IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTTS VALLEY BAND OF POMO INDIANS, Plaintiff, v. DOUGLAS BURGUM, et al., Defendants,	Civil Action No. 1:25-cv-958 Judge Trevor N. McFadden

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF THE MOTION FOR PRELIMINARY INJUNCTION

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At its core, this case is about finality, fairness, and the integrity of the administrative process. After years of review, litigation, and a court-ordered remand, the Department of the Interior issued a final gaming eligibility determination ("Eligibility Determination") on January 10, 2025, as part of trust land decision. That determination was made *exclusively* on the closed administrative record, and the Department was unequivocal: "[I]n reconsidering the 2019 ILO on remand, the Department neither solicited nor considered any additional evidentiary materials from outside parties, including the Band and those opposed to the Band's request." ECF No. 12, First Amended Complaint ¶ 22; Ex. A at 3–4 (emphasis added).

This was a lawful choice not to reopen the record — a decision grounded in bedrock principles of administrative law[1] and entitled to finality. Yet, with the March 27, 2025 Recission, Defendants unlawfully seek to upend that finality, to the great and immediate detriment of the Tribe. They now solicit *post hoc* input from third parties who had no entitlement to participate in the gaming eligibility process. As this Court already confirmed:

> The Scotts Valley Band replies that the gaming eligibility determination does not require public comment... The tribe is right that while other components of the process—like the land-in-trust decision and the National Environmental Policy Act review—allow public comment, the gaming eligibility does not.

Memorandum Order, ECF No. 38 at 10–11 (Apr. 23, 2025) (internal citations omitted); *see also* Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354, 29,361 (May 20, 2008) (The restored land exception does not require public comment because it involves a fact-based inquiry.) The Department has no authority under IGRA, the APA, or due process to reopen a final decision at the request of non-parties that had no right to comment on the Eligibility Determination. The March 27 Rescission was issued without lawful authority, violates due

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[1] *See Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1278 (Fed Cir. 2012) ("The decision to reopen the record is best left to the agency …").

process, unlawfully infringes on the Tribe's sovereign rights and reliance interests, and creates immediate and ongoing and irreparable injury. Injunctive relief should be granted.

ARGUMENT

I. Scotts Valley Is Likely to Prevail on the Merits Because the Department's Rescission Exceeded Its Authority, Violated Finality Principles, and Contravened the APA.

Scotts Valley is likely to prevail on the merits because Defendants have acted beyond the scope of their lawful authority and in direct contravention of binding regulations, final agency action doctrine, and the Administrative Procedure Act. The Secretary's authority to acquire land in trust is purpose-driven and exercised through lawful delegation. While agencies may retain inherent authority to reconsider prior decisions, that authority is not unlimited. The March 27 Rescission exceeds the narrow review authority provided in 43 C.F.R. § 4.5, exceeds any inherent authority to reconsider, and unlawfully purports to rescind a final, published determination without notice, process, or legal basis. Critically, it is a final agency action with immediate legal consequences, and it was issued without compliance with the APA's procedural and substantive safeguards. These fundamental legal defects not only render the rescission reviewable—they compel a finding that it is invalid. Because the rescission exceeds statutory or inherent authority, violates governing regulations, upends settled reliance interests, and inflicts immediate irreparable injury, the Tribe is substantially likely to succeed on the merits of its claims.

A. The Rescission Is Final Agency Action.

Defendants wrongly assert that the March 27 Rescission is not final agency action because it does not disturb the trust acquisition and purports only to "reconsider" the associated Eligibility Determination. But this argument misstates both the law and the record. The March 27 Rescission did not simply initiate a reconsideration process—it expressly withdrew the Eligibility Determination that had been finalized, published, and relied upon by the Tribe, state officials, federal agencies, and private partners. The Eligibility Determination was not ancillary or severable from the trust acquisition; it was part and parcel of the final agency action authorizing the acquisition of land into trust for the express purpose of gaming. Its rescission imposes immediate and substantial legal consequences, imposes state gaming laws, forecloses the Tribe's ability to conduct gaming under IGRA and its own gaming laws, halts compact negotiations, and injects uncertainty into every regulatory and contractual relationship built on the Department's prior final decision. The March 27 Rescission further establishes a new public comment process not contained in 25 C.F.R Part 292, and which was expressly rejected in the final rule governing gaming eligibility determinations. *See* Gaming on Trust Lands…, 73 Fed. Reg. at 29,361 ("[T]he section 2719(b)(1)(B) exceptions[2] do not require public comment . . . since they present a fact-based inquiry . . .. Nonetheless, there are opportunities for public comment in other parts of the administrative process--for example, in the process to take the land in trust and during the NEPA review process.") The March 27 Rescission therefore meets both prongs of finality under *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997). First, it marked the consummation of the agency's decision-making process to (a) rescind the Eligibility Determination and (b) impose a new public comment process not contained in IGRA or the Department's regulations. Second, it altered the legal rights and obligations of the Tribe and others.

Defendants' suggestion that the March 27 Rescission merely initiated a reconsideration process ignores its plain text and effect. By withdrawing the Eligibility Determination, the Department immediately removed the Vallejo Parcel from IGRA's provisions, applied California's gaming laws to the site, disrupted the Tribe's contractual relationships, and halted

[2] This includes the restored lands exception found at 25 U.S.C. § 2719(b)(1)(B)(iii).

ongoing gaming compact negotiations with the State of California.[3] No further agency action is required to accomplish the rescission of the Vallejo Site's gaming eligibility. This is not merely the first step of an ongoing reconsideration —it is a binding revocation with immediate real-world implications. The D.C. Circuit has recognized this distinction, holding that although a "decision to grant reconsideration, which merely begins a process," is not final agency action, where it is coupled with a stay or revocation of the underlying agency action, the revocation constitutes final agency action subject to judicial review. *Clean Air Council v. Pruitt*, 862 F.3d 1, 6-7 (D.C. Cir. 2017); *see also Nat'l Women's Law Ctr. v. Ofc. of Mgmt. and Budget*, 358 F.Supp.3d 66, 85 (D.D.C. 2019) (agency's revocation of earlier approval "is not interlocutory simply because [agency] will conduct future administrative proceedings"). The March 27 Rescission consummates the decision-making process with respect to the continued effectiveness of the Eligibility Determination. *Bennett* at 178.

