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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

ANNE CRAWFORD-HALL; SAN LUCAS RANCH, LLC; HOLY COW PERFORMANCE HORSES, LLC,

Plaintiffs,

v.

UNITED STATES OF AMERICA et al.,

Defendants.

Case No.: 2:17-cv-1616-SVW

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT

Filed concurrently herewith:

(1) Notice of Motion for Summary Judgment or, in the alternative for Partial Summary Judgment;
(2) Plaintiffs' Statement of Uncontroverted Facts and Conclusions of Law;
(3) Declaration of Wendy D. Welkom in Support Thereof;
(4) [Proposed] Order

Date: July 30, 2018
Time: 3:00 p.m.
Judge: Hon. Stephen V. Wilson

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I. INTRODUCTION

This is a motion for summary judgment or, alternatively, partial summary judgment challenging an agency decision on three grounds: the agency decision-maker lacked authority to issue a final decision; the agency failed to conduct a proper environmental review; and the agency failed to comply with its own regulations.

First, the agency decision is null and void because the decision was signed by the Principal Deputy Assistant Secretary-Indian Affairs ("Principal Deputy"). However, *only* the Assistant Secretary-Indian Affairs ("AS-IA"), and *not* the Principal Deputy, has the power to sign a final agency appeal decision:

> If the decision is signed by the Assistant Secretary-Indian Affairs, *it shall be final for the Department and effective immediately* . . . if the decision is signed by a Deputy to the Assistant Secretary-Indian Affairs, *it may be appealed to the Board of Indian Appeals pursuant to the provisions of 43 CFR part 4, subpart D.*"
> 25 C.F.R. § 2.20(c)(2), emphasis added.

The Federal Vacancies Reform Act dictates who may perform certain functions and duties of the offices which require Presidential appointment and Senate confirmation under the Appointments Clause of the Constitution ("PAS" offices). The Act prohibits a non-PAS officer from performing any exclusive function or duty of a PAS office. The distinction expressly set forth in the above regulation establishes that *only* the AS-IA, *a PAS officer*, has authority to issue a *final* decision for the Department. The agency consciously adopted this distinction when it revised its internal appeal regulations in 1989, to ensure that Department policy decisions would be made by the AS-IA, a Secretarial-level officer. The AS-IA's *final* decision-making authority is therefore exclusive to the office of AS-IA, and cannot be delegated to the very officer whose decision-making is expressly stated *not* to be final. Because the Principal Deputy's decision was not final, his decision and the subsequent land transfer into trust are void and of no effect. Summary judgment should be granted on this basis, these actions judicially invalidated, and the matter remanded.

Second, alternatively, if the agency's decision is considered on the merits, the

agency failed to conduct the appropriate environmental review under the National Environmental Protection Act ("NEPA"), 42 U.S.C. § 4321 *et seq*. The Bureau of Indian Affairs ("BIA") failed to prepare an Environmental Impact Statement ("EIS"), despite numerous substantial questions whether the project might have significant impacts on the environment. BIA's Final Environmental Assessment ("FEA") virtually *ignored* California's years-long drought, manipulated data on anticipated water usage, and failed to evaluate impacts related to an assertion of federal water rights to an aquifer already in a state of overdraft. BIA also ignored that it cannot ensure mitigation procedures, or prevent any changes to the project after the land is taken into trust, and did not address important cumulative effects. BIA also failed properly to analyze regulatory factors including tax issues, jurisdictional problems, the need for a business plan. The above-cited failures resulted in BIA's approval of the project and subsequent agency affirmance and transfer of real property. These actions were arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law. Accordingly, in the alternative, the Court should grant partial summary judgment, order the land taken out of trust and deed revoked, and remand with directions to prepare a thorough EIS.

II. STATEMENT OF FACTS

A. In 2010, the Band Bought Camp 4 and Then Applied to BIA For Approval of Fee to Trust

In 2010, the Santa Ynez Band of Mission Indians (the "Band") purchased the real property commonly known as Camp 4. Plaintiffs' Statement of Uncontroverted Facts ("PSUF") 1. In June 2013, the Band filed an application with BIA, and amended it in July 2013, asking the United States to take Camp 4 into trust under the Indian Reorganization Act of 1934 ("IRA"). PSUF 2; 25 U.S.C. § 2518. The 136-member Band's application sought trust status for over 1400 acres of land in Santa Barbara County, California. PSUF 3**.** This land, which was once part of Plaintiff Crawford-Hall's family ranch, sits across a narrow rural road from Plaintiffs'

sustainably-run, grazing, farming, and horse and cattle breeding facilities. PSUF 4.

B. BIA Issued an EA, FEA, FONSI and NOD, not an EIS

BIA issued an Environmental Assessment in 2013 ("EA") and a Final Environmental Assessment ("FEA") in 2014, but *not* an EIS. PSUF 5. The FEA concluded that there were no significant impacts to the environment. PSUF 6. On October 17, 2014, BIA issued a Finding of No Significant Impact ("FONSI"). PSUF 7.[1] Defendant Dutschke issued a Notice of Decision ("NOD") on December 24, 2014, approving the Camp 4 application. PSUF 7. Plaintiffs timely filed an appeal of the NOD to the Interior Board of Indian Appeals ("IBIA"). PSUF 8.

C. The AS-IA Exercised Jurisdiction Over the Administrative Appeal, But the Principal Deputy Decided the Appeal

On February 9, 2015, AS-IA Kevin Washburn, a PAS officer, took jurisdiction over the Plaintiffs' administrative appeal. PSUF 10. IBIA transferred the Plaintiffs' and *seven* other NOD appeals to the AS-IA's office. PSUF 11. Mr. Washburn resigned at the end of 2015, however, and no nomination was proposed for the AS-IA position through the end of President Obama's administration. PSUF 12.

Mr. Lawrence Roberts assumed the position of acting AS-IA on January 1, 2016, and continued in that position for the duration of the time allowed under the Federal Vacancies Reform Act of 1998 ("FVRA"), *i.e.*, until July 29, 2016. PSUF 13. He then reverted to his prior position of Principal Deputy. PSUF 14. On January 19, 2017, Mr. Lawrence signed the instant Decision, and resigned the next day. PSUF 15. His Decision affirmed the December 24, 2014 NOD, and concluded:

> Pursuant to the authority delegated to me by 25 C.F.R. § 2.4(c), I affirm the Regional Director's December 24, 2014 decision to take approximately 1,427.28 acres of land in trust for the Santa Ynez Band of Chumash Indians. This *decision is final in accordance with 25 C.F.R. § 2.20(c)* and no further administrative review is necessary. The Regional Director is authorized to approve the conveyance document accepting the Property in trust for the Tribe subject to any remaining regulatory requirements and approval of all title requirements. [Emphasis added.] PSUF 16.

