ORAL ARGUMENT NOT YET SCHEDULED

No. 19-5285

IN THE

United States Court of Appeals
For the District of Columbia Circuit

STAND UP FOR CALIFORNIA!, et al.,
Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, et al.,
Defendants-Appellees,

and

WILTON RANCHERIA, CALIFORNIA,
Intervenor for Defendants-Appellee.

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

FINAL BRIEF FOR WILTON RANCHERIA, CALIFORNIA

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), Wilton Rancheria, California (Wilton Rancheria) hereby certifies the following as to parties, rulings, and related proceedings in this case.

Parties and Amici

All parties appearing before the District Court and in this Court are accurately listed in the Plaintiffs-Appellants' opening brief.

Rulings Under Review

As set forth in Plaintiffs-Appellants' opening brief, the rulings for which they seek review are:

(1) The District Court's February 28, 2018 Order (Dkt. 54) and accompanying Memorandum Opinion (Dkt. 53), denying Plaintiffs' motion for summary judgment as to Counts I and II of the amended complaint, and granting Defendants' and Wilton Rancheria's cross-motions for summary judgment as to Counts I and II; and

(2) The District Court's October 7, 2019 Order (Dkt. No. 110) and accompanying Memorandum Opinion (Dkt. No. 109), denying Plaintiffs' motion for summary judgment as to Counts III through V of the amended complaint, and granting Defendants' and Wilton Rancheria's cross-motions for summary judgment as to Counts III through V.

Related Cases

Counsel is not aware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

/s/ Jessica L. Ellsworth
Jessica L. Ellsworth

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GLOSSARY

APA	Administrative Procedure Act
AS-IA	Assistant Secretary-Indian Affairs
BIA	Bureau of Indian Affairs
CEQ	Council on Environmental Quality
Department	Department of the Interior
EIS	Environmental Impact Statement
EPA	Environmental Protection Agency
GAO	Government Accountability Office
IGRA	Indian Gaming Regulatory Act
IRA	Indian Reorganization Act of 1934
NEPA	National Environmental Policy Act
ROD	Record of Decision
Secretary	Secretary of the Interior
Tribe	Wilton Rancheria, California

INTRODUCTION

Wilton Rancheria, California (the Tribe) is the present-day name for an Indian tribe left landless in the 1960s during a wave of terminations of over forty California Rancherias—a policy Congress has since disavowed. Like many other Rancherias, the Tribe was terminated even though the federal government had not delivered the developments that were a condition of distributing its lands. Many terminated Rancherias were restored by a settlement with the Government in 1983, but the Tribe was mistakenly left out.

After its independent quest for restoration, the Department of the Interior (Department) agreed in 2009 that the Tribe had been improperly terminated. The Department stipulated to a court judgment recognizing the illegitimacy of the termination and restoring the Tribe to its pre-termination status. That decree included a declaration that the Tribe would be eligible for services that the federal government confers on Indians because of their status as Indians, including an express promise to consider taking land into trust for the Tribe.

When the Tribe applied for the Department to take land into trust for the Tribe for gaming, the Department considered three sites close to each other on or near the Tribe's historic rancheria in Sacramento County. After an extensive environmental-impact analysis, the Tribe and the Department ultimately settled on a site in Elk Grove that had already been partially developed as a mall and thus has

less environmental impact than other alternatives. In January 2017, the Department approved the Tribe's application, and the land was taken into trust shortly thereafter.

Plaintiffs sued seeking to block, and later undo, the land acquisition. The District Court granted summary judgment to the Department and the Tribe on all of Plaintiffs' claims. Plaintiffs limit their appeal to three issues: whether the Tribe was eligible for land to be taken into trust, whether the Record of Decision (ROD) was final agency action, and whether the Department complied with the National Environmental Policy Act's (NEPA's) procedural requirements.

First, they say the Tribe was not eligible for land to be taken into trust because the Tribe had been irrevocably terminated decades earlier. This is not Plaintiff Stand Up's first effort at launching a years-late attack on a court order restoring a Rancheria. Plaintiffs' argument is just as flawed here as it was when they challenged another Rancheria—and this Court rejected it. *See Stand Up for California! v. U.S. Dep't of Interior*, 879 F.3d 1177 (D.C. Cir. 2018). The 2009 court-approved stipulated judgment in litigation between the Tribe and the United States conclusively settles that the Tribe's termination was never effective, because the statutory conditions for termination were not satisfied. Congress has specifically blessed restoration by court order and repudiated its disgraceful mid-century policy of terminating tribes. Plaintiffs are asking this Court to undermine

an eleven-year-old court judgment and Congress's will by enforcing an inapplicable and since-disavowed policy.

Plaintiffs' other challenges to the land acquisition are picayune and procedural. They challenge the Department's ability to delegate final land-acquisition authority to the official who signed the ROD based on a regulation that says nothing about delegation. In light of a strong presumption that authority may be subdelegated, that challenge is groundless. Plaintiffs also contest that the authority actually was delegated to the official, even though the Departmental Manual gave him that authority and the Deputy Secretary reaffirmed that delegation on the very day of the land-acquisition decision.

Plaintiffs' remaining objection is that the Department ran afoul of NEPA by failing to prepare a new or supplemental environmental impact statement (EIS) when the Tribe changed its application to the Elk Grove site from another site. All NEPA requires is that agencies fully consider the environmental impact of their actions, and the EIS that already existed fully evaluated the environmental effects of developing the Elk Grove site. If agencies could not select one of the analyzed alternatives, the entire purpose of NEPA would be undermined. Plaintiffs betray the weakness of their argument that the NEPA analysis was deficient; they make no argument that there were substantive errors or omissions in the EIS.

As this Court said in Stand Up's last attempt to undo a Rancheria's restoration: "Enough is enough!" *Stand Up*, 879 F.3d at 1186. The Court should recognize once and for all the Tribe's restoration and put an end to Plaintiffs' vexatious efforts to strip away, or delay access to, the Tribe's restored land.

STATUTORY PROVISIONS

The relevant statutes and regulations are included in the Addendum.

STATEMENT OF THE CASE

A. Legal Background

1. The Indian Reorganization Act of 1934 (IRA) § 5, 25 U.S.C. § 5108, authorizes the Secretary of the Interior (Secretary) to acquire land in trust for Indian tribes to promote tribal self-governance and economic self-sufficiency. The Indian Gaming Regulatory Act (IGRA) complements that authority by allowing tribes to provide for their economic development through gaming on land acquired as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii). A restored tribe seeking land for gaming starts by filing an application with the Department.

2. The Secretary exercises land-acquisition authority through the Assistant Secretary-Indian Affairs (AS-IA), or through regional Bureau of Indian Affairs (BIA) officials who handle "[t]he vast majority of trust acquisition decisions." Land Acquisitions: Appeals of Land Acquisition Decisions, 78 Fed. Reg. 67,928,

67,929 (Nov. 13, 2013). The Department's regulations have long treated these decisionmakers differently. Under the regulation that applies generally to all Department decisions, 25 C.F.R. § 2.6, decisions taken by BIA officials are not final until administrative appeals are exhausted. *See id.* § 2.6(b). Decisions taken by the Secretary or the AS-IA are final when issued. *See id.* § 2.6(a), (c).

In 2013, the Department sought to "clarif[y]" how the general rule set out at 25 C.F.R. § 2.6 applied "within the context of trust acquisition decisions." 78 Fed. Reg. at 67,929. The new Section 151.12(c) provided that "[a] decision made by the Secretary, or the Assistant Secretary-Indian Affairs pursuant to delegated authority, is a final agency action." 25 C.F.R. § 151.12(c); *see* 78 Fed. Reg. at 67,929 (explaining that this portion of the rule was based on 25 C.F.R. § 2.6(c)). The new Section 151.12(d) provided that "[a] decision made by a Bureau of Indian Affairs official pursuant to delegated authority is not a final agency action." 25 C.F.R. § 151.12(d).

3. Before the Secretary can take land into trust, the Department must comply with the procedural requirements NEPA imposes on all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Among other things, NEPA requires the Department to prepare "a detailed statement" that addresses "the environmental impact of the proposed"

acquisition and alternatives that would achieve the same objectives. *Id.* § 4332(2)(C)(i), (iii).

This "environmental impact statement" serves two purposes: "it ensures that the agency . . . will have available, and will carefully consider, detailed information concerning significant environmental impacts," and "it guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 768 (2004) (internal quotation marks and brackets omitted). The " 'heart of the environmental impact statement' is the requirement that an agency 'rigorously explore and objectively evaluate' the projected environmental impacts of all 'reasonable alternatives.' " *City of Alexandria v. Slater*, 198 F.3d 862, 866 (D.C. Cir. 1999) (quoting 40 C.F.R. § 1502.14). NEPA imposes no substantive mandate: "once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences." *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-228 (1980) (per curiam).

B. The Wilton Rancheria Tribe

The historic Wilton Rancheria sat on land in Sacramento County, which was acquired by the United States in 1927 using appropriations to purchase lands for

California Indians. JA2543. In 1958, as part of a general policy of assimilation, Congress enacted the California Rancheria Act (Rancheria Act), Pub. L. No. 85-671, 72 Stat. 619 (amended 1964). The Act provided for the distribution of the assets of forty-one named Rancherias, including the Wilton Rancheria. *Id.* The Act specified that, after distribution of the assets of a Rancheria "pursuant to th[e] Act," recipients would lose access to "services performed by the United States for Indians because of their status as Indians." *Id.* § 10(b). By 1964, the Government reported that it had terminated federal supervision of the Tribe. *See* Property of California Rancherias and of Individual Members Thereof: Termination of Federal Supervision, 29 Fed. Reg. 13,146 (Sept. 22, 1964).

In 1979, members of several former Rancherias brought a class action that culminated in a stipulated judgment that restored federal status to seventeen tribes. *See* Stip. for Entry of Judgment, *Hardwick v. United States*, No. C-79-1710-SW (N.D. Cal. Dec. 22, 1983), Dkt. No. 62a; JA2544. A decade later, Congress enacted the List Act, which rejected the assimilation policy in favor of one that sought "to restore recognition to tribes that previously have been terminated." Federally Recognized Indian Tribe List Act of 1994 (List Act), Pub. L. No. 103-454, § 103(5), 108 Stat. 4791, 4791. Through the List Act, "Congress delegated to the Secretary the regulation of Indian relations and affairs . . . including authority to decide in the first instance whether groups have been federally recognized in the

past or whether other circumstances support current recognition." *Stand Up for California! v. U.S. Dep't of the Interior*, 204 F. Supp. 3d 212, 300 (D.D.C. 2016) (ellipses in original; internal quotation marks omitted), *aff'd*, 879 F.3d 1177 (D.C. Cir. 2018). The List Act expressly provides that tribes may be recognized by "a decision of a United States court" and that tribes recognized in this way "may not be terminated except by an Act of Congress." *Id.* at 301 (quoting List Act § 103).

