IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

WILTON RANCHERIA, CALIFORNIA'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND CROSS-MOTION FOR SUMMARY JUDGMENT

Wilton Rancheria, California (the Tribe) files this opposition to plaintiffs' motion for summary judgment, ECF No. 33, cross-moves this Court for summary judgment against plaintiffs on Counts I and II of plaintiffs' amended complaint pursuant to Rule 56 of the Federal Rules of Civil Procedure, and respectfully requests that this Court enter judgment in accordance with the Proposed Order filed by the Federal Defendants, ECF No. 40-2. The Tribe relies on the accompanying statement of points and authorities.

Respectfully submitted this 6th day of November, 2017.

WILTON RANCHERIA, CALIFORNIA

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STATEMENT OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF WILTON RANCHERIA, CALIFORNIA'S CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case presents a straightforward question of regulatory interpretation. In 2013, the Secretary of the Interior promulgated a regulation delegating his authority to take final agency action with respect to applications to acquire land in trust for Indians to the Assistant Secretary–Indian Affairs (AS-IA). To ensure that the Department of the Interior (Department or DOI) can carry out its vital mission without interruption, the Secretary has authorized the AS-IA's Principal Deputy to render such decisions when the AS-IA is absent or unable to carry out his responsibilities.

On January 19, 2017, with no AS-IA in office, Principal Deputy Assistant Secretary–Indian Affairs Lawrence Roberts exercised this redelegated authority to issue a final decision approving the Tribe's application to take certain lands into trust. Plaintiffs allege that this decision was contrary to the DOI regulation and the Federal Vacancies Reform Act. Their claim turns entirely on whether 25 C.F.R. § 151.12(c) makes the AS-IA's authority to render final agency action on land-in-trust applications exclusive and not subject to redelegation. It does not.

Courts have long recognized a strong presumption favoring redelegation, and nothing in Section 151.12(c)'s text suggests a contrary intent. Plaintiffs' effort to read an absent limitation into the plain text impermissibly ignores the regulation's structure and purpose. Nor can plaintiffs overcome the controlling deference owed to the Secretary's consistent and established interpretation of the agency's own regulations. Because Roberts lawfully exercised the AS-IA's duly redelegated, non-exclusive authority, defendants are entitled to judgment on Count I.

Defendants are also entitled to judgment on Count II because Special Assistant to the Director of the Bureau of Indian Affairs (BIA) Michael Black likewise exercised duly redelegated, non-exclusive authority when he directed BIA officials to take title to the land at

issue here and when he assumed jurisdiction over plaintiffs' administrative appeal. The scant argument plaintiffs offer to the contrary is manifestly unpersuasive.

STATEMENT

A. Legal Background

1. *The Federal Vacancies Reform Act of 1998*

The Federal Vacancies Reform Act of 1998, 5 U.S.C. § 3345 *et seq*., is Congress's response to one of the inevitable "problems that arise when our Constitution confronts the realities of practical governance." *SW Gen., Inc. v. NLRB*, 796 F.3d 67, 69 (D.C. Cir. 2015). The Act strikes a balance between protecting the Senate's constitutional role in the appointment of "Officers of the United States," U.S. Const. art. II, § 2, cl. 2, and the need "[t]o keep the federal bureaucracy humming" when vacancies arise unexpectedly, *SW Gen*., 796 F.3d at 70; *see* S. Rep. No. 105-250, at 4 (1998).

When a Senate-confirmed presidential appointee leaves office, the Federal Vacancies Reform Act dictates who may carry out the "functions and duties of th[at] office," and for how long, in the absence of a duly nominated and confirmed replacement. 5 U.S.C. § 3345(a). Congress defined the "functions and duties" to which the Act applies narrowly; the Act's limitations apply only to those functions that are created by statute or regulation and that are "*required*" by that statute or regulation "to be performed by the applicable officer (and *only* that officer)." *Id.* § 3348(a)(2)(A)(ii), (B)(i)(II) (emphases added).

The Act says nothing, however, about the delegation of an officer's *non*-exclusive functions and duties. The Executive Branch has interpreted the Act since its enactment to allow an agency to delegate a vacant office's non-exclusive authority "to other appropriate officers and employees in the agency." Question 48, *Guidance on Application of Federal Vacancies Reform*

Act of 1998, 23 Op. O.L.C. 60, 72 (1999), *available at* https://www.justice.gov/sites/default/files/olc/opinions/1999/03/31/op-olc-v023-p0060.pdf (OLC Guidance). That understanding is part of DOI's formal policy on delegations, as set forth in DOI's Departmental Manual. The Manual interprets the Secretary's delegated authority as including the "broad power to [re]delegate authority" unless that authority "may not [be] redelegate[d]" "by the terms of the legislation, Executive order or other source of authority" that confers it. 200 DM 1.2.[1] The same limitation, which tracks the definition of "functions and duties" in the Federal Vacancies Reform Act, applies to all redelegations memorialized in the Manual's "[d]elegation [s]eries." *See, e.g.*, 209 DM 8.1 (delegating the Secretary's authority to the AS-IA "[s]ubject to the limitations in 200 DM 1"); 209 DM 8.3 (limiting the AS-IA's own authority to redelegate "where redelegation is prohibited by statute, Executive Order, or limitations established by other competent authority").

