IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STAND UP FOR CALIFORNIA!, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF INTERIOR, et al., Defendants, and WILTON RANCHERIA, CALIFORNIA, Intervenor-Defendant.	Case No. 1:17-cv-00058-TNM Oral Hearing Requested

REPLY MEMORANDUM IN SUPPORT OF WILTON RANCHERIA, CALIFORNIA'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs agree that the Secretary is "presumptively permi[tted]" to redelegate his authority to take land into trust and that it takes "*affirmative evidence*" to overcome that presumption. ECF No. 45, Pls.' Reply in Supp. of Summ. J. at 3 (citing *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (emphasis added)). They claim that this "uncontroversial" principle does not apply here, however, on the theory that the Secretary intended the 2013 amendments to 25 C.F.R. § 151.12 to preclude her from redelegating the AS-IA's authority when the office of AS-IA is vacant. The only support plaintiffs offer for this remarkable proposition is the bald statement that Section 151.12(c) confers final decisionmaking authority on the AS-IA "personally." Plaintiffs' say-so is no substitute for the affirmative evidence the law requires.

The presumption favoring redelegation sets a high bar, and plaintiffs come nowhere close to clearing it. Plaintiffs claim that Section 151.12(c) was meant to cabin redelegation, but the Secretary consciously modeled that provision on a regulation long interpreted to *allow* it. Plaintiffs invoke the *expressio unius* canon, but the D.C. Circuit has held time and again that the canon cannot displace interpretive presumptions. And the text of Section 151.12(c) could not support plaintiffs' preferred implication anyway. Plaintiffs urge that the distinction between final and non-final decisionmakers would be pointless if the regulation authorized redelegation, but they ignore Section 151.12's structure and purpose.

In light of plaintiffs' struggles with the text, it comes as no surprise that their reply is nearly silent on the issue of deference, which offers an independent basis to reject their claims. Plaintiffs' additional arguments are no more availing. Their attempt to invoke constitutional avoidance would invite absurd results and fails under controlling precedent. And their claim under the Federal Vacancies Reform Act cannot overcome the Act's rigorous clear-statement

rule. The Court should enter summary judgment for the Federal Defendants and the Tribe on Counts I and II.

ARGUMENT

I. THE SECRETARY MAY REDELEGATE THE AS-IA'S AUTHORITY TO MAKE FINAL TRUST DECISIONS.

A. Plaintiffs Cannot Overcome The Presumption Favoring Redelegation.

Plaintiffs tacitly concede that nothing on the face of Section 151.12 indicates that the AS-IA's authority to render final trust decisions is exclusive. They urge this Court to read an *implied* limitation to that effect into the regulation's text. That is not how it works. "[A]bsent affirmative evidence" that the Secretary intended to preclude redelegation, Section 151.12 "presumptively permi[ts]" it. *U.S. Telecom Ass'n*, 359 F.3d at 565.

1. *Section 151.12(c) presumptively permits redelegation.*

Plaintiffs contend (Reply 8) that the 2013 Final Rule that promulgated the current version of Section 151.12(c) and (d) "could have served no purpose other than to limit the authority to make final trust decisions to" two individuals only: the Secretary and AS-IA. But the regulations define Secretary to mean "Secretary . . . *or* authorized representative," 25 C.F.R. § 151.2(a) (emphasis added), and the 2013 amendments restated the already-existing rules on finality found in 25 C.F.R. § 2.6—a rule that had long been interpreted to *allow* redelegation of the AS-IA's final decisionmaking authority. *See Land Acquisitions: Appeals of Land Acquisition Decisions*, 78 Fed. Reg. 67,928, 67,929-30 (Nov. 13, 2013); Wilton Br. 4-5.

The preamble to the 2013 Final Rule explained that the Secretary's practice was to delegate "decisions to acquire land in trust . . . either to the AS-IA or a BIA official." 78 Fed. Reg. at 67,929. "The existing regulations that apply to *all* AS-IA and BIA decisions include different means and timelines for challenging decisions depending on whether the decision is

issued by the AS-IA or a BIA official." *Id.* (emphasis added). "If the AS-IA issues the decision," "the decision is a 'final agency determination' " under 25 C.F.R. § 2.6(c). *Id.* By contrast, a decision issued by a BIA official is subject to exhaustion. *Id.*; *see* 25 C.F.R. § 2.6(b).

