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7 Save the Park and Build the School

8 **UNITED STATES DISTRICT COURT**
9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

10 SAVE THE PARK AND BUILD THE
11 SCHOOL,

12 Plaintiff,

13 v.

14 NATIONAL PARK SERVICE; DAVID
L. BERNHARDT, in his official capacity
as Secretary of the United States
15 Department of the Interior; DAVID
VELA, in his official capacity as Director
16 of the National Park Service; LISA
MANGAT, in her official capacity as
17 Director of the California Department of
Parks and Recreation; and CARDIFF
18 SCHOOL DISTRICT,

19 Defendants.

Case No. 3:20-cv-01080-LAB-AHG

**PLAINTIFF SAVE THE PARK
AND BUILD THE SCHOOL'S
RESPONSE TO ORDER TO
SHOW CAUSE WHY THE
PRELIMINARY INJUNCTION
SHOULD NOT BE DISSOLVED
(ECF NO. 30)**

Ctrm.: 14A
Judge: Hon. Larry Alan Burns

Complaint Filed: June 12, 2020
Trial Date: Not set

1 **I. INTRODUCTION**

2 As will be discussed herein, the preliminary injunction and its prohibitions
 3 will have zero impact on the school reopening on September 14, 2020 (and assuming
 4 the County remains off of the “COVID-19 watchlist” for the mandatory fourteen
 5 days). Given this fact, inferentially the District’s Ex Parte Application was intended
 6 to seek relief from the Court’s injunction in light of at least three violations of the
 7 injunction since it issued (which Plaintiff’s Counsel addressed in various e-mails to
 8 the District’s Counsel). (*See* Reed Decl., Exs. 1-4.) In response to the latest email to
 9 the District’s Counsel notifying him of yet another violation of the injunction,
 10 District’s Counsel responded that it intended to file a motion for reconsideration of
 11 the Court’s Order. (*Id.*) The District has continued to proceed in violation of the
 12 Order and at risk during which time NPS is still considering Plaintiff’s request for
 13 reconsideration of its approval.

14 As the District’s own site plan reveals, the preliminary injunction does not impact
 15 the construction and completion of *any* classroom – not one.¹ The injunction *only* impacts
 16 the construction of the multipurpose building – which the District admitted is intended to
 17 “house the entire school population” (July 2020, 2020 Transcript at 23:4-5), twenty-four
 18 percent of its parking lot², the construction of a play structure (which the District’s written
 19 policy discourages use of on account of COVID-19) and other landscape improvements.

20 A review of the District’s site plan shows that the balance of construction (i.e.
 21 classrooms and the food service building) all lie outside the 6(f)(3) boundary, which
 22 is not impacted by the injunction whatsoever. (Ex. 5.)

23 Nonetheless, the District without any foundation concludes that the Order
 24 prevents the parking lot from being completed and claims that ADA walkways from
 25 the school’s entrance to the majority of existing classrooms, play areas and student
 26 restrooms “cannot be constructed/utilized until the injunction is modified or lifted.”

27 ¹ The District contends that it cannot construct a walkway to an art classroom and
 28 walkways attendant to the parking lot.

² *See* ECF No. 13 at 20:27-21:2.

1 (ECF No. 29-1 at 3:9-16.)³ This statement is not only unsupported by any factual
 2 detail, but is also belied by the District’s earlier admissions, along with the 6(f)(3)
 3 boundary map and the District’s site plan.

4 Further and notably, the District has not argued that the Park improvements
 5 (multipurpose room, play structure and landscaping) must be completed in order for
 6 school to resume.

