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The Honorable John C. Coughenour

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

STATE OF WASHINGTON, et al.

Plaintiffs,

v.

RUSSELL VOUGHT, et al.

Defendants.

NO. 2:21-cv-00002-JCC

PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION

NOTE ON MOTION CALENDAR:
JANUARY 29, 2021

ORAL ARGUMENT REQUESTED

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I. INTRODUCTION

In a rushed effort to sell off federal property, the Trump Administration intends to remove from the Pacific Northwest some of the most vital original records of this region’s history and people. This effort violates federal law and would cause irreparable harm—“we are made by history” and cannot afford to lose our past.¹ The Court should issue a preliminary injunction.

The National Archives building in Seattle houses unique, irreplaceable, and un-digitized federal records of profound importance to Indian Tribes and their members, individuals of Chinese and Japanese descent, researchers, historians, and the general public—including tribal and treaty records, case files related to the Chinese Exclusion Act of 1882, and records related to Japanese American internment during World War II. Nonetheless, the Administration plans to sell the facility imminently pursuant to the Federal Assets Sale and Transfer Act (FASTA) and to transfer these records to facilities over a thousand miles away. But the Archives facility is exempt from sale under FASTA because it is “used in connection with Federal programs for agricultural, recreational, or conservation purposes, including research in connection with the programs.” FASTA § 3(5)(B)(viii). Even if FASTA applied, Defendants failed to comply with its basic procedural requirements, ranging from mandatory deadlines to development of principles to guide decision-making, rendering their actions *ultra vires* and contrary to law.

Selling the Archives is not only illegal, it would also be profoundly harmful. As documented in dozens of declarations submitted with this motion, the Archives provide a vital link for Tribes, researchers, and members of the public to access historical documents, many of which have profound impacts today. Scattering these documents across the country will irreparably harm our region and there is no concomitant benefit to the federal government in using a rushed and haphazard process to sell this property. In short, selling the Archives in this manner is unlawful, will cause irreparable harm, and is counter to the equities and public interest. The Court should preliminarily enjoin this unlawful and shortsighted action.

¹ Martin Luther King, Jr., *Strength to Love* (1963).

II. RELEVANT FACTS

A. The National Archives at Seattle

Seattle’s Federal Archives and Records Center is located at 6125 Sand Point Way NE, Seattle, WA 98115 and houses the National Archives at Seattle. Dkt. #1 (Compl.) ¶4. It is currently occupied and operated by the National Archives and Records Administration (NARA), and is owned by the General Services Administration (GSA). Compl. ¶9. The Archives facility houses the permanent, irreplaceable federal records of Washington, Oregon, Alaska, and Idaho that are particularly important to residents of this region, such as census and genealogical records, tribal records, records related to the Chinese Exclusion Act and immigration, and records related to the internment of Japanese Americans during World War II. *See id.* ¶¶77-90.² Many of these records are unique, original documents, and the vast majority are un-digitized and not available online. *Id.* ¶¶1-2, 75-76.³ They are not “dead files” in perpetual storage, but “a vibrant, special collection *library*.” King George ¶5.

The Archives facility’s tribal and treaty records hold great value for Tribes and tribal members in particular, who use them for a variety of purposes such as applying for federal recognition or restoration, establishing tribal membership, demonstrating and enforcing tribal rights to fishing, tracing their lineage and ancestry, and accessing Native school records. Compl. ¶¶79-83.⁴ For many tribal members, the Archives documents are “not just boxes of historical records,” but offer a profoundly tangible connection to their history. *See, e.g.*, Hall ¶5; Farrar ¶7. The Archives also contain over 50,000 case files related to the Chinese Exclusion Act of 1882, a critical resource for historical preservation organizations and Chinese Americans seeking information about their ancestors. Compl. ¶¶84-87; *see, e.g.*, So Ltr. In addition, the Archives

² *See generally* all Declarations in the Appendix filed herewith.

³ *See also, e.g.*, Abe ¶3; de los Angeles ¶8; Bond ¶9; Booth ¶4; Brigman ¶3; Fisher ¶5; Gentry ¶13; Hall ¶4; Hansen ¶¶3-4; Harmon ¶9; Harrelson ¶9; Haycox ¶6; Farrar ¶¶11-12; Johnson ¶8; Klinge ¶4; Nicola, P. ¶3; Oberg ¶8; Pickernell ¶4; Rushforth ¶¶4-6; Stein, G. ¶5; Sullivan, M. ¶12.

⁴ *See also, e.g.*, de los Angeles ¶9; Booth ¶¶4, 5, 8; Fisher ¶7; Gentry ¶¶10, 14-15; Hall ¶¶4-7; Harmon ¶¶8, 14; Harrelson ¶¶4-6, 9; Hill ¶5; Pickernell ¶¶4-6, 9; Saluskin ¶9; Wooten ¶¶3-6.

1 facility—which sits on land farmed by the Uyeji family before their forced internment in 1942,
 2 and now houses internment-related records—has special significance for the local Japanese
 3 American community. Compl. ¶¶88-90; *see, e.g.*, Brigman ¶3.

4 **B. The Federal Assets Sale and Transfer Act of 2016 (FASTA)**

5 FASTA, Pub. L. No. 114-287, 130 Stat. 1463 (2016), as amended, establishes a process
 6 for selling federal real property on an expedited basis. It created an independent Public Buildings
 7 Reform Board (the PBRB) and a process for the PBRB to identify and recommend real property
 8 assets for disposal over a specified period, after which the PBRB will disband. *Id.* §§ 4, 10, 12.

9 **1. Properties used in connection with federal conservation, agricultural, or**
 10 **recreational programs are exempt from sale under FASTA**

11 Certain property types are excluded from the definition of “Federal civilian real property”
 12 that is subject to sale under FASTA. FASTA § 3(5). One type of exempt property is: “Properties
 13 used in connection with Federal programs for agricultural, recreational, or conservation
 14 purposes, including research in connection with the programs.” *Id.* § 3(5)(B)(viii). The Archives
 15 facility is just such a property, as it is used in connection with a vast number of such programs.

16 The National Park Service (NPS) “preserves unimpaired the natural and cultural
 17 resources and values of the National Park system,” working to “extend the benefits of natural
 18 and cultural resource conservation and outdoor recreation” nationwide. *Fraas Ex. 1*. As a recently
 19 retired NPS historian explains, Seattle Archives records are “an absolute necessity for research
 20 in connection with many federal programs for agricultural, recreational, or conservation
 21 purposes,” including programs related to resource management and historical use of NPS lands.
 22 Norris ¶5. Archives research has been used to develop visitor education materials, exhibits, and
 23 trailhead and trail signage for U.S. Forest Service projects at national parks and trails in the
 24 Pacific Northwest and Alaska. Booth ¶6; Allen ¶5; Smythe ¶6; Mansfield ¶8; *see also* Compl.
 25 ¶56 (use by Wing Luke Museum, a Smithsonian affiliate and NPS Affiliated Area). Researchers
 26 have also used Archives records for NPS-funded projects to guide the management of San Juan

1 Island National Park, Nash ¶9; document and conserve historic places important to Latino and
 2 African American communities in the Pacific Northwest, Sullivan, M. ¶11; and identify Alaska
 3 Native historic sites eligible for selection under the Alaska Native Claims Settlement Act of
 4 1971, which transferred land titles to Alaska Native corporations, Smythe ¶4; Stein, G. ¶¶2-3.
 5 Through a Japanese American Confinement Sites Grant, NPS also recently funded Archives
 6 research used to aid visitor interpretation at several national historic sites. Abe ¶5. Other federal
 7 agencies likewise use the Seattle Archives or fund Archives research for ecological conservation
 8 programs, including the U.S. Department of Fish and Wildlife, U.S. Army Corps of Engineers
 9 (USACE), Bureau of Land Management, and National Oceanic and Atmospheric Administration
 10 (NOAA) among others discussed below. House ¶¶11-12; Parham ¶7; Wilson ¶24.

