NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 19-5285

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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

v.

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

and

WILTON RANCHERIA, CALIFORNIA
Intervenor-Defendant/Appellee.

Appeal from the United States District Court for the District of Columbia
No. 1:17-cv-00058 (Hon. Trevor N. McFadden)

BRIEF FOR DEFENDANTS/APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

All parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Stand Up for California!, Patty Johnson, Joe Teixeira, and Lynn Wheat, Plaintiffs-Appellants.

B. Rulings Under Review

References to the rulings at issue appear in the Brief for Stand Up for California!, Patty Johnson, Joe Teixeira, and Lynn Wheat, Plaintiffs-Appellants.

C. Related Cases

There are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

/s/ Brian C. Toth
BRIAN C. TOTH

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GLOSSARY

Assistant Secretary or AS-IA	Assistant Secretary of the Interior – Indian Affairs
Board	Interior Board of Indian Appeals
BIA	Bureau of Indian Affairs
DEIS	Draft Environmental Impact Statement
EIS	Environmental Impact Statement
FEIS	Final Environmental Impact Statement
FVRA	Federal Vacancies Reform Act
IGRA	Indian Gaming Regulatory Act
Interior	U.S. Department of Interior
IRA	Indian Reorganization Act
List Act	Federal Recognized Indian Tribe List Act
NEPA	National Environmental Policy Act
Principal Deputy	Principal Deputy Assistant Secretary of the Interior – Indian Affairs
Rancheria Act	California Rancheria Act
ROD	Record of Decision
Stand Up	Plaintiff Stand Up for California!
Tribe / Wilton	Wilton Rancheria

INTRODUCTION

Plaintiffs appeal from a district court judgment rejecting their challenges to a decision by the Department of the Interior (Interior) acquiring land in trust for Wilton Rancheria (Wilton or Tribe), a federally recognized Indian tribe, to allow construction of a resort casino. Interior restored the Tribe's government-to-government relationship in 2009 after it was incorrectly terminated under the California Rancheria Act (Rancheria Act) in the 1960s. Plaintiffs contend that Interior's decision is unlawful because Interior's regulations and Department Manual prohibit the Principal Deputy Assistant Secretary – Indian Affairs (Principal Deputy) from exercising delegated authority to acquire the land in trust. Plaintiffs further contend that Interior violated the Rancheria Act and should have prepared a supplemental environmental impact statement (EIS) under the National Environmental Policy Act (NEPA) when it acquired land at a site different from the one that the Tribe first proposed. The district court correctly rejected those claims, and its judgment should be affirmed.

STATEMENT OF JURISDICTION

We agree with the statement of jurisdiction in the Opening Brief (at 1).

STATEMENT OF THE ISSUES

1. Whether the Principal Deputy lacked authority to acquire land in trust for the Tribe either by 25 C.F.R. § 151.12(c) or the Department Manual.

2. Whether Interior was barred by the Rancheria Act from acquiring land in trust for the Tribe.

3. Whether Interior was obligated under NEPA to prepare a second draft EIS or supplemental EIS before selecting an "alternative" to the Tribe's original proposed site for building a casino resort.

PERTINENT STATUTES AND REGULATIONS

All relevant statutes and regulations are contained in an addendum to the Plaintiffs' Opening Brief.

STATEMENT OF THE CASE

A. Statutory background

1. Indian Reorganization Act

In 1934, Congress enacted the Indian Reorganization Act (IRA) "to promote economic development among American Indians, with a special emphasis on preventing and recouping losses of land caused by previous federal policies." *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 31 (D.C. Cir. 2008); *see also* Pub. L. No. 383, 48 Stat. 984, 984 (1934) (seeking to

"conserve and develop Indian lands and resources"). To that end, the statute permits the Secretary to acquire lands in trust for Indians. 25 U.S.C. § 5108.

2. California Rancheria Act

From the 1950s through the early 1960s, federal policy shifted toward assimilating Indians into the dominant society. AR24440. Consistent with that policy, in 1958 Congress enacted the California Rancheria Act. Pub. L. 85-671, 72 Stat. 619, *amended*, Pub. L. 88-419, 78 Stat. 390 (1964), which "authorized the Secretary to terminate the federal trust relationship" with Indian tribes living on Rancherias in California, including Wilton, "and to transfer tribal lands from federal trust ownership to individual fee ownership." *Amador County v. Salazar*, 640 F.3d 373, 375 (D.C. Cir. 2011). Prior to distributing any Rancheria lands, Section 3 of the Act required Interior to install sanitation facilities and irrigation and domestic water systems, and to complete boundary surveys and improve roads. 72 Stat. at 619-20; 78 Stat. 390.

3. Indian Gaming Regulatory Act

In 1988, Congress enacted the Indian Gaming Regulatory Act (IGRA) "to provide a statutory basis for the operation of gaming" by tribes to promote "tribal economic development" and "self-sufficiency." 25 U.S.C. § 2702(1). The statute regulates gaming on land held by the United States in trust for tribes. *Id.* § 2703(4). With some exceptions, gaming is prohibited on trust lands

acquired after the statue's enactment. *Id.* § 2719(a). Relevant here, gaming may be authorized as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition." *Id.* § 2719(b)(1)(B)(iii).

4. Federal Recognized Indian Tribe List Act

In 1994, Congress enacted the Federal Recognized Indian Tribe List Act, Pub. L. 103-454, 108 Stat. 4791 (List Act), which requires Interior to maintain and publish a list of all federally recognized tribes. 25 U.S.C. § 5129. The Act's findings provide that Indian tribes may be recognized in one of three ways: by an Act of Congress, by Interior's administrative procedures, or "by a decision of a United States court." *Id.* A tribe so recognized "may not be terminated except by an Act of Congress." *Id.* Further, the List Act "expressly repudiated" the former "policy of terminating recognized Indian tribes," and Congress has "actively sought to restore recognition" to such tribes. *Id.*

5. Delegation authority

The Federal Vacancies Reform Act (FVRA) provides that, if an officer of an executive agency who is required to be appointed by the President and confirmed by the Senate appointment resigns, "the first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an active capacity" for no longer than 210 days. 5 U.S.C. § 3345(a)(1); *see also id.* § 3346(a)(1) (time restriction). FVRA's silence about what happens after

that time period has been interpreted as allowing non-exclusive responsibilities to be delegated to other appropriate officers in an agency. *See*, *e.g.*, Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 72 (1999). "Most, and in many cases all, the responsibilities performed by a [presidentially appointed and senate-confirmed] officer will not be exclusive, and [FVRA] permits non-exclusive responsibilities to be delegated to other appropriate officers and employees in the agency." *Id.*

B. Factual background

Wilton Rancheria is a federally recognized Indian tribe of various Miwok and Niensen speakers, most of whose members reside in Elk Grove, California, south of Sacramento, a few miles from its present-day headquarters and historic Rancheria. AR24439. Pursuant to a series of congressional appropriations in the early 1900s, Interior purchased land in California for Indians who either did not live on reservations or whose reservations consisted of land unsuitable for farming. AR24440. One such group of Indians was located on the Wilton Rancheria, who voted in an election conducted by the Secretary in 1936 to organize their government according to a constitution adopted pursuant to the IRA. *Id.*

Only a few decades later, the Secretary reported that the Tribe's federal trust relationship had been terminated, purportedly pursuant to the Rancheria

Act. 29 Fed. Reg. 13,146 (Sep. 22, 1964). Title to the Tribe's Rancheria was transferred to its members under a distribution plan. *Id.* Members (and their dependents) who received the assets were no longer recognized by the United States as having the status of Indians. *Id.*

In 1979, Indians from numerous California Rancherias filed a class action against the Secretary for unlawfully terminating their federal relationships in violation of the Rancheria Act. *Hardwick v. United States*, No. C-79-1710-SW (N.D. Cal. 1979); *see also Stand Up for California! v. U.S. Department of Interior*, 879 F.3d 1177, 1184 (D.C. Cir. 2018) (discussing *Hardwick*); *Amador County*, 640 F.3d at 375-76 (same). Distributees of the Wilton Rancheria were certified as class members. AR24441. Interior settled the class action in 1983 through a stipulated, court-approved judgment agreeing to renew the federal trust relationship with 17 Rancherias and to include them on the Secretary's published list of recognized Indian tribes. *Stand Up*, 879 F.3d at 1185 (citing Stipulation for Entry of Judgment, *Hardwick*, ¶¶ 2-4 (Aug. 3, 1983)). Wilton, however, was omitted from the settlement, and its claims dismissed without prejudice, based on a mistaken assumption that no members still owned property within the Rancheria's boundaries. AR10956, AR24441.