Defendants also cite *CSX Transp., Inc. v. Surface Transp. Bd.*, 774 F.3d 25 (D.C. Cir. 2014), for the proposition that "agency action is not final merely because it has the effect of requiring a party to participate in an agency proceeding," but ignore that the Court further stated that, "an aggrieved party need not fully exhaust administrative remedies before seeking judicial review because the agency is pursuing a matter on which it has no right to act." *Id.* at 32 (citations omitted). That is precisely the case here: the March 27 Rescission imposes a new public comment process that the Department expressly rejected in its final rule. 73 Fed. Reg. at 29,361. For this additional reason, the March 27 Rescission is final agency action subject to judicial review.

A district court facing similar circumstances also rejected Defendants' reasoning. *Texas v.*

[3] *See* ECF 62-1, p. 2; *see also* ECF 61-7, Declaration of Patrick R. Bergin ("Bergin Decl."), Ex. G.

Brooks-LaSure, No. 6:21-CV-00191, 2021 WL 5154219, *13 (E.D. Tex. Aug. 20, 2021). In *Texas*, a federal agency approved Texas' application to extend a special healthcare project in January 2021, but the administration turned over and in April 2021 the new acting administrator rescinded the approval. *Id.* *3. The court held the rescission was final agency action, despite a purported administrative stay of the rescission, a pending administrative appeal, and the possibility that the agency still "could consider and approve a new extension." *Id.* at *5, *13. Just as in *Texas*, here the March 27 Rescission was not tentative or interlocutory, and it determined the Tribe's rights and carried legal and practical consequences, making it a final decision. *See id.* at *5.

Defendants rely upon *County of Amador v. United States Dep't of Interior*, No. Civ. S-07-527 LKK/GGH, 2007 WL 4390499 (E.D. Cal. Dec. 13, 2007), to argue that the gaming eligibility rescission is not final, but that case undermines Defendants' argument. In *County of Amador*, the court distinguished final gaming decisions from non-final ones based on the existence or absence of trust land on which the gaming decision would have an effect. *Id.* at *4-5. Here, Scotts Valley holds title to the trust land in question, so both the gaming eligibility decision on January 10 and the extinguishment of eligibility on March 27 were final agency actions. The next case on which Defendants rely is similar, because the Indian lands decision there was "only part of the process that [would] result in the final [agency] action," so it did "not have a direct or immediate impact on the Tribe." *Miami Tribe of Okla. v. United States*, 198 Fed.Appx. 686, 690 (10th Cir. 2006). In contrast, the withdrawal of Scotts Valley's gaming eligibility on its trust land is a final decision because it has a direct and immediate impact on the Tribe.[4]

[4] The three decisions from the District of Kansas cited by Defendants all support the finality of the gaming eligibility rescission here. *See* Opp. Br. 17 (citing *Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 437 F.Supp.2d 1193, 1201 (D. Kan. 2006); *Miami Tribe of Okla. v. United States*, 927 F.Supp. 1419, 1420, 1422 (D. Kan. 1996); *Miami Tribe of Okla. v. United States*, 5

As *Bennett* emphasized, finality turns not on whether a document purports to end the agency process, but on whether it has "direct and appreciable legal consequences." *Bennett* at 178. The Department's action here rescinded a final agency determination that the Vallejo Parcel is eligible for gaming under IGRA, and thus plainly altered the legal rights and obligations of the Tribe, satisfying *Bennett*'s second prong. The agency's own description that "neither the Tribe nor any other entity or person should rely on the Gaming Eligibility Determination" underscores the immediate legal effect of the Rescission. *See* ECF 1-2 at 1.

Moreover, Defendants' effort to bifurcate the gaming determination from the trust acquisition ignores the record and the Department's own findings. The land was taken into trust *for gaming purposes*. See ECF No. 1-1 at 31 ("Pursuant to Section 5 of the IRA, 25 U.S.C. § 5108, the Department will acquire the Vallejo Site in trust for the Band. Furthermore, I have determined that the Band may conduct gaming on the Vallejo Site pursuant to Section 20 of IGRA, 25 U.S.C. § 2719(b)(1)(B)(iii)."). To now claim gaming eligibility was not essential to the acquisition contradicts the Department's rationale and defeats the purpose-driven analysis required under 25 C.F.R. § 151.9. Once the land was acquired in trust on that basis, and the Eligibility Determination made final, withdrawing the Eligibility Determination not only rescinded the Tribe's legal rights under IGRA, but it also hollowed out the primary basis for the trust acquisition.

Finally, responses to the Tribe's FOIA requests have produced internal records in which Department officials state unequivocally that the agency "will reevaluate all relevant evidence and legal analysis *and issue a new Gaming Eligibility Determination for the Vallejo Site*." ECF 61-6

F.Supp.2d 1213, 1216 (D. Kan. 1998)). The negative Indian lands opinions in those cases were final and reviewable. Under the circumstances of each case (denials of a gaming ordinance and gaming management contracts), the gaming eligibility determination affected the tribe's legal rights.

Bergin Decl. Ex. F, pg. 3-4 and 5-6. This statement confirms that the March 27 Rescission was not, as the Department now claims, a mere "temporary" suspension pending review, but rather a final agency action that revoked the Eligibility Determination with the express intent to replace it. The Rescission extinguished the legal effect of the earlier decision and required the Tribe and the Department to restart the eligibility analysis almost from scratch. While the outcome of the future reconsideration is not yet final, the decision to rescind the existing final determination is both consummated and binding and has immediate legal and practical consequences.