[1] Plaintiffs further detail the deficiencies of the FEA and FONSI in sections III, B and C, infra.

D. BIA Took Camp 4 Into Trust and Recorded the Deed.

At least a week before the Decision was issued, the Band had delivered a Grant Deed for Camp 4 to BIA's Pacific Regional office, where its signature was notarized. PSUF 17. On January 20, 2017, defendant Pacific Regional Director Amy Dutschke executed and had notarized her Acceptance of the Deed. PSUF 18.

On January 26, 2017, BIA recorded the Grant Deed. PSUF 19. Notice of the transfer has not yet appeared in the Federal Register. PSUF 20.

III. LEGAL ARGUMENT

A party may move for summary judgment upon all or any part of a claim, if there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). Under the Administrative Procedures Act ("APA"), a court must set aside an agency's decision if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "without observance of procedure required by law," or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2). Here, Defendants' FEA, FONSI, NOD, Decision, and Acceptance of Deed violate the APA.

A. The Principal Deputy Lacked Authority to Issue a Final Decision and the Decision Is Null and of No Effect.

Only the AS-IA may issue a final decision on an administrative appeal she/he takes from the IBIA. As explained below, this rule is based on Department of the Interior (the "Department" or "DOI") regulations, the FVRA, and the Appointments Clause of the United States Constitution. Because the Principal Deputy lacked authority to issue a final decision, Defendants' Decision and Acceptance of Deed violated this rule and are therefore null and void, and cannot be ratified.

1. Department Regulations Prohibit the Issuance of a Final Decision by the Principal Deputy.

a) Only the AS-IA, Not a Deputy, Is Authorized to Issue a *Final* Decision on the Appeal.

Section 5 of the IRA authorizes the Secretary of the Interior to acquire land in

trust for Indians. 25 U.S.C. § 5108. The application for such a fee-to-trust acquisition is made to BIA, and typically BIA makes the initial decision whether to approve the application. See, 25 C.F.R. Part 151. An administrative appeal from the initial BIA decision is governed by Department appeal regulations in 25 C.F.R. Part 2 and 43 C.F.R. Part 4. The administrative appeal is first taken to the IBIA. 25 C.F.R. § 2.20; 43 C.F.R. § 4.332. Department regulations allow several different officials to decide the appeal. Title 25 C.F.R. § 2.4 provides in relevant part:

> "The following officials may decide appeals: [¶ . .]
> (c) The Assistant Secretary-Indian Affairs *pursuant to the provisions of § 2.20* of this part.
>
> (d) A Deputy to the Assistant Secretary-Indian Affairs *pursuant to the provisions of § 2.20(c)* of this part.
>
> (e) The Interior Board of Indian Appeals, pursuant to the provisions of 43 CFR part 4, subpart D, *if the appeal is from a decision made by an Area Director or a Deputy to the Assistant Secretary—Indian Affairs . . .*" [Emphasis added.]

The above regulations sharply distinguish the various potential decision-makers' authority to make *final* decisions. Under 25 C.F.R. § 2.20, the AS-IA has broad authority to take the appeal from IBIA and then decide to issue a decision in that appeal, or to assign responsibility to issue a decision to a Deputy to the AS-IA. 25 C.F.R. § 2.20(a), (b), (c)(1) and (2); see also, 43 C.F.R. § 4.332(b) (the AS-IA may decide to review the appeal). That is what AS-IA Washburn did: he assumed and retained jurisdiction over the numerous appeals from the Camp 4 NOD. PSUF 10, 11. The number of appeals, the substantive issues, and the massive geographical area involved arguably supported his atypical assumption of jurisdiction from the IBIA.

Once the AS-IA takes jurisdiction from IBIA, however, 25 C.F.R. § 2.20(c)(2) limits the final decision-making authority *exclusively* to the AS-IA:

> *If the decision is signed by the Assistant Secretary-Indian Affairs, it shall be final for the Department and effective immediately* unless the Assistant Secretary-Indian Affairs provides otherwise in the decision. Except as otherwise provided in § 2.20(g) [which refers to appeals regarding the Indian Education Program], *if the decision is signed by a Deputy to the Assistant Secretary-Indian Affairs, it may be appealed to the Board of Indian Appeals pursuant to the*

> *provisions of 43 CFR part 4, subpart D*." [Emphasis added.] See also, 25 C.F.R. § 2.4(e).

Under the above regulation, a Deputy AS-IA does not outrank IBIA with respect to finality of appellate decision-making – rather, the Deputy's decision is explicitly stated to be *appealable to the IBIA*. The difference between a decision issued by the AS-IA and any other officer also is reiterated in 25 C.F.R. § 2.6, which provides that no decision subject to appeal to a superior authority (as the Deputy AS-IA's decision is subject to appeal to IBIA) is considered final unless public safety or other reasons require the decision to made effective immediately [§ 2.6(a)], and that:

> (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. [Emphasis added.]

These regulations thus strictly and expressly limit the authority to issue a final decision for the Department exclusively to the AS-IA (or IBIA, if the AS-IA does not take jurisdiction of the appeal) and no other officials.

b) DOI Considered and Formalized the Exclusivity of the AS-IA's Function to Issue a Final Decision.

In 1987, the Department proposed revised administrative appeal regulations for 25 C.F.R. Part 2 and 43 C.F.R. Part 4. Proposed 25 C.F.R. § 2.4(c) allowed the AS-IA to decide an appeal, "pursuant to the provisions of § 2.20 of this part." 52 Fed. Reg. 43006, 43007; Welkom Decl., Exh. F. Proposed § 2.20(c) authorized the AS-IA to take jurisdiction over an appeal, and to issue a final decision on it. *Id*. The proposed rule did not contain *any* provision enabling a deputy to render *any* decision.

