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February 4, 2018

VIA FEDERAL EXPRESS

The Honorable Ryan Zinke
Secretary
U.S. Department of the Interior
Mail Stop 7328
1849 C Street, NW
Washington, D.C. 20240

Subject: Timbisha Shoshone Tribe – Mandatory Trust Acquisition for a Proposed Casino in Ridgecrest, California

Dear Secretary Zinke:

On behalf of Stand Up for California! ("Stand Up"),[1] Ricky Fielding, and Michael Neel,[2] my purpose in writing is to request that you use the authority you have as Secretary of the Interior, pursuant to 43 C.F.R. §4.5(b), to review, reconsider, and withdraw from a January 2017 Memorandum of Agreement with the Death Valley Timbisha Shoshone Tribe of California ("Timbisha Shoshone" or "Tribe").[3]

This Memorandum of Agreement ("MOA") changed the classification of a pending trust land application for a tribal casino from a discretionary acquisition into a mandatory one.[4] The proposed casino is to be located in Ridgecrest, California, within the boundaries of Kern County. The MOA was executed by then-Principal Deputy Assistant Secretary—Indian Affairs, Lawrence Roberts, pursuant to the Timbisha Shoshone Homeland Act of 2000 ("Homeland Act" or "Act").[5]

The undersigned acknowledge and understand the need for economic development opportunities for the Timbisha Shoshone Tribe, especially given the Tribe's history and location

[1] Stand Up for California! is a statewide organization with a focus on gambling issues affecting California (www.standupca.org).
[2] Ricky Fielding and Michael Neel are residents of Ridgecrest, California.
[3] 43 C.F.R. § 4.5(b) authorizes the Secretary "to review any decision of any employee or employees of the Department … or to direct any such employee or employees to reconsider a decision." Subparagraph (c) states that if the Secretary uses this authority to review a decision, "the parties and the appropriate Department personnel will be advised in writing of such action, the administrative record will be requested, and, after the review process is completed, a written decision will be issued." 43 C.F.R. § 4.5(c).
[4] *See* Memorandum of Agreement between the U.S. Department of the Interior and the Death Valley Timbi-Sha Shoshone Tribe, January 19, 2017 (hereinafter "Memorandum of Agreement").
[5] Public Law 106-423. The Homeland Act is also cited at 16 U.S.C. § 410aaa note.

within Death Valley National Park. The citizens understand and respect the Tribe's goal to seek economic independence and self-determination for its government and its membership, and recognize the benefits to the Tribe that were provided in the Homeland Act. While Stand Up and the citizens are not opposed to gaming on eligible Indian lands, they are opposed to any effort to circumvent applicable regulatory processes, especially when such efforts are—by design—intended to reduce or eliminate the rights of the public or local government to participate in a regulatory process.

The MOA executed by Mr. Roberts is not in compliance with the Homeland Act, with the result that the Timbisha Shoshone are being permitted to open a casino many miles away from the Tribe's ancestral lands. As a result of the determination to make this a mandatory trust acquisition, the citizens of Ridgecrest and Kern County are prohibited from providing any meaningful input to the Department regarding the impact of this proposed casino on their community. And the application will no longer be processed in compliance with Interior regulations and National Environmental Policy Act ("NEPA") standards.

Just on the issue of environmental protection, it was an extraordinary decision by Mr. Roberts to avoid any type of NEPA review on the Ridgecrest parcel. This parcel is located adjacent to the China Lake Naval Air Weapons Station, which is the largest weapons development and testing facility that the U.S. Navy operates.[6] The facility is so large—more than 1.1 million acres—that it comprises 38% of the Navy's land holdings worldwide.[7]

The activities at this Navy facility include the use of hazardous materials,[8] the open burning of explosives,[9] and the generation of excessive noise levels from aircraft operations and ordnance detonations.[10] All of these activities present significant environmental risks to adjacent properties.

