**[ORAL ARGUMENT SCHEDULED FOR MARCH 18, 2016]**
**Nos. 14-5326 and 15-5033**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CONFEDERATED TRIBES OF THE GRANDE RONDE COMMUNITY OF OREGON,

Plaintiff-Appellant,

CLARK COUNTY, WASHINGTON, et al.,

Plaintiffs-Appellants,

v.

SALLY JEWELL, in her official capacity as Secretary of the Interior, et al.,

Defendants-Appellees,

COWLITZ INDIAN TRIBE,

Intervenor-Appellee.

On Appeal from the United States District Court for the District of Columbia

No. 1:13-cv-849-BJR

Hon. Barbara J. Rothstein
Judge Presiding

**APPELLANTS' MOTION FOR EMERGENCY RELIEF OR IN THE ALTERNATIVE TO EXPEDITE APPEAL**

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## PRELIMINARY STATEMENT

The issue in this appeal is whether the Secretary of the Interior acted unlawfully in taking land into trust for the Cowlitz Tribe to build a casino. The appeal was fully briefed on January 5, 2016, and oral argument is scheduled for March 18, 2016. Until mid-January 2016, construction on the "Parcel" at issue had not proceeded beyond preliminary steps. *See* Figures 1–2.


**Figure 1**. MacLean Decl. ¶ 2.

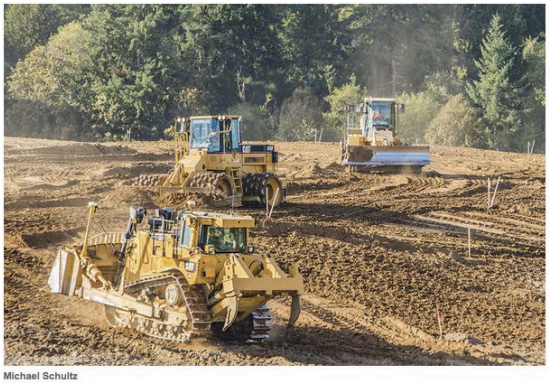


**Figure 2**. MacLean Decl. ¶ 3.

Despite the Court's imminent consideration of the lawfulness of the trust acquisition—and therefore construction—the Tribe began full-scale construction in mid-January. Gilbert Decl. ¶ 5. News reports from late January and mid-February show construction proceeding at a rapid pace. *See* Figures 3–4.

**Figure 3.** MacLean Decl. ¶ 4.

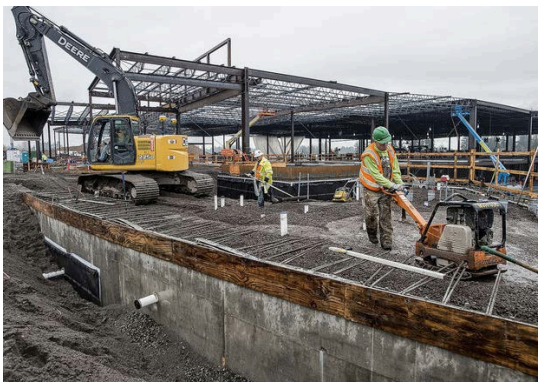


**Figure 4.** MacLean Decl. ¶ 5.

Appellants understood there to be three obstacles to full construction: (1) lack of financing; (2) a viable plan for addressing wastewater; and (3) the City of La Center's approval of upgrades to Interchange 16 on Interstate 5, which serves the Parcel. On December 7, 2015, the Tribe secured construction financing. MacLean Decl. ¶¶ 10, 26, 28. On February 22, 2016, EPA informed Appellants that the Tribe's proposal to inject up to 390,000 gallons of wastewater per day into an underground injection control well (UIC) above the sole source aquifer underlying the Parcel was deemed approved. Bockmier Decl. ¶ 7. And on February 24, La Center approved an agreement with the Tribe regarding Interchange 16 upgrades. MacLean Decl. ¶ 13. The Tribe chose to commence construction "in earnest" approximately 60 days before the Court hears argument. *Id.* ¶ 2.

