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 Interior, et al., Defendants.	Case No. 1:25-cv-00958-TNM

FEDERAL DEFENDANTS' BRIEF IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

The Scotts Valley Band challenges the United States Department of the Interior's March 27, 2025, temporary rescission of its earlier determination that land taken into trust for the Tribe was eligible for gaming. *See* Second Am. Compl. for Decl. & Inj. Relief, Dkt. No. 92. The Court should grant summary judgment in the Department's favor. The Tribe has not challenged a final agency action reviewable under the Administrative Procedure Act ("APA") because the Department's March 27 Letter is advisory only and its withdrawal does not independently create any legal consequences. The Tribe also has not stated a valid due process claim because it cannot identify a cognizable property or liberty interest of which it has been deprived. Further, the Department acted reasonably and within its inherent authority to reconsider when it issued

the March 27 Letter, and the Tribe fails to demonstrate that the Department's March 27 Letter was the result of improper political influence. In addition, any remedy the Court can grant is limited. As explained further below, this Court should deny Scotts Valley's motion for summary judgment and grant the Department's cross-motion.

II. BACKGROUND

A. Legal Background

The Indian Gaming Regulatory Act ("IGRA") was enacted in 1988 "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments[.]" 25 U.S.C. § 2702(1). IGRA permits federally recognized tribes to conduct gaming (subject to rules dependent on the type of gaming) on "Indian lands" within the tribe's jurisdiction. *Id.* §§ 2703(5), 2710(b)(1), (d)(3).[1] "Indian lands" is defined to include "all lands within the limits of any Indian reservation" and "any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power." *Id.* § 2703(4)(B).

Generally, IGRA bars gaming on lands taken into trust after October 17, 1988, with limited exceptions. *Id.* § 2719(a). As relevant here, the prohibition does not apply to lands taken into trust as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition." *Id.* § 2719(b)(1)(B)(iii). In 2008, the Secretary promulgated regulations to define and place reasonable limits on this so-called "restored lands" exception. *See generally* 25 C.F.R. §§ 292.7–292.12.

[1] Some portions of Section 2710 not relevant here have been held unconstitutional. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

IGRA authorizes three classes of Indian gaming. "Class I gaming consists of social games played for nominal prizes and traditional forms of Indian gaming occurring in connection with tribal ceremonies or celebrations. Class II gaming consists of bingo, games similar to bingo, and certain card games. Class III gaming consists of all forms of gaming that are not class I gaming or class II gaming [and] includes most conventional casino games—blackjack, roulette, slot machines, and the like." *Cherokee Nation v. U.S. Dep't of the Interior*, 643 F. Supp. 3d 90, 97–98 (D.D.C. 2022) (citations and internal quotations omitted).

The Secretary of the Interior may accept land into trust under the Indian Reorganization Act for "the purpose of providing land for Indians." *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009) (citing 25 U.S.C. § 465, since recodified at § 5108). The Department has issued regulations that set forth the policies and procedures governing the Secretary's decision-making on tribal applications to have land transferred into trust. 25 C.F.R. Part 151.

B. Factual Background

Scotts Valley was restored to Federal recognition in 1991. In 2016, the Tribe asked the Department to take a parcel in Vallejo, California (the "Vallejo Site") into trust for gaming purposes as restored lands. *See Scotts Valley Band of Pomo Indians v. U.S. Dep't of the Interior* ("*Scotts Valley I*"), 633 F. Supp. 3d 132, 171 (D.D.C. 2022). In February 2019, the Department denied that request, relying on an Indian Lands Opinion ("ILO") that concluded that Scotts Valley had failed to demonstrate the necessary "significant historical connection" to the Parcel to qualify under IGRA's restored lands exception. The Tribe challenged that decision in this Court.

In September 2022, Judge Jackson found in favor of the Department on almost all Scotts Valley's claims. The Court, however, granted Scotts Valley's motion for summary judgment on "the question of whether the ILO was arbitrary and capricious when considered in accordance with the Indian canon of statutory construction." *Id*. The Court held that the Department had

failed to apply the Indian canon to the evidence that Scotts Valley submitted in support of its trust application and had not resolved all alleged ambiguities in Scotts Valley's favor. *See id*. at 167–68. The Court therefore concluded that the Department's decision was arbitrary and capricious within the meaning of the APA. *Id.* at 171. The Department sought reconsideration of that Order, in part because "[t]he Indian canon of construction has never been applied to the Department's application of its regulations to evidence." Dkt. No. 56 at 1 (1:19-cv-1544-ABJ). The Department was concerned that the Court's Order was legally incorrect and had the effect of removing the discretion afforded to the Department by the APA. *Id.* at 10–11. The Court denied the motion for reconsideration, stating that it "did not find that it was clear error for it to review the agency's decision from the perspective of the Indian canon and to resolve all inferences in the Band's favor." Dkt. No. 69 at 34 (1:19-cv-1544-ABJ). The Court remanded the matter to the Department. *Id.*

On January 10, 2025, the Department issued a favorable decision on Scotts Valley's application to take the Vallejo Parcel into trust (the "Trust Determination"), which included the Department's conclusion that the Vallejo Parcel qualified as "restored lands" under IGRA (the "Gaming Eligibility Determination"). *See* Jan. 10, 2025, Decision ("Jan. 10 Decision"), SV-0001. The Department did not reopen the administrative record from its 2016 denial to allow new evidence to be submitted. *Id.* at 3–4. The Department published notice of the Trust Determination on January 15, 2025. *See* Land Acquisitions; Scotts Valley Band of Pomo Indians, Vallejo Site, Solano County, California, 90 Fed. Reg. 3906 (Jan. 15, 2025).

The January 10 Decision is the subject of three lawsuits in this Court. On March 24, the Yocha Dehe Wintun Nation and the Kletsel Dehe Wintun Nation of the Cortina Rancheria filed suit challenging the January 10 Decision, as did, in a separate suit, the United Auburn Indian

Community. *See Yocha Dehe Wintun Nation v. U.S. Dep't of the Interior*, No.:25-cv-867 (D.D.C. Mar. 24, 2025); *United Auburn Indian Cmty. of the Auburn Rancheria v. U.S. Dep't of the Interior*, No. 25-cv-873 (D.D.C. Mar. 24, 2025). Lytton Rancheria also later filed a complaint challenging the January 10 Decision and its underlying environmental assessment and finding of no significant impact. *See Lytton Rancheria of Cal. v. U.S. Dep't of Interior*, No. 25-cv-1088 (D.D.C. Apr. 10, 2025).

In the lead-up to those lawsuits, representatives for Yocha Dehe contacted Interior in January 2025 shortly after the change in Presidential administration. *See, e.g.*, SV-0054. They provided the Department a white paper titled "Reconsideration of the Politically Motivated Biden Administration Approval of Scotts Valley 'Restored Lands' in Vallejo, California." SV-0055. The white paper asserted that the January 10 Decision should be reversed. *Id.* Among other things, Yocha Dehe asserted that the Department had failed to honor "a binding commitment to consider evidence submitted by the local Patwin tribes before making any decision on the Scotts Valley trust application and restored lands request." *Id.* Yocha Dehe suggested that the Department notify Scotts Valley it would be reconsidering the January 10 Decision and then issue a new decision after reconsideration. SV-0057.

The Department considered the white paper and reviewed the January 10 Decision. For example, on February 4, 2025, the Acting Director of the Office of Indian Gaming briefed the Department official exercising the delegated authority of the Assistant Secretary–Indian Affairs, providing background information, a summary of the allegations and responses, and a list of meetings with tribes before the January 10 Decision. SV-0062–64. Staff attorneys in the Department's Solicitor's Office were also asked to review the white paper and the potential

reconsideration and to brief the Acting Solicitor, which they did on February 6. SV-0080, 0082, 0091.

Later in February, the Yocha Dehe Wintun Nation requested a meeting to discuss the January 10 Decision with new Departmental leadership. SV-0093, 0101. Yocha Dehe tribal members and attorneys met with the Department on March 11. SV-0175, 0184. A representative for Yocha Dehe later emphasized Yocha Dehe's view that, if the Department was going to reconsider, it was important to promptly notify Scotts Valley that the Department would be reconsidering the January 10 Decision. SV-0238. Yocha Dehe's representative also informed the Department that "a coalition of local Tribes, led by Yocha Dehe" was prepared to file a lawsuit challenging the January 10 Decision and provided the Department with a draft complaint. SV-0238, 0240–87.

On March 26, Yocha Dehe and Kletsel Dehe filed their complaint in this Court, as did the United Auburn Indian Community. SV-0324–445, 0446–606. That same day, the Department finalized a letter stating that the Department was temporarily rescinding the Gaming Eligibility Determination for reconsideration. SV-0618. The letter contained a typographical error misstating the acreage of the Vallejo Site. SV-0636. Accordingly, the Department issued a corrected letter on March 27. *See* Letter from Scott J. Davis, Sen. Advisors to Secretary of the Interior, to Hon. Shawn Davis, Chairman, Scotts Valley Band of Pomo Indians (Mar. 27, 2025) ("March 27 Letter"), SV-0676.

