NOT YET SCHEDULED FOR ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5285

STAND UP FOR CALIFORNIA!, PATTY JOHNSON, JOE TEIXEIRA, and LYNN WHEAT,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, DAVID BERNHARDT, in his official capacity as Secretary of the Interior, BUREAU OF INDIAN AFFAIRS, and TARA M. SWEENEY, in her capacity as Assistant Secretary-Indian Affairs,

Defendants-Appellees,

WILTON RANCHERIA, CALIFORNIA,

Intervenor-Appellee.

On Appeal from the United States District Court for the District of Columbia
Civil Action No. 1:17-cv-00058-TNM
Hon. Trevor N. McFadden, Judge Presiding

FINAL OPENING BRIEF OF STAND UP FOR CALIFORNIA!, PATTY JOHNSON, JOE TEIXEIRA, and LYNN WHEAT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a), the following is a statement of the parties, amici, rulings under review, and related cases:

I. Parties and Amici

Stand Up For California!, Patty Johnson, Joe Teixeira, and Lynn Wheat (collectively, "Stand Up") were plaintiffs in the district court and are appellants in 19-5285.

The United States Department of the Interior, David Bernhardt, in his official capacity as Secretary of the Interior, the Bureau of Indian Affairs, and Tara M. Sweeney, in her official capacity as Assistant Secretary–Indian Affairs, were defendants in the district court and are appellees in 19-5285.

Wilton Rancheria, California, appeared as an intervenor-defendant in the district court and is an intervenor-appellee in this Court.

There were no amici in the district court, and no amici have thus far sought to participate in this Court.

II. Rulings Under Review

Appellants in 19-5285 are appealing the following rulings of the United States District Court:

(1) the Court Order entered on February 28, 2018 (ECF Nos. 53, 54), granting summary judgment on Counts I and II in favor of defendants and intervenor-defendant; and

(2) the Court Order entered on October 7, 2019 (ECF Nos. 109, 110), granting summary judgment on Counts III through V in favor of federal defendants and intervenor-defendant.

III. Related Cases

There are no related cases.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Stand Up for California! represents that it has no parent corporation, and that no publicly held corporation owns 10% or more of its stock. This entity has not issued stock.

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GLOSSARY

APA:	Administrative Procedure Act
AS-IA:	Assistant Secretary–Indian Affairs
BIA:	Bureau of Indian Affairs
CRA:	California Rancheria Act of 1958
Department:	Department of the Interior
DEIS:	Draft Environmental Impact Statement
EIS:	Environmental Impact Statement
FVRA:	Federal Vacancies Reform Act
FEIS:	Final Environmental Impact Statement
IRA:	Indian Reorganization Act of 1934
IBIA:	Interior Board of Indian Appeals
NEPA:	National Environmental Policy Act
NIGC:	National Indian Gaming Commission
OLC:	Office of Legal Counsel
Principal Deputy:	Principal Deputy Assistant Secretary–Indian Affairs
PTO:	Patent and Trademark Office
ROD:	Record of Decision
Secretary:	The Secretary of the Interior
Stand Up:	Stand Up for California!, Patty Johnson, Joe Teixeira, and Lynn Wheat
Wilton:	The Wilton Rancheria Tribe

STATEMENT OF JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331, and issued a final order disposing of all claims on October 7, 2019. Stand Up filed a timely notice of appeal on October 21, 2019. The Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

The Department of the Interior (Department) approved the trust acquisition of land in Elk Grove, California for the Wilton Rancheria (Wilton) and declared the land eligible for gaming. Stand Up raises three issues in this appeal:

1. Whether the Department violated 25 C.F.R § 151.12 and the Administrative Procedure Act (APA) when the Principal Deputy Assistant Secretary–Indian Affairs (Principal Deputy) issued the Elk Grove decision and the Department treated the decision as final agency action and subsequently accepted title in trust.

2. Whether the Department violated Section 5 of the Indian Reorganization Act of 1934 (IRA), Section 10(b) of the California Rancheria Act (CRA), and the APA by acquiring the land in Elk Grove in trust on behalf of Indians to whom "all statutes of the United States which affect Indians because of their status as Indians [are] inapplicable."

3. Whether the Department violated the National Environmental Policy Act (NEPA) and the APA by announcing a new proposed action in a

final environmental impact statement (FEIS) and failing to adequately evaluate that action before making the trust decision.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are included in the Addendum.

STATEMENT OF THE CASE

I. Statement of Facts

A. History of the Indians at the Wilton Rancheria

In 1928, the Secretary of the Interior (Secretary) purchased 37.88 acres of land "for use by the [approximately 150] landless California Indians" living near Sacramento.[1] Designated the Wilton Rancheria, it—like many other rancherias—received varying use.[2] By the early 1950s, there was consensus that the rancheria program had failed and rancherias should be liquidated.[3] After extended debate, Congress determined that rancheria land and assets would be distributed to assignment holders or other Indians (distributees), as determined by the Secretary.[4] Congress chose not to rely on membership rolls—if any existed—because the land had been acquired for use by landless California Indians, not specific bands.[5]

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[1] JA2482-86. The Secretary acquired the land pursuant to the California Mission Indian Relief Act of 1891, as amended.

[2] *Id.*; *see also* JA2690-91 (Memorandum Opinion, *Rancheria Act of August 18, 1958*, U.S. Dep't of the Interior 1882, 1883 (Aug. 1, 1960)).

[3] JA2692.

[4] JA2692-95.

[5] *Id.*

The Indians living at the Wilton Rancheria (Wilton Indians) elected unanimously in 1955 to have rancheria lands and assets distributed to themselves in fee.[6] Congress accordingly included the Wilton Rancheria as one of 41 rancherias to be terminated under the CRA, Pub. L. No. 85-671, 72 Stat. 619 (Aug. 18, 1958).

To implement the Act, the Department prepared a distribution plan in consultation with the Wilton Indians, and the plan was formally approved on September 11, 1959.[7] After certifying the completion of improvements and satisfaction of other requirements, the Secretary distributed fee title to Rancheria property to 11 distributees in 1961.[8] On September 22, 1964, the Secretary published notice that the 31 Indians named in the notice—the 11 distributees and their dependents—"are no longer entitled to any of the services performed by the United States for Indians because of their status as Indians, and all statutes of the United States which affect Indians because of their status as Indians, shall be inapplicable to them."[9]

Forty-five years later, East-West Gaming entered into an agreement with a group self-identified as the "Wilton Rancheria," pursuant to which East-West Gaming agreed to fund federal recognition efforts so the group could

[6] JA2493.

[7] JA913-18.

[8] JA892-93.

[9] JA894.

develop a casino in exchange for a share of gaming revenues.[10] The Wilton Rancheria subsequently sued the Department seeking restoration based on the Department's alleged failure to improve roads, water, and sewers prior to termination a half-century earlier.[11]

The Department and Wilton stipulated to a settlement in June 2009 in which the Department agreed—without factual findings—that the Rancheria was not lawfully terminated and that distribution of rancheria assets was not made pursuant to the Act.[12] Under the settlement, the Department agreed to add the "Wilton Rancheria" to the list of federally recognized tribes, to accept land in trust on its behalf, and to restore the individual and collective status members had prior to termination.[13]

B. The Department's Review of Wilton's Trust Applications

By 2013, Wilton had selected a site in Galt, California for its casino.[14] On December 4, 2013, the Department published a notice of intent to prepare an environmental impact statement (EIS), which stated that Wilton had asked the Department to acquire "approximately 282 acres of fee land [in Galt] in

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[10] *See* https://www.nigc.gov/images/uploads/ManagementReviewLetters/20110421WiltonRancheriaEastWestGamingLLC.pdf at 2.

[11] JA2544.

[12] JA896-920.

[13] *Id.*

[14] JA921-23; JA924-25.

trust . . . upon which the Tribe would construct a gaming facility."[15] The notice identified the trust acquisition of the Galt site for a casino as the proposed action under consideration.[16]

For the next three years, the Department told the public that it was considering Wilton's request to have the Galt site acquired in trust for a casino. The Department held a scoping hearing in Galt on December 19, 2013, and invited the City of Galt—the local government with jurisdiction over the 282 acres—to participate as a cooperating agency.[17] The scoping report for the project described the proposed action and indicated that the Department would evaluate three alternatives on the Galt site itself—the proposed action, a reduced intensity casino, and retail development—along with two alternative gaming developments on fee land located on and adjacent to the boundaries of the historic rancheria, one gaming alternative on a 28-acre site in Elk Grove, and the no action alternative.[18]

Two years later, the Department published notice of the draft EIS (DEIS), which again identified the acquisition of the Galt site as the proposed action.[19] And at the public hearing on the DEIS—held in Galt—the Department circulated a handout describing the proposed action as the transfer of

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[15] JA943.

[16] *Id*.

[17] JA945; JA1074.

[18] JA968.

[19] JA1339-40.

the Galt site in trust for casino development.[20] Anyone relying on the Department's notices understood that Wilton wanted to build a casino in Galt, and the Department was deciding whether to approve that proposed action.

Others, however, learned from Wilton that instead of building a casino in Galt, Wilton had decided that it might prefer a casino elsewhere.[21] The Department said nothing—that is, until December 14, 2016, when it published notice of its FEIS, announcing that Wilton had asked the Department "to take into trust approximately 36 acres of land (known as the Elk Grove Mall site) . . . to construct a casino, hotel, parking area, and other ancillary facilities."[22] Thirty-six days later—just two days after the close of the FEIS comment period and on the last day of the Obama Administration—the Department issued the ROD approving the transfer of the Elk Grove site in trust for a casino.[23] The Department did not then, nor has it ever, published notice of the decision in the Federal Register.

II. The Legal Proceedings

A. Motion for TRO

Agencies usually do not initiate new proceedings between election and inauguration day. In this case, however, the Department sent a Notice of (Gaming) Land Acquisition Application for the Elk Grove site to 15 entities on

[20] JA1341.

[21] JA1384-399.

[22] JA2456; JA2458.

[23] JA2533-2622.

November 17, 2016, asking for comments within 30 days.[24] When California asked the Department for an extension, the Department refused to grant the State more than a week, despite having omitted from the Notice a copy of the trust application, a map of the Elk Grove parcel, and other important information.[25] The unusual timing of the Notice, combined with the Department's December 14, 2016 publication of the FEIS made it clear that the Department was planning to issue a final trust decision on Wilton's new application before January 20, 2017.[26]

Stand Up could not wait for the Department to issue the ROD because a quick trust acquisition would moot multiple state proceedings challenging Elk Grove's efforts to remove encumbrances that limited permissible uses of the site thereby eliminating the State's jurisdiction.[27] The City of Elk Grove had approved a modified proposal to develop the Elk Grove site as part of an outdoor mall in 2014, which was recorded as an encumbrance on the land under California law.[28] For that reason, Stand Up asked the Department on multiple occasions to delay title transfer to allow Stand Up to seek emergency

[24] JA1403-1409.

[25] JA2468-470; JA2459.

[26] JA2454.

[27] JA2463-66 (letter raising concerns regarding effect of decision on state proceedings).

[28] JA2463-64.

judicial relief.[29] The Department first ignored and then denied Stand Up's requests.[30]

With no other option, Stand Up sued the Department on January 11, 2017, and sought a temporary restraining order to enjoin the transfer of title upon approval of Wilton's application.[31] During the January 13 hearing, the Department represented that both the timing and the outcome of the final decision were uncertain and complained that Stand Up had not formally cited 5 U.S.C. § 705 in making its stay requests.[32] The court denied Stand Up's motion on January 13.[33] On January 17, 2017, Stand Up filed a request explicitly citing Section 705, asking the Department to "postpone the effective date of action taken by it [i.e., the trust decision], pending judicial review."[34] Six days after the hearing—on the evening of January 19—the Department approved the trust acquisition of the Elk Grove site.[35]

When Stand Up learned of the Department's decision from other sources, it asked the Department for a copy of the decision and the status of

[29] JA2471; JA2463-64; JA2476.

