UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	2:17-cv-01616-SVW-AFM	Date	February 13, 2019
Title	*Anne Crawford-Hall et al. v. United States of America et al.*		

JS-6

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE

Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: ORDER GRANTING SUMMARY JUDGMENT TO PLAINTIFFS IN PART AND STAYING FURTHER PROCEEDINGS [51][52]

Before the Court are cross-motions for summary judgment filed by Plaintiffs Anne Crawford-Hall, San Lucas Ranch, LLC, and Holy Cow Performance Horses, LLC ("Plaintiffs"), Dkt. 51, and by Federal Defendants the United States of America et al. (the "United States"), Dkt. 52, regarding Plaintiffs' First, Third, and Fourth causes of action. For the reasons set forth below, the Court GRANTS summary judgment in favor of Plaintiffs on Plaintiffs' First cause of action, the Court DENIES summary judgment to both parties as to Plaintiffs' Third and Fourth causes of action as unripe, and the Court STAYS further proceedings in this action.

I. Factual Background

In 2010, the Santa Ynez Band of Mission Indians (the "Band" or the "Tribe") purchased over 1400 acres of real property in Santa Barbara County, California, locally known as Camp 4 ("Camp 4" or the "Property"). Complaint, Dkt. 1 ("Compl."), ¶ 39; Answer, Dkt. 30 ("Answer"), ¶ 39. Camp 4 is located directly across the street from Plaintiffs San Lucas Ranch, LLC and Holy Cow Performance Horses, LLC, each of which is managed by Plaintiff Crawford-Hall. *Id.* ¶ 14. Camp 4 was previously owned by Ms. Crawford-Hall's family. *Id.*

In June 2013, the Band filed an application with the Bureau of Indian Affairs ("BIA"), a federal agency within the Department of the Interior ("Interior" or the "Department"), requesting that BIA take Camp 4 into trust pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 5101 *et seq.* (the

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"IRA"). *See* Administrative Record ("AR") 0030; *see also* 25 U.S.C. § 5108; 25 C.F.R. part 151. The application was supplemented in July 2013, see AR0032, and revised in November 2013, see AR0080. The trust acquisition would allow the Band to exercise full tribal governance and sovereignty over the property, with limited state or federal government interference. AR0194.14. The Band's primary goal for placing Camp 4 in trust was to facilitate the construction of additional housing for the Band's members, which would also advance the Band's efforts to bring tribal members and lineal descendants back to the Band's tribal community in order to protect and maintain the Band's heritage and culture. *See* AR0194.13-14.

A. Environmental Review

In considering the Band's application for trust acquisition for the Camp 4 property, BIA conducted an environmental review pursuant to the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* ("NEPA"). In August 2013, BIA prepared a Draft Environmental Assessment (the "Draft EA") and made the Draft EA available for public comment for a total of 90 days. AR0194.8, 12; *see also* AR0127. In May 2014, BIA issued a Final Environmental Assessment (the "Final EA"), totaling almost 2,000 pages, that analyzed the potential environmental effects of the trust acquisition pursuant to the Band's application. *See generally* AR0194.

In the Final EA, BIA addressed a wide variety of environmental issues, including land resources, water resources, air quality and climate change, biological resources, cultural resources, socioeconomic conditions and environmental justice, transportation and circulation, land use, public services, noise, hazardous materials, and visual resources. AR0194.15. The Final EA identified three reasonable project alternatives and analyzed the potential environmental consequences and potential cumulative impacts for each alternative. *See generally* AR0194.17-35; AR0194.120-193. The three alternatives are the following:

- "Alternative A" comprised of 143 five-acre lots for residential housing across approximately 793 acres, and included 206 acres of vineyards, 300 acres of open space or recreational land, 98 acres of riparian corridor, 33 acres of oak woodland conservation, and 3 acres for utilities. AR0194.19; *see also* AR0194.20-28.
- "Alternative B" was largely the same as Alternative A, with the exceptions that Alternative B featured 143 one-acre lots for residential housing across only 194 acres, added 30 acres for tribal

facilities, and converted the unused residential area into a total of 869 acres for open space and recreation. AR0194.19; *see also* AR0194.28-32.

- "Alternative C," or the "no action alternative," considered the environmental impacts if the Camp 4 property was not acquired in trust. AR0194.19; *see also* AR0194.32.

BIA compared the three alternatives to assess the relative benefits and environmental impacts for each alternative. AR0194.32-35; *see also* AR0194.120-153 (environmental consequences of Alternative A); AR0194.153-72 (environmental consequences of Alternative B); AR0194.173-75 (environmental consequences of Alternative C); AR0194.176-91 (cumulative effects for Alternatives A and B). In comparing Alternative A to Alternative B, each of which satisfied the Band's objective to obtain Camp 4 under tribal jurisdiction, BIA determined that "Alternative B would result in additional beneficial socioeconomic impacts through the development of additional tribal facilities." AR0194.35. BIA assessed Alternative C and determined that rejecting the Band's trust application would not pose many of the potential environmental effects discussed in connection with the other alternatives. *Id.*; *see also* AR0194.173. However, BIA also determined that rejecting the Band's application would result in *increased* groundwater usage based on representations from the Band that there would be an expansion of the existing vineyard on the Property, which would not occur if the Band's application was approved. AR0194.173. BIA ultimately concluded that "[d]espite the proportionately greater overall effects on the environment of Alternatives A or B, none of the identified impacts would be significant and unavoidable, following implementation of protective measures and mitigation recommended in this document." AR0194.35.

BIA also considered mitigation measures for the proposed trust acquisition under Alternatives A or B to minimize or eliminate certain adverse impacts. AR0194.194-204. Proposed mitigation measures include, among others: best management practices to minimize impacts to soils (AR0194.194-95); restrictions on where new groundwater wells can be constructed on the property and prohibitions on turf grass irrigation during years of local drought conditions (AR0194.196); measures to protect air quality, largely aimed toward vehicle use on the property (AR0194.196-97); protections for biological resources in the area, such as the preparation of an arborist report to provide a revegetation plan for oak trees and the implementation of habitat sensitivity training for construction contractors and other personnel on the property (AR0194.197-200); the use of buffer zones around cultural resources (AR0194.200); monetary contributions from the Band for traffic improvements (AR0194.201-02); and a requirement for the Band to enter into an agreement with the county fire department to provide fire protection and emergency response services to individuals living on the property after it is taken into trust (AR0194.203). BIA

noted that the mitigation measures "will be binding on the Tribe because it is intrinsic to the project, required by federal law, required by agreements between the Tribe and local agencies, and/or subject to a tribal resolution." AR0194.194.

The Final EA was released for public comment for a period of 30 days. AR0194.00014. Following the public comment period, on October 17, 2014, BIA issued a Finding of No Significant Impact (the "FONSI"), concluding that the proposed federal action to approve the Band's application to acquire the Property in trust for the purpose of developing up to 143 units of tribal housing and associated facilities "does not constitute a major federal action that would significantly affect the quality of the human environment." AR0237.22. Because BIA found that approving the Band's application would not significantly impact the environment, BIA determined that the preparation of an Environmental Impact Statement was not required. *Id.*

B. Regulatory Review and Approval

On December 24, 2014, BIA Regional Director Amy Dutschke, relying on the Final EA and the FONSI, issued a Notice of Decision announcing the intent to acquire the Property in trust for the Tribe (the "2014 NOD"). *See* AR0258.72-100. In the 2014 NOD, Regional Director Dutschke evaluated the Tribe's application under the applicable regulatory factors and addressed comments from state and local government entities and the general public. *See* AR0258.84-96; 25 C.F.R. §§ 151.10-11.

In late January 2017, Plaintiffs and other parties filed administrative appeals of the 2014 NOD to the Interior Board of Indian Appeals ("IBIA" or the "Board"). Compl. ¶ 64; Answer ¶ 64. IBIA is an administrative appellate board authorized to review decisions of BIA officials. *See* 25 C.F.R. § 2.3; 43 C.F.R. § 4.330. In a letter dated January 30, 2015, Assistant Secretary–Indian Affairs ("Assistant Secretary") Kevin Washburn assumed jurisdiction over the administrative appeals of the 2014 NOD pursuant to 25 C.F.R. § 2.20. *See* AR0258.816-23. By taking jurisdiction over the appeals, Assistant Secretary Washburn divested IBIA of its authority to hear the appeals, and IBIA transferred the appeals to the Assistant Secretary's offices. *See* AR0258.816-17; 25 C.F.R. 2.20(c).

While the administrative appeals of the 2014 NOD were pending, on December 31, 2015, Washburn resigned from his position as Assistant Secretary. Compl. ¶ 66; Answer ¶ 66. As "first assistant" to the Assistant Secretary, former Principal Deputy Assistant Secretary–Indian Affairs ("Principal Deputy") Lawrence Roberts automatically assumed the position of Acting Assistant Secretary on January 1, 2016. Compl. ¶ 66; Answer ¶ 66. Roberts served as Acting Assistant Secretary

for the maximum allowable period of 210 days under the Federal Vacancies Reform Act of 1998, 5 U.S.C. §§ 3345 *et seq.* (the "FVRA"). Compl. ¶ 66; Answer ¶ 66. Following Roberts' temporary term as Acting Assistant Secretary, Roberts reverted to his position as Principal Deputy on July 29, 2016, leaving the Assistant Secretary position temporarily vacant. Compl. ¶ 66; Answer ¶ 66.

On January 19, 2017, with the Assistant Secretary position still vacant, Principal Deputy Roberts issued a decision affirming the 2014 NOD (the "2017 Decision"). *See* AR0258.3425-66. In the 2017 Decision, Principal Deputy Roberts concluded:

> Pursuant to the authority delegated to me by 25 C.F.R. § 2.4(c), I affirm the Regional Director's December 24, 2014 decision to take approximately 1,427.28 acres of land in trust for the Santa Ynez Band of Chumash Indians. This decision is final in accordance with 25 C.F.R. § 2.20(c) and no further administrative review is necessary. The Regional Director is authorized to approve the conveyance document accepting the Property in trust for the Tribe subject to any remaining regulatory requirements and approval of all title requirements.

AR0258.3466. The 2017 Decision was signed by Roberts as "Principal Deputy Assistant Secretary – Indian Affairs." *Id.* On January 20, 2017, the day after issuing the 2017 Decision, Principal Deputy Roberts resigned from his position.

On January 12, 2017, the Chairperson for the Band executed a grant deed conveying the Property to the United States of America in trust for the Band (the "Grant Deed"). Compl. ¶ 68; Answer ¶ 68. Following the 2017 Decision, on January 20, 2017, Regional Director Dutschke accepted conveyance of the Property as described in the Grant Deed on behalf of the Secretary (the "Acceptance of Conveyance"). Answer ¶ 68. On January 26, 2017, BIA recorded the Grant Deed and the Acceptance of Conveyance with the office of the Santa Barbara County Reporter. *Id.*

C. Procedural History

On February 28, 2017, Plaintiffs initiated the instant action by filing a complaint against the United States. Dkt. 1. Plaintiffs brought five causes of action, alleging that: (1) Principal Deputy Roberts lacked authority to issue a final decision when he issued the 2017 Decision denying the appeals of the 2014 NOD; (2) the Secretary lacks the authority under the IRA to acquire the Property in trust for the

Band; (3) the 2014 NOD and the 2017 Decision violate NEPA by failing to take a "hard look" at the environmental consequences of accepting the Property into trust; (4) the 2014 NOD and the 2017 Decision did not adequately address and analyze the regulatory factors governing fee-to-trust acquisitions; and (5) Plaintiffs are entitled to a mandamus pursuant to 28 U.S.C. § 1651 to compel BIA to remove the Property from trust. Compl. ¶¶ 79-137.

