UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STAND UP FOR CALIFORNIA!, PATTY JOHNSON, JOE TEIXEIRA, and LYNN WHEAT,	**Civil No. 17-00058**
Plaintiffs,	**Washington, D.C.**
v.	
UNITED STATES DEPARTMENT OF INTERIOR, RYAN ZINKE, in his official capacity as Secretary of the Interior, BUREAU OF INDIAN AFFAIRS, and JOHN TAHSUDA III, in his official capacity as Acting Assistant Secretary-Indian Affairs,	**Tuesday, January 9, 2018**
Defendants,	
and	
WILTON RANCHERIA, CALIFORNIA,	
Intervenor-Defendant.	

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE TREVOR N. McFADDEN
UNITED STATES DISTRICT JUDGE

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P R O C E E D I N G S

(11:00 a.m.)

THE DEPUTY CLERK: Matter before the Court, Civil Case Number 17-58, Stand up for California, et al., versus United States Department of Interior, et al.

Counsel, please come forward to identify yourselves for the record.

MR. MILLER: Good morning. Eric Miller on behalf of plaintiffs.

THE COURT: Good morning, Mr. Miller.

MR. MILLER: May it please the Court, with me is my colleagues Jennifer MacLean and Ben Sharp and Niels Holch.

THE COURT: All right. Thank you.

MR. MCBRIDE: May it please the Court, Cody McBride for federal defendants, and with me is Steve Miskinis, co-counsel. Thank you.

THE COURT: Okay.

MS. ELLSWORTH: Good morning, Your Honor. Jessica Ellsworth for the Wilton Rancheria, California. With me are my colleagues Allison Turbiville and Eugene Sokoloff.

THE COURT: Good morning, Ms. Ellsworth.

Thank you to you all for your briefing.

We're here today to discuss cross motions for summary judgment. I would like to hear from Mr. Miller first. Just to give you a sense of my thinking at this point, it looks to

me like there are three main questions in front of me. The first is whether the role of the Assistant Secretary is delegable under Section 151.12(c). The second question is, if so, was there an effective redelegation of that authority to Mr. Roberts in this case. And third -- and this is probably a little more amorphous -- what role would *Auer* deference play in the analysis of those questions.

So I would like to hear from plaintiffs first. I have got some specific questions for you, but I would be interested in your views on those questions to begin with.

MR. MILLER: Thank you, Your Honor.

May it please the Court, there are a great many issues in this case, but as Your Honor's questions indicate, really the key question here is the interpretation of 25 C.F.R. § 151.12, because whatever might be said about the abstract question of the delegability of the Secretary's powers, there is no dispute that the Secretary has authority to issue regulations that are binding upon the Secretary, and once the Secretary has issued regulations, those have the force of law, and the Secretary is obligated to follow them. So if 151.12 restricts delegability and does not authorize the role of the Assistant Secretary to be given to someone else, then that ends the inquiry, and the Secretary has to follow that regulation.

In fact, 151.12, when you read it, does clearly

restrict who has what authority within the department, and it does not permit the role of the Assistant Secretary to be assigned to someone else.

The key provisions of the regulations in this case are subsection (c) and subsection (d). And those set out separately the different roles of different Department of Interior officials in responding to and ruling upon requests to take title to land in trust. Subsection (c) says a decision made by the Secretary or the Assistant Secretary of Indian Affairs pursuant to delegated authority is a final agency action. Subsection (d) talks about other officials. It says a decision made by a BIA official pursuant to delegated authority is not a final agency action.

There's are a couple of things that are salient about that provision. One is that that is not a regulation that creates the authority to take lands in trust. That authority is created by the Indian Reorganization Act, which says the Secretary, referring to the agency as a whole. This is a regulation that takes the existing authority and parcels it out, assigns it among the officials of the Department of Interior and says who has what role, and it says that some officials have the role or have the authority to make final decisions and other subordinate officials have only the authority to make preliminary decisions that are subject to administrative appeal. That's not an accident. Because when

you look at what the Secretary said about the regulation when it was adopted in the official statement in the preamble in the Federal Register, she said it was, quote, "intended to increase transparency by explicitly stating the process for issuing trust acquisition decisions and the availability of administrative or judicial review in such decisions. And so the way it does that is it says some people have authority to make final decisions, and if the decision comes from one of those people, it is final; if a decision comes from somebody else, it is not final and you can take an administrative appeal.

THE COURT: Mr. Miller, what is your response to defendants' argument that for a section to be nondelegable, you have to have specific -- there has to be evidence of an affirmative intent not to delegate.

MR. MILLER: I think it is fair to say that you have to find some evidence of intent not to delegate.

THE COURT: So you would agree with them, you would just say it is evident here?

