IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTTS VALLEY BAND OF POMO INDIANS,

Plaintiff,

v.

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

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

and

UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendants.

Civil Action No. 1:25-CV-958

BRIEF OF LYTTON RANCHERIA OF CALIFORNIA AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Lytton Rancheria of California is a federally-recognized band of Southern Pomo Indians located in Sonoma County, California. In 1959, Congress passed legislation terminating the government-to-government relationship between Lytton and the United States—resulting in the loss of Lytton's remaining homelands and impoverishment of its members. In 1991, Lytton, along with the Scotts Valley Band of Pomo Indians, reversed its wrongful termination through federal litigation. Since that time, Lytton has worked to regain its economic independence and restore a portion of its homelands. Today, Lytton operates a successful Class II gaming facility on its land in San Pablo, California and conducts other business activities in and around its homeland in Sonoma County. These business activities are critical to Lytton's ability to achieve self-determination and provide for its members.

Lytton has a strong interest in this case, which raises important questions about the authority of the Department of the Interior to temporarily rescind decisions to allow the Department to consider all evidence relevant in determining whether it may apply the restored-lands exception to the general statutory prohibition on gaming on newly-acquired trust lands. As a federally-recognized Indian tribe, Lytton is subject to and otherwise relies on decisions of the Department and has submitted evidence to the Department during the agency decision-making process. In addition, the proper interpretation of the restored-lands exception directly impacts the economic viability of Lytton's San Pablo gaming facility and Lytton's other business activities, as well as the well-being of its members who reside within Lytton's homeland.

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

If granted, Scotts Valley Band of Pomo Indians' request to set aside the Department's decision to temporarily rescind its Gaming Eligibility Determination would allow Scotts Valley to take significant steps toward building a casino that would compete with Lytton's gaming facility. That would threaten severe economic harm to Lytton, its members, and its community. The Department has clear authority to rescind a decision to reconsider its correctness. Moreover, there are strong arguments that the Department's initial decision was wrong both on the law and on the facts. Scotts Valley lacks the requisite historical and temporal connections to the trust land to allow application of the restored-lands exception. Further, the Department's decision to acquire land for Scotts Valley to develop a casino was based on a flawed environmental analysis and an incomplete factual record.

INTRODUCTION

This case arises out of the Department of the Interior's temporary rescission of the previous administration's eleventh-hour decision permitting Scotts Valley to construct and operate a casino on newly-acquired trust land.

Before the Department's January 10, 2025 decision authorizing Scotts Valley to conduct gaming on trust land ("the Gaming Eligibility Determination"), Lytton and other tribes were invited by high-level Department officials to submit relevant evidence and were given repeated assurances that the agency would consider their submissions in making its decision. Lytton relied on those assurances when it submitted evidence demonstrating that the Department could not take the land into trust for Scotts Valley.

Nonetheless, the Gaming Eligibility Determination expressly stated that it had ignored evidence submitted by Lytton and other tribes. As a result, multiple tribes were forced to bring lawsuits challenging the Department's decision. Lytton's complaint alleges that the Department failed to consult with Lytton and other affected parties—as required by the National Environmental

Policy Act (NEPA) and the Administrative Procedure Act (APA)—and disregarded its obligations to take a hard look at the Gaming Eligibility Determination's environmental impacts. Complaint, *Lytton Rancheria of Cal. v. U.S. Dep't of Interior*, No. 25-cv-1088 (D.D.C Apr. 10, 2025), Dkt. 1 ("Lytton Compl.").

On May 27, 2025, while those lawsuits were pending, the Department exercised its authority to temporarily rescind the Gaming Eligibility Determination. The Department expressed concerns that the previous administration, in its rush to approve the casino, had failed to consider all of the relevant evidence and consult with Lytton and other parties.[2] Scotts Valley initially sought a preliminary injunction in order to continue its work toward building a casino, but the Court rejected that request. Now, Scotts Valley moves for summary judgment.

If granted, Scotts Valley's motion would terminate the Department's temporary rescission and immediately reinstate the Gaming Eligibility Determination. That would have far-reaching consequences. For one, it would deprive the Department of the opportunity to fully and fairly consider the evidence that other tribes provided to it—and would force those tribes to proceed with their lawsuits challenging the Gaming Eligibility Determination. Moreover, judgment in Scotts Valley's favor would allow it to take key steps toward building a casino, including finalizing a gaming agreement with the City of Vallejo, negotiating a gaming compact with California, securing financing, and conducting construction planning. Each of these steps would move Scotts Valley closer and closer to the completion of a casino that the Department acknowledged will harm Lytton and other tribes.