11 Tribes, “this country’s first conservationists,” King George ¶6, also make extensive use
 12 of the Archives in connection with a wide variety of federal conservation, agricultural, and
 13 recreational programs. Many such programs are carried out with federal funding provided under
 14 the Indian Self-Determination and Education Assistance Act of 1975, as amended (ISDEAA),
 15 25 U.S.C. §§ 5301-5423,⁵ as well as grants from various federal agencies. *See, e.g.*, Sullivan, J.
 16 ¶¶5-9 (Archives research for ecological conservation, climate change impact assessment, and
 17 natural resource management programs); Thomas ¶¶2, 5-6 (research for federally funded Tribal
 18 Timber, Fish & Wildlife Program and archaeological, cultural and ecological conservation
 19 purposes); Stiltner ¶¶4-8; Geyer ¶¶6, 10-16 (research for conservation programs funded by
 20 ISDEAA, EPA, USACE, NPS); Strong ¶10 (research for conservation programs funded by
 21 NOAA, EPA, BIA); Peterson ¶¶8-12 (large portions of Alaska are federal lands; discussing use

22
 23 ⁵ ISDEAA “authorizes the [Federal] Government and Indian tribes to enter into contracts in which the
 24 tribes promise to supply federally funded services . . . that a [Federal] Government agency would otherwise
 25 provide.” *Cherokee v Leavitt*, 543 U.S. 631 (2005). Tribal officials acting under these contracts are “performing a
 26 federal function” administering “federal programs benefitting Indians.” *FGS Constructors, Inc. v. Carlow*, 64 F.3d
 1230, 1234 (8th Cir. 1995), cited approvingly in *Demontiney v. U.S. ex rel. Dep’t of Interior, Bureau of Indian
 Affairs*, 255 F.3d 801, 807-08 (9th Cir. 2001). Tribal Historical Preservation Officers are expressly authorized to
 undertake “conservation” efforts. 54 U.S.C. §§ 3021019(1), 302702. Tribal officials rely on the Seattle Archives in
 carrying out these and other federal functions. *See, e.g.*, Wisniewski ¶6; Sullivan, J. ¶6.

1 of Archives research in conserving those lands); Simon ¶¶17-19 (research related to Alaska
 2 National Interest Lands Conservation Act); Schutt ¶7; Peterson ¶9 (federal allotment land
 3 management program); Wisniewski ¶¶6, 8-9 (research for federally funded historic conservation
 4 research and environmental cleanup work); Bossley ¶¶14-17, 21; Parham ¶¶7-10; Mansfield
 5 ¶¶6-8; Thomas J. ¶6; Stiltner ¶¶4-8; *see also* King George ¶6. The Klamath Tribes also recently
 6 used the Archives for research to protect treaty-reserved water rights in the Klamath River Basin
 7 in connection with a long-term federal restoration project to store and divert water for irrigation
 8 and habitat conservation. Gentry ¶11; *see Baley v. United States*, 942 F.3d 1312, 1316 (Fed. Cir.
 9 2019), *cert. denied*, 141 S. Ct. 133 (2020). In general, tribal governments rely on the Archives
 10 for claims under the Native American Graves Protection and Repatriation Act and
 11 government-to-government relations, as well as to resolve land and water rights issues. Klinge
 12 ¶5; Taylor, J. ¶5; Gentry ¶11. In addition, a U.S. Department of Agriculture Specialty Crop Block
 13 Grant is funding a Washington agricultural history project that will require Archives research
 14 related to irrigation, soil conservation, transportation, and educational programs. McCaffrey ¶6.

15 NPS's National Register of Historic Places (the National Register) is another Federal
 16 conservation program that routinely involves use of the Archives. The National Register is "part
 17 of a national program to coordinate and support public and private efforts to identify, evaluate,
 18 and protect America's historic and archaeological resources." Fraas Ex. 2. It is authorized by the
 19 National Historic Preservation Act of 1966 (NHPA), which defines "historic preservation" to
 20 include "conservation" of historic properties. 54 U.S.C. § 300315(1). Nominating a property for
 21 inclusion on the National Register "generally requires extensive use of the National Archives
 22 facility" to establish the relevant criteria. Sullivan, M. ¶¶5-11; Brooks ¶¶4-5; Carter ¶4; Geyer
 23 ¶¶6-9; McCaffrey ¶7; Smythe ¶5; Tushingam ¶6; Wilson ¶25; Harrelson ¶6 (discussing Grand
 24 Ronde Land Tenure Project as a recent example); Bossley ¶¶14-17, 21 (discussing use of
 25 Archives for Traditional Cultural Property application). Furthermore, properties listed on the
 26 National Register are eligible for the Historic Tax Credit program, which is also a "conservation"

1 program, as defined in the Internal Revenue Code. *See* I.R.C. § 170 (4)(c)(A) (“conservation
 2 purpose” includes “the preservation of an historically important land area or a certified historic
 3 structure”); Brooks ¶¶6-7. Other similar programs include NPS’s Tribal Preservation Program,
 4 Historic American Buildings Surveys, Historic American Engineering Records, and Federal
 5 Certified Local Government program, which also conserve historical properties based on
 6 information obtained from the Archives. Brooks ¶8; McCaffrey ¶7; Wisniewski ¶6.

7 The Archives facility itself is also directly used for conservation. NARA, which operates
 8 the facility, has several “Preservation Programs,” including a “Conservation Division” that is
 9 generally responsible for document conservation. Compl. ¶126. The Conservation Division’s
 10 page on NARA’s website explains, *inter alia*: “We assess the condition of the records and
 11 identify their composition, and we stabilize and treat documents to prepare them for digitization,
 12 exhibition, and use by researchers.” *Fraas* Ex. 3. NARA also has a unit known as the “Document
 13 Conservation Laboratory” or “Conservation Lab.” Compl. ¶126. According to NARA’s website,
 14 the Conservation Lab “is responsible for conservation activities which contribute to the
 15 prolonged usable life of records in their original format.” *Id.* Among other activities, the
 16 Conservation Lab “repairs and stabilizes textual records (un-bound papers, bound volumes, and
 17 cartographic items) and photographic images among the holdings of [NARA] and provides
 18 custom housings for these records as needed.” *Fraas* Ex. 4. NARA conducts conservation-related
 19 activities as to documents housed at the Seattle Archives facility. *House* ¶18. In addition, staff
 20 at the National Archives at Seattle conduct conservation work themselves. *Id.* ¶¶13, 15.

21 Defendants do not appear to have considered this FASTA “Federal programs” exemption
 22 in connection with their planned sale of the Archives facility. *See infra* at 9.⁶ Indeed, they were
 23 not even aware of Tribes’ interest in the Archives for *any* purpose. *Infra* at 10.

24
 25 ⁶ The Court may consider extra-record evidence in an APA case where, *inter alia*, the agency has failed to
 26 take required actions, *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000), or failed to consider
 relevant factors, such as facts related to the scope of its statutory authority, *Lands Council v. Powell*, 395 F.3d 1019,
 1030 (9th Cir. 2005), as occurred here.

1 **2. FASTA’s procedural requirements**

2 FASTA Section 11 establishes a multi-step process to ensure the PBRB has the needed
3 decision-making framework and data to recommend properties for sale. The first step is for
4 federal agencies to make initial recommendations. FASTA § 11(a)(2). This must be done “[n]ot
5 later than 120 days after the date of enactment of this Act, and not later than 120 days after the
6 first day of each fiscal year thereafter until termination of the Board[.]” *Id.* § 11(a)(2).