2. *Finality of Trust Acquisition Decisions*

The Indian Reorganization Act of 1934 authorizes the Secretary of the Interior to acquire and hold property in trust "for the purpose of providing land for Indians." 25 U.S.C. § 5108. The Secretary exercises this authority through the AS-IA and through regional 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). But DOI'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 either they are upheld on appeal or the time for filing an appeal has lapsed. *See id.*

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

§ 2.6(b). Decisions taken by the Secretary or the AS-IA are final when issued. *See id.* § 2.6(a), (c).

Until 2013, this general rule applied to trust acquisition decisions. *See* 78 Fed. Reg. at 67,929. In 2012, however, the Supreme Court significantly expanded the scope of judicial review available in disputes over acquisitions.[2] In light of that ruling, DOI proposed a series of changes to the regulations that govern acquisition decisions in order "to increase transparency by explicitly stating the process for issuing trust acquisition decisions and the availability of administrative or judicial review of such decisions." *Id.* at 67,936.

As relevant here, DOI sought to "clarif[y]" how the existing general rule set out at 25 C.F.R. § 2.6 applied "in the context of trust acquisition decisions." 78 Fed. Reg. at 67,929. The new rules thus expressly incorporated Section 2.6's structure. Like Section 2.6(a) and (c), new Section 151.12(c) provided that "[a] decision made by the Secretary, or 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)). And like Section 2.6(b), 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).

DOI's rationale for retaining the basic structure of Section 2.6 was straightforward. Unlike decisions taken by BIA officials, the AS-IA's acquisition decisions typically involve "several layers of review by Department officials before issuance." 78 Fed. Reg. at 67,929. Requiring additional administrative review before a BIA official's decision becomes final gives

[2] In *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012), the Court held that a cause of action is available under the Administrative Procedure Act to challenge trust acquisitions even after the United States takes title to the property in question. *Id*. at 215-16.

the Department an opportunity to subject those decisions to comparable scrutiny. Because most decisions by BIA officials are made at the regional level, additional review also "ensures consistency in the decision-making across BIA regions and addresses any procedural errors before [a] decision becomes final for the Department." *Id.* at 67,933. Centralizing final decisionmaking authority in Washington thus allows the Department to ensure that the Secretary's authority is exercised in a manner consistent with the Reorganization Act's important policies.

B. Factual and Procedural Background

The Tribe has been landless for nearly sixty years as a result of the government's unlawful termination of its legal status in 1958. As part of its longstanding effort to restore land for its people and to promote economic development and tribal self-determination, the Tribe filed an application with the BIA in 2013, asking the Secretary of the Interior to acquire land in trust on its behalf. ECF No. 26, Am. Compl. ¶ 31.

While the Government's review was ongoing, plaintiffs filed suit in this Court, challenging various aspects of the application. *Id.* ¶¶ 5-6. Plaintiffs moved immediately for a temporary restraining order and preliminary injunction to prevent the United States from taking title to the land if DOI approved the Tribe's application. ECF Nos. 1, 2. After Judge Moss denied plaintiffs' motion for a temporary restraining order, Minute Order (Jan. 13, 2017), plaintiffs submitted a formal request to DOI and the BIA under 5 U.S.C. § 705, asking that they voluntarily postpone the effective date of any decision to acquire land in trust for the Tribe. ECF No. 6-1. With that request pending, the Court denied plaintiffs' motion for a preliminary injunction without prejudice. Minute Order (Jan. 17, 2017).

On January 19, 2017, with no AS-IA or Acting AS-IA in place, Principal Deputy Assistant Secretary–Indian Affairs Lawrence Roberts, who was temporarily exercising the non-exclusive authority of the AS-IA, approved the Tribe's application. ECF No. 15-1, BIA Record of Decision at 90 (January 19 Decision). On February 10, 2017, Special Assistant to the Director of the BIA Michael Black, who succeeded Roberts in temporarily carrying out the AS-IA's non-exclusive authority as of January 20, 2017, denied plaintiffs' pending request for a voluntary stay. Am. Compl. ¶ 4. Title to the land was transferred to the United States that same day. *Id.*

Plaintiffs filed an administrative appeal with the Interior Board of Indian Appeals. Among other things, plaintiffs claimed that the January 19 Decision was not final agency action under Section 151.12(c) because Roberts was not the Acting or confirmed AS-IA when he issued the decision. Am. Compl. ¶ 5. Relying on his temporarily redelegated authority, Black assumed jurisdiction over plaintiffs' appeal under 25 C.F.R. § 2.20(c) and 43 C.F.R. § 4.332(b), and dismissed it. ECF No. 33-1, Tab F, Order at 3, *Stand Up for California! v. Principal Deputy Assistant Sec'y–Indian Affairs* (Interior Dec. July 13, 2017) (July 13 Order).

Black began by explaining that the Secretary had redelegated authority to Roberts through the Departmental Manual to carry out certain "non-exclusive functions and duties of the AS-IA" in the absence of an AS-IA. *Id.* at 5 (citing 209 DM 8.4(B)). That redelegation was confirmed in a memorandum to Roberts from the Deputy Secretary, which explained that Roberts had been authorized to perform *all* of the AS-IA's non-exclusive functions and duties since July 2016. ECF No. 33-1, Tab I, Memorandum from Michael L. Connor, Deputy Sec'y, to Lawrence S. Roberts, Principal Deputy Assistant Sec'y–Indian Affairs, *Authority of Assistant Secretary–Indian Affairs* (Jan. 19, 2017) (Connor Memorandum).