As explained in this letter, Mr. Roberts' decision to re-classify this trust land application as a mandatory acquisition is not a reasonable interpretation of section 5(d) of the Homeland Act. Mr. Roberts also was not properly authorized by the Secretary to execute such an MOA.

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[6] *See* U.S. Navy, Mitigating Noise from Open Detonations at China Lake, at 1, Summer 2013, *available at* http://greenfleet.dodlive.mil/files/2013/08/Sum13_Mitigating_Noise_China_Lake.pdf (hereinafter "Mitigating Noise White Paper").

[7] U.S. Navy, Naval Air Weapons Station China Lake (About Webpage), *available at* https://www.cnic.navy.mil/regions/cnrsw/installations/naws_china_lake/about.html (last visited on February 3, 2018).

[8] *See* California Department of Toxic Substances Control, Draft Hazardous Waste Facility Permit: China Lake Naval Air Weapons Station, December 2017, *available at* https://www.dtsc.ca.gov/HazardousWaste/Projects/upload/ChinaLake_FS_dHWPermit_1217.pdf.

[9] *See* Evaggelos Vallianatos, "Insane Military Practices of Burning Explosives Near Neighborhoods," *The Huffington Post*, February 2, 2017, *available at* https://cswab.org/wp-content/uploads/2017/03/Huffington-Post-Insane-Military-Practices-of-Burning-Explosives-Feb-2017.pdf.

[10] *See Mitigating Noise White Paper, supra* note 6.

Factual Background

On January 19, 2017, then-Principal Deputy Assistant Secretary—Indian Affairs Lawrence Roberts executed this Memorandum of Agreement with the Timbisha Shoshone to re-classify a proposed trust land acquisition by the Tribe from a discretionary trust acquisition into a mandatory trust acquisition. Mr. Roberts' decision involved an interpretation of Section 5(d)(2) of the Homeland Act.

Mr. Roberts took this action despite the fact that the Tribe conceded in its September 2016 request to the Department that section 5(d)(2) of the Homeland Act only provides for discretionary purchases and acquisitions of the parcels listed in that section.

As a result of Mr. Roberts' decision, the Tribe's proposed casino in Ridgecrest, California will not be required to comply with Interior regulations under 25 C.F.R. Parts 151 and 292, nor will compliance be required under NEPA.

The Ridgecrest parcel is also a significant and non-commutable distance from the central homeland of the Tribe, located in Furnace Creek, California.[11] According to the Tribe's own calculations, the Ridgecrest parcel is 122 miles in driving distance from Furnace Creek.[12] The Ridgecrest parcel is also 265 miles in driving distance from the Lida Ranch acreage referenced in the Homeland Act and the acreage the Tribe seeks to substitute for a casino in Ridgecrest.[13]

The Ridgecrest Parcel is Not Eligible to be a Mandatory Trust Acquisition

For many decades, the Timbisha Shoshone were landless and the Homeland Act was enacted to remedy this injustice. The Act identifies seven (7) parcels of land that were to become the Tribe's initial reservation.[14] One of these parcels, which is within the Death Valley National Park, was to be transferred into trust for the Tribe by the National Park Service. Four parcels outside the Park were to be transferred into trust for the Tribe by the Bureau of Land

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[11] *See* Memorandum from Deputy Assistant Secretary—Indian Affairs (Operations) to Assistant Secretary—Indian Affairs, Recommendation and summary of evidence for proposed findings for Federal acknowledgment of the Death Valley Timbi-Sha Shoshone Band of Indians of California pursuant to 25 CFR 54, at 1, Feb. 9, 1982 ("The modern Death Valley Timbi-Sha Shoshone Band is the successor and direct descendant of Panamint Shoshone groups which inhabited Death Valley and surrounding areas at the time of earliest white contact in 1849. ... The original groups, which were historically linked, gradually combined into one beginning around 1920, coming to center on a settlement at Furnace Creek."). *See also* Final Determination for Federal Acknowledgment, Death Valley Timbi-Sha Shoshone Band of California, 47 Fed. Reg. 50,109 (Nov. 4, 1982).