7 The second, critical step is for the Office of Management and Budget (OMB) to “develop
8 consistent standards and criteria against which the agency recommendations will be reviewed,”
9 *id.* § 11(b)(1)(B), and, with GSA, to “jointly develop recommendations to the [PBRB] based on
10 the standards and criteria developed under paragraph (1).” *Id.* § 11(b)(2). “In developing the
11 standards and criteria under paragraph (1),” OMB and GSA “shall incorporate” ten enumerated
12 factors, including, *inter alia*, “[t]he extent to which a civilian real property aligns with the current
13 mission of the Federal agency” and “[t]he extent to which public access to agency services is
14 maintained or enhanced.” *Id.* §§ 11(b)(3)(F), (J). In addition, the standards developed by OMB
15 under FASTA Section 11 “shall incorporate and apply clear standard utilization rates to the
16 extent that such standard rates increase efficiency and provide performance data.” *Id.* § 11(c).

17 The third, equally critical step is for OMB to “submit the standards, criteria, and
18 recommendations . . . to the [PBRB] with all supporting information, data, analyses, and
19 documentation.” *Id.* § 11(d)(1); *see also* § 11(b)(1)(C). This must be done “[n]ot later than 60
20 days after the deadline for submission of agency recommendations under subsection (a)[.]” *Id.*
21 § 11(b)(1). “The standards, criteria, and recommendations developed pursuant to subsection
22 (b) shall be published in the Federal Register and transmitted to the [congressional] committees
23 listed in section 5(c) and to the Comptroller General of the United States.” *Id.* § 11(d)(2).

24 Section 12 of FASTA sets forth the PBRB’s duties, which include recommending
25 “Federal civilian real properties” for sale or disposal. The PBRB must make its recommendations
26 within 180 days after a quorum of Board members is appointed. *Id.* § 12(b)(1). In doing so, the

1 PBRB “shall consider the factors listed in section 11(b)(3).” *Id.* § 12(b)(1)(B). The PBRB’s
 2 recommendations are transmitted to OMB, *id.* § 12(b)(1)(B), and under Section 13, OMB then
 3 reviews the PBRB’s recommendations and approves or disapproves them. *Id.* §§ 13(a)–(b).
 4 FASTA provides that “[a]ctions taken pursuant to sections 12 and 13” and “[a]ctions of the
 5 [PBRB]” are exempt from judicial review. FASTA § 18. All other acts or omissions under
 6 FASTA, including the actions required under Section 11, are reviewable. *See id.*

7 As detailed below, in January 2020, OMB approved the PBRB’s recommendation to sell
 8 the Archives facility, without having completed Section 11’s procedural requirements.

9 **C. The Government’s Decision to Sell the Archives Facility**

10 Despite FASTA’s passage in 2016 and the strict deadlines it establishes to facilitate
 11 expedited property sales, a quorum of five PBRB members was not sworn in until May 2019.
 12 Compl. ¶130. This gave the PBRB until November 2019 to make its recommendations. *See*
 13 FASTA § 12(b)(1). The PBRB described this statutory timeline as “formidable,” particularly as
 14 “PBRB members did not have Government ID’s for over 2 months after being sworn in, and the
 15 PBRB had no staff for the first 4 months, leaving substantial work to be accomplished in just 8
 16 weeks.” *Fraas Ex. 5 at 12.* OMB’s failure to comply with its mandatory responsibilities under
 17 FASTA Section 11 compounded the problems. As the PBRB itself acknowledged in making its
 18 recommendations to OMB: “Unfortunately, the PBRB did not benefit from the Section 11
 19 FASTA directive that OMB, in consultation with GSA, develop standards and criteria to use in
 20 evaluating agency submissions and making recommendations to the PBRB.” *Id.* at 10. Indeed,
 21 “[t]o the best of PBRB’s knowledge, the standards and criteria [required by FASTA Section 11]
 22 were never developed.” *Id.* This, in turn, hampered the PBRB’s efforts under FASTA: as the
 23 PBRB candidly acknowledged in its final report, “defined standards, criteria, and
 24 recommendations would have significantly reduced the PBRB’s challenges.” *Id.* at 12.

25 On December 27, 2019, the PBRB submitted to OMB a list of twelve properties for
 26 proposed sale, one of which was the National Archives at Seattle, along with a “High Value

1 Assets Report” (the PBRB Report) that included the purported bases for its proposals. Compl.
 2 ¶135; Fraas Ex. 5. The PBRB Report acknowledged, but did not analyze, the FASTA exemption
 3 for “[p]roperties used in connection with Federal programs for agricultural, recreational, or
 4 conservation purposes[.]” Fraas Ex. 5 at 7. According to the PBRB Report, federal agencies
 5 submitted their recommended properties for sale or disposal to OMB and GSA on the following
 6 dates: April 14, 2017 (FY17); November 30, 2017 (FY18); December 7, 2018 (FY19); and
 7 November 8, 2019 (FY20). *Id.* FASTA required OMB and GSA to develop standards, criteria,
 8 and recommendations and transmit them to the PBRB within 60 days after those agency
 9 submission deadlines. FASTA § 11(b)(1). However, as noted above, the standards, criteria, and
 10 recommendations were never developed or transmitted to the PBRB. *See id.* at 10.

11 OMB’s failure to undertake its FASTA Section 11 responsibilities tainted the entire
 12 property selection process. Without OMB’s “information, data, analyses, and documentation,”
 13 FASTA § 11(d)(1), PBRB had to rely on other information. But, as the PBRB acknowledged, it
 14 “faced . . . challenges in gathering the data needed to support decision making for complex real
 15 estate transactions.” *Id.* at 12. Indeed, the PBRB identified “extraordinary issues with data gaps
 16 and data integrity” in the data contained in the Federal Real Property Profile,⁷ which it “relied
 17 heavily on” for its decision-making. *Id.* at 13; *see also* Fraas Ex. 6 (discussing data errors such
 18 as showing a federal building located “in the middle of an ocean”).

19 Moreover, in recommending and selecting the Archives facility for sale, Defendants
 20 failed to notify and/or consult with tribal leaders or other stakeholders in the Pacific Northwest
 21 regarding the Archives facility’s potential sale. Compl. ¶¶145-152.⁸ No public hearings were
 22 held in Washington, Idaho, Oregon, or Alaska—and in hearings held elsewhere, the potential
 23

24 ⁷ The Federal Real Property Profile is an inventory of information about the nature, use and extent of the
 Federal government’s real property assets. *See* <https://tinyurl.com/yxvwjyju> (last visited Jan. 7, 2021).

25 ⁸ *See, e.g.*, de los Angeles ¶5; Bossley ¶19; Gentry ¶14; King George ¶¶13-15; Gomez ¶7; Harrelson ¶¶7-8;
 26 James ¶¶7-8; Johnson ¶¶4-12; Krise ¶6; Matheson ¶8; Pickernell ¶¶7-8; Pierre ¶7; Saluskin ¶7; Schutt ¶¶10-11;
 Simon ¶20; Stiltner ¶¶8-9; Strong ¶12; Sullivan, J. ¶¶10-17; Taylor, A. ¶¶8-9; Thomas ¶¶7-8; Wooten ¶5; Abe ¶6;
 Booth ¶7; Carter ¶6; Fisher ¶¶9-10; Klingle ¶¶6-7; Lee ¶15; Norris ¶6; Rushforth ¶10; Taylor, J. ¶6; Carter ¶6.

