

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

THE COW CREEK BAND OF UMPQUA
TRIBE OF INDIANS, et al.,

Plaintiffs,

No 1:24-cv-03594-APM

v.

U.S. DEPARTMENT OF THE
INTERIOR, et. al.,

Defendants.

**COALITION OF LARGE TRIBES' *AMICUS CURIAE* MEMORANDUM IN SUPPORT
OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

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- 1) For non-governmental corporate parties please list all parent corporations: None.
- 2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.
- 3) If there is a publicly held corporation which is not party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests: Counsel for *Amicus Curiae* is aware of no such corporation.

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DATED: December 31, 2024

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INTERESTS OF *AMICUS CURIAE*

Amicus Curiae, the Coalition of Large Tribes (“COLT”), was established in 2011 to provide a unified advocacy base for sovereign, federally recognized Indian tribes governing large trust land bases. COLT represents the interests of the more than 50 tribes with reservations encompassing 100,000 acres or more, some the size of States like Delaware and West Virginia, including the Crow Tribe, Navajo Nation, Muscogee (Creek) Nation, Blackfeet Tribe, Shoshone-Bannock Tribes, Oglala Sioux Tribe, Mandan, Hidatsa and Arikara Nation, Rosebud Sioux Tribe, Sisseton Wahpeton Sioux Tribe, Cheyenne River Sioux Tribe, Fort Belknap Indian Community, Shoshone-Paiute Tribes of the Duck Valley Reservation and others.

COLT’s primary purpose is to defend its member tribes’ inherent rights, to promote the health and welfare of tribal citizens, and to protect the sovereignty and Treaty rights of each COLT member tribe. *Amicus curiae* is interested in maintaining the federal government’s duty to protect tribes, Treaty rights, and the natural resources necessary to sustain tribes, including tribal land bases—and the attendant ability of tribes to acquire or reacquire additional lands and to petition to have such lands secured by federal trust status. *Amicus curiae* offers for the Court’s consideration critical context regarding the grave consequences of allowing political interference on grounds of competitive interests of other governments—as Plaintiffs seek—into the regular order of the apolitical federal administrative land-into-trust process.

The goals of *Amicus Curiae* in this Memorandum are to describe to the Court the nature and characteristics of federally recognized Indian tribes’ rights to petition the federal government to secure their lands by taking them into trust held by the United States and how

this flows from tribes' unique government-to-government relationships with the United States, to help the Court understand the breadth of how essential the land-into-trust process is to self-determination and tribal governments' ability to protect their resources and serve their citizens, and how dangerous the sort of political interference advocated by Plaintiffs could be to those interests. COLT cares about tribal sovereignty and reducing Native American poverty, both of which interests would be harmed if Plaintiffs' requested relief is granted.

INTRODUCTION

As Defendants' Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction demonstrates, Plaintiffs' claims for emergency injunctive relief are baseless—amounting to little more than their disagreement with careful federal administrative decision-making predicated entirely on their anti-competitive concerns. COLT stands with the Coquille Indian Tribe in support of the Tribe's application to transfer 2.4 acres of land in Medford, Oregon into trust for gaming and with Defendants in opposition to Plaintiffs' Motion.

The Coquille Tribe was terminated in 1954. In 1989 Congress, expressly repudiating the United States' assimilationist Termination policies, adopted the Coquille Restoration Act (CRA), making the Coquille the most recently restored tribe in the State of Oregon and the first tribe restored after Congress adopted the watershed Indian Gaming Regulatory Act.

As Coquille's intervention papers will no doubt more fully explain, when developing the CRA, Congress considered how its Termination policy had affected the Tribe and its members. They learned that Termination (and other historical federal policies) caused Tribal members to spread across the landscape of Southern Oregon. Congress learned that Tribal member population

centers had developed at various locations, including but not limited to the Oregon counties of Lane and Jackson. Acknowledging this demographic change, Congress drafted the CRA to authorize the Secretary to take land into trust in a specific geographic area comprising five Oregon counties (including Jackson and Lane Counties). Congress added this language to allow the Tribe to create jobs and provide critical services in or near their established population centers.

Defendants’ recent publication of the Final Environmental Impact Statement matches the Department of the Interior’s long-time approach of supporting land-into-trust transactions as foundational to self-determination policy. Decisions in any BIA Region set precedent elsewhere, where the presumption to take land into trust prevails, as do the Indian canons. COLT believes strongly that fee-to-trust applications should be treated equitably among tribes and Regions and the federal government should make it easier—not harder—for tribes to get land into trust and restore their homelands, economies, and ecosystems consistent with the great weight of federal legal requirements and policies.

ARGUMENT

I. District Precedent and Sound Public Policy Support Defendants’ Approach to the Coquille Indian Tribe’s Land-Into Trust Application.

Indian tribes are governments “that exercise inherent sovereign authority over their members and territories.”¹ The sovereign authority that Indian tribes possess is “retained” and

¹ *Oklahoma Tax Comm’n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991) (citing *Cherokee Nation v. Georgia*, 5 Pet. 1, 17 (1831)); accord *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014). See generally COHEN’S HANDBOOK OF FEDERAL INDIAN LAW §§ 1.06-1.07, at 2, § 4.01, at 206-08 (N. Newton & R. Anderson eds., 2012) (“COHEN”).