[12] *See* Letter from Mark A. Levitan, Attorney at Law, to Mr. Lawrence Roberts, Acting Assistant Secretary—Indian Affairs, September 22, 2016, at Exhibit K.

[13] *Id.* The Lida Ranch acreage is in Esmeralda County, Nevada.

[14] Section 7(c) of the Homeland Act ("Lands taken into trust for the Tribe pursuant to section 5, except for the Park land [at Furnace Creek], shall be considered to the Tribe's initial reservation for purposes of [the Indian Gaming Regulatory Act])."

Management. And, finally, two parcels of land could be purchased and acquired in trust by the Secretary from private owners.

The purported authority for a mandatory trust acquisition, according to the MOA, is found in section 5(d) of the Homeland Act. While the National Park Service and Bureau of Land Management parcels can be classified as mandatory trust acquisitions, the private parcels provided for in section 5(d) are discretionary purchases and acquisitions by the Secretary.

1. The Homeland Act Uses Mandatory Language for Trust Transfers by the National Park Service and the Bureau of Land Management.

Section 5(b)(1) of the Homeland Act requires the National Park Service and the Bureau of Land Management to transfer 5 of the 7 parcels of land referenced above to be held in trust for the Tribe. Congress was clear in its intent that the acquisition of these 5 parcels would be a mandatory acquisition, by using the term "shall be held in trust" in the provision.[15]

2. The Homeland Act Does Not Use Mandatory Language Regarding the Purchase and Acquisition of Two Specific Parcels in California and Nevada.

In contrast, section 5(d) of the Homeland Act authorizes the Secretary to purchase from willing sellers and acquire in trust two (2) additional parcels that are privately-owned. The statutory language reads as follows:

> (d) Additional Trust Resources. The Secretary *may purchase* from willing sellers the following parcels and appurtenant water rights, or the water rights separately, to be taken into trust for the Tribe:
>
> (1) Indian Rancheria Site, California, an area of approximately 120 acres, as generally depicted on the map entitled 'Indian Rancheria Site, California' numbered Map #6 and dated December 13, 1999.
> (2) Lida Ranch, Nevada, an area of approximately 2,340 acres, as generally depicted on the map entitled 'Lida Ranch' numbered Map #7 and dated April 6, 2000, or another parcel mutually agreed upon by the Secretary and the Tribe. (emphasis added).

In drafting the Homeland Act, Congress was clear in its intent that the purchase and acquisition of these two (2) specific parcels would be at the discretion of the Secretary. The most obvious reason is that Section 5(d) uses the term "may purchase" instead of "shall

[15] *See* Section 5(b)(1) of the Homeland Act ("The following lands and water *shall be held in trust* for the tribe, pursuant to subsection (a) ...." (emphasis added). *See also* Section 3(7) of the Act ("to provide trust lands for the Tribe in 4 separate parcels of land that is [sic] now managed by the Bureau of Land Management ....").

purchase."[16] Additionally, the "Purposes" section of the Homeland Act is devoid of mandatory language (*e.g.*, "shall" or "require") regarding the Indian Rancheria Site and the Lida Ranch. Instead, this section uses the term "authorize" to define the Secretary's responsibilities regarding these two parcels.[17]

The transaction described in the January 2017 MOA is also not compliant with the language in section 5(d) stating that the Secretary is the one responsible for purchasing one or more of the parcels described in section 5(d), on behalf of the Tribe. Instead, the MOA states that a developer will purchase the Ridgecrest parcel and turn it over to the Interior Department for a payment of only $1.00.[18] The actual purchase price for this land was reported in the news media to be $5.5 million.[19] Compliance with the Homeland Act requires the Secretary to purchase this property for the actual amount of the sale price—in an arm's length transaction—from a willing seller, as Section 5(d) states.