7 The District has admitted that completion of the improvements within the 6(f)(3)
 8 boundary are not necessary in order for children to go back to school. As the District
 9 admitted, it intended to complete the lion’s share of its campus—the classrooms and food
 10 service building – as part of “Phase 1” to be completed by the end of August. (Ex. 6.) It
 11 also admitted that construction of the improvements within the 6(f)(3) boundary – the
 12 improvements subject to the injunction – could proceed while school is in session to be
 13 completed by Spring 2021. (*Id.*)

14 Given that the injunction does not preclude or impact the ability of children to
 15 go back to school on September 14, 2020 (presuming that they are able to by law),
 16 the public interest component of the injunction analysis does not weigh in the
 17 District’s favor sufficient to warrant relief from the injunction.

18 **II. THE DISTRICT REPEATEDLY VIOLATED THE COURT’S**
 19 **INJUNCTION**

20 The District has and continues to construct within the Park in violation of the
 21 clear terms of the Court’s Order. Presumably, the District’s *Ex Parte* Application
 22 was an attempt to dissolve the Preliminary Injunction before Plaintiff could move for
 23 contempt sanctions—or—is an effort to impede Plaintiff’s remedy as the District
 24 claims that the Court is without authority to order the encroaching improvements out
 25 of the Park. (*See* ECF No. 29-1 at 6:9-22, ECF No. 13 at 26:17-27:2.) In essence, the
 26 District asks the Court to allow it to continue construction which it believes—even if

27 ³ If the Court is inclined to consider the District’s *ex parte* “clear error” arguments
 28 (which are notably premised on factual misrepresentations and errors of law), Save the
 Park requests an opportunity to brief those issues.

1 Plaintiff is successful at trial—will not and cannot be removed.

2 Immediately after the Court issued a Preliminary Injunction at the hearing on
 3 July 20, 2020, the District continued with construction of the multipurpose building
 4 in an effort to complete as much work as possible. The District claimed that work
 5 was to “ensure that the stopped work condition of the incomplete structure is not left
 6 in an unsafe manner” (Ex. 4 (emphasis added).) Understanding the need to
 7 conduct a “safe stop” on the multipurpose building, Plaintiff did not raise the issue
 8 with the Court. However, the District’s *Ex Parte* Application belies the prior
 9 contentions of the District’s counsel who now claims that “[e]ssentially the entire
 10 exterior structure was complete as of July 21st.” (ECF No. 29-2 at ¶ 14.) It is now
 11 apparent that the District worked to complete the exterior of the multipurpose
 12 building under the guise of completing a “safe stop.”

13 Unfortunately, the District’s violation of the clear terms of the Order did not
 14 stop there. Despite the clear language of the Order⁴, the District took it upon itself to
 15 expand the scope of the Court’s Order and install large boulders, shrubbery,
 16 landscaping, hardscape, and play equipment within the Park. (Exs. 7-9.) None of
 17 these improvements involve the stormwater biofiltration basins or turf authorized by
 18 the Court. Although the District claims that it is not fast-tracking the improvements
 19 in the Park, the District’s construction schedule does not call for the installation of
 20 playground equipment until late October. (Ex. 10 at 12.)

21 **III. ARGUMENT**

22 “The public interest analysis involves weighing the importance of preserving
 23 the environment, following the rule of law, and avoiding environmental damage to
 24 the public against the economic interests of [Defendants].” *Indigenous Env’tl.*
 25 *Network v. U.S. Dep’t of State*, 369 F. Supp. 3d 1045, 1052 (D. Mont. 2018). There
 26 is a well-established principle that there is a “public interest in preserving nature and

27 ⁴ The Order enjoined all construction with the Park “with the exception that
 28 construction of the biofiltration basins and turf may proceed consistent with the
 terms of the settlement agreement” (ECF No. 21 at 2:3-7 (emphasis added).)

1 avoiding irreparable environmental injury.” *Alliance for the Wild Rockies v. Cottrell*,
 2 632 F.3d 1127, 1138 (9th Cir. 2011).