After public comment, however, the final rules explicitly provided that a deputy AS-IA *could* issue a decision: *but only* if the AS-IA expressly *assigned* that responsibility to the deputy, *and only* with the additional express condition that the deputy AS-IA's decision would *not* be final. Rather, it would be directly appealable to the IBIA. 25 C.F.R. § 2.20(c)(2). The Department comments on its final revised rules in 25 C.F.R. Part 2 and 43 C.F.R. Part 4 explained the reasoning behind this final authority restriction: *i.e*. that the *AS-IA was a Secretarial-level position*, and this

higher-level (PAS) officer was necessary to review the policy issues presented in the few appeals which would justify the atypical, non-IBIA appeal route:

> "A new § 2.4(d) has been added providing that a Deputy to the Assistant Secretary-Indian Affairs may issue a decision in an appeal *if* that responsibility has been assigned to him/her by the Assistant Secretary- Indian Affairs pursuant to § 2.20(c). See the discussion under § 2.20 . . . [Emphasis added.]
>
> "Section 2.20: . . . The comments recommending exclusion of the Assistant Secretary from the appeal process or making his/her decisions subject to review by the IBIA are not accepted. *Certain appeals involve policy matters requiring the attention of the Assistant Secretary*. . . . Section 2.20(c) has been further revised to authorize the Assistant Secretary – Indian Affairs to assign the responsibility to issue a decision in an appeal to a Deputy to the Assistant Secretary - Indian Affairs. *A decision made by a Deputy to the Assistant Secretary pursuant to such an assignment may be appealed to the Board of Indian Appeals* except as provided for in § 2.20(g)." (Emphasis added.) 54 Fed. Reg. 6478, 6479; Welkom Decl. Exh. G

Corresponding comments on the final regulations in 43 C.F.R. Part 4, also revised at this time, confirmed that the same analysis applied, stating as follows:

> Section 4.331(b): One commenter questioned the provision restricting the Board's review authority over decisions that are approved in writing by the Assistant Secretary -- Indian Affairs prior to issuance. *As a Secretarial-level official, the Assistant Secretary -- Indian Affairs has authority to issue or approve decisions that are final for the Department. The Board has not been delegated general review authority over such [Secretarial-level] decisions*. The comment is not accepted.
>
> Section 4.332(b): . . . . [¶] It is also recognized, however, that *there are some decisions involving Indians and Indian tribes that involve policy considerations that cannot adequately be addressed through the usual appeal procedures. It is anticipated that the Assistant Secretary -- Indian Affairs will infrequently exercise the authority to assume jurisdiction over an appeal.* [Emphasis added.] 54 Fed. Reg. 6483, 6484-6485; Welkom Decl. Exh. H.

The above comments establish that the Department took special care to ensure that *only* the AS-IA, a Secretarial-level (PAS) position, could take jurisdiction from IBIA, after which *only* the AS-IA, who has authority to make Department policy decisions, could issue a final determination for the Department.

c) The Purportedly Final Decision Violates Department Regulations and Should Be Vacated.

Here, Mr. Roberts was the acting AS-IA from January 1, 2016, until July 29, 2016. PSUF 13. As acting AS-IA, Mr. Roberts had the full authority of the AS-IA to issue a final administrative appeal decision. He did not do so.

On July 30, 2016, Mr. Roberts reverted to his prior position of Principal Deputy, and the position of AS-IA remained vacant. PSUF 14. On January 19, 2017, Mr. Roberts signed the instant Decision as the Principal Deputy, *not* as AS-IA. PSUF 15. The Decision is purportedly final based solely on the Principal Deputy's "delegated" authority pursuant to 25 C.F.R. §§ 2.4(c) and 2.20(c):

> Pursuant to the authority *delegated* to me by *25 C.F.R. § 2.4(c)*, I affirm the Regional Director's December 24, 2014 decision to take approximately 1,427.28 acres of land in trust for the Santa Ynez Band of Chumash Indians. This *decision is final in accordance with 25 C.F.R. § 2.20(c)* and no further administrative review is necessary. [¶] [Dated] Lawrence S. Roberts, *Principal Deputy Assistant Secretary – Indian Affairs*. [Emphasis added]. PSUF 16.

Mr. Roberts' reliance on 25 C.F.R. §§ 2.4 and 2.20(c) was wrong. These regulations do not delegate any of the AS-IA's unique authority to render a final decision to the Principal Deputy. To the contrary, these regulations expressly state that *only* a decision by the AS-IA is final, and a decision by a Deputy AS-IA is *not* final – it is directly appealable to the IBIA. To find that a Principal Deputy could issue a final decision would render the careful distinctions drawn in 25 C.F.R. §§ 2.4 and 2.20(c) invalid and meaningless. Such an interpretation would allow delegation to the Principal Deputy of the very authority which is expressly *denied* to the Principal Deputy. Given the careful analysis that went into the final rulemaking process, and the Department's published comments explaining the policy basis for limiting final policy pronouncements to a PAS officer, that interpretation should be rejected.

An agency is bound by its own regulations. *Texas v. EPA*, 726 F.3d 180, 200 (D.C. Cir. 2013) (quoting *Panhandle Eastern Pipe Line Co. v. FERC*, 613 F.2d 1120, 1135 (D.C. Cir. 1979)). An agency's failure to follow its own regulations is fatal to any deviant action. *Crawford v. FCC*, 417 F.3d 1289, 1297 (D.C. Cir. 2005) (quoting

Florida Institute of Technology v. FCC, 952 F.2d 549, 553 (D.C. Cir. 1992).

Applying the above, on January 19, 2017, the office of AS-IA was vacant; there was no acting AS-IA; and the Principal Deputy did not have authority to render a *final* appellate decision. It follows that the Principal Deputy also did not have authority to direct BIA to accept Camp 4 into trust, since Department regulations expressly provided for further appeal to the IBIA from a Principal Deputy decision. The Decision, the subsequent acceptance of the Deed, and the recording of the Deed, therefore should be vacated as these actions exceeded the agency's authority and are arbitrary and capricious under the APA. 5 U.S.C. § 706.