The Final Rule "clarifie[d] these distinctions" in the context of trust acquisitions by spelling out that when the AS-IA exercises delegated authority to make trust decisions, those decisions are final—just as they are whenever the AS-IA exercises any decisionmaking authority conferred on him by statute, regulation, or secretarial delegation. 78 Fed. Reg. at 67,929; *see* 25 C.F.R. § 151.12(c); *id.* § 2.6(c). Likewise, Section 151.12(d) reiterated that when a BIA official is delegated the authority to make a trust decision, that decision is not final until the time for filing an appeal has passed and no notice of appeal has been filed—just as under Section 2.6(b). *Compare id.* § 2.6(b), *with id.* § 151.12(d).

Crucially, the Secretary incorporated Section 2.6's structure into Section 151.12(c) and (d) against a background of judicial and administrative precedent consistently holding that the AS-IA's authority to make final decisions *could* be redelegated to other officials in the AS-IA's absence. Thus, in *Sokaogon Chippewa Community v. Babbitt*, 929 F. Supp. 1165 (W.D. Wis. 1996), the court held that a Deputy Assistant Secretary's denial of a trust application was "final for the Department" because he was exercising the AS-IA's authority while the AS-IA was recused. *Id.* at 1181-82. The court recognized that a decision by the Deputy as such would not be final. *See id.* at 1182 (citing 25 C.F.R. §§ 2.4(e), 2.6(a)). But it concluded that, to the extent the Deputy was "exercising the authority" of the *AS-IA* in accordance with the Departmental Manual, "it was within his power to designate the decision as final" under Section 2.6(c)—just as Roberts did here. *Id.*; *see* ECF No. 15-1, BIA Record of Decision at 3 (designating the January 19 Decision as final). Similarly, in *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d

389 (D. Conn. 2008), the court held that the AS-IA's authority to issue a final decision under the tribal acknowledgments regulation could be redelegated to an Associate Deputy Secretary where the Secretary had "issued an order delegating the authority delegated to the AS-IA to the [Associate Deputy]." *Id.* at 419-20 (rejecting argument that this redelegation violated the Appointments Clause and the Federal Vacancies Reform Act); *see also Reconsidered Final Determination To Decline To Acknowledge the Schaghticoke Tribal Nation*, 70 Fed. Reg. 60,101, 60,103 (Oct. 14, 2005) (designating the underlying decision as "final and effective").

Like these judicial decisions, the Interior Board of Indian Appeals had also held that Section 2.6(c) allows officials temporarily exercising the AS-IA's authority to make final decisions for the Department. *See* Wilton Br. 15-17 (discussing *Forest County Potawatomi Community v. Deputy Assistant Secretary-Indian Affairs*, 48 IBIA 259 (2009); and *Ramah Navajo Chapter v. Deputy Assistant Secretary for Policy and Economic Development-Indian Affairs*, 49 IBIA 10 (2009)).

In 2013, the Secretary made "explicit" that these same rules—long understood to permit redelegation—apply to trust decisions too. Far from limiting the Secretary's powers, the 2013 amendments were thus consciously modeled on a framework that preserved the Secretary's broad discretion to redelegate authority.

2. *The* expressio unius *canon cannot supply affirmative evidence of an intent to bar redelegation.*

Plaintiffs' efforts to read limitations into the regulation's text using canons of interpretation are no more persuasive. Plaintiffs do not dispute that Congress and the Secretary know how to foreclose delegation when they intend that result. *See* Wilton Br. 10-11 (citing statutes and regulations with language such as "may not delegate," "not subject to delegation," and "shall not be redelegated"). Indeed, the provision of the Departmental Manual that effected

the redelegation here provided that Roberts' authority could "not be [further] redelegated." 209 DM 8.4(B).[1] The use of such explicit language makes sense given the need for affirmative evidence to overcome the presumption of delegability. And it shows why plaintiffs' reliance on the *expressio unius* canon to *imply* such a limit in Section 151.12(c) is wholly inappropriate.