On May 31, 2018, the Court granted the United States' motion to dismiss the Second and Fifth claims with prejudice. Dkt. 49. On July 6, 2018, the parties filed cross-motions for summary judgment on Plaintiffs' First, Third, and Fourth claims. Dkts. 51, 52.

II. Standard of Review

Summary judgment should be granted where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). When reviewing final agency action, however, "there are no disputed facts that the district court must resolve." *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985). Instead, "the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Id.* Thus, the Court decides whether the agency's action passes muster under the appropriate standard of review. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep't of Agric*, 499 F.3d 1108, 1115 (9th Cir. 2007) (quoting *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985)).

The Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* (the "APA"), governs judicial review of decisions by agencies, such as fee-to-trust acquisitions by BIA analyzed under the IRA and NEPA. *See Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Zinke*, 889 F.3d 584, 594-97, 602-08 (9th Cir. 2018). Under the APA, a court may hold unlawful and set aside an agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. §706(2)(A).

The "arbitrary and capricious" test of the APA is "a narrow scope of review of agency factfinding." *Ariz. Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1236 (9th Cir. 2001) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967)). "The court is not empowered to substitute its judgment for that of the agency." *Id.* (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)). Instead, a court's task is to ascertain "whether the agency articulated a rational connection between the facts found and the choice made." *Id.* (citing *Pyramid Lake*

Paiute Tribe of Indians v. U.S. Dep't of the Navy, 898 F.2d 1410, 1414 (9th Cir. 1999)); *see also Turtle Island Restoration Network v. U.S. Dep't of Commerce*, 878 F.3d 725, 732 (9th Cir. 2017) (noting that the agency must "examine the relevant data and articulate a satisfactory explanation for its action") (internal quotation marks and citation omitted). Thus, arbitrary and capricious review is "highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision." *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000) (internal quotation marks and citation omitted). The bases for the agency's decision "must come from the agency" from the court's review of the administrative record. *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1236 (citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973)).

Nevertheless, judicial review of agency action is "meaningless" unless the court "carefully review[s] the record to 'ensure that agency decisions are founded on a reasoned evaluation of the relevant factors.'" *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1236 (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989)); *see also San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) (noting that a court's inquiry into the agency's decision "must be thorough"). As the Supreme Court articulated, an agency decision is arbitrary and capricious if the agency

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Where a dispute over the agency's decision primarily rests on issues of fact requiring technical expertise, the court must defer to the agency's expertise in making factual determinations. *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1236 (citing *Marsh*, 490 U.S. at 377); *see also Sierra Club v. EPA*, 346 F.3d 955, 961 (9th Cir. 2003). Therefore, where "the evidence is susceptible of more than one rational interpretation," the court must uphold the agency's finding if "a reasonable mind might accept [the evidence] as adequate to support a conclusion." *San Luis*, 747 F.3d at 601.

III. Analysis

Plaintiffs raise three distinct challenges under the APA to the 2014 NOD and the 2017 Decision.

First, Plaintiffs assert that Principal Deputy Roberts lacked the authority to issue the 2017 Decision, a final decision on appeals of the 2014 NOD. Plaintiffs claim that the authority to issue final decisions on appeals of BIA decisions fell within the exclusive authority of the position of the Assistant Secretary after former Assistant Secretary Washburn assumed jurisdiction over the appeals of the 2014 NOD but resigned prior to issuing a final decision.

Second, Plaintiffs contest the adequacy of the Final EA, identifying numerous deficiencies in the EA's analysis of certain environmental impacts such as groundwater usage, incompatible land use of the Property compared to the surrounding area, proposed mitigation measures, and the cumulative impacts of the proposed development on the Property.

Third, Plaintiffs assert that BIA did not satisfy the regulatory requirements for fee-to-trust acquisitions because BIA did not sufficiently evaluate the tax impacts of the trust acquisition, failed to evaluate the jurisdictional and land use conflicts of the proposed development on the Property, failed to require the Band to include a business plan, and ignored BIA's obligation to determine whether BIA is equipped to discharge additional responsibilities following the trust acquisition.

A. Principal Deputy's Authority to Issue a Final Decision

1. *The FVRA*

The Constitution requires the President of the United States to obtain "the Advice and Consent of the Senate" prior to appointing certain Officers of the United States. U.S. Const. art. II, § 2, cl. 2; *see also Edmond v. United States*, 520 U.S. 651, 659 (1997) (discussing the appointment and confirmation process as a "significant structural safeguard[] of the constitutional scheme"). These positions requiring Presidential appointment and Senate confirmation are commonly referred to as "PAS" officers. Federal law designates three Assistant Secretaries of the Interior as PAS officers, with their duties and authority prescribed by the Secretary. *See* 43 U.S.C. §§ 1453, 1453a, 1454.

In order to account for vacancies in PAS offices that would otherwise leave the duties of PAS officers unfulfilled, in 1998 Congress enacted the FVRA. *See generally N.L.R.B. v. SW Gen., Inc.*, -- U.S. --, 137 S. Ct. 929, 935-36 (2017) (discussing the history of the enactment of the FVRA). Under the FVRA, if a PAS officer dies, resigns, or is otherwise unable to perform the functions and duties of the office, "the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity." 5 U.S.C. § 3345(a)(1). The first assistant's acting duty is subject to a

temporal limitation of 210 days from the date the vacancy first occurred, or 210 days following the Senate's rejection, withdrawal, or return of a nomination for the PAS office. *Id.* §§ 3346 (a)(1), (b).

The term "function or duty" is defined in the FVRA as:

> any function or duty of the applicable office that--
>
> (A)(i) is established by statute; and (ii) is required by statute to be performed by the applicable officer (and only that officer); or
>
> (B)(i)(I) is established by regulation; and (II) is required by such regulation to be performed by the applicable officer (and only that officer); and (ii) includes a function or duty to which clause (i)(I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs.

Id. § 3348(a)(2). In other words, by defining functions or duties as those to be performed "only" by a PAS officer, the FVRA was intended to pertain only to "exclusive" functions or duties. Although the FVRA does not address the effect of a vacancy on the "non-exclusive" duties of the vacant PAS office, courts have interpreted the FVRA as allowing any non-exclusive functions or duties not required by law to be performed by that PAS officer to be "reassigned to another official within the agency or department" via the delegation authority of the agency's head. *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d. 389, 420 (D. Conn. 2008), *aff'd*, 587 F.3d 132 (2d Cir. 2009) (per curiam).

Sections 3345 and 3346 of the FVRA "are the exclusive means for temporarily authorizing an acting official to perform the functions and duties" of a PAS office. 5 U.S.C. § 3347(a). If no officer is permitted under the FVRA to perform the functions of a PAS office in an acting capacity, "the office shall remain vacant" and only the head of the Executive agency is authorized to perform any of the functions or duties of the vacant office. *Id.* § 3348(b). Any action taken by an agency employee in performance of a function or duty of a vacant POS office without authority pursuant to the FVRA "shall have no force or effect" and "may not be ratified." *Id.* § 3348(d)(1)-(2).

Applying the FVRA to the instant case, it is undisputed that Roberts signed the 2017 as Principal Deputy, not as Acting Assistant Secretary. Washburn resigned as the Assistant Secretary on December

31, 2015. Roberts, as Washburn's "first assistant," automatically assumed the position of Acting Assistant Secretary on January 1, 2016. After 210 days as Acting Assistant Secretary, on July 29, 2016, Roberts reverted to his position as Principal Deputy, and the Assistant Secretary position was left vacant until a new appointment and confirmation. While the Assistant Secretary position remained vacant, Principal Deputy Roberts signed the 2017 Decision as Principal Deputy on January 19, 2017. *See* AR0258.3466. Therefore, Principal Deputy Roberts signed the 2017 Decision as Principal Deputy, not as Acting Assistant Secretary within the 210-day period prescribed by the FVRA.

During the period that the Assistant Secretary position was vacant after July 29, 2016, only the Secretary could perform any function or duty of the Assistant Secretary's office that was "required by . . . regulation to be performed by the applicable officer (*and only that officer*)." *Id.* § 3348(b)(2) (emphasis added); *see also id.* § 3348(a)(2)(B)(i). Therefore, Principal Deputy Roberts had the authority under the FVRA to issue the 2017 Decision as a final decision for the agency only if the ability to issue final decisions on appeals taken from IBIA is not a "function or duty" that could be performed only by the Assistant Secretary—*i.e.*, authority that is "exclusive" to the Assistant Secretary position.

Whether the authority to issue final decisions on appeals is "exclusive" depends on the applicable statutes and agency regulations governing the appeals process over decisions made by BIA officials.

2. *Appeals of BIA Decisions under Department of Interior Regulations*

Regulations promulgated by the Department of the Interior allow for several different officials or governing boards to decide administrative appeals of decisions relating to Indian affairs made by BIA officials or by a Deputy to the Assistant Secretary. Generally, appeals first fall within IBIA's jurisdiction. *See* 25 C.F.R. § 2.4(e); 43 C.F.R. § 4.1(b)(1). A notice of appeal must be filed with IBIA within 30 days following the decision from which the appeal is taken. 43 C.F.R. § 4.332(a); 25 C.F.R. § 2.9(a). The party filing the appeal must send a copy of the notice of appeal simultaneously to the Assistant Secretary. 43 C.F.R. § 4.332(a); 25 C.F.R. § 2.20(a).

A notice of appeal is not effective for 20 days following receipt by IBIA, during which the Assistant Secretary may exercise his or her broad discretion to take jurisdiction over the appeal. 43 C.F.R. § 4.332(b); 25 C.F.R § 2.20(c). The Assistant Secretary's authority to take jurisdiction over an appeal from IBIA is purely within the Assistant Secretary's discretion, and the Assistant Secretary "will not consider petitions to exercise this authority." 25 C.F.R. § 2.20(c). The Assistant Secretary can

exercise his authority to take jurisdiction over an appeal in two manners. First, the Assistant Secretary may "[i]ssue a decision in the appeal" directly. *Id.* § 2.20(c)(1). Second, the Assistant Secretary may "[a]ssign responsibility to issue a decision in the appeal to a Deputy to the [Assistant Secretary]." *Id.* § 2.20(c)(2). If the Assistant Secretary exercises his authority to take over an appeal before IBIA in either of these ways, the Assistant Secretary notifies IBIA which transfers the appeal to the Assistant Secretary's office. *Id.* § 2.20(c).

Section 2.20(c) requires the Assistant Secretary, or the Deputy assigned authority by the Assistant Secretary, to issue a decision on the appeal "within 60 days after all time for pleadings (including all extensions granted) has expired." *Id.* If the Assistant Secretary or the Deputy fails to issue a decision in that timeframe, "any party may move the Board of Indian Appeals to assume jurisdiction" over the appeal. *Id.* § 2.20(e).