2. The FVRA Prohibits Non-PAS Officers From Performing Exclusive PAS Functions Such as Finality

Article II of the United States Constitution requires that the President obtain the advice and consent of the Senate before appointing principal officers of the United States. U.S. Const. art. II, § 2, cl. 2. The Appointments Clause provides a critical check on the President's power unilaterally to appoint officers of the United States, and a "structural safeguard" intended "both to curb executive abuses of the appointment power [citation] and to promote a judicious choice of [persons] for filling the offices of the union." *Edmond v. United States*, 520 U.S. 651, 659 (1997) (internal quotations omitted). The AS-IA is a PAS officer. PSUF 9; 43 U.S.C. § 1453, 1453a.

Congress has accounted for vacancies that arise in PAS offices by granting the President authority temporarily to fill vacant offices through the Vacancies Acts. The most recent of these is the FVRA. See generally, *NLRB v. SW General, Inc.*, __ U.S. __, 137 S.Ct. 929, 935-936 (2017) and M. Rosenberg, Congressional Research Service Report for Congress, *The New Vacancies Act: Congress Acts to Protect the Senate's Confirmation Prerogative*, 2-4 (1998). [2]

Under the FVRA, should a PAS officer die, resign or otherwise become unable

[2] Available at https://www.everycrsreport.com/reports/98-892.html (last accessed July 6, 2018).

to perform his duties, "the first assistant to the office of such officer shall perform the functions and duties of the office *temporarily* in an acting capacity" for no longer than 210 days. 5 U.S.C. §§ 3345(a)(1) (emphasis added); § 3346(a)(1). Title 5 U.S.C. §§ 3345 and 3346 are the exclusive means for temporarily authorizing an acting official to perform the functions and duties of a PAS office, absent a Congressional statute or Presidential recess appointment. 5 U.S.C. § 3347(a). In the absence of an officer permitted under the FVRA to perform the "functions and duties" of the PAS office, the office shall remain vacant and only the head of such Executive agency may perform any function or duty of such office. 5 U.S.C. § 3348(b). [3]

The term "function or duty" of a vacant office means any function or duty of the applicable office that is established by statute *or*:

> "(i) (I) is established by regulation; and (II) is required by such regulation to be performed by the applicable officer (and only that officer); and
>
> (ii) includes a function or duty to which clause (i) (I) and (II) applies, and the applicable regulation is in effect at any time during the 180-day period preceding the date on which the vacancy occurs." 5 U.S.C. § 3348(a)(2)(B)(i) and (ii).

Here, the FVRA question of whether only the AS-IA can issue a final administrative appeal decision is conclusively answered by DOI's appeal regulations. First, the regulations exclusively limit final decision making for the Department to the office of AS-IA. As shown above, the Department explained its reasoning in Federal Register comments: the finality difference derived from the AS-IA being a Secretarial-level (PAS) position and, as such, an authorized Department policy maker. 54 Fed. Reg. 6478, 6479; 54 Fed. Reg. 6483, 6484-6485. The published final regulations of 25 C.F.R. §§ 2.4 and 2.20(c) did the following: (1) expressly restricted the function or duty of issuing a *final* appellate decision for the Department to the office of the AS-IA; and, at the same time, (2) explicitly made the decision of a

[3] The ultimate agency authority at the time the Decision was signed was Secretary of the Interior Sally Jewell. PSUF 20. Secretary Jewell thus had the authority to issue and sign a final decision for the Department in this matter. 5 U.S.C. § 3348(b)(2).

Deputy AS-IA directly appealable to the IBIA and therefore *not* a final decision. The Department's conclusion that policy reasons require limiting final decisions to a PAS-level officer, and not an inferior officer, fully supports its exclusive finality restriction.

Second, the regulations have been in effect for longer than 180 days preceding the vacancy. The final agency appellate rules in 25 C.F.R. Part 2 and 43 C.F.R. Part 4 were published in the Federal Register in 1989, after appropriate comment period. 54 Fed. Reg. 6478; 54 Fed. Reg. 6483 As a result, the requirements of 5 U.S.C. § 3348(a)(2)(B)(i) and (ii) are fulfilled. Only the office of the AS-IA can perform the function or duty of issuing a final appellate decision. The instant Decision, signed by the Principal Deputy, was therefore *not* a final decision.

The FVRA ensures compliance by providing that an "action taken by any person who is not acting under" the FVRA "in the performance of any function or duty of a vacant office… shall have no force or effect" and "may not be ratified." 5 U.S.C. § 3348(d)(1), (2); see also, *SW General, Inc. v. NLRB,* 796 F.3d 67, 70 (D.C. Cir. 2015) (void *ab initio* provisions were enacted in response to *Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d. 203 (D.C. Cir 1998), where the actions of an acting director were upheld because they were later ratified). Here, long-standing regulations give exclusive authority to issue a final appellate decision to the PAS office of AS-IA. Because the instant Decision was not final for the Department, it should be vacated as should the subsequent Acceptance of Deed.

3. The Recent *Stand Up* Case Is Neither Binding Nor Persuasive As To the Instant Appeal Regulations

Plaintiffs are aware that a recent case, *Stand Up for California! et al. v. United States DOI et al*., 298 F. Supp. 3d 136 (D.D.C. 2018), has concluded that the Principal Deputy had delegated, *non*-exclusive authority to issue a final *initial* determination approving a different fee-to-trust application. With respect, that unpublished opinion neither controls nor applies to this case for several reasons.

First, the *Stand Up* Court was bound by D.C. Circuit authority on implied

delegation, which is contradicted by Ninth Circuit precedent. The *Stand Up* Court was required to follow the D.C. Circuit analysis in *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554 (D.C. Cir. 2004), which held that "subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent." *Id.* at 565. This presumption of subdelegability when the statute/regulation is silent does not apply in the Ninth Circuit, however, which directs: "'[w]ithout express congressional authorization for a subdelegation,'" courts "'must look to the purpose of the statute to set its parameters.'" *Inland Empire Pub. Lands Council v. Glickman*, 88 F.3d 697, 702 (9th Cir. 1996) (quoting *Assiniboine & Sioux Tribes v. Board of Oil & Gas Conservation*, 792 F.2d 782, 795 (9th Cir. 1986)). Applying the Ninth Circuit's context-sensitive approach here demonstrates that subdelegability is incompatible with *both* the text and purpose of 25 C.F.R. § 2.20, as it expressly limits finality to the AS-IA on policy grounds, at the same time that it denies such authority to a deputy AS-IA.

