# EXHIBIT H

United States Department of the Interior
OFFICE OF THE SECRETARY
Washington, DC 20240

FEB 10 2017

Ms. Jennifer MacLean
Perkins Coie
700 13th Street NW
Washington, DC 20005

Dear Ms. MacLean:

This letter is in response to your January 17, 2017 request pursuant to 5 U.S.C. § 705 that the Department of the Interior (Department) postpone the effective date of any decision by the Department to acquire land in trust on behalf of the Wilton Rancheria (Tribe). You submitted your request on behalf of Stand Up for California!, Patty Johnson, Joe Teixeria, and Lynn Wheat (Stand Up). On January 19, 2017, the Department issued a Record of Decision (ROD) announcing its intent to acquire approximately 35.92 acres of land in trust in the City of Elk Grove, California (Site), for the Tribe, for gaming and other purposes. Upon careful consideration of your request and supporting materials, we must inform you of our determination to deny your request. Because a stay is not warranted pursuant to Section 705, we follow the Department's fee-to-trust regulations, which require that upon completion of the requirements of 25 C.F.R. § 151.13 and any other Departmental requirements, the Bureau of Indian Affairs Regional Director, Pacific Region, shall immediately acquire the Site in trust.

Section 705 of the Administrative Procedure Act (APA) provides, in relevant part, that "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." As Stand Up notes in their request, the Department has broad discretion in deciding whether this standard has been met, and has not developed regulations or criteria for evaluating Section 705 requests in the land-into-trust context. As the analysis below shows, "justice" does not require a stay here, especially where such a stay prejudices the Tribe and does not, at the end of the day, preclude Stand Up from acquiring any relief a court might conclude it deserves.[1]

In interpreting Section 705, however, some Federal courts have concluded that "the standard for a stay at the agency level is the same as the standard for a stay at the judicial level: each is governed by the four-part preliminary injunction test applied in this Circuit."[2] In order to prevail on a preliminary injunction (PI) motion, a plaintiff must establish to a court that: (1) they are likely to succeed on the merits of their claims; (2) they are likely to suffer irreparable harm in the

[1] We note that the only case supplied by Stand Up finding an agency's refusal to postpone the effective date of a decision was unreasonable, *Chicago, B. & Q.R. Co. v. Illinois Commerce Comm'n*, 82 F. Supp. 368, 377 (N.D. Ill. 1949), involved circumstances where there was immediate, if not irreparable, injury on the requester in the form of severe penalties for disobeying the agency's order. Such is not the case here. Moreover, *Chicago* did not involve a stay request to a federal agency pursuant to Section 705 and says nothing about what standard should be applied by an agency reviewing such a request.

[2] *See Sierra Club v. Jackson*, 833 F. Supp. 2d 11, 30 (D.D.C. 2012). *See also Corning Savings & Loan Ass'n v. Federal Home Land Bank Board*, 562 F. Supp. 279, 281 (E.D. Ark. 1983).

absence of preliminary relief; (3) the balance of equities tip in their favor; and (4) injunction is in the public interest.[3] Stand Up has brought suit against the Department in the United States District Court for the District of Columbia.[4] Because that Court has at least on one occasion required application of the standards for granting a PI in the context of a Section 705 request for an agency stay, we apply that standard here, while not conceding that it applies in every case. We reiterate, however, that even under a more flexible standard, we choose not to exercise such discretion here.

*Likelihood of success on the merits*

Stand Up makes several arguments challenging the Department's promulgation of the so-called "*Patchak* Patch rulemaking," which revised the Department's regulation governing notice of fee-to-trust decisions by deleting the 30-day waiting period between notice of a fee-to-trust determination and trust deed transfer.[5] The *Patchak* Patch requires the Department to immediately accept title in trust after issuance of trust acquisition decision and compliance with title and environmental due diligence requirements.[6] Stand Up merely rehashes arguments made by some commenters during formal notice and comment on the proposed rule, which the Department carefully considered and addressed in issuing the final rule.[7] Moreover, the fact that the Department is considering Stand Up's Section 705 request demonstrates that 25 C.F.R. § 151.12 does not foreclose the possibility of a stay in all circumstances. Rather, Section 151.12 reflects a Departmental policy that, where justice does not require otherwise, land should be taken into trust as soon as practicable because doing so will not hinder judicial review. Accordingly, we decline to revisit our rulemaking now.

