IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTTS VALLEY BAND OF POMO INDIANS, *Plaintiff*, v. DOUGLAS BURGUM, *et al.*, *Defendants.*	)	Civil Action No.: 1:25-cv-00958-TNM Judge Trevor N. McFadden

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BRIEF OF AMICUS CURIAE GTL PROPERTIES, LLLP IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

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INTEREST OF AMICUS CURIAE[1]

GTL Properties, LLLP ("GTL") submits this brief as amicus curiae in support of the Motion for a Preliminary Injunction filed by Scotts Valley Band of Pomo Indians ("Scotts Valley" or "Plaintiff") to prevent unlawful and irreversible harm to Scotts Valley's sovereign and vested economic interests, and to safeguard Scotts Valley's ability to enter commercial agreements with other entities related to gaming activities.

GTL operates in the real estate industry as an owner of properties as well as a management and development company. GTL is the former owner of a 32-acre parcel of land in Vallejo, California ("32-Acre Parcel") that is directly at issue in this case. The 32-Acre Parcel is located within the San Francisco Bay Area, where land values are some of the highest nationwide.

On January 10, 2025, the U.S. Department of the Interior ("Department") issued a decision ("January 10 Decision") containing two intertwined decisions that relate directly to the 32-Acre Parcel and to GTL.

First, after nearly a decade of process, the Department determined that a certain approximately 160-acre parcel of land ("Vallejo Parcel")—that includes the 32-Acre Parcel—qualified as restored lands under 25 U.S.C. § 2719(b)(1)(B)(iii) and 25 C.F.R. § 292.12, meaning that Scotts Valley could lawfully conduct gaming on the Vallejo Parcel pursuant to the Indian Gaming Regulatory Act ("IGRA") ("Eligibility Determination"). *See* ECF 1-1 at 1–2.

Second, and as a direct consequence of the Eligibility Determination under § 2719(b)(1)(B)(iii), the Department determined that it would take the Vallejo Parcel "into trust

[1] No counsel for any party authored this brief in whole or in part, and no party, nor counsel for any party, nor any other person contributed money to fund the preparation or submission of this brief. *See* LCvR 7(o)(5); Fed. R. App. P. 29(a)(4)(E).

for [Scotts Valley]," and further explained that Scotts Valley "may conduct gaming on the Vallejo [Parcel] once it is acquired in trust . . . ." *Id.* at 23–24; *see also id.* at 30.

In reliance on the January 10 Decision, GTL executed multiple transactions, including with the United States. Indeed, as a direct consequence of the Department's Eligibility Determination, the United States accepted and recorded the deed to the 32-Acre Parcel from GTL. *See* Exhibit A (Declaration of Gregory T.H. Lee "Lee Decl.") ¶ 5; Exhibit B (Deed for Parcel); Notice, 90 Fed. Reg. 3,906, 3,906–07 (Jan. 15, 2025). In accepting the deed, the Department expressly accepted the conveyance in accordance with 25 C.F.R. § 151.16. Exhibit B at 4 (approving deed transfer "in accordance with authority delegated to the Assistant Secretary"); *see also* 25 C.F.R. § 151.14(a)(1) (providing that if the applicant for a trust acquisition does not yet have title, then applicant will provide evidence of transferor's title).

This transfer of property would not have occurred *but for* the January 10 Decision. GTL also provided Scotts Valley with a substantial loan so that Scotts Valley could purchase the remaining approximately 128-acre portion of the Vallejo Parcel. *See* Exhibit A, Lee Decl. ¶ 4. Under the terms agreed to by Scotts Valley and GTL, which relevant terms were contingent upon the January 10 Decision, GTL will only receive payment for the 32-Acre Parcel and repayment of the loan once gaming occurs on the Vallejo Parcel. *See id.*

Completely ignoring Scotts Valley's and GTL's reliance interests, however, the Department, via a March 27, 2025 letter ("March 27 Letter"),[2] purported to rescind the Eligibility Determination. *See* ECF 1-2 at 1. Despite purporting to rescind the Eligibility Determination, the

[2] Herein, GTL refers to the Department's action as the March 27 Letter. However, for purposes of considering the actual timing of events, a substantively identical letter was initially drafted on March 26, 2025, and only a "typographical error" was corrected in the March 27 Letter. ECF 1-2 at 1. ("This letter is a correction and re-issuance of my March 26, 2025, letter, which contained a typographical error regarding the acreage of the Vallejo [Parcel].")

March 27 Letter stated expressly that the Department's determination to hold the Vallejo Parcel in trust for Scotts Valley has not been rescinded. *See id.* In short, the Department intends to hold GTL's former land, but will not allow gaming thereon, which was the express purpose for the trust acquisition in the first place. This contradictory position leaves Scotts Valley with land held in trust but stripped of its economic value, and leaves GTL both without its real property and without the payment structure that was fundamentally premised on the Department's Eligibility Determination.

Scotts Valley is likely to succeed on the merits of its claims, and GTL provides additional rationale supporting that conclusion in this brief. GTL also describes the irreversible injury resulting from the Department's actions. Based on the reasons set forth in Scotts Valley's Memorandum in Support of Preliminary Injunction ("Memorandum"), its reply in support thereof, and for the additional reasons described here, GTL respectfully urges this Court to grant the preliminary injunction and adopt Plaintiff's Proposed Order. *See* ECF 3-4.

