IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STAND UP FOR CALIFORNIA!, PATTY JOHNSON, JOE TEIXEIRA, and LYNN WHEAT,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF INTERIOR, SALLY JEWELL, in her official capacity as Secretary of the Interior, BUREAU OF INDIAN AFFAIRS, LARRY ROBERTS, in his official capacity as Acting Assistant Secretary-Indian Affairs, and AMY DUTSCHKE, in her official capacity as Regional Director Bureau of Indian Affairs,

Defendants,

WILTON RANCHERIA, CALIFORNIA,

Intervenor-Defendant.

Civil Action No. 1:17-cv-00058-RDM

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO HOLD CASE IN ABEYANCE

The Federal Defendants[1] do not oppose Plaintiffs' motion for a temporary stay, but any such stay should be limited to the time necessary for the Department of the Interior ("Department") to determine whether it has, or should assume, jurisdiction over Plaintiffs' attempt to bring an administrative appeal before the Interior Board of Indian Appeals ("IBIA"). After resolution of that question, the Court should require the parties to file a joint status report

[1] Pursuant to Federal Rule of Civil Procedure 25(d), Ryan Zinke should be substituted for Sally Jewell as Secretary of the Interior and Michael Black should be substituted for Larry Roberts as Acting Assistant Secretary – Indian Affairs.

proposing next steps in this case. Depending on how the Department resolves the question before it, the Federal Defendants believe the parties should either attempt to agree to a schedule either to (a) move this case forward or, (b) in the event the Department permits Plaintiffs' administrative appeal to proceed, brief whether this case should be dismissed while Plaintiffs exhaust administrative remedies.

On January 11, 2017, Plaintiffs filed this action seeking to enjoin the Department from taking land into trust for the benefit of the Wilton Rancheria ("Tribe"), eight days before the Department decided the Tribe's trust application. ECF No. 1 (Complaint). On January 13, 2017, this Court denied Plaintiffs' motion for a Temporary Restraining Order ("TRO"), finding there was no basis for the emergency relief Plaintiffs sought. Minute Order, January 13, 2017. In light of that ruling, Plaintiffs opted not to pursue further a Preliminary Injunction and instead asked the Department to self-stay, pursuant to 5 U.S.C. § 705, placement of the land in trust. ECF No. 6 (Joint Status Report attaching Plaintiffs' agency stay request); Minute Order, January 17, 2017.

On January 19, 2017, the Department decided the Tribe's trust application favorably, ECF No. 17-1 (Record of Decision), and on February 10, 2017, determined there was no basis to self-stay for reasons largely comparable to those justifying denial of Plaintiffs' motion for a TRO, ECF No. 17-8 (February 10, 2017 Department letter declining to self-stay). Plaintiffs were aware of the trust decision on the day it occurred and received a copy of the Record of Decision ("ROD") that same day. ECF No. 17-3 (email communications documenting transmittal of ROD on January 19). The Department did not take title to the lands that were the subject of the Tribe's trust request until February 10, 2017. ECF No. 17-9 (email communication confirming placement of land in trust on February 10).

Between January 19 and February 10, a period of twenty-two days, Plaintiffs took no action to amend their complaint to include claims actually challenging the January 19, 2017 ROD and took no steps to pursue further any emergency relief from this Court. To this date, in fact, Plaintiffs raise no claims in federal court challenging the ROD. Having failed to secure emergency relief first from this Court and then from the Department, Plaintiffs now ask the IBIA to take jurisdiction of an administrative appeal of a Department decision that indicated it was a final agency action by directing the BIA to acquire the land in trust. *See also* ECF No. 17-5 (Notice of Availability) ("The Principal Deputy Assistant Secretary – Indian Affairs made a final agency determination to acquire 35.92 acres, more or less, in the City of Elk Grove, Sacramento . . . on January 19, 2017").

The IBIA is "an appellate review body" within Interior that is authorized, through a delegation of authority from the Secretary of the Interior, *see* 43 C.F.R. § 4.1, to "issue final decisions for the [Department] in appeals involving Indian matters," *see* U.S. Department of the Interior, "About the Interior Board of Indian Appeals," https://www.doi.gov/oha/organization/ibia. The IBIA is not a court of general jurisdiction, however, and only exercises those powers delegated to it by regulation and the Secretary. In the context of fee-to-trust challenges, decisions by officials of the Bureau of Indian Affairs are not final and may be appealed to the IBIA. *See* 25 C.F.R. § 151.12(d); *see also* 43 C.F.R. § 4.331 (providing for IBIA appeals of "a final administrative action or decision of an official of the Bureau of Indian Affairs").

On February 24, 2017, the IBIA ordered briefing on its jurisdiction to hear Plaintiffs' appeal. ECF No. 17-13. Plaintiffs' IBIA appeal concerns the authority of Mr. Roberts to issue final agency decisions, including whether he had been performing the functions and duties of the Assistant Secretary at the time he made the decision at issue. Such a matter concerns internal

agency delegations of authority, and the Department should have an opportunity to resolve the issue in the first instance. Moreover, it would not be in the interests of judicial economy to have litigation proceed while the Department resolves the issue.

The Federal Defendants accordingly support Plaintiffs' stay motion at least until the Department determines whether the administrative appeal should go forward. If the Department declines to entertain Plaintiffs' administrative appeal, the parties should attempt to agree to a schedule providing for (a) Plaintiffs' to amend their complaint if they plan to seek judicial review of the January 19, 2017 ROD; (b) an answer or other responsive pleading deadline for Defendants; and (c) a date for production of the administrative record(s) for any agency decision(s) Plaintiffs challenge. And if the Department determines that Plaintiffs' administrative appeal may proceed to the merits, then the parties' should confer as to whether dismissal of this case is appropriate while Plaintiffs exhaust their administrative remedies. *See Avocados Plus Inc. v. Veneman*, 370 F.3d 1243 (D.C. Cir. 2004).

Accordingly, the Federal Defendants support a stay until the parties apprise the Court through a status report that the Department has decided whether Plaintiffs' administrative appeal should go forward. Such status report should also set forth the parties' view on how the case should proceed at that juncture.

DATED: March 3, 2017

Respectfully submitted,

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