Stand Up additionally argues that recent changes to the title evidence requirements, 81 Fed. Reg. 30,173 (May 16, 2016) (title rule),[8] also call the *Patchak* Patch into question, alleging that because our title review will not be as "exhaustive," a 30-day waiting period is more important. However, as noted in the preamble to the Department's title rule, the purpose of title evidence requirements is "to ensure that the Tribe has marketable title to convey to the United States, thereby protecting the United States."[9] The case that Stand Up relies on to support its argument,

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[3] *Winter v. Natural Res. Def. Council, Inc.,* 555 U.S. 7, 20 (2008); *Stand Up for California! v. United States DOI*, 919 F. Supp. 2d 51, 61 (D.D.C. 2013).

[4] *Stand Up for California! v. United States Department of Interior*, 1:17cv00058-RDM (D.D.C.).

[5] *See* 25 C.F.R. § 151.12; 78 Fed. Reg. 67,928 (Nov. 13, 2013). As explained in the rule, in 2012, the Supreme Court held in *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199 (2012), that neither the Quiet Title Act, 28 U.S.C. § 2409a nor Federal sovereign immunity barred APA challenges to the Secretary's decision to acquire land in trust after title was transferred, unless the aggrieved party asserts an ownership interest in the land as the basis for the challenge. 78 Fed. Reg. at 67,929. That change to the legal landscape led the Department to reconsider, and ultimately eliminate, the 30-day waiting period before trust transfer, because interested parties had the opportunity to seek judicial review of a trust acquisition decision under the APA even after title was transferred. *Id.*

[6] 25 C.F.R. § 151.12.

[7] *See, e.g.,* 78 Fed. Reg. at 67,932-33 (assuring commenters that the ability to seek judicial review, and the remedies available, remain fully intact following a trust transfer); *id.* at 67,934 (addressing commenters' concerns about whether land could come out of trust). *See also id.* at 67,932 (summarizing the many comments in support of the rule).

[8] The rule replaced the "Standards for the Preparation of Title Evidence in Land Acquisitions by the United States" issued by the United States Department of Justice.

[9] 81 Fed. Reg. at 30,174.

*Crest-Dehesa-Granite Hills-Harbison Canyon Subregional Planning Group v. Acting Pacific Regional Director,* 61 IBIA 208 (2015), explains that "the interest protected by 151.13 is that of the United States, not the land or property interests of third parties that are not being acquired."[10] This undermines Stand Up's position. Moreover, the preamble to the title rule further notes the Department's determination that the revised title evidence requirements still ensure evidence of good title and protect the United States' interests.[11] Thus, for the policy and legal reasons explained in the preambles to the *Patchak* Patch and title evidence rules, and as supported by Federal and Interior Board of Indian Appeals ("IBIA") case law, we are not persuaded by Stand Up's objections to our regulations. We further note that the Department has been granted broad delegated authority to prescribe regulations "carrying into effect the various provisions of any act relating to Indian affairs."[12] We are entitled to deference in interpreting and carrying out general and ambiguous provisions in the Indian Reorganization Act (IRA) through APA notice and comment rulemaking.[13] Thus, Stand Up is not likely to succeed on the merits of its arguments related to the Department's fee-to-trust regulations.

