IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTTS VALLEY BAND OF POMO INDIANS, Plaintiff, v. DOUGLAS BURGUM, in his official capacity as Secretary of the Interior, et al., Defendants.	Case No. 1:25-cv-00958-TNM

FEDERAL DEFENDANTS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

INTRODUCTION

Scotts Valley fails to challenge a final agency action reviewable under the Administrative Procedure Act. Neither the temporary rescission of the Gaming Eligibility Determination nor the Department's reconsideration of that determination creates legal consequences for the Tribe. There has not been a "final word" from the Department on gaming eligibility. Because the Tribe fails to challenge a reviewable final agency action, the Court should grant summary judgment in favor of Federal Defendants for that reason alone.

But even if the March 27 Letter constituted final agency action, Scotts Valley still fails to meet its burden here. The Department's March 27 Letter was reasonable and in accordance with law. The Department did not violate Scotts Valley's procedural due process rights. The Department acted within the scope of its inherent authority to reconsider when it issued the

March 27 Letter. And the Tribe fails to prove that the Letter was a product of improper political influence.

Federal Defendants' cross-motion for summary judgment should therefore be granted, and Plaintiff's motion should be denied. But even if the Court finds for the Tribe, the remedy should be limited and allow the Department's reconsideration process to proceed. Vacatur of the March 27 Letter would not be warranted under the circumstances here.

ARGUMENT

I. The March 27 Letter is not final agency action reviewable under the APA.

The Department's March 27 Letter is not final agency action with respect to either the Department's decision to temporarily rescind the Gaming Eligibility Determination or the reconsideration of that prior determination. The Tribe fails to meet its burden to prove the contrary. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990). An agency action is "final" for purposes of the Administrative Procedure Act ("APA") only if two conditions are met: "(1) the action marks the consummation of the agency's decision-making process and is not 'of a merely tentative or interlocutory nature;' and (2) it is an action 'by which rights or obligations have been determined, or from which legal consequences will flow.'" *Soundboard Ass'n v. Fed. Trade Comm'n*, 888 F.3d 1261, 1267 (D.C. Cir. 2018) (alteration omitted) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)). The March 27 Letter does not satisfy those conditions.

A. The Tribe fails to demonstrate that legal consequences flow from the rescission.

We begin with the temporary rescission of the prior Gaming Eligibility Determination. That aspect of the March 27 Letter did not impact Scotts Valley's rights, particularly given that the Vallejo Site remains in trust. *See* Fed. Defs. Br. in Supp. of Cross-Mot. for Summ. J. & In Opp. to Pl. Mot. for Summ. J. ("Defs. Mem.") 15-21, Dkt. No. 100. The Tribe asks the Court to

disregard that the March 27 Letter did not change the Department's Trust Determination, as well omit the fact that, to date, the land remains in trust. The temporary rescission of the Gaming Eligibility Determination, standing alone, thus does not have any legal consequences under the Indian Gaming Regulatory Act ("IGRA") until and unless the Department takes some action to reverse the Trust Determination. That weighs against finality here.

i. The Tribe misconstrues our arguments.

Scotts Valley's reply rehashes the finality arguments in the Tribe's opening brief. Still, none pass muster. To begin, Scotts Valley misconstrues our final agency action arguments. Contrary to the Tribe's assertion, Federal Defendants never framed Indian Land Opinions ("ILOs") as "merely advisory" for purposes of the final agency action inquiry, *see* Pl. Combined Opp. to Defs. Mot. for Summ. J. & Reply in Supp. of Pl. Mot. for Summ. J. ("Pl. Opp.") 6, Dkt. No. 111; *see also id.* at 7, 14. True, we used that terminology when discussing due process, *see* Defs. Mem. 24. But the fact remains that Indian Land Opinions are just that: opinions. Our argument is—as we explained, *see* Defs. Mem. 12-15—that nothing in IGRA or any other relevant statute proclaim that the Department's opinion on a parcel's eligibility for gaming operates in the nature of a license or is otherwise a separate final agency action for purposes of IGRA. The Act does not require the Secretary of the Interior to issue final decisions on gaming eligibility determinations, as it does for the "two part" exception in § 2719(b)(1)(A) for land-into-trust determinations. *Id.* at 12-13.