In 2007, Wilton's members brought two actions in federal district court to compel Interior to restore the Tribe to federal recognition, alleging that the Tribe's termination was invalid because Interior had failed to comply with the Rancheria Act's requirements for providing water, sanitation, and roads. *See Wilton Miwok Rancheria v. Kempthorne*, No. 5:07-cv-2681 (N.D. Cal. May 21, 2007), Complaint at 8-11; *Me-Wuk Indian Community v. Kempthorne*, No. 1:07-cv-412 (D.D.C. Feb. 28, 2007), Complaint at 6-13, *transferred*, Case No. 5:07-cv-5706 (N.D. Cal. Nov. 9, 2007). The parties reached a settlement agreement wherein Interior agreed that the Tribe's termination was unlawful and that its land had not been distributed in accordance with the Rancheria Act. AR602-03. Interior agreed to restore the Tribe to federal recognition and to process an application for acquiring land in trust for the Tribe. *Id.* The settlement agreement was entered as a stipulated judgment on June 8, 2009. AR596-621.

Pursuant to the settlement, Interior published notice in the Federal Register that the Tribe was "relieved from the application" of the Rancheria Act's termination provisions and acknowledged as "an Indian entity with the same status as it possessed prior to distribution of the assets of the Rancheria." 74 Fed. Reg. 33,468 (Jul. 13, 2009). Interior added the Tribe's name to the official list of federally recognized Indian tribes published that same year, and

it has been included on that list ever since. 74 Fed. Reg. 40,218, 40,222 (Aug. 11, 2009); 85 Fed. Reg. 5462, 5466 (Jan. 30, 2020).

In November 2013, the Tribe submitted an application for Interior to acquire in trust a 282-acre parcel near Galt, California, on which the Tribe sought to build a casino resort. AR13431-47. The next month, Interior published a Notice of Intent to prepare an EIS for Wilton's application. 78 Fed. Reg. 72,928 (Dec. 4, 2013). A public hearing was held to solicit comments on the scope of the EIS. AR16278. Thereafter, Interior issued a Scoping Report (AR16272-303) which identified seven alternatives, including the Galt site as the Tribe's proposed action (Alternative A), and a smaller, approximately 30-acre parcel planned for a mall in Elk Grove (Alternative F). *See* AR16281-83, AR16291. The Report states that Interior "may not determine a Preferred Alternative until completion of the environmental analysis." AR16290.

Two years later, Interior issued a Draft EIS (DEIS), which identified and analyzed the same alternatives as the Scoping Report. 80 Fed. Reg. 81,352 (Dec. 29, 2015). The DEIS did not identify Interior's preferred alternative, but it did analyze both the Galt and Elk Grove options in detail. *Id.* On June 30, 2016, following the public comment period on the DEIS, Wilton submitted a

revised fee-to-trust application, which asked Interior to take the Elk Grove site into trust. AR13215-31.

On December 14, 2016, Interior issued a Final EIS (FEIS), in which it identified Alternative F, the Elk Grove site, as its preferred alternative based on input received during the public hearing and comment period on the DEIS. 81 Fed. Reg. 90,379 (Dec. 14, 2016); AR10259. Notably, plaintiff Lynn Wheat, a resident of Elk Grove, voiced a preference for the mall site at a public hearing on January 29, 2016. AR10676-77 ("I'd like you to consider carefully the last Alternative F. I believe the Mall site in Elk Grove will still provide residents of Galt the jobs that they need.").

On January 19, 2017, Interior issued a Record of Decision (ROD) selecting the Elk Grove site for acquisition. AR24430-519. The ROD was signed by Lawrence Roberts in his capacity as Principal Deputy Assistant Secretary–Indian Affairs. AR24519. At the time, the office of the Assistant Secretary–Indian Affairs (Assistant Secretary, or AS-IA) was unoccupied. ECF-33-1 at 33. The prior Assistant Secretary had resigned effective December 31, 2015, after which time Roberts—whom the Department Manual designates as "first assistant and principal advisor" to the Assistant Secretary, *id.* at 58—became Acting Assistant Secretary pursuant to the FVRA for 210 days. *Id.* at 33. After the 210-day period ended on July 28, 2016, Roberts continued to

exercise all of the nonexclusive authority of the Assistant Secretary. *Id.* at 37-38. Roberts was exercising delegated authority when he signed the ROD. *Id.*

Plaintiffs petitioned Interior for an administrative stay of the ROD, which Interior denied. ECF-17-8. On February 10, 2017, Interior accepted title to the Elk Grove site in accordance with the ROD. ECF-26-1. Plaintiffs filed an administrative appeal alleging that the Principal Deputy lacked authority to issue the ROD. Acting Assistant Secretary Michael S. Black rejected Plaintiffs' argument and concluded that the ROD had been issued with properly delegated authority. ECF-33-1 at 33-40.

C. Proceedings below

Plaintiffs challenged Interior's decision to acquire land in trust for the Tribe, alleging that Interior violated its internal regulations and the FVRA when the Principal Deputy approved Wilton's application authorizing the acquisition of the Elk Grove land in trust. ECF-26 at 18-19 (amended complaint). Plaintiffs also alleged that Interior's decision violated the Rancheria Act, IGRA, and NEPA. *Id.* at 21-22, 24-25.

The district court granted summary judgment to Interior and the Tribe on the improper delegation claims. *See* ECF-53 (memorandum opinion); ECF-54 (order). The court held that there was no violation of Interior's regulations or the FVRA because the authority to authorize the fee-to-trust application and

acquisition was delegable and non-exclusive, and that the authority had been properly delegated to the Principal Deputy. ECF-53 at 11-25.

By separate memorandum opinion and order, the district court granted summary judgment to Interior and the Tribe on Plaintiffs' remaining claims. ECF-109, ECF-110. The court rejected Plaintiffs' claim that the Rancheria Act prohibited Interior from acquiring land in trust for the Tribe. ECF-109 at 7-9. Under the List Act and the "plain terms" of the 2009 stipulated judgment, the Rancheria Act "does not apply to Wilton." *Id.* at 8. Moreover, Plaintiffs "abandoned" their attack on the stipulated judgment. *Id.* The court further held that Interior fully complied with IGRA, *id.* at 10-17, and NEPA, *id.* at 17-33.[1]

SUMMARY OF ARGUMENT

Plaintiffs assert that the district court erred in rejecting their claims that the Principal Deputy lacked delegated authority to acquire land in trust for the Tribe, that the Rancheria Act precluded the land acquisition, and that Interior was obligated under NEPA to prepare a supplemental or second draft EIS when it selected the Elk Grove site. None of their arguments has merit.

1. Plaintiffs incorrectly argue that Interior's regulations preclude delegation to the Principal Deputy of the authority to acquire land in trust. The

[1] Plaintiffs do not appeal from the denial of their FVRA or IGRA claims, or from the denial of their claim that Interior acted *ultra vires* by denying Plaintiffs a stay and dismissing their administrative appeal. ECF-53 at 26-27.

regulations provide: "A decision made by the Secretary, or by the Assistant Secretary–Indian Affairs pursuant to delegated authority, is final agency action" upon issuance. Nothing in that regulation, however, expressly restricts the power to delegate that authority to other officials. Nor may such a restriction fairly be implied by the fact that the text expressly names one such official, the Assistant Secretary. That is especially so given that "Secretary" is defined as including his "authorized representative." Plaintiffs' contrary interpretation is not supported by the regulation's purpose or history, which reflect Interior's intent to clarify procedures for administrative appeals, not to restrict redelegation. Furthermore, the Deputy Secretary and an Assistant Secretary confirmed the Principal Deputy's authority, rendering irrelevant any quibbles about whether the Principal Deputy's delegation complied with the ordinary procedures contemplated in the Department's manual.

2. Interior's decision did not violate the Rancheria Act. The government-to-government relationship between the Tribe and Interior was restored in 2009 through a stipulated court judgment, due to Interior's prior noncompliance with the Act's terms when it purported to terminate that relationship in 1964. Plaintiffs abandoned any opportunity to challenge the settlement, and in any event, the termination policy in the Rancheria Act has since been repudiated by Congress under the List Act.