INTRODUCTION AND BACKGROUND

As discussed above, GTL is the former owner of the 32-Acre Parcel that GTL deeded to the United States to be held in trust for Scotts Valley, and GTL also loaned Scotts Valley substantial funds to acquire the adjoining approximately 128-acre parcel, which two parcels collectively comprise the approximate 160.33-acre Vallejo Parcel. *See* Exhibit A, Lee Decl. ¶¶ 3–4; Exhibit B (Deed for Parcel). As a direct result of the January 10 Decision, the United States Government now holds title to the Vallejo Parcel, and is to hold that title in trust for the benefit of Scotts Valley.

GTL and Scotts Valley agreed to the terms of a purchase and sale agreement ("Agreement") on November 2, 2024, in anticipation of a potential determination by the Department that the

Vallejo Parcel may host gaming operations subject to IGRA. *See* Exhibit A, Lee Decl. ¶ 4. However, because of the uncertainty of the Department's decision, the deed for the 32-Acre Parcel was held in escrow, not to be released if and until the Department issued the Eligibility Determination. *Id.* ¶ 5. In other words, the terms of the Agreement were structured such that the deed to the United States would not be accepted and recorded until after the Department had determined that the Vallejo Parcel qualified as restored lands and was therefore eligible for gaming under IGRA. Upon satisfaction of that condition, the Department would take title to the Vallejo Parcel and hold it in trust for Scotts Valley. *Id.* The full execution of the Agreement was thereby contingent on the January 10 Decision, *as a complete package*. *See id.* ¶¶ 5–7 (describing structure of transaction being tied to January 10 Decision). After the Department issued the January 10 Decision, the deed to the Vallejo Parcel was accepted by the Department to be held in trust for Scotts Valley. *See* Notice, 90 Fed. Reg. at 3,907; Exhibit B at 4. The Department's acceptance of the deed directly from GTL demonstrates that the Department was well aware of the underlying arrangement between GTL and Scotts Valley.

In addition to the Agreement for the 32-Acre Parcel and the loan allowing Scotts Valley to acquire the remaining 128 acres of the Vallejo Parcel, GTL also has in place certain development agreements with Scotts Valley, the value of which are contingent on gaming taking place on the Vallejo Parcel. *See* Exhibit A, Lee Decl. ¶ 9.

GTL reasonably relied on the finality of the January 10 Decision because GTL will only receive compensation for its former property (and the loan on the other 128 acres) once Scotts Valley operates gaming at the site. *Id.* ¶ 4. This is because payment of the purchase price for the land, along with repayment of the loan, are contingent upon gaming being conducted on the Vallejo Parcel. *Id.* Thus, GTL has not received a penny from Scotts Valley (or the Department) in exchange

for the Department holding title to GTL's former real property. *Id.* And, the fact that the Department accepted title to the 32-Acre Parcel manifests the Department's own understanding that GTL reasonably relied on the January 10 Decision.

But then the Department inexplicably turned things upside down. On March 27, 2025, the Department issued a two-page letter where it claimed to be "temporarily rescinding the . . . Eligibility Determination for reconsideration." ECF 1-2 at 1. The only basis for this action was a "concern[]" that not enough information had been considered during the prior decade-long process. *Id.* The Department also solicited further information relevant to the reconsideration process, to be submitted by Scotts Valley "and other interested parties" by May 30, 2025. *Id.* Notably, while the March 27 Letter purports to temporarily rescind the Eligibility Determination, the March 27 Letter explicitly provides that the action to take title to the Vallejo Parcel and hold it in trust is not being reconsidered. *Id.* The March 27 Letter's rescission is also indefinite because the letter does not state how long the Department intends to take in reconsidering the Eligibility Determination. *See id.*

ARGUMENT

Plaintiff satisfies the stay/injunction criteria, as set forth in the Memorandum. *See* ECF 3-1. This Brief further supports Scotts Valley's arguments.

The factors for granting a preliminary injunction or stay are: (1) likelihood of success on the merits, (2) irreparable harm, absent relief, (3) the balance of hardships, and (4) the public interest. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also Nken v. Holder*, 556 U.S. 418, 434 (2009) (noting "overlap" between stay and injunction factors). Factors (3) and (4) merge when the government is the opposing party. *See Nken*, 556 U.S. at 435.

A few initial responses are in order concerning these factors and the applicable legal standard. First, the United Auburn Indian Community, Yocha Dehe Wintun Nation, and Kletsel Dehe Wintun Nation ("Opposition Coalition") and the Department claim that Scotts Valley's requested preliminary injunction is overbroad. *See, e.g.*, Opp. to Mot. for Prelim. Inj. ("Opp."), ECF 47 at 35. However, Scott's Valley's requested relief is more accurately considered a request for *stay* of agency action pending review. *See* Memorandum, ECF 3-1, at 43. Staying the March 27 Letter would "temporarily divest[] [the March 27 Letter] of enforceability," or "temporarily suspend[] the source of authority to act." *Nken*, 556 U.S. at 428–29. Thus, a stay here would simply suspend the March 27 Letter. Contrary to the Opposition Coalition's arguments, this outcome would not "direct[] [the Department]'s conduct." *Id.* at 428. Rather, suspending the March 27 Letter would maintain the status quo until this Court can make a fulsome decision on the merits.

Second, the government maintains that economic loss does not itself constitute irreparable harm. *See* Opp., ECF 47, at 8. However, the recent Supreme Court case *Ohio v. Environmental Protection Agency* dispels that notion. 603 U.S. 279 (2024). In staying agency action, the Supreme Court relied exclusively on financial costs to industry as irreparable harm. *Id.* at 292.