Having determined that Roberts was authorized to carry out the AS-IA's non-exclusive functions and duties, Black considered whether that authority extended to rendering a final decision to acquire land into trust under Section 151.12(c). *See* July 13 Order at 5-6. He concluded that it did. Because "[a] review of the statutory and regulatory provisions reveals that neither the function of acquiring land in trust nor issuing final agency actions on fee-to-trust applications is assigned 'only,' 'exclusively,' or 'solely' to the AS-IA," Black found that Roberts' January 19 Decision was final agency action. *Id.* at 5-6.

Black also rejected plaintiffs' challenge to his own authority. He explained that he had been redelegated the AS-IA's non-exclusive powers under Amended Secretarial Order 3345 and Order No. 3345, Amendment 5. *Id.* at 7. Like the authority to make final trust acquisition decisions, Black concluded that the power to deny plaintiffs' self-stay request and to assume jurisdiction over their administrative appeal were non-exclusive because neither had "been assigned 'only,' or 'exclusively' or 'solely' to the AS-IA" by statute or regulation. *Id.*

Plaintiffs subsequently filed an amended complaint in this litigation, expanding their claims to include the January 19 Decision and July 13 Order. ECF No. 26. Relevant to this motion, Count I alleges that the January 19 Decision and the subsequent transfer of the land into trust were *ultra vires* because Roberts was neither the AS-IA nor a BIA official. Am. Compl. ¶¶ 69-71. Count II alleges in turn that Black improperly exercised exclusive authority of the AS-IA when he ordered the land to be taken into trust and when he assumed jurisdiction over and dismissed plaintiffs' administrative appeal. *Id.* ¶ 82. Plaintiffs allege that these actions violated the governing regulation, the Federal Vacancies Reform Act, and the Administrative Procedure Act. *Id.* ¶¶ 70-71, 73, 82.

On September 29, Federal Defendants and the Tribe filed answers in response to the Complaint. ECF Nos. 31-32. Without waiting for Federal Defendants to file the administrative record, plaintiffs filed a motion for summary judgment on Counts I and II. ECF No. 33. Judge Moss extended the time for defendants to file oppositions to plaintiffs' motion and, over plaintiffs' objection, granted defendants leave to file cross-motions for summary judgment. *See* Minute Order (Oct. 12, 2017). He also stayed the requirement for Federal Defendants to produce the portion of the administrative record covering January 20 to July 13, 2017. *See* Minute Order (Oct. 17, 2017).

ARGUMENT

I. THE JANUARY 19 DECISION WAS FINAL AGENCY ACTION.

Plaintiffs face an uphill battle on Count I. They claim that the authority delegated by the Secretary to the AS-IA to make final trust acquisition decisions under Section 151.12(c) cannot be redelegated. But courts have long recognized a strong presumption favoring redelegation absent some affirmative indication to the contrary. And, in any event, DOI's interpretation of its own regulation is entitled to deference. Faced with these insurmountable obstacles, plaintiffs strain to inject a constitutional issue into this straightforward case of regulatory interpretation. Their efforts are unpersuasive. The Secretary properly redelegated the AS-IA's non-exclusive authority under Section 151.12(c) to Principal Deputy Assistant Secretary–Indian Affairs Roberts. Because nothing in that subparagraph suggests that *only* the AS-IA may render such final decisions, the redelegation does not implicate the Federal Vacancies Reform Act.

A. Nothing In The Text, Structure, Or Purpose Of Section 151.12 Suggests That The AS-IA's Authority To Render Final Trust Decisions Is Exclusive.

The D.C. Circuit has held that "[w]hen 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); *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1190 (10th Cir. 2014) (collecting cases and noting the "unanimous" view that "subdelegations to subordinates" are permitted, "even where the enabling statute is silent, so long as the enabling statute and its legislative history do not indicate a prohibition on subdelegation").[3] 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 has been delegated to the AS-IA. The only question is whether the Secretary has affirmatively demonstrated an intent to bar redelegation of the AS-IA's authority in Section 151.12(c). He has not.

Section 151.12(c) provides, in full, 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). Nothing in those twenty-eight words expressly indicates that the AS-IA's authority is exclusive, and plaintiffs do not seriously contend otherwise. Instead, they ask this Court to read into the provision a novel and potentially paralyzing limitation on DOI's acquisition of trust lands. But plaintiffs' pseudo-textual analysis makes sense only if one ignores contrary evidence, overlooks the structure of the regulations as a whole, and distorts the purpose of the rules. Properly construed, Section 151.12(c) describes a

[3] A "subdelegation" is simply a more precise way of describing a "redelegation" to a subordinate federal officer. Courts in this Circuit and others use the terms interchangeably. *Compare, e.g.*, *U.S. Telecom Ass'n*, 359 F.3d at 565 (describing a "subdelegation to a subordinate federal officer"), *with Novelty, Inc. v. DEA*, 571 F.3d 1176, 1177 (D.C. Cir. 2009) (Henderson, J., concurring) ("The Attorney General has delegated the authority to deny, revoke or suspend registration to the DEA Administrator, who has redelegated [that authority] to the Deputy Administrator (DA)." (internal citations omitted)).

non-exclusive function that, like countless others committed to the Secretary's discretion, can be redelegated as needed.

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

Plaintiffs' first mistake is to ignore what Section 151.12(c) does *not* say: The regulation is silent as to whether the AS-IA's authority to render final trust acquisition decisions is exclusive. That silence gives rise to a presumption that it not. *Cf. U.S. Telecom Ass'n*, 359 F.3d at 565; *Kobach*, 772 F.3d at 1191.

