer have heretofore entered into a Development Agreement,
19 approved by the City of Elk Grove by Ordinance No. 29-2014, adopted on
20 October 22, 2014 (the "Development Agreement"), and relating to certain
21 property in the City of Elk Grove upon which Developer desires to develop.
- 22 B. Those recitals provided in the Development Agreement are herein incorporated by
23 reference.
- 24 C. In furtherance of the Project, the City and Developer desire to enter into this First
25 Amendment to make certain modifications and amendments to the Development
26 Agreement. (First Amendment, Titus decl. Ex. 2; RJN No. 2, p. 1, Recitals.)

27 ³ Government Code § 36937 provides, in relevant part, that: "Ordinances take effect 30 days after their
28 final passage."

⁴ Elections Code § 9235 provides, in relevant part, that: "No ordinance shall become effective until 30 days
from and after the date of its final passage..."

⁵ Government Code § 65867.5 provides, in relevant part, that: "(a) A development agreement is a
legislative act that shall be approved by ordinance and is subject to referendum." Government Code §
65868 provides, in relevant part, that: "An amendment to an [development] agreement shall be subject to
the provisions of Section 65867.5."

1 That 2014 DA, among other things, expressly reserves to the City the right, subject to the
2 vested rights, to:

- 3 • grant or deny land use approvals;
- 4 • approve, disapprove or revise maps;
- 5 • adopt, increase, and impose regular taxes, utility charges, and permit processing fees
applicable on a city-wide basis;
- 6 • adopt and apply regulations necessary to protect public health and safety;
- 7 • adopt increase or decrease fees, charges, assessments, or special taxes;
- 8 • 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;
- 9 • adopt and apply City engineering design standards and construction specification;
- 10 • adopt and apply certain building standards code;
- 11 • adopt laws not in conflict with the terms and conditions for development established in
prior approvals; and
- exercise the City's power of eminent domain with respect to any part of the property.
(RJN No. 1.)

12 If the BIA takes the Phase 2 property into trust based on the Ordinance and First
13 Amendment to the DA, which was improperly recorded, then Plaintiffs will have lost their right
14 to referend. This is the irreparable harm that Plaintiffs seek to prevent by this Motion. (Barnes
15 decl. ¶6.)

16 Case law supports Plaintiffs' position that the Ordinance is ineffective until the residents
17 have the opportunity to referend. In the case of *Midway Orchard vs. County of Butte* (1990) 220
18 Cal. App. 3d 765, the trial court ruled that the DA in that case never became operative because
19 the resolution amending the general plan, upon which the DA was based, was not effective for a
20 period of 30 days after its passage to allow a referendum petition to be passed. Midway
21 (developer) appealed and the appellate court affirmed, writing: "Midway contends it has vested
22 development rights as a consequence of its development agreement. The trial court concluded
23 that since the resolution amending the general plan was subject to referendum, the resolution was
24 not effective for a period of 30 days after its appeal to allow a referendum petition to be
25 filed....[the trial courts conclusion is correct.]" (*Supra* at. p. 773.) The appellate court further
26 wrote that: "The [referendum] power is the power to determine whether a legislative act should
27 *become* law. It is not to determine whether a legislative act, once effective, should be appealed."
28 (*Supra* at. 781, italics in the original.) "In accord with this view of the referendum power,

1 neither the state statutes nor local ordinances subject to referendum go into effect during the time
2 permitted for the filing of a referendum petition. [Internal cites omitted] Thus, a 'prime purpose
3 of deferment of the effective date of ordinances is to preserve the right of referendum.'"

4 [Internal cites omitted.] (*Supra* at. p. 781.) The City's conduct in filing the First Amendment
5 puts that Amendment "into effect during the time permitted for the filing of a referendum
6 petition" as prohibited by law.

7 Government Code §§ 65867.5 and 65868 provide that DAs, including amendments
8 thereto, are subject to referendum. Because the City went ahead and filed the First Amendment,
9 removing the encumbrance from title, the BIA will take the land into Trust and deprive Plaintiffs
10 of their right to referend. (Barnes decl. ¶6.)

11 For the above reasons, a Temporary Restraining Order should be immediately issued to
12 prevent further harm to Plaintiffs as alleged and as set forth in the attached declarations in
13 support.

14 **IV. AN ORDER TO SHOW CAUSE RE PRELIMINARY INJUNCTION SHOULD**
15 **ALSO ISSUE**

16 Plaintiffs also request by this Motion an order to show cause (OSC) regarding the
17 preliminary injunction. (Cal. Rules of Court, Rule 3.1150(a).) A filed stamped copy of the
18 Petition is attached to the Barnes decl. as Exhibit 1. Pursuant to CRC Rule 3.1150(b), Plaintiffs
19 have requested that the Court file be made available in Department 24 at the time of making this
20 application by means of a request to the Department Clerk. (Barnes decl. ¶13.)