3. NEPA did not require Interior to prepare a supplemental or second draft EIS when it selected the Elk Grove mall location for trust acquisition. That site was identified early in the scoping process as an "alternative," providing ample notice to the public, and associated environmental effects were thoroughly analyzed by the draft EIS on which Plaintiffs commented. Nothing in NEPA or its regulations requires Interior to restart the NEPA process when an applicant changes its proposal to another option that was fully analyzed by Interior in the NEPA process.

The district court's judgment should be affirmed.

STANDARD OF REVIEW

Summary judgment orders are reviewed de novo. *Stand Up*, 879 F.3d at 1181. Interior's decision is reviewed under the Administrative Procedure Act, which permits courts to set aside agency decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Agency action is arbitrary and capricious if the agency "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 the product of agency expertise." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983).

ARGUMENT

I. Interior's decision to acquire land in trust for the Tribe did not violate any regulation or the Department Manual.

The district court held that the authority to acquire land in trust for the Tribe was validly delegated to the Principal Deputy because: (1) the authority was not exclusive to the Secretary, (2) Interior's regulations do not prohibit redelegation, and (3) delegation did not depart from the terms of the Department Manual. ECF-53 at 10-24. That ruling was correct. On appeal, Plaintiffs argue that 25 C.F.R. § 151.12(c) prohibits redelegation, and that the district court misinterpreted Interior's Manual. The Court should reject both arguments.

A. The regulations permit delegating to the Principal Deputy the authority to make land-into-trust decisions.

Plaintiffs argue (at 13-24) that § 151.12(c) restricts the Secretary's power to redelegate his trust-land-acquisition authority. That argument is not supported by the text, purpose, or history of that regulation, and it contradicts Interior's longstanding interpretation of the Secretary's authority.

1. The regulatory text does not limit redelegation.

"When a statute delegates authority to a federal officer or agency, subdelegation to a subordinate federal officer or agency is presumptively permissible absent affirmative evidence of a contrary congressional intent."

U.S. Telecom Ass'n v. FCC, 359 F.3d 554, 565 (D.C. Cir. 2004); *see also Shook v. D.C. Financial Responsibility & Management Assistance Authority*, 132 F.3d 775, 784 n.6 (D.C. Cir. 1998) ("We often have upheld an agency head's ability to delegate duties to subordinate officers.").

Under Section 2 of Reorganization Plan No. 3 of 1950, 5 U.S.C. App., the Secretary has broad and express power to redelegate his statutory authority, i.e., to "authoriz[e] the performance by any other officer, or by any agency or employee, of the Department of the Interior of any function of the Secretary." *See also id.* § 1(a) (transferring to the Secretary, with an exception not relevant here, "all functions of all other officers of the Department of the Interior and all functions of all agencies and employees of such Department"). In 1984, Congress expressly confirmed that broad power by statute. *See* Pub. L. No. 98-532, 98 Stat. 2705.

Plaintiffs, however, contend that the Secretary has limited his redelegation authority by regulation, 25 C.F.R. § 151.12(c). That regulation provides: "A decision made by the Secretary, or by the Assistant Secretary–Indian Affairs pursuant to delegated authority, is final agency action under 5 U.S.C. 704 upon issuance." *Id.* Nowhere, however, does § 151.12(c) expressly exclude the Principal Deputy from exercising the Secretary's trust-land-

acquisition authority. For instance, the regulation contains no limiting language, such as "only" or "exclusively," to describe the exercise of authority.

Where the Secretary wishes to restrict his power to redelegate the authority Congress has given him, he does so expressly. *See*, *e.g.*, 25 C.F.R. § 33.3 ("The administrative and programmatic authorities of the Assistant Secretary–Indian Affairs pertaining to Indian education functions shall not be delegated to other than the Director, Office of Indian Education Programs."); *id.* § 262.5(a) (authority for archeological resources removal permits is delegable to Agency Superintendents, "but only on a permit-by-permit basis and only to those who have adequate professional support available"); 43 C.F.R. § 17.570(*l*) (authority to investigate Rehabilitation Act complaints is delegable to other agencies "except" for "the authority for making the final determination"); *id.* § 20.202(b)(1) (authority of ethics officer to impose disciplinary or remedial action "may not be redelegated"); *id.* § 20.602(c)(1) (same for ethics counselor's authority to require remedial action for violations of conflict-of-interest laws); *id.* § 3191.2(b) ("Authority delegated to a State under this subpart shall not be redelegated"). In contrast to those regulations, Part 151 contains no provision expressly restricting redelegation of the Secretary's authority to acquire land in trust for Indians. Notably, § 151.2 defines "Secretary" as including an "authorized representative."

Plaintiffs' reliance on the interpretive canon *expressio unius est exclusio alterius* for their argument that § 151.12(c) limits delegation to the Assistant Secretary is unavailing. Opening Brief 19. In delegation contexts particularly, a provision "may mention a specific official only to make it clear that this official has a particular power rather than to exclude delegation to other officials." *United States v. Mango*, 199 F.3d 85, 90 (2d Cir. 1999). For example, it is "unexceptional" that "vesting a duty in the [Department Head] . . . evinces no intention whatsoever to preclude delegation to other officers in the [same] Department . . ." *United States v. Giordano*, 416 U.S. 505, 512-14 (1974); *see also Shook*, 132 F.3d at 782 (observing that sometimes "provisions that appear duplicative of others" are intended to "clarify what might be doubtful—that the mentioned item is covered—without meaning to exclude the unmentioned ones"). "Now and then silence is not pregnant," and can be explained by "inadvertence" rather than intentionality. *El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 487 (1999); *see also Van Hollen, Jr. v. FEC*, 811 F.3d 486, 493 (D.C. Cir. 2016) ("The *expressio unius* canon operates differently in our review of agency action" than when interpreting statutes.").

Plaintiffs' reliance (at 21) on the Supreme Court's decision in *Giordano* as holding express prohibitions unnecessary to restrict delegation, is likewise misplaced. *Giordano* held that 18 U.S.C. § 2516(1) does not allow wiretap

applications by the Attorney General's Executive Assistant, despite the statute's omission of an express prohibition on redelegation. 416 U.S. at 514. That interpretation, however, was "strongly supported" by the statute's purpose: "to prohibit, on the pain of criminal and civil penalties, all interceptions of oral and wire communications, except those specifically provided for in the Act." *Id.* at 514. Congress evinced a "clear intent to make doubly sure" the statute be used with "restraint," a view the legislative history "supports." *Id.* at 515-16.

Here, by contrast, the statutory purpose is salutary, not prohibitory, of trust-land acquisitions. *See supra* (p. 2-3). *Compare Mango*, 199 F.3d at 90-91 (stating that a provision "may mention a specific official only to make it clear that this official has a particular power rather than to exclude delegation to other officials," and distinguishing *Giordano* based on the absence of legislative history supporting delegation restrictions) *with Halverson v. Slater*, 129 F.3d 180, 188 (D.C. Cir. 1997) (following *Giordano* where statute's "language and legislative history" manifest an intent to limit delegation). Additionally, the regulations focus on delineating the process for finality and exhaustion rather than restricting delegation, as explained below (pp. 19-21).

Plaintiffs argue (at 21) that interpreting "Secretary" as defined by § 151.2 to include an "authorized representative" such as the Principal Deputy would

render that § 151.12(c)'s reference to the "Assistant Secretary" superfluous. That argument misreads the regulations. The definition of "Secretary" may distinguish the exercise of the authority of the "Secretary, or the Assistant Secretary," 25 C.F.R. § 151.12(c), to make decisions that are final for the Department, as different from decisions that may be administratively appealed because they were made "by a Bureau of Indian Affairs [BIA] official," *id.* § 151.12(d). Such an interpretation distinguishes among final and nonfinal agency decisions without restricting redelegation. Regardless, redundancies in drafting are "not unusual," *Connecticut National Bank v. Germain*, 503 U.S. 249, 253 (1992), and the "preference for avoiding surplusage constructions is not absolute," *Lamie v. U.S. Trustee*, 540 U.S. 526, 536 (2004). Here, the canon against treating any word in any provision as surplusage is "inappropriate" because it creates rather than resolves a perceived ambiguity. *Id.*; *see also Cares Community Health v. HHS*, 944 F.3d 950, 961 (D.C. Cir. 2019) (rejecting use of the canon where one provision "may have been the intended target" of an enactment, and its effect on another provision "may have been overlooked").

