NOT YET SCHEDULED FOR ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19-5285

STAND UP FOR CALIFORNIA!, PATTY JOHNSON, JOE TEIXEIRA, and LYNN WHEAT,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, DAVID BERNHARDT, in his official capacity as Secretary of the Interior, BUREAU OF INDIAN AFFAIRS, and TARA M. SWEENEY, in her capacity as Assistant Secretary-Indian Affairs,

Defendants-Appellees,

WILTON RANCHERIA, CALIFORNIA,

Intervenor-Appellee.

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

REPLY BRIEF OF STAND UP FOR CALIFORNIA!, PATTY JOHNSON, JOE TEIXEIRA, and LYNN WHEAT

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GLOSSARY

APA:	Administrative Procedure Act
AS-IA:	Assistant Secretary–Indian Affairs
BIA:	Bureau of Indian Affairs
CRA:	California Rancheria Act of 1958
Department:	Department of the Interior
DEIS:	Draft Environmental Impact Statement
EIS:	Environmental Impact Statement
FVRA:	Federal Vacancies Reform Act
FEIS:	Final Environmental Impact Statement
IRA:	Indian Reorganization Act of 1934
IBIA:	Interior Board of Indian Appeals
NEPA:	National Environmental Policy Act
NIGC:	National Indian Gaming Commission
Principal Deputy:	Principal Deputy Assistant Secretary–Indian Affairs
ROD:	Record of Decision
Secretary:	The Secretary of the Interior
SEIS	Supplemental Environmental Impact Statement
Stand Up:	Stand Up for California!, Patty Johnson, Joe Teixeira, and Lynn Wheat
Wilton:	The Wilton Rancheria Tribe

SUMMARY OF ARGUMENT

The Supreme Court recently reiterated that "the Government should turn square corners in dealing with the people." *Dep't of Homeland Security Regents of the Univ. of California Wolf v. Vidal*, 591 U.S. __, Slip Op., *11 (2020) (quoting *St. Regis Paper Co. v. United States*, 368 U. S. 208, 229 (1961) (Black, J., dissenting)). In this case, an officer not authorized to acquire land in trust did exactly that for ineligible Indians without properly informing the public of the location of the land. The Department did not "turn square corners"; it sprinted a straight line to finalize a decision before January 20, 2017.

ARGUMENT

I. The Department violated Section 151.12(c) in acquiring the Elk Grove site in trust.

There is no question that Principal Deputy Roberts was not the Secretary or the AS-IA when he issued the trust decision challenged here. Nonetheless, Roberts approved Wilton's trust request and directed the Department to immediately acquire the Elk Grove site in trust, in violation of 25 C.F.R. § 151.12(c).

Defendants contend that Roberts had such authority, despite having already served as the Acting AS-IA for the maximum time federal law permits. They claim that Roberts was automatically redelegated all of the AS-IA's delegable authority by Departmental Manual. And because *all* of the AS-IA's powers are delegable, Roberts could make any decision the AS-IA could make. And if not, someone ratified it later. One wonders why an AS-IA is needed at

all, if the Department can circumvent the Appointments Clause by Departmental Manual.

The AS-IA's final trust authority, however, cannot be redelegated under Section 151(c). Roberts did not have authority to issue this decision, and neither the memorandum from the Deputy Secretary, nor a decision by an unauthorized deputy "ratified" Roberts' illegal trust decision.

A. Section 151.12(c) does not permit redelegation of final trust authority.

Section 151.12(c) unambiguously authorizes two officials to make final trust decisions—the Secretary and the AS-IA. The Court should apply the regulation as written. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) ("Only truly ambiguous rules are entitled to deference.").

1. The Department does not argue that Section 151.12 is ambiguous, and the district court did not conclude otherwise.[1] The rule likewise states, "To carry out the Secretary's delegated authority under the IRA, decisions to acquire land in trust *are delegated either to the AS-IA or to a BIA official*." 78 Fed. Reg. 67,929 (Nov. 12, 2013) (emphasis added).

Defendants do not like that result, so they urge the Court to read "Principal Deputy" into Section 151.12(c), by applying a presumption courts sometimes invoke when interpreting statutes. *See* Gov.Br. 15; Wilton.Br. 25. Defendants identify no case where this Court has applied the presumption to a

[1] ECF-53, 12_n.9. Wilton argues [at 32] that *Auer* deference applies but does identify any ambiguous language.

regulation, and they offer no compelling reason for it to do so now.[2] Unlike Congress, which operates in broad strokes, an agency's job is to "fill out the statutory scheme." *Kisor*, 139 S. Ct. at 2413. Section 151.12 does that by delegating final and non-final trust authority to named officials in subsections (c) and (d). The Court should not read Section 151.12(c) as authorizing something it does not. *See Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000) (An agency should not be permitted, "under the guise of interpreting a regulation, to create *de facto* a new regulation.").