Section 151.12(c)'s silence stands in stark contrast to other statutory and regulatory provisions that bar redelegation on their face. Some of these, such as the statutes that govern minerals agreements and the application of preferences in the BIA, include restrictive or prohibitory language. Thus, the Secretary's authority to disapprove minerals agreements "may *only* be delegated to the Assistant Secretary of the Interior for Indian Affairs." 25 U.S.C. § 2103(d) (emphasis added). And the Secretary "may *not* delegate" his authority to demote certain individuals in the BIA "to any individual other than a Deputy Secretary or Assistant Secretary." *Id.* § 5117(b)(2) (emphasis added); *see also id.* § 2706(a) (granting the Indian Gaming Commission certain powers "not subject to delegation"); 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"). Other provisions include mandatory language that strongly implies that redelegation is forbidden. Thus, the statute that governs the BIA's education functions provides that "[t]he Secretary *shall* vest in the Assistant Secretary for Indian Affairs all functions" related to education and directs that "[t]he Assistant Secretary *shall* carry out such

functions through the Director of the Office of Indian Education Programs." 25 U.S.C. § 2006(a) (emphases added).

Section 151.12(c) has none of these features. It does not say that "only" a decision by the AS-IA is final, or that the power to render such decisions is vested "solely" or "exclusively" in the AS-IA. Nor does it provide that the authority to make final decisions "shall" be vested in the AS-IA and that he "shall" exercise that authority in a particular manner. There thus is no reason to believe the Secretary intended Section 151.12(c) to be any different from the overwhelming majority of official powers that can be redelegated to other agency officials.

2. *Plaintiffs can point to no affirmative evidence that Section 151.12(c) was meant to bar redelegation.*

With no express limit on redelegation, plaintiffs are left asking this Court to read a drastic limitation into Section 151.12(c). Plaintiffs assert that the 2013 amendments to the regulations "replaced" references to the "Secretary" with "the Secretary, or the Assistant Secretary–Indian Affairs." ECF No. 33, Pls.' Mot. for Summ. J. at 12 (quoting 25 C.F.R. § 151.12(c)). They claim that "this change served no other purpose other than to limit the authority to make final trust decisions to those two officials." *Id.* at 12-13. That is wrong. For one thing, Section 151.12(c) did not "replace" anything. The prior rule comprised just two subparagraphs, (a) and (b), neither of which addressed finality. *See* 25 C.F.R. § 151.12 (1998). The inclusion of a reference to the AS-IA in the *new* subparagraph (c) thus offers no basis to infer a change from the status quo. To the contrary, and as explained above, the amendments to Section 151.12 were meant to incorporate the existing distinction between final and non-final decisionmakers set out in Section 2.6(c) and to "clarif[y]" its application "within the context of trust acquisition decisions." 78 Fed. Reg. at 67,929 (citing 25 C.F.R. § 2.6(c)). That purpose fully explains each

piece of textual "evidence" plaintiffs muster to support their cramped interpretation of the regulation.

Plaintiffs argue (at 12-13) that reading Section 151.12(c) to permit redelegation 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 representatives," including the AS-IA. But that actually 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."

Indeed, 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) (explaining that the new definition would clarify that "local BIA officials," "the Assistant Secretary–Indian Affairs[,] or the BIA Area Directors" could all be "authorized" to perform functions related to trust acquisitions). Given that definition, the most natural reading of a provision in part 151 that stated only that "[a] decision made by the Secretary is a final agency action" would be that *all* decisions on trust applications are final, whether made by the AS-IA or a BIA official. That is not what the Secretary intended. Rather, consistent with Section 2.6, Section 151.12 delegates final decisionmaking authority to certain officials and non-final authority to others.

To preserve and clarify Section 2.6's distinction between final and non-final decisionmakers, Section 151.12(c) and (d) specify *which* of the Secretary's "authorized representatives"—i.e., which agency officials acting "pursuant to delegated authority" from the

Secretary to make acquisition decisions—are empowered to speak conclusively for the agency and which are not. This is, in other words, "a situation where [the agency] has 'mentioned 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) (brackets omitted)), *cert. denied*, 137 S. Ct. 625 (2017). 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 redelegation.

Plaintiffs next claim (at 13) that "[t]he phrase 'pursuant to delegated authority' " limits the AS-IA's ability to redelegate the authority to issue final trust decisions. They posit that the Secretary "would have used the phrase 'or authorized representative' " when referring to the AS-IA in Section 151.12(c) if she intended to allow such redelegation. This argument gets them nowhere because it was *the Secretary*, not the AS-IA, who properly redelegated the AS-IA's authority here to Roberts. And plaintiffs offer no reason to read that phrase as limiting redelegation by the Secretary. After all, every agency official who exercises authority originally conferred to the "Secretary" by statute or Executive Order acts "pursuant to delegated authority." The better reading is that Section 151.12(c) and (d) use that phrase to make clear that the Secretary can delegate both final and non-final decisionmaking authority to take land into trust. The reference to "delegated authority" serves that clarifying function. And, as explained above, the phrase differs markedly from the language the Secretary uses to bar redelegation. *See supra* pp. 10-11.[4]

[4] Plaintiffs' final argument on this point is both irrelevant to the question of who has the authority to make final decisions and wrong on its face. Plaintiffs assert (at 13) that only the AS-IA and not BIA officials can implement a final trust decision. That is not true. A BIA official is

Having ignored the regulation's purpose up to this point, plaintiffs briefly contend (at 14) that permitting redelegation would add confusion to the trust acquisition process by permitting officials not named in the regulation to make final decisions. But that argument ignores the rest of the provision and DOI's own procedures for delegating authority. Section 151.12 ensures that there can be no public confusion as to whether a particular decision is final. Among other things, the regulation directs a BIA official rendering a non-final decision to "promptly provide" notice to interested parties of their rights to an administrative appeal. 25 C.F.R. § 151.12(d)(1), (2). In the case of an approval, the official must "publish" that "notice in a newspaper of general circulation" so that the public knows that a non-final decision has been issued. *Id.* § 151.12(d)(2)(iii).[5] Nor could redelegation lead to confusion within DOI, as plaintiffs implausibly suggest. Under the agency's established practice, redelegations are set out in the Departmental Manual, providing ample notice to decisionmakers of the scope of their authority. *See* 200 DM 1.

