UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTTS VALLEY BAND OF POMO INDIANS,

Plaintiff,

v.

DOUGLAS BURGUM, et al.,

Defendants,

Case No. 1:25-cv-00958 (TNM)
Judge Trevor N. McFadden

PLAINTIFF'S COMBINED OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This case challenges the unlawful reversal of a final agency decision. On January 10, 2025, the Department of the Interior placed land in Vallejo, California ("Vallejo Site") into trust for the Scotts Valley Band of Pomo Indians ("Tribe") and declared it gaming eligible as "restored lands" under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2719(b)(1)(B)(iii) (the "January 10 Decision"). On March 27, 2025, the Department issued a letter ("Rescission Letter") that immediately rescinded the Vallejo Site's gaming eligibility (the "Gaming Eligibility Determination") and announced a process for reconsideration of that eligibility outside any existing regulatory framework, while leaving the trust status intact.

The Rescission Letter is a final agency action on these two important matters. It stripped the Tribe of vested legal rights, subjected it to an unauthorized "reconsideration" process, and immediately impaired its ability to develop the Vallejo Site. The action violates the Fifth Amendment and the APA in multiple respects: it deprived the Tribe of its entitlement without due process, it was arbitrary and capricious, it exceeded Interior's authority to reconsider final decisions, and it was driven by political influence rather than reasoned analysis.

Defendants' responsive arguments collapse under scrutiny. They insist the Rescission Letter "[m]erely initiat[es]" reconsideration and "requires the Tribe to do nothing." ECF No. 99-1 at 10, 15 (Defendants' Brief in Support of Cross-Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgement). Not so. The Tribe's legal interests were directly and distinctly harmed, signifying a final action subject to judicial review. They further claim no property interest exists because the Tribe had not yet commenced gaming. That is irrelevant. The January 10 Decision conferred the legal entitlement to game; the Rescission Letter unlawfully revoked it. Defendants also concede they did not follow the reconsideration procedures of 43 C.F.R. § 4.5, confirming the Letter was ultra vires. Finally, they cannot deny

that political pressure was brought to bear and that Interior officials yielded to it, fatally compromising the integrity of the decision-making process. For this and other reasons, the Letter was the result of arbitrary and capricious decision-making.

ARGUMENT

I. The Rescission Letter takes immediate action that imposes obligations and restrictions upon the Tribe, in both the rescission of the Gaming Eligibility Determination and the imposition of an *ad hoc* reconsideration process, that constitute final agency action.

There is no dispute about the operative terms of the Rescission Letter. As the Tribe has pointed out, the Letter expressly provides for three things. First, the Rescission Letter immediately rescinded the Gaming Eligibility Determination for the Vallejo Site and directed that neither the Tribe nor any other party should rely on that Determination. It did so without any notice to the Tribe at all, an inconvenient fact that the Defendants now ignore. Second, the Rescission Letter announced a process under which it has already begun reconsideration of the Vallejo Site gaming eligibility. This process provides no opportunity to be heard that meets even the minimal requirements of the Due Process Clause, another inconvenient fact that the Defendants now ignore. Third, the Rescission Letter commits to a new opinion on gaming eligibility of the Vallejo Site, one that takes into account documents and/or arguments that are unspecified and not disclosed to the Tribe.

The Defendants seize only on the third point, that a promised reconsideration is not yet final. *See* ECF No. 99-1 at 9-11. The Tribe has acknowledged that the reconsidered gaming eligibility determination is not final and advised that it does not challenge that as yet unmade decision. *See* ECF No. 96-1 at 4, n. 4. As a result, the Federal Defendants' lengthy discussion of

the issue is beside the point.[1] However, the Tribe challenges the other two decisions announced in the Rescission Letter, and Defendants cite no authority or circumstances indicating that those decisions are not final agency actions.

A. The rescission decision is final and has concrete consequences.

The Tribe demonstrated in its opening memorandum that the rescission decision is final, insofar as the effectiveness of the Gaming Eligibility Determination is concerned. ECF No. 96-1 at 11-12. The agency expressly revoked that Determination and directed the Tribe and others not to rely on it. Rescission Letter at 1, SV-0669. The fact that the Rescission Letter characterizes this revocation as "temporary" does not alter its finality for purposes of judicial review. The principal authority cited by the Tribe for this proposition was *Nat. Res. Def. Council v. Wheeler*,

[1] *Amicus* United Auburn's discussion of "ongoing agency review" is similarly inapt. ECF No. 107 at 8 (quoting *Marcum v. Salazar*, 694 F.3d 123, 128 (D.C. Cir. 2012)). United Auburn relies upon *Southwest Airlines Co. v. U.S. Dep't of Transp.*, 832 F.3d 270, 275 (D.C. Cir. 2016), in which the Court found an agency "guidance letter" was not final because of an ongoing agency proceeding pursuant to which the agency would "entertain arguments about the guidance set forth in its [guidance letter], and it invited [Plaintiff] (and other interested parties) to participate and file a brief on those issues," "to resolve, among other things, the very issues addressed in the challenged [guidance letter]." *Id.* at 275-76. Another case United Auburn cites, *Int'l Telecard Ass'n v. FCC*, 166 F.3d 387 (D.C. Cir. 1999), involved a plaintiff filing suit challenging a decision made by a lower level agency official that was already being challenged by the plaintiff in an administrative appeal before the full agency. *Id*. at 388. By contrast, here the Rescission Letter is not mere "guidance," nor is it a decision of a lower-level agency official that is subject to administrative review. Instead, it is a decision of the Department that has immediate legal consequences. United Auburn also relies upon *California v. EPA*, 940 F.3d 1342, 1351 (D.C. Cir. 2019), where the Court found non-final the EPA's move to revise greenhouse gas emissions standards, while in the meantime keeping the existing standards in effect. *Id.* at 1350. The Department's immediate revocation of Scotts Valley's Gaming Eligibility Determination is starkly different, because, again, it has immediate legal consequences. In *MediNatura, Inc. v. FDA*, 998 F.3d 931 (D.C. Cir. 2021), which United Auburn cites, agency action was non-final because pending administrative proceedings allowed the plaintiff "an opportunity to convince the agency to change its mind." *Id.* at 939 (quoting *Ciba-Geigy Corp. v. EPA*, 801 F.2d 430, 435 (D.C. Cir. 1986)). Here, however, again, the agency is in no position to change its mind about the already-effective recission or the already-set procedures for submitting new materials, and furthermore, the Department's process disables Scotts Valley's ability to respond to the new submissions and thereby virtually guarantees Scotts Valley would be unable to convince the agency to adhere to its original decision.

955 F.3d 68, 78 (D.C. Cir. 2020) ("an interim agency resolution counts as final agency action despite the potential for a different permanent decision, as long as the interim decision itself is not subject to further consideration by the agency"). Defendants do not address the *Wheeler* holding. To the contrary, Defendants concede that the Department "will issue a new decision at the end of the reconsideration process." ECF No. 99-1 at 27.[2]

Defendants dismiss the secondary authority cited by the Tribe on this point, *Ciba-Geigy Corp. v. E.P.A.*, 801 F.2d 430 (D.C. Cir. 1986), as distinguishable. *See* ECF No. 99-1 at 14. They argue that, unlike the agency action considered there, "the Department has not required the Tribe [here] to do anything." *Id.* at 15.[3] This is plainly wrong. The Rescission Letter expressly directed the Tribe not to rely on the Gaming Eligibility Determination. SV-0669. The Defendants therefore fail to grapple with authority holding that even federal actions labeled "temporary" are final if they are not subject to further agency consideration. *See* ECF 96-1, at 10-11.

Further, none of the authority cited by the Defendants undermines the Tribe's authorities. In *Marcum v. Salazar,* 694 F.3d 123, 128 (D.C. Cir. 2012), the plaintiff sought judicial review of an agency decision while that same decision was undergoing administrative appeal, but here there is no pending administrative appeal of the decision to rescind the Gaming Eligibility Determination, nor could there be, as the Rescission was a decision of the Secretary. In *American*

[2] This means that, as the Tribe argued in its opening memorandum, unless the Rescission Letter is vacated, the Gaming Eligibility Determination is in reality a dead letter. Even if the Tribe were to prevail on a reconsidered eligibility determination at the end of reconsideration (a doubtful proposition, at best), it will be a new decision based upon a different record and presumably different rationale than that set out in the January 10 Decision. Thus, unless the Rescission Letter is vacated, the rescinded Gaming Eligibility Determination will never be reinstated under any set of circumstances.

