A. Barry Cappello (SBN 037835)
abc@cappellonoel.com
Lawrence J. Conlan (SBN 221350)
lconlan@cappellonoel.com
Wendy D. Welkom (SBN 156345)
wwelkom@cappellonoel.com
CAPPELLO & NOEL LLP
831 State Street
Santa Barbara, California 93101
Telephone: (805) 564-2444
Facsimile: (805) 965-5950

Attorneys for Plaintiffs
Anne Crawford-Hall, San Lucas Ranch, LLC,
And Holy Cow Performance Horses, LLC

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' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Filed concurrently herewith:
(1) Supplemental Declaration of Wendy D. Welkom In Support Of Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment

Date: July 30, 2018
Time: 3:00 P.M.
Courtroom: 10
Judge: Hon. Stephen V. Wilson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

Other Authorities

I. INTRODUCTION

Defendants challenge Plaintiffs' First Claim, but do not provide the Court with the text of 25 C.F.R. § 2.20, the regulation at issue. The reason is because the regulation's text is very clear, and it defeats the Defendants' argument. The regulation expressly *limits* the Principal Deputy's authority, at the same time that it expressly allows *only* the AS-IA to issue a final appellate decision. The Defendants' theory turns this plain language on its head. It ignores the policy decisions made by the Department during the rulemaking process, to authorize *only* the AS-IA to take jurisdiction from the IBIA and render a final appellate decision, and explicitly to *reject* handing the Principal Deputy that same final authority. Under the Administrative Procedures Act, the Federal Vacancies Reform Act, and the Appointments Clause of the U.S. Constitution, the Principal Deputy's action of purporting to issue a final decision was unauthorized. His action was arbitrary, capricious, and outside of law. It is null, of no effect, and cannot be ratified.

Regarding NEPA, the administrative record is clear that, as the drought heightened, as neighboring well levels dropped, and as the State water allocations were reduced to zero, BIA changed its original 2013 EA analysis which acknowledged a basin in *overdraft* status, to a 2014 FEA analysis of that same basin in *surplus*. The record also establishes that there were knowledgeable criticisms of the EA and FEA, rendering BIA's water resource calculations suspect and the environmental documents controversial. The record also demonstrates that critical mitigation measures were inadequately discussed/explained and most merely "recommended," not "required." The Defendants' argument is that they only had to "consider" these issues, not resolve them. But that argument is flatly inconsistent with their obligation to present a convincing case that there were no questions whether environmental impacts might exist. Under standard NEPA law, they failed to present a convincing case and an EIS should be prepared.

/ / /

Regarding the review of factors under the IRA regulations, BIA also failed to comply with its obligations. It ignored or dismissed manifestly evident land use, jurisdictional conflicts and tax impacts, and did not require the Band to provide a business plan despite business uses being anticipated for the property. In addition, the BIA failed to acknowledge that there were services it might be required to perform, or its inability to perform them. As a result, the NOD and Decision fail.

This Court should find that the Decision was unauthorized when issued, rescind and revoke the Decision and the Acceptance of Deed, and order the new AS-IA to review this matter anew. In the alternative, the Court should find that the Defendants failed to comply with their obligations under NEPA and the Indian Reorganization Act ("IRA"), and remand this matter for preparation of an EIS and additional review under IRA. Under either of these two findings, the Acceptance of Deed should be revoked, rescinded and vacated.

II. THE AS-IA HAS THE EXCLUSIVE FUNCTION AND DUTY OF RENDERING A FINAL DEPARTMENT APPELLATE DECISION

The Defendants contend that the authority to issue a final Department appellate decision is not exclusive and may be delegated. This theory makes a mockery of both the purpose and the plain language of the actual regulation. A conclusion of non-exclusivity is flatly inconsistent with the evident and overriding textual distinction called out in the regulation. It would negate the Department's notice and comment procedures, which identified the policy reasons for the Department's stated distinction between the final authority of the AS-IA and that of the Principal Deputy. For these and other reasons, the Defendants' argument should be rejected.

A. The AS-IA, and Only the AS-IA, May Take Jurisdiction from IBIA And Issue a Final Decision for the Department

The authority of the Assistant Secretary-Indian Affairs ("AS-IA") to take an appeal from the Internal Board of Indian Appeals ("IBIA") is set forth in two sets of related regulations, under 25 C.F.R. Part 2 and under 43 C.F.R. Part 4. First, 25

C.F.R. § 2.20(c) states, in relevant part:

> "In accordance with the provisions of § 4.332(b) of title 43 of the Code of Federal Regulations, a notice of appeal to the Board of Indian Appeals shall not be effective until 20 days after receipt by the Board, during which time the Assistant Secretary--Indian Affairs *shall have authority to decide to:*
> *(1) Issue a decision in the appeal, or*
> *(2) Assign responsibility to issue a decision in the appeal to a Deputy to the Assistant Secretary--Indian Affairs.*
> The Assistant Secretary--Indian Affairs will not consider petitions to exercise this authority." (Emphasis added.)

The corresponding regulation, 43 C.F.R. § 4.332 (b), states:

> "In accordance with 25 CFR 2.20(c) a notice of appeal shall not be effective for 20 days from receipt by the Board, *during which time the Assistant Secretary -- Indian Affairs may decide to review the appeal*." (Emphasis added.)

Under the above regulations, the AS-IA has exclusive authority to decide to take jurisdiction from IBIA and issue a decision. Department comments during the rulemaking process expressly stated: "In order to make clear that this section is not intended to give the parties to an appeal a choice of forum, but rather to *vest the exclusive authority to assume jurisdiction over an appeal in the Assistant Secretary*, a sentence has been added to § 2.20(c) stating, 'The Assistant Secretary – Indian Affairs will not consider petitions to exercise this authority.'" 54 Fed. Reg. 6478, 6479, emphasis added.

