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' OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

I. INTRODUCTION

Plaintiff Scotts Valley Band of Pomo Indians ("Scotts Valley" or the "Tribe") challenges a United States Department of the Interior (the "Department" or "Interior") March 27 Letter that temporarily rescinded a Gaming Eligibility Determination for reconsideration. *See* 1st Am. Compl. for Decl. & Inj. Relief, ¶ 27, ECF No. 12. The Court should deny Scotts Valley's motion for a preliminary injunction, ECF No. 3, because Scotts Valley has not carried its heavy burden to show that the extraordinary remedy of injunctive relief should issue. First and foremost, Scotts Valley has failed to identify an irreparable harm that would justify preliminary relief. It offers little factual support for its assertions of harm, failing to show that any contracts are in jeopardy, that it will have to pay damages, or that it will suffer other harm before this Court can decide the merits. The Court should deny Scotts Valley's motion on that basis alone.

But the other preliminary injunction factors also weigh against injunctive relief. Scotts Valley is not likely to succeed on the merits. For one, Scotts Valley has not challenged a final agency action reviewable under the Administrative Procedure Act ("APA") because the Department's March 27 Letter does not create any legal consequences for Scotts Valley. In addition, Scotts Valley has not stated a valid due process claim because it cannot identify a cognizable property or liberty interest of which it has been deprived. And the Department appropriately exercised its authority to review its own decision in a timely manner.

Finally, the balance of harms and the public interest factors weigh against preliminary relief. Scotts Valley has not demonstrated any irreparable harm. In contrast, the Department has the inherent authority to consider its prior decisions. Scotts Valley also has not adequately supported its requested relief. Scotts Valley's motion therefore should be denied.

II. BACKGROUND

A. Legal Background

The Secretary of the Interior ("Secretary") 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.

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 land within the limits of an 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.

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).

B. Factual Background

Scotts Valley was restored to Federal recognition in 1991. In 2016, Scotts Valley 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*

[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).

("*Scotts Valley I*"), 633 F. Supp. 3d 132, 171 (D.D.C. 2022). In February 2019, the Department denied that request in issuing an Indian Lands Opinion ("ILO"), finding that Scotts Valley failed to demonstrate the necessary "significant historical connection" to the Parcel to qualify under IGRA's restored lands exception. Scotts Valley challenged that decision in this Court.

In September 2022, Judge Berman 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." *Scotts Valley I*, 633 F. Supp. 3d at 171. 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 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 its finding that the Vallejo Parcel qualified as "restored lands" under IGRA (the "Gaming Eligibility Determination"). *See* Jan. 10, 2025, Decision ("January 10 Decision"), ECF No. 1-1. The Department did not reopen the administrative record 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, 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* Case Nos. 1:25-cv-867; 1:25-cv-873. Lytton Rancheria later also filed a complaint challenging the January 10 decision and its underlying environmental assessment and finding of no significant impact. *See* Case No. 1:25-cv-1088.

On March 27, the Department issued a letter to Scotts Valley that temporarily rescinded the Gaming Eligibility Determination for reconsideration. *See* Letter from Scotts 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"), ECF No. 1-2. The 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, Scotts Valley filed their Complaint in this action, with an Amended Complaint filed on April 4, 2025. *See* ECF Nos. 1, 12. Scotts Valley challenges the Department's March 27 Letter, alleging that it was arbitrary and capricious, *ultra vires*, and violated procedural due process. Also on April 1, Scotts Valley moved for emergency injunctive relief to prevent the Department from proceeding with its reconsideration and asking that the rescission be deemed to have no legal force or effect while the case is litigated. *See* ECF No. 3. Scotts Valley withdrew its motion for a temporary restraining order but continues to seek a preliminary injunction. *See* Minute Entry issued April 7, 2025.

III. STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 24 (2008) (citation omitted). Instead, preliminary injunctive relief "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id.* at 22 (citation omitted); *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011). A plaintiff seeking a preliminary injunction must demonstrate four elements: (1) a likelihood of irreparable harm absent injunctive relief; (2) a likelihood of success on the merits; (3) a balance of hardships that tips in their favor; and (4) that the public interest weighs in favor of granting the injunction. *Winter*, 555 U.S. at 20 (citations omitted). The party seeking the preliminary injunction bears the burden of establishing that these four factors weigh in its favor, which includes a "burden of producing credible evidence sufficient to demonstrate her entitlement to injunctive relief." *Workman v. Bissessar*, 275 F. Supp. 3d 263, 267 (D.D.C. 2017) (citations omitted).

IV. ARGUMENT

Scotts Valley has not carried its burden of demonstrating that any of the preliminary injunction factors weigh in its favor, much less all four. Scotts Valley has failed to demonstrate irreparable harm, relying only on vague statements without supporting documentation. Scotts Valley also does not demonstrate the Court is likely to rule in its favor on the merits, or that the balance of harms and public interest factor justifies issuing preliminary relief. Scotts Valley's motion should be denied.

A. Scotts Valley has fallen far short of its burden to demonstrate irreparable harm.

The Court should deny Scotts Valley's motion because the Tribe has failed to identify an irreparable harm that would warrant preliminary relief. "Failure to show a likelihood of irreparable harm is sufficient to defeat a motion for a preliminary injunction 'even if the other

three factors entering calculus merit such relief.'" *Novartis Pharmaceuticals Corp. v. Becerra*, No. 24-cv-02234, 2024 WL 3823270, at *4 (D.D.C. Aug. 13, 2024) (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)).