3 **A. The Park Improvements Are Not Necessary for School to Resume**

4 The multipurpose building being constructed in the Park is designed to “house
 5 the entire school population.” (Transcript at 23:4-5.) As the District’s owns exhibits
 6 admit, San Diego County prohibits the use of facilities like a multipurpose building for
 7 their intended purpose. In the County’s August 4, 2020 telebriefing on school
 8 reopening lodged by the District in support of its *Ex Parte* Application, “[o]utdoor and
 9 indoor sporting events, assemblies, . . . and other activities that require close contact or
 10 that would promote congregating are not permitted at this time.”⁵ (ECF No. 29-2 at Ex.
 11 C-11 (emphasis added).) Additionally, the District’s construction schedule lodged as
 12 part of its Opposition to Plaintiff’s Motion for Preliminary Injunction shows that the
 13 multipurpose building would not be completed until October—months after the students
 14 were originally planned to return to school. Given the COVID-19 limits on large
 15 gatherings/assemblies, the District does not need to (nor did it plan to) construct the
 16 multipurpose building in order to allow students to return to in-person learning.

17 Likewise, the District claims that “the DSA approved ADA walkways from the
 18 school entrance to the majority of existing classrooms, play areas, and student
 19 restrooms, are located within the old 6(f)(3) boundary and cannot be
 20 constructed/utilized until the injunction is modified or lifted” is false. (ECF No. 29-1 at
 21 3:13-16). The District’s construction documents show that all of the classrooms (with
 22 the exception of the art lab previously constructed in the Park) can be reached through
 23 ADA-complaint pathways that do not require construction within the Park. (Ex. 11.)
 24 The District’s construction plans show that there are other accessible pathways for
 25 teacher and student access from the parking lot. (*Id.*)

26 Even more germane is the District’s own construction schedule, which shows

27 ⁵ Additionally, with respect to the play structure, the District’s COVID-19 Protocols
 28 states that “[u]se of shared toys, games, and playground equipment will be discouraged.” (Ex. 12.)

1 that the pathway in the Park is not scheduled to be constructed until mid/late
2 October—long after school was originally scheduled to begin. (Ex. 10 at 13.) Again
3 the Preliminary Injunction does not interfere with the reopening of the school and the
4 public interest favors Plaintiff.

5 **B. The District Can Reopen the School Without Constructing a**
6 **Parking Lot into George Berkich Park**

7 Additionally, the District claims that it must build within the Park in order to
8 complete the school’s parking lot. First, 76% of the parking lot lies outside the 6(f)(3)
9 boundary and the District can proceed to construct it without limitation. (See ECF No. 13
10 at 20:27-21:2.) It is evident that the District has feigned it necessary to build within the
11 Park given its conduct *after* the Court issued the Preliminary Injunction. After the Court
12 issued its ruling, the District proceeded with installation of the concrete curbs and other
13 parking lot improvements outside of the original 6(f)(3) boundary. (Ex. 3.) Instead of
14 temporarily reverting to the District’s original parking lot design or modifying its new
15 design during the pendency of the preliminary injunction, the District proceeded to
16 solidify its commitment to building within the Park regardless of the Court’s Order and
17 regardless of NPS’s pending reconsideration of its approval. As a result of the District’s
18 actions *after the Preliminary Injunction was issued*, the District now claims that it
19 “must” build in the Park in order to finish the parking lot prior to school reopening.

20 The parking lot in its current state (without encroaching into the Park)
21 provides access to Montgomery Avenue. If the District removes the curbs it
22 recklessly installed, it can provide a sufficient drop-off and pick-up area for the
23 limited number of students returning to school. The Park should not be further
24 sacrificed as a result of the District’s gamble that the Court will dissolve the
25 injunction or rule in its favor prior to school beginning.

26 **IV. CONCLUSION**

27 For the reasons stated above, Plaintiff requests that the Court not dissolve the
28 Preliminary Injunction and extend its expiration until trial.

1 DATED: August 24, 2020

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By: /s/Rebecca L. Reed

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Save the Park and Build the School

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