To prevent further irreparable harm to Appellants, it has become necessary to ask the Court to enjoin construction during the pendency of this appeal.[1] Appellants' briefs in this Court establish a substantial likelihood of success on the merits: the Secretary's decision rests on several Administrative Procedure Act (APA) violations, exceeds her authority under the Indian Reorganization Act (IRA), and violates the Indian Gaming Regulatory Act (IGRA) and the National Environmental Policy Act (NEPA).

[1] The City of Vancouver is not immediately impacted by the Tribe's construction. Accordingly, it has not joined in this motion.

The construction is now and will continue to irreparably harm Appellants' environmental interests and Clark County's jurisdictional interests. The Tribe commenced construction in January, fully aware that this Court will be the first appellate court to review the Secretary's new interpretation of the IRA, in the wake of the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009) and that argument is scheduled for March. The Tribe's decision to build as much of the casino as possible before this Court rules is calculated risk—one that also appears intended to undercut the Court's review and limit available remedies. Any injury to the Tribe from an injunction would therefore be self-inflicted. Finally, the public interest weighs strongly in favor of maintaining the status quo until this appeal is resolved. If the Court were to deny Appellants' request for injunctive relief, Appellants respectfully ask that consideration of this appeal be expedited.

## FACTUAL AND PROCEDURAL BACKGROUND

The Secretary issued her second record of decision (ROD) for this Parcel on April 22, 2013. JA0161. Appellants challenged the ROD on June 6, 2013. 1:13-cv-00849-BJR (D.D.C. Jun. 6, 2013) [Dkt. No. 1]. The court granted summary judgment for defendants on December 12, 2014. [Dkt. Nos. 84, 85.] On March 9, 2015, the Secretary acquired the Parcel in trust for the Tribe. MacLean Decl. ¶ 6.

Three months later, the Tribe informed Appellants that it "was no longer obligated to provide notice regarding [its] timing or plans for the property." *Id*. ¶ 7.

The Tribe began grading and site preparation in mid-September. Gilbert Decl. ¶ 5. A week later, Appellants asked the Tribe for information about its construction plans. MacLean Decl. ¶ 8. The Tribe responded that "the work that is currently underway includes grading and site prep, to be followed by excavation and later construction of the gaming facility and tribal buildings." and that construction would be completed in May 2017. *Id.* ¶ 9.

A local news channel reported significant construction activities at the Parcel in late January. MacLean Decl. ¶ 11. Appellants scheduled two meetings with EPA (February 8 and 22, 2016) to discuss the proposed UIC. Bockmier Decl. ¶¶ 9, 10. On February 22, EPA informed Appellants that the UIC was deemed approved. *Id.* ¶ 10. Five days later, La Center approved an agreement with the Tribe addressing upgrades to Interchange 16. MacLean ¶ 13. Clark County issued a Stop Work Order on February 24, which the Tribe has ignored. *Id*. ¶¶ 12, 13.

On March 1, 2016, Appellants contacted counsel telephonically and by email to give notice of this motion. *Id.* ¶¶ 14, 15.

## ARGUMENT

This Court may enter an injunction pending appeal under 28 U.S.C. § 1651(a), and the standard for doing so is the same as that for a preliminary injunction: the party seeking the injunction "must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of

preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[2] *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). All of the factors support the issuance of an injunction in this case.

**A. Plaintiffs are likely to succeed on the merits of the appeal.**

Appellants are likely to prevail on the merits. *See Akiachak Native Community v. Jewell*, 995 F. Supp. 2d 7, 17 (D.D.C. 2014) (*quoting Population Inst. v. McPherson*, 797 F.2d 1062, 1078 (D.C. Cir. 1986) (An appellant "need not

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[2] It would be impracticable for Appellants to seek an injunction in the district court. *See* Fed. R. App. P. 8(a)(2)(A)(i). While Fed. R. Civ. P. 62(c) authorizes a district court to issue an injunction while an appeal is pending if the appeal is "from an interlocutory order or final judgment that grants, dissolves, or denies an injunction," the district court did not "grant[], dissolve[], or den[y]" an injunction. Appellants had no basis for seeking an injunction during district court proceedings, because the Secretary stipulated to staying the trust transfer during those proceedings and no construction occurred. In fact, construction did not begin until months after the court entered a final judgment and ceased to have jurisdiction. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982).