"The D.C. Circuit 'has set a high standard for irreparable injury.'" *Novartis*, 2024 WL 3823270, at *4 (quoting *Mdewakanton Sioux Indians of Minn. v. Zinke*, 255 F. Supp. 3d 48, 52 (D.D.C. 2017) (internal citation omitted)). "First, the injury must be both certain and great; it must be actual and not theoretical. The moving party must show the injury complained of is of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm. Second, the injury must be beyond remediation." *Chaplaincy*, 454 F.3d at 297 (cleaned up). A showing of "some possibility of irreparable injury" is insufficient. *Hanson v. Dist. of Columbia*, 120 F.4th 223, 245 (D.C. Cir. 2024) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)).

The basis for Scotts Valley's supposed harm is that it has "committed substantial resources" toward its planned project since January 10, and that those resources "are now placed at risk." Pl.'s Mem. 39, ECF No. 3-1. This falls far short of the necessary showing.

For one, Scotts Valley's sparse factual support renders the harms speculative. *See* Decl. of Shawn Davis, ECF No. 3-2. The Davis Declaration provides scant detail, showing only that Scotts Valley has: (1) "entered and authorized its development team to enter into several contracts with third parties" (¶ 12); (2) "authorized the payment" of almost $1.9 million in invoices (¶ 13); (3) entered a cost reimbursement agreement with City of Vallejo (¶ 13); and (4) suffered unspecific "confusion and disruption" (¶ 21). Scotts Valley did not attach any contract, invoice, agreement, or other evidence of payment.

This hardly constitutes proof of irreparable harm that would justify the extraordinary remedy of preliminary injunctive relief. Scotts Valley provides no details on with whom it has contracted or how many contracts there are. And Scotts Valley does not make any showing that these unidentified contracts are in jeopardy, that it is on the verge of having to pay contract damages, or that it will suffer any other harm while this case is litigated on the merits. The Declaration's use of the verb "authorize" also clouds whether all the unidentified contracts and invoices have been entered or paid. *See* Davis Decl. ¶¶ 12, 13. For any invoices that have been paid, a prior cost cannot provide a basis for prospective preliminary relief. *See AARP v. U.S. Equal Emp. Opportunity Comm'n*, 226 F. Supp. 3d 7, 22 (D.D.C. 2016) (preliminary injunction "would serve little purpose" because any harm "has already occurred"). And in any event, for "purely financial or economic" harms, "the barrier to proving irreparable injury is higher still, for it is 'well settled that economic loss does not, in and of itself, constitute irreparable harm.'" *Mexichem Specialty Resins, Inc. v. EPA*, 787 F.3d 544, 555–56 (D.C. Cir. 2015) (quoting *Wisc. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

Scotts Valley has not established that a delay in project development amounts to irreparable harm, and it does not provide facts that would allow the Court to do any more than speculate on the subject. *See* Davis Decl. ¶ 21 (describing "confusion and disruption" in pending planning and negotiations but failing to state facts that adequately describe and quantify the level of harm Scotts Valley faces). Any disruptions in planning also would be remedied by a ruling in the Tribe's favor on the merits. *See Dotson v. District of Columbia*, No. 24-cv-1864, 2024 WL 5046282, at *6 (D.D.C. Dec. 9, 2024) ("the injury 'must be beyond remediation', meaning that '[t]he possibility [of] adequate compensatory or other corrective relief . . . at a later date . . . weighs heavily against a claim of irreparable harm'") (quoting *Chaplaincy*, 454 F.3d at 297–98)

(other internal citations omitted). Indeed, in opposing intervention by other tribes, Scotts Valley argued that its envisioned casino is still far from certain. *See* Pl.'s Combined Opp'n to Mots. to Intervene 31–32, ECF No. 31.

Scotts Valley's other points fair no better. After the Department's January 10 Decision, Scotts Valley submitted an updated tribal gaming ordinance to the National Indian Gaming Commission ("NIGC") (one of the necessary prerequisites to Class II and Class III gaming under IGRA). *See* Pl.'s Mem. 39. But NIGC *approved* the ordinance. Davis Decl. ¶ 15. Scotts Valley also references its negotiations with the State of California for a gaming compact (another Class III gaming prerequisite). Pl.'s Mem. 39–40. California has asked that the "next negotiation-related dates . . . be put on hold while" it considers the March 27 Letter and pending litigation. ECF No. 40-2 at 1-2. But Scotts Valley has not made any factual showing that California has ended compact negotiations, or that the requested preliminary relief would bring California back to the table while this case—and the Department's continued reconsideration—is on-going. Should Scotts Valley believe the State is not acting in good faith, IGRA provides the Tribe with a potential remedy. *See* 25 U.S.C. § 2710(d)(7)(A)(i). Finally, Scotts Valley's concern about its sovereignty are misplaced. *See* Pl.'s Mem. 40. The Department's Trust Determination stands, and the Vallejo Site remains in trust. There has thus been no change in the land's jurisdictional status. *See infra* at Section IV.B.3. Scotts Valley has not proven it will suffer any irreparable harm while this case is litigated. The motion for preliminary injunctive relief should be denied on that basis alone.

B. Scotts Valley will not succeed on the merits of its case.

Scotts Valley has also not demonstrated that it will succeed on the merits of its case. The Tribe has pled all four of its claims under the APA, alleging arbitrary and capricious decision-

making for different reasons. Count I alleges a failure to follow proper procedures. *See* Am. Compl. ¶¶ 33–40. Count II alleges a failure to provide Scotts Valley with due process.[2] *Id.* ¶¶ 41–47. Count III alleges the Department lacked the authority to issue the Letter. *Id.* ¶¶ 48–51. Count IV alleges an unlawful reversal of position. *Id.* ¶¶ 52–56. These claims will fail because Scotts Valley has not challenged a "final agency action" reviewable under the APA. And even if it had, Federal Defendants would otherwise prevail.

