IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTTS VALLEY BAND OF POMO INDIANS,
2727 Syston Drive, Concord, CA 94520

Plaintiff,

v.

DOUGLAS BURGUM, in his official capacity as Secretary of the U.S. Department of the Interior;
1849 C Street, NW, Washington, D.C. 20240

SCOTT DAVIS, in his official capacity as Senior Advisor to the Secretary of the U.S. Department of the Interior,
1849 C Street, NW, Washington, D.C. 20240;

and

UNITED STATES DEPARTMENT OF THE INTERIOR,
1849 C Street, NW, Washington, D.C. 20240

Defendants.

Case No. 1:25-cv-00958-TNM

BRIEF OF *AMICUS CURIAE* UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION AND SUMMARY OF ARGUMENT

The claims brought by Scotts Valley Band of Pomo Indians ("Scotts Valley") are no more successful on summary judgment than they were at the preliminary injunction stage. Even after it had the opportunity to amend its complaint, Scotts Valley remains unable to articulate—much less substantiate with evidence—a valid basis for preventing the Department of the Interior ("Interior") from exercising its inherent right to reconsider.

It is beyond dispute that Interior has authority to reconsider decisions such as the January 10, 2025 Indian Lands Opinion ("January 10 ILO") regarding Scotts Valley's gaming eligibility on trust land in Vallejo, California (the "Vallejo Site"). Case law in this Circuit also makes clear that exercising that authority is itself a non-final agency action, and thus unreviewable. That Interior's March 27, 2025 letter announcing reconsideration (the "March 27 Letter") also referred to "rescission" is immaterial under this line of cases and does not make "rescission" a separate form of agency action. Interior's "rescission" is simply an acknowledgment of a potential consequence of reconsideration—that the agency could, after considering the relevant evidence, issue a decision that is substantively different from the January 10 ILO.

Further, even if the March 27 Letter is reviewable at least in part, the agency's action was not arbitrary, capricious, or otherwise unlawful. Again, Interior has the inherent authority to engage in reconsideration. And Interior's March 27 Letter—issued less than three months after the January 10 ILO amidst a concurrent change in administration and agency leadership—was timely and proper based on every factor this Circuit has deemed relevant to that analysis. ***First***, the March 27 Letter responded to a complex underlying decision, as the January 10 ILO was the product of years of contentious administrative proceedings, including multiple prior decisions ***rejecting*** Scotts Valley's gaming applications in thorough and well-reasoned opinions. ***Second***,

the March 27 Letter followed Interior's normal procedures. ***Third***, Scotts Valley has not identified, much less substantiated, any cognizable reliance or property interests resulting specifically from the January 10 ILO. Nor could it, given that, by Scotts Valley's own prior admission, the January 10 ILO did not create any entitlement to proceed with gaming, or even an imminent likelihood of gaming taking place. ***Fourth***, Scotts Valley cannot point to any evidence of pretext in the March 27 Letter. On the contrary, the administrative record repeatedly demonstrates just the opposite: genuine concern with the same irregularities that resulted in *amicus* United Auburn Indian Community of the Auburn Rancheria ("UAIC") suing the Defendants for issuing the January 10 ILO. And ***fifth***, the negative impact of allowing the January 10 ILO to stand, without at least engaging in a reconsideration process, is considerable, in particular for the affected tribal *amici*.

The same analysis eliminates any risk of a due process violation, or indeed even the existence of a threshold property right capable of being infringed by Interior's March 27 Letter. Scotts Valley's due process claim therefore fails as well. Summary judgment should be entered in favor of Defendants and against Scotts Valley, and the ordinary reconsideration process announced in the March 27 Letter should be allowed to proceed unhindered.[1]

ARGUMENT[2]

I. THE MARCH 27 LETTER WAS NOT A FINAL AGENCY ACTION

Scotts Valley lacks a cause of action under the Administrative Procedure Act ("APA") because the March 27 Letter that forms the basis of its claims is not "final agency action."

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[1] This process is already underway. Tribal *amici* submitted evidence to Interior. Scotts Valley also had the opportunity to submit evidence to Interior.

[2] UAIC and the other tribal *amici* have briefed the factual and procedural history of this dispute on several occasions. *See* ECF 15-1 at 2-8; ECF 55-1 at 1-2. UAIC incorporates that briefing by reference rather than repeating it here.

5 U.S.C. § 704; *Trudeau v. Fed. Trade Com'n*, 456 F.3d 178, 185 (D.C. Cir. 2006). Case law in this Circuit is clear that notices of reconsideration like the March 27 Letter are necessarily non-final and therefore not subject to review. The March 27 Letter is advance notice of a process that Scotts Valley was invited to participate in, which will result in a decision that Interior has yet to make. Scotts Valley's claims are premature.

A. Reconsideration is non-final and unreviewable.

The March 27 Letter was not a final agency action subject to review under the APA. Two conditions must be met for agency action to qualify as final and thus subject to judicial review. "First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). "[S]econd, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Id.* at 178 (citations omitted). Grants of reconsideration like the March 27 Letter simply do not satisfy the *Bennett* test under the case law of this Circuit. The March 27 letter initiated a process; it did not conclude one.

"In assessing whether a particular agency action qualifies as final for purposes of judicial review, [the D.C. Circuit] and the Supreme Court ha[ve] looked to the way in which the agency subsequently treats the challenged action." *Sw. Airline Co. v. U.S. Dep't of Transp.*, 832 F.3d 270, 275 (D.C. Cir. 2016). Where an agency decision entails "[o]ngoing agency review," the agency order is "non-final and judicial review premature." *Marcum v. Salazar*, 694 F.3d 123, 128 (D.C. Cir. 2012). This principle has natural application to the reconsideration process. An agency grant of reconsideration "creates the possibility (but not the certainty) of an adjustment in the underlying [decision], depending on the result of the ensuing proceedings." *California v. EPA*, 940 F.3d 1342, 1351 (D.C. Cir. 2019). The decision to grant reconsideration "merely begins a process that could culminate in no change" to a decision, and "is not reviewable final

agency action." *Id.* (quotation marks omitted).