“inherent;” it is not granted by the federal government.² Rather, as the Supreme Court has explained, tribes are “separate sovereigns pre-existing the Constitution.”³ Tribes retain all attributes of their sovereignty that Congress has not divested.⁴ This is true of all federally recognized tribes, to which the United States owes common trust duties, including the duty to receive their petitions to secure federal trust protections for their tribal lands.

Additionally, Indian tribes also have the inherent power to engage in, and regulate, economic activity within their jurisdictions to “raise revenues to pay for the costs of government.”⁵ Congress broadly encourages the enterprises of Indian tribes to flourish.⁶ It does so comprehensively for gaming pursuant to the Indian Gaming Regulatory Act (“IGRA”), 25 U.S.C. §§ 2701-2721 (2006).

² *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978) (stating that “The powers of Indian tribes are, in general, ‘inherent powers of a limited sovereignty which has never been extinguished,’” citing *COHEN* at 122); *Talton v. Mayes*, 163 U.S. 376, 384, (1896)).

³ *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978).

⁴ *See, e.g., Bay Mills*, 572 U.S. at 789; *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 755–56 (1998); *Wheeler*, 435 U.S. at 323.

⁵ *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 144 (1982); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 335-36 (1983). In much the same way that states generate governmental revenues through a variety of enterprises, including liquor stores and lotteries, Indian tribes exercise their sovereign authority to generate such revenues by operating myriad enterprises, including tourism, timber harvesting, and gaming *see, e.g. id.* at 327 (“resort complex” for recreational hunting and fishing); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 139 (1980) (“tribal enterprise that manages, harvests, processes, and sells timber”); *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 219 (1986) (gaming enterprise).

⁶ *See, e.g.,* 25 U.S.C. § 1521 (provisions of Indian Financing Act of 1974 establishing Indian business-development grant programs); 25 U.S.C. §§ 4103(22), 4111, 4131 (provisions of the Native American Housing Assistance and Self-Determination Act authorizing funding for tribally designated housing authorities).

Nowhere in any federal law or policy is there any requirement that the Department of the Interior favor the economic interests of certain tribes over others or reject new intertribal competition occasioned by federal decision-making. Rather, federal law and policy provides for equitable treatment among tribes, with federal agencies required to strictly follow the law and their processes outside of political interference.

Recent District precedent recognized the importance of the application of the Indian canons of construction in agency fact-finding, with the canons' roots inextricably intertwined with the trust doctrine and the government-to-government relationship between tribes and the United States.⁷

From the founding of our Nation, the Supreme Court has recognized that the federal government has a unique trust obligation to protect tribal sovereignty and the power of self-governance. This trust responsibility has its origins in the constitutional responsibility for Indian affairs lodged in Congress, *see* U.S. CONST., art. I, § 8, cl. 3 (the “Indian Commerce Clause”), and in Chief Justice Marshall’s foundational Indian law decisions interpreting that responsibility.⁸ While the Supreme Court has interpreted the Indian Commerce Clause to give Congress powers over Indian affairs, the political branches also have an obligation to protect Indian tribes as

⁷ *Scotts Valley Band of Pomo Indians v. United States Dep’t of the Interior*, 633 F. Supp. 3d 132 (D.D.C. 2022), appeal dismissed, No. 23-5162, 2023 WL 9187175 (D.C. Cir. Nov. 9, 2023) (holding anti-competitive interests of tribes versus another with respect to an Indian Lands Opinion were not a reason to disregard the Indian canons of construction, which instead required ambiguity to be resolved in favor of the applicant tribe).

⁸ *See Worcester v. Georgia*, 31 U.S. 515, 551-52, 555 (1832) (United States’ trust to Indian nations involves “a nation claiming and receiving the protection of one more powerful: not that of individuals abandoning their national character, and submitting as subjects to the laws of a master”); *see also Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (discussing trust doctrine).

governments. As such, the Executive Branch has historically recognized the United States’ “unique trust relationship with Indian tribal governments” and the need to “[s]upport tribal sovereignty and self-determination.”⁹

This trust responsibility pervades the field to this day. Congress confirms that “[t]he United States has a trust responsibility to each tribal government,” respecting “the sovereignty of each tribal government,” and “through statutes, treaties, and the exercise of administrative authorities, [Congress] has recognized the self-determination, self-reliance, and inherent sovereignty of Indian tribes.”¹⁰

Judge Berman Jackson applied the canon directing federal statutes (including the Indian Gaming Regulatory Act) to be broadly construed in favor of all tribes. The Court found that the Indian Land Order at issue in the case had failed to take the government’s role in weakening the historical connection between the Band and its land into account, and given the fundamental remedial nature of the restored lands exception and the Indian canon of construction, any ambiguity or doubt when applying the regulation must be resolved in favor of the Band.¹¹ The Court found the Department of the Interior’s decision in denying the land-into-trust application arbitrary and capricious. In short, the Court applied the Indian canon correctly and the result was exactly as intended—effecting justice for an Indian tribe in light of the many grave injustices visited upon tribes by the United States.