1 sale of the Seattle Archives facility was never mentioned. Compl. ¶145. In addition, in an
 2 October 2020 PBRB meeting, a Board member acknowledged that Tribes were not consulted in
 3 selecting properties, stating that “[w]ith respect to tribal entities, I guess, that hasn’t been brought
 4 to our attention before that there was an interest there,” while acknowledging “if they are a
 5 stakeholder in a property, certainly we would want to consult with them.” Fraas Ex. 7. After the
 6 sale decision became public, there was a significant and immediate regional outcry once the
 7 public learned, largely after the fact, of the decision to sell the Archives facility. *Id.* Exs. 8-10.
 8 Many tribal representatives and others sent letters seeking reconsideration, to no avail.⁹

9 On January 24, 2020, OMB summarily approved the sale of the Archives facility and the
 10 other properties. Compl. ¶136; Fraas Ex. 11. Once the facility is sold, Defendants plan to ship
 11 the Archives’ records to other NARA facilities in Southern California and Missouri. Compl. ¶10.

12 **D. The Archives Facility Could Be Sold in Early 2021**

13 On November 30, 2020, the State unexpectedly learned from a chance review of the
 14 PBRB’s website that the agency intends to bundle the Seattle Archives facility with several other
 15 federal properties and sell them as “a single portfolio,” and that “[t]he Government intends to
 16 bring the properties to market by early 2021.” Fraas ¶15, Ex. 12. Despite the demonstrated public
 17 interest in the Archives facility and the State’s pending Freedom of Information Act lawsuits,¹⁰
 18 Defendants did not alert Plaintiffs of this decision nor seek their input. Fraas ¶15.

19 **III. ARGUMENT**

20 **A. Legal Standard**

21 A party seeking a preliminary injunction must show that: (1) it is likely to succeed on the
 22 merits; (2) it will likely suffer irreparable harm in the absence of an injunction; (3) the balance
 23 of equities tips in its favor, and (4) an injunction is in the public interest. *See Fed. R. Civ. P.*
 24 *65(b)(1); Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

25 ⁹ *See Stiltner Exs. B-C; Sullivan, J. Ex. G; Bond Ex. 1; Turner Ex. 1.*

26 ¹⁰ On February 3, 2020, the State of Washington submitted FOIA requests to the PBRB, OMB, GSA, and NARA regarding the proposed sale of the Archives Facility, and later sued to obtain the documents. *See Dkt. #5.*

1 **B. Plaintiffs Are Likely to Succeed on the Merits**

2 Plaintiffs are likely to succeed on the merits of their claims. Count I alleges that the
3 Archives facility is exempt from sale under FASTA because it is a property “used in connection
4 with Federal programs for agricultural, recreational, or conservation purposes, including
5 research in connection with the programs.” FASTA § 3(5)(B)(viii); Compl. ¶¶153-162. Counts
6 II and III allege that OMB and GSA failed to comply with FASTA Section 11’s mandatory
7 procedural requirements, rendering their actions to facilitate and effectuate the sale procedurally
8 deficient and contrary to law. *Id.* ¶¶163-180. (Plaintiffs are not moving on Count IV.)

9 **1. The Archives facility is exempt from sale under FASTA**

10 Under the statute’s plain language, the Archives facility falls within FASTA’s “Federal
11 programs” exemption for multiple independent reasons. Among other things, the Archives is
12 regularly used in creating signage, exhibits, and visitor education materials at national parks and
13 other federal conservation and recreational areas; Tribes use the Archives extensively to
14 implement conservation programs for which they have been delegated responsibility under
15 ISDEAA and/or for research in connection with other federally funded conservation,
16 agricultural, or recreational programs; it is routinely used for a variety of federal historical
17 conservation programs, including the National Register of Historic Places, National Historic
18 Landmark Program, and Historic Tax Credit program, among others; and the Archives facility
19 itself houses documents subject to NARA’s own conservation programs. *Supra* Section II.B.1.

20 Count I calls for a straightforward, plain-language application of the “Federal programs”
21 exemption to uses of the Archives facility in connection with the programs discussed herein.
22 “ ‘Canons of statutory construction help give meaning to a statute’s words. We begin with the
23 language of the statute.’ ” *City of Los Angeles v. Barr*, 941 F.3d 931, 940 (9th Cir. 2019) (quoting
24 *Wilderness Soc’y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir. 2003)). Notably,
25 FASTA does not define any of the terms used in the exemption, including “conservation,”
26 “agricultural,” or “recreational.” *See generally* FASTA § 3. As such, these terms are to be given

1 “‘their ordinary, contemporary, common meaning,’ ” and the Court “‘may consult dictionary
2 definitions.’ ” *City of Los Angeles*, 941 F.3d at 940 (citation omitted).

3 Webster’s defines “conservation” as, *inter alia*, “a careful preservation and protection of
4 something”; “the things that are done to keep works of art or things of historical importance in
5 good condition”; “planned management of a natural resource to prevent exploitation, destruction,
6 or neglect.”¹¹ The well-established use of the Archives facility for research in connection with
7 the federal ecological and historical conservation programs discussed above exempts that
8 property from sale under FASTA. *Supra* at 3-6. Many of these programs also have a
9 “recreational” component, in that they offer the public “a means of refreshment or diversion”¹²
10 such as hiking, camping, and other outdoor activities, or learning about historically significant
11 sites. Federal programs pertaining to natural resources, water, and land use rights almost
12 inevitably have a conservation, recreational, and/or agricultural purpose, and Tribes often use
13 the Archives for research related to such programs. *Supra* at 3-6. Use of the Archives facility in
14 connection with conservation of “things of historical importance,” including the National
15 Register of Historic Places and other NPS historical conservation programs, also exempts the
16 property from sale under FASTA. “Conservation” also applies directly to the work of NARA’s
17 Conservation Division and Conservation Lab: NARA “repairs and stabilizes textual
18 records . . . and photographic images” to “prolong[] the “usable life” of the records—including
19 records housed at the Seattle Archives facility itself. *Supra* at 6. Use of the Archives facility in
20 connection with any one of these programs exempts the property from sale under FASTA.

21 Moreover, the FASTA exemption’s phrase “in connection with” should be construed
22 broadly. The Supreme Court “has often recognized that ‘in connection with’ can bear a ‘broad
23 interpretation.’ ” *Mont v. United States*, 139 S. Ct. 1826, 1832 (2019) (quoting *Merrill Lynch,*
24 *Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 85 (2006)); *see also In re Plant Insulation*

25 _____
26 ¹¹ *Conservation*, Merriam-Webster.com, <https://tinyurl.com/yy536v3w> (last visited Jan. 5, 2021).

¹² *Recreation*, Merriam-Webster.com, <https://tinyurl.com/yy4p8jzp> (last visited Jan. 5, 2021).

1 Co., 734 F.3d 900, 910 (9th Cir. 2013) (“in connection with” is synonymous with “relating to”);
 2 Cal. Tow Truck Ass’n v. City & County of San Francisco, 807 F.3d 1008, 1022 (9th Cir. 2015)
 3 (“relating to” has a “broad” meaning). As the Supreme Court explained, “[i]f Congress intended
 4 a narrower interpretation [of the statute], it could easily have used narrower language,” and
 5 courts “cannot override Congress’ choice to employ the more capacious phrase ‘in connection
 6 with.’ ” *Mont*, 139 S. Ct. at 1832–33. Applying these principles of statutory construction,
 7 FASTA’s exemption for properties used “in connection with” certain Federal programs, or
 8 research “in connection with” such programs, should be construed broadly and plainly exempts
 9 the Archives facility from FASTA sale based on the uses discussed herein. Defendants lack any
 10 discretion to sell under FASTA a property that is exempt from that statute under its plain terms.
 11 See *King v. Burwell*, 576 U.S. 473, 486 (2015) (Court must enforce statute’s plain terms).¹³

12 In sum, Congress chose to broadly exempt properties used “in connection with” federal
 13 conservation, agricultural, or recreational programs, including for related research, from
 14 expedited sale under FASTA. This does not mean the federal government lacks the power to sell
 15 its own property in general, but it does mean that Defendants’ actions to facilitate and effectuate
 16 the sale are not within their authority under FASTA. Plaintiffs are likely to succeed on Count I.