A decision signed by the Assistant Secretary "shall be final for the Department and effective immediately unless the [Assistant Secretary] provides otherwise in the decision." *Id.* § 2.20(c); *see also* 25 C.F.R. § 2.6(c). However, a decision signed by a Deputy assigned authority to decide the appeal by the Assistant Secretary pursuant to Section 2.20(c)(2) is *not* final and may be further appealed to IBIA. *Id.* § 2.20(c); *see also id.* § 2.6 (omitting reference to any Deputy as having the authority to make final decisions that bind the agency).

The parties disagree about the nature of the Assistant Secretary's authority to decide appeals under Section 2.20(c). Plaintiffs characterize the Assistant Secretary's authority as exclusive to the Assistant Secretary; once the Assistant Secretary assumes jurisdiction from IBIA over an appeal and opts to decide the appeal directly under Section 2.20(c)(1), Plaintiffs argue that only the Assistant Secretary may issue a final decision regarding the appeal. Thus, Plaintiffs construe the Assistant Secretary's jurisdiction to issue final decisions on appeals as a "function or duty" to be performed by the Assistant Secretary and only the Assistant Secretary, as defined by the FVRA. Because this authority is exclusive, Plaintiffs argue, Principal Deputy Roberts' purported exercise of that exclusive authority by issuing the 2017 Decision in his capacity as Principal Deputy was unlawful as an *ultra vires* act.

In response, the United States argues that the Assistant Secretary's authority to decide an appeal is always non-exclusive under Section 2.20(c) because IBIA also has the authority to decide appeals generally, and because the parties may divest the Assistant Secretary of jurisdiction over an appeal after 60 days have elapsed with no decision following the deadline to file pleadings in the appeal. The United States asserts that because the Assistant Secretary's authority to decide appeals is non-exclusive, the

Secretary may subdelegate the Assistant Secretary's non-exclusive authority to other agency officials, because subdelegations are presumptively permissible unless there is evidence that Congress intended to prevent subdelegations in the particular context. The United States then points to the Department of the Interior Department Manual (the "Department Manual" or "DM"),[1] which authorizes the Principal Deputy Assistant Secretary to "exercise the authority delegated" to the Assistant Secretary "[i]n the absence of, and under conditions specified by the Assistant Secretary," provided that the authority of the Assistant Secretary is non-exclusive in conformity with the FVRA. 209 DM 8.4(B). Relying on this section of the Department Manual, the United States concludes that, because the Assistant Secretary position remained vacant at the time and because the Assistant Secretary's authority to issue final decisions on appeals under Section 2.20(c) is non-exclusive, Principal Deputy Roberts had the authority to issue the 2017 Decision as a final action that binds the agency.

When presented with an issue of an agency's interpretation of its own regulations, courts must "defer to an agency's interpretation of its own ambiguous regulations." *Turtle Island*, 878 F.3d at 733 (citing *Auer v. Robbins*, 519 U.S. 452 (1997)). This is true even where the agency's interpretation "is advanced in a legal brief." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012) (citation omitted). Under "*Auer* deference," the agency's regulatory interpretation "controls unless 'plainly erroneous or inconsistent with the regulation,' or where there are grounds to believe that the interpretation 'does not reflect the agency's fair and considered judgment of the matter in question.'" *Turtle Island*, 878 F.3d at 733 (quoting *Christopher*, 567 U.S. at 155); *see also Singh v. Holder*, 771 F.3d 647, 652 (9th Cir. 2014) ("[W]e are bound to follow an agency's reasonable interpretations of its own regulations, but we do not defer to an agency's interpretation when it is contrary to the plain language of the regulation."). In other words, courts must defer to an agency's interpretation "unless an alternative reading is *compelled* by the regulation's plain language or by other indications of the agency's intent at the time of the regulation's promulgation." *Bassiri v. Xerox Corp.*, 463 F.3d 927, 931 (9th Cir. 2006) (internal quotation marks and alterations omitted) (emphasis in original) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)).

If the regulation at issue is not ambiguous, however, then no deference to the agency's interpretation of the regulation under *Auer* is warranted. *Christensen v. Harris County*, 529 U.S. 576, 588 (2000). "As a general interpretive principle, the plain meaning of a regulation governs." *Safe Air for Everyone v. EPA*, 488 F.3d 1088, 1097 (9th Cir. 2007) (internal quotation marks and citation omitted). "Other interpretative materials, such as the agency's own interpretation of the regulation, should not be

[1] The Department Manual is available at https://www.doi.gov/elips/browse.

considered when the regulation has a plain meaning." *Id.* (citations omitted). Courts should not defer to an agency's interpretation where doing so would improperly "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation," *Christensen*, 529 U.S. at 588, or where the agency's interpretation "is nothing more than a convenient litigating position . . . or a *post hoc* rationalization advanced by an agency seeking to defend past agency action against attack," *Christopher*, 567 U.S. at 155 (internal quotation marks and citations omitted). Thus, a court's review of an agency's construction of a regulation falling outside the scope of *Auer* deference is de novo, but the court "may still accord the agency's opinion some weight." *Turtle Island*, 878 F.3d at 733 (citing *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952-53 (9th Cir. 2009)).

3. *Whether Section 2.20(c) Makes the Assistant Secretary's Authority to Issue Final Decisions on Appeals Exclusive*

The dispositive question in this case is whether 25 C.F.R. § 2.20(c) exclusively reserves with the Assistant Secretary the authority to issue final decisions on appeals of BIA decisions over which the Assistant Secretary assumes jurisdiction, or whether the Assistant Secretary's authority to issue final appeals decisions is delegable to a Deputy.

The Ninth Circuit has recognized a presumption that subdelegations by a federal officer or agency to a subordinate are permissible, and "express statutory authority for [sub]delegation is not required." *Loma Linda Univ. v. Schweiker*, 705 F.2d 1123, 1128 (9th Cir. 1983) (citation omitted). "When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent." *Frankl v. HTH Corp.*, 650 F.3d 1334, 1350 (9th Cir. 2011) (internal quotation marks omitted) (quoting *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004)). To determine whether the presumption applies, courts "must look to the purpose of the statute to set its parameters" regarding subdelegation. *Inland Empire Pub. Lands Council v. Glickman*, 88 F.3d 697, 702 (9th Cir. 1996). Ultimately, "delegation generally is permitted where it is not inconsistent with the statute." *Id.* (internal quotation marks and citation omitted).

The statutory authority cited for Section 2.20(c) is 5 U.S.C. § 301 and 25 U.S.C. §§ 2 and 9. The former statute, 5 U.S.C. § 301, authorizes the heads of Executive agencies to prescribe regulations that govern the operation of their respective departments. The latter provisions, 25 U.S.C. §§ 2 and 9, authorize the President or the United States or the Commissioner of Indian Affairs, under the direction of the Secretary, to enact regulations governing the management of matters pertaining to Indian affairs.

Based on the language in these statutes, Congress wholly contemplated—and in fact directly intended—that the Secretary would delegate and subdelegate his or her responsibilities to various officers or employees within Interior.

In this case, however, the issue is not whether *Congress* authorized subdelegations in this particular context, but whether the agency is permitted to engage in subdelegations based on the language of its own regulatory provisions. Agencies are bound to follow the regulations they promulgate, whether procedural or substantive in nature. *Dyniewicz v. United States*, 742 F.2d 484, 485-86 (9th Cir. 1984) (citations omitted); *see also Sameena Inc. v. U.S. Air Force*, 147 F.3d 1148, 1153 (9th Cir. 1998) ("The Supreme Court has long recognized that a federal agency is obliged to abide by the regulations it promulgates.") (citations omitted); *Romeiro de Silva v. Smith*, 773 F.2d 1021, 1025 (9th Cir. 1985) ("An agency is bound by its regulations so long as they remain operative, but may repeal them and substitute new rules in their place.") (citations omitted). Because an agency enacts regulations pursuant to the authority prescribed to the agency by Congress, the text of the agency's regulation itself may constitute "affirmative evidence" of an intent to restrict subdelegations. *Frankl*, 650 F.3d at 1350. Thus, whether a subdelegation of agency authority is lawful also depends on an analysis of the applicable regulations to determine the agency's own intent regarding subdelegations.

Here, a plain reading of Section 2.20(c) provides affirmative evidence of an intent to restrict the Assistant Secretary's authority to subdelegate the ability to decide appeals. This is true for two reasons: (1) Section 2.20 only allows the Assistant Secretary to issue final decisions on appeals, and (2) Section 2.20 is a delegation regulation that limits the Assistant Secretary's authority to delegate appeals to subordinates.

i. *Section 2.20(c) Only Authorizes the Assistant Secretary to Decide Appeals in a Final Agency Action*

Reviewing the explicit text of Section 2.20, only the Assistant Secretary has the authority to issue a final decision on an appeal after the Assistant Secretary takes jurisdiction over an appeal pursuant to Section 2.20(c)(1).

First, Section 2.20(c) provides that once the Assistant Secretary exercises jurisdiction to decide an appeal, IBIA no longer has any jurisdiction over the appeal. When the Assistant Secretary exercises his or her discretion under Section 2.20(c) to take an appeal, IBIA must "transfer the appeal" to the Assistant Secretary's office. *Id.* "Transferring" the appeal from IBIA to the Assistant Secretary's office

means that IBIA is divested of its jurisdiction over the appeal, placing the authority to issue a decision on the appeal solely with the Assistant Secretary. Thus, a plain reading of the regulation requires that, after the Assistant Secretary accepts jurisdiction to decide an appeal directly under Section 2.20(c)(1), the Assistant Secretary may issue a final decision on the appeal at the exclusion of any prior or subsequent appellate review by IBIA.

After the Assistant Secretary divests IBIA of jurisdiction over an appeal, Section 2.20(c) sets forth clear and specific procedures for how the appeal is to be resolved: the Assistant Secretary may decide the appeal directly, or the Assistant Secretary may assign the authority to decide the appeal to a Deputy. 25 C.F.R. § 2.20(c)(1)-(2). No other procedures are explicitly authorized or reserved in the event that the Assistant Secretary opts to take an appeal away from IBIA. If the Assistant Secretary decides not to assign a Deputy to an appeal taken away from IBIA's jurisdiction, per the explicit terms of Section 2.20(c), the text of the regulation restricts the authority to issue a decision on the appeal to the Assistant Secretary alone.

Section 2.20(c) explicitly states that a decision on appeal signed by the Assistant Secretary "shall be final for the Department and effective immediately." *Id.* § 2.20(c). By contrast, if the Assistant Secretary decides to assign the appeal to a Deputy, the Deputy's decision would not be final and would be subject to review by IBIA. *See id.* § 2.20(c) ("[I]f the decision is signed by a Deputy to the Assistant Secretary--Indian Affairs, it may be appealed to the Board of Indian Appeals pursuant to the provisions of 43 CFR part 4, subpart D."). Reading Section 2.20(c) as a whole, after the Assistant Secretary accepts jurisdiction to decide an appeal directly under Section 2.20(c)(1), the Assistant Secretary—and *only* the Assistant Secretary—may issue a final decision on the appeal.