So it is here. Interior's reconsideration is "pend[ing]," interested parties have submitted evidence, and Interior will ultimately issue—but has not yet issued—a final decision. ECF 1-2 at 2. This fact pattern alone precludes judicial review under *Bennett*. *See California*, 940 F.3d at 1351 (finding action non-final where EPA "announced its intention to revisit the information collected in . . . earlier proceedings, along with new information gathered since," to reach a new determination). The *outcome* of reconsideration will presumably be a final decision of some kind, subject to judicial review if challenged. But as Scotts Valley would have it, this Court should also entertain *midstream* judicial review, before Interior has reviewed the evidence and made a decision. *See MediNatura, Inc. v. Food & Drug Admin.*, 998 F.3d 931, 938 (D.C. Cir. 2021) (finding agency action non-final where and judicial review "premature because it may be 'rendered unnecessary'" if the plaintiff convinces the agency to adhere to its original decision); *cf. Int'l Telecard Ass'n v. F.C.C.*, 166 F.3d 387, 388 (D. C. Cir. 1999) (holding that seeking "simultaneous review and agency reconsideration" is "an invitation to waste judicial resources"). No authority supports that approach.[3]

B. Scotts Valley's challenge to "rescission" is misplaced.

Scotts Valley latches onto Interior's reference to "temporary rescission," characterizing that aspect of the March 27 Letter as a distinct final decision, even if the reconsideration itself is not. ECF 96-1 at 10 & n.4. This separate challenge to "rescission" is unavailing. In practice, an

[3] Scotts Valley's reliance on *U.S. Army Corps of Engineers v. Hawkes Co.*, 578 U.S. 590, 598 (2016) is unhelpful to it. *See* ECF 96-1 at 12-13. *Hawkes* concerned an Army Corps "jurisdictional determination" under the Clean Water Act—the term of art for a formal determination that property does or does not contain "waters of the United States." 578 U.S. at 595. Jurisdictional determinations "*are defined by regulation*" as the Army Corps's "final agency action." *Id.* (emphasis added). They are "binding for five years." *Id.* They bear no resemblance to Interior's notice of reconsideration, which advised that an earlier decision is under review.

agency's exercise of its authority to reconsider entails notice that a prior decision is subject to change, and has limited reliance value, until reconsideration is complete and a new final decision issues. Courts recognize this practical reality and have therefore accepted "temporary rescission" as a practical consequence of an agency's inherent authority to reconsider its prior decisions. *See, e.g.*, *Dun & Bradstreet Corp. Found. v. U.S. Postal Serv.*, 946 F.2d 189, 192-94 (2d Cir. 1991) (describing the Postal Service's authority to "rescind its decisions" and "revers[e] [an] earlier decision and rescind[] [prior] approval," and to "reconsider its interim or even its final decisions"); *Cal. Dep't of Health Servs. v. Babbitt*, 46 F. Supp. 2d 13, 19 (D.D.C. 1999) (stating that the Secretary "rescinded" its prior decision), *vacated in part on other grounds sub nom. US Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20 (D.C. Cir. 2000). There is no reason for a different result here. The effect of the March 27 Letter was to advise that the January 10 ILO was under review and would be the subject of a *forthcoming* final decision. For that reason, the March 27 Letter also advised, logically and sensibly, that no party should presume that the January 10 ILO would remain substantively the same.

The court found a strikingly similar reconsideration letter non-final in *Lannett Company v. United States Food and Drug Administration*, 300 F. Supp. 3d 34 (D.D.C. 2017). There, the FDA initially approved a generic drug for marketing after determining, mistakenly, that the drug manufacturer was compliant with industry manufacturing practices. After realizing its mistake, the FDA informed Lannett that it was "correcting its error," "*rescinding* the approval," and placing the application "in pending status." *Id.* at 41 (emphasis added). As here, Lannett latched onto the agency's temporary "rescission" of approval, contending that the "rescission" language signaled the reviewable consummation of an agency decisionmaking process. *Id.* at 43. The court rejected this view as "too narrow . . . to accept," noting that Lannett improperly "focuse[d] solely

on the rescission of the approval." *Id.* As the court explained, "although the FDA did rescind Lannett's . . . approval, the FDA expressly advised Lannett that its [application] was 'now in pending status.'" *Id.* at 44. The FDA also informed Lannett that it could submit an amendment to its application, and that the FDA would consider that amendment. *Id.* As reconsideration was pending, the temporary rescission "did not represent the conclusion of [the FDA's] decision-making process regarding the review process for Lannett's [application] or its ultimate decision to either approve or deny Lannet's [application]." *Id.*

So too here. After becoming aware that Interior did not consider additional evidence potentially material to the January 10 ILO, Interior notified the interested parties that it was rescinding and reconsidering the defective January 10 ILO. Interior also invited the interested parties, including Scotts Valley, to take part in reconsideration by submitting evidence. ECF 1-2. Because reconsideration is pending, Interior advised Scotts Valley not to rely on the underlying ILO, as it is possible that the review of additional evidence could result in a substantively different final decision. As in *Lannett*, the temporary rescission does not give rise to an independent final agency action. *Id.*; *see also Fort Sill Apache Tribe v. Nat'l Indian Gaming Comm'n*, 317 F. Supp. 3d 504, 514 (D.D.C. 2018) ("If, for any reason [an] agency reopens a matter and, after reconsideration, issues a new and final order, that order is reviewable on the merits, even though the agency merely reaffirms its original decision" (quoting *Sendra Corp. v. Magaw*, 111 F.3d 162, 167 (D.C. Cir. 1997)).

In its motion, Scotts Valley relies on *Natural Resources Defense Council v. Wheeler*, 955 F.3d 68, 78 (D.C. Cir. 2020), for the proposition that an "interim" decision should be deemed final even if it may be subject to future change. *See* ECF 96-1 at 11-12. But *Wheeler* is unhelpful to Scotts Valley's position. *Wheeler* did not concern an agency's notice of reconsideration. It

considered a final EPA rule that all parties and intervenors ***agreed*** constituted "the culmination of th[e] agency's consideration of an issue." *Wheeler*, 955 F.3d at 78. The *Wheeler* Court then considered and rejected the argument—advanced by no party, but offered by the court as a hypothetical—that the EPA's rule could be deemed a non-final "interim" decision because further rulemaking could, "at some point," "displace[]" it. *Id.* As the court concluded, even in that scenario, the supposedly "interim" rule would still be final, "as long as th[at] interim decision is not itself subject to further consideration by the agency." *Id.* That scenario bears no resemblance to the situation here, where the March 27 Letter announced a "pend[ing]" reconsideration process that necessarily entails further review by the agency. ECF 1-2 at 2.