The March 27 Letter states that "[t]he Secretary is concerned that the Department did not consider additional evidence submitted after the 2022 Remand." *Id.* The Department invited Scotts Valley "and other interested parties to submit evidence and/or legal analysis regarding whether the Vallejo Parcel qualifies as restored lands under 25 U.S.C. § 2719(b)(1)(B)(iii) and 25

C.F.R. Part 292" by May 30, 2025. *Id.* The Letter states that the Trust Determination remains in place and the land remains in trust, but that no party should rely on the Gaming Eligibility Determination until the Department's reconsideration is completed. *Id.*

On April 1, 2025, Scotts Valley filed its Complaint in this action, with an Amended Complaint filed on April 4, 2025, and a Second Amended Complaint filed July 16, 2025. *See* Dkt. Nos. 1, 12, 92. Scotts Valley raises five claims against the March 27 Letter: (1) alleged violation of the APA; (2) alleged violation of the Tribe's procedural due process rights under the Fifth Amendment and the APA; (3) alleged *ultra vires* agency action in violation of the APA and IGRA; (4) alleged violation of the APA for contradicting a prior agency decision; and (5) alleged agency action unlawfully influenced by political pressure. Second Am. Compl. ¶¶ 49–80. This Court denied Scotts Valley's motion for a preliminary injunction. Dkt. No. 83. Scotts Valley moved for summary judgment on July 25, 2025. Dkt. No. 96.

III. STANDARD OF REVIEW

Scotts Valley brought suit under the APA. *Id.* The APA authorizes a reviewing court to "hold unlawful and set aside" final agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989). "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., Colorado*, 145 S. Ct. 1497, 1511 (2025) (citing *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)); *FCC v. Prometheus Radio Project*, 592 U.S. 414, 423 (2021)). The court may not substitute its judgment for that of the agency and must uphold a decision of less-than-ideal clarity if the agency's path may reasonably be discerned. *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974); *Ctr. for Biological Diversity v. U.S. Fish*

& Wildlife Serv., No. 23-5285, 2025 WL 2181489, *10 (D.C. Cir. Aug. 1, 2025) ("*CBD*"). The question before the Court "is not whether the [Department's] conclusion was the only reasonable one on this record or even the most reasonable one, but whether it was a sensible one." *CBD*, 2025 WL 2181489, at *13.

Review under the APA is confined to "the whole record or those parts of it cited by a party." 5 U.S.C. § 706. The "whole record" consists of "materials that were before the agency at the time its decision was made," *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997), and "were directly or indirectly" considered by agency decisionmakers, *Pac. Shores Subdivision, Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 7 (D.D.C. 2006).

IV. ARGUMENT

Scotts Valley's claims fail because it has not challenged a "final agency action" reviewable under the APA. The March 27 Letter is not final agency action either for the Department's reconsideration process or its rescission of the Gaming Eligibility Determination. The Department also did not violate Scotts Valley's procedural due process rights because Scotts Valley does not have a property interest in the Gaming Eligibility Determination protected by the Fifth Amendment. In addition, the Department acted reasonably and within its inherent authority to reconsider when it issued the March 27 Letter. The Department was within its authority to reconsider the Gaming Eligibility Determination and Scotts Valley has not demonstrated undue political influence. Further, the Tribe's reliance interests are not significant and do not render the March 27 Letter unlawful. Finally, any relief the Court grants should be limited.

A. The March 27 Letter is Not Final Agency Action Reviewable Under the APA.

Summary judgment should be granted in favor of the Department because the March 27 Letter is not reviewable under the APA. The APA permits review of only "final agency action." 5 U.S.C. § 704. *Am. Anti-Vivisection Soc'y v. U.S. Dep't of Agric.*, 946 F.3d 615, 620 (D.C. Cir.

2020) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990)). "To be final, an [agency] action must (1) mark the consummation of the agency's decisionmaking process and (2) be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)) (citation modified).

"Whether an agency action has 'direct and appreciable legal consequences' under the second prong of *Bennett* is a 'pragmatic' inquiry." *Sierra Club v. EPA*, 955 F.3d 56, 62 (D.C. Cir. 2020) (quoting *U.S. Army Corps of Engr's v. Hawkes*, 578 U.S. 590, 599 (2016)). "[C]ourts should 'make prong-two determinations based on the concrete consequences an agency action has or does not have as a result of the specific statutes and regulations that govern it.'" *Sierra Club*, 955 F.3d at 62–63 (quoting *Cal. Cmtys. Against Toxics v. EPA*, 934 F.3d 627, 637 (D.C. Cir. 2019)). Agency decisions are not "final agency actions" if they "do not themselves adversely affect complainant but only affect his rights adversely on the contingency of future administrative action." *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 22 (D.C. Cir. 2006) (citation modified). "Practical consequences" that may result "are insufficient." *Indep. Equip. Dealers Ass'n v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004).

Under that standard, the Department's March 27 Letter is not final agency action reviewable under the APA with respect to either (1) the Department's reconsideration process for its determination that the Vallejo parcel is "Indian lands" eligible for gaming ("Indian lands determination") or (2) the temporarily rescission of the prior determination.

1. The Department's ongoing reconsideration process does not mark the consummation of agency decision-making.

Despite recognizing that the reconsideration process remains ongoing, *see* Pl. Mem. 9, 11, 16, the Tribe maintains that the reconsideration process is final agency action. An *ongoing* reconsideration process cannot be deemed final agency action. Indeed, the D.C. Circuit has

confirmed that "[o]ngoing agency review renders an agency order non-final and judicial review premature." *Marcum v. Salazar*, 694 F.3d 123, 128 (D.C. Cir. 2012).

The March 27 Letter informed Scotts Valley, in part, that the Department is reconsidering its Gaming Eligibility Determination, and "invite[d] the Tribe and other interested parties to submit evidence and/or legal analysis regarding whether the Vallejo Site qualifies as restored lands under 25 U.S.C. § 2719(b)(1)(B)(iii) and 25 C.F.R. Part 292."[2] SV-0676 (March 27 Letter). Thus, Scotts Valley had to decide whether to participate in the reconsideration process. "It is firmly established[,]" however, "that agency action is not final merely because it has the effect of requiring a party to participate in an agency proceeding." *CSX Transp., Inc. v. Surface Transp. Bd.*, 774 F.3d 25, 30 (D.C. Cir. 2014) (citation omitted). Indeed, the Department recognized that, because the Department's process was just beginning, the Letter did not (and could not) constitute final agency action on the restored lands question. SV-0676 (March 27 Letter) (citing 25 C.F.R. § 2.101, which defines "final agency action," and § 2.301, which denotes finality in the context of administrative appeals). Merely initiating the reconsideration process does not consummate the agency's decision-making process.

Because the March 27 Letter is not the culmination of the Department's decision-making process, the March 27 Letter fails to meet the first prong of the final agency action test with regard to reconsideration and therefore is nonreviewable on this basis alone. The Court thus need not consider whether the March 27 Letter is one from which legal consequences will flow. But the Tribe's arguments on the second prong of the final agency action test also fail.

[2] Scotts Valley incorrectly notes the May 30 submission deadline for submitting materials in response to the March 27 letter. The Department agreed to extend the submission deadline to June 13. *See* Mot. 2–3, Dkt. No. 28; Mem. Order 4, Dkt. No. 38. Either way, the submission deadline has now passed.

The Tribe's legal rights have not been affected by initiating the reconsideration process. In its January 10 Decision, the Department took the Vallejo Site into trust and determined that it was eligible for gaming. The March 27 Letter does not take the property out of trust. Nor does the March 27 Letter state that the property is *not* eligible for gaming (or that the Tribe cannot game). The March 27 Letter simply stated that the Gaming Eligibility Determination is temporarily rescinded pending the reconsideration. In other words, now there is an absence of a gaming determination, not a reversal. Thus, no legal rights can be said to have been impacted by the initiation of the reconsideration process. The Tribe's rights may be impacted at the end of the reconsideration process but have not been affected yet. For these reasons, the Department's decision to reconsider the January 10 Decision is not final agency action.

2. Rescission of the Gaming Eligibility Determination Does Not Create Legal Consequences for Scotts Valley.

Nor does the March 27 Letter's rescission of the Gaming Eligibility Determination during the pendency of the Department's reconsideration constitute final agency action. Under the facts presented here, the rescission does not have any "direct" or "appreciable legal consequences," *Sierra Club*, 955 F.3d at 62, for Scotts Valley under IGRA. Actions involving Indian lands opinions have legal consequences only in certain circumstances not present here. An Indian lands determination has "concrete consequences," *id.* at 63, under IGRA that could meet the *Bennett* standard for finality when it is concomitant to a decision to take land into trust or to deny a trust land application. But here, the "the Trust Determination still stands and the Vallejo Site remains in trust." SV-0676 (March 27 Letter).

a. <u>The role of Indians lands determinations under IGRA.</u>

The analysis begins with IGRA. Scotts Valley's application stated plans to operate a Class III gaming facility. Tribes may conduct Class III gaming under four conditions. *See* 25

U.S.C. § 2710(d). First, the gaming must be on "Indian lands." *Id.* IGRA defines "Indian lands" to include those that are (like the Vallejo Site presently is) "held in trust by the United States for the benefit of any Indian tribe." 25 U.S.C. § 2703(4)(B). Second, the gaming must be authorized by a gaming "ordinance or resolution" approved by the National Indian Gaming Commission ("NIGC"). *Id.* § 2710(d)(1)(A). Third, the gaming must be "located in a State that permits such gaming for any purpose by any person, organization, or entity." *Id.* § 2710(d)(1)(B). And fourth, the gaming must be "conducted in conformance with a Tribal-State compact." *Id.* § 2710(d)(1)(C).

Contrast that with the Clean Water Act jurisdiction determinations in *Hawkes* that the Supreme Court found to be final agency actions under the APA. *See* 578 U.S. at 593. The *Hawkes* Court so held because the determinations, among other things, either "limit[] the potential liability a landowner faces for discharging pollutants without a permit," or "represent a denial of the safe harbor that negative [jurisdictional determinations] afford." *Id.* at 599. The Department's Indian lands determinations do not play a similar role under IGRA § 2710(d)(1).