2. The regulation's purpose, preamble, and history do not demonstrate an intent to limit delegation.

Contrary to Plaintiffs' arguments (at 15-17, 19-20), the regulation's purpose does not compel a conclusion that redelegation of authority to the Principal Deputy is prohibited. Section 151.12(c) mentions the Assistant

Secretary to establish procedures for administrative appeals. In 2013, Interior substantially revised § 151.12 by setting forth two general paths for decisions: Under part (c), decisions may be made by the "Secretary, or the Assistant Secretary – Indian Affairs." 78 Fed. Reg. 67,928, 67,937 (Nov. 13, 2013) (codified at § 151.12(c)). Such decisions are "final agency action . . . upon issuance." *Id.* Under part (d), decisions may be made by a "Bureau of Indian Affairs official." *Id.* at 67,938 (codified at § 151.12(d)). Those decisions are "not a final agency action . . . until administrative remedies are exhausted . . . or until the time for filing a notice of appeal has expired and no administrative appeal has been filed." *Id.*

This bifurcated path for decisionmaking is consistent with Interior's general regulations for administrative appeals, 25 C.F.R. Part 2. Under those regulations, decisions by BIA officials are appealable, generally speaking, to the Interior Board of Indian Appeals (Board). *Id.* § 2.3(a). However, the Assistant Secretary may take jurisdiction of such an administrative appeal either to decide the matter herself, *id.* § 2.20(c)(1), or to delegate it to the Principal Deputy for decision, *id.* §§ 2.20(c)(2). In the latter case, the Principal Deputy's decision "may be appealed to the Board." *Id.* § 2.20(c).

As the preamble explains, the 2013 amendments were intended to provide "clarification and transparency to the process for issuing decisions,"

and to "make explicit that parties must exhaust administrative remedies prior to pursuing judicial review" for certain land-into-trust decisions. *Id.* at 67,929. The amendments also removed a waiting period for acquiring title that was deemed unnecessary after a Supreme Court decision. *Id.* at 67,928-29 (discussing *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209 (2012)). Most of the regulation addresses procedures for notifying the applicant, publishing notice of the decision, and the timing for acquiring title. *See id.* §§ 151.12(c)(1), (2)(i)–(iii). Those topics do not concern delegation.

Interior's interpretation of § 151.12(c) comports with the purpose of distinguishing between final and nonfinal decisions. Here, the Principal Deputy was exercising the Assistant Secretary's authority to make a decision on the trust-land acquisition in the first instance. *See*, *e.g.*, 81 Fed. Reg. at 90,380 (Principal Deputy's notice of FEIS publication was "in the exercise of authority delegated to the Assistant Secretary – Indian Affairs . . . ."). That authority remains final for the Department because it was the authority of the *Assistant Secretary*. The Principal Deputy was *not* exercising his *own* authority to resolve an administrative appeal to the Board pursuant to § 2.20(c)(2).[2]

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[2] Contrary to Plaintiffs' assertions (at 31 n.78), the Principal Deputy is "the first assistant" to the Assistant Secretary, *County of Amador v. U.S. Department of Interior*, 872 F.3d 1012, 1019 n.5 (9th Cir. 2017), making him eligible under the FVRA to succeed to that office for the first 210 days it was unfilled pursuant to 5 U.S.C. § 3345(a)(1). Even after 210 days, the Principal Deputy continued to exercise the Assistant Secretary's trust-land-acquisition as delegated to him.

Nor did the fact that the Principal Deputy issued the ROD effectively deprive Plaintiffs of further administrative review of that decision. Plaintiffs received further explanation from Interior through decisions by Michael S. Black, who was delegated authority of the Assistant Secretary, as discussed below (pp. 29-30). He issued detailed decisions denying Plaintiffs' request for a stay of the trust-land acquisition, ECF-17-8, and dismissing their administrative appeal, ECF-33-1 at 33-40. Plaintiffs were provided meaningful administrative review consistent with the regulations' purpose. The district court rejected their claim alleging otherwise, ECF-53 at 26-27, and Plaintiffs do not pursue that claim on appeal.

Furthermore, Interior's conclusion that § 151.12(c) permits redelegation to the Principal Deputy is consistent with its long-held views of the Assistant Secretary's authority. A 2005 memorandum from the Solicitor to the Secretary examined whether the Assistant Secretary's duties "may be reassigned temporarily to another Departmental official in the event the position becomes vacant and pending confirmation of a successor." ECF-40-1 at 6. The memorandum considered a situation where, as here, nobody was available who could "automatically assume the duties of the position" under FVRA. *Id.* at 7. Performance of the Assistant Secretary's nonexclusive functions by other Department officials was nevertheless deemed permissible "We have not

identified any regulations that assign duties or functions exclusively to the AS-IA." *Id.* at 8. In 2008, Interior relied on the memorandum to argue that the authority to acknowledge a tribe's federal status was not exclusive to the Assistant Secretary. *See Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 421 (D. Conn. 2008), *aff'd*, 587 F.3d 132 (2d Cir. 2009); *see also* ECF-33-1 at 38 n.37 (discussing memorandum, dismissing Plaintiffs' administrative appeal). If Interior had intended § 151.12(c) to limit redelegation authority contrary to the memorandum, it would be surprising for the preamble to the 2013 amendments to Part 151 not to address redelegation directly.

Nor does the regulation's early history support Plaintiffs' interpretation. In 1995 the Secretary rejected a proposal to identify the Assistant Secretary as having specific responsibilities under the regulation. *See* 60 Fed. Reg. 32,874, 32,878 (Jun. 23, 1995). Plaintiffs contend that the *failure* to revise the regulation in such a particular way "confirms the Secretary's intent to limit final decisionmaking authority." Opening Brief 20. Not so. First, Plaintiffs infer too much from the Secretary's *inaction* rather than from an actual change to the regulation. *Cf. United States v. Wise*, 370 U.S. 405, 411 (1962) ("Logically, several equally tenable inferences could be drawn from the failure of the Congress to adopt an amendment . . . including the inference that the existing legislation already incorporated the offered change."). Further, because the

term "Secretary" includes his "authorized representative," Interior explained that "the authority to approve certain acquisitions may continue to be held by the Assistant Secretary–Indian Affairs or the BIA Area Directors." 60 Fed. Reg. 32,874, 32,878 (Jun. 23, 1995). That change responded to comments that the rule should reflect "efforts to reorganize the BIA and decentralize its critical functions," *id.*, not that redelegation should be restricted. As a "general matter," such arguments to infer meaning from failed proposals "deserve little weight in the interpretive process. Even were that not the case, the competing arguments here would not point to a definitive answer." *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994).

3. The constitutional avoidance canon does not apply.

Plaintiffs' assertion (at 23) that Interior's interpretation of § 151.12(c) raises "serious constitutional concerns" is incorrect. First, Plaintiffs assert that trust acquisitions significantly affect the "balance" of state and federal power. *Id.* The Supreme Court, however, has held that states' "inherent jurisdiction" on Indian lands "can of course be stripped by Congress." *Nevada v. Hicks*, 533 U.S. 353, 365 (2001); *see also Seminole Tribe v. Florida*, 517 U.S. 44, 62 (1996) ("States . . . have been divested of virtually all authority over Indian commerce and Indian tribes."). Accordingly, challenges to Interior's authority to acquire land in trust on such grounds have all been rejected. *See*, *e.g.*, *Upstate Citizens for*

Equality, Inc. v. United States, 841 F.3d 556, 569 (2d Cir. 2016) (rejecting challenge under "principles of state sovereignty"), *cert denied*, No. 16-1320, 2017 WL 5660979 (Nov. 27, 2017); *Carcieri v. Kempthorne*, 497 F.3d 15, 39-40 (1st Cir. 2007) (Tenth Amendment), *rev'd on other grounds*, 555 U.S. 379 (2009); *see also Gila River Indian Community v. United States*, 729 F.3d 1139, 1153-54 (9th Cir. 2013) (same as to trust land acquired pursuant to a tribe-specific statute).

Next, Plaintiffs contend that the trust-land-acquisition decision must have been "directed or supervised by [a] Presidentially-appointed, Senate-confirmed" officer. Opening Brief 24. In the district court, Plaintiffs argued that such a limitation must apply to prevent the Principal Deputy from functioning, *de facto*, as one of the principal "Officers of the United States," who must be nominated by the President and confirmed by the Senate under the Appointments Clause. U.S. Constitution art. II, § 2, cl. 2; *see*, *e.g.*, ECF-33 at 1, 14-16, 20 (summary judgment brief); (reply brief). On appeal, Plaintiffs sprinkle their brief with references to the Constitution but fail to discuss the Appointments Clause in detail. Such "arguments not clearly raised in a party's opening brief are generally considered to be forfeit." *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 274 (D.C. Cir. 2015).