II. THE MARCH 27 LETTER WAS NOT ARBITRARY AND CAPRICIOUS.

Scotts Valley's claims fail even if the March 27 Letter is deemed reviewable. The March 27 Letter was not arbitrary and capricious and did not violate the APA. On the contrary, it is nothing more than an ordinary and valid exercise of Interior's authority to reconsider an earlier decision, squarely in line with Circuit precedent "unequivocally hold[ing] that agencies are empowered to reopen administrative processes." *Fort Sill Apache Tribe*, 317 F. Supp. 3d at 514.

A. Interior had the inherent right to reconsider the January 10 ILO.

Federal agencies have an inherent right to reconsider their prior decisions. *Id.* This inherent right extends to Interior and is routinely exercised in the context of decisions and opinions affecting Indian tribes. For example, in a series of decisions spanning over a decade and multiple different administrations, Interior issued, withdrew, replaced, and then reinstated its opinions on how to apply the term "under federal jurisdiction" for purposes of the Indian Reorganization Act. *See* Mar. 12, 2014 M-Opinion 37029; Mar. 9, 2020 M-Opinions 37055 & 37054; Apr. 27, 2021 M-Opinion 37070. Interior is once again reconsidering this opinion now. *See* Feb. 28, 2025 Mem. Regarding M-Opinion Review. There is nothing unusual or improper

about this process, which occurs both within and across changes in agency leadership.

Interior may also review and reconsider issues pertaining to one or more specific tribes, as with an ILO. For example, in a mineral rights dispute between the Three Affiliated Tribes on the Fort Berthold Reservation and the State of North Dakota, the outgoing administration issued an opinion favoring the Tribes' position. *See* Jan. 18, 2017 M-Opinion 37044. Roughly a year and a half later, the next administration reversed that opinion and replaced it with one favoring North Dakota. *See* June 8, 2018 M-Opinion 37052; May 26, 2020 M-Opinion 37056. That opinion was then withdrawn and replaced by the next administration over the subsequent two years. *See* Mar. 19, 2021 M-Opinion 37066; Feb. 4, 2022 M-Opinion 37073.[4]

Scotts Valley is no stranger to this principle and has ***itself*** sought reconsideration in connection with the present dispute. In its 2019 ILO, Interior rejected Scotts Valley's request for gaming approval on the Vallejo Site because Scotts Valley lacks a significant connection to that land. Scotts Valley then ***twice*** asked Interior to reconsider, alleging "missteps in the decision-making process," and invoking Interior's "broad discretion to reconsider its prior decisions." *See* ECF 55-7 at 1 (citing 5 U.S.C. § 701 *et seq.* and *Macktal v. Chao*, 286 F.3d 822, 826-26 (5th Cir. 2002)); ECF 55-8. Needless to say, reconsideration is not a one-way ratchet favoring whatever outcome gets Scotts Valley closer to opening an off-reservation casino. Reconsideration is an inherent and unobjectionable power of the agency.

B. The March 27 Letter was timely.

The D.C. Circuit has "many times held that an agency has the inherent power to reconsider and change a decision if it does so within a reasonable period of time." *Mazaleski v.*

[4] This is far from the only such example. *See, e.g.*, Dec. 22, 2017 M-Opinion 37049 (withdrawing and replacing M-37036, which found that BLM had discretion to grant or deny a lease renewal application).

Treusdell, 562 F.2d 701, 720 (D.C. Cir. 1977); *see also Albertson v F.C.C.*, 182 F.2d 397, 399 (D.C. Cir. 1950); *Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014) (collecting cases).[5] Interior notified Scotts Valley of its intent to reconsider 76 days—less than three months—after issuing the January 10 ILO. That notice was timely, particularly here, where it occurred in the midst of a change in administration. *See Voyageur Outward Bound Sch. v. United States*, 444 F. Supp. 3d 182, 192-97 (D.D.C. 2020), *vacated on other grounds*, 2022 WL 829754 (D.C. Cir. 2022) (finding a one-year period reasonable where "Interior began reviewing the [decision] in the middle of a change of the Administration, when senior level-officials were still being appointed"); *see also, e.g.*, *Mazaleski*, 562 F.2d at 720. Scotts Valley cannot point to any case in which a court found reconsideration untimely on a 76-day timeframe.

The factors laid out in *Belville Mining Company v. United States*, 999 F.2d 989, 1001-02 (6th Cir. 1993), confirm that no genuine dispute exists as to timeliness in this case. *See also Voyageur*, 444 F. Supp. 3d at 192-97 (applying the *Belville* factors to assess the propriety of an agency reconsideration). These factors include (1) the complexity of the decision, (2) whether the agency acted in accordance with its general procedures, (3) whether legally cognizable property interests had arisen through the initial decision or whether the plaintiff had acted in reliance on the initial decision, (4) whether the agency's justification for reconsideration was pretextual, (5) the probable impact of an erroneous agency decision absent reconsideration; and

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[5] An agency's inherent reconsideration authority may also be limited where there is a statutory prohibition against reconsideration or where Congress "has provided a mechanism of rectifying mistaken actions." *Ivy Sports*, 767 F.3d at 86 (quoting *Am. Methyl Corp. v. EPA*, 749 F.2d 826, 835 (D.C. Cir. 1984); *see also Albertson*, 182 F.2d at 399. Neither condition applies here, and Scotts Valley does not contend otherwise. *See also* D. Bress, *Administrative Reconsideration*, 91 Va. L. Rev. 1737, 1743 (2005) ("Nearly every federal court that has addressed the issue of reconsideration has adopted the default presumption that in the absence of specific statutory or regulatory authority, administrative agencies engaged in adjudication possess the inherent power to reconsider their own final decisions.").

(6) whether the agency gave notice of reconsideration. *See Belville*, 999 F.2d at 1001.[6] All factors favor timeliness here.