To start, under D.C. Circuit law, the *expressio unius* canon could not possibly stand in for the "affirmative evidence" plaintiffs need to overcome the strong presumption favoring redelegation. *U.S. Telecom Ass'n*, 359 F.3d at 565. In rejecting an analogous argument, the court of appeals held that a party could not invoke *expressio unius* to supply the "clear and manifest" evidence of congressional intent necessary to displace another presumption—the presumption against implied repeal. *See Howard v. Pritzker*, 775 F.3d 430, 436-37 (D.C. Cir. 2015). The D.C. Circuit has also repeatedly held that *expressio unius* is "too thin a reed to support the conclusion that Congress has clearly resolved an issue" for purposes of determining whether *Chevron* deference applies. *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 697 (D.C. Cir. 2014) (quoting *Mobile Commc'ns Corp. of Am. v. FCC*, 77 F.3d 1399, 1405 (D.C. Cir. 1996)); *accord Tex. Rural Legal Aid, Inc. v. Legal Servs. Corp.*, 940 F.2d 685, 694 (D.C. Cir. 1991). The canon cannot bear the weight that plaintiffs put on it here, either.

That is particularly so because the regulation's text cannot support the implication plaintiffs attempt to read into it via the canon. Section 151.12 does not delegate the Secretary's authority to render trust decisions to the AS-IA or BIA officials. Nor could it. After all, the regulation gives no indication as to *which* trust decisions are delegated to *whom*. And the Secretary had *already* distinguished the AS-IA's and BIA officials' general authority to make final and nonfinal decisions, respectively, in Section 2.6. As the preamble to the 2013

[1] All provisions of the Departmental Manual cited in this reply are available at ECF No. 33-1, Tab H.

amendments explained, Section 151.12 was simply meant to describe what happens when an official exercises authority the Secretary has delegated, a practice that predated the new regulation. *See supra* pp. 2-3. This Court should thus adhere to the well-established principle that constraints on delegation cannot be implied from the mention of an official in a provision that does "not delegate a particular function," *Ethicon Endo-Surgery, Inc. v. Covidien LP*, 812 F.3d 1023, 1033 (Fed. Cir. 2016) (internal quotation marks omitted), or "address delegation *directly*," *United States v. Mango*, 199 F.3d 85, 90 (2d Cir. 1999) (emphasis added). All that Section 151.12 does is clarify that the same rules that govern the finality of *all* DOI decisions apply in the trust acquisition context. The references to the AS-IA and BIA officials in Section 151.12 thus do not "exclude delegation to other officials." *Ethicon Endo-Surgery*, 812 F.3d at 1033 (quoting *Mango*, 199 F.3d at 90); *cf. Forest Cty. Potawatomi Cmty.*, 48 IBIA at 270 ("A specific delegation of authority is not the same as a delegation of *exclusive* authority.").

Plaintiffs' contrary argument is circular. They claim (Reply 6) that Section 151.12 addresses delegation because it "expressly grants" certain powers to certain officials by mentioning them. But, again, the reference to a particular official is only even potentially relevant to the Secretary's authority to redelegate if the provision at issue "*directly*" addresses *delegation*. *Mango*, 199 F.3d at 90 (emphasis added). Section 151.12 does not. Plaintiffs' reliance on *United States v. Giordano*, 416 U.S. 505 (1974), is misplaced. Unlike Section 151.12, the statute in *Giordano* was itself a delegation of authority from Congress. It provided that "the Attorney General, or any Assistant Attorney General specially designated by the Attorney General, *may* authorize" certain wiretaps. *Id.* at 513 (quoting 18 U.S.C. § 2516(1) (1970) (brackets omitted and emphasis added)). The Court thus found that it "expressly addressed" the "matter of delegation." *Id.* at 514. And while the Court allowed that the text was

not "precise," it found that the statute's "purpose and legislative history" "strongly supported" limiting redelegation. *Id.*; *see Mango*, 199 F.3d at 90 (distinguishing *Giordano* on the basis of this evidence alone). Again, Section 151.12 does not confer any authority, and the regulation's history *supports* redelegation. *See supra* p. 5; Wilton Br. 23. Nothing in *Giordano* suggests that the *expressio unius* canon would bar redelegation here.