Appellants' need for relief now is urgent. Appellants could not have realized that the Tribe would commence full construction so soon before argument. Indeed, it is unusual for *any* developer to commence major construction two months before argument. Appellants only learned of EPA's UIC approval on February 22, Bockmier Decl. ¶ 10, and La Center did not approve the Tribe's Interchange project until February 24, MacLean Decl. ¶ 13. Argument is in 15 days. Even if the district court still had jurisdiction, asking that court to revisit the merits at virtually the same time this Court will would be wasteful of judicial resources, particularly given that an appeal would be a virtual certainty. These are precisely the sort of circumstances that make moving in the district court first impracticable.

Appellees were personally served today—March 3, 2016—and have 10 days to respond. Appellants will reply on or before March 17 so that the motion is fully briefed before argument.

establish an absolute certainty of success [on the merits]: It will ordinarily be enough that the [movant] has raised serious legal questions going to the merits, so serious, substantial, difficult as to make them a fair ground of litigation and thus for more deliberative investigation.")). Appellants have established in their briefs that the Secretary's trust decision should be vacated for three independent reasons.

First, the Secretary exceeded her authority to acquire land in trust under section 19 of the IRA, which extends to "persons of Indian descent who are members of any recognized Indian tribe" that was "under federal jurisdiction" in 1934. *Carcieri*, 555 U.S. at 395. A landless tribe that went unrecognized until 2002 cannot have been "recognized" and "under federal jurisdiction" in 1934.

Second, the Tribe more than doubled its membership in the four years following acknowledgment. The Secretary violated the APA by failing to respond to questions regarding the Tribe's expanded enrollment; NEPA by impermissibly excluding alternatives based on the Tribe's assessment of economic need to serve its expanded membership; and the IRA, by ignoring the effect of the Tribe's expanded enrollment on her trust authority under Section 19 of the IRA.

Third, the Secretary erred in determining that the Parcel is eligible for gaming as an "initial reservation" because the Secretary did not find that the Parcel is "within an area where the tribe has significant historical connections," as her

regulations require, and she departed without explanation from the standards applied in other cases to establish "significant historic connections."

### B. Appellants are suffering irreparable environmental harms, and Clark County irreparable jurisdictional harm, from the construction.

Appellants are suffering and will continue to suffer irreparable environmental harm from the Tribe's construction. The construction is causing the kind of "[e]nvironmental injury" the Supreme Court finds irreparable because it cannot "be adequately remedied by money damages and is often permanent or at least of long duration." *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 545 (1987); *see also Citizen's Alert Regarding Env't v. U.S. Dep't of Justice*, No. CIV. A. 95-1702 (GK), 1995 WL 748246, at *10 (D.D.C. Dec. 8, 1995).

The irreparable harm to Appellants includes: (1) the destruction of protected agricultural lands; (2) degradation of critical water resources and risks to public health from the UIC; and (3) imminent construction on Interchange 16, which will irreparably harm both agricultural lands and water. Finally, the County's jurisdictional interests are being irreparably harmed by the Tribe's activities.

#### 1. The construction is destroying protected agricultural land.

The Parcel is located on and surrounded by lands the County designated agricultural lands of long-term significance. MacLean Decl. ¶¶ 16-18. Residents near the Parcel purchased their properties because of the agricultural character of the area. Gilbert Decl. ¶ 2; *see also* Figures 5-6.

**Figure 5**. MacLean Decl. ¶ 19.

**Figure 6**. MacLean Decl. ¶ 20.

When Appellants purchased their properties, they reasonably expected the area to retain its agricultural character, because Washington's Growth Management Act (GMA) "mandates conservation of … limited, irreplaceable agricultural resource lands." *King Cnty. v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 142 Wash. 2d 543, 562-63, 14 P.3d 133 (2000). The GMA requires counties and cities to designate agricultural lands of long-term commercial significance and to conserve such lands. *Id.* at 558 (*citing* RCW 36.70A.020(8), .060, and .170). In fact, Washington courts have repeatedly protected agricultural lands in the vicinity of the Parcel by rejecting attempts to prematurely de-designate and urbanize the area. *See e.g., Karpinski v. Clark Cnty., W. Wash. Growth Mgmt. Hr'gs Bd.*, Case No. 07-2-0027, Amended Final Decision and Order, 2008 WL 2783671, *37- 38 (June 3, 2008); *Clark Cnty. Wash. v. W. Wash. Growth Mgmt. Hr'gs Bd.*, 161 Wash. App. 204, ¶¶ 53-69, 254 P.3d 862 (2011), *vacated in part on other grounds*, 177 Wn.2d 136, 298 P.3d 704 (2013).

