IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTTS VALLEY BAND OF POMO INDIANS, *Plaintiff,* v. DOUGLAS BURGUM, et al., *Defendants.*	No. 1:25-cv-00958 (TNM)

CALIFORNIA GAMING ASSOCIATION'S AMICUS BRIEF IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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INTEREST OF AMICUS CURIAE

The California Gaming Association ("CGA") is a trade association made up of over 90% of California's state-licensed cardrooms and third-party providers.[1] CGA members generate approximately $5.6 billion of economic impact, 20,000 jobs, and $500 million of tax revenue for the communities in which they operate. CGA members are also one of the leading sources of general fund revenue used by many local jurisdictions to provide essential community services.

CGA's mission includes monitoring legislation and regulation and taking legal action to protect its members' interests. CGA and its members have an interest in ensuring that important government decisions like the Indian Lands Opinion in this case are made only after considering all the relevant facts and in a manner consistent with statutory and constitutional requirements. Likewise, when a decision is based on incomplete evidence or faulty legal principles, CGA and its members have an interest in the Secretary of the Interior being able to voluntarily reconsider the Department's position.

More broadly, CGA and its members are committed to upholding the fundamental constitutional principle of equality before the law. The decision in *Scotts Valley Band of Pomo Indians v. Department of Interior*, 633 F. Supp. 3d 132 (D.D.C. 2022) ("*Scotts Valley I*"), flouted that principle by applying the Indian canon of

[1] No counsel for any party authored this brief in whole or in part, and no party or counsel for any party contributed money to fund the preparation or submission of this brief. Fed.R.App.P.29(a)(4)(E).

construction to invalidate a reasoned agency decision that balanced competing tribal interests to resolve a deeply contested factual dispute. *See id.* at 165. On remand, the Biden Administration doubled down by issuing a ruling purporting to analyze the issue "in light of the [*Scotts Valley I*] decision," including *Scotts Valley I*'s unjustified second-guessing of the Interior Department's factfinding and policymaking. *See* Garriott, Principal Deputy Asst. Sec'y Indian Affs., DOI, *Scotts Valley II ILO* 2 (Jan. 10, 2025), perma.cc/QX83-9QZW.

INTRODUCTION AND SUMMARY OF ARGUMENT[2]

CGA writes to make two points[3] regarding Scotts Valley's effort to lock-in the prior Administration's last-minute ruling:

I. The Secretary had the authority, under the Department's regulations and its inherent power, to reconsider the last-minute ruling. A fundamental premise of administrative law is that agencies are allowed to change their positions over time. *See, e.g.*, *FDA. v. Wages & White Lion Invs., LLC*, 145 S. Ct. 898, 917 (2025). Were

[2] Aside from the issues discussed in this amicus brief, CGA takes no position on any other legal questions regarding Scotts Valley's efforts to engage in gaming operations on the parcel at issue.

[3] CGA takes no position on whether any of the actions at issue are reviewable as final agency action under the APA. For the sake of accuracy, however, CGA notes that Scotts Valley's citation to 25 C.F.R. §2.6 (at 11) appears to reference an outdated version of Title 25. *See* 88 Fed. Reg. 53774, 53779 (Aug. 9, 2023) (revising the relevant sections of the Code of Federal Regulations). CGA also notes that the Interior Department rulemaking establishing procedures for deciding restored lands questions under Title 25 stated three times that "[a]lthough the regulations do not provide a formal opportunity for public comment under subpart B[,] … *the public may submit written comments that are specific to a particular lands opinion.* Submissions may be sent to the appropriate agency that is identified in §292.3." 73 Fed. Reg. 29354, 29360-61, 29373 (May 20, 2008) (emphasis added).

that not true, the first agency staffer to opine on a question could forever lock in the federal government's policy, crowding out development as the Executive Branch responded to changing times, personnel, and priorities. The resulting ossification would undermine the entire point of having a politically accountable executive that exercises delegated policymaking authority. *Cf. FCC v. Consumers' Rsch.*, 145 S. Ct. 2482, 2496-97 (2025).