3. *The canon against superfluity does not support plaintiffs' interpretation either.*

Plaintiffs repeat their contention that, unless Section 151.12(c) is read to foreclose redelegation of the AS-IA's authority in his absence, it renders superfluous the distinction between final and non-final decisionmakers. Nonsense. As the Tribe explained in its cross-motion, the 2013 amendments did not "replace" the former rules' references to the Secretary, as plaintiffs again contend (Reply 8). *See* Wilton Br. 11-12. Rather, the amendments added *new* subparagraphs that replaced an indeterminate reference to administrative exhaustion by explicitly replicating the distinction found in the existing, generally applicable regulation between final decisions and decisions that must be appealed administratively before they can be challenged in court. *Id.*; 78 Fed. Reg. at 67,929; *see supra* pp. 2-3. The express reference to the AS-IA alongside the reference to the Secretary in Section 151.12(c) was necessary to make clear that, as with any DOI decision, those made by the Secretary and AS-IA could immediately be challenged in court. (Indeed, decisions by the Secretary and the AS-IA could not be subject to administrative exhaustion through the Interior Board of Indian Appeals in the trust context, as in any other context, because the Board lacks jurisdiction to review decisions of either the Secretary or AS-IA unless it receives explicit authorization. *See* U.S. Dep't of the Interior, *Limitations on the Board Jurisdiction, available at* https://www.doi.gov/oha/organization/ibia/Limitations-on-the-Board-Jurisdiction.) Contrary to plaintiffs' assertion (Reply 7), that purpose is not rendered

"pointless" just because the Secretary designates someone to temporarily exercise the AS-IA's authority while there is no AS-IA.

Nor does temporarily redelegating the AS-IA's authority undermine the regulation's clarifying purpose as a practical matter, as this case shows. Plaintiffs do not dispute that the Departmental Manual designated Roberts—in his capacity as the Principal Deputy to the AS-IA—as the official authorized by the Secretary to exercise the AS-IA's nonexclusive functions and duties in the AS-IA's absence. *See* 209 DM 8.4(B). Nor do plaintiffs contend they were confused as to the nature of Roberts' decision or whether they were required to exhaust administrative remedies in order to be able to challenge it. To the contrary, they argue (Reply 3) that the "order itself" made clear that it was final. So there is no reason to believe that the established, formal process of internal redelegation risks any confusion.

That should come as no surprise. If plaintiffs were correct that authorizing someone to stand in the AS-IA's shoes through the Departmental Manual was enough to undermine Section 151.12's intended structure, then the automatic substitution of an *acting* AS-IA under the Federal Vacancies Reform Act would likewise render the regulation senseless. Not even plaintiffs go that far. Section 151.12 does not revoke *sub silentio* the Secretary's power to redelegate final decisionmaking authority any time the AS-IA is unavailable.

B. DOI's Interpretation Of Its Own Regulations Is Entitled To Deference.

Plaintiffs' reply is tellingly silent when it comes to deference. Their only response appears to be (Reply 7) that this case is the first time the Department has addressed the meaning of Section 151.12(c). That is both irrelevant and misleading. It is irrelevant because even if the briefs filed in this case were the only evidence of the Department's views, they would suffice to command deference. Courts "defer to an agency's interpretation of its regulations, even in a legal brief, unless the interpretation is plainly erroneous or inconsistent with the regulations."

Talk Am., Inc. v. Mich. Bell Tel. Co., 564 U.S. 50, 59 (2011) (internal quotation marks and brackets omitted). And an interpretation is not "plainly erroneous or inconsistent with [a] regulation" unless "an alternative reading is *compelled* by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (internal quotation marks omitted and emphasis added). If nothing else, the foregoing discussion shows that the text and purpose of Section 151.12 cannot "compel" plaintiffs' reading.[2]

Plaintiffs' response is also misleading, because the Department's briefing is not the only relevant agency interpretation here. Michael Black's administrative decision in this case is likewise a conclusive construction of Section 151.12(c). And Section 2.6's framework, which Section 151.12 makes "explicit" also applies to trust decisions, has repeatedly been interpreted by the agency to permit redelegation of the AS-IA's final decisionmaking authority. The Department has articulated that interpretation through: (1) decisions from the Interior Board of Indian Appeals, *supra* p. 4; (2) a 2005 opinion from the Department's Solicitor expressing the considered view that *no* regulation committed authority exclusively to the AS-IA, *see* ECF No. 40-1, Ex. 2, Memorandum from Solicitor to Secretary, *Redelegation of Duties of Assistant Secretary-Indian Affairs* (Jan. 28, 2005); *see also* Wilton Br. 17; and (3) the Department's consistent position in litigating the finality of decisions made by individuals redelegated the AS-IA's authority when no AS-IA was available. *See, e.g.*, ECF No. 179, Fed. Resp'ts' Mem. in