MR. MILLER: I would say two things: One, it is evident here. Two, I think my friends on the other side are over reading some of the cases and suggesting that there is this doctrine of nondelegability that requires some sort of clear statement to overcome. There doesn't have to be any sort of magic words or especially clear statement. It just

has to be that when you read the statute or regulation taken as a whole you find an intent not to delegate. A couple of cases that show that are the *Mango* case in the Second Circuit where the Court said that a grant of power to one official sometimes can be evidence of an intent not to allow subdelegation, and what you just have to look at is the language they use, the overall intent of the statute.

THE COURT: Is *Mango* the best case for your position?

MR. MILLER: No. That's the case they're relying on.

THE COURT: Right. What about you? What is your best case?

MR. MILLER: *Giordano* from the Supreme Court involving the Wiretap Act. And what's significant about *Giordano* is that the statute there did not say -- it said that the application for the warrant had to come from the attorney general or a specially designated assistant attorney general. It didn't say only; it didn't say exclusively; it didn't say and they may not delegate to anyone else.

THE COURT: The courts of appeal, their gloss on that is that there was evidence in the legislative history that made clear it was to be the Attorney General or an Assistant Attorney General and no one else. Do you have similar evidence here?

MR. MILLER: We do. We have, one, the structure of the statute, the division of authority between (c) and (d)

that some people get to make some kinds of decisions and other people get to make other kinds of decisions. To say that the Secretary, who is one of the people in (c), could delegate that authority to others is to make meaningless the division of authority between the people in (c) and the people in (d).

We also have statements in the preamble, and a couple of those that are particularly relevant are the Secretary's responses to comments of the rulemaking. There was one that the commenter said to the agency, you should point out that the Assistant Secretary can approve in writing a BIA decision and that will make it final. The Secretary said, we don't have any need to say that explicitly because an Assistant Secretary's decision is final for the department when issued. So the point of that response is to say, well, there's a difference based on who it is that's issuing the decision, the Assistant Secretary or somebody who is not the Assistant Secretary.

THE COURT: Defendants point out that the language of 151 earlier on, the definitional subsection, says that it is the Secretary or his authorized representative. Are you saying that "authorized representative" language is inapplicable to Subsection 12(c)?

MR. MILLER: Yes, Your Honor. And that's because that definitional provision, it applies to all of part 151,

and like every definitional provision, it applies except in a case where the context indicates otherwise. So in most of 151, the context indicates that that makes perfect sense. For example, 151.9 says, if a tribe wants to have land taken into trust, it has to file a written request with the Secretary. They don't have to give it to the Secretary personally; they can give it to an authorized representative. But if you plug that definition into 151.12, it doesn't make any sense, both because (c) says the Secretary or the Assistant Secretary pursuant to delegated authority. That part would be superfluous because the Assistant Secretary pursuant to delegated authority is an authorized representative of the Secretary. And then (d), which refers to BIA officials, would make no sense because BIA officials, whenever they do anything, they are acting pursuant to power delegated to them by the Secretary. So just plugging that definition into 151.12 would make the whole thing nonsensical.

Another problem with the reliance on that definition here -- and this really gets to the second of the questions you posed at the outset -- is that when Mr. Roberts issued this decision in January, he was not purporting to act as a representative of the Secretary. He was purporting to act as a representative of the vacant position of the Assistant Secretary. That is made quite clear in Mr. Black's

July decision. He said, in his view, the reason Roberts was able to act was because he had been delegated the powers of the Assistant Secretary. At the time of the administrative decision, they were not relying on 151.2.

THE COURT: So I could rule for you and not have to find whether the Secretary could have said, Mr. Roberts is my authorized representative and whether that would have worked. You're saying that that is not what the Secretary purported to do; he purported to make him the Assistant Secretary.

MR. MILLER: That's right. Two different paths to get there, and either one of them is an independent basis to rule for us here.

THE COURT: Okay.

MR. MILLER: Now, I think maybe the next question that brings up then is the question of deference. There are a couple of points that are related to *Auer*. As you know, it is our view that *Auer* was wrongly decided, but of course we recognize that this Court is bound by it. But in conducting the analysis under *Auer,* there are a number of factors that are relevant, one of which is that this is not a longstanding interpretation of the Secretary. The government and the tribe have said that the Secretary has taken this position for a long time, but all of the evidence that they point to is statements that were made before the present rules were even adopted in 2013.

The key point in conducting the analysis under *Auer* is what the Supreme Court said in *Perez v. Mortgage Bankers Association,* and that is, quoting from footnote 4, that even in cases where an agency's interpretation receives *Auer* deference, it is the Court that ultimately decides whether a given regulation means what the agency says.

THE COURT: And what was that case again?

MR. MILLER: That's *Perez v. Mortgage Bankers Association* in 2015.