Under the above regulations and Department comments, *only* the AS-IA may take appellate jurisdiction from IBIA and decide the appeal, and this function and duty is *exclusive* to the office of AS-IA. Having taken jurisdiction, the AS-IA, *alone*, also has exclusive authority to assign appellate review to a Deputy. In this case, it was not assigned by Mr. Washburn; rather, he retained the appeal for his own determination.

/ / /

Title 25 C.F.R. § 2.20(c) continues:

> *If the Assistant Secretary--Indian Affairs decides to issue a decision in the appeal or to assign responsibility to issue a decision in the appeal to a Deputy* to the Assistant Secretary--Indian Affairs, he/she shall notify the Board of Indian Appeals, the deciding official, the appellant, and interested parties within 15 days of his/her receipt of a copy of the notice of appeal. . . . *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), *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), emphasis added.

The above text is specific in limiting the finality authority of the possible decision makers. Only the AS-IA had exclusive authority to take jurisdiction from IBIA and issue his or her decision, which would be a final decision. The Deputy AS-IA could be assigned a decision by the AS-IA, and could only issue a decision which was subject to further review by IBIA. The basis for these clear-cut lines of authority was the Department's determination that *only* the AS-IA, a PAS position, was authorized to make policy determinations for the Department. As contemporaneous Department comments explained:

> "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: . . . *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.

/ / /

/ / /

/ / /

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): *As a Secretarial-level official, the Assistant Secretary -- Indian Affairs has authority to issue or approve decisions that are final for the Department. . .*
>
> Section 4.332(b): . . . .The usual appeal procedures within the Department do not include appeals to the Assistant Secretaries. . . . [¶] 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.* The Assistant Secretary – Indian Affairs is aware that such assumption of jurisdiction will operate to alter the legitimate expectations of the parties as to normal processing of their appeals. *For this reason, the final regulations issued by the Bureau of Indian Affairs show that the authority to assume 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. . . [Emphasis added.] 54 Fed. Reg. 6483, 6484-6485.

Under the above regulations, the Principal Deputy is *not* authorized to take jurisdiction from IBIA. The IBIA handles most appeals, and taking jurisdiction from IBIA is reserved *solely* for the AS-IA. Likewise, the Principal Deputy may only issue a decision *if* the AS-IA, who has exclusive authority, then assigns it to him/her, and any decision signed by the Principal Deputy is not final, but reviewable by IBIA, the other final appellate decisionmaker. The basis for these distinctions -- that the AS-IA was a Secretarial-level (PAS) position, and therefore authorized to make final policy decisions for the Department -- was carefully thought through and formalized during the rulemaking procedure. There is no basis on which the regulations can be read as giving non-exclusive authority to the AS-IA to delegate these appellate jurisdiction-taking and finality functions to a Deputy.

B. Department Regulations Preclude Delegation of Final Appeal Authority to the Principal Deputy

Defendants rely on the fact that Department regulations authorize more than the AS-IA to decide appeals. Def. Br., Dkt. 51-1, Page ID # 834. This reliance is

misplaced. The regulations relied on, 25 C.F.R. § 2.4, and 43 C.F.R. §§ 4.312 and 4.5, disprove the Defendants' contention.

While 25 C.F.R. § 2.4 does provide that several different officials "may" decide an appeal, it also strictly limits the scope and final authority of those reviewing persons/entities, by providing explicit qualifying criteria for each:

> The following officials may decide appeals:
>
> (a) An Area Director, ***if*** the subject of appeal is a decision by a person under the authority of that Area Director.
>
> (b) An Area Education Programs Administrator, Agency Superintendent for Education, President of a Post-Secondary School, or the Deputy to the Assistant Secretary--Indian Affairs/Director (Indian Education Programs), ***if*** the appeal is from a decision by an Office of Indian Education Programs (OIEP) official under his/her jurisdiction.
>
> (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* other than the Deputy to the Assistant Secretary--Indian Affairs/Director (Indian Education Programs). (Emphasis added.)

Under the above, subsections 2.4(a) and (b) have express "if" qualifiers which list the types of appeal these officials may entertain. Notably, these appeal decisions are not final, as further appellate review is provided under 25 C.F.R. § 2.6, discussed below. In any event, because the instant appeal is not from one of those two listed reviewable decisions, those subsections are inapplicable here.

Subsections 2.4(c) and (d) are the critical provisions at issue in this case. Under subsection 2.4(c), the AS-IA has decision making authority *pursuant to §2.20*. Turning to § 2.20, AS-IA Washburn had the authority to take the appeal from IBIA and decide it, himself. He also had the authority to assign it to his Principal Deputy, if he wanted to. In this case, he did not assign the decision: he kept this appeal for his own review and determination. Under subsection 2.20(c), he therefore had sole *final* decision-making authority as expressly stated in that subsection.

In parallel fashion, subsection 2.4(d) provides that a Deputy to the AS-IA has decision-making authority *pursuant to § 2.20(c),* i.e., *not all of § 2.20*, as did the AS-IA. Turning to § 2.20(c), one finds that the Deputy has authority to decide an appeal ***if*** the AS-IA assigns it to him, and that the Deputy's decision is ***not*** final, but appealable to the IBIA. The Deputy's non-final limitation is then re-confirmed in subsection 2.4(e), which sets forth the decision-making authority of the IBIA. That subsection states that the IBIA may decide appeals from *either* the BIA Regional Director (the typical appeal route for an appeal of a fee-to-trust decision), *or from the Deputy to the AS-IA*. In other words, IBIA is the final decision-maker in normal appeals of the BIA fee-to-trust decisions, as well as review of decisions by the Deputy to the AS-IA; IBIA may *not* review decisions by the AS-IA, however.