The Tribe also represented to the Department that the Lida Ranch acreage was no longer for sale, having been taken off the real estate market in 2014.[20] The Tribe stated that the price would be $25 million, which the Tribe believed would not be a realistic amount for Congress to appropriate for this purpose.[21] These representations are not accurate. The current owner has authorized the establishment of a website with the title "Love Lida Ranch," for the purpose of selling individual parcels within the Ranch to interested third parties.[22] The owner is also willing to sell the entire Lida Ranch (more than 2,700 acres) for $13,500,000. Despite the Tribe's

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[16] Section 5(d) of the Homeland Act ("The Secretary *may* purchase from willing sellers the following parcels ....") (emphasis added).

[17] Section 3(7) of the Homeland Act ("...to provide trust lands for the Tribe in 4 separate parcels of land that is now managed by the Bureau of Land Management and *authorize* the purchase of 2 parcels now held in private ownership to be taken into trust for the Tribe.")(emphasis added). This language is also supported in the legislative history of the Homeland Act. *See, e.g.*, Senate Report No. 106-327, citing a letter from Donald J. Barry, Assistant Secretary for Fish, Wildlife, and Parks, March 21, 2000 ("The bill also authorizes the purchase of two additional properties, now in private ownership, to be taken into trust for the tribe. Each of these lands is located within the ancestral homeland of the Timbisha Shoshone Tribe, and each is of particular historical, cultural, or spiritual significance.").

[18] *See Memorandum of Agreement* at 3 (section 4(a)) ("Pursuant to the authority of Section 5(d)(2) of the Act, the Secretary hereby agrees to purchase the Ridgecrest parcel from a willing seller for the sum of one dollar ($1.00) ...."). The Tribe proposed this arrangement in its acquisition request to the Department. *See* Memorandum in Support of the Timbisha Shoshone Tribe Request to the Secretary of the Interior for an MOA to Mutually Agree to Acquire the Ridgecrest Parcel in Trust for the Tribe Pursuant to Section 5(d)(2) of the Timbisha Homeland Act, at 2, September 20, 2016 ("The Tribe's gaming developer has acquired an option for the purchase of the parcel. Upon the approval of the MOA and the fee to trust, the developer will sign the Ridgecrest parcel over to the BIA at no cost or, if the Secretary finds that it is necessary to pay for the parcel in order to comply with the Act, the United States may purchase the parcel from the Tribe's developer for a nominal price.") (hereinafter "Timbisha Shoshone Memorandum").

[19] Jessica Weston, "Council approves casino land sale," *The Daily Independent*, September 9, 2016, *available at* http://www.ridgecrestca.com/article/20160909/NEWS/160909704.

[20] *Timbisha Shoshone Memorandum* at 7.

[21] *Id.*

[22] *See* https://www.lovelidaranch.com/ (last visited on February 1, 2018).

protestations, there is no obstacle to the Department purchasing the Lida Ranch, as contemplated by the Homeland Act.

3. The BIA Handbook Requires a Complete Lack of Discretion on the Part of the Secretary for a Mandatory Trust Acquisition.

Similarly, the January 2017 MOA does not comply with the BIA Fee-to-Trust Handbook ("Handbook"). The current edition of the Handbook defines a mandatory acquisition as "[a] trust acquisition directed by Congress or judicial order that requires the Secretary to accept title to land into trust ... [and where the] Secretary does not have the discretion to accept or deny the request to accept title into trust."[23] In other words, a mandatory acquisition occurs when Congress directs the Secretary to acquire a parcel and removes any discretion in the administrative decision-making process.

The use of the words "may purchase" and "authorize the purchase" in the Homeland Act are clear expressions by Congress that the Secretary is to have discretion in purchasing and acquiring these two parcels. Section 5(d)(2) also permits the Secretary and the Tribe to mutually agree that the Secretary would purchase another parcel, in lieu of the Lida Ranch acreage.[24] Any purchase and subsequent acquisition are also discretionary decisions on the part of the Secretary.