1. The March 27 Letter is Not Final Agency Action 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 Ag.*, 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)) (cleaned up).

"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

[2] Count II in the original complaint did not reference the APA. *See* Compl. ¶¶ 39–44, ECF No. 1. But that is no longer the operative complaint.

administrative action." *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 22 (D.C. Cir. 2006) (cleaned up). "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 does not constitute final agency action reviewable under the APA with respect to either re-opening the Department's Indian lands determination or temporarily rescinding the prior determination.

2. Re-opening the Gaming Eligibility Determination Does Not Mark the Consummation of Agency Decision-Making nor Create Legal Consequences for Scotts Valley.

The easier analysis is with respect to the Department's decision to engage in a reconsideration process. 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." March 27 Letter.

As an initial matter, the Department has not completed its reconsideration process. The March 27 Letter requested any material be submitted by May 30. *Id.* The D.C. Circuit has been clear 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).

To be sure, the reconsideration aspect of the Letter requires Scotts Valley to consider whether to participate in the Department's reconsideration process, and it also invites other parties opposed to Scotts Valley's casino to engage in that same 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 constitute final agency action on the restored lands question. March 27 Letter at 1 n.1 (citing 25 C.F.R. § 2.101, which defines "final agency action," and § 2.301, which denotes finality in the context of administrative appeals).

Scotts Valley claims the Letter "effectively grants judgment in favor of plaintiffs on contested issues" in the cases pending before the Court challenging the Department's land-into-trust decision. Pl.'s Mem. 17. Scotts Valley appears to argue that the Department has effectively taken a voluntary remand of the Trust Determination, which is not the case. Regardless, a "'decision to grant reconsideration, which merely begins a process that could culminate in no change to [an action]' is not reviewable final agency action." *California v. EPA*, 940 F.3d 1342, 1351 (D.C. Cir. 2019) (citing *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017)).

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

The more difficult analysis is the March 27 Letter's rescission of the Gaming Eligibility Determination during the pendency of the Department's reconsideration. But there, too, the Letter does not 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. An Indian lands determination would have "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, under the present circumstances, out of trust). But here, the "the Trust Determination still stands and the Vallejo Site remains in trust." March 27 Letter.

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

The analysis begins with IGRA. Scotts Valley plans to operate a Class III gaming facility. Tribes may conduct Class III 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 an NIGC-approved gaming "ordinance or resolution." *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*, which the Supreme Court found to be final agency actions under the APA. *See* 578 U.S. at 593. The Court so held because the determinations, among either 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 October 17, 1988, 73 Fed. Reg. 29354, 29358 (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 with respect to 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]

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

[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 prior to January 11, 2024, because the Tribe's application was submitted before January 11, 2026, 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.

C.F.R. § 292.3(a) or (b)] is not, per se, a final agency action under the Administrative Procedure Act (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 29358. In a different context, the D.C. Circuit has recognized this legal reality. *See Butte County, Cal. v. Hogen*, 613 F.3d 190, 195 n.3 (D.C. Cir. 2010). With respect to 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 "nothing in [§ 2719] shall affect or diminish the authority and responsibility of the Secretary to take land into trust." 25 U.S.C. § 2719(c).

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

Which brings us back to the March 27 Letter. 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. By logical extension, the opposite also must be 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

[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).

abstract—that is, one issued prior to 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.*

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 in order 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 obligation under IGRA. The Letter does not constitute final agency action for purposes of the APA.

[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.

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.'s Mem. 14–17. None has merit.

Scotts Valley begins by making an over-generalized statement of law: any agency decision to suspend or pause a prior final agency action is itself final agency action. *See* Pl.'s Mem. 15. But as explained above, the Trust Determination, not the Gaming Eligibility Determination concomitant to it, was the Department's final agency action with respect to Scotts Valley's application. And the Vallejo Site remains in trust. The cases Scotts Valley cites—two of which are out-of-circuit—only stand for the undisputed point that a suspension or pause would constitute final agency action if it has legal consequences. *See Clean Air Council*, 862 F.3d at 6–8 (challenging EPA decision to stay implementation of portions of a final legislative rule, including compliance deadlines); *Salazar v. King*, 822 F.3d 61, 72, 82–84 (2d Cir. 2016) (challenging Department of Education decision to not suspend collection of student loan debt and alleviate legal obligation to make payments); *Texas v. United States*, 524 F. Supp. 3d 598, 610, 642–43 (S.D. Tex. 2021) (challenging government decision to pause removal of noncitizens that were already subject to final order of removal, altering the government's removal obligations).

Scotts Valley next argues that it is "incurring serious harm" because "[i]t has committed substantial resources in reliance on the Department's final Eligibility Determination." Pl.'s Mem. 16. This includes negotiating and entering contracts, signing reimbursement agreements, incurring loans, and "initiating regulatory planning." *Id.*; *see also id.* at 17 (claiming "legal uncertainty" over the project and jeopardy to "relationships with partners and contractors").