Although members of Wilton Rancheria were initially certified as members of the *Hardwick* class, they were dismissed from the final judgment based on a misunderstanding of whether Wilton members remained in the area. After the Tribe filed suit against the Government seeking to correct that mistake, the United States District Court for the Northern District of California entered a stipulated judgment in 2009; the Government acknowledged that the Tribe had not been terminated in accordance with the Rancheria Act's provisions and agreed to restore the Tribe's federal recognition. JA895-920; *see also* Judgment *Nunc pro Tunc*, *Wilton Miwok Rancheria v. Kempthorne*, No. 5:07-cv-02681-JF (N.D. Cal. July 16, 2009), Dkt. No. 62. The Department has formally included the Tribe on the definitive list of federally recognized tribes since then. *See, e.g.*, Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 84 Fed. Reg. 1200, 1204 (Feb. 1, 2019).

C. The Fee-To-Trust Application and Decision

1. Initial Application

In 2013, the Tribe voted to secure its future by seeking trust land for gaming. As reported in the press at the time, the Tribe considered two potential locations for a casino: (1) an undeveloped parcel of land near the City of Galt, and (2) the site of a partially developed mall in neighboring Elk Grove—both within miles of its historic rancheria. *See* Bryan M. Gold, *Tribe seeks property for casino outside Galt: Wilton Rancheria chair said mall site a possibility*, Elk Grove Citizen (Mar. 7, 2013), *available at* https://bit.ly/2ICfSaL. In November 2013, the Tribe filed a fee-to-trust application with the Department for the Galt site. JA1075.

2. NEPA Process

The Department published a Notice of Intent to prepare an EIS for the Tribe's application and held a hearing "to provide an opportunity for the public and government agencies to have input into the scope of the EIS." JA964; JA943-944. In the resulting "Scoping Report," issued in February 2014, the Department explained that "[t]he purpose and need for the Proposed Action is to improve the Tribe's short-term and long-term economic condition and promote its self-sufficiency." JA968. It identified six "alternatives to meet th[is] purpose and need" at three different sites, including the Tribe's then-proposed casino in Galt (Alternative A) and a casino at the Elk Grove mall site (Alternative F), plus a "No

Action" alternative. *Id.*; *see also* JA969-976 (providing detailed maps). The Scoping Report specifically stated that the BIA might not determine a preferred alternative until the end of the NEPA review process. JA977.

The 712-page Draft EIS released in December 2015 offered a detailed assessment of all seven options, including Alternatives A and F. JA1264-270; Draft Environmental Impact Statement, 80 Fed. Reg. 81,352 (Dec. 29, 2015). Consistent with guidance issued by the Council on Environmental Quality (CEQ), "[t]he degree of analysis devoted to each alternative in the EIS" was "substantially similar to that devoted to the 'proposed action.' " Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations ("CEQ Guidance"), 46 Fed. Reg. 18,026, 18,028 (Mar. 23, 1981) (#5b); *see, e.g.*, JA1193-261 (summary of environmental effects for each alternative). The Draft EIS offered a point-by-point analysis of the Elk Grove alternative's environmental impact. JA1271-275.

During the public comment period on the Draft EIS, the Department held a public hearing. In his opening remarks, the Tribe's Chairman told the 350 attendees that "Alternatives A and F, Elk Grove, are the tribe's preferred alternatives." JA1349; *see* JA2547. Elk Grove's Economic Development Director also made a statement "that the City of Elk Grove is here and in presence this evening," explaining that Elk Grove "ha[s] had and will continue to have

discussions with the tribe as we evaluate the impacts and effects of these projects on the City of Elk Grove." JA1354. The crowd also heard from Plaintiff Lynne Wheat. She urged the Department to "consider [Alternative F] carefully," opining that "the Mall site in Elk Grove will still provide residents of Galt the jobs that they need" and generate much-needed revenues, while making use of the Elk Grove site's existing infrastructure. JA1351. As the comments poured in, dozens of commenters shared their views on the development of a casino at the Elk Grove site. *See infra* pp. 47-48. The U.S. Environmental Protection Agency (EPA) recommended that the Elk Grove alternative be designated the "environmentally preferable alternative." JA1437.

In June 2016, the Tribe determined that the Elk Grove alternative was the better option and filed a new application requesting that the Secretary take the Elk Grove site into trust in lieu of the Galt site. JA1384-399. In July 2016, the Tribe held a town-hall meeting in Elk Grove in which it offered detailed information about its plans to build a casino on the Elk Grove mall site to a "standing-room only" crowd. Dana Griffin, *Residents pack community meeting for Elk Grove casino proposal*, KCRA 3 (July 7, 2016), *available at* https://bit.ly/2XF4O0a; Lance Armstrong, *Wilton Rancheria presents Elk Grove casino plan to community*, Elk Grove Citizen (July 12, 2016), *available at* https://bit.ly/2ZsPDbX.

To address any concerns about its Elk Grove application, the Tribe executed a memorandum of understanding with Sacramento County "in which the Tribe committed to extensive mitigation in response to impacts created by th[at] Proposed Action." JA1538. The Tribe also entered into a memorandum of understanding with the City of Elk Grove in which the Tribe agreed to "address and mitigate any and all direct impacts" that its casino would have on "the City of Elk Grove and" city "services as described within th[e] EIS." *Id.* (internal quotation marks and brackets omitted); JA1403.

On December 14, 2016, the Department issued its Final EIS. The accompanying Federal Register notice announced it had "selected Alternative F, located on the Elk Grove Mall Site, as its Preferred Alternative." Final Environmental Impact Statement, 81 Fed. Reg. 90,379, 90,379 (Dec. 14, 2016). The Department concluded that "[t]he development of Alternative F would meet" the purpose of the Tribe's application "better than the other development alternatives." JA1551. And the Department found that Alternative F's "environmental effects" would be "less than those under any other Alternative." JA1552.

On December 16, 2016, EPA issued its own notice that the Final EIS had been filed. *See* Environmental Impact Statements; Notice of Availability, 81 Fed. Reg. 91,169 (Dec. 16, 2016); JA2631. On January 19, 2017, four days after the

end of the required 30-day waiting period, *see* 40 C.F.R. § 1506.10(b)(2), the Department issued the ROD approving the Tribe's application for the Elk Grove site.

3. Trust Decision

On January 19, 2017, there was no AS-IA or Acting AS-IA in place, and Principal Deputy Assistant Secretary-Indian Affairs Lawrence Roberts was temporarily exercising the non-exclusive authority of the AS-IA when he approved the Tribe's application. JA2622. In the ROD, the Department addressed the final comments received (including Plaintiffs') in a densely-set, 33-page table. JA2633-666.

Plaintiffs filed an administrative appeal. The appeal was dismissed by the then-Acting AS-IA, Michael Black on the basis that the ROD was a final action not administratively appealable. JA232, JA237.

D. Procedural Background

1. On January 11, 2017—before the end of the 30-day waiting period on the Final EIS—Plaintiffs filed suit to restrain the Department from taking the Elk Grove parcel into trust. *See* JA2-3, ¶¶ 1-2. The District Court denied Plaintiffs' request for a temporary restraining order. *See* Minute Entry for Jan. 13, 2017. After the Department took title to the Elk Grove parcel and dismissed Plaintiffs' administrative appeal, Plaintiffs amended their complaint. *See* JA138-165. The

District Court dismissed all counts in the amended complaint over the course of two rounds of summary-judgment briefing.

2. The delegation objections that Plaintiffs press on appeal were resolved in an opinion and order in November 2017. JA328-354. After observing that "subdelegation to a subordinate federal officer or agency is presumptively permissible," JA338 (internal quotation marks omitted), the District Court analyzed the text of Section 151.12(c) and determined that it did not limit subdelegation, much less override the presumption of delegability, JA338-340. The court went on to explain that nothing in the "context or comments relating to the regulation" supported Plaintiffs' contrary reading because the regulation was not about delegation at all and only identified specific officers for the purpose of establishing which types of decisions are final agency action. JA340-341. Having concluded that Section 151.12 was no barrier to Roberts being delegated the AS-IA's authority to make trust decisions, the court explained that the Departmental Manual had, in fact, accomplished that delegation because it gave the Principal Deputy the authority to act in the AS-IA's absence. JA350-351.

3. The District Court dismissed Plaintiffs' remaining claims in a summary-judgment opinion and order in October 2019. JA857-889. As relevant to the issues on appeal, the court first rejected Plaintiffs' argument that the Rancheria Act barred the Department from taking land into trust. The court explained that

"[u]nder the plain terms of the stipulated judgment" between the Department and Tribe, the Rancheria Act "does not apply" because the Tribe had never been properly terminated. JA863-864. Moreover, the court recognized that subsequent legislation—the List Act—authorized tribal re-recognition, which would have overridden any barriers imposed by the Rancheria Act. JA864-865.

The District Court also ruled that the Department complied with NEPA. The court rejected Plaintiffs' substantive challenges to the Department's environmental analysis, JA874-878, none of which Plaintiffs reprise on appeal. The court also rejected Plaintiffs' argument that the Department had to prepare a new or supplemental EIS when the Elk Grove site was selected. As the court explained, "the record shows a thorough and comprehensive environmental review of each of the alternatives, including the Elk Grove site," JA882, showing that "the Department made a 'reasoned decision' not to complete a new or supplemental EIS" when it selected that site, JA883. The court therefore granted the Department's and Tribe's motions for summary judgment and closed the case. JA890-891.

This appeal followed.

SUMMARY OF ARGUMENT

I. The Tribe was restored by a 2009 court judgment in which the Department acknowledged that the Tribe had never been properly terminated. That judgment definitively establishes that the Rancheria Act and its restriction do not apply to the Tribe. The subsequent List Act disavows the Rancheria Act's policy of termination and establishes that court judgments restoring tribes can only be overturned by act of Congress—not private citizens like Plaintiffs.

II. Plaintiffs' procedural objections to the Department's fee-to-trust decision also fail.

A. Lawrence Roberts was delegated the authority to exercise the AS-IA's land-acquisition powers, both by the Departmental Manual and by a memorandum from the Deputy Secretary. The regulation that is central to Plaintiffs' contrary arguments, 25 C.F.R. § 151.12(c), says nothing about subdelegation and must be read in light of a presumption of subdelegability. Plaintiffs' reading would yield absurd results and conflict with the longstanding interpretation of the Department, which is entitled to deference. Nor do Plaintiffs' nitpicking objections to the format of the delegation undermine the Department's clear intent to delegate to Roberts final land-acquisition authority.