[30] JA2494.

[31] JA1.

[32] JA72, 108-112.

[33] JA126.

[34] JA2498-99.

[35] JA2533-2622 (ROD); JA2513.

its Section 705 request.[36] The Department stated that it would not transfer title to the Elk Grove site before resolving the Section 705 request, but refused to answer Stand Up's entreaties for a meeting to discuss the ROD or to negotiate a briefing schedule.[37] The Department acquired title to the Elk Grove site on February 10, 2017, immediately before informing Stand Up that it was denying the Section 705 request.[38]

B. Stand Up's Administrative Appeal

Pursuant to 25 C.F.R. § 151.12(c), only the Secretary and the Assistant Secretary–Indian Affairs (AS-IA) have authority to issue trust decisions that are final for the Department. Because the ROD was signed by the Principal Deputy—not the Secretary or the AS-IA—Stand Up asked the Department why it treated the ROD as final and acquired the Elk Grove site in trust.[39] The Department declined to provide an explanation.[40]

Stand Up appealed the decision to the Interior Board of Indian Appeals (IBIA) on February 21, 2017, before the statute of limitations applicable to non-final trust decisions could run.[41] On February 24, the IBIA ordered the parties to address the question whether the ROD was final agency action for

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[36] JA2514.

[37] JA19-20 at ¶¶ 5, 7; JA23-24; JA25-26.

[38] JA28-30; JA29-38.

[39] JA39-42.

[40] JA43-65.

[41] *Id.*

jurisdictional purposes.[42] The Acting AS-IA assumed jurisdiction of the appeal from IBIA on March 7, 2017.[43] After five months of deliberation, the Acting AS-IA dismissed Stand Up's IBIA appeal on the grounds that the Departmental Manual authorized the Principal Deputy to exercise the authority delegated to the AS-IA such that the ROD was final.[44]

C. The District Court's Orders and Opinions

On October 1, 2017, Stand Up filed a motion for summary judgment, arguing that agency regulations limit final trust authority to the Secretary and the AS-IA only.[45] The Department and Wilton, as Intervenor-Defendant, filed cross-motions.[46] The court denied Stand Up's motion and granted the defendants' motions, concluding that: (1) 25 C.F.R. § 151.12(c) does not limit final trust authority to the Secretary and AS-IA; and (2) the Principal Deputy was properly delegated the authority of the AS-IA under Departmental Manuals.[47] The district court upheld the Department's withholding of all documents dated after January 19, 2017, based on its conclusion that the ROD was final agency action.[48]

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[42] JA66-71.

[43] JA200-03.

[44] JA229-239.

[45] ECF-33.

[46] ECF-40, 41.

[47] JA328-354; JA355-56.

[48] JA357-58.

After challenging the adequacy of the administrative record and obtaining discovery, Stand Up moved for summary judgment on April 1, 2019, arguing that: (1) the CRA prohibited the Department from acquiring the Elk Grove site in trust because Section 10 of the CRA makes Section 5 of the IRA inapplicable to Wilton members; and (2) the Department violated NEPA by, *inter alia*, announcing a new proposed action in an FEIS.[49] The Department and Wilton filed cross-motions.[50]

On October 7, 2019, the court denied Stand Up's motion and granted the Department and Wilton summary judgment.[51] The court held that: (1) the Department's stipulated settlement with Wilton overrode the statutory prohibition in the CRA applicable to Wilton members; and (2) the Department did not violate NEPA by announcing a new proposed action in an FEIS because the Department's analysis of the Elk Grove site was adequate and the public had adequate notice.

Stand Up timely filed this appeal on October 7, 2019.

SUMMARY OF ARGUMENT

Departmental regulations state that final trust decisions must be made by either the Secretary or the AS-IA. All other decisions are non-final. In this case, the Principal Deputy made the decision to acquire the Elk Grove site in trust. The Department treated that decision as final and acquired title to the

[49] ECF-90; ECF-91.

[50] ECF 96; ECF-98.

[51] JA857-889; JA890-91.

site. Those actions stripped Stand Up of its right to an administrative appeal and mooted environmental claims related to the site that were then pending in a California state court. The Department claims that it can and did delegate final trust authority to the Principal Deputy. But none of the authorities it cites override the clear language of the regulation, and there is no evidence that the Department properly delegated the Principal Deputy this authority.

The California Rancheria Act of 1958 makes all federal statutes that affect Indians because of their status as Indians inapplicable to anyone who received rancheria lands or assets under the Act. The Federal Register establishes that the members of Wilton received Rancheria lands under the Act. Despite the plain language of the CRA and the uncontested facts, the Department invoked Section 5 of the Indian Reorganization Act of 1934—a statute authorizing the Secretary to acquire land in trust "for the purpose of providing land for Indians"—to acquire the Elk Grove site in trust. The Department claims that the CRA's prohibition does not apply here because the Department entered into a stipulated settlement in 2009. But a stipulated settlement does not excuse the Department from complying with a federal statute.

NEPA requires agencies to prepare an EIS for every proposed action that will significantly affect the quality of the human environment. It also requires agencies to prepare supplemental EISs (SEIS) when there is a significant change in a proposed action. The Department did not prepare an EIS or an SEIS for the Elk Grove casino. Rather, it prepared an EIS for a casino in Galt and substituted the Elk Grove casino as the proposed action in the final EIS.

The fact that the Department considered the Elk Grove site as an alternative does not excuse it from following the regulations that apply to proposed actions or from relying on an inadequate document.

The Court should require the Department to comply with the federal statutes and regulations that limit its authority and govern its decision-making. It should vacate the trust decision and order the removal of the Elk Grove site from trust.

STANDARD OF REVIEW

The Court's "review is de novo, as though on direct appeal from the agency." *Catholic Healthcare West v. Sebelius*, 748 F.3d 351, 353 (D.C. Cir. 2014) (citation omitted). The Court must "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction, authority, or limitations," or adopted "without observance of procedure required by law." 5 U.S.C. § 706(2); *Baltimore Gas and Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97-98 (1983).

ARGUMENT

I. Because the Principal Deputy lacked authority to issue final trust decisions, the Elk Grove acquisition and subsequent transfer of title violated agency regulations.

By regulation, the Secretary allows only two officials to make final trust decisions. Section 151.12(c) provides that "[a trust] decision made by the Secretary, or the Assistant Secretary–Indian Affairs pursuant to delegated authority, is a final agency action under 5 U.S.C. 704 upon issuance." 25 C.F.R. §

151.12(c). If either approves a trust request, the "Assistant Secretary" must "[i]mmediately acquire the land in trust under § 151.14 on or after the date such decision is issued and upon fulfillment" of title review requirements. *Id.* § 151.12(c)(2)(i-iii).

The Department treated this trust decision as final agency action and immediately acquired the Elk Grove site in trust upon fulfillment of title review requirements. But the trust decision was not made by the Secretary or the AS-IA. Instead, it was made by the Principal Deputy—an official not authorized to make final trust decisions under Section 151.12 at all.

When asked about this "discrepancy," the Department spent five months deliberating before deciding that the Principal Deputy had been delegated final trust authority by Departmental Manual, contrary to the plain text of Section 151.12(c). The district court agreed and offered the observation: "[I]t turns out that, in practice, there are very few duties that cannot be delegated to an 'acting' officeholder, the second-in-command . . . , or even another official who acts in the place of the principal pursuant to agency regulations or orders."[52]

That is not correct. When the Secretary revised Section 151.12 in 2013, he unambiguously restricted who can make final trust decisions to the Secretary and the AS-IA. Allowing virtually unfettered redelegation of that power is contrary to Section 151.12's text, structure, history, and purpose, and raises

[52] JA328-29.

constitutional concerns. By treating the ROD as final, the Department deprived Stand Up of its administrative appeal rights. And by prematurely acquiring title to the Elk Grove site in trust, the Department mooted Stand Up's pending state claims by negating state jurisdiction.[53] Because the Department exercised authority it does not have, this Court should reverse.

A. The Department violated Section 151.12(c) when the Principal Deputy issued the trust decision and the Department subsequently acquired the Elk Grove site in trust.

It is "axiomatic that an agency is bound by its own regulations." *Texas v. EPA*, 726 F.3d 180, 200 (D.C. Cir. 2013) (internal quotation and citation omitted); *see also Crawford v. FCC*, 417 F.3d 1289, 1297 (D.C. Cir. 2005) ("[A]n agency's failure to follow its own regulations is fatal to the deviant action.") (quoting *Florida Inst. of Tech. v. FCC*, 952 F.2d 549, 553 (D.C. Cir. 1992)). The Department violated two unequivocal constraints on its trust authority: (1) the officials authorized to decide trust requests; and (2) the finality of such decisions.

1. Section 151.12(c) unambiguously limits the authority to issue final trust decisions to the Secretary and AS-IA.

Section 5 of the IRA authorizes "the Secretary of the Interior" to acquire land in trust "for the purpose of providing land for Indians." 25 U.S.C. § 5108. The regulations implementing Section 5 are codified at 25 C.F.R. Part 151. In 2013, the Secretary revised Section 151.12 to address how the Department takes

[53] *See Patty Johnson, et al. v. City of Elk Grove, et al.*, Sacramento County Superior Court, No. 34-2016-80002493.

action on trust requests. *See Land Acquisitions: Appeals of Land Acquisition Decisions*, 78 Fed. Reg. 67,928 (Nov. 13, 2013).

Under Section 151.12(c), the Secretary or the AS-IA may decide a trust application personally, in which case the decision is final agency action. *See* 25 C.F.R. § 151.12(c) ("A decision made by the Secretary, or the Assistant Secretary–Indian Affairs pursuant to delegated authority, is a final agency action under 5 U.S.C. 704 upon issuance."). Under subsection (d), a BIA official may also decide a trust application, but such decisions are non-final. *See id*. § 151.12(d) ("A decision made by a Bureau of Indian Affairs official pursuant to delegated authority is not a final agency action of the Department . . . until administrative remedies are exhausted under part 2 of this chapter or until the time for filing a notice of appeal has expired and no administrative appeal has been filed.").

The preamble to the final rule restates what the plain language establishes: "To carry out the Secretary's delegated authority under the IRA, *decisions to acquire land in trust are delegated either to the AS-IA or to a BIA official*." 78 Fed. Reg. at 67,929 (emphasis added). The Secretary intended the rule to "[p]rovide clarification and transparency to the process for issuing decisions by the Department, *whether the decision is made by the Secretary, Assistant Secretary—Indian Affairs (AS-IA), or a Bureau of Indian Affairs (BIA) official*." *Id.* (emphasis added). To that end, the Secretary structured Section 151.12 so that the identity of the decisionmaker would dictate the finality of the decision and, thus, the applicable procedural requirements. *Compare* 25 C.F.R. §

151.12(c)(2)(i-iii) with 151.12(d)(2-4). The process for issuing decisions is clear and transparent only if the Department adheres to the division of authority the Secretary established in the 2013 revisions to Section 151.12.

Here, the Principal Deputy—who is not the Secretary, the AS-IA, or a BIA official—issued the trust decision.[54] The regulation does not authorize the Principal Deputy to issue a final trust decision. It necessarily follows that the Department lacked authority to acquire the Elk Grove site in trust. *See* 25 C.F.R. § 151.12(c)(2)(iii) (requiring trust acquisition for final agency action only). This Court does "not hesitate to overturn agency action as arbitrary and capricious if the agency fails to 'comply with its own regulations.'" *Nat'l Biodiesel Bd. v. Envtl. Prot. Agency*, 843 F.3d 1010, 1018 (D.C. Cir. 2016) (quoting *Environmentel, LLC v. FCC*, 661 F.3d 80, 85 (D.C. Cir. 2011)). It should not hesitate here.