And that's because, even on its own terms, *Auer* says that there is deference except when the agency's interpretation is plainly contrary to the language of the statute. Neither the Secretary nor the tribe has really even made any serious effort to reconcile their position with the text of what the regulation actually says, with the language of (c) and (d), with the structure of the division of responsibility between the officials named in (c) and the officials named in (d). There simply isn't a way that you can read that, makes sense of it, that is consistent with the position that the authorities in (c) can be delegated to the officials who are not named in (c). So anyone at the discretion of the Secretary can make a final agency action.

THE COURT: Do you agree with intervenors that the government defendants' brief is entitled to *Auer* deference?

MR. MILLER: The Court in *Auer* itself said that an

agency interpretation expressed in a brief can be entitled to deference.

THE COURT: Even putting aside everything from pre-2013, there is evidence here or agency gloss that I would need to give deference to?

MR. MILLER: Yes, but with the caveat that the level of deference does take account of whether there has been a consistently held, longstanding position of the agency or whether it is something new. So with that qualification, we acknowledge we're in the *Auer* framework here, but even applying *Auer*, the agency doesn't win just because they have articulated a position. They have to show that their position is a plausible reading of some ambiguity in the language of the regulation, and they haven't done that.

THE COURT: Back to the discussions about what the section itself means, a number of the cases cited by defendants for understanding the meaning of the regulation or actually cases referring to glosses on statutes, does that matter? Should I be interpreting a regulation the same as I would be interpreting the statute for like expressio unius and those other various canons?

MR. MILLER: I think the basic interpretive principles and the canons of interpretation, the inferences to be drawn from structure and context, all of that is the same. The enterprise of reading authoritative text and

interpreting the text is the same whether it is a regulation or a statute. The one respect in which I think it is different is that the cases that say that in statutes an assignment of an authority to one official doesn't preclude delegation to other officials don't necessarily track onto regulations. That's because in the statutory context, it is quite common for Congress to assign authority to an agency by naming the head of the agency. Pretty much all of Title 25 says the Secretary shall do X, and that means the whole department. When you're reading a regulation, particularly one like this one, this was not a regulation that was creating authority or vesting authority in the agency. This was the Secretary taking authority that she already had from Congress and saying here is who is going to exercise that authority.

THE COURT: Do you have any case law for that proposition?

MR. MILLER: The last point that I --

THE COURT: This suggestion that Secretary in a statute should be read differently than Secretary in a regulation?

MR. MILLER: I am not aware of a case that specifically says that, but I think it is a fair inference from the reasoning in the cases dealing with delegation in the context of statutes.

THE COURT: Okay.

MR. MILLER: Unless the Court has further questions.

THE COURT: Thank you. I will give you a chance to speak at the end here.

MR. MILLER: Thank you.

THE COURT: All right. Mr. McBride, are you speaking first?

MR. MCBRIDE: Yes.

THE COURT: Perhaps you could start out just kind of telling me, do you agree, do I have the three main questions right? Is there something I'm missing there?

MR. MCBRIDE: Yes, Your Honor, I think you do have the three main questions right. I think this case turns on whether Section 151.12 allows redelegation of the AS-IA's authority to make final fee-to-trust decisions.

Plaintiffs have attempted to raise the question of whether the redelegations themselves were generally proper here. They didn't raise that in their complaint in the first instance; but in any case, the redelegations here were clearly proper. The D.C. District Court has a flexible standard for finding that redelegations are valid, and the redelegations here clearly meet that standard. The redelegation occurred through the DM automatically when the Office of the AS-IA was vacant. That happened through 209 DM § 8.4.B, which says, when the Office of AS-IA is

vacant, then the PDAS, the Principal Deputy, can exercise all of the authority of the AS-IA.

THE COURT: Why was it necessary for the Deputy Secretary to write his letter of January 19th?

MR. MCBRIDE: So, that letter was in response to a mistake in the secretarial order setting up Larry Roberts as the First Assistant to the Assistant Secretary. That was just to clear up any confusion that might have occurred through that secretarial order that had Mr. Roberts' title wrong. It doesn't have any effect on the automatic redelegation that occurred through 209 DM § 4.B.

THE COURT: But the letter says the department typically uses succession orders to delegate authority to perform the duties of vacant positions. It doesn't refer to the DM.

MR. MCBRIDE: Right. Again, I think the Connor memo was discussing the succession that occurred after the Office of AS-IA became vacant in the first place to make Mr. Roberts the Acting AS-IA. In this case, even if --

THE COURT: But how is that relevant? That expired.

MR. MCBRIDE: Correct. That's my point. The Connor memo, for the most part, was just clarifying that Roberts was the Acting AS-IA --

THE COURT: Previously.

MR. MCBRIDE: Previously. It also then went on to

clarify that because he was actually PDAS starting in 2013, he was also automatically redelegated the AS-IA's non-exclusive authority after he stopped being acting.

THE COURT: Okay. So your position is that the various orders and the January 19th letter are beside the point; that the only thing that matters for delegation purposes is the DM?