B. NEPA is satisfied when an agency appropriately considers the environmental effects of its actions, irrespective of its substantive choice. Here,

the Department thoroughly considered the environmental impacts of the Elk Grove site, and there is overwhelming evidence that the public (including Plaintiffs) understood that site was being considered and in fact gave feedback on it. The fact that Plaintiffs are no longer pressing any substantive objections to the Department's environmental analysis further confirms its sufficiency. This Court should affirm.

STANDARD OF REVIEW

This Court reviews the District Court's grant of summary judgment de novo. *Mayo v. Reynolds*, 875 F.3d 11, 19 (D.C. Cir. 2017). The Government's land-acquisition decision will stand unless the challenging party can establish that it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Stand Up*, 879 F.3d at 1181 (internal quotation marks omitted); *see* 5 U.S.C. § 706(2).

That "deferential standard of review" also applies to "NEPA-based challenges." *Sierra Club v. FERC*, 867 F.3d 1357, 1367 (D.C. Cir. 2017). The "role of the courts" under NEPA "is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Nevada v. Dep't of Energy*, 457 F.3d 78, 87-88 (D.C. Cir. 2006) (internal quotation marks omitted).

ARGUMENT

I. THE WILTON RANCHERIA IS A RECOGNIZED TRIBE ELIGIBLE FOR TRIBAL BENEFITS.

Plaintiffs argue—in largely cursory fashion (at 33-37)—that the Department's fee-to-trust decision was substantively invalid because the Tribe's status was irrevocably terminated decades ago. That argument conflicts with decisions of all three branches of government: a court judgment invalidating the termination, the Executive's considered determination of the Wilton Rancheria's tribal status, and a congressional statute expressly disclaiming the sorts of mid-century tribal terminations that Plaintiffs wish to enforce.

A. The Tribe's Status Is Not Up For Debate.

The List Act explains that "Indian tribes presently may be recognized . . . by a decision of a United States court" and that "a tribe which has been recognized" in that manner "may not be terminated except by an Act of Congress." List Act § 103(3)-(4). In accordance with the List Act, the Secretary publishes an "accurate" "list of all Indian tribes . . . eligible for the special programs and services provided by the United States to Indians because of their status as Indians." *Id.* §§ 103(7), 104(a). The Wilton Rancheria was recognized by court order in 2009 and has been listed since then on the Secretary's definitive list of tribes. *See supra* p. 8. Barring an act of Congress, that settles the Wilton Rancheria's status under the List Act and pursuant to Congress's delegation to the

Secretary to decide "whether groups have been federally recognized in the past or whether other circumstances support current recognition." *Mackinac Tribe v. Jewell*, 829 F.3d 754, 757 (D.C. Cir. 2016) (per curiam) (citing 25 U.S.C. § 2).

Plaintiffs suggest otherwise, citing to the 1958 Rancheria Act, but that Act is inapplicable for two reasons highlighted by the District Court. JA863-864. *First*, the Rancheria Act's terms were triggered when tribal assets were "distributed *pursuant to this Act*"—which never happened for Wilton Rancheria. Rancheria Act § 10(b) (emphasis added). The Department found, and the 2009 judgment recognized, that the Wilton Rancheria "was *not* lawfully terminated, and the Rancheria's assets *were not* distributed, in accordance with the provisions of the [Rancheria Act]." JA901 (emphases added); *see* JA863-864. The judgment even expressly stated that the Department "will process . . . any applications for land into trust for any parcels of land acquired by the Tribe." JA904; *see* JA864.

Second, the later-in-time List Act "expressly repudiated" the termination policy that the Rancheria Act reflected, "actively sought to restore recognition to tribes," and recognized court decisions as a conclusive way to establish such restoration. List Act §§ 103(3)-(5); *see* JA864. It made clear that a tribe whose recognition was restored is "eligible for the special programs and services provided by the United States to Indians because of their status as Indians," List Act § 104(a)—precisely the benefits Plaintiffs argue should be denied to the Tribe here.

As the District Court recognized, "[t]o the extent that there is a conflict between the 1958 [Rancheria Act] and 1994 List Act, of course the more recent statute prevails." JA864; *see Owner-Operator Indep. Drivers Ass'n v. U.S. Dep't of Transp.*, 724 F.3d 230, 233 (D.C. Cir. 2013) (When there is "a conflict between . . . two statutes," "the more recent legal pronouncement controls.").

B. Plaintiffs' Contrary Arguments Are Unpersuasive.

Plaintiffs do not address the District Court's first rationale—that the stipulated judgment recognized that the Tribe had never been properly terminated under the Rancheria Act in the first place. It is far too late for Stand Up collaterally to attack that 2009 judgment, and Stand Up expressly disclaimed any such challenge before the District Court. *See* JA864 (Plaintiffs' summary judgment reply brief "clarifies that they do not challenge the settlement itself").

Plaintiffs' responses to the District Court's second rationale—that the List Act allowed court recognition of the Tribe notwithstanding the Rancheria Act—are feeble. First, Plaintiffs make a new-on-appeal argument (at 36) that the List Act is ineffective because several of its relevant provisions are labeled as "Findings." *See* List Act § 103.[1] Whatever the nomenclature, the language is declarative that "Indian tribes . . . may be recognized . . . by a decision of a United States court"

[1] Because Plaintiffs made no such argument below, it is forfeited. *See* JA392-393; *Gov't of Manitoba v. Bernhardt*, 923 F.3d 173, 179 (D.C. Cir. 2019) ("Absent exceptional circumstances, a party forfeits an argument by failing to press it in district court.").

and that a tribe so recognized "may not be terminated except by an Act of Congress." *Id.* § 103(3)-(4). Plaintiffs cite no authority for the proposition that such definitive language is made ineffective because it is preceded by the statement "Congress finds."

The declaratory language in Section 103 was enacted through bicameralism and presentment just like Section 104, which Plaintiffs acknowledge to be effective. To be sure, statutory findings may receive less weight in statutory interpretation where they conflict with the "unambiguous" "operative" parts of a statute. *Ass'n of Am. Railroads v. Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977); *see Rothe Dev., Inc. v. U.S. Dep't of Def.*, 836 F.3d 57, 66 (D.C. Cir. 2016). But in the List Act, the so-called findings give meaning to Section 104's command to the Secretary to publish an annual list of Indian tribes; Section 103 explains how the list is to be created. Indeed, the very reason Congress enacted the Act was to make clear that the Department "does not have the authority to 'derecognize' a tribe" and that recognition is a "formal political act" that "*permanently* establishes a government-to-government relationship between the United States and the recognized tribe" and "establishes tribal status for *all* federal purposes." H.R. Rep. No. 103-781, at 2-3 (1994) (emphases added). In light of that aim, there would be no reason to enact the List Act if it simply ordered the Secretary to make a list without the instructions of Section 103.

Plaintiffs next say (at 36-37) that the stipulated judgment's promise to take land into trust was ineffective if it violated federal law. Whether or not that is so, the only law that Plaintiffs say the stipulation violated is the Rancheria Act, and that Act does not apply for at least the two reasons identified by the District Court.

More generally, Plaintiffs' arguments also conflict with decades of case law in which courts have restored improperly terminated Rancherias. Just within this Circuit, this is the second case in which plaintiff Stand Up has unsuccessfully challenged a Rancheria's restoration. In the prior case, involving the North Fork Rancheria, the district court held on similar facts that the tribe's recognition "was prescribed by the Executive's agreement and stipulation and the Judiciary's order" and "confirmed through Congress' enactment of the List Act." *Stand Up*, 204 F. Supp. 3d at 301. This Court affirmed that judgment, explaining that even Stand Up there "acknowledg[ed] that the *Hardwick* stipulation restored the North Fork to its [pre-Rancheria Act] status." *Stand Up*, 879 F.3d at 1184. When Stand Up instead challenged the stipulation's recognition that the North Fork Rancheria had in fact existed before it was terminated, this Court balked because that argument conflicted with the plaint text of the stipulation, on which the Department "quite reasonably" had relied. *Id.* at 1185. So too here.

This Court's analysis was consistent with court decisions dating to the 1970s recognizing that the Government's failure to satisfy the Rancheria Act's conditions

rendered subsequent termination unlawful and restoring Rancherias' tribal status and benefits. *See, e.g.*, *Table Bluff Band of Indians v. Andrus*, 532 F. Supp. 255, 258, 259-261, 265 (N.D. Cal. 1981) (restoring improperly terminated tribe and ordering that its "lands should be returned in trust"); *Smith v. United States*, 515 F. Supp. 56, 61-62 (N.D. Cal. 1978) (similar); *Duncan v. Andrus*, 517 F. Supp. 1, 5-6 (N.D. Cal. 1977) (unlawfully terminated "Rancheria must be 'unterminated' "); *accord* 1 *Cohen's Handbook of Federal Indian Law* § 3.02[8][a] (Nell Jessup Newton ed., 2017) (explaining that courts have found the Rancheria Act's requirements to provide irrigation and water systems to be "a condition precedent to termination" and recognizing "restoration of tribal status" as an appropriate remedy for improper termination).

Plaintiffs' attempted collateral attack on the Tribe's restoration would require ignoring the List Act, invading the finality of a federal-court judgment, and overruling the Executive's discretion to recognize tribes. It would also cast doubt on the status of every former Rancheria that has been restored by stipulation or court order for the last forty-plus years. This Court has already rejected such an attack, and it should do so again here.

II. PLAINTIFFS' PROCEDURAL CHALLENGES TO THE FEE-TO-TRUST DECISION ALSO LACK MERIT.

A. Department Officials Acted With Properly Delegated Authority In Taking Land Into Trust.

Plaintiffs' lead argument (at 13-33) is that 25 C.F.R. § 151.12 prevented Lawrence Roberts from exercising the AS-IA's authority to make a final fee-to-trust decision and that he was not even delegated that authority anyway. But Section 151.12 does not limit delegation in any way, and the Department has repeatedly affirmed and re-affirmed that such authority was delegated to Roberts.

1. Section 151.12(c) does not bar subdelegation.

a. Nothing in Section 151.12(c) affects subdelegation.

As the District Court correctly recognized, Section 151.12(c) "must be interpreted against a background presumption of delegability." JA338. "When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is *presumptively permissible* absent affirmative evidence of a contrary congressional intent." *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565 (D.C. Cir. 2004) (emphasis added); *accord, e.g.*, *Mobley v. CIA*, 806 F.3d 568, 585 (D.C. Cir. 2015).[2] In other words, delegated authority is presumptively *not* exclusive. Plaintiffs do not dispute that the Secretary's authority to acquire and hold property in trust under 25 U.S.C. § 5108 can be and

[2] Case law uses the terms "subdelegation" and "redelegation" as synonyms to refer to delegation from one federal officer to a subordinate official.

has been delegated to the AS-IA. The only question is whether anything in Section 151.12(c) prohibits further subdelegation of the AS-IA's authority. It does not.