But the March 27 Letter did not purport to invalidate any of Scotts Valley'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 Assoc. 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 sovereignty has been impacted because the temporary recission "changes the applicable substantive gaming laws on the Vallejo Site from the laws of [Scotts Valley] to the laws of the State of California." Pl.'s Mem. 16 (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] 18 U.S.C. § 1166(a). The term "gambling" in § 1166, however, 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]

[9] "Under principles of federal Indian 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 Village 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. 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

Scotts Valley's point here is not clear. If the Tribe were intending to conduct Class I or Class II gaming, § 1166 does not apply. *See id.* § 1166(c). Scotts Valley also does not have a Tribal-State compact under which it could conduct Class III gaming. *See* Davis Decl. ¶ 16. And the March 27 Letter did not take any action with respect to a compact. Thus, Scotts Valley is not in any different legal posture today with respect to § 1166 than it was before the March 27 Letter. Practically speaking, the temporary rescission means 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 present absence of a determination from the Department on the subject, however, does not have any legal consequences for Scotts Valley under IGRA. Scotts Valley cites *Mashpee Wampanoag Tribe v. Bernhardt*, No. 18-cv-2242, 2020 WL 3034854 (D.D.C. June 5, 2020) to support its position. But that case involved the Department's decision to take the land out of trust. *See id.* at *3; *see also Mashpee Wampanoag Tribe v. Bernhardt*, 466 F. Supp. 3d 199, 213 (D.D.C. 2020).

Finally, Scotts Valley claims to have been deprived of a valuable property right. Pl.'s Mem. 16. 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 is not a final agency action under the APA, and Scotts Valley will therefore not succeed on the merits of its claims.

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any violation of relevant state law if gaming on Indian lands is occurring outside of IGRA's requirements. *See Alabama v. PCI Gaming Authority*, 801 F.3d 1278, 1285–85 (11th Cir. 2015).

4. Scotts Valley is not likely to succeed on its due process claim.

Even assuming the March 27 Letter constituted final agency action reviewable under the APA, Scotts Valley would fare no better with its argument that the Department deprived it of a protected property or liberty interest by issuing the March 27 Letter. Pl.'s Mem. 17–22. "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)). Scotts Valley has not identified a valid property or liberty interest affected by the March 27 Letter. Scotts Valley currently has no vested interest in Class III gaming on the Vallejo Site because there are conditions that must be met before that gaming are allowed. The March 27 Letter also did not deprive Scotts Valley of any cognizable interest because, as explained further above regarding the lack of reviewable final agency action, the Letter has no legal consequences.

Scotts Valley asserts that the March 27 Letter "immediately deprives" it of a concrete, valuable property interest in the right to conduct gaming on the Vallejo Site. Pl.'s Mem. 19–20. This argument fails because even without the recission, Scotts Valley currently does not have the ability to conduct its proposed Class III gaming on the site. As Scotts Valley itself stated, before operating a Class III casino, "Scotts Valley is required to negotiate and conclude a tribal-state gaming contract," "secure NIGC approval of management contracts," "secure NIGC review of development and financing agreements," and "comply with mitigation measures contained in the Final EA and the mitigated FONSI." ECF No. 31 at 24–25. Those steps are in addition to beginning and completing construction of the casino development and hiring and conducting IGRA-required background checks on hundreds of employees. *See id.* at 25. Thus, *by Scotts Valley's own admission*, even without the March 27 Letter, Scotts Valley does not have the right

to conduct Class III gaming on the site at this time. *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). Scotts Valley's expectation that the conditions precedent would be met is not sufficient. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972) ("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."). As such, the March 27 Letter did not deprive Scotts Valley of a cognizable property interest.

Scotts Valley also asserts that it has property interests in its contracts with vendors. Not all contracts create property interests protected by the due process clause. *See, e.g.*, *Nat'l R.R. Passenger Corp. v. Atchison Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 472 (1985) (noting that impairment of contract rights must be of "constitutional dimension"). Scotts Valley relies on *Lynch v. United States*, 292 U.S. 571, 579 (1934), for the overly-broad proposition that contractual rights are protected property rights. In *Lynch*, the United States was a party to the contract. *See id.* at 575. But in any event, the Department is not interfering with Scotts Valley's contracts. The March 27 Letter did not take any action against those contracts or prevent Scotts Valley from entering into other contracts. Thus, the United States has not deprived Scotts Valley of protected property interests in its contracts.

Nor does Scotts Valley have a cognizable interest in the exercise of its sovereign authority to regulate and conduct gaming on the Vallejo Site. Again, Scotts Valley is "many steps removed" from being able to conduct Class III gaming on the site. ECF No. 31 at 24. The March 27 Letter does not otherwise interfere with Scotts Valley's sovereignty or ability to enforce tribal law. Being required to proceed through the administrative process is not a

deprivation of tribal sovereignty. And to the extent that Scotts Valley argues that the March 27 Letter immediately transferred the applicable gaming laws from Scotts Valley's to California's, that argument fails for the same reasons as discussed in Section IV.B.3.c, *supra*. The March 27 Letter did not affect Scotts Valley's legal posture with respect to 18 U.S.C. § 1166. Scotts Valley therefore has not been deprived of a concrete liberty interest.

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 at this time, 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. As such, Scotts Valley is not likely to prevail on its argument that the Department violated its due process rights.

5. The Secretary has authority to review prior decisions.

Scotts Valley's argument that the Department cannot reconsider the Gaming Eligibility Determination similarly fails. It is well-established that "administrative agencies are assumed to possess at least some inherent authority to revisit their prior decisions, at least if done in a timely fashion." *Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014) (citing cases). Contrary to Scotts Valley's argument, the Department has authority to reconsider its decision and did so in a timely manner and for an appropriate reason.