Under the BIA Handbook, any proposed purchase and acquisition pursuant to section 5(d) cannot be a mandatory trust acquisition because of the discretion provided to the Secretary by Congress.

4. Federal Decisions Involving Other Tribes Have Upheld These Clear Distinctions Between Mandatory and Discretionary Trust Acquisitions.

A number of Federal decisions have upheld these distinctions between a mandatory trust acquisition and a discretionary trust acquisition. For example, a recent opinion by the Interior Board of Indian Appeals ("IBIA") on this issue stated the following in interpreting the Restoration Act of the Ponca Tribe of Nebraska, 25 U.S.C. § 983:

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[23] Bureau of Indian Affairs, Acquisition of Title to Land Held in Fee or Restricted Fee Status (Fee-to-Trust Handbook), at 5, March 16, 2016.

[24] The language in section 5(d)(2) of the Act is not without limitations, however, as the Chairwoman of the Tribe testified that these "private parcels ... were all once in tribal members' ownership and [were] lost as a result of the white man's advancement into our homeland." Statement of Pauline Esteves, Chairperson, Timbisha Shoshone Tribe, Hearing Before the Committee on Indian Affairs, United States Senate, at 28 (Mar. 21, 2000). Additionally, the Senate Committee Report is clear that "[a]ll of the parcels recommended for trust status are within the Tribe's ancestral homeland area and were identified as having particular historical, cultural, or economic importance to the Tribe." S. Rep. No. 106-327, at 4 (June 30, 2000). The Ridgecrest parcel was not previously owned by a tribal member and is outside of the Tribe's ancestral homelands, so any discretionary acquisition of this parcel pursuant to section 5(d)(2) would be inconsistent with the legislative history of the Homeland Act. The Ridgecrest parcel was selected only for gaming purposes and not because it was a parcel within the Tribe's ancestral homelands.

> The language '*shall accept*' tracks similar language in other statutes that the Board has construed as making a trust acquisition mandatory, assuming any other requirements of the applicable statute are satisfied. And it stands in marked contrast to the permissive authority granted in the last sentence of § 983b(c): 'The Secretary *may accept* any additional acreage in Knox or Boyd Counties pursuant to [her] authority under the [IRA].' (emphases added) (internal citations omitted).[25]

The Ninth Circuit Court of Appeals also has opined on this issue. In a 2003 decision involving the application of the Flathead Act of 1968 to the Confederated Salish & Kootenai Tribes, the Court stated the following:

> Congress clearly demonstrated in the Flathead Act that it knows how to use the word 'shall' when it wishes to mandate an act. Congress's use of the term 'authorized' rather than 'shall' in setting forth the Secretary's powers to dispose of or acquire land upon tribal request demonstrates its intent that the Secretary of the Interior should exercise his or her judgment in determining whether it is in a tribe's best interests to honor its request to dispose of or acquire land.[26]

5. <u>The Timbisha Shoshone Tribe Conceded that the Ridgecrest Parcel is a Discretionary Trust Acquisition.</u>

As noted earlier, in its September 2016 request to the Department to take the Ridgecrest parcel into trust under section 5(d)(2) of the Homeland Act, the Tribe conceded that this trust acquisition would be a discretionary one. The Tribe stated the following:

> The Tribe requests the Secretary to enter into a Memorandum of Agreement ('MOA') with the Tribe to acquire an alternative parcel in Ridgecrest, California (the 'Ridgecrest parcel') by mutual agreement between the Secretary and the Tribe pursuant to Section 5(d)(2) of the [Homeland] Act.
>
> The Act provides that the Secretary 'may' acquire the additional parcel, therefore it is a discretionary acquisition, not a mandatory acquisition, and