In any event, the contention that Interior's interpretation of 151.12(c) violates the Appointment Clause lacks merit. Whether an official is properly

characterized as a *de facto* principal officer or as an inferior officer depends principally on "the power to remove officers at will and without cause," which is "a powerful tool for control of an inferior." *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, 561 U.S. 477, 510 (2010) (internal quotation marks, citation omitted); *accord In re Grand Jury Investigation*, 916 F.3d 1047, 1052 (D.C. Cir. 2019) (holding "sufficient control" retained over official who "effectively serves at the pleasure of an Executive Branch [principal] officer"); *see also Edmond v. United States*, 520 U.S. 651, 663 (1997) (inquiring into whether the inferior officer is directed and supervised "at some level" by someone who is Senate-confirmed).

The Principal Deputy is properly characterized as an inferior officer even when making a land-into-trust decision such as the one at issue here because his authority is adequately constrained in several key respects. He must exercise his delegated authority "in accordance with relevant policies, standards, programs, organization and budgetary limitations, and administrative instructions prescribed by . . . the Secretary." 200 DM 1.8 (ECF-33-1 at 70). Otherwise, he may be subject to "disciplinary measures," *id.*, including removal "at any time." 5 U.S.C. § 3592(c); *see also* 5 C.F.R. § 359.902(a) (providing removal authority over noncareer appointees in the Senior Executive Service); U.S. Government Policy and Supporting Positions,

Senate Committee on Homeland Security and Governmental Affairs, 114th Congress, 2d Session 90 (2016) (so identifying the Principal Deputy).

Plaintiffs' reliance on the fact that the Principal Deputy's decision here was "final" action, and that land was acquired in trust "immediately" after he issued the ROD, is misplaced. Opening Brief 23-24 (quotation marks, brackets omitted). The Secretary could have made the trust-acquisition decision himself, because his redelegation "does not divest the power to exercise that authority." 209 DM 1.9 (ECF-33-1 at 70); *see also* 109 DM 1.1 (ECF-33-1 at 54) ("The Secretary . . . is responsible for the direction and supervision of all operations and activities of the Department."). Regardless of whether the decision was "final" at the time the ROD was issued, the decision could have been withdrawn or changed by the Secretary, who may "review any decision of any employee" in the Department and may "direct any such employee or employees to reconsider a decision," 43 C.F.R. § 4.5(a)(2); *see also id.* § 4.5(a)(1) (Secretary may "take jurisdiction at any stage of any case" before the Department). Indeed, Plaintiffs unsuccessfully asked the Secretary to exercise that very authority in this case. ECF-33-1 at 24. In sum, the Appointments Clause poses no problems here.

B. The Principal Deputy's delegation of authority was confirmed by the actions of higher level officials—the Deputy Secretary and Acting Assistant Secretary.

Plaintiffs contend (at 24-33) that Interior's decision to acquire land in trust for the Tribe is unlawful because "there was no valid redelegation" of the Secretary's authority in this case. Opening Brief 24. That contention is incorrect. Delegation of authority to the Principal Deputy was confirmed by the actions of the Deputy Secretary and the Assistant Secretary, who implemented the Principal Deputy's decision even after he left office.

This Court has repeatedly "affirmed the ability of a properly appointed officer to uphold the decision of one who was not." *Intercollegiate Broadcasting Systems, Inc. v. Copyright Royalty Board*, 796 F.3d 111, 118 (D.C. Cir. 2015) (citing *Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 213-14 (D.C. Cir. 1998)); *accord FEC v. Legi-Tech, Inc.*, 75 F.3d 704, 709 (D.C. Cir. 1996); *Andrade v. Regnery*, 824 F.2d 1253, 1257 (D.C. Cir. 1987). Here, the Principal Deputy's delegation was confirmed three times by two other officials with requisite authority.[3]

[3] When we say that other officials "confirmed" the delegation, we are referencing the general descriptions of delegated authority found in the Department Manual. *See*, *e.g.*, 209 DM 8.4.A–B (ECF-33-1 at 71-72). The multiple ratifications of the delegated decision here, *see infra* (pp. 29-30), make it unnecessary for the Court to decide whether the Manual, standing alone, is legally effective to delegate authority to the Principal Deputy.

First, Deputy Secretary Michael L. Connor issued a memorandum on January 19, 2017 that "confirms" the Principal Deputy's authority to exercise the nonexclusive functions of the Assistant Secretary, including taking final actions. ECF-33-1 at 79. It states: "To the extent that it is determined that you lacked such authority, I hereby ratify and approve any actions you have taken under the authority of the AS-IA." *Id*.

Second, the decision was ratified on February 10, 2017, when Michael S. Black, acting with the delegated authority of the Assistant Secretary, denied Plaintiffs' request for an administrative stay of the decision. ECF-17-8. The denial directed BIA to acquire the parcel in trust "immediately." *Id.* at 1. At that time, Black was delegated authority to act as Assistant Secretary through an order issued by an official whom the previous President had delegated the authority to act as the Secretary. ECF-33-1 at 46-47; *see also* ECF-33-1 at 34 n.3. Black had previously been delegated the Assistant Secretary's authority by a Senate-confirmed Secretary. ECF-33-1 at 44-45.

Third, the decision was ratified again by Mr. Black on July 13, 2017, when he dismissed Plaintiffs' administrative appeal after concluding that the Principal Deputy had acted with fully delegated authority to issue the ROD as a final decision for the Department. ECF-33-1 at 33-40. At that time, Black

was acting with the authority of the Assistant Secretary as delegated by former Secretary Ryan K. Zinke. ECF-33-1 at 48-49.

Plaintiffs contend (at 29) that the Connor Memorandum demonstrates Interior's awareness that the Principal Deputy lacked properly delegated authority. That Memorandum, however, was issued to address the possibility that the Principal Deputy's authority could be challenged and was not an admission that any such challenge had merit. *Cf.* Fed. R. Evid. 407 (prohibiting admission of "subsequent" remedial measures to prove liability). Moreover, whatever the Deputy Secretary's motivation, an agency decisionmaker's subjective awareness does not undermine the validity of a ratification. *See*, *e.g.*, *Legi-Tech, Inc.*, 75 F.3d at 709 (upholding ratification despite the possibility that it was "nothing more than a 'rubberstamp.'"); *Andrade*, 824 F.2d at 1257 (ruling there was no legal violation where a properly appointed official, in office only three days, ratified and implemented a program planned by his improperly appointed predecessor).

Plaintiffs further contend (at 32) that Deputy Secretary Connor was not delegated proper authority by the Secretary to issue the January 17, 2017 Memorandum because the pertinent Manual provision refers to his authority to act only in the Secretary's "absence," which cannot be established, 109 DM 1.2.B (ECF-33-1 at 54) (quoted in Opening Brief 32 & n.79), and that he could

not confirm the Principal Deputy's authority because the Manual purportedly required him to follow other procedural or formalistic requirements that were not observed. Those arguments should be rejected. The Manual does not confer rights upon third parties. It "describes the organizations and functions of the Department[']s bureaus and offices, documents delegations of the Secretary[']s authority, and prescribes the policies and general procedures for administrative activities and specific program operations . . . It is used . . . to provide guidance to the bureaus and offices in their administrative and program operations, and to serve as the primary source of information on organization structure, authority to function, and policy and general procedures." 011 DM 1.2.A (ECF-33-1 at 51). Although "[b]ureaus and offices must comply with the provisions of the DM," the Deputy Secretary is not one of Department's "[b]ureaus" or "offices." 011 DM 1.2.B (ECF-33-1 at 51). He is one of the "Secretarial officers." 109 DM 1.2.B (ECF-33-1 at 54). The current version of the Manual makes the point even more emphatically: Its policies "do not bind" the Deputy Secretary "except to the extent they affect the rights of third parties or have the force and effect of law," 011 DM 1.2.C (2020), which is not the case here. *See Electronic Privacy Information Center v. Internal Revenue Service*, 910 F.3d 1232, 1245 (D.C. Cir. 2018) ("A non-binding document cannot impose on an agency an enforceable duty to act.").

