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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

CACHIL DEHE BAND OF WINTUN
INDIANS OF THE COLUSA INDIAN
COMMUNITY, a federally
recognized Indian Tribe,

Plaintiff,

v.

KENNETH SALAZAR, Secretary of
the Interior, et al.,

Defendants.

No. 2:12-CV-3021-JAM-AC

**ORDER DENYING PLAINTIFFS'
MOTIONS FOR A TEMPORARY
RESTRAINING ORDER AND/OR WRIT OF
MANDAMUS; ORDER REQUIRING JOINT
STATUS REPORT ON MOTION TO
INTERVENE**

UNITED AUBURN INDIAN
COMMUNITY OF THE AUBURN
RANCHERIA

Plaintiff,

v.

KENNETH SALAZAR, et al.,

Defendants.

CITIZENS FOR A BETTER WAY, et
al.,

Plaintiffs,

v.

1 UNITED STATES DEPARTMENT OF
2 THE INTERIOR, et al.,
3 Defendants.
4

5
6 I. PROCEDURAL BACKGROUND

7 Before the Court are three Applications for Temporary
8 Restraining Orders ("TROs") and Preliminary Injunctions. The
9 first was filed by Plaintiff Cachil Dehe Band of Wintun Indians
10 of the Colusa Indian Community ("Colusa") (Case # 2:12-CV-3021-
11 JAM-AC, Doc. ## 8, 18).¹ The second was filed by the United
12 Auburn Indian Community of the Auburn Rancheria ("UAIC") (Case #
13 2:13-CV-64-JAM-AC, Doc. # 49). The third was filed by Dan Logue,
14 William F. Connelly, Stand Up for California!, Citizens for a
15 Better Way, Robert Edwards, Grass Valley Neighbors, James M.
16 Gallagher, Andy Vasquez, Roberto's Restaurant (collectively the
17 "Citizen Plaintiffs") (Case # 2:13-CV-64-JAM-AC, Doc. # 24).²
18 The Citizen Plaintiffs also seek a writ of mandamus. Each
19 application seeks to prohibit Defendants Kenneth Lee Salazar,
20 Secretary, U.S. Department of the Interior; Kevin K. Washburn,
21 Assistant Secretary - Indian Affairs, U.S. Department of the
22 Interior; the Bureau of Indian Affairs; and the U.S. Department
23

24 ¹ Case numbers 2:12-CV-3021-JAM-AC and 2:13-CV-64-JAM-AC were
25 consolidated into case number 2:12-CV-3021-JAM-AC on January 23,
26 2013. Pre-consolidation references to the 2:13-CV-64-JAM-AC
27 docket are included in this order for administrative convenience.

28 ² The TRO applications were all submitted upon order of the Court
without oral argument. Local Rule 230(g). A hearing for the
preliminary injunctions and the motion to intervene is scheduled
for March 20, 2013.

1 of the Interior (collectively "Defendants") from accepting a
2 parcel of land into trust for the Enterprise Rancheria of Maidu
3 Indians of California ("Enterprise"). Enterprise also seeks to
4 intervene as a defendant in this lawsuit (Case # 2:12-CV-3021
5 Doc. # 13). Each TRO is fully briefed by the parties.

7 II. BACKGROUND

8 At the heart of this litigation are two decisions by
9 Defendants to take a parcel of land near Olivehurst, CA into
10 trust for Enterprise (the "Proposed Site") in order to construct
11 a gaming facility. Pursuant to the Indian Gaming Regulatory Act
12 ("IGRA"), 25 U.S.C. § 2719(b)(1)(A), Defendants were required to
13 proceed through a "two-step determination" before taking land
14 into trust for Enterprise. The two-step determination was
15 required because the IGRA prohibits gaming on lands taken into
16 trust after October 17, 1988 unless an exception applies. The §
17 2718(b)(1)(A) exception permits such an acquisition if the
18 Secretary of the Interior (the "Secretary") consults with state,
19 local, and nearby tribal officials and determines that the
20 acquisition will be in the best interests of the tribe and not
21 detrimental to the surrounding community. Section 2718(b)(1)(A)
22 requires that the Governor of the state concur in the Secretary's
23 determination. On September 1, 2011, Assistant Secretary of
24 Indian Affairs Echo Hawk signed a Record of Decision ("ROD") that
25 the § 2718(b)(1)(A) exception was met with respect to the
26 Proposed Site. Simultaneously, AS-IA Echo Hawk sent a letter to
27 California Governor Brown, requesting his concurrence. Governor
28 Brown concurred by letter dated August 30, 2012 and Defendant