2. The district court erred in concluding that Section 151.12 permits redelegation.

The district court did not apply Section 151.12 as written, but instead concluded that Section 151.12(c) "must be interpreted against a background presumption of delegability," such that virtually any Department official can issue final trust decisions if properly delegated authority.[55] That was error, and the Court should reverse.

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[54] *See* JA2674, 130 DM 2.1 ("The Bureau of Indian Affairs is headed by a Director, who reports to the Principal [Deputy AS-IA]."), and JA2672, 110 DM 8 (Principal Deputy serves in Office of the AS-IA).

[55] JA338.

When interpreting federal statutes, courts generally presume that the powers Congress assigns are delegable "absent affirmative evidence of a contrary congressional intent." *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004). That is because "Congress regularly gives heads of agencies more tasks than a single person could ever accomplish, necessarily assuming that the head of the agency will delegate the task to a subordinate officer." *Ethicon Endo-Surgery, Inc. v. Covidien LP*, 812 F.3d 1023, 1031 (Fed. Cir. 2016).

That rationale, however, has limited application in the context of regulations promulgated by an agency. When Congress enacts a statute, it assumes that the head of the agency will allocate responsibility for implementing the statute by assigning appropriate tasks to appropriate officials—typically through rulemaking. And when agencies promulgate regulations to implement a statute, the expectation is that the regulations will allocate statutory responsibilities to agency officials in reasonably clear terms. Applying the presumption of delegability to regulations, therefore, is likely to introduce uncertainty and potentially undermine the head of the agency's authority by negating what is otherwise a clear division of responsibility.

Policy concerns aside, the presumption simply does not apply to the Part 151 regulations. Like 25 U.S.C. § 5108, the Part 151 regulations make the "Secretary" responsible for trust decisions. *See* 25 C.F.R. Part 151 generally. The regulations also define the "Secretary" as "the Secretary of the Interior *or authorized representative*." *Id.* § 151.2(a) (emphasis added). There is no reason to apply a presumption of delegability to regulations that expressly allow

redelegation. Nor is there any reason to apply the presumption after the Secretary has chosen to eliminate that delegation from a key regulation. When the Secretary identified "the Secretary and the Assistant Secretary . . . pursuant to delegated authority" as the two officials having the power to issue final trust decisions, he withheld that power from other officials. *See Setser v. United States*, 566 U.S. 231, 238 (2012) (noting that, under the interpretive canon of *expressio unius est exclusio alterius*, a provision conferring "authority in only specified circumstances could be said to imply that it is withheld in other circumstances"); *see also United States v. Mango*, 199 F.3d 85, 90 (2d Cir. 1999) ("[A] specific grant of power to an executive official to delegate a function to a named subordinate may be persuasive evidence that Congress did not intend subdelegation to any other official.")

The Secretary explained his decision to authorize the AS-IA, but not others, to issue final trust decisions. In a section entitled, *Who the Decision Maker Should Be*, the Secretary explained that "[t]rust acquisition decisions issued by the AS-IA involve several levels of internal review prior to issuance." 78 Fed. Reg. at 67,934. Decisions made by subordinate officials do not undergo the same several levels of review—namely, they lack final review by the AS-IA, who is a Presidentially-appointed, Senate-confirmed officer. This limitation is unsurprising—decisions by the Principal Deputy are not final as a rule. With the exception of decisions by the AS-IA, "[n]o decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final." 25 C.F.R. § 2.6. That is true even when the AS-IA

assigns a Deputy responsibility for resolving an administrative appeal of a decision. *See id.* § 2.20 (allowing Deputies to resolve appeals on a non-final basis). Had the Secretary intended to allow the AS-IA to redelegate final trust authority to a subordinate, the section addressing *Who the Decision Maker Should Be* was the place to say so.

The history of the Part 151 regulations confirms the Secretary's intent to limit final decision-making authority. In 1991, the Secretary proposed changes to Part 151 to govern trust applications for land located outside of, and non-contiguous with, reservation boundaries. *See* 56 Fed. Reg. 32,278, 32,279-80 (July 15, 1991). The proposed rule assigned the AS-IA responsibility for notifying local governments and issuing final decisions. *Id.* at 32,280. In the final rule, however, the Secretary eliminated the references to the AS-IA to "ensure that all actions will be taken by an authorized official, since 25 CFR 151.2(a) of this Part will define 'Secretary' to mean 'the Secretary of the Interior or authorized representative.'" 60 Fed. Reg. 32,874, 32,878 (June 23, 1995). The Secretary anticipated that "local BIA officials" would continue to provide notice, and he recognized that the proposed rule's use of "Assistant Secretary" would have prevented that practice. *Id.* (noting that decisions made below the AS-IA level are appealable, while those of the AS-IA are final).

Further, had the Secretary not wanted to limit redelegation when he revised Section 151.12, he would have modified "Assistant Secretary" with "or authorized representative"—not "pursuant to delegated authority." The phrase "pursuant to delegated authority" in this context is limiting and defines the

source of the AS-IA's authority to act. Nor can "Secretary" be read as "Secretary or authorized representative" in Section 151.12(c). Doing so would render the phrase "or the Assistant Secretary–Indian Affairs pursuant to delegated authority" superfluous. *See TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (a regulation, like a statute, should "be so construed that, if it can be prevented, no clause" is rendered "superfluous, void or insignificant") (citations omitted). The AS-IA is—by law and delegation—the Secretary's "authorized representative." *See* JA2689 (Reorganization Plan No. 3 of 1950); JA2680-81.

The Secretary did not have to expressly prohibit redelegation, as the district court suggests.[56] The Supreme Court's decision in *United States v. Giordano*, 416 U.S. 505 (1974), establishes that prohibitory language is not necessary. In *Giordano*, the Court analyzed 18 U.S.C. § 2516, which provides that "'(t)he Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize' an application for intercept authority." 416 U.S. at 513. The Court observed that Section 2516 did not forbid redelegation, as—for example—the Civil Rights Act of 1968 did by directing the Attorney General or the Deputy Attorney General to certify certain prosecutions, "which function of certification may not be delegated." *Id.* at 514 (discussing 18 U.S.C. § 245(a)(1)) (internal quotation omitted). The Court granted that there was no "language forbidding redelegation," but it concluded that Section 2516, "*fairly read*, was intended to limit the power to authorize

[56] JA339-340 (discussing the lack of prohibitory language).

wiretaps applications to the Attorney General himself and to any Assistant Attorney General he might designate." *Id.* (emphasis added).

Nor is it correct that Section 151.12 is not a "delegation regulation" so that reading it to preclude redelegation was inappropriate.[57] In *Ethicon*, the court interpreted 3 U.S.C. § 3(b)(3) as not cabining the authority of the Director of the Patent and Trademark Office (PTO) to delegate tasks. *Ethicon*, 812 F.3d at 1032-33. That provision, however, is part of the organic statute establishing the PTO. It serves as a "source of authority for the Director to appoint subordinates and assign them tasks," but it is "not primarily a delegation provision at all." *Id.*

The opposite is true here. Section 5 of the IRA authorizes "[t]he Secretary of the Interior . . . to acquire" lands in trust "for the purpose of providing lands for Indians." 25 U.S.C. § 5108. The Part 151 regulations implement Section 5 by creating a process for reviewing trust applications. *See, e.g.*, 25 C.F.R. § 151.1 ("These regulations set forth the authorities, policy, and procedures governing the acquisition of land by the United States in trust status."). Section 151.12(c) allocates final decision-making authority to the Secretary and AS-IA and further assigns the AS-IA responsibility for executing final trust decisions. Unlike 3 U.S.C. § 3(b)(3), Section 151.12 obviously "delegat[es] a specific named function to a specific named official" and can thus be read as limiting

[57] JA340.

delegation. *Ethicon*, 812 F.3d at 1033 (citing *Giordano*, 416 U.S. at 513 and *Mango*, 199 F.3d at 90).

Finally, interpreting Section 151.12(c) to allow redelegation raises serious constitutional concerns. The district court rejected those concerns, apparently "due to [Stand Up's] overemphasis on the finality of the action."[58] While it is not entirely clear what the court was objecting to, the finality of the action is precisely what raises constitutional concerns. Trust acquisitions have significant consequences for the jurisdictional balance between the federal government and the states. As the Supreme Court observed, "complex interjurisdictional concerns . . . arise when a tribe seeks to regain sovereign control over territory." *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 220-21 (2005). Land taken into trust is exempt from state and local taxation, 25 U.S.C. § 5108, and by agency regulation, state civil and regulatory jurisdiction and local zoning requirements, *see* 25 C.F.R. § 1.4; *DeCoteau v. Dist. Cty. Court for Tenth Judicial Dist.*, 420 U.S. 425, 428 (1975).

The 2013 revisions to Section 151.12 only raise the stakes. The Secretary revised Section 151.12(c) to require the AS-IA to "[i]mmediately acquire the land in trust . . . on or after the date such decision is issued." 25 C.F.R. § 151.12(c)(2)(iii). If the Department completes title review requirements in advance of a decision, the AS-IA may acquire land in trust before state and local governments receive notice. *See id.* § 151.12(c) (requiring only "prompt"

[58] JA349 n.13.

publication in the Federal Register). Such significant power should not reside in an official who is not politically accountable for his decisions. As Justice Alito observed, "nothing final should appear in the Federal Register unless a Presidential appointee has at least signed off on it." *Dep't of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 64 (2015) (Alito, J., concurring).

The Principal Deputy purported to exercise the authority of the AS-IA to take a final action for the Department. His decision was not directed or supervised by any Presidentially-appointed, Senate-confirmed officer. Reading Section 151.12(c) to preclude redelegation is not only consistent with the text, it avoids these constitutional concerns. *See, e.g., Abbott-Northwestern Hosp. v. Leavitt*, 377 F. Supp. 2d 119, 130 n.7 (D.D.C. 2005) (regulations should not be construed to raise constitutional concerns).

B. The Principal Deputy was not properly delegated authority to act on behalf of the AS-IA.

Even if Section 151.12(c) could plausibly be read to permit redelegation, there was no valid redelegation here. There is nothing in the ROD or the record to indicate that anyone delegated to the Principal Deputy the AS-IA's authority to issue final trust decisions or to decide this particular application. Nor do the delegations the court relied on provide the Principal Deputy with the necessary authority.

On January 19, 2017, the Department had three legally permissible options. It could have had the Secretary issue a final trust decision. It could have had a BIA official issue a non-final trust decision. Or it could have simply

waited until the next Administration took office to have the new AS-IA make a decision. But the Department did none of these things. The Department tried to cobble together a last-minute delegation, violating internal procedures and Section 151.12(c).

1. The district court erred in relying on the delegations in the Departmental Manual, because those delegations only apply when the AS-IA is absent, not when the office is vacant.

Relying on delegations in 209 DM 8.1 and 8.4, the district court concluded that "the AS-IA is authorized to act on behalf of the Secretary, and the Principal Deputy Assistant Secretary has broad authority to act on behalf of his boss, the AS-IA, or in lieu of the AS-IA if the AS-IA's office is vacant."[59] That was wrong.

As an initial matter, general delegations contained in a Departmental Manual cannot supersede the specific directives of Section 151.12(c). *See Schweiker v. Hansen*, 450 U.S. 785, 789 (1981) (agency manual is not binding where it is contrary to a published regulation); *see also NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 941 (2017) ("[I]t is a commonplace of statutory construction that the specific governs the general.") (quoting *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012)). Moreover, 209 DM 8.3 states that redelegation is not permitted where "prohibited by statute, Executive order, *or limitations established by other competent authority*." (Emphasis

[59] JA335; *see also* JA2680-81, 209 DM 8.1 and 8.4.

added). Section 151.12(c) is obviously a limitation established by a competent authority.