MR. MCBRIDE: Well, I think the DM in itself is enough for the Court to find that the redelegation here was proper to Mr. Roberts. On top of that, I think the Connor memo does say something about the fact that he was redelegated the non-exclusive authority of the AS-IA. So I think that was just belts and suspenders on the part of the agency to make it clear and explicit that Mr. Roberts did have authority to make the decision he made here to take land in trust for Wilton. The Connor memo came before the Wilton decision. So even if --

THE COURT: How do I know that?

MR. MCBRIDE: That is clear through the department's internal e-mails.

THE COURT: Is that in the record?

MR. MCBRIDE: It is not in the record right now, but that's what happened. So even if the DM redelegation, if there is a problem with that, which there's not, the Connor memo in itself redelegated to Mr. Roberts properly. I think

the real question in this case is whether 25 C.F.R. § 151.12 allows redelegation of authority to take land in trust.

THE COURT: Because if it doesn't, none of this would make any difference?

MR. MCBRIDE: Right. I think that's right. I think the redelegations generally are a clear question because of the low standard that this Court has applied to find that redelegations are proper.

THE COURT: Do you believe that 151.12 is ambiguous?

MR. MCBRIDE: I don't think it is ambiguous. I think the department's interpretation of the regulation is the plain reading of the regulation.

THE COURT: So *Auer* deference is not really important here that I should be ruling for you just on you all have the better interpretation?

MR. MCBRIDE: I don't think you have to reach *Auer* deference. But I do think if the Court does think that the regulation is ambiguous, I think *Auer* deference means that the question before the Court is whether the department's interpretation is reasonable and consistent. And it was reasonable and consistent here. And that's because the text of the regulation makes it clear that this authority was redelegable. The delegation simply says that a decision made by the Secretary or the AS-IA is final, and then it goes on to describe what happens once a decision is made, how it is

implemented. It doesn't say anything explicitly about precluding redelegation of the AS-IA's authority to make final decisions. And in fact, it actually includes explicit evidence that that authority is redelegable, and that is in the definition of the Secretary. The Secretary is defined as the Secretary or the authorized representative of the Secretary.

THE COURT: You're not suggesting that Mr. Roberts was the authorized representative; correct?

MR. MCBRIDE: So Mr. Roberts was the authorized representative of the Secretary because he was redelegated the final decision-making power of the AS-IA. He was redelegated the final decision-making authority of the AS-IA to make final fee-to-trust decisions.

THE COURT: I thought he was acting as the AS-IA himself. According to the plain reading of the statute, the regulation, you have got two people, right? You have got the Secretary and you have got the AS-IA. And I think according to your interpretation, you could have an authorized representative who could stand in for the Secretary, or you could have, according to your interpretation, someone delegated the power of the AS-IA. So you're saying he was both?

MR. MCBRIDE: I'm saying that that is the same thing. I think the definition of the Secretary -- everyone is an

authorized representative of the Secretary when they act. Everyone in the department. Even the AS-IA was the authorized representative of the Secretary.

THE COURT: What about someone from BIA?

MR. MCBRIDE: Yes. Someone from BIA is the authorized representative of the Secretary.

THE COURT: Doesn't that just collapse the whole distinction that the subsection is trying to make?

MR. MCBRIDE: It doesn't. Because the subsection here wasn't trying to make that decision. The subsection here is not a delegation regulation. The purpose of the subsection is to clarify and provide transparency for the fee-to-trust decision-making process. It does that by explaining how decisions can be appealed after they're made, whether they have to be appealed administratively or if they can be appealed straightaway to the federal court.

THE COURT: If everyone is an authorized representative, it sounds to me like that increases confusion, that doesn't create transparency.

MR. MCBRIDE: It doesn't increase confusion. It lays out what happens in the default situation when the BIA official makes the decision. If the BIA official has been E authority by the Secretary to make a final decision, he is then put into the shoes of the AI-SA, and that's exactly what happened here for the PDAS.

THE COURT: Can you run that by me again.

MR. MCBRIDE: Sure.

THE COURT: With a BIA official --

MR. MCBRIDE: So for a BIA official, he would be put in the shoes of the Assistant Secretary if he was given authorization to make a final decision for the department. And that would be clear on the face of the decision itself, which would clarify what authority it is being made under. It would say it was a final decision, and the redelegation itself would be clear through either the DM or a secretarial order, depending on how the Secretary decided to delegate authority. So I think all that the regulation itself does is set up the different boxes for what happens when a final decision is made and what happens when a nonfinal decision is made. You will know when it is a final decision, and then you will be in box (c), section (c), and that's what happens when that decision is made.

THE COURT: But plaintiffs sought to appeal to the IBIA; right? Apparently, it wasn't clear to them.