Under the Department's regulations, the Secretary has "[t]he authority to review any decision of any employee of the Department … or to direct any such employee or employees to reconsider a decision." 43 C.F.R. §4.5(a)(2). That is exactly what happened here. Even if it were not, the Secretary is also "charged with the supervision of public business" relating to "Public Lands" and "Indians" within the Department of which he is "head." *See* 43 U.S.C. §§1451, 1457. Together with the Department's substantive authority under the Indian Gaming Regulatory Act, this language underscores that the Secretary has the inherent power to timely reconsider a prior Indian Lands Opinion. *See, e.g.*, *Ivy Sports Med. v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014) (Kavanaugh, J.). To maintain the chain of command Congress so clearly intended (and that Article II likely requires), the Secretary must be able to effectively supervise his subordinates, including by reviewing the last-minute decision at issue here.

II. The last-minute decision Scotts Valley seeks to freeze in amber is especially worthy of reconsideration. Itself a reversal from the Interior Department's previous position, the ruling relies on the fatally flawed logic of *Scotts Valley I*. That

decision extended the Indian canon to factual and policymaking determinations in an agency adjudication with conflicting tribal interests—a highly inappropriate context to apply any canon of construction, much less one purporting to protect the interests of tribes. *Scotts Valley I*, 633 F. Supp. 3d at 165-69. And although then-Secretary Haaland's Interior Department attempted on remand to distance itself from *Scotts Valley I*'s obviously faulty reasoning, the last-minute decision still gave determinative weight to the district court's unjustified factual critiques. *See, e.g.*, *Scotts Valley II ILO* at 5, 15, 17-18, 23, 30.

Compounding this mistake, the outgoing administration released its decision only days before the inauguration of the new administration. As then-Secretary Haaland and her staff must have expected, the ruling was soon challenged by other tribes who stood to lose from the Department's about face. *See Yocha Dehe Wintun Nation v. DOI*, No. 25-cv-867 (D.D.C. Mar. 24, 2025); *United Auburn Indian Comm. 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). The current Secretary should not be penalized for opting to reconsider the last-minute decision on a complete factual record and after providing all interested parties an additional opportunity to be heard.

ARGUMENT

I. The Secretary had the authority to reconsider the outgoing Administration's last-minute decision.

Scotts Valley's primary Administrative Procedure Act argument is that Secretary Burgum lacked the legal authority to reconsider the Biden Administration's last-minute decision on its request for an Indian Lands Opinion. *See*

Scotts Valley MSJ (Dkt.96-1) at 29-35. But that misreads the Department's regulations, misapplies precedent on agencies' inherent reconsideration power, and threatens to disrupt the Department's chain of command by limiting the Secretary's supervision and control over the cabinet agency he was appointed to lead.

A. Section 4.5 of the Department's regulations authorizes reconsideration.

First and most obviously, the Department's regulations authorize the Secretary to reconsider his subordinates' decisions. Under Title 43, Subtitle A, Part 4 of the Code of Federal Regulations, the Department has promulgated procedures "involving hearings, appeals, and other review functions of the Secretary." 43 C.F.R. §4.1. Contrary to Scotts Valley's assertions, these procedures are not intended to circumscribe or supersede the Secretary's authority to lead his Department. *See* 43 U.S.C. §1451 (establishing the Office of the Secretary and providing that he "shall be the head" of the Department); *id.* §1457 (explaining that the Secretary is "charged with the supervision of public business relating to both" "Public lands" and "Indians"). Rather, the regulations explicitly state that "[n]othing in [the Department's procedures] may deprive the Secretary of any power conferred upon the Secretary by law." 43 C.F.R. §4.5. The next clause confirms that this "reserved" authority "includes, but is not limited to … [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).

