MIWOK United Auburn Indian Community
MAIDU of the Auburn Rancheria

John L. Williams, Chairman | Gabe Cayton, Secretary | Jason Camp, Treasurer | Leonard Osorio, Council Member

August 20, 2024

Amy Dutschke
Director, Pacific Regional Office
Bureau of Indian Affairs
2800 Cottage Way
Room W-2820
Sacramento, California 95825

Subject: Comments Regarding Environmental Assessment for the Scotts Valley Casino

Dear Regional Director Dutschke:

On behalf of the United Auburn Indian Community ("United Auburn"), I am writing to provide comments on the Environmental Assessment for the Scotts Valley Casino and Tribal Housing Project, proposed by the Scotts Valley Band of Pomo Indians ("Scotts Valley" or "Band") in Vallejo, California. This Environmental Assessment ("EA") was released to the public by the Bureau of Indian Affairs ("BIA") on July 8, 2024.

As noted in our earlier letter to the BIA, United Auburn has actively commented on this trust land application by Scotts Valley, an application that was formally denied by the Interior Department in 2019.[1] This denial followed an earlier rejection by Interior in 2012 of a similar off-reservation casino project in Richmond, California, where United Auburn was also a commenter.[2] In both cases, the Department determined—after reviewing voluminous documentation submitted by all interested parties—that Scotts Valley failed to provide sufficient evidence of a "significant historical connection" to lands in either Vallejo or Richmond, California.[3]

[1] *See* Letter to The Honorable Shawn Davis, Chairman, Scotts Valley Band of Pomo Indians, from John Tahsuda, Principal Deputy Assistant Secretary – Indian Affairs, U.S. Department of the Interior, February 7, 2019 (hereinafter "2019 Interior Determination").
[2] *See* Letter to The Honorable Donald Arnold, Chairperson, Scotts Valley Band of Pomo Indians, from Donald E. Laverdure, Acting Assistant Secretary – Indian Affairs, U.S. Department of the Interior, May 25, 2012 (hereinafter "2012 Interior Determination").
[3] *See* 25 C.F.R. §292.2 and §292.12(b); *see also* Gaming on Trust Lands Acquired After October 17, 1988, 17 Fed. Reg. 29,354, at 29,366 (May 20, 2008) ("The definition of 'significant historical connection' establishes criteria which requires something more than evidence that a tribe merely passed through a particular area.").

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The Vallejo Parcels Do Not Qualify for the Restored Lands Exception

The EA's purpose and need is invalid because it presumes that Scotts Valley's selected acreage qualifies as "restored lands" under the Indian Gaming Regulatory Act ("IGRA"), without any analysis to support the Department's prior decision in 2019 that found the lands in question were not "restored lands." Under IGRA, a tribe may conduct gaming on "lands … taken into trust as part of … the restoration of lands for an Indian tribe that is restored to Federal recognition" but there must be an evidentiary showing to meet this requirement.[4] The recent ruling by the U.S. District Court for the District of Columbia ("District Court") remanded the matter to the Department for re-evaluation under the Indian canon of construction, but it did not dictate a specific outcome.[5] There is no rationale provided in the EA as to why the Department has changed its long-standing, historical position.

Nothing has changed regarding whether this off-reservation casino proposal qualifies for the restored lands exception under the Indian Gaming Regulatory Act. This project simply does not meet IGRA's regulatory requirement for "restored lands," which is based on well-established court precedent. Even when applying the Indian canon of construction here, there is no evidence of a "significant historical connection" between the applicant and the proposed location of the project.[6] The proposed Vallejo project is located more than 90 miles from the former Scotts Valley Rancheria and the Band's homelands in Lake County, California. In contrast, the lands in Vallejo are within the aboriginal territory of the Yocha Dehe Wintun Nation and other Indians of Patwin heritage.