Section 151.12(c) provides that "[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." 25 C.F.R. § 151.12(c). Those twenty-eight words are silent as to whether the AS-IA's authority to render final trust acquisition decisions is exclusive, and the regulation's silence on that question gives rise to a presumption that it is not. *Cf. U.S. Telecom Ass'n*, 359 F.3d at 565; *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1191 (10th Cir. 2014).

The crux of Plaintiffs' argument (at 15-16, 18-19) is that because the regulation mentions the Secretary and AS-IA, no one else—under any circumstance—can make a final trust decision. But it makes no sense to read Section 151.12(c) as imposing any restrictions on subdelegation because the regulation is not about delegation at all. Rather, as the District Court explained, "the regulation describes, for the benefit of external parties, the Department's process of reviewing and taking action on acquisition requests." JA340. Section 151.12(c) explains that when the Secretary or AS-IA, or somebody acting with their authority, makes a land-acquisition decision, it is final for purposes of the APA. That contrasts with subsection (d), which explains that a "decision made by

a Bureau of Indian Affairs official is *not* a final agency action," requiring exhaustion of internal "administrative remedies" before the action is final. 25 C.F.R. § 151.12(d) (emphasis added); *see supra* pp. 4-5.

Subsection (c) therefore "mention[s] a specific official only to make it clear that this official has a particular power rather than to exclude delegation to other officials." *Ethicon Endo-Surgery, Inc. v. Covidien LP*, 812 F.3d 1023, 1033 (Fed. Cir. 2016) (quoting *United States v. Mango*, 199 F.3d 85, 90 (2d Cir. 1999)); *see* JA340. Where the official is making a land-acquisition decision in the shoes of the AS-IA—as was the case here—the decision is final, and judicial review is immediately available. Where a BIA official who is not delegated the AS-IA's authority is making the decision, it is not final, and a dissatisfied party must first seek internal review. That is all the regulation says.

Plaintiffs incorrectly suggest (at 16-17) that the Secretary's preamble when promulgating Section 151.12(c) supports their interpretation. As the District Court explained, "[n]one of the comments" in that preamble "explicitly or implicitly address delegation." JA341. Rather, the 2013 revision that added Section 151.12(c) was principally about eliminating a 30-day waiting period to take land into trust, which had become unnecessary after the Supreme Court held that APA challenges were permissible after acquisition. 78 Fed. Reg. at 67,929. Subsections (c) and (d) were added as part of the revision to "[p]rovide clarification and

transparency to the process for issuing decisions" and to "[e]nsure notice" of any "right . . . to file an administrative appeal." *Id.* The crux of subsections (c) and (d), then, are the instructions they give about how the AS-IA or BIA officials are to give notice of an acquisition decision to affected parties. Nothing in the preamble suggests they are intended in any way to restrict delegation.

Indeed, as the District Court pointed out, Plaintiff's inference that only the Secretary and AS-IA may act under Section 151.12(c) "would lead to absurd results." JA342. In service of providing notice, subsection (c) explains that "the Secretary or Assistant Secretary" must "promptly provide the applicant with the decision," and, if the request is approved, "publish [it] in the Federal Register" and "[i]mmediately acquire the land in trust." 25 C.F.R. § 151.12(c)(1)-(2). Under Plaintiffs' reading, the Secretary or AS-IA must personally execute all these administrative tasks and may not delegate them to others. If, however, those administrative tasks—"which by the strict language of the regulation are assigned to the AS-IA"—may be delegated, then there is no reason why the Secretary or AS-IA "cannot also re-delegate other responsibilities of the AS-IA that are discussed in the same section." JA342-343.

Last, Plaintiffs' reading of Section 151.12(c) makes little sense when compared to surrounding regulations. When the Secretary wants to bar subdelegation, he knows how to say so explicitly. *See, e.g.*, 43 C.F.R. § 3191.2(b)

(providing that the authority delegated to a State respecting oil and gas leases "shall not be redelegated"); *id.* § 20.202(b)(1) (authority of an ethics officer to impose disciplinary or remedial action "may not be redelegated"). Section 151.12(c) says nothing like that.

b. Plaintiffs' counterarguments are wrong.

Without any language in the regulation or its promulgating preamble that even addresses subdelegation, Plaintiffs are left grasping at straws to undermine the District Court's cogent analysis of the regulation.

First, they argue (at 18)—in a paragraph notably devoid of any citations—that the strong presumption of subdelegability should apply less rigorously to regulations because its application may create "uncertainty" there. But Plaintiffs provide no explanation of why any "uncertainty" would differ between delegations of authority by statute or by regulation. If anything, it is Plaintiffs' reading that creates "uncertainty." A uniform presumption of subdelegability does not arbitrarily distinguish between statutory and regulatory grants of authority. Plaintiffs' mode of interpretation, on the other hand, would create just the confusion they say they want to avoid by allowing challengers to argue for implied limitations to delegations years after a decision was taken. Also, because of Section 151.12's detailed notice requirements, there is little practical risk of "uncertainty" as to who made a particular decision and whether it is final.

Unsurprisingly, district court decisions expressly considering whether the AS-IA's authority could be subdelegated found that it could. *See Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 419-421 (D. Conn. 2008); *Sokaogon Chippewa Cmty. v. Babbitt*, 929 F. Supp. 1165, 1181-82 (W.D. Wis. 1996).

Second, Plaintiffs point (at 19) to a section of the preamble to the 2013 regulatory amendment explaining 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. True enough, and the preamble contrasts the AS-IA with regional BIA officials whose decisions are subject to review to "ensure[ ] consistency in the decision-making across BIA regions." *Id.* at 67,933. Plaintiffs provide no explanation, however, for why an official in Washington delegated the AS-IA's authority and acting in the shoes of the AS-IA would not presumptively apply the same level of internal review and consistency as the AS-IA. Plaintiffs also look for support (at 19-20) in 25 C.F.R. § 2.6, the general provision about finality of Indian Affairs decision. But that provision simply mirrors Section 151.12(c)'s distinction between AS-IA decisions being final and BIA officials' decisions being appealable. *See supra* p. 5. So, it presents the same question and should be read to allow subdelegation for the same reasons.

Third, Plaintiffs argue (at 20-21) that reading Section 151.12(c) to permit subdelegation of the AS-IA's authority would render the reference to the AS-IA

"superfluous" because the "Secretary" is already defined in Section 151.2(a) to include the Secretary's "authorized representative." In fact, though, that helps explain why added clarity was needed in the portion of the regulation that sets out which officials can make final decisions. After all, *any* official acting pursuant to authority delegated by the Secretary—including a BIA official—is acting as the Secretary's "authorized representative." The reason the Secretary promulgated Section 151.2(a)'s definition of the "Secretary" in the first place was to provide a shorthand way to refer to both the AS-IA and BIA officials involved in trust acquisitions. *See* Land Acquisitions (Nongaming), 60 Fed. Reg. 32,874, 32,878 (June 23, 1995). To preserve and clarify the distinction between final and non-final decisionmakers, Section 151.12(c) and (d) specify *which* of the Secretary's "authorized representative[s]"—i.e., which agency officials acting "pursuant to delegated authority" from the Secretary—are empowered to speak conclusively for the agency and which are not. Section 151.12(c)'s reference to the AS-IA serves that important clarifying purpose—and thus is not "superfluous"—even when read to say nothing precluding subdelegation.

Fourth, Plaintiffs incorrectly argue (at 21-22) that *United States v. Giordano*, 416 U.S. 505 (1974), supports them. Unlike Section 151.12, the statute in *Giordano* "expressly addressed" the "matter of delegation." *Id.* at 514. Although the Court allowed that the text was not "precise," it found that the

statute's "purpose and legislative history"—namely to *restrict* the wiretap authority that was delegated in the provision—"strongly supported" limiting subdelegation to serve the statutory purpose. *Id.*; *see Mango*, 199 F.3d at 90; JA343-344. Section 151.12, in contrast, evinces no similar purpose to restrain land acquisitions.

Fifth, and finally, Plaintiffs vaguely assert (at 23) that the District Court's interpretation of Section 151.12 "raises constitutional concerns," because land-to-trust decisions can override state and local taxation and zoning laws. But the power of the Department to take land into trust is not disputed, and the question of who may exercise that authority does not change the nature of the authority itself. To the extent Plaintiffs are trying to allude to the Appointments Clause argument they made below, the District Court made short shrift of that argument. JA349-350 n.13. The Appointments Clause is not concerned with "the *degree* of an individual's authority" so long as the individual is "supervised at *some* level" by a Senate-confirmed officer. *Ass'n of Am. Railroads v. U.S. Dep't of Transp.*, 821 F.3d 19, 38 (D.C. Cir. 2016) (quoting *Edmond v. United States*, 520 U.S. 651, 663 (1997)) (emphases added). And an official subdelegated the AS-IA's authority is supervised by the Deputy Secretary and, ultimately, the Secretary. JA349-350 n.13.

c. The Department's interpretation deserves deference.

Even if Section 151.12(c) were not subject to the presumption favoring subdelegation, the Department's interpretation of its own regulation would control. Courts defer to an agency's "reading of its own regulations unless that reading is plainly erroneous or inconsistent with the regulations." *Great Lakes Comnet, Inc. v. FCC*, 823 F.3d 998, 1002 (D.C. Cir. 2016) (internal quotation marks omitted); *see Auer v. Robbins*, 519 U.S. 452, 461-462 (1997). The Department's reading of Section 151.12(c) easily satisfies that test.

The Department's interpretation is not only reasonable (and correct), it is "consistent and well established." *Flytenow, Inc. v. FAA*, 808 F.3d 882, 890 (D.C. Cir. 2015). The Interior Board of Indian Appeals has held that the AS-IA's authority to make final decisions under Section 2.6(c)—the model for Section 151.12(c)—is not exclusive and can be subdelegated. In *Forest County Potawatomi Community v. Deputy Assistant Secretary-Indian Affairs*, 48 IBIA 259 (2009), the Board considered an administrative appeal from a decision taken by an Associate Deputy Secretary who, as here, "had been temporarily redelegated, by the Secretary, all" non-exclusive functions "of the [AS-IA]." *Id.* at 262 (internal quotation marks omitted). Rejecting an argument similar to Plaintiffs', the Board explained that "[a] specific delegation of authority is not the same as a delegation of *exclusive* authority." *Id.* at 270.

The Board reached a similar conclusion in *Ramah Navajo Chapter v. Deputy Assistant Secretary for Policy and Economic Development-Indian Affairs*, 49 IBIA 10 (2009). There, the Deputy Secretary had delegated a Deputy Assistant Secretary "to temporarily assume, until further notice, the responsibilities of the [AS-IA]" after the AS-IA resigned. *Id.* at 11. The Board concluded that it "lack[ed] authority to review" the Deputy Assistant's decision "because he ha[d] been delegated the authority and responsibilities of the [AS-IA]"—notwithstanding the fact that he "signed the . . . decision as 'Deputy Assistant Secretary.' " *Id.* at 12.