Third, the Opposition Coalition argues that Scotts Valley's requested relief would upend the status quo. *See* Opp. at 35; Opp. Coal. Amicus Br., ECF 57, at 21. Quite the opposite. The status quo has been upended by the Department's about-face. Scotts Valley is only asking that status quo be restored. To be sure, the status quo may be difficult to ascertain when an appellate court reviews a lower court's stay/injunction decision. *See Labrador v. Poe*, 144 S. Ct. 921, 930 (2024) (Kavanaugh, J., concurring in the grant of stay) (noting complexities). Here, however, the answer is not difficult; Scotts Valley's requested relief would "return[] to . . . the state of affairs before the [agency] order was entered." *Nken*, 556 U.S. at 429.

While the Opposition Coalition claims the status quo is actually the state of affairs on January 9, 2025, that makes little sense. This case challenges the March 27 Letter, not the January 10 Decision. Just because the Opposition Coalition has separately challenged the January 10 Decision in court does not mean that the status quo somehow relates back to their challenge. If the Opposition Coalition had wanted to preserve the January 9 status quo, they could have requested that this Court stay the January 10 Decision, but they have not pursued that relief. The January 10 Decision stands as the status quo.

I. Scotts Valley Is Likely To Succeed On The Merits.

A. The March 27 Letter Constitutes Final Agency Action.

In addition to the reasons explained by Scotts Valley, the March 27 Letter constitutes final agency action for the purposes of judicial review.

Agency action is final for the purposes of judicial review where the action marks the consummation of the agency's decisionmaking process and when the action either determines rights or obligations or is an action from which legal consequences will flow. *See Bennett v. Spear*, 520 U.S. 154, 178 (1997). The March 27 Letter satisfies both criteria.

First, the March 27 Letter marks the consummation of the Department's decisionmaking process because the Department has suspended or stayed the Eligibility Determination indefinitely. This fact is undisputed. Federal courts of appeals repeatedly hold that agency stays of their own earlier actions are themselves final agency actions subject to judicial review. *See, e.g.*, *NRDC v. NHTSA*, 894 F.3d 95, 113 (2d Cir. 2018); *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017) (distinguishing agency decision to reconsider earlier action from agency decision to impose a stay, which "is an entirely different matter"); *Public Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (temporary suspension of agency action subject to judicial review).

As the D.C. Circuit has explained, granting a requested interim modification of an earlier decision while purporting to reconsider that earlier decision is "a modification . . . for the entire period of time that the" agency reconsiders the underlying action and "represents the final agency position on this issue, has the status of law, and has an immediate direct effect on the parties." *Int'l Union, United Mine Workers of Am. v. MSHA*, 823 F.2d 608, 614–15 (D.C. Cir. 1987).

Applying *Clean Air Council* outside of a rulemaking context, this Court has held that an agency's decision to "reconsider and stay" an earlier decision "'marked the consummation of the agency's decisionmaking process.'" *Nat'l Women's Law Ctr. v. OMB*, 358 F. Supp. 3d 66, 85 (D.D.C. 2019) (quoting *Clean Air Council*, 862 F.3d at 6) (alteration omitted).

In *National Women's Law Center*, the Office of Management and Budget ("OMB") had approved an aspect of an Equal Employment Opportunity Commission's ("EEOC") data collection effort pursuant to OMB's review authority under the Paperwork Reduction Act. *Id.* at 73–74. Then, in an about-face, and just under one year later, OMB purported to stay the earlier approval while initiating a review period to reconsider the EEOC's data collection. *Id.* at 74–75. This Court held that OMB's stay of the earlier determination "thereby revok[ed] its earlier approval of the [EEOC's] information collection." *Id.* at 85. As relevant here, "OMB's stay [was] not interlocutory simply because OMB [would] conduct future administrative proceedings . . . ." *Id.*; *see also id.* (noting that OMB did not need to stay earlier decision to undertake review).

Second, legal consequences flow directly from the March 27 Letter. The March 27 Letter states: "During the pendency of this reconsideration, neither *[Scotts Valley] nor any other entity or person* should rely on the [Eligibility Determination]." ECF 1-2 at 1 (emphasis added). Thus, under the plain terms of the Department's March 27 Letter, Scotts Valley—and GTL—are directed not to rely on the Eligibility Determination. This reliance-destroying tactic squarely meets the

criterion for agency action. As in *Sackett v. Environmental Protection Agency*, 566 U.S. 120, 126 (2012), where the agency's determination limited the plaintiff's ability to obtain a permit, here the March 27 Letter purports to limit Scotts Vally's and GTL's (and "any other entity['s]") ability to undertake any gaming development at the Vallejo Parcel based on the Eligibility Determination. The State of California has gotten the message loud and clear. *See* Mot. for Leave to File Suppl. Mem., ECF 40-2, at 2 ("put[ting] on hold" compact negotiations with Scotts Valley). Accordingly, the agency's suspension of its earlier decision impacts the affected "parties' rights or obligations." *Clean Air Council*, 862 F.3d at 7. Further, the legal consequences of the purported rescission of the Eligibility Determination should be clear to the Department, given its express acceptance of the deed to the 32-Acre Parcel. *See* Exhibit B.

National Women's Law Center is again directly on point, where this Court explained that the stay of the earlier approval "creat[ed] legal consequences for the regulated entities, no matter whether OMB ultimately decide[d] to" reconsider its earlier decision. 358 F. Supp. 3d at 86. *National Women's Law Center* also considered—but rejected—arguments that an agency determination outside of the rulemaking context is somehow distinguishable for purposes of analyzing what legal consequences flow from agency action. *See id.* & n.6 (concluding that the rulemaking-versus-other-action distinction makes no difference and that Defendants failed to demonstrate "why the stay in this case is not final"). Here, the legal consequences will continue to flow unabated until this Court enjoins the Department's unlawful action.

