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UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

COUNTY OF SANTA BARBARA,

Plaintiff,

v.

KEVIN HAUGRUD, in his official capacity as Acting Secretary of the Interior; LAWRENCE ROBERTS, in his official capacity as Principal Deputy Assistant Secretary – Indian Affairs; AMY DUTSCHKE, in her official capacity as Director, Pacific Region, Bureau of Indian Affairs; THE DEPARTMENT OF THE INTERIOR, an agency of the United States of America; THE BUREAU OF INDIAN AFFAIRS, a division of the United States Department of Interior; and DOES 1 through 100,

Defendants.

Case No: 2:17-cv-703

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

DATE: TBD
TIME: TBD
COURTROOM:
JUDGE:

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Pursuant to Federal Rule of Civil Procedure 65 and Local Rule 65-1, the County of Santa Barbara (the "County") hereby requests that the Court issue a Temporary Restraining Order ("TRO") and preliminary injunction. On January 27, 2017, the County notified Rebecca Ross, counsel for the Pacific Regional Director in the underlying appeal, of its intent to file this request.

I. INTRODUCTION.

The County exercises taxing, regulatory, and land use and planning jurisdiction over the unincorporated areas of the County and is responsible for the public health of safety of those in its jurisdiction. On January 19, 2017, the Department of Interior ("DOI"), Bureau of Indian Affair's ("BIA") issued a final agency action to remove over 1,400 acres of agricultural land in the Santa Ynez Valley from the County's jurisdiction, an area larger than the most populous city in the Valley, and take it into trust for the Santa Ynez Band of Chumash Indians (the "Tribe"). The trust acquisition permits the Tribe to urbanize the property with 143 residences and 30 acres of tribal facilities in contravention of all local land use and planning regulations, all without completing an adequate environmental review or fee-to-trust analysis. The County seeks a TRO and preliminary injunction removing the property from trust and/or prohibiting any construction activities during the pendency of this litigation in order to preclude irreversible development *prior to the DOI meeting its basic legal and environmental obligations* under the National Environmental Policy Act ("NEPA") and its own fee-to-trust regulations.

As discussed fully below, the County meets all of the requirements for preliminary injunctive relief in that: (1) it is likely to succeed on the merits of its claims; (2) absent preliminary injunctive relief, the County will suffer irreparable and imminent harm; (3) the balance of equities weighs strongly in favor of the County; and (4) an injunction is in the public interest. Thus, the County respectfully requests this Court grant its request for injunctive relief.

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1 II. **STATEMENT OF RELEVANT FACTS.**

2 In November 2013, the Chumash Tribe submitted an amended Fee-to-
3 Trust Application ("Application") requesting the BIA accept five parcels of
4 land in the Santa Ynez Valley, and commonly known as "Camp 4," into trust
5 (collectively the "Property" or "Camp 4"). (Declaration of Amber Holderness
6 in Support of County of Santa Barbara's Ex Parte Application for TRO and
7 OSC Why Preliminary Injunction Should Not Issue ["Holderness Decl."], filed
8 concurrently herewith, at Ex. A.) The Property totals approximately 1,433 acres
9 and is located in the middle of the Santa Ynez Valley in Santa Barbara County,
10 California. (*Id.* at B, p. 1-1, 1-5 to 1-6.)

11 In May 2014, the BIA released a Final EA for the Application. (*Id.* at
12 cover page.) The EA identified two alternatives for development of the
13 Property, Alternatives A and B, and a third alternative of no action, Alternative
14 C. (*Id.* at C, p. 2-3.) Alternative A would convert the 1,433 acre property into
15 143 five-acre residential lots, covering 793 acres. (*Id.*) Alternative B would
16 consist of 143 one-acre residential lots, covering approximately 194 acres, and
17 30 acres of tribal facilities. (*Id.*) The tribal facilities would include a
18 community center and banquet hall/exhibit facility, office complex, and tribal
19 community space. (*Id.* at p. 2-15.) The community center would host 100
20 special events per year with up to 400 attendees per event. (*Id.* at p. 2-13.) As
21 to either alternative, the Tribe adopted a Tribal Resolution stating that the Tribe
22 would honor the Williamson Act contract on the parcels, requiring them to stay
23 in agricultural use until 2023. (*Id.* at Ex. D, p. 4-24.)

24 On October 17, 2014, the BIA issued a FONSI for the project based on
25 the Final EA. (Holderness Decl. at Ex. E.) In the FONSI, the BIA indicated
26 that the Tribe chose Alternative B as its preferred development alternative. (*Id.*
27 at p. 5.) Then, on December 24, 2014, the BIA issued an NOD for the
28 acquisition stating the BIA's intent to take the property into trust. (Holderness

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Decl. at Ex. F, p. 25.) Following several appeals, on January 19, 2017, Principal Deputy Assistant Secretary – Indian Affairs Lawrence Roberts ("Roberts") issued a final decision for the DOI, which upheld taking the Property into trust and authorized the Pacific Regional Director to approve the conveyance document to do so. (*Id.* at Ex. G.) The decision was effective immediately for the DOI. 25 C.F.R. § 151.12.