Scotts Valley argues that §4.5(a)(2) does not apply because "the Rescission Letter purported to reconsider a final decision made by a predecessor Secretary" and

thus did not involve a "decision of any employee." Scotts Valley MSJ at 30. But that is plainly incorrect. Former Secretary Haaland's Principal Deputy Assistant Secretary for Indian Affairs, Wizipan Garriott, issued the decision on January 10, 2025, in an exercise of delegated authority from the Assistant Secretary for Indian Affairs, Bryan Newland. *Scotts Valley II ILO* at 30. Regardless of whether that ruling was final agency action for purposes of the APA, it was clearly a "decision of [an] employee … of the Department" within the meaning of §4.5(a)(2).[4]

Scotts Valley also contends that the Secretary did not follow the reconsideration procedure laid out in §4.5(c). But that subsection states only that "[i]f the Secretary … 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, the Secretary or Directory will issue a decision." 43 C.F.R. §4.5(c). It is undisputed that Scotts Valley was "advised in writing of" the Secretary's decision to invoke his reconsideration authority. *See, e.g.*, Scotts Valley MSJ at 7-8. And no one doubts that the Secretary will issue a

[4] This Court has concluded in several recent decisions that deference to agencies' interpretation of their own regulations survived the fall of *Chevron*. *See Campaign Legal Ctr. v. FEC*, 2025 WL 1768099, at *7 (D.D.C. June 26) (collecting cases). But even if it did not, the Supreme Court explained in *Loper Bright* that "courts may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular" legal enactments. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 394 (2024) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Thus, the Secretary's practical experience supervising his Department—including by reviewing his subordinates' decisions under §4.5(a)(2)—is at minimum helpful confirmation that the regulatory phrase "decision of any employee … of the Department" encompasses a Principal Deputy Assistant Secretary's issuance of an Indian Lands Opinion pursuant to delegated authority.

"written decision" resolving the restored lands issue one way or the other "after the review process is completed." Given the Department's possession of the existing administrative record and the Secretary's underlying concerns about that record's completeness, nothing more is required under §4.5(c).

Scotts Valley points to a single out-of-circuit decision for the proposition that §4.5(c) requires the Secretary to allow a party to respond to the concerns animating his decision to reconsider an issue before formally announcing the start of the reconsideration process. *See* Scotts Valley MSJ at 31 (citing *Tesoro High Plains Pipeline Co., LLC, v. United States*, 2024 WL 3359433, at *6 (D.N.D. July 10)). But that case is not on point—*Tesoro High Plains Pipeline Co.* was issued in a preliminary injunction posture, and the court merged its preliminary analysis of §4.5(c) with a discussion of the agency's inherent power to reconsider its past decisions. *See id.* at *4-*7. Whatever ex ante notice might be necessary to invoke an agency's inherent reconsideration power, the text of §4.5(c) requires only that "the parties and the appropriate Departmental personnel … be advised in writing" of the Secretary's decision to take an issue under reconsideration. And though Scotts Valley claims that the Secretary should have provided a more detailed explanation ex ante, §4.5(c) makes clear that the Secretary's full "written decision" need be issued only "after the review process is completed." The Secretary should not be faulted for following his Department's longstanding procedural regulations.

Even if *Tesoro High Plains Pipeline Co.*'s discussion of inherent reconsideration power were relevant to notice under §4.5(c), the facts of the two cases

are nothing alike. *Tesoro High Plains Pipeline Co.* involved an order by the Acting Secretary purporting to vacate a series of agency decisions going back at least nine months. *Id.* at *2-*4. In the interim, the Department had cashed an almost $4 million check tendered by one of the parties. *Id.* And lower-level Department officials had denied appeals from both sides of the dispute. *Id.* Here, by contrast, the Secretary took up a single Indian Lands Opinion, issued during the waning days of an outgoing administration, for reconsideration during his first hundred days in office. And the Secretary did so to address a serious legal concern: that his predecessor's last-minute ruling—by then subject to several pending court challenges—had been based on an incomplete factual record. The Department then provided Scotts Valley written notice of this development, explained the applicable reconsideration procedure, and ensured that all interested parties would have the opportunity to submit evidence and argument before a final decision was rendered. Under these circumstances, the Secretary satisfied both the letter of §4.5(c) and any more stringent requirements associated with the Department's inherent reconsideration power.

B. The Department has the inherent power to reconsider past decisions.

Separate from the Secretary's express authority under §4.5(a)(2), electing to reexamine the last-minute decision was also justified by the Department's inherent power to reconsider its decisions and, when appropriate, to change positions.