This same distinction is further confirmed by 25 C.F.R. § 2.6(a)-(c), which provide: (a) that a decision that is subject to further review by a superior authority (i.e., a BIA or Deputy decision, each of which is appealable to IBIA) is not final; (b) that BIA decisions are final only after the appeal time has run and no appeal was filed; and (c) that a decision by the AS-IA is final and effective immediately. These regulations give no support to the Defendants' assertion that the *finality* appellate function is authorized for many different officials; rather, normal finality is reserved only for BIA decisions which are not appealed; for IBIA decisions; and for AS-IA decisions when the AS-IA has taken jurisdiction from IBIA.

Title 43 C.F.R. §§ 4.5 and 4.312 also do not support Defendants. Subsection 4.5(a)(1) and (2) simply state that the Secretary has the power to take jurisdiction from a hearing judge or a review board, except for decisions related to contract disputes, and render the final decision or remand the matter. Subsection 4.5(b) allows the Director, "pursuant to delegated authority from the Secretary," to take cases from the reviewing board. Subsection 4.5(c) confirms that in any case where the Secretary or Director takes jurisdiction, the Department personnel will be notified and a written

/ / /

decision will be issued after the review is complete. Nothing in this regulation addresses finality of any decision.

Moreover, with respect to the Director's authority which must be delegated from the Secretary, such delegation is expressly provided in another regulation. Title 43 C.F.R. § 4.1 states that the Director heads the Office of Hearings and Appeals, and "is *an authorized representative* of the Secretary for the purpose of hearing, considering and deciding matters within the jurisdiction of the Department involving hearings, appeals and other review functions of the Secretary. The Office may hear, consider and decide those matters as fully and finally as might the Secretary, subject to any limitations on its authority imposed by the Secretary." No similar regulation with express delegation is applicable for matters as between the AS-IA and the Principal Deputy. To the contrary, the regulations are explicit that the line of final authority in the appellate situation is entirely different.

Finally, subsection 4.312 likewise does not help the Defendants. It states that decisions of the IBIA are final. This is consistent with the appellate regulations in 25 C.F.R. Part 2. That is, unless the AS-IA takes jurisdiction, the IBIA is authorized by regulation to issue a final decision. No such definitive statement exists for the Principal Deputy; rather, the explicit statements are 180 degrees to the contrary.

C. Defendants' Authority Supports Plaintiffs, Not Defendants

Defendants cite *Schaghticoke Tribal Nation v. Kempthorne*, 587 F.3d 132 (2nd Cir. 2009), and *Stand Up for California v. U.S. DOI*, 298 F. Supp. 3d 136 (D.D.C. 2018), as support for the proposition that the finality of appellate agency decisions is non-exclusive. Defendants are wrong. In *Kempthorne*, the plaintiff challenged a determination issued by the Associate Deputy of the Interior in an acknowledgment proceeding, claiming it was issued in violation of the FVRA. *Kempthorne,* 587 F.3d at 134-35. However, the relevant regulation in the case, 25 C.F.R. § 83.1, stated that Indian "acknowledgment decisions may be made *either* by the 'Assistant Secretary-Indian Affairs' *or* by his or her 'authorized representative.'" *Id.* at 135, emphasis in

original. Thus, because the regulation in *Schaghticoke* specifically authorized an appointed representative to render decisions, the FVRA did not apply and the court upheld the Deputy's final determination. *Id.*

By contrast, 25 C.F.R. § 2.20, the relevant regulation governing BIA *appeals* here, explicitly states that *only* an appeal decision signed by the AS-IA after taking jurisdiction from IBIA is "final" and "effective immediately." The regulations do not specifically authorize any other representative of the AS-IA to render final decisions, and in fact expressly state the contrary, *i.e.*, an appeal decision signed by a Deputy of the AS-IA "may be appealed" to the IBIA. *Id.*

In *Stand Up*, plaintiff challenged an *initial* determination by the Principal Deputy in a fee-to-trust decision. The D.C. District Court found that delegation was presumed where the regulation was silent and there were no express or implied agency statements during the rulemaking process to demonstrate that delegation was not permitted. *Stand Up*, 298 F. Supp .3d at 143-144. Here, by contrast, as shown in Plaintiffs' opening brief, there were numerous agency statements showing that the Department gave thorough and complete consideration to the issue of delegation for agency appeals, and expressly stated in rulemaking comments and in the language of the appeal procedure regulations, that only the AS-IA (or IBIA) would have final appellate authority.

It is worth noting that the *Stand Up* case also challenged an eleventh-hour decision (*not* an appeal decision) issued by the same Principal Deputy in this case. Recently, the *Stand Up* Court has found a *prima facie* case of bad faith by the Defendants related to the BIA process in that fee-to-trust matter. See, *Stand Up for California! v. DOI*, 2018 U.S. Dist. LEXIS 90205 (D.D.C., Case No. 1:17-cv-00058, 5/30/2018), at *15-17. The bad faith circumstances included the hurried review process after substantial delay, a documented effort to issue the decision before the change in Presidential Administrations, the disparity between the Department's representation about uncertainty in time line contrasted with the Department issuing

the decision a week later, and political pressure from the Senate Committee on Indian Affairs. *Id*. The bad faith finding resulted in the Court ordering the Defendants to produce a privilege log. That same untoward pressure and rush to decide before the Administration changed likely informed the instant decision. Indeed, the Principal Deputy's signing of decisions on his last day may be reminiscent of the robo-signing debacle which occurred in the run up to the last depression.

Here, neither *Schaghticoke* nor *Stand Up* involve the instant appeal regulations.[1] Neither involves the explicitly-stated division of final authority between the AS-IA and the Principal Deputy as shown in the plain language of the appellate regulations under 25 C.F.R. Part 2 and 43 C.F.R. Part 4. Accordingly, the function of finality is exclusive to the AS-IA once jurisdiction is taken from IBIA.