[3] The Defendants also indicated that the Tribe has inappropriately relied upon *Ciba-Geigy* because it is a case on ripeness, not finality. *Id.* at 14. But the Circuit Court has noted that *Ciba-Geigy* is "complementary" to the finality standard, even though it involves ripeness. *See Sierra Club v. E.P.A.*, 955 F.3d 56, 64 (D.C. Cir. 2010).

Anti-Vivisection Society v. U.S. Department of Agriculture, 946 F.3d 615 (D.C. Cir. 2020), the court addressed the finality of long-promised but never completed agency action, not whether a self-described temporary agency decision is final. *Id.* at 620. In *Sierra Club v. E.P.A.*, 955 F.3d at 63, finality was lacking because the challenged action imposed no obligations, prohibitions, or restrictions. By contrast, the Rescission Letter imposed a direct prohibition: the Tribe may not rely on the Gaming Eligibility Determination. In *Fund for Animals, Inc. v. U.S. Bureau of Land Management*, 460 F.3d 13 (D.C. Cir. 2006), the challenged "strategy" had no immediate legal effect because it was contingent on future congressional appropriations. *Id.* at 22. Again, in *Independent Equipment Dealers Association v. E.P.A.*, 372 F.3d 420 (D.C. Cir. 2004), the court found no final action where an agency letter merely restated its interpretation of existing regulations and had no impact ("none whatsoever") on the plaintiff. *Id.* at 428; *see Delaware Valley Regional Center, LLC v. U.S. Dep't of Homeland Security*, 678 F. Supp. 3d 73, 81 (D.D.C. 2023) (*Indep. Equip. Dealers Ass'n* "stands for the proposition that agency merely expressing its view of what the law requires of a party is typically not final agency action"). Under Defendants' own authority, then, rescission of the Gaming Eligibility Determination is an agency action that has immediate impact on the Tribe, expressly restricts the Tribe's reliance on the Determination,

and is final agency action.[4]

Defendants also attempt to support their position with a collection of unrelated statutory observations, none of which undermines the finality of the rescission of the Vallejo Site's gaming eligibility. None of these, either singly or in combination, supports the Defendants' position.

According to the Defendants, an Indian Lands Opinion ("ILO") is merely advisory and does not alone constitute final agency action. *See* ECF No. 99-1 at 12-14, 15-17. The Tribe does not dispute this proposition in the abstract, but it is irrelevant here. To be sure, the Part 292 regulations authorize a tribe to seek an opinion on whether land not yet in trust would qualify for an exception to the prohibition on gaming on newly acquired lands under 25 U.S.C. § 2719. *See* 25 C.F.R. § 292.3. These opinions are not necessarily final agency action because IGRA does not authorize these opinions. Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29354, 29358 (May 20, 2008). But Congress does authorize the Secretary to accept land into trust

[4] A decision of this Court, upon which *amicus* United Auburn relies to establish the general validity of agency rescissions, supports Scotts Valley. *See* ECF No. 107 at 10 (citing *Cal. Dep't of Health Servs. v. Babbitt*, 46 F. Supp. 2d 13, 22 (D.D.C. 1999), *vacated in part other grounds sub nom. US Ecology, Inc. v. U.S. Dep't of Interior*, 231 F.3d 20 (D.C. Cir. 2000)). There, the Court held that "Secretary Babbitt's decision rescinding Secretary Lujan's ROD was final agency action." *Id.* at 22. This was so even though the "decision both rescinded Secretary Lujan's ROD and stated that additional review of the [project] would be conducted." *Id.*

United Auburn also discusses *Lannett Co. v. FDA*, 300 F. Supp. 3d 34 (D.D.C. 2017), characterizing the agency action there as "strikingly similar." ECF No. 107 at 10. In fact, the *Lannett* decision was fundamentally different from this case. In *Lannett* the FDA rescinded its approval of a drugmaker's product because FDA had mistakenly failed to enter the manufacturing facility's noncompliant status into its system at the time of the approval. *Lannett* at 39-40. FDA was in constant contact with the drugmaker before and after the rescission, which was only part of an ongoing process in which the drugmaker was already participating. *Id.* at 40-41, 44. Further, under the governing statute, such noncompliance required disapproval. *Id.* at 44. The drugmaker did not dispute that the initial approval was not legally valid, such that no "validly vested legal right" was conferred, but simply tried to capitalize on an undisputed mistake. *Id.* at 44-45. Here, in contrast, the Department rescinded a valid decision that conferred protected property rights, based on political pressure from a commercial rival, not an undisputed statutory requirement, while excluding Scotts Valley from the process of reaching that decision and functionally excluding it from the ongoing reconsideration process.

under the IRA and to determine gaming eligibility under IGRA; section 2719 precludes gaming on post-1988 trust acquisitions "by the Secretary" and excepts lands "taken into trust" by the Secretary for restored tribes (among other exceptions). Plainly, IGRA authorizes the Secretary to accept land into trust for gaming that meets the restored tribes and other exceptions. And once the Secretary exercises that authority to accept land into trust and simultaneously determines that the land is gaming eligible, those determinations are final agency action subject to court review. *See County of Amador v. Dep't of the Interior*, No. 07-cv-527, 2007 WL 4390499, *4 (E.D. Cal. Dec. 13, 2007) (decision regarding gaming eligibility "has no effect upon the parties *unless* the decision is first made to take the [land] into federal trust.") (emphasis added); 25 C.F.R. § 2.301 ("An agency decision that is not subject to administrative appeal is a final agency action and immediately effective when issued unless the decision provides otherwise."). This is what occurred in the final agency action made on January 10, 2025 – the Eligibility Determination was made by the Secretary as part of the final trust acquisition decision; the January 10 Decision explicitly so states. SV-0030. In short, there is no mere advisory ILO before the Court for review, and whether advisory ILO's are final is beside the point. Defendants cannot now reframe the January 10 Decision as only an advisory ILO to avoid this Court's review.

The Defendants also argue for a strained construction of IGRA, that it does not expressly create a role for the Secretary as to restored lands, unlike the two-part determination under 25 U.S.C. § 2719(b)(1)(A), and thus a restored lands decision cannot constitute final agency action. *See* ECF No. 99-1 at 12-14 (final agency action only occurs when an agency acts under powers granted by Congress). This appears to be a variation on the proposition discussed above, that an ILO alone is not final agency action. And as noted above, Congress certainly contemplates action by the Secretary to take land into trust for restored tribes under section 2719. But whether or not

this proposition is correct, it is beside the point here.[5] The January 10 Decision, including the Gaming Eligibility Determination, is final agency action as the decision itself plainly states, and the Tribe would be entitled to commence gaming based upon it, but for the Rescission Letter.[6]

Most importantly, the Defendants deny that the Tribe's legal position changed as a result of the Rescission Letter. But as the Tribe demonstrated in its opening memorandum, the change was immediate and profound: the Tribe lost its ability to conduct gaming under IGRA on the Vallejo Site. This concrete consequence easily satisfies the "pragmatic approach" to finality. *U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 578 U.S. 590, 599 (2016). Under 18 U.S.C. § 1166, gaming on post-1988 trust lands is exempt from state law if it qualifies under § 2719. ECF No. 96-1 at 13-14. At the moment the Department withdrew the Tribe's § 2719 exception, gaming on the Vallejo Site became "prohibited" by § 2719 of IGRA, and state law attached. Defendants

[5] The point is not necessary to the Tribe's finality argument but the proposition that the Secretary was not authorized by Congress to make restored lands determinations in IGRA is doubtful. Section 2719 addresses "Gaming on lands acquired after October 17 1988," generally prohibits gaming on such acquisitions (subsection a), and identifies exceptions to the prohibition (subsection b). Subsection b identifies two categories of exceptions: first, those for which the Secretary determines that gaming is in the best interest of the Indian tribe and would not be detrimental to the surrounding community, followed by gubernatorial concurrence; and second, those circumstances known generally as the equal footing exceptions which include the restoration of lands for an Indian tribe that is restored to federal recognition. 25 U.S.C. § 2719(b)(1)(B)(iii). While the Secretary is not explicitly directed to make the restored lands determination, the implication is pretty clear from the structure of the section that the determination, like the two-part determination, will be made by the Secretary. Certainly the Department reads the section as authorizing Secretarial action. *See* 25 C.F.R. § 292.1 ("This part contains procedures that the Department of the Interior will use to determine whether these [referring to all] exceptions apply," citing IGRA).