To oppose the exclusivity of the Assistant Secretary's authority to issue final decision on appeals after the Assistant Secretary assumes jurisdiction pursuant to Section 2.20(c), the United States relies on Section 2.20(e), which states that any party may move for IBIA to take back jurisdiction over an appeal removed by the Assistant Secretary if the Assistant Secretary has not rendered a decision on the appeal after 60 days following the close of pleadings on the appeal. *See* 25 C.F.R. § 2.20(e). However, per this regulatory language, for the Assistant Secretary to be divested of his or her authority to decide the appeal, two conditions must be satisfied: (1) 60 days have elapsed following the close of pleadings; *and* (2) a party has moved for IBIA to take back jurisdiction. If *either* of those two conditions are not satisfied, only the Assistant Secretary may issue a final decision on the appeal. The regulatory language further confirms that "[a] motion for Board decision under this section shall invest the Board with jurisdiction as of the date the motion is received by the Board." *Id.* Because IBIA is "invested" with

jurisdiction only *after* receipt of a motion to reclaim jurisdiction filed by a party to the appeal, IBIA is necessarily divested of jurisdiction *prior to* receipt of such a motion. Certainly, prior to the date where 60 days have elapsed since the time for filing pleadings has expired and without a decision on the appeal, no party would be able to motion for IBIA to take back jurisdiction from the Assistant Secretary in the first place. The Assistant Secretary's authority to issue a final decision during that time is exclusive, just as the fact that only the Assistant Secretary may issue a final decision beyond the 60-day deadline if no party moves for IBIA to take back jurisdiction.

The United States also argues that the Assistant Secretary's authority to issue final decisions on appeals under Section 2.20(c) is not "exclusive" by virtue of the fact that other persons or bodies, including IBIA, generally can issue final decisions on appeals in other circumstances. *See* Dkt. 51-1 at 25 (citing 25 C.F.R. § 2.4; 43 C.F.R. § 4.312 (making decisions on appeals by IBIA final for the Department)). The United States' argument is incorrect, because even if other officials may generally have the authority to issue final decisions on appeals in the abstract, what is relevant to this case is the specific authority to decide an appeal following the Assistant Secretary's exercise of discretionary authority to assume jurisdiction over an appeal pursuant to Section 2.20(c). The United States has not articulated any reason why any other official within Interior enumerated in Section 2.4 would have the authority to make a decision in lieu of the Assistant Secretary in circumstances where (1) the Assistant Secretary has assumed jurisdiction pursuant to Section 2.20(c)(1), and (2) no party has moved for IBIA to take back jurisdiction over the appeal after 60 days have elapsed without a decision following the time for filing pleadings in the appeal. Under these precise conditions, the regulatory scheme over appeals of BIA decisions only allows the Assistant Secretary to issue a final decision—or *any* decision, for that matter—on an appeal.

The United States' reliance on 43 C.F.R. § 4.5 is equally unavailing. Section 4.5(a)(1) authorizes the Secretary "to take jurisdiction at any stage of any case before any employee or employees of the Department, including any administrative law judge or board of the Office . . . and render the final decision in the matter after holding such hearing as may be required by law." 43 C.F.R. § 4.5(a)(1). Per the plain language of this provision, the Secretary's authority to assume jurisdiction over any case at any time does not divest any other official, administrative law judge, or board with jurisdiction over a matter *unless and until* the Secretary exercises his or her discretion to "take jurisdiction." Simply because the Secretary may theoretically do so at any time does not designate the Assistant Secretary's responsibility to decide an appeal after assuming jurisdiction under Section 2.20(c) non-exclusive for purposes of the FVRA. Such a conclusion would render any purportedly exclusive obligations of a PAS officer non-exclusive and would wholly eliminate the purpose of the FVRA to prevent non-PAS officials from

carrying out the exclusive functions and duties of a vacant PAS office, including those functions and duties delineated by the head of an Executive agency via regulation.

Taken together, the above findings from a plain reading of Section 2.20(c) dictate that only the Assistant Secretary may issue a final decision on an appeal taken from IBIA's jurisdiction pursuant to Section 2.20(c)(1), unless and until the Assistant Secretary is divested of jurisdiction by a party's motion under Section 2.20(e) or by the exercise of the Secretary's discretionary authority under Section 4.5. This conclusion is "compelled" by the unambiguous language of Section 2.20(c). *Bassiri*, 463 F.3d at 931.

ii. *The Purpose and Context of Section 2.20(c) Supports the Conclusion that Section 2.20(c) Is a Delegation Regulation*

Next, an analysis of Section 2.20(c) and the history and purpose behind the Assistant Secretary's authority over appeals reveals that Section 2.20(c) is a delegation regulation that is intended to restrict the Assistant Secretary's permissible delegation authority. When "discerning the meaning of regulatory language," a court must "interpret the regulation as a whole, in light of the overall statutory and regulatory scheme." *Norfolk Energy, Inc. v. Hodel*, 898 F.2d 1435, 1442 (9th Cir. 1990) (internal quotation marks and citation omitted); *see also Inland Empire*, 88 F.3d at 702 (courts "look to the purpose of the [regulation] to set its parameters" regarding subdelegations). "An agency's interpretation of a regulation must 'conform with the wording and purpose of the regulation.'" *Alaska Trojan P'ship v. Gutierrez*, 425 F.3d 620, 628 (9th Cir. 2005) (quoting *Pub. Citizen Inc. v. Mineta*, 343 F.3d 1159, 1166 (9th Cir. 2003)).

When Interior first issued proposed regulations governing administrative appeals, the regulations did not provide for a Deputy to the Assistant Secretary to maintain authority to review appeals of BIA administrative actions in any capacity. *See* Appeals from Administrative Actions, 54 Fed. Reg. 6478, 6478 (Feb. 10, 1989). Instead, the regulations limited the Assistant Secretary's jurisdiction over appeals to the Assistant Secretary alone. Following public comment, in 1989 the agency[2] issued a final rule allowing for the Assistant Secretary to delegate his or her discretionary authority to exercise jurisdiction over appeals to a Deputy, whose decision on appeal is not final and is expressly conditioned on further

[2] The final rulemaking for the 1989 revisions to 25 C.F.R. part 2 was issued by the Assistant Secretary pursuant to delegated authority from the Secretary according to the Department Manual. *See* 54 Fed. Reg. at 6478 (citing 209 DM 8); *id.* at 6483 (final rulemaking signed by Ross O. Swimmer in his capacity as Assistant Secretary).

review by IBIA. *See id.* at 6479 (revising Section 2.20(c) "to authorize the Assistant Secretary--Indian Affairs to assign the responsibility to issue a decision in an appeal to a Deputy to the Assistant Secretary--Indian Affairs" and noting that "[a] decision made by a Deputy to the Assistant Secretary pursuant to such an assignment may be appealed to the Board of Indian Appeals"); *see also id.* at 6478 (similar statements regarding the changes to Sections 2.4(d) and (e)).

Interior received comments from the public objecting to the Assistant Secretary's authority to exercise his or her discretion to decide an appeal under Section 2.20, or requesting that any decisions made by the Assistant Secretary be subject to further appellate review by IBIA. *Id.* at 6479. The agency rejected these comments, reasoning that "[c]ertain appeals involve policy matters requiring the attention of the Assistant Secretary" and noting that "IBIA does not have jurisdiction to review discretionary decisions of BIA officials." *Id.* In response to another comment that appellants should be able to choose whether to have the Assistant Secretary or IBIA decide their appeals, Interior stated that Section 2.20(c) "is not intended to give the parties to an appeal a choice of forum, but rather is intended to vest the *exclusive authority* to assume jurisdiction over an appeal in the Assistant Secretary." *Id.* (emphasis added). For this reason, Interior added the sentence to Section 2.20(c) stating that the Assistant Secretary "will not consider petitions to exercise" the Assistant Secretary's discretion to decide an appeal. *Id.*; *see* 25 C.F.R. § 2.20(c).

These statements above in the preamble to the revisions to 25 C.F.R. part 2 reveal that, while the Assistant Secretary has complete discretion to take jurisdiction from IBIA over an appeal, the regulatory scheme intends for the Assistant Secretary's jurisdiction to be a limited exception to the normal appeals process before IBIA. The Assistant Secretary was not assigned jurisdiction broadly over appeals; the agency believed it was important to preserve the Assistant Secretary's jurisdiction only as it pertained to appeals involving important "policy matters" that require the Assistant Secretary's consideration, or appeals involving "discretionary decisions of BIA officials" since IBIA does not have jurisdiction to decide such appeals. By denoting these specific purposes of authorizing the Assistant Secretary's review of appeals, the agency intended to limit the types of cases that would typically proceed before the Assistant Secretary pursuant to the Assistant Secretary's complete discretion.

The same sentiments are also echoed in the regulatory preamble to the 1989 revisions to IBIA's general appeals procedures under 43 C.F.R. part 4 subpart D, released the same day as the revisions to 25 C.F.R. part 2. *See* Dep't Hearings & Procedures, 54 Fed. Reg. 6483 (Feb. 10, 1989). There, when discussing revisions to Section 4.332(b) authorizing the Assistant Secretary to take jurisdiction over appeals pursuant to Section 2.20(c), the agency reiterated that "there are some decisions involving

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Indians and Indian tribes that involve policy considerations that cannot adequately be addressed through the usual appeal procedures." *Id.* at 6484. Cases involving important policy considerations beyond the purview of IBIA's review were not expected to be a common occurrence: "It is anticipated that the Assistant Secretary—Indian Affairs will infrequently exercise the authority to assume jurisdiction over an appeal." *Id.*; *see also id.* at 6485 ("Because the Department continues to believe that there are *some* instances in which it may be appropriate for the Assistant Secretary—Indian Affairs to review an appeal, the comments suggesting that that official be entirely removed from the review process are not accepted.") (emphasis added). Accordingly, the agency contemplated that the Assistant Secretary's authority to take jurisdiction over an appeal away from IBIA would merely be a limited exception exercised with restraint.

The regulatory history also reveals that, because the Assistant Secretary's discretionary authority over appeals was contemplated to be a rare exception to IBIA's jurisdiction, the agency intended to craft the Assistant Secretary's jurisdiction over appeals in a manner that preserved IBIA's general jurisdiction over appeals to the maximum extent possible. In discussing the revisions to Section 4.332(b), the agency explained that IBIA is part of the Office of Hearings and Appeals (the "OHA"), which was established in 1970 as a separate office within the Office of the Secretary "to provide independent, objective administrative review of decisions issued by the Department's various program Bureaus and Offices." 54 Fed. Reg. at 6484. When Interior first established IBIA via regulation, the purpose of having IBIA review appeals, instead of delegating that authority to other officials within Interior, was to "ensure impartial review free from organizational conflict" which might otherwise taint the agency's appellate review. *Id.* The agency elaborated that "[i]t was never contemplated that the Assistant Secretary—Indian Affairs would handle administrative appeals as a routine or frequent part of his official duties." *Id.* If the Assistant Secretary were to be given that responsibility, the Assistant Secretary "would have to create, in effect, an Office of Hearings and Appeals within their own offices." *Id.*

The agency's reasoning signifies that the Assistant Secretary's jurisdiction over appeals was meant to be as limited as possible to encourage the Assistant Secretary to decide cases of political importance but not as a matter of course. Like any agency tasked with deciding appeals of decisions made by its own employees, Interior was concerned with the potential "organizational conflict" that might arise if the Assistant Secretary's office became akin to an appeals board but without assurances of neutrality. Allowing appellants to select the Assistant Secretary to adjudicate their appeals instead of IBIA could effectively eliminate the possibility impartial review by IBIA altogether, or alternatively the Assistant Secretary's office would be required to establish its own independent appeals board—surely redundant in light of IBIA's existence. To preclude either possibility, the agency disallowed parties from

being able to choose to have their appeal heard by the Assistant Secretary and instead limited the Assistant Secretary's authority over appeals to the sole discretion of the Assistant Secretary, authority which was contemplated to be used only in the rare cases implicating significant policy concerns that must be adjudicated in accord with Interior's general policies as a whole.