MR. MCBRIDE: It was clear on the face of the decision that the decision was final. Mr. Roberts said he was making a final decision for the department and he said he was doing so through the non-exclusive authority of the AS-IA because that's why he had been redelegated. It was clear on the face of the decision. And because it was clear, the

department decided that it was a final decision.

THE COURT: What is your response to the plaintiffs' perspective that your reading makes the AS-IA language in the section superfluous?

MR. MCBRIDE: That language would not be superfluous under the department's interpretation. First of all, it clarifies that decisions made by the AS-IA or decisions that are made by someone exercising the redelegated authority of the AS-IA are final for the department. It also clarifies that the Secretary could take away that authority, and it clarifies what happens when the AS-IA or someone exercising the AS-IA's redelegated authority -- when such decisions are made. It says that they're final. This is how those decisions are implemented. It gives the three subsections that say this is what happened. Promptly and immediately land is taken into trust.

THE COURT: I guess I still don't see, if the AS-IA is always the Secretary's authorized representative, what the point is of having that language in the statute or the reg.

MR. MCBRIDE: Which language?

THE COURT: The language specifically talking about the AS-IA.

MR. MCBRIDE: It just clarifies that the AS-IA has been delegated authority already. In 209 DM 8.1, the AS-IA is delegated all of the authority of the Secretary, including

the Secretary's authority under 5 U.S.C. § 5108 to take land into trust. And that language "or pursuant to delegated authority" makes it clear that the AS-IA can make decisions, that the AS-IA usually makes decisions, and it is through the delegated authority, and this is what happens when the AS-IA does make a decision.

THE COURT: What should I do with the Federal Register discussion? As I read this, in the background, obviously there is the language about clarification and transparency; that plaintiffs argue ways for them that it is making very clear these two people have final authority, the agency has nonfinal authority. But it also talks more broadly about how the vast majority of cases, trust acquisition decisions, are delegated to and issued by BIA officials and only a small percentage of decisions are reviewed and considered by the AS-IA.

The structure, the discussion here makes it sound like there's the mine run of cases that are decided by BIA and are appealable, and there's these very few presumably high profile or important decisions that must be decided by the principal himself. It seems to me that your argument that everybody is the authorized representative flies in the face of that distinction here in the Register.

MR. MCBRIDE: I don't think it does, Your Honor, and I don't think it does because Interior's internal policies

determine which trust decisions go where. Generally, at the time of Mr. Roberts, when he was exercising the re-delegated authority of the AS-IA, gaming decisions went to the Office of the AS-IA. That's why Mr. Roberts made that decision. Non-gaming applications generally are decided by the regional offices, and those decisions can be appealed to the IBIA. That's simply how the Secretary decided to structure the fee-to-trust decision-making process. It doesn't change that everyone is the authorized representative of the Secretary. It is just that when each of those officers are exercising their authority this is what happens.

THE COURT: Okay. Are there any instances where a regulation only gives power to the AS-IA, nondelegable power?

MR. MCBRIDE: Yes. So there are a few examples that we cited in our brief, examples where the Secretary has used expressed restrictions to preclude redelegations. Those weren't in the AS-IA context. But there has also been statutes where Congress has given exclusive authority to the AS-IA, and it can't be redelegated.

THE COURT: Okay. A question I asked Mr. Miller, I would be interested in your perspective. A lot of your discussion in your briefs talk about interpreting regulations but you're citing to cases that are interpreting statutes. Does that matter?

MR. MCBRIDE: No, I don't think it does, Your Honor.

I think the principles of interpretation that apply to statutes I agree would apply to the regulations here, and I think that would apply across the board to all of the cases that we cite, including the cases that make it clear that the expressio unius maxim doesn't always apply, and it doesn't always apply here. And *Giordano* doesn't change that. *Mango* explains that the only reason the language in *Giordano* was interpreted as it was is because Congress specifically and explicitly decided not to allow redelegations in the legislative history. We don't have that history here. All we have is the preamble, which says that the purpose is to provide clarity and transparency, and that's done without precluding redelegations. That's then by describing the process for fee-to-trust decision-making.

And I also think that that express evidence is required for the plaintiffs' reading to be correct. That's because there is a presumption that redelegations are allowed unless there is an express provision that they're not allowed, and we don't have that here. So even doing away with the definition of the Secretary, if the Secretary isn't defined that way in these sections, we still don't have express evidence that there was an intent to preclude redelegations.

THE COURT: Does Mr. Black's decision matter? It looks to me like either everything was appropriate, in which

case his decision is moot, or it was nondelegable, in which case you run into The Federal Vacancies Reform Act and the ratification principle.

MR. MCBRIDE: I would agree with that. I don't think Mr. Black's decision is important for those reasons. It is important because it is an interpretation of the department.

THE COURT: More evidence --

MR. MCBRIDE: Exactly.

THE COURT: Okay. Okay. Is there currently a presidential AS-IA?