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[25] *City of Bloomfield, Nebraska v. Acting Great Plains Regional Director*, 61 IBIA 296, *7-*9 (2015). This IBIA opinion also cites four earlier cases with similar or identical holdings: (1) *Manistee County Board of Comm'rs v. Midwest Regional Director*, 53 IBIA 293 (2011); (2) *State of Minnesota v. Acting Midwest Regional Director*, 47 IBIA 122 (2008); (3) *Todd County, South Dakota v. Aberdeen Area Director*, 33 IBIA 110 (1999); and (4) *Confederated Tribes of Coos, Lower Umpqua, and Siuslaw Indians v. Portland Area Director*, 27 IBIA 48 (1994).
[26] *Confederated Salish & Kootenai Tribes v. United States*, 343 F.3d 1193, 1196-97 (9th Cir. 2003).

> the Tribe will be required to complete the fee to trust process provided for at 25 C.F.R. Part 151.[27]

Without statutory language like "shall," "require," or "must," there is no justification for interpreting the language of section 5(d) as obliging the Secretary to purchase and acquire the Ridgecrest parcel as a mandate from Congress. And it is even more unreasonable to interpret the "mutually agreed upon" language in section 5(d)(2) to mandate that the Lida Ranch parcel in Nevada should be substituted by the Secretary in favor of a parcel of land in Ridgecrest, California. As noted above, the Lida Ranch remains available for purchase from a willing seller and the Ridgecrest parcel is 265 miles away and in a different State.

Principal Deputy Assistant Secretary Roberts Was Not Authorized to Use the Secretary's Authority to Execute a Memorandum of Agreement under the Homeland Act

1. Roberts Was Not a Designee of the Secretary, as Required by the Homeland Act.

Under the Homeland Act, only the Secretary of the Interior or "the designee of the Secretary" are authorized to take actions under the Act.[28] The Merriam-Webster Dictionary defines a "designee" as "one who is designated."[29] The term "designated" or "designate" is further defined as an action "to indicate and set apart for a specific purpose, office, or duty."[30]

There is no documentation to indicate that Mr. Roberts received such a designation from the Secretary to execute this MOA, in order to use the authority of the Secretary under the Homeland Act.

In another challenge to Mr. Roberts' authority brought in 2017, the Department argued that Roberts was authorized to exercise the authority of the Assistant Secretary—Indian Affairs under a 2013 succession order that was approved by both the Assistant Secretary and the Secretary.[31] However, this succession order lists the Deputy Assistant Secretary for Policy and Economic Development, which was held by a different person than Mr. Roberts in 2016-2017.[32]

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[27] *Timbisha Shoshone Memorandum* at 1.
[28] Section 4(2) of the Homeland Act ("The term 'Secretary' means the Secretary of the Interior or the designee of the Secretary.").
[29] See https://www.merriam-webster.com/dictionary/designee (last visited on January 30, 2018).
[30] *See* https://www.merriam-webster.com/dictionary/designated (last visited on January 30, 2018).
[31] *See* Assistant Secretary—Indian Affairs, Order Dismissing Administrative Appeal, *Stand Up for California! v. Principal Deputy Assistant Secretary—Indian Affairs*, July 13, 2017.
[32] Memorandum from Kevin K. Washburn, Assistant Secretary—Indian Affairs, to Sally Jewell, Secretary, "Designation of Successors for Presidentially—Appointed, Senate-Conformed Positions," June 20, 2013.

On January 19, 2017, the then-Deputy Secretary, Michael Connor, attempted to correct this error in the delegation process in a memorandum to Mr. Roberts.[33] Deputy Secretary Connor stated in this memorandum that the Department "typically uses succession orders to delegate authority to perform the duties of vacant positions, but the succession order that currently applies to the [Assistant Secretary—Indian Affairs] is inaccurate."[34] The memorandum goes on to "ratify and approve any actions you have taken under the authority of the [Assistant Secretary—Indian Affairs]."[35]

