IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTTS VALLEY BAND OF POMO INDIANS,

Plaintiff,

v.

DOUGLAS BURGUM, in his official capacity as Secretary of the U.S. Department of the Interior,

SCOTT DAVIS, in his official capacity as Senior Advisor to the Secretary of the U.S. Department of the Interior,

and

UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

Civil Action No. 1:25-CV-958

BRIEF OF LYTTON RANCHERIA OF CALIFORNIA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Lytton Rancheria of California is a federally-recognized band of Pomo Indians located in Sonoma County, California. In 1959, Congress terminated the government-to-government relationship between Lytton and the United States. As a result, Lytton lost its remaining homelands and its members became impoverished. In 1991, Lytton's wrongful termination was reversed through federal litigation. Since that time, Lytton has worked to regain its economic independence and restore a portion of its homelands. Today, Lytton operates a successful Class II bingo facility on its land in San Pablo, California and conducts other business activities in and around its homeland in Sonoma County. These business activities are critical to Lytton's ability to achieve self-determination and provide for its members.

Lytton has a strong interest in this case, which raises important questions about the authority of the Department of the Interior to temporarily rescind decisions to enable it to consider all evidence relevant to application of the restored-lands exception to the general statutory prohibition on gaming on newly-acquired trust lands. As a federally-recognized Indian tribe, Lytton is subject to and otherwise relies on decisions of the Department and often submits evidence to the Department during the agency decision-making process. In addition, the proper interpretation of the restored-lands exception directly impacts the economic viability of a gaming facility in Northern California that Lytton operates.

If granted, a preliminary injunction staying the effect of the Department's decision to temporarily rescind its determination that trust land held for Scotts Valley Band of Pomo Indians is eligible for the restored-lands exception would allow Scotts Valley to take significant steps

[1] No counsel for any party authored this brief in whole or in part, and no entity or person other than *amicus curiae*, its members, and counsel made any monetary contribution intended to fund the preparation or submission of this brief.

toward building a casino that would compete with Lytton's gaming facility. That would threaten severe economic harm to Lytton, its members, and its community. Moreover, Scotts Valley is unlikely to succeed in arguing that the Department's temporary rescission was unreasonable because the Department has clear authority to rescind a decision to reconsider its correctness and, in addition, there are strong arguments that the Department's initial decision was wrong both on the law and on the facts: Scotts Valley lacks the historical and temporal connections to the trust land that are essential prerequisites to application of the restored-lands exception.

INTRODUCTION

This case arises out of the Department of the Interior's decision to temporarily rescind the Biden Administration's eleventh-hour determination that the Scotts Valley Band of Pomo Indians may construct and operate a casino on newly-acquired trust land. Leading up to that decision, tribes with nearby trust lands submitted evidence explaining that the Department could not take the land into trust for Scotts Valley—which has no historical connection to the area—and that the parcel is ineligible for gaming in any event. The tribes were assured that their submissions would be taken into account by the Department, but the Department's decision expressly stated that the submissions had been ignored.

That forced area tribes, including Lytton, to bring lawsuits challenging the Department's decisions. Meanwhile, the Department exercised its authority to temporarily rescind the gaming-eligibility determination due to concerns that the Biden Administration had failed to consider all of the relevant evidence in its rush to approve a casino. Scotts Valley seeks a preliminary injunction of the temporary rescission in order to continue its work toward building a casino.

Lytton submits this brief to assist the Court's review of Scotts Valley's request. The implications of a preliminary injunction—which, as a practical matter, would reinstate the gaming-

eligibility determination—would be far-reaching. Scotts Valley would be able to continue taking significant steps to build the very casino whose eligibility for the restored-lands exception the Department is currently reconsidering. Indeed, Scotts Valley acknowledges that a preliminary injunction would allow it to take key actions to finalize a gaming agreement with the City of Vallejo, negotiate a gaming compact with California, secure financing, and conduct planning around infrastructure development. Each of these steps would move the casino closer and closer to completion—harming Lytton and in addition forcing Scotts Valley and others to expend resources that will be wasted if the Department reverses its decision, as seems likely given the applicable law and relevant facts.