Plaintiffs' attempt to distinguish an "absence" from a "vacancy" should also be rejected. Opening Brief 25-30, 32. First, Plaintiffs "forfeited the argument by failing to raise it in the district court." *United States v. Volvo Powertrain Corp.*, 758 F.3d 330, 338 (D.C. Cir. 2014). In any event, Plaintiffs' argument is incorrect. Plaintiffs rely on a law dictionary, the FVRA, and opinions by the Office of Legal Counsel (OLC) and the Government Accountability Office (GAO), to distinguish "absence" from "vacancy." The GAO opinion Plaintiffs cite (at 27-28) concludes that an Associate Deputy Secretary of the Interior was "an employee rather than an officer, either principal or inferior," under the Appointments Clause. GAO Report B-290233, at 5 (2002). Plaintiffs' reliance on the GAO opinion is misplaced because the Principal Deputy is not merely an employee. Rather, he is a duly appointed inferior officer whose exercise of delegated authority does not violate the Appointment Clause, as discussed above (pp. 25-27).

Plaintiffs' reliance on an OLC opinion that long predates the FVRA is likewise misplaced. Opening Brief 26. The opinion compares 12 U.S.C. § 242, allowing the Federal Reserve Board's Vice Chairman to serve as Chairman in the latter's "absence," with "numerous other agencies" whose statutes also allow vice chairmen to serve "as a result of a vacancy" in a chairman's office. 2 Op. O.L.C. 394, 395 (1978). Because the omission of language about vacancies

in § 242 "must be . . . meaningful," *id.*, the Vice Chair may not "automatically serve as Chairman" temporarily, when the latter's term expires. *Id.* at 397. Whatever its validity in other contexts, however, the distinction between "vacancy" and "absence" elsewhere is unsupported here. As already discussed, the FVRA, enacted two decades after the OLC opinion Plaintiffs cite, "permits non-exclusive responsibilities to be delegated to other appropriate officers and employees in the agency." 23 Op. O.L.C. at 72. It poses no obstacle to delegation here.

Moreover, the Manual chapter Plaintiffs identify as concerned with "vacancies" addresses "succession" in office, not delegation. 302 DM 1.1 (quoted in Opening Brief 28); *see also* 302 DM 2.1 (ECF-33-1 at 75) (chapter's purpose is "designating automatic successors"). Succession is not at issue. Nobody disputes that the Principal Deputy's temporary "succession" to the Assistant Secretary position ended before he issued the ROD. Nor is Interior relying on the succession memorandum cited by Plaintiffs (at 30-31) that incorrectly identified the Principal Deputy by name rather than by his title. Yet Plaintiffs cite nothing in the Manual's "Delegation Series" (Parts 200-255) distinguishing "vacancy" from "absence." *See* ECF-33-1 at 68-74. That omission is fatal to their argument.

Plaintiffs raise various other flyspecks regarding whether the Principal Deputy was properly delegated authority under the Department Manual. *See* Opening Brief 25-30. Their argument (*id.* at 25-26) that nothing in the Manual may override limits on delegation imposed by regulations merely repeats Plaintiffs' incorrect argument regarding § 151.12(c), discussed in Section I.A above (pp. 14-27). Given the confirmation of the Principal Deputy's authority by former Deputy Secretary Connor, and twice by Acting Assistant Secretary Black, the Court need not reach any of Plaintiffs' other quibbles.

II. Plaintiffs' Rancheria Act challenge should be rejected.

Plaintiffs argue (at 33-37) that Interior's decision acquiring land in trust for the Tribe violated the Rancheria Act, which prohibits a tribe whose assets have been distributed "pursuant to this Act" from receiving any benefits due to its status as an Indian tribe. 72 Stat. 621. That argument should be rejected.

Plaintiffs' argument disregards the fact that Interior restored the Tribe's federal relationship after entering into a court-approved settlement in another case. In response to litigation in the Northern District of California alleging that Interior's termination of the Tribe's federal status was unlawful, Interior entered into a settlement with the Tribe in 2009, agreeing "that the Tribe was not lawfully terminated, and the Rancheria's assets were not distributed, in accordance with the [Rancheria Act]." AR602 (settlement); *see supra* (p. 3)

(discussing statute's requirements). Interior agreed "to restore the Tribe to the status of a federally-recognized Tribe," AR603, and to process "any applications for land into trust for any parcels of land acquired by the Tribe," AR605. The Northern District of California entered judgment "in accordance with" the settlement agreement. AR599.

Pursuant to the settlement, Interior published notice in the Federal Register that the Tribe was "relieved from the application" of the Rancheria Act's termination provisions and acknowledged as "an Indian entity with the same status as it possessed prior to distribution of the assets of the Rancheria." 74 Fed. Reg. 33,468 (Jul. 13, 2009). Interior added the Tribe's name to the official list of federally recognized Indian tribes published that same year. 74 Fed. Reg. at 40,222. As the preamble to the list explained, "Federal relations have been reestablished with Wilton Rancheria pursuant to a court-ordered settlement stipulation." *Id.* at 40,218. The Tribe has appeared on the list ever since. *See* 85 Fed. Reg. 5462, 5466 (Jan. 30, 2020).

Plaintiffs' argument that the Rancheria Act nonetheless prohibits Interior from acquiring land for the Tribe is incorrect. Opening Brief 35-37. Section 10(b) of that Act provides: "After the assets of a rancheria or reservation have been distributed *pursuant to this Act*, the Indians who receive any part of such assets . . . shall not be entitled to any of the services performed by the United

States for Indians because of their status as Indians," and "all statutes of the United States which affect Indians because of their status as Indians shall be inapplicable to them . . . ." 72 Stat. 621 (emphasis added). As just discussed, the court-ordered settlement specified that the Tribe's "assets were not distributed, in accordance with the provisions of the [Rancheria Act]." AR602. The settlement unwound the unlawful termination of the Tribe's federally recognized status. *See*, *e.g.*, *Stand Up*, 879 F.3d at 1185 (observing that a similar stipulation "reinstated" tribes that had lived on Rancherias "as Indian entities with the same status as they possessed" prior to termination); *Amador County*, 640 F.3d at 375-76 (Rancheria Act "authorized" terminating relations with tribes, and *Hardwick* sought to "undo the effects" of the statute).

Plaintiffs contend that the settlement agreement cannot be given effect because federal law prohibits restoring the Tribe to its federally recognized status. Opening Brief 36. However, the district court held that "Stand Up has abandoned its attack on the settlement agreement" based on statements in its summary judgment reply. ECF-109 at 8 (footnote omitted). Because Plaintiffs' opening brief on appeal does not challenge that holding, they have "forfeited" the opportunity to do so. *Stand Up*, 879 F.3d at 1186. In any event, the district court was correct. Plaintiffs' summary judgment reply disclaimed any challenge to the settlement. *See* ECF-100 at 10, 14.

Nor may Plaintiffs challenge the Tribe's status as a recognized Indian tribe because the time to do so has now passed. *See* 28 U.S.C. § 2401(a) (six-year statute of limitations); *see also Big Lagoon Rancheria v. California*, 789 F.3d 947, 950 n.1 (9th Cir. 2015) (prohibiting untimely indirect challenge to a tribe's federally recognized status). Notice of the Tribe's restored status was published in the Federal Register on July 13, 2009. 74 Fed. Reg. 33,468. This case was filed in January 2017, ECF-1, a year-and-a-half beyond the six-year statute of limitations. Interior's land-into-trust decision neither reopens the legality of the settlement nor permits a challenge to its decision restoring the Tribe's federal relationship. *See Alliance for Safe, Efficient & Competitive Truck Transportation v. FMCSA*, 755 F.3d 946, 954 (D.C. Cir. 2014) (rejecting claim that earlier agency decision was reopened).

In any event, the settlement is supported by the List Act, which acknowledges that Indian tribes may be recognized "by a decision of a United States court." 108 Stat. 4791. The court-entered settlement here qualifies as such a decision. Moreover, a tribe so recognized "may not be terminated except by an Act of Congress." *Id.* Indeed, Congress has "expressly repudiated the policy of terminating recognized Indian tribes," embodied by the Rancheria Act, and has "actively sought to restore recognition" to such tribes.

Id.; *see also* 25 U.S.C. § 2501(f) (Congress "repudiates and rejects . . . any policy of unilateral termination of Federal relations with any Indian nation.").