2. The Department, having assumed that the presumption applies, contends [at 16] that limiting language—"such as 'only' or 'exclusively'"—is necessary to rebut the presumption. That is not the rule. Courts are to read statutes "fairly." *United States v. Giordano*, 416 U.S. 505, 514 (1974). The Department insists [at 17-18] that the *Giordano* rule does not apply because the statute in *Giordano* was "prohibitory," not "salutary." But *Giordano* does not suggest its interpretive approach differs depending on statutory purpose.

[2] Defendants cited two cases where a court interpreted a *regulation* to permit redelegation, but neither supports their argument. In *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 419-421 (D. Conn. 2008), the court concluded that acknowledgment decisions could be redelegated because the regulation defined the AS-IA to include "or that officer's authorized representative." In *Sokaogon Chippewa Cmty. v. Babbitt*, 929 F. Supp. 1165, 1181-82 (W.D. Wis. 1996), the court determined that 209 § DM 8.3(A) authorized a Deputy Assistant Secretary to resolve an appeal where the AS-IA recused herself.

Defendants offer no persuasive reason for the Court to adopt a more restrictive rule for interpreting agency regulations.

The Department turns [at 22] to a 2005 memorandum in which the Solicitor was unable to identify any agency regulations assigning exclusive duties to the AS-IA.[3] A survey conducted in 2005 does not inform the meaning of a 2013 regulation. And at least one district court disagreed with it. *See Crawford-Hall v. United States*, 394 F. Supp. 3d 1122, 1129-30, 1137 (C.D. Cal. 2019) (holding AS-IA's authority to resolve appeals under 25 C.F.R. § 2.20(c) not redelegable).[4] Section 2.20—promulgated in 1989—provides that the AS-IA "shall have authority to decide to issue a decision in the appeal, or [a]ssign responsibility to [i]ssue a decision in the appeal to a Deputy," whose decision is non-final. *See* 54 Fed. Reg. 6480 (Feb. 10, 1989). Section 2.20 does not contain "limiting language."

The Department declares [at 20-21] Section 151.12's "bifurcated path" to be consistent with 25 C.F.R. Part 2 appeal regulations. That only reinforces the view that final trust authority is nondelegable. Part 2 establishes that "[n]o decision, which at the time of its rendition is subject to appeal to a superior authority in the Department, shall be considered final," with the sole

[3] That survey was conducted prior to and in support of the delegation involved in *Schaghticoke*, 587 F. Supp. 2d at 421.

[4] The court in *Crawford-Hall* adopted the lower court's opinion addressing Section 151.12(c) and used the lower court's analysis to distinguish Section 2.20 from Section 151.12(c). 394 F. Supp. 3d at 1147-52. *Crawford-Hall*'s reliance on the lower court's analysis is unpersuasive for the reasons set forth above.

exception of the AS-IA's decisions. *Id.* § 2.6. Under no circumstances is a deputy's decision final, including when the AS-IA directs him to resolve an appeal. *Id.* § 2.20(c). If a deputy cannot resolve a trust appeal, there is no reason to read Section 151.12(c) as allowing him to issue a final trust decision, thereby circumventing an administrative appeal.

3. In any case, Section 151.12(c) *does* include limiting language. When the Secretary included "AS-IA" in subsection (c) and modified it with "pursuant to delegated authority," rather than "or authorized representative," he precluded redelegation. The Department contends [at 16-17] that the Secretary remains free to redelegate because 25 C.F.R. § 151.2(a) defines "Secretary" to include "authorized representative." When the Secretary promulgated that definition in 1995, he stated that "decisions will be appealable if they are made below the [AS-IA's] level." 60 Fed. Reg. 32,874, 32,878 (Jun. 23, 1995).

More importantly, the Department's interpretation renders "AS-IA" superfluous, violating the canon against superfluity. *See TRW, Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (avoiding constructions that render clauses "superfluous, void or insignificant"). The Department concedes [at 19] that its interpretation creates redundancy but claims that Plaintiffs' reading "creates rather than resolves a perceived ambiguity." What that ambiguity is the Department does not say.

Citing *United States v. Mango*, 199 F.3d 85, 90 (2d Cir. 1999), the Department claims [at 17] that regulations "may mention a specific official only to make it clear that this official has a particular power rather than to exclude

delegation to other officers." True, but *Mango* next acknowledges, "a specific grant of power to an executive official to delegate a function to a named subordinate may be persuasive evidence that Congress did not intend subdelegation to any other official." *Id.* Here, there was no need to "make clear" that the AS-IA has final trust authority because the AS-IA is the Secretary's "authorized representative" by law.

4. Limiting final trust authority to the Secretary and the AS-IA is consistent with the history of the rule and constitutional concerns. Wilton argues [at 29] that Plaintiffs fail to explain why an official acting as the AS-IA "would not presumptively apply the same level of internal review and consistency as the AS-IA." But one obvious level of review is missing—review by a Presidentially appointed, Senate-confirmed officer.