1 Washburn signed another ROD on November 21, 2012 and published it
2 in the Federal Register on December 3, 2012 announcing
3 Defendants' decision to acquire the Proposed Site in trust for
4 Enterprise. Because the legal description of the Proposed Site
5 in the original notice contained an error, a revised notice was
6 published on January 2, 2013.

7 Plaintiffs collectively oppose the acquisition of the
8 Proposed Site based on alleged violations of administrative
9 statutes governing such agency decisions. Plaintiffs' complaints
10 include causes of action pursuant to the Indian Gaming Regulatory
11 Act, the National Environmental Policy Act, the Indian
12 Reorganization Act of 1934, the Clean Air Act, and the
13 Administrative Procedure Act. With respect to the present
14 motions, Plaintiffs seek to preserve their challenges by
15 enjoining Defendants' transfer of the Proposed Site into trust so
16 that the merits of their challenges can be considered.

17 Plaintiffs argue that the threat that their suit will be barred
18 by the federal government's sovereign immunity once the Proposed
19 Site is transferred into trust necessitates injunctive relief.

20 Pursuant to 25 C.F.R. Part 151.12(b), the Proposed Site
21 could not be taken into trust for at least another 30 days after
22 December 3, 2012. In the past, Defendants took the position that
23 the Quiet Title Act ("QTA"), 29 U.S.C. § 2409a, barred suits such
24 as those brought by Plaintiffs in this case once land was
25 transferred into trust and Defendants accordingly stayed
26 transferring land into trust until legal challenges were
27 resolved. Defendants agreed to delay taking the Proposed Site in
28 this case into trust until February 1, 2013, but declined to stay

1 the acquisition any longer despite the ongoing litigation.
2 Defendants took the position that a 2012 Supreme Court case,
3 Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak,
4 made it clear that the QTA does not bar lawsuits like Plaintiffs'
5 and there was therefore no reason to delay the transfer because
6 the transfer would not divest this Court of jurisdiction to
7 review Defendants' actions and strip title from the government if
8 appropriate. 123 S. Ct. 2199 (2012).

9 Plaintiffs are collectively wary of Defendants' analysis of
10 the Patchak case, and they dispute the dispositive nature of its
11 holding. They therefore filed their motions for TROs and
12 Preliminary Injunctions in order to halt the transfer of the
13 parcel into trust.

14 III. OPINION

15 A. Temporary Restraining Order

16 1. Legal Standard

17 Fed. R. Civ. P. 65 provides authority to issue either
18 preliminary injunctions or temporary restraining orders. A
19 plaintiff seeking a preliminary injunction must demonstrate that
20 he is "[1] likely to succeed on the merits, [2] that he is likely
21 to suffer irreparable harm in the absence of preliminary relief,
22 [3] that the balance of equities tips in his favor, and [4] that
23 an injunction is in the public interest." Am. Trucking Ass'ns v.
24 City of Los Angeles, 559 F.3d 1046, 1052 (9th Cir. 2009) (quoting
25 Winter v. Natural Res. Def. Council, 129 S. Ct. 365, 374 (2008)).
26 The requirements for a temporary restraining order are the same.
27 Stuhlberg Int'l Sales Co. v. John D. Brush & Co., 240 F.3d 832,
28 839 n. 7 (9th Cir. 2001). A TRO is an emergency measure,

1 intended to preserve the status quo pending a fuller hearing on
2 the injunctive relief requested, and the irreparable harm must
3 therefore be clearly immediate. Fed. R. Civ. Proc. 65(b)(1).