[2] To the extent plaintiffs invoke the *expressio unius* canon to resist deference, they are mistaken. The D.C. Circuit has held that courts "must defer" to an agency's "refusal to read [a provision] in the manner suggested by the *expressio* canon if its interpretation is otherwise reasonable." *Tex. Rural Legal Aid, Inc.*, 940 F.2d at 694; *see also St. Marks Place Hous. Co. v. U.S. Dep't of Hous. & Urban Dev.*, 610 F.3d 75, 82-83 (D.C. Cir. 2010) (noting that the canon "has little force," especially where courts "review[] an agency's interpretation of its own regulations" (internal quotation marks omitted)).

Opp'n to Pet'r's Mot. for Summ. J. at 54-60, *Schaghticoke Tribal Nation*, 587 F. Supp. 2d 389 (No. 3:06-cv-00081-PCD).

That some of these interpretations pre-date the 2013 amendments cuts *against* plaintiffs, not the other way around. The 2013 amendments to Section 151.12 expressly apply Section 2.6's structure to trust decisions—and with it, the Board's holdings, the Solicitor's conclusion, and the agency's litigation position consistently concluding that Section 2.6(c) permits redelegation of the AS-IA's final decisionmaking authority. *See* 78 Fed. Reg. at 67,929-30. The consistency of the Department's interpretation only reinforces its entitlement to deference. *See Barnhart v. Walton*, 535 U.S. 212, 220 (2002) (noting that the Supreme Court "normally accord[s] particular deference to an agency interpretation of longstanding duration" (internal quotation marks omitted)).

C. Plaintiffs' Constitutional-Avoidance Argument Is Meritless.

Plaintiffs' reply confirms that their constitutional-avoidance argument is a non-starter. The Appointments Clause distinguishes between officers—like the Secretary and AS-IA—who are appointed by the President and confirmed by the Senate and "inferior Officers" like Roberts, whose appointment Congress has vested "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2; *see Ass'n of Am. R.Rs. v. U.S. Dep't of Trans.* (*AAR*), 821 F.3d 19, 36 (D.C. Cir. 2016). The D.C. Circuit has explained that "the *degree* of an individual's authority" is irrelevant, so long as the individual is either Senate-confirmed or "directed and supervised at some level" by a Senate-confirmed officer. *AAR*, 821 F.3d at 38 (quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997) (emphasis added)). That disposes of plaintiffs' argument.

As the Tribe explained in its cross-motion, Roberts' exercise of the AS-IA's authority was subject at all times to the Secretary's direction and supervision. *See* Wilton Br. 18. The Secretary is expressly "responsible for the direction and supervision of *all* operations and activities of the Department." 109 DM 1.1 (emphasis added). He has "authority to take jurisdiction at any stage of any case" and to "review any decision of any employee or employees of the Department, including any administrative law judge or board of the Office, or to direct any such employee or employees to reconsider a decision" with exceptions not relevant here. 43 C.F.R. § 4.5(a). And the Secretary retained ultimate responsibility for any action Roberts took pursuant to the delegation. *See* 200 DM 1.9. Plaintiffs have no answer to these provisions.

And there is more: The Federal Vacancies Reform Act limited Roberts to the AS-IA's non-exclusive functions and duties. *See* 5 U.S.C. § 3348(b); 200 DM 1.2. Roberts was required to carry out those functions "in accordance with relevant policies, standards, programs, organization and budgetary limitations, and administrative instructions prescribed by officials of the Office of the Secretary or bureau" on pain of "disciplinary measures." 200 DM 1.8. As a noncareer appointee in the Senior Executive Service, Roberts could be dismissed "at any time." 5 U.S.C. § 3592(c); *see* 5 C.F.R. § 359.902.[3] Short of firing Roberts, the Secretary could redelegate the AS-IA's functions to another Department official, effectively ousting Roberts from his temporary role. *See* 43 U.S.C. § 1451(2) (granting the Secretary broad discretion to delegate authority); 200 DM 1.2 (same). Those constraints were more than enough to satisfy any Appointments-Clause concern.