17 2. OMB and GSA violated FASTA’s mandatory procedural requirements

18 Even setting the exemption aside, the impending sale is also unlawful because OMB and
 19 GSA failed to fulfill the statute’s basic, nondiscretionary, procedural requirements. The Court
 20 need not consider the wisdom of the agencies’ decisions, because their procedural failures render
 21 the entire process void and the forthcoming sale unlawful.

22 a. OMB failed to fulfill its FASTA Section 11 duties

23 Under Section 706(1) of the Administrative Procedure Act (APA), courts “shall compel
 24 agency action unlawfully withheld or unreasonably delayed.” 5 U.S.C. § 706(1). “A court can

25 ¹³ Even if the “Federal programs” exemption were somehow ambiguous, there is no agency interpretation
 26 to which deference is owed. Any *post hoc* interpretation or rationale offered in litigation is not a proper subject of
 judicial review. See *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020).

1 compel agency action under this section only if there is ‘a specific, unequivocal command’
 2 placed on the agency to take a ‘discrete agency action,’ and the agency has failed to take that
 3 action.” *Vietnam Veterans of Am. v. C.I.A.*, 811 F.3d 1068, 1075 (9th Cir. 2016) (quoting *Norton*
 4 *v. S. Utah Wilderness All.*, 542 U.S. 55, 63-64 (2004)). The required agency action must be “so
 5 clearly set forth that it could traditionally have been enforced through a writ of mandamus.” *Id.*

6 Here, Section 11(b)–(d) of FASTA specifically and unequivocally requires OMB and
 7 GSA to take a number of discrete, nondiscretionary actions. Section 11 repeatedly uses
 8 mandatory language in setting forth these duties. See *Nat’l Ass’n of Home Builders v. Def. of*
 9 *Wildlife*, 551 U.S. 644, 661 (2007) (Congress’s “use of a mandatory ‘shall’ ” imposes
 10 “discretionless obligations”) (internal citation omitted). Specifically, Section 11 requires that:

- 11 • The Director of OMB “shall,” within a specified 60-day period, in consultation with the
 12 GSA Administrator, “develop consistent standards and criteria against which [property
 13 sale recommendations] will be reviewed,” § 11(b)(1);
- 14 • The Director of OMB and the GSA Administrator “shall jointly develop
 15 recommendations to the [PBRB] based on [OMB’s] standards and criteria,” § 11(b)(2);
- 16 • The Director of OMB “shall,” within the same specified 60-day period, and in
 17 consultation with the GSA Administrator, “submit to the [PBRB] the recommendations
 18 developed,” § 11(b)(1), (2); OMB “shall submit the standards, criteria, and
 19 recommendations . . . to the [PBRB] with all supporting information, data, analyses, and
 20 documentation,” § 11(d)(1); and
- 21 • The standards, criteria, and recommendations developed by the Director of OMB “shall
 22 be published in the Federal Register and transmitted to the [congressional] committees
 23 listed in section 5(c) and to the Comptroller of the United States.” § 11(d)(2).

24 OMB failed to take even *one* of these mandatory procedural steps. As the PBRB put it:
 25 “To the best of PBRB’s knowledge, the standards and criteria were never developed.” Fraas
 26 Ex. 5 at 10. Consequently, OMB never provided the nonexistent standards, criteria, and

1 recommendations to the PBRB, never published them in the Federal Register, and never
2 transmitted them to the specified congressional committees or the Comptroller General.

3 OMB and GSA’s failure to fulfill their most basic duties under FASTA are “egregious
4 enough to warrant mandamus.”¹⁴ *Telecomms. Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 79
5 (D.C. Cir. 1984) (*TRAC*); see *Agua Caliente Tribe of Cupeno Indians of Pala Reservation v.*
6 *Sweeney*, 932 F.3d 1207, 1216 n.7 (9th Cir. 2019) (the *TRAC* factors apply to a request for
7 mandamus under the APA). While the standard is “hardly ironclad,” courts addressing claims of
8 unlawfully withheld or unreasonably delayed agency action consider the following factors: (1)
9 agency decision-making timelines must be governed by a “rule of reason”; (2) where Congress
10 has provided a timetable or other indication of the speed with which it expects the agency to
11 proceed, that statutory scheme may supply the content for this rule of reason; (3) delays that
12 might be reasonable in the sphere of economic regulation are less tolerable when human health
13 and welfare are at stake; (4) the court should consider the effect of expediting delayed action on
14 other agency activities; (5) the court should consider the nature and extent of the interests
15 prejudiced by delay; and (6) the court need not “find any impropriety lurking behind agency
16 lassitude in order to hold that the agency action is unreasonably delayed.” *TRAC*, 750 F.2d at 80.

17 Here, the *TRAC* factors demonstrate that OMB and the GSA’s failures warrant relief
18 under APA Section 706(1). First, as to *TRAC* factors 1 and 2, Congress provided a definite
19 “timetable” for the agencies to act: the standards, criteria, and recommendations must be
20 transmitted to the PBRB within 60 days of the agency-recommendation deadline. FASTA
21 § 11(b)(1). This timetable makes sense, because FASTA is designed to “expedite[]” federal
22 property sales, § 2(8), and contemplates that the PBRB will have the benefit of OMB’s standards,
23 criteria, and recommendations in identifying properties for sale, which it must quickly do within
24 180 days after a quorum of Board members is appointed, § 12(b)(1). See § 12(b)(3)

25
26 ¹⁴ As discussed in Section III.E, *infra*, at this stage the Court need only preliminarily enjoin the sale of the Archives Facility to preserve the status quo pending a final judgment. A writ of mandamus need not issue now.

1 (“In identifying properties pursuant to paragraph (1), the [PBRB] shall consider the factors”
 2 incorporated into OMB’s standards and criteria.). Second, as to *TRAC* factors 3 and 5, the
 3 agencies’ failure to fulfill their duties caused the PBRB to recommend selling the Archives
 4 facility without the benefit of the Congressionally-mandated standards, criteria,
 5 recommendations, and “supporting information, data, analyses, and documentation.” *See*
 6 Sections II.A, II.B.1, III.C. The resulting harms are not purely “economic,” but implicate
 7 profound human interests such as tribal membership and treaty rights, cultural heritage, and
 8 regional history. *See id.* Third, as to *TRAC* factor 4, requiring Defendants to fulfill FASTA’s
 9 mandatory procedural requirements before proceeding with the sale of the Archives is not unduly
 10 prejudicial. The agencies lack authority to move forward with the sale absent compliance with
 11 FASTA’s mandatory procedures (and also because the property is exempt from FASTA sale),
 12 and will not be harmed if the sale is halted absent compliance with FASTA’s requirements.

13 **b. Any sale of the facility is procedurally deficient and unlawful**

14 Independent of the substance of an agency’s decision, federal courts must conduct an
 15 “exacting” review of agency action to “ensure[] that statutorily prescribed procedures have been
 16 followed.” *Kern Cty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006); *see also, e.g.,*
 17 *Nat. Resources Def. Council, Inc. v. Sec. & Exch. Comm’n*, 606 F.2d 1031, 1048 (D.C. Cir.
 18 1979). Courts “shall hold unlawful and set aside agency action” that is “without observance of
 19 procedure required by law,” 5 U.S.C. § 706(2)(D), “in excess of statutory . . . authority,” *id.*
 20 § 706(2)(C), or “otherwise not in accordance with law,” *id.* § 706(2)(A).

