UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTTS VALLEY BAND OF POMO INDIANS, Plaintiff, v. UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*, Defendants.	)	Civil Action No. 19-1544 (ABJ)

OPINION & ORDER

Plaintiff Scotts Valley Band of Pomo Indians ("Scotts Valley") has brought this action under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, against the United States Department of the Interior ("DOI" or "Department"); David L. Bernhardt, in his official capacity as Secretary of the Department; Tara Sweeney, in her official capacity as Assistant Secretary for Indian Affairs; and John Tahsuda, in his official capacity as Principal Deputy to the Assistant Secretary for Indian Affairs. Compl. [Dkt. # 1]. It challenges a February 7, 2019 decision ("ILO Decision" or "Tahsuda letter") issued by Principal Deputy Assistant Secretary Tahsuda, finding that a parcel of land in the City of Vallejo, California, that Scotts Valley seeks to develop does not qualify as a "restored land" for purposes of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et. seq*. *See* Compl. ¶¶ 33–37. That decision eliminated plaintiff's ability to acquire the rights to develop the land.

On February 28, 2019, Scotts Valley requested reconsideration of the Department's decision, *see* Ex. H to Decl. of Arlinda F. Locklear [Dkt. # 28-2] ("Locklear Decl.") at PDF 45,

and on March 14, 2019, Scotts Valley supplemented its request. March 14 Suppl., Ex. I to Locklear Decl. [Dkt. # 28-2] ("March 14 Suppl.") at PDF 47–55. It argued that the Department should reconsider the ILO opinion because: 1) the Office of Indian Gaming ("OIG") had been excluded from the Department's consideration of the ILO request, 2) Principal Deputy Assistant Secretary Tahsuda lacked authority to issue the ILO decision, and 3) the reasoning in the Tahsuda letter was arbitrary and capricious. *See id*.

On April 26, 2019, the Assistant Secretary of Indian Affairs declined to reconsider the ILO decision. Ex. K to Locklear Decl. [Dkt. # 28-2] ("April 26 Letter") at PDF 59–60. The three-paragraph letter denying reconsideration addressed the two procedural issues raised in Scotts Valley's supplement but did not discuss the Tribe's arguments about the merits of the Tahsuda opinion. *See id.* It also specifically stated that "the February 7, 2019, Decision is the Department of Interior's (Department) final agency action on this matter, and the Decision will not be reconsidered." *Id*. at 59.

On May 24, 2019, Scotts Valley filed the complaint in this matter, Compl. at 16, and on August 5, 2019, defendants answered. Answer [Dkt. # 14] at 13. On October 10, 2019, the government filed notice certifying the administrative record of the decision. Now pending before the Court is Scotts Valley's motion to complete the administrative record. Pl.'s Mot. to Complete Administrative R. [Dkt. # 28] ("Pl.'s Mot."). It argues that defendants should be compelled to add three categories of materials to the record:

> 1. All documents, emails, and other materials considered by the Department between the February 7, 2019 letter of Principal Deputy to the Assistant Secretary - Indian Affairs and the April 26, 2019 letter of Assistant Secretary - Indian Affairs.
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> 2. Specific documents related to the Tribe's request for reconsideration ("Reconsideration Documents") considered by the Department between the February 7, 2019 letter of Principal Deputy to the Assistant Secretary -

Indian Affairs and the April 26, 2019 letter of Assistant Secretary - Indian Affairs. The Reconsideration Documents include:

a. February 26, 2019 email from Eric Shepard, Associate Solicitor, Division of Indian Affairs to Arlinda Locklear (Tribe's counsel), releasing the Feb. 7, 2019 letter and indicating that this letter was mailed to the Tribe the previous day.

b. February 28, 2019 letter of Tribal Chairman Shawn Davis, making the request for reconsideration.

c. March 14, 2019 letter from Arlinda Locklear (Tribe's counsel) specifying grounds for the requested reconsideration.

d. March 14, 2019 email from Tara Sweeney, Assistant Secretary - Indian Affairs to Arlinda Locklear (Tribe's counsel), indicating a referral of request for reconsideration to the OIG.

e. April 26, 2019 letter from Tara Sweeney, Assistant Secretary - Indian Affairs, to Tribal Chairman Shawn Davis rejecting, in part, grounds for reconsideration.