Lytton therefore advances several arguments in support of the Department's opposition to a preliminary injunction. Scotts Valley has not carried its burden of showing that it is likely to succeed on the merits. The Department's action was lawful under the plain language of 43 C.F.R. § 4.5 and the agency's inherent authority to reconsider its adjudicatory decisions. Further, the Department reasonably explained that it was rescinding the casino-eligibility determination in order to evaluate relevant evidence that had not previously been considered. That evidence includes comments from area tribes explaining that trust land does not fall within the restored-lands exception because Scotts Valley lacks the requisite historical and temporal connections to that land. The casino-eligibility determination expressly stated that the Department had not considered that evidence, notwithstanding the commitments by Department officials that the evidence would be considered. In addition, there are significant legal flaws in the eligibility decision, and in the related Department actions, including the decision to take the land into trust in the first place.

Scotts Valley also fails to carry its burden of showing that the balance of the equities supports a preliminary injunction. In weighing the equities, the Court must consider the potential impact not only on Scotts Valley, but also on other tribes with which the federal government has trust relationships. Granting Scotts Valley's request to reinstate the casino-eligibility determination would allow it to take critical steps towards completing a casino that will have very substantial adverse economic and other effects on area tribes including Lytton.

ARGUMENT

I. Scotts Valley Fails To Demonstrate It Is Likely To Succeed On the Merits

Scotts Valley has not shown a likelihood of success on the merits. The Department has authority to temporarily rescind a gaming eligibility determination and its decision to do so here was reasonable.

The Department explained that it wanted an opportunity to evaluate relevant evidence that the Biden Administration had failed to consider—after the Biden Administration had promised interested parties, including Lytton, that the Department would do so. That evidence includes submissions demonstrating that the trust land is ineligible for a casino because Scotts Valley lacks a significant historical connection or a temporal connection to it.

A. The Department Has The Authority to Rescind A Gaming-Eligibility Determination

Scotts Valley argues (Dkt. 3-1 at 24-37 ("Br.")) that the Department of the Interior lacked authority to temporarily rescind the gaming-eligibility determination. That is incorrect.

The Department's regulations include a non-exhaustive list of "authorit[ies] reserved to the Secretary." 43 C.F.R. § 4.5(a). That list includes "[t]he authority to review *any decision* of any employee or employees of the Department . . . or to direct any such employee or employees to reconsider a decision." *Id.* § 4.5(a)(2) (emphasis added). As the Senior Advisor to the Secretary of

the Interior explained when temporarily rescinding the gaming-eligibility determination, the authority described in Section 4.5(a)(2) is "broad." Dkt. 1-2 at 1 ("Rescission Ltr."). The Department acted in accordance with its broad authority by "temporarily rescinding the Gaming Eligibility Determination for reconsideration." *Id.*

For the reasons explained in the Department's brief, Scotts Valley is incorrect that Section 4.5(a)(2) is inapplicable. But even if that were correct, Section 4.5(a)(2) does not purport to describe *every* action the Secretary or his designee has the authority to undertake much less to circumscribe that power. Rather, it enumerates a non-exhaustive list of "authorit[ies] reserved to the Secretary" and explains that the Secretary's power "is *not limited to*" the authorities on that list. 43 C.F.R. § 4.5(a) (emphasis added).

Accordingly, nothing in Section 4.5 circumscribes the Department's "inherent power to reconsider [its] own decisions." *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 23–24 (D.D.C. 2008). That is because the "power to reconsider is inherent in the power to decide." *Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014). In fact, Scotts Valley cited the "broad discretion" and "inherent authority to reconsider [agency] decisions" when it sought reconsideration of the Department's 2019 determination that the parcel was ineligible for the restored-lands exception. Dkt. 28-2 at 45, 47-48, *Scotts Valley Band of Pomo Indians v. DOI*, No. 19-cv-1544 (D.D.C. Dec. 17, 2019) (quoting *Macktal v. Chao*, 286 F.3d 822, 825 (5th Cir. 2002)). The Department thus was entitled to temporarily rescind the gaming-eligibility determination regardless of the scope of the powers described in Section 4.5.