B. The Rescission Exceeds the Scope and Purpose of 43 C.F.R. § 4.5.

The Department's reliance on 43 C.F.R. § 4.5 as authority for the March 27 Rescission is legally misplaced and procedurally indefensible. Part 4 of Title 43 is the Department's adjudicatory rulebook. It governs formal administrative adjudications, including appeals from agency decisions, evidentiary hearings, and administrative judicial review. Section 4.1 establishes the authority of the Office of Hearings and Appeals, which is the "authorized representative of the Secretary for the purpose of hearing, considering, and deciding matters within the jurisdiction of the Department involving hearings, appeals, and other review functions of the Secretary." 43 C.F.R. § 4.1. In other words, the entire framework of Part 4 — including § 4.5 — presumes the existence of an active, pending adjudicatory matter.

Section 4.5 provides that the Secretary may "take jurisdiction at any stage of any case before any employee or employees of the Department, including any administrative law judge or board of the Office." 43 C.F.R. § 4.5(a)(1). But critically, in the absence of a pending case, there is no adjudicatory posture into which the Secretary can step. Once a trust acquisition becomes final agency action — as confirmed by 25 C.F.R. § 151.13(c) — there is no "case" before any employee, Administrative Law Judge or appeal board, no open record, and no ongoing Departmental review. *See Silver State Land LLC v. United States,* 148 Fed.Cl. 217, 255 (2020) (finding § 4.5 "appears to provide the Secretary with the specified authority only when a party has filed an administrative appeal"). Section 4.5 confers no power to reopen or reconsider a matter that has already reached finality.

Further, § 4.5 reserves to the Secretary authority to review decisions made by subordinate Departmental employees or tribunals within the adjudicatory system. *See United States v. Navajo Nation*, 537 U.S. 488, 513 (2003) (section 4.5 authorizes "Secretary to set aside or modify his subordinate's decision"). It does not allow Secretarial review of the final decisions of a predecessor Secretary, nor (as occurred here) a subordinate official's review of a decision by the person who previously held that same office. The regulation provides procedures for internal appellate review of lower-level decisions, not for the re-examination of final agency actions already taken by the Department's highest officer. Once the Secretary, or their lawful delegate, has completed the trust acquisition and title has transferred to the United States, § 4.5 confers no power to subsequently revisit or rescind that final agency action.

Section 4.5(c) underscores this limited scope, presuming the existence of an ongoing adjudicatory posture — that is, the decision under review has been issued within the Department's formal decision-making procedures, involving: (1) the assumption of jurisdiction by the Secretary, (2) written notice to the parties and appropriate Departmental personnel of such action, (3) a request for the administrative record, and (4) the issuance of a written decision upon completion of the review process. Crucially, § 4.5 is not a free-floating power to reopen closed matters at will or to solicit new factual submissions from anyone who wishes to participate. It is designed to ensure internal agency review within the bounds of established procedures and parties' rights. The March 27, 2025 Rescission ignored important procedural guardrails:

1. **No Pending Adjudication:** There was no active administrative appeal or lower-level employee decision pending before the Department at the time of the rescission. The January 10 Decision was final, all administrative review was completed, and the trust acquisition had been completed on that basis.

2. **No Parties of Record or Adversarial Process:** Part 4 procedures presume a closed adjudicatory process with specific parties of record. Yet Defendants' rescission invites "other interested parties" to submit new evidence — a clear departure from the closed-record rule and an open invitation to third parties with no standing in the completed proceeding. Scotts Valley, as the applicant tribe and party of record, was not consulted in advance or provided an opportunity to participate before the rescission decision was made.[5]

3. **No Review of the Existing Record:** Part 4 contemplates internal review based on the existing administrative record. Section 4.5 explicitly requires that the administrative record be requested for review. But here, Defendants bypassed the record issuing a decision that the Department seeks to overwrite that record with new post hoc evidence.

[5] Although Scotts Valley was never consulted during the preparation of the Rescission letter, at least one opponent to the Tribe's eligibility—the Yocha Dehe Wintun Nation—was actively consulted during that process. FOIA responses reveal that on March 11, 2025, Kennis Bellmard, Deputy Assistant Secretary, along with numerous officials from the Office of the Solicitor and the Office of Indian Gaming, met with the Yocha Dehe Tribal Council and their legal team to discuss Scotts Valley's trust decision. Nine days later, on March 20th, John Hay, Assistant Solicitor for Indian Affairs, circulated the first internal draft of the Rescission letter to Defendant Scott Davis. Then, on March 27 at 9:54 a.m., George Skibine, a Yocha Dehe attorney, emailed Phil Bristol, Acting Director of the Office of Indian Gaming, to confirm receipt of the "reconsideration letter dated yesterday"—a reference to the March 26 version of the letter, which was later corrected to fix the acreage figure. Scotts Valley never received the March 26 version and was provided only the final, corrected letter dated March 27—which it received on March 28. In other words, Yocha Dehe received both the original and corrected versions, while the applicant Tribe received only the latter, and had no advance opportunity to respond to either. This sequence highlights the Department's failure to provide a structured adversarial process in accordance with the regulation or to give the applicant Tribe a meaningful opportunity to be heard or even notice. ECF 61-2 and 61-4, Bergin Decl., Ex. B and D.

4. **No Structured Briefing or Decision:** The Department's adjudicatory rules provide for structured adversarial briefing —briefs, responses, and replies submitted by parties to the proceeding. 25 C.F.R. §§ 2.200-2214. The March 27 letter departed from this process entirely, soliciting third-party submissions with no clear process for response, no briefing schedule, and no assurance that Scotts Valley will be afforded any opportunity to rebut the new materials.

Defendants purport to act under § 4.5 but have sidestepped key adjudicatory safeguards that give meaning to the Secretary's reserved review authority. This is not adjudication. It is unlawful administrative fiat masquerading as lawful review.

There is no doubt that a gaming eligibility determination is a final decision when, as in this case, it is accompanied (or followed) by a decision taking land into trust, or when the relevant land is already in trust. *County of Amador*, 2007 WL 4390499, *5. The finality of the trust decision is confirmed by regulation. 25 C.F.R. § 151.13(c). Defendants cite no statute or regulation that provides for reconsideration of a final trust acquisition or its underlying findings. Instead, they rely on general principles of inherent agency authority and a broad adjudicatory regulation, 43 C.F.R. § 4.5, that does not address reconsideration in this context. Once the decision is final and the land is held in trust, a new official's attempt to unilaterally reopen or reverse the prior decision exceeds the scope of the official's lawful authority. Because the Defendants lack statutory or regulatory authority to reopen a final trust acquisition decision, and because the rescission attempts to do precisely that without legal basis, Scotts Valley is likely to succeed in demonstrating that the March 27 action is ultra vires and invalid under the APA.