On January 20, 2017, Defendant Dustchke approved the conveyance of the Property into trust. (Request for Judicial Notice in Support of the County of Santa Barbara's *Ex Parte* Application for a TRO and OSC Why Preliminary Injunction Should Not Issue ["RJN"], filed concurrently herewith, at Ex. 1.) The Tribe announced that Camp 4 was in federal trust and the Tribe was beginning the process of building homes on the property on January 23, 2017. (*Id.* at Ex. 2.) On January 26, 2017, the Chumash Tribe recorded a deed of trust with the County Clerk-Recorder indicating the land was in trust. (*Id.*)

III. STANDARDS FOR PRELIMINARY INJUNCTIVE RELIEF.

Under Federal Rule of Civil Procedure 65, the Court may issue preliminary injunctive relief pending resolution of a plaintiff's claims on the merits. Fed. R. Civ. P. 65. A preliminary injunction preserves the status quo and prevents irreparable loss before judgment. *Textile Unlimited, Inc. v. A. BMH & Co., Inc.*, 240 F.3d 781, 786 (9th Cir. 2001). A plaintiff must establish: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm absent a preliminary injunction; (3) the balance of equities tips in favor of issuing an injunction; and (4) an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 374 (2008). "A preliminary injunction [may] issue where the likelihood of success is such 'that serious questions going to the merits were raised and the balance of hardship tips sharply in [plaintiff's] favor.'" *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132, 1135 (9th Cir. 2011). The standard for issuing a TRO is

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1 the same as the standard for issuing a preliminary injunction. *Niu v. U.S.*, 821
2 F.Supp.2d 1164, 1167 (C.D. Cal. 2011).
3 Although preliminary injunctions are typically prohibitory, courts may
4 grant mandatory preliminary injunctions, such as removing the property from
5 trust, under Federal Rule of Civil Procedure 65 when a prohibitory injunction is
6 inadequate or ineffective. *Franco-Gonzales v. Holder*, 767 F.Supp.2d 1034,
7 1061 (C.D. Cal. 2010). In the context of fee-to-trust acquisitions, the DOI has
8 acknowledged that district courts can order the DOI to take land out of trust or
9 halt construction activities. (RJN at Ex. 3, p. 39, n.20 (stating DOI "will take
10 the land out of trust if ordered to do so by Court" and DOI "has taken land out
11 of trust in other cases"); Ex. 4, p. 2. (stating "this Court can order the United
12 States to take land out of trust").)
13 Under the above standards, this Court should issue a TRO and
14 preliminary injunction: (1) removing the Property from trust; and/or (2)
15 prohibiting any construction activities on the Property to effectively preserve
16 the status quo pending resolution of the issues.

17 **IV. THE COUNTY IS LIKELY TO SUCCEED ON ITS CLAIMS.**

18 The County only needs to show that "serious questions" exist as to its
19 likelihood of success. *See Alliance for Wild Rockies*, 632 F.3d at 1134-35. The
20 record in this proceeding establishes that the County is likely to succeed on the
21 merits of its claims, or at the very least that serious questions exist.

22 **A. THE BIA VIOLATED NEPA.**

23 The County is likely to succeed on the merits because Defendants failed
24 to comply with NEPA's substantive requirements. As discussed fully below,
25 the BIA failed to prepare an EIS for the project despite the evidence that it may
26 have significant impacts on the environment. The BIA also failed to take a hard
27 look at the impacts of the project or adequately consider the cumulative
28 impacts, mitigation measures, or alternative in the Final EA that it did prepare.

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Further, the BIA failed to prepare a supplemental environmental review discussing significant changes in circumstances bearing on the proposed action's impacts prior to the DOI issuing a final decision.

1. The BIA Was Required to Prepare an EIS.

For all "major Federal actions significantly affecting the . . . human environment," NEPA requires an agency to prepare an EIS. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.3; 43 C.F.R. § 46.400. To trigger an EIS, a plaintiff need only raise "substantial questions whether a project ***may*** have a significant effect. . . ." *Blue Mountain Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998) (emphasis added). When such questions are raised, an agency violates NEPA by failing to prepare an EIS. *Anderson v. Evans*, 371 F.3d 475, 494 (9th Cir. 2004). "Significant" for purposes of NEPA requires consideration of the context and intensity of a project. 40 C.F.R. § 1508.27. Context refers to the setting in which the action takes place. 40 C.F.R. § 1508.27(a). Intensity means "the severity of the impact" and refers to the degree to which the agency action affects the locale and interest in which the proposed action takes place. *Id.* § 1508.27(b). Here, the BIA failed to prepare an EIS despite evidence of the significance of its proposed action.

As to its context, the development of the Property will convert agricultural uses to residential, event, and tribal facility uses and bring a considerable addition of residents (415), employees (40+) and visitors (800 per weekend) to a rural area. (Holderness Decl. at Ex. C, p. 2-13; Ex. G, p. 3-38 to 3-39.) As recent as 2009, that rural area was found lacking resources necessary to support such a development. (Ex. J at AR0195.00429-AR0195.00434.) Thus, the project is significant in context, requiring an EIS.

Further, the intensity of the project is significant. The acquisition and development implicate several of the intensity factors enumerated by the Council on Environmental Quality for consideration. In particular, the

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1 acquisition and development: (1) impact unique geographic characteristics; (2)
2 threaten protective Federal, State, or local laws or requirements; (3) impact
3 endangered or threatened species or their habitat; (4) impact public health and
4 safety; (5) are controversial; and (6) have adverse impacts. 40 C.F.R. §
5 1508.27(b). Degradation of one of these factors requires the preparation of an
6 EIS. *See Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir. 1988).
7 Several would be degraded by the acquisition and development.

8 First, development of the Property would impact unique geographic
9 considerations. Camp 4 would convert 1,227 acres of agricultural land (all but
10 206 acres for vineyard) to other uses. (Holderness Decl. at Ex. C, p. 2-3.) The
11 conversion of agricultural land to other uses is of great significance to the State,
12 region, and locality because agriculture provides economic and environmental
13 benefits, as well as protects the recharging of groundwater basins, wildlife
14 habitats, open space, and visual relief for residents. (Holderness Decl. at Ex. J,
15 p. AR0195.00365-395, 408, 423, 426-427, 432, 453-456.) Such a conversion
16 also fuels loss of surrounding agricultural uses. The growth of urban
17 development in agricultural areas brings land use conflicts that can increase
18 regulatory costs and lead to trespass, vandalism, nuisance complaints, littering,
19 and grass fires, which decrease farming potential and crop productivity. (*Id.* at
20 p. AR0195.00391-92, 441-47.) The division of agricultural parcels into smaller
21 sizes likewise makes acreages less viable for agriculture in the future and leads
22 to a cycle of urbanization by other landowners. (*Id.*)

