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 15 **UNITED STATES DISTRICT COURT**
 16 **EASTERN DISTRICT OF CALIFORNIA**
 17 **SACRAMENTO DIVISION**

18 UNITED AUBURN INDIAN
 19 COMMUNITY OF THE AUBURN
 RANCHERIA

20 Plaintiff.

21 vs.

22 KENNETH LEE SALAZAR, et al
 Defendants, and
 23 THE ESTOM YUMEKA MAIDU TRIBE
 24 OF THE ENTERPRISE RANCHERIA,
 CALIFORNIA,

25 Intervenor Defendant.
 26

CASE NO. 12-CV-03021-TLN-AC

(Consolidated Cases)

**INTERVENOR-DEFENDANT'S
 RESPONSE TO PLAINTIFFS' MOTION
 FOR AN EXTENSION OF THE
 DEADLINE TO FILE FOR A
 PRELIMINARY INJUNCTION AND
 MOTION FOR A STATUS
 CONFERENCE REGARDING
 INJUNCTIVE RELIEF**

27
 28 CASE NO. 12-CV-03021-TLN-AC

INTERVENOR-DEFENDANT'S RESPONSE
 TO PLAINTIFFS' MOTION TO EXTEND
 DEADLINE FOR PRELIMINARY
 INJUNCTION AND MOTION FOR STATUS
 CONFERENCE

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CITIZENS FOR A BETTER WAY, et al.
Plaintiffs.

vs.

UNITED STATES DEPARTMENT OF
INTERIOR, et al.,

Defendants, and

THE ESTOM YUMEKA MAIDU TRIBE
OF THE ENTERPRISE RANCHERIA,
CALIFORNIA,

Intervenor Defendant.

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

Plaintiff,

vs.

S.M.R. JEWELL, Secretary of the Interior,
et al.,

Defendants, and

THE ESTOM YUMEKA MAIDU TRIBE
OF THE ENTERPRISE RANCHERIA,
CALIFORNIA,

Intervenor Defendant.

CASE NO. 12-CV-03021-TLN-AC

INTERVENOR-DEFENDANT'S RESPONSE
TO PLAINTIFFS' MOTION TO EXTEND
DEADLINE FOR PRELIMINARY
INJUNCTION AND MOTION FOR STATUS
CONFERENCE

1 Intervenor-Defendant the Estom Yumeka Maidu Tribe of the Enterprise Rancheria,
2 California (the "Tribe" or "Enterprise") responds as follows to Plaintiffs' Motion for an
3 Extension of the Deadline to File for a Preliminary Injunction and Motion for a Status
4 Conference Regarding Injunctive Relief (the "Motion") (ECF 163).

5 1. Pursuant to the Court's Stipulation and Order Governing Further Proceedings (ECF
6 57, 69, 131), on August 31, 2015 the Tribe filed a 60-day Notice of Construction Activities for
7 land held in trust for land held in trust for the Tribe near Olivehurst, California (the "Yuba
8 Site"). Relevant factual background preceding the 60-day Notice can be found in the Notice
9 itself (ECF 162), attached for convenient reference as **Exhibit A**.

10 2. The terms of the Stipulation and Order Governing Further Proceedings — terms
11 which Plaintiffs explicitly re-affirmed as recently as July 15 (ECF 160, 161) — do not specify
12 any particular plans, documents, or other information that must be included in a 60-day notice of
13 construction activities (ECF 161).

14 3. Although not specifically required to do so, the Tribe included in its 60-day Notice of
15 Construction Activities a detailed statement explaining the factual basis for the Tribe's planned
16 construction; a narrative description of the facilities that will be built; a site plan identifying the
17 features of those facilities and their location(s) on the Yuba Site; and a written assurance that
18 construction will comply with all applicable mitigation measures set forth in the Department of
19 the Interior's Environmental Impact Statement ("EIS") and Record of Decision ("ROD")
20 (Exhibit A at 3-5). The Tribe's Notice also explained that the planned construction includes a
21 permanent building that will host Class II gaming activities until such time as the Tribe secures a
22 gaming compact for Class III gaming activities (*id.* at 4-5); the building will be approximately
23 105,750 square feet, much smaller than the gaming facility approved for construction at the
24 Yuba Site by the Department of the Interior (317,885 square feet) or the "Reduced Intensity
25 Alternative" described and evaluated in the Department's EIS (148,515 square feet) (*id.* at 5);
26 and although significantly smaller than the Reduced Intensity Alternative, the gaming facility

1 will otherwise be built in a similar fashion (*id.*).