B. The Department's Decision To Temporarily Rescind The Gaming-Eligibility Determination Was Reasonable

The Department's temporary rescission to allow reconsideration of the gaming-eligibility determination was entirely reasonable.

Scotts Valley's speculation (Br. 29-32) that the rescission was pretextual contravenes the "presumption of regularity" that attaches to agency actions and Scotts Valley does not argue—much less make the required "strong showing"—that the Department acted in "bad faith" or exhibited "improper behavior." *Biden v. Texas*, 597 U.S. 785, 811 (2022). The Department reasonably explained that the purpose of the rescission was to "consider additional evidence" that it was "concerned" had been ignored. Rescission Ltr. 1.

That is in fact what occurred. Area tribes submitted substantial evidence to the Department showing that Scotts Valley's trust land is ineligible for gaming. *See, e.g.*, Dkt. 1 at 34-35, *Yocha Dehe Wintun Nation v. DOI*, No. 25-cv-867 (D.D.C. Mar. 24, 2025); Dkt. 1 at 17, 21-22, *United Auburn Indian Cmty. of the Auburn Rancheria v. DOI*, No. 25-cv-873 (D.D.C. Mar. 24, 2025). Yet the gaming-eligibility determination expressly stated that the Department did not "consider[] any additional evidentiary materials from outside parties, including . . . those opposed to" Scotts Valley's request. Dkt. 1-1 at 4 (2025 Indian Lands Opinion ("2025 ILO")). The evidence that the Department failed to consider demonstrates that, among other flaws, the gaming-eligibility determination failed to consider evidence showing that Scotts Valley lacks the requisite "significant historical connection" and "temporal connection" to the land. 25 C.F.R. § 292.12(b), (c). Accordingly, Scotts Valley has not shown that it is likely to succeed in challenging the rescission.

1. Scotts Valley lacks a significant historical connection to the trust land

The Indian Gaming Regulatory Act generally prohibits gaming on trust lands acquired after 1988. The Act provides a limited exception to that prohibition for lands "taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(a), (b)(1)(B). To qualify for the restored-lands exception, a tribe must demonstrate its "significant historical connection to the [restored] land." 25 C.F.R. § 292.12. A "significant

historical connection" means that the land is "located within the boundaries of the tribe's last reservation under a ratified or unratified treaty, or a tribe can demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land." *Id*. § 292.2.

It is undisputed that the project site is not located within or near Scotts Valley's former reservation. *See* 2025 ILO 8-9. Scotts Valley therefore claims a significant historical connection to the trust land based on its alleged "occupancy or subsistence use in the vicinity of" the site. *Id.* at 5. Its claim is based on biographical documents about "an individual named Augustine . . . who lived and worked in the North Bay region during the mid-1800s" and to whom some Scotts Valley members "trace [their] ancestry[.]" *Id.* at 11-14.

In 2019, the Bureau of Indian Affairs rejected this evidence as insufficient to meet the "significant historical connection" requirement. *See* Dkt. 28-2 at 15, *Scotts Valley Band of Pomo Indians v. DOI*, No. 19-cv-1544 (D.D.C. Dec. 17, 2019). The Bureau cited its past restored-lands opinions, which interpreted "occupancy" in 25 C.F.R. § 292.2 to require "more than a transient presence." *Id.* at 24. The Bureau concluded that the evidence submitted by Scotts Valley did not show a continuous presence in the area. *Id.* at 24, 30.

In 2025, however, the Department reversed course and concluded in the gaming-eligibility determination that Scotts Valley satisfied the "significant historical connection" despite having an "'inconsistent' or unsettled presence in the North Bay region." 2025 ILO 6, 20. That change in position occurred in the midst of what the U.S. Justice Department has described as the Biden Administration's last-minute rush to "take . . . land into trust before the next administration." Dkt. 40-1 at 12:6-13, *Federated Indians of Graton Rancheria v. Burgum*, No. 24-cv-8582 (N.D.