In sum, the Secretary chose her words carefully. The rule's preamble explained that the purpose of the 2013 amendments was to clarify the distinction between decisionmakers set out in Section 2.6 "within the context of trust acquisition decisions." 78 Fed. Reg. at 67,929 (citing 25 C.F.R. § 2.6(c)). That is exactly what the Final Rule accomplished. It was never intended to and

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also directed to "[i]mmediately acquire the land in trust" once her decision becomes final. 25 C.F.R. § 151.12(d)(2)(iv). To the extent plaintiffs suggest that the *Secretary* himself is powerless to take land into trust, that fanciful suggestion is addressed *infra* p. 25.

[5] Although the regulation directs that notice of a final decision be published in the Federal Register, *see* Pls.' Mot. for Summ. J. at 6, and a notice has not yet appeared there, there is no question that plaintiffs' received "[p]rompt[]" notice of Roberts' decision—on the very day it was issued—and that the Decision made clear that it was a final decision. *See* 25 C.F.R. § 151.12(c)(2)(i); Pls.' Mot. for Summ. J. at 5; January 19 Decision at 90 (noting that the land was to be "immediately acquire[d]" in trust).

did not create novel limitations on the exercise of the Secretary's non-exclusive authority to take lands into trust. *See* 25 U.S.C. § 5108.

B. In Any Event, DOI's Interpretation Of Section 151.12(c) To Permit Redelegation Is Entitled To Deference.

Even if Section 151.12(c) was not subject to the presumption favoring redelegation, DOI's interpretation of its own regulation to permit redelegation 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, 461-62 (1997). DOI's reading of Section 151.12(c) easily satisfies that test.

The Department concluded that the AS-IA's delegated authority to make final decisions with respect to trust acquisitions under Section 151.12(c) could be redelegated because no legal authority confines or forbids such redelegation. Plaintiffs' contrary argument (at 17) rests entirely on their unpersuasive claim that Section 151.12(c) itself renders the AS-IA's authority exclusive. But, as explained above, nothing in the regulation's text or purpose compels that reading, and this Court "must defer to the Secretary's interpretation unless an alternative reading is *compelled* by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation." *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (internal quotation marks omitted; emphasis added); *accord Petit v. U.S. Dep't of Educ.*, 675 F.3d 769, 778 (D.C. Cir. 2012). The Department's interpretation is therefore "controlling." *Texas v. EPA*, 726 F.3d 180, 194 (D.C. Cir. 2013) (quoting *Auer*, 519 U.S. at 461).

The Department's interpretation is also both "consistent and well established." *Flytenow, Inc. v. FAA*, 808 F.3d 882, 890 (D.C. Cir. 2015), *cert. denied*, 137 S. Ct. 618 (2017). 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 redelegated. *Cf. Glob. Crossing Telecomms., Inc. v. FCC*, 259 F.3d 740, 746 (D.C. Cir. 2001) ("[W]e must accord deference to an agency's reasonable interpretation of its own precedents."). 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. As here, the Associate Deputy "had been temporarily redelegated, by the Secretary, all functions, duties, and responsibilities of the Assistant Secretary–Indian Affairs that are not required by statute or regulation to be performed only by the Assistant Secretary–Indian Affairs." *Id.* at 262 (internal quotation marks omitted). The appellants argued that the Associate Deputy's decision was not final because "the regulations specifically assign" final decisionmaking authority to the AS-IA. *Id.* at 270. But the Board rejected that argument. It explained that "[a] specific delegation of authority is not the same as a delegation of *exclusive* authority." *Id.* Accordingly, the Board held that "[a] decision by the Assistant Secretary, or in this case by the Associate Deputy Secretary acting pursuant to the redelegated authority of the Assistant Secretary, becomes final and effective immediately." *Id.* at 271 (citing 25 C.F.R. § 2.6(c)).

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). In that case, "the Deputy Secretary of the Department delegated authority to" a Deputy Assistant Secretary "to temporarily assume, until further notice, the responsibilities of the Assistant Secretary" 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 Assistant Secretary"—notwithstanding the fact that he "signed the . . . decision as 'Deputy Assistant Secretary.' " *Id.* at 12.

And, lest there be any doubt, DOI'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 delegate authority exclusively to the AS-IA. ECF No. 40-1, Ex. 2, Memorandum from Solicitor to Secretary, *Redelegation of Duties of Assistant Secretary–Indian Affairs* (Jan. 28, 2005). Although that survey predates Section 151.12(c), it reflects a consistent approach. Indeed, at the time the memorandum was prepared, the provision governing the Board's jurisdiction had wording similar to that in Section 151.12(c). *See, e.g.*, 43 C.F.R. § 4.330(a) & (b) (conferring Board jurisdiction over cases "referred to it for exercise of review authority of the Secretary or the Assistant Secretary–Indian Affairs" with limitations "[e]xcept as otherwise permitted by the Secretary or the Assistant Secretary–Indian Affairs").