D. Reliance On The Department Manual Delgation Is Unavailing

Finally, Defendants also cite the Department Manual ("DM"), at 200 DM 1.3 and 209 DM 8. These sections merely outline general delegation, however. They do not identify any specific authority, exercisable only by the AS-IA, that is generally delegated.

In fact, 209 DM 8, cited by Defendants, is the very DM section the Department relied on in promulgating the final agency appeal rules for 25 C.F.R. Part 2: *i.e.*, the appeal rules were published "in exercise of rulemaking authority delegated by the Secretary of the Interior to the AS-IA by *209 DM 8*." 54 Fed. Reg. 6478, 6470. It is implausible to believe that the Department expected that the expressly-stated, exclusive authority given only to the AS-IA could be vitiated by an alleged non-exclusive general delegation derived from 209 DM 8, the same DM section it cited in promulgating the plain language of the exclusive distinction.

---

[1] The agency appeal rules in 25 CFR Part 2 do not apply if other regulations or Federal statutes provide a different administrative appeal procedure. 25 CFR §2.3(b).

In addition, case law confirms that courts do not afford deference to agency manuals, when they are not based on comment and rule-making procedures, or are contradicted by the plain text of the regulation. *Schweiker v. Hansen*, 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) (policy statements, agency manuals, and enforcement guidelines, which lack the force of law, do not warrant deference); *Christensen v. Harris Cnty*, 529 U.S. 576, 588 (2000) (no deference when the language of the regulation is not ambiguous); *Mata v. Mukasey*, 543 F.3d 1165, 1167 (9th Cir. 2008) (court is not obligated to accept an agency interpretation clearly contrary to the plain and sensible meaning); *Borgess Med. Ctr. v. Burwell*, 843 F.3d 497, 501 (D.C. Cir. 2016) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 512 (1994) (deference does not apply if an alternative reading is compelled by the regulation's plain language or other indications of the Secretary's intent at the time of the regulation's promulgation). Courts also reject deference to an agency opinion on a statute which the agency is not charged with administering. 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). Here, the FVRA applies, and the Principal Deputy's Decision is null, void, and of no effect. The Decision also cannot be ratified. The Decision and the subsequent Acceptance of Deed should therefore be revoked and rescinded.

III. BIA FAILED TO COMPLY WITH NEPA AND SHOULD BE ORDERED TO PREPARE A THOROUGH EIS

Defendants proffer a list of the various environmental factors which BIA purportedly weighed and evaluated. Def. Br. at 14-15, Dkt. 51-1 page ID ##823-824. However, scrutiny of this list *does not* demonstrate that BIA took the required "hard look" at the environmental impacts. See, *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1070 (9th Cir. 2002); 42 U.S.C. § 4332(C). Rather, it shows BIA disregarded relevant information, or simply ignored the issues. An agency's decision

not to prepare an EIS will be considered unreasonable if the agency fails to supply a convincing statement of reasons why potential effects are insignificant. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998). That is the case here.

Defendants' authority, *Kern v. U.S. Bureau of Land Management*, 284 F.3d 1062 (9th Cir. 2002), in fact supports Plaintiffs, not Defendants: it finds the agency violated NEPA as to both the EA and EIS at issue in that case. The environmental document used non-NEPA evaluated documents as a basis for conclusions, and the conclusions were non-specific future plans promising to be more specific. *Id.* at 1074. The same is true in this case, and the FEA and FONSI therefore violate NEPA.

A. The BIA Improperly Evaluated Environmental Effects

Plaintiffs' opening brief established that there were substantial questions whether the project would have significant impacts to water and other resources. Pltfs' Br. at 21-29, Dkt. 52-1, page ID ## 861-869.[2] Defendants' opening brief citations to the record confirm the existence of these questions.

Water. Defendants' listing does *not* demonstrate that BIA performed an adequate analysis as to water resources. To the contrary, that list confirms that BIA presented a misleading picture of the Uplands Basin as in a state of "surplus," *despite* the existence of an unparalleled historic drought, the lowering of neighboring wells, the failure to consider more recent information, the admitted potential ineffectiveness of the new wells, and the admitted significant impacts of alternative well locations. See, AR0194.00046, .00125, .00155, .00173, .00178, .00753, .01698-01699, .01733-01734, .01745. Basing a finding on outdated and misleading information is a classic

[2] See, also, Plaintiffs' comments on the Camp 4 proceeding, found at AR0063.00001-.00006, AR0109.00001-.00027, AR0194.01440-.01451, AR0237.00322-.00335, and AR0247.00001-.00002. All citations to AR pages that were not previously included in the Declaration of Wendy D. Welkom in support of Plaintiffs' Motion for Summary Judgment or, in the alternative, for Partial Summary Judgment, are included as Exhibit A in the concurrently-filed Supplemental Declaration of Wendy D. Welkom ISO Plaintiffs' Response in Opposition to Defendants' Motion for Summary Judgment.

case of arbitrary and unreasonable conduct under the APA. Notably, the Defendants' list includes the following:

- The admission that the County has declared a drought emergency, demonstrating full knowledge of the drought (AR0194.00734);
- The admission that Santa Ynez River Water Conservations District, Improvement District No. 1 ("ID No. 1"), which supplies Camp 4's neighbors and the Band's casino, relies on allotments from the State Water Project, showing it knew water allotments were key to any maintenance of the basin (AR0194.00101);
- The admission that two new wells "could result in significant adverse affects to adjacent wells if placed in close proximity" (AR0194.00155-156);
- an admission that, while "new wells located in the northeastern portion of the project area would likely provide the best onsite production, the nearby offsite wells northeast of the project area could experience significant water-level impacts from project wells in that location" (AR0194.00750); and,
- statements that the project would respond to drought emergencies merely by reducing turf/grass and lawns, and nothing else, during those emergencies. AR0194.00125, .00156, .00196, .00734, .00736-737, .00739-740, .00746, .00754, .01891.[3]