Stand Up also raises concerns with a 2014 Development Agreement that, while pertaining primarily to Stand Up's assertions of irreparable harm, are also addressed here to the extent they contain implicit allegations that BIA did not properly consider the Development Agreement in approving the fee-to-trust application. In 2014, the City of Elk Grove (City) entered into a Development Agreement with Elk Grove Town Center, L.P. to develop approximately 100 acres of land owned by Elk Grove Town Center, including the Site, into a regional mall (Development Agreement). As explained by Stand Up, the Development Agreement is "regulatory in nature, and serves as zoning for the entire site, including the proposed trust land."[14] The Development Agreement runs with the land, "and the burdens and benefits [of the Development Agreement] shall bind and inure to all successors in interests to the parties hereto."[15] The Development Agreement presently encumbers title to the property. On October 26, 2016, the City voted to amend the Development Agreement to remove from its scope the Phase 2 area, which includes the Site (2016 Amendment). However, City residents submitted a referendum petition to trigger the City either reconsidering the 2016 Amendment or holding a referendum on it. On February 8, 2017, the City voted to repeal the ordinance adopting the 2016 Amendment. We understand that the City will hold a final vote on the ordinance on February 22, 2017.

Stand Up argues that the Department's title review and consideration of jurisdictional issues pursuant to the IRA and Indian Gaming Regulatory Act (IGRA) are legally insufficient. Specifically, Stand Up appears to take the position that the 2014 Development Agreement constitutes an encumbrance making title unmarketable in violation of 25 C.F.R. §151.13. Stand Up further argues that the 2014 Development Agreement provides the City authority that would create jurisdictional or land use conflicts in contravention of 25 C.F.R. § 151.10(f) and the IGRA, 25 U.S.C. § 2703. Regarding title sufficiency, as the Department has already explained in its ROD at 86-88, there is no requirement that title be clear of all encumbrances in order for

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[10] 61 IBIA at 216.
[11] 81 Fed Reg. at 30,174.
[12] 25 U.S.C. § 9; *see also* 25 U.S.C. § 2.
[13] *See Atchison, T. & S.F. Ry. V. Pena*, 44 F.3d 437, 441-42 (7th Cir. 1994), *aff'd sub nom Bhd. Of Locomotive Eng'rs v. Atchison, T. & S.F. R.R.*, 516 U.S. 152 (1996).
[14] *See* Stand Up Section 705 Request Letter at 7 (Jan. 17, 2017).
[15] *Id.* at 8.

the Department to accept it in trust. Rather, the purpose of title review under 25 C.F.R. § 151.13 is to evaluate whether any title issues create potential liability for the United States.[16] As such, Stand Up has no standing to challenge the Department's compliance with 25 C.F.R. § 151.13.

The Department has and will comply with the title rule. The Department will only take title in trust that it has determined is free of unmarketable encumbrances. Stand Up identifies rights expressly reserved to the City in the Development Agreement. As the City expressly acknowledges in its Memorandum of Understanding with the Tribe,[17] once the United States acquires the Site in trust, the City does not have regulatory authority or land use control over the Site as a matter of Federal law. For that same reason, and as buttressed by the cooperative efforts by the Tribe and the City to address jurisdictional and land use issues in their MOU, as well as is explained in the ROD at 83, the Department has satisfied its duty to evaluate jurisdictional conflicts pursuant to 25 C.F.R. § 151.10(f) and the Tribe will be able to exercise jurisdictional authority over the Site for purposes of the IGRA. Therefore, assuming the Department's title review were subject to judicial review, Stand Up is unlikely to succeed on the merits of its claims against the United States deriving from the Development Agreement. If Stand Up styles their claim as a challenge to the Department's consideration of jurisdictional and land use conflicts pursuant to Section 151.10(f), such claim is unlikely to succeed because the Department did in fact consider the Development Agreement.[18]

Last, Stand Up also argues that the Department has violated the National Environmental Policy Act (NEPA) in processing the Tribe's trust application. Stand Up submitted extensive comments through the NEPA process, which were thoroughly considered by the Department in Attachment IV to the ROD, the Final Environmental Impact Statement,[19] and in the Scoping Report.[20] We reject Stand Up's arguments for the reasons articulated in those documents and do not believe Stand Up would be likely to succeed on the merits of these claims.