C. The Reconsideration Process Conflicts with the Regulatory Framework in 25 C.F.R. § 292.12.

The March 27 Rescission invites "the Tribe and other interested parties to submit evidence and/or legal analysis regarding whether the Vallejo Site qualifies" under the "restored lands" exception of IGRA, as defined in 25 U.S.C. § 2719(b)(1)(B)(iii) and 25 C.F.R. Part 292. But rather than following the established regulatory framework for assessing eligibility under the restored lands exception, the Department has created a new, unstructured process with no basis in law—and one that conflicts with the mandatory criteria and procedures in 25 C.F.R. § 292.12. This violates the APA. *FCC v. Fox Tele. Stations, Inc.*, 566 U.S. 502, 515 (2009) (agency must acknowledge departure from previous policy and show there are good reasons for new policy).

Under § 292.12, the burden is on the applicant tribe alone to establish its eligibility by demonstrating it possesses the requisite connections to the land.[6] Nowhere in § 292.12 is there any authorization for the Department to solicit, accept, or rely on evidence from "other interested parties" to refute or undermine the Tribe's showing under these three criteria.[7] The regulation imposes a substantive eligibility test—not an adversarial or public comment process. It vests the responsibility with the applicant tribe and provides no role for third parties to introduce counterevidence, propose alternative interpretations, or inject political or economic motivations into the analysis. By inviting open-ended evidentiary submissions from unnamed "interested parties," the Department has sidestepped the governing regulations and replaced the eligibility criteria in § 292.12 with an undefined and improper public comment process. The March 27 Rescission does not provide that Scotts Valley will have a meaningful opportunity to review or respond to these third-party materials—an omission that not only contradicts basic due process but

[6] The tribe must demonstrate a modern connection under § 292.12(a); a significant historical connection under § 292.12(b); and a temporal connection to the date of restoration under § 292.12(c).

[7] Nonetheless, the Department permitted several third parties to participate in the pre-2019 evaluation, and both Yocha Dehe and United Auburn, in fact, submitted substantial evidence and comments addressing the historical connection requirement—even though third-party input is not contemplated under the restored lands determination process. *See, e.g.*, ECF No. 1-1, at 4-5 fn.37; 8 fn.55; 13, fn.98, 102, 104, 105.

also undermines the integrity of the restored lands determination itself.

This approach is flatly inconsistent with the regulatory framework. As the Department explained when adopting the final rule, "the section 2719(b)(1)(B) exceptions do not require public comment and since they present a fact-based inquiry, it is unnecessary to include a requirement for public comment in the regulations." Gaming on Trust Lands…, 73 Fed. Reg. at 29,361-62. The Department's decision to solicit broad, extra-record submissions from unidentified parties is not only unauthorized— it is contrary to the regulatory intent and structure of Part 292.[8] *See also Nat'l Small Shipments Traffic Conf., Inc. v. I.C.C.*, 725 F.2d 1442, 1449 (D.C. Cir. 1984) (c*iting Morton v. Ruiz*, 415 U.S. 199, 235 (1974)) ("Ordinarily an agency must follow its own procedures whether they are mandated by law or not.").

Moreover, Congress did not authorize a public comment process for exceptions under 25 U.S.C. § 2719(b)(1)(B), recognizing that restored lands determinations are fact-intensive inquiries based on the applicant tribe's historical and governmental connections to the land. In contrast to § 2719(b)(1)(A), which expressly references input from state and local governments, § 2719(b)(1)(B) contains no such mechanism. The Department's formal solicitation of public comment on Scotts Valley's Eligibility Determination violates IGRA by improperly expanding the

[8] Furthermore, the Department's own rulemaking confirms that it views gaming eligibility determinations under Section 2719(b)(1)(B) as functionally linked to the fee-to-trust acquisition process, which is subject to public input and environmental review. While the Department has acknowledged that Section 2719(b)(1)(B) does not require a formal opportunity for public comment, it nonetheless emphasized that "there are opportunities for public comment in other parts of the administrative process—for example, in the process to take the land in trust and during the NEPA review process." 73 Fed. Reg. 29354, 29361–62 (May 20, 2008). This statement confirms that the Department treats gaming eligibility and trust acquisition as part of an integrated administrative decision, in which NEPA review provides essential procedural safeguards. The March 27 Rescission, by purporting to sever the Eligibility Determination from the underlying trust acquisition and reopen it in isolation, contradicts the Department's own regulatory framework and undermines the integrity of the original trust acquisition process.

statutory process and undermining the Tribe's right to a fair, record-based adjudication. The Department cannot circumvent binding law through informal letter-writing. Its deviation from IGRA and § 292.12 renders the reconsideration process procedurally defective and arbitrary under the APA.[9] The March 27 Rescission should be set aside for this reason alone.

D. Any Inherent Authority to Reconsider was Not Properly Exercised Because it was Arbitrary, Capricious and/or an Abuse of Discretion.

While Defendants properly cite *Macktal v. Chao*, 286 F.3d 822 (5th Cir. 2002), for the proposition that "[a]n agency may not reconsider its own decision if to do so would be arbitrary, capricious, or an abuse of discretion," they ignore that the March 27 Rescission accomplishes precisely what *Macktal* prohibits. First, in *Macktal*, the Fifth Circuit made clear that "[r]econsideration must also occur within a reasonable time after the first decision and notice of the agency's intent to reconsider must be given to the parties." *Macktal* at 826 (citing *Dun & Bradstreet Corp*. *Foundation v. U.S. Postal Serv.*, 946 F.2d 189, 193 (2d Cir. 1991); *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct. Cl. 1972)).