In its 2012 restored lands decision, the Department firmly rejected Scotts Valley's contention that it was a successor-in-interest to the Suisun Patwin Indians.[7] The Department also found that the unratified 1851 Treaty signed by Scotts Valley's ancestors did not substantiate the Band's historical claims in the San Pablo Bay area. Eight tribes signed this 1851 Treaty and the land ceded by the Band's ancestors could have existed anywhere within the Treaty's immense boundaries.[8]

Additionally, the Department previously rejected Scotts Valley's "regional interface center" argument in an earlier Indian Lands determination issued to the Guidiville Band of Pomo Indians.[9]

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[4] *See* 25 U.S.C. §2719(b)(1)(B)(iii).

[5] *See Scotts Valley Band of Pomo Indians v. U.S. Department of the Interior*, 633 F. Supp. 3d 132 (D.D.C. Sept. 30, 2022) (hereinafter "2022 District Court Opinion").

[6] *See* 25 C.F.R. §292.12(b) (2019 version). This regulation in 2019 further defined "significant historical connection" to mean "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." 25 C.F.R. §292.2.

[7] *2012 Interior Determination* at 13.

[8] *Id.* at 14.

[9] *See id.* at 13, footnote 48. Scotts Valley argued in earlier submissions to the Department in its Richmond application that its ancestors participated in a "regional interface center" in which Wappo, Patwin, Coast Miwok, Costanoan, and Pomo interacted socially, culturally, and economically while working at the Ranchos in Vallejo, California. The Department rejected this theory as unfounded in the Guidiville restored lands determination issued in 2011. *See* Letter from Larry Echo Hawk, Assistant Secretary – Indian Affairs, to The Honorable Merlene Sanchez, Chairperson, Guidiville Band of Pomo Indians, at 15, September 1, 2011.

In both its Richmond and Vallejo applications, Scotts Valley argued that some of its members left its Rancheria in the Lake County area to work as cattle drivers for the Vallejo Ranchos in the 1840's.[10] Interior has now rejected this theory twice, in 2012 and 2019, finding that the transient nature of this activity did not meet the more rigorous standard of "subsistence use and occupancy" under the Department's regulations.[11]

In the 2022 remand decision of the 2019 Determination, the District Court applied the Administrative Procedure Act's "arbitrary and capricious" standard of review and agreed with the Department's reasoning and conclusion regarding the lack of evidence presented by Scotts Valley to justify a "significant historical connection" under the restored lands exception. As stated in its opinion:

> In sum, the agency provided a reasoned basis for its decision, which was based on the record. It did not overlook or ignore materials supplied by the Band; it considered them and supplied a rational connection between its assessment of those facts and its conclusions. Interior's findings cannot be said to be conclusory, unexplained, or unsupported, and therefore, from a pure administrative law perspective, the agency's application of Part 292 to the facts presented by Scotts Valley comports with the [Administrative Procedure Act] ....[12] (citation omitted)

As a recently restored tribe, Scotts Valley was permitted a period of 25 years by Interior regulations to submit a gaming trust application under the restored lands exception.[13] Instead of submitting a trust proposal for a parcel near the former Scotts Valley Rancheria in Lake County, the Band has squandered this 25-year period by attempting to secure gaming approvals from the Department for lands closer to San Francisco and between 75 and 90 miles from its actual homelands.

The District Court recognized that Interior properly weighed the evidence and rejected Scotts Valley's latest attempt to circumvent well-established standards for restored land applications. Additionally, the District Court expressly stated that "the Indian canon does not mandate invalidating the long-standing regulation."[14] This well-reasoned analysis by Interior cannot be completely undone due to the application of the Indian canon of construction, even when weighing inferences in favor of Scotts Valley. While the Court found Interior's 2019 decision deficient in one respect, it did not vacate that decision, nor did it direct a specific outcome.

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[10] *See, e.g., 2012 Interior Determination* at 13.

[11] *See id.* ("It is first important to understand that subsistence use and occupancy requires something more than a transient or occasional presence in an area. Activities that would tend to show a tribe was using land for subsistence purposes might include sowing, tending, harvesting, gathering, fishing, and hunting. 'Occupancy' can be demonstrated by a consistent presence, supported by the existence of dwellings, villages, or burial grounds, as alluded to in the regulations."); and *2019 Interior Determination* at 19 ("Here, while the Band's narrative concerning its ancestors' dispersal throughout the North Bay region during the mid-1800's is compelling, missing from this Request is the identification of significant historical sites in the vicinity of the Parcel ....").