Cal. Jan. 2, 2025). Further, the Department failed to take into account substantial evidence demonstrating that Scotts Valley lacks a significant historical connection to the trust land.

For example, the gaming-eligibility determination concluded that Scotts Valley made the "occupancy" showing based largely on documents about Augustine—"especially" documents on "his possible baptism" at a Sonoma, California mission in 1837 and "his dwelling in Napa in 1870." 2025 ILO 18; *see id.* at 12-13. As an initial matter, the purported presence in the region of a single individual to whom some Scotts Valley members trace their ancestry is not the sort of collective tribal presence that demonstrates a significant historical connection. Further, the Department previously acknowledged that Augustine's presence in the area did not demonstrate a significant historical connection because it was "inconsistent, if not transitory." *Id.* at 14; *cf.* 73 Fed. Reg. 29,354, 29,366 (May 20, 2008) (explaining that a "'significant historical connection' . . . require[s] something more than evidence that a tribe merely passed through a particular area").

In any event, the evidence regarding Augustine does not show that Scotts Valley has a significant historical connection to the parcel. Records that Scotts Valley and others submitted to the Department revealed that Augustine was not in fact the person baptized at the Sonoma mission. *See* Dkt. 1 at 35, 45, *Yocha Dehe Wintun Nation v. DOI*, No. 25-cv-867 (D.D.C. Mar. 24, 2025). And Scotts Valley cannot document its connection to the person who allegedly resided in Napa, as it has acknowledged. *Id.* at 45. Rather, the evidence indicates that the Augustine who resided in Napa is a different person than the Augustine to whom Scotts Valley members trace their ancestry. *Id.* at 35. Notably, the gaming-eligibility determination did not consider this evidence. 2025 ILO 4.

Because Scotts Valley's evidence of its connection to the parcel was relatively weak, the gaming-eligibility determination had to rely on facts that apply to all area tribes. For example, the determination described the "backdrop" of "[v]iolence against California Indians"; the fact that

"Indian people were forced off their land"; and the "devastating impacts on tribal populations" from "diseases introduced by the Spaniards." 2025 ILO 16-17.

But the plight of California Indians writ large is immaterial to whether a particular tribe has a significant historical connection to a specific parcel of land. For example, general facts about California Indians cannot demonstrate that a specific tribe's "villages, burial grounds, occupancy, or substance use [is] in the vicinity of the land" at issue. 25 C.F.R. § 292.2. Indeed, in past gaming-eligibility determinations, the Bureau of Indian Affairs has acknowledged that such historical facts concerning the general Indian experience in an area are insufficient to demonstrate that a specific tribe has a significant historical connection to a parcel.[2]

The land-eligibility determination tried to circumvent this restriction by stating that Augustine's alleged experiences were "representative of what many Indigenous peoples across the region endured during the relevant time periods." 2025 ILO 17 (describing this as "additional context" about Augustine). But "additional context" about the general experience of Indians in Northern California cannot justify the 2025 ILO's change in position. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (agency must "show that there are good reasons" for a change in position (citation omitted)). The gaming-eligibility determination should not have credited generally applicable facts and ignored evidence directly relevant to whether Scotts Valley has a significant historical connection to the site. It was therefore reasonable for the Department to rescind the determination to consider all material evidence.

[2] *E.g.*, Letter from Larry Echo Hawk, Assistant Sec'y – Indian Affairs, U.S. Dep't of the Interior, to Merlene Sanchez, Chairperson, Guidiville Band of Pomo Indians (Sept. 1, 2011), https://www.bia.gov/sites/default/files/dup/assets/public/pdf/idc015051.pdf (noting when denying application that the area was "marked by significant displacement of Indian peoples in present-day northern California").

2. Evidence that Scotts Valley lacks a temporal connection to the trust land

To meet the "temporal connection" requirement, a tribe must show that "(1) [t]he land is included in the tribe's first request for newly acquired lands since the tribe was restored to Federal recognition; or (2) [t]he tribe submitted an application to take the land into trust within 25 years after the tribe was restored to Federal recognition and the tribe is not gaming on other lands." 25 C.F.R. § 292.12(c).