Defendants do not contest the significance of acquiring trust land. That power "reaches the core of the Federal trust responsibility." 78 Fed. Reg. at 67,929. The exercise of a significant authority such as this is what "marks … the line between officer and nonofficer." *Edmond v. United States*, 520 U.S. 651, 662 (1997). That is why a final trust decision, which immediately binds the United States, must have "extensive public participation and several layers of review by Department officials before issuance." 78 Fed. Reg. at 67,929. If the purpose of the Appointments Clause is "to preserve political accountability relative to important Government assignments," *Edmond*, 520 U.S. at 663, interpreting Section 151.12(c) to allow redelegation of such a "core" power raises

constitutional concerns and should be avoided.[5] *See* Op.Br. 23-24; *cf. L.M.-M. v. Cuccinelli*, --- F. Supp. 3d ---, 2020 WL 985376, *23 (D.D.C. Mar. 1, 2020) ("It was the pervasive use of those vesting-and-delegation statutes, along with 'the lack of an effective enforcement process,' that convinced Congress of the need to enact the FVRA.")

B. Apart from Section 151.12(c)'s plain language, Roberts was not redelegated the AS-IA's authority.

The Department largely abandons its argument that 209 DM 8.4.A–B of the Departmental Manual automatically redelegated Roberts authority. It argues [at 28 n.3] that agency officials ratified Roberts' decision, "mak[ing] it unnecessary for the Court to decide whether the Manual, standing alone, is legally effective to delegate authority." This argument fails.

1. As an initial matter, Deputy Secretary Michael Connor's January 19, 2017 memorandum, Acting AS-IA Michael Black's February 10, 2017 denial of Plaintiffs' 5 U.S.C. § 705 stay request, and Black's July 13, 2017 dismissal of Plaintiffs' appeal are not part of the record. The Department successfully argued below that documents post-dating Roberts' decision were impermissible extra-record material that was too burdensome to produce.[6] And although the

[5] The Department claims [at 25-26] that Roberts was properly characterized as an "inferior officer" because his authority was "constrained." But the authorities it cites are applicable to all Department employees to whom authority is delegated. Nor can it be said that Roberts' decision was meaningfully supervised; there simply wasn't time. *See* ECF-91 at 8, 30-33.

[6] *See* ECF-35; ECF-56. Plaintiffs' summary judgment motion raised the purely legal question of whether Roberts violated Section 151.12(c). ECF-35 at 3 ("This

Connor memorandum predates the trust decision, it is not in the record.[7] Plaintiffs objected to Defendants' reliance on those decisions in the absence of a record. ECF-45 at 14. The Court cannot uphold the trust decision based on actions for which no record has been produced. *See* 5 U.S.C. § 706(2); *see also Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 793 (D.C. Cir. 1984) (noting unfairness of resolving case on partial record).

2. Defendants' reliance on Black's decisions is misplaced; neither decision purports to ratify Roberts' decision. Black's February 10, 2017 decision denies Plaintiffs' January 17, 2017 5 U.S.C. § 705 request that the Department administratively stay the transfer of title. ECF-17-H. Black's July 13, 2017 dismissal of Plaintiffs' administrative appeal concludes that Roberts' decision was final. ECF-33-1 at 33-40. In neither case did Black indicate he was "ratifying" Roberts' decision. *Cf. Jooce v. Food and Drug Admin.,* Slip Copy, 2020 WL 680143, *2 (D.D.C. Feb. 11, 2020) (quoting Senate-confirmed commissioner's express ratification of rule published in the Federal Register).

The Connor memorandum is the only document that purports to ratify anything, but Connor issued that document *before* Roberts' trust decision. *See*

Court will resolve, as a pure legal question, whether the January 19, 2017 decision was final and subject to judicial review."). Defendants' cross-motions, however, raised record-dependent claims, and because the court held that Roberts' decision was final, it relieved the Department from producing the record for the decisions Defendants now cite. ECF-56.

[7] *See, e.g.,* 2018_Transcript 16 (noting that internal emails regarding the Connor memorandum were not in the record).

2018_Transcript 16 (Remarks of Cody McBride) ("The Connor memo came before the Wilton decision."). "Ratification" is the "[c]onfirmation of a previous act, thereby making the act valid from the moment it was done." BLACK'S LAW DICTIONARY 1513 (11th Ed. 2019). The Connor memorandum could not "ratify" Roberts' later-occurring trust decision.

3. More importantly, Black could not ratify Roberts' decision, because Black was not a properly appointed official. Ratification can remedy a defect arising from the decision of "an improperly appointed official … when … *a properly appointed official* has the power to conduct an independent evaluation of the merits and does so." *Intercollegiate Broad. Sys. v. Copyright Royalty Bd.*, 796 F.3d 111, 117-21, 124 (D.C. Cir. 2015) (emphasis added).