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." *Id.* (quoting *Albertson v. FCC*, 182 F.2d 397, 399 (D.C. Cir. 1950)); *see 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). The Department here invoked 43 C.F.R. § 4.5. Recognizing the Secretary's inherent authority, this section reserves broad power to the Secretary to review any decisions of any Department employee and to order reconsideration of those decisions.

Ultimately, "[a]n agency may not reconsider its own decision if to do so would be arbitrary, capricious, or an abuse of discretion." *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002). Generally, courts have recognized two restrictions on agencies' inherent authority to reconsider. First, agencies cannot reconsider decisions if there is a specific statutory prohibition on reconsideration. *See Voyageur*, 444 F. Supp. 3d at 193 (citing *Ivy Sports*, 767 F.3d at 86). Scotts Valley does not identify any such statutory prohibition here. Second, agencies must act to reconsider "within a short and reasonable period." *Mazaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977) (quoting *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972)). What constitutes a reasonable time period for reconsideration turns on the facts of the individual case. *See Cooley v. United States*, 324 F.3d 1297, 1305–06 (Fed. Cir. 2003) (remanding to the trial court to consider whether a three-year period between an initial denial decision and reconsideration "was reasonable under the circumstances of this case"). This limitation applies because 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 Mining Co. v. United States*, 999 F.2d 989, 997 (6th Cir. 1993) (quoting *Civil Aeronautics Bd. v. Delta Air Lines, Inc.*, 367 U.S. 316, 321 (1961)); *accord Frito-Lay, Inc. v. U.S. Dep't of Labor*, 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 cure their own errors and 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.").

Section 4.5 does not contain any time limit for reconsideration. Instead, it simply recognizes that the Secretary has broad authority to review and reconsider any decision. In *Voyageur*, the 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 begin its reconsideration here is even more reasonable, given that it began just two and-a-half months after a change in Administration.

Courts have considered other factors in determining whether reconsideration is timely. *See Voyageur*, 444 F. Supp. 3d at 195 (listing factors articulated in *Belville*, 999 F.2d at 1001):

> (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.

The factors demonstrate that the Department's decision to reconsider here was timely.

a. Complexity.

The January 10 Decision is thirty single-spaced pages long that determined whether Scotts Valley met the "restored tribe" and "restored lands" criteria in the Part 292 regulations, Jan. 10 Decision at 5–23, as well as whether it met the trust acquisition factors in the Part 151 regulations, *id*. at 24–30. The restored lands criteria "requires a tribe to demonstrate modern, temporal, and significant historical connections to a parcel." *Id.* at 5. The decision involved analysis of agency standards for showing "significant historical connections," as well as of the

court order finding the Department's prior ILO decision arbitrary and capricious and establishing additional factors to be considered. *See id.* at 4, 18. The decision being reconsidered, therefore, is complex.

Scotts Valley argues that the March 27 Letter "was not complex." Pl.'s Mem. 25–26. This, however, focuses on the wrong decision; the question is whether *the decision being reconsidered* is complex. For example, in the *Voyageur* case, this Court found that reconsideration was timely by examining the complexity of the legal opinion to be reconsidered. *See, e.g.*, 444 F. Supp. 3d at 195.

b. Legally cognizable property interests.

Scotts Valley also mistakenly asserts that the January 10 Decision conveyed legally cognizable property interests. To the extent this is true, those interests are not affected by the March 27 Letter. The Trust Determination was not rescinded and the land remains in trust for Scotts Valley. As discussed above, the Trust Determination did not create a property interest in gaming. *See* Section IV.B.4. According to Scotts Valley, "[o]nce the land is gaming eligible, there is practically no bar to [Scotts Valley's] authority to conduct gaming on that land." Pl.'s Mem. 27. This is not true with respect to the Class III gaming Scotts Valley intends to conduct. As Scotts Valley has acknowledged elsewhere, there are multiple steps still left to occur before Scott Valley can conduct Class III gaming. *See* ECF No. 31 at 24–25. In particular, IGRA requires a Tribal-State compact be in effect before Class III gaming can take place. Without that, Scotts Valley has no current legally-protected right to conducting Class III gaming on the Vallejo Site.

c. Decision based on fact or law.

The Department's decision was based on both fact and law—the Department applied the definition of "significant historical connection," as informed by the Department's precedent and

the Court's prior *Scotts Valley* decision, as well as the Part 151 regulations, to the administrative record before the agency. The Department now seeks to reopen the record to ensure that all relevant evidence is considered.

d. Reliance.

Scotts Valley has not demonstrated reasonable reliance on the January 10 Decision that would cause the Department's reconsideration to be untimely. First, even setting aside the Department's ability to reconsider its own decisions, 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.*, Appx. 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 May 9, 2025). For example, the Yocha Dehe Wintun Nation attempted to intervene in the earlier litigation over the Department's 2019 decision to protect its asserted interests. *See Yocha Dehe v. U.S. Dep't of the Interior*, 3 F.4th 427 (D.C. Cir. 2021). In fact, three separate cases have been filed to date 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.

Scotts Valley also has not demonstrated sufficient reliance to make the reconsideration untimely. The land remains in trust. The March 27 Letter did not invalidate any contracts, prohibit Scotts Valley from seeking financing, or bar project planning. Scotts Valley has not demonstrated that its contracts are in jeopardy, 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.