BIA literally dismissed any comment that suggested the basin might *not* be in a state of surplus, or that imported water might *not* exist. For example, Plaintiffs had

[3] The FEA also states that the "No Action" alternative would increase the water usage because the vineyards would be expanded. AR0194.00033. It then misleadingly compares the water usage in Alternative B to the expanded water usage of the "No Action" alternative in an attempt to foster the favorable (but nonspecific) idea that Alternative B is the best option for water resources.

cited to a County comment confirming that "recent data suggests that the supplemental supplies obtained from the State Water Project and the Cachuma Project, that helped create a surplus in the past, will not constitute a long-term, stable additional water source (PW)." AR0237.00075-76. BIA's response was to note only that "[t]he reference [to 'PW'] is not recognized by the BIA and does not supersede the references of the [2009] SYVCP presented in the Final EA." AR0237.00442. BIA's response ignored that the County had previously defined "PW" to refer to expert comments from its Public Works department (AR0237.00051-2). BIA therefore dismissed relevant evidence, choosing instead to rely on a document drafted six years previously, *before* the drought, *which had itself contained qualifiers negating the "surplus" if imported water was not obtainable.* This refusal to consider the facts and impacts of drought underscore the inadequacy of the FEA and FONSI.

In like fashion, BIA dismissed comments by other experts as to water resources, where criticisms should have confirmed the project was controversial and required an EIS. See, AR0237.00360 (Santa Ynez Rancho Estates Mutual Water Company); AR0194.01155, 1162-1164 (ID No. 1, which found water usage failed to consider certain factors, which would increase the amount needed per year and result in a 30 percent increase in the overdraft amount of the basin); see, *Found. For N.Am. Wild Sheep v. U.S. Dept. of Agriculture*, 681 F.2d 1172, 1182 (9th Cir. 1982).[4]

Other water elements were also insufficiently considered. For example, recycled water is mentioned without any specific information on how the recycled system will work, the quantities of water it will hold, or other necessary supporting data. AR0194.00124-.00125. And, while pumping tests were performed on Camp 4's two productive wells (AR0194.00047), which the Principal Deputy found was a key

[4] Defendants note that "BIA received and considered over one thousand comment letters." Def Br., Dkt. 51-1, page ID #828 at 24-25. Defendants fail to mention that 1,063 letters are form letters dated October 21, 2013, delivered by the Band's counsel to BIA in a notebook, and obviously not prepared by the individuals who signed them. See, e.g., AR0077.00001, .00002, .00003, .01064. These letters do not address any environmental issues, and it is unclear if any of the signers reside in the Valley.

point supporting affirmance (AR0258.03458-3459), these wells were only tested to see whether Camp 4's agricultural needs could be met, *not* the residential and tribal facility needs. AR0194.01698, .01745.

Finally, Federal water rights, which Defendants assert were "weighed" and "evaluated," were neither weighed nor evaluated. They were simply noted as part of the project. There was no discussion of the possible legal issues surrounding such rights, the potential that the Band might sell water pumped from wells under an assertion of such rights, or the other impacts that could result for neighbors and the community served by the basin, particularly in a drought situation. See, Def. Br. p. 14, Dkt. No. 51-1, page ID # 823; AR0194.00047.

The above errors are glaring. They demonstrate BIA's failure to consider an important aspect of the problem, or BIA's offer of an explanation that runs counter to the evidence before it, or is so implausible that it could not be ascribed to a difference in view or 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. DOI*, 113 F.3d 1121, 1124 (9th Cir. 1997). The water resources errors, standing alone, should mandate remand to the agency with directions to take Camp 4 out of trust and to prepare a thorough EIS.

Land Use. Agriculture is Santa Barbara County's most valuable industry, with gross production value of approximately $1.2 billion, annually. AR0194.00101. The Camp 4 development would convert purely low density agricultural uses to residential, event, and tribal facility uses, and bring a substantial number of additional residents (at least 415), employees (40+), and visitors (800 per weekend[5]) into this rural area. AR0194.00019, 22-23, 28-29, 141, 166, 1723. As of 2009, when the Santa

[5] Plaintiffs mistakenly stated that there would be 400 visitors per weekend in their opening brief. The figure is actually 800 visitors per weekend. AR0194.00029 (100 events per year with 400 attendees plus vendors, *i.e.*, 2 events each weekend).

Ynez Valley Community Plan ("SYVCP") was issued, this rural area lacked the resources necessary to support such a development.

The conversion of agricultural land to other uses is of great significance to the State, region, and locality. Agriculture provides economic and environmental benefits; it protects the recharge of groundwater basins, wildlife habitats, open spaces, and visual relief for residents. AR0195.00365-395, 408, 423, 426-427, 432, 453-456. Yet the FEA does not provide basic information about the components of the development, such as the full scope of the residential[6] and any accessory structures, or the tribal facilities, so these cannot be evaluated. AR0237.00005-6; AR0194.01722-23. The FONSI also downplays the conversion of Camp 4, by citing to continued grazing operations (AR0237.00439), but provides no data analyzing the viability of that grazing operation or whether it will remain in agricultural use. AR0194.00098-99. Rather, the FEA simply asserts that the land will be removed from County jurisdiction and thus County land use regulations will not apply. AR0194.00140, 166. This improperly presupposes approval of the project, which violates NEPA. *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1084-85 (9th Cir. 2011). Notably, Camp 4's neighbors will be constrained to comply with County regulations.