This ratification memorandum raises a Federal Vacancies Reform Act ("FVRA") issue. Under section 3348 of the FVRA, when an office headed by a Presidential appointee subject to Senate confirmation is vacant, only the head of an agency may perform any function or duty that is required by a statute or a regulation to be performed by that appointee—*i.e.*, the Assistant Secretary—Indian Affairs.[36] In this particular circumstance, only the Secretary and the designee of the Secretary are permitted to perform functions and duties under the Homeland Act. Mr. Roberts was not designated to act on behalf of the Secretary under this Act and the FVRA does not permit any type of ratification of an unauthorized decision when the Office of the Assistant Secretary is vacant.[37]

2. Roberts' Action Did Not Comply With the Departmental Manual.

In a Stand Up casino case pending in U.S. District Court, the Department has argued that Mr. Roberts' authority to act in place of the Assistant Secretary—Indian Affairs (and the Secretary) can be found in a provision of the Departmental Manual that provides for the Principal Deputy Assistant Secretary to assume the authority of the Assistant Secretary in the "absence" of the latter.[38]

A recent decision by the U.S. District Court of the District of Columbia, involving the Consumer Financial Protection Board ("CFPB"), is highly critical of a broad reading of "absence" when an Executive Branch vacancy occurs.[39] This case involves a dispute over whether a Presidential appointee, Mick Mulvaney, or the current Deputy Director of the CFPB, Leandra English, is properly the Acting Director of the agency.

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[33] Memorandum from Michael Connor, Deputy Secretary, to Lawrence Roberts, Principal Deputy Assistant Secretary—Indian Affairs, "Authority of Assistant Secretary—Indian Affairs," January 19, 2017.
[34] *Id.*
[35] *Id.*
[36] 5 U.S.C. § 3348(a) and (b). This circumstance arose after Mr. Roberts served 210 days in 2016 as the Acting Assistant Secretary—Indian Affairs, pursuant to 5 U.S.C. §3346(a). After that time period expired, Mr. Roberts reverted back to his previous role as Principal Deputy Assistant Secretary—Indian Affairs.
[37] 5 U.S.C. § 3348(d).
[38] *See* 209 DM 8.4.B.
[39] *English v. Trump*, 2018 U.S. Dist. LEXIS 4571 (D.D.C. Jan. 10, 2018).

In siding with the Trump Administration's legal analysis, the Court evaluated certain provisions in the Dodd Frank Act, which is the statute establishing the CFPB. The pertinent language states that the Deputy Director of the CFPB serves as the acting Director of the agency "in the absence or unavailability of the Director."[40] The Court looked to various dictionary definitions and found that "absence" is defined as "a failure to appear, or be available and reachable, when expected."[41] The term "available" was defined as "immediately utilizable" or "capable of use for the accomplishment of a purpose."[42]

The Administration argued, and the Court agreed, that these two words indicate a "temporary condition, such as not being reachable due to illness or travel."[43] These circumstances were distinguishable from the resignation of the CFPB Director, Richard Cordray, which was a permanent condition.[44] The Court also found that the absence of the term "vacancy" in the statute was a conscious act by Congress, as it used the term in other parts of the Dodd-Frank Act.[45]

The facts are very similar here. The last Assistant Secretary—Indian Affairs, Kevin Washburn, resigned from his position on or around December 31, 2015. Mr. Roberts, as the "first assistant" in the office, assumed the responsibilities of the Acting Assistant Secretary for 210 days, as permitted by the FVRA. On or around August 1, 2016, Mr. Roberts reverted back to his former position as the Principal Deputy Assistant Secretary—Indian Affairs.

Like the circumstances in the CFPB case, the Assistant Secretary—Indian Affairs was not "absent" for a temporary period, as a result of sickness or out-of-town travel. Mr. Washburn resigned and a vacancy was created for almost 13 months, until January 20, 2017. Any argument that Mr. Roberts was delegated authority for 13 months in the "absence" of the Assistant Secretary is an overly broad and unreasonable interpretation of this language in the Departmental Manual, given the permanence of Mr. Washburn's resignation and the length of time—more than a year—of the vacancy in the Assistant Secretary's Office.