The first method is inapplicable because this is not Scotts Valley's first request for newly acquired lands. The Bureau of Indian Affairs denied Scotts Valley's 2005 application to apply the restored-lands exception to a different parcel far from its historic homeland. Letter from Donald E. Laverdure, Acting Assistant Sec'y – Indian Affairs, U.S. Dep't of the Interior, to Donald Arnold, Chairperson, Scotts Valley Band of Pomo Indians (May 25, 2012), https://www.bia.gov/sites/default/files/dup/assets/public/pdf/idc-018517.pdf. However, the gaming-eligibility determination concluded that the second method applied, reasoning that Scotts Valley was restored to federal recognition on September 6, 1991, *i.e.*, 24 years and 11 months before Scotts Valley submitted an application in August 2016 to take into trust the land at issue. 2025 ILO 6.

But evidence submitted to the Department demonstrates that Scotts Valley was restored to federal recognition earlier. In March 1991, Scotts Valley and the United States filed a stipulation agreeing to restore Scotts Valley to federal recognition. *See* Stipulation for Entry of Judgment, *Scotts Valley Band of Pomo Indian of the Sugar Bowl Rancheria v. United States*, No. C-86-3660 (N.D. Cal. Mar. 15, 1991).[3] Accordingly, Scotts Valley was restored to federal recognition more

[3] A stipulation in the same litigation restored Lytton to federal recognition. *See* Stipulation for Entry of Judgment, *Scotts Valley Band of Pomo Indian of the Sugar Bowl Rancheria v. United States*, No. C-86-3660 (N.D. Cal. Mar. 22, 1991). The Department denied Lytton's 1999 application for a restored-lands determination. *See* Dkt. 1 at 62, *Lytton Rancheria of Cal. v. DOI*, 25-cv-535 (D.D.C. Feb. 21, 2025).

than 25 years before it submitted the August 2016 land-into-trust application, which makes its application untimely.

Even if the August 2016 application were timely, it requests trust status for only 128 acres of the 160 acres covered in the gaming-eligibility determination. The application did not ask the Department to take into trust the remaining 32 acres. Scotts Valley did not make that request until 2024 when it sent a letter asking the Department to tack on an additional 32 acres to its application. Dkt. 1 at 18, *Lytton Rancheria of Cal. v. DOI*, No. 25-cv-1088 (D.D.C. Apr. 10, 2025) ("Lytton Compl."). The gaming-eligibility determination characterized that letter as a "subsequent[] update[]" to Scotts Valley's August 2016 application. 2025 ILO 1. But a tribe's timely-filed application must request that the federal government take into trust "the land" for which trust status is sought. 25 C.F.R. § 292.12(c)(2). The August 2016 application is the only application that Scotts Valley purports to have filed before the running of the 25-year limitations period, and it did not include a request to take into trust the 32 acres. Nothing in the text of the regulation permits the Department to backdate untimely land-into-trust requests by referencing earlier applications. Further, that reading would render toothless the timely-filing requirement and create enormous regulatory uncertainty for the many third parties that the Department's gaming-eligibility determinations impact.

The gaming-eligibility determination should not have ignored evidence demonstrating that Scotts Valley lacks a temporal connection to the parcel. It was therefore reasonable for the Department to rescind the determination to consider all material evidence.

3. The Biden Administration reneged on its commitment to consider evidence submitted by Lytton and other third parties.

It is unsurprising that the gaming-eligibility determination contained the errors discussed above in light of the Biden Administration's failure to consider evidence submitted by area tribes.