The Department's reading of Section 151.12(c) is consistent with its prior decisions and the Solicitor's memorandum and "reflect[s] the agency's fair and considered judgment on the matter in question." *Texas*, 726 F.3d at 194 (quoting *Auer*, 519 U.S. at 461-62 (internal quotation marks omitted)). The doctrine of deference to agency interpretations of their own regulations and precedents thus offers this Court an independent basis to reject plaintiffs' reading of Section 151.12(c).

C. Plaintiffs' Constitutional Argument Is Meritless.

Faced with the presumption in favor of redelegation and a clear case for deference, plaintiffs advance a novel constitutional avoidance argument: They claim (at 15) that the Appointments Clause does not permit trust acquisitions to be made by inferior officers "who

[are] not subject to supervision by a Senate-confirmed officer" because such acquisitions "have significant consequences for the jurisdictional balance between the federal government and the states." That argument falls flat for three reasons. First, the redelegated authority to make final trust acquisition decisions *is* "subject to supervision by a Senate-confirmed officer." The Departmental Manual provides that "the delegation or redelegation" of any authority by a department official does not "relieve that official of the responsibility for action taken pursuant to the delegation." 200 DM 1.9.

Second, the purported "significance" of trust acquisition decisions is irrelevant to the Appointments Clause analysis because plaintiffs affirmatively argue (at 15-16) that the relevant officer here, Roberts, was an "inferior officer[]." The Supreme Court has explained that "[t]he exercise of significant authority pursuant to the laws of the United States marks, not the line between principal and inferior officer for Appointments Clause purposes, but rather . . . the line between officer and nonofficer," which is not at issue here. *Edmond v. United States*, 520 U.S. 651, 662 (1997) (internal quotation marks omitted); *see Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 821 F.3d 19, 37 (D.C. Cir. 2016) (noting that "the Appointments Clause is concerned only with the appointment of officers, not nonofficers"). In any event, plaintiffs seriously overstate the significance of trust acquisitions. Transferring a privately-owned piece of real estate from one jurisdiction to another does not change the "balance" between the jurisdictions; it merely shifts property from one to the other. That may be why plaintiffs identify no authority suggesting that trust acquisition decisions or anything like them raise the specter of an Appointments Clause problem.

Finally, plaintiffs' argument proves too much. Plaintiffs argue (at 15) that their sui generis constitutional argument is "consistent with" their reading of Section 151.12(d) because

that provision allows BIA officials "to make only preliminary trust acquisition decisions." But Section 151.12(d) also directs BIA officials to immediately take land into trust if no administrative appeal is timely filed, with no direct involvement of the AS-IA or any other Senate-confirmed officer. 25 C.F.R. § 151.12(d)(2)(iv). And even if an appeal is filed, the Interior Board of Indian Appeals is authorized to issue a final decision for the Department—again, without any action by a Senate-confirmed officer. *Id.* § 2.4(e); 43 C.F.R. § 4.1(b)(1). Either a function is so important that it requires sign-off from a Senate-confirmed officer or it is not. That plaintiffs cannot even reconcile their constitutional argument with their own reading of the regulation offers yet another reason to reject it.

D. Roberts Duly Exercised The AS-IA's Non-Exclusive, Redelegated Authority To Issue A Final Decision Under Section 151.12(c).

Where an official exercises a superior's non-exclusive function or duty, the question is whether that authority was, in fact, properly subdelegated. That inquiry is necessarily flexible. A redelegation need not be the product of notice and comment rulemaking. *See Mobley*, 806 F.3d at 584-85 (upholding a subdelegation conveyed by order); *Stewart v. Stackley*, 251 F. Supp. 3d 138, 158 n.17 (D.D.C. 2017) (upholding a delegation conveyed by letter to the delegee). Indeed, the delegation need not even be "clear and explicit . . . in all instances, as such a standard could hamper the functionality of federal agencies as they carry out their duties." *League of Women Voters of U.S. v. Newby*, 238 F. Supp. 3d 6, 12 n.3 (D.D.C. 2017). The Department's redelegation of the AS-IA's delegated Section 151.12(c) authority to Principal Deputy Assistant Secretary–Indian Affairs Roberts—memorialized in both the Departmental Manual and a memorandum from the Deputy Secretary—was plainly effective under those standards.

The Departmental Manual documents the Secretary's delegation to the AS-IA of "all of the authority of the Secretary" that is not exclusive or otherwise specifically excepted, including

his authority to take land into trust under 25 U.S.C. § 5108. 209 DM 8.1; *see* 200 DM 1.2 (prohibiting delegations specifically barred by statutes or other applicable law). "In the absence of" an AS-IA or Acting AS-IA, the Manual memorializes the redelegation of the AS-IA's delegated authority to the Principal Deputy Assistant Secretary–Indian Affairs. 209 DM 8.4(B) (authorizing the Principal Deputy to "exercise the authority delegated [to the AS-IA] in 209 DM 8.1" with exceptions not relevant here).[6]

As plaintiffs acknowledge, Roberts assumed the office of the Principal Deputy Assistant Secretary–Indian Affairs in the summer of 2013. *See* Connor Memorandum. Roberts served as Acting AS-IA for the 210-day period from January 1, 2016 (the day after the December 31, 2015 effective date of the resignation of the former AS-IA) until July 29, 2016. Pls.' Mot. for Summ. J. at 8. Roberts then resumed his duties as Principal Deputy, while the office of the AS-IA remained vacant. Connor Memorandum. Roberts was still serving in that capacity, and the office of the AS-IA still remained vacant, when he issued the January 19 Decision. As a result, Roberts was authorized to exercise all but a few of the AS-IA's non-exclusive duties, including the authority to make final trust acquisition decisions. *See* 209 DM 8.4(B).