*Irreparable Harm*

Stand Up claims that if the Site is placed immediately in trust, Stand Up will lose the right to bring its California Environmental Quality Act (CEQA) claim in California State court as well as the right to pursue a referendum to overturn the 2016 Amendment to the Development Agreement.[21] In addition, Stand Up argues that trust acquisition will render the Development Agreement unenforceable under the Quiet Title Act (QTA), 28 U.S.C. § 2409. According to Stand Up, California citizens have the right to enforce compliance with development agreements in court, but such right would be cut off by the QTA once the land was in trust.

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[16] *See* 81 Fed. Reg. at 30,174.
[17] *See* MOU at Section 9(b).
[18] *See* ROD at 82-83.
[19] *See* Final Environmental Impact Statement, Volume I – Responses to Comments (Dec. 2016), *available at* http://www.wiltoneis.com/wp-content/uploads/2016/12/Volume-1-Final-EIS-Responses-To-Comments.pdf.
[20] *See* EIS Scoping Report Wilton Rancheria Fee-to-Trust and Casino Project (Feb. 2014), *available at* http://www.wiltoneis.com/wp-content/uploads/2014/02/Scoping-Report.pdf.
[21] In November 2016, Stand Up filed a lawsuit against the City in state court arguing that the City violated CEQA by failing to prepare an Environmental Impact Report before enacting the 2016 Amendment. *See Stand Up California!, et al. v. City of Elk Grove, et al.*, No. 32-2016-80002493 (Cal. Super. Ct. Nov. 23, 2016).

In reviewing Stand Up's claims, we note that the D.C. Circuit sets a "high standard for irreparable injury," requiring that the injury "be both certain and great; it must be actual and not theoretical."[22]

Since Stand Up submitted its Section 705 request, the City has voted to repeal the ordinance adopting the 2016 Amendment to the Development Agreement. A final vote will be held on February 22. Thus, a referendum on the 2016 Amendment may not occur and it is questionable whether Stand Up will continue its state court lawsuit. Stand Up cannot claim any rights or harm related to a referendum that may not happen or a state court lawsuit it may drop or a court may find moot. Even if the City reverses course and holds the referendum, it is unclear what the results of the referendum will be, and thus Stand Up's alleged harms are mired in contingency. Stand Up also does not have a right to be protected from circumstances rendering claims moot, particularly where the Department's placement of land in trust is not the cause of the mootness. In addition, assuming for the purposes of argument the land use restrictions are enforceable, and that Stand Up has standing to enforce them, Stand Up misreads the QTA. Stand Up would not be claiming title to the Site, which would be barred by the QTA; it would just be seeking to enforce restrictions that it believes apply to the land. Stand Up cannot show harm on this basis.

Stand Up has also not shown the irreparability of any potential harm. Stand Up has not yet filed a complaint challenging the ROD. Presumably, it intends to challenge the ROD on the same grounds on which it opposed the application and submitted this request. At that point Stand Up will have the opportunity to litigate its claims, and, should it prevail, obtain relief, which could include the land being taken out of trust in certain circumstances. Stand Up also raises concerns that the Department will not or cannot reverse a trust acquisition due to the lack of a formal agency process or clear legal authority to do so. In the *Patchak* Patch rulemaking, the Department explained that "[i]f a court determines that the Department erred in making a land-into-trust decision, the Department will comply with a final court order and any judicial remedy that is imposed."[23] The Department has made statements to that same effect in injunctive relief motions practice in other cases.[24] Thus, as other courts have found, no irreparable harm will result from the Department's acquisition of the Site in trust because the Department of the Interior will take the Site out of trust if ordered to do so by the Court.[25]

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[22] *Chaplaincy of Full Gospel Churches v. England,* 454 F.3d 290, 297 (D.D.C. 2006) (quoting *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

[23] 78 Fed. Reg. at 67,934.