Second, the *Stand Up* Court's focus was not the specific appeal regulations at issue here. The *Stand Up* Court's concern was 25 C.F.R. § 151.12, the regulation dealing with an *initial* fee-to-trust determination ("Action on Request"). But that regulation does not mention a Deputy to the AS-IA at all, unlike the clear differentiation between AS-IA and Principal Deputy set forth in § 2.20(c). The *Stand Up* Court was also unable to find affirmative evidence of Department comments during the adoption of § 151.12 which precluded delegation. See, *Stand Up,* 298 F. Supp. 3d, 141-144 and n. 10 (specifically identifying the absence of agency comments in the Federal Register that could explicitly or implicitly address delegation). Here, unlike § 151.12, Department comments in the Federal Register during the rules process in the adoption of final § 2.20 *do* provide affirmative evidence that decision-making finality is exclusively limited to the office of AS-IA, for policy reasons.

Third, the *Stand Up* Court relied in part on an opinion from the Department's Office of the Solicitor, which reported that his survey found only three *statutes* which

precluded delegation of duties. *Stand Up*, 298 F. Supp. 3d at 142-143. The Solicitor's evaluation was limited, however, to reviewing whether a statute or regulation contained the words, "only," "exclusively," or "solely." *See*, Welkom Decl. Exh. I at p. 2. Such a review would not have pulled the appellate regulations at issue here, which nonetheless clearly distinguish the different levels of authority and equally clearly prohibit a non-PAS officer from signing a final appellate decision for the Department. Moreover, the Solicitor's opinion on delegation is essentially an interpretation of the FVRA, which is not a statute that the Department is charged with administering. As a result, the opinion is not afforded *any* judicial deference. See, *Epic Systems, Inc. v. Lewis*, __ U.S. __, 138 S. Ct. 1612, 1630 (2018); *Hooks v. Kitsap Tenant Support Services, Inc.*, 816 F.3d 550, 564 (9th Cir. 2016).[4]

An agency's interpretation of a regulation also is not entitled to deference when an alternative reading is compelled by the regulation's plain language. *Borgess Med. Ctr. v. Burwell*, 843 F.3d 497, 501 (D.C. Cir. 2016) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994)). Where the appeal regulations are so specific and unambiguous in restricting the office of Principal Deputy from issuing a final appellate determination, as is the case here, the agency's interpretation conflicts with the plain text and cannot support a different reading. See, *Christensen v. Harris Cnty*, 529 U.S. 576, 588 (2000); *Mata v. Mukasey*, 543 F.3d 1165, 1167 (9th Cir. 2008).

Finally, the *Stand Up* Court apparently looked to Department Manual ("DM") and non-public statements regarding delegation to the Principal Deputy. *Stand Up*, 298 F. Supp. 3d 136, 140-150. None of that material was included in the Administrative Record here, leaving the Defendants without any record support for delegation. Moreover, none of those materials were adopted through notice and comment rulemaking such that they are given deference, and they are not binding in the face of contrary published regulations, which were. See, *Schweiker v. Hansen*,

[4] The Solicitor's opinion is not even binding on the Department, as it is not an "M Opinion." See, 209 DM 3.2(A)(11).

450 U.S. 785, 789 (1981) (agency manual is not binding when contrary to published regulation); *Sierra Club v. U.S.*, 671 F.3d 955, 962 (9th Cir. 2012). For all of the above reasons, the *Stand Up* decision does not support a finding of delegability in this case, and its reasoning should be rejected.

B. There Are Substantial Questions Whether There Would Be Significant Impacts, Compelling the Preparation of an EIS.

Before granting an application, BIA is obligated to take a "hard look at the environmental consequences of [its] actions." *Neighbors of Cuddy Mt. v. Alexander*, 303 F.3d 1059, 1070 (9th Cir. 2002); 42 U.S.C. § 4332(2)(C). "If the action is expected to have significant impacts, or if the analysis in the EA identifies significant impacts, then an EIS will be prepared." Div. of Envtl. & Cultural Res. Mgmt., Dep't of the Interior, 59 IAM 3-H, *Indian Affairs National Environmental Policy Act (NEPA) Guidebook* ("BIA NEPA Guidebook") § 8.1 (Aug. 2012). Indeed, "only in those obvious circumstances where no effect on the environment is possible, will an EA be sufficient for environmental review required under NEPA." *Natural Res. Defense Council v. Duvall*, 777 F. Supp. 1533, 1538 (E.D. Cal. 1991); *Anderson v. Evans*, 371 F.3d 475, 488 (9th Cir. 2004).[5]

An EA is a "concise document that provides sufficient evidence and analysis for determining the significance of effects from a proposed action." BIA NEPA Guidebook, § 2.2.3, p. 5. The instant massive FEA confirms that this is *not* one of "those obvious circumstances where no effect on the environment is possible," and therefore an EA was *not* sufficient. *Duvall*, 777 F. Supp. 1533, 1538; see also, *Anderson*, stating that "*girth is not a measure of the analytical soundness of an environmental assessment*. *Anderson*, 371 F.3d 494, 475. No matter how thorough, an EA can never substitute for preparation of an EIS, if the proposed action *could* significantly affect the environment." *Id.* at 494, emphasis added (lengthy EA did not justify the failure to prepare an EIS).

[5] The NOD did not discuss NEPA, it merely incorporated the FEA. PSUF 22

It is important to place the NOD in its proper context. It approves a fee-to-trust acquisition of over 1400 acres previously dedicated to low-density agriculture, in a County whose primary land use goal is the retention of agricultural land. The NOD authorizes development of a subdivision of at least 143 densely clustered homes, each with ancillary buildings (all of uncertain square footage and occupancy); a large wastewater treatment plant; paved roads; group facility with parking lot sufficient to host 100 events per year (400 visitors each weekend); and the drilling of *two* additional water wells during a historic drought, into a groundwater basin which is in overdraft, all in an agricultural area where one house per hundred acres is the zoning plan, and, cumulatively, *coupled with* a massive hotel and casino expansion; a new museum and related facilities, and other economic development. PSUF 21.