Interior's intention to preserve IBIA's jurisdiction to the maximum extent possible is also consistent with the preamble to the rulemaking describing the revisions to Section 4.331(b). There, Interior rejected a comment requesting that the Assistant Secretary's decision on an appeal be subject to further review by IBIA, because IBIA "has not been delegated general review authority over such decisions" by the Assistant Secretary. 54 Fed. Reg. at 6484. In doing so, the agency reiterated the importance of the Assistant Secretary's position "[a]s a Secretarial-level official," since the Assistant Secretary "has authority to issue or approve decisions that are final for the Department." *Id.* Not only does the agency reaffirm the importance of the Assistant Secretary's position as a PAS officer, meaning that the Assistant Secretary's decisions can legally bind the agency, but the agency also explains that the only reason why the Assistant Secretary's appeals decisions are final is that IBIA *does not have the authority* to review such decisions. This reveals that the agency contemplated making even the Assistant Secretary's authority to decide appeals non-final and subject to IBIA review. But the agency could not do so solely because of the Assistant Secretary's authority to bind the agency as a PAS officer. By contrast, a Deputy to the Assistant Secretary does *not* have the authority to bind the agency to action as a PAS officer and does *not* have the express authority to issue final decisions on appeals if the Assistant Secretary delegates an appeal taken from IBIA to the Deputy. *See* 25 C.F.R. § 2.20(c); *id.* § 2.4(c), (e). The agency could have made a Deputy's decision final and not subject to IBIA review like decisions made by the Assistant Secretary directly, but by not doing so, the agency intended to ensure that IBIA's jurisdiction to issue final appeals decisions was preserved to the maximum extent possible.

In order to preserve IBIA's general jurisdiction over appeals, it was vital for the agency to restrict what the Assistant Secretary might do after taking jurisdiction over an appeal under Section 2.20(c). It would be impracticable to require the Assistant Secretary to issue decisions on all of these appeals directly; the Assistant Secretary has a multitude of important duties as a PAS officer that would interfere with the Assistant Secretary's ability to decide appeals in a timely manner, which could deter the Assistant Secretary from exercising jurisdiction over appeals in the first place. On the other hand, if the Assistant Secretary could broadly delegate his or her authority to issue final decisions on appeals that bind the agency, the Assistant Secretary feasibly could exercise his or her discretion to take jurisdiction over appeals frequently and assign those appeals to partial agency officials, usurping IBIA's function without the assurance of independent review. And allowing the Assistant Secretary to delegate final

decisionmaking authority over appeals would mean that employees who are not a "Secretarial-level official" subject to Presidential appointment and Senate confirmation, see 54 Fed. Reg. at 6484, would bind the agency on important policy matters that the agency intended to keep singularly within the Assistant Secretary's dominion.

Given these competing considerations, Interior arrived at a middle ground, restricting the Assistant Secretary's delegation authority to assigning appeals to a Deputy for an "advisory" decision that would still be subject to review by IBIA, so that IBIA can issue a final decision on the appeal that binds the agency. The overall regulatory scheme envisioned by 25 C.F.R. part 2 and 42 C.F.R. part 4 subpart D consistently reaffirms that a Deputy's authority to decide appeals is limited to the procedures of Section 2.20(c) and that all decisions by a Deputy are subject to review by IBIA. *See id.* § 2.4(c) (recognizing the authority to decide appeals belonging to "[a] Deputy to the Assistant Secretary--Indian Affairs pursuant to the provisions of § 2.20(c) of this part"); *id.* § 2.4(e) (IBIA may decide appeals "from a decision made by an Area Director or a Deputy to the Assistant Secretary--Indian Affairs"). Moreover, Section 2.6, titled "Finality of decisions," repeats that the Assistant Secretary's decision on an appeal operates as a final decision for Interior, but the regulation makes no mention of any decision made by a Deputy. *See id.* § 2.6(c). By limiting a Deputy's delegated authority over appeals to non-final decisions, the ultimate effect of Interior's procedures governing appeals of decisions by BIA officials is to authorize only two entities to issue final decisions on appeals: IBIA generally, and the Assistant Secretary pursuant to his or her discretionary authority to decide appeals under Section 2.20(c)(1).

To summarize, in the full context of the 1989 revisions to the regulations governing appeals of BIA decisions, the Assistant Secretary's discretionary authority to assume jurisdiction over appeals operates as an exception to the general rule that IBIA normally hears appeals of BIA decisions. Interior intended to limit final appellate review in these exceptional circumstances to a PAS official with authority to make decisions that bind the agency, to ensure that the decision on appeal is issued in conformity with Interior's broader policy concerns. To carry out these intentions, the agency restricted the Assistant Secretary's authority to subdelegate appellate review to subordinates, only authorizing the Assistant Secretary to delegate non-final decisionmaking authority to a Deputy. The 1989 revisions confirm that the Secretary intended to vest the authority to issue final decisions on appeals under Section 2.20(c) solely with the Assistant Secretary and at the exclusion of any other agency official. In other words, the Assistant Secretary's authority to make final decisions on appeals taken from IBIA is exclusive.

The United States argues that Section 2.20(c) does not preclude redelegation of the Assistant Secretary's authority to issue a final decision to a Deputy. Because the regulations do not explicitly *prohibit* subdelegations of the Assistant Secretary's authority to issue final decisions on appeals under Section 2.20(c)(1), the United States asserts that the Assistant Secretary is presumed to have the authority to delegate his final decisionmaking authority to subordinates, including to a Deputy or Principal Deputy. In support of this argument, the United States points to other regulations in which the Secretary clearly restricted subdelegations through clear language, noting that the Secretary could have done so for Section 2.20(c) as well. *See* Dkt. 57 at 19-20 (citing 25 C.F.R. § 33.3; 43 C.F.R. §§ 3191.2(b), 20.202(b)(1)). In this regard, the United States' argument equates to the assertion that the "plain meaning" of Section 2.20(c) does not reveal an intent about whether the Assistant Secretary may re-delegate final decisionmaking authority over appeals. *See Safe Air for Everyone*, 488 F.3d at 1097 ("As a general interpretive principle, the plain meaning of a regulation governs.") (internal quotation marks and citation omitted).

The Court acknowledges the absence of language affirmatively prohibiting redelegation by the Assistant Secretary of final decisionmaking authority, which otherwise might imply that Section 2.20(c) is silent on the question of whether the Assistant Secretary may so redelegate. However, such specific language is not absolutely required to amount to an intent to prohibit subdelegations. "The canon of statutory construction *expressio unius est exclusio alterius* . . . 'creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.'" *Webb v. Smart Document Solutions, LLC*, 499 F.3d 1078, 1084 (9th Cir. 2007) (quoting *Silvers v. Sony Pictures Entm't, Inc.*, 402 F.3d 881, 885 (9th Cir. 2005)); *see also Christensen*, 529 U.S. at 583 (accepting the proposition that "when a statute limits a thing to be done in a particular mode, it includes a negative of any other mode") (internal quotation marks and citation omitted). The Supreme Court has repeatedly held that while *expressio unius* "does not apply to every statutory listing or grouping," the canon "has force . . . when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (citing *United States v. Vonn*, 535 U.S. 55, 65 (2002)); *cf. Plata v. Schwarzenegger*, 603 F.3d 1088, 1095 (9th Cir. 2010) (reliance on *expressio unius* is inappropriate "when a single thing provided for is quite different from another thing omitted").

Here, the canon of *expressio unius* applies to the agency's wording of Section 2.20(c). After the Assistant Secretary takes jurisdiction over an appeal, the regulation sets forth a list of two possible choices for the Assistant Secretary: (1) decide the appeal directly, or (2) assign the appeal to a Deputy.

See 25 C.F.R. § 2.20(c)(1)-(2). These two choices are expressed in an "associated group or series." The two items in the list directly pertain to one another and do not conflict with each other. If the Assistant Secretary chooses to decide the appeal directly under option (1), he or she cannot assign the appeal to a Deputy under option (2) at the same time. Or, if the Assistant Secretary does decide to assign the appeal to a Deputy under option (2), he or she no longer may choose to decide the appeal directly in a final decision under option (1). If the agency wanted to provide the Assistant Secretary with another mechanism by which the Assistant Secretary may delegate authority over appeals, the agency easily could have done so in the text of Section 2.20(c). But by prescribing only these two options for how the Assistant Secretary may dispose of the appeal after exercising jurisdiction, the regulation intended to exclude all other modes of delegation omitted from the list. Therefore, when applying the canon of *expressio unius*, the specific parameters of permissible delegation to a Deputy of non-final decisionmaking authority outlined in Section 2.20(c) prohibit any other delegation of the Assistant Secretary's final decisionmaking authority over appeals. The construction of Section 2.20(c), combined with the regulatory history and intent behind the provision, constitutes "affirmative evidence of a contrary [regulatory] intent" to defeat the presumption that subedelegations of the Assistant Secretary's final decisionmaking authority over appeals is permissible. *Frankl*, 650 F.3d at 1350.

Moreover, "[a]s a general rule applicable to both statutes and regulations, textual interpretations that give no significance to portions of the text are disfavored." *Nat'l Wildlife Federation v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 932 (9th Cir. 2008) (citing *Hart v. McLucas*, 535 F.2d 516, 519 (9th Cir. 1976)). Section 2.20(c) expressly subjects a Deputy's decision on an appeal to further review by IBIA, and the United States' position that the Assistant Secretary may nonetheless delegate final decisionmaking authority to that same Deputy would render the delegation limitations of Section 2.20(c)(2) meaningless. If the United States' argument were to be accepted, the result would in effect be to create a new regulatory scheme for reviews of IBIA appeals that nullifies the explicit restrictions on the Assistant Secretary's delegation authority. It would be impermissible to defer to the United States' interpretation which creates such an absurd result. *Christensen*, 529 U.S. at 588.

In summary, the restrictive mode of delegation to a Deputy as provided in Section 2.20(c)(2) means that the Secretary has spoken as to the allowable subdelegations of the Assistant Secretary's authority over appeals taken from IBIA. The United States' interpretation of Section 2.20 as authorizing the Assistant Secretary to make subdelegations of final decisionmaking authority is inconsistent with the plain language of the regulation restricting the Assistant Secretary's delegation authority over appeals only to a Deputy and only of non-final authority. *See Singh*, 771 F.3d at 652; *Turtle Island*, 878 F.3d at 733; *Bassiri*, 463 F.3d at 931.

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iii. *Case Law Supports the Conclusion that Section 2.20(c) Restricts the Assistant Secretary's Ability to Delegate Final Decisionmaking Authority*

A review of the applicable case law presented by the parties further supports the reading of Section 2.20(c) as a delegation provision that restricts the Assistant Secretary's authority to delegate.