More importantly, the delegations the district court cited do not apply when the Office of the AS-IA is *vacant*. They apply only when the AS-IA is *absent*. Under 209 DM 8.1, "the Assistant Secretary—Indian Affairs is authorized to exercise all of the authority of the Secretary" without limitation. But under 209 DM 8.4, the Principal Deputy may exercise the authority delegated in 209 DM 8.1, *but only* "[*i*]*n the absence of . . . the Assistant Secretary–Indian Affairs*." (Emphasis added).

The district court treated the words "absence" and "vacancy" as equivalent, but they do not mean the same thing.[60] "Absence" means a "failure to appear, or to be available and reachable, when expected."[61] A "vacancy" is altogether different. It is "[t]he time during which an office, post, or piece of property is not occupied."[62] Congress understood the distinction when it enacted the Federal Vacancies Reform Act (FVRA), under which a vacancy occurs when an official "dies, resigns, or is otherwise unable to perform the functions and duties of the office." 5 U.S.C. § 3345(a).

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[60] JA335.

[61] Black's Law Dictionary, at 8 (11th ed. 2019); *see also* Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/absence ("a failure to be present at a usual or expected place").

[62] Black's Law Dictionary, at 1862 (11th ed. 2019).

The Office of Legal Counsel (OLC) also recognizes the distinction between "vacancy" and "absence." In 1978, the OLC addressed the scope of the authority of the Vice Chairman of the Federal Reserve Board under 12 U.S.C. § 244 when the Office of the Chairman was "vacant."[63] Section 244 authorized the Vice Chairman "to 'preside' at Board meetings in the 'absence' of the Chairman but [did] not otherwise specify his duties."[64] The OLC explained that Congress's choice to use the word "absence" was meaningful because "[t]he term 'absence' normally connotes a failure to be present that is temporary in contradistinction to the term 'vacancy' caused, for example, by death of the incumbent or his resignation."[65] The OLC has adhered to that distinction.[66]

The GAO has followed suit. In 2002, the GAO addressed language nearly identical to 209 DM 8.4 in the context of a delegation to the Associate Deputy Secretary of the Interior.[67] The GAO was responding to the concern "that the Associate Deputy Secretary might be exercising all of the authorities of the Secretary of the Interior but, unlike the Secretary, he was not nominated by

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[63] *See Federal Reserve Board—Vacancy with the Office of the Chairman—Status of the Vice Chairman*, 2 Op. O.L.C. 394, 1978 WL 15323 (Jan. 31, 1978).

[64] *Id.* at 395.

[65] *Id.*

[66] *Cf. Designating an Acting Director of the Bureau of Consumer Financial Protection*, Off. Legal Counsel, slip op. at 3 (Nov. 25, 2017) (reaffirming distinction between "absence" and "vacancy"), available at https://www.justice.gov/olc/file/1085611/download.

[67] *See* Appointment of Dep't of the Interior Associate Deputy Secretary, B-290233, 2002 WL 31388352 (Oct. 22, 2002).

the President and confirmed by the Senate," which potentially raised constitutional issues.[68] In that case, the Associate Deputy Secretary was authorized to exercise the authorities of the Deputy Secretary "*in the absence of*, and under conditions specified by the [Deputy] Secretary."[69] As the Department of the Interior explained to the GAO, the "absences" in which the Associate Deputy Secretary acted were when the Deputy Secretary was out of town or had to recuse himself from signing rulemakings—both of which were consistent with the OLC's interpretation of "absence."[70] Because the "Associate Deputy Secretary [could] perform only certain of the Deputy Secretary's functions, and only in the *absence* and at the pleasure of the Deputy Secretary," the GAO concluded that his role did not raise constitutional concerns.[71]

Unsurprisingly then, the Departmental Manual also distinguishes between "vacancies" and "absences." "Vacancies" are handled under Part 302. That part states the "[r]equirements for succession for positions covered by the Vacancies Act [positions that are Presidentially-appointed, Senate-confirmed (PAS)] . . . are provided in 302 DM 2."[72]

The Department's conduct confirms that it too understood the difference between "vacancy" and "absence." Apparently realizing that the Principal

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[68] *Id.* at *1.

[69] *Id.* at *3 (emphasis in original).

[70] *Id.* at *2.

[71] *Id.* at *7 (emphasis added).

[72] *See* JA2682, 302 DM 1.1.

Deputy had been exercising the AS-IA's authority for over a year without having been delegated power to do so, the Deputy Secretary issued a memorandum on the final day of the Administration purporting to "ratify and approve any actions [the Principal Deputy had] taken under the authority of the AS-IA."[73] The Connor Memorandum acknowledges that "[t]he Department typically uses *succession orders to delegate authority to perform the duties of vacant positions*" and that the applicable succession order was ineffective.[74] That is why the Deputy Secretary purported to "confirm[]" the Principal Deputy's "authority to exercise the functions and duties of the AS-IA . . . including the authority to issue final Agency decisions."[75] Had the Department understood 209 DM 8.1 and 8.4 to automatically delegate to the Principal Deputy the AS-IA's authority when the office is vacant, it would not have found it necessary to issue the Connor Memorandum on the final day of the Administration.[76]

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[73] *See* JA276, Memorandum from Michael L. Connor, Deputy Secretary, to Lawrence S. Roberts, Principal Deputy (Jan. 19, 2017) (Connor Memorandum).

[74] *Id*. (emphasis added).

[75] *Id.*

[76] In fact, the Department identified 209 DM 8.1 and 8.4 six months *after* issuing the ROD, when the Department offered its post hoc justification for why the ROD was final agency action. ECF-31 at 4-5; JA230-37. That document is not in the record because the Department successfully excluded documents from January 20 to July 13, 2017, including the dismissal of the IBIA appeal, by arguing that the ROD was final agency action. JA278-280; JA328-354; JA357-58. For that reason, the court did not consider arguments related to the Acting AS-IA, including whether he was legally permitted to serve in that role, whether he violated agency regulations in assuming jurisdiction over Stand Up's appeal, and whether he had authority to resolve the appeal at all. *See,*

Contrary to the district court's finding, Section 8.4 did not authorize the Principal Deputy to make the Elk Grove decision because that authorization can only apply in the "absence" of the AS-IA. When the Principal Deputy issued the Elk Grove decision, the AS-IA was not "out of town," nor recused from the decision. He had resigned a year earlier. The AS-IA was not absent; the office was vacant. By conflating "absence" with "vacancy," the district court improperly ascribed "a meaning so broad that it is inconsistent with its accompanying words." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (citation omitted). The Court should reverse the district court's decision.

2. The Connor Memorandum did not properly delegate the AS-IA's authority to the Principal Deputy.

To the extent that the Connor Memorandum is argued to provide the missing authority, it too fails as a legitimate delegation. In June 2013, the AS-IA issued a succession memorandum naming the Deputy Assistant Secretary for Policy and Development as automatically succeeding the AS-IA.[77] The

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e.g., JA351 n.14; *see also Crawford-Hall v. United States*, 394 F. Supp. 3d 1122, 1139 (C.D. Cal. 2019) (concluding that "only the Assistant Secretary may issue a final decision on an appeal taken from IBIA's jurisdiction" but accepting the district court's conclusion that Section 151.12 does not preclude redelegation).

Questions related to the Department's post-January 19, 2017 actions cannot be resolved without a complete administrative record, which should be produced if the trust decision is vacated and remanded. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (requiring complete administrative record); *see also* 5 U.S.C. § 706; JA360-61.

[77] *See* JA2697, Memorandum from Kevin K. Washburn, Assistant Secretary–Indian Affairs (Designation of Successors for Presidentially—Appointed, Senate-Confirmed Positions).

succession order did not identify the Principal Deputy. It named the Deputy AS-IA, and then the Chief of Staff in the Office of the AS-IA, the BIA Director, and finally, the Deputy AS-IA for Management.[78] The 2013 succession order never authorized the Principal Deputy to exercise the authority of the AS-IA because succession orders must identify successors "by position title, not by a person's name." JA2682, 302 DM 1.4.C.

The Deputy Secretary had nothing to confirm in the Connor Memorandum, because the Department had never delegated the Principal Deputy the AS-IA's authority in the first place. Apart from that, the Connor Memorandum is ineffectual as a grant of authority. The Deputy Secretary did not identify in the Connor Memorandum the authority under which he was purporting to act, but if he was attempting to exercise the Secretary's authority, he failed. First, the Deputy Secretary cannot issue a delegation of Secretarial authority by memorandum. *See* JA2675, 200 DM 1.3. Second, "[a]ny statement regarding delegation of authority that is contained in any directive or regulatory material must be cross-referenced to, or have as its basis, a delegation published in *Parts 200-299 of the Departmental Manual*." *Id*. Third, the Deputy Secretary is required to route all proposed delegations to the supervising Secretarial Office, the Office of the Solicitor, the Office of Planning and Performance, and the Assistant Secretary for Policy, Management and Budget "before routing to

[78] *Id.* The Principal Deputy served as the Acting AS-IA for 210 days, despite not being the AS-IA's "first assistant," in violation of the FVRA. The FVRA declares that actions taken in violation of the FVRA "shall have no force or effect" and "may not be ratified." 5 U.S.C. § 3348(d).

the Secretary for signature (200 DM 3)." JA2676, 200 DM 1.5. Any redelegation of the Secretary's authority by the Deputy Secretary must be issued "in *strict compliance* with the requirements in Part 200 of the Departmental Manual." JA2678, 209 DM 2.2 (emphasis added). None of this happened.

To the extent that the Deputy Secretary believed he was acting under 109 DM 1.2B, as the Department suggested in its July 2017 decision, that provision only authorizes the Deputy Secretary to act in the "absence" of the Secretary—just like 209 DM 8.4.[79] The Secretary was not absent on January 19, 2017; she issued temporary redelegations for PAS-officers that day.[80] Had the Secretary thought it important to delegate authority to the Principal Deputy, she could have done so. Likewise, had the Secretary believed that making a final trust decision for the Elk Grove site was a priority, the Secretary could have signed that decision as well. She did neither.

The Departmental Manual does not empower agency officials to delegate authority at the eleventh hour or to "ratify" months of *ultra vires* or legally void decisions. The Departmental Manual is there to ensure that decisions are made by the proper officials who are politically accountable. The Department ignored the regulatory limits it established, those set forth in its Departmental Manual, and those implicit in the Constitution. The Court should reverse the

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[79] *See* JA230-37, 251, 268.

[80] *See* JA241-46, Order No. 3345, Temporary Redelegation of Authority for Certain Vacant Non-Career Senate-confirmed Positions (Jan. 19, 2017) (signed by S. Jewell, Secretary of the Interior).

district court's decision, vacate the trust decision and order the removal of the Elk Grove site from trust.

II. Because the California Rancheria Act expressly prohibits the exercise of trust authority for members of Wilton, the Department lacked authority to acquire the Elk Grove site in trust.

In 1934, Congress authorized the Secretary to acquire land in trust "for the purpose of providing land for Indians." 25 U.S.C. § 5108. The Secretary's trust authority is limited to those who satisfy the definition of "Indian."[81] *Id*. § 5129; *see also Carcieri v. Salazar*, 555 U.S. 379, 393 (2009).

In 1958, Congress enacted the CRA to terminate the trust relationship with the Indian people living on 41 enumerated rancherias in California. Pub. L. No. 85-671, 72 Stat. 619. Section 1 provides "[t]hat the lands, including minerals, water rights, and improvements located on the lands, and other assets of the [enumerated] rancherias . . . shall be distributed in accordance with . . . this Act." *Id.* § 1. Rancheria assets are to be distributed pursuant to a plan developed by the Secretary in conjunction with and approved by rancheria Indians. *Id*. §§ 2(c), 6. Upon distribution, "the Indians who receive any part of [rancheria] assets, and the dependent members of their immediate families, shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians," and all federal statutes "which

[81] The IRA defines "Indians" as: "[1] all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and [2] all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and . . . [3] all other persons of one-half or more Indian blood." 25 U.S.C. § 5129.

affect Indians because of their status as Indians shall be inapplicable to them." *Id*. § 10(b).