21 Plaintiffs request a full hearing on a Preliminary Injunction for the same reasons and
22 under the same authorities as set forth in support of the TRO, and request that an Order to Show
23 Cause be issued along with the TRO to afford Defendants the opportunity to show why they
24 should not be restrained and enjoined in the same manner for the remainder of this litigation.

25 A Preliminary Injunction is proper in the following relevant circumstances:

- 26 (1) When it appears by the complaint that the plaintiff is entitled to the relief
27 demanded, and such relief, or any part thereof, consists in restraining the
28 commission or continuance of the act complained of, either for a limited
period or perpetually.

1 (2) When it appears by the complaint or affidavits that the commission or
2 continuance of some act during the litigation would produce waste, or great
3 or irreparable injury, to a party to the action.

4 (3) When it appears, during the litigation, that a party to the action is doing,
5 or threatens, or is about to do, or is procuring or suffering to be done, some
6 act in violation of the rights of another party to the action respecting the
7 subject of the action, and tending to render the judgment ineffectual.

8 ...
9 (6) Where the restraint is necessary to prevent a multiplicity of judicial
10 proceedings.

11 As shown in the declarations submitted herewith, and as will be shown at the hearing on
12 a preliminary injunction, sufficient grounds exist for both the TRO and a preliminary injunction.

13 **V. EX PARTE RELIEF IS PERMITTED UNDER THESE CIRCUMSTANCES, AND**
14 **PLAINTIFF HAS COMPLIED WITH CALIFORNIA RULES OF COURT**

15 "An applicant [for an ex parte application] must make an affirmative factual showing in a
16 declaration containing competent testimony based on personal knowledge of irreparable harm,
17 immediate danger, or any other statutory basis for granting relief ex parte." (Cal. Rules of Court,
18 Rule 3.1202(c).)

19 As shown by the Declaration of Brigit S. Barnes in Support of Ex Parte Application,
20 there is an imminent and present danger of irreparable harm/immediate danger or other statutory
21 basis for granting relief ex parte, in that if Defendants are not immediately compelled to grant the
22 relief requested, Plaintiffs will suffer great and immediate irreparable harm if the First
23 Amendment is allowed to remain on record in such fashion that BIA considers title free of the
24 encumbrances created by the 2014 DA, because the property may be transferred into Trust. Once
25 taken into Trust, Petitioners will have been denied their statutory and California Constitutional
26 rights to referend the City's adoption of the Ordinance approving the First Amendment. This
27 damage is irreparable and cannot be undone.

28 **Notice Requirement**

Plaintiffs informed Defendant City of the need to file for this relief in writing on
December 12, 2016, and all known Defendants of the date of this hearing on December 15, 2016.
(BSB decl. ¶¶10-13, Exs. 2, 3, & 4.) Plaintiffs will have served this Motion by email on

1 December 19, 2016, all of which is before the 10:00 a.m. deadline before the required court date
2 as required by law. (Cal. Rules of Court, Rule 3.1201.) On December 15, 2016, Defendant City
3 indicated it would be filing a notice attempting to correct the defects contained in the First
4 Amendment to DA. As of this filing, an unsigned notice was received, but no evidence assuring
5 that the notice was recorded, nor any evidence that the City has advised BIA that the referendum
6 effected a suspension of the First Amendment of the DA. No offer from the City has been
7 received to communicate corrective notices to the Dept. of Interior. Plaintiffs are informed that
8 Defendant City and Real Party will be appearing to oppose the application. (Cal. Rules of Court,
9 Rule 3.1204(a); see Barnes decl. ¶¶11-13.)

10 In addition to the above required notice, Plaintiffs' counsel called Elk Grove City
11 Attorney Jon Hobbs on December 1, 2016, but did not reach him and left a voice-mail. Because
12 the call was not returned, Plaintiffs' counsel also sent a meet and confer letter to Mr. Hobbs on
13 December 12, 2016, regarding the subject matter of this Motion. (A copy of this meet and confer
14 letter is attached to the Barnes decl., ¶12, as Exhibit 3.) As a result of this meet and confer letter,
15 conversations were had among the parties to resolve this matter, which were ultimately not
16 successful, leading Plaintiffs to file this Motion.

17 **VI. CONCLUSION**

18 For all of the foregoing reasons and supporting facts and authorities, Plaintiffs
19 respectfully requests that the Court issue a Temporary Restraining Order, and set an Order to
20 Show Cause hearing for Preliminary Injunction.

21 Respectfully submitted,

22 Dated: December 19, 2016

BRIGIT S. BARNES & ASSOCIATES, INC.
A California Law Corporation

23
24 By: 

25 Brigit S. Barnes, Attorney for
26 Petitioners/Plaintiffs
27
28