To be sure, that straightforward statutory analysis is complicated by IGRA's general prohibition on lands acquired into trust after October 1988 and, in particular, the exceptions to that prohibition. *See* 25 U.S.C. § 2719(a), (b). IGRA establishes a role for the Secretary in the so-called "two part" exception in § 2719(b)(1)(A). But the statute does not expressly create a similar role for the Secretary as to the exceptions in § 2719(b)(1)(B)(iii), including the "restoration of lands" exception implicated here, that require the Secretary to issue final agency decisions on gaming eligibility.

Instead, the Department opines on a given parcel's eligibility for a § 2719(b)(1)(B) exception as a necessary part of exercising its authority to take final agency actions pursuant to

authorities in IGRA or other statutes, including final decisions to acquire land into trust for Tribes. *See* 25 C.F.R. §§ 292.1, 292.3; *see also* Gaming on Trust Lands Acquired After Oct. 17, 1988, 73 Fed. Reg. 29,375, 29,358 (May 20, 2008) ("[25 C.F.R. § 292.3(b)] requires the tribe to submit a request for an Indian lands opinion to the [Interior Office of Indian Gaming] if the tribe must also request a land-into trust application in order to game on the newly acquired lands . . . ."). The Department's regulations governing implementation of its trust acquisition authorities require that the Department consider the purpose for which the land will be used and potential land use conflicts. *See, e.g.*, 25 C.F.R. §§ 151.11(a)(3), 151.11(c).[3] Those considerations necessarily require analysis on whether the intended use (here, gaming) could reasonably occur. The same would be true for any assessment of potential effects under the National Environmental Policy Act. *See* 25 C.F.R. § 151.15(a).[4] And the Secretary may similarly need to determine a parcel's eligibility for gaming concomitant to any decision to approve a Tribal-State gaming compact. *See* 25 U.S.C. § 2710(d)(8)(A) ("The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on *Indian lands* of such Indian tribe." (emphasis added)).[5]

[3] We cite here to the Part 151 regulations currently in effect. Scotts Valley's application was processed under the Part 151 regulations in effect before January 11, 2024, because the Tribe's application was submitted before January 11, 2024, and the Tribe did not request that the application be processed under the new regulations. *See* 25 C.F.R. § 151.7(a); *see also* Jan. 10 Decision at 24. The parallel citations to the pre-2024 regulations are 25 C.F.R. §§ 151.10(c), 151.10(f).

[4] The parallel citation to the pre-2024 regulations is 25 C.F.R. § 151.10(h).

[5] Gaming compacts do not necessarily require an assessment of eligibility to game, including for those compacts that are not site-specific.

But none of those considerations turn the Department's opinion on a parcel's eligibility for gaming into a separate final agency action under IGRA. In promulgating the Part 292 regulations, the Department noted that "an opinion provided in response to a request under [25 C.F.R. § 292.3(a) or (b)] is not, per se, a final agency action under the [APA]. Final agency action only occurs when agency officials act on a determination pursuant to powers granted to them by Congress." 73 Fed. Reg. at 29,358. In a different context, the D.C. Circuit has recognized this legal reality. *See Butte Cnty., Cal. v. Hogen*, 613 F.3d 190, 195 n.3 (D.C. Cir. 2010). As for the Vallejo Site, the Department's action on a power granted to it by Congress was the decision to take land into trust, not the concomitant Gaming Eligibility Determination.[6] Indeed, Congress was clear that "[n]othing in [§ 2719] shall affect or diminish the authority and responsibility of the Secretary to take land into trust." 25 U.S.C. § 2719(c).

Contrary to the Tribe's contention, this case is distinguishable from *Ciba-Geigy* case. *See* Pl. Mem. of P&A in Supp. of its Mot. for Summ. J. at 12, Dkt. No. 96-1 ("Pl. Mem."). To begin, that case concerned ripeness, not a determination of what constitutes final agency action. Even so, there, the agency notified the manufacturer and seller of pesticides that it had reclassified an ingredient in its pesticide, requiring a change to the product's labeling. *Ciba-Geigy v. United States Env't Pol'y Agency*, 801 F.2d 430, 431–33 (D.C. Cir. 1986). The notice informed pesticide registrants that the agency would cancel their registrations if they did not submit revised labels. *Id.* at 432–33. The court found that this notification constituted final agency action because it

[6] When the Department decides to accept land into trust, the APA makes the underlying Indian lands determination subject to judicial review. 5 U.S.C. § 704 ("A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."); *see, e.g.*, *Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460, 463 (D.C. Cir. 2007) (reviewing Interior Indian lands determination under the "initial reservation" exception in conjunction with Interior decision to accept land into trust).

was unambiguous, did not indicate that further agency proceedings would occur, and "emphatically required . . . immediate compliance." *Id.* at 437. The court also found a direct impact on the plaintiffs' day-to-day activities because the cost of compliance was great. *Id.* at 438. Here, in contrast, the Department is reconsidering the issue, so further agency proceedings are occurring. And there is no direct effect on Plaintiff, as the Department has not required the Tribe to do anything.

b. The March 27 Letter did not impact Scotts Valley's rights under IGRA.

Indian land determinations only have legal consequences under IGRA when used to inform an agency's decision under one of the powers IGRA or another statute granted to that agency. The opposite is also true: an agency's rescission of an Indian lands determination that does not disturb the trust acquisition or other decision it had informed does not create any "appreciable legal consequences." *Sierra Club*, 955 F.3d at 62. The March 27 Letter was therefore not a final agency action for purposes of the APA.

Existing case law on Indian lands opinions supports this conclusion. *County of Amador v. Department of the Interior* involved a challenge to an Interior Indian lands opinion in the abstract—that is, one issued before any a final decision to acquire lands in trust, which was the ultimate decision necessary to allow the affected tribe to game. *See* No. 07-cv-527, 2007 WL 4390499, at *1 (E.D. Cal. Dec. 13, 2007). The court dismissed the case for lack of final agency action "for the simple reason that the trust application has yet to be approved." *Id.* at *4. The Department's decision regarding gaming eligibility "has no effect upon the parties unless the decision is first made to take the [land] into federal trust." *Id.*; *see also Citizens Against Casino Gambling in Erie Cnty. v. Kempthorne*, 471 F. Supp. 2d 295, 327–28 (W.D.N.Y. 2007), amended on reconsideration in part, 2007 WL 1200473 (W.D.N.Y. Apr. 20, 2007) (concluding that an

Indian lands opinion standing alone is "merely a legal opinion that does not constitute final agency action" because it has no immediate impact).

Similarly, *Miami Tribe of Oklahoma v. United States* involved an Indian lands opinion that the Department had proffered to NIGC concluding that the land in question was not eligible for gaming because it was not within the Tribe's jurisdiction. *See* 198 F. App'x 686, 689 (10th Cir. 2006). The Tenth Circuit concluded the Department's opinion was not final agency action. *Id.* at 690–91. The IGRA authority at issue there was NIGC's decision whether to approve a gaming contract between the tribe and a third party. *Id.* at 690. "Only the NIGC's final determination regarding a gaming contract is final agency action subject to appeal under the APA." *Id.* at 690. "The [Department's] Opinion Letter is only a part of the process that will eventually result in the final NIGC action." *Id.* It therefore "[did] not have a direct or immediate impact on the Tribe" that would make it a final agency action. *Id.*

The circumstances are different when the Department is presented with a land-into-trust application and concludes that a given parcel is *not* eligible for gaming. The effect of that conclusion—as was the case in Scotts Valley's prior suit—is to end the Department's consideration of the Tribe's application. *See Scotts Valley I*, 633 F. Supp. 3d at 140 (relying on its negative Indian lands opinion, "Interior declined to take the Vallejo Parcel in trust for gaming purposes"); *see id.* at 166, n.24 ("[T]he [Indian lands opinion] *was* the agency's final decision.").

Other courts have likewise reviewed the Department or NIGC Indian lands determinations concluding land is *ineligible* for gaming when the effect of that conclusion is to deny the Tribe's request to the agency. *See, e.g.*, *Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 437 F. Supp. 2d 1193, 1201 (D. Kan. 2006) (NIGC negative Indian lands conclusion in

conjunction with denial of request to approve an amended gaming ordinance);[7] *Miami Tribe of Okla. v. United States*, 927 F. Supp. 1419, 1420, 1422 (D. Kan. 1996) (Department negative Indian lands conclusion that NIGC relied upon in denying a request to approve gaming management contract); *Miami Tribe of Okla. v. United States*, 5 F. Supp. 2d 1213, 1216 (D. Kan. 1998) (same).[8]

But the circumstances here do not involve a negative Indian lands determination. The Department has simply rescinded the Gaming Eligibility Determination to reconsider the question. The Department has *not* concluded the Vallejo Site is ineligible for gaming. And the Department has *not* acted to take the land out of trust or otherwise withdrawn the Trust Determination. Thus, the March 27 Letter has not affected Scotts Valley's rights or obligations under IGRA. The Letter is not final agency action for purposes of the APA.

c. Scotts Valley has not demonstrated any legal consequences flowing from the March 27 Letter.

Scotts Valley makes several points arguing in favor of final agency action. *See* Pl. Mem. 12–14. None have merit.

The Tribe first argues that the Gaming Eligibility Determination gave them "clear rights . . . with no further action by the Department needed to confirm the land is eligible for gaming." *Id.* at 13. But there is no clear right to game flowing from a gaming eligibility determination—

[7] In an earlier case, the District of Kansas had dismissed for lack of final agency action the Wyandotte's claims challenging an Indian lands opinion that NIGC provided in the absence of a request to approve a gaming ordinance. *See Wyandotte Nation*, 437 F. Supp. 2d at 1200–01 (describing prior events and litigation); *Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, No. 04-cv-1727, 2005 WL 8160917, at *1–2 (D.D.C. May 18, 2005) (same).