4 2. Discussion

5 a) Irreparable Harm of Transferring Proposed
6 Site Into Trust

7 The primary focus of Plaintiffs' collective TROs is their
8 allegations of irreparable harm. Plaintiffs contend that the
9 transfer of the Proposed Site must be enjoined pending a hearing
10 on their preliminary injunction motions because once the transfer
11 occurs, this Court may well be without jurisdiction to remove the
12 parcel from trust. Defendants vigorously contest Plaintiffs'
13 position. Defendants argue that Patchak makes it clear that the
14 mere transfer of the Proposed Site into trust will not divest
15 this Court of jurisdiction.

16 Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v.
17 Patchak involved the 2005 determination of the Secretary of the
18 Interior to take land into trust for an Indian tribe in Michigan.
19 132 S. Ct. at 2203. The plaintiff in that case, Patchack, filed
20 suit challenging the acquisition of the parcel as violating the
21 Indian Reorganization Act of 1934 and the APA. Id. Patchak
22 contended that the tribe was not federally recognized in 1934,
23 and the Secretary was therefore prohibited from taking the land
24 into trust. Id. Patchak sought a declaration that the
25 acquisition was unlawful and an injunction preventing the
26 Secretary from taking title, but he did not assert an interest in
27 the land itself. Id. at 2203-04. Shortly after Patchak filed
28 his suit, the Secretary transferred the parcel into trust,

1 converting Patchak's suit into one that sought to divest the
2 government of its title, and the District Court dismissed
3 Patchak's suit upon finding that he lacked prudential standing.
4 The District Court rejected the Secretary's argument that
5 sovereign immunity derived from the QTA barred the suit,
6 contradicting three Circuits' decisions on that issue. Id. at
7 2204.

8 Patchak's suit was brought pursuant to the APA, which waives
9 federal sovereign immunity from a suit "seeking relief other than
10 money damages and stating a claim that an agency or an officer or
11 employee thereof acted or failed to act in an official capacity
12 or under color of legal authority." Id. (quoting 5 U.S.C. §
13 702). The APA's waiver, however, does not override another
14 "statute that grants consent to suit expressly or impliedly
15 forbids the relief which is sought." Id. The Secretary
16 contended in Patchak that the QTA overrides the APA's waiver
17 because the QTA authorizes a suit so long as it "does not apply
18 to trust or restricted Indian lands," blocking through its
19 express language the APA's waiver of sovereign immunity for suits
20 seeking to strip the government's title to Indian lands. Id.
21 (quoting 28 U.S.C. 2409a(a)).

22 The Supreme Court considered the interplay between the QTA
23 and the APA and determined that the QTA only blocks suit when a
24 claimant prosecutes a quiet title action. Id. at 2210. A quiet
25 title action for QTA purposes has two key components: 1) it must
26 contest the government's title, and 2) the claimant must assert
27 some competing interest in the property. Id. at 2206. If a suit
28 lacks either component, then the QTA's limitation on sovereign

1 immunity does not apply. Id. Applying this definition of a
2 quiet title action, the Supreme Court held that Patchak's suit
3 was not barred because the federal government had waived
4 sovereign immunity in the APA. Id. at 2207. Patchak did not
5 seek title to the land or otherwise claim an interest in it, and
6 he was therefore not prosecuting a quiet title action. Id. at
7 2207-08. Even though all parties agreed that Patchak's suit did
8 seek to divest the federal government of its title to the land,
9 it was not barred by the QTA's Indian lands exception. Id. at
10 2208.