Defendants plainly failed to meet the latter requirement because they gave no notice—formal or informal—of their intent to reconsider or rescind the January 10 Decision. Scotts Valley was never informed that the Department was reviewing the restored lands determination, let alone planning to rescind it, even temporarily. As a result, the Tribe was deprived of any meaningful opportunity to seek injunctive relief, or even argue against the action, before the legal status of the

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[9] By soliciting and presumably relying on extra-record materials and outside input to rescind the final agency action, the Department is effectively amending the regulatory framework without following the procedural requirements of the APA. Specifically, agencies may not impose new procedures or alter the legal effect of regulations without compliance with 5 U.S.C. § 553. The APA mandates that agencies provide general notice of proposed rulemaking in the Federal Register, allow for public participation through submission of written data, views, or arguments, and publish the final rule not less than 30 days before its effective date. *Id*.

land was stripped away. *See Tesoro High Plains Pipeline Co., LLC v. United States*, No. 1:21-cv-90, 2024 WL 3359433, *6 (D.N.D. July 10, 2024) (holding that 43 C.F.R. § 4.5(a)(2) requires the Secretary to provide the parties written notice of the Secretary's decision to review previous decisions, and granting preliminary injunction based in part on the failure to provide such notice).

Contrary to the Government's suggestion, it was the Department —not Scotts Valley—that upended the *status quo*. *See Nken v. Holder*, 556 U.S. 418, 429 (2009) (status quo means "the state of affairs before the [Rescission] order was entered"). Defendants' decision to rescind a final agency action without providing notice or a chance to be heard—indeed, without even informing the Tribe that it was reconsidering the matter—is both procedurally defective and substantively prejudicial. The failure to afford Scotts Valley advance notice of its intent to rescind not only violates the due process principles outlined in *Macktal*, but also deprived the Tribe of the opportunity to protect its reliance interests through pre-enforcement judicial review.

Second, the March 27 Rescission was not done "within a short and reasonable time period" after the January 10 Decision. *Bookman*, 453 F.2d at 1265. "[A]bsent unusual circumstances, the time period would be measured in weeks, not years." *Masaleski v. Treusdell*, 562 F.2d 701, 720 (D.C. Cir. 1977) (quoting *Gratehouse v. United States*, 512 F.2d 1104, 1109 (Ct. Cl. 1975)). Appropriate time limits are similar to what court rules allow for reconsideration—typically one month or less. *Dayley v. United States*, 169 Ct. Cl. 305, 308-09 & n.2 (1965); *Texas v. Brooks-LaSure*, 2021 WL 5154219, *8; *see* Fed. R. Civ. P. 59 (28 days); Fed. R. App. P. 40 (14 days, or 45 days in civil case where United States is a party) U.S. Supreme Court Rule 44 (25 days). If the January 10 Decision had been subject to administrative appeal (which it was not), the time limit would have been 30 days from receipt. 25 C.F.R. § 2.203; *see* 25 C.F.R. § 151.13(c), (d). The seventy-six days Defendants took here is well outside these norms. The time lapse is also "not short and reasonable from a functionalist perspective due to the intervening, reasonable reliance" upon the January 10 Decision, as described below. *Texas* at *8; *see infra*, §§ I.F & II.E. Additionally, while the Eligibility Determination may have been complex, the Rescission was based on the much narrower and simpler issue, newly reconsidered and decided in order to rescind the Eligibility Determination, of whether the Department should reopen the record for additional evidence submitted by interested parties. ECF 1-2; *see Texas* at *9 (focusing on the "complexity" of the issues reconsidered in the later decision). These factors demonstrate the untimeliness of the March 27 Rescission, further supporting Scotts Valley's likelihood of success on the merits.

Third, as discussed above, the March 27 Rescission was arbitrary and capricious because it was based on a decision, supported only by a nebulous "concern[]," to impose a new public comment process that is not authorized by IGRA or 25 C.F.R. Part 292, and was expressly rejected by the Department in its final rule. *See* 73 Fed. Reg. at 29,361.

E. Defendants' Attempt to Sever Gaming Eligibility from the Trust Acquisition Is Arbitrary and Capricious.

The Supreme Court's decision in *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 591 U.S. 1 (2020), confirms that an agency may not rescind part of a final agency action without considering whether its components are severable and independently justified. In *Regents*, DHS relied on a legal rationale that applied only to benefits eligibility but used it to eliminate both benefits and the separate forbearance component of the DACA program. *Id.* at 28. The failure to explain how the components were connected violated the APA. *Id.* Here, the Department rescinded the Eligibility Determination without analyzing its relationship to the trust acquisition—an action the agency previously treated as unified and final. The Secretary had approved Scotts Valley's trust application for the express purpose of gaming-driven economic development. *See* ECF 1-1 at 25. A trust acquisition requires the Secretary to evaluate "the purpose for which the land will be used," 25 C.F.R. § 151.9(a)(3), which ensures the Secretary appraises the acquisition in light of specific, articulated tribal government objectives, consistent with the factors considered under § 151.10 (on-reservation) or § 151.11 (off-reservation). As the D.C. Circuit has explained, "when the Secretary decides to take land into trust for gaming" he must "determine whether a tribe meets one of IGRA's exceptions." *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 462-63 (D.C. Cir. 2007). The Eligibility Determination thus "formed the basis" for the trust decision and "was intended to have the force of law." *Id.* at 466-67. In the March 27 Rescission, however, the Department failed to explain why it should not keep the Eligibility Determination in place, given that it establishes the purpose of the still-effective trust decision. Under *Regents*, that omission renders the Rescission arbitrary and capricious and supports Plaintiffs' likelihood of success on the merits.

F. Defendants Cannot Disregard Reliance Interests Based on the Mere Possibility of Litigation.

"When an agency changes course," it is "arbitrary and capricious" to ignore the "reliance interests" engendered by its prior decision. *Regents* at 30 (cleaned up). A party's reliance on an initial agency decision is thus a key factor limiting the agency's authority to reconsider the decision. As the Court of Claims held, "If the parties act on the initial decision, … and if the agency knows they will act, then the agency may reverse its initial decision only upon a showing that it was erroneous." *McAllister v. United States*, 3 Cl. Ct. 394, 398 (1983). Despite Scotts Valley's reliance on the January 10 Decision, the March 27 Rescission ignored the Tribe's reliance interests and made no attempt to show the earlier decision was erroneous. These failures also render the Rescission arbitrary and capricious. *See Tesoro*, 2024 WL 3359433 at *8.