23 Second, development of the Property would violate numerous local laws
24 and regulations that protect and promote the public health, safety, and general
25 welfare of the residents and businesses of the County. The land use designation
26 of the Property is Agricultural Commercial (AC) and the Zone is Agriculture II,
27 100 acres minimum lot size. (Holderness Decl. at Ex. H, p. 3-59.) Therefore,
28 the maximum theoretical subdivision/development potential for the Property

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would be 14 lots with 14 main residences. Thus, the development violates the County Comprehensive Plan, including the Santa Ynez Valley Community Plan (SYVCP), as it greatly exceeds allowable uses and densities for the area and is inconsistent with these plans. (*See, e.g.*, *id.* at Ex. J, p. AR0195.00361-395, 402-405, 423, 426-434, 437-451.) Likewise, the development would violate current agricultural zoning, the County zoning ordinance, and other County Codes such as the Agricultural Buffer and Grading ordinances and Outdoor Lighting Regulations. (*Id.* at AR0195.00436-00451.)

The project also is inconsistent with the Williamson Act and the County's Uniform Rules. Under the Williamson Act, the County can enter into a contract with the landowner to restrict the Property to agricultural use. Gov. Code § 51200 *et. seq.* In return, the Tribe receives property tax assessments that are much lower than fair market value. *Id.* Under the County Uniform Rules, all land under contract must be in agricultural production except for 2 acres. All non-agricultural use, including residential and personal use, must occur within the 2 acres. (Holderness Decl. at Ex. J, p. AR0195.00403.) The Property has been subject to a Williamson Act Contract since 1971 that does not expire until 2023. (*Id.* at D, p. 4-24.)

Third, the proposed development of the Property would threaten protected species and habitats. The selected development alternative would remove 50 oak trees on the property, which are protected and provide habitat to many other species. (*Id.* at p. 4-40.) The removal would occur without proper mitigation, significantly impacting biological resources in the area. (*Supra*, § IV.A.2.b.)

Fourth, public services in the area would be impacted. The proposed development of the Property could result in at least 415 new residents to the area, as well as 800 event attendees per weekend. (Holderness Decl. at Ex. C, p. 2-13; Ex. I, p. 3-38.) As County expert staff pointed out during the comment

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period, adding 415 residents and 800 visitors a week requires: (1) the need for an additional one-half to one Sheriff's deputy in the area; (2) an increase in the need for fire and emergency response services; (3) an increase in water use in the area from the Santa Ynez Uplands Groundwater Basin, which basin is already in a state of overdraft; (4) an increase in the solid waste in the area; (5) an increase in traffic on the rural roads; and (6) an increase in projected student growth of approximately 22.78 elementary students, 15.73 middle school students, and 25.74 high schools students. (*Id.* at Ex. J, pp. 22-30.)

Fifth, the proposed action is controversial. "The term 'controversial' refers to cases where a substantial dispute exists as to the size, nature, or effect of the major federal action rather than to the existence of opposition to a use." *Found. for N. Am. Wild Sheep v. U.S. Dep't of Agric.*, 681 F.2d 1172, 1182 (9th Cir.1982) (internal quotations omitted). Several parties, including several experts in their respective fields, disputed the findings of the Final EA. For instance, County Fire, the County Planning and Development Department, the County Public Works Department, and the Sheriff's Office disagreed with several of the conclusions in the Final EA. (Holderness Decl. at Ex. J, pp. 16-30.) They opined that the Final EA was inadequate or incorrect as to its analysis of land use issues and impacts to traffic, water, waste, and public services, including law enforcement and fire services. (*Id.*)

Several other experts disagreed with the Final EA findings as well. Biologist Lawrence Hunt opined that the oak tree mitigation program was inadequate and that impacts on the Vernal Pool Fairy Shrimp and other wildlife were not sufficiently addressed. (*Id.* at Ex. K.) The Audubon Society opined that the biological survey for the project was inadequate. (*Id.* at Ex. L.) The California Department of Fish and Wildlife opined that the residential development would modify the urban-wildlife interface and create edge effects to surrounding habitats and concurred with the County's recommended oak tree

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replacement ratio. (*Id.* at Ex. L.) Even the Final EA agrees that both of the project alternatives "would adversely impact water of the U.S., special-status species, protected oak trees, and migratory birds." (*Id.* at Ex. C, p. 2-13.)

With respect to water and traffic impacts, the Santa Ynez Rancho Estates Mutual Water Company found the analysis of water impacts flawed. (*Id.* at Ex. N.) The Santa Ynez River Water Conservation District, Improvement District No. 1, which supplies water in the area, found the water estimates for Camp 4 understated. (*Id.* at Ex. O, p. 9-10.)

As to traffic, the California Department of Transportation ("Caltrans") advised the BIA that the traffic study supporting the EA was flawed and misrepresented the actual operating conditions. (*Id.* at Ex. P.) The traffic study used an incorrect minimum operating standard for Highway 154 and Highway 246, misapplied methodology outlined in the Highway Capacity Manual, and failed to address appropriate mitigation. (*Id.*) Ultimately, Caltrans opined that the FONSI did not adequately address its concerns or the traffic impacts and did not fulfill the burdens of NEPA. (*Id.* at Ex. Q.)

Finally, the proposed action would have adverse impacts. 40 C.F.R. § 1508.27(b)(1). As discussed above, it would adversely impact agricultural resources, water, waste, traffic, schools, fire services, emergency and law enforcement services, and protected species, flora, and habitats. Further, it would impact visual resources. The proposed development is in a rural area with scenic roads where it will stand in stark contrast to it surroundings and likely preclude views of ridge lines, hillsides, and vegetation. (*Id.* at Ex. B, p. 1-5 to 1-6; Ex. H, Fig. 3-59a & 3-59b, p. 3-82 to 3-83.)

