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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CITY OF BERKELEY; MAYOR AND MEMBERS OF THE CITY COUNCIL OF THE CITY OF BERKELEY,

Plaintiffs,

v.

UNITED STATES POSTAL SERVICE; PATRICK R. DONOHOE AS POSTMASTER GENERAL OF THE UNITED STATES POSTAL SERVICE; TOM A. SAMRA, VICE PRESIDENT-FACILITIES OF THE UNITED STATES POSTAL SERVICE; DIANA ALVARADO, DIRECTOR, REAL ESTATE, USPS PACIFIC REGION,

Defendants.

Case No.: 3:14-CV-04916

FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Date: Thursday, December 11, 2014
Time: 8:00 am
Judge: Hon. William Alsup

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## INTRODUCTION

Defendants, Patrick R. Donahoe, Postmaster General of the United States Postal Service, Tom A. Samra, Vice President-Facilities of the United States Postal Service, Diane Alvarado, Director, Real Estate, United States Postal Service, Pacific Region, and the United States Postal Service (collectively, "the Postal Service" or "USPS"), file this Memorandum of Law in Opposition to Plaintiffs' Motion for Preliminary Injunction. Plaintiffs, the City of Berkeley and the Mayor and members of the City Council, challenge the United States Postal Service's decision to sell a historic main post office, (hereinafter "Berkeley MPO" or "the Property") located in the downtown area of Berkeley, California, and request that this Court preliminarily enjoin the Postal Service from the future sale of this property. Plaintiffs' motion should be denied.

Plaintiffs first fail to demonstrate that any irreparable harm is likely or imminent, and on this basis alone, their request should be denied. The possible termination of postal services at the Berkeley MPO is not the near certainty that Plaintiffs portray. The sales agreement between the Postal Service and the purchaser includes a leaseback provision that will authorize the Postal Service's continued occupancy of retail space at the Berkeley MPO for an initial term of five years, with three five-year renewal options that the Postal Service can exercise at its sole discretion. Lowe Decl. ¶¶ 6-7. Plaintiffs likewise fail to carry their burden and provide *any* concrete evidence that would suggest the potential alteration or demolition of the building's historic features is anything more than speculation and conjecture.

Plaintiffs' lawsuit also fails on the merits. As a threshold matter, Plaintiffs' Complaint suffers from a fatal flaw: They have not identified a private right of action to challenge the Postal Service's compliance with the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470f, or the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332.

Nevertheless, Plaintiffs' substantive arguments under these two statutes fail. Following an extensive and robust consultation process undertaken pursuant to Section 106 of the NHPA, the Postal Service reasonably determined that, with the proposed preservation covenant, the planned sale would not have any adverse effects on the Berkeley MPO's historic features. Indeed, the Section 106 process unfolded in precisely the manner Congress intended. The Postal Service similarly complied with the

procedural requirements of NEPA when it determined that the sale of this property was authorized by a categorical exclusion, thereby obviating the need for an Environmental Impact Statement or an Environmental Assessment. Finally, the balance of harms and the public interest in having the Berkeley MPO transfer out of federal control weigh in favor of denying Plaintiffs' motion.

## LEGAL BACKGROUND

### I. Postal Reorganization Act

The Constitution empowered the federal government to provide and regulate postal services. *USPS v. Flamingo Indus. Ltd.*, 540 U.S. 736, 739 (2004) (citing to Article of Confederation IX and U.S. Const., art. I, § 8). Designed to "increase the efficiency of the Postal Service and reduce political influences on its operations," passage of the Postal Reorganization Act of 1970 ("PRA"), 39 U.S.C. §§ 101-5605, marked a significant change. While preserving the Postal Service's public obligations as an independent establishment of the executive branch, the Act also "indicated that [Congress] wished the Postal Service to be run more like a business than had its predecessor, the Postal Department." *Currier v. Potter*, 379 F.3d 716, 724-25 (9th Cir. 2004) (internal quotation marks and citation omitted; alteration in original). Congress therefore exempted the Postal Service from a number of statutes governing federal agencies. *See* 39 U.S.C. §§ 409–410; *Mittleman v. Postal Regulatory Comm'n*, 757 F.3d 300, 305 (D.C. Cir. 2014). Consistent with that goal, the Supreme Court has liberally construed 39 U.S.C. § 401(1)'s sue-or-be-sued clause, "presum[ing] that the Service's liability is the same as that of any other business." *Franchise Tax Bd. Of Cal. v. U.S. Postal Serv.*, 467 U.S. 512, 520 (1984). As a consequence, portions of the Administrative Procedure Act, including its judicial review provisions, do not apply to the Postal Service. *Currier*, 379 F.3d at 725.

### II. NHPA

The National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470–470x-6, is a "stop, look, and listen" provision that requires each federal agency to consider the effects of an undertaking, without mandating any particular outcome. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999) (per curiam). To that end, the NHPA established the Advisory Council on Historic Preservation ("ACHP"), 16 U.S.C. § 470i, and delegated to the ACHP the authority to promulgate regulations designed to implement 16 U.S.C. § 470f, colloquially referred to as "Section 106." *See id.* at § 470s. The ACHP's regulations set forth a multi-step procedure for compliance with Section 106 and

can be found at 36 C.F.R. part 800.

The agency must first determine whether there is a federal undertaking and, if so, identify appropriate parties to participate in the review process, including the State Historic Preservation Officer ("SHPO"). 36 C.F.R. § 800.3. The agency next identifies historic properties, within a particular Area of Potential Effects ("APE") of the undertaking, and evaluates their significance and any potential impact. 36 C.F.R. § 800.4. If there are properties that would be affected, the agency undertakes the third step in the review process, which is to assess the potential adverse effects in consultation with the SHPO and any other consulting parties. 36 C.F.R. §§ 800.4, 800.5. Should the agency find that an adverse effect will occur, the agency will work with consulting parties to develop alternatives or modifications to avoid or mitigate adverse effects on historic properties. 36 C.F.R. § 800.6.

The activity challenged here falls within the third step of the process: Plaintiffs challenge the Postal Service's determination that the sale would have no adverse effects with the preservation covenant in place. In these circumstances, the process provides for two options when the SHPO or any other consulting party disagrees with an agency's determination of no adverse effect. 36 C.F.R. § 800.5(c)(2)(i), (ii). The agency can consult with the dissenting party and attempt to resolve the differences, or it can seek review of its finding from the ACHP and request an advisory opinion as to whether the agency correctly applied the Section 106 criteria in determining its finding. 36 C.F.R. §§ 800.5(c)(2), (3). Although the agency must give the ACHP a "reasonable opportunity" to comment with regard to such an undertaking, 16 U.S.C. § 470f, the agency may still proceed even if the ACHP disapproves of the agency action. 36 C.F.R. § 800.5(c)(3)(ii)(B) ("If the final decision of the agency is to affirm the initial finding of no adverse effect, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled.").