The FEA also improperly asserts that adverse impacts would only result if the County was unable to continue to implement existing land use policies outside of the project boundaries, and that this will not occur because the project is "similar" to other development. AR0194.00034, 95. This is wrong: no other development bordering Camp 4 has one-acre residences (an *urban* development); most are required to be a minimum of 100 acres. *Id.*

---

[6] The Band is comprised of 136 members and no explanation is given for the project containing 143 residences, rather than 136, except for the continual reference to "1300 lineal descendants." See, e.g., AR0194.00014, .00341. The basis for 143 residences is unclear, since acquired lands may only be used by tribe members. 25 U.S.C. § 5110.

Moreover, disparate land use policies *within* the project would impact the surrounding uses. One example is the need for agricultural buffers. The FONSI states that "there is more than adequate area available on each residential lot to site structures while maintaining an appropriate buffer of 100 to 300 feet." AR0237.00441. But the FONSI does not explain how a buffer will be ensured, such as confirming an easement for this space. The FONSI also does not include a discussion of the uses that would be allowed in the buffer zone. If uses such as hikers, or children playing are allowed, this will impact agriculture. Or, if the 100 to 300-foot buffer is not maintained, it would provide a haven for invasive weeds and pests which impact adjacent agriculture.

The FONSI effectively dismisses the impact of Camp 4 on its agricultural neighbors. AR0237.00440. This urban project in a rural, agricultural setting can cause trespassing, vandalism, nuisances, and decreased farming potential or crop productivity. AR0237.00065, .00091. In short, significant land use impacts are brushed aside.

Traffic. BIA dismissed comments by the California Department of Transportation, which advised that the traffic study for the FEA was flawed and misrepresented actual operating conditions. AR0248.00001; AR0194.01085-87. BIA used an incorrect minimum operating standard for Highways 154 and 246, misapplied methodology outlined in the Highway Capacity Manual, and failed to address mitigation. *Id.* There is no basis on which to ignore comments from the governmental entity responsible for highway design, construction and maintenance.

B. BIA Improperly Described and Evaluated Mitigation

The Defendants contend that the mitigation will be binding "because it is intrinsic to the project, required by federal law, required by agreements between the Tribe and local agencies, and/or subject to a tribal resolution" and will be monitored and enforced for the same reasons. Def. Br. at 20, Dkt. No. 51-1, page ID #829, citing AR0194.194 and AR0237.499. However, these statements are devoid of citation to

statute or regulation; and none of the alleged agreements and not all of the apparent tribal resolutions are included, so these cannot be reviewed. This general statement, devoid of supporting citation or documents, is thus inadequate.

Looking to the FONSI, however, for some clarification of whether mitigation can and will be enforced, the only mitigation measures that are "required" are for Oak Trees, Waters of the U.S., Vernal Shrimp, the red-legged frog, nesting migratory birds and other birds of prey and, in part, cultural resources. AR0237.00015-18. The rest are merely "recommended." AR0237.00013-14, .00018-21. Whatever the reason so few mitigation measures are "required," and so many are only "recommended," the words are clear. And, since very few are required, it follows that only these very few could be enforceable at all.

More critically, the FEA mitigation measures do not provide the detail and discussion required to support a FONSI. Most of them simply list Best Management Practices ("BMPs") without data regarding their effectiveness or ability to reduce a specific impact to an insignificant level. AR0194.00194-204; AR0237.00011-21. Many are recommended only so far as is "feasible" or a similar general statement. See e.g. AR0194.00194, .00339; AR0237.00012, 00020. This listing of measures, absent analytical data, is insufficient under NEPA. *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208 (9th Cir. 1998); *W. Land Exch. Project v. U.S. Bureau of Land Management*, 315 F. Supp. 2d 1068, 1091 (D. Nev. 2004).

For example, the FONSI proposes to mitigate the loss of oak trees with replacement at a no net loss ratio. AR0237.00015. But local regulations require a specific 15:1 replacement ratio to account for the less than 100% survival rate and mitigation of lost habitat until the trees mature. AR0237.00142-145. The Department of Fish and Wildlife agreed that this 15:1 ratio should be used. AR0194.01092.[7] The

[7] These differences in expert opinions on critical environmental issues typify a controversial project, which should require an EIS. *Found. For N. Am. Wild Sheep v. U.S. Dept. of Agric.*, 681 F.2d 1172, 1182 (9th Cir. 1982).

FONSI does not commit to such ratio, or state what BIA understands as "no net loss."

Another example is recycled water. While the FONSI states that recycled water would be used (AR0237.00006, 00013), it does not describe the proposed recycling program, how the program would be implemented, and the specific impact it would have on the surrounding area. AR0237.00006. The FONSI simply asserts that the recycling program would reduce the acre-feet per year of water use by 30 and 34 for alternatives A and B, respectively, without stating how it would accomplish such an ambitious objective. *Id.*

Furthermore, while the FONSI and FEA give a nod to water resource mitigation by proposing not to water turf or grass during a drought emergency, this does not address the overdraft of the basin, or long-term water resource issues. The only response to concerns about the overdraft situation is the FONSI's "recommendation" to site at least one of the new wells away from neighboring wells, which was accompanied by no guarantee that this would occur, and the corresponding note that the best locations are in fact those near neighboring wells. AR0194.00125, .00156, 00754, AR0237.00006, .00475. These mitigation measures are not a commitment to mitigation, despite the existence of admitted impacts. *See also* Dkt 52-1, pageID #868.