Based on the above, among other issues, the County likely will prevail on showing that the proposed action raises significant questions about its effect on the environment requiring an EIS and, therefore, that the BIA violated NEPA by failing to prepare one.

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2. The Final EA Failed to Meet the Requirements of NEPA.

The County also is likely to prevail on its NEPA claim that the Final EA that the BIA did prepare was wholly inadequate. Even with an EA, NEPA requires a federal agency to take a "hard look" at the impacts of its proposed federal action. *Sierra Nev. Forest Protection Campaign v. Weingardt*, 376 F.Supp.2d 984, 991 (E.D. Cal. 2005). Impacts include "ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative." 40 C.F.R. § 1508.8.

An EA also must fully assess the cumulative impacts of a project. *Te–Moak Tribe of Western Shoshone of Nev. v. U.S. Dept. of Interior*, 608 F.3d 592, 603 (9th Cir. 2010). In assessing cumulative impacts, "some quantified or detailed information is required. Without such information, neither the courts nor the public ... can be assured that the [agency] provided the hard look that it is required to provide." *Te-Moak Tribe*, 608 F.3d at 603 (citation omitted).

In addition, an EA must contain sufficient detail regarding the mitigation measures to ensure the environmental consequences have been fairly evaluated. *Neighbors of Cuddy Mt. v. U.S. Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998); *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000). It must provide an estimate of how effective mitigation measures would be if adopted, or give a reasoned explanation as to why such an estimate is not possible. *Neighbors of Cuddy Mt.*, 137 F.3d at 1381. Merely listing mitigation measures is insufficient. *Id.* at 1380.

Finally, an EA must study, develop and describe appropriate alternatives to the proposed federal action. 42 U.S.C. § 4332(2)(E). The range of alternatives is essential to "sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public." 40 C.F.R. § 1502.14. An agency must "rigorously explore and objectively evaluate

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all reasonable alternatives." *Id.* at § 1502.14(a). "The existence of a viable but unexamined alternative renders an [EA] inadequate." *Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008).

Even if an EA were an appropriate environmental review in this case, which it was not, the Final EA prepared by the BIA failed the above requirements. In the Final EA, the BIA failed to take the necessary hard look at the potential environmental impacts of the project, cumulative impacts, mitigation measures, and reasonable alternatives.

a. The BIA Did Not Take the Necessary Hard Look.

The Final EA failed to take a hard look at ecological, aesthetic, economic, social, and health impacts. For example, an underlying and major issue with the Final EA was that the BIA did not provide enough information about the basic components of the proposed developments, such as the full scope of the residential, including any accessory structures, or tribal facilities development. (Holderness Decl. at Ex. C, p. 2-3, 2-12 to 2-16.) Without this information, the BIA and County lacked basic components of the project, including: (a) the number of new people that would be accessing the property for events or residing or staying on the property; and (b) the design, size and height of the residences for fire safety, visual impacts, and other factors. (*Id.*) The County and BIA thus could not properly analyze the impacts of the project.

The Final EA also fails to adequately address ecological impacts. For example, the Final EA summarily and wrongly concluded that the proposed development will be similar to other area developments. Thus, it did not adequately analyze the proposed development's compatibility with and impact on adjacent land uses. (*Id.* at D, p. 4-21.) No other development bordering Camp 4 has one-acre residences, which is an urban development. Most parcels are required to be 100 acres. (*Id.* at Ex. H, Fig. 3-8.) Such an incompatible use would impact adjacent uses. (*Id.* at Ex. J, p. AR0195.00391-92, 441.)

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Further, the Final EA failed to properly analyze economic, social, and health impacts as it contained factual inaccuracies, conclusory statements, and improper assumptions in the analysis of fire protection and emergency medical services, law enforcement, traffic, and water. For example, several sections of the Final EA state that the County would provide emergency and structural fire protection services to the project area, despite there being no agreement in place to do so. (*Id.* at Ex. H, p. 3-68 to 3-69.) Similarly, the Final EA states that County Fire would provide wild fire protection services. County Fire does not have a contract to do so though. (*Id.*; Ex. R, p. 5-10.) Also, as discussed above, the traffic study contains numerous errors. (*Supra*, § IV.A.1, p. 9.) These inadequacies render the Final EA inadequate under NEPA.

Finally, the Final EA failed to properly analyze aesthetic impacts. For example, the Final EA does not describe or provide a rendering of the size, style or height of the proposed 143 residences or tribal facility. (*See generally* Holderness Decl. at Ex. C.) Yet the project is located adjacent to State Highway 154, and there is a scenic design overlay over and surrounding Highway 154. (*Id.* at Ex. H, p. 3-82 to 3-83.)

b. The Mitigation Measures Were Inadequate.

The mitigation measures contained in the Final EA do not provide the detail and discussion required to support a finding of no significant impact. For most of the resources, the mitigation measures simply list Best Management Practices without a discussion of their effectiveness or ability to reduce a specific impact to an insignificant level. (*Id.* at Ex. R.) Likewise, the "protective" mitigation measures identified in the Final EA provide no data regarding their effectiveness or how they mitigate a particular impact. (*See, e.g.*, *id.* at Ex. R, p. 5-4; Ex. E, p. 11, 14.) This is insufficient under NEPA. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998).

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In addition, for those mitigation measures that provide some detail, they do not sufficiently minimize or avoid the impacts. For example, the mitigation measures discussing funding and contractual mitigation of fire and law enforcement services discuss entering into new agreements with the Sheriff and Fire. (Holderness Decl. at Ex. R, p. 5-10.) Likewise, with traffic impacts, the Final EA stated that the Tribe will contribute a fair share for traffic improvements, which does not alleviate the impact. (*Id.* at p. 5-8.) For the removal of oak trees, the Tribe proposes to mitigate the loss with replacement at a no net loss ratio. (*Id.* at p. 5-4.) The County requires a 15:1 replacement ratio to account for the less than 100% survival rate and mitigation of lost habitat until the trees mature. (*Id.* at Ex. J, AR0195.00399.) The Department of Fish and Game agreed that the County's replacement ratio should be used. (*Id.* at Ex. M, p. 2.) For water resources, the mitigation measures do not address any mitigation other than prohibiting turf watering during declared drought emergencies, which does not even consider the impacts independent of a drought. (*Id.* at Ex. R, p. 5-3.) Further, it is insufficient during drought conditions in which significant water restrictions may be imposed on surrounding properties. (*See, e.g.*, RJN at 5 [requiring a 25% reduction in water usage statewide].)