[2] Due to the reconsideration, Lytton has not challenged the Gaming Eligibility Determination's improper reliance on the Indian Gaming Regulatory Act's (IGRA's) restored-lands exception. Lytton reserved the right to amend its complaint to challenge the Department's reliance on the exception. Lytton Compl. ¶ 11.

Scotts Valley has not carried its burden of showing that the Department's temporary rescission was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Stand Up for California! v. U.S. Dep't of Interior*, 410 F. Supp. 3d 39, 46 (D.D.C. 2019) (citation omitted). The Department's action was lawful under the plain language of 43 C.F.R. § 4.5 and the agency's inherent authority to reconsider its adjudicatory decisions. Further, the Department reasonably explained that it was rescinding the Gaming Eligibility Determination so that it could evaluate relevant evidence that it did not previously consider. That evidence includes comments from tribes explaining that the acquired parcel does not qualify for IGRA's restored-lands exception because Scotts Valley lacks the requisite historical and temporal connections to it. Further, there are other significant legal flaws in the Gaming Eligibility Determination and in the Department's related decision to take the land into trust in the first place.

The Court should deny Scotts Valley's motion and grant Defendants' cross-motion for summary judgment.

ARGUMENT

The Department has authority to temporarily rescind a gaming eligibility determination, and its decision to do so here was reasonable. The Department explained that the reason for the temporary rescission is to evaluate relevant evidence that it had failed to consider when it issued the Gaming Eligibility Determination in the waning days of the previous administration—despite having promised interested parties, including Lytton, that it would do so. That evidence includes submissions demonstrating that the trust land is ineligible for a casino because Scotts Valley lacks a significant historical connection or a temporal connection to it. In addition, the Department's reconsideration may obviate the need to litigate challenges brought by Lytton and other tribes regarding other flawed determinations underlying the Department's decision.

I. The Department Has The Authority To Rescind A Gaming Eligibility Determination.

Scotts Valley argues (Dkt. 96-1, at 29-35 ("Br.")) that the Department of the Interior lacked authority to temporarily rescind the Gaming Eligibility Determination. That is incorrect.

The Department's regulations include a non-exhaustive list of "authorit[ies] reserved to the Secretary." 43 C.F.R. § 4.5(a).[3] That list includes "[t]he authority to review *any decision* of any employee or employees of the Department . . . or to direct any such employee or employees to reconsider a decision." *Id*. § 4.5(a)(2) (emphasis added). As the Senior Advisor to the Secretary of the Interior explained when temporarily rescinding the Gaming Eligibility Determination, the authority described in Section 4.5(a)(2) is "broad." Dkt. 1-2, at 1. The Department acted in accordance with its broad authority by "temporarily rescinding the Gaming Eligibility Determination for reconsideration." *Id*.

Scotts Valley argues that Section 4.5(a)(2) is inapplicable because it refers to review of decisions by "any employee of the Department," and that the Department's Gaming Eligibility Determination was made by a predecessor Secretary, not a department employee. Br. 29-30. That is incorrect. For one, the Gaming Eligibility Determination was not issued by the predecessor Secretary, but by Wizipan Garriott, a Principal Deputy Assistant Secretary, exercising by delegation the authority of the Assistant Secretary for Indian Affairs. SV-0030. Moreover, the language of Section 4.5(a)(2) is broadly written to authorize the Secretary to reconsider "*any* decision of *any* employee or employees of the Department." 43 C.F.R. § 4.5(a) (emphasis added). *See Del. Dep't of Nat. Res. & Env't Control v. EPA, 895 F.3d 90, 97 (D.C. Cir. 2018)* ("The word

[3] The Department modified 43 C.F.R. § 4.5 on July 21, 2025. *See* 90 Fed. Reg. 2332 (Jan. 10, 2025) (interim final rule modifying provision); 90 Fed. Reg. 24231, 24231 (June 9, 2025) (delaying effective date of changes until July 21, 2025). Unless stated otherwise, this brief cites the version of the regulation in effect when the Department temporarily rescinded the Gaming Eligibility Determination.