BIA bears the burden to "make a convincing case" that the impact is not significant enough to require an EIS: "an 'assessment' . . . must provide convincing reasons why a construction project with 'arguably' potential significant environmental impact does not require a detailed environmental impact statement." *Maryland-National Capital Park & Planning Com. v. U.S. Postal Service*, 487 F.2d 1029, 1039 (D.C. Cir. 1973); see also, *In Defense of Animals v. U.S. Dept. of Interior*, 751 F.3d 1054, 1068 (9th Cir. 2014). Under this test, Plaintiff *need not prove* there will be significant adverse impacts; rather, an EIS *must* be prepared if there is a substantial question whether the project *may* cause a significant effect on the local environment. *Oregon Natural Desert Ass'n v. Green*, 953 F. Supp. 1133, 1147 (D. Or. 1997); see also, *Grand Canyon Trust v. Federal Aviation Administration*, 290 F.3d 339, 340 (D.C. Cir. 2002) ("If *any* 'significant' environmental impacts might result from the proposed agency action, then an EIS must be prepared *before* agency action is taken) (emphasis in original); *Anderson*, 371 F.3d 475, 488 (to prevail on a claim that the agency was required to prepare an EIS, plaintiff need not demonstrate that significant effects *will* occur; a showing of substantial question whether a project *may* have a significant effect on the environment is sufficient). Significance involves a

consideration of both context and intensity; it cannot be avoided by terming an action temporary or by breaking it down into small component parts. 40 C.F.R. § 1508.27. Moreover, if a project is controversial, and substantial disputes exist as to the size, nature or effects, an EIS should be prepared. See, *Found. For N. Am. Wild Sheep v. U.S. Dept. of Agric*., 681 F.2d 1172, 1182 (9th Cir. 1982).

In an APA challenge, the Court considers whether the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The Court determines whether the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or be the product of agency expertise." *Motor Vehicle Manufacturers Association v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Natural Resources Defense Council v. Department of the Interior*, 113 F.3d 1121, 1124 (9th Cir. 1997). Here, the FEA, FONSI, NOD and Decision fail.

1. BIA Relied on Misleading and Inadequate Data to Find No Significant Impacts to Groundwater Resources.

When the NOD was signed, California was in the midst of one of the worst droughts in its recorded history. Santa Barbara County remains in drought.[6] The project includes drilling two new wells. PSUF 21. Camp 4 sits above the Santa Ynez Uplands groundwater basin, which was known to be in overdraft status since the issuance of the 2009 Santa Ynez Valley Community Plan ("SYVCP") EIR. PSUF 23. That EIR had also identified imported water which supplemented the basin. PSUF 24. But by 2013, the drought had compelled California State Water Allocations to be decreased to thirty-five percent. PSUF 25. The preliminary 2013

[6] While much of California has recovered, the area surrounding Camp 4 is still in severe drought. See, e.g. http://droughtmonitor.unl.edu/CurrentMap/StateDroughtMonitor.aspx?CA

EA therefore acknowledged the basin was in overdraft status. PSUF 23. In January 2014, the State of California and Santa Barbara County both declared drought emergencies, and State Water Allocations were pared back to *zero* percent, all of which was highly publicized. PSUF 26. Despite the elimination of imported water and the long-known overdraft, in May 2014, BIA issued the FEA, concluding that the basin was in a state of *surplus*. PSUF 29. The FONSI then found no significant impacts to groundwater or any other factors. PSUF 28. These findings are glaringly misleading, and the groundwater analysis is fundamentally flawed in numerous ways.

First, the FEA reached the implausible conclusion of basin *surplus* by citing to a 2002 study which concluded that increases in imported water resulted in a basin that was balanced or in a slight surplus; and by noting that the 2009 SYVCP Final EIR identified a surplus of approximately 513 acre-feet per year ("AFY"), and stated that several hundred acre feet of new long-term demand could be accommodated. PSUF 29. However, the FEA ignored that the SYVCP EIR had qualified its conclusion of surplus, stating that "without those imported water supplies the demands on the groundwater basin would exceed supply," and that "the County's 2001 water budget for the basin exceeds recharge by approximately 2000 AFY, as corroborated in a study by Hopkins (2002)." PSUF 30.

Although the only support for a finding of surplus was the existence of an imported supply, the FEA and FONSI also improperly dismissed or ignored comments that detailed the lowering of neighboring well levels from 2009 to 2013, the fact that imported water was no longer available, and a more recent 2013 Annual Engineering and Survey Report. PSUF 31. BIA failed to model the basin or to evaluate long-term water supply, despite existing drought conditions and comments that such a modeling was essential. PSUF 32. In short, in a historic drought, BIA misleadingly portrayed the basin in a state of surplus, based on the existence of imported water sources, which it knew or should have known were not available.

Second, the FEA misstated the amount of groundwater the Proposed Action will withdraw. Neighboring agencies with data on residential use noted that the EA and FONSI relied on grossly understated figures, and that the withdrawal of water would be a significant impact. PSUF 33. The FEA and FONSI nevertheless dismiss all alternative figures and rely on their own figures, which include apparently arbitrary changes, such as an unsupported reduction in domestic indoor water demand from 90 gallons to 65 gallons per capita per day. PSUF 34.

Third, the FEA relies on proposed groundwater mitigation measures, without providing supporting evidence. Perhaps the most important of the mitigation recommendations is to site new wells "as far as possible" from existing offsite wells and to site "at least one of the new wells south of the Baseline fault." PSUF 35. However, there is no evidence that this recommended measure would suffice. The FEA concedes that the "capacity of the proposed wells to meet the project demand and water quality cannot be properly assessed without actually constructing and testing each well." PSUF 36.[7] If there is insufficient draw from these wells, the only other proposed well locations *admittedly* would result in a significant impact on neighboring wells. PSUF 37.

Finally, while the FEA explains that the Band has federal water rights, it does not evaluate how invoking those rights and drawing unlimited amounts from the basin could affect the environment or the community's groundwater source. PSUF 38. This issue is particularly significant, for at least two major reasons: (1) BIA states that the relevant regulations "do not authorize the department to impose restrictions on a tribe's future use of land which has been taken into trust" so the Band may change usage with impunity (PSUF 39); and (2) despite the Band's public assertions, there is no basis for the Band to assert any federal water rights. Federal

[7] Plaintiff Crawford-Hall is extremely knowledgeable about Camp 4, which was formerly part of her family ranch. She understands the impacts threatening her properties located directly across the narrow rural road from Camp 4, including but not limited to impacts from well drilling and runoff onto her pastures. PSUF 4.

surface water rights may be implied only when the government reserves land from public domain. See, *Winters v. United States*, 207 U.S. 564 (1908). Here, there is no reservation from public domain lands, since the Camp 4 land was owned by the Band.[8] Under any analysis, the above factors at least raised a substantial question whether there were significant impacts, and rendered the project controversial.