Finally, the March 27 Letter's claim that the Department has not taken final action is legally meaningless. *See Sackett*, 566 U.S. at 127 (possibility of agency reconsideration does not suffice to make an otherwise final agency action nonfinal). And just because the agency says it is so does not make it so. *See Ctr. for Biological Diversity v. Haaland*, 58 F.4th 412, 417 (9th Cir. 2023)

(Analysis of finality focuses on "the practical and legal effects of the agency action, not on labels, and finality is interpreted in a pragmatic and flexible manner." (internal quotation and citations omitted)).

B. The March 27 Letter Is Unlawful.

The March 27 Letter is unlawful multiple times over, as set forth in Scotts Valley's Memorandum. ECF 3-1 at 24–39. GTL adds two additional arguments: (1) the Department cannot undo a restored lands determination in these circumstances under applicable substantive canons of construction; and (2) the factual backdrop in this case, as set forth in Scotts Valley's Memorandum (at 29–32) demonstrates that the Department's claimed basis for the March 27 Letter is a pretextual and that the Department's action in issuing the letter is not entitled to a presumption of regularity, given the pretextual explanation.

1. The Supreme Court has repeatedly held that statutes are to be construed in favor of Indian tribes. *See, e.g.*, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."); *Ysleta Del Sur Pueblo v. Texas*, 596 U.S. 685, 703 n.3 (2022) (noting canon that statutes be construed liberally in favor of tribes is one "long established by our precedents"); *cf. McGirt v. Oklahoma*, 591 U.S. 894, 916 (2020) (same, for treaty rights).

The D.C. Circuit and this Court have, as required by stare decisis, followed the Supreme Court's instruction to apply that canon of construction. *See City of Roseville v. Norton*, 348 F.3d 1020, 1032 (D.C. Cir. 2003) ("[S]tatutes are to be read liberally in favor of the Indians"); *Scotts Valley Band of Pomo Indians v. United States*, 633 F. Supp. 3d 132, 153–54 (D.D.C. 2022) (applying canon of construction).

Applying that canon of construction to the particular circumstances here, IGRA should be construed liberally to foreclose the Department's authority to reconsider a determination of gaming

eligibility under 25 U.S.C. § 2719(b)(1)(B), where a gaming eligibility determination based on the restored lands exception results directly in the United States taking title to real property and immediately holding that real property in trust, for which the Department has not claimed to rescind. This is because, as the D.C. Circuit has held, § 2719(b)(1)(B) "'ensur[es] that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones.'" *Scotts Valley Band of Pomo Indians*, 633 F. Supp. 3d at 148 (quoting *City of Roseville*, 348 F.3d at 1030–31). Being able to rescind an earlier eligibility determination, and without any process whatsoever, does not serve Congress's manifest intent in § 2719(b)(1)(B). The abrupt reversal stands in stark contrast to the nearly 10-year process it took to arrive at the Eligibility Determination.

Both the structure of § 2719(b)(1)(B) and the circumstances of this case drive home why this must be the case. Under the plain terms of IGRA, the restoration of Indian lands exception is triggered *only* when lands are taken into trust. *See id.* § 2719(b)(1)(B)(iii) (providing exception for "*lands [that] are taken into trust* as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition" (emphasis added)). Taking lands into trust, in turn, is contemplated as a permanent undertaking, and the Department has not attempted to unwind that action. This structure demonstrates that Congress contemplated that *both* taking the lands into trust *and* the determination of restored lands would be permanent undertakings. Beyond IGRA's structure, IGRA also does not expressly allow rescission of restored-lands determinations. That silence, read alongside the Indian canon of construction, again confirms rescission is not authorized in these circumstances. On top of that, the Department's rushed and poorly explained rescission is emblematic of an "especially dangerous" process where an agency reverses itself after

taking final action on which parties rely. *Confederated Tribes of Warm Springs Rsrv. of Oregon v. United States*, 177 Ct. Cl. 184, 191 (1966).

This conclusion is reaffirmed by the circumstances in this case. Scotts Valley initiated the process to acquire lands in trust for gaming in August 2016. After the nearly decade-long administrative and judicial process, the Department finally issued its Eligibility Determination in early January 2025. At that point, it made no sense for Scotts Valley to sit on its hands and not proceed with developing gaming facilities. The same is true for Scotts Valley's private business partners like GTL, which further demonstrates why a determination under § 2719(b)(1)(B) is not reversible as a matter of law, in the way the Department has forced the issue here.

Tribes would be in a much harder position to find private business partners to develop gaming facilities if the private business partners are unable to place any weight on the determination of gaming eligibility reached by the Department. As Scotts Valley explains, it "has limited financial resources," ECF 3-1 at 42, meaning that private parties—like GTL—can help to provide financing to purchase necessary property or get a gaming facility up and running. However, without the ability to provide concrete assurances that, as a matter of law, a gaming eligibility determination is final, the exception in § 2719(b)(1)(B) would be rendered a dead letter. Tribes could receive such determinations, but the tribes (and their business partners) would be unable to act on them.

2. Despite political pressures that surround tribal gaming determinations, Scotts Valley is still "entitled to . . . an agency decision on the merits without regard to extra-statutory, political factors." *Aera Energy LLC v. Salazar*, 642 F.3d 212, 213 (D.C. Cir. 2011).