1. The decision was complex.

Although Scotts Valley claims that the "reconsidered decision is relatively simple" because it "question[s] only the Department's discretionary decision at the time of the 2022 remand to not open the historical record," Scotts Valley once again misapprehends the complexity inquiry. ECF 96-1 at 33.[7] What matters is not whether an error identified in connection with reconsideration is described as complex, but whether the underlying decision is complex, such that any lag in acting on reconsideration is reasonably justifiable. *See Voyageur*, 444 F. Supp. 3d at 195 (assessing the complexity of the decision subject to reconsideration).

On that count there is no dispute that the January 10 ILO's procedural, legal, and factual complexities all cut in favor of timeliness. The January 10 ILO was the product of a yearslong administrative process with a voluminous administrative record presenting complex and hotly disputed issues of statutory interpretation and administrative law. Interior's consideration of whether Scotts Valley met the trust acquisition factors and the "restored tribe" and "restored lands" criteria under Parts 292 and 151 resulted in a 30-page, single-spaced opinion with a 40-page appendix. ECF 1-1. Indeed, Scotts Valley has itself conceded that "the issues underlying the Department's January 10, 2025 final agency action [were] complex." ECF 3-1 at 26. This factor favors timeliness. *See Voyageur*, 444 F. Supp. 3d at 195 (finding that complexity favored

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[6] The factors are occasionally described in slightly different but substantively overlapping terms. *See, e.g.*, *Voyageur*, 444 F. Supp. 3d at 195.

[7] In its preliminary injunction briefing, Scotts Valley mistakenly focused its complexity analysis on the March 27 Letter, not the January 10 ILO. EFC 3-1 at 25-26. Scotts Valley commits a similar analytical error here.

timeliness where Interior needed to assess a 13-page "detailed and exhaustive" opinion involving "careful review" of leases, lease renewals, and "thousands of pages of historical documents").

2. Interior undertook reconsideration in accordance with its general procedures.

The March 27 Letter provides that Interior undertook reconsideration pursuant to 43 C.F.R. § 4.5. ECF 1-2. That regulation restates the Secretary's broad power to review and reconsider any decision of the agency. It provides in relevant part:

> Nothing in this part may deprive the Secretary of ***any power*** conferred upon the Secretary by law including:
>
> (1) The authority to take jurisdiction at any stage of any case before any employee of the Department, including any judge or other presiding officer of OHA, and render the final decision in the matter after holding such hearing as may be required by law; and
>
> (2) The authority to review any decision of any employee of the Department, including any judge or other presiding officer of OHA, or to direct any such employee or employees to reconsider a decision[.]

43 C.F.R. § 4.5(a) (emphasis added). Section 4.5 does not purport to limit the Secretary's power in any way. To the contrary, by its plain terms section 4.5 is non-exhaustive: it reserves for the Secretary "any power" conferred by law, which necessarily includes the Secretary's well-established "inherent" power to reconsider the agency's prior decisions. *See Ivy Sports*, 767 F.3d at 86 (finding that the FDA possessed inherent reconsideration authority under the Food, Drug, and Cosmetic Act despite the Act's lack of an express reconsideration provision). Scotts Valley's contention that Interior should not be allowed to "rely[] on claimed inherent authority to reconsider" does not square with Section 4.5's non-exhaustive language and this Circuit's case law. And it rings particularly hollow given that Scotts Valley itself invoked Interior's "broad" authority when reconsideration suited it in the past. *See* ECF 55-7; ECF 55-8.

The March 27 Letter appropriately relied on 43 C.F.R. § 4.5 and is consistent with

Interior's historical practice of reconsidering potentially erroneous agency decisions.[8] This factor also favors timeliness.

3. Scotts Valley cannot identify any reasonable reliance or legally cognizable property interest specifically tied to the January 10 ILO.

As with its motion for a preliminary injunction, Scotts Valley cannot point to any reasonable reliance on the January 10 ILO or any detrimental impact to a legally cognizable property interest specifically tied to reconsideration.

As an initial matter, Scotts Valley cannot claim any reasonable reliance based the January 10 ILO because it is known, based on years of experience and prior litigation, that Scotts Valley's casino project is vigorously contested by affected tribes, who have repeatedly and publicly stating their willingness to defend their rights in court. Scotts Valley cannot reasonably have presumed that the January 10 ILO would proceed unchallenged and remain intact in the weeks after it was issued. *See Bell Atlantic Tel. Cos. v. F.C.C.*, 79 F.3d 1195, 1207 (D.C. Cir. 1996) (finding reliance interests unreasonable where an issue had long been in dispute); *Voyageur*, 444 F. Supp. 3d at 196 (finding that plaintiffs "unreasonably relied on a decision actively being challenged").

Furthermore, even if Scotts Valley could have relied on the January 10 ILO, it offers no evidence that it did. After months of litigation, Scotts Valley's alleged reliance amounts to just two nearly identical paragraphs, ECF 96-1 at 3, 42, which are nothing but an abridged

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[8] Scotts Valley also suggests that because the January 10 ILO can be challenged in court, it should somehow be outside the reach of Interior's reconsideration power. ECF 96-1 at 33. But whether *third parties* can challenge an Interior decision has nothing to do with the *Secretary's* independent authority to reconsider. Scotts Valley also suggests, without authority, that the Secretary may not reconsider a decision made by a predecessor, but only a pending action under consideration by a subordinate. ECF 96-1 at 30. Again, contrary examples abound. *See supra* Section II.A. And the case law is plainly to the contrary, as the "power to reconsider is inherent in the power to decide." *Ivy Sports Med.*, 67 F.3d at 86 (quotation marks omitted).

restatement of the same interests that failed to support a preliminary injunction. *Compare* ECF 3-1 at 27-29, 41 *with* ECF 96-1 at 3, 42. They are:

1. That Scotts Valley entered into unspecified contracts with third parties, "including for infrastructure work related to water and wastewater systems, environmental analysis, and related technical studies," and that it authorized the payment of $1,889,688 in "project related invoices" under these contracts "and other agreements." *See* ECF 96-1 at 3, 42.