In addition, it also appears that Scotts Valley initiated some of the actions *before* the January 10 Decision. For example, GTL Properties'[11] motion to intervene states that "GTL and the Tribe agreed as to the terms of a purchase and sale agreement . . . on November 2, 2024, in anticipation of a potential determination by the Department that the Vallejo Parcel qualifies as restored lands and is therefore eligible for gaming." ECF No. 20-1 at 1. Mr. Davis's declaration also refers to "authorized" payments pursuant to contracts entered into after the January 10 Decision "and other agreements," suggesting that some of the payments authorized are for agreements entered into *before* January 10. Davis Decl. ¶¶ 12–13, ECF No. 3-2. Any such actions were not taken in reliance on the Department's January 10 Decision and undercut Scotts Valley's argument.

Scotts Valley also asserts that it relied on the January 10 Decision when it submitted a gaming ordinance to NIGC for approval. The NIGC approved that ordinance. *See* Ex. 1 (Gaming Ordinance and NIGC Letter Approving Gaming Ordinance).Further, the gaming ordinance is not site-specific and thus would have not relation to any gaming eligibility determination for the Vallejo Site. *Id.* Nor has Scotts Valley alleged (let alone demonstrated) that the NIGC rescinded its approval of the gaming ordinance. Scotts Valley also already had a gaming ordinance since 1996. *Id.*

Nor does the March 27 Letter prevent Scotts Valley from negotiating with the State of California for a Tribal-State Gaming Compact. The state has asked that the "next negotiation-related dates . . . be put on hold while we assess the situation," noting both the March 27 Letter *and* the pending litigation. ECF No. 40 at 1-2. The email "welcomes the Tribe's perspective on

[11] GTL Properties LLLP is the previous owner of a 32-acre portion of the Vallejo Site who also loaned Scotts Valley funds to acquire the rest of the Site. ECF No. 20-1 at 2.

the potential impacts (if any) of these developments." ECF No. 40-2 at 2. This email does not indicate that the State is refusing to negotiate a compact. Scotts Valley also has recourse through IGRA if that happens. *See* 25 U.S.C. § 2710(d)(7)(A)(i). In short, Scotts Valley has not demonstrated sufficient reliance to make the Department's March 27 Letter untimely.

e. Pretext.

Nor has Scotts Valley shown that the Department's stated reason for reconsideration—wanting to consider the full evidence—is pretextual. Scotts Valley relies entirely on the timing of the decision to reconsider as "proof" of pretext. But courts have rejected such arguments. *Belville*, 999 F.2d at 998 ("Belville has presented no evidence, beyond the timing of the change in leadership, to suggest" that reconsideration "was attempting to change existing policy rather than to correct erroneous . . . determinations."). As in *Belville*, this case "is not one in which [an agency], based only on policy reasons, has decided to adopt one legally supportable position rather than another." *Id.* at 999. Rather, the Department had justifiable reasons—the consideration of additional evidence—to undertake reconsideration.

An agency's actions are afforded a "presumption of regularity," *Shieldalloy Metallurgical Corp. v. Nuclear Regulatory Comm'n*, 707 F.3d 371, 387 (D.C. Cir. 2013), meaning that the Department is presumed to have acted in good faith and relied on proper motivations in deciding to reconsider the Gaming Eligibility Determination. *See In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1279 (D.C. Cir. 1998). Scotts Valley offers nothing to overcome this presumption.

f. Probable impact of an erroneous agency decision absent reconsideration.

This factor also weighs in favor of the Department. This is a case where the underlying decision is important to a number of groups. Obviously, it is important to Scotts Valley. It is also important to the Yocha Dehe, the Kletsel Dehe, the United Auburn Indian Community, and

the Lytton Rancheria, all of which have filed lawsuits challenging the Department's decision. Scotts Valley emphasizes that the Department found that taking the land into trust for gaming and tribal housing purposes would not have a significant adverse effect on the human environment. Pl.'s Mem. 32–33. But the factor is not so narrowly focused. The agency and the public have an interest in ensuring that the Department reaches a correct decision based on the evidence.

These factors therefore demonstrate that the Department acted to reconsider the January 10 Decision in a timely fashion. The March 27 Letter is within the scope of the Department's authority to reconsider its decision.

6. Section 4.5 allows the Secretary to rescind the January 10 Decision.

Scotts Valley argues that "Section 4.5 does not provide the Secretary with unbridled authority to reopen the record after a final agency decision is issued." Pl.'s Mem. 35. But Scotts Valley does not cite any case law or other authority supporting this premise. Instead, Scotts Valley rehashes its argument that the reconsideration is untimely. For the reasons stated above, this argument is not persuasive.

Section 4.5(c) states that if the Secretary decides to review a decision, the administrative record will be requested. It does not state that the decision can only be based on the existing administrative record. Such a finding would be incongruous with Section 4.5's recognition of the Secretary's broad and inherent discretion to reconsider decisions.

According to Scotts Valley, the Department is required to promulgate rules governing its reconsideration process. But, again, this is not supported by any binding case law or other authority. If the Department abuses its reconsideration process, it is subject to a court finding that it acted arbitrarily and capriciously. It is not required to promulgate rules regarding reconsideration when the rules already provide that the Secretary has broad discretion.

7. The Senior Advisor to the Secretary had authority to issue the March 27 Letter.

Scotts Valley argues that 43 C.F.R. § 4.5 does not allow delegation of the Secretary's authority to reconsider decisions to a senior advisor who is not a Presidentially Appointed, Senate-Confirmed ("PAS") officer. Pl.'s Mem. 22. There are two issues here: whether the Secretary can delegate his authority to reconsider decisions to the Assistant Secretary–Indian Affairs ("AS–IA"), and whether the AS–IA's authority can be delegated to a non-PAS officer when the office of the AS–IA is vacant. Both delegations are permissible.