The BIA recognized the deficiency of the mitigation measures in the FONSI as the Tribe adopted additional resolutions after the comment period for the Final EA. (Holderness Decl. at Ex. E, p. 7.) Specifically, the Tribe passed Resolution 948 establishing a Santa Ynez Tribal Police Department to reduce the burden on the Sheriff's Office and Resolution 949, which provides some additional funding for local schools. (*Id.*) These resolutions do not address all of the failed mitigation measures. Further, the FONSI does not analyze the effectiveness of the additional mitigations. It does not analyze the functionality of the Tribal Police Department, its impact on law enforcement services, or

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operational date. (*Id.*) Likewise, it does not analyze how a grant set aside for school districts equal to the taxes paid for 2013/2014, which were based on reduced rates due to the land being in an agricultural preserve, is sufficient to mitigate residential land uses that bring more children to the area. (*Id.*)

c. The Cumulative Impact Analysis Was Inadequate.

The Final EA stated that near-term cumulative conditions were established by reviewing the cumulative project database maintained by the County and considering the addition of the hotel and casino expansion on the Reservation. (*Id.* at Ex. D, p. 4-57.) As to long-term cumulative conditions, the Final EA stated that they were established using the 20-year build out forecasts of the Santa Ynez Valley Community Plan. (*Id.*) The Final EA, however, does not breakdown actual increases in population, businesses, or other uses and their impacts such that it is clear the impacts were actually studied. (*Id.* at p. 4-59 to 4-74.)

Further, the impact analysis did not fully consider the casino and Reservation development, nor other foreseeable tribal developments in the area. Until responding to comments on the Final EA in the FONSI, the BIA did not mention the 6.9 acres of land in the Valley approved to be taken into trust for the Tribe by the BIA or other proposed trust acquisitions in the area. (*Id.* at Ex. D, p. 4-57 to 4-58.) Thus, the increase in patrons from that project could not have been analyzed in the Final EA, which could be significant. On the 6.9 acres, the Tribe plans to develop a Tribal museum, cultural center, and 27,600 square foot commercial retail facility, a commemorative park, and 100 parking spaces. *Preservation of Los Olivos et al. v. Pacific Regional Director*, 58 IBIA 278, 281 (2014).

Likewise, the BIA did not analyze the need for increased public service and resources impacts due to the significant casino expansion on the Tribe's Reservation, which will add 215 hotel rooms and over 500 parking spaces and

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thus many more people to the area. (Holderness Decl. at Ex. D, p. 4-57 to 4-58; RJN at Ex. 6.) For instance, the traffic study in the Final EA indicates the casino expansion was not addressed by the cumulative impacts analysis, and further confirms the 6.9 acres was not addressed. (Holderness Decl. at Ex. S, p. 15 [using "approved and pending projects located within the Santa Ynez planning area" for near-term cumulative conditions, but not casino/hotel expansion or 6.9 acre development]; Ex. S, p. 5-6 [identifying use of 20-year buildout forecasts for cumulative conditions, but also not casino/hotel expansion or 6.9 acre development].) In short, the record falls far short of properly analyzing the cumulative impacts of the project under NEPA.

d. Not All Viable Alternatives Were Analyzed.

The BIA failed to adequately study Alternative C, the No-Action Alternative. The BIA did not analyze the residential development that is foreseeable if the proposed development does not go forward, which could include some residences. (*Id.* at Ex. C, p. 2-16.)

The BIA failed to consider the alternatives of rebuilding the Reservation, taking fewer parcels of Camp 4 into trust, and/or approving less development, all of which could accomplish the primary purpose to provide housing for the Tribe's current members and anticipated growth. *See Friends of Yosemite Valley*, 520 F.3d at 1038. (*See generally id.* at Ex. C.)

Further, the residential and tribal facility development in Alternative B, the alternative chosen by the Tribe, only requires the use of 227 acres of land for housing and tribal facilities. (*Id.* at Ex. C, p. 2-3.) Taking fewer acres into trust or approving less development on Camp 4 in conjunction with increased development on other trust lands could accomplish the primary goals of the Tribe, especially considering the economic development on other properties. Alternatively, the purpose of the trust acquisition could be accomplished in another location. *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1097-

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98 (9th Cir. 2006). Camp 4 is non-contiguous to the Reservation and therefore other off-Reservation locations should be considered, including the recently acquired 350 acre property as discussed below in Section IV.A.3. (Holderness Decl. at Ex. B, Fig. 1-2.) By omitting a detailed analysis of these feasible alternatives, the BIA violated NEPA.

3. The BIA Failed to Supplement its Environmental Review.

NEPA imposes a continuing duty on federal agencies to supplement EAs and EISs in response to "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii); *see Greater Gila Biodiversity Project v. United States Forest Service*, 926 F.Supp. 914, 916–17 (D. Ariz. 1994) (citation omitted). With respect to the Property, significant new circumstances developed while the Camp 4 decision was still pending that required the BIA to prepare a supplemental environmental review for the proposed action. Specifically: (1) the Tribe purchased an additional 350 acres of land in the area that is a viable alternative to taking the Property into trust and that could have less environmental impacts; (2) the State of California's drought conditions worsened since the Final EA was issued; and (3) the Tribe provided additional information regarding its development plans for the Property.