21 As discussed above, OMB and GSA failed to follow FASTA’s basic procedural
 22 requirements, skipping *all* of Section 11(b)-(d)’s mandatory steps. As such, Plaintiffs are likely
 23 to succeed on the merits of their claim that Defendants’ actions under FASTA are procedurally
 24 deficient, *ultra vires*, and contrary to law. Defendants are simply not authorized to sell the
 25 Archives facility under FASTA absent compliance with the statute’s procedural prerequisites.
 26 *See, e.g., Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157 (9th Cir. 2003) (U.S.

1 Forest Service failed to comply with procedures required by National Environmental Policy
2 Act's (NEPA) procedural requirements); *Campanale & Sons, Inc. v. Evans*, 311 F.3d 109 (1st
3 Cir. 2002) (Secretary of Commerce failed to comply with Atlantic Coastal Fisheries Cooperative
4 Management Act's "explicit procedural requirement to consult with the appropriate councils
5 before implementing" fishing regulations); *N.Y. Pub. Interest Research Grp., Inc. v. Johnson*,
6 427 F.3d 172, 182 (2d Cir. 2005) (EPA failed to comply with Clean Air Act's requirement that
7 operating permits for non-compliant air pollution sources must include a compliance schedule).

8 Notably, whereas Congress exempted certain actions and statutory sections under
9 FASTA from judicial review, actions (or lack thereof) under Section 11 are not among them.
10 See FASTA § 18. Where, as here, a statute's bar on judicial review is "demonstratively narrow
11 in scope," other agency action under the statute "remains subject to judicial review." *Hyatt v.*
12 *Office of Mgmt. & Budget*, 908 F.3d 1165, 1171-72 (9th Cir. 2018) (reviewing OMB decision
13 that was "outside the narrow scope of the [statute's] judicial review bar"); see generally *Regents*,
14 140 S. Ct. at 1905 (APA establishes a "basic presumption of judicial review"). The Court can,
15 and must, review OMB and GSA's failure to comply with Section 11. See 5 U.S.C. § 706.

16 Moreover, it cannot be said that OMB and GSA's procedural failures were "harmless."
17 See 5 U.S.C § 706 ("due account shall be taken of the rule of prejudicial error" in APA review).
18 The Ninth Circuit has stressed that courts must exercise "great caution" in applying the harmless
19 error rule: a procedural failure is "harmless only where the agency's mistake clearly had no
20 bearing on the procedure used or the substance of the decision reached." *Cal. Wilderness Coal.*
21 *v. U.S. Dep't of Energy*, 631 F.3d 1072, 1090 (9th Cir. 2011). "The reason is apparent: Harmless
22 error is more readily abused [in the administrative context] than in the civil or criminal context."
23 *Id.* To avoid "gutting" Congress's procedural safeguards, "harmless error analysis in
24 administrative rulemaking must therefore focus on the process as well as the result." *Id.*; see
25 also, e.g., *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Comm'n*, 896 F.3d 520, 534 (D.C. Cir.
26 2018) (rejecting harmless error defense to claim that agency violated procedural requirements).

1 Here, OMB and GSA’s failure to comply with Section 11’s procedural requirements is
 2 inherently harmful. The publication and transmittal requirements (FASTA § 11(d)(2)) ensure
 3 transparency in the standards for evaluating properties recommended for expedited sale, while
 4 the requirement to provide “standards, criteria, and recommendations” and the underlying
 5 “information, data, analyses, and documentation” (FASTA § 11(d)(1)) is meant to guide the
 6 PBRB and provide it with relevant factual information on which to base its recommendations.
 7 *See id.* § 12(b)(3) (“In identifying properties pursuant to paragraph (1), the [PBRB] shall
 8 consider the factors” incorporated into OMB’s standards and criteria.); H.R. Rep. No. 114-578,
 9 pt. 1, at 13 (2016) (OMB’s provision of property data to the PBRB under Section 11 is
 10 “necessary” because “this data is critical to ensuring proper recommendations are developed”).
 11 Indeed, similar to NEPA, Section 11 “imposes only procedural requirements,” which “ensur[e]
 12 that the agency, in reaching its decision, will have available, and will carefully consider, detailed
 13 information” that bears on its decision-making. *Winter*, 555 U.S. at 23. It also ensures that OMB
 14 has an informed, factual basis on which to “conduct a review” of the PBRB’s recommendation.
 15 *See* FASTA § 13(a). OMB and GSA’s violations of Section 11 cannot be “forgiven merely
 16 because they are procedural”: the procedures are the point. *Oglala Sioux Tribe*, 896 F.3d at 534.

17 **C. Plaintiffs Will Suffer Irreparable Harm Absent Injunctive Relief**

18 Irreparable harm is harm “for which there is no adequate legal remedy, such as an award
 19 of damages.” *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014). The harm
 20 analysis “focuses on irreparability, irrespective of the magnitude of the injury.” *California v.*
 21 *Azar*, 911 F.3d 558, 581 (9th Cir. 2018) (internal quotation marks omitted). The testimony of
 22 numerous tribal leaders, local organizations, historians, university administrators, and
 23 professors, among others, establishes that the sale and closure of the Archives facility under
 24 FASTA and the subsequent removal of NARA’s archival records from the Pacific Northwest is
 25 likely to cause irreparable harm to Plaintiffs and the regional public at large: it will deprive tribal
 26 communities of critical, non-digitized records essential for establishing tribal membership,

1 enforcing land and water use rights, cultural preservation, and documenting tribal history, among
 2 other purposes; threatens the organizational missions of historical preservation and community
 3 groups and their members; and harms the proprietary interests of Washington and Oregon’s
 4 public universities, which rely upon the Archives for recruitment and scholarship, as well as state
 5 agencies that regularly rely on the Archives to carry out their functions.¹⁵ At a minimum, these
 6 documents will be inaccessible for an unknown time period during transit and processing, and
 7 could be separated or even irreparably damaged during the move.¹⁶ These harms are particularly
 8 acute because the PBRB intends to bring the Archives facility to market “by early 2021,” as part
 9 of a “single portfolio” with all 12 properties. Fraas Ex. 12. Given the difficulty (if not
 10 impossibility) of unwinding such a complex transaction, and the significant harm that would
 11 occur if the Archives facility is sold, a preliminary injunction is necessary to maintain the status
 12 quo to ensure the facility is not sold before the claims in this matter are resolved.

13 Harm to Tribal Plaintiffs. As set forth in the numerous declarations submitted herewith,
 14 tribal governments and communities will be irreparably harmed if the Seattle Archives facility
 15 is sold because tribes and their members are uniquely dependent on its records for core tribal
 16 functions and cultural preservation. *See, e.g.*, Fisher ¶¶8 (use of Archives to vindicate tribal land
 17 rights); Gomez ¶¶4, 8 (use to protect treaty hunting and fishing rights, implement historic
 18 preservation efforts, and investigate eligibility for tribal membership); Geyer ¶¶5-18 (use for
 19 treaty rights and conservation efforts); Hansen ¶¶3-4, 7 (use in seeking federal recognition);
 20 Harrelson ¶¶4-6, 9 (use for self-determination and community-based research and for review of
 21 federal undertakings under NHPA and NEPA); Krise ¶¶5, 7 (use to protect treaty hunting,
 22

23 ¹⁵ Washington and Oregon have standing to vindicate their proprietary interests in the academic and
 24 educational missions of state universities and in the fulfillment of state agency functions. *See Alfred L. Snapp &*
 25 *Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982) (like any similarly situated proprietor, states have
 26 standing to pursue their proprietary interests); *City of Sausalito v. O’Neill*, 386 F.3d 1186, 1197 (9th Cir. 2004)
 (government entity’s proprietary interests “are not confined to protection of its real and personal property” and “are
 as varied as [its] responsibilities, powers, and assets”); *see infra* at 21-22.