It is black-letter administrative law that "[a]gencies are free to change their existing policies" so long as the change is conscious and reasonably explained. *Encino Motorcars v. Navarro*, 579 U.S. 211, 221 (2016); *see also Wages & White Lion Invs.*,

145 S. Ct. at 917. There are good reasons for that rule. "For example, it may be imperative … to consider new developments or newly discovered evidence." *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972). "There may also be instances when unmistakable shifts in our basic judgments about law or policy necessitate the revision or amendment of previously established rules of conduct." *Id.* To be sure, agencies changing positions must "provide a reasoned explanation for the change, display awareness that [they are] changing position, and consider serious reliance interests." *Wages & White Lion Invs.*, 145 S. Ct. at 917 (cleaned up).

But fine-grained arguments about the quality of an agency's reasoning or its analysis of reliance interests are best examined on APA review of a decision on the merits of reconsideration. *See* 5 U.S.C. §704 (explaining that "preliminary, procedural, or intermediate" rulings are generally reviewed "on the review of the final agency action"); *accord Scotts Valley Band of Pomo Indians v. Burgum*, 2025 WL 1639901, at *1 (D.D.C. June 10) ("declin[ing] to stop the agency process while this case is pending"). Otherwise, courts would be forced to referee endless preliminary disputes over whether an agency could even begin to consider whether to change its mind.

Closely related to the change-in-position doctrine is an agency's inherent power to reconsider its past decisions. This rule too, has a strong practical justification: "It is often the case that reconsideration of a prior decision, within a reasonable period of time, is absolutely essential to the even administration of justice." *Bookman*, 453 F.2d at 1265. The interpretive rationale is just as simple and as forceful—an agency's

"power to reconsider is inherent in [its] power to decide." *Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950); *see also NRDC v. Regan*, 67 F.4th 397, 401 (D.C. Cir. 2023) (explaining that such power is best understood as "statutorily implicit" in an agency's organic statute). Thus, the D.C. Circuit has held that "administrative agencies are assumed to possess at least some inherent authority to revisit their prior decisions, at least if done in a timely fashion." *Ivy Sports Med.*, 767 F.3d at 86.

Scotts Valley concedes, as it must, that the Department possesses the inherent power to reconsider a restored lands decision. Scotts Valley MSJ at 31-32. And it does not argue that this is the rare case when Congress has acted to "'limit [the] agency's discretion to reverse itself'" by statute. *Regan*, 67 F.4th at 401; *contra id.* at 401-04 (concluding that EPA lacked inherent reconsideration power over certain agency actions that the Safe Drinking Water Act mandated that the EPA "shall" undertake). With such attacks exhausted, Scotts Valley is left arguing about the clock—that, under the circumstances, the decision to reconsider the last-minute ruling was not made "in a timely fashion." *Ivy Sports Med.*, 767 F.3d at 86. But Scotts Valley's framing of timeliness as being "typically measured in weeks, not years," betrays the weakness of its argument. Scotts Valley MSJ at 32. The Secretary's decision was not issued years later. Rather, it took roughly ten weeks from start to finish—hardly an unreasonable time period, especially given that the new Administration did not take office until January 20 and the Secretary was not confirmed for another ten days after that. And most of those weeks were during the always-frenetic presidential transition period. Thus, even absent the "'unusual circumstances'" of the last-minute decision's

conspicuous timing just before President Trump's inauguration, *Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977), the Secretary's decision to reconsider the issue was "conducted within a short and reasonable time period," *Bookman*, 453 F.2d at 1265.

Scotts Valley argues that the deadline to take an administrative appeal is critical to the timeliness inquiry. Scotts Valley MSJ at 32. But the best it can muster is an assertion that "[i]f the reconsideration takes place within the time period allowed for court or administrative rules for appeals in such cases, a presumption of timeliness arises." *Id.* Any such presumption is irrelevant to this case for two reasons. First, the Secretary's express reconsideration authority under §4.5 lacks any definite timeline. *See* 43 C.F.R. §4.5(a)(2); *accord Bookman*, 453 F.2d at 1265 (explaining that the inherent power inquiry arises only "in situations where there are no statutory or administrative guidelines"). Second, no presumption is required because, as discussed above, the Secretary's decision to take the issue under reconsideration was timely under the totality of the circumstances.