[6] The Defendants correctly observe that there are other actions that the Tribe must complete before class III gaming commences. *See* ECF No. 99-1 at 12. This ignores that the Tribe could immediately engage in Class II gaming, as discussed in II(A) below. Also, unlike the decisions to accept the parcel into trust and declare it to be gaming eligible, none of those steps can block even Class III gaming. *See id*. In other words, under the January 10 Decision, the Tribe had a vested right to engage in Class II gaming, and will at some point conduct Class III gaming on the Vallejo Site. This all changed with the Rescission Letter.

suggest otherwise with some clever wordsmithing: "Thus, if the Tribe were intending to conduct Class I or II gaming, § 1166 does not apply." ECF No. 99-1 at 19. As written with apparent reference to the Tribe's intent under the January 10 Decision, the Defendants are correct - had the Tribe conducted class I or II gaming *at that time* (and prior to the March 27 Rescission), state law would not apply under § 1166. But this changed dramatically with the Rescission Letter.

As the Defendants acknowledge, IGRA *prohibits* gaming on land taken into trust after October 17, 1988, with limited exceptions, including lands taken into trust as part of the restoration of lands for a restored Indian tribe. ECF No. 99-1 at 2. Thus, absent a determination that lands qualify for one of the Section 2719 exceptions, gaming on trust land acquired after October 17, 1988, is *prohibited* under IGRA. 18 U.S.C. § 1166(a) applies state laws regulating gaming to Indian country, but excepts "class I gaming or class II gaming *regulated* by [IGRA]" and class III gaming under an approved compact. *Id.*, subsection (c). As a result, where there is a determination that lands acquired in trust after October 17, 1988, qualify for one of the exceptions under section 2719, the gaming is *regulated* by IGRA, and state gaming laws do not apply. But absent such a determination, gaming on such lands is *prohibited* by IGRA and state gaming laws apply.[7]

The Tribe went from the first situation to the second immediately, as a result of the Rescission Letter. The January 10 Decision was final agency action that included a positive Gaming Eligibility Determination. SV-0001. At that point, any gaming on the Vallejo Site was

[7] Gaming on ineligible Indian lands would not only subject the Tribe to federal criminal enforcement for violation state gambling laws under 18 U.S.C. § 1166(b), the Tribe's violation of 25 U.S.C. § 2719 would subject the Tribe to civil enforcement by the National Indian Gaming Commission under 25 U.S.C. § 2713. *See*, *e.g.*, NIGC Notice of Violation, NOV-08-20 (Sept. 3, 2008) (directing Seneca Nation to close gaming facility operating on Indian lands ineligible for gaming under § 2719 or be subject to daily $25,000 fine); NIGC Notice of Violation, NOV-09-35 (Jul. 21, 2009) (directing Fort Sill Apache Tribe to cease class II gaming operations on Indian lands ineligible for gaming or face daily fines) (both notices available at https://www.nigc.gov/commission/commission-actions/enforcement-actions/).

regulated by IGRA and state gaming laws for class I and class II gaming did not apply. When the Defendants rescinded the Gaming Eligibility Determination in the Rescission Letter, the Vallejo Site instantly lost the exception from the gaming prohibition in section 2719 and gaming on the Site became *prohibited* under IGRA, triggering the application of state law under 18 U.S.C. § 1166(a). Were the Tribe to conduct class I or II gaming on the Vallejo Site now, it would face the full force of California civil and criminal law governing gaming. *See United States v. E.C. Investments, Inc.*, 77 F.3d 327 (9th Cir. 1996) (upholding indictment of Indian casino operators in Indian country for conducting class III gaming without the benefit of a compact). The Defendants are simply wrong that the Rescission Letter "does not have any legal consequences under IGRA until and unless the Department takes some action to reverse the Trust Determination." *See* ECF No. 99-1 at 20. It had immediate and stark legal consequences for the Tribe and constitutes final agency action subject to judicial review.

B. The *ad hoc* process adopted in the Rescission Letter for reconsideration of gaming eligibility is itself final agency action with concrete legal consequences.

The Defendants deny that the Rescission Letter adopted a new procedural rule governing the reconsideration of the Vallejo Site gaming eligibility. ECF No. 99-1 at 21. Yet they do not dispute that the process described in the Recission Letter departs from governing regulations set out in 25 C.F.R. Part 292. The Tribe has shown that the procedures in Part 292 do not authorize or require public participation in the deliberations on a restored lands application. 25 C.F.R. § 292.12. By contrast, the Rescission Letter expressly invited and authorized third-party submissions, and in essence announced that any restored lands decision that failed to include public participation may be vulnerable. SV-0669. The Tribe does not merely question whether Interior may adopt a different process in the abstract; rather it challenges the legality and fairness of this

specific, *ad hoc* process, which alters the Tribe's rights and violates Due Process.[8] ECF No. 96-1 at 18 ("Most importantly, parties' rights are clearly altered in the Rescission Letter from those set out in the governing regulations.").[9]

Defendants attempt to dismiss this concern as speculative, claiming that the Tribe's challenge "rests upon future events that may not occur..." ECF No. 99-1 at 21. That characterization is untenable. The Rescission Letter does not describe a contingent possibility; it lays down the procedures Interior has adopted and is now actively applying. That process is underway, and the agency expects parties – including the Tribe -- to comply. *See* ECF No. 99-1 at 42. This is the very definition of finality: the consummation of Interior's decision-making on an important procedural question. *See Clean Air Council v. Pruitt*, 882 F.3d 1, 7 (D.C. Cir. 2017).

Moreover, this new process has immediate and concrete consequences. It grants rights to third parties that they never had under Part 292, while restricting the Tribe's ability to meaningfully defend its own application to conduct gaming. Third parties may now lodge objections of unknown scope—whether based on historical, temporal, or other connections to the Vallejo Site—without the Tribe having any notice of their content. The Tribe has no opportunity to review or rebut these submissions. The result is a process that expands third-party rights while diminishing the Tribe's procedural protections, to the Tribe's distinct detriment. That alteration of rights and

[8] To be clear, the Tribe challenges both of the final actions set out in the Rescission Letter under the Due Process Clause - i.e., the rescission of the Gaming Eligibility Determination without any notice at all to the Tribe and the adoption of a reconsideration process that fails to provide the Tribe a meaningful opportunity to respond. *See* ECF No. 96-1 at 24-29.

[9] The Defendants complain that the Tribe improperly frames this as a finality issue, then goes on to argue that it is, "at best, premature." ECF No. 99-1 at 21. But Defendants do not argue that the *ad hoc* process adopted is subject to further consideration or alteration by the Department. To the contrary, the Tribe immediately sought modification of this process upon receipt of the Rescission Letter and the Department declined to even meet with the Tribe to discuss the possibility. *See* Third Declaration of Shawn Davis ¶¶ 4-7 (Sept. 5, 2025). The Department has firmly settled upon this *ad hoc* process and it is, therefore, subject to review by this Court.

obligations has practical legal significance and thus constitutes final agency action. *Racing Enthusiasts and Suppliers Coalition v. E.P.A.*, 45 F.4th 353, 358 (D.C. Cir. 2022) (final agency action results in concrete consequences); *Delaware Valley Regional Center, LLC*, 678 F. Supp. 3d at 83 (second prong of finality analysis is a pragmatic one, determined in part by whether agency applies decision as binding).[10]

Defendants cannot credibly maintain that the Rescission Letter is not the agency's final word on the process to be applied in reconsidering gaming eligibility. Nor can they deny that the process binds the parties, creates new third-party rights, and significantly impairs the Tribe's ability to meaningfully defend the gaming eligibility of the Vallejo Site. These circumstances satisfy both prongs of the finality requirement. *Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015) (final agency action creates new rights); *Racing Enthusiasts and Suppliers*, 45 F.4th at 358 (final agency action results in concrete consequences).[11]

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[10] Defendants suggest that "practical considerations" may be insufficient to support finality. ECF No. 99-1 at 9 (citing *Indep. Equip. Dealers Ass'n v. E.P.A.*, 372 F.3d at 428). But the Court there distinguished between "practical" consequences as opposed to "concrete" consequences, indicating that the latter would be sufficient and concluding that the plaintiff before it had "none whatsoever." 372 F. 3d at 428. Further, the Court there held that the EPA notice being challenged did not compel the regulated party to do anything. *Id.* That is plainly not the case here, where the new or *ad hoc* procedure required the Tribe to decide whether to submit material without knowledge of or an opportunity to respond to third party submissions.