**III. NEPA**

Like the NHPA, NEPA also imposes procedural rather than substantive requirements. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349-50 (1989); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989). A Categorical Exclusion ("CE") is by definition *not* a major federal action significantly affecting the quality of the human environment because the Council on Environmental

Quality ("CEQ") defines CEs to include "a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such . . . ." 40 C.F.R. §§ 1508.4, 1507.3; *West v. Sec'y of Dept. of Transp.*, 206 F.3d 920, 927 (9th Cir. 2000). Thus, unlike the situation where a federal agency has proposed a "major Federal action[] significantly affecting the quality of the human environment," thereby requiring preparation of an Environmental Impact Statement ("EIS"),[1] 42 U.S.C. § 4332(C), "where agency action falls under a categorical exclusion, it need not comply with the requirements of an [environmental impact statement]." *Ctr. for Biologic Diversity v. Salazar*, 706 F.3d 1085, 1097 (9th Cir. 2013) (citing *Wong v. Bush*, 542 F.3d 732, 737 (9th Cir. 2008)); *see also* 40 C.F.R. § 1508.4. Thus, a full NEPA analysis is not required where a proposed action fits within a CE. *Id.*; 40 C.F.R. § 1500.4(p). "An agency satisfies NEPA if it applies its categorical exclusions and determines that neither an EA nor an EIS is required, so long as the application of the exclusions to the facts of the particular action is not arbitrary and capricious." *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1456 n.5 (9th Cir. 1996).

Consistent with the CEQ regulations, the Postal Service has adopted (and subsequently revised) procedures for compliance with NEPA, including recent revisions to its categorical exclusions and determinations of extraordinary circumstances. *See* 79 Fed. Reg. 2102-01 (Jan. 13, 2014) (codified at 39 C.F.R. pt. 775) (interim final rule); 79 Fed. Reg. 33095-01 (Jun. 10, 2014) (codified at 39 C.F.R. pt. 775 (final rule). Relevant here, 39 C.F.R. § 775.6(e)(8) sets forth the categorical exclusion invoked by the Postal Service for the proposed disposal of the Berkeley Main Post Office.

## FACTUAL BACKGROUND

### I. Decision to Relocate Services and Market the Property

On March 7, 2012, the Postal Service's Pacific Area Vice President, Tom A. Samra, signed a Facility Optimization Study which found that the Berkeley MPO, located at 2000 Allston Way, Berkeley, CA was underutilized and costs savings could be achieved by selling the property and relocating to a smaller location. Decl. of Diana Alvarado, ¶ 2 ("Alvarado Decl.") (attached). Later that

[1] To determine whether an EIS is required, an agency may prepare an environmental assessment ("EA"). 40 C.F.R. §§ 1501.4(b), 1508.9. If the agency concludes via the EA that no significant environmental impacts will occur, the agency may issue a Finding of No Significant Impact ("FONSI"), and no EIS is required. *See* 40 C.F.R. §§ 1501.3, 1501.4(c), (e), 1508.9; *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1355-56 (9th Cir. 1994).

year and throughout the beginning of 2013, the Postal Service pursued a community engagement process, which included a written public comment period and a community meeting at Berkeley Council Chambers in February 2013. Alvarado Decl. ¶ 3; Press Release, Pls.' Ex. 10, ECF No. 3. After consideration of the public input received through this process, the USPS announced its decision to relocate retail services at the Berkeley MPO in April 2013. Alvarado Decl. ¶ 4, Ex. A at 4.

After the completion of an appeal and review period, the Postal Service issued a Final Determination Regarding Relocation of Retail Services in Berkeley, California on July 18, 2013. Alvarado Decl., Ex A. The decision, authored by Mr. Samra, upheld the Postal Service's April 19, 2013 decision regarding relocation of the Berkeley MPO. In the Final Review Determination letter, the Postal Service acknowledged and addressed the various concerns that had been expressed by many parties regarding the relocation decision. *Id.* Among other things, the Postal Service expressed an appreciation for community members' attachment to the Berkeley MPO as well as their interest in ensuring a "convenient location to access postal services." *Id.* at 1. Accordingly, the Postal Service indicated that it will "keep[] convenience in mind" when investigating its relocation options, including the consideration of a sale that would "include a lease-back of a portion of the premises to the Postal Service so as to allow existing Postal Service retail services to remain in place." *Id.* at 2.

In response to concerns that the Postal Service failed to comply with NEPA and the NHPA with regard to the relocation of services, the Postal Service pointed out that it "has not yet identified the potential relocation site and thus it is premature to evaluate potential impacts" under NEPA. The Postal Service also acknowledged that it would engage in the Section 106 consultation process prior to any sale of the Berkeley MPO. *Id.* The Postal Service also explained that "dire financial circumstances force [it] to pursue every opportunity to reduce costs and generate revenue, in particular at under-utilized locations such as the Berkeley Post Office." *Id.* The Postal Service went on to observe that "the Postal Service operations only require approximately 4,000 square feet of the approximately 57,000 square feet in the building." *Id.* at 3. In conclusion, the Postal Service stated that it had "considered all of the public input received, but the concerns expressed do not outweigh the dire financial circumstances facing the Postal Service." *Id.* at 4.

In October 2013, the Postal Service's broker began marketing the Property; the materials discussed the historic landmark restrictions and the Postal Service's interest in leasing back 3,500 square feet on the ground floor for retail operations. Decl. of Joseph D. Lowe ¶¶ 4-5 ("Lowe Decl."). In September 2014, the Postal Service entered into an Agreement to Sell and Purchase the Berkeley MPO with Hudson McDonald LLC. *Id.* at ¶ 6.

The sales agreement includes a leaseback provision requiring the purchaser to provide for the Postal Service's continued occupancy of retail space at the Property for an initial term of five years, with three five-year renewal options that the Postal Service can exercise at its sole discretion. Lowe Decl. ¶¶ 6-7. For the first three months of the initial lease term, the Postal Service will retain rights to occupy the entire Property and, following that, it will continue its current retail services in the same location as today. Lowe Decl. ¶ 7b, d. As a result, there will be little, if any, change of use for the average postal customer and the public will retain regular access to historic features, including the Suzanne Scheuer mural, for a minimum of five years following the sale. Lowe Decl. ¶ 7d. The leaseback provision is an essential term of the sales agreement, and the Postal Service will not close on the sale of the Berkeley MPO until an executed leaseback is in place. Lowe Decl. ¶ 8. The current agreement in place provides that the closing will occur by December 22, 2014. *See* ECF No. 17-1 (Decl. of Joseph D. Lowe, dated Nov. 6, 2014)).

**II. Section 106 Process**

As promised by Defendant Samra in his July 2013 Final Review Determination, Alvarado Decl. Ex. A, the Postal Service initiated Section 106 consultations in September 2013 by sending a letter to the California State Historic Preservation Officer ("SHPO"), with copies to the ACHP, the City of Berkeley ("the City"), the National Trust for Historic Preservation ("NTHP"), and other consulting and interested parties. Decl. of Daniel Delahaye, ¶ 10 ("Delahaye Decl."), Ex. B. The letter included, *inter alia*, a draft preservation covenant and noted that the "USPS is actively seeking a preservation covenant enforcer for this property." Delahaye Decl. ¶ 10, Ex. B. at 9, 11. The September 2013 letter also determined that, with the use of a preservation covenant, the disposition of this property would result in no adverse effect. *Id.* at 10-11. The preservation covenant required that the entity that assumes responsibility for enforcement of the covenant review and approve of any rehabilitation, alteration, or

modification plans to ensure consistency with *The Secretary of the Interior's Standards for the Treatment of Historic Properties* and applicable guidelines. *Id.* at 9.