In 1955, the Indians living at Wilton had a choice to continue under federal supervision with full Indian rights or to accept the CRA and give up Indian status in return for fee title to all Rancheria assets. They voted to get the land under the CRA.[82] The distributees approved a plan for the distribution of Rancheria assets, and in 1961, the United States distributed to them unrestricted fee title to Rancheria lands.[83] The Department published formal notice of their termination in 1964 and declared that the "statutes of the United States which affect Indians because of their status as Indians, shall be inapplicable to" the named distributees and their dependents.[84]

In 2007, a group identifying as the "Wilton Miwok Rancheria" sued the United States alleging that it had failed to improve roads, water, and sewers prior to termination a half-century earlier.[85] In 2009, the parties entered a Stipulation for Entry of Judgment, stating that "the Tribe was not lawfully terminated, and the Rancheria assets were not distributed, in accordance with" the CRA.[86] The parties further stipulated that "the initial tribal organization of the Tribe shall be a General Council consisting of all distributees and

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[82] JA2493.

[83] JA913-18; JA892-93.

[84] JA894.

[85] JA895-918; JA2544.

[86] JA901 ¶ 1.

dependent members listed in the Distribution Plan, and all lineal descendants."[87] The parties did not stipulate to any facts explaining the unlawful termination.

No one disputes that the United States transferred fee title to the distributees as the result of the CRA. All agree that members of Wilton include those distributees.[88] Members of Wilton are thus indisputably "Indians who receive[d rancheria] assets, and the dependent members of their immediate families" under Section 10(b) of the CRA. As such, they are not entitled to services "because of their status as Indians," and all federal statutes "which affect Indians because of their status as Indians" are inapplicable to them. That includes Section 5 of the IRA, which authorizes the Secretary to acquire lands in trust for "Indians." 25 U.S.C. § 5108.

The district court appeared to agree that the plain language of the CRA would bar this trust acquisition.[89] But instead of applying the federal statute, the district court concluded the Federally Recognized Indian Tribe List Act of 1994 (List Act), Pub. L. No. 103-454, 108 Stat. 4791, 4792 (Nov. 2, 1994), "and the stipulated judgment relieved Wilton from 'the application of section 10(b)

[87] JA902-03 ¶ 6.

[88] *Id.*

[89] JA863 ("The stark language of the CRA buttresses Stand Up's argument.").

of the [CRA]' and entitled the tribe to 'the same status as it possessed prior to distribution of the assets of the Rancheria.'"[90] That is incorrect.

First, the district court was incorrect that the List Act "specifically authorized the restoration of terminated tribes to their pre-CRA status."[91] The court cites to Section 103, but that section does not authorize the restoration of congressionally terminated tribes or anything else. It sets forth Congressional Findings. Section 104 is the only substantive provision of the List Act, and all that it mandates is that the Department publish a list of all federally recognized tribes annually in the Federal Register. *See* 25 U.S.C. § 5131. In short, the List Act is not authority to restore tribes terminated under the CRA.[92]

Second, it makes no difference what the stipulated judgment says because the Department is bound by federal law, and federal law prohibits the Department from taking land into trust on behalf of these Indians. The Department cannot violate federal law because it promised Wilton it would or agreed to do so. *See, e.g.*, *Keith v. Volpe*, 118 F.3d 1386, 1393 (9th Cir. 1997) (parties to consent decree "could not agree to terms which would exceed their

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[90] JA864 (citing 74 Fed. Reg. 33,468-02 (July 13, 2009).

[91] JA865.

[92] Certainly, *Congress* has authority to restore Congressionally terminated tribes, and it has done so in other instances. *See, e.g.*, Auburn Indian Restoration Act, 25 U.S.C. § 1300l (1994); Paskenta Band of Nomlaki Indians of California, 25 U.S.C. § 1330m-1 (1994); Graton Rancheria Restoration Act, 25 U.S.C. § 1330n-2 (2000). It has not done so here.

authority and supplant state law"); *Kasper v. Bd. of Election Comm'rs*, 814 F.2d 332, 341–42 ("A consent decree is not a method by which state agencies may liberate themselves from the statutes enacted by the legislature that created them."); *Dunn v. Carey*, 808 F.2d 555, 559–60 (7th Cir. 1986) ("Because a consent decree's force comes from agreement rather than positive law, the decree depends on the parties' authority to give assent.").

The Department's acquisition of the Elk Grove site in trust violated the CRA and the IRA.

III. The Department violated NEPA and the APA when it changed the proposed action from a Galt casino to an Elk Grove casino in the FEIS.

For three years, the Department told the public that it was reviewing an application to acquire in trust 282 acres of land in Galt, California for a casino. The public relied on that representation and focused comments on the impacts a Galt casino would have on the community. At the final stage of the review proceedings—the publication of the final EIS—the Department changed the proposed action to a casino on 36 acres in Elk Grove, and 36 days later, the Department approved the Elk Grove application.

NEPA does not permit an agency to change a proposed action from a casino in one town to a casino in another town at the last minute in the FEIS. Nor can an agency rely on an EIS that focused its evaluation on impacts to other sites and provided only a superficial analysis of impacts to the last-minute proposed action. When a tribe files a new trust application to have a different parcel of land acquired in trust for a casino—as Wilton did here—that

is a new proposed action requiring an EIS. At a minimum, the Department was required to prepare an SEIS. It refused.

Its actions violated NEPA and are contrary to fundamental APA requirements.

A. Because NEPA does not allow agencies to change proposed actions in an FEIS, the Department violated the Act.

The Department's actions in this case are unprecedented. The Department has never before prepared an EIS for an application to build a casino in one town, only to announce in an FEIS that it is actually considering an application to build a casino in another town. In fact, Stand Up can find no instance where any agency has announced a new proposed action in an FEIS without first engaging the public and conducting additional review. And there is a reason for that—NEPA does not allow it. *See Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988) ("[A]n agency's failure to disclose a proposed action before the issuance of a final EIS defeats NEPA's goal of encouraging public participation in the development of information during the decision making process.").

While this trust decision is unprecedented now, if the Court does not vacate the ROD, the Department will do it again. After all, it is far easier to address public concerns regarding a casino project if the public does not know to raise them. The public does not know what lands a tribe might have a property interest in. Like everyone else, tribes acquire interests in fee lands through private transactions. Moreover, the trust regulations do not require the

Department to provide the public notice of an application.[93] If the public cannot rely on the identification of the proposed action in a NEPA scoping notice, it will not know what proposed action is actually under consideration until the end of the process. That contravenes fundamental APA requirements. *See, e.g., MCI Telecomms. Corp. v. FCC*, 57 F.3d 1136, 1141-42 (D.C. Cir. 1995) (agencies are not permitted to "turn the provision of notice into a bureaucratic game of hide and seek") (citations omitted).

The Department's approach is not only inconsistent with the APA, it violates the regulations implementing NEPA, which also stress the importance of notice and disclosure. The first, crucial step in preparing an EIS is to "make sure the proposal which is the subject of an [EIS] is *properly defined*." 40 C.F.R. § 1502.4(a) (emphasis added). An agency's identification of a proposed action forms the basis for its public notice. Once the agency decides that it will prepare an EIS, and before it begins the scoping process, it must publish a notice of intent that describes the proposed action and possible alternatives. *See id.* §§ 1501.7(a), 1508.22(a). Thus, the way an agency defines a proposed action

[93] The trust regulations only require notice to state and local governments, which can occur very late in the NEPA review process. *See* 25 C.F.R. § 151.10. The public must rely on the NEPA notice to learn about an application and to inform the Department that they are interested parties entitled to receive notice of a trust decision. *See id.* § 151.12(d)(2)(ii)(A) (requiring a BIA official to provide written notice of a decision to interested parties); 78 Fed. Reg. at 67,930 (requiring "interested parties . . . to make themselves known to the BIA official in writing in order to receive written notice of the BIA official's decision").

determines *what the public is given notice of*. NEPA requires agencies to "[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures."[94] *Id.* § 1506.6(a). That process will not work if the agency has not given the public accurate notice of the proposed action it was considering until after it has implemented its NEPA procedures.

How a proposed action is defined is not just material to the notice the agency provides; it shapes the entire EIS process, including scoping, where hearings are held, which cooperating agencies are selected, and so forth. Agencies hold scoping hearings "when the impacts of a particular action are confined to specific sites." 40 C.F.R. § 1501.7(b) (recommending that agencies hold a scoping hearing). Such hearings are usually held in the community where the proposed action is to occur. Because cooperating agencies are selected based on their jurisdiction by law or special expertise, correctly disclosing the geographic location of a proposed action is essential for identifying them. *See id.* § 1501.5. And most importantly, agencies and the public can only identify "the significant issues related to a proposed action" in the scoping process if they know what the actual proposed action is. *Id.* § 1501.7. No one can credibly argue that the impacts of a casino are the same regardless of location. Developing a casino in a rural area does not have the same impacts as

[94] *See also* Indian Affairs NEPA Guidebook (Aug. 2012) at § 2.1 (emphasizing that "[t]he NEPA process is intended to facilitate public participation and disclosure in the Federal planning process") (emphasis added); § 2.4 ("Public disclosure and involvement is a key requirement of NEPA.").

developing a casino in an urban area, or across from a school, by a nature preserve, or underneath an Air Force traffic pattern.

The Department did not follow these regulations for suburban Elk Grove; it followed them for rural Galt. And the effects on the process and the EIS are evident. The Department held a public scoping hearing in Galt, not Elk Grove, where it told the public that the proposed action was the acquisition of the Galt site in trust.[95] The Department invited the City of Galt to participate as a cooperating agency early in the process, not Elk Grove.[96] *See* 40 C.F.R. § 1501.6 (directing the lead agency to "[r]equest the participation of each cooperating agency in the NEPA process at the earliest possible time"). The public scoping comments focused on "the significant issues related to" a casino in Galt.[97] And when the Department published notice of the DEIS two years later, it again identified the Galt site as the proposed action.[98] It made a hard copy of the DEIS available at the Galt library, and it held another hearing in Galt on January 29, 2016.[99]

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[95] JA945; JA958.

[96] JA1074.

[97] The comments the Department received in response to the notice of intent and the scoping hearing generally identified issues specific to the Galt site, including—for example—agricultural impacts, JA1012, JA1017-19; impacts on species, JA1000; impacts on wetlands and the Cosumnes River, which is in a different watershed than Elk Grove, JA1004, JA1011-13; and traffic impacts, JA1010, JA1014-15.

[98] JA1339.

[99] *Id.*; JA1343; JA1341.

But in the FEIS, the Department simply switched the proposed action from the Galt casino to the Elk Grove casino.[100] NEPA regulations do not permit this. When an applicant withdraws one trust application for a specific site and submits a new application for a different site, the Department has under its consideration a new proposed action that independently triggers NEPA.[101] Because NEPA defines the "[a]pproval of *specific projects*" as a proposed action, and because a casino project is a "major Federal action" for which an EIS is required, the new application requires a new EIS. 40 C.F.R. § 1508.18(b)(4) (emphasis added); *see also* 42 U.S.C. § 4332(C) (requiring an EIS for "every . . . major Federal action[ ] significantly affecting the quality of the human environment").

The district court did not address these regulatory requirements. It concluded instead that the public was not deprived "of a meaningful opportunity to participate in the selection process."[102] That is not a fair description of Stand Up's legal objections, and it is not correct in any case.

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[100] JA2456-57. Before publishing the FEIS on December 14, 2016, the Department did not inform the public that it was considering acquiring 36 acres of land in Elk Grove in trust. The Department sent a Notice of (Gaming) Land Acquisition Application on November 17, 2016, to a limited distribution list consisting largely of governmental entities. *See* JA1403-09. Stand Up was included.