[11] Defendants also reject the assumption that the Department will ultimately reverse the Gaming Eligibility Determination. ECF No. 99-1 at 38. Elsewhere, however, attempting to minimize the Tribe's injury, Defendants assert that "[t]he Tribe's rights may be impacted at the end of the reconsideration process but have not been affected yet." ECF 99-1 at 11 (emphasis added). This suggestion is telling. By acknowledging that the Tribe's rights "may be impacted" at the conclusion of reconsideration, Defendants confirm that the process is directed at altering vested legal interests, not merely engaging in an administrative review. The insertion of the word "yet" underscores the point. It is not a neutral description of procedural posture but a tacit admission that Interior has set its course and that the Tribe's rights are destined to be impaired. Far from demonstrating the absence of injury, this phrasing highlights not only the immediacy of the threat but also the certainty of this injury (which is in addition to the immediate injury discussed herein).

II. Defendants miss the legal mark in all respects in their attempt to deny a Due Process Clause violation.

In its opening memorandum, the Tribe established that it holds a constitutionally protected property interest in the January 10 Decision, including the gaming determination on the Vallejo Site, and that this property interest was impaired without the protections required by the Due Process Clause. *See* ECF No. 96-1 at 20-28. As a federal district court recently held with respect to another California Indian tribe's restored lands determination,

> When DOI issued its Record of Decision and accompanying Decision Letter concluding that IGRA's restored lands exception applied, Koi [Nation]'s legally protected interests to engage in Class II gaming vested. … [O]nce the Shiloh Parcel was taken into trust and it was determined that the restored lands exception applied, Koi's exercisable right to conduct Class II gaming attached. Indeed, Koi has already received approval of its gaming ordinance from the Chair of the National Indian Gaming Commission, meaning that its rights to Class II gaming have fully materialized. This is a present, not a future, interest.

Calif. v. U.S. Dep't of Interior, No. 25-cv-03850-RFL, 2025 WL 2459355, *1 (N.D. Cal. Aug. 26, 2025). That same reasoning applies here. Scotts Valley's entitlement to conduct gaming on the Vallejo Site vested upon the January 10 Decision, which both placed the Site into trust and determined that it qualified as restored lands under IGRA. That entitlement is a present, not speculative, interest.

The Defendants argue otherwise, contending that no property interest arose because; (1) the January 10 Decision was not itself sufficient to confer a protected entitlement; (2) the Tribe had not yet commenced gaming; and (3) even if Due Process applies, the Rescission Letter afforded adequate process. *See* ECF No. 99-1 at 23-27. For several reasons, Defendants are wrong.

A. The January 10 Gaming Eligibility Determination was final agency action that established the Tribe's entitlement to game on the Vallejo Site under the governing law and regulations.

It is important at the outset to restate the nature of the January 10 Decision. In the

Department's words:

> Pursuant to Section 5 of the IRA, 25 U.S.C. § 5108, the Department will acquire the Vallejo Site in trust for the Band [Tribe]. 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). Consistent with applicable law and the Department's requirements, the Regional Director shall immediately acquire the land in trust. This decision constitutes final agency action pursuant to 5 U.S.C. § 704.

SV-0030. Thus, the January 10 Decision identifies the governing law and regulations[12] that establish the gaming eligibility property right and announces final agency action on that entitlement. The Defendants' contention otherwise largely ignores both the governing law and regulations and the nature of the January 10 Decision.

First, the Defendants characterize the Gaming Eligibility Determination as a legal opinion only. As noted above, Defendants are simply wrong on this point. The January 10 Decision contained a final *gaming eligibility determination* of the Secretary, not an advisory *Indian Lands Opinion* as contemplated by 25 C.F.R. § 292(3). Moreover, the Department concedes that an ILO becomes final agency action when adopted as part of a decision to place the parcel into trust. ECF No. 99-1 at 15 ("Indian land determinations only have legal consequences under IGRA when used to inform an agency's decision under one of the powers IGRA or another statute granted to that agency. . . . The 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.'") (citing *County of Amador*, 2007 WL 4390499, at *4) (emphasis added). But the Defendants overlook this significant distinction when considering the property interests that vested as a result of the January 10

[12] The Tribe set out these same statutes and regulations as governing the inquiry on whether the January 10 Decision created an entitlement to game on the Vallejo Site. *See* ECF No. 96-1 at 22. Nonetheless, the Defendants inexplicably and wrongly claim that the Tribe "has not identified a rule or understanding that established its alleged property right." ECF No. 99-1 at 24.

Decision.

Neither does the Department's claimed, expansive authority to reconsider a decision render the January 10 Gaming Eligibility Determination less than final. Defendants claim this broad authority to justify its Rescission Letter. But even if Defendants were correct about the scope of this authority (and they are not, as discussed below), the simple existence of such a power would not impact the January 10 Decision, unless and until it is properly exercised. In other words, the mere existence of this claimed power does not, in and of itself, render a final agency action less binding. But here the exercise of that claimed power necessarily impacts property rights that accrued as a result of the January 10 Decision.[13]

Further, the federal regulations do *not* acknowledge an overhanging potential for reconsideration of decisions made under them, contrary to the Defendants' assertion. *See* ECF No. 99-1 at 23, quoting 25 C.F.R. § 292.26 ("regulations acknowledge the Department's 'full discretion to qualify, withdraw or modify' its prior *legal opinions*") (emphasis added). The quoted language appears at the end of a section stating that the regulations apply to all requests under 25 U.S.C. § 2719, except, in relevant part, those made before the effective date of the regulations by the National Indian Gaming Commission. As the Department explained when it adopted the regulations, section 292.26 "clarifies that the regulations do not disturb existing *decisions* made by the BIA or the National Indian Gaming Commission (NIGC)." 73 Fed. Reg. at 29354. As noted above, the January 10 Gaming Eligibility Determination is not a "legal opinion," nor it is a decision by the BIA or the NIGC; it is a final gaming eligibility determination made by the Secretary outside the scope of § 292.26.

Second, the Defendants repeat the argument first made on the finality issue that the Tribe

[13] This must be so. Otherwise, there is literally no such thing as a binding, final agency action.

cannot acquire a property interest under the January 10 Decision because "IGRA does not require that the Secretary make this determination." ECF No. 99-1 at 24. As noted above, this construction of IGRA is belied by the language of IGRA, 25 U.S.C. § 2719(a) and (b), which only speak of the Secretary's authority. As with finality, it also misses the point. Whether the Secretary's authority is mandated or discretionary, a decision made under the statute that confirms an entitlement creates a property interest within the meaning of the Due Process Clause. *See Spinelli v. City of New York*, 579 F.3d 160, 169 (2d Cir. 2009) (a business license, once granted, becomes a property interest entitled to due process protection even though government authority to issue the license was discretionary, not mandated). Thus, IGRA can support a claim of entitlement, even though it may not explicitly direct or mandate that the Secretary consider or grant the entitlement. *See Goss v. Lopez*, 419 U.S. 565, 574 (1975) (government may not be constitutionally mandated to offer an entitlement, but once it does so it cannot deprive an entitled claimant in violation of due process); *see also Town Court Nursing Ctr., Inc. v. Beal*, 586 F.2d 280, 285 (3d Cir. 1978) (a claim of entitlement stems from state or federal law, regulation or practice that extends the benefit).

Third, the Defendants incorrectly claim that the Tribe cannot hold a vested entitlement to game because it lacks a compact. ECF No. 99-1 at 25. This claim ignores that, as the result of the January 10 Decision, the Tribe could conduct Class I or II gaming on the Vallejo site without a gaming compact. Indeed, because the Tribe already had an NIGC-approved gaming ordinance that authorizes Class II gaming, there were no further statutory hurdles for the Tribe to clear in order to conduct Class II gaming as of January 10. *See Calif. v. U.S. Dep't of Interior*, 2025 WL 2459355, *1 ("[o]nce land is taken into trust and determined to be restored lands under IGRA, the Tribe's right to Class II gaming vests where, as here, the Tribe has an NIGC-approved gaming

ordinance"). Moreover, Defendants incorrectly suggest that the need for a compact to conduct class III gaming on the Vallejo Site may preclude the Tribe from ever conducting such games on the Site. IGRA requires that, upon receiving a request from a tribe for the conduct of class III gaming, "the State *shall* negotiate with the Indian tribe in good faith to enter into such a compact." 25 U.S.C. § 2710(d)(3)(A) (emphasis added). But should a state and tribe be unable to voluntarily agree to a compact due to the state's failure to negotiate in good faith, then the Secretary of the Interior is required to prescribe rules for the tribe's conduct of class III gaming. 25 U.S.C. § 2710(d)(7)(B)(vii). As result, there *will* be a compact or its equivalent, Secretarial procedures, at some point for class III gaming on eligible trust land, such as the Vallejo Site under the January 10 Decision.[14] Thus, there is no contingency that renders gaming under the January 10 Decision uncertain.