First, the Secretary can delegate his authority to reconsider decisions to the AS–IA. The Department has established an internal Department Manual setting forth its operational procedures. The Departmental Manual delegates to the AS–IA the authority to exercise all of the Secretary's authority, subject to the limitations in 200 DM 1. *See* 209 DM 8.1, attached as Ex. 2. The Secretary "has broad power to delegate authority," except when "the terms of the legislation, Executive order or other source of authority" do not allow delegation. 200 DM 1, attached as Ex. 3. Scotts Valley does not identify any authority that prevents delegation here. Thus, the Secretary's delegation of authority to the AS-IA is valid.

Scotts Valley is wrong in arguing that the Secretary cannot delegate his authority under § 4.5 because the regulation mentions only the Secretary. *See* Pl.'s Mem. 23. There is a presumption of delegability, and the authority must state that it is nondelegable to override that presumption. *See Stand Up for California! v. U.S. Dep't of Interior*, 298 F. Supp. 3d 136, 143 (D.D.C. 2018). For example, the Secretary's authority to disapprove Tribal Minerals Agreements "may only be delegated to the Assistant Secretary of the Interior for Indian Affairs." 25 U.S.C. § 2103(d). Similarly, 25 U.S.C. § 5117 limits delegation of the Secretary's authority to anyone "other than a Deputy Secretary or Assistant Secretary of the respective department." 25 U.S.C.

§ 5117(b)(2); *see also* 43 C.F.R. § 3191.2(b) ("Authority delegated to a State under this subpart shall not be redelegated."). No such restriction appears in § 4.5. It does not use "any affirmative language precluding delegation, such as 'may only be delegated to,' 'may not [be] delegate[d],' 'may not be redelegated,' 'shall not be redelegated,' or is 'not subject to delegation.'" *Stand Up*, 298 F. Supp. 3d at 143. Scotts Valley asks the Court to import into § 4.5 the words "only," "exclusively," or "solely" to create a prohibition that is not there. Courts lack authority to add such restrictive terms where drafters chose not to. *Overseas Educ. Ass'n, Inc. v. Fed. Labor Rels. Auth.*, 876 F.2d 960, 975 (D.C. Cir. 1989) (Buckley, J., concurring).

As to the second question—whether the AS–IA's authority can be delegated to a non-PAS officer when the office of the AS–IA is vacant—under the circumstances here, the delegation to a non-PAS official was valid. The AS–IA is a Presidentially-appointed and Senate-confirmed ("PAS") position that is currently vacant after Bryan Newland resigned from the position prior to January 20, 2025. On March 20, 2025, the Secretary of the Interior granted Senior Advisor to the Secretary Scott Davis the decision-making authority associated with the duties and responsibilities of the AS–IA. *See* SO 3414 A4, Establishment of New Department Leadership Team and Temporary Redelegation of Authority, § 4 (Mar. 20, 2025) (attached as Ex. 4).[12] The delegation included "the authority necessary to perform all functions, duties, and responsibilities of their respective positions that are not required by statute or regulation to be performed only by a PAS official in that position." *Id.* at § 5.

This delegation was made in compliance with the Federal Vacancies Reform Act ("FVRA"), 5 U.S.C. § 3345. "[T]he FVRA is Congress' practical response to the 'problems that

[12] Secretary Order No. 3414, Amendment 4 is available electronically on the Department's website at https://www.doi.gov/document-library/secretary-order/so-3414-a4-amendment-so-3414-establishment-new-department.

arise when our Constitution confronts the realities of practical governance,' such as when the change in presidential administrations leaves vacant certain positions requiring appointment by the President and confirmation by the Senate (known as "PAS" positions)." *Stand Up*, 298 F. Supp. 3d at 141 (citing *SW General, Inc. v. NLRB*, 796 F.3d 67, 69 (D.C. Cir. 2015); U.S. Const. art. II, § 2, cl. 2 (Appointments Clause)). FVRA "has been deemed to 'permit[ ] non-exclusive responsibilities to be delegated to other appropriate officers and employees in the agency.'" *Id.* (quoting Guidance on Application of Federal Vacancies Reform Act of 1998, 23 Op. O.L.C. 60, 72 (1999)). If the FVRA is instead read to require all duties to be performed by the head of the agency, it would seriously disrupt the government's business. *Id.*

Scotts Valley argues that the decision could not be delegated to a non-PAS because the decision is a "significant exercise of federal power." Pl.'s Mem. 23. But this Court has elsewhere held that a non-PAS officer properly had the delegated authority to issue a final decision on whether land should be taken into trust under 25 C.F.R. § 151.12(c). *Stand Up*, 298 F. Supp. 3d at 141; *see also Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 420 (D. Conn. 2008) (holding that non-PAS officer could make decisions on acknowledgment of Indian tribes); *Sokaogon Chippewa Cmty. v. Babbitt*, 929 F. Supp. 1165, 1182 (W.D. Wis. 1996) (holding that non-PAS official could make final decision). There is no reason why that authority (to approve a fee-to-trust decision) would be any less of an exercise of power than the authority at issue here (to reconsider a land eligibility determination). Scotts Valley's argument that a "significant exercise of federal power" can only be taken by PAS officials is not supported by the case law.