During a September 20, 2024 meeting, politically-appointed officials of the Bureau of Indian Affairs told Lytton and another tribe that they could submit additional comments and evidence regarding Scotts Valley's application that the Bureau would take into account in making a determination. Lytton Compl. at 20-21. Based on these commitments, Lytton and other tribes submitted comments addressing the above factual and legal issues and other problems with the gaming-eligibility determination. *See, e.g.*, Lytton Compl. at 27 (referencing Letter from Andy Mejia, Chairperson, Lytton Rancheria of California to Wizipan Garriott, Principal Deputy Assistant Secretary – Indian Affairs, U.S. Department of the Interior (Dec. 1, 2024)). The Bureau not only declined to consider those comments but also denied that it had asked for them at all. The gaming-eligibility determination stated that "the Department neither solicited nor considered any additional evidentiary materials from outside parties." 2025 ILO 4.

The Department's decision to temporarily rescind the gaming-eligibility determination corrects that error. Agencies have discretion to solicit comments when engaging in informal adjudications in order to facilitate informed decision-making. *See Neustar, Inc. v. FCC*, 857 F.3d 886, 895 (D.C. Cir. 2017). As explained above, the Department is reasonably "concerned that [it] did not consider additional evidence" relevant to the gaming-eligibility determination, Rescission Ltr. 1, in light of the Biden Administration's statement that it did not "consider[] any additional evidentiary materials from outside parties," 2025 ILO 4.

For these reasons, Scotts Valley cannot show that it is likely to succeed on the merits of its challenge to the rescission.[4]

[4] In addition, there are significant issues with other aspects of the Department's decisions relating to Scotts Valley's casino-eligibility determination. Those decisions are subject to pending lawsuits alleging that the Department failed to adequately consult with affected tribes in violation of the National Historic Preservation Act; failed to conduct an adequate environmental review in violation of the National Environmental Protection Act; and violated regulatory requirements for

II. The Court Must Consider Harm To Lytton And Other Tribes

To obtain a preliminary injunction, Scotts Valley must show that the balance of the equities tips in its favor and that an injunction is in the public interest. Where the federal government is the opposing party, these factors merge. *Nken v. Holder*, 556 U.S. 418, 435 (2009). In considering the balance of the equities, the Court must weigh impacts to non-party tribes including Lytton. *See, e.g.*, *Oglala Sioux Tribe v. United States*, 674 F. Supp. 3d 635, 685 (D.S.D. 2023); *Neighbors Against Bison Slaughter v. NPS*, 2019 WL 6465093, at *5 (D. Mont. Dec. 2, 2019); *see also Mills v. District of Columbia*, 571 F.3d 1304, 1308 (D.C. Cir. 2009) (requiring that movant show an injunction "would not substantially injure other interested parties"); *cf.* 25 U.S.C. § 5123(f) (prohibiting the federal government from "mak[ing] any decision . . . with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes")

There is no dispute that Scotts Valley's proposed casino would cause severe economic harm to Lytton. For example, the Department has projected that the casino would cause a "sharp[] negative" 21% reduction in Lytton's annual gaming revenue. *See* Bureau of Indian Affairs, *Final Environmental Assessment, Scotts Valley Band of Pomo Indians, Casino and Tribal Housing Project, Appendix A* 39 (Dec. 2024), https://www.scottsvalleycasinoea.com/wp-content/uploads/2025/01/Appendix-A-Socioeconomics-Study.pdf. That revenue reduction would impact the broader community since 65% of the budget of the City of San Pablo comes from casino operating revenue. *See* City of San Pablo, *San Pablo City Council Adopts New Two-Year (Biennial) General Fund Operating and Capital Improvement Program Budgets* (May 2024),

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land-into-trust decisions, among other flaws. *See Yocha Dehe Wintun Nation v. DOI*, No. 25-cv-867 (D.D.C. Mar. 24, 2025); *United Auburn Indian Cmty. of the Auburn Rancheria v. DOI*, No. 25-cv-873 (D.D.C. Mar. 24, 2025); *Lytton Rancheria of Cal. v. DOI*, No. 25-cv-1088 (D.D.C. Apr. 10, 2025).

https://www.sanpabloca.gov/DocumentCenter/View/17135/Media-Statement. Reinstating the Department's determination while the case is pending would, in Scotts Valley's own words (Br. 39-40), allow it to take critical steps towards completing the casino, which would harm Lytton.

Dated: May 9, 2025 MAYER BROWN LLP

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