Finally, the Defendants deny that the Tribe has a property interest in the January 10 Decision on gaming eligibility because the Tribe is not yet receiving the benefits of gaming on the Vallejo Site. *See* ECF No. 9-1 at 25-26. But this is not the governing test. Instead, courts ask

[14] The inevitability of class III gaming holds true for any Indian tribe in a state that permits such gaming and that has waived its immunity from bad faith lawsuits under IGRA that can lead to Secretarial Procedures. California is such a state. Elsewhere, states have "veto power over Indian gaming." *Pueblo of Santa Ana v. Kelly*, 932 F. Supp. 1284, 1297 (D.N.M. 1996), *aff'd* 104 F.3d 1546 (10th Cir. 1997). This difference alters the practical and legal effect of a tribe's possession of gaming-eligible Indian lands – unlike in California, these tribes' right to conduct class III gaming depends upon the state's political decisions. Therefore, *Pueblo of Santa Ana* and *Jicarilla Apache Tribe v. Kelly*, 129 F.3d 535 (10th Cir. 1997) are not contrary to Scotts Valley's position, as Defendants suggest. *See* ECF No. 99-1 at 25. The *Santa Ana* court did not contemplate the inevitable satisfaction of the compact requirement because the court instead supposed New Mexico, whose State Supreme Court had found the tribes' gaming compacts invalid under state law, would refuse to ratify any compacts and assert its immunity against any bad faith claims that could lead to Secretarial Procedures. 932 F. Supp. at 1297. In *Jicarilla*, as predicted, New Mexico did not waive its immunity from such suits. 129 F.3d at 538. Scotts Valley does not face the same impediment to class III gaming, because California has waived its immunity to bad faith suits under IGRA. *See In re Indian Gaming Related Cases*, 331 F.3d 1094, 1101 (9th Cir. 2003) (noting California statutory provision containing state's consent to suits under IGRA).

whether the claimant has "a legitimate claim of entitlement to [the benefit]." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). This, in turn, is determined by reference to the law and/or regulations that define the benefit and support the claim of entitlement thereto. *Id.* The court considered this issue at length in *NB ex rel. Peacock v. District of Columbia*, 794 F.3d 31 (D.C. Cir. 2015), in the context of a claimed Medicaid entitlement. The court described a legitimate claim of entitlement as follows:

> A "legitimate claim of entitlement" means that a person would be entitled to receive the government benefit *assuming* she satisfied the preconditions to obtaining it. A claim of entitlement is therefore "legitimate" if award of the benefit would follow from satisfaction of applicable eligibility criteria. *See Wash. Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 36 (D.C. Cir. 1997) (emphasis in original).

Id. at 41. As the January 10 Decision makes plain, the Tribe satisfied the eligibility criteria for gaming on the Vallejo Site, as set forth in IGRA, the IRA, and governing regulations under both. SV-0030. And the Tribe was awarded the benefit in the Gaming Eligibility Determination in the January 10 Decision. Thus, the Tribe has acquired a valuable property interest as a result of the January 10 Decision.

Nothing in the authority cited by the Defendants indicates otherwise. In *Lyng v. Payne,* 476 U.S. 926 (1986), the Court considered whether would-be applicant farmers held a legitimate entitlement to emergency loans administered by the Secretary of Agriculture. The farmers had missed a deadline for filing applications and argued that they held a Due Process protected property interest in receiving the loans. *Id.* at 942. The Court held otherwise and indicated that a mere applicant for a benefit does not hold a property interest within the protection of the Due Process Clause. Similarly, the court in *Muwekma Ohlone Tribe v. Salazar,* 708 F.3d 209 (D.C. Cir. 2013), considered a tribe's claim that it was entitled to Due Process protection for the benefits of federal recognition, even though the tribe had failed to establish its eligibility as a federally recognized tribe. *Id.* at 219. Simply stated, neither claimant had satisfied the preconditions for receipt of the

claimed benefit and, as a result, had no property interest in the claimed benefit. The crucial difference here is that, as of January 10, the Tribe was no longer a mere *applicant* that had not established preconditions for eligibility for gaming-eligible lands; as of January 10, the Tribe became the *recipient* of a final determination that it had satisfied the preconditions for receipt of a valuable benefit – trust lands that are eligible for gaming; the *Lyng* and *Muwekuma* claimants had not and, as a result, lacked a property interest protected by the Due Process Clause.

Thus, the January 10 Determination established the Tribe's entitlement to game on the Vallejo Site, under the governing statute and regulations.[15] As such, the gaming entitlement is a federal benefit[16] to which the Tribe had a clear entitlement, and it was deprived of that entitlement by the Rescission Letter.

B. The Defendants do not and cannot seriously defend the process the Tribe received on the rescission of gaming eligibility as sufficient.

In two sentences and with no reference to authority, Defendants simply assert that the Department "notified Scotts Valley of the temporary rescission [and] provided the opportunity to submit additional evidence." ECF No. 99-1 at 27. The "notice" was in the form of an announcement that the Gaming Eligibility Determination had been rescinded. And the opportunity to submit evidence in the reconsideration included no notice of the substantive concerns and what the evidence on those concerns may be. In short, the Tribe was given the opportunity to shoot in

[15] That the Vallejo Site remains in trust does not remedy or mitigate the deprivation of the Gaming Eligibility Determination. The January 10 Decision simultaneously determined gaming eligibility and placed the Site into trust. But the two decisions were governed by distinct statutes and regulations, the IRA and Part 151 for the trust acquisition and IGRA and Part 292 for the gaming determination. Although Defendants assert that it is so, they fail to explain how leaving one part of the January 10 Decision intact obviates the deprivation of the other. *See* ECF No. 99-1 at 27.

[16] Indeed, IGRA states that, "Indian tribes have the *exclusive right* to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity." 25 U.S.C. § 2701(5).

the dark at unknown targets. This is a profound denial of due process.

In *Goss v. Lopez,* the Court held that, at a minimum, due process requires that a deprivation of liberty or property be preceded by notice and an opportunity to be heard. 419 U.S. at 579. The notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Reeve Aleutian Airways, Inc. v. United States*, 982 F.2d 594, 598 (D.C. Cir. 1993). It is indisputable that the Rescission Letter provided neither. Although the possible rescission of the Gaming Eligibility Determination had been under discussion between the Defendants and opposing tribes for nearly two months, the Tribe had no notice that this was on-going. The first the Tribe knew of any of this was the day it received the Rescission Letter. By that point, the decision to rescind the gaming eligibility of the Vallejo Site had been made and the Letter simply announced this decision to the Tribe. Given these circumstances, the Tribe obviously had no opportunity at all to present its objections to the proposed rescission. Instead, the Tribe was presented with a *fait accompli* in the form of the Rescission Letter, with no advance notice or opportunity to comment upon the rescission.

The prescribed process for the new gaming determination fares no better under Due Process. It merely allows the submission of additional material or documents by a set deadline. It provides no notice to the Tribe of specific issues other than "whether the Vallejo Site qualifies as restored lands under 25 U.S.C. § 2719(b)(l)(B)(iii) and 25 C.F.R. Part 292;" nor does it mention the nature of the objections by third parties to those issues. This obviously does not comport with the due process requirement that the Tribe have an opportunity to be heard at a meaningful time and in a meaningful manner. *See Matthews v. Eldridge*, 424 U.S. 319, 333 (1976); *Gray Panthers v. Schweiker*, 716 F. 2d 23, 32 (D.C. Cir. 1983) (due process requires notice of the proposed action

and the grounds for it); *Parker v. District of Columbia*, 293 F. Supp. 3d 194, 207 (D.D.C. 2018) (interested party must be provided some sense of the factual basis for proposed action); *NB v. District of Columbia*, 244 F. Supp. 3d 176, 183 (D.D.C. 2017) (notice must give specific reasons so individual not required to guess what evidence can or should be submitted in response).

The Defendants' attempt to defend these processes—both the immediate rescission with no advance notice or opportunity to be heard and the reconsideration process with no notice of issues to be considered or the evidence submitted against the Tribe—is as feeble as the processes themselves. There can be no serious question that the minimal due process requirements have not been met.

III. The Rescission Letter was arbitrary and capricious.

At its heart, the APA standard requires reasoned decision-making that takes all factors Congress considered relevant into account and is consistent with the law. *Motor Vehicle Mfg. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (an agency decision, in general and when changing course, must supply a reasoned analysis); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 30 (2020). The Rescission Letter violated this standard in multiple respects.