11 Patchak is indistinguishable from the present case because
12 no Plaintiff claims an interest in the Proposed Site, meaning
13 that this is not a quiet title action and the QTA's limitation on
14 suits related to Indian lands does not apply. Patchak squarely
15 addressed the supposedly irreparable harm that Plaintiffs
16 complain of and indicated that federal district courts do have
17 the power to strip the federal government of title to land taken
18 into trust for an Indian tribe under the APA so long as the
19 claimant does not assert an interest in the land. In this case,
20 Plaintiffs only seek to divest the government of its title. They
21 do not assert an interest in the Proposed Site. Plaintiffs have
22 therefore not shown that the mere act of transferring the
23 Proposed Site into trust on February 1, 2013 constitutes
24 irreparable harm, and a TRO is therefore inappropriate.

25 b) Irreparable Harm of Construction on Proposed
26 Site

27 Plaintiffs also argue that once the Proposed Site is
28 transferred into trust, construction and/or gaming can begin

1 which will cause irreparable harm relevant to their NEPA and IGRA
2 claims. Defendants rely on a declaration submitted by Glenda
3 Nelson, who testifies that she is the Chair of Enterprise. Ms.
4 Nelson indicates that no construction will take place on the
5 Proposed Site for at least 120 days after February 1, 2013.
6 Additionally, Ms. Nelson testifies that Enterprise has agreed to
7 provide 30 days notice to this Court prior to any construction at
8 the Proposed Site.

9 Colusa objects to the admission of Ms. Nelson's testimony
10 based on the relevance of her entire declaration and the
11 admissibility of several specific statements for various reasons
12 (Case. # 2:12-CV-3021-JAM-AC, Doc. # 37). Colusa's basic
13 position is that Ms. Nelson's declaration does little to
14 guarantee that construction and/or gaming will not commence at
15 the proposed site prior to the March 20, 2013 hearing date.

16 While Colusa's concerns might support a finding of
17 irreparable harm if construction and gaming were to occur without
18 any notice, Enterprise and Defendants both represent that 30 days
19 notice will be given before any activity commences at the
20 Proposed Site. Given this promise, they are further explicitly
21 ordered to provide such notice to this Court at least 30 days
22 prior to commencing any activity on the Proposed Site. This
23 notice will be sufficient for the Court to revisit the harm
24 caused by activity at the site without issuing a TRO.
25 Accordingly, Plaintiffs are unable to show immediate irreparable
26 harm from construction and/or gaming at the Proposed Site, making
27 a TRO inappropriate. Defendants and Enterprise are also
28 cautioned that any activity at the Proposed Site prior to the

1 scheduled March 20, 2013 hearing will not necessarily sway any
2 future equitable analysis in their favor, and they therefore
3 proceed with such activity at their own peril. The Court has
4 relied on Defendants and Enterprise's representations in
5 determining that irreparable harm is not imminent, but the Court
6 has not reached the merits of Plaintiffs' claims. In the event
7 that Plaintiffs' claims are found to be meritorious, any further
8 investment in the Proposed Site may be wasted if the Court strips
9 the government's title from the Proposed Site.

10 B. Writ of Mandamus

11 The Citizen Plaintiffs also seek a writ of mandamus
12 compelling Defendants to comply with 25 C.F.R. § 151.12(b) by
13 staying any transfer of the Proposed Site into trust pending the
14 outcome of this litigation. Defendants oppose a writ of mandamus
15 on the same grounds that they oppose issuance of a TRO.

16 "For mandamus relief, three elements must be satisfied: '(1)
17 the plaintiff's claim is clear and certain; (2) the [defendant
18 official's] duty is ministerial and so plainly prescribed as to
19 be free from doubt; and (3) no other adequate remedy is
20 available.'" Johnson v. Reilly, 349 F.3d 1149, 1154 (9th Cir.
21 2003) (quoting R.T. Vanderbilt Co. v. Babbitt, 113 F.3d 1061,
22 1065 n. 5 (9th Cir.1997)).