Over the course of the next year, the Postal Service extensively consulted with the California SHPO, the NTHP, the City, and other parties, while also taking into account views expressed by the public. Delahaye Decl. ¶¶ 10-21. As part of this consulting process, the draft preservation covenant was revised two times, with each version taking into consideration comments received from the City and others. Delahaye Decl. ¶¶ 15-21, Exs. C and D.

Following a year of negotiations, however, the parties reached an impasse with respect to several specific issues stemming from the preservation covenant. First, several of the consulting parties insisted that the Postal Service mandate use of the property as a retail post office, either in perpetuity or for a substantial amount of time, such as a 50- or 20-year term. *See, e.g.*, Pls.' Ex. 21 at 30, ECF No. 3-8 (letter from the City to the Postal Service). The USPS deemed this impractical for numerous reasons, including that the USPS needs "flexibility in managing its resources" and that "adaptive reuse of historic structures has proven to be [a] valuable tool in ensuring historic resources are maintained in perpetuity and such adaptive reuse is encouraged by the preservation community." Delahaye Decl., Ex. E at 1-2.

Second, the Postal Service requested that at least three different organizations, including the City, be the covenant holder; each refused. Delahaye Decl., Ex. H at 2-3. The California SHPO simply rejected the offer, and the City and NTHP requested a $75,000 lump-sum payment, an amount the Postal Service had already declared unacceptably high for a service often performed at no cost. Delahaye Decl. ¶¶ 14f, 20, Ex. E at 2-3. Ultimately, the Postal Service determined that it would assume responsibility for enforcement and administration of the preservation covenant, but with the specific provision that an appropriate successor may be appointed at a future date. Delahaye Decl. ¶ 23.

After a year of unsuccessful negotiations, the Postal Service, following 36 C.F.R. §§ 800.5(c)(2), (3), requested an advisory opinion from the ACHP. Delayahe Decl. ¶ 22, Ex. F. On September 24, 2014, the ACHP provided its advisory opinion to the Postal Service, and on October 31, 2014, pursuant to 36 C.F.R. § 800.5(c)(ii)(A)-(B), the Postal Service responded to the ACHP's opinion. Delayahe Decl. ¶ 22, Ex. H. The Postal Service indicated that it had taken the ACHP's opinion into account, but disagreed with it for several reasons and ultimately found no reason to revise its finding of no adverse

effect resulting from the disposal of the Berkeley MPO. *Id*. Among other points, the Postal Service stressed that, given its position as owner of over 8,500 properties, many of which are historic, and its voluntary compliance with Section 106 since 1982, it believed that it did have an adequate interest and capability in maintaining and preserving historic properties. *Id.* at 2. The Postal Service concluded its response by noting that its submission of this letter to the ACHP, the California SHPO, and the consulting parties concluded the Section 106 process. *Id.*; *see* 36 C.F.R. § 800.5(c)(ii)(A)-(B).

**III. NEPA**

In September 2012, six months after the Facility Optimization Study, the Postal Service engaged an outside consultant (ADR Environmental Group, Inc.) to complete an environmental due diligence report, which included a Facilities Environmental Checklist ("FEC") for the Berkeley MPO.[2] Parrish Decl. ¶ 5.

Later, in 2014, the Postal Service engaged URS Group, Inc. ("URS") to perform a NEPA update for the Berkeley MPO, due in part to the changes to Postal Service regulations regarding categorical exclusions that had gone into effect in January 2014. *Id.*; *see* 79 Fed. Reg. 2102-01. On April 18, 2014, URS provided its findings to the Postal Service. Parrish Decl. ¶ 6. The only potential impact noted in the FEC was that the Berkeley MPO was on National Register of Historic Places and was within the Berkeley Historic Civic Center District. Parrish Decl. ¶ 7. The Facilities Environmental Specialist for the Postal Service responsible for the environmental due diligence relating to the proposed disposal of the Berkeley MPO, Ms. Charlotte Parrish, subsequently reviewed the URS Report and concluded that the Categorical Exclusion at 39 C.F.R. §775.6(e)(8) applied. Parrish Decl. ¶ 9.[3] A Record of Environmental Consideration reflecting this conclusion was prepared and signed by Ms. Parrish and the current Responsible Official, Jerry Goddard, on April 30, 2014, completing the Postal Service's NEPA process for the proposed disposal of the Berkeley MPO. Parrish Decl. ¶ 10, Ex. C.

[2] An FEC is part of the Postal Service's NEPA process and is used to assist the Postal Service in determining whether the proposed action is categorically excluded from further NEPA review. Decl. of Charlotte Parrish, ¶ 3 ("Parrish Decl.").

[3] Ms. Parrish also concluded that the effects of the proposed disposal on the Berkeley MPO's historical aspects were addressed through the Section 106 process. Parrish Decl. ¶ 8.

## STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy never awarded as of right" and "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 24 (2008) (citing *Mazuerk v. Armstrong*, 520 U.S. 968, 972 (1977) (per curiam)). A plaintiff seeking a preliminary injunction must establish that: (1) it is likely to succeed on the merits, (2) it is likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in its favor, and (4) an injunction is in the public interest. *Winter*, 555 U.S. at 20. To grant preliminary injunctive relief, a court must find that "a certain threshold showing is made on each factor." *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (per curiam). Provided that this has occurred, in balancing the four factors, "serious questions going to the merits and a balance of hardships that tips sharply towards the plaintiff can support issuance of a preliminary injunction, so long as the plaintiff also shows that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (internal quotation marks omitted). An injunction should issue only where a plaintiff makes a "clear showing" and presents "substantial proof" that an injunction is warranted. *Mazurek*, 520 U.S. at 972. The standard is high because a preliminary injunction is an "extraordinary and drastic remedy" that is never awarded as of right. *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008) (internal quotation marks omitted).

## ARGUMENT

### I. Plaintiffs Have Not Demonstrated That They Are Likely to Suffer Immediate and Irreparable Harm.

To meet their burden of establishing irreparable harm absent a grant of injunctive relief, Plaintiffs must establish that it is "*likely*, not just possible," that they will suffer particular harms that cannot be remedied at a later time. *Cottrell*, 632 F.3d at 1131 (citing *Winter*, 555 U.S. at 22) (emphasis in original). While harm may be sufficient to confer standing to seek injunctive relief, a showing of *irreparable* harm is necessary to obtain such relief. *See Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 n.6 (9th Cir. 2011) ("[A] plaintiff may establish standing to seek injunctive relief yet fail to show the likelihood of irreparable harm necessary to obtain it"). Thus, a "preliminary injunction will not be issued simply to prevent the possibility of some remote future injury[,]" *Winter*, 555 U.S. at 22, and a "[s]peculative injury cannot be the basis for a finding of irreparable harm." *In re Excel Innovations*,

*Inc*., 502 F.3d 1086, 1098 (9th Cir. 2007) (citing *Goldie's Bookstore, Inc. v. Superior Court*, 739 F.2d 466, 472 (9th Cir. 1984)).