In addition, the Department's Solicitor undertook a complete survey of the applicable laws and regulations in 2005 and opined that *no* regulations—and just a handful of statutes—contained the kind of prohibitory or mandatory language necessary to prohibit subdelegation of the AS-IA's authority. JA286-288. Although that survey predates Section 151.12(c), it does not predate Section 2.6(c)—the model for Section 151.12(c)—and it reflects the agency's consistent approach. This is a classic situation for application of *Auer* deference: the Department's interpretation "reflect[s] the agency's fair and considered judgment on the matter in question." *Texas v. EPA*, 726 F.3d 180, 194 (D.C. Cir. 2013)

(quoting *Auer*, 519 U.S. at 461-462). *Auer* deference is therefore an independent basis to reject plaintiffs' reading of Section 151.12(c).[3]

2. The authority to make the fee-to-trust decision was clearly and repeatedly delegated and ratified.

a. Roberts was delegated the AS-IA's nonexclusive authorities.

Plaintiffs' remaining arguments dispute whether Roberts *was* in fact delegated the authority to make fee-to-trust decisions.[4] Here, there can be no doubt whatsoever that the Department intended to delegate Roberts the nonexclusive authorities of the AS-IA. When the AS-IA left the Department in January 2016, the Secretary issued a press release saying that "Roberts will lead Indian Affairs for the remainder of the Obama Administration." Press Release, U.S. Dep't of the Interior, *Assistant Secretary for Indian Affairs Kevin Washburn to Conclude Successful Tenure at Interior, Return to Teaching* (Dec. 10, 2015), https://on.doi.gov/2XprTGX. As the first assistant to the AS-IA, Roberts automatically assumed the role of Acting AS-IA under the Federal Vacancies

[3] The Supreme Court reaffirmed *Auer* deference just last year in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2418 (2019). Although *Kisor* elaborated some conditions for applying *Auer* deference, all relevant ones are satisfied here: This is "the agency's authoritative or official position," *id.* at 2416 (internal quotation marks omitted), it "implicate[s] [the Department's] substantive expertise" about how it administers its own affairs, *id.* at 2417, and it is a "fair and considered judgment" that the Department has long followed, *id.* (internal quotation marks omitted).

[4] Plaintiffs do not dispute that a subdelegation need not follow any particular form. *See, e.g.*, *Mobley*, 806 F.3d at 584-585 (subdelegation by order); *Stewart v. Stackley*, 251 F. Supp. 3d 138, 158 n.17 (D.D.C. 2017) (subdelegation by letter).

Reform Act from January to July 2016, at which point he reverted to being Principal Deputy. JA234. As anticipated by the Secretary, he then continued to lead Indian Affairs until the end of the Obama Administration, and he was still doing so on January 19, 2017, when he issued the ROD. *Id.*

Once his time as Acting AS-IA expired, Roberts exercised the AS-IA's authority pursuant to the Departmental Manual, which provided that in the absence of the AS-IA, the Principal Deputy may exercise all the nonexclusive authority delegated to the AS-IA. *Id.*; *see* JA268-269 (209 DM 8.4(B)). To make Roberts's authority unmistakable, on the very day Roberts issued the fee-to-trust decision, Deputy Secretary Michael Connor—who, with inapplicable exceptions, "has the full authority of the Secretary," JA251 (109 DM 1.2(B))—issued a memorandum "confirm[ing] [Roberts's] authority to exercise the functions and duties of the AS-IA that are not required by law or regulation to be performed only by the AS-IA." JA276 (Connor Memorandum). And then, Roberts's successor as acting AS-IA—named by the Trump Administration's first appointed Secretary, JA246—further confirmed that Roberts had been properly delegated the AS-IA's authority when dismissing Stand Up's administrative appeal, JA232-235. Three years later, the Department in this litigation continues to defend its view from January 2017 that Roberts was delegated the AS-IA's nonexclusive authorities.

The only people who do not think Roberts was delegated the AS-IA's authority are Plaintiffs. They present nothing that suggests that the Secretary, Deputy Secretary, or any of the personnel in Indian Affairs doubted what the Departmental Manual and Connor Memorandum said: that Roberts was delegated the AS-IA's non-exclusive authority. Nor do Plaintiffs explain who was leading Indian Affairs if not Roberts.

b. Even Plaintiffs' technical quibbles are wrong.

Plaintiffs have identified no decision vacating an agency action where a delegation was uniformly understood to be in effect. Although their quibbles with the mode of delegation here are thus irrelevant, the Tribe briefly explains why the also lack merit.

1. Plaintiffs argue (at 26-30) at great length that the Departmental Manual did not delegate authority to Roberts because the relevant provision only applied in the "absence" of the AS-IA, which Plaintiffs say is categorically different from a "vacancy" of the AS-IA's office. Because this distinction is newly minted on appeal and did not appear in their summary-judgment briefing, it is forfeited. *See Bernhardt*, 923 F.3d at 179; *supra* n.1. It is also wrong. Plaintiffs cherry-pick (at 26 & n.61) the second definition from Webster's to suggest that absence cannot include vacancy, but the primary definition of "absence" is "a state or condition in which something expected, wanted, or looked for is not present *or does not*

exist"—a broad definition that encompasses a vacant office. *Absence*, Merriam-Webster, https://www.merriam-webster.com/dictionary/absence (last updated Apr. 22, 2020) (emphasis added).

The two cases Plaintiffs cite (at 27-28), in which the Office of Legal Counsel and the Government Accountability Office (GAO) parsed the difference between absence and vacancy, are not at all analogous: They involved subordinate officials stepping into the role of the head of a cabinet department or independent agency.[5] Exercising such sweeping and potentially non-delegable authority without proper Presidential appointment and Senate confirmation in those cases raised significant statutory and constitutional questions. Here, though, there were no potential constitutional or statutory bars to Roberts exercising the AS-IA's non-exclusive authority, and the only question is whether he was in fact delegated that authority.

Plaintiffs' other arguments fare no better. They point out (at 28) that the Departmental Manual addresses vacancies specifically, but that section of the Manual essentially just codifies the successions that are automatic under the

[5] *See* Fed. Reserve Bd.-Vacancy With the Office of the Chairman-Status of the Vice Chairman, 2 Op. O.L.C. 394, 1978 WL 15323 (Jan. 31, 1978) (Vice Chairman of the Federal Reserve Board acting as Chairman); Comptroller General, Opinion Letter on Appointment of Department of the Interior Associate Deputy Secretary, B-290233 (Comp. Gen.), 2002 WL 31388352 (Oct. 22, 2002) (Associate Deputy Secretary of the Department of the Interior acting as Secretary of the Interior).

Federal Vacancies Reform Act. JA272-273 (302 DM 2). Nothing in it indicates that there is some categorical distinction between vacancies and absences.

Plaintiffs also suggest (at 28-29) that the Connor Memorandum reveals the Deputy Secretary's knowledge that Roberts had been improperly exercising the AS-IA's authority. That is a willful misreading of the Memorandum. It says just the opposite, that from the time Roberts reverted to the role of Principal Deputy it was the Department's "intent" that he "would continue to exercise the functions and duties of the AS-IA that are not required by statute or regulation to be performed by the AS-IA." JA276. The Deputy Secretary then explained that there had been a typo in a succession order which correctly "identifie[d] [Roberts] by name but incorrectly" listed his office. *Id.* The Memorandum then "confirm[ed] [Roberts's] authority" and "ratif[ied] and approve[d] any actions" he had taken, just to clear up any "confusion" the typo may have caused. *Id.*

2. Plaintiffs also attack the validity of the Connor Memorandum itself (at 30-33). Because the Departmental Manual provided the necessary delegation, the Connor Memorandum is just gilding the lily of Roberts's authority. In any event, Plaintiffs' objections are baseless.

The Departmental Manual allowed "temporary delegation[s]"—as Roberts's was—to be "issued as a Secretary[']s Order," and the Manual authorized the

Deputy Secretary (then Connor) to "sign delegations of the Secretary[']s authority." JA265 (200 DM 1.3). That is what the Connor Memorandum was.

Nor can the Manual be read to impose limits on the *form* of delegation. The Manual is simply a means to "communicate the instructions of the Office of the Secretary throughout the Department," and it may be "superseded by . . . a Secretary[']s Order." JA248 (011 DM 1.2). The "Deputy Secretary has the full authority of the Secretary," JA251 (109 DM 1.2(B)), and is in fact authorized to revise the Departmental Manual itself, JA248 (011 DM 1.2, 1.3). The technical details of the Departmental Manual therefore could not have constrained the Deputy Secretary's delegation authority.

More generally, what Plaintiffs are asking for, if granted, would wreak havoc on the efficient administration of government. They are asking this Court to invalidate a years-old land acquisition because (they say) the Secretary and Deputy Secretary did not use the correct magic words to delegate authority. Allowing a guidance document to override the Secretary's authority in such post-hoc fashion would both dissuade departments from issuing any guidance about administrative functions to begin with and would give challengers every incentive to bring the most trifling challenges to the format of every delegation that may have affected a contested decision.

B. NEPA Did Not Require A New EIS Or Supplemental EIS.

Plaintiffs' third challenge—that the Department's fee-to-trust decisional process violated NEPA—rests on fundamental misunderstandings of NEPA's requirements and ignores significant parts of the factual record. "NEPA itself does not mandate particular results." *Pub. Citizen*, 541 U.S. at 756-757 (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989)). "Rather, NEPA imposes only procedural requirements on federal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions." *Id.* Judicial review is "accordingly limited." *Sierra Club*, 867 F.3d at 1367. A court's role "is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious." *Id.* at 1367-68 (internal quotation marks omitted).

Here, there can be little question that the Department gave thorough consideration to the environmental impact of its decision through its voluminous and comprehensive analysis of the Elk Grove site in both the Draft and Final EISs. Nor can there be doubt that the public was aware the Department was actively considering the Elk Grove site in light of ample public notice and the many comments received on Elk Grove. Indeed, Plaintiffs all but concede the substantive sufficiency of the environmental analysis because they have abandoned

their arguments that the EISs were deficient after the District Court quickly dispatched with those objections below. *See* JA874-878.

1. Labeling Galt the "proposed action" based on the Tribe's initial application did not limit consideration of Elk Grove.

Plaintiffs premise their NEPA arguments on the notion that the Department engaged in a bait-and-switch because the Scoping Report and Draft EIS identified the "proposed action" as the transfer of the Galt site into trust, and the Final EIS reflected the Tribe's revised request that the Government take the Elk Grove site into trust. There was nothing remotely improper about shifting from Alterative A in the Draft EIS to Alternative F in the Final EIS.