The circumstances and timeline here are strong evidence of bad faith action and pretextual, i.e., "extra-statutory" explanations, *id.*, by the Department, *see* Am. Compl., ECF 12, ¶ 36. After

a nearly decade-long process that included one previous appeal to and remand from this Court, the Department concluded on January 10, 2025, that the Vallejo Parcel satisfied the restored-lands exception criteria in 25 C.F.R. § 292.12, and as a result, that gaming was permissible thereon. Then, hardly two months after reaching that determination, and without any public process or notice, the Department pulled an abrupt about-face through the March 27 Letter. Notably, the agency's turnabout occurred mere weeks after the change in presidential administration. *See* Memorandum, ECF 3-1, at 30. The agency also reversed itself mere days after other tribes challenged the January 10 Decision in this Court. *See Yocha Dehe Wintun Nation v. DOI*, No. 1:25-cv-00867-TNM (filed Mar. 24, 2025); *United Auburn Indian Cmty. v. DOI*, No. 1:25-cv-00873-TNM (filed Mar. 24, 2025).

In addition to an already suspicious timeline, another factor indicating pretextual motive is the politically charged nature of these agency decisions. The January 10 Decision has more than its fair share of opponents, as demonstrated by the three cases (*Yocha Dehe*, *United Auburn*, and *Lytton Rancheria of Calif. v. DOI*, No. 1:25-cv-01088-TNM (filed Apr. 10, 2025)) challenging the January 10 Decision. *See, e.g.*, Opp. Coal. Amicus Br., ECF 57, at 16 ("For nearly a decade, Scotts Valley's Project has been vigorously disputed and heavily litigated."). Whether to allow for tribal gaming under IGRA has been a politically charged issue for decades, across the country. *See, e.g.*, *Stand Up for California! v. DOI*, 204 F. Supp. 3d 212, 226 (D.D.C. 2016) (noting litigants "vehement[] oppos[ition]" to proposed casino and their efforts in "state and federal litigation as well as statewide political efforts . . . to halt the . . . casino development."). Of course, policy differences attendant to changes in presidential administration may spur agency changes in some contexts. *See Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012). Such

changes, however, must be statutorily permitted under both the Administrative Procedure Act and the relevant substantive acts. Here, they are not.

The March 27 Letter offers the rationalization that the Secretary is supposedly "concerned that the Department did not consider additional evidence submitted after the 2022 Remand." ECF 1-2 at 1. That justification runs headlong into several crucial facts.

First, the existing administrative record underlying the 2019 Indian Lands Opinion ("ILO") contained voluminous submissions from members of the Opposition Coalition. *See* 2019 ILO, Exhibit C at 2 n.7 (noting letters and accompanying materials submitted) at 13–14 (citing historical work commissioned by Yocha Dehe). Members of the Opposition Coalition had adequate time to submit these comments and analyses because Scotts Valley submitted its request to the Department on January 28, 2016, with supporting historical materials submitted on January 29, 2016, and members of the Opposition Coalition submitted their comments and analyses in November 2016, approximately ten months later. *Id.* at 1–2 & nn.5–6. Likewise, the historian commissioned by Yocha Dehe submitted her report in November 2016. *Id.* at 13 n.83. As a factual matter, the Opposition Coalition has already had its opportunity to submit evidence. What's more, the Department clearly considered and analyzed the Opposition Coalition's submitted materials as a part of the original administrative record supporting the January 10 Decision. *See* ECF 1-1 at 3–4 & n.32 ("Our conclusion is based on the extensive documentation in the administrative record for the 2019 ILO, which includes materials submitted by . . . parties opposed to [Scotts Valley]'s request . . . .") at 10 (expressly considering Yocha Dehe input) at 12–13 (expressly considering historical work commissioned by Yocha Dehe), 23 (considering amicus brief submitted by Yocha Dehe in preceding litigation). Members of the Opposition Coalition had a meaningful opportunity to participate in the Department's consideration of restored lands, and they *did* participate.

Second, the remand in 2022 was based on an issue of law, and so it was perfectly reasonable for the Department to apply the legal conclusions from that case to the *existing* administrative record. *See Scotts Valley Band of Pomo Indians*, 633 F. Supp. 3d at 165–68 (applying Indian canon of construction). This is not uncommon when a court remands to apply a different legal rule. *See, e.g.*, Report of the Special Master, *Florida v. Georgia*, No. 142, 2019 WL 13148211 at *3 (Dec. 11, 2019) (not taking additional evidence after remand to special master from Supreme Court on issue of law), *aff'd* 592 U.S. 433, 444 (2021); 81 Fed. Reg. 24,420, 24,428–29 (Apr. 25, 2016) (agency basing decision on the "*prior record*" updated with a consideration of cost as required by Supreme Court remand (emphasis added)), *on remand from Michigan v. EPA*, 576 U.S. 743 (2015). Doing otherwise is inefficient, and there is no legal requirement to give parties a second bite at the apple.

Third, the Department's 2008 rulemaking setting forth the regulations governing restored lands applications notes that 25 U.S.C. § 2719(b)(1)(B) does "not reference an opportunity for public comment" because the "exceptions . . . present a fact-based inquiry." 73 Fed. Reg. 29,354, 29,361 (May 20, 2008); *see also id.* (noting availability of public comment for analyses conducted under the National Environmental Policy Act, which statute expressly calls for public comment). Thus, the Department—through notice-and-comment rulemaking process conducted nearly twenty years ago—has already concluded that public input on restored lands applications is not legally required. "[D]epart[ing] from a prior policy *sub silentio*," the March 27 Letter arbitrarily and capriciously reversed course on the agency's long-held interpretation by immediately rescinding the Eligibility Determination on the premise that it should solicit further public comment on what should be a fact-based inquiry. *See FCC v. Fox Tele. Stations, Inc.*, 556 U.S. 502, 515 (2009).