First, in June 2015, the Tribe purchased approximately 350 acres of land in the Santa Ynez Valley that is approximately .6 miles from the Tribe's Reservation. (RJN at Exs. 7,8.) Three hundred and fifty acres would provide sufficient land to build 143 homes on one-acre plots as proposed in Alternative B and a 30 acre tribal facility, with land remaining for other pursuits. Also, the 350-acre property is surrounded by residential lots, commercial lots, and smaller agricultural lots (5 to 20 acres in size). (*Id.* at Ex. 9.) The landscape also may contain fewer oak trees and less protected habitat than Camp 4. The availability of this alternative is a significant change that requires additional environmental

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review as it appears this alternative could have less impact to, for example, agricultural uses, traffic, visual aesthetics, and the County's tax base and could be more compatible with surrounding land uses.

The development of 143 residences closer to other residential areas and commercial uses in an area with less protected habitat and species, rather than in a rural area with agricultural uses and nearly pristine surroundings could significantly alter the impacts to agriculture, wildlife, habitats, and visual resources. Further, as stated above, the impacts to public services could be lessened since the County would lose less in taxes on a smaller acreage and due to the closer proximity to a town. Thus, the 350 acre property is a viable alternative to Camp 4, which is a significant new circumstance bearing on the environmental consequences that the BIA should have studied in a supplemental environmental review.

Second, beginning on January 17, 2014, California Governor Brown declared a State of Emergency to exist due to severe drought conditions, which caused drinking water shortages, diminished water for agricultural production, increased wildfire risk, and degradation of habitat and water supplies and began implementing mandatory water reductions. (RJN at Ex. 5.) The BIA should have updated the environmental review to consider these changed circumstances.

Third, on February 5, 2016, the Tribe provided the County with a "Proposed Tribal Land Use" map, which shows its proposed development for the Property and surrounding parcels. The proposed land use map shows an increased tribal facility build-out, increased agricultural/residential development, and decreased open space from what was studied in the Final EA, all of which would impact the resource analysis. (*Id.* at Ex. 8.) The proposed land use map also shows increased commercial development in the surrounding area that was not studied in the Final EA's cumulative impacts analysis.

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(*Compare id.* at Ex. 8 *with* Ex. C, Fig. 2-2.) Further, the proposed land use map indicates the Tribe intends to request the 350 acre property be taken into trust, making it a viable alternative as discussed above. (*Id.* at Ex. 8.) Even though it is not in trust presently, the BIA studies off-site alternatives to proposed trust acquisitions even when those alternative sites may be required to be taken into trust. *Citizens for a Better Way v. U.S. Dep't of Interior*, No. 2:12-CV-3021-TLN-AC, 2015 WL 5648925 at *6 (E.D. Cal. Sept. 24, 2015) ("four sites (that would have to be taken into trust) were given 'serious consideration'").

B. THE COUNTY IS LIKELY TO SUCCEED ON ITS NOD CLAIMS.

The Code of Federal Regulations, 25 C.F.R. sections 151.10 and 151.11, govern the acquisition of off-Reservation land into trust and require that the Department make certain findings under those regulations prior to approving a fee-to-trust application. Despite these clear regulatory mandates, Defenants either did not make the required findings or did not support them with any evidence, at least as discussed below. Defendants' violation of the Department's regulations is by definition arbitrary and capricious, and contrary to law.

First, in applying to have land taken into trust, a tribe must establish a need for the land it seeks to have transferred. 25 C.F.R. §§ 151.10(b), 151.11(a). Also, taking land into trust is governed by the aims of the Indian Reorganization Act ("IRA"), which was enacted to provide lands sufficient to enable Indians to achieve self-support and ameliorate the damage resulting from the prior allotment policy. *Cnty. of Charles Mix v. U.S. Dep't of Interior*, 799 F.Supp.2d 1027, 1039 (D.S.D. 2011), aff'd, 674 F.3d 898 (8th Cir. 2012). The Tribe asserted that it needed five parcels of land taken into trust for housing, as well as land-banking and holding for development for future generations. (Holderness Decl. at Ex. A, p. 8-9.) In the NOD, the Regional Director merely reiterated the Tribe's statements with respect to the need for the land as the basis for concluding all 1,433 acres were "necessary." (*Compare id. with* Ex. F,

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1 p. 20-21.) The Regional Director did not conduct an independent evaluation or
2 determine all parcels were necessary and in support of the aims of IRA.
3 Second, the Regional Director did not discuss all of the current and
4 proposed uses of the property as is required under 25 C.F.R. §§ 151.10(c).
5 *Thurston County, Nebraska v. Great Plains Reg'l Director, BIA*, 56 IBIA 296,
6 307 (2013). The NOD does not describe the scope of the current uses on the
7 Property. (*Id.* at Ex. F, p. 22.) As to planned uses, the NOD does not discuss
8 the use of the tribal facility or agricultural operations. (*Id.*)
9 Third, the Regional Director is required to consider the County's
10 comments on tax loss. 25 C.F.R. § 151.10(e), 151.11(a), (d). In commenting on
11 the fee-to-trust application, the County stated that it would lose up to $311
12 million in tax revenues over a fifty year time period if the land is taken into
13 trust, out of the Williamson Act contract, and developed. (Holderness Decl. at
14 Ex. G, p. 20.) The Regional Director did not address or mention the County's
15 comments and therefore cannot show she gave due consideration to them. (*Id.*
16 at Ex. F, p. 22.)
17 Fourth, as to jurisdictional and land use conflicts, the Regional Director
18 concluded the "Tribe's intended purposes of tribal housing, land consolidation,
19 and land banking are not inconsistent with the surrounding uses," ignoring all
20 of the evidence to the contrary. (*Id.*) The Property is zoned AG-II-100
21 (Agriculture, minimum parcel size of 100 acres). (*Id.* at Ex. H, p. 3-59.) As
22 discussed above, the development of 143 homes and a 12,000 square foot tribal
23 facility with 250 parking spaces is incompatible with County land use plans and
24 inconsistent with surrounding open space, agricultural, and ranch uses.
25 Fifth, the Regional Director found the regulatory factor requiring a
26 business plan for new economic businesses irrelevant. (Holderness Decl. at Ex.
27 F, p. 24.) The proposed development on the Property, however, includes the
28 development of a Tribal Facility. (*Id.* at Ex. C, p. 2-15.) The Tribal Facility

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will hold 100 special events per year for approximately 400 persons plus vendors and also house 40 employees. (*Id.*) This new economic use required the Tribe to submit a business plan. 25 C.F.R. § 151.11(c). Based on at least the above, the BIA acted in an arbitrary and capricious manner by not properly considering the required regulatory criteria and the County is likely to succeed on these claims.