When making trust determinations, the Department may opine on a given parcel's eligibility for a § 2719(b)(1)(B) exception as a necessary part of exercising its authority to take final agency actions under IGRA or other statutes, including final decisions to acquire land into trust for Tribes. *Id.* (citing 25 C.F.R. §§ 292.1, 292.3); *see* Pl. Opp. 6 (conceding that Indian

Lands Opinions "are not necessarily final agency action because IGRA does not authorize these opinions"). But that practical necessity does not elevate a gaming eligibility determination to a final agency action. *Cf. Kansas ex rel. Schmidt v. Zinke*, 861 F.3d 1024, 1032-33 (10th Cir. 2017) (concluding NIGC gaming eligibility opinions are not final agency actions under the APA because no legal consequences flow from such decisions, even if the gaming eligibility opinion can pave the way for tribes on Indian lands). Thus, conversely, a temporary rescission of a gaming eligibility cannot be a final agency action when the trust determination remains intact. Indeed, as the Tribe readily acknowledges, Pl. Opp. 7, it is the Secretary acceptance to land into trust that creates the final agency action, even where the Department is also assessing whether that the land is gaming eligible. *See Scotts Valley Band of Pomo Indians v. U.S. Dep't of the Interior*, 633 F. Supp. 3d 132, 140 (D.D.C. 2022).

ii. The March 27 Letter did not impact Scotts Valley's rights because it did not disturb the trust acquisition.

Here, the March 27 Letter's rescission of the Gaming Eligibility Determination did not disturb the Department's January 10 Decision to take the land into trust, *see* Pl. Opp. 7. Thus, the March 27 Letter was not a final agency action.

To show finality, Scotts Valley tries to divorce the rescinded Gaming Eligibility Determination from the untouched Trust Determination to show finality. *See* Pl. Opp. 6-7. To no avail. The Department has not acted to take the land out of trust or otherwise withdrawn the Trust Determination. And therefore, Scotts Valley fails to prove the March 27 Letter impacted the Tribe's rights.

Nor is the Department's March 27 Letter the final word from the agency on the Gaming Eligibility Determination. The Department has not concluded that the land is ineligible for gaming. *See also Ciba-Geigy Corp. v. U.S. Env't Prot. Agency*, 801 F.2d 430, 437 (D.C. Cir.

1986) (where the agency had "provided its final word on the matter," judicial review was appropriate). The Department has only temporarily rescinded its prior Gaming Eligibility Determination during the ongoing reconsideration process, *see* Defs. Mem. 14-15. The March 27 Letter signaled that the gaming eligibility question is subject to further consideration by the Department.

Thus, the Tribe's reliance on *Natural Resources Defense Council v. Wheeler*, 955 F.3d 68 (D.C. Cir. 2020) is misplaced, Pl. Opp. 3-4. The *Wheeler* court found that an agency's "interim" action meets the first prong of finality "as long as the interim decision is not *itself* subject to further consideration by the agency[,]" which is not the case here. 955 F.3d at 79 (emphasis added). The Gaming Eligibility Determination *is currently* being reconsidered by the Department. Thus, contrary to the Tribe's assertion, *Wheeler* reinforces that the March 27 Letter's interim rescission is not final agency action.

The decision in *Ciba-Geigy v. Environmental Protection Agency*, 801 F.2d 430 (D.C. Cir. 1986) also does not save the Tribe's argument, Pl. Opp. 4. *See also* Defs. Mem. 14-15. The Tribe asserts that the facts here are like those in *Ciba-Geigy* because the March 27 Letter directed the Tribe not to "rely" on the Gaming Eligibility Determination. *See* Pl. Opp. 4. But agency action in *Ciba-Geigy* required the manufacturer and seller to change its product's labeling, which required the company to act and expend resources on compliance. *Ciba-Geigy*, 801 F.2d at 437-38. That is not the case here where the Department has not required the Tribe to do anything nor advised the Tribe that it cannot game. The Department has merely instructed the Tribe and interested parties to not rely on the Gaming Eligibility Determination during its reconsideration process.

iii. The Tribe is not in any different legal posture today with respect to § 1166 than it was before the March 27 Letter.