In *United States v. Giordano*, the Supreme Court addressed a wiretap statute in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 211-225, providing that "[t]he Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize" a wiretap application. 416 U.S. 505, 507, 513 (1974) (citing 18 U.S.C. § 2516(1) (1968)).[3] In that case, evidence was presented revealing that the Executive Assistant to the Attorney General had approved the special designation of the Assistant Attorney General to authorize a wiretap application, because the Attorney General was away from the office and unable to authorize the designation himself. *Id.* at 510. The government argued that the Executive Assistant's authorization of an application to intercept wire communications was not inconsistent with the statute. *Id.* at 512. Relying on another statute authorizing the Attorney General to "make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General," *id.* at 513 (quoting 28 U.S.C. § 510), the government concluded that Section 2516 "evinces no intention whatsoever to preclude delegation to other officers" in the Attorney General's staff, *id.* at 512-13.

The Court rejected the government's argument. *Id.* at 512. First, the Court addressed the text of Section 2516(1) and determined that the Executive Assistant does not fall within the enumerated categories of officials with authority to authorize a wiretap application. *Id.* at 513. The Court concluded that "the matter of delegation is expressly addressed by [§ 2516], and the power of the Attorney General in this respect is specifically limited to delegating his authority to 'any Assistant Attorney General specially designated by the Attorney General.'" *Id.* at 514 (quoting 18 U.S.C. § 2516(1) (1968)). The Court also rejected the government's reliance on the Attorney General's broad delegation authority under Section 510, noting that "Congress does not always contemplate that the duties assigned to the Attorney General may be freely delegated." *Id.* The Court acknowledged that other statutes contained express language prohibiting re-delegation of authority, and "[e]qually precise language forbidding

[3] Title III has since been amended to allow for a wider range of officials to authorize a wiretap application. *See* 28 U.S.C. § 2516(1).

delegation was not employed in the legislation before us." *Id.* (citing 18 U.S.C. § 245(a)(1)). Nevertheless, the Court held that "[section] 2516(1), fairly read, was intended to limit the power to authorize wiretap applications to the Attorney General himself and to any Assistant Attorney General he might designate." *Id.*

The Court in *Giordano* then discussed at length the statute's purpose and legislative history, which revealed that "Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint and only where the circumstances warrant the surreptitious interception of wire and oral communications." *Id.* at 515; *see also id.* at 520 (finding that the Senate Judiciary Committee's report on the bill "not only recognize[d] that the authority to apply for court orders is to be narrowly confined but also declare[d] that it is to be limited to those responsive to the political process"). Therefore, the Court concluded that the Court's interpretation of a limited delegation authority by the Attorney General over authority to approve wiretap applications was "strongly supported" by the intent behind the statute. *See id.* at 514-23.

Here, like in *Giordano*, Section 2.20(c) prescribes the delegation procedures available to the Assistant Secretary in issuing decisions on appeals otherwise falling within IBIA's jurisdiction. The Assistant Secretary is limited to delegating initial decisionmaking authority to a Deputy under Section 2.20(c)(2), and the Deputy's decision is non-final and subject to further appeal to IBIA in conformity with the procedures set forth in 43 C.F.R. part 4, subpart D. *See* 25 C.F.R. § 2.20(c). As in *Giordano*, by designating the delegation process of the Assistant Secretary's authority and by limiting a Deputy's authority to decide appeals, the intent of Section 2.20(c) was to preclude the Assistant Secretary from delegating *fina*l decisionmaking authority to a Deputy. And like *Giordano*'s rejection of the argument that specific language prohibiting subdelegations was required to effectuate that intent, here the applicability of the canon *expressio unius*[4] to Section 2.20(c) and the regulatory history behind Section 2.20(c) both reveal the agency's intent to prohibit subdelegations of the Assistant Secretary's final decisionmaking authority over appeals, even in the absence of express language to that effect in the regulation itself. All in all, Section 2.20(c), "fairly read," was intended to limit the power to issue final decisions on appeals taken away from IBIA to the Assistant Secretary alone.

[4] The Court in *Giordano* did not explicitly rely on the canon of *expressio unius* in arriving at its conclusion, but the Court's analysis in that case, as described in this Order, is consistent with the doctrine.

Furthermore, just as the Court in *Giordano* determined that the statutory authority to authorize wiretap applications was intended to be "used with restraint," as articulated above, Interior contemplated that the Assistant Secretary's authority under Section 2.20(c) to exercise jurisdiction over an appeal otherwise before IBIA would be used with restraint. As articulated in the preamble to the 1989 final rulemaking, "[i]t is anticipated that the Assistant Secretary—Indian Affairs will infrequently exercise the authority to assume jurisdiction over an appeal." 54 Fed. Reg. at 6484. The purpose of giving the Assistant Secretary such authority was merely to allow for the Assistant Secretary, on an irregular basis, to decide appeals of particular political significance or cases involving discretionary decisions made by BIA officials. And as the Court noted in *Giordano*, delegations of agency authority to a PAS official are not always contemplated to be freely delegable, particularly where the delegation itself is highly limited in nature. The purpose behind the Assistant Secretary's delegated authority to issue final decisions on appeals is consistent with the explicit language of Section 2.20(c) in making the Assistant Secretary's authority to issue final decisions on appeals an exclusive function of the Assistant Secretary position.

In support of its argument that the Assistant Secretary's authority to issue final decisions on appeals before IBIA pursuant to Section 2.20(c) is non-exclusive and delegable, the United States relies heavily on *Stand Up for Cal.! v. U.S. Dep't of Interior*, 298 F. Supp. 3d. 136 (D.D.C. 2018). Although there are many similarities between *Stand Up* and this case, *Stand Up* is distinguishable because of material differences between the regulations at issue in each case.

In *Stand Up*, the district court was faced with a similar challenge to an action by Principal Deputy Roberts in issuing a Record of Decision approving a fee-to-trust application submitted by the Wilton Rancheria Tribe of California for a 36-acre parcel of land in Elk Grove, California. *Id.* at 137-18. In that case, the plaintiffs challenged Principal Deputy Roberts' authority to issue a decision on a fee-to-trust application under 25 C.F.R. § 151.12(c), which authorizes "the Secretary, or the Assistant Secretary—Indian Affairs pursuant to delegated authority," to issue a decision on a fee-to-trust application that would constitute a "final agency action." *Stand Up*, 298 F. Supp. 3d at 141-42; 25 C.F.R. § 151.12(c).

First, the district court in *Stand Up* engaged in an extensive analysis of the regulatory language at issue to determine whether the "presumption of delegability" applied to allow the Assistant Secretary to delegate authority to issue decisions on fee-to-trust applications to a Deputy. *See generally Stand Up*, 298 F. Supp. 3d at 142-49. The court first held that the statutory language in Section 5 of the IRA, 25 U.S.C. § 5108, did not reveal an intent by Congress to preclude subdelegation of the Secretary's authorization to acquire land in trust for Indians. *Id.* at 142. The court determined that the explicit

language in Section 151.12(c) did not contain sufficient evidence to overcome the presumption of delegability, specifically calling out the lack of any "affirmative language precluding delegation, such as 'may only be delegated to,' 'may not [be] delegate[d],' 'may not be re[del]egated,' 'shall not be redelegated,' or is 'not subject to delegation.'" *Id.* at 143 (first and second alterations in original) (citations omitted). Noting that "[t]hese types of phrases have been invoked by Congress or the Secretary to clearly preclude delegation in other contexts," *id.* (citations omitted), the court concluded that, because Section 151.12 "is devoid of any similar language prohibiting the delegation of a fee-to-trust decision," the regulation's plain text suggests that delegation of the Assistant Secretary's authority to a Deputy to issue such decisions is "presumptively permissible," *id.* (citing *U.S. Telecom*, 359 F.3d at 565).

Next, the court in *Stand Up* engaged in a review of the purpose and history behind the 2013 revisions to the regulatory language in Section 151.12 and concluded that the context and comments relating to the regulation "do not suggest it is a delegation regulation." 298 F. Supp. 3d at 143. The court determined that the purpose of Section 151.12 "is not about the Secretary's ability to delegate" and that the regulation does not establish a "delegation structure" applicable to the Secretary's delegation authority. *Id.* Instead, the court reasoned, Section 151.12 "exemplifies a situation where the creating entity has mentioned a specific individual only to make it clear that this official has a particular power rather than to exclude delegation to other officials." *Id.* (internal quotation marks and alterations omitted) (quoting *Ethicon Endo-Surgery, Inc. v. Covidien LP*, 812 F.3d 1023, 1033 (Fed. Cir. 2016)). The court elaborated that the regulation merely describes Interior's internal process for reviewing and deciding fee-to-trust applications "for the benefit of external parties," and the agency's comments during the rulemaking process evince "an intent to clarify matters externally, not an intent to internally restrict delegation." *Id.* at 143-44.

The court in *Stand Up* then rejected the plaintiffs' reliance on *Giordano*, distinguishing the statute at issue in that case (18 U.S.C. § 2516(1)) from Section 151.12. *See Stand Up*, 298 F. Supp. 3d at 145. First, the court noted that the statute in *Giordano* "generally served to restrict an action, whereas Section 151.12 and its subsection (c) do not share the same overall goal to restrict" because Section 151.12 was merely procedural in nature to describe the action process for fee-to-trust applications. *Id.* The court also differentiated the legislative history behind Section 2516, which revealed "specific instances where Congress intended 'the authority to apply for court orders [ ] to be narrowly confined but also declare[d] that it is to be limited to those responsive to the political process.'" *Id.* (quoting *Giordano*, 416 U.S. at 520). By contrast, the court reasoned that "the Secretary's commentary around the rulemaking [for Section 151.12] did not explicitly or implicitly approach the topic of delegation,

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much less display an intent that final fee-to-trust decisions should be an exclusive power" to the Assistant Secretary. *Id.* The court cited favorably to two circuit court decisions holding on comparable reasoning that statutory provisions were intended to define the scope of an official's powers and were not specifically intended to restrict delegation authority. *See id.* at 146 (quoting *Ethicon*, 812 F.3d at 1033; *United States v. Mango*, 199 F.3d 85, 90 (2d Cir. 1999)). The court ultimately concluded by stating that, based on the legal principles articulated from these cases, "Section 151.12(c) is not intended to preclude the Secretary's authority to delegate to others, and [] delegation to the [Assistant Secretary] is one such, but not the only, permissible delegation." *Id.*

Lastly, the court in *Stand Up* rejected the argument that the regulatory language and legal maxims of statutory construction compelled the contrary result that Section 151.12 intended to limit the Assistant Secretary's delegation authority. *Id.* at 147-49. The plaintiffs in *Stand Up* had first attempted to distinguish between Section 151.12(c), which made decisions by the Assistant Secretary a "final agency action," from Section 151.12(d), which made decisions by BIA officials "not a final agency action" until the administrative appeal process to IBIA has been exhausted, as a basis to find that the Assistant Secretary's authority to issue a final action for the agency on a trust application exclusive to the Assistant Secretary. *Id.* at 147; 25 C.F.R. § 151.12(d). The court explained that both subsection (c) and subsection (d) "were promulgated not to restrict who may make trust decisions, but to distinguish between final and non-final agency action and provide external guidance as to when agency decisions must be administratively exhausted versus being immediately judicially reviewable." *Stand Up*, 298 F. Supp. 3d at 147. The court similarly rebuked the plaintiffs' reliance on *expressio unius*—arguing that the revisions to Section 151.12(c), by affirmatively adding the Assistant Secretary as an authorized official to issue final decisions, intended to restrict all other roles from issuing final decisions—and superfluity—*i.e.*, arguing that delegation of the Assistant Secretary's authority to issue final decisions would render superfluous the pre-existing language that the "Secretary of the Interior or authorized representative" is authorized to issue final decisions. *Id.* at 148-49. The court reiterated that "the overall purpose of the 2013 revisions focused on which trust decisions are subject to judicial review, and when they become so subject," as opposed to a focus on the exclusivity of any agency official's authority to issue final decisions. *Id.* at 148. The court concluded that "Section 151.12 clarifies that it is the decision-maker (*i.e.*, the Secretary, his authorized representative, the [Assistant Secretary], an individual acting for the [Assistant Secretary] under delegated authority, or a BIA official) who drives whether the decision is final." *Id.* at 148-49.