Defendants' assertion that reliance on the January 10 Decision was unreasonable due to the foreseeability of litigation is both legally flawed and factually unsupported. The mere possibility of a legal challenge is not a basis to disregard reliance interests—especially in the Indian gaming context, where trust land and gaming determinations are frequently litigated in this District and ultimately upheld.[10] The Tribe's reliance on the Eligibility Determination was also reasonable in light of the fact that any challenger would need to prove that the determination was arbitrary and capricious in order to succeed. *See, e.g.*, *Stand Up for California*, 410 F.Supp.3d at 45. The March 27 Rescission has effectively eliminated that standard.

Moreover, the January 10 Decision was the culmination of a multi-year administrative process that included extensive public comment (among them, hundreds of pages of comments submitted by the amici tribes on the very issue now subject to reconsideration), followed by judicial proceedings and a remand. The Department expressly stated that it would rely solely on the closed record and would not consider new evidence. Having declared the record closed and the decision final, the Department cannot now discredit the Tribe's reliance simply because opponents filed suit. Nor does the March 27 Rescission show any indication that the Department considered the Tribe's reliance interests—an omission that is fatal to the decision. *Regents*, 591 U.S. at 33 (agency's rescission of DACA program was arbitrary and capricious because it failed "to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns").

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[10] *See, e.g.*, *Stand Up for California! v. U.S. Dep't of Interior*, 410 F.Supp.3d 39 (D.D.C. 2019), *aff'd* 994 F.3d 616 (D.C. Cir. 2021); *Stand Up for California! v. U.S. Dep't of the Interior*, 204 F.Supp.3d 212 (D.D.C. 2016), *aff'd* 879 F.3d 1177 (D.C. Cir. 2018); *Confederated Tribes of Grand Ronde v. Jewell*, 75 F.Supp.3d 387 (D.D.C. 2014), *aff'd* 830 F.3d 552 (D.C. Cir. 2016); and *Michigan Gambling Opposition (MichGO) v. Norton*, 477 F.Supp.2d 1 (D.D.C. 2007), *aff'd on other grounds* 525 F.3d 23 (D.C. Cir. 2008).

II. The Recission Inflicts Immediate and Irreparable Harm on the Tribe.

A. The Rescission Irreparably Harms the Tribe's Sovereign Right to Apply Its Gaming Laws to the Vallejo Site.

The March 27 Rescission immediately removed the application of the Tribe's gaming laws to the Vallejo Site and supplanted them with California's laws "pertaining to the licensing, regulation, or prohibition of gambling." 18 U.S.C. § 1166(a). It is beyond debate that the enforcement of state laws on tribal trust lands constitutes irreparable injury to the Tribe's sovereignty. *See, e.g.*, *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006) (enforcement of state gaming laws on tribal lands constitutes irreparable injury to tribe's sovereignty); *Mashpee Wampanoag Tribe v. Bernhardt*, No. CV 18-2242 (PLF), 2020 WL 3034854, *3 (D.D.C. June 5, 2020) ("even a partial infringement on a tribe's sovereignty over its land constitutes an irreparable harm") (citations omitted); *see also Ohio v. EPA*, 603 U.S. 279, 291 (2024) (staying enforcement of EPA rule that "impair[ed] [States'] sovereign interests in regulating their own industries and citizens").

Defendants' claim that the March 27 Rescission causes no harm under 18 U.S.C. § 1166 is circular and legally flawed. They assert that because § 1166 exempts gaming conducted "in accordance with IGRA" or "under a Tribal-State compact," the Tribe is not harmed by the rescission of its Eligibility Determination. But that argument begs the question—it assumes the land still qualifies to conduct gaming under IGRA when the very act of rescission strips the land of that qualification.

Contrary to Defendant's claims, Section 1166 does not permit the Tribe to regulate or conduct gaming under tribal law pursuant to IGRA—either under 25 U.S.C. § 2710(b) (for Class II gaming) or § 2710(d) (for Class III gaming under a compact), because the Tribe's ability to avail itself of either provision is contingent on the land being eligible for gaming under IGRA. Once the

Department rescinded the Eligibility Determination, the land ceased to be eligible for gaming under the statute. That means any gaming activity would now fall outside IGRA's protections and squarely within § 1166's state-law imposing provisions.

Moreover, the absence of a compact is itself a consequence of the March 27 Rescission. A valid compact cannot be negotiated, approved, or implemented without a final federal determination that the land is eligible for gaming. The January 10 Decision provided that legal foundation. The March 27 Rescission destroyed it. In doing so, it not only foreclosed Class III gaming, but also cut off the Tribe's ability to generate any revenue through Class II operations in the interim, further compounding the irreparable economic and sovereign harm to the Tribe.[11]

In other words, the harm arises from the Rescission itself, which disables the Tribe's present ability to regulate or conduct Class II gaming lawfully under IGRA, and prevents the Tribe from entering into a compact with the State of California or obtaining gaming procedures from the Secretary, either of which would permit the Tribe to regulate and operate Class III gaming. 25 U.S.C. § 2710(d)(3), (d)(7)(B)(vii). Under the March 27 Rescission, the Tribe's land is not eligible for gaming, foreclosing any lawful pathway to gaming under IGRA, and subjecting the Tribe to federal criminal liability if it were to proceed to operate even Class II gaming without a license from the State.