Plaintiffs' arguments are insufficient to carry this burden. Plaintiffs begin with two broad articulations of purported harm: a "change [in] use of the facility" and "alteration or even demolition of the property." Pls.' Mem. in Supp. of TRO & Prelim. Inj. at 3 (ECF No. 3) ("Pls.' Mem."). With respect to the first, Plaintiffs have provided no evidence to suggest that postal services at the Berkeley MPO will be terminated upon transfer of the property, as their burden requires. And in fact, they will not. The sales agreement includes a leaseback provision requiring the purchaser to provide for the Postal Service's continued occupancy of retail space at the Property for an initial term of five years, with three five-year renewal options that the Postal Service can exercise at its sole discretion. Lowe Decl. ¶¶ 6-7. For the first three months of the initial lease term, the Postal Service will retain rights to occupy the entire Property and, following that, it will continue its current retail services in the same location as today. Lowe Decl. ¶ 7b, d. There will therefore, be little, if any, change of use for the average postal customer and the public will retain regular access to historic features, including the murals, for a minimum of five years following the sale. Lowe Decl. ¶ 7d. Thus, Plaintiffs' articulated harm is not imminent and is the very type of speculative and "remote future injury" that cannot form the basis for a preliminary injunction. *Winter*, 555 U.S. at 22.

Plaintiffs' second generalized claim of immediate and irreparable harm—a purported "fail[ure] to protect alteration or even demolition of the property"—fares no better than their first. Pls.' Mem. at 3. As an initial matter, Plaintiffs' contention is based on nothing more than speculation and conjecture. Plaintiffs cite to no evidence that suggests such alteration or demolition is planned, let alone imminent, and at least one news article suggests otherwise.[4] Moreover, the preservation covenant, into which Plaintiffs had considerable input, requires the new owner to restore, maintain, and preserve the historic features of the property. Delayahe Decl., Ex. F at 3.

[4] The Buyer, Hudson McDonald LLC, has been quoted as saying, "Our goal is to generate revenue for the city, repurpose the building, and have it continue to function as a post office" and confirming that it had "no plans to create residences in the building or put it in private use." *See* http://www.berkeleyside.com/2014/11/05/local-developer-hudson-mcdonald-in-contract-to-buy-downtown-berkeley-post-office/ (last visited Nov. 24, 2014).

Several speculative and (to date) unforeseen events would have to occur for Plaintiffs' harm to materialize. First, the developer would have to propose construction, alteration, or rehabilitation that would affect the historic features. Second, the Postal Service—as covenant holder—would have to approve of the proposal. And, third, it is possible that the developer would need permits or permissions from Plaintiffs themselves. There is, therefore, no basis for Plaintiffs' apparent claim that the sale, in and of itself, will cause immediate and irreparable harm.

Plaintiffs also attempt to portray purported procedural violations of NEPA and the NHPA as a specific irreparable harm warranting the drastic remedy of a preliminary injunction. Pls.' Mem. at 4-5. This approach, however, fails as a matter of law because a "procedural injury alone is insufficient to . . . demonstrate the irreparable injury required to justify injunctive relief." *Sierra Forest Legacy v. Sherman*, 951 F. Supp. 2d 1100, 1110 (E.D. Cal. 2013). The Supreme Court has explicitly rejected Plaintiffs' contention that an injunction is the appropriate remedy for a potential NEPA violation "absent unusual circumstances." Pls.' Mem. at 5. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010) (stating that "[n]o such thumb on the scales is warranted"); *see also Perfect 10, Inc. v. Google, Inc.*, 653 F.3d 976, 980 n.1 (9th Cir. 2011). As the Court in *Monsanto* explained, when evaluating the propriety of an injunction in a NEPA case, a court cannot "presume that an injunction is the proper remedy[,]" but must rather engage in a true consideration of whether "an injunction *should* issue under the traditional four-factor test." 561 U.S. at 157-158. Indeed, it is well-settled that there is no presumption of irreparable injury in environmental cases. *See Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 545-46 (1987); *cf. Sierra Forest Legacy v. Rey*, 691 F. Supp. 2d 1204, 1209 (E.D. Cal. 2010) (concluding that plaintiffs' "generic and blanket assertion of harm" fails to carry their burden of demonstrating that they are "likely to suffer irreparable harm *before a decision on the merits can be rendered*" and that their motion fails "on this basis alone") (*quoting Winter*, 555 U.S. at 22).

Plaintiffs' contention that "allowing completion of the property sale would prejudice [P]laintiffs' ability to ensure that the federal-agency disposition complies with NHPA and NEPA[,]" Pls.' Mem. at 5, similarly fails because there is no presumption of irreparable injury in environmental cases. *Amoco*, 480 U.S. at 545-46. In addition, Plaintiffs' argument fails because it rests on the faulty assumption that Plaintiffs have a cause of action against the Postal Service under NEPA or NHPA, when, in fact, they do

not. *See infra* Section II.A.[5] That Plaintiffs do not have a cause of action also undermines their attempt to suggest that, should this Court not enter an injunction now, it will find itself frustrated down the road if it were to ultimately conclude that a violation had occurred. Yet, even if this Court were to allow Plaintiffs to proceed with their claims, the case cited by Plaintiffs, *Kettle Range Conservation Group v. BLM*, 150 F.3d 1083, 1086 (9th Cir.1998), does not stand for the proposition that a court should, as a matter of course, enjoin any transfer of title in which a plaintiff alleges a NEPA violation. Instead, *Kettle Range* turned on the fact that the plaintiffs had failed to join the private parties who had received title to the formerly public lands, thus making it impossible for the court to offer any relief without "impair[ing] or imped[ing]" the interests of absent, but necessary, parties. *Id.* at 1086 (concluding that once the private parties took title, they became necessary parties pursuant to Fed. R. Civ. P. 19 and noting that the plaintiffs did not even attempt to join them); *see also id.* at 1088 ("Primary responsibility" for seeking necessary relief rests with "private litigants seeking to enforce environmental statutes.") (Reinhart, J. concurring).

Finally, Plaintiffs do not even attempt to establish that their final articulated injury is likely to occur, relying instead on a general proclamation that "the sale of the post office ***could*** irreparably foreclose future options" without any further statement or evidence as to why the purported lack of consideration of alternatives would truly harm Plaintiffs or why such alternatives could not be considered outside of the NEPA process. Pls.' Mem. at 6 (emphasis added).

In sum, Plaintiffs have not alleged, let alone proven, a likely irreparable harm sufficient to enjoin the sale of the Berkeley MPO. The Court should deny Plaintiffs' motion on this basis alone.