'any' has an expansive meaning that usually indicates one or some indiscriminately of whatever kind as long as there is no reason to contravene its obvious meaning." (quotations and alterations omitted)).

Further, Section 4.5(a)(2) does not purport to describe *every* action the Secretary or his designee has the authority to undertake much less to circumscribe that power. Rather, it enumerates a non-exhaustive list of "authorit[ies] reserved to the Secretary" and explains that the Secretary's power "is *not limited to*" the authorities on that list. 43 C.F.R. § 4.5(a) (emphasis added).[4]

Nothing in Section 4.5 therefore circumscribes the Department's "inherent power to reconsider [its] own decisions." *Sierra Club v. Van Antwerp*, 560 F. Supp. 2d 21, 23-24 (D.D.C. 2008) (citation omitted); *see also, e.g., Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014) (Agencies possess "at least some inherent authority to revisit their prior decisions.") That is because the "power to reconsider is inherent in the power to decide." *Ivy Sports Med., LLC*, 767 F.3d at 86 (citation omitted).

Indeed, Scotts Valley cited the "broad discretion" and "inherent authority to reconsider [agency] decisions" when it sought reconsideration of the Department's 2019 determination that the parcel was ineligible for the restored-lands exception. Decl. of Arlinda F. Locklear in Support of Mot. to Complete the Admin. Rec. 45, 47-48, *Scotts Valley Band of Pomo Indians v. DOI*, No. 19-cv-1544 (D.D.C. Dec. 17, 2019), Dkt. 28-2 (quoting *Macktal v. Chao*, 286 F.3d 822, 825 (5th Cir. 2002)). Scotts Valley now retreats from this basic principle of administrative law but that does

[4] Scotts Valley also argues (Br. 31) that the Department violated the reconsideration procedures in 43 C.F.R. § 4.5(c). That is incorrect. Pursuant to Section 4.5(c), the Department "advised [Scotts Valley] in writing" of its decision to temporarily rescind the Gaming Eligibility Determination. *Id.* The Department presumably will issue "a written decision" "after the review process is completed." *Id.*

not render the principle any less applicable. The Department was entitled to temporarily rescind the Gaming Eligibility Determination.

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

To the extent the Department's temporary rescission was a final agency action reviewable under the APA, it was reasonable. "The arbitrary and capricious standard is 'deferential,' merely requiring that the agency action be 'reasonable and reasonably explained.'" *Ramsingh v. TSA*, 40 F.4th 625, 631-32 (D.C. Cir. 2022) (citation omitted).

The Department easily cleared that low bar here. The record contradicts Scotts Valley's assertion that the Department's explanation for the temporary rescission—the need to consider additional evidence—was pretextual. Indeed, in light of the evidence that Scotts Valley lacks a significant historical connection or a temporal connection to the parcel, the Department was reasonably concerned that its restored-lands determination was erroneous. In addition, the Department's initial decision was flawed in other respects.

A. The Temporary Rescission Was Not Pretextual.

Scotts Valley speculates (Br. 34-35) that the Department's decision to temporarily rescind the Gaming Eligibility Determination was pretextual. Yet the Department reasonably explained in its decision to temporarily rescind that it wanted to "consider additional evidence" that it was "concerned" had been ignored. Dkt. 1-2, at 1. Scotts Valley's argument contravenes the "presumption of regularity" that attaches to agency actions. *Biden v. Texas*, 597 U.S. 785, 811 (2022). Scotts Valley does not so much as attempt to make the requisite "strong showing" that the Department acted in "bad faith" or exhibited "improper behavior." *Id.*