Moreover, the Deputy Secretary confirmed this redelegation of the AS-IA's non-exclusive duties in a memorandum also issued on January 19, 2017. The Deputy Secretary, who "has the full authority of the Secretary" with respect to non-exclusive functions and duties, 109

[6] The Tribe is not contending that the Departmental Manual "overrides" Section 151.12(c), as plaintiffs suggest (at 16-17). Rather, the Manual embodies the Department's interpretation of its own authority under the statutes it administers and the regulations it promulgates. For the same reason, plaintiffs' hand-waving (at 17) over the fact that the Manual was not adopted through notice-and-comment rulemaking is "foreclosed by *Perez v. Mortgage Bankers Ass'n*, [135 S. Ct. 1199, 1206-07 (2015),]" which holds that such procedures are not required for interpretive rules. *Flytenow*, 808 F.3d at 889.

DM 1.2(B), reiterated that Roberts had "authority to exercise the functions and duties of the AS-IA . . . including the authority to issue final Agency decisions." Connor Memorandum.

Plaintiffs argue in a footnote (at 16 n.7) that all redelegations of the AS-IA's authority must be in the form of a release, and that it appears that no such release was made in this case. But plaintiffs fail to mention that this requirement only applies to "redelegations of authority *made by*" the AS-IA. 209 DM 8.3 (emphasis added). There was no AS-IA when Roberts issued the decision here. The source of Roberts' authority to render a final decision was 209 DM 8.4(B), the *Secretary's* redelegation of the AS-IA's delegated authority to the Principal Deputy "[i]n the absence of" an AS-IA. Plaintiffs do not dispute that Roberts was the Principal Deputy at all relevant times. *See* Am. Compl. ¶¶ 3, 5, 46, 69 (describing Roberts as the Principal Deputy Assistant Secretary–Indian Affairs); Pls.' Mot. for Summ. J. at 5, 8 (same). That redelegation encompassed the authority to render final decisions under Section 151.12(c). And it was confirmed by the Deputy Secretary's January 19 memorandum.

In yet another footnote (at 17 n.9), plaintiffs contend that the redelegation at issue here is "limited" by 302 DM 2.5 to instances in which "*immediate action is required*." Plaintiffs misread the Manual once again. That section of the Manual applies to redelegations of authority to an officer who automatically succeeds a Senate-confirmed officer in a temporary acting capacity if a vacancy occurs. *See* 302 DM 2.1. But Roberts had resumed his undisputed position as Principal Deputy when he issued the decision here. His authority to exercise the AS-IA's authority under Section 151.12(c) flowed from 209 DM 8.1 and 8.4(B) and the Deputy Secretary's memorandum—not part 302.

E. Roberts' Exercise Of The AS-IA's Non-Exclusive Authority Was Consistent With The Federal Vacancies Reform Act.

Because the AS-IA's authority under Section 151.12(c) can be redelegated, the January 19 Decision does not implicate the Federal Vacancies Reform Act. The Act simply does not apply to functions or duties that are not "required by such regulation to be performed by the applicable officer (and *only* that officer)." 5 U.S.C. § 3348(a)(2)(B)(i)(II) (emphasis added). As explained in detail above, the authority to render final trust acquisition decisions under Section 151.12(c) is not "required" by that subparagraph "to be performed" only by the AS-IA. Rather, the regulation "mention[s]" those "specific official[s]"—the Secretary and the AS-IA—"only to make it clear that" they have the authority to issue such decisions, and not "to exclude delegation to other officials." *Ethicon Endo-Surgery*, 812 F.3d at 1033 (internal quotation marks omitted); *see also Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 420 (D. Conn. 2008) (finding no Federal Vacancies Reform Act problem where statute's text did not "assign the function 'only' or 'exclusively' to the AS-IA"). And if there could be any doubt on that score, DOI's reading of its own regulation would control. *See supra* pp. 15-17.

Plaintiffs appear (at 19) to fault the Department for continuing to function in the absence of a Senate-confirmed AS-IA since January 1, 2016. But that should come as no surprise. Congress defined narrowly the range of functions and duties subject to the Federal Vacancies Reform Act's restrictions. The Act reaches only those functions and duties that are "established by" a statute or regulation, and that are "required by such" statute or regulation to be performed by a particular officer, "and *only* that officer." 5 U.S.C. § 3348(a)(2)(A), (B) (emphasis added). In other words, it is not enough that a regulation identifies an officer, or even that it directs that officer to carry out a particular function. Rather, the regulation must *exclude* others or else the Act does not apply.

Even if the Act did not by its own terms impose a clear-statement rule for determining when a function or duty is exclusive, it would have to be read in light of the presumption favoring redelegation that was a deeply ingrained feature of the common law by 1998. *See Kobach*, 772 F.3d at 1190 & n.2 (citing *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 121 (1947), and *Parish v. United States*, 100 U.S. 500, 504 (1879), to illustrate this "well-established" rule). The plain text and the familiar "presumption that Congress legislates against the background of general common-law principles" thus set an exceptionally high bar for showing that a particular function or duty cannot be redelegated. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 966 (2017).