Plaintiffs treat the phrase "proposed action" as something immutable, but they wholly misunderstand the nature of the NEPA process. An EIS is meant to "provid[e] a clear basis for *choice among options* by the decisionmaker and the public." 40 C.F.R. § 1502.14 (emphasis added). So long as the agency's ultimate course of action was studied and disclosed, "NEPA's goal of ensuring that relevant information is available to those participating in agency decision-making" is satisfied. *Nevada*, 457 F.3d at 90.

The proposed action is just the starting point for the NEPA analysis. "When an agency is asked to sanction a specific plan," it begins by defining "the needs and goals of the parties involved in the application." *Citizens Against Burlington, Inc.*

v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991) (Thomas, J.). Those *goals*, in turn, "delimit the universe of the action's reasonable alternatives." *Id.* at 195.

It is the agency's "discussion of alternatives"—not its description of the proposed action—that "forms 'the heart of the environmental impact statement.' " *Id.* at 194 (quoting 40 C.F.R. § 1502.14). Although the proposed action is analyzed as *one* of the alternatives, the agency must " 'rigorously explore and objectively evaluate' the projected environmental impacts of *all*" reasonable alternatives. *City of Alexandria*, 198 F.3d at 866-867 (quoting 40 C.F.R. § 1502.14) (emphasis added).

Plaintiffs do not dispute that the Department's stated objectives were reasonable given the Tribe's plans and IGRA's purposes. *See Citizens Against Burlington*, 938 F.2d at 196. Nor do they dispute that the Elk Grove alternative was "reasonable in light of these objectives." *City of Alexandria*, 198 F.3d at 867.

Instead, Plaintiffs assert (at 38) that "NEPA does not allow" an agency to select any alternative other than what was labeled the "proposed action" in the Draft EIS. In fact, agencies have considerable discretion when it comes to choosing among the alternatives discussed in an EIS. The CEQ Guidance expressly authorizes agencies to select "an alternative *other than the proposed action* [a]s the agency's 'preferred alternative.' " 46 Fed. Reg. at 18,027-28 (emphasis added) (#5a). That alternative need not even have "been disseminated

previously in a draft EIS," so long as it is " 'qualitatively within the spectrum of alternatives that were discussed.' " *Dubois v. U.S. Dep't of Agric.*, 102 F.3d 1273, 1292 (1st Cir. 1996) (quoting 46 Fed. Reg. at 18,035 (#29b)). And the selection of a preferred alternative is not binding; courts have held that agencies may act on *any* option that has "already been fully considered" in the review process. *Friends of Marolt Park v. U.S. Dep't of Transp.*, 382 F.3d 1088, 1097 (10th Cir. 2004). Indeed, an agency "d[oes] not cut off the public's right to comment" even when it ultimately selects an alternative *rejected* in the Final EIS. *Id.* at 1096. Even the case Plaintiffs selectively quote (at 38) to support their asserted rule explains that "agencies must have some flexibility to modify alternatives canvassed in the draft EIS to reflect public input, without having to circulate a supplemental draft EIS describing the proposed action." *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 508 (9th Cir. 1988) (internal quotation marks omitted).

NEPA's flexibility is grounded in sound policy. It would make little sense to confine an agency to the terms of an applicant's proposal when, as the CEQ Guidance recognizes, that "may be, but is not necessarily, the *agency's* 'preferred alternative.' " 46 Fed. Reg. at 18,027-28 (emphasis added) (#5a). After all, as was the case for the Galt site, "[t]he proposed action may be a proposal in its initial form before undergoing analysis in the EIS process." *Id.* NEPA requires "only that proper procedures be followed for ensuring that environmental consequences

have been fairly evaluated." *Nat'l Comm. for the New River, Inc. v. FERC*, 373 F.3d 1323, 1329 (D.C. Cir. 2004). It "does not require that a complete plan be actually formulated at the outset," *id.*, or that the agency take a final position before hearing from the experts and the public.

2. The public had ample notice that the Department was seriously considering Elk Grove.

In addition to Plaintiffs' incorrect understanding of the role of a "proposed action," their argument that the public was deprived of meaningful notice is also wrong. Far from hiding the ball, the Department transparently advised the public from the start that it might select the Elk Grove alternative at the end of the review process, and it cogently explained its reasons for doing so in the Final EIS.

Consistent with the CEQ Guidance, the February 2014 Scoping Report explained that, while "Alternative A is the Tribe's Proposed Project," the Department "*may not determine a Preferred Alternative until completion of the environmental analysis*." JA977 (emphasis added); *see* 46 Fed. Reg. at 18,027-28 (#5a). No reasonable person reading the Scoping Report could have thought that the only option on the table was the Galt site. To the contrary, the report attached detailed maps of three different sites, including the Elk Grove mall site, with preliminary diagrams of six different development options. JA969-976. So did the 712-page Draft EIS. It featured a detailed analysis of all six development options, plus a "No Action/No Development" alternative. JA1264-268.

After reviewing the Draft EIS and comments on it—including EPA's recommendation that the Elk Grove alternative be designated the environmentally preferable alternative—the Department's Final EIS concluded that "Alternative F, Casino Resort at Mall Site, would best meet the BIA's purpose and need." JA1551; *see also* JA2589-590; JA1437. In particular, the Department found that the Elk Grove alternative was preferable to the Tribe's original proposal because it "would allow the Tribe to connect to existing infrastructure," thereby "reducing the environmental impacts." JA1552; *see also* JA2589-590. That is exactly the kind of environmentally conscious decision-making NEPA is intended to produce.

Ignoring all of this notice and explanation, Plaintiffs fret (at 41) that the Department held public meetings in Galt and displayed a copy of the Draft EIS in Galt's branch of the Sacramento County library. But all three proposed sites sit within a roughly 8-mile radius. *See* JA969 (fig. 1). And if Elk Grove residents did not want to drive fifteen or twenty minutes to Galt's public library to read the Draft EIS, the draft and all the other NEPA documents were readily available on a website established for that purpose, www.wiltoneis.com. Plaintiffs also complain (at 41) that the Department did not invite the City of Elk Grove to participate formally as a "cooperating agency" at the scoping stage, but the City lodged extensive comments on the Draft EIS, *infra* p. 47, and it was made a cooperating agency in May 2016, just six days after requesting that designation. JA1554-555.

Irrespective of Plaintiffs' objections to the Department's formal notices, both the record and public press coverage reveal that the public had *actual* knowledge that the Elk Grove site was receiving serious consideration. In fact, a local Elk Grove newspaper reported as early as *March 2013* that "[t]he leader of the Wilton Rancheria tribe said the Elk Grove Promenade Mall site could be an option for a future casino if their proposal to build one four miles south of Elk Grove [in Galt] falls through." Bryan M. Gold, *Tribe seeks property for casino outside Galt: Wilton Rancheria chair said mall site a possibility*, *supra*.

The comments submitted in response to the Draft EIS also reflect that "the public had sufficient information to comment on" each alternative "evaluated in the [Draft EIS]." *Nevada*, 457 F.3d at 90. "[T]he volume and substance of the comments received by the" Department "in response to the [Draft EIS] undermine [Plaintiffs'] position that the [Draft] failed to serve its purpose." *New River*, 373 F.3d at 1329-30.

Among the most significant examples:

- Plaintiff Lynne Wheat delivered an impassioned plea at the public hearing on the Draft EIS, asking the Department "to consider carefully the last Alternative F [Elk Grove]," and explaining: "I believe the Mall site in Elk Grove will still provide residents of Galt the jobs that they need. The residents will be employed. They'd come back home. They would spend their money in their hometown of Galt, and that would produce the sales tax revenue." JA1518.[6]

- Plaintiff Stand Up submitted *three* separate letters—two of which plainly assumed that the Elk Grove site was a potential candidate for trust acquisition. In these letters, Stand Up argued that the "City of Galt *and* Elk Grove" had "substantial role[s] in the federal process as well as state legal obligations to adhere to the California Environmental Quality Act"—obligations that would apply to Elk Grove only if the Elk Grove alternative was under consideration. JA1450 (emphasis added); JA1460.

- The City of Elk Grove submitted a letter, which attached several extensive memoranda commenting on the Elk Grove alternative and explained that "[w]hile there is not an application at this time to take the Alternative F site [Elk Grove] into trust, *our understanding is that this is still the appropriate time to comment on the Alternative F site*." JA1417 (emphasis added); *see also* JA1519-520 (hearing testimony from Elk Grove's economic development director).

- Sacramento County submitted a letter indicating that "[t]he County understands that the Elk Grove alternative site may have merit as a potential location for the project" and explaining that the Tribe's memorandum of understanding with the County and City of Elk Grove "addresses the County's needs [if the] *Elk Grove site is ultimately selected*." JA1448 (emphasis added).

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[6] In trying to downplay the fact that one Plaintiff herself urged the Department to pick the Elk Grove site, Plaintiffs suggest (at 44-45) that they participated in the NEPA process in bad faith by advocating for a site they believed to be an "impossible" option. Whatever their cynical motivation for supporting an option they are now challenging, the comment still proves the fact that matters: the public (and Plaintiffs themselves) were aware Elk Grove was being considered.

- EPA submitted a letter "recommend[ing]" that the Elk Grove alternative "be designated the environmentally preferable alternative and that BIA and the Tribe *strongly consider this site for the project*." JA1437 (emphasis added); *see* JA1440.

- The Tribe itself submitted a letter asking the Department to add additional detail to its analysis of the Elk Grove alternative and to add language indicating that "[t]he Tribe is in discussions with the current owner over the terms of an agreement to purchase the Mall site." JA1447.

The Department also received numerous comments from individual members of the public, voicing their support for or indifference to building a casino at the Elk Grove site. *See, e.g.*, JA1471; JA1472; JA1474; JA1476; JA1479; JA1484-485; JA1487-490; JA1493; JA1495; JA1497-498; JA1501; JA1503-504; JA1506; JA1508; JA1509-510. Others stated opposition to the casino project "that is being considered in Elk Grove," JA1480, "the Elk Grove Casino project in the works," JA1491, and "the Draft EIS proposal to build a casino in Elk Grove," JA1502. *See also, e.g.*, JA1477; JA1481-483; JA1486; JA1492; JA1499-500; JA1511-514; JA1515.

In addition to the comments submitted and the press coverage during the comment period, the Tribe held a town-hall meeting in Elk Grove in July 2016 in which it offered detailed information about its plans to build a casino on the mall site to a "standing-room only" crowd. Dana Griffin, *Residents pack community meeting for Elk Grove casino proposal*, *supra*; Lance Armstrong, *Wilton Rancheria presents Elk Grove casino plan to community*, *supra*.