To the contrary, there were good reasons for the Department's concern. The Gaming Eligibility Determination stated that "the Department neither solicited nor considered any

additional evidentiary materials from outside parties." SV-0003-04. But as Scotts Valley acknowledges (Br. 35), the Department had several meetings with Lytton and other tribes during which it assured them that the agency would consider comments they submitted before deciding whether the parcel qualified under IGRA for the restored-lands exception. For example, at a September 20, 2024 meeting, high-level Department officials told Lytton that the agency would consider evidence submitted by Lytton before making a determination. *See* Lytton Compl. ¶ 82. At a December 10, 2024 meeting, Department officials again met with Lytton and another tribe. *Id*. ¶ 85. During that meeting, the Department officials reiterated that Lytton could submit additional evidence regarding Scotts Valley's application. Lytton relied on these assurances when it drafted and submitted substantive comments. Other tribes likewise relied on Department statements that it would consider submitted evidence when they submitted comments regarding the parcel's ineligibility for the IGRA restored-lands exception. *See, e.g.*, Compl. 34-35, *Yocha Dehe Wintun Nation v. DOI*, No. 25-cv-867 (D.D.C. Mar. 24, 2025), Dkt. 1; Compl. 17, 21-22, *United Auburn Indian Cmty. of the Auburn Rancheria v. DOI*, No. 25-cv-873 (D.D.C. Mar. 24, 2025), Dkt. 1.

The Department's position that it would consider information submitted by impacted tribes is also consistent with its statement to that effect in earlier litigation regarding the parcel's eligibility for gaming. *See* Federal Appellees' Final Response Br. 15, *Yocha Dehe v. U.S. Dep't of the Interior*, No. 21-5009, Doc. No. 1893213 (D.D.C. Apr. 5, 2021) (noting that a tribe "could submit information to the agency . . . to ensure that the agency considered all the appropriate arguments to properly assess Scotts Valley's claim of a historical connection to the parcel"). There

plainly was a sound basis for the Department's "concern" that the previous administration had ignored relevant evidence.[5]

Scotts Valley also argues that the Department's explanation was pretextual because the agency had "established a closed process" for considering the parcel's gaming eligibility under which it supposedly decided not to consider "additional evidence." Br. 34. But neither IGRA nor the Department's gaming-eligibility regulations prohibits the agency from considering relevant evidence submitted by third parties. Rather, the Department follows the process that is typical in informal adjudications—soliciting comments and considering all relevant evidence in order to facilitate informed decision-making. *See Neustar, Inc. v. FCC*, 857 F.3d 886, 895 (D.C. Cir. 2017). Further, Scotts Valley cites no evidence in the administrative record or otherwise to support its bald assertion that the Department had resolved to ignore outside evidence. To the contrary, the Department repeatedly stated that it would in fact consider relevant evidence submitted by third parties. *See* pp. 7-8, *supra*. Scott's Valley's pretext argument therefore lacks any support.

B. Scotts Valley Did Not Satisfy the Restored-Lands Exception.

The IGRA generally prohibits gaming on trust lands acquired after 1988. There is a limited exception for lands "taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(a), (b)(1)(B). To qualify for the restored-lands exception, a tribe must demonstrate a significant historical connection and a temporal

[5] Scotts Valley also argues (Br. 1-9, 35-40) that Yocha Dehe Wintun Nation's efforts to present arguments on the parcel's ineligibility for gaming "politically influence[d]" the Department's decision to reconsider. But a "court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities." *Dep't of Com. v. New York*, 588 U.S. 752, 781 (2019). Further, as discussed, the Department reasonably decided to temporarily rescind the Gaming Eligibility Decision to consider all relevant evidence when the Decision expressly stated that the agency had not "considered any additional evidentiary materials from outside parties." SV-0003-04.

connection to the land. 25 C.F.R. § 292.12. The "additional evidence" the Department is now "consider[ing]" demonstrates that Scotts Valley cannot make either showing. Dkt. 1-2, at 1.

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

To demonstrate a "significant historical connection" to a parcel acquired into trust, 25 C.F.R. § 292.12, a tribe must show that the land is "located within the boundaries of the tribe's last reservation under a ratified or unratified treaty"; alternatively, a tribe "can demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land." *Id.* Scotts Valley cannot make either showing.

It is undisputed that the project site is not located within or near Scotts Valley's former reservation. *See* SV-0009. Scotts Valley therefore claims a significant historical connection to the trust land based on its alleged "occupancy or subsistence use in the vicinity of" the site. SV-0005. Its claim is based on biographical documents about "an individual named Augustine . . . who lived and worked in the North Bay region during the mid-1800s" and to whom some Scotts Valley members "trace [their] ancestry." SV-0011-14.