C. BIA Failed to Evaluate Cumulative Impacts

The analysis of cumulative impacts must be more than perfunctory. *Kern, supra*, 284 F.3d at 1075. BIA's analysis did not fully consider the casino, reservation, or other foreseeable Band developments. For instance, until responding to the comments on the FEA in the FONSI, BIA did not mention the 6.9 acres of land in the Valley approved to be taken into trust for the Band, or other proposed trust acquisitions in the area. AR0194.00176-177; AR0237.00435. As a result, the significant increase in patrons from that project was not analyzed in the FEA. On the 6.9 acre project, the Band planned to develop a 42,000 square foot Tribal Museum, cultural center, and commercial retail facility, a 3.5 acre commemorative park, and

/ / /

100 parking spaces. AR0237.00435; see, Environmental Evaluation Santa Ynez Band of Chumash Indians Hotel Expansion Project at 3.11-2, 9, available at www.chumashee.com (last accessed July 20, 2018).[8]

The significant casino expansion, anticipated to bring 1,200 additional patrons daily to the casino and area, was similarly inadequately evaluated. AR0194.00176-177, AR0237.00435. For example, the traffic study in the FEA does not show how the casino expansion or the 6.9 acres were addressed. AR0194.00805 (referring to "approved and pending projects located within the Santa Ynez planning area" for near-term cumulative conditions, but not specifying casino/hotel expansion or 6.9 acre development); AR0194.00814 (identifying use of 20-year buildout forecasts for cumulative conditions, but also not specifying casino/hotel expansion or 6.9 acre development). This additional 1,200 casino patrons, 415 residents at Camp 4, approximately 800 visitors each weekend to Camp 4, patronage to the 6.9 acres, as well as planned growth, is significant growth in the Valley that requires an EIS.[9]

The errors noted above in sections A-C constitute either a failure to consider an important aspect of the problem, or BIA's offer of an explanation that runs counter to the evidence before it, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Manufacturers Association v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Natural Resources*

---

[8] If this Court remands for preparation of an EIS, an additional project should be added to the cumulative impact analysis. The Band has indicated that it will develop the 300+ acres commonly known as the "Triangle Property," across Highway 154 from Camp 4.

[9] Defendants make much of the fact that BIA circulated a draft EA and Final EA, which they apparently believe is unnecessary. Def. Br. at 19, Dkt.51-1, page ID #828. BIA's draft EA was based entirely on an approval of *11,000* acres as a Tribal Consolidation Area Plan, with no NEPA or IRA review whatsoever. When that overreaching Plan was withdrawn, BIA circulated the FEA, which attempted to alleviate problems BIA had created by removing references to the Tribal Consolidation Area Plan. Defendants acknowledge this occurred. Def. Br. at p. 3 fn 4, Dkt. 51-1, page ID# 812, fn. 4.

Defense Council v. DOI, 113 F.3d 1121, 1124 (9th Cir. 1997). These errors render the FEA and FONSI arbitrary, capricious and outside of law. They should be set aside, the NOD, Decision and Acceptance of Deed revoked and rescinded, and the matter remanded for preparation of a complete EIS.

IV. BIA FAILED TO FULFILL ITS OBLIGATIONS TO EVALUATE THE FACTORS REQUIRED FOR A FEE-TO-TRUST ACQUISITION

Before BIA may approve a fee-to-trust application, it must evaluate numerous factors. 25 C.F.R. §§ 151.10 and 151.11.[10] In this evaluation, it cannot reach a conclusion that is arbitrary, capricious, an abuse of discretion, or outside of the law. 5 U.S.C. § 706(2)(A). As shown below, BIA failed in its task.

A. BIA Dismissed Major Jurisdictional Conflicts and Tax Impacts

Because Camp 4 was an off-reservation acquisition, BIA was obligated to give heightened scrutiny and greater weight to jurisdictional and tax impacts. 25 C.F.R. § 151.11(b). It did not do so. Incredibly, BIA concluded that "no significant jurisdictional conflicts will occur" and that the Band's intended purposes were "not inconsistent with the surrounding uses." AR0123.00022. The record demonstrated the contrary: Camp 4 was zoned AG-II-100, *i.e.*, agriculture, with a minimum parcel size of 100 acres. AR0123.00022. The maximum development on under existing zoning was 14 main residences and no facilities or parking lots. AR0195.00438-440.

[10] Plaintiffs acknowledge the Court's prior order bars them from asserting their Second Claim. However, Plaintiffs would note that Defendants' allegedly "uncontroverted" facts are indeed controverted. Specifically, Defendants reiterate a narrative that Camp 4 is part of the Band's ancestral and historic territory. Def. Br. at pp. 3, 4, Dkt. 51-1, page ID## 812, 813. These facts are contested. See, e.g., AR0063.00003-.00004, AR0109.00002-.00006. The administrative record was devoid of any data to confirm that the Indians who settled at the mission were of one tribe, as opposed to a mixed group, or that they had a historic land base including Camp 4, instead of being from tribes that were localized in land bases. The lack of evidence supporting these facts demonstrates BIA's inadequate consideration of the Band's asserted justification and purpose. 25 C.F.R. § 151.11(b).

The record was equally clear that surrounding uses were likewise rural. AR0194.00095; AR0195.00347-348; AR0244.00038-39. The development of a subdivision including 143 residences, ancillary buildings, a 12,000 square foot tribal facility with parking for 250 vehicles would constitute a significant change from current land use that is inconsistent, creating an urban development in the middle of a rural area. AR0195.00347-348; AR0244.00014, 38-39. Such a development contravenes rural area policy countywide and is inconsistent with the County General Plan, the SYVCP, and County land use regulations. AR0195.00321-325, 333-334, 362-451; AR0244.00017-18, 44-58. It creates conflicts in the open space, agriculture, and ranch uses on surrounding and adjacent properties, and causes significant health, safety and regulatory problems. As noted above in section III.A, a key problem is the lack of agricultural buffers to protect the agricultural uses nearby. A similar problem is created with transportation, in that the increased traffic from the development impedes Sheriff and Fire Department response time, stretching community resources. And such development induces further urbanization, creating further conflicts related to water, habitat and air quality. AR0195.00312-337; AR0244.0014-30.