## II. Plaintiffs Have Not Demonstrated That They Are Likely to Succeed on the Merits of Their Claims.

Under *Cottrell*, to succeed in a petition for injunctive relief, a plaintiff must demonstrate a "substantial case for relief on the merits." *Cf. Leiva-Perez*, 640 F.3d at 967-68. Indeed, "[b]ecause injunctive relief prior to trial is a harsh and extraordinary remedy, it is to be granted sparingly and only in cases where the issues are clear and . . . the plaintiff has established a reasonable certainty of

[5] Both of Plaintiffs' NEPA and NHPA irreparable harm arguments also improperly assume that the Postal Service did, in fact, fail to comply with the two statutes.

prevailing at trial." *Arthur J. Gallagher & Co. v. Edgewood Partners Ins. Center*, No. C 07-06418 JSW, 2008 WL 205274, at *1 (N.D. Cal. Jan. 23, 2008) (quoting *Watermark, Inc. v. United Stations, Inc.*, 219 U.S.P.Q. 31, 32-33 (C.D. Cal. 1982)). If the moving party fails to show a sufficient chance of success on the merits, a court need not determine whether there is a potential injury or balance the hardships. *See e.g., Sports Form, Inc. v. United Press Int'l., Inc.*, 686 F.2d 750, 753 (9th Cir. 1982).

Moreover, "on application for preliminary injunction the court is not bound to decide doubtful and difficult questions of law or disputed questions of fact." *Dymo Industries, Inc. v. Tapeprinter, Inc.*, 326 F.2d 141, 143 (9th Cir. 1964) (per curiam). In fact, "[i]n circumstances where the court finds that it cannot yet resolve 'doubtful and difficult questions of law or disputed questions of fact,' . . . a preliminary injunction may not issue." *Marilley v. McCamman*, No. C-11-02418 DMR, 2011 WL 4595198, at *1 (N.D. Cal. Oct. 3, 2011) (quoting *Mayview Corp. v. Rodstein*, 480 F.2d 714, 719 (9th Cir. 1973) (reversing grant of preliminary injunction based on existence of disputed factual issues)).

A. Plaintiffs have not identified a private right of action to challenge the Postal Service's compliance with NEPA or Section 106.

Plaintiffs contend that the Postal Service's decision to enter into a Purchase and Sale Agreement is a "reviewable final agency action," Pls.' Mem. at 2, yet fail to identify any viable private cause of action for their claims under NEPA, Section 106 of the NHPA, or the APA. To bring a suit against the executive branch, potential plaintiffs must identify a waiver of sovereign immunity, subject matter jurisdiction, **and** a private right of action. *Presidential Gardens Assocs. v. United States ex rel. Sec'y of Housing & Urban Dev.*, 175 F.3d 132, 139 (2d Cir. 1999); *see FDIC v. Meyer*, 510 U.S. 471, 484 (1994) (explaining that, even with a waiver of sovereign immunity, plaintiffs filing suit against the federal government must still identify an "avenue for relief" within the "source of substantive law upon which the [plaintiff] relies"). Even the Postal Service's broad "sue and be sued" clause, at 39 U.S.C. § 401, does not suffice by its own terms to subject the Postal Service to suit for alleged violations of all substantive statutes. *Flamingo*, 540 U.S. at 744. Instead, a court must still "decide whether [Plaintiff] has a private right of action to obtain relief." *Currier*, 379 F.3d at 725 (citing *Flamingo* and *Meyer*).[6]

[6] To the extent Plaintiffs seek to rely on § 409 of the PRA for jurisdiction and/or a cause of action, *see* Compl. at ¶ 8 (ECF No. 1), the Ninth Circuit has rejected such attempts to use this provision as a means of conferring subject matter jurisdiction without an accompanying "substantive legal framework of federal law." *Currier*, 379 F.3d at 725 (internal quotation marks omitted). Similarly, Plaintiffs'

Thus, even assuming that the PRA provides an applicable waiver of sovereign immunity, under *Meyer* and *Flamingo*, Plaintiffs must still identify a private right of action for their claims. They do not—and cannot—do so. First, the APA, the standard course for judicial review under these two statutes,[7] does not provide the requisite "avenue for relief" and therefore cannot serve as a basis for judicial review. *Meyer*, 510 U.S. at 484. As the Ninth Circuit has recognized, Congress has explicitly excepted the Postal Service from the judicial review provisions of the APA. *Currier*, 379 F.3d at 725 (concluding that 39 U.S.C. § 410(a) renders the "[Postal] Service . . . exempt from the APA's general mandate of judicial review of agency actions.");[8] *see Mittleman*, 757 F.3d at 305 (explaining that the D.C. Circuit and several other Courts of Appeals have "observed that the Postal Service is exempt from review under the Administrative Procedures Act") (internal quotation marks and citation omitted).

Without the APA as a basis for review, Plaintiffs have not identified an alternative private right of action. Neither of the two sources of substantive law upon which Plaintiffs rely—NEPA or Section 106 of the NHPA—provide a private right of action. *See Gros Ventre*, 469 F.3d at 814. Plaintiffs' statement that NEPA applies to the Postal Service therefore misses the point. Pls.' Mem. at 8. The question is not whether the substantive provisions of NEPA apply to the Postal Service, but whether there is any private right of action which enables Plaintiffs to sue the Postal Service for alleged violations of the statute. There is not. *See Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (explaining that the Court has "sworn off the habit" of implying rights of action in the absence of clear

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assertion that jurisdiction arises under the Declaratory Judgment Act, 28 U.S.C. § 2201, is misguided. *See Countrywide Home Loans, Inc. v. Mortg. Guar. Ins. Corp.*, 642 F.3d 849, 853 (9th Cir. 2011) (holding that the Declaratory Judgment Act "in no way modifies the district court's jurisdiction, which must properly exist independent of the DJA").

[7] *See Gros Ventre Tribe v. United States*, 469 F.3d 801, 814 (9th Cir. 2006) ("Neither statute [NHPA or NEPA] provides a private right of action; therefore the [Plaintiffs] must rely on the APA to state a claim."); *see also Karst Environmental Educ. and Protection, Inc. v. E.P.A.*, 475 F.3d 1291, 1295 (D.C. Cir. 2007) ("[B]ecause NHPA, like NEPA, contains no private right of action, we agree with the Ninth Circuit that NHPA actions must also be brought pursuant to the APA.")

[8] 39 U.S.C. § 410(a) reads: "Except as provided by subsection (b) of this section, and except as otherwise provided in this title or insofar as such laws remain in force as rules or regulations of the Postal Service, **no Federal law dealing with public or Federal contracts, property**, works, officers, employees, budgets, or funds, **including the provisions of chapters 5 and 7 of title 5, shall apply to the exercise of the powers of the Postal Service**." (emphasis added). Chapter 7 of Title 5 of the United States Code, titled "Judicial Review," is the part of the APA that provides a cause of action for judicial review. *Mittleman v. Postal Regulatory Comm'n*, 757 F.3d 300, 304 (D.C. Cir. 2014).

statutory intent and affirming that, if such intent is not present, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute").