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

In 2025, however, the Department reversed course and concluded in the Gaming Eligibility Determination that Scotts Valley satisfied the "significant historical connection" despite having an "'inconsistent' or unsettled presence in the North Bay region." SV-0020. That change in position

occurred in the midst of what the U.S. Justice Department has described as the previous administration's last-minute rush to "take . . . land into trust before the next administration" took office. Ex. 10 to Defendants' Response to Plaintiff's Motion for a Preliminary Injunction 12:6-13, *Federated Indians of Graton Rancheria v. Burgum*, No. 24-cv-8582 (N.D. Cal. Jan. 2, 2025), Dkt. 40-1. Further, the Department failed to consider substantial evidence demonstrating that Scotts Valley lacks a significant historical connection to the trust land.

For example, the Gaming Eligibility Determination concluded that Scotts Valley made the "occupancy" showing based largely on documents about Augustine—"especially" documents on "his possible baptism" at a Sonoma, California mission in 1837 and "his dwelling in Napa in 1870." SV-0018; *see* SV-0012-13. As an initial matter, the purported presence in the region of a single individual to whom some Scotts Valley members trace their ancestry is not the sort of collective tribal presence necessary to demonstrate a significant historical connection. Further, that finding contradicts the Department's prior conclusion: the Department had previously acknowledged that Augustine's presence in the area did not demonstrate a significant historical connection because it was "inconsistent, if not transitory." SV-0014; *cf.* 73 Fed. Reg. 29354, 29366 (May 20, 2008) (explaining that a "'significant historical connection' . . . require[s] something more than evidence that a tribe merely passed through a particular area").

In any event, records that Scotts Valley and others submitted to the Department revealed that Augustine was not in fact the person baptized at the Sonoma mission. *See* Compl. 35, 45, *Yocha Dehe Wintun Nation v. DOI*, No. 25-cv-867 (D.D.C. Mar. 24, 2025), Dkt. 1. And Scotts Valley cannot document its connection to the person who allegedly resided in Napa, as it has acknowledged. *Id*. at 45. Rather, the evidence indicates that the Augustine who resided in Napa is

a different person than the Augustine to whom Scotts Valley members trace their ancestry. *Id*. at 35. Notably, the Gaming Eligibility Determination did not consider this evidence. SV-0004.

Because Scotts Valley's evidence of its connection to the parcel was relatively weak, the Gaming Eligibility Determination had to rely on facts that apply to all tribes in the area. For example, the determination described the "backdrop" of "[v]iolence against California Indians"; the fact that "Indian people were forced off their land"; and the "devastating impacts on tribal populations" from "diseases introduced by the Spaniards." SV-0016-17. But the plight of California Indians writ large is immaterial to whether a particular tribe has a significant historical connection to a specific parcel of land. For example, general facts about California Indians cannot demonstrate that a specific tribe's "villages, burial grounds, occupancy, or subsistence use [is] in the vicinity of the land" at issue. 25 C.F.R. § 292.2. Indeed, in past gaming eligibility determinations, the Department has acknowledged that such historical facts concerning the general Indian experience in an area are insufficient to demonstrate that a specific tribe has a significant historical connection to a parcel.[6]

The Gaming Eligibility Determination tried to circumvent this restriction by stating that Augustine's alleged experiences were "representative of what many Indigenous peoples across the region endured during the relevant time periods." SV-0017 (describing this as "additional context" about Augustine). But "additional context" about the general experience of Indians in Northern California cannot justify the Gaming Eligibility Determination's change in position. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (agency must "show that there are good

[6] *E.g.*, Letter from Larry Echo Hawk, Assistant Sec'y – Indian Affairs, U.S. Dep't of the Interior, to Merlene Sanchez, Chairperson, Guidiville Band of Pomo Indians 17 (Sept. 1, 2011), https://www.bia.gov/sites/default/files/dup/assets/public/pdf/idc015051.pdf (noting when denying application that the area was "marked by significant displacement of Indian peoples in present-day northern California").

reasons" for a change in position) (citation omitted). The Gaming Eligibility Determination should not have credited generally applicable facts and ignored evidence directly relevant to whether Scotts Valley has a significant historical connection to the site. It was therefore reasonable for the Department to rescind the determination to consider all material evidence.