Finally, Scotts Valley claims that the Court should not consider the Department's inherent power because the reconsideration notice did not use those precise words. *See* Scotts Valley MSJ at 29 n.17. To be sure, "[j]udicial review of agency action is generally limited to 'the grounds that the agency invoked when it took the action.'" *Id.* (quoting *DHS v. Regents of the Univ. of Calif.*, 591 U.S. 1, 20 (2020)). But the regulation that the Department cited clearly states that it does not

purport to limit the Secretary's inherent power to supervise the Department or review his subordinates' decisions:

> **Secretary.** The authority *reserved to the Secretary includes, but is not limited to*:
>
> > (1) The authority to take jurisdiction at any stage of any case before any employee or employees of the Department, including any administrative law judge or board of the Office, and render the final decision in the matter after holding such hearing as may be required by law; and
> >
> > (2) *The authority to review any decision of any employee or employees of the Department*, including any administrative law judge or board of the Office, or to direct any such employee or employees to reconsider a decision.

43 C.F.R. §4.5(a)(1)-(2) (emphasis added). No reasonable reader of the reconsideration notice, which cited §4.5 for the proposition that the Secretary has "broad authority to review and reconsider any decision of the Department," would understand it not to have invoked the reconsideration power inherent in the Department and "reserved to the Secretary" by law. Thus, the rule against "invok[ing] belated justifications" simply does not apply. *Regents*, 591 U.S. at 23.

C. Background Article II principles confirm the Secretary's reconsideration authority.

Even if the Secretary's authority to reconsider the last-minute decision were unclear, the Court should resolve that ambiguity in favor of reconsideration to avoid the serious constitutional problems that might otherwise result.

"Under our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'" *Seila Law v. CFPB*, 591 U.S. 197, 203 (2020) (quoting U.S. Const. art. II, §1, cl.1; *id.* §3). Thus,

"[t]he President 'occupies a unique position in the constitutional scheme' as 'the only person who alone composes a branch of government.'" *Trump v. United States*, 603 U.S. 593, 610 (2024). Of course, "[b]ecause no single person could fulfill that responsibility alone, the Framers expected that the President would rely on subordinate officers for assistance." *Seila Law*, 591 U.S. at 203-04. True to prediction, "[t]oday, thousands of officers wield executive power on behalf of the President in the name of the United States." *United States v. Arthrex, Inc.*, 594 U.S. 1, 11 (2021).

Because of his status as sole object of the Article II Vesting Clause, the President is singularly "responsible for the actions of the Executive Branch." *Id.* Neither the "ultimate responsibility" nor "the active obligation to supervise that goes with it" can be constitutionally delegated outside the Presidency. *See id.* The corollary to this Article II nondelegation rule is that lower-level officers of the United States *can* exercise delegated executive power with "legitimacy and accountability" so long as they make up "'a clear and effective chain of command' down from the President, on whom all the people vote." *Id.* (quoting *Free Enter. Fund v. PCAOB*, 561 U.S. 477, 498 (2010)). If that chain of command were to be severed, a serious constitutional problem would likely arise. *See Free Enterprise Fund*, 561 U.S. at 497-98; *accord Collins v. Yellen*, 594 U.S. 220, 283 (2021) (Gorsuch, J., concurring in part and dissenting in part) ("[O]fficials cannot wield executive power except as Article II provides.").

Under Scotts Valley's cramped view of the Secretary's reconsideration authority, an incoming Secretary has few, if any, options to address a decision made

before he enters office. Were that correct, outgoing officials would be strongly incentivized to engage in procedural gamesmanship to lock in favored positions, especially when the incoming President is expected to enact a substantially different policy agenda. Denying the Secretary (and through him, the President) a robust reconsideration power would usher in an era of regulation-by-midnight-orders that would raise serious constitutional concerns. *Cf. Arthrex*, 594 U.S. at 11.

In sum, allowing outgoing officials to obstruct the Department's chain of command through midnight orders would risk seriously impairing the President's ability to "take Care that the Laws be faithfully executed." U.S. Const., art. II, §3. In the absence of a clear legal requirement to that effect, the Court should decline to find one in an overbroad reading of precedents discussing agencies' inherent reconsideration power. *Cf. Kennedy v. Braidwood Mgmt.*, 145 S. Ct. 2427, 2451 (2025) (applying the constitutional avoidance canon to avoid disrupting the Article II chain of command).