In spite of all this evidence of actual public knowledge, Plaintiffs maintain (at 44) that "the public did not know that the Elk Grove site was a possibility" because the site was subject to a 2007 development agreement that did not contemplate a casino. That is nonsense. The comments just discussed show that the public understood the Elk Grove site was a serious option. In any event, the Department's subsequent acquisition of the parcel demonstrates that the premise of Plaintiffs' argument—that the development agreement made it impossible for the Department to take the Elk Grove parcel into trust—is simply untrue.[7]

3. The Department was not required to draft a new EIS when it adopted the Elk Grove site as the "preferred alternative."

Because the "proposed action" designation does not have the significance Plaintiffs suggest, and because there is overwhelming evidence that the public was given notice of the Elk Grove option, the Court can easily dispose of Plaintiffs' arguments that the Department had to produce a new EIS when it selected Elk Grove as the preferred alternative. This Court has repeatedly explained that "[a] court's role in reviewing an agency's decision not to prepare an EIS is a limited

[7] In any event, NEPA's requirements are subject to a harmless-error analysis. Case after case in this Circuit has applied the APA's harmless-error rule, 5 U.S.C. § 706, in the NEPA context. *See, e.g.*, *Delaware Riverkeeper Network v. FERC*, 857 F.3d 388, 401 (D.C. Cir. 2017); *Nevada*, 457 F.3d at 90; *New River*, 373 F.3d at 1327-28. Even if the Department could have notified the public in some additional way that it was considering Elk Grove, the fact that the public was actually aware Elk Grove was being considered makes any notice error harmless.

one, designed primarily to ensure that no arguably significant consequences have been ignored." *Mayo*, 875 F.3d at 20 (internal quotation marks omitted).

Plaintiffs can identify no "arguably significant consequences" the Department "ignored" by choosing not to rehash its analysis of the Elk Grove alternative in a new EIS. *Id.* (internal quotation marks omitted). Instead, they ask this Court to set aside controlling precedent and add novel requirements to NEPA.

Plaintiffs insist (at 42) that an EIS is required whenever a tribe files a new fee-to-trust application. That is true, as far as it goes. *See* 42 U.S.C. § 4332(2)(C). But the question here is whether the Draft EIS that the Department had *already prepared* and that the public had *already commented on* was sufficient. For all their hand-wringing, Plaintiffs "ha[ve] not shown that" the claimed errors here "left the public unable to make known its environmental concerns about the project's impact." *New River*, 373 F.3d at 1329. Nor have Plaintiffs "pointed to any area [*they*] would have addressed differently had the" Department identified Elk Grove as the proposed action. *Id.* at 1330. Because the Department had "adequately considered and disclosed the environmental impact of" the Elk Grove alternative, a second EIS was not required. *Id.* at 1327 (internal quotation marks omitted); *see Pub. Citizen*, 541 U.S. at 767.

4. The Department was not required to prepare a supplemental EIS, either.

For essentially the same reasons, the Department also was not required to prepare a supplemental EIS. Without any basis in case law or regulatory text, Plaintiffs advocate a *per se* rule (at 46-48) that anytime an agency adopts an action that was not initially labeled the "proposed action," a supplemental EIS is required. Such a requirement would undermine the purpose of NEPA to make agencies meaningfully consider alternatives. To that end, the relevant regulation says agencies need supplement an EIS only when it "makes substantial changes in the proposed action *that are relevant to environmental concerns*." 40 C.F.R. § 1502.9(c)(1)(i) (emphasis added). Case after case holds that a supplemental EIS is required only when a change leads to environmental effects that are "to a significant extent not already considered." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 374 (1989); *see also, e.g.*, *Friends of Marolt Park*, 382 F.3d at 1097.

Here, the Department had comprehensively considered the Elk Grove site in the Draft EIS, its NEPA process gave ample notice and opportunity to comment on the Elk Grove site, *see supra* pp. 44-49, and Plaintiffs have abandoned any arguments that there were substantive deficiencies in the EIS, *see supra* pp. 40-41. The NEPA process thus served its purpose without the need for a supplemental EIS.

Plaintiffs complain (at 47) that "the Department did not cite" cases "where an applicant changed a site-specific proposed action and a court did not require" a supplemental EIS. That is quite the blinkered criticism: The *Tribe* did expressly provide just such citations below. *See* JA435-436; *California ex rel. Imperial Cty. Air Pollution Control Dist. v. U.S. Dep't of Interior*, 767 F.3d 781, 796 (9th Cir. 2014) (Supplemental EIS not required where the applicant had "altered" their "originally proposed" conservation strategy); *Custer Cty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1036, 1039-41 (10th Cir. 2001) (Supplemental EIS not required where the agency selected an alternative identified as the "preferred alternative" in the final EIS that was distinct from "the original proposal"). And *all* the parties consistently discussed cases explaining that no supplemental EIS is required where "the relevant environmental impacts ha[d] already been considered," *Friends of Marolt Park*, 382 F.3d at 1097, and that a supplemental EIS is required only where "the final action departs substantially from the alternatives described in the draft EIS," *Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011). More to the point, Plaintiffs have cited no authority for their stark *per se* rule that a change in proposed action automatically requires a supplemental EIS, and it is they who have the burden to show that the Department acted unreasonably.

Plaintiffs also say (at 49-50) that the Draft EIS was deficient because it considered multiple alternative scenarios for Galt but only one for Elk Grove. In fact, the Department considered two alternatives for the Elk Grove site: the casino ultimately chosen and a "Reduced Intensity and Retail" option, which it ultimately rejected. JA2549 n.26; JA1277-78; JA1547-548. In any event, there is no NEPA requirement to consider a certain number of alternatives.

Plaintiffs next argue (at 51-52) that new materials added to the Final EIS prove that the Draft EIS was deficient. But NEPA regulations command that "[f]inal environmental impact statements *shall respond to comments*" on the draft EIS and that "[t]he agency *shall discuss* at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement." 40 C.F.R. § 1502.9(b) (emphases added). A final EIS is supposed to respond to the comments on the draft and to report additional developments since the draft; that is the whole point of having a draft before a final EIS.

Last, Plaintiffs argue (at 52) that the quick turnaround between the Final EIS and the ROD suggests that the Department did not fully consider the environmental consequences. Again, if this were so, Plaintiffs would be able to point to something missing from the Final EIS or the ROD. Moreover, the Department's timing was entirely permissible. The overall process took nearly four years from the Tribe's application to the ROD, and the Department strictly

complied with its duty not to make a final decision until "[t]hirty (30) days after" EPA's "publication" of the notice of availability of the Final EIS. 40 C.F.R. § 1506.10(b). Plaintiffs do not suggest otherwise, nor do they contest the bedrock principle of administrative law that courts may not "engraft[] their own notions of proper procedures upon agencies." *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 525 (1978). Demanding that the Department take longer than law required to issue the ROD flies in the face of the *Vermont Yankee* principle.[8]

C. Vacatur Is Not An Appropriate Remedy For Any Procedural Violations.

Even if this Court were to rule that there were some infirmity in the delegation to Roberts or the NEPA process, Plaintiffs offer no justification for their request (at 53) that the "trust decision" be "vacated" and "the Elk Grove site ordered to be removed from trust." *At most*, Plaintiffs' arguments would demonstrate that a new Department official should consider the trust decision or that supplementary environmental analysis is warranted. But numerous officials

[8] Given the irrelevance of the ROD's timing to the sufficiency of the NEPA analysis, Plaintiffs appear to be hinting at arguments they made below that the Department prejudged its decision or acted with a closed mind, arguments properly rejected by the District Court. *See* JA884-888. It is now too late for Plaintiffs to resuscitate them. *See Twin Rivers Paper Co. v. SEC*, 934 F.3d 607, 615 (D.C. Cir. 2019) ("[A]n argument is forfeited if the petitioners were obscure on the issue in their opening brief and only warmed to the issue in their reply brief." (internal quotation marks omitted)).

(across two Administrations) have endorsed the fee-to-trust decision, and the Department continues to defend it. Plaintiffs are no longer even arguing there were any specific substantive flaws in the environmental analysis.

Vacating and undoing the land acquisition would be a radical remedy in these circumstances. The deficiencies Plaintiffs claim are slight and procedural, whereas unwinding the trust decision would be complex and devastating to a tribe left landless for decades after it was improperly terminated. *See Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-151 (D.C. Cir. 1993) (holding that "whether to vacate depends on [1] the seriousness of the order's deficiencies . . . and [2] the disruptive consequences of an interim change that may itself be changed" (internal quotation marks omitted)). There is no reason to think that the current Secretary, AS-IA, or their delegate would not make the same decision, or that a supplemental environmental analysis would change the end result from the prior extensive analysis of the same site. Any error would have "relative insignificance," and the "disruptive consequences of rolling back an essential predicate to the trust decision" make it reasonable to find "vacatur unnecessary to address any harm." *Stand Up*, 879 F.3d at 1190 (internal quotation marks omitted).[9]

[9] Moreover, this Court typically remands any remedy question rather than addressing it in the first instance. *See Nebraska Dep't of Health & Human Servs. v. Dep't of Health & Human Servs.*, 435 F.3d 326, 330 (D.C. Cir. 2006) (vacatur is

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

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fact-bound decision "to grant or withhold equitable relief," typically left to district court and reviewed "for abuse of discretion"). The District Court, for example, could address whether any remedy is required if this Court finds a subdelegation issue, given the de facto officer doctrine. That "doctrine confers validity upon acts performed by" an official "even though it is later discovered that the legality of that person's appointment . . . is deficient." *Ryder v. United States*, 515 U.S. 177, 180 (1995). A plaintiff seeking to avoid this doctrine "must show that the agency . . . had reasonable notice under all the circumstances of the claimed defect in the official's title to office." *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 81-82 (D.C. Cir. 2015) (quoting *Andrade v. Lauer*, 729 F.2d 1475, 1499 (D.C. Cir. 1984)). "[T]he District Court on remand" thus could "determine whether and when the agencies involved knew of the alleged defect" and whether the doctrine applies. *Andrade*, 729 F.2d at 1500.

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limits of Fed. R. App. P. 32(a)(7) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 12,883 words.

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/s/ Jessica L. Ellsworth
Jessica L. Ellsworth

July 22, 2020

ADDENDUM

TABLE OF CONTENTS

California Rancheria Act (Rancheria Act), Pub. L. No. 85-671, 72 Stat. 619 (amended 1964)

AN ACT

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

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

* * *

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.

(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.

(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.

(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:

(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.

(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 oi 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.

(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 anv 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.

* * *

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.

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.

(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.

* * *

Approved August 18, 1958.

Federally Recognized Indian Tribe List Act of 1994 (List Act),
Pub. L. No. 103-454, 108 Stat. 4791

An Act
To provide for the annual publication of a list of federally recognized Indian tribes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—WITHDRAWAL OF ACKNOWLEDGEMENT OR RECOGNITION

SEC. 101. SHORT TITLE.