The ongoing construction is irreparably harming Appellants by converting "agricultural lands of long-term significance" into what the Tribe describes as "almost like a small city in itself"—a small city that will *initially* include a one-story casino-resort building of 368,000 total square feet, a 100,000-square-foot gaming floor, meeting facilities and 15 different restaurants, bars, and retail shops. MacLean Decl. ¶ 2. Indeed, the Tribe has stated that its development, including its funding of a sewer line to Interchange 16, "will be an incentive for developers to build near the casino," *id.* ¶ 27, which will only further harm resources the County is required to protect. McCauley Decl. ¶¶ 2, 5. Agricultural fields and habitat are rapidly being replaced by concrete structures and blacktop. *See* Figures 7-8.

**Figure 7**. C. MacLean Decl. ¶ 11.

**Figure 8**. MacLean Decl. ¶ 21.

The longer construction is permitted, the more irreparable injury Appellants will suffer. To preserve the status quo and protect the remaining agricultural value of the Parcel and surrounding area, the Court should enjoin further construction activity until this appeal is resolved.

**2. The UIC not only jeopardizes public health and safety but also violates the Tribe's commitment to comply with local standards.**

The Tribe is building a $13.4 million UIC, into which it will inject an estimated 390,000 gallons of casino-generated wastewater every day. MacLean Decl. ¶ 4. The UIC injection will directly recharge the Troutdale Aquifer System, which supplies *99 percent* of the County's drinking water. *Id*. ¶ 24; McCauley Decl. ¶ 7. There are approximately 100 family domestic wells within a mile of the Parcel that tap this aquifer. MacLean Decl. ¶ 24.

EPA deemed the UIC approved upon receipt of the proposal, without considering community concerns. Bockmier Decl. ¶ 10; McCauley Decl. ¶ 7. This UIC presents unique public health and safety risks for two key reasons. First, the Troutdale Aquifer underlying the Parcel is a federally designated Sole Source Aquifer, which means that it is the *only* source of drinking water for many residents. *See* 71 Fed. Reg. 52541 (Sept. 6, 2006); *see e.g.,* Gilbert Decl. ¶¶ 13, 14. State law requires sole source aquifers be given "special consideration or increased protection," WAC 173-200-090, which EPA did not consider. Bockmier Decl. ¶¶ 9, 10.

Second, because the Parcel is relatively small (152 acres), and the UIC would be very close to the potentially affected population, significant offsite impacts are much more likely than with UIC applications on larger parcels. Weber Decl. ¶ 8. The down-gradient affected population here is comprised predominantly

of single-family domestic wells users, some of which are directly adjacent to the Parcel, substantially increasing the likelihood that these families will be drinking water affected by injected treated wastewater effluent in a relatively short time. *Id.*

The impacts of the UIC on the aquifer will likely be substantial. Although the current water quality of the Troutdale Aquifer is very good, with low concentrations of total dissolved solids (TDS) and nitrates, the UIC will degrade that quality. Because the UIC does not include reverse osmosis in the treatment stream (as required by State regulations), for example, the wastewater effluent will increase TDS in the aquifer, likely in excess of State groundwater quality standards. *Id.* ¶ 12. High TDS results in water with poor taste qualities (becoming undrinkable at some point) and corrosion and scale accumulation of household plumbing and appliances. *Id.* The proposed reuse of treated wastewater for toilet flushing and laundry will further concentrate dissolved solids in the effluent. *Id*.