MR. MCBRIDE: There is not currently a presidential AS-IA.

THE COURT: I believe the intervenors suggest that the AS-IA would be a principal officer, but you are arguing that the AS-IA is an inferior officer. Am I correct in that?

MR. MCBRIDE: That's correct. The AS-IA is an inferior officer under the case law on the appointments clause in the U.S. Supreme Court, and that's because he is supervised. Most importantly, he is removable. He is an at-will employee who serves at the pleasure of the Secretary.

THE COURT: Isn't that true for a lot of inferior officers, as well?

MR. MCBRIDE: It is, and that's what makes them an inferior officer. That's what the case law tells us makes an inferior officer. If they're supervised by a principal

officer, then they're inferior. They're inferior if they're removable, otherwise supervised, and their decisions are reversible.

THE COURT: Doesn't the Constitution talk about principal officers being confirmed by the Senate while inferior officers are just appointed by the department head?

MR. MCBRIDE: Well, for inferior officers, Congress has a choice. They can make it either that they confirm them or that they're appointed by the agency head.

THE COURT: I see. Okay. Anything else that I should keep in mind before I hear from Ms. Ellsworth?

MR. MCBRIDE: I would just say that there are several reasons why an express intent and express evidence to preclude redelegation is needed here. That's what the Secretary has done in other instances. He included express evidence that he did not intend to preclude -- or that he did intend to preclude redelegations. That is what the department has long required when it has interpreted its regulations. That is simply not what happened here. The ultimate question is the Secretary's intent in promulgating the regulation, and all the evidence points to the fact that the Secretary did not intend to preclude redelegation here. It is not a delegation statute. It is simply outlining the process for fee-to-trust decision-making. The delegations were provided elsewhere.

In conclusion, because the plain reading of the regulation shows that and because even if it didn't, the department's interpretation is a reasonable and consistent interpretation of the regulation, federal defendants ask that the Court grant their motions for summary judgment.

THE COURT: Okay. Thank you, Mr. McBride.

Good morning, Ms. Ellsworth.

MS. ELLSWORTH: Good morning, Your Honor.

I think the Court can really start and end its analysis of the regulation in this case by looking to the strong presumption favoring delegation and the fact that there is no affirmative evidence that would overcome the presumption. You can tell that by looking at the text of the regulation, which does not use the language that Congress or the Secretary have used in other instances to make clear that delegation is prohibited.

The courts of appeal unanimously hold that this presumption applies even if there is silence on redelegation. There has to be some sort of textual hook that actually affirmatively shows an intent to prohibit redelegation, and that is not in the text.

THE COURT: That wasn't in the text in *Giordano* either; was it?

MS. ELLSWORTH: It wasn't. And that's why determinative evidence doesn't just come from the text. It

can also come from the purpose or intent, the legislative history, the regulatory history. That is what *Mango*, what *U.S. Telecom* from the D.C. Circuit -- that is where this notion of affirmative evidence comes from.

THE COURT: What would you say about my question from the Federal Register?

MS. ELLSWORTH: I think the Federal Register is actually extremely strong evidence that supports the defendants in this case. What the Federal Register shows, that notice, if you read through it, it consistently says that this change was making no change to the status quo in what the previous administrative exhaustion requirements had been in the department. You can see this at 78 FR 67929 and 67930. What the Federal Register notice says is that under the existing rules -- in other words, before 2013 -- administrative remedies were available to challenge BIA officials' decision and required administrative exhaustion. This new rule makes this requirement explicit.

It goes on, on 67933, to say the new rule retains the existing administrative appeals process for BIA officals' decisions. This rule was not changing anything. It was making clear that the general background governing principle for administrative exhaustion, which is contained in Section 2.6. 25 C.F.R. 2.6 applies to trust decisions, as well. And that provision, 2.6, sets out the same distinction

between the Secretary and AS-IA level decisions and decisions made by BIA officials. All that this change in 2013 did was to replicate that same framework in the specific part of the C.F.R. talking about trust decisions. It is particularly important that when the agency made that amendment to incorporate that framework from 2.6, there were already both judicial and administrative precedence holding that the AS-IA's final decision-making authority was delegable if the AS-IA was recused or the Office of the AS-IA was vacant. Most importantly, I point you to the *Sokaogon Chippewa Community* case cited in our reply brief. It is a Western District of Wisconsin case from 1996. It actually involved a Deputy Assistant making a final decision in a trust context, the same exact context. In that case, the AS-IA was recused. It wasn't the office was vacant, the AS-IA was recused. The Deputy stepped into the AS-IA's role through the same departmental manual provision that is cited here, which included the same language at that time, and the Court concluded that if the Deputy had been acting in his capacity as the Deputy, he would have been unable to issue a final decision, but because he was exercising the authority of the AS-IA, it was within his power to designate the decision as final.

THE COURT: Sorry, Ms. Ellsworth. What was the case?