2 4. By the terms of the Court's Stipulation and Order Governing Further Proceedings
3 (ECF 161), the Tribe's August 31 Notice triggered a 15-day deadline for Plaintiffs to file any
4 motions to enjoin the Tribe's planned construction of the Facility.

5 5. Plaintiffs did not respond to the Tribe's Notice until the end of the business day on
6 September 8, more than half way through the 15-day period (*see Exhibit B*). Plaintiffs' response
7 alleged that the Tribe had not provided sufficient information about the timing of construction at
8 the Yuba Site (Exhibit B at 2). Plaintiffs also questioned the need for further briefing "given
9 that the case is fully briefed" (*id.*).

10 6. The Tribe promptly replied (*see Exhibit C*). With respect to the timing of planned
11 construction activities, the Tribe's reply explained that "[d]uring the construction period, the
12 exact timing of specific on-site activities will depend on a variety of factors, including
13 availability of equipment and materials, weather, and the results of pre-construction plans and
14 surveys...[h]owever, it is currently anticipated that ground-disturbing activities, including
15 grading, will begin in early November" (*id.*). With respect to the need for further briefing, the
16 Tribe's reply stated "[t]he Tribe agrees that it would be preferable to avoid unnecessary briefing"
17 and offered to work with Plaintiffs on a joint request for a status conference that could address
18 Plaintiffs' concerns without undue delay (*id.*).

19 7. The Tribe did not hear anything more from Plaintiffs until two days later, at which
20 time Plaintiffs rejected the Tribe's offer to work on a joint request for a status conference (*see*
21 **Exhibit D**) and instead filed the Motion here at issue (ECF 163).

22 8. The Motion is premised on the notion that Plaintiffs lack meaningful information
23 about the Tribe's construction plans. That premise is entirely inaccurate. The Tribe has
24 explained what will be built on the Yuba Site. The Tribe has provided a site plan showing the
25 features of the development and identifying the portions of the Yuba Site on which construction
26 will occur. The Tribe has explained when construction is scheduled to begin. And, contrary to

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1 Plaintiffs' representation, the Administrative Record contains thousands of pages of relevant
 2 information addressing environmental conditions at the Yuba Site.¹ Plaintiffs have all of the
 3 information necessary to determine whether to seek a preliminary injunction of the Tribe's
 4 construction activities pursuant to the clear process set forth in the Stipulation and Order
 5 Governing Further Proceedings.

6 9. Rather than following that process or accepting the Tribe's offer of cooperation,
 7 Plaintiffs have requested an indefinite (but likely substantial) delay in addressing the Tribe's
 8 construction plans. Such a delay may suit Plaintiffs' purposes — after all, some of them are
 9 using this environmental litigation to suppress a perceived economic competitor (*see* ECF 119-1
 10 at 10-12, ECF 136 at 2-3). But significant delay and procedural uncertainty will result in
 11 substantial harm to the Tribe. The direct economic costs of delay are substantial. For example,
 12 the Tribe has incurred more than \$2.43 million in carrying costs since the close of briefing on
 13 the parties' cross-motions for summary judgment, and an additional \$6,606.62 per day will be
 14 incurred going forward.² The Tribe has done everything in its power to make ends meet without
 15 burdening the Court's calendar, but it simply cannot afford to continue absorbing such costs (*see*,
 16 *e.g.*, AR 22973-74 (50% of Tribe unemployed or earning less than \$9,048 per year)). Indeed, if

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 18 ¹ Plaintiffs' position is that the information in the Administrative Record is irrelevant because the
 19 development described in the Tribe's 60-day Notice is "a different project" from the one
 20 approved by the Department of the Interior (Pl. Motion at 4-5). The argument is flawed in
 21 several respects. First, the vast majority of the environmental information in the Administrative
 22 Record (*e.g.*, information about land use, soils, potential wetlands, potential habitats, access,
 23 etc.) is relevant to *any* potential development at the Site. Second, to the extent the development
 24 described in the Tribe's 60-day Notice differs from the activities described in the Administrative
 Record, it is because ***the development described in the 60-day Notice will be smaller and less
 impactful.*** Third, the construction activities described in the Tribe's 60-day Notice are not "a
 different project"; rather, they are a subset of the larger project reviewed and approved by the
 Department of the Interior — an initial step in implementing the "Preferred Alternative"
 described in the EIS and approved in the ROD (and, for avoidance of doubt, the only step the
 Tribe proposes to undertake prior to resolution of the merits of this case).