To address the well and aquifer plugging issues inherent in UIC systems, the Tribe has proposed maintaining chlorine in the effluent. *Id.* ¶ 10. Chlorine in wastewater effluent, however, combines with organic material and forms trihalomethanes and haloacetic acids, which are associated with increased risk of cancer and liver, kidney, and central nervous system problems. *Id*. Both will be injected into the aquifer, potentially above federal primary drinking water standards for these compounds. *Id*. The UIC system also does not address the

elevated levels of endocrine disrupting chemicals (EDCs) from pharmaceuticals and personal-care products that wastewater effluent is known to have. *Id.* ¶ 11. EPA has classified EDCs as contaminants of emerging concern and the National Institutes of Health has warned that exposure to EDCs may result in adverse developmental, reproductive, neurological, and immune effects in humans, especially in children and pregnant women. *Id.*

The UIC does not comply with Critical Aquifer Recharge Area Requirements in the Clark County Code. Because of the proximity of the UIC to public water systems and its location above the Troutdale Aquifer System, the UIC would require either a County permit or could be prohibited altogether. *Id.* ¶ 14. On February 27, 2016, the County issued a Stop Work Order to the Tribe "to protect the environment and public health of all its citizens." MacLean Decl. ¶¶ 12, 13. The Tribe ignored the Stop Work Order, because "[i]t's the EPA's jurisdiction, something they (county officials) have no authority over. Again, it's on our reservation.'' *Id.* ¶ 13.

But the Tribe is not correct. In 2007, the Tribe passed Ordinance 07-02: Environment, Public Health and Safety Protections for the Construction and Operation of the Cowlitz Indian Tribe Gaming Facility. JA2635. In Sections 3(F) and (G) of the Ordinance, the Tribe promised to develop its casino in a "manner consistent with the Clark County codes as they existed" in 2004 and to address

sewage conveyance, treatment and disposal in a manner that "meet[s] or exceed[s] applicable federal and state standards." *Id.* The Secretary predicated her trust decision in part on commitments set forth in the Ordinance, *see* JA0175, yet the Tribe is proceeding with construction without regard to those commitments. Its actions will likely irreparably harm Appellants by jeopardizing water quality. Weber Decl. ¶ 14; McCauley Decl. ¶¶ 6, 7.

**3. Construction on Interchange 16 will irreparably harm Appellants.**

The Tribe has proposed $32 million of improvements to Interchange 16 of Interstate 5 at NW La Center Road, including reconstruction of the overpass, and relocation and reconstruction of the entrance and exit ramps and related of surface streets. MacLean Decl. ¶¶ 13, 28; McCauley Decl. ¶¶ 8, 9. The purpose of these improvements—which the Tribe will privately fund—is to improve access to the casino; these improvements would not occur *but for* the casino development. MacLean Decl. ¶ 28. In fact, the Federal Highway Administration (FHWA) and Washington State Department of Transportation (WaDOT) relied on the environmental review that is before this Court to approve the upgrades. *Id*. ¶ 29.

Appellants understand that the Tribe needs to certify to FHWA and WaDOT that all necessary land has been acquired and approvals from local jurisdictions obtained before commencing construction. On February 24, 2016, La Center approved an agreement allowing the upgrades. *Id*. ¶ 30. To obtain its approval, the

Tribe represented to the City that it was "now 75 days behind schedule on the construction at the interchange," *id*., a statement that clearly suggests that the Tribe considered the City's approval its last obstacle to construction. The County, however, owns two rights-of-ways which cross the Parcel—Northwest 31st Avenue and 319th Street—both of which are to be relocated under the Tribe's proposal. *Id.* ¶ 28. The Tribe, however, does not believe that County approval is required. *Id.* In fact, the Tribe met with the County on March 2, 2016 and informed the County that it could move the County's rights-of-way without County authorization. McCauley Decl. ¶ 9. The County will not approve alteration of its rights-of-way within the boundaries of the Parcel. MacLean Decl. ¶ 31.

Construction on Interchange 16 will clearly be disruptive. On December 15, 2015, *The Columbian* reported that the project "presents a major long-term change to Exit 16, as well as potential short-term headaches during construction." *Id*. ¶ 28; *see also* Gilbert Decl. ¶¶ 12, 13. Interchange upgrades will reduce recharge rates to the Troutdale Aquifer, Weber Decl. ¶ 13, and increase pollutants to the unnamed stream, Gilbert Decl. ¶ 13. The Court is likely to resolve this appeal during Interchange construction, which will take over a year. MacLean ¶ 28. If the Court vacates the ROD, there is no indication of what the Tribe would do with respect to the Interchange improvements that it would not be funding *but for* the casino project. McCauley Decl. ¶¶ 12, 13.