Fourth, contrary to the supposedly "obvious conclusion" that the Department "took a fresh look" after "facing a wave of" challenges to the January 10 Decision, it defies credulity that an agency would move so quickly. Opp. Coal. Amicus Br., ECF 57 at 13. (Indeed, as discussed at note 3, *infra*, direct evidence of Department communications conclusively dispels the so-called "obvious" conclusion.) The earliest cases challenging the January 10 Decision were filed on March 24, 2025, yet the finalized (and corrected) March 27 Letter was issued a mere three days later. Federal bureaucracies are simply too "slow" and "lumbering" to move that quickly. *Wyman v. James*, 400 U.S. 309, 335 (1971) (Douglas, J., dissenting). Instead, the timing signals that Department was already plotting to reverse course, and the process "concern" provided the necessary pretext.[3]

Indeed, if the agency's *actual* concern (rather than pretext) was not considering late-submitted evidence, then the agency would have evaluated any additional evidence submitted after the 2022 remand *without* having taken action to immediately rescind the Eligibility Determination. That is the process 43 C.F.R. § 4.5(c) requires: "[i]f the Secretary or Director assumes jurisdiction of a case or reviews a decision, the parties and the appropriate Departmental personnel will be advised in writing of such action, the administrative record will be requested, and, after the review process is *completed*, a written decision will be issued." *Id.* (emphasis added). Here, by contrast, the "written decision" to rescind the Eligibility Determination—for an indefinite period—was

[3] GTL understands that Scotts Valley submitted requests to the Department under the Freedom of Information Act requesting information on the process giving rise to the March 27 Letter and that the responsive materials reveal initial drafts were indeed completed before March 24, 2025. *See, e.g.*, ECF 60-3 at 2–4 (showing draft letter was prepared no later than March 20, 2025); *id.* at 12–13, 18 (correspondence demonstrating that Scotts Valley was not informed of the March 27 Letter until after certain other members of the public); ECF 60-5 at 2–3 (showing Microsoft Teams meeting invite between the Department and members of the Opposition Coalition on March 11, 2025 "[t]o discuss decision to approve a gaming [fee-to-trust] application for Scotts Valley").

reached at the very start of the review process, far before the process was "completed." *Id.* Also contrary to § 4.5(c), neither Scotts Valley nor GTL (who had recently deeded its property directly to the United States) were "advised in writing" of the Department's intention to rescind the Eligibility Determination until the March 27 Letter purported to do so.

A federal district court recently found evidence of pretextual motivations in the Department's invocation of § 4.5. *See Tesoro High Plains Pipeline Co. v. United States*, No. 1:21-cv-90, 2024 WL 3359433 at *6 & n.5 (D.N.D. July 10, 2024). There, the court explained that, as here, the plaintiff was not given any notice or opportunity to respond to the potential bases that the Department identified for invoking § 4.5 before the Department's action took effect. *Id. Tesoro* therefore noted: "Given this lack of notice and an opportunity for Tesoro to respond, it appears the Acting Secretary may have pretextual reasons for summarily vacating all the prior orders." *Id.* at *6 n.5. Continuing, the court stated that the Department's claimed basis "seems a squirrely justification for an order that itself lacked the requisite notice and opportunity to respond." *Id.* So too here. The Department failed to provide any written notice to Scotts Valley in advance of the March 27 Letter—contrary to § 4.5(c)—yet now invokes process considerations as the basis for reconsideration and rescission on an indefinite basis.

Beyond *Tesoro*, which presents the most on-point case, the Supreme Court has also vacated agency action based on pretextual motive. For example, in *Department of Commerce v. New York*, the Supreme Court "viewing the evidence as a whole," found "a significant mismatch between the decision the Secretary made and the rationale he provided." 588 U.S. 752, 783 (2019); *cf. Ohio*, 603 U.S. at 293 (requiring reasoned explanation for agency action). This mattered because the "reasoned explanation requirement of administrative law is, after all meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and

the interested public." *Dep't of Com.*, 588 U.S. at 785. The Supreme Court relied on several factors in finding pretextual motivations, including: (1) timing (i.e., the Commerce Secretary's action soon after taking office), and (2) communications with agency personnel and the Department of Justice to identify a rationale for the action. *Id.* at 784. Once the Supreme Court concluded that the agency's "sole stated reason [for its action] seem[ed] to have been contrived," the Court affirmed the district court's vacatur of the agency's action. *Id.*; *see also id.* ("Our review is deferential, but we are 'not required to exhibit a naiveté from which ordinary citizens are free.'" (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2nd Cir. 1977) (Friendly, J.))); *see also Aera Energy LLC*, 642 F.3d at 224 ("[S]ometimes political pressure crosses the line and prevents an agency from performing its statutorily prescribed duties.").

The D.C. Circuit has also held unlawful agency action based on extra-statutory factors. In *D.C. Federation of Civic Associations v. Volpe*, the Secretary of Transportation approved a bridge project only after significant political pressure from members of Congress. 459 F.2d 1231, 1235–36 (D.C. Cir. 1971). Going even further than *Department of Commerce*, the D.C. Circuit held the agency's action unlawful where its rationale was based even *in part* on extra-statutory factors because that would result in political pressure "usurp[ing]" the function of the agency. *Id.* at 1248–49.[4] Likewise, this Court recently granted a preliminary injunction after determining that the presumption of regularity that typically attaches to governmental actions had been rebutted by the

[4] Other federal courts of appeals have also held agency action unlawful when based on pretext. *See, e.g.*, *Texas v. United States*, 809 F.3d 134, 173–76 (5th Cir. 2015) (upholding district court preliminary injunction based in part on pretext finding), *aff'd by an equally divided court*, 549 U.S. 547 (2016) (per curiam); *Woods Petroleum Corp. v. DOI*, 18 F.3d 854, 859 (10th Cir. 1994) (holding unlawful the Department's action where "sole reason" offered for action was pretextual), *adhered to on reh'g* 47 F.3d 1032 (1995).

circumstances that "strongly suggest [executive branch's stated concern] was mere pretext." *Nat'l Treasury Emps. Union v. Trump*, No. 25-0935, 2025 WL 1218044 at *12 (D.D.C. Apr. 28, 2025).