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

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

The first method is inapplicable because this is not Scotts Valley's first request for newly acquired lands. The Department denied Scotts Valley's 2005 application to apply the restored-lands exception to a different parcel in Richmond, far from its historic homeland. Letter from Donald E. Laverdure, Acting Assistant Sec'y – Indian Affairs, U.S. Dep't of the Interior, to Donald Arnold, Chairperson, Scotts Valley Band of Pomo Indians (May 25, 2012), https://www.bia.gov/sites/default/files/dup/assets/public/pdf/idc-018517.pdf. However, the Gaming Eligibility Determination concluded that the second method applied, reasoning that Scotts Valley was restored to federal recognition on September 6, 1991, *i.e.*, 24 years and 11 months before Scotts Valley submitted an application in August 2016 to take into trust the land at issue. SV-0006.

But evidence submitted to the Department demonstrates that Scotts Valley was restored to federal recognition earlier. In March 1991, Scotts Valley and the United States filed a stipulation agreeing to restore Scotts Valley to federal recognition. *See* Stipulation for Entry of Judgment, *Scotts Valley Band of Pomo Indian of the Sugar Bowl Rancheria v. United States*, No. C-86-3660

(N.D. Cal. Mar. 15, 1991).[7] Accordingly, Scotts Valley was restored to federal recognition more than 25 years before it submitted the August 2016 land-into-trust application, which makes its application untimely.

Even if the August 2016 application were timely, that application requested trust status for only 128 acres of the 160 acres covered in the Gaming Eligibility Determination. The application did not ask the Department to take into trust the remaining 32 acres. Scotts Valley did not make that request until 2024, when it sent a letter asking the Department to tack on an additional 32 acres to its application. Lytton Compl 18. The Gaming Eligibility Determination characterized that letter as a "subsequent[] update[]" to Scotts Valley's August 2016 application. SV-0001. But a tribe's timely-filed application must request that the federal government take into trust "the land" for which trust status is sought. 25 C.F.R. § 292.12(c)(2). The August 2016 application is the only application that Scotts Valley purports to have filed before the running of the 25-year limitations period, and it did not include a request to take into trust the 32 acres. Nothing in the text of the regulation permits the Department to backdate untimely land-into-trust requests by referencing earlier applications. Further, that reading would render toothless the timely-filing requirement and create enormous regulatory uncertainty for the many third parties that the Department's gaming eligibility determinations impact.

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

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

C. Other Aspects Of The Department's Decisions Relating To The Gaming Eligibility Determination Were Flawed.

In addition to running afoul of the requirements of the restored-lands exception, the Department's other decisions relating to the Gaming Eligibility Determination were flawed in critical respects. Among other things, the Department's NEPA analysis was erroneous because it relied on improper assumptions and flawed data. Likewise, the Department failed to abide its by obligations under Part 151 of its regulations, including by failing to consider various jurisdictional problems and the distance between the project site and Scotts Valley's former reservation. Vacating the temporary rescission therefore would reinstate a decision that is predicated on shoddy analysis by the Department.

1. The Department's NEPA analysis was inadequate.

In support of the Gaming Eligibility Determination and in accordance with NEPA, the Department developed an Environmental Assessment (EA),[8] which concluded that the casino project would not have significant environmental effects. The EA failed to sufficiently analyze the project's impacts.

First, the EA improperly relied on unenforceable mitigation measures. Where an agency "lack[s] the power to guarantee" the performance of mitigation measures on which its environmental effect determination is premised, the agency must "exclude [those measures] from the analysis and consider only those actions that are in fact under agency control or otherwise reasonably certain to occur." *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 936 n.17 (9th Cir. 2008); *see also Pacificans for a Scenic Coast v. Cal. Dep't of Transp.*, 204 F. Supp. 3d 1075, 1090 (N.D. Cal. 2016) (agency's environmental effects determination was premised on mitigation measures "not under [its] control").

[8] The EA is available at https://www.scottsvalleycasinoea.com/environmental-assessment/.

The Department's determination that the project will not have significant environmental impacts is based on many unenforceable mitigation measures. For example, the EA assumes that Scotts Valley—a sovereign that has not waived its sovereign immunity—will undertake "good faith efforts" to mitigate the Project's disruptive effects on law enforcement in the area by entering into a service agreement with the Vallejo Police Department and the Solano County Sheriff's Office that would require Scotts Valley to compensate them for direct and indirect law enforcement costs. EA at 4-9. But the EA does not explain how those measures would be enforceable against a tribe with sovereign immunity. An agency may reasonably assume that mitigation measures are enforceable only where a tribe has waived its sovereign immunity to enforcement. *See, e.g.*, *Confederated Tribes of Grand Ronde Cmty. of Or. v. Jewell*, 75 F. Supp. 3d 387 (D.D.C. 2014).