25 ² These figures represent just a small fraction of the total costs of delay to the Tribe. They do
 26 not capture increases in labor, materials, and other construction costs. Nor do they capture the
 costs and other impacts associated with delaying the benefits of development to the Tribe and
 the community.

1 the Tribe's carrying costs are not soon abated, they will overwhelm the Tribe's ability to finance
2 even the modest development described in the 60-day Notice, leaving the Tribe indebted and
3 impoverished for years to come.

4 10. The Tribe has sought to mitigate its harm by making arrangements to proceed
5 toward financing and construction of a small Class II gaming facility at the Yuba Site this fall —
6 a "first step" that will defray costs and will provide some community benefits until such time as
7 pending litigation is resolved (*see* Exhibit A at 3-5 (explaining the Tribe's entitlement to proceed
8 with Class II gaming)). In making those arrangements, the Tribe has reasonably relied on the
9 Court's Stipulation and Order Governing Further Proceedings, which sets out a clear, agreed-
10 upon process guaranteeing prompt resolution of any disputes related to construction activities.
11 If Plaintiffs' Motion is granted, that process will be replaced by an indefinite (but likely
12 substantial) delay in the proceedings. The uncertainty and delay associated with such a result
13 will almost certainly preclude the Tribe from securing necessary financing.

14 11. For the reasons set forth in Paragraphs 2 through 10, there is no just cause or basis to
15 grant Plaintiffs' request for an indefinite extension of the preliminary injunction deadlines in the
16 Court's Stipulation and Order Governing Further Proceedings.

17 12. However, the Tribe also recognizes (a) the parties' cross-motions for summary
18 judgment have been fully briefed for more than a year (*see* ECF 98, 99, 102, 116, 119, 126, 128,
19 130, 136, 139); (b) related motions regarding Plaintiffs' reliance on extra-record evidence have
20 been resolved (ECF 158); (c) it is therefore possible that a ruling on the parties' cross-motions
21 for summary judgment is forthcoming; and (d) if such a ruling is anticipated prior to the Tribe's
22 early-November target construction date, it would be unreasonable and unnecessary for
23 Plaintiffs to file — and the parties to brief — a request for preliminary injunction at this time.

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13. The Tribe has no desire to waste party or judicial resources on an unnecessary preliminary injunction process. Nor does it wish to force the Court to issue multiple decisions in this matter. With that in mind:

(a) The Tribe would not object to a short extension of Plaintiffs' deadline for filing a preliminary injunction request so that the Court can provide direction regarding the status of the parties' cross-motions for summary judgment (*see* Exhibits C and D (offering to cooperate with Plaintiffs)).

The Tribe respectfully submits that an extension of 7 days (extending Plaintiffs' due date to September 22, 2015) would be appropriate.

(b) If a ruling on the parties' cross-motions for summary judgment is anticipated to be issued prior to the Tribe's early-November target for construction, the Tribe will agree not to initiate construction prior to the issuance of that ruling (thereby releasing Plaintiffs from any obligation to seek preliminary injunctive relief and obviating the need for briefing and hearing). To the extent that any injunctive relief issues remain to be resolved after the ruling,³ the parties could address them at that time.

(c) On the other hand, if a ruling on the parties' cross-motions for summary judgment is not anticipated to be issued before early November, the Tribe respectfully requests that Plaintiffs be ordered to promptly file their motions for preliminary injunction, if any, so as to avoid the risk of unnecessary delay, cost, and other harm to the Tribe.

³ *See, e.g.*, Fed. R. App. Proc. 8 (motions for injunction pending appeal ordinarily filed in District Court); *Monsanto v. Geertson Seed Farms*, 561 U.S. 139, 156-57 (2010) (requiring detailed evaluation of four-factor test prior to issuance of permanent injunction).

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Dated: September 14, 2015

Respectfully Submitted,

DENTONS US LLP

By /s/ Matthew G. Adams
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CERTIFICATE OF SERVICE

I hereby certify that on September 14, 2015, true and correct copies of **INTERVENOR-DEFENDANT’S RESPONSE TO PLAINTIFFS’ MOTION FOR AN EXTENSION OF THE DEADLINE TO FILE FOR A PRELIMINARY INJUNCTION AND MOTION FOR A STATUS CONFERENCE REGARDING INJUNCTIVE RELIEF** were served electronically on all parties for which attorneys to be noticed have been designated, via the CM/ECF system for the U.S. District Court for the Eastern District of California.

Respectfully submitted,

Dated: September 14, 2015

DENTONS US LLP

By: /s/ Matthew Adams

MATTHEW G. ADAMS

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