[8] The land eligibility question at issue in the *Miami Tribe* cases was also reviewed after NIGC later approved the management contract, thus permitting gaming. *See Kansas v. United States*, 249 F.3d 1213 (10th Cir. 2001). IGRA authorizes judicial review under the APA of certain NIGC decisions. *See* 25 U.S.C. § 2714. There is no similar provision for the Secretary of the Interior.

the determination does not function like a license or permit. Instead, other statutory factors govern whether the Tribe may conduct Class II or Class III gaming, including a Tribal-State compact for Class III gaming. *See* 25 U.S.C. § 2710(b), (d). The March 27 Letter did not take any action with respect to a compact. SV-0676. Nor did it state that the Tribe can no longer game or immediately require anything of the Tribe. *Id.* Thus, the absence of a gaming eligibility determination from the Department does not have any legal consequences for the Tribe under IGRA.

The March 27 Letter also did not purport to invalidate any of the Tribe's contracts, prohibit Scotts Valley from seeking financing, or bar project planning. Thus, the harms are just "practical consequences" that the D.C. Circuit has held to be insufficient under *Bennett*'s second prong. *See Indep. Equip. Dealers Ass'n*, 372 F.3d at 61; *see also Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 810–11 (D.C. Cir. 2006) (change in guidelines despites seven years of voluntary reliance on prior guidelines did not amount to a legal consequence); *Nat'l Ass'n. of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005) ("If the practical legal effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for purposes of judicial review.").

Scotts Valley also argues that its operation of Class II and Class III gaming on the Vallejo Site would now subject it to federal prosecution in light of the March 27 Letter. Pl. Mem. 14 (citing 18 U.S.C. § 1166). The cited criminal code provision applies (as a matter of federal law) state laws regarding "the licensing, regulation, or prohibition of gambling" in Indian country."[9]

[9] "Under principles of federal Inian law, 'Indian country' denotes the geographic scope where 'primary jurisdiction . . . rests with the Federal Government and the Indian tribe inhabiting it, and not with the States.'" *Michigan v. EPA*, 268 F.3d 1075, 1079 (D.C. Cir. 2001) (quoting *Alaska v. Native Vill. of Venetie Tribal Gov't*, 522 U.S. 520, 527 n.1 (1998)). Lands the United States holds in trust for the benefit of a tribe are generally considered Indian country. *See United States v.*

18 U.S.C. § 1166(a). But the term "gambling" in § 1166 does not include: (1) "class I gaming or class II gaming regulated by [IGRA;]" or (2) "class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior[.]" *Id.* § 1166(c).[10] Thus, if the Tribe were intending to conduct Class I or II gaming, § 1166 does not apply. *See id.* And the Tribe does not have a Tribal-State compact under which it could conduct Class III gaming.[11] If Scotts Valley believes the State of California is not negotiating in good faith, *see* Pl. Mem. 14, it can seek recourse through 25 U.S.C. § 2710(7)(A). The Tribe, therefore, is not in any different legal posture today with respect to § 1166 than it was before the March 27 Letter. The temporary rescission, rather, signals that whether the Vallejo Site qualifies for a § 2719 exception is a question left for another day—whether as part of the Department's present reconsideration, the Department's future consideration of any Tribal-State compact, or a future NIGC action. The current absence of a determination from the Department on the subject, however, does not have any legal consequences for Scotts Valley under IGRA.

John, 437 U.S. 634, 649 (1978). Because the Vallejo Site remains in trust, its status as Indian country (and the reach of State jurisdiction) has not changed.

[10] 18 U.S.C. § 1166 was added to the criminal code by IGRA. *See* An Act to Regulate Gaming on Indian Land, Pub. L. 100-497, § 23, 102 Stat. 2467 (1988). It allows federal prosecution for any violation of relevant state law if gaming on Indian lands is occurring outside of IGRA's requirements. *See Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1285 (11th Cir. 2015).

[11] Class III Tribal-State gaming compacts are not guaranteed as IGRA only requires states to "negotiate with the Indian tribe in good faith to enter into such a compact" *Id.* at § 2710(d)(3)(A). Compact negotiations can be lengthy and complex, and do not always result in a negotiated agreement. To the contrary, these negotiations are regularly disputed. *See e.g., Chicken Ranch Rancheria of Me-Wuk Indians v. Cal.*, 42 F.4th 1024, 1029 (9th Cir. 2022) (holding "that by negotiating for topics well outside § 2710(d)(3)(C)'s permitted list, California did not bargain in good faith."); *Rancheria v. Newsom*, 719 F. Supp. 3d 1068, 1076 (E.D. Cal. 2024). And negotiated compacts are subject to Secretarial approval. 25 U.S.C. § 2710(d)(3)(B)

Finally, the Tribe claims to have been deprived of a valuable property right. Pl. Mem. 14. But the Vallejo Site remains in trust. And as explained above, the temporary rescission of the Indian Lands determination, standing alone, does not have any legal consequences under IGRA until and unless the Department takes some action to reverse the Trust Determination. The March 27 Letter thus is not a final agency action, and the Tribe's claims therefore are not reviewable under the APA. Summary judgment should be granted in favor of the Department.

Amicus curiae GTL Properties, LLLP ("GTL") GTL states that it is blackletter law that granting an interim modification of an earlier decision while purporting to reconsider that earlier decision is final agency action. Br. of Amicus Curiae GTL Properties, LLLP in Supp. of Pl. Mot. for Summ. J. at 5, 7, Dkt. No. 98. But the cases it cites do not stand for such a broad proposition. Instead, the courts applied the *Bennett v. Spear* test and found that under the circumstances of those cases, the action was final agency action. In *Clean Air Council v. Pruitt*, for example, the Environmental Protection Agency granted a petition to reconsider a regulation. 862 F.3d 1, 6 (D.C. Cir. 2017). The court held that this decision was not "reviewable final agency action." *Id.* The agency also, however, stayed implementation of portions of the final rule while the reconsideration was proceeding, which was final agency action. *Id.* The court applied the *Bennett* test and held that the decision to stay "represents the final agency position on this issue, has the status of law, and has an immediate and direct effect on the parties." *Id*. The court also found that the stay affected the regulated parties' rights or obligations because it relieved them of liability they would have otherwise faced. *Id*. at 7. Here, as discussed above, the rescission of the Gaming Eligibility Determination did not affect Scotts Valley's (or GTL's) rights or obligations.

Similarly, in *National Women's Law Center v. OMB*, 358 F. Supp. 3d 66 (D.D.C. 2019), OMB had approved the collection of pay data for three years. OMB then reviewed the decision to collect data and stayed the data collection during the review. Applying the *Bennett* test, the court found that the stay decision was final agency action. It was the end of the agency's decision-making process on the stay, and had legal consequences because, without the stay, covered employers were legally obligated to submit the pay data and were subject to fines or imprisonment. *Id.* at 86. Here, by contrast, the temporary rescission of the Gaming Eligibility Determination did not relieve any group of duties or have other legal consequences.

3. The March 27 Letter Neither Creates a "New Rule" Nor is that "New Rule" Final Agency Action.

Scotts Valley argues that the March 27 Letter "sets up a new process for the restored lands determination" and that the creation of this new process qualifies as final agency action. Pl. Mem. 15. The Tribe's argument boils down to an allegation that the Department violated its Part 292 regulations by inviting third parties to submit evidence on the Tribe's fee-to-trust application when the regulations do not explicitly provide for third-party submissions. This is not appropriately framed as an argument about final agency action; it is an argument that the Department acted *ultra vires*. As we explain below, *infra* Section IV.C.2.c, the March 27 Letter did not impose a new process and was reasonable and complied with the APA.

The Tribe complains about the reconsideration process arguing that its "rights are substantially restricted in the new process" because the Tribe "will not be allowed to see any third-party submissions." Pl. Mem. 19. This argument is, at best, premature. As explained above, the Department's reconsideration remains ongoing. It is simply too soon to challenge the Department's reconsideration process. The Tribe's challenge to the reconsideration process "rests upon contingent future events that may not occur as anticipated[] or indeed may not occur

at all." *Devia v. NRC*, 492 F.3d 421, 425 (D.C. Cir. 2007) (citation modified). "Refusing to involve the courts in ongoing administrative matters both protect judicial resources and comports with the judiciary's role as the governmental branch of last resort." *In re Aiken Cty.*, 645 F.3d 428, 434 (D.C. Cir. 2011). Therefore, the Department's ongoing reconsideration is not final agency action reviewable under the APA.

Because Scotts Valley has not challenged final agency action, the Court should grant summary judgment for Federal Defendants.[12]

B. The March 27 Letter did not violate Scotts Valley's procedural due process rights.

Even if March 27 Letter did constitute a final agency action, Scotts Valley's claims fail on the merits. Scotts Valley first argues that the March 27 Letter deprived it of a property interest in the Gaming Eligibility Determination and thus violated the Fifth Amendment of the United States Constitution. Pl. Mem. 19–20. This argument fails because the Gaming Eligibility Determination is not a property interest protected under the Fifth Amendment.