V. THE COUNTY WILL SUFFER IRREPARABLE INJURY ABSENT INJUNCTIVE RELIEF.

In order to receive preliminary injunctive relief, a party must show irreparable harm is likely to result in the absence of such relief. *Winter*, 555 U.S. at 20. Irreparable harm is harm which cannot be redressed by a legal or an equitable remedy following a trial. *See Save the Yaak Comm. v. Block*, 840 F.2d 714, 722 (9th Cir. 1988). In the NEPA context, "irreparable injury flows from the failure to evaluate the environmental impact of a major federal action." *High Sierra Hikers Assoc. v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004). Further, "[e]nvironmental injury, by its very nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable." *Alliance for Wild Rockies*, 632 F.3d at 1135.

In similar fee-to-trust cases, courts have recognized that the commencement of construction activities likely supports the irreparable harm element. In *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Salazar*, the court found that a plaintiff's concerns "might support a finding of irreparable harm if construction and gaming were to occur without any notice, [contractors] and Defendants both represent that 30 days notice will be given before any activity commences at the Proposed Site." *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty.*, No. 2:12-CV-3021-JAM-AC, 2013 WL 417813, at *4 (E.D. Cal. Jan. 30, 2013). Likewise, in *Stand Up for California! v. U.S. Dep't of the Interior*, the District Court was "mindful that, once the

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1 transfer occurs, the likelihood of irreparable harm will increase as this litigation
2 continues. Therefore, the Court will require, during the pendency of this case,
3 that the North Fork Tribe provide notice to the parties and the Court at least 120
4 days prior to any physical alteration of the land at the Madera Site." *Stand Up*
5 *for California!*, 919 F. Supp. 2d 51, 83–84 (D.D.C. 2013).

6 Without due consideration under NEPA and the fee-to-trust criteria of the
7 trust acquisition and proposed development, the County will suffer irreparable
8 harm. The Property is in an unincorporated area entirely within the boundaries
9 of the County, over which the County has plenary authority and obligations to
10 regulate and manage the lands and services. Cal. Const., art. XI, § 7; *Sierra*
11 *Club v. Napa Cnty. Bd. of Sup'rs*, 205 Cal.App.4th 162, 172 (2012). Further,
12 the Property is adjacent to County property. Baseline Avenue and Armour
13 Ranch Road are owned by the County and border the project site. (Holderness
14 Decl. at Ex. C, p. 2-7; Ex. H, p. 3-56.) County managed and owned Fire Station
15 32 is .75 miles from the Property, and many other County roadways, County
16 public transit stops, County facilities, and the County maintained Santa Ynez
17 Park are within the project site or vicinity. (*Id.* at Ex. H, p. 3-56, 3-59, 3-69 to
18 3-71.) The development of the Property to be implemented by the Tribe will
19 convert 1,227 acres of agricultural land to other uses, remove 50 oak trees from
20 the Property, and impact public services and roads. (*Id.* at Ex. D, p. 4-40.)

21 As stated above, the Chumash Tribe's construction would convert
22 agricultural lands to residential and tribal facilities. Agriculture is a significant
23 and important resource in Santa Barbara County. (Holderness Decl. at Ex. J, p.
24 AR0195.00365-395, 408, 423, 426-427, 432, 453-456.) Agricultural lands
25 enhance biodiversity, improve habitat for endangered species, sequester carbon,
26 improve soil and water quality, suppress fires, provide valuable open space, and
27 give visual relief from the more urbanized township and inner rural areas. (*Id.*
28 at AR0195.00368, 391-92, 408.) If agricultural land is converted, these benefits

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1 will immediately be impacted, and it could take years to return the land to its
2 current, productive state.
3 In addition, the construction is slated to remove 50 oak trees. Once those
4 oak trees are removed, it will take many years to *possibly* establish *some*
5 replacement trees. (*See* Ex. J at AR0195.00398-400 [requiring extensive oak
6 tree replacement management plan, including 15:1 replacement ratio].) In the
7 meantime, the support to wildlife, including food sources, shade in summer,
8 shelter in winter, perching, roosting, nesting, and food storage sites, would be
9 lost. (*See id.* at Ex. K, p. 1, 3.) Likewise, the removal of critical habitat of the
10 Vernal Pool Fairy Shrimp cannot simply be undone. (Holderness Decl. at Ex.
11 D, p. 4-41; Ex. K at p. 5.)
12 The removal of the land from the County's jurisdiction and its
13 development also will irreparably affect the County's ability to manage its
14 municipality and public safety functions. The County has a finite and approved
15 budget. Cal. Gov't Code §§ 29080-29092. The Tribe currently has no
16 agreement with County for the provision of any road improvements, law
17 enforcement, or emergency response services for the Camp 4 impacts. (*Id.* at
18 Ex. R, p. 5-8, 5-10; Ex. E, p. 7.) If the County has to allocate resources to the
19 area due to an influx of people, traffic, or activities such as construction, it will
20 have to take funds from other programs or decide not fund certain items
21 resulting in the irreparable loss of valuable community services. Cal. Gov't
22 Code § 29088.
23 In addition, the BIA's failure to adequately analyze the project's impacts
24 will irreparably harm the County and public by depriving them of information
25 and analysis essential to an informed decision before action is taken. Similarly,
26 allowing the transfer of title to proceed could give the project momentum and
27 bias the DOI's future decision-making because it already has committed to a
28 course of action. It also could limit the Court's ability to order complete

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1 compliance in the future. The status quo should be preserved to prevent these
2 irreparable harms and avoid an artificial pre-determination of this case prior to
3 adjudication on the merits.