¹⁶ *See, e.g.*, Bossley ¶22; Fisher ¶8; Gentry ¶¶13-14; King George ¶16; Harrelson ¶9; House ¶14;
 Saluskin ¶¶6, 9; Taylor, A. ¶5.

1 gathering, fishing, water, and land ownership rights); Pickernell ¶¶4-6, 9 (use to protect land and
 2 fishing rights, defend tribal sovereignty, and conduct cultural anthropology work); Reynon
 3 ¶¶4-5, 9 (use for tribal history, NHPA compliance, and research on archaeological and culturally
 4 significant sites); Saluskin ¶5 (use to assert and defend tribal sovereignty and treaty rights);
 5 Schutt ¶¶6-7 (use to establish tribal membership and protect subsistence rights and conservation
 6 interests; harm compounded by prior loss of records when NARA Anchorage facility closed).¹⁷

7 Travel outside of the Pacific Northwest to access the archival records needed for these
 8 foundational purposes is simply not feasible for many Tribes and their members. *See, e.g.*,
 9 Gentry ¶14 (“It is already difficult for our members and researchers to travel from our homelands
 10 in Southern Oregon, and moving the records to Southern California or Kansas City would
 11 effectively take away our ability to study our customs, languages, and traditions.”); Gomez
 12 ¶¶6, 8 (“[T]he Tribe lacks the financial resources to access these records on a necessary basis if
 13 they are moved out of the Pacific Northwest”); Harrelson ¶9 (“A move would increase travel
 14 costs for gaining access to materials in person and in some cases prevent access due to lack of
 15 funds to access the materials.”); James ¶9 (discussing “potentially insurmountable accessibility
 16 issues”); Krise ¶7 (Archives move would require tribe to incur “significant cost” to protect legal
 17 interests and would “cause cultural harm to the Tribe and individual members by dramatically
 18 limiting access to cultural and historical research resources”).¹⁸ Notably, financial harm is
 19 irreparable where sovereign immunity prevents recovery from the federal government. *See Azar*,
 20 911 F.3d at 581; *Idaho v. Coeur d’Alene Tribe*, 794 F.3d 1039, 1046 (9th Cir. 2015).

21
 22 ¹⁷ *See, e.g.*, Forsman Statement (tribal history and land claims research); Reich ¶¶ 6-8 (tribal history);
 23 Simon ¶¶9-19 (essential for Alaska Native allotment applicants; resolving land disputes; subsistence hunting and
 24 fishing rights); Stiltner ¶¶9-11 (use to learn about massive transfer of tribal lands to non-Indians); Strong ¶¶6-11
 25 (use to maintain tribal enrollment roll; secure and preserve territory and treaty rights to hunt, gather, and fish;
 maintain cultural knowledge; and fulfill obligations under ISDEAA and federal grants); Taylor, A. ¶10 (use to
 access ancestral Indian names, which helps continue the practice of cultural naming ceremonies); *see also, e.g.*, de
 los Angeles ¶9; Foster ¶4; King George ¶16; Kentta ¶¶5-7; Stiltner ¶¶4-8; Thomas ¶6; Trebon ¶¶ 4-6.

26 ¹⁸ *See also, e.g.*, Matheson ¶¶7, 9 (inability of elderly tribal members “to journey outside of the northwest”
 due to financial and health restrictions); Kentta ¶8 (limited tribal resources make travel an extraordinary financial
 hardship); King George ¶16; Simon ¶13; Wooten ¶6; Trebon ¶11; *see also* Stein, J. ¶10.

1 Harm to Plaintiff States. Washington and Oregon also risk irreparable harm if the Seattle
 2 facility is closed and archival records are removed from the Pacific Northwest. Irreparable harm
 3 to state agencies’ organizational missions satisfies the *Winter* test and establishes standing. *See*
 4 *E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1265-66, 1280 (9th Cir. 2020); *League of*
 5 *Women Voters of U.S. v. Newby*, 838 F.3d 1, 8 (D.C. Cir. 2016); *Valle del Sol Inc. v. Whiting*,
 6 732 F.3d 1006, 1029 (9th Cir. 2013). The Washington State Department of Natural Resources
 7 and Department of Archaeology and Historic Preservation use the Seattle Archives to carry out
 8 their functions, which will be impeded if those records are moved over a thousand miles away.
 9 *See* Bower ¶¶2-13 (access to Seattle Archives is necessary for land use, environmental cleanup,
 10 conservation, and other State purposes); Brooks ¶¶2-9 (reliance on Archives in reviewing
 11 nominations to the National Register of Historic Places, among other State functions).

12 State universities and their museums will also suffer harm if the Archives records are
 13 moved out of reach, including harm to their programs and educational missions, loss of goodwill,
 14 and compromised recruiting. *See Regents of Univ. of Cal. v. Am. Broad. Cos., Inc.*, 747 F.2d
 15 511, 520 (9th Cir. 1984) (actionable harms include “impairment of [the university’s] ongoing
 16 recruitment programs [and] the dissipation of alumni and community goodwill and support
 17 garnered over the years”); *see also Rent-A-Center, Inc. v. Canyon Television & Appliance*
 18 *Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991) (“[I]ntangible injuries, such as damage to ongoing
 19 recruitment efforts and goodwill, qualify as irreparable harm.”). Such harms will occur here. *See,*
 20 *e.g.*, *Wilson* ¶¶9, 11, 13, 17-21, 27 (lost access to Archives will hamper UW’s research and
 21 scholarship activity, impact recruitment, and harm UW’s mission); *Nash* ¶¶2-10; *Kucher* ¶¶2,
 22 6-10; *Gregory Ltr.*; *Bond* ¶¶8-12, 14, 17 (loss of access to Archives will harm WSU students
 23 and faculty who rely on archival records for scholarship and impact university’s work on tribal
 24 record digitization project); *Reid* ¶¶4-9 (describing “dependence on the unique archival records”
 25 for academic research, undergraduate education, and graduate programs, including loss of
 26 diversity); *Rushforth* ¶¶4-5, 7-8, 10-11 (records at Archives critical to the work of many scholars

1 in U of O’s History Department, including faculty, graduates and undergraduates; one third of
 2 history graduate students engaged in research that relies on materials housed at the NARA
 3 Seattle facility); Deitering ¶¶3-4, 6 (describing importance of Archives records for OSU faculty
 4 and student research, particularly given OSU’s status as a “land grant institution” and its
 5 researchers’ work with government agencies that regulate and protect natural resources and
 6 federal lands); Stein, J. ¶¶6-7 (access to Archives critical to Burke Museum’s research).

7 Harm to Other Plaintiff Organizations, Their Members, and the Public. Plaintiff historical
 8 societies, museums, and community organizations also have standing and will suffer irreparable
 9 harm to their missions if the Archives records are moved out of the Pacific Northwest. *See E.*
 10 *Bay Sanctuary*, 950 F.3d at 1265; *Newby*, 838 F.3d at 8. For example, members of the American
 11 Historical Association, the world’s largest professional historian organization, regularly use the
 12 facility for their historical work and attest that archival records “are the lifeblood of [the]
 13 profession.” Compl. ¶48; *see, e.g.*, Booth ¶¶3-5, 8 (Archives facility provides the “intimate and
 14 personal stories in their records” historians need to tell useful stories that speak “to the broad
 15 experience of humanity”; describing finding Archives letters “written by my great, great
 16 grandfather asking the superintendent at the Chemawa Indian School to send my great grandma
 17 home for the summer” and “postcards sent to beloved teachers at Chemawa from the trenches of
 18 World War I” that led to an article “about the Native students who fought in World War I”).¹⁹
 19 Members of community organizations such as the Chinese American Citizens Alliance and
 20 OCA – Asian Pacific Advocates, who rely on the Archives to learn about their own histories and
 21 teach about the tragic errors of the past, will also be irreparably harmed.²⁰ *See, e.g.*, Lee ¶¶4-14
 22 (records’ relocation would “frustrate the mission of C.A.C.A. Seattle,” including “educat[ing]
 23 the Pacific Northwest community about the [Chinese Exclusion] Act and its impact on the region
 24

25 ¹⁹ *See also, e.g.*, Fisher ¶¶11-12; Harmon ¶¶5-14; Klinge ¶¶3-4, 8; Ostendorf ¶¶2-6; Schlimgen ¶¶ 3-6;
 Taylor, J. ¶¶2-7; Wadewitz ¶¶ 3-5; *see also* McCaffrey ¶¶4-9 (HistoryLink); Compl. ¶¶48-49, 51-53, 55-56.