Prior to serving as the Acting AS-IA, Black was the Special Assistant to the Director of BIA. In that role, he was not the "first assistant" to the AS-IA and could not serve as the Acting AS-IA. *See* 5 U.S.C. § 3345(a) ("[T]he first assistant to the office of such officer shall perform the functions and duties of the office temporarily in an acting capacity."). The Department contends [at 29] that Black was delegated authority to serve as the Acting AS-IA by virtue of "an order issued by an official whom the previous President had delegated authority to act as the Secretary," but such order is insufficient. The FVRA requires a *Presidential*, not a Secretarial order. *See id.* § 3345(a)(3) ("[T]he President (and only the President) may direct an officer or employee … to perform the functions and duties of the vacant office …").

Black had no more authority to exercise the exclusive functions and powers of the AS-IA than Roberts. Acquiring land in trust and assuming jurisdiction over an IBIA appeal are nondelegable functions exclusive to the AS-IA, as discussed above [at 2-7]. Thus, to the extent that Black's decisions could be construed as ratifying Roberts' unlawful actions, they violate the FVRA. *See* 5 U.S.C. § 3348(d)(1), (2) ("An action taken by any person who is not acting [in compliance with the FVRA] shall have no force or effect" and "may not be ratified.").

4. To the extent that Defendants continue to rely on the Departmental Manual to support Roberts' decision, that argument also fails. Defendants concede that Roberts' trust authority as Acting AS-IA expired in July 2016, pursuant to the express language of the FVRA. *See* Gov.Br. 9-10; Wilton.Br. 34-35. Nonetheless, both assert that Roberts' expired trust authority was reanimated by a Manual provision delegating Roberts the AS-IA's authority. That is not correct.

The Manual provisions Defendants cite do not apply when the AS-IA's office is vacant. Under 209 DM 8.4, Roberts could exercise the AS-IA's authority under 209 DM 8.1, only "[i]n the absence of … the [AS-IA]." The Department unpersuasively contends [at 32-33] that the terms "absence" and "vacancy" are interchangeable. In fact, the United States has separately argued "with some force, that ['absence' and 'unavailability'] are commonly understood to reflect a temporary condition, such as not being reachable due to illness or travel." *English v. Trump*, 279 F. Supp. 3d 307, 322 (D.D.C. 2018). "Vacancy," it

acknowledged, has a different meaning—one signifying permanence, as with a resignation. *Id.* The Court should reject the Department's self-serving contention [at 33] that "[w]hatever its validity in other contexts, … the distinction between 'vacancy' and 'absence' elsewhere is unsupported here."

Nor did Plaintiffs forfeit this argument. *See* Gov.Br. 32; Wilton.Br. 36. They have always maintained that the Manual, including 209 DM 8.4, did not delegate Roberts final trust authority. ECF-33 at 16-17; ECR-45 at 4. When it became clear at oral argument that Defendants and the court were conflating "absence" and "vacancy," Plaintiffs stated that "if you're talking about a situation where the Assistant Secretary is absent or recused, that comes within the language of the DM relating to absence, which is a different matter from a vacancy…." 2018_Transcript_37-38. The FVRA, Plaintiffs continued, "doesn't allow them to grant the exclusive powers of a vacant office to a subordinate who has not been confirmed by the Senate." *Id.* The district court nonetheless conflated the terms in its decision. *See, e.g.,* ECF-53 at 8.

5. To the extent Defendants rely on the Connor memorandum, their argument fails for the same reason. Under 109 DM 1.2.B, the Deputy Secretary may only perform the Secretary's functions in his "absence." The Secretary was not absent on January 19. The Department now contends [at 31] that this limitation does not matter because the Manual does not bind the Secretary or Deputy Secretary. That is not correct. The Manual's purpose is to describe "the authorized means of documenting and issuing instructions, policies, and procedures that have general and continuing applicability to Department

activities, or that are important to the management of the Department." 011 DM 1.1. It describes in detail the authority, roles and responsibilities of all Secretarial officers. *See, e.g.*, 109 DM 1.

The Department's reliance on 011 DM 1.2.C [at 31], which states that Manual policies do not bind the Deputy Secretary, is similarly unavailing. That provision was added to the Manual on August 3, *2018*—18 months *after* the Connor memorandum and the initiation of this litigation. Even under that new provision, the Deputy Secretary is not excused from following Manual policies to the "extent they affect the rights of third parties or have the force and effect of law." 011 DM 1.2.C. Delegations obviously affect third party rights, including finality and administrative appeal rights. *See, e.g.*, 25 C.F.R. Part 2; 43 C.F.R. Part 4.