Amicus curiae supports the broadest possible application of the Indian canons because

⁹ Exec. Order No. 13175, § 2 (a)-(b), 65 Fed. Reg. 67, 249 (Nov. 9, 2000).

¹⁰ 25 U.S.C. § 2601(2)-(3) (2001).

¹¹ *Scotts Valley*, 633 F. Supp. 3d at 165.

they are a theory of sovereignty, not a theory of contract interpretation and unequal bargaining power as commonly misunderstood.¹² As Justice O'Connor explained:

‘[R]ooted in the unique trust relationship between the United States and the Indians,’ the Indian canon presumes congressional intent to assist its wards to overcome the disadvantages our country has placed upon them.¹³

This is a normative canon that stands for the basic principle that the United States should honor its trust and Treaty relationships with tribes and try to help, and not hurt, Indians.¹⁴ The Court in *Scotts Valley* understood this and remanded the ILO to the Department for something less than a herculean demonstration of historic connection to the land so the Band might be able to achieve some modicum of economic dignity thereafter.

One of the most important roles the federal government plays in rebuilding the nation-to-nation relationship is placing land into trust on behalf of tribes—it is critical for tribal sovereignty and self-determination, preserves tribal histories and culture for future generations, spurs economic development, supports the well-being of tribal citizens, and, critically, helps to right the wrongs of

¹² See Alex Tallchief Skibine, Textualism and the Indian Canons of Statutory Construction, 55 U. Mich. J. L. Reform 267 (2022).

¹³ *Chickasaw Nation v. United States*, 534 U.S. 84, 99-100 (2002)(O'Connor, J., dissenting).

¹⁴ This is what many scholars have argued for years. See Curtis Berkey, *Rethinking the Role of the Federal Trust Responsibility in Protecting Indian Law and Resources*, 83 DENVER L. REV. 1069, 1079 (2006) (“In the current hostile legal climate, arguments that the trust responsibility requires federal agencies to act in the best interests of tribes, independent of their statutory duties, are likely to be greeted with skepticism”). Besides Berkey, other scholars have also argued that Tribes should be able to force the government to defend tribal trust resources. See, e.g., Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims for Injunctive Relief Against Federal Agencies*, 39 TULSA L.REV. 355, 364–68 (2003); Scott W. Stern, *Rebuilding Trust: Climate Change, Indian Communities, and a Right to Resettlement*, 47 ECOLOGY L.Q. 179 (2020).

past policy. That is exactly the process that Defendants followed as to the Coquille Indian Tribe's land-into-trust application.

Quite simply, Judge Berman got it right, ruling in favor of the Tribe challenging a Trump Administration denial of the Tribe's land-into-trust application. Judge Berman Jackson's opinion recognized the importance of the application of the Indian canons of construction in agency fact-finding, with the canons' roots inextricably intertwined with the trust doctrine and the government-to-government relationship between tribes and the United States. Judge Berman Jackson applied the canon directing federal statutes (including the Indian Gaming Regulatory Act) to be broadly construed in favor of all tribes, with equitable opportunity for all tribes, not just the few rich tribes lucky to have already experienced economic success who now jealously try to pull up the ladder behind them.

If this Court were to grant Plaintiffs' Motion—on their sole alleged ground of 'economic harm' to their casino interests from increased competition—*Amicus curiae* fears a proliferation of frivolous filings challenging land-into-trust decisions—from competing tribes, states, counties or other entities. Virtually every land-into-trust decision could have some economic consequence for another government, whether it is direct tax revenue, competition for premium business locations, or new economic development competition not possible outside of trust status. But nothing in NEPA or any other federal statute requires Defendants to conclude that only those governments first-in-time to economic opportunities get to benefit, and too bad for those tribes that come later. Rather, federal law requires that Defendants engage in exactly the careful trust-based process they undertook here.

Assistant Secretary's Newland's Declaration [ECF No. 13-1] details at least eight lengthy formal meetings Plaintiffs and their United States Senators had to try to negatively influence the Department's decision on Coquille's land-into-trust application, in addition to perhaps just as great a number of informal opportunities. Far from being denied an opportunity to voice their concerns, it is clear Plaintiffs had abundant access to make their views known. Nothing in federal law requires Defendants to accept those views. Instead, Defendants followed the regular order established by federal law. There is no reason for this Court to disrupt the conclusion of that federal decision-making.

CONCLUSION

The Court should deny Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction.

Respectfully submitted this 31st day of December 2024,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 29(a)(4)(G) and 32(g)(1) of the Federal Rules of Appellate Procedure and LCvR 7(o)(5), I hereby certify that the foregoing filed on December 31, 2024, complies with LCvR 7(o)(4) because it does not exceed 9 pages.

/s/ Jennifer H. Weddle
Jennifer H. Weddle

CERTIFICATE OF SERVICE

I hereby certify that, on the 31st day of December 2024, a copy of the foregoing was filed through the Court's CM/ECF management system and electronically services on counsel of record.

/s/ Jennifer H. Weddle
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