Further, the mitigation plans in the EA rely on a third party's willingness to enter into agreements with Scotts Valley. For example, Scotts Valley must "negotiate a service agreement with the [Vallejo Flood and Wastewater District]" to minimize impacts to public services and utilities. EA at 4-7; *see also id.* (requiring negotiation of service agreement with local law enforcement); *id.* (requiring service agreement with local fire department). The Department's conclusion that the project will not have significant environmental impacts thus rests on a series of assumptions about Scotts Valley's ability and willingness undertake mitigation measures many of which depend on third parties over which neither the Department nor Scotts Valley has control.

Likewise, many of the mitigation measures are wholly speculative. For instance, the EA states that Scotts Valley will implement numerous measures only to the extent that those measures are "feasible" or "practicable." *E.g.*, EA at 2-17 ("[L]ow-flow toilets, faucets, and other water-using appliances shall be installed to the extent feasible"); 2-18 ("The use of low reactive organic gases . . . will be required for architectural coatings to the extent practicable"); 4-19 (requiring the

use of "environmentally preferable materials" "to the extent readily available and economically practicable"); 2-19 ("The Tribe will use clean fuel vehicles . . . in the vehicle fleet where practicable."); 4-1 ("Potential waters of the U.S. shall be avoided to the extent feasible."); 4-4 ("To the maximum extent feasible, the 25-foot buffer shall be maintained."). But the EA does not explain whether Scotts Valley's failure to undertake these measures would undermine the Department's conclusion that the project will not have significant impacts. In short, the conclusion in the EA that the project will not have significant impacts rests on a series of unreasonable assumptions about mitigation measures.

The environmental impact analysis suffers from other flaws. For instance, the EA relied on a water feasibility study that expressed uncertainty with respect to a number of key variables related to water supplies on which it acknowledged that "further investigation" was "require[d]." EA, App. B, at 6.1. Yet the Department never conducted that investigation. In addition, the EA's socioeconomic study relied on flawed data that collapsed Napa County, Sonoma County, and Marin County into a single economic unit for its analysis of the economic impact on the local area, whereas it provided individualized statistics for multiple other Bay Area counties, including Alameda County and San Francisco County. EA, App. A, at 13. The Department relied on that flawed statistic to underestimate the Project's impact on household income, employment, population, and gaming revenue in these counties. *Id.* These are but a few of the examples of the significant errors in the EA. The Gaming Eligibility Determination therefore was based on a fundamentally flawed NEPA analysis.

2. The Department's Part 151 analysis was inadequate.

The Department's regulations at 25 C.F.R. Part 151 "set forth the authorities, policies, and procedures governing the acquisition of land by the United States in trust status for . . . Tribes"

under the IRA.[9] 25 C.F.R. § 151.1. Part 151 mandates that the Department consider several requirements when evaluating an application to acquire land into trust if the land is not near the tribe's reservation. *Id.* §§ 151.10, 151.11. The Department failed to consider a number of these requirements.

First, the Department failed to consider "[j]urisdictional problems and potential conflicts of land use which may arise." 25 C.F.R. § 151.10(f). As Lytton explained to the Department, the portion of the parcel on which Scotts Valley has proposed to develop a 600,000 square-foot casino contains sensitive ecological features and are therefore set aside as open space under the General Plan of the City of Vallejo. Lytton Compl. 27. The Department acknowledged that "the proposed uses of the Vallejo Site are not consistent with the allowable uses under the existing zoning code," but nonetheless determined this was not a problem because "once acquired in trust status, the Vallejo Site will no longer be under the jurisdiction of the City, and thus, the policies and land use regulations of the City of Vallejo would no longer apply." SV-0027.