Roberts did not have authority to issue the trust decision, and nothing the Department cites rescues his decision. The Court should vacate the trust decision and order the removal of the Elk Grove site from trust.

II. Section 10(b) of the California Rancheria Act bars this trust acquisition.

Under Section 10(b) of the California Rancheria Act (CRA), "all statutes of the United States which affect Indians because of their status as Indians" are inapplicable to "the Indians who receive any part of [Rancheria] assets" pursuant to the Act. Pub. L. No. 85-671, 72 Stat. 619 (Aug. 18, 1958). Section 5 of the Indian Reorganization Act (IRA), which authorizes the Secretary to acquire trust land "for the purpose of providing land for Indians," is a statute

that benefits Indians because of their status as Indians. 25 U.S.C. § 5108. Trust land applicants must meet one of the IRA's definitions of "Indian" to qualify for trust land. *Carcieri v. Salazar*, 555 U.S. 379, 393 (2009).

No one disputes that the Secretary transferred title to Rancheria land to Wilton members or that some continue to own former Rancheria land today.[8] For that reason alone, Section 5 of the IRA is inapplicable to Wilton members, eliminating the Secretary's authority to acquire trust land for them.

Defendants' various arguments do not negate this central point.

1. The Department asserts [at 36] that its 2009 settlement agreement with Wilton controls because Plaintiffs "disclaimed any challenge to the settlement." Plaintiffs were not parties to their settlement and are not bound by it. "A judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Martin v. Wilks*, 490 U.S. 755, 762 (1989), *superseded by statute on other grounds*, 42 U.S.C. § 2000e–2(n); *see also Sam Fox Pub. Co. v. United States*, 366 U.S. 683, 690 (1961) ("[J]ust as the Government is not bound by private antitrust litigation to which it is a stranger, so private parties, similarly situated, are not bound by government litigation.").

Plaintiffs did not attack the settlement because they—like any third party—are free to "enforc[e] claims that are inconsistent with those that have been adjudicated." REST 2D JUDG § 76. "[T]he fact that the parties have

[8] *See* AR26183; AR620-21 (settlement agreement map identifying Rancheria lands received by Wilton residents).

consented to the relief contained in a decree does not render their action immune from attack on" other grounds. *Local No. 93, Intern. Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 525-26 (1986). The 2009 settlement does not insulate Roberts' trust decision from attack under the CRA, IRA, and APA.

2. The Department also argues that the Secretary has authority to acquire trust land because the Attorney General can "'compromise any case on such terms as he sees fit.'" Gov.Br. 36-38 (quoting 38 Op. Att'y Gen. 124, 126 (1934)). The Attorney General cannot empower the Secretary to take unlawful acts.[9] *See Exec. Bus. Media, Inc. v. U.S. Dep't of Def.*, 3 F.3d 759, 762 (4th Cir. 1993) (The plenary power to settle cases "does not include license to agree to settlement terms that would violate the civil laws governing the agency.").

The Department's claim [at 38] that Plaintiffs "cite nothing to show that the settlement exceeds" the Attorney General's authority is beside the point. Plaintiffs need only establish that the Secretary could not acquire trust land because Section 10(b) of the CRA makes Section 5 of the IRA inapplicable to Wilton members.[10] And if that is correct, the Attorney General exceeded his

[9] A consent decree must (1) "spring from and serve to resolve a dispute within the court's subject-matter jurisdiction;" (2) "come within the general scope of the case made by the pleadings;" and (3) "further the objectives of the law upon which the complaint was based." *Local No. 93*, 478 U.S. at 525.

[10] The Department also asserts [at 39] Plaintiffs forfeited their argument that the trust decision was unlawful under Section 5, but that is not so. *See* Op.Br. 33, 35, 37 (arguing that the Secretary cannot invoke Section 5 because Wilton

authority because his "authority to settle litigation for its government clients stops at the walls of illegality." *Exec. Bus.*, 3 F.3d at 762.

In any case, the Department's settlement concessions do not dictate the result here. "[T]he central characteristic of a consent judgment is that the court has not actually resolved the substance of the issues presented." 18A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4443 (3d ed. 2020 Update). The settlement is irrelevant because its representations cannot preclude Plaintiffs' claims.[11] *See Arizona v. California,* 530 U.S. 392, 414 (2000).

3. If the Department believes it failed to comply with some aspect of the distribution plan such that Rancheria assets were not distributed "pursuant to the Act," it misinterprets Section 10(b).[12] Section 10(b)'s ineligibility provision is triggered by receipt of assets "pursuant to this Act"—not in compliance with a distribution plan. In Section 10(a), Congress declared distribution

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members cannot meet the IRA's definition of "Indians" under 10(b) of the CRA).