2. BIA Did Not Analyze Incompatible Land Use Impacts

The purpose of the Proposed Action is to convert zoned agricultural land to other, denser land uses. The FONSI and FEA do not address adequately the incompatibility of the Proposed Action with the surrounding property and the conflict posed with the County's General Plan, the SYVCP, and the County's zoning and land use regulations. PSUF 41. The level of scrutiny on these issues is extremely high: where "the Federal Government exercises its sovereignty so as to override local zoning protections, NEPA requires more careful scrutiny." *Maryland-National Capital Park & Planning Com.*, 487 F.2d at 1037.[9] Yet neither the FONSI nor the FEA addresses the lack of agricultural buffers, the increase in pests, or the risk that weeds and diseases would spread to neighboring agricultural properties. PSUF 43. Nor do they address the unsuitability of the ill-draining yellow clay land for any purpose but agriculture. PSUF 44. Neither the FONSI nor the EA adequately evaluates the impact of dense residential development, plus a meeting facility hosting 100 events per year (all built on yellow clay substrate, poorly draining property that was restricted previously to agricultural uses) on neighboring agricultural or very low density properties. The Proposed Action would increase noise, traffic, lights, and pollution, and increase the potential for trespassing, vandalism, and littering. PSUF

[8] The Band's original reservation also is not held in trust for the Band, it is merely owned by the United States as landlord. There are no treaties, orders, or deeds establishing trust status of its alleged reservation in the AR; see PSUF 40.

[9] Federal regulations purport to exempt land taken into trust from state and local laws. 25 C.F.R. § 1.4(a). The FONSI and EA also must be evaluated under a more stringent standard because the application is an off-reservation proposal. PSUF 42.

45. Yet the FEA and FONSI fail properly to evaluate the impact of this increased noise, pollution, light and lack of buffers on neighboring grazing and crop operations, and there is no evaluation of the likely impacts on agricultural neighbors of trespassing or vandalism.

BIA avoided the issue by improperly stating that the project is not inconsistent with neighboring uses. PSUF 46. But this is nonsense: the application sought approval for parcels between 5 and 100 times the size of the few neighboring uses. PSUF 47. In similar fashion, BIA's answer to comments noting the incompatibility of the project to the land use regulations imposed on neighboring properties is simply to state that the project will not be bound by local land use regulations when the project is approved. PSUF 48. This effectively presupposes approval, an approach which violates NEPA. See, *N. Plains Res. Council, Inc. v. Surface Transp. Bd*., 668 F.3d 1067, 1084-85 (9th Cir. 2011) (inappropriate to presuppose approval under NEPA); see also, *Half Moon Bay Fishermans' Marketing Association v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988); *LaFlamme v. F.E.R.C.*, 852 F.2d 389, 400 (9th Cir. 1988). BIA's refusal properly to analyze relevant impacts rendered the FEA, FONSI, NOD and Decision arbitrary, capricious, and an abuse of discretion.

3. BIA Relied on Improper Mitigation Measures.

The FONSI acknowledges that mitigation measures are required to "reduce significant impacts to a less-than-significant level." PSUF 49. The FONSI lists more than 100 "best management practices"/"mitigation measures," to reduce the undisputed significant impacts. PSUF 50. However, these key mitigation measures are not *required*, they are only "recommended," including those pertaining to critical issues such as the siting of new wells. PSUF 51. Moreover, there is no certainty that mitigation will be enforced. CEQ guidance states that monitoring is "essential" to support a FONSI and that mitigation measures should be "carefully specified in terms of measurable performance standards or expected results, so as to establish clear

performance expectations."[10] Here, many mitigation recommendations are devoid of references to local environmental regulations, which might provide the requisite specification. PSUF 52. Others are purely aspirational, not specific. PSUF 53.

Finally, Defendants frankly admit they have no authority to monitor or restrict actual land use after the land is taken into trust. PSUF 54; see also, *City of Lincoln v. Portland Area Dir.*, 1999 I.D LEXIS 18, *12 [33 IBIA 102, 107] (1999) ("[n]othing in . . .25 U.S.C. § 465, or 25 C.F.R. Part 151 authorizes the Department to impose restrictions on the [Applicant's] future use of land which is taken into trust"). The FEA, FONSI, and NOD thus fail to address whether the Band would be obligated to implement any mitigation measures, or if BIA could monitor and/or enforce them.

4. BIA did not sufficiently evaluate the cumulative impacts

Cumulative impact is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions *regardless of what agency (Federal or non-Federal) or person undertakes such other actions*." 40 C.F.R. § 1508.7 (emphasis added). These cumulative impacts "must be fully analyzed in any EA." *Kern v. United States BLM*, 284 F.3d 1062, 1078 (9th Cir. 2002).

One important cumulative impact was the Band's casino renovation, which was to include the: "addition of up to 215 hotel guest rooms; addition of up to 584 parking spaces; expansion of the casino to ease overcrowding; and renovation of the existing casino and hotel to address overcrowding and circulation issues."[11] This expansion alone was slated to bring an additional 1,200 visitors per day to the area

[10] Memorandum for Heads of Fed. Departments and Agencies from Nancy H. Sutley, Chair, Council of Envtl. Quality 8 and 10 (Jan. 14, 2011), accessible at https://www.nrc.gov/docs/ML1513/ML15131A117.pdf (last accessed Jul. 7, 2018);
[11] Notice of Adoption and Approval from Santa Ynez Band of Chumash Indians to Office of Planning & Research and Bd. of Supervisors of Cnty. of Santa Barbara (Sept. 22, 2014), *available at* http://www.chumashee.com/wp-content/uploads/2014/09/Notice-of-EE-Adoption-Approval-Signed.pdf.

surrounding Camp 4 and its neighboring property.[12] The FEA recognized this "cumulative impact," but did not address in any detail the environmental impact anticipated from these additional 1,200 patrons per day. PSUF 55. Another cumulative impact was the additional expected visitors to the cultural center, museum, park, gift shop, and offices on the Band's 6.9 acre project. PSUF 56. Combined with the additional residents and visitors in the Proposed Action, these projects would have significant impacts on the environment, scarce water resources, agriculture, air quality, traffic, public resources and services, and public safety. PSUF 57. Because the FEA and the FONSI fail adequately to analyze impacts combined with other development projects, they are "inadequate under NEPA" and they, the NOD and Decision should be vacated. *See Kern*, 284 F.3d at 1075-76.