Plaintiffs' reliance (at 36-37) on case law prohibiting agencies from entering into settlements beyond their statutory authority is misplaced. Congress has authorized the Attorney General to conduct and supervise litigation for the government. *See* 28 U.S.C. §§ 516, 519. That includes authority to "compromise any case on such terms as he sees fit," a power "in part inherent [in the Attorney General's] office and in part derived from various statutes and decisions." 38 Op. Att'y Gen. 124, 126 (1934). Plaintiffs cite nothing to show that the settlement exceeds that broad authority. *See*, *e.g.*, *Swift & Co. v. United States*, 276 U.S. 311, 331 (1928) ("we do not find in the statutes defining the powers and duties of the Attorney General any . . . limitation" on entering into a consent decree that contains broader prohibitions than does the underlying statute); *Confiscation Cases*, 74 U.S. 454, 458 (1869).

Plaintiffs contend that Congress alone may restore tribes to federal recognition. Opening Brief 36 n.92. That undeveloped argument is made through a footnote, which "results in forfeiture." *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014); *accord Hutchins v. District of Columbia*, 188 F.3d 531, 539-40 n.3 (D.C. Cir. 1999). Regardless, Plaintiffs' contention is incorrect. The Court has upheld as "perfectly reasonable" Interior's reliance on a stipulated

judgment restoring an improperly terminated tribe to federal recognition as the basis for acquiring land in trust for that tribe. *Stand Up*, 879 F.3d at 1185; *see also County of Amador*, 872 F.3d at 1020-28 (upholding acquisition of land in trust for administratively restored tribe). Finally, although Plaintiffs refer fleetingly to the Indian Reorganization Act (at 35, 37), that undeveloped argument has also been forfeited.

III. Interior complied with NEPA.

The Elk Grove parcel was analyzed in the draft EIS as an alternative to the site originally proposed, and was subsequently designated as the preferred alternative in the final EIS. Plaintiffs contend that Interior violated NEPA (1) by failing to prepare either a second draft EIS or a supplemental EIS before deciding to acquire in trust the Elk Grove site (Br. at 37-42, 45-53); and (2) by failing to provide the public adequate notice that Elk Grove would be selected (Br. at 43-45). These arguments lack merit and should be rejected.

A. Neither a new draft nor a supplement was required because the EIS fully analyzed the effects of Elk Grove.

Agencies must prepare a supplemental EIS for "substantial changes in the proposed action that are relevant to environmental concerns," or for "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. §§ 1502.9(c)(1)(i), (ii). "NEPA does not require agencies to needlessly repeat

their environmental impact analyses every time [new] information comes to light." *Friends of Capital Crescent Trail v. FTA*, 877 F.3d 1051, 1060 (D.C. Cir. 2017). Rather, supplements are required only where new information "provides a seriously different picture of the environmental landscape." *National Committee for New River v. FERC*, 373 F.3d 1323, 1330 (D.C. Cir. 2004); *accord Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989) (requiring supplement only where the environment will be affected "in a significant manner or to a significant extent not already considered"). "So long as the impacts of the steps that the agency takes were contemplated and analyzed by the earlier NEPA analysis, the agency need not supplement the original EIS or make a new assessment." *Mayo v. Reynolds*, 875 F.3d 11, 21 (D.C. Cir. 2017); *see also Friends of Marolt Park v. DOT*, 382 F.3d 1088, 1097 (10th Cir. 2004) ("a supplemental EIS is not required where the [agency] selects an option not identified as the preferred option in the final EIS, as long as the selected option was fully evaluated").

Here, Interior's identification of Elk Grove as the preferred alternative does not require supplementation because the environmental effects at that site were extensively analyzed in both the draft and final EIS. For example, the draft EIS discusses Elk Grove's effects on: geology and soils, water resources, air quality, biological resources, cultural and paleontological resources,

socioeconomic conditions, transportation, land use, public services, noise, hazardous materials, aesthetics, induced growth, and cumulative effects. *See* AR26671-72, AR26690-93, AR26711-13, AR26728-29, AR26733, AR26784-89, AR26831-37, AR26853-54, AR26878-82, AR26894-97, AR26903, AR26913-15, AR26926-29, AR26935-36, AR26937-40, AR26979-88. In addition to discussing the topics already mentioned, the final EIS includes what Plaintiffs concede are "hundreds of pages" of additional analysis on environmental, economic, and cultural impacts. Opening Brief 47 & n.113 (citing final EIS's appendices), 51.

There is no support in NEPA or its regulations for Plaintiffs' contention (at 37-42, 45) that Interior had to start over with a completely new EIS when Elk Grove became the proposed action and preferred alternative. NEPA imposes procedures that force agencies to take a "hard look" at the environmental impacts of their choices before making any "irreversible and irretrievable commitments of resources." 42 U.S.C. § 4332(2)(C)(v); *see also Marsh*, 490 U.S. at 385 (requiring a "hard look" at new information to assess whether supplementation is necessary). These procedures further "the Act's 'action-forcing' purpose," *id.* at 371 & n.14, by requiring analysis of environmental impacts from both the "proposed action" *and* from "alternatives." 42 U.S.C. § 4332(2)(C)(i), (iii). For that process to be

meaningful, agencies must be free to choose among the stated alternatives to the proposals without endless study. *See*, *e.g.*, 40 CFR § 1500.1(c) ("NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action."); *accord* § 1500.2(b), § 1500.4. "To require otherwise would render agency decision-making intractable . . . ." *Marsh*, 490 U.S. at 373.

Plaintiffs seek further procedures—*e.g.*, a "new" draft or a supplement (Opening Brief 45-48), two proposed actions (*id.* at 48), new public scoping (*id.* at 39-42), or more hearings—before Interior may select an alternative already analyzed in the EIS. Such an approach "improperly imposes on agencies an obligation beyond the 'maximum procedural requirements' specified" by statute or regulation. *Perez v. Mortgage Bankers Association*, 575 U.S. 92, 100 (2015) (quoting *Vermont Yankee Nuclear Power Corp. v. NRDC,* 435 U.S. 519, 524 (1978)). If agencies had to restart their analyses whenever new information arose, "an unyielding avalanche of information might overwhelm [their] ability to reach a final decision," *Village of Bensenville v. FAA*, 457 F.3d 52, 71 (D.C. Cir. 2006). Or the parties could "behave like Penelope, unravelling each day's work to start the web again the next day," *Western Coal Traffic League v. ICC*, 735 F.2d 1408, 1411 (D.C. Cir. 1984). In any event, given the proximity of Galt to Elk Grove, it cannot fairly be said that newspaper notices or public hearings did not reach the affected community. *See*, *e.g.*, AR12957 (noting the

public hearing held in Galt was "approximately ten miles away from the Mall site in Elk Grove"); AR12958-59 (notice of draft EIS was published in a "newspaper that circulates in Elk Grove"); *see also Richland Park Homeowners Association, Inc. v. Pierce*, 671 F.2d 935, 943 (5th Cir. 1982) (collecting cases from multiple circuits holding that NEPA imposes "no obligation to hold public hearings or give any particular form of public notice").

Nothing in NEPA's regulations prohibits agencies from authorizing an action that a draft EIS analyzed as an alternative to the original proposal. When preparing a final statement, agencies may "[m]odify alternatives including the proposed action." 40 C.F.R. § 1503.4(a)(1). Additionally, agencies must "[i]dentify the agency's preferred alternative or alternatives, *if one or more exists*, in the draft statement and identify such alternative in the final statement" unless otherwise prohibited by law. *Id.* § 1502.14(e) (emphasis added). As the italicized clause implies, an agency need not have a preferred alternative at the draft stage. Indeed, allowing agencies to select an "alternative" to the option proposed by the draft EIS comports with the regulations' dictate that agencies "rigorously explore and objectively evaluate" the environmental impacts of all "reasonable alternatives." *Id.* § 1502.14; *accord City of Alexandria v. Slater*, 198 F.3d 862, 866 (D.C. Cir. 1999).

Plaintiffs (at 50) fault Interior for not considering additional alternatives at the Elk Grove site such as a "reduced-scale casino" or "non-gaming retail development." Interior, however, considered those options and provided an explanation for why it did not analyze them in greater detail. AR11004-05. Concerning reduced-intensity development, environmental impacts were "already likely to be relatively low since the site is already partially developed." AR11004. And because the retail market is saturated, socioeconomic effects on other retailers from non-gaming development would be increased. *Id.* Plus, the option would not generate enough revenue to meet the project's purpose of providing for tribal economic development, self-sufficiency, and government programs. AR11005; *see also* AR24432 (ROD's statement that Alternative F would best meet project purpose); AR10964 (FEIS's discussion of project purpose).