23 The Citizens Plaintiffs' motion for a writ fails because
24 they are unable to show that no other adequate remedy is
25 available. In this case, for the reasons discussed with respect
26 to the TRO, a writ is unnecessary at this point because the
27 Citizen Plaintiffs can still proceed with their Preliminary
28 Injunction Motion on March 20, 2013. Additionally, the motion

1 for a writ is based on 25 C.F.R. § 151.12(b), but that section
2 only requires a 30 day stay prior to transferring property into
3 trust. It is undisputed that Defendants complied with that
4 requirement in this case. Finally, the Citizen Plaintiffs rely
5 on State of S.D. v. U.S. Dep't of Interior, 69 F.3d 878 (8th Cir.
6 1995), which held that judicial review must be available prior to
7 land being taken into trust. That case is called into question
8 by Patchak, however, because Patchak established that judicial
9 review of such decisions can occur after property is taken into
10 trust. The Citizen Plaintiffs' motion for a writ of mandamus is
11 accordingly denied.

12 C. March 20, 2013 Hearing

13 Plaintiffs' motions for preliminary injunction and
14 Enterprise's motion to intervene remain calendared for March 20,
15 2013. In light of this order, Plaintiffs are given leave to file
16 supplemental briefs in support of their motions not to exceed 15
17 pages by February 15, 2013, or they may alternatively file one
18 consolidated brief not to exceed 25 pages by the same date.
19 Defendants are given leave to file a consolidated opposition to
20 Plaintiffs' supplemental briefing not to exceed 25 pages by March
21 1, 2013. Plaintiffs may file individual reply briefs not to
22 exceed 10 pages or one consolidated reply brief not to exceed 15
23 pages by March 8, 2013. All parties are to exercise extreme
24 caution to not repeat arguments already briefed and presented to
25 this Court.

26 As to the Motion to Intervene, Plaintiffs are ordered to
27 meet and confer with Enterprise before filing any oppositions to
28 this motion. This Motion to Intervene appears, on its face, to

1 be meritorious and the Court will not look favorably upon any
2 opposition that is filed simply to create additional and
3 unnecessary work for the Court and Proposed Intervenors.
4 Accordingly the Court orders the parties to file a joint status
5 report on or before February 8, 2013. The parties should inform
6 the Court as to whether any opposition to the Motion to Intervene
7 will be filed and the general grounds upon which the opposition
8 will be based. If there is no opposition to the Motion to
9 Intervene, the parties should submit a stipulation to the Court
10 granting this motion. The parties are hereby notified that even
11 if the Court grants the Motion to Intervene, it is considering
12 placing a number of limitations and/or conditions on Enterprise
13 including, but not limited to, prohibiting Enterprise from filing
14 separate briefs in connection with substantive motions in this
15 case.

16 17 IV. ORDER

18 1. Plaintiffs' Motions for Temporary Restraining Orders are
19 DENIED.

20 2. Defendants and Enterprise are ordered to provide 30 days
21 notice to the Court prior to commencing any activity at the
22 Proposed Site.

23 3. The Citizens Plaintiffs' Motion for Writ of Mandamus is
24 DENIED.

25 4. Plaintiffs' Motions for Preliminary Injunction will be heard
26 on March 20, 2013 at 9:30 AM in Courtroom No. 6 of this Court.
27 Plaintiffs' supplemental briefing must be filed by February 15,
28 2013, Defendants may respond by March 1, 2013, and Plaintiffs may

1 reply by March 8, 2013.

2 5. The parties are ordered to meet and confer regarding
3 Enterprise's pending Motion to Intervene and file a joint status
4 report addressing that motion on or before February 8, 2013.

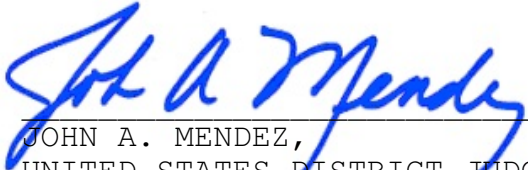
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6 IT IS SO ORDERED.

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8 Dated: January 30, 2013

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JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE

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