3. Departmental memoranda regarding the agency's process for determining whether newly acquired lands are part of the restoration of lands for a restored Indian tribe, in particular:

a. May 22, 2008 guidance memorandum from Carl Artman, Assistant Secretary - Indian Affairs, entitled "Guidance on policy decision regarding restored lands for restored tribes."

b. February 25, 2019, memorandum from Tara Sweeney, Assistant Secretary - Indian Affairs, withdrawing the May 22, 2008 guidance memorandum.

Mem. of P. & A. in Supp. of Pl.'s Mot. [Dkt. # 28-1] ("Pl.'s Mem.") at 5–6. Defendants oppose the motion, Fed. Def.'s Opp. to Pl.'s Mot. [Dkt. # 30] ("Def.'s Opp."), and the matter is fully briefed.[1] For the following reasons, plaintiff's motion will be denied.

1 *See* Pl.'s Reply Brief in Supp. of Pl.'s Mot. [Dkt. # 31] ("Pl.'s Reply").

LEGAL FRAMEWORK

The APA directs courts to "review the whole record or those parts of it cited by a party" in making determinations about the propriety of an agency action. 5 U.S.C. § 706. The Supreme Court has made it clear that in order to perform this function, a court must review "the full administrative record that was before the [agency] at the time [it] made [its] decision." *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 420 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). Thus, when a regulatory challenge is raised, an agency is required to identify and produce the complete administrative record. *Nat'l Res. Def. Council v. Train*, 519 F. 2d 287, 291 (D.C. Cir. 1975). The D.C. Circuit has stated that "[i]t is 'black-letter administrative law that in an [Administrative Procedure Act] case, a reviewing court should have before it neither more nor less information than did the agency when it made its decision.'" *CTS Corp. v. EPA*, 759 F.3d 52, 64 (D.C. Cir. 2014), quoting *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013); *see also Camp v. Pitts*, 411 U.S. 138, 142 (1973) (per curiam) ("In applying [the abuse of discretion] standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.").

The administrative record produced by an agency "is entitled to a strong presumption of regularity," *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, Civ. No. 16-1534 (JEB), 2019 WL 2028709, at *2 (D.D.C. May 8, 2019), quoting *Sara Lee Corp. v. Am. Bakers Ass'n*, 252 F.R.D. 31, 34 (D.D.C. 2008), and supplementation of the record is to be the exception, not the rule. *Theodore Roosevelt Conservation P'ship v. Salazar,* 616 F. 3d 497, 514 (D.C. Cir. 2010). In some circumstances, the presumption can be rebutted when a plaintiff presents "clear evidence" that the documents it seeks to add were actually before the decisionmaker. *Pac. Shores*

Subdivision, Cal. Water Dist. v. U.S. Army Corps of Eng'rs, 448 F. Supp. 2d 1, 5 (D.D.C. 2006). In such a case, a plaintiff "must identify reasonable, *non-speculative grounds* for its belief that documents were *considered* by the agency and not included in the record." *Marcum v. Salazar*, 751 F. Supp. 2d 74, 78 (D.D.C. 2010) (emphasis in original), quoting *Pac. Shores*, 448 F. Supp. 2d at 6.

Otherwise, a court may consider an order that the record be supplemented in exceptional cases where the plaintiff has "demonstrate[d] unusual circumstances justifying a departure from the usual rule." *City of Dania Beach v. F.A.A.*, 628 F.3d 581, 590 (D.C. Cir. 2010), quoting *Texas Rural Legal Aid v. Legal Servs. Corp.*, 940 F.2d 685, 698 (D.C. Cir. 1991). These circumstances include: (1) if the agency "deliberately or negligently excluded documents that may have been adverse to its decision," (2) if background information was needed "to determine whether the agency considered all the relevant factors," or (3) if the "agency failed to explain administrative action so as to frustrate judicial review." *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008), quoting *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996).

ANALYSIS

Before the Court can determine whether plaintiff has made the requisite showing to supplement the administrative record, it must first determine which decision qualifies as the final agency action that is under review and for which the record must be complete.

As an initial matter, "when an agency merely affirms its original decision in denying a petition for reconsideration, it has not rendered a judicially reviewable decision." *Palacios v. Spencer*, 906 F.3d 124, 127 (D.C. Cir. 2018), citing *Sendra Corp. v. Magaw*, 111 F.3d 162, 167 (D.C. Cir. 1997). The D.C. Circuit has established two circumstances, though, in which an agency's denial of reconsideration could qualify as a final agency action: first, if the party seeking

consideration alleged "new evidence" or "changed circumstances" as grounds for reconsideration, or second if the agency "after reconsideration, issue[d] a new and final order." *Sendra Corp.*, 111 F.3d at 166–67.