Interior's explanation satisfies NEPA's requirement that agencies need only "briefly discuss" the reasons for eliminating alternatives from detailed study. 40 C.F.R. § 1502.14(a); *see also Vermont Yankee*, 435 U.S. at 551 (agency need not "include every alternative device thought and conceivable by the mind of man") (internal quotation marks omitted). That is especially so here where Interior approved a project by a nonfederal sponsor. *See Theodore Roosevelt Conservation Partnership v. Salazar*, 661 F.3d 66, 73 (D.C. Cir. 2011)

(agency "reasonably chose to confine its goal simply to addressing [the] proposal" by a private company); *City of Grapevine v. DOT*, 17 F.3d 1502, 1506 (D.C. Cir. 1994) (agency "may accord substantial weight to the preferences of the [nonfederal] applicant and/or sponsor in the siting and design of the project") (internal quotation marks and citation omitted).

B. Interior provided adequate notice that Elk Grove was under consideration.

Because an EIS "provides a springboard for public comment," *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989), the district court correctly took into account that the public had adequate notice Elk Grove was being considered. ECF-109 at 32-33. Although Plaintiffs contend (at 43-45) that the notice was insufficient, that factual contention is refuted by the record.

Elk Grove (Alternative F) was publicly identified as a viable option beginning with the scoping report in February 2014 (*see* AR16281-83, AR16291), and continuing with the draft EIS. *See* 80 Fed. Reg. 81,352 (Dec. 29, 2015) (inviting comments on a draft that included Alternative F); *see also* 81 Fed. Reg. 2214 (Jan. 15, 2016) (allowing 60 days for comments). One of the Plaintiffs suggested at a public meeting in January 2016 that Interior consider the Elk Grove site "carefully." AR10677. At that same meeting, the Tribe's chairman stated that "Alternatives A and F, Elk Grove, are the tribe's preferred alternatives." AR10623. Accordingly, the City of Elk Grove provided

extensive written comments on Alternative F, AR10290-10307, to which Interior responded. AR10718-32. The Environmental Protection Agency, a cooperating agency, also recommended "that [Interior] and the Tribe strongly consider the [Elk Grove] site for the project." AR10310; *see also* AR10733 (response). Elk Grove became a cooperating agency on the project as well. AR1148; *see also* AR515 (letter request), AR12957 (response to comments).

Plaintiffs (at 44-45) contend that they suggested Elk Grove because they wished to "defeat" the Tribe's land-into-trust proposal altogether by urging an option they believed "impossible." But "administrative proceedings should not be a game or a forum to engage in unjustified obstructionism . . . ." *Vermont Yankee*, 435 U.S. at 553. "NEPA is not a suitable vehicle for airing grievances about the substantive policies adopted by an agency." *Grunewald v. Jarvis*, 776 F.3d 893, 903 (D.C. Cir. 2015) (internal quotation marks, citation omitted); *see also Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 777 (1983) ("The political process, and not NEPA, provides the appropriate forum in which to air policy disagreements.").

Other commenters understood that Elk Grove was under serious consideration. Sacramento County stated that its needs would be addressed if the "Elk Grove site is ultimately selected." AR10348. The Sacramento Environmental Council recognized the air quality advantages of Alternative F.

AR10447-48. Another commenter stated that "Elk Grove remains an option for proposed Indian casino site." AR10507. Furthermore, Plaintiffs admit (at 42 n.100) they were told nearly a month before the final EIS issued that the Tribe had submitted a new application for the Elk Grove site. *See* AR4031-43. The record shows that the public had ample notice that Elk Grove was a realistic option. *See*, *e.g.*, *Nevada v. Department of Energy*, 457 F.3d 78, 90 (D.C. Cir. 2006) (observing that the "many comments submitted in response to the FEIS manifest that the public had sufficient information to comment" on the alternatives analyzed).

In any event, the final EIS unequivocally identified Elk Grove as Interior's preference, AR11008-09, and Interior responded to Plaintiffs' comments on the final EIS. AR12951-66; *see also* 40 C.F.R § 1503.1(b) ("persons may make comments before the final decision"). "Any defects there may have been in the DEIS were cured by the [agency's] consideration of comments on the FEIS." *National Committee for New River*, 373 F.3d at 1331.

C. Plaintiffs' remaining arguments should be rejected.

Plaintiffs quibble with the district court's NEPA ruling in other insubstantial ways, all of which lack merit. Their citation (at 38) to *Half Moon Bay Fishermans' Marketing Association v. Carlucci*, 857 F.2d 505 (9th Cir. 1988), actually supports Interior. There, "although the draft supplement's discussion

of alternatives indicate[d] that [one option] was the preferred site, the alternative finally selected . . . was clearly within the range of alternatives the public could have reasonably anticipated the [agency] to be considering." *Id.* at 509. So, too, here, where the draft EIS analyzed the selected choice as a stand-alone alternative, and the final EIS included even more detailed study. *See supra* (pp. 40-41). Indeed, where the final EIS fully analyzes environmental impacts of the chosen option, an agency's failure to identify any preferred alternative whatsoever has been held harmless. *See Nevada*, 457 F.3d at 91. Interior did far more than that here.

Plaintiffs' argument (at 52) that Interior decided to acquire the Elk Grove property in trust too quickly after issuing the final EIS should also be rejected. Interior properly observed the 30-day waiting period required by the applicable regulations. *See* 40 C.F.R. § 1506.10(b)(2) (prohibiting decision's issuance until at least 30 days after availability of the FEIS); *see also* 81 Fed. Reg. 91,169 (Dec. 16, 2016) (providing notice of availability of final statement). Furthermore, Plaintiffs' argument ignores that an agency may have a "preferred" alternative throughout the environmental review process. *See* 40 C.F.R. § 1502.14(e) (referring to agency's preference at the draft, final stages); *see also Carolina Environmental Study Group v. United States*, 510 F.2d 796, 801 (D.C. Cir. 1975) (citing *Environmental Defense Fund, Inc. v. Army Corps of*

Engineers, 470 F.2d 289, 295 (8th Cir. 1972)) (agency need not be "subjectively impartial"). In any event, Interior spent a year revising the draft before issuing a final EIS, which was sufficient to dispel any notion that selection of the proposed action was predetermined. *See* 40 C.F.R. § 1506.10(b)(1) (prohibiting decision until at least 90 days after draft EIS is available).

Plaintiffs rely on guidance about the "Forty Most Asked Questions" under NEPA, 46 Fed. Reg. 18,026 (Mar. 23, 1981), to contend that differences in the terms "alternatives" and "preferred alternative" show that Interior had to prepare another draft or a supplemental EIS. Opening Brief 43. Nothing in the cited guidance, however, requires an agency to redo its NEPA analysis merely because it selects a fully analyzed alternative that was not originally named as the action proposed. In any event, the guidance is "not a binding regulation." *Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852, 862 (D.C. Cir. 2006); *see also Cabinet Mountains Wilderness v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982) (holding the guidance unpersuasive). Plaintiffs also misquote the definition of "major Federal action" as "proposed action." Opening Brief 43 (quoting 40 C.F.R. § 1508.18(b)(4)). "Major Federal action" is merely one threshold requirement for preparing an EIS. *See* 42 U.S.C. § 4332(2)(C). It does not address whether an alternative other than the proposed action may be selected without preparing a supplement or new draft.

Finally, Plaintiffs argue (at 52-53) that Interior did not conduct internal deliberations about Elk Grove as it would have if the site had been proposed earlier. Deliberative communications, however, play no role in judicial review of Interior's decision because they are outside the administrative record. *See Checkosky v. SEC*, 23 F.3d 452, 489 (D.C. Cir. 1994) (Randolph, J.) (agency deliberations are "privileged from discovery"); *id.* at 454 (per curiam) (rejecting petitioners' challenge "as per Part V of Judge Randolph's opinion"); *see also San Luis Obispo Mothers for Peace v. NRC*, 789 F.2d 26, 28, 44-45 (en banc) (D.C. Cir. 1986) (requests to supplement the administrative record with deliberative materials must be rejected absent a strong showing of "bad faith [or] improper conduct."); *id.* at 45-46 (Mikva, J., concurring).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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