[3] The "Plum Book" maintained by the Senate Committee on Homeland Security establishes that Roberts was the Principal Deputy to the AS-IA in 2016, serving as a noncareer appointee in the Senior Executive Service. *See* Staff of S. Comm. on Homeland Sec. & Governmental Affairs, 114th Cong., *U.S. Gov't Policy and Supporting Positions* 90 (Comm. Print 2016), https://www.govinfo.gov/content/pkg/GPO-PLUMBOOK-2016/pdf/GPO-PLUMBOOK-2016.pdf.

Plaintiffs protest (Reply 9-10) that Roberts was empowered to take final agency action. That is not the test. For one thing, it would call into question the long-settled understanding, codified in the Federal Vacancies Reform Act, that an inferior officer may exercise *all* of the powers of a Senate-confirmed officer on an acting basis—including taking final action for the agency. *See* 5 U.S.C. § 3345(a). Congress has authorized such gap-filling "[s]ince the beginning of the nation," and for good reason. *Sw. Gen., Inc. v. NLRB*, 796 F.3d 67, 70 (D.C. Cir. 2015) (internal quotation marks omitted). It often takes weeks or months to fill a Senate-confirmed position. Secretary Zinke, for example, was not sworn in until March 1, 2017.[4] The implication of plaintiffs' constitutional-avoidance argument is that from January 20, 2017 through March 1, the Department of the Interior should have come to a complete standstill.

Complicating matters further, any time a Senate-confirmed officer has non-exclusive final decisionmaking authority, plaintiffs' argument would render unconstitutional the provisions of the Federal Vacancies Reform Act that permit *any* government employee to carry out those duties and functions after the 210-day period of an acting official has passed. 5 U.S.C. §§ 3346, 3348(b). It is unsurprising that plaintiffs cannot point to any court that has so held. This Court should decline to follow plaintiffs down a path that risks paralyzing government and upending over two hundred years of federal law. *See, e.g.*, Act of May 8, 1792, ch. 37, § 8, 1 Stat. 279, 281.

Plaintiffs' argument also contradicts their own insistence that there is no Appointments-Clause problem with allowing BIA officials to make trust decisions. Mem. 15. Plaintiffs argue (Reply 10 n.1) that the AS-IA can opt to decide an appeal or let the Board decide it. To the

[4] *See* Press Release, U.S. Dep't of the Interior, *Ryan Zinke Sworn In as 52nd Sec'y of the Interior* (Mar. 1, 2017), https://www.doi.gov/pressreleases/ryan-zinke-sworn-52nd-secretary-interior.

extent that answer means plaintiffs have abandoned their claim that trust acquisition decisions require "sign-off" from a Senate-confirmed officer, that is a welcome concession. To the extent plaintiffs suggest that the AS-IA's authority to review Board decisions somehow makes it different from what happened here, they are mistaken. The Secretary retained the authority to assume jurisdiction over Roberts' decision "at any stage of any case" and to "render the final decision" himself. *See* 43 C.F.R. § 4.5(a)(1).

On top of all of these infirmities, plaintiffs' argument is contradicted by controlling precedent. Courts determine whether an official's "work is directed and supervised at some level" based on a variety of considerations. *Edmond*, 520 U.S. at 661, 663. Among other things, the Supreme Court has "noted that the power to remove officers at will and without cause is a powerful tool for control of an inferior." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 510 (2010) (internal quotation marks and brackets omitted). And it has held that such authority easily meets *Edmond*'s test, at least when combined with the kind of general supervisory power that the Secretary possesses here. *See id.*; *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1341 (D.C. Cir. 2012) (holding that Appointments Clause was satisfied so long as a principal officer retained "unfettered" removal authority). The Secretary's unquestioned discretion to dismiss Roberts at will or remove him from his temporary role as the official exercising the AS-IA's non-exclusive functions and duties plainly satisfies these precedents.

The decision in *Association of American Railroads* offers no support for plaintiffs' claims. That case addressed a statute, the Passenger Rail Investment and Improvement Act of 2008, that authorized the Surface Transportation Board to appoint an arbitrator to resolve disputes between a government entity (Amtrak) and the private rail industry; the arbitrator's

decisions would be final and binding and could involve promulgating performance metrics and standards. 821 F.3d at 39. The court held that allowing the Board to appoint an arbitrator with such powers was unconstitutional because the statute contained *no* provision for "the arbitrator's direction or supervision" by Senate-confirmed officers at the agency. *Id.* The point of the Appointments Clause, the court emphasized, is to ensure political accountability. *Id.* at 36. That was missing in *AAR*—where an outside arbitrator could promulgate performance metrics with the force of law—but it is present here, where the Secretary remains ultimately responsible for decisions of those exercising redelegated authority.