Conclusion

On the last day of the Obama Administration, the then-Principal Deputy Assistant Secretary—Indian Affairs Lawrence Roberts executed an MOA to change the classification of a gaming trust application in Ridgecrest, California from a discretionary trust acquisition to a mandatory one. Mr. Roberts relied on an incorrect interpretation of the Timbisha Shoshone Homeland Act to justify his decision.

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[40] 12 U.S.C. § 5491(b)(5)(B).
[41] *English v. Trump,* at *32.
[42] *Id.*
[43] *Id.*
[44] *See id.* at *33.
[45] *See id.* at *32.

The Act provides for 5 parcels of National Park Service and Bureau of Land Management land to be taken into trust as mandatory acquisitions. However, two other privately-owned parcels of land—one in California and one in Nevada—are provided for as discretionary trust acquisitions. Through the use of the words "may" and "authorize," the Secretary is empowered to use his or her discretion to purchase and acquire these two parcels, if the owners of these parcels are willing to sell.

The Secretary is further authorized to use his or her discretion to substitute another property for the Nevada parcel, although it is doubtful that Congress intended to empower the Secretary to substitute with a parcel that is in another state, outside the aboriginal lands of the Timbisha Shoshone, and at least 265 miles driving distance from the Nevada parcel authorized to be purchased by the Act.

The legal interpretation of the Homeland Act advanced in this letter is consistent with the language in the BIA Fee-to-Trust Handbook and follows the holdings in multiple Federal decisions that have analyzed the differences between mandatory and discretionary trust acquisitions. The Timbisha Shoshone Tribe also conceded in its September 2016 request to the Department that section 5(d)(2) of the Homeland Act only provides for discretionary purchases and acquisitions of the two parcels at issue.

The MOA also incorrectly asserts that the Ridgecrest parcel is "less than five miles from or within the Tribe's ancestral homelands."[46] This is not accurate and the Tribe has not offered sufficient historical documentation to justify this claim.

Additionally, this letter questions the authority of Mr. Roberts in executing this MOA with the Tribe. He was not authorized as a designee of the Secretary under the Homeland Act. The 2013 succession orders for the Assistant Secretary—Indian Affairs designated a different Deputy Assistant Secretary once a vacancy occurs in this Office. And the delegation of authority in the Departmental Manual applicable to an "absence" by the Assistant Secretary does not apply in circumstances where a vacancy is created through a resignation and the vacancy lasts for almost 13 months.

Mr. Roberts' actions now mean that this Timbisha Shoshone trust land application will not be evaluated for compliance with 25 C.F.R. Parts 151 and 292, as well as with NEPA. The local community, the State of California, and the City of Ridgecrest will not be permitted to provide input and comments during the application review process.

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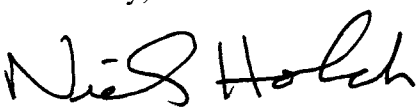
[46] *See Memorandum of Agreement* at 2.

To correct this problem, Stand Up and the citizens request that you use your authority under 43 C.F.R. § 4.5(b) to review, reconsider, and withdraw this MOA. This application should then be processed as an off-reservation discretionary trust application. If you believe that there are legal issues that should be further considered in this matter, Stand Up suggests that you establish a briefing schedule for interested parties before you make a final decision.

Department regulations at 25 C.F.R. § 2.8 state that this request is entitled to an answer within 10 days of receipt, including the establishment of a later date by which a decision shall be made.

My clients and I appreciate your consideration of this matter. Please contact me at 202-624-1461 or via email at nholch@holcherickson.com with any questions, or if you need additional information regarding this request.

Sincerely,



Niels Holch

cc: The Honorable David Bernhardt, Deputy Secretary
James Cason, Associate Deputy Secretary
John Tashuda, Principal Deputy Assistant Secretary—Indian Affairs