A. Neither 43 C.F.R. § 4.5 nor inherent authority authorized the Rescission Letter.

1. Section 4.5 does not authorize the Rescission Letter.

The Rescission Letter relied upon authority the Department claimed was contained in 43 C.F.R. § 4.5. Defendants now distance themselves from reliance on § 4.5 itself, arguing that the citation to § 4.5 actually only signified reliance on the "inherent authority" that § 4.5 recognizes. ECF No. 99-1 at 29. The language of the Rescission Letter belies this assertion. The letter states: "This action is taken pursuant to 43 C.F.R. § 4.5, which provides the Secretary of the Interior

(Secretary) with broad authority to review and reconsider any decision of the Department." SV-0669. Thus, the Department informed Scotts Valley that it was acting "pursuant to" § 4.5, and that § 4.5 is the source of law that "provides the Secretary" with the necessary authority. The free-ranging power to reconsider decisions untethered from § 4.5 was not the authority on which the Department relied to make the March 27 decision.

As the Tribe showed in its opening brief, the powers provided in § 4.5 do not authorize the Rescission Letter. *See* ECF 96-1 at 38-40. Section 4.5 cites Secretarial "authority to take jurisdiction at any stage of any case before any employee of the Department," 43 C.F.R. § 4.5(a)(1), "authority to review any decision of any employee of the Department," 43 C.F.R. § 4.5(a)(2), and authority "to direct any such employee or employees to reconsider a decision," *id.* The Rescission Letter mashed together the latter two powers. SV-0669 (asserting authority under § 4.5 to "review and reconsider any decision of the Department"). The Rescission Letter fits none of the circumstances contemplated in § 4.5. It plainly does not involve the Secretary's assertion of jurisdiction over a pending matter. Nor does it involve the Secretary's appellate "review" of a subordinate employee's decision, nor is there any "direct[ive]" from the Secretary ordering a subordinate employee to "reconsider a decision." 43 C.F.R. § 4.5(a)(2); *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").

In response, the Department does not attempt to demonstrate that the Rescission Letter met § 4.5's procedural requirements. *See* 43 C.F.R. § 4.5(c) ("If the Secretary or Director assumes jurisdiction of a case or reviews a decision, the parties and the appropriate Departmental personnel will be advised of such action, the administrative record will be requested, and, after the review process is completed, the Secretary or Director will issue a decision."); ECF No. 96-1 at 40. Most

significantly, the Department failed to advise Scotts Valley before rescinding the January 10 Decision's gaming eligibility determination, instead informing the Tribe only that it had been rescinded and depriving the Tribe of the opportunity to respond to its opponents' contentions. Even assuming § 4.5 provided the necessary authority, as the Rescission Letter claims, the Department's exercise of such authority did not comply with the regulation's requirements.

2. Inherent authority does not authorize the Rescission Letter.

In its opening brief, Scotts Valley explained that the Department's failure to provide the Tribe notice of either its reconsideration of the Gaming Eligibility Determination or the immediate rescission of that Determination pending review placed the Rescission outside the scope of inherent authority (or more accurately, "statutorily implicit" authority, *Natural Res. Def. Council v. Regan*, 67 F.4th 397, 401 (D.C. Cir. 2023)) to reconsider agency actions. ECF No. 96-1 at 35; *see Dun & Bradstreet Corp. Found. v. U.S.P.S.*, 946 F.2d 189, 193 (2d Cir. 1991); *Tesoro High Plains Pipeline Co. v. United States*, No. 1:21-cv-90, 2024 WL 3359433, *5-6 (D.N.D. July 10, 2024). Defendants do not dispute that Scotts Valley received no notice of the rescission of gaming eligibility or that the Tribe was completely excluded from the Department's decision-making. As *Tesoro* held under similar circumstances, this was "contrary to both the [Defendants'] inherent authority and the authority under 43 C.F.R. § 4.5." *Tesoro*, 2024 WL 3359433 at *6.

Scotts Valley also identified several factors that demonstrate the untimeliness of the Rescission Letter, also placing the Rescission Letter beyond the agency's statutorily implicit authority to revisit final actions. ECF No. 96-1 at 32-35. Since the Rescission Letter invoked 43 C.F.R. § 4.5 as the source of the Secretary's authority, Defendants' failure to adhere to the procedure set forth in § 4.5 – and particularly, the attempt to recall a decision well outside the ordinary time period for concluding administrative appeals – weigh against timeliness. Second, the Eligibility Determination immediately conferred upon the Tribe an enforceable entitlement to

conduct gaming at the Vallejo Site, as discussed above. Defendants would be "much freer to change a decision when the change will not snatch back vested rights," *Prieto v. United States*, 655 F. Supp. 1187, 1192 (D.D.C. 1987), but the legal effect of the Eligibility Determination limited Defendants' authority to revisit the previous final action.

Finally, the Tribe has demonstrated that Defendants' stated basis for rescinding the gaming determination was pretextual. Without analyzing the surrounding circumstances, Defendants simply insist that "the Department had justifiable reasons to temporarily rescind its prior decision while undertaking its reconsideration…" ECF No. 99-1 at 33. But those "justifiable reasons" do not appear on the face of the Rescission Letter, the Defendants do not state those reasons, and the surrounding circumstances completely belie any "justifiable reasons." The only justification stated in the Rescission Letter is the Department's failure to consider additional submissions from third parties on remand. But no statute or regulation requires the Department to entertain third-party input to make a restored lands decision. While Defendants cite the opposition White Paper's assertion of a "commitment" to consider additional evidence (ECF No. 99-1 at 33, citing SV-0055), neither the Rescission Letter nor the administrative record contains anything suggesting that the Department believed its officials had made any such commitment. Certainly, the Rescission Letter does not claim the January 10 Decision reneged on any agency promise. Defendants also cite the complaint provided to the Department in draft and filed versions (SV-0240, SV-0324), but with respect to the asserted commitment, these documents also contain only allegations unsupported by evidence. Nor do the Defendants, who should be able to confirm the assertions, concede in their brief that any binding commitment was made. And there is no support for the notion that any such commitment would be binding on the Department, even assuming that

officials made the representation.[17]

As for the substance of the opponents' allegedly ignored information, again the record reveals no effort by the Department to assess the data or determine whether the data was relevant or helpful. Although Yocha Dehe's complaint refers to the submission of "hundreds of pages of ethnohistorical documentation and expert analysis," SV-0358, not a single one of these pages appears in the record to support the Rescission Letter. The record is devoid of the evidence that is said to have prompted reconsideration. Defendants claim the Department's rationale was its desire "to give those other tribes the opportunity to express their concerns," ECF No. 99-1 at 33, but the *expression* of their concerns was never the problem (*cf.* the hundreds of pages of documentation and analysis), and that was not the reason stated in the Rescission Letter. Rather, the decision was based on the Secretary's concern "that the Department did not consider additional evidence." SV-0669. But the record shows no engagement at all with that additional evidence. The Department's anemic, *ad hoc* reconsideration procedure also displays no desire to give the additional evidence fair and honest consideration, as it excludes Scotts Valley from any opportunity to respond to it. After a decade of studying thousands of pages submitted on Scotts Valley's significant historical connection to the Vallejo Site, including materials addressing the same subjects Yocha Dehe described in its complaint, it is evident that the Department was now willing to jettison all of its previous work at the merest suggestion that it could be politically advantageous to do so. Defendants saw no need to delve deeper into the substance before withdrawing the Eligibility

[17] Defendants and *amicus* Yocha Dehe also point to statements from the 2021 briefing in Yocha Dehe's appeal from the denial of its motion to intervene. ECF No. 99-1 at 38; ECF No. 108 at 7-8, 19. However, the Circuit Court did not rely on any representations about Yocha Dehe's ability to submit more material addressing the significant historical connection issue, much less the Department's duty to consider any such material. *See Yocha Dehe Wintun Nation v. U.S. Dep't of Interior*, 3 F.4th 427 (D.C. Cir. 2021).

Determination and no need even to consult Scotts Valley, because the fix was in.

B. Improper political influence unlawfully supplanted reasoned decision making.

Scotts Valley demonstrated in its opening brief that the Rescission Letter's sudden reversal was decided on the basis of an *ex parte* pressure campaign by opposition lobbyists, rather than solely upon the considerations Congress made relevant in the applicable statute. ECF No. 96-1 at 35-41; *see D.C. Federation of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971). Because the Department reached its decision to reverse course based on matters Scotts Valley did not have the opportunity to rebut, and because its rationale identified no legal error, the record reveals clearly that the Rescission Letter resulted from improper political influence, requiring that it be set aside.