[101] The Department's trust regulations require tribes "desiring to acquire land in trust status [to] file a written request for approval of such acquisition with the Secretary," which must include "a description of the land to be acquired." 25 C.F.R. § 151.9.

[102] JA888.

1. There is no legal basis for concluding that the public was provided notice that the Elk Grove site was the "proposed action" because the Department never published any notice prior to the FEIS. It is the agency's responsibility to provide notice. *See, e.g.*, 40 C.F.R. § 1500.3 (making NEPA "regulations applicable to and binding on all Federal agencies"). Nor is it correct that the Department complied with the regulations governing "proposed actions."

While the scoping report and the DEIS named a smaller 28-acre site in Elk Grove as an "alternative" under consideration, "alternatives" are not the same as "proposed actions." "Proposed actions" include the "[a]pproval of specific projects" and "actions approved by permit or other regulatory decision." 40 C.F.R. § 1508.18(b)(4). NEPA requires an evaluation of reasonable "alternatives," *id*. § 1502.14, which includes those that an applicant may not itself be capable of carrying out, *NEPA Forty Questions*, 46 Fed. Reg. 18,026, 18,027 (#2a) (Mar. 23, 1981). A "preferred alternative" is something else again; it is the alternative the agency thinks would best "fulfill its statutory mission and responsibilities." 46 Fed. Reg. at 18,027-28 (#4a). These terms are not interchangeable, and it was error for the district court and the Department to treat them as such.

2. The court also concluded that there was evidence that "the public was aware of the possibility" that the Elk Grove site would be acquired.[103] That is not accurate.

[103] JA889.

First, the public is entitled to rely on the notices the federal government provides. When all of those notices state that the proposed action under consideration is the Galt site, it is not reasonable to conclude that the public knew that the proposed action might actually be another site.

Second, the public did not know that the Elk Grove site was a possibility because that site was owned by another entity and approved for development as part of an open-air regional mall under the 2007 development agreement.[104] The public did not know that the owner of the Elk Grove site would sell the land or that it could be developed as a casino, if the owner did. In California, when a city approves a proposed project, the city and the developer enter into a development agreement that is recorded as a restrictive covenant on the land.[105] Throughout the NEPA process (and when the Department acquired the land in trust), the Elk Grove site was encumbered by a development agreement that did not permit casino development.[106]

The district court deemed Lynn Wheat's comment that the Department "consider carefully" the Elk Grove site as evidence that the public knew that acquisition of the Elk Grove site was possible.[107] But it is not uncommon for a commenter to seek to defeat a proposed action at Site A by suggesting that an alternative at Site B might be better—particularly when the commenter

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[104] *See, e.g.*, JA450-817; JA818-856.

[105] JA2502-09 (discussing laws then-applicable to the Elk Grove site).

[106] *Id.*; JA374; JA2503-07.

[107] JA889.

believes that Site B is impossible because another entity owns it and is planning to build a mall. Stand Up's DEIS comments are a better measure of what the public knew. Those said nothing about the Elk Grove site; they focused instead on the proposed action the Department identified.[108]

This Court requires strict compliance with NEPA regulations. *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n*, 449 F.2d 1109, 1112 (D.C. Cir. 1971) (NEPA "provisions . . . establish a strict standard of compliance."); *see also Young v. Gen. Services Admin.*, 99 F. Supp. 2d 59, 74 (D.D.C. 2000) (same). It is not enough that Wilton suggested that it might prefer the Elk Grove site at a public hearing.[109] It is the Department's obligation to comply with the regulations, and it did not.

B. At a minimum, the Department was required to prepare a supplemental EIS.

The Department had options that would have ensured that the public had a meaningful opportunity to participate and helped to guarantee that "the significant issues related to" an Elk Grove casino were identified—preparing a new EIS or an SEIS. Preparing a new EIS does not require an agency to reinvent the wheel. It can prepare the document on an expedited basis by using many of the detailed studies previously prepared.

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[108] JA1355-362. The same is true of Caltrans' comments on the DEIS (JA1363), California Department of Fish and Wildlife (JA1369), and the U.S. Fish and Wildlife (JA1379-381).

[109] JA1348-09.

Or the Department could also have prepared an SEIS. NEPA requires agencies to "prepare supplements to either draft or final [EISs] if *the agency makes substantial changes in the proposed action that are relevant to environmental concerns* or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1) (emphasis added); *see also id.* § 1501.7(c) (requiring revisions to scoping determinations "if substantial changes are made later in the proposed action"). Changing the proposed action from a casino in Galt to a casino in Elk Grove is a substantial change.

Despite the plain language of 40 C.F.R. § 1502.9(c)(1), the district court concluded that an SEIS was not required because "the Department did not define the Galt site as the proposed action; Wilton's application to the Department did."[110] According to the court, "[i]t would be perverse to hold against the Department a designation that it did not control."[111] And in any case, the court concluded, "the record shows a thorough and comprehensive review of each of the alternatives."[112] Both conclusions are incorrect.

1. Because the Department changed the proposed action from one site to another, an SEIS was required.

First, there is nothing perverse about requiring the Department to comply with NEPA regulations when an applicant changes a proposed action. That

[110] JA880-81.

[111] JA881.

[112] JA882.

is what the law requires. *See Young.*, 99 F. Supp. 2d at 74. The *reason* a proposed action changed is largely irrelevant. What matters is whether there was a "substantial change in the proposed action that is relevant to environmental concerns," and here, there was. 40 C.F.R. § 1502.9. The Department has argued that whatever change was made was not relevant to environmental concerns. But that's obviously not true. There would have been no reason for the Department to prepare hundreds of pages of new analyses that it tucked into appendices to the FEIS if the changes were not relevant to environmental concerns.[113]

Second, there is no conflict between the *regulatory requirement* that an agency prepare an SEIS when there is a substantial change in the proposed action and an agency's ability to select a "preferred alternative." If the selection of a "preferred alternative" results in a substantial change to a "proposed action," then the Department must comply with the regulation and prepare an SEIS. *See* 40 C.F.R. § 1502.9. In fact, the Department did not cite a single case where an applicant changed a site-specific proposed action and a court did not require an SEIS. The cases the Department relied on involve broadly stated proposed actions—such as, the adoption of a forest management plan or a

[113] *See, e.g.*, mitigation agreements (JA1556-1613), economic reports (JA1614-660), biological reports (JA1661-689), cultural studies (JA1690-91), traffic studies (JA1692-95), environmental site assessments (JA1695-1922), and air quality monitoring (JA1923-2453).

mining operations plan, or the selection of a route between two locations for a transmission line, pipeline, or highway.[114]

Those fact patterns are inapposite to this case. Here, there are two different proposed actions supported by two different applications—one for the acquisition of 282 acres of land in Galt for a casino and one for the acquisition of 26 acres of land in Elk Grove for a casino. Had the Department truly wanted to choose between those two proposed actions, it should have announced and considered both at once. Wilton could have submitted applications for Galt and Elk Grove, and the Department could have defined the proposed action as "the proposed trust acquisition of 282 acres of land in Galt *or* 36 acres of land in Elk Grove for the development of a casino." That would have ensured that parties concerned about Elk Grove knew to participate from the start of the NEPA process and that significant issues were properly identified. But the Department did not do that. Having failed to do so, the Department was at least required to prepare an SEIS. *See* 40 C.F.R. § 1502.9(c)(1).

2. The district court's conclusion that the Department adequately analyzed the Elk Grove site negating the need for an SEIS is incorrect.

The Department did not analyze the Elk Grove site with the same level of detail as the Galt site. Alternatives to private proposals are rarely analyzed with the same level of detail as the proposed action. Wilton admits this in claiming that there is "nothing in NEPA that requires an agency to look past a

[114] JA366-67.

party's application to initiate a costly and burdensome environmental review of an alternative the agency thinks an applicant might wind up preferring."[115] And that is precisely the problem. No one looked past Wilton's Galt application to look closely at the alternative Wilton wound up preferring.

A quick look at the DEIS confirms this. The Department evaluated three alternative scenarios for the Galt site: a full-scale casino resort, a reduced intensity casino resort, and a non-gaming commercial retail development.[116] It evaluated two alternative scenarios for development on the historic rancheria.[117] Using different development intensities and different uses is very helpful in assessing the true impacts of a proposed action. Gaming and non-gaming developments have different traffic impacts (different peak times and different alcohol consumption patterns); different water usage (hotel and restaurant versus shops); different crime impacts (problem gambling); and other impacts. The Department obviously agrees, as it compares different developments on the same site in virtually all of its recent EISs for gaming-related trust requests.[118]

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[115] JA380.

[116] JA1190-91.

[117] JA1191.

[118] *See, e.g.*, Tule River Tribe's Proposed Fee-to-Trust and Eagle Mountain Casino Relocation Project, 81 Fed. Reg. 96,477-02 (Dec. 30, 2016) (noting that alternatives under consideration include an expanded casino site alternative; a reduced-intensity casino alternative; and an alternate-use (non-casino) alternative on proposed trust site); DEIS for the Proposed Redding Rancheria Casino Project, 84 Fed. Reg. 14,391-01 (Apr. 10, 2019) (evaluating proposed

Unlike the Galt site, however, the Department only evaluated a full-scale casino resort at the Elk Grove site.[119] The Department claims that it did not consider a reduced intensity development on the Elk Grove site because "the environmental effects on the Mall site are already likely to be relatively low since the site is already partially developed."[120] But that claim has no merit. The only development on the site at the time of the FEIS was empty buildings, which have since been demolished. The existence of empty buildings provides no information regarding the differing economic, traffic, water, and other impacts associated with full-scale versus reduced-scale casino development or non-gaming retail development in Elk Grove. There is no reasonable claim that the Department considered the Elk Grove site with the same level of detail as it did the Galt site. And again, a primary purpose of the public notice of proposed actions is to invite the public to identify environmental concerns for agency consideration that may not be identified without their comments. Without notice that the proposed action was a casino at the Elk Grove site, no one can reliably say that all environmental concerns were identified and addressed.

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project, proposed project with no retail, reduced intensity, and non-gaming alternatives on proposed trust site).

[119] JA1191; JA968; *see also* JA980 (scoping comment recommending consideration of different developments on same site).

[120] JA1277 ¶ 2.9.6.

The Department points to the additional studies it completed after the DEIS. Those studies, however, do not provide the comparison between alternatives that the three Galt alternatives provided. Moreover, those additional studies only underscore the inadequacy of the DEIS. The district court asserted that "the Department was not required to complete a supplemental EIS solely because it analyzed the issues in greater detail in the Final EIS than it did in the Draft."[121] The regulations state otherwise. A DEIS "must fulfill and satisfy to the fullest extent possible the requirements established for final statements," 40 C.F.R. § 1502.9(a), whereas an FEIS "shall respond to comments as required . . . [and discuss] any responsible opposing view which was not adequately discussed in the draft statement." *Id*. § 1502.9(b). As the Seventh Circuit observed, "[t]his regulatory scheme front-loads the EIS's analytic process, and contemplates publication of a final EIS that addresses issues raised about the draft." *Habitat Educ. Center, Inc. v. U.S. Forest Serv.*, 673 F.3d 518, 527 (7th Cir. 2012). "Strictly construed, NEPA and the CEQ regulations permit an agency to issue a final EIS that does no more than incorporate a previously issued draft EIS and respond to comments received regarding that draft." *Id*.