[12] *2022 District Court Opinion* at 165.

[13] *See* 25 C.F.R. §292.12(c)(2).

[14] *2022 District Court Opinion* at 154.

Interior must conduct a new analysis that still honors the facts. Indeed, Interior could risk issuing an "arbitrary and capricious" decision if it bends the facts too far when applying the Indian canon of construction.

The Indian Canon of Construction Does Not Automatically Mean Interior Must Approve Scotts Valley's Application

The only reason this trust land application is back before the agency is because of the District Court's mistaken view of how the Indian canon of construction should be applied in this trust land application.

Inexplicably, the United States did not appeal this misguided ruling, and it is unclear how it has dealt with it on remand. Indeed, the Notice of Availability of the EA provides no background to explain the basis for conducting a National Environmental Policy Act ("NEPA") review on the proposed project. It is unclear if Interior has even conducted a new restored lands opinion analysis in light of the District Court's ruling.

Furthermore, just because Interior must apply the Indian canon, that does not condone the creation of classes of tribes. The District Court acknowledged as much, involving the Indian Reorganization Act's ("IRA") fundamental, guiding principle of equality amongst tribes, which prohibits the Federal government from promulgating or issuing "any regulation or administrative decision or determination … that classified, enhances, or diminishes the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes."[15] The United States has a trust responsibility to *all* Federally recognized tribes, including those with existing land bases.

The Department would be creating favored classes or tribes if it applies the canon in a manner that disadvantages those tribes with land bases that are within their homelands and/or are those who have endured the more onerous "two-part determination" process (assuming they wished to game in more populated urban areas away from their homelands). Permitting certain "restored" tribes to more easily enjoy such gaming opportunities based on a court-created canon with no basis in law only harms these land-based tribes that the District Court did not consider.

Indeed, the District Court articulated IGRA's purpose as ensuring that terminated and landless tribes are "on par" with other tribes.[16] While Interior must closely examine the evidentiary record with an eye that considers the hardships endured by Scotts Valley, as is the case with all terminated tribes, it does not mean Interior must blindly grant approval for all restored lands applications. There still must be grounding in IGRA, the IRA, and the particular tribe's circumstances.

While the District Court found Interior's 2019 decision to be "arbitrary and capricious" for not properly applying the Indian canon, and took the liberty to espouse how it would have weighed

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[15] *See* 25 U.S.C. § 5123(g).
[16] *See 2022 District Court Opinion* at 167.

the evidence, it notably did not order an approval or the application and merely ordered a remand to the agency "for further proceedings consistent with this opinion."[17]

Thus, before launching this NEPA review, Interior should have conducted a proper analysis regarding the eligibility of Scotts Valley to game on the proposed parcel, including applying the Indian canon and the well-established standards for "restored lands" applications. This balancing of standards is a delicate act that must be conducted by Interior to inform not only its position on the proposed project under IGRA and the IRA, but also before launching this NEPA review. Without that analysis, the EA's purpose and need is on unsteady legal footing.

The BIA Is Ignoring Its Policies and Procedures Regarding Affected Indian Tribes

In addition to the legal issues set forth above, United Auburn reiterates its strong opposition to the manner in which the BIA is processing this application after it was remanded back to the agency by the District Court.[18] By preparing an Environmental Assessment without consulting with United Auburn and other California tribes that would be impacted by this off-reservation casino project, the Bureau has ignored its current policy requirement in the Departmental Manual, which requires the BIA to consult with affected tribal governments "during the preparation of environmental documents."[19]

Similarly, the lack of notice or tribal outreach in the preparation of this Environmental Assessment did not comply with general Interior Department consultation procedures, which requires the BIA to "consult with Tribes when Departmental Actions with Tribal Implications affect Tribe's traditional homelands."[20]

Additionally, the Department is not providing enough time for tribal and public comments on an Environmental Assessment that comprises 191 pages of narrative descriptions and 2,284 pages of appendices. A limited time period of 30-45 calendar days is too compressed, especially given the amount of technical and scientific material that needs to be reviewed and considered.