Plaintiffs' citations to the Postal Service's regulations regarding NEPA and Section 106 of the NHPA are also to no avail. Pls.' Mem. at 8, 11. The Supreme Court has flatly rejected the notion that an agency's regulations can, on their own, create a private right of action. *Sandoval*, 532 U.S. at 291 ("[I]t is most certainly incorrect to say that language in a regulation can conjure up a private cause of action that has not been authorized by Congress.").[9]

More specifically, the Ninth Circuit has held that the PRA "evinces Congress's general intent to withdraw judicial scrutiny of postal regulations." *Currier*, 379 F.3d at 725 (declining to infer a private right of action). Thus, the mere fact that the Postal Service has incorporated aspects of NEPA and the Section 106 process into its regulations cannot undo Congress's intentional exemption of the Postal Service from the APA's general mandate of judicial review of its actions. *Id.*

Finally, each of the Ninth Circuit's conclusions discussed above—that neither NEPA nor NHPA nor the APA provide a private right of action against the Service—comports with the Supreme Court's rationale in *Sandoval*. 532 U.S. at 289 ("Statutes that focus on the person [or agency] regulated rather than the individuals protected create no implication of an intent to confer rights on a particular class of persons.") (internal quotation marks omitted). Both NEPA and Section 106 of the NHPA are such statutes, directed exclusively at federal agencies and not applicable to private parties. *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1097-98 (9th Cir. 2005) ("NHPA's status as a 'look and listen' statute akin to NEPA weighs against implying a private right of action."). Similarly, as the Ninth Circuit has found, Congress's decision to exempt the Postal Service from judicial review under the APA comports with "Congress's intent to insulate the Postal Service from administrative challenges and to

[9] The Court's 2008 decision in *Sandoval* thus calls into question the Ninth Circuit's previous assumption, in *Akiak Native Community v. USPS*, 213 F.3d 1140, 1144 (2000), that the Postal Service's adoption of certain provisions of NEPA via its regulations subjected it to review under APA standards. Similarly, Plaintiffs' citation to *City of Rochester v. USPS*, 541 F.2d 967 (2d Cir. 1976), is inapposite as a pre-*Sandoval* and pre-*Meyer* decision in which the Second Circuit apparently assumed, without discussing, that a NEPA claim could be brought independently of the APA—a notion that has been explicitly rejected by the Ninth Circuit. *See Gros Ventre*, 469 F.3d at 814.

place the Service on a business like footing." *Currier*, 379 F.3d at 725-26.

NEPA and the NHPA do not include private rights of action. Because Congress has explicitly excepted the Postal Service from the APA's judicial review provisions, Plaintiffs have failed to—and will be unable to—identify a valid cause of action for their claims. Accordingly, Plaintiffs have failed to meet their burden of establishing likelihood of success on the merits and an injunction should not issue.

B. Even if the Postal Service's Actions are subject to judicial review, Plaintiffs have no likelihood of success on the merits under Section 106 of the National Historic Preservation Act.

**1. The NHPA allows the Postal Service to proceed with the sale, so long as it provided the ACHP an opportunity to comment and considered those comments.**

The NHPA imposes purely procedural requirements. When enacting the NHPA, Congress intended to encourage federal agencies to consider historic preservation during the course of approving federal projects. *See* 16 U.S.C. §§ 470(b)(7), 470f. The intent was not to prevent agencies from acting or even to change those actions. *See* 36 C.F.R. § 800.5(c).

Accordingly, the regulations allow a federal entity, such as the Postal Service, that has complied with its consulting obligations and concluded that there will be no adverse effect, to request an advisory opinion from the ACHP. 36 C.F.R. § 800.5(c)(3). Following issuance of the ACHP's opinion, the agency can either decide to revise the finding of no adverse effect or affirm the initial finding of no adverse effect. *Id.* § 800.5(c)(3)(ii)(B). So long as the agency provides a decision that contains its rationale and evidence of consideration of the Council's opinion, the agency may proceed even if the ACHP ultimately disapproves of the agency action. *Id.* § 800.5(c)(3)(ii)(B) ("If the final decision of the agency is to affirm the initial finding of no adverse effect, once the summary of the decision has been sent to the Council, the SHPO/THPO, and the consulting parties, the agency official's responsibilities under section 106 are fulfilled."); *see also* Delahaye Decl. Ex. H at 3. As described below, this is exactly what the Postal Service did.

**2. The Postal Service reasonably concluded that a preservation covenant would sufficiently avoid any adverse effects.**

Plaintiffs paint a false picture of an uninformed agency undertaking environmentally destructive practices without having examined the resources it stewards. Yet the truth is that there was a robust year-long exchange between the Postal Service, consulting parties, and the ACHP, much of which is documented in Plaintiffs' own exhibits. *See, e.g.*, Pls.' Exs. 25, 28 (ECF Nos. 3-9). This is exactly what Section 106 contemplates.

The Postal Service first initiated Section 106 consultations in September 2013, sending letters to the SHPO, the City, and the NTHP. Delahaye Decl. ¶ 10, Ex. B. To avoid any potential for adverse effects, as described in 36 C.F.R. § 800.5(a)(2)(vii), the Postal Service proposed a preservation covenant that: 1) would protect both the directly and indirectly affected properties as part of the disposition, and 2) be adequate and legally enforceable. Delahaye Decl. ¶ 10-11.

The initial draft covenant prohibited any construction, alteration or rehabilitation by the purchaser of the Property that would affect the historic features without consultation and express agreement by the covenant holder. Delahaye Decl., Ex. C at 1. The new owner would also be required by the preservation covenant to restore, maintain, and preserve the historic features of the Property in accordance with the recommendations of the Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings. *Id.* Responding to concerns expressed by various parties, the Postal Service strengthened the substantive provisions of the covenant, removing, for instance, a clause that the ACHP had found problematic in past covenants. Pls.' Ex. 25 (ECF No. 3-9).

Following a year of negotiations, however, the parties reached an impasse with respect to several issues involving the preservation covenant. Some consulting parties, including the City, insisted that the Postal Service mandate use of the property as a retail post office, either in perpetuity or for a substantial amount of time, such as a 50- or 20-year term. *See, e.g.*, Pls.' Ex. 21 at 7 (ECF No. 3-8). The Postal Service reasonably concluded that such a long lease, let alone one in perpetuity was "untenable" given "[c]urrent trends in mail volume" and its already "limited resources." Delahaye Decl., Ex. E at 1-2. The Postal Service explained, however, that a five-year base term, with three five-year options to extend

would both provide the Postal Service the needed "flexibility to manage its resources" and be consistent with the Postal Service's approach in other locales. *Id.*

Though Plaintiffs criticize the Postal Service's decision to be the covenant holder, the City and other consulting parties had the opportunity to assume responsibility for the covenant and thus exact considerable control over the future of the historic features of the building. They refused. The California SHPO rejected the Postal Service's request, while others demanded unreasonable pre-conditions. For example, the City and the NTHP requested a $75,000 advance, lump-sum payment. Delahaye Decl. ¶¶ 14f, 20; Pl.'s Ex. 21 at 6 (ECF No. 3-8). The Postal Service, however, had previously informed the City that although most covenant holders, including the City of Los Angeles, do not charge any fee, the Postal Service was open to a one-time up-front fee not to exceed $25,000. Delahaye Decl., Ex. E at 3. Thus, it was only after the City and others rebuffed the Postal Service's repeated overtures that it assumed the role of covenant holder, and it has only done so with the understanding that, should another appropriate party be identified, the Postal Service can re-assign its status to that entity. Delahaye Decl. ¶ 23.