[11] The Department claims [at 37] that its settlement is supported by the List Act, 108 Stat. 4791. The fact that the List Act expressly repudiated termination in 1994 does not validate a settlement negotiated 25 years later. Nor is a negotiated settlement "a decision of a United States court," as Wilton contends [at 18]. *See, e.g., Ass'n for Retarded Citizens of Connecticut, Inc. v. Thorne,* 30 F.3d 367, 370 (2d Cir. 1994) ("Because the terms of the consent decree were voluntarily assumed rather than legally imposed, there is no basis for extending the negotiated outcome to a nonparty.").

[12] The settlement does not identify the alleged infirmity in the distribution of Rancheria assets, and no assets were returned to the United States.

plans to be final upon mutual approval and barred all claims against the United States based on "the distribution of assets *pursuant to such plan*"—not the distribution of assets pursuant to the Act.[13] 72 Stat. 621 (emphasis added). Courts are to "assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning." *Bailey v. United States*, 516 U.S. 137, 146 (1995).

4. Ultimately, the Department and Wilton mischaracterize Plaintiffs' position because they have no response to their arguments as actually stated. Both, for example, argue that Plaintiffs challenge Wilton's recognition or restoration. Gov.Br. 37-38; Wilton.Br. 18. But Wilton's *tribal* recognition is irrelevant because Plaintiffs' argument turns on whether Wilton members are "Indians" under Section 5 of the IRA in light of Section 10(b). As the Supreme Court observed, "[t]here simply is no legitimate way to circumvent the definition of 'Indian' in delineating the Secretary's [trust authority]." *Carcieri*, 555 U.S. at 393.

The Department knows this. When the *Carcieri* Court held that the Secretary lacked authority to acquire trust land for the Narragansett Tribe, that tribe's recognition was unaffected. *Id*. at 384-85. And when the First Circuit held that the Mashpee Tribe did not qualify for trust land under the IRA's second definition of "Indian," the Tribe was not removed from the list of

[13] The distribution plan identifies specific actions the Department was to undertake prior to the distribution of assets. AR614-19. The Department certified their completion on July 19, 1961. AR26181-82.

federally recognized tribes. *See Littlefield v. Mashpee Wampanoag Indian Tribe*, 951 F.3d 30, 34 (1st Cir. 2020). That there might be other repercussions is irrelevant. The only question presented here is whether Section 10(b) of the CRA prevents the Secretary from acquiring trust land under Section 5 of the IRA, and the answer is that it does.

Wilton members voted to be included in the CRA because they wanted title to Rancheria lands. Congress acceded to that request, and the Department transferred title to them almost 60 years ago. Their choice had consequences, and the consequence relevant here is that the Secretary cannot acquire trust land for them.

III. Agencies cannot substitute a new proposed action with a different location in an FEIS.

An agency's identification of a proposed action matters. If the Department announced that it was considering acquiring land in Tysons Corner for a tribal casino, Alexandria residents would note it with passing interest. Few would drive to Tysons to attend a scoping meeting. Fewer still would review the DEIS. Why should they? A casino in Tysons will impact Tysons, not Alexandria.

A few curious Alexandrians might learn that a site at Potomac Yards in Alexandria is included as an alternative, but they would assume it was included only for purposes of comparison. After all, the proposed action is whether to acquire the Tysons site, not Potomac Yards. And Alexandrians

know that Potomac Yards is where Virginia Tech is building its extension campus as part of the Amazon deal.

People only know what an agency is doing when the agency tells them. That is why the agency must provide notice of a proposed action. How an agency identifies a proposed action fundamentally affects who participates and what information they provide. NEPA works "by focusing the agency's attention on the environmental consequences of a proposed project [so] that important effects will not be overlooked or underestimated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The public plays an important role by helping agencies identify "the significant issues related to a proposed action." 40 C.F.R. § 1501.7. If agencies do not "make sure the proposal which is the subject of an [EIS] is properly defined," *id.* § 1502.4(a), the process cannot work. That is why the district court's statement [at 25] that "the delineation of preferred and alternative proposals is inconsequential when an agency properly analyzes each" is wrong.

The Department ignores this basic principle, but it never disputes that it did not designate Elk Grove as the proposed action at the outset of the EIS process, as 40 C.F.R. § 1502.4(a) requires. It did not conduct scoping for Elk Grove, *id.* § 1501.7(a). It did not hold hearings in Elk Grove, *id.* § 1501.7(b), or ask Elk Grove to participate as a cooperating agency early in the process, *id.* §

1501.6.[14] It cannot cite one instance, prior to the FEIS, where it identified Elk Grove as the proposed action in any public notice, forum, or document.

The Department does not address these arguments, claiming that its inclusion of Elk Grove as an alternative suffices. NEPA demands more. *See Delaware Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014) (NEPA's purposes "can be achieved only if the prescribed procedures are faithfully followed.") (quoting *Lathan v. Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974)).

1. The Department claims [at 45] that its actions satisfy NEPA because agencies are permitted to modify alternatives, including the proposed action. 40 C.F.R. § 1503.4(a)(1). True, but that provision does not apply here.