2. That Scotts Valley presented the City of Vallejo with a reimbursement agreement related to its costs to "evaluate and analyze potential impacts and proposed financial payments." *Id.*

3. That Scotts Valley commenced negotiations with the California Governor's Office for a class III gaming compact. *Id.*

4. That Scotts Valley "initiated the process" before the National Indian Gaming Commission ("NIGC") to obtain approval of an amended tribal gaming ordinance, which NIGC later approved. *Id.*

These purported reliance interests fall apart on the slightest scrutiny.

Contracts. Although Scotts Valley has repeatedly cited the "contracts" it supposedly entered with third parties, Scotts Valley has yet to provide any evidence of these contracts, let alone describe them with specificity. These barebones allegations are insufficient at summary judgment. *See Solenex LLC v. Bernhardt*, 962 F.3d 520, 529 (D.C. Cir. 2020) (holding that "the harm occasioned must be specifically identified, reasonably incurred, and causally tied" to the decision at issue). Further, as to the assertion that Scotts Valley authorized nearly $2 million in "project related invoices," Scotts Valley has never provided these invoices, despite the fact that such invoices would be readily obtainable. *See Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 722 (D.C. Cir. 2016) (finding that "merely mentioning the 'millions of dollars' allegedly spent in reliance upon a permit" insufficient "to preserve an argument that EPA must weigh those reliance costs against environmental harms"). Tellingly, the declaration referring to this expenditure is careful ***not*** to ascribe it to contracts entered after January 10, in reliance on the

January 10 ILO. *Compare* ECF 3-2 at ¶ 12 (referring to contracts entered since January 10) *with id*. at ¶ 13 (referring to post-January 10 contracts "and other agreements"). And the only contract described with any specificity whatsoever is a ***November 2, 2024*** agreement between Scotts Valley and GTL Properties entered into more than two months before the January 10 ILO. ECF 3-1 at 16. Any supposed reliance associated with contractual commitments is unsubstantiated and unconnected to the January 10 ILO. *See Solenex*, 962 F.3d at 529.

Reimbursement Agreement. Like the loan agreement, the "reimbursement agreement" on which Scotts Valley relies was entered into long before the January 10 ILO—on November 22, 2024, as part of a separate "cooperative agreement." ECF 55-2 at ¶ 3; ECF 55-3 at 4 ("[Scotts Valley] agrees to enter into a Reimbursement Agreement to reimburse the City for all costs and expenses incurred by the City in connection with the technical expert analysis . . . ."). Further, the November 22 cooperative agreement was not tentative or somehow conditioned on later events, as confirmed by the inclusion a waiver of sovereign immunity to ensure enforceability. ECF 55-2 at ¶¶ 3-6; ECF 55-3 at 9; ECF 55-4 to 55-6. Again, there is no valid reliance interest.

Compact Negotiations. Although Scotts Valley asserts that it initiated negotiations with the State of California after January 10, 2025, the first actual compact negotiation session did not take place until March 27—***after*** the *amici* tribes sued to vacate the January 10 ILO. Again, Scotts Valley's actions undertaken after *amici* filed their lawsuits do not qualify as reasonable reliance interests. Moreover, Scotts Valley has identified no harm associated with its initiation of negotiations. Nothing indicates that negotiations are permanent halt. And as Scotts Valley strenuously maintained when seeking to prevent the tribal *amici* from participating in this case as intervenors, compact negotiations are just one of countless preconditions to actually moving forward with gaming—and even then the negotiation is lengthy and uncertain. *See* ECF 31 at 24-

25, 31 (noting that "[t]his negotiation process is inherently uncertain," and that "the State retains discretion to negotiate or withhold agreement, and the Secretary must approve the compact for it to be effective"). As Scotts Valley knows, it had no right to engage in class II or class III gaming at the Vallejo Site as a result of the January 10 ILO. Nothing about that status has changed since. Compact negotiations—even execution of a compact—would not provide it that right, given that legislative and executive review and approval are still required at both state and federal levels before gaming may take place. *See* Cal. Const. art. IV, § 19(f) (subjecting gubernatorial compact negotiations to ratification by the state legislature); 40 C.F.R. § 1505.3 (requiring that Scotts Valley adhere to enforceable environmental mitigation requirements); ECF 1-1 at 22-23, 61-72 (setting forth Scotts Valley's mitigation obligations); 25 C.F.R. § 293.4(a) (requiring secretarial review and approval of all compacts); 25 U.S.C. § 2710(d)(8) (governing compact approval by the Secretary); 25 U.S.C. § 2710(d)(9) (requiring that the tribe submit a management contract to the NIGC for approval). A temporary pause in compact negotiations provides no evidence of either detrimental reliance or injury to a cognizable property right.

NIGC Gaming Ordinance. Finally, Scotts Valley notes that the NIGC has approved its gaming ordinance. But this isn't relevant evidence of anything at all. Scotts Valley has had an approved gaming ordinance since 1996. ECF 47-1 at 3. It then submitted an amendment to that ordinance that was not site-specific—meaning that it did not refer specifically to the Vallejo Site. *Id.* And NIGC approved that ordinance. *See id.* at 2. Nothing about that sequence of events shows any meaningful reliance on the January 10 ILO to Scotts Valley's detriment. Further, NIGC approval of a gaming ordinance—***even if*** site-specific and expressly conditioned on the January 10 ILO—would not entitle Scotts Valley to engage in gaming on the Vallejo Site. *See* 25 U.S.C. § 2710(d)(1)(C); Cal. Const. art. IV, § 19(f); 40 C.F.R. § 1505.3; 25 C.F.R. § 293.4(a); 25

U.S.C. § 2710(d)(8); 25 U.S.C. 2710(d)(9). There is therefore no relevant, cognizable right to be injured.

In sum, Scotts Valley cannot point to any reasonable reliance or cognizable property interests specifically tied to the January 10 ILO—just as one would expect given the promptness with which the agency moved to provide notice of reconsideration. This factor favors timeliness.