D. Plaintiffs Do Not Meaningfully Defend Their Federal Vacancies Reform Act Claim.

To establish a violation of the Federal Vacancies Reform Act, plaintiffs would have to show that the AS-IA's authority to render final trust decisions is "established" by Section 151.12(c) and "*required*" by Section 151.12(c) "to be performed by the [AS-IA] (*and only* [the AS-IA])." 5 U.S.C. § 3348(a)(2)(B)(i) (emphases added). Setting aside the fact that Section 151.12 did not "establish" any new authority, *see supra* p. 5, plaintiffs remain unable to explain *what* language in Section 151.12(c) they believe meets the Act's exceptionally demanding clear-statement rule. Instead, plaintiffs simply assert (Reply 11-12) that the AS-IA's authority is exclusive. That is no answer at all.

Nor can plaintiffs answer any of the other, serious problems with their arguments raised in the Tribe's and Federal-Defendants' cross-motions. *See* Wilton Br. 22-24; Fed. Defs.' Br. 12-15. They cannot explain why the Act should not be read to incorporate the presumption favoring redelegation. Nor do they address the legislative history showing that the Act's sponsors did not intend to interfere with the "routine operation of the government" when vacancies arose. 144 Cong. Rec. S6414 (daily ed. June 16, 1998) (statement of Sen. Thompson introducing the bill).

And they leave unanswered the OLC memorandum explaining that "[m]ost, and in many cases all, the responsibilities performed by" Senate-confirmed officers can "be delegated to other appropriate officers and employees." Question 48, *Guidance on Application of Federal Vacancies Reform Act of 1998*, 23 Op. O.L.C. 60, 72 (1999), *available at* https://www.justice.gov/sites/default/files/olc/opinions/1999/03/31/op-olc-v023-p0060.pdf. Plaintiffs' non-response is telling. This case does not implicate the Federal Vacancies Reform Act.[5]

II. DEFENDANTS ARE ENTITLED TO JUDGMENT ON COUNT II.

If this Court reaches plaintiffs' second count, it should enter judgment for defendants. Plaintiffs' reply abandons their meritless contention that the authority to take land into trust is exclusive to the AS-IA. *See* Mem. 19. And instead of explaining how their remaining argument—that the AS-IA's authority to assume jurisdiction over Board appeals is exclusive—is viable given that it rested entirely on quotations taken out of context from the 1989 preamble to the final rule giving the AS-IA that authority, *see* Wilton Br. 25-26, plaintiffs just repeat the same quotations. This suggests they have nothing more to say. As the Tribe explained in its cross-motion, Michael Black was undisputedly delegated the non-exclusive functions and duties of the AS-IA effective January 20, 2017. Wilton Br. 24. There is no textual basis to interpret the AS-IA's authority under 25 C.F.R. § 2.20(c), and 43 C.F.R. § 4.332(b), as exclusive. And if

[5] This Court should reject plaintiffs' bid (Reply 14) for a second bite at the apple by belatedly raising arguments they claim require further record development. Plaintiffs chose to seek summary judgment on Counts I and II before addressing their substantive challenges to the January 19 Decision. The motions before the Court fully address the merits of plaintiffs' procedural claims. If plaintiffs wanted to pursue additional, record-based arguments in support of those Counts, they should have done so in their motion for summary judgment. In any event, the Plum Book, *see supra* p. 11, n.3, resolves any question about Roberts' appointment as the Principal Deputy AS-IA.

there could be any doubt, the Department's reasonable interpretation of the regulations would control. Defendants are therefore entitled to judgment on Count II.

CONCLUSION

For the foregoing reasons and those advanced by the Federal Defendants, the Tribe respectfully requests that this Court grant summary judgment to defendants on Counts I and II of plaintiffs' amended complaint.

DATED this 5th day of January, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 5, 2018, the foregoing reply memorandum was filed via the Court's CM/ECF system and served upon ECF-registered counsel for all parties to this proceeding.

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