[24] *See* Federal Defendants' Response in Opposition to Emergency Motion for Injunction Pending Appeal at 14, filed on March 14, 2016, *Confederated Tribes of the Grand Ronde Cmmty. v. Jewell*, Case Nos. 15-5033, 14-5326 (D.C. Cir.); United States' Memorandum in Opposition to Plaintiffs' Motion for Preliminary Injunction or Writ at 19-20, filed on June 17, 2016, *Littlefield v. United States Dep't of the Interior*, Case. 1:16-cv-10184 (D. Mass.); United States' Response to Plaintiffs' Motion for Preliminary Injunction at 39, filed on January 18, 2013, *Stand Up For California! v. United States Dep't of the Interior*, Case No. 1-12-cv-02039 (D.D.C).

[25] *See, e.g.*, *Stand Up for California!*, 919 F. Supp. 2d 51, 82 (2013) (finding no irreparable harm because "the Court sees no cognizable limit to its jurisdiction that would preclude a future order vacating the trust transfer in this case after the transfer has already been made," and "the government has repeatedly assured the Court" that it would take the land out of trust if ordered to do so). The Department of the Interior has taken land out of trust in other cases. For example, following the Supreme Court's granting of the petition for a writ of certiorari in *United States Dep't of the Interior v. South Dakota*, 519 U.S. 919 (1996), the case that led to the promulgation of the now-eliminated requirement for the 30 day notice period before acquiring land into trust to allow for judicial review, the Department of the Interior reversed the land into trust decision because the district court's judgment was vacated. *See* Land Status: Lower Brule Sioux Tribe, 62 Fed. Reg. 26,551 (May 14, 1997). The Department of the Interior also took

Stand Up also argues that, if the Department acquires the Site in trust, its right to judicial review of its NEPA claims will be irreparably harmed or eliminated. Yet Stand Up cites to cases that are easily distinguishable from the situation at hand. In *New York v. Shinnecock Indian Nation*, 280 F. Supp. 2d 1 (E.D.N.Y. 2003), the court found that irreparable harm was demonstrated by the fact the tribe had already broken ground on construction, this construction would create traffic congestion, and further, that the tribe had not undertaken any environmental review of the project pursuant to state or federal law.[26] In contrast, the Wilton Tribe has not broken ground on construction and, furthermore, the project has already been subject to extensive environmental review under federal law and with the participation of state and local governments.[27] The remaining cases cited by Stand Up concern projects that had been completely constructed.[28]

We conclude Stand Up's arguments are too speculative and do not demonstrate irreparable harm. The Tribe would have to start construction of a casino, and then complete construction, all before a court reviews the merits of a NEPA claim. The proposed Wilton casino/hotel will cover 608,756 square feet, and include multiple restaurant facilities, retail space, a fitness center and spa, convention center, and a three-story parking garage.[29] Given that construction has not started, and construction of a Class III casino of this scope often takes years, we find it unlikely Stand Up will not have an opportunity to litigate its claims.

*Balance of Equities*

As discussed above, Stand Up has not demonstrated that irreparable harm will occur from the trust transfer. On the other hand, the Tribe and the United States will be harmed by a stay. As noted in the ROD, the Tribe is without a reservation or trust land held by the United States.[30] The Tribe's efforts to restore its historical homelands are fueled by the Tribe's formidable poverty levels, limited employment opportunities, and high demand for adequate housing.[31] These acute needs will be allayed by the dependable stream of income from gaming operations, which will support tribal government functions and provide members with critical employment and educational opportunities.[32] The IRA is sweeping legislation enacted by Congress to

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land out of trust to correct an administrative defect in the publication of the 30 day notice. *See* December 24, 2012, Joint Status Report, Ex. 4, ECF No.14-4 (Brief in Support of the United States's Amended Motion to Dismiss or in the Alternative for Summary Judgment, at 32-34, State of South Dakota, v. United States Dep't of the Interior, ECF No. 13-1, Case No. 10-cv-03006-RAL (D.S.D. 2010)). *But see Prieto v. United States*, 655 F. Supp. 1187, 1192 (D.D.C. 1987) (based on equitable considerations, "the Secretary exceeded his authority in reconsidering and in revoking the trust status of plaintiff's land.").