What does the complaint allege that bears on this issue? Plaintiff indicates in some counts that it is intending to challenge the decision on reconsideration, but its own recitation of the events does not suggest that this case falls within either of the exceptions to the rule.

Paragraph thirty-three of the complaint alleges that on February 26, 2019, the Department issued the letter, signed by Principal Deputy Tahsuda, announcing its determination that the Parcel did not qualify under the IGRA or the implementing regulations as restored lands. Compl. ¶ 33. Plaintiff calls this "the February letter," and paragraphs thirty-four through thirty-seven recite the conclusions in the letter. Compl. ¶¶ 34–37. Three of the findings favored plaintiff, but the fourth conclusion regarding the lack of "significant historical connections" was the one that led to the negative determination. *See* Compl. ¶ 37.

Plaintiff alleges that it sought reconsideration of the Tahsuda decision on three grounds: the OIG should not have been excluded from the deliberations on the issue; Tahsuda did not have authority to sign the letter; and the February letter was arbitrary and capricious for a number of reasons. Compl. ¶ 39.

On April 26, 2019, the agency mailed what plaintiff calls "the Decision" to the Tribe. Compl. ¶ 40. According to paragraph forty-one of the complaint, it addressed only the procedural grounds for reconsideration identified by the Tribe — the Tahsuda issue — and in a footnote, the OIG issue. Compl. ¶ 41. According to plaintiff, "[t]he Decision made no reference to and did not address the Tribe's arguments that the February letter is arbitrary and capricious and otherwise not in accordance with law." Compl. ¶ 41. The Decision designated the February letter as final agency

action, and plaintiff specifically alleges in the final sentence of paragraph forty-one that "[t]he February letter and the Decision together constitute the agency's final agency action." Compl. ¶ 41.

Based on those allegations, the First Claim for Relief, titled "*Ultra Vires* action by Defendant Tahsuda," takes the position that Tahsuda, the person who signed the February letter, did not have the authority to do so. *See* Compl. ¶¶ 42–47. But in paragraph forty-eight, plaintiff alleges that "[b]ecause the February letter claimed as the basis for the Decision is *ultra vires*, the Decision itself is also *ultra vires* and, hence, not in accordance with law." Compl. ¶ 48. Notably, the complaint does not challenge the Decision on any other grounds; indeed, in paragraph forty-seven, plaintiff reiterates that "[t]he Decision did not purport to address the merits of the Tribe's ILO request but merely restated the erroneous view that Principal Deputy Tahsuda had authority to sign the February letter." Compl. ¶ 47. So this would appear to be a claim in which the challenge of the denial of reconsideration merges with the challenge to the initial agency decision, even as plaintiff has characterized it.

The Second Claim for Relief, titled "Decision beyond Secretary's authority in IGRA" does purport to challenge the "Decision"; it claims that the denial of the ILO requested by the tribe was inconsistent with the statute, the IGRA, because agency regulations included restrictions not included in the statute. *See* Compl. ¶¶ 49–50. And it says in paragraph fifty: "The imposition of this requirement . . . beyond that required in the IGRA itself violates the Secretary and his delagatees' authority, rendering *the Decision* not in accordance with the law." Compl. ¶ 50. But, as noted above, the Decision did not address this issue. So again, there are no factual allegations on the face of the complaint that would support the applicability of an exception to the doctrine in

this Circuit that a decision on reconsideration is not separate from the initial decision. Indeed, plaintiff itself says that the two comprise the final agency action "together." Compl. ¶ 41.

The last three claims do not even purport to challenge the April 26 decision on reconsideration. *See* Compl. ¶¶ 51–62. The Third Claim is about "the February letter, which the Decision declined to reconsider," Compl. ¶ 51, the Fourth Claim also challenges "the February letter which the Decision declined to reconsider," Compl. ¶ 56, and the Fifth Claim is the same. *See* Compl. ¶ 61. But in the prayer for relief, plaintiff does again refer to "the Decision" in paragraphs four and five, and it asks for "[a] declaration that the Decision violates the Department's regulations" for various reasons. Compl. at 15–16.

In its motion, Scotts Valley argues that the April 26 letter denying reconsideration should be considered to be the final agency action because it "explicitly rejected, for the first time in writing, the Tribe's argument that the exclusion of OIG from the decision-making process violated the agency's regulation and past practice," and it discusses the Tribe's position about Tahsuda's authority. Pl.'s Mem. at 7–8. "Under the circumstances here," Scotts Valley continues, "the Tribe reasonably believed that the Department intended to exercise [its authority to reconsider its decision] and, indeed, the Department proceeded to do so." Pl.'s Mem. at 8. But these arguments do not comport with the record or plaintiff's own recitation of the facts; nor do they satisfy either of the criteria established in *Sendra Corp*. *See* 111 F.3d at 166–67.