Defendants incorrectly liken this case to *Voyageur Outward Bound School v. United States*, No. 18:cv-01463 (TNM), 2021 WL 1929213 (D.D.C. May 13, 2021). The agency action in *Voyageur* "comprehensively" analyzed "anew" the pertinent documents and regulations, and thoroughly catalogued the errors of the agency's prior opinion. *Id.* *4. The "review process took several months and followed all mandated procedures, producing a well-reasoned and well-supported explanation of the agency's changed position." *Id.* The decision here contrasts sharply with this detailed analysis.

The decision in this case reveals no agency analysis of any of the materials submitted, how those materials might ultimately change the outcome of the gaming determination, and no other assessment that might justify immediately withdrawing the completed final gaming determination. The Rescission Letter does not identify any legal error in the prior decision. It does not even attempt to justify the stated concern that the Department, in making the January 10 Decision, was wrong when it exercised its discretion to limit its post-remand consideration to the existing record.

After all, the agency's job on remand was to reevaluate the significant historical connection issue through the lens of the Indian canon of construction. *Scotts Valley Band of Pomo Indians v. U.S. Dep't of the Interior*, 633 F. Supp. 3d 132, 165 (D.D.C. 2022). This review required the agency to refocus its analysis, but not to supplement the record with additional evidence. And it is undisputed that neither IGRA nor the Department's regulations require the agency to consider submissions from interested parties in a restored lands determination. It was therefore well beyond the reasonable bounds of agency discretion within the authority of IGRA to nullify the Gaming Eligibility Determination simply to collect more material from the same opponents about the same subject addressed in their previous submissions and considered in the Department's previous decisions.[18]

Even setting aside the political pressure applied to the Department, the agency's silence about its reasons for departing from the discretionary and rational decision to close the record post-remand "constitutes an inexcusable departure from the essential requirement of reasoned decisionmaking." *Jicarilla Apache Nation v. U.S. Dep't of the Interior*, 613 F.3d 1112, 1120 (D.C.

[18] Multiple *amici curiae* fill their briefs with arguments challenging the merits of the January 10 Decision on various grounds. *See* Brief of Lytton Rancheria at 9-20 (ECF No. 110); Brief of Calif. Gaming Assoc. at 14-21 (ECF No. 109); Brief of Yocha Dehe Wintun Nation and Kletsel Dehe Wintun Nation at 13-14 (ECF No. 108). These contentions are not relevant. The January 10 Decision is not under review in this action. *Amici*'s asserted faults with the January 10 Decision are not "the ground the agency invoked" in the Rescission Letter, and therefore they are outside the scope of judicial review here. *Dep't of Homeland Security v. Regents of the Univ. of Calif.*, 591 U.S. 1, 20 (2020). Furthermore, with respect to allegations about the substance of Yocha Dehe's recent submissions, while the submissions appear nowhere in the administrative record for the Rescission Letter, the record does reveal that the subject matter was well covered not only in the January 10 Decision, but also in the 2019 decision. *See* SV-0011-18 (discussing Augustine as an exemplar of Scotts Valley's occupancy in the vicinity of the Vallejo Site); SV-0221-27 (2019 decision declining to attribute Augustine's experiences to the Tribe as a whole); SV-0012-13 (discussing forced Indian labor on ranchos); SV-0222-23 (same in 2019 decision). Nothing justifies reopening the factual record for repackaged historical information that should have been (and was) submitted to the record years earlier.

Cir. 2010) (cleaned up). This was not a "good faith exercise in error correction." *Voyageur* at *4. Instead, the record shows government officials accepting well-connected opposition lobbyists' directives at the drop of a hat. SV-0069. Memos were later circulated, *see* SV-0089, 0232, though whatever those memos stated, the final decision made no pretense of relying on them. The Department, of course, never contacted Scotts Valley until the deed was done.[19]

Indeed, because the Department was operating in an arena of "ambiguity and discretion," this Court has held "that is exactly when the [Indian] canon demands that any doubt be resolved in favor of the Tribe." *Scotts Valley I*, 633 F. Supp. 3d at 166. Scotts Valley's status as a restored tribe seeking to make use of the restored lands exception should have provided the Tribe a degree of statutory solicitude. Multiple agency decisions, including the January 10 Decision, establish that the Tribe meets the criteria for a restored tribe. SV-0005; *see Scotts Valley I* at 138-39, 148. With the Rescission Letter, the Department neglected to account for the remedial purpose of IGRA's restored lands exception, "to restore tribes in [Scotts Valley's] position to some semblance of the status they enjoyed before, with the opportunity to sustain themselves economically." *Id.* at 166; *see also Butte County, CA v. Chaudhuri*, 887 F.3d 501, 503 (D.C. Cir. 2018); *City of Roseville v. Norton*, 348 F.3d 1020, 1030-31 (D.C. Cir. 2003).[20] The Department also ignored the history

[19] The Department's exclusion of Scotts Valley and embrace of its opponents continued after the Rescission Letter. Scotts Valley sent multiple requests to meet with Assistant Secretary-Indian Affairs Scott Davis to consult regarding, *inter alia,* the reconsideration process, and received no response. Third Declaration of Shawn Davis ¶¶ 4-6. Documents the Tribe obtained through FOIA requests show that in April 2025, the Department decided to decline Scotts Valley's March 29 consultation request and yet, days later, quickly agreed to set a meeting with a Yocha Dehe lobbyist to discuss the reconsideration process. *Id.* ¶ 8.

[20] The importance of heeding Congress' remedial exceptions for tribes that lacked trust land when IGRA was enacted is especially true in light of the temporal requirement of the regulations, *i.e.*, that to qualify as restored lands, the tribe's trust application must be submitted within 25 years after the tribe was restored. 25 C.F.R. § 292.12(c)(2). It has now been 33 years since the Tribe was restored. ECF No. 1, ¶ 9. The Vallejo Site is the Tribe's last opportunity to qualify for the special exception that Congress created for it and similarly situated tribes.

of Scotts Valley's treatment by the federal government and "how completely it was disbursed" once its land was "stripped away" and "its people scattered to the winds." *Id.* at 166-67. Instead, in order to bank political capital with more powerful interests, the Department seized upon the baseless procedural objections of project opponents who urged the Department to hear, again, their one-sided version of Scotts Valley's history, gave those opponents the benefit of the doubt, and withdrew the one action the federal government had taken "to make up for the disadvantages" Scotts Valley had faced "through no fault of its own." *Id.* at 167.

The totality of the circumstances and the bare, conclusory rationale of the decision compel the conclusion that considerations not authorized by Congress—political expediency and favor—drove the Rescission Letter.

C. Defendants failed to consider the Tribe's reliance interests

The Rescission Letter is also arbitrary and capricious because it ignored the Tribe's reliance interests. Within weeks of the January 10 Decision, the Tribe commenced negotiations with the Governor for a class III compact, initiated financing discussions with institutional lenders, and advanced an intergovernmental agreement with the City of Vallejo. Declaration of Shawn Davis ¶¶ 12-16 (Apr. 1, 2025, ECF No. 3-2); Second Declaration of Shawn Davis ¶¶ 11-13 (ECF No. 63-2). These are precisely the kinds of "serious reliance interests" that the Supreme Court has held that agencies must "take into account" before reversing course. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016). Yet the Recission Letter revoked the Gaming Eligibility Determination without a reasoned analysis nor any acknowledgement of the Tribe's reliance interests.

Defendants counter with the argument that it was unreasonable for Scotts Valley to rely on the January 10 Decision, given the virtual certainty that the decision would be challenged in court. ECF No. 99-1 at 41. However, as the Supreme Court explained in *Regents*, the DACA policy at

issue there expressly "conferred no substantive rights and provided benefits only in two-year increments," and yet these features did not "automatically preclude reliance interests," but were pertinent only in considering the strength of such interests. *Regents*, 591 U.S. at 30-31. Similarly, once the January 10 Gaming Eligibility Determination was made here, the potential that it could soon be challenged or even nullified does not preclude Scotts Valley's reliance in the meantime. To hold otherwise would mean no one could rely upon any administrative adjudication for as long as the judicial review was available – ordinarily six long years under the APA – and that the agency could change its mind during that six-year period without even considering whether it was interfering with public reliance on its prior decision. Moreover, even judicial review involves its own type of reliance, given the deferential standard of review and the fact that the agency will typically defend a challenged action; the agency's disavowal of its decision at the first sign of a challenge deprives the Tribe of these protections. And even if the likelihood of judicial review might reduce the strength of the Tribe's reliance interests, *Regents* emphasizes that "that consideration must be undertaken by the agency in the first instance, subject to normal APA review." *Id.* at 31. The undisputed absence of any such consideration was arbitrary and capricious.[21]

The prejudice to the Tribe is neither abstract nor curable. As in *Regents*, the Defendants' unexplained disregard for reliance interests has left the Tribe in limbo. Such omissions confirm that Recission letter was not the product of reasoned decision making, but of expediency. The APA requires more.