II. The last-minute decision here is especially worthy of reconsideration.

The Department's reconsideration notice identified a serious flaw in the outgoing Administration's last-minute effort to resolve Scotts Valley's request for an Indian Lands Opinion—the request was decided without consideration of "additional evidence submitted after the [*Scotts Valley I*] Remand." Scotts Valley MSJ at 34. The various lawsuits brought by other tribes have alleged many more deficiencies. *See* Compl. (Dkt.1), *Yocha Dehe Wintun Nation v. DOI*, No. 25-cv-867 (D.D.C. Mar. 24, 2025); Compl. (Dkt.1), *United Auburn Indian Comm. v. DOI*, No. 25-cv-873 (D.D.C.

Mar. 24, 2025); Compl. (Dkt.1), L*ytton Rancheria of Cal. v. DOI*, No. 25-cv-1088 (D.D.C. Apr. 10, 2025).

CGA writes to flag an additional issue. The last-minute decision relied on *Scotts Valley I*'s application of the Indian canon to second-guess the Department's factfindings and policymaking determinations in the 2019 Indian Lands Opinion. But *Scotts Valley I*'s extension of the Indian canon to adjudicative factfinding was deeply misguided. As this Court has recognized, the Indian canon has no place in judicial review of agency factfinding or policymaking. *See Mashpee Wampanoag Tribe v. Bernhardt*, 466 F. Supp. 3d 199, 216-17 (D.D.C. 2020). And even if it did, the canon should not have been applied to unfairly privilege one group of Indians over another, loading the dice for one side in a conflict among tribes. *E.g.*, *Confederated Tribes of Grand Ronde Cmty. of Or. v. Jewell*, 75 F. Supp. 3d 387, 396 (D.D.C. 2014), *aff'd*, 830 F.3d 552 (D.C. Cir. 2016); *E. Band of Cherokee Indians v. DOI*, 534 F. Supp. 3d 86, 101 (D.D.C. 2021) (McFadden, J.) (collecting cases).

By extending the Indian canon to adjudicatory factfinding and policymaking in a hotly contested dispute between divergent tribal interests, *Scotts Valley I* clearly misapplied the law. And although the outgoing Administration's last-minute decision sought to distance itself from that faulty logic, the decision ultimately relied on the same inappropriate use of the Indian canon.

A. The Indian canon does not apply to factfinding or policymaking determinations.

"Substantive canons are rules of construction that advance values external to a statute." *Biden v. Nebraska*, 600 U.S. 477, 508 (2023) (Barrett, J., concurring)

(emphasis added) (citing Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 117 (2010)). As this definition suggests, substantive canons *do not* apply to an agency's factfinding and policymaking determinations or its subsequent application of those determinations to settled legal tests. Instead, "when an agency exercises discretion granted by a statute, judicial review is typically conducted under the Administrative Procedure Act's deferential arbitrary-and-capricious standard. Under that standard, a court asks not whether it agrees with the agency decision, but rather only whether the agency action was reasonable and reasonably explained." *Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, 145 S. Ct. 1497, 1511 (2025).

For an example of a court applying this distinction, take *Mashpee Wampanoag Tribe*. There, a tribe "invoke[d] the Indian canon of construction" to "suggest that the Secretary's application of" a settled administrative test "should be favorable to the Tribe." 466 F. Supp. 3d at 216. This Court rejected the tribe's argument, explaining that it "misunderst[ood] the canon." *Id.* Since "[t]here was no question that [the Department had] applied the Indian canon to the IRA's ambiguous phrase 'under federal jurisdiction,' which resulted in the [administrative interpretation's] two-part analysis," the "canon's role [was] complete" and "the statutory interpretation resolved." *Id.*at 217. All that was left for the Court to review was the agency's factfinding and its policymaking discretion, two questions governed by the APA's arbitrary and capricious standard, not the Indian (or any other) canon of construction. *Id.*