"A 'threshold requirement of a due process claim' is 'that the government has interfered with a cognizable liberty or property interest.'" *Muwekma Ohlone Tribe v. Salazar*, 708 F.3d 209, 219 (D.C. Cir. 2013) (quoting *Hettinga v. United States*, 677 F.3d 471, 479–80 (D.C. Cir. 2012) (per curiam)). A property interest in a benefit, such as governmental employment, is constitutionally protected only when a person has "a legitimate claim of entitlement to it." *McKinney v. D.C.*, 142 F.4th 784, 793 (D.C. Cir. 2025) (quoting *Bd. of Regents of State Colleges*

[12] GTL makes an argument that the Court can grant relief under the All Writs Act. GTL Br. at 12–13. This is a new issue not raised by Plaintiff and the Court should disregard it accordingly. *Huerta v. Ducote*, 792 F.3d 144, 151 (D.C. Cir. 2015) ("[O]rdinarily this court will not entertain an amicus's argument if not presented by a party."). The Department notes, however, that *ex parte* communications are not prohibited in informal agency action, such as the one at issue here. *See, e.g.*, *United States v. Navajo Nation*, 537 U.S. 488, 513 (2003).

v. Roth, 408 U.S. 564, 577 (1972)). Plaintiff has not identified a valid property or liberty interest affected by the March 27 Letter.

First, the Tribe did not have a cognizable property interest in the Gaming Eligibility Determination because the Determination is a legal opinion for which Department always holds the discretion to review and potentially reverse. "[I]t is generally accepted that in the absence of a specific statutory limitation, an administrative agency has the inherent authority to reconsider its decisions." *Macktal v. Chao*, 286 F.3d 822, 825–26 (5th Cir. 2002) (citing *Belville Mining Co. v. United States,* 999 F.2d 989, 997 (6th Cir. 1993); *Dun & Bradstreet Corp. v. U.S. Postal Serv.,* 946 F.2d 189, 193 (2d Cir. 1991); *Gun South, Inc. v. Brady,* 877 F.2d 858, 862 (11th Cir. 1989); *Iowa Power & Light Co. v. United States,* 712 F.2d 1292, 1297 (8th Cir. 1983); *Trujillo v. Gen. Elec. Co.,* 621 F.2d 1084, 1086 (10th Cir. 1980); *United States v. Sioux Tribe,* 616 F.2d 485, 493 (1980); *Albertson v. FCC,* 182 F.2d 397, 399 (D.C. Cir. 1950)). "The power to reconsider is inherent in the power to decide." *Albertson*, 182 F.3d at 399; *see also Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1360 (Fed. Cir. 2008).

In addition, 43 C.F.R. § 4.5 gives the Secretary authority to review Departmental decisions. And the Part 292 regulations acknowledge the Department's "full discretion to qualify, withdraw or modify" its prior legal opinions "regarding the applicability of 25 U.S.C. § 2719 for land to be used for a particular gaming establishment." 25 C.F.R. § 292.26; *see also* 73 Fed. Reg. at 29,372; *City of Council Bluffs, Iowa v. United States Dep't of Interior*, 368 F. Supp. 3d 1276, 1298 (S.D. Iowa 2019), *aff'd*, 11 F.4th 852 (8th Cir. 2021) (noting NIGC's exercise of "its 'full discretion to qualify, withdraw or modify' the conclusions in the Gross Memorandum"). The agency's discretion to review and potentially reverse gaming eligibility

determinations leads to the conclusion that Plaintiff did not have a legitimate claim of entitlement to the Gaming Eligibility Determination.

Second, property interests protected by the Fifth Amendment "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *McKinney*, 142 F.4th at 793 (quoting *Roth*, 408 U.S. at 577). Thus, the Court must determine whether Plaintiff "had a legitimate expectation, based on rules (statutes or regulations) or understandings (contracts, expressed or implied)." *Id.* (citing *Hall v. Ford*, 856 F.2d 255, 265 (D.C. Cir. 1988). Scotts Valley has not identified a rule or understanding that established its alleged property right. IGRA does not create a legitimate property interest in the Gaming Eligibility Determination because, as discussed above, IGRA does not require that the Secretary make this determination as part of the "restored lands" exception to the prohibition on gaming. Further, the Secretary's gaming eligibility determinations are opinions and not, per se, final agency actions. 73 Fed. Reg. at 29,358. They are "advisory in nature and thus do not legally bind the persons vested with the authority to make final agency decisions." *Butte Cnty.*, 613 F.3d at 195 n.3 (citing 73 Fed. Reg. at 29,372). Nor do Plaintiffs point to any other provision of the regulations that establishes a property right. Therefore, Plaintiff cannot demonstrate a legitimate claim of entitlement created by a statute or regulation.

This case thus differs from the cases Plaintiff cites. In *Gray Panthers v. Schweiker*, 652 F.2d 146 (D.C. Cir. 1980), the plaintiffs were beneficiaries of the Medicare program and the government did not dispute that the claimants had a property interest "in receiving the medical insurance benefits for which they have paid a monthly premium." *Id.* at 148 n.2. The question in that case was not whether a property interest existed, but "what process was due." *Id.* In *Goss v. Lopez*, the Court found "legitimate claims of entitlement to a public education" when state

laws required a free education to all residents in a certain age range and a compulsory attendance law. 419 U.S. 565, 573 (1975). Here, no statute or regulations establishes such a claim of entitlement.

Third, Plaintiff does not have a vested interest in Class III gaming on the Vallejo Site because IGRA's provisions for Class III gaming have not been met. As the Court noted in its Order denying the preliminary injunction, there are many additional steps before the Tribe would be able to engage in Class III gaming on the property. Mem. Order 12–13, Dkt. No. 83. Most notably, gaming can only be "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State" that is approved by the Secretary. *See* 25 U.S.C. § 2710(b)(3); 25 C.F.R. § 293.10; *Jicarilla Apache Tribe v. Kelly*, 129 F.3d 535, 537 (10th Cir. 1997) ("IGRA imposes two separate requirements—the State and the Tribe must have 'entered into' a compact *and* the compact must be 'in effect' pursuant to Secretarial approval—before class III gaming is authorized). Scotts Valley does not have a Tribal-State compact approved by the Secretary. Scotts Valley acknowledged in prior proceedings that "even a positive Indian Lands Opinion would not permit Scotts Valley to enter the [gaming] market, but would merely allow the process to continue. 2021 WL 1265225, at *22. Thus, even without the March 27 Letter, Scotts Valley would not have the right to conduct Class III gaming on the site at this time.

As such, the March 27 Letter did not deprive Scotts Valley of benefits it was already receiving. *See Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1297 (D.N.M. 1996), *aff'd*, 104 F.3d 1546 (10th Cir. 1997) (holding that no cognizable property interest existed when tribes did not have a Tribal-State compact in place); *see also Rincon Band v. Schwarzenegger*, 602 F.3d 1019, 1024–26 (9th Cir. 2010) (discussing failed compact negotiations between a tribe and California). Due process "is a safeguard of the security of interests that a person has already

acquired in specific benefits." *Roth*, 408 U.S. at 576 (emphasis added); *Lyng v. Payne*, 476 U.S. 926, 942 (1986) ("We have never held that applicants for benefits, as distinct from those already receiving them, have a legitimate claim of entitlement protected by the Due Process Clause . . . ."); *Muwekma Ohlone*, 708 F.3d at 219–20 (distinguishing between applicant for government benefits and those already receiving said benefits).

In *McKinney*, the plaintiff asserted that he had a property interest in governmental employment when he was offered jobs, but ultimately not hired because he failed a background check. 142 F.4th at 793. The D.C. Circuit held that "he did not have a legitimate claim of entitlement" because the offers were contingent on the completion of a successful background check. *Id.* The background check was not a ministerial task and thus the plaintiff did not have a protected property right in the employment. *Id.* at 794. Similarly, in this case, there are conditions precedent to Plaintiff's ability to game that are more than ministerial. As such, Plaintiff does not have a legitimate claim of entitlement to the Gaming Eligibility Determination and no property interest had vested in Plaintiff.

The Tribe equates the Gaming Eligibility Determination to "a binding, substantive determination that the predicates for a statutory benefit exist," and brushes aside any further prerequisites to Class III gaming. Pl. Mem. 20. But Scotts Valley's expectation that the conditions precedent would be met is not sufficient. *See Roth*, 408 U.S. at 577 ("To have a property interest in a benefit, a person . . . must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it."). There is a difference "between losing what one has and not getting what one wants." *Greene v. Babbitt*, 64 F.3d 1266, 1273 (9th Cir. 1995) (citing Henry J. Friendly, "Some Kind of Hearing," 123 U. PA. L. REV. 1267, 1296 (1965)). Scotts Valley did not have the right to conduct Class III gaming on the site and certainly

not a right created by the eligibility determination. As such, the March 27 Letter did not deprive Scotts Valley of a cognizable property interest.

Plaintiff's primary argument otherwise is that IGRA and the regulations are intended to benefit tribes' economic development. Pl. Mem. 22–23. It argues that once the January 10 Decision was announced as a final agency action, the Department's discretion was "exercised and exhausted" and a protected property interest accrued in the Tribe. *Id.* at 23. This argument ignores, however, the inherent discretion reserved to the Department to reconsider its decision. "The Indian Gaming Regulatory Act 'does not unambiguously impose upon the United States the duty to ensure that Indian gaming continue under any circumstances.'" *Massachusetts v. Wampanoag Tribe of Gay Head*, 98 F. Supp. 3d 55, 71 n.17 (D. Mass. 2015) (citing *Pueblo of Santa Ana,* 932 F. Supp. at 1298). Moreover, Scotts Valley cannot contest that there are steps still to be completed before it can game on the property, meaning that no entitlement has vested in Scotts Valley.

Even if Scotts Valley had identified a protected property or liberty interest, the Department has not deprived Scotts Valley of those interests. The Vallejo Site remains in trust. And now, the temporary rescission of the Gaming Eligibility Determination, standing alone, does not have any legal consequences under IGRA until and unless the Department takes some action to reverse the Trust Determination. Scotts Valley thus cannot demonstrate that the Department deprived it of a protected property or liberty interest.