What distinguishes the instant case from *Stand Up* is that, unlike Section 151.12(c) which is silent on delegation, Section 2.20(c) *does* affirmatively prescribe when and how the Assistant Secretary

may delegate authority to decide appeals once the Assistant Secretary exercises his or her discretionary authority to remove an appeal from IBIA's jurisdiction. Section 151.12(c) is wholly silent even on the question of whether and how the Assistant Secretary may delegate authority over decisions on fee-to-trust applications, and the court in *Stand Up* correctly concluded that, in the face of complete silence on the question of subdelegability, the presumption of delegability applies. By contrast, Section 2.20(c) is *not* silent on the scope of the Assistant Secretary's authority: the Assistant Secretary may delegate the authority to decide appeals to a Deputy, but the Deputy's decision is subject to further appeal before IBIA. Stated differently, Section 2.20(c) restricts the Assistant Secretary to delegations only of non-binding decisionmaking authority and only to a Deputy. By restricting the Assistant Secretary's ability to delegate, Section 2.20(c) is far more analogous to the statutory provision at issue in *Giordano*, which the court in *Stand Up* acknowledged "generally served to restrict an action," than 25 C.F.R. § 151.12(c), which does not generally restrict any delegation authority for any discernible reason.

Furthermore, the final rulemaking for the 1989 revisions to Section 2.20(c) is distinguishable from the final rulemaking for the 2013 revisions to Section 151.12. The court in *Stand Up* correctly concluded that Section 151.12 was not intended to establish any kind of delegation structure within the Assistant Secretary's office regarding authorization to decide fee-to-trust applications. But as analyzed above, the purpose of the revisions to Section 2.20(c) were two-fold: (1) to provide the Assistant Secretary discretionary authority to assume jurisdiction over appeals before IBIA, and (2) to restrict the Assistant Secretary's ability to delegate such authority by limiting permissible delegations only to a Deputy of non-final decisionmaking authority. Even though Section 2.20(c) primarily sets forth the Assistant Secretary's particular powers over appeals, the limited authority of the Assistant Secretary to delegate those powers to a Deputy is indicative of an intent to exclude delegation to other officials. And the exclusivity of the Assistant Secretary's authority over appeals taken from IBIA is manifested in the agency's use of the word "exclusive" throughout the regulatory preambles. *See* 54 Fed. Reg. at 6479 (the amendments to Section 2.20 were "intended to vest the *exclusive* authority to assume jurisdiction over an appeal in the Assistant Secretary") (emphasis added); *id.* at 6485 (noting that "the authority to assume jurisdiction over an appeal [under Section 2.20(c)] lies *exclusively* with the Assistant Secretary") (emphasis added).

Moreover, the conclusion reached by the court in *Stand Up*, that Section 151.12 was intended to provide "external guidance" as to when decisions rendered by agency officials are appealable to IBIA versus when decisions are final and subject to judicial review, does not apply to Section 2.2(c). The regulatory history for the revisions to Section 151.12 at issue in *Stand Up* explicitly stated that among the reasons behind the revisions was to "'[p]rovide clarification and transparency to the process for

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issuing decisions by the Department, whether the decision is made by the Secretary, [the AS–IA], or a [BIA] official'" and to "clarify the distinctions of the 'different means and timelines for challenging decisions' within 'the context of trust acquisition decisions.'" *Stand Up*, 298 F. Supp. 3d at 143-44 (alterations in original) (quoting 78 Fed. Reg. at 67,929). The regulatory preamble for Section 2.20(c) makes no similar representation about being promulgated for the purpose of external clarification and transparency. The rulemaking for 2.20(c) generally states the purpose and effect of the revisions, which is to "eliminate[] Central Office action on many of the appeals which originate in the field" and, instead, "[m]ost appeals will be sent directly to the Interior Board of Indian Appeals (IBIA) from the field." 54 Fed. Reg. at 6478. Unlike in *Stand Up*, the revisions to Section 2.20(c) were not intended solely to describe the Assistant Secretary's discretionary authority to decide appeals "for the benefit of external parties" but were promulgated to implement specific changes in the agency's internal review process, including the "elimination" of "Central Office action" over appeals. Thus, Section 2.20(c) was also affirmatively intended to internally restrict delegation to Deputies of the Assistant Secretary as provided in the text of Section 2.20(c), in order to constrain the Assistant Secretary's discretionary authority to rare cases of political significance and to protect IBIA's jurisdiction over appeals to the maximum extent possible. The express delineation of the Assistant Secretary's delegation authority to a Deputy, combined with the statements in the rulemaking revealing that the Assistant Secretary's newfound authority to decide appeals was intended to be a limited exception to the typical IBIA appellate process, indicates an intent to "internally restrict delegation" of the Assistant Secretary's authority under Section 2.20(c) and not merely an intent to "clarify matters externally." *See Stand Up*, 298 F. Supp. 3d at 144. Because Section 2.20(c) affirmatively provides for a scope of delegation by the Assistant Secretary to a Deputy, *Giordano* is on point (as explained above) and *Ethicon* and *Mango*, relied on by the court in *Stand Up*, are distinguishable.

Significantly, the court in *Stand Up* analyzed and rejected the plaintiffs' reliance on the preamble to the final rulemaking for Section 151.12, pointing to the agency's response to a comment suggesting that a Deputy should issue all fee-to-trust acquisitions that the Assistant Secretary otherwise would decide, so that the Deputy's decision would be appealable to IBIA. 298 F. Supp. 3d at 147 (citing Land Acquisitions: Appeals of Land Acquisition Decisions, 78 Fed. Reg. 67,928, 67,934 (Nov. 13, 2013)). The agency had responded to the comment by noting that the Assistant Secretary "retains the discretion to issue a decision or assign responsibility to a Deputy Assistant Secretary to issue the decision under 25 CFR 2.20(c)." 78 Fed. Reg. at 67,934. The court interpreted the agency's response as "focus[ing] on the [Assistant Secretary]'s authority *and an instance where the [Assistant Secretary] may delegate it*, and is not a discussion of the Secretary's intention to constrain his authority on final fee-to-trust decisions." *Stand Up*, 298 F. Supp. 3d at 147 (emphasis added). This language from the court in *Stand Up* reaffirms

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that Section 2.20(c) *is a delegation provision* by authorizing the Assistant Secretary to engage in a particular limited delegation procedure. Any contrary interpretation would ignore the plain directive of Section 2.20(c)(2) dictating how the Assistant Secretary may delegate his or her discretionary authority to a subordinate—in this case, only to a Deputy and only of non-final decisionmaking authority. Because Section 2.20(c) is a delegation provision, the Secretary has spoken to the permissible bounds of the Assistant Secretary's delegation authority, and any delegation inconsistent with the authority provided by regulation is not presumptively permissible.

The United States also relies on two other cases, both of which were analyzed by the court in *Stand Up*, addressing the Assistant Secretary's delegation authority. The United States asserts that these cases support the conclusion that delegation of the Assistant Secretary's authority under Section 2.20(c) is presumptively permissible, as is the case under other Interior regulations. The Court disagrees.

In *Schaghticoke*, the court held that regulations authorizing the Assistant Secretary to make tribal acknowledgment decisions, found in 25 C.F.R. part 83, did not preclude delegation of the Assistant Secretary's authority over tribal acknowledgment decisions. 587 F. Supp. 2d at 420. The court reasoned that the regulations did not use limiting language such as "exclusively," "only," or "solely" when referencing the Assistant Secretary's responsibilities, and the court placed great weight on the fact that the regulation "defines the term Assistant Secretary to include the [Assistant Secretary] 'or that officer's authorized representative.'" *Id.* at 420-21 (quoting 25 C.F.R. § 83.1). Here, on the other hand, Section 2.20(c) affirmatively restricts the scope of the Assistant Secretary's delegation authority, as already described above. But further, unlike in *Schaghticoke*, neither set of regulations prescribing IBIA's appeals authority and the Assistant Secretary's authority to take jurisdiction over IBIA appeals includes a definition of the term "Assistant Secretary" *at all*. *See* 25 C.F.R. § 2.2 (no definition of the term "Assistant Secretary"); 43 C.F.R. § 4.201 (no definition of the term "Assistant Secretary" despite defining the Secretary as "the Secretary of the Interior or an authorized representative"). The absence of any definition extending the Assistant Secretary's authority to "an authorized representative," as is present in numerous other Interior regulations, indicates that the agency did not intend to allow the Assistant Secretary to designate an authorized representative in these particular circumstances—*i.e.*, taking jurisdiction over an appeal before IBIA—other than to a Deputy, who is expressly limited to a delegation of non-final authority provided by Section 2.20(c)(2).

The other case analyzed by the court in *Stand Up* pertaining to the Assistant Secretary's delegation authority was *Sokaogon Chippewa Cmty. v. Babbitt*, 929 F. Supp. 1165 (W.D. Wis. 1996). There, the district court rejected a challenge to a Deputy's authority to issue a final decision denying an

application to acquire a greyhound racing facility in trust for a tribe under the Indian Gaming Regulatory Act, 25 U.S.C. § 2719(b)(1)(A), or Section 5 of the IRA. *Id.* at 1181-82. The Assistant Secretary had recused herself from making a determination on the application, and the Deputy issued a final decision in the Assistant Secretary's absence, signing the decision not as "Acting Assistant Secretary" but as "Deputy Assistant Secretary." *Id.* at 1182. Noting that it would have been "wise" for the Assistant Secretary to document her recusal in the administrative record, and that the Deputy's signing of the decision as Acting Assistant Secretary "might have made this judicial inquiry less complicated," the court nonetheless concluded that the Deputy had authority to issue a final decision and "evidenced his authority by claiming that the decision was final." *Id.* The court presumed that the Deputy was "aware of the limits of his authority and would know that his decisions as Deputy Assistant Secretary are generally subject to appeal" under 25 C.F.R. § 2.4(e), and because the Deputy was aware of the Assistant Secretary's recusal, the Deputy "knew that he was making a decision that otherwise would have been" for the Assistant Secretary to make. *Id.* Therefore, the court held that the Deputy "was acting as Assistant Secretary and had the authority to make a final decision on plaintiffs' application." *Id.*

Sokaogon is distinguishable because, while the Deputy's authority to issue decisions on trust applications are *generally* subject to appeal under Section 2.4(e), the Deputy's authority to decide an appeal under Section 2.20(c) is *specifically and explicitly* subject to appeal due to the Assistant Secretary's limited delegation authority under Section 2.20(c). *Sokaogon* was not a well-reasoned opinion, in that the court did not attempt to determine whether the Assistant Secretary's authority to issue a final decision on the trust application was exclusive by applying the customary standards governing statutory and regulatory interpretation and examining the rulemaking behind the relevant provisions. Nevertheless, as thoroughly analyzed in *Stand Up*, nothing about the Assistant Secretary's authority to issue final decisions on fee-to-trust applications under Section 5 of the IRA or 25 C.F.R. § 151.12(c) precludes the Assistant Secretary from delegating his or her authority to a subordinate, making the Assistant Secretary's authority over those decisions non-exclusive. Applying the holding from *Stand Up* to the earlier decision in *Sokaogon*, the court in *Sokaogon* correctly held that the Deputy's decision to issue a final decision on the trust application was appropriately based upon the Assistant Secretary's presumed authority to delegate non-exclusive functions or duties to a Deputy under the Department Manual. But in this case, delegations of the Assistant Secretary's final decisionmaking authority under Section 2.20(c) were not contemplated or intended under the regulations setting forth the review process for decisions by BIA officials, in light of the explicit language of the regulation limiting the Assistant Secretary to assigning non-final authority over an appeal to a Deputy and the regulatory backdrop confirming the exceptional and exclusive nature of the Assistant Secretary's authority over appeals. Thus, for the same reasons *Stand Up* is distinguishable from the instant case, so too is *Sokaogon*.