Ultimately, having still not reached an agreement after a year of consultation, the Postal Service followed the Section 106 regulations and requested that the ACHP provide an advisory opinion regarding the Postal Service's conclusion that, with the covenant, the proposed sale would have no adverse effect. Delahaye Decl. ¶ 22, Ex. F; *see* 36 C.F.R. § 800.5(c)(3). The ACHP responded on October 24, 2014, disagreeing with some of the Postal Service's conclusions, but acknowledging that the regulations allowed the Postal Service to proceed with the undertaking so long as it prepared a summary of findings containing the rationale for its decision. Delahaye Decl. ¶ 25, Ex. G. On October 31, 2014, the Postal Service did just that, and thus fulfilled its responsibilities under Section 106. *See* 36 C.F.R. § 800.5(c)(3).

Notwithstanding Plaintiffs' protestations to the contrary, the Section 106 process worked precisely as intended. The Postal Service engaged in a lengthy and thorough consultation process that prompted significant consideration of potential effects on the historic property and several adjustments to its initial plan. In doing so, the Postal Service not only fulfilled all of its obligations under this procedural statute, but also created a covenant that will protect the buildings historic features after it

passes out of federal ownership. *See Muckleshoot Indian Tribe*, 177 F.3d at 805 (Section 106 of the NHPA is "stop, look, and listen" provision).

**3. The Postal Service did consider alternatives such as leasing and adaptive reuse.**

Plaintiffs also contend that the Postal Service violated the NHPA by failing to consider alternatives to sale such as leasing. Delahaye Decl. at 15-16. Plaintiffs are wrong. The Postal Service expressly considered concerned parties' suggestions of outleasing excess space and offering additional services to increase revenue as an alternative to sale. Alvarado Decl. Ex. A. The Postal Service determined, however, that such alternatives were not practical because becoming a landlord could divert the Postal Service from its core mission and because the Postal Service is "legally restrained from offering additional non-postal services." *Id.* at 3.[10]

Plaintiffs similarly considered—and have explicitly allowed for—adaptive reuse of the property. In fact, it was the Postal Service's understanding that adaptive reuse "has proven to be [a] [sic] valuable tool" and "is encouraged by the preservation community" that contributed to its rejection of the City's demand that the property be maintained as a retail post office in perpetuity. Delahaye Decl., Ex. E at 1-2; Ex. H at 2 (discussing adaptive reuse). In addition, the current covenant provides that the Postal Service will propose plans for adaptive reuse and rehabilitation of the Property in a manner that may require a substantial level of improvements, all of which improvements shall be done in accordance with the Secretary of lnterior's Standards. Delahaye Decl. ¶ 21. Thus, the Postal Service's considerations, as outlined above, are entirely in line with Section 106's requirements and the district court decision cited by Plaintiffs. *See Comm. for Pres. of Seattle Fed. Reserve Bank Bldg. v. Fed. Reserve Bank of San Francisco*, No. C08-1700RSL, 2010 WL 1138407, at *6 (W.D. Wash. Mar. 19, 2010) (stating that an agency should "consider[] adaptive use and/or a lease agreement before deciding to transfer ownership of the historic property to a third party").

[10] The Postal Service's decision to include a limited leaseback for a portion of the premises here is also entirely consistent with past practices. For example, an agreement concerning a post office in Phoenix, that Plaintiffs describe as an "attractive alternative," Pls.' Mem. 6, contains terms that are substantially similar to the ones here. Although the overall lease-term in Phoenix provided for eleven five-year options (versus the three here) it is no more restrictive than the provisions here. There, like here, the Postal Service negotiated a base term of five years. The lease there, like here, was subject to five-year intervals thereafter. Plaintiffs' reliance on the sale of the Phoenix post office therefore only highlights the Postal Service's reasoned position here.

That the Postal Service engaged in a robust and thorough consideration under the NHPA is evident, and Plaintiffs' arguments and evidence in many ways only reaffirm the Postal Service's reasonable conclusions. Plaintiffs thus fail to raise serious questions as to the merits of their NHPA claim and their request for preliminary injunctive relief should be denied.

C. Even if the Postal Service's sale is subject to judicial review, Plaintiffs are not likely to succeed on the merits of their NEPA claim.

The Postal Service has not, as Plaintiffs' suggest, made an "end-run around NEPA." Pls.' Mem. at 9. To the contrary, the Postal Service reasonably determined, consistent with its regulations, that the action is categorically excluded from any requirement to conduct an EA or EIS.

Categorical exclusions are a "form of NEPA compliance." *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1096 (9th Cir. 2013). The CEQ NEPA regulations authorize agencies to use categorical exclusions for "category[s] of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency[.]" 40 C.F.R. § 1508.4; *see also* 40 C.F.R. § 1507.3(b)(2), 1508.4. Where an agency reasonably determines that 1) a proposed action falls within a categorical exclusion and 2) that there are no extraordinary circumstances, no further NEPA analysis is required. *See, e.g., Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1456 (9th Cir.1996).

In approving the sale of the Property, the Postal Service relied upon a categorical exclusion in 39 C.F.R. § 775.6(e)(8), which provides that:

> Disposal of properties where the size, area, topography, and zoning are similar to existing surrounding properties and/or where current and reasonable anticipated uses are or would be similar to current surrounding uses (e.g., commercial store in a commercial strip, warehouse in an urban complex, office building in downtown area, row house or vacant lot in an urban area).

Here, the Postal Service's reliance on the categorical exclusion for disposal of the facility was neither arbitrary nor capricious in light of the Postal Service's conclusions that the potential disposal of the facility falls within the terms of 39 C.F.R. § 775.6(e)(8) and that there are no extraordinary circumstances.

**1. The Postal Service properly invoked the Categorical Exclusion.**

The Postal Service's conveyance of the Property falls squarely within the confines of 39 C.F.R.

§ 775.6(e)(8). The Postal Service observed that the Property is located in an area where the zoning designation allows for public, retail, and commercial uses. As the Postal Service further explained, the potential use of the property as a retail or commercial entity is entirely consistent with the surroundings. The Property is located in a densely-populated, urban setting—Berkeley's main business district—surrounded on the north side by Downtown Berkeley, retail on the south and east side, while Berkeley City College is to the West. Parrish Decl., Ex. C. The reasonably foreseeable uses of the site would therefore be similar to the current surroundings, *i.e.* public, retail, and commercial use. The Postal Service documented its conclusion that sale of the property does not pose a potentially significant effect, and the agency's determinations are entitled to this Court's deference. *Ctr. for Biological Diversity*, 706 F.3d at 1090; *Alaska Ctr. For Env't v. U.S. Forest Serv.*, 189 F.3d 851, 858 n.5 (9th Cir. 1999) (stating that the question of whether an action "fits within the categorical exclusion is a factual determination that implicates substantial agency expertise and is reviewed under the arbitrary and capricious standard").

**2. There are no extraordinary circumstances that preclude the use of this Categorical Exclusion.**

Per the Postal Service's regulations, extraordinary circumstances "are those unique situations presented by specific proposals, such as scientific controversy about the environmental impacts of the proposal, uncertain effects or effects involving unique or unknown risks." 39 C.F.R. § 775.6. In an effort to demonstrate extraordinary circumstances where there are none, Plaintiffs rely on: 1) potential impacts to a historic property; and 2) the discontinuation of postal services. Neither argument has merit.