First, the April 26 letter does not reveal that the Department considered new evidence or changed circumstances when it took up the Tribe's request for reconsideration; indeed, the Tribe does not allege that it presented new evidence or changed circumstances. Scotts Valley's arguments on reconsideration were legal and procedural in nature, and the Supreme Court has held that "where a party petitions an agency for reconsideration on the ground of material error, *i.e.*, on

the same record that was before the agency when it rendered its original decision, an order which merely denies rehearing of . . . [the prior] order is not itself reviewable." *I.C.C. v. Brotherhood of Locomotive Eng'rs.*, 482 U.S. 270, 280 (1987) (internal quotation omitted).

Here the Department's April 26 letter addresses the Tribe's procedural objection to the ILO decision, that is, whether Tashuda had the authority to issue it, and it touches on the need for OIG participation in a footnote, but it does not revisit the merits of the ILO request or consider any new evidence presented by Scotts Valley. *See* April 26 Letter. Accordingly, Scotts Valley cannot rely on the first *Sendra Corp*. ground to argue that the April 26 letter is the final agency action.

And because the agency explicitly rejected reconsideration of the ILO decision and did not issue any new and final order, the second *Sendra Corp*. criteria is also unavailable. For these reasons, the February 7 letter denying the ILO, and not the April 26 letter denying reconsideration, is the final agency decision.

Based on this determination, the Court can assess whether the documents Scotts Valley seeks to add to the administrative record may be properly included. And since the records were not before the agency at the time it made its decision, the order plaintiff seeks would be contrary to Circuit precedent. As an initial matter, the Court notes that all but one of the documents post-date the February 7 determination that is the final agency action. *See* Pl.'s Mem. at 5–6. So it is clear that these materials were not "actually before the decisionmaker[]" when it made its decision, and therefore cannot be added to the record. *Sara Lee Corp.*, 252 F.R.D. at 34.

The only document plaintiff seeks to add that existed at the time the final decision was rendered is the May 22, 2008 guidance memorandum – a statement of departmental policy that was in force at the time. *See* Pl.'s Mem. at 5–6; *see also* Ex. F to Locklear Decl. [Dkt. # 28-2] at PDF 36–41. Plaintiff seeks to include the memo to advance its argument that the decision is invalid

because the agency failed to follow its own guidance to seek input from the Office of Indian Gaming when making its decision on the ILO request. *See* Pl.'s Mem. at 9–11. But departmental regulations, policies, and procedures are not generally made part of the administrative record, and the memorandum in this case need not be a part of the *record* for plaintiff to be able to argue that the agency's action was unreasonable because it departed from its own written guidance on how to go about making the decision. [2]

Thus, plaintiff has not shown the existence of "unusual circumstances" that would warrant supplementing the record. There is no reason to believe that the May 22, 2008 guidance memorandum was "deliberately or negligently excluded" from the record. *See Kempthorne*, 530 F.3d at 1002. And while it may bear in some way on whether the Department considered all relevant factors in its decision, *see City of Dania Beach*, 628 F.3d at 590, as noted, it need not be part of the record for plaintiff to make that point. Finally, the agency's eighteen-page letter denying the Tribe's request for an ILO provides sufficient detail to permit judicial review. *See James Madison Ltd.*, 82 F.3d at 1095 (collecting cases).

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2 Under the APA, the agency's role is to resolve factual issues and arrive at a decision that is supported by the administrative record, and the court's role is to "determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985), citing *Overton Park*, 401 U.S. at 415; *see also Richards v. INS*, 554 F.2d 1173, 1177 & n.28 (D.C. Cir. 1977). The scope of review is narrow, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983), but a court must be satisfied that the agency has examined the relevant data and articulated a satisfactory explanation for its action, "including a 'rational connection between the facts found and the choice made.'" *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006), quoting *State Farm*, 463 U.S. at 43. Thus, while departmental policy may be an important aspect of assessing whether the agency proceeded in an appropriate manner, the *record* under review is the evidence and data upon which the agency relied in making its decision.

For these reasons, Scotts Valley's motion to complete the administrative record is **DENIED**.

SO ORDERED.

AMY BERMAN JACKSON
United States District Judge

DATE: October 15, 2020