Finally, the Department provided Scotts Valley with the process it is due. It notified Scotts Valley of the temporary rescission, provided the opportunity to submit additional evidence, and will issue a new decision at the end of the reconsideration process.

C. The Department's March 27 letter was reasonable and in accordance with law.

Scotts Valley's argument that the March 27 Letter was arbitrary and capricious under the APA also fails. Scotts Valley has the burden of showing that the Department acted in an arbitrary or capricious manner to succeed on its APA claim. *See* 5 U.S.C. § 706(2)(A); *Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193, 1198 (D.C. Cir. 2000). It fails to carry its burden. First, the Department acted within its inherent authority to reconsider prior decisions. Second, the Department acted reasonably and in a timely fashion in issuing the March 27 Letter. Third, Scotts Valley has not established that the March 27 Letter was the result of undue political influence. Fourth, Scotts Valley's purported reliance interests are not significant and do not render the March 27 Letter unlawful. But even if the Tribe prevails on the merits of its claims, the available APA relief—remand for further consideration—is already taking place because the Department is undertaking further administrative proceedings for its prior Gaming Eligibility Determination.

1. The Secretary has the authority to reconsider prior decisions.

The March 27 Letter did two things: (1) began a reconsideration process; and (2) temporarily rescinded the Gaming Eligibility Determination. The lawfulness of the first—the decision to reconsideration itself—cannot be seriously questioned. The D.C. Circuit has repeatedly recognized that "administrative agencies are assumed to possess at least some inherent authority to revisit their prior decisions" because the "power to reconsider is inherent in the power to decide." *Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014) (citing cases and quoting *Albertson*, 182 F.2d at 399); *Voyageur Outward Bound Sch. v. United States*, 444 F. Supp. 3d 182, 191 (D.D.C. 2020), *opinion vacated, appeal dismissed*, No. 20-cv-5097, 2022 WL 829754 (D.C. Cir. Mar. 17, 2022); *Fla. Mun. Power Agency v. FERC*, 315 F.3d 362, 366 (D.C. Cir. 2003); *Macktal*, 286 F.3d at 825–26; *Ideal Basic Indus., Inc. v. Morton*, 542 F.2d

1364, 1368 (9th Cir. 1976) (finding that even though the agency made a favorable final determination, the agency had authority to reconsider its prior decision to consider the sufficiency of the record made in connection with that determination).

Scotts Valley does not identify any statutory prohibition or limitation on the Department's inherent authority to reconsider. *See Voyageur*, 444 F. Supp. 3d at 193 (citing *Ivy Sports*, 767 F.3d at 86). The March 27 Letter referenced 43 C.F.R. § 4.5. *See* SV-0632 ("This action is taken pursuant to 43 C.F.R. § 4.5, *which provides the Secretary of the Interior (Secretary) with broad authority to review and reconsider any decision of the Department.*" (emphasis added)). Section 4.5 simply recognizes the Secretary's inherent authority and reserves broad power to the Secretary to review any decisions of any Department employee and to order reconsideration of those decisions. *See* 43 C.F.R. § 4.5(a) ("Nothing in this part may deprive the Secretary of any power conferred upon the Secretary by law[.]"). Section 4.5 does not limit the Department's broad and inherent discretion to reconsider decisions, and Scotts Valley does not argue to the contrary.[13]

The Tribe argues that the March 27 Letter exceeds the scope and purpose of § 4.5 because the reconsideration does not fit within the confines of the Department's hearings and appeal procedures, Pl. Mem 29–30. This narrow interpretation misses the point. Section 4.5 does not limit the Department's inherent authority nor set the scope of the agency's authority. Therefore, as recognized by § 4.5, the Department properly acted under its inherent authority.

[13] The Tribe previously argued that the Senior Advisor lacked authority to issue the March 27 Letter, *see, e.g.*, Second Am. Compl. ¶ 53, Dkt. No. 92; Dkt. No. 3-1 at 22–23. Plaintiff did not advance these arguments in its summary judgment brief, and they should be considered waived.

2. The Department acted within its authority to temporarily rescind the Gaming Eligibility Determination.

The Department's decision to temporarily rescind the Gaming Eligibility Determination during the reconsideration process is a more detailed inquiry, but there too the Department reasonably acted within its authority. The Department's inherent authority to change its mind is broad, but it is not unlimited. "An agency may not reconsider its own decision if to do so would be arbitrary, capricious, or an abuse of discretion." *Macktal*, 286 F.3d at 826. An agency's inherent authority encompasses the ability to temporarily rescind a prior decision. *See Ranbaxy Labs., Ltd. v. Burwell*, 82 F. Supp. 3d 159, 192 (D.D.C. 2015); *Gun South*, 877 F.2d at 862 (recognizing the agency's implied authority to impose a temporary suspension where the relevant statute lacked an express provision authorizing such action). Courts have limited an agency's inherent authority when there is a specific statutory prohibition to the contrary or when the agency fails to act in a timely manner. *See, e.g.*, *Voyageur*, 444 F. Supp. 3d at 193 (citing *Ivy Sports*, 767 F.3d at 86); *Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977) (quoting *Bookman v. United States*, 452 F.2d 1263, 1265 (Ct. Cl. 1972)). Neither limits the Department's authority to temporarily rescind its prior decision here.

As stated above, the Tribe does not identify any such statutory prohibition. Thus, we turn to the timeliness of the Department's temporary decision. *See Mazaleski*, 562 F.2d at 720 (quoting *Bookman*, 452 F.2d at 1265).

a. The Rescission was Timely.

In the D.C. Circuit, an agency has inherent power to reconsider and change a decision if it does so "within a reasonable period of time." *Mazaleski*, 562 F.2d at 720. Whether an agency's reconsideration is proper requires consideration of two opposing policies: "the desirability of finality, on the one hand, and the public interest in reaching what, ultimately,

appears to be the right result on the other." *Belville*, 999 F.2d at 997 (quoting *Civ. Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 321 (1961)); *accord Frito-Lay, Inc. v. U.S. Dep't of Lab.*, 20 F. Supp. 3d 548, 553–54 (N.D. Tex. 2014) (quoting *Macktal*, 286 F.3d at 826). And though timeliness matters, there are strong public interests in encouraging agencies to get to the right substantive answer. *See Crager v. United States*, 25 Cl. Ct. 400, 410–11 (1992) ("Although . . . *de novo* review was not really conducted within a short time, this court still believes that effective, unbiased *de novo* review of agency action should be promoted, regardless of the time which has lapsed.").

What constitutes a "reasonable" time period turns on the facts of the individual case. *See Cooley v. United States*, 324 F.3d 1297, 1305–05 (Fed. Cir. 2003) (remanding to the trial court to consider whether three years between an initial denial decision and reconsideration "was reasonable under the circumstances of this case"); *Voyageur*, 444 F. Supp. 2d at 194 n.7 (26 months); *Bookman*, 453 F.2d at 1264–66 (3 months); *Confed. Tribes v. United States*, 177 Ct. Cl. 184, 193 (1966) (4 months); *Belville*, 999 F.2d at 1001 (8 months); *Elkem Metals Co. v. United States*, 193 F. Supp. 2d 1314, 1322–23 (Ct. Int'l Trade 2002) (4.5 years). In *Voyageur*, this Court found that a one-year delay was timely in part because the Department began reviewing the decision to be reconsidered "in the middle of a change of the Administration, when senior-level officials were still being appointed to [the Department]." 444 F. Supp. 3d at 195. The time the Department took to temporarily rescind the Gaming Eligibility Determination here is even more reasonable, given that it began just two and-a-half months after a change in Administration. The Court should reject the Tribe's unsupported assertion the March 27 Letter was issued "well beyond the period of presumptive timeliness." Pl. Mem. 32.

Courts consider various factors when determining whether reconsideration is timely:

> (1) the complexity of the decision; (2) whether the decision was based on fact or law; (3) whether the agency acted according to its general procedures for review; (4) whether parties had relied upon the initial decision; (5) whether the agency acted in bad faith by advancing a pretextual explanation to justify reconsideration; (6) whether the agency provided notice of its intent to reconsider the initial decision; and (7) the probable impact of an erroneous agency decision absent reconsideration.

Voyageur, 444 F. Supp. 3d at 195 (listing factors outlined in *Belville*, 999 F.2d at 1001). The Tribe identifies "four circumstances" that it asserts weigh against a conclusion that the Department's reconsideration and temporary rescission was timely. Pl. Mem. 33. None supports the Tribe's cause.

Agency's general procedure for review. The Tribe first argues the Department did not comply with its general procedures for review. Pl. Mem. 33. This is incorrect. As stated above, the Secretary has broad authority to review and reconsider any prior decision, which is recognized by 43 C.F.R. § 4.5. Thus, the Department did not act contrary to its regulations. In direct contradiction to binding precedent, the Tribe argues that the Department should not be allowed to rely on its inherent authority to reconsider, Pl. Mem. 33. *See Voyageur*, 444 F. Supp. 3d at 193 (citing *Ivy Sports*, 767 F.3d at 86); *Nat. Res. Def. Council v. Regan*, 67 F.4th 397, 404 (D.C. Cir. 2023). The Court should deny the Tribe's invitation to constrain the Department's inherent authority when Congress has not acted to do so. *See Ivy Sports*, 767 F.3d at 86 ("Put more simply, our cases assume that Congress intends to displace an administrative agency's inherent reconsideration authority when it provides statutory authority to rectify the agency's mistake."); *New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008) ("Congress . . . undoubtedly can limit an agency's discretion to reverse itself.").