This outcome is not speculative—the March 27 Rescission produced immediate and

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[11] The March 27 Rescission eliminated both Class III and Class II gaming opportunities. *See* Scotts Valley Band of Pomo Indians Gaming Ordinance, https://www.nigc.gov/images/uploads/gamingordinances/20250325_Scotts_Valley_Band_of_Pomo_Indians_Amend_Gam_Ord.pdf, at Sec. 4 (approved March 25, 2025) (authorizing Class II and Class III gaming); Second Declaration of Shawn Davis ¶¶ 3-10; *see also* ECF 62-1, p. 2; ECF 61-7, Bergin Decl., Ex. G. Indeed, class II gaming can be just as lucrative for an Indian tribe as Class III gaming. As Lytton Rancheria states in its amicus brief: "Lytton operates a successful Class II bingo facility on its land in San Pablo, California…" (ECF No. 58 at 5).

irreparable harm to the Tribe's sovereign rights by preventing the Tribe from regulating or operating Class II gaming (which does not require a compact under IGRA), pursuing a compact for the operation of Class III gaming, securing necessary financing, or asserting its rights under federal law. The Recission casts immediate legal doubt over any Tribal gaming plans, chilling contractual relationships, halting regulatory progress, and obstructing the Tribe's lawful exercise of sovereignty. Such disruption constitutes irreparable harm that cannot be cured retroactively and underscores the need for injunctive relief.

B. The March 27 Rescission Irreparably Harms the Tribe's Reliance Interests.

The Rescission destabilizes a final agency determination on which the Tribe has extensively relied. The Tribe has committed millions of dollars to regulatory compliance, project planning, intergovernmental agreements, and compact negotiations in reliance on the Department's final January 10 Decision. *See* ECF 3-2, Davis Decl. ¶¶ 12-16; Second Davis Decl. ¶¶ 11-13. The Tribe's financial commitments in reliance do not represent only a past injury but were "investments that created a future expectation of benefits" from gaming under the Eligibility Determination. *Texas v. Brooks-LaSure*, 2021 WL 5154219, *12. Investment in gaming held the promise of a revenue stream that would allow the Tribe to establish essential Tribal projects, such as a tribal administration building and tribal member housing. Declaration of Branden Martin ¶¶ 4-5. The Rescission jeopardizes these investments and extinguishes the Tribe's ability to conduct any form of gaming under IGRA, creating immediate legal and economic consequences that cannot be undone. "Economic harm caused by federal agencies protected by sovereign immunity 'is irreparable ... because the [plaintiff] will not be able to recover monetary damages.'" *Perkins Coie LLP v. U.S. Dep't of Just.*, No. CV 25-716 (BAH), 2025 WL 1276857, *48 (D.D.C. May 2, 2025) (quoting *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018)); *see also Ohio*, 603 U.S. at

291 (granting stay based on "nonrecoverable" financial effects). This is not a speculative harm; it is a fundamental impairment of the Tribe's sovereign and statutory rights under IGRA and the APA. No monetary damages can remedy the lost opportunity to lawfully operate gaming, negotiate a compact, secure regulatory approvals, and reestablish a tribal homeland. The Tribe's injury is precisely the kind of regulatory whiplash and legal uncertainty that the preliminary injunction standard is designed to prevent.

C. The Government's Argument That the Harm Is "Speculative" Misstates the Record and Ignores Concrete Reliance.

Defendants argue the Tribe's harms are "speculative" because Scotts Valley has not attached executed contracts, proven they are in jeopardy, or shown that damages are imminent. But that mischaracterizes both the record and the nature of irreparable harm under D.C. Circuit precedent. While the standard for irreparable harm is high, it does not require the movant to furnish documentary proof of every affected contract or demonstrate imminent financial collapse. Instead, the D.C. Circuit recognizes that a party seeking preliminary relief must present credible, non-conclusory evidence that articulates "specific details regarding the extent to which its business will suffer." *California Ass'n of Priv. Postsecondary Sch. v. DeVos*, 344 F.Supp.3d 158, 171 (D.D.C. 2018) (*quoting Nat'l Ass'n of Mortg. Brokers v. Bd. of Governors of the Fed. Res. Sys.*, 773 F. Supp. 2d 151, 181 (D.D.C. 2011)). The key inquiry is whether the evidence shows the harm is actual and imminent, not speculative, and serious in terms of its effect on the plaintiff's operations. *Id*. at 177. Here, Plaintiff's declarations identify specific contractual, regulatory, and governmental consequences stemming from the challenged agency action, the timing of those effects, and the resulting disruption to critical tribal operations. Specifically, Scotts Valley has shown, through sworn declarations, that it has authorized over $2.3 million in expenditures, entered intergovernmental agreements, and moved forward on compact negotiations, premised on the finality of the January 10 Decision. (ECF 3-2, Davis Decl. ¶¶ 12–16; Second Davis Decl. ¶¶ 11-13.) This level of detail meets the standard required at the preliminary injunction stage.

Moreover, the government's assertion that Scotts Valley's reliance is flawed because some actions predated January 10, 2025 is beside the point. Much of the Tribe's development activity was expressly authorized in reliance on the final trust and gaming eligibility decision. That the Tribe had been preparing for success prior to the final determination does not undercut the reliance it placed on the federal government's conclusion when that conclusion was finally issued.

D. The Department Concedes that the Rescission Disrupts Compact Negotiations and Regulatory Progress.

Defendants admit in their brief that the State of California has "put on hold" negotiations regarding a tribal-state gaming compact as a direct result of the March 27 Rescission. (ECF 47 at 9.) That admission undercuts their argument that the Rescission causes no immediate harm. IGRA requires a compact for Class III gaming, and the ability to negotiate a compact is a protected federal right. The Rescission has directly chilled that process.

Defendants contend the March 27 Letter does not prevent Scotts Valley from negotiating a Tribal-State gaming compact. But that argument ignores the practical and legal reality that compact negotiation under IGRA is a bilateral process requiring mutual engagement and a shared understanding that the land is eligible for gaming. The Department's rescission extinguished that shared premise. The State of California has formally acknowledged that it is uncertain whether it has any duty to negotiate a compact with the Tribe given the rescission. ECF 61-7, Bergin Decl., Ex. G. This is not a hypothetical concern or minor scheduling delay. The State is plainly withholding participation in the compact process because the March 27 Rescission revoked the legal predicate for gaming and, in the State's view, for compact negotiations. That posture stalls the compact process and blocks the Tribe from pursuing one of the core statutory rights that IGRA guarantees. The harm to the Tribe's compact rights is real, immediate, and irreparable.