8. The March 27 Letter does not threaten the trust acquisition process or intrude on NIGC's authority.

Scotts Valley asserts that if the Gaming Eligibility Determination is no longer valid, the trust acquisition itself is called into question. It is not likely to succeed on the merits of this argument.

First, the land is still in trust for Scotts Valley, and it is purely speculative that the trust acquisition may be reversed. In addition, the Department's regulations that govern applications to take land into trust, 25 C.F.R. Part 151, are separate from its regulations that govern whether gaming can take place on land acquired after October 17, 1988, for purposes of the IGRA, 25 C.F.R. Part 292. As discussed above, the fee-to-trust regulations require that the Department consider the purpose for which land will be used, including gaming. But the Department's rescission of a determination that a parcel is eligible for gaming is not a separate final agency action currently reviewable under the APA. *See supra* at Section IV.B. The Department has not concluded that the site is ineligible for gaming, nor has it acted to take the land out of trust.

Nor does the March 27 Letter intrude on NIGC's authority. NIGC still has responsibility under IGRA to approving gaming ordinances and management contracts. *See Miami Tribe*, 198 F. App'x at 690 ("Congress has vested the authority to decide gaming contracts under the IGRA with the NIGC."). The Department's decision to reconsider its Gaming Eligibility Determination no more usurps NIGC's authority than the Department making the determination as part of its fee-to-trust decision in the first place.

For the foregoing reasons, Scotts Valley is not likely to prevail on the merits.

C. The Balance of Harms Counsels Against Preliminary Relief.

The final two factors for preliminary injunctive relief are the balance of harms and the public interest. When the government is a party, the two factors merge. *See Nken*, 556 U.S. at

435. Here, those factors weigh against preliminary relief. As explained above, Scotts Valley has made no showing of irreparable harm. Balanced against that nullity is the federal government's inherent authority to reconsider prior decisions. *See Ivy Sports*, 767 F.3d at 86 ("[I]nherent authority for timely administrative reconsideration is premised on the notion that the 'power to reconsider is inherent in the power to decide.'" (citation omitted)). Scotts Valley has failed to demonstrate that it is entitled to preliminary injunctive relief.

D. Scotts Valley's Requested Relief is Unsupported.

Scotts Valley's motion is defective for another reason: it seeks preliminary relief that either (1) alters the status quo, or (2) is untethered to the harms the Tribe (unsuccessfully) tries to demonstrate.

To the first point, Scotts Valley requests that the March 27 Letter be "set aside" and that the Gaming Eligibility Determination be "reinstated and preserved." Pl.'s Proposed Order 2, ECF No. 3-4. But preliminary injunctive relief is intended to *maintain* the status quo until the court can resolve the merits. *See Lackey v. Stinnie*, 604 U.S. __, 145 S. Ct. 659, 667 (2025). Here, that status quo is that the Gaming Eligibility Determination has been temporarily rescinded. Instead of maintaining the status quo, Scotts Valley seeks to alter it. Though the D.C. Circuit applies the typical standard in these circumstances, courts in other circuits have held requests for this sort of preliminary relief to a heightened standard. *Singh v. Berger*, 56 F.4th 88, 96 (D.C. Cir. 2022).

What's more, Scotts Valley's request is the same relief it seeks in its Amended Complaint. *See* Am. Compl. Prayer for Relief ¶¶ B, C, E. Thus, the Tribe is attempting to obtain through only a showing of likely success (at this stage) the same thing it desires after actual success (on summary judgment). The Court should reject the attempted short cut. Further still, the request to have the Gaming Eligibility Determination preliminarily reinstated is *beyond* the relief Scotts

Valley would be entitled to if it ultimately succeeds on the merits of this APA case. *See PPG Industries, Inc. v. United States*, 52 F.3d 363, 365 (D.C. Cir. 1995) ("Under settled principles of administrative law, when a court reviewing agency action determines that an agency made an error of law, the court's inquiry is at an end: the case must be remanded to the agency for further action consistent with the corrected legal standards." (citations omitted)).

Turning to the point about untethered harms, Scotts Valley requests preliminary relief prohibiting the Department from "reopening the administrative record" and "considering or accepting evidence." Pl.'s Proposed Order 1. But Scotts Valley has not even alleged (let alone proven) any irreparable harm emanating from the process of the Department undertaking its planned reconsideration. *See* Pl.'s Mem. 39–40. Thus, at a minimum, the Court should deny that portion of the injunction because it is not "tailored to remedy the harm shown." *Beacon Assocs., Inc. v. Apprio, Inc.*, 308 F. Supp. 3d 277, 284 (D.D.C. 2018) (citation omitted). Nor can preliminary relief be based on speculation regarding the outcome of the Department's reconsideration. *See St. Croix Chippewa Indians v. Kempthorne*, 535 F. Supp. 2d 33, 36–37 (D.D.C. 2008) ("Unfortunately for plaintiff, however, its position is based entirely on pure speculation about how the Department will rule on the Part 151 determination, and ultimately, its application. Such speculation is legally insufficient to constitute the irreparable harm necessary to warrant injunctive relief.").

V. CONCLUSION

Scotts Valley has not met its burden of demonstrating that a preliminary injunction should issue. It has failed to demonstrate any irreparable injury, which alone is reason to deny the motion. In addition, however, Scotts Valley is not likely to prevail on the merits of its argument, in particular because it has failed to challenge final agency action. Moreover, the balance of harms and the public interest weight against issuing an injunction here. For the foregoing

reasons, Federal Defendants respectfully request that this Court deny Scotts Valley's motion for a preliminary injunction.

Respectfully submitted this 9th day of May, 2025.

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