The hundreds of pages of studies the Department added in appendices to the FEIS were not responses to comments. They were analyses intended to

[121] The Department, for example, did not disclose that casino parking would not be permitted on the adjacent Mall site in the FEIS, but acknowledged it in the ROD. *Compare* JA1540-41 (FEIS) with JA2652 (ROD).

fill very large gaps in the Department's initial, cursory assessment of the Elk Grove alternative and were never subject to meaningful comment.[122]

In the end, the Department did not prepare an SEIS because it had every intention of approving the Elk Grove site before the end of the Obama Administration. Even the district court acknowledged that less than two-day's turnaround is "arguably 'alarming, especially in light of the crawling pace at which administrative agencies typically conduct their business.'"[123] When a final decision takes, on average, 15 months, a two-day turnaround is more than "arguably alarming." It is a very strong indication that the Department did not take the "hard look" at the environmental consequences the law requires. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). A "hard look" takes time. *See North Carolina Alliance for Transp. Reform, Inc. v. U.S. Dept. of Transp.*, 151 F. Supp. 2d 661, 676 (M.D.N.C. 2001). It cannot be done in 40 hours on the basis of an EIS prepared for a different proposed action.

The "hard look" requires clear notice to the public, identification of issues specific to the proposed project, early involvement of cooperating agencies, and a DEIS that contains all of the information legally required of an FEIS. And then, a "hard look" requires internal deliberations, first at the Regional Office, which is supposed to review and respond to comments with the environmental contractor and prepare a recommendation memorandum. And

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[122] *See* JA447-49; JA1556-2453.

[123] JA884 (quoting *Alaska v. U.S. Dep't of Agric.*, 273 F. Supp. 3d 102, 118-19 (D.D.C. 2017)).

then the central office reviews it, including the Solicitor, the Office of Indian Gaming, and ultimately the AS-IA, who prepares a ROD. Because none of that happened here in anything other than a superficial way, the Court should reverse.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, the trust decision vacated, and the Elk Grove site ordered to be removed from trust.

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Respectfully submitted,

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STATUTORY AND REGULATORY ADDENDUM

5 U.S.C. Code Chapter 7 – Judicial Review

5 U.S. Code § 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority

5 U.S. Code § 706. Scope of review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

5 U.S. Code § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Federal Vacancies Reform Act of 1998 (FVRA), codified at 5 U.S.C. §§ 3345-3349d

5 U.S. Code § 3345. Acting officer

(a) If an officer of an Executive agency (including the Executive Office of the President, and other than the Government Accountability Office) whose appointment to office is required to be made by the President, by and with the advice and consent of the Senate, dies, resigns, or is otherwise unable to perform the functions and duties of the office—

(1) the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity subject to the time limitations of section 3346;

(2) notwithstanding paragraph (1), the President (and only the President) may direct a person who serves in an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate, to perform the functions and duties of the vacant office temporarily in an acting capacity subject to the time limitations of section 3346; or

(3) notwithstanding paragraph (1), the President (and only the President) may direct an officer or employee of such Executive agency to perform the functions and duties of the vacant office temporarily in an acting capacity, subject to the time limitations of section 3346, if—

(A) during the 365-day period preceding the date of death, resignation, or beginning of inability to serve of the applicable officer, the officer or employee served in a position in such agency for not less than 90 days; and

(B) the rate of pay for the position described under subparagraph (A) is equal to or greater than the minimum rate of pay payable for a position at GS–15 of the General Schedule.

(b)

(1) Notwithstanding subsection (a)(1), a person may not serve as an acting officer for an office under this section, if—

(A) during the 365-day period preceding the date of the death, resignation, or beginning of inability to serve, such person—

(i) did not serve in the position of first assistant to the office of such officer; or

(ii) served in the position of first assistant to the office of such officer for less than 90 days; and

(B) the President submits a nomination of such person to the Senate for appointment to such office.

(2) Paragraph (1) shall not apply to any person if—

(A) such person is serving as the first assistant to the office of an officer described under subsection (a);

(B) the office of such first assistant is an office for which appointment is required to be made by the President, by and with the advice and consent of the Senate; and

(C) the Senate has approved the appointment of such person to such office.

(c)

(1) Notwithstanding subsection (a)(1), the President (and only the President) may direct an officer who is nominated by the President for reappointment for an additional term to the same office in an Executive department without a break in service, to continue to serve in that office subject to the time limitations in section 3346, until such time as the Senate has acted to confirm or reject the nomination, notwithstanding adjournment sine die.

(2) For purposes of this section and sections 3346, 3347, 3348, 3349, 3349a, and 3349d, the expiration of a term of office is an inability to perform the functions and duties of such office.

Indian Reorganization Act, §§ 5 and 19, Pub. L. No. 73-383, 48 Stat 984, codified as amended at 25 U.S.C. §§ 5108 and 5129

25 U.S. Code § 5108. Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption

The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.

For the acquisition of such lands, interests in lands, water rights, and surface rights, and for expenses incident to such acquisition, there is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, a sum not to exceed $2,000,000 in any one fiscal year: Provided, That no part of such funds shall be used to acquire additional land outside of the exterior boundaries of Navajo Indian Reservation for the Navajo Indians in Arizona, nor in New Mexico, in the event that legislation to define the exterior boundaries of the Navajo Indian Reservation in New Mexico, and for other purposes, or similar legislation, becomes law.

The unexpended balances of any appropriations made pursuant to this section shall remain available until expended.

Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) [1] shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S. Code § 5129. Definitions

The term "Indian" as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members

who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians. The term "tribe" wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. The words "adult Indians" wherever used in this Act shall be construed to refer to Indians who have attained the age of twenty-one years.

25 C.F.R. Chapter I – Bureau of Indian Affairs, Department of the Interior

25 CFR § 2.6 - Finality of decisions

(a) No decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final so as to constitute Departmental action subject to judicial review under 5 U.S.C. 704, unless when an appeal is filed, the official to whom the appeal is made determines that public safety, protection of trust resources, or other public exigency requires that the decision be made effective immediately.

(b) Decisions made by officials of the Bureau of Indian Affairs shall be effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed.

(c) Decisions made by the Assistant Secretary - Indian Affairs shall be final for the Department and effective immediately unless the Assistant Secretary - Indian Affairs provides otherwise in the decision.

25 CFR § 2.20 - Action by the Assistant Secretary - Indian Affairs on appeal

(a) When a decision is appealed to the Interior Board of Indian Appeals, a copy of the notice of appeal shall be sent to the Assistant Secretary - Indian Affairs.

(b) The notice of appeal sent to the Interior Board of Indian Appeals shall certify that a copy has been sent to the Assistant Secretary - Indian Affairs.

(c) In accordance with the provisions of § 4.332(b) of title 43 of the Code of Federal Regulations, a notice of appeal to the Board of Indian Appeals shall not be effective until 20 days after receipt by the Board, during which time the Assistant Secretary - Indian Affairs shall have authority to decide to:

(1) Issue a decision in the appeal, or

(2) Assign responsibility to issue a decision in the appeal to a Deputy to the Assistant Secretary - Indian Affairs.

The Assistant Secretary - Indian Affairs will not consider petitions to exercise this authority. If the Assistant Secretary - Indian Affairs decides to issue a decision in the appeal or to assign responsibility to issue a decision in the appeal to a Deputy to the Assistant Secretary - Indian Affairs, he/she shall notify the Board of Indian Appeals, the deciding official, the appellant, and interested parties within 15 days of his/her receipt of a copy of the notice of appeal. Upon receipt of such notification, the Board of Indian Appeals shall transfer the appeal to the Assistant Secretary - Indian Affairs. The decision shall be signed by the Assistant Secretary - Indian Affairs or a Deputy to the Assistant Secretary - Indian Affairs within 60 days after all time for pleadings (including all extensions granted) has expired. If the decision is signed by the Assistant Secretary - Indian Affairs, it shall be final for the Department and effective immediately unless the Assistant Secretary - Indian Affairs provides otherwise in the decision. Except as otherwise provided in § 2.20(g), if 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.

(d) A copy of the decision shall be sent to the appellant and each known interested party by certified or registered mail, return receipt requested. Such receipts shall become a permanent part of the record.

(e) If the Assistant Secretary - Indian Affairs or the Deputy to the Assistant Secretary - Indian Affairs to whom the authority to issue a decision has been assigned pursuant to § 2.20(c) does not make a decision within 60 days after all time for pleadings (including all extensions granted) has expired, any party may move the Board of Indian Appeals to assume jurisdiction subject to 43 CFR 4.337(b). 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.

(f) When the Board of Indian Appeals, in accordance with 43 CFR 4.337(b), refers an appeal containing one or more discretionary issues to the Assistant Secretary - Indian Affairs for further consideration, the Assistant

Secretary - Indian Affairs shall take action on the appeal consistent with the procedures in this section.

(g) The Assistant Secretary - Indian Affairs shall render a written decision in an appeal from a decision of the Deputy to the Assistant Secretary - Indian Affairs/Director (Indian Education Programs) within 60 days after all time for pleadings (including all extensions granted) has expired. A copy of the decision shall be sent to the appellant and each known interested party by certified or registered mail, return receipt requested. Such receipts shall become a permanent part of the record. The decision shall be final for the Department and effective immediately unless the Assistant Secretary - Indian Affairs provides otherwise in the decision.

25 CFR Part 151 - LAND ACQUISITIONS

25 CFR § 151.12 - Action on requests

(a) The Secretary shall review each request and may request any additional information or justification deemed necessary to reach a decision.

(b) The Secretary's decision to approve or deny a request shall be in writing and state the reasons for the decision.

(c) A decision made by the Secretary, or the Assistant Secretary - Indian Affairs pursuant to delegated authority, is a final agency action under 5 U.S.C. 704 upon issuance.

(1) If the Secretary or Assistant Secretary denies the request, the Assistant Secretary shall promptly provide the applicant with the decision.

(2) If the Secretary or Assistant Secretary approves the request, the Assistant Secretary shall:

(i) Promptly provide the applicant with the decision;

(ii) Promptly publish in the Federal Register a notice of the decision to acquire land in trust under this part; and

(iii) Immediately acquire the land in trust under § 151.14 on or after the date such decision is issued and upon fulfillment of the requirements of § 151.13 and any other Departmental requirements.

(d) A decision made by a Bureau of Indian Affairs official pursuant to delegated authority is not a final agency action of the Department under 5 U.S.C. 704 until administrative remedies are exhausted under part 2 of this chapter or until the time for filing a notice of appeal has expired and no administrative appeal has been filed.

(1) If the official denies the request, the official shall promptly provide the applicant with the decision and notification of any right to file an administrative appeal under part 2 of this chapter.

(2) If the official approves the request, the official shall:

(i) Promptly provide the applicant with the decision;

(ii) Promptly provide written notice of the decision and the right, if any, to file an administrative appeal of such decision pursuant to part 2 of this chapter, by mail or personal delivery to:

(A) Interested parties who have made themselves known, in writing, to the official prior to the decision being made; and

(B) The State and local governments having regulatory jurisdiction over the land to be acquired;

(iii) Promptly publish a notice in a newspaper of general circulation serving the affected area of the decision and the right, if any, of interested parties who did not make themselves known, in writing, to the official to file an administrative appeal of the decision under part 2 of this chapter; and

(iv) Immediately acquire the land in trust under § 151.14 upon expiration of the time for filing a notice of appeal or upon exhaustion of

administrative remedies under part 2 of this title, and upon the fulfillment of the requirements of § 151.13 and any other Departmental requirements.

(3) The administrative appeal period under part 2 of this chapter begins on:

(i) The date of receipt of written notice by the applicant or interested parties entitled to notice under paragraphs (d)(1) and (d)(2)(ii) of this section;

(ii) The date of first publication of the notice for unknown interested parties under paragraph (d)(2)(iii) of this section.

(4) Any party who wishes to seek judicial review of an official's decision must first exhaust administrative remedies under 25 CFR part 2.

40 C.F.R. Chapter V – Council on Environmental Quality

40 CFR § 1501.7 - Scoping

There shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action. This process shall be termed scoping. As soon as practicable after its decision to prepare an environmental impact statement and before the scoping process the lead agency shall publish a notice of intent (§ 1508.22) in the Federal Register except as provided in § 1507.3(e).