The legislative history further confirms that Congress did not intend the Federal Vacancies Reform Act to undermine the critical work of Executive Branch agencies. As one of the Act's sponsors explained, "it is important to establish a process that permits the routine operation of the government to continue, but that will not allow the evasion of the Senate's constitutional authority to advise and consent to nominations." 144 Cong. Rec. S6414 (daily ed. June 16, 1998) (statement of Sen. Thompson introducing the bill). That is why the Act's definition was intended to make clear that only the "*non-delegable* functions or duties of the officer" were subject to the Act's provisions. S. Rep. No. 105-250, at 18 (emphasis added). "Delegable functions of the office could still be performed by other officers or employees." *Id*. As the OLC explained, "[*m*]*ost, and in many cases all*, of the responsibilities performed by" Senate-confirmed officers such as the AS-IA "will not be exclusive," and thus can "be delegated to other appropriate officers and employees in the agency." OLC Guidance at Question 48 (emphasis added).

To the extent plaintiffs advocate for a presumption that a Senate-confirmed officer's functions and duties are exclusive, that reading would not only be atextual, it would upend the careful balance Congress struck in the Federal Vacancies Reform Act. While Congress undoubtedly sought to protect the Senate's constitutional role in the appointment of "Officers of the United States," U.S. Const. art. II, § 2, cl. 2, "no legislation pursues its purposes at all costs," *CTS Corp. v. Waldburger*, 134 S. Ct. 2175, 2185 (2014) (internal quotation marks omitted). The text and purpose of the Act make plain that Congress did not intend the administrative state to grind to a halt any time there was a lag in replacing a Senate-confirmed officer.

Because Principal Deputy Assistant Secretary–Indian Affairs Roberts was delegated the non-exclusive functions and duties of the AS-IA, including the authority to render final decisions regarding trust acquisitions under Section 151.12(c), the January 19 Decision was final. Defendants are therefore entitled to summary judgment on Count I.

II. BLACK WAS DULY AUTHORIZED TO TAKE THE LAND INTO TRUST AND DISMISS PLAINTIFFS' ADMINISTRATIVE APPEAL.

Plaintiffs devote a single paragraph of their brief to Count II of their complaint. They do not dispute that Michael Black was delegated the non-exclusive duties of the AS-IA, effective January 20, 2017. Rather, they argue (at 19) that Black could not have assumed the position of Acting AS-IA because he was not the AS-IA's "first assistant." Setting aside the merits of that claim, it would matter only if Black had exercised some "function or duty" that can "only" be performed by the AS-IA. He did not.

Plaintiffs first contend that the responsibility to direct BIA officials to take title to trust lands is exclusive to the AS-IA. That is obviously wrong for at least three reasons. First, as noted, BIA officials are themselves authorized to take title to trust lands when their decisions become final, without the involvement of the Secretary or AS-IA. *See* 25 C.F.R.

§ 151.12(d)(2)(iv). The "function or duty" of taking title is thus plainly not entrusted "only" to the AS-IA. 5 U.S.C. § 3348(a)(2)(B)(i)(II). Second, although Section 151.12(c)(2) identifies the AS-IA as the official responsible for taking title following a decision by the Secretary or AS-IA, that does not establish that the function is exclusive. As explained above in detail, the presumption favoring redelegation and the deference owed to an agency's interpretation of its regulation foreclose plaintiffs' interpretation. Finally, plaintiffs' reading of the regulation would produce the absurd result that a decision taken personally by the Secretary could not be implemented if there was no AS-IA in place. That cannot be what the Secretary intended when she promulgated the regulation.

The lone sentence plaintiffs devote to their second argument—that Black could not assume jurisdiction over their administrative appeal—is rendered moot by the fact that Roberts' January 19 Decision was final. But even if this Court disagreed, defendants would still be entitled to judgment on Count II. Plaintiffs' only authority is two quotes from the preamble to the Final Rule that promulgated 43 C.F.R. § 4.332(b) that refer to the AS-IA's "exclusive authority to assume jurisdiction over an appeal." *Appeals from Administrative Actions*, 54 Fed. Reg. 6,478, 6,479 (Feb. 10, 1989); *see also Department Hearings and Appeals Procedures*, 54 Fed. Reg. 6,483, 6,485 (Feb. 10, 1989). In context, however, it is clear that the phrase "exclusive authority" in both passages refers to the AS-IA's complete *discretion* to take jurisdiction. Thus, the preamble provides that "this section is not intended to give the parties to an appeal a *choice of forum*, but rather is intended to vest the exclusive authority to assume jurisdiction over an appeal in the Assistant Secretary." 54 Fed. Reg. at 6,479 (emphasis added). The other passage that plaintiffs quote provides that "jurisdiction over an appeal lies exclusively with the Assistant Secretary–Indian Affairs and he or she will not consider petitions filed by the parties asking for

such review." 54 Fed. Reg. at 6,485. Even if these quotes could inject some ambiguity, the Department's reasonable construction of the regulations to permit redelegation would control. *See supra* pp. 15-17.

Defendants are entitled to judgment on Count II.

CONCLUSION

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

DATED this 6th day of November, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on November 6, 2017, the foregoing opposition and cross-motion for summary judgment, the accompanying statement of points and authorities, and a proposed order were filed via the Court's CM/ECF system and served upon ECF-registered counsel for all parties to this proceeding.

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