4. Interior's justification for reconsideration was not pretextual but was based on identifiable errors.

The March 27 Letter makes clear that "[t]he Secretary [was] concerned that the Department did not consider additional evidence submitted after the 2022 Remand." ECF 1-2 at 1. Nothing about this stated concern is demonstrably "pretextual," as Scotts Valley argues, such that Interior may be barred from exercising its authority to reconsider. *See* ECF 96-1 at 34. Just the opposite. As the various tribal *amici* have explained at length in this case and in their own actions challenging the improper January 10 ILO, reconsideration is prudent and well-supported. *See United Auburn Indian Cmty. of the Auburn Rancheria v. U.S. Dep't of the Interior et al.*, No. 1:25-cv-00873-TNM, ECF 1 (D.D.C. 2025) ("UAIC Compl."); *Yocha Dehe Wintun Nation & Kletsel Dehe Wintun Nation of the Cortina Rancheria v. U.S. Dep't of the Interior et al.*, No. 1:25-cv-00867-TNM, ECF 1 (D.D.C. 2025) ("Patwin Compl."); *Lytton Rancheria of Cal. v. U.S. Dep't of the Interior et al.*, No. 25-cv-1088, ECF 1 (D.D.C. 2025) ("Lytton Compl.").

The record on this issue is straightforward. The tribal *amici* identified significant defects in the January 10 ILO in their earlier-filed litigation—including Interior's failure to consider evidence submitted following the 2022 remand, despite its commitments to do so. *See* UAIC Compl. at ¶¶ 120-123; Patwin Compl. at ¶¶ 142-148. The administrative record shows that Interior was aware of *amici* tribes' contentions when it discussed the possibility of reconsideration. *See* SV-0238, SV-0323, SV-0649. Indeed, Scotts Valley acknowledges that the

record shows "the Department was aware of litigation raising in court the very basis it claims for reconsideration." ECF 96-1 at 33 n.19.

The administrative record is also full of evidence that *amici* tribes raised with Interior its failure to consider evidence. As early as January 31, 2025, Yocha Dehe representatives emailed department officials a "White Paper" alerting that the January 10 ILO "should be reconsidered and overturned due to legal error . . . including" the fact that "none of the evidence submitted by both Patwin and Pomo tribes was in fact considered." SV-0055, SV-0127. On February 22, Yocha Dehe requested a meeting with the Assistant Secretary, also attaching the White Paper. SV-0101, SV-0175. As Scotts Valley acknowledges, Yocha Dehe's White Paper was ultimately distributed to and reviewed by numerous Interior officials, including Scott Davis, no fewer than ten times. SV-0054, SV-0058, SV-0065, SV-0069, SV-0075, SV-0082, SV-0093, SV-0100, SV-0126, SV-0232, SV-0238; *see also* ECF 96-1 at 3-9.

The record also shows that Interior took time to evaluate the tribes' concerns regarding unreviewed evidence. On February 4, 2025, BIA Director Bryan Mercier forwarded the White Paper to Acting Director of the Office of Indian Gaming Philip Bristol, asking Bristol to "please look . . . and give me a short response." SV-058. Bristol replied with a brief providing "some back[]ground and a quick and dirty summary of allegations with responses." SV-0062. On February 5, Gregory Zerzan forwarded the White Paper to Associate Solicitor Eric Shepard, asking him to "please review the attached and provide me with a briefing tomorrow." SV-0082. Shepard responded the next day with a memo addressing the White Paper's claims. SV-0091.

In sum, Interior knew of the concerns that relevant evidence was not reviewed, investigated those concerns, and then cited those concerns as a basis for the reconsideration announced in the March 27 Letter. That sequence of events does not show pretext. It shows the

normal agency process working as it should, in an expeditious attempt to "correct the legally erroneous" January 10 ILO "that, left uncorrected, would be vulnerable to court challenge because of the wholly inadequate process by which [it was] reached." *Belville*, 999 F.2d at 998.

Scotts Valley has no meaningful response to this considerable evidence. Scotts Valley contends that Interior's stated rationale for reconsideration "appears" to be pretext because (1) "the decision to close the record occurred years [prior], in 2022, and was a discretionary one," and (2) the March 27 Letter "fails to explain how the 2022 decision not to open the administrative record was an abuse of discretion." ECF 96-1 at 34. But even setting aside that these points are both false,[9] they have nothing to do with pretext. There is no dispute that the January 10 ILO failed to consider additional evidence from the tribal *amici*—evidence that has now been submitted as part of the reconsideration process. Scotts Valley may well believe (incorrectly) that Interior was right not to consider that evidence and should not do so now. But Scotts Valley's disagreement with Interior's choice does not make the choice "pretextual." It is simply a reconsideration that Scotts Valley does not want Interior to complete, because Scotts Valley fears an unfavorable decision once all relevant material is accounted for.

Scotts Valley also appears to suggest that reconsideration was the improper consequence of a change in administration. *See* ECF 96-1 at 35. But a change in administration is not pretext.

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[9] As previously noted, *see* ECF 55-1 at 13, and as other tribal *amici* address in greater detail, the notion that Interior "closed" the record and then decided "not to open" it is invented from whole cloth. The evidence shows that Interior agreed that interested tribes (in particular Yocha Dehe) would have an opportunity for their evidence to be considered after the 2022 remand. *See, e.g.*, Federal Appellees' Final Resp. Br. (Doc. No. 1893213) at 15, *Scotts Valley Band of Pomo Indians v. U.S. Dep't of the Interior*, No. 21-5009 (D.C. Cir. Apr. 5, 2021) ("[R]emand[ing] [this] matter back to the agency would not impair Yoche Dehe's interest, because Yoche Dehe could submit information to the agency (as it did before) to ensure that the agency consider[s] all the appropriate arguments to properly assess Scotts Valley's claim of a historical connection to the [Vallejo] parcel.").

See Belville, 999 F.2d at 998 (finding reconsideration timely where plaintiff presented "no evidence" of pretext but relied only on "the timing of the change in [agency] leadership"). It is simply a decision taken by executive leadership with which Scotts Valley now disagrees. To the extent it affects the timeliness inquiry at all, in cuts in favor of timeliness. *See Voyageur*, 444 F. Supp. 3d at 195 (finding reconsideration timely in part due to the inherent delay caused by a change in administration). This factor also favors timeliness.