[26] 280 F. Supp. 2d at 4-5.

[27] It is also important to note that *Shinnecock* involved a proposed casino on fee lands for a tribe that was not federally recognized; therefore, the court's decision to issue a PI was largely rooted in the plaintiff's high likelihood of success on the merits. *See* 280 F. Supp. 2d at 6-7.

[28] *See Neighborhood Transp. Network, Inc. v. Pena*, 42 F.3d 1169 (8th Cir. 1994) (finding no relief available once I-35W high occupancy vehicles lanes were completed); *Bayou Liberty Ass'n, Inc. v. United States Army Corp of Eng'rs*, 217 F.3d 393 (5th Cir. 2000) (finding requested relief moot since retail complex had been completely constructed); *Knaust v. City of Kingston*, 157 F.3d 86 (2d Cir. 1998) (dismissing NEPA claims as moot because park project was completed).

[29] *See* ROD at 2-3.

[30] *See* ROD at 2.

[31] *See* ROD at 75.

[32] *See* ROD at 14.

"establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."[33] Congress intended that greater tribal self-governance be obtained, in part, by securing for Indian tribes a land base on which to engage in economic development and self-determination.[34] Additionally, in IGRA, Congress intended to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."[35] Agreeing to a stay would "bring to a screeching halt the process of the Tribe obtaining the economic benefits contemplated by the IGRA,"[36] as well as frustrate Congress' goals of restoring tribal homelands and building tribal economies. Thus, the equities weigh against staying the trust transfer.

*Public Interest*

As noted above, Congress has determined through the IRA and IGRA that tribal economic development and strong tribal governments through gaming and the acquisition of land in trust are important federal interests. Moreover, there is tremendous support for the proposed Wilton casino by local governments and many citizens, and to the extent citizens opposed the acquisition, those interests were carefully considered in the Part 151 and NEPA processes. Thus, we conclude that the public interest would not be served by granting a stay.

*Conclusion*

In conclusion, your request for a stay pursuant to Section 705 of the APA is denied. None of the factors courts consider when deciding to issue a PI justify a stay here. Through its rulemakings, the NEPA process, and the ROD, the Department has thoroughly considered, and rejected, Stand Up's arguments on the merits, and we believe the likelihood of Stand Up's success on the merits is low. Moreover, Stand Up failed to demonstrate the potential for irreparable injury. In addition, Stand Up will have their day in court, and ultimately, if a court were to conclude that the Department erred in making the land-into-trust decision, the Department will comply with any judicial remedy that is imposed. Regarding the balance of equities, the Tribe's history of hardships, including unlawful termination and the lack of a homeland, is articulated in the ROD and supports immediate trust transfer. In addition, based on Congressional intent in enacting IGRA and the IRA, and for the policy reasons explained in our *Patchak* Patch rulemaking, the public interest does not justify a stay.

Even assuming, for argument's sake, that Stand Up need not show irreparable harm, justice does not require a stay here based on the other factors analyzed above.

Sincerely,

Michael S. Black
Acting Assistant Secretary – Indian Affairs

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[33] *Morton v. Mancari*, 417 U.S. 535, 542 (1974).
[34] *See generally Cohen's Handbook of Federal Indian Law*, § 1.05 (2012 ed.).
[35] 25 U.S.C. § 2702.
[36] *Stand Up for California!*, 919 F. Supp. 2d at 84.