This logic is obviously circular. If the Department could wave away jurisdictional problems and land-use conflicts by reasoning that conflicting state and local laws will not govern once the land is acquired into trust, then the requirement in Section 151.10(f) would be toothless. *See In re Grand Jury Investigation*, 315 F. Supp. 3d 602, 633 (D.D.C. 2018), *aff'd*, 916 F.3d 1047 (D.C. Cir. 2019) ("[A] regulation should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant.") (quoting *Corley v. United States*, 556 U.S. 303, 314 (2009)). Even setting aside the regulation, the law is clear that Section 5 of the IRA "has far more to do with land use" and requires that the Secretary consider "how tribes will

[9] Substantial revisions to the Part 151 regulations became effective in January 2024. Scotts Valley and the Department elected to proceed under the prior version of the regulations. SV-0024. All Part 151 citations are to the pre-2024 version.

use those lands," including "assessing potential conflicts that use might create." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 226-27 (2012). The Department's dismissal of these jurisdictional conflicts was therefore legally erroneous.

Second, the Department also failed to give sufficient weight to the "distance" between the project site and "the boundaries of the [Scotts Valley's] reservation." 25 C.F.R. § 151.11(b). "[A]s the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition" and "shall give greater weight to the concerns raised" by state and local governments. *Id.* When analyzing whether Scotts Valley's application fit within the restored-lands exception, the Department acknowledged that the project site is far from Scotts Valley's historic rancheria—the equivalent of its current reservation. *See* SV-0009 (recognizing that the "Parcel is located approximately 90 driving miles . . . southeast of the former Scotts Valley Rancheria"). But when required to consider the distance between the project site and "the boundaries of the [Scotts Valley's] reservation" pursuant to Section 151.11(b), the Department failed to measure from Scotts Valley's former reservation because "[t]he Band is landless." SV-0029. Instead of measuring from any fixed location, the Department simply stated that "approximately 18%, or about one-fifth, of the Band's members live within a 36-mile radius of the Vallejo Site." SV-0029.

Nothing in the regulations permits the Department to take this unusual approach to measuring "the distance between the tribe's reservation and the land to be acquired." *Advanced Energy United, Inc. v. FERC*, 82 F.4th 1095, 1116 (D.C. Cir. 2023) ("[I]t is elementary that an agency must adhere to its own rules and regulations.") (quoting *Reuters Ltd. v. FCC*, 781 F.2d 946, 950 (D.C. Cir. 1986)). Where applicant tribes have similarly been "landless," the Department has historically used the location of a tribe's historic rancheria or ancestral area as the "reservation"

when making the required determination under Section 151.11(b).[10] The Department's utter failure to address this change in practice highlights the weakness of its analysis.

Moreover, the Gaming Eligibility Determination's conclusion that Scotts Valley is "landless" may be incorrect. After the temporary rescission, a Department official informed Lytton that Scotts Valley has trust lands in Sonoma and Solano Counties as well as an individual member-owned trust tract in Lake County. The fact that Scotts Valley may already have lands in trust that the Department did not assess also raises serious questions about the EA's failure to consider "a reasonable range of alternatives" as required by NEPA. 42 U.S.C. § 4332(C)(iii).

Finally, even assuming that the Department was correct to refer to the "36-mile radius" of the project site, it nonetheless failed to scrutinize, let alone apply "greater scrutiny" to, Scotts Valley's claimed anticipated benefits from the casino. The Department simply stated that the trust acquisition "is necessary to facilitate Tribal self-determination and economic development" and that Scotts Valley "needs an economic driver to generate funds to provide much-needed housing for its members and governmental facilities." SV-0024. This cursory analysis cannot be characterized as "great[] scrutiny." And nowhere did the Department indicate that it gave "greater weight" to concerns raised by state and local governments.

In sum, the Department's analysis related to its decision to take Scotts Valley's land into trust and its conclusion that the land was eligible for gaming were not reasonable. Its wise decision to temporarily rescind the Gaming Eligibility Determination may obviate the need to litigate challenges brought by Lytton and other tribes regarding the flaws outlined above.

[10] *See, e.g.*, Dep't of Interior, Record of Decision, Trust Acquisition for the Wilton Rancheria 2 (Jan. 2017) (considered location of historic reservation, which was 5.5 miles away from the land being taken in trust), https://www.bia.gov/sites/default/files/media_document/508_compliant_2017.01.19_wilton_rod_with_attachments.pdf.

CONCLUSION

The Court should deny Scotts Valley's motion for summary judgment and grant the Department's cross-motion for summary judgment.

Respectfully submitted,

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