5. The impact of letting the erroneous January 10 ILO stand is considerable.

The flawed January 10 ILO will have profoundly negative repercussions, both in this case and beyond it. As tribal *amici* have explained in this litigation and in their own earlier-filed cases, Interior's erroneous decision would allow for the construction of a sprawling casino development, in a major urban area, posing significant economic, cultural, and environmental threats to *amici* and the surrounding areas. *See* ECF 15-1 at 12-13; ECF 16-1 at 10; ECF 55-1 at 14. Scotts Valley's proposed casino development also threatens irremediable harm to Patwin cultural resources—resources in which Scotts Valley, an unrelated Pomo tribe from a different area of California, has no interest. ECF 16-1 at 10. Further, the economic harms posed by Scotts Valley's unprecedented off-reservation casino undermine tribal *amici*'s sovereignty and self-sufficiency. *See* UAIC Compl. at ¶ 96; Patwin Compl. at ¶¶ 8, 63.

The harmful downstream effects of the January 10 ILO do not end with *amici*. The January 10 ILO also sets a dangerous precedent for gaming policy that upends the previously accepted system of Indian gaming regulation. The erroneous January 10 ILO effectively greenlights a major off-reservation casino on behalf of a tribe lacking any significant historical connection to the land in question. *See Belville*, 999 F.2d at 1002 (finding that "the public interest in achieving the correct result . . . tips the scales in favor of finding that reconsideration

was timely"). Such a decision harms all tribes that have abided by the accepted regulatory framework governing on-reservation gaming.[10] Scotts Valley makes no attempt to rebut these negative effects. This factor also favors timeliness.

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All of the *Belville* factors favor timeliness. The March 27 Letter was an appropriate and proper exercise of Interior's authority to reconsider.

C. Reconsideration was not otherwise arbitrary and capricious.

Scotts Valley's remaining arguments for a purported APA violation also fail.[11] Interior properly notified Scotts Valley of reconsideration, adequately explained the reason for reconsideration, and appropriately treated Scotts Valley's nonexistent reliance interests.

1. The March 27 Letter appropriately notified Scotts Valley of Interior's intent to reconsider.

Scotts Valley complains that it lacked notice of Interior's intent to reconsider. ECF 96-1 at 32. But the March 27 Letter did just that. The Letter informed Scotts Valley of Interior's concerns regarding the January 10 ILO, alerted Scotts Valley that it was "reconsider[ing]" that decision, and invited Scotts Valley to participate in reconsideration by submitting evidence or legal analysis regarding the eligibility of the site as restored lands. ECF 1-2. In claiming that it

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[10] This includes tribes with gaming facilities, such as UAIC. And it also includes tribes without gaming facilities, such as Kletsel Dehe Wintun Nation of the Cortina Rancheria, whose ancestral territory includes the Vallejo Site. *See* Patwin Compl. at ¶ 61.

[11] The bulk of Scotts Valley's APA argument is encompassed within the *Belville* timeliness factors. *See* ECF 96-1 at section III. To avoid unnecessary duplication, UAIC generally defers to the other tribal *amici* on Scotts Valley's novel assertion of "improper political influence." *See id.* at section III.B. Here, it suffices to note that agency leadership reviewing the January 10 ILO, and agreeing that it suffers from potential defects requiring reconsideration, is not improper political influence. It is simply a choice with which Scotts Valley disagrees. Scotts Valley's suggestion of improper political influence is particularly farfetched given that its prior gaming applications were rejected, and it is the January 10 ILO that marks an abrupt change of course, rushed through approval on the eve of a change in administration. See ECF 1-1 at 1.

lacked notice, Scotts Valley effectively asks that Interior be required to provide notice *of its notice* of reconsideration. No authority supports such a requirement.

2. Interior properly dealt with the absence of any reasonable reliance interest.

Scotts Valley also asserts that Interior erred in ignoring its reliance interests, but those arguments fail out of the gate. The case law to which Scotts Valley points applies "[w]hen an agency changes course." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020). As noted above, Interior has not changed course, and could not have, because reconsideration is still "pend[ing]." ECF 1-2. No final decision has been reached.

Furthermore, even if Scotts Valley's authority applies, the APA requires only that an agency "display awareness that it is changing position," note "good reasons for the new policy," and "be cognizant that longstanding polices may have engendered serious reliance interests that must be taken into account." *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221-22 (2016) (quoting *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (internal quotation marks omitted)). Interior did so here.[12]

The March 27 Letter plainly states that Interior is reconsidering the January 10 ILO and provides a compelling basis for undertaking reconsideration: Interior failed to consider additional evidence on remand. ECF 1-2. The record also shows that Interior was "cognizant" of the potential for reliance, even if the January 10 ILO is hardly the kind of "longstanding policy" that could reasonably justify it. *Encino*, 579 U.S. at 221-22. Yocha Dehe's White Paper—which was

[12] Although Scotts Valley relies on *Regents*, that case is unhelpful to it. ECF 96-1 at 41. In *Regents* the Court faulted the Acting Secretary of Homeland Security's failure to address "*legitimate* reliance" on the "longstanding polic[y]" of the Deferred Action for Child Arrivals program. 591 U.S. at 30 (emphasis added quotation marks omitted). As described below, the January 10 ILO was not "longstanding," Scotts Valley's reliance was not legitimate, and the record shows that Interior took the potential for reliance into account.

disseminated widely throughout Interior leading up to the March 27 Letter, and which informed Interior of the procedural deficiency ultimately identified in that letter—drew attention to the role of (genuine) reliance interests in limiting Interior's reconsideration authority. *See, e.g.*, SV-055. Furthermore, in a March 19, 2025 email to Deputy Assistant Secretary for Policy and Economic Development Kennis Bellnard, a Yocha Dehe representative informed Interior that "if Scotts Valley starts breaking ground (or otherwise relies on the decision), there's a real risk Interior might not be successful and/or could be tied up in court." SV-0238.

In other words, the record indicates that Interior was aware of potential reliance interests as it discussed whether to reconsider. Furthermore, the fact that the March 27 Letter does not refer to this record does not render it arbitrary and capricious, as the APA does not require that Interior explain its review of reliance interests in the document in which it announces a course of action. *See MediNatura, Inc. v. Food & Drug Admin.*, 496 F. Supp. 3d 416, 456 (D.D.C. 2020), *aff'd* 998 F.3d 931 (D.C. Cir. 2021) (noting that "[a]lthough the FDA did not address reliance interests in its memorandum withdrawing [its earlier decision], the agency did consider reliance interest (albeit briefly) in its response to [a] citizen petition").