Compare that to *Scotts Valley I*, which similarly concluded that the Department "did not act outside of its statutory authority under [IGRA] or the [IRA] when it promulgated [25 C.F.R. §292.12's requirement that] tribes … demonstrate a 'significant historical connection' for purposes of the restored lands exception." 633 F. Supp. 3d at 171. The Court also concluded that the Department "provided a reasoned basis for its decision [applying §292.12], 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." *Id.* at 165. In other words, the Department's finding could not "be said to be conclusory, unexplained, or unsupported" and "from a pure administrative law perspective, [its] application of [25 C.F.R. §292.12] to the facts presented by Scotts Valley comport[ed] with the APA." *Id.*

But, after conceding that the Department's analysis was "reasonable and reasonably explained," *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021), *Scotts Valley I* radically changed tacks. Rather than defer to the Department's "reasoned basis for its decision" under the APA, the court explained that "review of agency action [did] not operate in a vacuum" and that "the equally important evaluation of the decision through the lens of the Indian canon of construction require[d]" the opposite conclusion. *Scotts Valley I*, 633 F. Supp. 3d at 165. Under the auspices of applying the Indian canon, the court proceeded to second-guess many of the factual findings it had just admitted were reasonably based on record evidence. *Id.* at 165-68. Bottom line: there was "ample material in the [record] to support a

finding in the Band's favor if all inferences [were] resolved to its benefit" because the "agency cited facts that weighed in the Band's favor, but then chose to devalue them." *Id.* at 168 (emphasis added).

When the government later moved for reconsideration, the court's decision denying relief stated that it "didn't rule that the Department of Interior had to apply the [Indian canon]." *See* Transcript of Hr'g on Mot. for Reconsideration (Dkt.69) at 16:23-24, *Scotts Valley I* (D.D.C. May 23, 2023). But in the same paragraph, the court affirmed its view that the Indian canon was relevant to "assessing whether the agency's decision about the restored lands exception … was reasonable and in accordance with law." *Id.* at 17:1-4. It also affirmed that it had evaluated the agency's factfinding and policymaking determinations by "[r]esolving all inference and doubts in favor of the Band" under the Indian canon. *Id.* at 17:6-15, 18:1-8, 34:9-12. But Congress has long instructed courts to defer to agencies when the latter weigh the evidence and produce a reasoned conclusion based on executive policymaking determinations. *See, e.g.*, *Loper Bright Enters.*, 603 U.S. at 392 ("Section 706 does mandate that judicial review of agency policymaking and factfinding be deferential."). As this Court and the Supreme Court have both recognized, but *Scotts Valley I* ignored, this principle means that interpretive tie-breaking rules like the Indian canon have no place in the analysis. *See Mashpee Wampanoag Tribe*, 466 F. Supp. 3d at 216-17; *cf. Seven Cnty. Infrastructure Coal.*, 145 S. Ct. at 1511 (2025).

B. The Indian canon does not apply to privilege one side of a conflict in tribal interests.

In addition to erroneously extending the Indian canon to factfinding and policymaking determinations, *Scotts Valley I* applied the canon to a hotly disputed case featuring conflicting tribal interests. *See* 633 F. Supp. 3d at 152-54; *cf. Yocha Dehe Wintun Nation*, No. 25-cv-867 (D.D.C. Mar. 24, 2025); *United Auburn Indian Comm.*, No. 25-cv-873 (D.D.C. Mar. 24, 2025); *Lytton Rancheria of Cal.*, No. 25-cv-1088 (D.D.C. Apr. 10, 2025). This, too, was an unjustified departure from the preponderance of authority on the subject.

Take *Jewell*, which rejected a proposed application of the Indian canon after concluding that the canon "does not apply for the benefit of one tribe if its application would adversely affect the interests of another tribe." 75 F. Supp. 3d at 396. Or *Forest County Potawatomi Community v. United States*, which "decline[d] to apply the Indian law canon where the interests of all tribes are not aligned" 330 F. Supp. 3d 269, 280 (D.D.C. 2018). Or this Court's recognition in 2021 that "it might well be appropriate to discard the Indian canon" when "interpreting … generally applicable enactments" like IGRA "on the theory that Congress would not have intended to benefit one Indian tribe if it would come at the cost of another." *E. Band of Cherokee Indians*, 534 F. Supp. 3d at 101; *see also Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 442 F. Supp. 3d 53, 80 (D.D.C. 2020), *rev'd sub nom. on other grounds* 25 F.4th 12 (D.C. Cir. 2022); *Connecticut v. DOI*, 344 F. Supp. 3d 279, 314 (D.D.C. 2018). The "no-tribal-conflicts" rule is common sense. "After all, the United States' trust duties," which have been invoked to justify the Canon as an interpretive tool,