The BIA Has Ignored Environmental Justice Concerns in This Environmental Assessment

Recent NEPA regulations promulgated by the Council on Environmental Quality ("CEQ") require the BIA to examine "both the context of the action and the intensity of the effect," in its evaluation of whether a proposed action is likely to have significant adverse effects.[21] In its evaluation of *context*, the regulations require that the BIA consider the proximity of this proposed casino to "communities with environmental justice concerns," which clearly include

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[17] *See 2022 District Court Opinion* at 171.

[18] *See* Letter to Amy Dutschke, Director, Pacific Regional Office, from John Williams, Chairman, United Auburn Indian Community, July 30, 2024 (hereinafter "United Auburn July 2024 Letter").

[19] U.S. Department of the Interior, Departmental Manual, Managing the NEPA Process – Bureau of Indian Affairs, 516 DM 10, at 10.3.A(2)(a) (July 28, 2020) ("When BIA determines that Tribal governments could be affected by a proposed action, Tribal governments are to be consulted during the preparation of environmental documents and, at their option, may cooperate in the review or preparation of such documents.").

[20] U.S. Department of the Interior, Departmental Manual, Procedures for Consultation with Indian Tribes, 512 DM 5, at 5.4.A (Requirement for Consultation) (Nov. 30, 2022).

[21] 40 C.F.R. §1501.3(d),

Federally recognized Indian Tribes and Native populations.[22] In its evaluation of the *intensity* of effects, the BIA is required to evaluate—at a minimum—the following factors:

- "The degree to which the action may adversely affect unique characteristics of the geographic area such as historic or cultural resources … [and] Tribal sacred sites…."[23]

- "Whether the action may violate relevant … Tribal … laws or other requirements or be inconsistent with … Tribal … policies for the protection of the environment."[24]

- "The degree to which the action may adversely affect communities with environmental justice concerns."[25]

- "The degree to which the action may adversely affect rights of Tribal Nations that have been reserved through treaties, statutes, or Executive Orders."[26]

The BIA has completely ignored the environmental justice concerns of several other Federally recognized Indian tribes in its evaluation process. The agency has ignored requests for meetings, briefings, or any other type of meaningful engagement with these neighboring tribes, including those with significant historical and aboriginal connections to Vallejo and the surrounding area.

To add insult to injury, the Environmental Assessment refuses to discuss any of these environmental justice issues, concluding instead that "[t]here are no adverse project impacts that would disproportionately affect minority communities."[27] This is a wholly inadequate conclusion that ignores the legitimate environmental justice concerns of neighboring tribes, in order to justify a favorable decision for a tribe that Interior has determined twice lacks a significant historical connection to Vallejo and the surrounding area.

The Department is Required to Issue an Environmental Impact Statement For This Project

Under the requirements of NEPA, the BIA is permitted to use an Environmental Assessment if the proposed action "[i]s not likely to have significant [environmental] effects or the significance of the [environmental] effects is unknown."[28] The use of an Environmental Assessment for a project of this type will result in the BIA either determining to prepare an Environmental Impact Statement ("EIS"), or issuing a Finding of No Significant Impact ("FONSI").[29]

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[22] *Id.* at §1501.3(d)(1).
[23] *Id.* at §1501.3(d)(2)(ii).
[24] *Id.* at §1501.3(d)(iii).
[25] *Id.* at §1501.3(d)(vii).
[26] *Id.* at §1501.3(d)(viii).
[27] Environmental Assessment, Scotts Valley Casino and Tribal Housing Project, at 3-49, July 2024. The BIA does acknowledge that there would be gaming substitution effects for several other tribes operating casinos in the area, but the Environmental Assessment ignores any discussion or meaningful examination of the "context of the action and the intensity of the effect," as required by 40 C.F.R. §1501(d).
[28] 40 C.F.R. §1501.3(c)(2).
[29] *See* 40 C.F.R. §1508.1(j) and §1501.6.