Moreover, far from being "legitimate," Scotts Valley's supposed reliance interests are non-existent. *See Solenex*, 962 F.3d at 529 ("[U]nidentified and unproven reliance interests are not a valid basis on which to undo agency action."). First, reconsideration took place expeditiously, before Scotts Valley had any opportunity to move forward in reasonable reliance on the January 10 ILO.[13] Second, it has long been understood that gaming at the Vallejo Site is

[13] The short window between the January 10 ILO and Interior's reconsideration also renders the January 10 ILO insufficiently "longstanding" to engender any legitimate reliance interest. *See Breeze Smoke, LLC v. U.S. Food & Drug Admin.*, 18 F.4th 499, 507 (6th Cir. 2021) (finding that [two-year-old] guidance does not qualify as 'longstanding.'").

heavily contested by the affected tribes and would continue to be the subject of further disputes before moving forward. Third, the January 10 ILO arises from a statutory and regulatory framework that imposes numerous additional hurdles before gaming can move forward on the Vallejo Site—hurdles that introduce significant time and uncertainty into the path to gaming, and that undermine any assertion of reasonable detrimental reliance on the January 10 ILO. Scotts Valley has itself acknowledged these hurdles, at least for the purpose of excluding *amici* tribes as intervenors. Interior did not err by responding rationally, in the context of the January 10 ILO, to the absence of any colorable risk of reliance. *Id.*

Scotts Valley's own authority on this point is instructive. *See* ECF 96-1 at 41-42 (citing *McAllister v. United States*, 3 Ct. Cl. 394, 398 (1983)). The court in *McAllister* held that, "[i]f the parties act on the initial decision, . . . and if the agency knows they will act, then the agency may reverse its initial decision only upon a showing that it was erroneous." 3 Ct. Cl. At 398. Here, Scotts Valley has not shown reasonable reliance on the January 10 ILO.[14] Interior properly accounts for that fact.

3. The court has rejected APA-based claims in nearly identical circumstances.

Finally, it bears noting that this District has previously rejected arguments that closely track Scotts Valley's, and on a nearly identical posture. In *California Department of Health Services v. Babbitt*, an incoming administration reversed the last-minute decision of its predecessor to approve of the direct sale of federal land under NEPA. 46 F. Supp. 2d at 22-23. The incoming Secretary also "rescinded" the prior decision and stated that Interior would

[14] In any event, the record strongly supports the conclusion that the January 10 ILO was "erroneous," *McAllister*, 3 Ct. Cl. at 398, for failing to consider the evidence submitted by interested tribes. *See* UAIC Compl. at ¶¶ 120-123; Patwin Compl. at ¶¶ 142-148.

conduct additional review. *Id.* at 15. As here, the plaintiff argued that the rescission was arbitrary, capricious, based on improper political considerations, and otherwise unlawful *Id.* at 22. The court rejected these arguments because the Secretary pointed to irregularities in the prior decision that, whatever their merits, constituted "a discernable and reasonable basis for his decision" to rescind and reconsider. *Id.* at 19-25.

So too here. The March 27 Letter explains that the Secretary reviewed the record in this case and was "concerned that the Department did not consider additional evidence submitted after the 2022 Remand." ECF 1-2 at 1. The APA requires no more.

III. INTERIOR'S VALID EXERCISE OF ITS RECONSIDERATION AUTHORITY DOES NOT OFFEND DUE PROCESS.

For the same reasons Interior timely and properly exercised its authority to reconsider the January 10 ILO, there is no due process violation. Scotts Valley mistakenly says that as soon as Interior announced its determination of gaming eligibility in the January 10 ILO, it immediately acquired a "legitimate claim of entitlement . . . to which due process protection attached." ECF 96-1 at 23 (quotation marks omitted). Courts have rejected this argument in the context of agency reconsideration. *See, e.g.*, *Dun & Bradstreet*, 946 F.2d at 193 ("[W]e cannot agree that by initially approving [] refund requests, the Postal Service surrendered its discretion to review and ultimately reverse its decisions granting [] refunds."). As the Second Circuit explained:

> It is well-recognized that in order for an entity to have a constitutionally-protected property right, it clearly must have more than a unilateral expectation of [a benefit]. [The entity] must, instead, have a legitimate claim of entitlement to it. We have repeatedly stated that our primary inquiry in determining whether a legitimate claim of entitlement exists is whether, absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the [benefit] would have been granted. Essentially, we have focused on the extent of the issuing agency's discretion to grant or deny the [relief] in question.

Id. (alterations in original and citations omitted). The existence of a protectable property right,

and any due process claim associated with it, therefore depends on whether the agency has transgressed the limits of its discretionary authority. *See Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) ("[A] benefit is not a protected entitlement if government officials may grant or deny it in their discretion."); *Crooks v. Mabus*, 845 F.3d 412, 419 (D.C. Cir. 2016) ("Generally, a 'claim of entitlement' is not viable when a government agency wields significant or unfettered discretion in determining whether to award or rescind a particular benefit or when an individual lacks an objective basis for believing that he is entitled to retain a benefit.").

As discussed, Interior has broad, inherent discretionary authority to reconsider. *See supra* section II.A. Scotts Valley is simply wrong to contend that, in issuing the January 10 ILO, "all discretion [was] exercised and exhausted." ECF 96-1 at 23. An agency does not "relinquish[] all discretion" the moment it renders its decision. *Dun & Bradstreet*, 946 F.2d at 193. This Circuit and others have "repeatedly" made clear that the scope of agency discretion is broad, and that the relevant constraint on reconsideration is ***timeliness***. *Mazaleski*, 562 F.2d at 720 ("[A]n agency has the inherent power to reconsider and change a decision if it does so within a reasonable period of time."). The due process inquiry is therefore functionally indistinct from the timeliness inquiry addressed as part of Scotts Valley's meritless APA claim. *See supra* section II.B. It fails for the same reasons.

CONCLUSION

For the foregoing reasons, the Court should deny Scotts Valley's motion for summary judgment and grant Defendants' motion for summary judgment.

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Respectfully submitted,

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