MS. ELLSWORTH: *Sokaogon Chippewa Community*.

In addition to that case, there is a District of Connecticut case from 2008 that similarly finds the AS-IA final decision-making authority is delegable, and there are two IBIA decisions, internal agency decisions that reach the same conclusion. All of those were in place when the Secretary adopted the framework from 2.6 and included it in 151.12.

THE COURT: Ms. Ellsworth, what if the subsection said, in addition to the Secretary and the AS-IA, that also the PDAS could and yet one of the DASs purported to make that decision? Would it be any different?

MS. ELLSWORTH: I think it would be different for a couple of reasons. One is that this provision, 151.12, is not doing the work of actually delegating the authority. The delegation comes through the departmental manual. This is just explaining, if there is delegated authority, this is when it becomes final, and this is when exhaustion is required.

THE COURT: What about if Mr. Black, acting as a special assistant to the BIA director, purported to use this authority?

MS. ELLSWORTH: When there was a PDAS in office?

THE COURT: Yes. Sure.

MS. ELLSWORTH: I think that would cause some more question. You would want to know exactly what the delegation

had been. The way the department manual is set up, the authority is structured to go to the AS-IA, the delegation to the AS-IA in Section 8.1. If the Office of AS-IA is vacant, 8.1.B says that the authority is redelegated to the PDAS. It explicitly says that that PDAS's redelegated authority cannot be further redelegated. So the hypothetical you're posing sounds to me like it was then being passed on to another person. I think that would be problematic under the language of 8.4.B.

THE COURT: But wasn't Mr. McBride saying that anybody and everybody are authorized representatives of the Secretary? Do you disagree with that?

MS. ELLSWORTH: I think that the Court doesn't need to reach that question. As I understood Mr. Miller to be telling you, everyone really agrees Roberts is filling in for the AS-IA. I think Your Honor's questions to Mr. McBride recognized the same thing. The Secretary was not delegating the Secretary's authority to make a decision here. The Secretary was redelegating the AS-IA's authority. So this case presents really the narrower question of whether the AS-IA's final decision-making authority is redelegable. And because of the presumption, it favors redelegability, the silence in the regulation on it, the fact that the intent and the purpose here are really to replicate an existing framework where the AS-IA's decisions are final, all shows

that there is simply really no meat on the argument that plaintiffs are offering.

THE COURT: Your view is he was not acting as the Secretary's authorized representative, he was only acting as the AS-IA?

MS. ELLSWORTH: That's right. He was exercising the AS-IA's final decision-making authority. I think that is right.

If I could mention the superfluity argument that you raised and asked if the reference to the AS-IA would become superfluous, the answer is no, largely for the same reasons we have been discussing about the fact that 151.12 is replicating 2.6 because 2.6 already set out that the AS-IA's decision-making is final. So in order to provide the clarity that the Register notice makes clear that the agency was trying to provide, it made sense to use the same language that is already used in the general regulation that applies to when administrative exhaustion is required and when it is not. We think that is an answer to that. Numerous courts have held that merely referencing an official is not enough to show that there is some sort of exclusive delegation. You can see that in the *Ethicon Endo* case from the Federal Circuit and the *Mango* case from the Second Circuit.

THE COURT: Do you agree with Mr. McBride that it is the DM that is really the operative document here; that these

various orders and letters are beside the point?

MS. ELLSWORTH: Yes, Your Honor. I think that all you need to do to answer the second question you posed about whether an effective redelegation to Roberts is to look at the DM 8.1 and 8.4.B in combination with the Plum Book citation that federal defendants and we provided in our reply brief that indicate that Roberts was in fact serving as the PDAS in 2016, so 8.4.B would be applicable to him at the time he issued the decision.

THE COURT: So 209 DM 8 references the Secretary's authority under Section 204(a) of Public Law 94-579 relating to the withdrawal or reservation of certain lands by issuance of public land orders, do you know, is that what was going on here? Was that the authority being utilized, or is that different from the land acquisition authority?

MS. ELLSWORTH: I believe that the answer to that question is that it is the same, but I would need to double-check that.

THE COURT: Mr. McBride, do you happen to know?

MR. MCBRIDE: I'm not sure. I can check on that and get back to you.

THE COURT: Okay. I would be interested, actually, if you don't mind, in you sending me a letter, obviously copying counsel.

MS. ELLSWORTH: If I could briefly address the *Auer*

deference question, which was the third question that Your Honor had answered.