E. The Department's Continued Recognition of the Trust Status Does Not Cure the Harm.

Defendants assert the rescission causes no legal harm because "the Vallejo Site remains in trust." (ECF 47 at 9, 12, 13.) That is a red herring. While the land's trust status remains intact, the rescission withdrew the Eligibility Determination that renders the land usable for the purposes authorized under IGRA. The trust acquisition was expressly premised on the land's suitability for gaming and tribal housing. The Tribe's inability to use the land for its intended purpose represents a present, not speculative, injury.

III. The Balance of Equities and Public Interest Strongly Favor Injunctive Relief.

A. The Balance of Harms Favors Scotts Valley.

The harm to Scotts Valley from denial of injunctive relief is immediate, concrete, and irreparable. The Tribe faces the collapse of regulatory progress, the potential loss of millions in investments, the disruption of compact negotiations, and the extinguishment of its legal right to conduct gaming under IGRA—an economic engine that is essential to advancing tribal self-governance and self-sufficiency. These harms cannot be remedied through post hoc judicial review or monetary damages, particularly where sovereign rights and governmental functions are at stake.

In contrast, there is no cognizable harm to Defendants from maintaining the *status quo* and enjoining the Rescission while the Court considers the merits.[12] The was a final agency action,

[12] Whether the Department should have considered post-remand, extra-record materials in connection with the January 10 Decision is already being actively litigated in cases filed in this Court before the issuance of the March 27 rescission letter. *See Yocha Dehe Wintun Nation v. U.S. Dep't of the Interior*, No. 25-cv-867 (D.D.C. filed Mar. 24, 2025), ECF No. 1 ¶¶ 113-128, 140-164; *United Auburn Indian Cmty. v. U.S. Dep't of the Interior*, No. 25-cv-873 (D.D.C. filed Mar. 24, 2025), ECF No. 1 ¶¶ 120-123. The Department was aware of these allegations before issuing the March 27 letter. In a March 26, 2025 email at 11:50 a.m., Phil Bristol, Acting Director of the Office of Indian Gaming advised senior officials—including Kennis Bellmard, Deputy Assistant

publicly issued after exhaustive administrative and judicial review. The Department expressly disclaimed reliance on any new evidence and confirmed that the record was closed. The March 27 Rescission does not respond to newly discovered facts, legal error, or statutory requirement—it simply reopens a closed proceeding without process. Enjoining such a procedurally flawed action imposes no hardship on the government, and certainly none that outweighs the immediate and lasting damage to the Tribe.[13]

B. The Public Interest Strongly Supports the Injunction.

The public interest is best served by upholding the rule of law, ensuring the integrity of final agency actions, and protecting the sovereign rights of federally recognized Indian tribes. Courts generally accord agencies the presumption of administrative regularity and good faith, absent evidence demonstrating the contrary. *Educ. Assistance Found. for the Descendants of Hungarian Immigrants in the Performing Arts, Inc. v. United States*, 32 F.Supp.3d 35, 43-44

Secretary and the Solicitors—that he was "attaching the complaints filed by both Yocha Dehe and United Auburn. Both complaints raised similar factual and process-based allegations. After reviewing these complaints and the draft reconsideration letter, as well as speaking with Laura the staff attorney in John Hay's shop…" (remainder redacted). ECF 61-2, Bergin Decl., Ex. B.

[13] Furthermore, the interests of the amicus tribes opposing Scotts Valley are not harmed by the requested injunction because they have no regulatory entitlement to participate in the restored lands determination process under 25 C.F.R. Part 292. The regulations do not authorize public comment or third-party submissions under the restored lands exception in § 2719(b)(1)(B), and the Department has expressly acknowledged that no public process is required for such determinations. *See* 73 Fed. Reg. at 29,361. Even setting that aside, the amicus tribes already participated extensively in the prior administrative process. They submitted hundreds of pages of documents contesting Scotts Valley's historical connection to the Vallejo site during the initial administrative proceedings, and that record was incorporated in full into the remand that led to the January 10 final decision. Their objections were considered and rejected on the merits. The injunction would preserve the legal *status quo* and prevent the Department from unlawfully reopening a final determination based on extra-record evidence. Because the amicus tribes had no right to re-litigate their objections outside the established regulatory process, they suffer no cognizable prejudice from enforcement of the governing legal framework.

(D.D.C. 2014). This presumption means that agencies are expected to act properly and according to law. *FCC v. Schreiber*, 381 U.S. 279, 296 (1965). Additionally, agencies are entitled to a presumption of procedural regularity, and reviewing courts sometimes presume that the agency followed required procedures before acting. *League of United Latin Am. Citizens v. Exec. Off. of the President*, --- F.Supp.3d ----, 2025 WL 1187730, *20 (D.D.C. 2025).

But when that presumption is rebutted—when an agency acts without notice, without providing an opportunity to be heard, and in direct contradiction to its own prior final decision, and imposes a new process not authorized by existing statute or regulation—the public interest shifts decisively in favor of judicial intervention. Such conduct undermines the transparency and fairness essential to reasoned agency decision-making. Granting the injunction here preserves the integrity of the administrative process and ensures compliance with foundational principles of fairness and due process. The public has no legitimate interest in shielding unlawful or procedurally deficient agency conduct from judicial review.

Granting the injunction also promotes tribal economic development, a central policy goal of both the Indian Reorganization Act and IGRA. Preventing the Tribe from proceeding with a lawful and carefully reviewed project undermines not only the Tribe's rights, but also broader federal commitments to tribal self-determination. Conversely, allowing an agency to unilaterally revoke final decisions without notice, record-based justification, or authority would create regulatory chaos and chill investment in Indian Country, directly harming the public interest.

CONCLUSION

For these reasons, and those set forth in Plaintiff's opening memorandum, the Court should grant the motion for a preliminary injunction, stay the effects of the March 27 Rescission, and enjoin Defendants from reopening the administrative record or considering extra-record materials regarding the Eligibility Determination, pending further order of the Court.

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Respectfully submitted,

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