Section 1503.4(a)(1) states that an agency may "[m]odify alternatives including the proposed action" in response to comments made on a DEIS. The Department, however, did not "modify" the proposed action in response to DEIS comments. It announced a new proposed action after receiving a new application from Wilton.[15] An applicant has to "own[] an interest in the land" before the Department can acquire it. 25 C.F.R. § 151.3(a)(2). For that reason, the Department cannot "modify" a proposed action by selecting a new site for a tribe. In the trust acquisition context, "the only federal action that is involved when a non-federal applicant seeks federal approval or funding is the agency's

[14] Elk Grove only became a cooperating agency in May 2016, after the DEIS was circulated. AR515; AR1148.

[15] AR3198-213.

decision to grant or deny the applicant's request." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 207 (D.C. Cir. 1991) (Buckley, J., dissenting in part).

Defendants cite no case where a court permitted an agency to change private proposed actions like this.[16] The Department complains [at 41] that Plaintiffs unreasonably demand "further procedures," but Plaintiffs only ask the Department to follow basic NEPA requirements.[17] Wilton's Elk Grove application constituted a new proposal, triggering the Department's obligation to "commence preparation of an [EIS] as close as possible to the time the agency is developing or is presented with a proposal." 40 C.F.R. § 1502.5.

2. The Department tries [at 45] to minimize its violations by insisting the public always knew that it might acquire Elk Grove. That is legally and factually incorrect.

The Department published three notices in this case: (1) the scoping notice, which identified Galt as the proposed action;[18] (2) the notice of

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[16] The cases Wilton cites [at 52] do not support the claim that an agency can switch proposed actions in an FEIS. Neither *California ex rel. Imperial Cty. Air Pollution Control Dist. v. U.S. Dep't of Interior*, 767 F.3d 781 (9th Cir. 2014) nor *Custer Cty. Action Ass'n v. Garvey*, 256 F.3d 1024, 1036 (10th Cir. 2001) involved changing the proposed action from one site to another.

[17] Plaintiffs did not insist that "Interior had to start over …." Gov.Br. 41; *see* Op.Br. 45. The critical point was to meaningfully engage the public. In any case, "considerations of administrative difficulty, delay or economic cost will not suffice to strip the [EIS requirement] of its fundamental importance." *Calvert Cliffs' Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

[18] AR4852-53.

availability for the DEIS, which also identified Galt as the proposed action;[19] and (3) the FEIS notice, which identified Elk Grove as the proposed action.[20] The last notice came 36 days before the final decision. The public could not have known from the scoping and DEIS notices that the Department would announce Elk Grove as the proposed action in the FEIS notice. NEPA procedures do not obligate the public to investigate scoping reports or DEISs to see if the agency misidentified the proposed action.[21] Nor does it matter what Wilton stated in a public hearing—a hearing that many Elk Grove residents did not know to attend.[22] NEPA places the obligation squarely on the agency to tell the public precisely what the proposed action is. 40 C.F.R. § 1502.4(a).

And as far as the public knew in this case, Elk Grove was being developed as an outdoor mall by another developer.[23] Elk Grove's late designation as a cooperating agency was not public and did not serve as notice—not to mention the DEIS was already complete.[24] The evidence Defendants cite does not "manifest that the public had sufficient information to comment" on the change in proposed action. The Department relies on *Nevada v. Dep't of Energy*, 457 F.3d 78, 90 (D.C. Cir. 2006) to suggest otherwise, but that case

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[19] AR4143-44.

[20] AR1582-83; AR24430-4519; AR5845.

[21] The DEIS also identified Galt as the proposed action. AR26357.

[22] *See* AR431; AR16281-83; AR26360.

[23] AR3364-65.

[24] AR515; AR1148.

involved an agency's failure to identify a "preferred action"—not the proposed action itself.

If the Department had wanted to make it obvious that it might acquire Elk Grove from the outset, it should have just said so. When the Bureau of Prisons looks for land for a new federal penitentiary, for example, it identifies its proposed action as "the acquisition of approximately 800 acres of land … in Lechter County," 78 Fed. Reg. 45,277 (July 26, 2013), not one specific parcel. And when the Army wants land for military training purposes, it identifies its proposed action as the "acquisition of approximately 82,800 acres of land *in the vicinity of* Fort Benning, Georgia)." 76 Fed. Reg. 28,005 (May 13, 2011) (emphasis added). These notices reasonably alert the public about how their interests may be affected. The Department's notice did not.

There are only two reasons the Department did not take the same approach here. It had no idea until after the DEIS was complete that Wilton would file an application for Elk Grove. Or it knew that Wilton would file an application for Elk Grove but withheld that information from the public. Either way, the consequence is that the Department prepared an EIS for the wrong *proposed action*. The only way to ensure that applicants are forthcoming with agencies, and agencies with the public, is to demand that agencies "make sure the proposal which is the subject of an [EIS] is properly defined" at the outset. 40 C.F.R. § 1502.4(a). If it is not, an agency must restart or supplement the process.