26 ²⁰ *See also, e.g.*, So Ltr.; Brigman ¶¶3-6; Carter ¶¶4-7; Farrar ¶¶2-8; House ¶11; Nicola, P. ¶¶3-4, 6; Nimura
 ¶¶2-5; Compl. ¶¶50, 54.

1 as a whole” and “efforts to add the Chinese Exclusion Act studies to the Washington K-12
 2 curriculum”); So Ltr. It also will impede historic conservation in the region by “delay[ing] or
 3 prevent[ing] the research and documentation needed to identify and protect historic places in the
 4 Pacific Northwest and the important stories that go with them.” Sullivan, M. ¶13. Many
 5 historians and community members expound not only on the importance of access to original
 6 documents, but also on the benefits of being able to visit the Archives in person, browse its
 7 records, and benefit from the knowledge of its local staff.²¹ All this will be lost if the sale moves
 8 forward and the Pacific Northwest’s archival records are shipped far away.²²

9 Procedural Harm. Finally, Defendants’ procedural failings alone, *supra* Section III.B.2,
 10 constitute irreparable harm. *See Azar*, 911 F.3d at 581 (9th Cir. 2018) (affirming finding of
 11 “irreparable procedural harm” and “reaffirming that the harm flowing from a procedural
 12 violation can be irreparable”); *Save Strawberry Canyon v. Dep’t of Energy*, 613 F. Supp. 2d
 13 1177, 1189–90 (N.D. Cal. 2009) (irreparable harm satisfied by claimed procedural violation).

14 **D. The Equities and Public Interest Weigh Strongly in Plaintiffs’ Favor**

15 The equities and the public interest strongly favor injunctive relief. Because the
 16 government is a party, these inquiries merge. *Drake’s Bay Oyster Co. v. Jewell*, 747 F.3d 1073,
 17 1092 (9th Cir. 2014). For all the reasons above, there is a strong public interest in preventing the
 18 unlawful sale to ensure Archives records are not removed from the Pacific Northwest. Moreover,
 19 it is in the public interest to “ ‘curtail unlawful executive action.’ ” *Hawai’i v. Trump*, 859 F.3d
 20 741, 784 (9th Cir. 2017) (citation omitted), *vacated on other grounds by Trump v. Hawai’i*, 138
 21 S. Ct. 377; *see Planned Parenthood of Great N.W. & Hawaiian Islands, Inc. v. Azar*, 352 F.
 22 Supp. 3d 1057, 1066 (W.D. Wash. 2018) (“The Ninth Circuit has recognized that ‘the public
 23 interest favors applying federal law correctly.’ ” (citation omitted)). Put another way, “[t]here is
 24

25 ²¹ *See, e.g.*, Bond ¶¶9, 16; Coen ¶¶3-4; Fisher ¶¶4-6, 12; Hall ¶4; House ¶¶ 3-6, 9; Klinge ¶8; Nicola, R.
 26 ¶3; Nimura ¶3; Oberg ¶8; Reich ¶¶6-8; Schutt ¶5; Smythe ¶3; Sullivan, M. ¶12; Taylor, J. ¶5, 7; Turner ¶4; Wilson
 ¶26; Wisniewski ¶11.

²² *See, e.g.*, Oberg ¶8; Nicola, P. ¶6; Thrush ¶5; Stein, J. ¶11; Taylor, J. ¶7; Turner ¶9.

1 generally no public interest in the perpetuation of unlawful agency action. To the contrary, there
 2 is a substantial public interest in having governmental agencies abide by the federal laws that
 3 govern their existence and operations.” *Newby*, 838 F.3d at 12 (citations and internal quotation
 4 marks omitted). The equities also weigh particularly strongly in Plaintiffs’ favor due to the
 5 federal government’s failure to consult with tribal leaders and other stakeholders, *supra* at 9-10,
 6 and its broken promise to digitize Alaska records that were moved to Seattle when NARA’s
 7 Anchorage facility closed in 2014. *See* Smythe ¶7; Stein, G. ¶7; Goforth ¶¶6-7; Turner ¶10.²³
 8 Any suggestion that the Seattle facility’s records will be digitized rings hollow, and moving
 9 Alaska records even further away only adds insult to injury.²⁴

10 **E. A Preliminary Injunction Prohibiting the Sale Is Necessary and Appropriate**

11 The Court should enjoin Defendants from selling the Seattle Archives facility to preserve
 12 the status quo *pendente lite*. “ ‘Crafting a preliminary injunction is an exercise of discretion and
 13 judgment, often dependent as much on the equities of a given case as the substance of the legal
 14 issues it presents.’ ” *California v. Azar*, 911 F.3d 558, 583 (9th Cir. 2018) (quoting *Trump v.*
 15 *Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017)). “The purpose of such interim
 16 equitable relief is not to conclusively determine the rights of the parties but to balance the equities
 17 as the litigation moves forward.” *Id.* Plaintiffs contend that the sale of all twelve properties is
 18 procedurally deficient and thus unlawful. *See* Section III.B.3, *supra*. But Plaintiffs will only be
 19 irreparably harmed by the sale of the FASTA-exempt Seattle Archives facility, so the Court need
 20 only enjoin any further steps to effectuate or facilitate the sale of that facility.

21 **IV. CONCLUSION**

22 Plaintiffs respectfully request that this Motion be granted.

23
 24 ²³ *See also* H.R. 133 (Consolidated Appropriations Act, 2021), Explanatory Statement, Division E at 44-45,
 25 available at <https://tinyurl.com/y65of8wa> (“It is profoundly disappointing that NARA has failed to keep its
 26 commitment to digitize and post online using an easy-to-find, navigable, and searchable platform the Territorial and
 Federal records generated in Alaska since they were moved from Anchorage to Seattle more than 5 years ago.”).

²⁴ *See, e.g.*, Brown ¶¶7-8; Haycox ¶6; House ¶15; Klinge ¶8; Norris ¶7; Parham ¶¶1-12; Peterson ¶¶13-14;
 Simone ¶3; Smythe ¶¶3, 8-9; Stein, G. ¶7.

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DATED this 7th day of January, 2021.

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ASSOCIATION OF KING COUNTY HISTORICAL ORGANIZATIONS, HISTORIC SEATTLE, HISTORYLINK, MUSEUM OF HISTORY AND INDUSTRY, and WASHINGTON TRUST FOR HISTORIC PRESERVATION

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WING LUKE MEMORIAL FOUNDATION d/b/a
WING LUKE MUSEUM

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court’s CM/ECF System which will send notification to counsel that have appeared in this case. I also caused a true and correct copy of the foregoing document to be served via hand delivery upon the following:

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I also caused a true and correct copy of the foregoing document to be served via certified mail upon the following:

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DATED this 7th day of January, 2021, at Seattle, Washington.

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