Despite abundant data and comments of record, BIA refused to acknowledge the evident and major conflicts that existed, and would exist, with the development. Camp 4's neighbors would be burdened with County regulations, but unable to seek redress for problems created by Camp 4 related to transportation, water supply, air quality, and the other resources regulated by the County. Indeed, BIA did not even clarify or confirm the status of the rights of way it was agreeing to take into trust, including County roads. AR0194.01704; AR0123.

BIA's frequent comment when conflicts were raised was to state that the land would be free from County regulation once in trust. AR0194.01722, .01736, .01788, .01796, .01819, .01839, .01855 (housing, lighting, wastewater, land use, air quality). Defendants themselves acknowledge that BIA applied this exact perspective to the issues. See, Def. Br. at 11, Dkt. 51-1, page ID# 820 (BIA evaluated "how certain land

use laws would be preempted by the acquisition of the Property in trust"). This approach is directly counter to the requirement that such conflicts be given greater weight. 25 C.F.R. § 151.11(b). BIA's summary dismissal of the major existing conflicts should void the FEA, FONSI, NOD and Decision.

BIA applied the same dismissive approach in considering tax impacts. The issue is not whether the development would generate more taxes in the future. The Defendants admit that the Band had already filed its withdrawal from the Williamson Act, which previously had restricted its taxes. Def. Br. at 15, 17, Dkt 51-1, page ID# 824, fn 10, 826. Absent its former Williamson Act status, Camp 4's current tax status was its already-changed status, which totaled $340,000 annually, based on County figures. AR0109.00008.

This figure is not *de minimus*. These taxes support the County's ability to protect the community from fire and crime, transportation and road problems, and a plethora of other health and safety community concerns. Indeed, Camp 4's additional 415 residents and 800 visitors per weekend would be beneficiaries of these tax dollars as these residents and visitors utilize the roads, and benefit from other County protections. As with land use impacts, the need for heightened weight and scrutiny given to this factor was disregarded, and BIA's conclusion should be vacated.

B. BIA Failed to Require a Business Plan

Where land is being acquired for business purposes, BIA must require a plan which specifies the anticipated economic benefits. 25 C.F.R. § 151.11(c). Here, BIA and the Principal Deputy concluded that no business plan was necessary because no "new" business was anticipated. AR0123.00018; AR0258.03450. But the regulation is not so limited.

This acquisition was meant to retain ongoing businesses, *i.e.*, the vineyard and horse stable. These businesses likely were making money and would be anticipated to make additional money, given the planned residential and tribal facility development. As such, there were anticipated economic benefits that were expected to flow from

enhanced "new" business. Additionally, the tribal facility events involved business activities, even if the tribal facility was itself a cultural building. Such economic benefits were not discussed. Finally, the Band produced maps showing designations of commercial activity located at the entrances of the development. AR0258.03363-3366; .03442-3443. There is no reason to exempt an applicant from providing a business plan where commercial uses are not only ongoing, but anticipated to increase. Presumably these economic activities would benefit the Band as a whole, and BIA should rightly require the Band to provide a plan for review.

C. BIA Did Not Consider Whether It Could Discharge Responsibilities

When BIA approved the fee-to-trust application, the Band had no existing agreements with any agency for emergency services for police or fire. BIA concluded that there were agreements with the County; this was incorrect. AR0123.00023. The Principal Deputy concluded that the Band's post-NOD determination to provide its own police force and the Band's intention to grant permission to Santa Barbara County Fire Department to enter the property were sufficient. AR0258.03448-03449. Notably, nowhere in the FEA or FONSI was there any discussion of the Band's new police force or related impacts from that police force. Also, the Band's intent to grant permission to the County was a speculative concept which required agreement of a third party, and it was not clear that this would occur as of the time either the NOD or the Decision were issued. As a result, neither of these conclusions was adequate.

Moreover, Plaintiffs had also raised the issue that there was insufficient consideration of whether BIA could monitor and enforce any mitigation measures. AR0258.03448-03449. This query was not answered by either the FEA, the FONSI, the NOD, or the Decision. This same issue is noted above, in section III(B), *supra*. It has still not been answered with any specificity.

/ / /

/ / /

V. CONCLUSION

This case demonstrates agency abuse of discretion, overreaching, and unauthorized conduct. As set forth herein, and in Plaintiffs' motion papers seeking summary judgment or, alternatively, partial summary judgment, all of which are incorporated herein,[11] these agency actions should be remedied.

Plaintiffs respectfully request that this Court deny the Defendants' motion for summary judgment, and grant summary judgment for Plaintiffs on their First Claim for Relief; find that the Principal Deputy acted beyond his authority under the FVRA and Department regulations; order the Decision and Acceptance of Deed to be revoked, rescinded, and declared null and void; and direct the Defendants to unwind the Camp 4 transfer.

Alternatively, Plaintiffs respectfully request that this Court deny the Defendants' motion for summary judgment, and find in favor of Plaintiffs on their Third and Fourth Claims for Relief; find that the FONSI, FEA, NOD, and Decision are in violation of NEPA and the IRA; order the FONSI, FEA, NOD, Decision and Acceptance of Deed to be revoked, rescinded, and declared null and void; and direct the Defendants to unwind the Camp 4 transfer.

DATED: July 20, 2018

CAPPELLO & NOËL LLP

By: */s/A. Barry Cappello*
A. Barry Cappello
Lawrence J. Conlan
Wendy D. Welkom
Attorneys for Plaintiffs,
Anne Crawford-Hall, San Lucas Ranch, LLC, and Holy Cow Performance Horses, LLC

[11] Plaintiffs' motion papers included herein include Dkt. Nos. 52, 52-1, 53, 54, 54-1 through 54-9.

CERTIFICATE OF SERVICE

I, A. Barry Cappello, hereby certify that on July 20, 2018, I caused the foregoing **PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANT UNITED STATES OF AMERICA, ET AL.'S MOTION FOR SUMMARY JUDGMENT** to be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/A. Barry Cappello
A. Barry Cappello