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In summary, the explicit language of Section 2.20(c) restricting the scope of delegations of the Assistant Secretary's authority over appeals to a Deputy, and the requirement that Deputy's decision to be subject to review by IBIA, distinguishes the instant case and the regulation at issue from any precedent cases analyzing Interior regulations that set forth the Assistant Secretary's powers and duties without addressing the delegability of the Assistant Secretary's authority.

4. *The 2017 Decision Issued by Principal Deputy Roberts Was an* Ultra Vires *Action*

Applying the above analysis to the instant case, Principal Deputy Roberts did not have authority to issue a final decision denying the appeals of the 2014 NOD.

Former Assistant Secretary Washburn exercised his discretion under Section 2.20(c) to remove the appeals of the 2014 NOD from IBIA's jurisdiction. After taking control over the appeals, Washburn did not assign the appeals to any Deputy within 20 days of the filing of the appeals under Section 2.20(c)(2). Had Washburn decided to assign the appeal to a Deputy, the Deputy would retain the sole authority to decide the appeal subject to further review by IBIA, and Washburn would have relinquished his own ability to issue a final decision on the appeal. Instead of assigning the appeal to a Deputy in that manner, Washburn opted to retain jurisdiction for himself to issue a final decision on the appeals under Section 2.20(c)(1). Therefore, only Assistant Secretary Washburn was authorized to issue a final decision on the appeals.

After Washburn resigned, Washburn's exclusive authority to decide the appeal inured to Principal Deputy Roberts, who stepped in as Acting Assistant Secretary for 210 days under the FVRA. After Roberts reverted to Principal Deputy following the expiration of his term as Acting Assistant Secretary, still no decision had been issued on the appeals of the 2014 NOD. No party had moved for IBIA to take back jurisdiction over the appeals after 60 days without a decision following the close of pleadings, so IBIA did not have jurisdiction over the appeals of the 2014 NOD pursuant to Section 2.20(e).[5] And the Secretary did not exercise the discretionary authority under 43 C.F.R. § 4.5 to take

[5] The parties' ability to move the appeal back to IBIA if no decision is rendered within 60 days pursuant to Section 2.20(e) prevents against the dangers posed by a prolonged vacancy in the Assistant Secretary position, demonstrated by the precise facts of this case. Had the appellants desired a speedier resolution of their appeals, moving for IBIA to take back jurisdiction from the Assistant Secretary would have allowed the appeals to proceed forward under the normal IBIA appellate procedure. Therefore, Section 2.20(e) precludes the argument that the exclusivity of the Assistant Secretary's authority under Section 2.20(c) would place any appeals pending before the Assistant Secretary prior to a vacancy as forever in review

jurisdiction over the appeals of the 2014 NOD away from the Assistant Secretary position after Washburn exercised his discretion to decide the appeals under Section 2.20(c). Because no other agency official or board had jurisdiction over the appeals of the 2014 NOD, only the Assistant Secretary position—which was vacant at the time—could issue a final decision on the appeals under the circumstances in this case.

Roberts signed the 2017 Decision as Principal Deputy and asserted that the decision was "final in accordance with Section 2.20(c)." AR0258.3466.[6] Only the Assistant Secretary had the authority to issue a final decision pursuant to Section 2.20(c) in these circumstances. Thus, by purporting to issue a final decision on an appeal in the absence of the Assistant Secretary, Principal Deputy Roberts acted without authority in performing an exclusive function or duty of the Assistant Secretary and committed an *ultra vires* act in violation of the FVRA and Interior regulations. The United States' position for why Section 2.20(c) allows for Principal Deputy Roberts to issue a final decision on an appeal is not entitled to deference, because the United States' arguments for Principal Deputy Roberts' authority to issue the 2017 Decision are not rooted in the regulatory language or history and merely amount to a *post hoc* rationalization for Principal Deputy Roberts' *ultra vires* action. *See Christopher*, 567 U.S. at 155. Accordingly, the 2017 Decision issued by Principal Deputy Roberts was "not in accordance with the law" in violation of the APA. 5 U.S.C. §706(2)(A).

Based on the above, the Court GRANTS summary judgment for Plaintiffs on their First cause of action. The 2017 Decision issued by Principal Deputy Roberts is VACATED as an *ultra vires* act, and the various appeals of the 2014 NOD are REMANDED to the agency for final decision by the Assistant Secretary.[7] The Acceptance of Conveyance, premised upon the upon the purported finality of the 2017 Decision, also must be vacated on these grounds.

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purgatory until a new Assistant Secretary is appointed.

[6] As discussed above, the applicable agency regulations, including Section 2.20(c), were revised in 1989 and have been in effect ever since, satisfying the requirement under the FVRA that the regulation at issue be in effect during the 180-day time period preceding the date Washburn resigned as Assistant Secretary. *See* 5 U.S.C. § 3348(a)(2)(B)(ii).

[7] Because former Assistant Secretary Washburn did not assign the appeals of the 2014 NOD to Principal Deputy Roberts within 20 days of IBIA receiving the notices of appeal as required by Section 2.20(c)(2), the agency did not adhere to the proper procedures for delegating non-final decisionmaking authority to Principal Deputy Roberts. For this reason, the 2017 Decision cannot stand as a *non*-final agency action subject to further review by IBIA. The Assistant Secretary's failure to assign the appeals to a Deputy under Section 2.20(c)(2) thus provides a related basis for granting summary judgment for Plaintiffs on the question of Principal Deputy Roberts' authority to issue *any* decision on the appeals. As analyzed in this Order, only the Assistant Secretary position had the authority to decide the appeals of the 2014 NOD, and therefore the 2017 Decision issued by Principal Deputy Roberts must be vacated in its entirety.

B. Sufficiency of Environmental and Regulatory Review

The Court's holding above, that the 2017 Decision was unlawful as executed without authority in violation of the FVRA and must be vacated in its entirety, means that there was never a "final agency action" properly subject to judicial review as required by the APA. *See* 5 U.S.C. § 704. The finality of agency action is a jurisdictional requirement for judicial review under the APA. *See Ticor Title Ins. Co. v. F.T.C.*, 814 F.2d 731, 746 (D.C. Cir. 1987). "Courts are generally precluded, under the ripeness doctrine, from prematurely adjudicating administrative matters until the proper agency has formalized its decision." *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1067 (9th Cir. 2002) (citation omitted). Although Plaintiffs also challenge the environmental and regulatory review conducted by BIA in the Final EA, the FONSI, and the 2014 NOD, Plaintiffs' challenges on the "merits" of these decisions are not ripe since the appeals to the 2014 NOD are once again pending following the Court's holding in this case. "A pending appeal would render the action before a court . . . 'incurably premature.'" *Church v. United States*, No. CV 12-3990 GAF (SSx), 2013 WL 12064271, at *6 (C.D. Cal. May 15, 2013) (citations omitted). "[I]n the context of a non-final – and thus not ripe – agency decision, strong considerations counsel the Court to avoid interference with agency decisions until absolutely necessary." *Id.* at *7.

Here, the timeline of agency actions challenged by Plaintiffs primarily encompasses four key agency actions: (1) the Final EA, (2) the FONSI, (3) the 2014 NOD, and (4) the 2017 Decision. The first three agency actions are not subject to judicial review until there has been a "final agency action" under 5 U.S.C. § 704. Because the agency's purported final agency action, the 2017 Decision, was *ultra vires*, the Court will not interfere with the precursor decisions made by the agency leading up to the 2017 Decision. Any analysis conducted by the Court regarding the Final EA, the FONSI, or the 2014 NOD would be wholly advisory and speculative. Following the remand of the appeals of the 2014 NOD, the current Assistant Secretary may ultimately decide to change course from the prior administration's decision on the appeals of the 2014 NOD, especially considering the duration of time that has elapsed since BIA's initial environmental and regulatory review. If the Court were to analyze BIA's substantive analysis of the Band's application at the present time, the Court's decision might ultimately be rendered moot by the agency's subsequent decision after remand. Moreover, without a final agency action on the parties' appeals to the 2014 NOD, the administrative record before the Court is now incomplete regarding Plaintiffs' remaining claims. Simply put, it would be inappropriate for the Court to continue forward to address the substantive analysis conducted by BIA until the appeals of the 2014 NOD are

conclusively resolved via a final agency action. In light of the above, the parties' cross-motions for summary judgment are DENIED as to Plaintiffs' Third and Fourth causes of action.

Consequently, this brings the Court to the question of the appropriate disposition of the Third and Fourth causes of action. The Court fairly could dismiss the Third and Fourth causes of action without prejudice so that Plaintiffs may refile their case anew following a final agency decision regarding the appeals of the 2014 NOD. This solution is inefficient, however, because it imposes needless procedural steps on Plaintiffs in their effort to resolve their outstanding claims.

Instead, because Plaintiffs' challenges to the Final EA, the FONSI, and the 2014 NOD were purportedly ripe when originally brought in this action, the Court finds it more appropriate to stay the action to allow the agency to complete its administrative process, because dismissing an action at the summary judgment stage due to the lack of final agency action would be a judicially inefficient result. *See Church*, 2013 WL 12064271, at *7 (staying an action that became unripe due to the agency's decision to vacate and reopen its previously final decision after the initiation of litigation). Following the agency's review of the appeals of the 2014 NOD upon remand, if the Final EA, the FONSI, and the 2014 NOD are upheld by the agency, Plaintiffs will be permitted to return to this Court to challenge the unchanged environmental and regulatory analysis conducted by the agency.

IV. Conclusion

For the reasons set forth above, Plaintiffs' motion for summary judgment as to the First cause of action is GRANTED. The 2017 Decision and the Acceptance of Conveyance of the Grant Deed to the United States in trust for the Band are VACATED as unlawful. The parties' cross-motions for summary judgment are DENIED as to Plaintiffs' Third and Fourth causes of action, as those claims are unripe.

This action is STAYED from further proceedings pending the agency's resolution of the appeals of the 2014 NOD in a final agency action subject to judicial review. The case will be placed on the Court's inactive calendar. The parties are ordered to notify the Court when a final agency action issues, at which time the Court will restore the case to the active calendar and proceed to resolve any of Plaintiffs' remaining causes of action not yet adjudicated by the Court.

IT IS SO ORDERED.

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