(a) As part of the scoping process the lead agency shall:

(1) Invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds), unless there is a limited exception under § 1507.3(c). An agency may give notice in accordance with § 1506.6.

(2) Determine the scope (§ 1508.25) and the significant issues to be analyzed in depth in the environmental impact statement.

(3) Identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review (§ 1506.3), narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere.

(4) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement.

(5) Indicate any public environmental assessments and other environmental impact statements which are being or will be prepared that are related to but are not part of the scope of the impact statement under consideration.

(6) Identify other environmental review and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently with, and integrated with, the environmental impact statement as provided in § 1502.25.

(7) Indicate the relationship between the timing of the preparation of environmental analyses and the agency's tentative planning and decisionmaking schedule.

(b) As part of the scoping process the lead agency may:

(1) Set page limits on environmental documents (§ 1502.7).

(2) Set time limits (§ 1501.8).

(3) Adopt procedures under § 1507.3 to combine its environmental assessment process with its scoping process.

(4) Hold an early scoping meeting or meetings which may be integrated with any other early planning meeting the agency has. Such a scoping meeting will often be appropriate when the impacts of a particular action are confined to specific sites.

(c) An agency shall revise the determinations made under paragraphs (a) and (b) of this section if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

40 CFR § 1501.6 - Cooperating agencies

The purpose of this section is to emphasize agency cooperation early in the NEPA process. Upon request of the lead agency, any other Federal agency which has jurisdiction by law shall be a cooperating agency. In addition any other Federal agency which has special expertise with respect to any environmental issue, which should be addressed in the statement may be a

cooperating agency upon request of the lead agency. An agency may request the lead agency to designate it a cooperating agency.

(a) The lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest possible time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent possible consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest possible time.

(2) Participate in the scoping process (described below in § 1501.7).

(3) Assume on request of the lead agency responsibility for developing information and preparing environmental analyses including portions of the environmental impact statement concerning which the cooperating agency has special expertise.

(4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.

(5) Normally use its own funds. The lead agency shall, to the extent available funds permit, fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(c) A cooperating agency may in response to a lead agency's request for assistance in preparing the environmental impact statement (described in paragraph (b)(3), (4), or (5) of this section) reply that other program commitments preclude any involvement or the degree of involvement

requested in the action that is the subject of the environmental impact statement. A copy of this reply shall be submitted to the Council.

40 CFR § 1502.9 - Draft, final, and supplemental statements

Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and may be supplemented.

(a) Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion. The agency shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(b) Final environmental impact statements shall respond to comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall adopt procedures for introducing a supplement into its formal administrative record, if such a record exists.

(4) Shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

California Rancheria Act of 1958 (CVA), Pub. L. 85-671, 72 Stat. 619 (Aug. 18, 1958)

Public Law 85-671

AN ACT

August 18, 1958
[H. R. 2824]

To provide for the distribution of the land and assets of certain Indian rancherias and reservations in California, and for other purposes.

Indian rancherias.
Land distribution.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the lands, including minerals, water rights, and improvements located on the lands, and other assets of the following rancherias and reservations in the State of California shall be distributed in accordance with the provisions of this Act: Alexander Valley, Auburn, Big Sandy, Big Valley, Blue Lake, Buena Vista, Cache Creek, Chicken Ranch, Chico, Cloverdale, Cold Springs, Elk Valley, Guidiville, Graton, Greenville, Hopland, Indian Ranch, Lytton, Mark West, Middletown, Montgomery Creek, Mooretown, Nevada City, North Fork, Paskenta, Picayune, Pinoleville, Potter Valley, Quartz Valley, Redding, Redwood Valley, Robinson, Rohnerville, Ruffeys, Scotts Valley, Smith River, Strawberry Valley, Table Bluff, Table Mountain, Upper Lake, Wilton.

Distribution of assets.

SEC. 2. (a) The Indians who hold formal or informal assignments on each reservation or rancheria, or the Indians of such reservation or rancheria, or the Secretary of the Interior after consultation with such Indians, shall prepare a plan for distributing to individual Indians the assets of the reservation or rancheria, including the assigned and the unassigned lands, or for selling such assets and distributing the proceeds of sale, or for conveying such assets to a corporation or other legal entity organized or designated by the group, or for conveying such assets to the group as tenants in common. The Secretary shall provide such assistance to the Indians as is necessary to organize a corporation or other legal entity for the purposes of this Act.

Referendum.

(b) General notice shall be given of the contents of a plan prepared pursuant to subsection (a) of this section and approved by the Secretary, and any Indian who feels that he is unfairly treated in the proposed distribution of the property shall be given an opportunity to present his views and arguments for the consideration of the Secretary. After such consideration, the plan or a revision thereof shall be submitted for the approval of the adult Indians who will participate in the distribution of the property, and if the plan is approved by a majority of such Indians who vote in a referendum called for that purpose by the Secretary the plan shall be carried out. It is the intention of Congress that such plan shall be completed not more than three years after it is approved.

Record of conveyance.

(c) Any grantee under the provisions of this section shall receive an unrestricted title to the property conveyed, and the conveyance shall be recorded in the appropriate county office.

Taxation.

(d) No property distributed under the provisions of this Act shall at the time of distribution be subject to any Federal or State income tax. Following any distribution of property made under the provisions of this Act, such property and any income derived therefrom by the distributee shall be subject to the same taxes, State and Federal, as in the case of non-Indians: *Provided*, That for the purpose of capital gains or losses the base value of the property shall be the value of the property when distributed to the individual, corporation, or other legal entity.

SEC. 3. Before making the conveyances authorized by this Act on any rancheria or reservation, the Secretary of the Interior is directed:

Surveys.

(a) To cause surveys to be made of the exterior or interior boundaries of the lands to the extent that such surveys are necessary or

appropriate for the conveyance of marketable and recordable titles to the lands.

Improvement of roads.

(b) To complete any construction or improvement required to bring Indian Bureau roads serving the rancherias or reservations up to adequate standards comparable to standards for similar roads of the State or subdivision thereof. The Secretary is authorized to contract with the State of California or political subdivisions thereof for the construction or improvement of such roads and to expend under such contracts moneys appropriated by Congress for the Indian road system. When such roads are transferred to the State or local government the Secretary is authorized to convey rights-of-way for such roads, including any improvements thereon.

Water systems.

(c) to install or rehabilitate such irrigation or domestic water systems as he and the Indians affected agree, within a reasonable time, should be completed by the United States.

(d) To cancel all reimbursable indebtedness owing to the United States on account of unpaid construction, operation, and maintenance charges for water facilities on the reservation or rancheria.

Land exchanges.

(e) To exchange any lands within the rancheria or reservation that are held by the United States for the use of Indians which the Secretary and the Indians affected agree should be exchanged before the termination of the Federal trust for non-Indian lands and improvements of approximately equal value.

Water rights.

SEC. 4. Nothing in this Act shall abrogate any water right that exists by virtue of the laws of the United States. To the extent that the laws of the State of California are not now applicable to any water right appurtenant to any lands involved herein they shall continue to be inapplicable while the water right is in Indian ownership for a period not to exceed fifteen years after the conveyance pursuant to this Act of an unrestricted title thereto, and thereafter the applicability of such laws shall be without prejudice to the priority of any such right not theretofore based upon State law. During the time such State law is not applicable the Attorney General shall represent the Indian owner in all legal proceedings, including proceedings before administrative bodies, involving such water right, and in any necessary affirmative action to prevent adverse appropriation of water which would encroach upon the Indian water right.

Conveyances.

SEC. 5. (a) The Secretary of the Interior is authorized to convey without consideration to Indians who receive conveyances of land pursuant to this Act, or to a corporation or other legal entity organized by such Indians, or to a public or nonprofit body, any federally owned property on the reservations or rancherias subject to this Act that is not needed for the administration of Indian affairs in California.

(b) For the purposes of this Act, the assets of the Upper Lake Rancheria and the Robinson Rancheria shall include the one-hundred-and-sixty-acre tract set aside as a wood reserve for the Upper Lake Indians by secretarial order dated February 15, 1907.

(c) The Secretary of the Interior is authorized to sell the five hundred and sixty acres of land, more or less, which were withdrawn from entry, sale, or other disposition, and set aside for the Indians of Indian Ranch, Inyo County, California, by the Act of March 3, 1928 (45 Stat. 162), and to distribute the proceeds of sale among the heirs of George Hanson.

Disbursements.

SEC. 6. The Secretary of the Interior shall disburse to the Indians of the rancherias and reservations that are subject to this Act all funds of such Indians that are in the custody of the United States.

Claims.

SEC. 7. Nothing in this Act shall affect any claim filed before the Indian Claims Commission, or the right, if any, of the Indians sub-

ject to this Act to share in any judgment recovered against the United States on behalf of the Indians of California.

Appointment of guardians.

SEC. 8. Before conveying or distributing property pursuant to this Act, the Secretary of the Interior shall protect the rights of individual Indians who are minors, non compos mentis, or in the opinion of the Secretary in need of assistance in conducting their affairs, by causing the appointment of guardians for such Indians in courts of competent jurisdiction, or by such other means as he may deem adequate, without application from such Indians, including but not limited to the creation of a trust for such Indians' property with a trustee selected by the Secretary, or the purchase by the Secretary of annuities for such Indians.

Educational training.

SEC. 9. Prior to the termination of the Federal trust relationship in accordance with the provisions of this Act, the Secretary of the Interior is authorized to undertake, within the limits of available appropriations, a special program of education and training designed to help the Indians to earn a livelihood, to conduct their own affairs, and to assume their responsibilities as citizens without special services because of their status as Indians. Such program may include language training, orientation in non-Indian community customs and living standards, vocational training and related subjects, transportation to the place of training or instruction, and subsistence during the course of training or instruction. For the purposes of such program, the Secretary is authorized to enter into contracts or agreements with any Federal, State, or local governmental agency, corporation, association, or person. Nothing in this section shall preclude any Federal agency from undertaking any other program for the education and training of Indians with funds appropriated to it.

Finality of plan.

SEC. 10. (a) The plan for the distribution of the assets of a rancheria or reservation, when approved by the Secretary and by the Indians in a referendum vote as provided in subsection 2 (b) of this Act, shall be final, and the distribution of assets pursuant to such plan shall not be the basis for any claim against the United States by an Indian who receives or is denied a part of the assets distributed.

Laws applicable.

(b) After the assets of a rancheria or reservation have been distributed pursuant to this Act, the Indians who receive any part of such assets, and the dependent members of their immediate families, shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all statutes of the United States which affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several States shall apply to them in the same manner as they apply to other citizens or persons within their jurisdiction. Nothing in this Act, however, shall affect the status of such persons as citizens of the United States.

Revocation.
25 USC 461-479.

SEC. 11. The constitution and corporate charter adopted pursuant to the Act of June 18, 1934 (48 Stat. 984), as amended, by any rancheria or reservation subject to this Act shall be revoked by the Secretary of the Interior when a plan is approved by a majority of the adult Indians thereof pursuant to subsection 2 (b) of this Act.

Rules and regulations.

SEC. 12. The Secretary of the Interior is authorized to issue such rules and regulations and to execute or approve such conveyancing instruments as he deems necessary to carry out the provisions of this Act.

Appropriation.

SEC. 13. There is authorized to be appropriated not to exceed $509,235 to carry out the provisions of this Act.

Approved August 18, 1958.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. As measured by the word-processing system used to prepare this brief, the brief contains 12,797 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a 14 point proportionally spaced roman-style typeface (Constantia).

Date: July 22, 2020

/s/ Jennifer A. MacLean
Jennifer A. MacLean

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 22, 2020 */s/ Jennifer A. MacLean*
Jennifer A. MacLean