Legally cognizable interests. Next, the Tribe mistakenly asserts that the January 10 Decision conveyed legally cognizable property interests. Pl. Mem. 33–34. But the Trust Determination was not rescinded and the land remains in trust for the Tribe. As discussed above,

the Trust Determination did not create a property interest in the Gaming Eligibility Determination. *See* Section IV.B. And the Tribe cites no authority that notice of an agency's reconsideration or rescission holds any weight in the Court's timeliness consideration. *See* Pl. Mem. 35.

Pretext. The Tribe also fails to show that the Department's stated reason for the temporary rescission—ensuring that it considered the full evidence—is pretextual. Far from pretextual, the record reveals that the Department had justifiable reasons to temporarily rescind its prior decision while undertaking its reconsideration, including its valid concern that it did not consider all the evidence in issuing its Gaming Eligibility Determination, a decision which the Tribe acknowledges was "significant." Pl. Mem. 34. The Department's concern was reasonable, and it acted in a timely fashion to ensure it considers all the relevant evidence. The administrative record shows that immediately after the administration change, tribes, including Yocha Dehe, reached out to the Department to inform the Department that they had been told that submissions made during the remand would be considered. SV-0055. They also presented the Department with complaints challenging the January 10 Decision, giving the Department an opportunity to review their claims and determine that it was appropriate to rescind and reconsider the decision with additional evidence. An agency's legitimate concern overcomes any notion of pretext. *Belville*, 999 F.2d at 997; *Voyageur*, 444 F. Supp. 3d at 196–97.

The Tribe next argues that the March 27 Letter failed to explain how the additional evidence would be relevant to the Department's reconsideration, Pl. Mem. 34. But the Department's intent is reasonably discernable from the March 27 Letter—it wanted to give those other tribes the opportunity to express their concerns. That is sufficient. *See, e.g.*, *Animal Legal Def. Fund, Inc. v. Vilsack*, 237 F. Supp. 3d 15, 20–21 (D.D.C. 2017) ("But even if the agency did

not fully explain its decision, the Court may uphold it 'if the agency's path may reasonably be discerned.'" (quoting *Bowman*, 419 U.S. at 285–86).

Given the circumstances, the Department acted to temporarily rescind its Gaming Eligibility Determination within a reasonable time.

b. The March 27 Letter was not the result of improper political influence.

Plaintiff's argument that the March 27 Letter is arbitrary and capricious because of undue political influence fares no better. Plaintiff claims the March 27 Letter and decision to reconsider and temporarily rescind was the result of improper political interference from the representatives of other tribes. Pl. Mem. 35–41. The record, however, does not support that assertion.

Agency policymaking is "routinely informed by unstated considerations of politics, the legislative process, public relations, interest group relations, foreign relations, and national security concerns (among others)." *Dep't of Com. v. New York*, 588 U.S. 752, 781 (2019). "It is hardly improper for an agency head to come into office with policy preferences and ideas, discuss them with affected parties, sound out other agencies for support, and work with staff attorneys to substantiate the legal basis for a preferred policy." *Id*. at 783; *see also Sierra Club v. Costle*, 657 F.2d 298, 408 (D.C. Cir. 1981). Courts have refused to allow reconsideration "where the *sole* motivation was a policy reversal." *Voyageur Outward Bound Sch. v. United States*, No. 1:18-CV-01463 (TNM), 2021 WL 1929123, at *3 (D.D.C. May 13, 2021) (emphasis added). 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." *New York*, 588 U.S. at 781.

To determine whether there was undue political influence, the Court must consider the totality of the circumstances, including the agency's stated justification. The Court must always be mindful, as well, of the "presumption that agencies have properly discharged their official

duties unless there is 'clear evidence to the contrary.'" *Voyageur*, 2021 WL 1929123, at *4 (quoting *Latif v. Obama*, 677 F.3d 1175, 1178 (D.C. Cir. 2011)); *Stand Up for Cal! v. U.S. Dep't of Interior*, 410 F. Supp. 3d 39, 61–62 (D.D.C. 2019), *aff'd* 994 F.3d 616 (D.C. Cir. 2021).

Here, Plaintiff does not demonstrate that the Department issued the March 27 Letter solely for the purpose of reversing policy. *See Voyageur*, 2021 WL 1929123, at *4. The Department's March 27 Letter stated that it was concerned that relevant evidence had not been considered in the Department's Gaming Eligibility Determination. There is no question that (a) other tribes were interested in the decision and wanted to present additional evidence, and (b) that the Gaming Eligibility Determination was made without considering evidence submitted by those tribes. *See, e.g.*, SV-0004 (noting that on remand "the Department neither solicited nor considered any additional evidentiary materials from outside parties" with respect to the Gaming Eligibility Determination); SV-0055.

Plaintiff argues that the decision was "driven by outside political influence," Pl. Mem. 37, but the administrative record shows that the agency acted appropriately. As this Court held in *Voyageur*, "political pressure *triggering* a review is not, by itself, enough to invalidate a reversal." *Voyageur*, 2021 WL 1929123, at *3 (emphasis added). And "even if third parties had solely policy-based reasons for urging Interior to reconsider, that far from proves that Interior's ultimate decision was not a good-faith exercise . . . ." *Id.* at *4.

Plaintiff also misrepresents the evidence. The Tribe states that the Deputy Assistant Secretary did not request a briefing paper from his staff until March 18, 2025, implying that the agency did not consider the issue until then and relied solely on materials provided by the outside parties. Pl. Mem. 38. But the record shows that agency staff, including the Solicitor's Office,

had reviewed and considered the issue since late January. *See, e.g.*, SV-0058, 69, 73, 80 (Solicitor's Office review), 90–91 (Solicitor's Office background briefing memo).

This case is akin to *Voyageur*, where this Court found that the plaintiffs failed to demonstrate undue political influence. There, the Department reinstated a company's mining leases in a national forest one year after canceling those leases. *Voyageur*, 444 F. Supp. 3d at 187. As here, the agency's "reversal followed both a change in Administrations and a request from [the company] to meet with the new Secretary of the Interior." *Id.* at 196. In a motion to be relieved from the judgment, the plaintiffs presented materials showing that members of Congress and company representatives communicated with the Department to "highlight flaws" in a legal opinion "and lobby administration officials to reinstate the leases." *Voyageur*, 2021 WL 1929123, at *1. The Court considered the presumption of regularity and the agency's stated justification for its reconsideration and again held that the evidence did not demonstrate that the agency's stated reasons for reversing its decision were pretextual. *Id.* at *4.

The Court should find similarly here. There is no evidence that the Department's March 27 Letter was based on anything other than a desire to consider all relevant evidence pertaining to the Gaming Eligibility Determination. As in *Voyageur*, the outside parties "focused not on the adverse policy ramifications . . . but on the [alleged] *legal* deficiencies" of the agency's prior decision. *Id.* at *4. The outside parties identified numerous purported legal deficiencies in the January 10 Decision. SV-0055–57. The outside parties went so far as to provide the Department drafts of their complaints challenging the January 10 Decision under the APA before they filed lawsuits alleging that the Department's decision was legally deficient. SV-0238; SV-0446–606; SV-0612 (attaching Yocha Dehe and United Auburn complaints and indicating review with the Solicitor's Office). Those complaints include allegations that the Department erred by refusing

to consider relevant evidence. *See* Compl. ¶¶ 142–48, *Yocha Dehe*, No. 25-cv-867, Dkt. No. 1; Compl.¶¶ 75–76, 91–94, 120–23, *United Auburn Indian Cmty.*, No. 25-cv-873, Dkt. No. 1. They also contain allegations that the Department erred by refusing to consult with the tribes before reaching the January 10 Decision. Compl. ¶¶ 94, 130, 134–39, *United Auburn Indian Cmty.*, No. 25-cv-873.

And Scotts Valley cannot rely simply on an assumption that the outside parties were motivated solely by policy reasons; it still must prove that the Department did not act in good faith. *See Voyageur*, 2021 WL 1929123, at *4. The Department chose to receive additional evidence before issuing a decision and temporarily rescind the prior conclusion while it considers that additional evidence. In short, there is no basis to conclude that the Department's justification for the March 27 Letter was pretextual or the result of undue political influence, particularly given the presumption of regularity that accompanies agency action.

Plaintiff also argues that the Department considered factors not relevant to IGRA or the Part 292 regulations. Pl. Mem. 40. The Tribe states that the Department should have discussed "the three regulatory requirements for restored land—modern connection, temporal connection, or significant historical connection." *Id.* But the Department's decision to rescind the Gaming Eligibility Determination is intended to ensure that the Department considers all the evidence relevant to these factors. The Department's decision on reconsideration will analyze those factors; the letter announcing the reconsideration need not.

Plaintiff further argues that Part 292 does not require consideration of outside evidence. But neither does Part 292 prevent such evidence from being considered, as discussed more thoroughly below, in Section IV.C.2.c. As Plaintiff is aware, when the Department reached the negative Indian Lands Determination in 2019, it considered outside evidence. *See, e.g.,* Br. of

Appellee Scotts Valley Band of Pomo Indians at *16, *Scotts Valley Band of Pomo Indians v. U.S. Dep't of the Interior*, No. 21-5009, 2021 WL 1265225 (D.C. Cir. 2021) (noting that Yocha Dehe "submitted hundreds of pages of documents and argument" in the administrative process leading to the 2019 decision). Indeed, the Federal Defendants told the D.C. Circuit Court that Yocha Dehe lacked standing to intervene in that case, in part because "if the Department's decision is remanded, Yocha Dehe will have additional opportunities to submit relevant information or views in other proceedings." Fed. Appellees' Final Reply Br., *Scotts Valley*, 2021 WL 1265224, at *9. Thus, the record does not support Plaintiff's allegation that the Part 292 regulations prevent additional evidence from being considered.