[21] Similarly, Defendants' suggestion that the January 10 Decision is not susceptible to the Tribe's reliance because it is not "long-standing" may lessen the weight attached to reliance interests. *See* ECF No. 99-1 at 40. But it does not obviate the need for the agency to take reliance interests into account.

IV. Vacatur and Reinstatement of the January 10 Decision Is Required

Defendants urge the Court to remand without vacatur, leaving the Tribe stripped of gaming eligibility while the Department reconsiders. That outcome would reward unlawful agency conduct and significantly harm the Tribe. The appropriate remedy under the APA is vacatur of the Rescission Letter and reinstatement of the January 10 Eligibility Determination.[22]

A. The APA mandates vacatur of unlawful agency action.

The APA directs courts to "hold unlawful and set aside" agency actions found to be arbitrary, capricious, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). To "set aside" an agency action is to vacate it. *Bridgeport Hosp. v. Becerra*, 108 F.4th 882, 890 (D.C. Cir. 2024) (quoting *Corner Post, Inc. v. Bd. of Governors*, 603 U.S. 799, 830 (2024) (Kavanaugh, J., concurring)). Courts have long recognized that vacatur is the normal consequence of unlawful agency action. *Id.*; *AARP v. U.S. Equal Emp. Opportunity Comm'n*, 292 F. Supp. 3d 238, 242 (D.D.C. 2017) ("[V]acatur is 'normally require[d]'" when agency action lacks reasoned

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[22] Defendants contend that the All Writs Act, 28 U.S.C. § 1651(a), is "a new issue not raised by Plaintiff" and therefore should be disregarded as raised by *amicus* GTL. Fed. Defs.' Br. at 32 n.12 (citing *Huerta v. Ducote*, 792 F.3d 144, 151 (D.C. Cir. 2015)). That assertion is demonstrably incorrect. Unlike in *Huerta*, where the D.C. Circuit declined to entertain a purely new argument raised only by an *amicus*, the Tribe itself invoked the All Writs Act in its pleadings. The Second Amended Complaint cites § 1651(a) in the Jurisdiction and Venue section (p. 4) and again in the Prayer for Relief (p. 26), where the Tribe asks the Court, pursuant to 28 U.S.C. § 1651(a), to enjoin Defendants "from reopening the administrative record established prior to the Eligibility Determination and preserve this Court's jurisdiction to review final agency action." This is not an argument injected belatedly by *amicus*, but a claim squarely raised and preserved by the Tribe itself. *Huerta* is therefore inapposite.

The January 10 Decision was based on the administrative record compiled prior to the Gaming Eligibility Determination. Allowing Defendants to reopen or alter that record mid-litigation would compromise the Court's ability to conduct meaningful review under the APA. The All Writs Act exists to prevent precisely such tactics, authorizing federal courts to issue orders "necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. § 1651(a). Injunctive relief under the Act is therefore essential here—to preserve the Court's jurisdiction, to ensure that judicial review proceeds on the record actually before the agency at the time of its decision, and to protect the Tribe's substantial reliance interests in the Gaming Eligibility Determination.

explanation) (quoting *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1151 (D.C. Cir. 2005)); *see also Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001). The Rescission Letter is such an action. It rescinded a final agency determination without justification or authority, without notice, and without consideration of the Tribe's substantial reliance interests. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983) (when changing course, an agency must supply a reasoned analysis). The statutory remedy is vacatur.

B. Remand without vacatur is inappropriate where the defect is structural and ongoing.

The Court retains equitable discretion, but remand without vacatur is justified only in narrow circumstances—where (1) the deficiencies are minor and curable, and (2) vacatur would cause significant disruption. *AARP*, 292 F. Supp. 3d at 242 (citing *Allied-Signal, Inc. v. U.S. Nuclear Reg. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)); *see also Citizens for Resp. & Ethics in Washington v. Off. of Mgmt. & Budget*, No. CV 25-1051 (EGS), 2025 WL 2025114, *16 (D.D.C. July 21, 2025) (remand without vacatur is an "exceptional remedy" available only when an error is curable). "Because vacatur is the default remedy … defendants bear the burden to prove that vacatur is unnecessary." *Nat'l Parks Conservation Ass'n v. Semonite*, 422 F. Supp. 3d 92, 99 (D.D.C. 2019). Here, neither condition applies.

First, the defects here are structural: the Department ignored reliance interests, created an unlawful new process, acted under political influence, and violated basic Due Process protections. These are not technical flaws; they go to the heart of lawful agency decision-making. The D.C. Circuit has explained that procedural violations are not minor deficiencies but rather fundamental flaws that demand vacatur. *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 85 (D.C. Cir. 2020). Deficient notice and comment procedures, as here with the Rescission Letter, are "fundamental

flaws" that almost always require vacatur. *Mendoza v. Perez*, 72 F. Supp. 3d 168, 175 (D.D.C. 2014) (quoting *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 199 (D.C. Cir. 2009)). When an agency cannot justify its deficient procedural decision, this factor weighs in favor of vacatur, even if the corrected procedure is unlikely to change the agency's bottom line. *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 985 F.3d 1032, 1052 (D.C. Cir. 2021).

Second, defendants have not shown that vacatur would lead to serious, disruptive consequences. The natural consequence of vacating the Rescission Letter would be to restore the January 10 Decision's Gaming Eligibility Determination. The January 10 Decision was fully considered over nine years, finalized, and implemented. It remains (but for the Recission Letter) a valid, reasoned determination. The only disruption comes from the Department's unlawful rescission. Reestablishing the Tribe's gaming rights by vacating the Rescission Letter could potentially prompt construction activities on the Vallejo Site, but such activities could not be deemed disruptive, as nothing prevents the Tribe from building non-gaming facilities on its trust land now. Vacatur would also halt the Department's poorly considered reconsideration process until such time as the agency, if it is willing and able, makes a new decision within its authority and in compliance with law. Since there is as yet no reconsidered gaming determination, no reliance has arisen on the proceeding's outcome. The Department does not suggest that it has done significant work toward making a decision. Nor does vacatur disruptively undercut any legitimate reliance on the Department's reconsideration process, which improperly sidelined Scotts Valley. Vacatur would not require the Department to unravel past actions or disrupt settled transactions. *See Am. Great Lakes Ports Ass'n v. Schultz*, 962 F.3d 510, 519 (D.C. Cir. 2020). The result of all this would simply be a return to the status quo prior to the Rescission Letter. Meanwhile, the availability of alternative measures, namely, the lawsuits already commenced by the project

opponents challenging the January 10 Decision, mitigates any detrimental impact of vacatur. *See Public Employees for Env. Responsibility v. U.S. Fish and Wildlife Service*, 189 F. Supp. 3d 1, 5 (D.D.C. 2016).

The Court should not leave in place an action that is demonstrably defective and harmful to the Tribe. Such an outcome would transform the APA's remedial scheme into a shield for agency misconduct, permitting the Department to nullify final rights through procedurally defective shortcuts yet retain the benefit of its unlawful act. Equity demands that the Tribe be restored to the position it lawfully occupied before the Department acted outside its authority. That requires vacatur of the Rescission Letter and reinstatement of the January 10 Gaming Eligibility Determination.

CONCLUSION

Defendants are not entitled to summary judgment upholding any aspect of the Rescission Letter. Scotts Valley asks the Court to deny Defendants' motion and grant the Tribe's motion for summary judgment, and set aside the Rescission Letter in its entirety.

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Respectfully submitted,

By: s/ *Patrick R. Bergin*

Patrick R. Bergin (D.C. Bar No. 493585)
Tim Hennessy (D.C. Bar No. CA00040)
PEEBLES BERGIN SCHULTE & ROBINSON LLP
2020 L Street, Suite 250
Sacramento, California 95811
(916) 441-2700
pbergin@ndnlaw.com
thennessy@ndnlaw.com

Conly J. Schulte (D.C. Bar No. NE20158)
PEEBLES BERGIN SCHULTE & ROBINSON LLP
945 Front Street
Louisville, Colorado 80027
(303) 284-8228
cschulte@ndnlaw.com

Arlinda F. Locklear (D.C. Bar No. 962845)
4113 Jenifer Street, NW
Washington, D.C. 20015
(202) 237-0933
alocklearesq@verizon.net

Attorneys for Scotts Valley Band of Pomo Indians