**4. The Tribe's construction is irreparably harming the County's regulatory and land use authority.**

Injuries to the County, in particular, go beyond irreparable environmental harm. By transferring the Parcel into trust *before* this appeal was resolved, the Secretary enabled the Tribe to engage in construction that is prohibited under State and local law under any circumstance. Although "[s]tate sovereignty does not end at a reservation's border," the taking of land into trust plainly eliminates most state and local jurisdiction. *Nevada v. Hicks*, 533 U.S. 353, 361-362 (2001); *see Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 43 (1823) ("Of all the attributes of sovereignty, none is more indisputable than that of [a State's] action upon its own territory."). The injury to that sovereignty has become even more concrete now that otherwise prohibited construction is proceeding apace and the County's ability to maintain some say over land use has been severely circumscribed. McCauley Decl. ¶ 11.

The Supreme Court has held that an injury to a State's sovereign interests "is entitled to special solicitude" in evaluating federal jurisdiction. *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007). Courts have recognized that harm to sovereign interests is irreparable, and will support the issuance of an injunction. *See, e.g.*, *Idaho v. Coeur d'Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015) (recognizing "irreparable harm to [a State's] economic and public policy interests" as basis for enjoining gaming); *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001) ("[B]ecause the State of Kansas claims … its sovereign interests and public

policies [are] at stake, we deem the harm the State stands to suffer as irreparable."); *cf. Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006) ("[A]n invasion of tribal sovereignty can constitute irreparable injury.").

In *Akiachak*, the district court recognized state sovereign interests in granting Alaska's motion to enjoin the Secretary from implementing a rule that would have allowed her to acquire land in trust for Alaska tribes. 995 F. Supp. 2d at 17. The court recognized the importance of "prevent[ing] the irreparable harm to state sovereignty and *state management of land* that will befall Alaska if state land begins to be taken into trust for the Tribes" before *this Court* has the chance to rule on Alaska's challenge. *Id.* (emphasis added).

Appellees will doubtless argue that *Washington*'s sovereign interests are not implicated here, but that is not correct. First, the concern the court noted in *Akiachak* was the "state management of land." *Id.* And in Washington State, land use is regulated largely by *counties* under authority delegated to them by the Washington Legislature. The GMA vests *counties* with the primary authority to plan future development and directs *counties* to adopt county-wide planning policies to which state agencies must adhere and establish "a countywide framework from which county and city comprehensive plans are developed and adopted pursuant to this chapter." RCW 36.70A.210(1). And *counties* are required to designate agricultural lands of long-term significance and to determine what

lands are to be designated as forest lands, mineral resource lands and "critical areas." RCW 36.70A.020(9), .030(5), .060(2), .170(1)(d), .210(4).

Second, because the Secretary's trust regulations explicitly acknowledge the jurisdictional, taxing, and land use interests of local governments, the Secretary cannot reasonably argue that such interests can suffer no harm. *See* 25 C.F.R. § 151.10(e, f) (requiring the Secretary to consider "the impact on the State and *its political subdivisions* resulting from the removal of the land from the tax rolls" and the "[j]urisdictional problems and potential conflicts of land use which may arise"); *see also id.* § 151.11(b, d) (requiring the Secretary to "give greater weight to the concerns" of "state and local governments" in cases involving off-reservation trust requests).

The County's injuries are thus not simply environmental injuries to its citizens the County seeks to enjoin *parens patriae*, but jurisdictional injuries to itself and—by extension—the State, which has delegated authority for land use decisions to the County. Normally applicable land use and environmental laws—all of which prohibit this development—may not apply to trust land, but if the trust transfer was unlawful, the harm to the County is irreparable.

Moreover, the availability of remedies outside of this proceeding is highly questionable. Even if the trust decision is reversed, Appellants likely cannot take action against the Tribe or the Secretary, both of which will likely invoke

sovereign immunity to block any attempt to mitigate the environmental harms that have accrued by the time this Court resolve the case. An injunction preserving the status quo will limit the harms that potentially cannot be redressed by Appellants.