C. BIA Did Not Satisfy Additional Regulatory Requirements

BIA also must evaluate other regulatory criteria. These include the "impact on the State and its political subdivisions" and "[j]urisdictional problems and potential conflicts of land use which may arise;" whether BIA is "equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status;" and "a plan which specifies the anticipated economic benefits associated with the proposed use." 25 C.F.R. §§ 151.10(b), (c), (e), (f), (g) and § 151.11(c). Moreover, because this land is off-reservation, BIA was required to give greater scrutiny to the Band's asserted justification and purpose, and greater weight to jurisdictional and tax impacts. 25 C.F.R. § 151.11(b). BIA failed properly to evaluate these requirements.

1. BIA Did not Adequately Consider the Tax Impacts, or The Jurisdictional and Land Use Conflicts.

The County's tax loss over the next 50 years would be from *at least* $35 million (if there is no development) to in excess of $275 million under the Proposed

[12] *See* Final Environmental Evaluation Santa Ynez Band of Chumash Indians Hotel Expansion Project 3-42 (Sept. 2014), *available* at http://www.chumashee.com/wp-content/uploads/2014/09/Hotel-Expansion-Final-EE-September-2014.pdf.

Action. PSUF 58. BIA and the Principal Deputy only considered the historically low taxes that the Band paid previously by virtue of Camp 4's enrollment under the Williamson Act, and dismissed the tax loss as "de minimis" and "insignificant." PSUF 59. But, as part of its application, the Band withdrew from the Williamson Act. PSUF 60. As a result, even with no development, Camp 4's assessed value would result in tax liability of $340,000 annually, not the $81,000 the Band previously paid. With development, the tax liability would approximate nearly $5.5 million per year (taking the County's estimate of nearly $275 million over 50 years). The enhanced tax rate therefore should have been considered: it would properly reflect the increased demand imposed on public resources from the additional at least 415 residents and the additional visitors to Camp 4, which would have a detrimental impact on the rural roads, the community schools, and Santa Barbara County Sheriff's and Fire Department's ability to respond to the community needs. The refusal to consider the actual tax resource impact in the present context, where the Williams Act basis for the low taxes no longer applied, was improper.

As to jurisdictional problems and potential conflicts of land use, Camp 4 is presently zoned for agricultural use: AG-II-100. PSUF 61. The development of residential units and supporting infrastructure is inconsistent with this designation and with the surrounding land, and would contravene the County's General Plan, the SYVCP, and County regulations. BIA failed to consider this conflict and the Proposed Action's impact on surrounding properties and the health, safety, and regulatory problems that will arise. PSUF 63.

The Principal Deputy dismissed Plaintiffs' concerns based on lack of standing. PSUF 63. However, Plaintiff Crawford-Hall demonstrated Plaintiffs' prudential standing under 25 U.S.C. § 5108, as well as their particularized injury to legally protected interests.[13] *Match-E-Be-Nash-She-Wish Band v. Patchak et al.*, 567 U.S.

[13] Plaintiff exemplifies the community's commitment to agriculture. She has voluntarily encumbered her property (which would constitute a premier building site),

209, 224-225 (2012); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). These Plaintiffs have standing to challenge Defendants' actions under the APA.

2. The NOD fails for lack of the required business plan.

Where off-reservation land is acquired for "business purposes," the applicant must provide a business plan. 25 C.F.R. § 151.11(c). Although the Band proposed to utilize the land for economic pursuits (vineyard and a horse boarding stable), no business plan was included. PSUF 64. The NOD dismissed the business plan as unnecessary because these businesses are "on-going." PSUF 65. But the regulations do not exempt on-going business from the requirement of a business plan, nor is there any logical reason to support such an exemption. Because the Application was deficient in this regard, the NOD is invalid.

Additionally, after the NOD issued, the Band produced, for public view, maps that designated general commercial uses for Camp 4 which had not been part of the original application. PSUF 66. The Principal Deputy did not consider whether this constituted new information to justify reopening the matter. PSUF 67. Yet these new plans raised questions whether all commercial uses had been considered by BIA. These new plans should have resulted in supplemental consideration.

3. BIA Did Not Analyze Whether It Could Discharge Responsibilities

BIA must consider whether it is "equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status." 25 C.F.R. § 151.10(g). BIA concluded that emergency services would be provided by the County Fire and Police Departments through agreements with the Band. PSUF 68. But those agreements were for services on the current reservation and did not extend to Camp 4. PSUF 69. BIA therefore failed entirely to address how BIA would discharge these additional duties with regard to the Camp 4 property acquisition.

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with a conservation easement which precludes *any* development. PSUF 62.

IV. CONCLUSION

Defendants' actions in processing the instant Camp 4 fee-to-trust matter were patently improper. The Decision was exactly what the FVRA was designed and enacted to prevent. On the last day of the Obama presidency, a Principal Deputy who lacked authority issued a final decision in an appeal laden with substantial policy issues. This Court should not condone an end-run around the FVRA, or the plain terms of the Department's own regulations. Rather, it should find that the Principal Deputy's actions are null, void and of no effect, and may not be ratified.

Additionally, the Defendants failed to comply with their NEPA and regulatory obligations in approving the Camp 4 fee-to-trust application. Substantial questions whether significant impacts existed, which should have compelled the preparation of an EIS. Instead, Defendants relied on an FEA which was misleading as to groundwater, understated water usage, contained vague and potentially unenforceable mitigation "recommendations" and failed to analyze other critical issues. Defendants' regulatory analyses were equally arbitrary, given the massive size of this project. Defendants failed to consider important aspects of the problem, offered explanations for decisions that ran counter to the evidence, and were implausible. Under the APA, these actions were arbitrary, capricious, an abuse of discretion, and outside the law.

Plaintiffs request that this Court grant summary judgment or, in the alternative, partial summary judgment on their Claims, and direct the Defendants to vacate, revoke and rescind the Decision, the NOD, and the Acceptance of Deed; and to prepare an appropriate EIS prior to rendering any decision on the Band's application.

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