4 The threat of irreparable harm is imminent. The Tribe previously
5 indicated that it would not commence development of Camp 4 until 2023 due to
6 the parcels being subject to a Williamson Act contract. (*Id.* at Ex. C, p. 2-9.)
7 The Chumash Tribe, however, now has indicated that it will start building
8 housing on the property immediately and moved quickly to record the Grant
9 Deed conveying the property to the United State in Trust for the Tribe. (RJN at
10 Exs. 1-2.) The Tribe's actions thus evince an intent to proceed with
11 development now.

12 Accordingly, enjoining defendants before the merits of this action have
13 been adjudicated is the only practical way to avoid irreversible changes to the
14 status quo, and the County has satisfied this element of the test for issuing a
15 TRO and preliminary injunction.

16 **VI. <u>THE BALANCE OF EQUITIES STRONGLY FAVORS GRANTING THE COUNTY INJUNCTIVE RELIEF.</u>**
17

18 "[W]hen environmental injury is 'sufficiently likely,' the balance of
19 harms will usually favor the issuance of an injunction to protect the
20 environment." *Save the Yaak Comm. v. Block*, 840 F.2d 714, 722 (9th Cir.
21 1988) (citation omitted). Here, the balance of equities favors an injunction.

22 In contrast to the irreparable injuries to the public and the County if the
23 transfer of title and construction proceeds as discussed above, neither
24 Defendants nor the public will suffer any disadvantage from the issuance of
25 preliminary injunctive relief. The Tribe committed to not beginning
26 construction on the residential housing and Tribal facility until 2023 in the Final
27 EA for this project. (Holderness Decl. at Ex. C, p. 2-9.) Since that time,
28 however, the Tribe has stated its intent to begin construction immediately.

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1 (RJN at Ex. 2.) A short delay should have no impact on Defendants as they
2 already planned on the Tribe beginning construction in 2023. Further, this
3 matter should not take long; the County is committed to expediting it.
4 At most then, implementation of the decisions would be delayed pending
5 an appropriate environmental review and approval, which is typical with land
6 use changes on a Property. In fact, Defendants only recently abandoned their
7 policy of staying fee-to-trust actions pending the outcome of federal litigation,
8 reinforcing the lack of adverse impact on Defendants. 78 Fed. Reg. 67,937
9 (Dec. 13, 2013) (codified at 25 C.F.R. § 151.12). Thus, the balance of equities
10 favors injunctive relief.

11 **VII. <u>THE PUBLIC INTEREST SUPPORTS INJUNCTIVE RELIEF.</u>**

12 There is a strong public interest: (a) "in preserving nature and avoiding
13 irreparable environmental injury"; (b) careful consideration of environmental
14 impacts before major federal projects commence; and (c) in ensuring agencies
15 adhere to federal law. *Alliance for Wild Rockies*, 632 F.3d at 1056; *Small v.*
16 *Avanti Health Systems, LLC*, 661 F.3d 1180, 1197 (9th Cir. 2011) (citation
17 omitted). If an agency has not carefully considered the environmental impacts
18 of a project, it is in the public interest to suspend that project. *South Fork Bank*
19 *Council of Western Shoshone of Nev. v. Dept. of the Interior*, 588 F.3d 718, 728
20 (9th Cir. 2009). Here, it is in the public interest to order the Property be taken
21 out of trust and prohibit any construction on the Property until Defendants have
22 carefully considered the environmental impacts of the project as required by
23 NEPA and met the requirements of their own land acquisition policies.

24 **VIII. <u>THE COURT SHOULD WAIVE THE POSTING OF SECURITY OR SET A NOMINAL SUM.</u>**
25

26 Rule 65 references the posting of a security upon issuance of a temporary
27 restraining order or preliminary injunction. The Court, however, "has discretion
28 to dispense with the security requirement, or to request mere nominal security,

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1 where requiring security would effectively deny access to judicial review."
2 *People ex rel. Van de Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319,
3 1325-26 (9th Cir. 1985). Courts often waive the bond requirement or require
4 nominal security in NEPA litigation where the interests of the public are being
5 served. *See, e.g.*, *Save Strawberry Canyon v. Dept. of Energy*, 613 F.Supp.2d
6 1177, 1190-91 (N.D. Cal. 2009) (citation omitted); *Van de Kamp*, 766 F.2d at
7 1325; *Wilderness Society v. Tyrrel*, 701 F.Supp. 1473, 1492 (E.D. Cal. 1988).
8 The Court should waive the security requirement in this case. The
9 County brings this action as a last resort to protect natural resources and the
10 interests of the County of Santa Barbara and its residents. The County has
11 demonstrated a high likelihood of success on the merits, and the Defendants
12 would suffer no cognizable harm from maintaining the status quo. Therefore,
13 the waiver of security or a nominal security amount is justified.

14 **IX. CONCLUSION**

15 For the foregoing reasons, this Court should grant the County's request
16 for a temporary restraining order that: (1) requires Defendants to file the
17 necessary documentation to have the Property taken out of trust until
18 Defendants' compliance with the APA and NEPA is adjudicated or this Court
19 orders otherwise; and/or (2) prohibits Defendants' from permitting, authorizing,
20 or continuing to authorize any pre-construction, ground-disturbing, or
21 construction activities related to development of the Property.

22 Dated: January 28, 2017

Respectfully submitted
MICHAEL C. GHIZZONI,
23 COUNTY COUNSEL

24

25 By: __/s/__________________
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