This title may be cited as the "Federally Recognized Indian Tribe List Act of 1994".

SEC. 102. DEFINITIONS.

For the purposes of this title:

(1) The term "Secretary" means the Secretary of the Interior.

(2) The term "Indian tribe" means any Indian or Alaska Native tribe, band, nation, pueblo, village or community that the Secretary of the Interior acknowledges to exist as an Indian tribe.

(3) The term "list" means the list of recognized tribes published by the Secretary pursuant to section 104 of this title.

SEC. 103. FINDINGS.

The Congress finds that—

(1) the Constitution, as interpreted by Federal case law, invests Congress with plenary authority over Indian Affairs;

(2) ancillary to that authority, the United States has a trust responsibility to recognized Indian tribes, maintains a government-to-government relationship with those tribes, and recognizes the sovereignty of those tribes;

(3) Indian tribes presently may be recognized by Act of Congress; by the administrative procedures set forth in part 83 of the Code of Federal Regulations denominated "Procedures for Establishing that an American Indian Group Exists as an Indian Tribe;" or by a decision of a United States court;

(4) a tribe which has been recognized in one of these manners may not be terminated except by an Act of Congress;

(5) Congress has expressly repudiated the policy of terminating recognized Indian tribes, and has actively sought to restore recognition to tribes that previously have been terminated;

(6) the Secretary of the Interior is charged with the responsibility of keeping a list of all federally recognized tribes;

(7) the list published by the Secretary should be accurate, regularly updated, and regularly published, since it is used by the various departments and agencies of the United States to determine the eligibility of certain groups to receive services from the United States; and

(8) the list of federally recognized tribes which the Secretary publishes should reflect all of the federally recognized Indian tribes in the United States which are eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

SEC. 104. PUBLICATION OF LIST OF RECOGNIZED TRIBES.

(a) PUBLICATION OF THE LIST.—The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(b) FREQUENCY OF PUBLICATION.—The list shall be published within 60 days of enactment of this Act, and annually on or before every January 30 thereafter.

* * *

Approved November 2,1994.

42 U.S.C. § 4332

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local shortterm uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section

552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

[1] So in original. The period probably should be a semicolon.

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource- oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

(Pub. L. 91–190, title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub. L. 94–83, Aug. 9, 1975, 89 Stat. 424.)

25 C.F.R. § 2.6

§ 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.

[54 FR 6480, Feb. 10, 1989; 54 FR 7666, Feb. 22, 1989]

25 C.F.R. § 151.12

§ 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.

[78 FR 67937, Nov. 13, 2013].

40 C.F.R. § 1502.9

§ 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.

40 C.F.R. § 1502.14

§ 1502.14 Alternatives including the proposed action.

This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public. In this section agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Devote substantial treatment to each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include reasonable alternatives not within the jurisdiction of the lead agency.

(d) Include the alternative of no action.

(e) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(f) Include appropriate mitigation measures not already included in the proposed action or alternatives.

40 C.F.R. § 1506.10

§ 1506.10 Timing of agency action.

(a) The Environmental Protection Agency shall publish a notice in the FEDERAL REGISTER each week of the environmental impact statements filed during the preceding week. The minimum time periods set forth in this section shall be calculated from the date of publication of this notice.

(b) No decision on the proposed action shall be made or recorded under § 1505.2 by a Federal agency until the later of the following dates:

(1) Ninety (90) days after publication of the notice described above in paragraph (a) of this section for a draft environmental impact statement.

(2) Thirty (30) days after publication of the notice described above in paragraph (a) of this section for a final environmental impact statement.

An exception to the rules on timing may be made in the case of an agency decision which is subject to a formal internal appeal. Some agencies have a formally established appeal process which allows other agencies or the public to take appeals on a decision and make their views known, after publication of the final environmental impact statement. In such cases, where a real opportunity exists to alter the decision, the decision may be made and recorded at the same time the environmental impact statement is published. This means that the period for appeal of the decision and the 30-day period prescribed in paragraph (b)(2) of this section may run concurrently. In such cases the environmental impact statement shall explain the timing and the public's right of appeal. An agency engaged in rulemaking under the Administrative Procedure Act or other statute for the purpose of protecting the public health or safety, may waive the time period in paragraph (b)(2) of this section and publish a decision on the final rule simultaneously with publication of the notice of the availability of the final environmental impact statement as described in paragraph (a) of this section.

(c) If the final environmental impact statement is filed within ninety (90) days after a draft environmental impact statement is filed with the Environmental Protection Agency, the minimum thirty (30) day period and the minimum ninety (90) day period may run concurrently. However, subject to paragraph (d) of this section agencies shall allow not less than 45 days for comments on draft statements.

(d) The lead agency may extend prescribed periods. The Environmental Protection Agency may upon a showing by the lead agency of compelling reasons of national policy reduce the prescribed periods and may upon a showing by any other Federal agency of compelling reasons of national policy also extend prescribed periods, but only after consultation with the lead agency. (Also see § 1507.3(d).) Failure to file timely comments shall not be a sufficient reason for extending a period. If the lead agency does not concur with the extension of time, EPA may not extend it for more than 30 days. When the Environmental Protection Agency reduces or extends any period of time it shall notify the Council.

[43 FR 56000, Nov. 29, 1978; 44 FR 874, Jan. 3, 1979]

Forty Most Asked Questions Concerning CEQ's
National Environmental Policy Act Regulations,
46 Fed. Reg. 18,026 (Mar. 23, 1981) ("CEQ Guidance")

* * *

4a. Q. What is the "agency's preferred alternative"?

A. The "agency's preferred alternative" is the alternative which the agency believes would fulfill its statutory mission and responsibilities, giving consideration to economic, environmental, technical and other factors. The concept of the "agency's preferred alternative" is different from the "environmentally preferable alternative," although in some cases one alternative may be both. See Question 6 below. It is identified so that agencies and the public can understand the lead agency's orientation.

* * *

5a. Q. Is the "proposed action" the same thing as the "preferred alternative"?

A. The "proposed action" may be, but is not necessarily, the agency's "preferred alternative." The proposed action may be a proposal in its initial form before undergoing analysis in the EIS process. If the proposed action is internally generated, such as preparing a land management plan, the proposed action might end up as the agency's preferred alternative. On the other hand the proposed action may be granting an application to a non-federal entity for a permit. The agency may or may not have a "preferred alternative" at the Draft EIS stage (see Question 4 above). In that case the agency may decide at the Final EIS stage, on the basis of the Draft EIS and the public and agency comments, that an alternative other than the proposed action is the agency's "preferred alternative."

5b. Q. Is the analysis of the "proposed action" in an EIS to be treated differently from the analysis of alternatives?

A. The degree of analysis devoted to each alternative in the EIS is to be substantially similar to that devoted to the "proposed action." Section 1502.14 is

titled “Alternatives including the proposed action” to reflect such comparable treatment. Section 1502.14(b) specifically requires “substantial treatment” in the EIS of each alternative including the proposed action. This regulation does not dictate an amount of information to be provided, but rather, prescribes a level of treatment, which may in turn require varying amounts of information, to enable a reviewer to evaluate and compare alternatives.

* * *

29b. Q. How must an agency respond to a comment on a draft EIS that raises a new alternative not previously considered in the draft EIS?

A. This question might arise in several possible situations. First, a commentor on a draft EIS may indicate that there is a possible alternative which, in the agency's view, is not a reasonable alternative. Section 1502.14(a). If that is the case, the agency must explain why the comment does not warrant further agency response, citing authorities or reasons that support the agency's position and, if appropriate, indicate those circumstances which would trigger agency reappraisal or further response. Section 1503.4(a). For example, a commentor on a draft EIS on a coal fired power plant may suggest the alternative of using synthetic fuel. The agency may reject the alternative with a brief discussion (with authorities) of the unavailability of synthetic fuel within the time frame necessary to meet the need and purpose of the proposed facility.

A second possibility is that an agency may receive a comment indicating that a particular alternative, while reasonable, should be modified somewhat, for example, to achieve certain mitigation benefits, or for other reasons. If the modification is reasonable, the agency should include a discussion of it in the final EIS. For example, a commentor on a draft EIS on a proposal for a pumped storage power facility might suggest that the applicant's proposed alternative should be enhanced by the addition of certain reasonable mitigation measures, including the purchase and setaside of a wildlife preserve to substitute for the tract to be destroyed by the project. The modified alternative including the additional mitigation measures should be discussed by the agency in the final EIS.

A third slightly different possibility is that a comment on a draft EIS will raise an alternative which is a minor variation of one of the alternatives discussed in the

draft EIS, but this variation was not given any consideration by the agency. In such a case, the agency should develop and evaluate the new alternative, if it is reasonable, in the final EIS. If it is qualitatively within the spectrum of alternatives that were discussed in the draft, a supplemental draft will not be needed. For example, a commentor on a draft EIS to designate a wilderness area within a National Forest might reasonably identify a specific tract of the forest, and urge that it be considered for designation. If the draft EIS considered designation of a range of alternative tracts which encompassed forest area of similar quality and quantity, no supplemental EIS would have to be prepared. The agency could fulfill its obligation by addressing that specific alternative in the final EIS.

As another example, an EIS on an urban housing project may analyze the alternatives of constructing 2,000, 4,000, or 6,000 units. A commentor on the draft EIS might urge the consideration of constructing 5,000 units utilizing a different configuration of buildings. This alternative is within the spectrum of alternatives already considered, and, therefore, could be addressed in the final EIS.

A fourth possibility is that a commentor points out an alternative which is not a variation of the proposal or of any alternative discussed in the draft impact statement, and is a reasonable alternative that warrants serious agency response. In such a case, the agency must issue a supplement to the draft EIS that discusses this new alternative. For example, a commentor on a draft EIS on a nuclear power plant might suggest that a reasonable alternative for meeting the projected need for power would be through peak load management and energy conservation programs. If the permitting agency has failed to consider that approach in the Draft EIS, and the approach cannot be dismissed by the agency as unreasonable, a supplement to the Draft EIS, which discusses that alternative, must be prepared. (If necessary, the same supplement should also discuss substantial changes in the proposed action or significant new circumstances or information, as required by Section 1502.9(c)(1) of the Council's regulations.)

If the new alternative was not raised by the commentor during scoping, but could have been, commentors may find that they are unpersuasive in their efforts to have their suggested alternative analyzed in detail by the agency. However, if the new alternative is discovered or developed later, and it could not reasonably have been raised during the scoping process, then the agency must address it in a

supplemental draft EIS. The agency is, in any case, ultimately responsible for preparing an adequate EIS that considers all alternatives.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of July, 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 using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Jessica L. Ellsworth
Jessica L. Ellsworth