The way that *Auer* deference works is that an agency's reading of its own regulation is controlling unless it is plainly inconsistent with the language that is used, plainly erroneous, or there is reason to suspect it doesn't reflect the fair judgment of the agency. The agency has taken the same position dating back to that 1996 case from Wisconsin I discussed earlier, that this final decision-making authority in the trust context in particular is delegable when the AS-IA is not available. So you have a number of decisions from the agency over the course of 20-plus years in which this decision has been articulated. You have the 2005 Solicitor's memo in which the Solicitor concluded that there were only a very small number of functions of the AS-IA that could not be redelegated. This was not one of them. Of course, at the time, in 2005, we would have been looking at the 2.6 framework that hadn't yet been adopted or incorporated into 151.12 but was already applicable. In addition, you have Black's administrative decision. So we think all of these things do show a consistent longstanding interpretation of the agency. There is nothing inconsistent about that position and the language of the regulation, and under *Auer*, the agency's interpretation is controlling.

THE COURT: Okay. Thank you.

MS. ELLSWORTH: Thank you, Your Honor.

THE COURT: Mr. Miller.

MR. MILLER: Thank you, Your Honor.

The government says that all the regulation does is set up what happens when a final decision is made and what happens when a nonfinal decision is made. I think when you look at the face of the regulation and also the history of its adoption, the regulation is really doing something more than that. It is providing clarity on which decisions are final and which are not, not just what happens afterwards. So the regulation, by dividing authority between (c) and (d), lets the public know whether a decision is final or not based on who has issued it. The principal device of the interpretation offered by the government and the intervenors, in addition to its inconsistency with the text, is it really defeats that purpose, as illustrated by this very case where the shifting explanations of exactly what the nature of the delegation to Mr. Roberts was. It left us not knowing what this decision was, by what authority it was issued, and what the agency's view was of its finality or nonfinality. Adhering to the text of the regulation and the division of the authority that it sets out would avoid that problem and provide clear notice to the public and allow people to figure out, if you get a decision from the Secretary or the Assistant, you know it is final and you can go to court. If

you get a decision from someone at the BIA, it is not final.

THE COURT: He wasn't from the BIA; right? He is the principal deputy who was purporting to act with the authority of the Assistant Secretary. Was there really a notice issue there?

MR. MILLER: The notice problem was that even the regulation tells us that it is the Secretary or Assistant Secretary who make final decisions, and it doesn't contemplate a decision coming from the Deputy.

Now, the government's answer to that is to say, well, everybody is an authorized representative of the Secretary, but that just re-creates the problem, as Your Honor's question indicated, by collapsing all of the distinctions that are drawn by the regulation. And I think when you look at the regulatory preamble, it really does illustrate what the agency was trying to do, was to allow people to understand when a decision was final. I have talked about one of the comments on finality of decisions. There is another very significant response to comments in the preamble, and that is that the agency set out under the heading who the decision maker should be, and it addresses 25 C.F.R. 2.20, which is the administrative appeal provisions, and that is the regulation that actually does mention the Deputy Assistant Secretary, and it says that his decisions are not final. And so one of the comments that the

agency got was maybe you should let the Deputy issue trust acquisition decisions, and that way the decisions would be nonfinal and appealable. And the agency said, we're not going to do that. And they said, sort of drawing a distinction between the Assistant Secretary and everyone else, they say decisions issued by the Assistant Secretary involve several layers of internal review prior to issuance, the point being that it makes sense to make those decisions be final. So the agency understood the background presumption against which they were operating in the context of internal appeals is that Deputy decisions are not final.

THE COURT: But they are when they purport to act with the authority of the Assistant Secretary; right? I think the government has cited to *Forest County Potawatomi Community v. The Deputy Assistant Secretary* where it was that precise situation where the Deputy Assistant -- it was actually an Acting Deputy Assistant Secretary but was purporting to be acting with the authority of the vacant Assistant Secretary -- and the IBIA said they had no authority to review that decision.

MR. MILLER: I think there are a couple of answers. One, that was under a different set of regulations, not under these regulations which were adopted to draw a distinction here. Two, I forget if it was that case or the case cited by intervenors, if you're talking about a situation where the

Assistant Secretary is absent or recused, that comes within the language of the DM relating to absence, which is a different matter from a vacancy, and if they really are taking the view that when there is a vacancy in the presidentially appointed senate confirmed office of the Assistant Secretary, all powers of that office can be devolved on the Deputy, that does run right into the Federal Vacancies Reform Act. The Vacancies Reform Act doesn't allow them to grant the exclusive powers of a vacant office to a subordinate who has not been confirmed by the Senate.

I think you don't even really need to get to that question here because the regulation on its face doesn't authorize the Deputy to carry out those functions.

THE COURT: Okay. Thank you, Mr. Miller.

MR. MILLER: Thank you, Your Honor.

THE COURT: Thank you all. I appreciate your arguments and briefings. It was very good.

(Proceedings adjourned at 11:57 a.m.)

CERTIFICATE OF OFFICIAL COURT REPORTER

I, Patricia A. Kaneshiro-Miller, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Patricia A. Kaneshiro-Miller — January 10, 2018

PATRICIA A. KANESHIRO-MILLER — DATE