are at minimum "'owe[d] the same ... to all tribes.'" *E. Band of Cherokee Indians*, 534 F. Supp. 3d at 101 (quoting *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 338, 340 (9th Cir. 1996)).

On even the narrowest reading of this authority, there is a substantial argument that the Indian canon should not apply when the government interprets a generally applicable legal enactment (like IGRA's restored lands exception and the Department's implementing regulations) and there is a clear conflict of interest among the tribes affected by the challenged interpretation. *See E. Band of Cherokee Indians*, 534 F. Supp. 3d at 101. *Scotts Valley I* brushed past all that to extend the canon and second-guess what it had already conceded was a reasonable and reasonably explained decision balancing sharply divergent tribal interests. 633 F. Supp. 3d at 152-54. Doing so was a clear misapplication of the law.

C. The last-minute decision relied on *Scotts Valley I*'s improper application of the Indian canon.

The outgoing Administration's last-minute decision, at least at points, attempted to retreat from *Scotts Valley I*'s application of the Indian canon. *See Scotts Valley II ILO* at 10. But it also made clear that the "one issue" requiring remand was that the 2019 Indian Lands Opinion was "'arbitrary and capricious when considered in accordance with the Indian canon of statutory construction.'" *Id.* at 3 (quoting *Scotts Valley I*, 633 F. Supp. 3d at 171). In the outgoing Administration's own words, *Scotts Valley I* "explained that '[t]he determination … turns upon the application of an imprecise adjective—'significant'—and this means that the agency was operating in an arena filled with ambiguity and discretion.'" *Id.* (quoting *Scotts Valley I*, 633 F.

Supp. 3d at 166). According to the last-minute decision, *Scotts Valley I* ruled that such a situation is "'exactly when the canon demands that any doubt be resolved in favor of the Tribe.'" *Id.* Thus, because "the Department did not resolve certain doubts in the Band's favor, [*Scotts Valley I*] concluded that the 2019 [Indian Lands Opinion] was arbitrary and capricious specifically when viewed through the lens of the Indian canon and remanded … to the Department" for further consideration. *Id.* (citing *Scotts Valley I*, 633 F. Supp. 3d at 168, 171).

The result of the outgoing Administration's half-hearted retreat was that the last-minute decision reevaluated the facts and, consistent with *Scotts Valley I*'s erroneous extension of the Indian canon to factfinding and policymaking determinations, made every possible inference in favor of Scotts Valley before switching the government's position on whether Band's parcel constituted "restored lands" under IGRA. *See id.* at 5, 15, 17-18, 23, 30. That then-Secretary Haaland authorized such a consequential agency decision accepting *Scotts Valley I*'s novel and concerning legal theory a mere ten days before the new Administration took office underscores the appropriateness of Secretary Burgum's decision to take the issue under timely reconsideration. As the Department has explained, such decisions should be made on a complete factual record. CGA emphasizes that they should also apply neutral factfinding principles to ensure that neither side has the dice loaded in its favor from the start.

CONCLUSION

Under the Department's regulations and its inherent reconsideration power, the Secretary had the authority to reconsider a last-minute Indian Lands Opinion that was based on an incomplete factual record and already subject to significant legal challenges. The Secretary's exercise of this authority was all the more appropriate given that the last-minute decision was based on *Scotts Valley I*'s inappropriate extension of the Indian canon to adjudicatory factfinding and policymaking determinations in a case with conflicting tribal interests. The Secretary's ultimate ruling on reconsideration should be based on the facts and the law, not the application of the Indian canon as a tie-breaking rule to the benefit of some tribes and the detriment of others.

The Court should deny Plaintiffs' motion for summary judgment and permit the Secretary to reconsider the last-minute decision.

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Respectfully submitted,

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