Additional direct evidence of pretext or bad faith may be made available through further litigation. *See Dep't of Com.*, 588 U.S. at 781 (noting exception to general rule against inquiring into unstated motivations of administrative decisionmakers); *Envt'l Def. Fund v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981) (court may obtain additional information where "there was such a failure to explain administrative action as to frustrate effective judicial review" (citation omitted)).

In the end, the March 27 Letter smacks of pretext and failure to "turn square corners in dealing with the people." *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 591 U.S. 1, 24 (2020) (quoting *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting)). Had the Department truly been concerned about ensuring that sufficient evidence was considered, the Department could have *first* evaluated the materials that were submitted to the Department after the remand to analyze whether it would be sensible to reverse course without simultaneously issuing an indefinite rescission. Instead, the Department's choice to indefinitely rescind the Eligibility Determination—without notice or an opportunity for comment by Scotts Valley—demonstrates that the Department has already made up its mind that at the conclusion of the reconsideration charade, it intends to permanently reverse itself. The transparent and reliance-killing tactic of purporting to temporarily rescind the Eligibility Determination is clear evidence of that intent.

Because the "sole stated reason" for the March 27 Letter is pretextual, "viewing the evidence as a whole," Scotts Valley is likely to prevail on the merits. *Dep't of Com.*, 588 U.S. at 783–84.

II. Scotts Valley And GTL Suffer Irreparable Injury From The March 27 Letter.

To avoid repetition, GTL does not address the arguments that Scotts Valley made regarding its vested economic and sovereign interests that both suffer irreparable injury—and will continue to suffer such injury absent a preliminary injunction. *See* Memorandum, ECF 3-1, at 39–41. Rather, GTL (1) addresses one additional point for Scotts Valley's vested economic injury and (2) discusses GTL's own injury.

GTL first identifies an additional consideration in weighing the injury to both Scotts Valley and to GTL: under IGRA, the Eligibility Determination allows Scotts Valley to conduct Class II gaming (in contrast with Class III gaming) *without* negotiating a gaming compact with the State of California. *See* 25 U.S.C. § 2710(b)(1) (permitting such gaming without a state compact); *Cabazon Band of Mission Indians v. NIGC*, 14 F.3d 633, 634–35 (D.C. Cir. 1994) (describing differences between Class I, Class II, and Class III gaming under IGRA).

Arguments that Scotts Valley's (and GTL's) economic injuries only stem from the future possibility of being able to conduct Class III gaming therefore do not address the whole landscape of vested economic benefit bestowed by the Eligibility Determination (and now obliterated by the March 27 Letter). *See* Opp., ECF 47, at 21–22, 26 (citing Class III gaming throughout argument); Opp. to GTL's Mot. to Intervene, ECF 30, at 8 ("[B]efore Scotts Valley can legally participate in class III gaming activities on the Vallejo Parcel, it must negotiate and enter a Tribal-State gaming compact with the State of California.").

Class II gaming has an independent, and strong, potential for economic development. In fact, the Lytton Rancheria of California ("Lytton") operates a casino in nearby San Pablo, California, with Class II gaming only. *See* Compl. ¶¶ 50–51, *Lytton*, No. 1:25-cv-01088-TNM (Apr. 10, 2025) (noting operation of the San Pablo Lytton casino "as a Class II casino"); Lytton Amicus Br., ECF 58, at 1 ("Lytton operates a successful Class II bingo facility . . . ."). Annual

revenues from Lytton's Class II-only operation are sizeable, having paid approximately $31.5 million in taxes to the City of San Pablo in fiscal year 2024.[5] Accordingly, because the Eligibility Determination permitted Scotts Valley to conduct Class II gaming without the interim step of entering a compact with California, the rescission of the Eligibility Determination works immediate injury to Scotts Valley by depriving it of *all* economic opportunity contemplated by Scotts Valley, including revenue derived from Class II gaming.

As this Court recently recognized, and to put it more plainly, the "Government's rescission of the [Eligibility Determination], of course, poses quite the problem for building a casino on the" Vallejo Parcel. Order, ECF 38, at 7. That statement is especially true for Class II gaming, where no state compact is required.

Second, and turning to GTL's own harms,[6] GTL has already undertaken substantial business obligations in reliance on the Eligibility Determination, and reasonably so. These business obligations are premised on repayment. Any delay in staying the unlawful March 27 Letter (even pending judicial review) will have caused irreparable financial harm to GTL through the loss of interest that GTL could have earned had it been paid earlier. Financial harm from loss of interest is a legally relevant harm for the purposes of considering whether to grant preliminary relief. *See Placid Oil Co. v. DOI*, 491 F. Supp. 895, 905 (N.D. Tex. 1980) (noting inability to

[5] City of San Pablo, *FY 2024-25 & FY 2025-26 – Budget Book* (May 20, 2024) https://city-san-pablo-ca-budget-book.cleargov.com/17781/funding-sources/funding-sources (last visited May 16, 2025). *See also* Lytton Amicus Br., ECF 58, at 13 (noting gaming revenue).