Plaintiff's argument also assumes that the Department's decision on reconsideration will reverse the January 10 Decision. It would be premature to assume the outcome of a decision not yet made.

c. The Department is not implementing a new rule.

Scotts Valley argues that the March 27 Letter "sets up a new process for the restored lands determination." Pl. Mem. 15. This argument is wrong. The Department did not create a new process nor implement a new Part 292 process that conflicts with its regulations.

When agencies conduct informal adjudications, they may follow a specific process, but the APA does not prescribe a specific process for informal adjudications. *See* 5 U.S.C. § 555. Here, the Part 292 regulations implementing Section 2719 of IGRA set forth the process by which the Department considers requests from tribes seeking an opinion on whether the tribe can conduct class II and class III gaming activities on lands acquired in trust after October 17, 1988. *See* 73 Fed. Reg. at 29,361. But the Part 292 regulations do not prescribe a process for how the Department must handle submissions by parties other than the applicant, leaving the agency discretion in each case. Contrary to the Tribe's arguments, Pl. Mem. 17–18, 43, the Part 292

regulations do *not* provide for a closed process—the public may submit comments to a specific ILO opinion. 73 Fed. Reg. at 29,361.

In crafting IGRA, Congress neither required nor prohibited the Department from considering outside evidence in its restored lands inquiries. Naturally then, the Part 292 regulations do not prohibit the Department from considering evidence from the public. *See, e.g.*, 73 Fed. Reg. at 29,361 (noting that IGRA does "not reference an opportunity for public comment"). The Part 292 regulations acknowledge this and thus do not *require* public comment. The regulations, however, *permit* public comment, noting that "there are opportunities for public comment in other parts of the administrative process," including the process to take land into trust.[14] The regulations also provide that "the public may submit written comments that are specific to a particular lands opinion." *Id.* Thus, as the Tribe acknowledges, IGRA gives the Department discretion to consider outside evidence for these types of inquiries. *See* Pl. Mem. 33. Interested tribes' submissions are not only permissible but, in practice, are common. The Court should therefore reject Scotts Valley's argument that that the governing regulations prohibit third parties from participating in the restored lands inquiry, Pl. Mem. 18–19. Because the Department's regulations permit it to consider public comments, it acted reasonably and in accordance with law by inviting interested tribes to participate in the reconsideration process.

[14] GTL states that "the Department has previously made it very clear that it does not provide 'opportunity for public comment' for restored lands applications." GTL Br. at 22 (citing 73 Fed. Reg. at 29,361). GTL misrepresents the regulations and the cited Federal Register notice. Far from supporting GTL's statement, the Federal Register notice shows the opposite is true and public comment is permitted but not required.

d. The Tribe's reliance interests are not significant and do not render the March 27 Letter unlawful.

Nor did the Department err by not specifically calling out Scotts Valley's reliance interests. The Tribe cites to *Department of Homeland Security v. Regents of the University of California*, 591 U.S. 1 (2020), but the facts here differ from those in that case. In *Regents*, the Supreme Court reviewed the rescission of a five-year-old immigration program known as the Deferred Action for Childhood Arrivals ("DACA") program by the Acting Secretary of Homeland Security. *Id*. at 1–3. There, "the Attorney General advised [the agency] to rescind DACA, based on his conclusion that it was unlawful." *Id*. The Court held the Acting Secretary acted arbitrarily and capriciously in deciding to rescind DACA, a multi-year program that provided work authorization, eligibility for various federal benefits, and protection from removal for certain undocumented individuals who came to the United States as children. *Id.* at 32–33. In particular, the Court concluded the agency failed to consider the DACA recipients' reliance interests and, in doing so, failed to consider alternative means of winding down the DACA program. *Id.* Neither *Regents*, nor the earlier Supreme Court cases *Encino Motors* or *Fox*, *see* Pl. Mem. 41–43, stand for the principle that agencies must *always* account for reliance interests. *Regents*, 591 U.S. at 32; *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 212 (2016)); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 538 (2009).

This case does not involve a rescission of a "longstanding policy." *Regents*, 591 U.S. at 30 (instructing that an agency should recognize that longstanding policies may have "engendered serious reliance interests that must be taken into account" (quoting *Encino Motorcars*, 579 U.S. at 212). The Department temporarily rescinded a recent gaming eligibility determination during the pendency of its reconsideration process to assess whether it considered all the evidence. SV-0632 (March 27 Letter). The March 27 Letter acknowledged this change and explained that "the

Secretary is concerned that the Department did not consider additional evidence submitted after the 2022 Remand." SV-0632 (March 27 Letter); *see FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 538 (2009). The Department also did not conclude in its March 27 Letter that the Vallejo Site is ineligible for gaming.

Though the Department did not explicitly consider the Tribe's reliance interests, the record illustrates that the Department acted swiftly so that the Tribe or any other interested party did not continue to rely on a decision the Department is reconsidering. *See* SV-238 (March 27 Letter). Even so, the Tribe fails to prove sufficient reliance interests rendering the Department's rescission arbitrary or capricious. To begin, even setting aside the Department's ability to reconsider its own decision, it was virtually certain that the January 10 Decision would be challenged, given the previous litigation and opposition to Scotts Valley's proposal. *See, e.g.*, App'x O to Final EA/FONSI at pdf p. 259–453, found at https://www.scottsvalleycasinoea.com/wp-content/uploads/2025/01/Appendix-O-Response-to-Comments.pdf (last visited Aug. 22, 2025); *see also* GTL Br. 17. For instance, Yocha Dehe attempted to intervene in the earlier litigation over the Department's 2019 decision to protect its interests. *See Yocha Dehe v. U.S. Dep't of the Interior*, 2 F.4th 427 (D.C. Cir. 2021). There are three pending cases challenging the January 10 Decision. *See* 1:25-cv-867; 1:25-cv-873; 1:25-cv-1088. Given that litigation always presents uncertainty, relying on an agency action that was virtually certain to be challenged in court is unreasonable.

The Tribe further fails to prove sufficient reliance to render the Department's rescission unlawful. The land remains in trust. The March 27 Letter did not invalidate any contracts, prohibit the Tribe from seeking financing, or bar project planning. Nor has the Tribe shown that

its contracts are in danger, that it is on the verge of having to pay contract damages, or that it will suffer any other harm based on the March 27 Letter.

GTL argues that Scotts Valley and GTL relied on the January 10 Decision because it allows Scotts Valley to conduct Class II gaming without a Tribal-State gaming compact. GTL Br. at 24. This is not an argument raised by Scotts Valley, and the Court should not address it on that basis. *See Huerta*, 792 F.3d at 151.

D. Any relief would be limited.

As explained above, summary judgment should be entered in favor of the Department. But even if that were not the case, the remedy here would be limited. Scotts Valley's requested remedy is that the Court "set aside" the March 27 Letter. Pl. Mem. 44. To the extent that Scotts Valley is intending such a request to effectively reset the world as it existed on March 26, it should be rejected. As explained above, those portions of the March 27 Letter initiating reconsideration of the Gaming Eligibility Determination are an implementation of the Department's inherent authority. Scotts Valley has not even attempted to justify what would be an extraordinary injunction prohibiting an agency from exercising that discretion. At a minimum, the Department's reconsideration process should be allowed to proceed. *See The Last Beef, LLC v. Dudas*, 506 F.3d 333, 340 (4th Cir. 2007) (citing *Citizens Against the Pellissippi Parkway Extension, Inc. v. Mineta*, 375 F.3d 412, 416 (6th Cir. 2004)).

The same is largely true with that portion of the March 27 Letter that temporary rescinded the Gaming Eligibility Determination. The Department is already undertaking further administrative proceedings, so any remand of the temporary rescission is effectively underway. Elsewhere, Scotts Valley has asked for the Court to reinstate the Gaming Eligibility Determination. Second Am. Compl. at 27. But under the APA, courts are to remand to the agency for further consideration without directing how the agency should act. *Fla. Power &*

Light Co. v. Lorion, 470 U.S. 729, 744 (1985). The Tribe has not attempted to explain how vacatur would lead to automatic reinstatement of the prior Eligibility Determination. And in any event, it is unlikely the supposed error would be one that would justify vacatur in the first place. *See Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 151 (D.C. Cir. 1993) (finding remand without vacatur appropriate when "there is at least a serious possibility that the [agency] will be able to substantiate its decision on remand").

V. CONCLUSION

In conclusion, the Department acted appropriately when it issued the March 27 Letter temporarily rescinding the Gaming Eligibility Determination and reconsidering its determination with additional evidence. The March 27 Letter was not a final agency action. In addition, the Department did not violate the Tribe's due process rights and or act arbitrarily, capriciously, or otherwise not in accordance with law. The Department respectfully requests that the Court deny Scotts Valley's motion for summary judgment and grant the Department's cross-motion.

Respectfully submitted this 22nd day of August, 2025.

ADAM R.F. GUSTAFSON
Acting Assistant Attorney General

s/ Devon Lehman McCune
Devon Lehman McCune
Senior Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
999 18th St., N. Terrace, Suite 600
Denver, CO 80202
Phone: (303) 358-8981
devon.mccune@usdoj.gov

s/ Amber Dutton-Bynum
Amber Dutton-Bynum
(DC Bar No. 1778319)
Trial Attorney

U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
P.O. Box 7611
Washington, D.C. 200044-7611
Phone: (202) 330-2649
Amber.Dutton-Bynum@usdoj.gov

Attorneys for Defendants