As to the former, Plaintiffs claim NEPA prohibits the Postal Service from issuing a categorical exclusion for this particular project because "[p]otential impacts to historic properties" may constitute an extraordinary circumstance that would require further review. Pls.' Mem. at 10. No such bright line prohibition exists. Both the Postal Service's regulations as well as CEQ guidance recognize that the mere presence of a protected resource is not considered a *per se* extraordinary circumstance. *See* 79 Fed. Reg. 33095, 33096 (citing 75 Fed. Reg. 75,628, 75,629 (Dec. 6, 2010) (CEQ's guidance on categorical exclusions)). Indeed, the utility of a categorical exclusion under NEPA would be nullified if

the Postal Service were required to prepare a full scale NEPA review merely because a historic property is present.

The ACHP's guidance, taken in context and quoted in full, likewise undermines Plaintiffs' argument. Although the ACHP guidance states that potential impacts to a historic property could be considered an extraordinary circumstance, the ACHP went on to explain that an extraordinary circumstance would occur "[w]hen there are no clear opportunities to avoid or mitigate impacts to historic properties. . . ." Pls.' Ex. 17 at 24 (ECF No. 3-7). The extensive consultation process the Postal Service undertook, coupled with its decision to ensure that a preservation covenant will attach, is therefore entirely consistent with both the ACHP's guidance and Postal Service regulations. *See* 79 Fed. Reg. at 33096 ("[T]he Postal Service, [General Services Administration ("GSA")], and [the United States Coast Guard] each consider whether such potential issues exist and whether they could be sufficiently alleviated outside of the NEPA process, *such as through historic preservation covenants*.") (emphasis added).

Plaintiffs can offer no credible reason why the Postal Service erred when it determined that the disposal of this property, albeit an historic one, does not rise to the level of an extraordinary circumstance. Plaintiffs have not identified any uncertain effects or any other effects involving unique or unknown risks which would qualify as extraordinary circumstances under the Postal Service regulations. *See* 39 C.F.R. § 775.6.

As to Plaintiffs' second point that the loss of postal services is an extraordinary circumstance, Pls.' Mem. 10, they again miss the mark. As an initial matter, the Postal Service will maintain retail operations at the Berkeley MPO. Lowe Decl. ¶¶ 4-5. In any event, Plaintiffs do not cite to a single statute, case, regulation or legal authority that would suggest an EIS or an EA must prepared in connection with the routine transfer of operations. *See generally* 39 C.F.R. § 775.5. Plaintiffs likewise fall short with their citation to 39 U.S.C. § 404 of the PRA for the proposition that there exists "no Congressional NEPA exemption for closure or consolidation of post offices." Pls.' Mem. 10. In its recent rulemaking, the Postal Service acknowledged that both "proposed actions to dispose of property," like the one at issue here, and proposed actions to "move the Postal Service's operations from one place

to another . . . are subject to the Postal Service's NEPA process." 79 Fed. Reg. at 33096. Yet, "[u]nder the Postal Service's longstanding NEPA regulations, an EIS does not generally need to be performed for a Postal Service action, including a routine transfer of operations, absent extraordinary circumstances." *Id.* (citing 39 C.F.R. § 775.5(a); 40 C.F.R. § 1508.27). The Postal Service also explained that the notion that a property's historical status can itself trigger the need for an EA, *see* Pls.' Mem. at 10, is "at odds with CEQ guidance," the "Postal Service's experience with sales of historical properties," and the regulatory schemes of other federal agencies, including the GSA, which is responsible for the acquisition and disposal of most federal property. 79 Fed. Reg. at 33096; *see* 79 Fed. Reg. at 2103. Instead, because the Postal Service, like GSA and the Coast Guard considers options, such as historic preservation covenants, for alleviating potential issues arising from the historic features of a property, a property's "historic status may be a starting point to consideration of 'extraordinary circumstances,' but it is not an immediate EA decision point under the regulatory scheme of the GSA, USCG, or USPS." 79 Fed. Reg. at 33096.

Thus, Plaintiffs fail to carry their burden to establish a likelihood of success on the merits of either of their claims, and this Court should therefore deny their request for a preliminary injunction.

**III. The Equities and Public Interest Do Not Favor Plaintiffs.**

Plaintiffs' argument relating to the balancing of the equities and public interest is merely a restatement of their argument on the merits and irreparable harm—*i.e.*, that the public's interest in compliance with NEPA and NHPA weighs in favor of an injunction and that, without a preliminary injunction, the citizens of Berkeley will instantaneously lose access to the retail services and historic portions of the current post office building. Each of these arguments, however, has been refuted above. Moreover, Plaintiffs cannot simply rest on their arguments for the first two factors of a four factor test.

The issuance of a preliminary injunction would, however, harm the Postal Service, both financially and institutionally. Most immediately, an injunction would, at best, significantly delay receipt of the purchase price, and could completely derail the existing agreement. Moreover, should an

injunction lead to termination of the sale, it is possible that any future disposal would be more difficult. The Postal Service would also incur the added administrative costs of having to re-market the property. Finally, in the interim, the Postal Service would be burdened with the continuing costs of maintaining the entire facility even as it has determined that it only needs approximately 4,000 square feet of the approximately 57,000 square-foot building. Alvarado Decl. Ex. A at 3.

The cost to the Postal Service, and to the public interest, however, goes far beyond money. Issuing a preliminary injunction in this case, where the Postal Service has fulfilled all of its legal obligations, would give license to cities and other entities to run to court in an effort to obstruct any sale of federal property with which it was not entirely pleased. Such a result simply does not square with the extensive power to dispose of property that the Constitution has granted to Congress and which, in turn, Congress has delegated to the Postal Service. *See* U.S. Const. art. IV, § 3, cl. 2 (granting Congress the power "to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"); 39 U.S.C. §§ 401(5), 404(a)(3) (giving the Postal Service the power "to determine the need for post offices" and "to hold, maintain, sell, lease, or otherwise dispose of such property or any interest therein"). Accordingly, the public interest weighs heavily in favor of the Postal Service, and Plaintiffs' motion for preliminary injunction should be denied. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction."); *cf. Coal. for Econ. Equity v. Wilson*, 122 F.3d 718, 719 (9th Cir. 1997) ("[I]t is clear that a state suffers irreparable injury whenever an enactment of its people or their representatives is enjoined.").

## CONCLUSION

Plaintiffs have failed to demonstrate any non-speculative irreparable injury. For that reason alone, this Court should deny Plaintiffs' request for emergency, preliminary injunctive relief. Further, because the APA's judicial review provisions do not apply to Postal Service actions, Plaintiffs have not identified a cause of action for either count.

Even assuming jurisdiction and a cause of action exists, the Postal Service fully complied with Section 106's and NEPA's procedural requirements. Accordingly, Plaintiffs' motion for a preliminary injunction should be denied.

DATED: November 25, 2014

Respectfully submitted,

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