[6] GTL acknowledges that this Court recently determined, based on the redressability prong, that GTL does not have standing to challenge the March 27 Letter as an intervenor. *See* ECF 38 at 16–22. However, this Court relied significantly on "state compact negotiations with California" being potentially "long, arduous, and uncertain." *Id.* at 21. For the purposes of the preliminary injunction analysis, GTL urges this Court to consider the financial benefits GTL would receive from Class II gaming, which do not require a compact.

"recover interest" is sufficient monetary harm); *Conoco, Inc. v. Watt*, 559 F. Supp. 627, 630–31 (E.D. La. 1982) (granting temporary restraining order based on injury of lost interest). The Department's own Board of Land Appeals recognizes this form of harm. *See Marathon Oil Co.*, 90 IBLA 236, 247, 1986 WL 69711 (DOI Jan. 30, 1986) (recognizing lost interest as irreparable injury). Because the land transferred to the Department has a high value, the interest losses are also substantial. *See* Exhibit A, Lee Decl. ¶¶ 3, 4.

And most notably, the United States accepted the deed to the 32-Acre Parcel to hold in trust for Scotts Valley, and GTL loaned Scotts Valley funds to acquire the adjoining 128-acre parcel. The Department emphasizes repeatedly that the United States still holds GTL's former property in trust for the benefit of Scotts Valley. *See* Opp., ECF 47, at 5, 9, 17, 20, 23, 26. These two parcels together compose the entire Vallejo Parcel that was deeded to the Department to be held in trust for Scotts Valley. Under the terms of GTL's purchase and sale agreement for its land (contingent on the January 10 Decision), along with the loan terms for the other parcel, GTL's payment is dependent on gaming occurring at the Vallejo Parcel. With the ability to further develop the site unlawfully put on hold, GTL may never be paid because the Department has not specified any deadline by which the March 27 Letter would be lifted. Being deprived of payment "with no guarantee of eventual recovery" constitutes irreparable injury for the purposes of granting a judicial stay. *Ala. Ass'n of Realtors, v. Dep't of Health & Hum. Servs.*, 594 U.S. 758, 765 (2021) (per curiam). Moreover, the availability of Class II gaming discussed above does not make GTL's loss contingent on Scotts Valley entering a compact with California or approvals from other authorities.

III. The Public Interest And The Balance Of Hardships Tip Sharply In Favor Of A Preliminary Injunction.

As a starting point, "our system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors*, 594 U.S. at 766. In other words, there "is a substantial public interest in having governmental agencies abide by the federal laws that govern their existence and operations." *League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016) (quoting *Washington v. Reno*, 35 F.3d 1093, 1103 (6th Cir. 1994)) (internal quotation omitted). Given the Department's unlawful action—and its attempt to shield itself from judicial review by calling the March 27 Letter "temporary" when it is no such thing—the public interest clearly favors Scotts Valley and GTL. *Cf. Nken*, 556 U.S. at 434 (likelihood of success factor more important than third and fourth factors).

Further, it is difficult to discern any public interest rationale for allowing the March 27 Letter to remain in effect pending this litigation. As opposed to when an agency at least declares a public interest benefit, *see, e.g.*, *Ohio*, 603 U.S. at 291 (noting agency's claimed air-quality benefits), there is no such public interest concern here. As this Court and the D.C. Circuit have reaffirmed, the purpose of 25 U.S.C. § 2719(b)(1)(B) "'ensur[es] that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones.'" *Scotts Valley Band of Pomo Indians*, 633 F. Supp. 3d at 148 (quoting *City of Roseville*, 348 F.3d at 1030–31). And the Department has already concluded that the fact-based inquiry involved in restored lands evaluations does not require public comment. *See* 73 Fed. Reg. at 29,361. Being able to indefinitely rescind an earlier eligibility determination, and without any process whatsoever, does not serve Congress's manifest intent in 25 U.S.C. § 2719(b)(1)(B). Moreover, the Opposition Coalition's argument on this issue is premised on the illegality of the January 10 Decision, for which they already have a legal avenue to challenge. *See* Opp. Coal. Amicus Br., ECF 57, at 14.

The balance of harms also weighs heavily in favor of a stay or injunction. Whereas the Department would face minimal—if any—hardship from leaving the Eligibility Determination in place pending judicial review, Scotts Valley suffers from an imposition on its own sovereignty and economic vitality.

Meanwhile, GTL faces the prospect of dramatic monetary loss from not being able to ever receive the purchase price payment for its former land that has been irrevocably transferred to the Department and is being held in trust, or for the loan to acquire the remaining land. Monetary loss for which there is no guarantee of ultimate recovery is a hardship that the Supreme Court weighs heavily. *See Ohio*, 603 U.S. at 291 (describing significant monetary loss as "weighty" (quotation and citation omitted)); *Ala. Ass'n of Realtors*, 594 U.S. at 765.

CONCLUSION

For the foregoing reasons, GTL respectfully urges the Court to grant Plaintiff's Motion for Preliminary Injunction, which this Court may construe as a request to stay the March 27 Letter, for the reasons described *supra* at 6.

Dated: May 19, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7(o), which incorporates Federal Rule of Appellate Procedure 29(a)(4)(G), I certify that this brief complies with the page-length limitation of Local Rule 7(o)(4) because it is no longer than 25 pages.

/s/ Jasmine G. Chalashtori
Jasmine G. Chalashtori

CERTIFICATE OF SERVICE

I hereby certify that on May 19, 2025, I electronically filed the foregoing using the Court's CM/ECF system, which will send notification of such filing to the parties.

/s/ Jasmine G. Chalashtori
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