The issuance of a FONSI for a such a large-scale gaming and tribal development project in an urbanized area of California that does not have a Class III casino, or any type of existing tribal presence, would be a completely unjustified conclusion. As noted in our earlier comment letter, it is hard to argue that this Scotts Valley project—with a 615,000 square-foot casino operating 24 hours a day, 1.6 million square-feet of impervious surface area for parking, 24 single-family residences, and a tribal administration building—will not significantly impact the human and physical environment of Solano County.[30]

The Department is also applying a different standard of NEPA review to this trust application than other, large-scale off-reservation trust land applications it has evaluated in California. All of these applications have been subject to an EIS, instead of an Environmental Assessment and a FONSI. Examples include:

- Final Environmental Impact Statement for the North Fork Rancheria's Proposed 305-Acre Trust Acquisition and Hotel/Casino Project, Madera County, California (Aug. 6, 2010), *available at* https://www.govinfo.gov/content/pkg/FR-2010-08-06/pdf/2010-19180.pdf

- Final Environmental Impact Statement for the Proposed Enterprise Rancheria Gaming Facility and Hotel Fee-to-Trust Acquisition Project, Yuba County, CA (Aug. 6, 2010), *available at* https://www.govinfo.gov/content/pkg/FR-2010-08-06/pdf/2010-19194.pdf

- Final Environmental Impact Statement for the Ione Band of Miwok Indians 228.04-Acre Fee-to-Trust Land Transfer and Casino Project, Amador County, California (Aug. 13, 2010), *available at* https://www.govinfo.gov/content/pkg/FR-2010-08-13/pdf/2010-19906.pdf

- Final Environmental Impact Statement for the Cloverdale Rancheria of Pomo Indians' Proposed 65-acre Fee-to-Trust Acquisition and Resort Casino, Sonoma County, California (Apr. 18, 2014), *available at* https://www.govinfo.gov/content/pkg/FR-2014-04-18/pdf/2014-08514.pdf

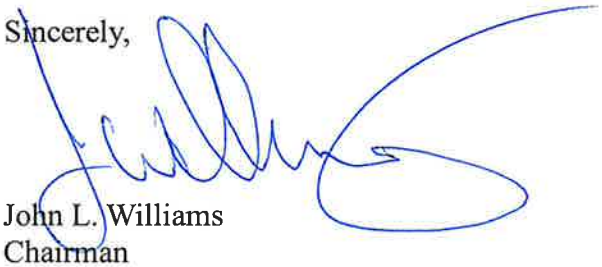
- Final Environmental Impact Statement and Final Conformity Determination for the Tejon Indian Tribe's Proposed Fee-to-Trust Acquisition and Casino Resort Project, Kern County, California (Oct. 23, 2020), *available at* https://www.govinfo.gov/content/pkg/FR-2020-10-23/pdf/2020-23497.pdf

- Final Environmental Impact Statement for the Redding Rancheria Win-River Casino Relocation Project (Apr. 3, 2024): *available at* https://www.govinfo.gov/content/pkg/FR-2024-04-03/pdf/2024-07048.pdf

[30] *See United Auburn July 2024 Letter*, at 2-3.

Remarkably, on the same day as the BIA released its EA regarding the Scotts Valley casino project, it issued a Draft Environmental Impact Statement for the Koi Nation's proposed casino project in Sonoma County.[31] This project is of similar size and scope as Scotts Valley, seeking approval for a resort facility that includes a casino, hotel, ballroom/meeting space, event center, spa, and associated parking and infrastructure.[32] There is absolutely no reason why these two projects should be subject to different levels of NEPA review.

Sincerely,



John L. Williams
Chairman

[31] Notice of Availability of a Draft Environmental Impact Statement and Draft Conformity Determination for the Koi Nation of Northern California's Proposed Shiloh Resort and Casino Project, Sonoma County, California, 89 Fed. Reg. 55,968 (July 8, 2024), *available at* https://www.govinfo.gov/content/pkg/FR-2024-07-08/pdf/2024-14783.pdf.
[32] *Id.*