### C. Because the Tribe knowingly proceeded with construction, the balance of equities favors an injunction.

The potential economic losses to the Tribe do not outweigh irreparable damage to the environment. *See e.g., Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 150-52 (D.D.C. 1993) (balance of equities weighed in favor of injunctive relief to prevent irreparable aesthetic harm, notwithstanding potential loss of research funding due to delay of project). When environmental injury is "sufficiently likely, . . . the balance of harms will usually favor the issuance of an injunction to protect the environment." *Amoco*, 480 U.S. at 545 (1987), *see also Sierra Club v. U.S. Dep't of Agriculture, Rural Utilities Serv.*, 841 F. Supp. 2d 349, 358–60 (D.D.C. 2012), (likelihood of substantial air pollution outweighed harm caused by injunction delaying plans for coal plant construction).

Courts also consider whether the defendant's economic harm is largely self-inflicted when balancing the equities. *See, e.g., Sierra Club* v. *U.S. Army Corps of Eng'rs*, 645 F.3d 978, 997 (8th Cir. 2011) (environmental harm outweighed the millions of dollars of losses to defendant where defendant commenced construction of project prior to receiving permit and ignored legal challenges and warnings that it was proceeding at its own risk); *Davis v. Mineta*, 302 F.3d 1104,

1116 (10th Cir. 2002) (environmental harm outweighed the costs to defendants where defendants "'jumped the gun' on environmental issues by entering into contractual obligations that anticipated a pro forma result").

The Tribe has been an active participant in this litigation and thus aware of the prospect of an unfavorable result and the possibility of injunctive relief. United States Representative Jaime Herrera Beutler questioned the Secretary's trust transfer before this case is resolved and its impact on the availability of remedies, as well as the environmental impacts of the Tribe's construction. MacLean ¶¶ 24, 25. News reports have repeatedly emphasized that the Tribe is proceeding with construction, despite the risks posed by the ongoing litigation. *Id.* ¶¶ 3, 11, 26, 27. The Secretary confirmed that she will "comply with any remedy the court should order if plaintiffs prevail on any of their claims," including the removal of land from trust. MacLean Decl. ¶ 23. The Tribe, therefore, clearly knew that any investment made before resolution of the appeal could be lost. Indeed, the litigation risk is likely why Moody's Investor Service assigned a B3 Corporate Family Rating to the Cowlitz Gaming Authority's $485 million financing for its casino, a rating that is considered speculative and subject to high credit risk. *Id.* ¶ 10. The Tribe decided to commence full construction two months before argument despite these risks on an informed basis and any economic harm it might experience if enjoined would be self-inflicted.

**D. The public interest favors an injunction.**

In assessing the public interest, a court "cannot 'ignore the judgment of Congress, deliberately expressed in legislation.'" *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497 (2001) (quoting *Virginian R. Co. v. Railway Employees*, 300 U.S. 515, 551 (1937)). Considerations of the "public interest" favor requiring agencies to adhere to their legal obligations. *See N.D. v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1113 (9th Cir.2010) ("[I]t is obvious that compliance with the law is in the public interest.").

There is substantial question regarding the Secretary's authority to acquire trust land for this Tribe. Added to the scale are Appellants' environmental and jurisdictional concerns, the protection of which are also in the public interest. *See e.g., Akiachak*, 995 F. Supp. 2d at 17; *Brady Campaign to Prevent Gun Violence v. Salazar*, 612 F. Supp. 2d 1, 26-27 (D.D.C. 2009). The public's interest in an orderly resolution of the scope of the Secretary's trust authority and in protecting the environment far outweighs the Tribe's immediate interest in constructing a casino.

## CONCLUSION

For the foregoing reasons, the Court should enjoin the Tribe from further construction activities during the pendency of this appeal. Alternatively, the Court should expedite consideration of this appeal.

Dated: March 3, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Benjamin S. Sharp, certify that on March 3, 2016, I electronically filed the foregoing Appellants' Motion for Emergency Relief or in the Alternative to Expedite Appeal, and accompanying declarations, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to attorneys of record. I further certify that on March 3, 2016 paper copies will be hand delivered to the following:

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