3. At a minimum, the Department had to prepare an SEIS once Wilton submitted an application for Elk Grove. The Department acknowledges [at 39] that agencies are required to prepare SEISs when they make substantial changes to their proposed actions or there are new circumstances or new information relevant to environmental concerns under 40 C.F.R. § 1502.9(c)(1). But it misapplies that regulation by conflating terms of art.

For example, the Department contends [at 39-40] that its "identification of Elk Grove as the preferred alternative [in the FEIS] does not require supplementation." Wilton similarly characterizes [at 41] the Department's switch from one proposed action to another as merely a choice between alternatives. But an agency's choice between alternatives and identification of its "preferred alternative" is irrelevant to NEPA's supplementation requirement. An agency's "preferred alternative" is nothing more than the alternative it "believes would fulfill its statutory mission and responsibilities." 46 Fed. Reg. 18,026, 18,027-28 (Question #4a) (Mar. 23, 1981).

An agency's obligation to prepare an SEIS turns on whether it has made "substantial changes in the *proposed action*." 40 C.F.R. § 1502.9(c)(i) (emphasis added). The Department does not argue that the change from Galt to Elk Grove was an insubstantial change. It contends [at 40-41] that a supplement was not required because "the environmental effects at that site were extensively analyzed in both the draft and final EIS," pointing to the "'hundreds of pages' of additional analysis on the environmental, economic, and cultural impacts" it included in the FEIS.

But the Department only proves Plaintiffs' point. Agencies must prepare supplements when there are "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)(ii). The hundreds of pages of new analyses of the "environmental, economic, and cultural impacts" included in the FEIS obviously meet that description. The Department's obligation to prepare a supplement under these circumstances is evident from subsection (a), which states that a DEIS "must fulfill and satisfy to the fullest extent possible the requirements established for final statements in section 102(2)(C) of the Act." *Id.* § 1502.9(a). Agencies are supposed to respond to comments in an FEIS, not introduce hundreds of pages of new information. *See Habitat Educ. Center, Inc. v. U.S. Forest Serv.*, 673 F.3d 518, 527 (7th Cir. 2012).

4. Finally, Wilton claims [at 50] that Plaintiffs did not identify any "'arguably significant consequences' the Department 'ignored' by choosing not to rehash its analysis." That is both incorrect and beside the point. Plaintiffs' primary argument is that the EIS is inadequate because the Department never engaged the public to help identify significant issues or meaningfully participate. *See, e.g.,* Op.Br. 40, 41 n.97, 50. When that happens, it is not possible to determine whether the Department "has adequately considered and disclosed the environmental impacts of its actions." *Baltimore Gas and Elect. v. Nat. Res. Def. Counsel*, 462 U.S. 87, 97-98 (1983). In any case, Plaintiffs also argued [at 48-50] that the Department failed to analyze Elk Grove with the same level of detail as either the Galt or historic Rancheria properties. In fact, they raised a

variety of concerns, including the Department's reliance on outdated analyses that were prepared for an outdoor mall, not a casino; water supply concerns; traffic and parking issues; land use limitations; and other impacts.[25]

NEPA does not permit an agency to switch from one proposed action to another in an FEIS. "[T]here is a strong public interest in meticulous compliance with the law by public officials," *Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1993), and the Department did not come close.

IV. Vacatur and removal of the Elk Grove site from trust is the appropriate remedy.

Finally, Wilton argues [at 54-55] that "Plaintiffs offer no justification for their request … that the 'trust decision' be 'vacated' and 'the Elk Grove site ordered to be removed from trust.'" That is not correct. When an agency decision is not "in accordance with law," the court "shall hold unlawful and set aside agency action, findings, and conclusion." 5 U.S.C. § 706(2)(A). Decisions issued in violation of the FVRA have "no force or effect," and are void ab initio. *Id*. § 3348(d)(1), (2). Removing the Elk Grove site from trust is not "radical." It is what the law requires and the Department promised. ECF-25 at 35 ("[T]he Department … has made clear that if a court orders at the end of an APA case that the Department take the land out of trust, the Department is going to comply."); *see* 78 Fed. Reg. at 67,934 (same).

[25] *See* AR7-14.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, the trust decision vacated, and the Elk Grove site ordered to be removed from trust.

July 1, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. As measured by the word-processing system used to prepare this brief, the brief contains 6,499 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and complies with the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a 14 point proportionally spaced roman-style typeface (Constantia).

Dated: July 1, 2020

/s/ Jennifer A. MacLean
Jennifer A. MacLean

CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 1, 2020

/s/ Jennifer A. MacLean
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