The Department's rescission of the Gaming Eligibility Determination did not create any appreciable legal consequences for the Tribe. *See* Defs. Mem. 15-17 (citing supporting case law). Scotts Valley maintains that the Tribe's legal position changed as of March 27, 2025, because of changes in the applicability of state law, *see* Pl. Opp. 8-9 (relying on 18 U.S.C. § 1166(a)). But the Tribe's point is overly simplistic. *See* Defs. Mem. 18-19. Section 1166 applies (as a matter of federal law) state laws regarding "the licensing, regulation, or prohibition of gambling" in Indian country. 18 U.S.C. § 1166(a). There is no dispute that lands the United States hold in trust for the benefit of a tribe is considered Indian country. *See* Defs. Mem. 18 n.9 (citing *United States v. John*, 437 U.S. 634, 649 (1978)); *see also Alaska v. Native Vill. Of Venetie Tribal Gov't*, 522 U.S. 520, 529-31 (1998) (noting federal land held in trust for Indians is Indian country). Because the Vallejo Site remains in trust, its status as Indian country (and thus the reach of State jurisdiction) has not changed. And the Tribe agrees that "gambling" under § 1166 does not include Class I or Class II gaming under IGRA, Pl. Opp. 9. *See* 18 U.S.C. § 1166(c).

The Tribe's focus on the absence of an affirmative Gaming Eligibility Determination misses the point because the land remains in trust. IGRA prohibits gaming on land taken into trust after October 17, 1988, with limited exceptions, including lands taken into trust as part of the restored lands exception. *See* 25 U.S.C. § 2719(b)(1)(B)(iii). Scotts Valley wrongly contends that "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." Pl. Opp. 9 (emphasis in original). In doing so, the Tribe asks the Court to read a requirement into IGRA that simply does not exist. IGRA does not state that gaming is *only* legal on Indian lands once

the Department (or NIGC) has made a positive Indian lands determination. *See* 25 U.S.C. § 2719(b)(1)(B)(iii) (prohibition does not apply when "lands are taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition") (cleaned up).

The Tribe also puts the cart before the horse. The Vallejo Site remains in trust. And the temporary rescission (and absence) of the affirmative gaming eligibility determination does not somehow render the land "ineligible Indian land." Pl. Opp. 9 & n.7. Rather, as we explained, *see* Defs. Mem. 19, the temporary rescission only means that whether the Vallejo Site qualifies for a § 2719 exception is an open question left for another day—whether as part of the Department's present reconsideration process or other some other future action or determination.

Because the rescission of the Gaming Eligibility Determination, standing alone, does not have any legal consequences under IGRA, the March 27 Letter is not final agency action. Consequently, the Tribe's claims are not reviewable under the APA.

B. The March 27 Letter does not create a "New Rule" nor does that "Rule" constitute final agency action.

Scotts Valley argues that the Department failed to dispute that the process described in the March 27 Letter "departs" from Part 292 regulations. Pl. Opp. 10. The Tribe, again, misinterprets our arguments. The Department's ongoing reconsideration process does not depart from its regulations because those regulations provide for a closed process and permit the public to submit comments on ILOs. Defs. Mem. 38-39 (citing 73 Fed. Reg. at 29,361). The regulations also do not govern every detail of the Department's decision-making process. *Contra* Pl. Opp. 10. The Department *does* dispute that the reconsideration process "departs" from its regulations. As we explained, *see* Defs. Mem. 21-22, 38-39, the Department did not create a new process that conflicts with its regulations. We maintain that the Tribe's argument is not one for final agency action, but an argument that Department acted *ultra vires*. *See id.* at 21.

Even so, Scotts Valley appears to complain that the reconsideration process is unlawful because it does not mirror the decision-making process of the decision being reconsidered. *See* Pl. Opp. 11-12. But the Tribe cites no authority to support its position. The Tribe argues that the process "grants rights to third parties that they never had under Part 292," Pl. Opp. 11. But the Department's Part 292 regulations which implement Section 2719 of IGRA does not dictate a process for how the Department should handle submissions by parties other than the applicant. *See* Defs. Mem. 38 (citing 73 Fed. Reg. at 29,361). The Department has the discretion to tailor a particular process in each case, including whether to seek submissions from other entities or individuals. *See id.* Scotts Valley also continues to ignore that the Part 292 regulations allow the public to submit comments to a specific ILO opinion. 73 Fed. Reg. at 29,361. And interested tribes' submissions are common in restored lands inquiries.

In any event, the process for restored lands decisions is highly informal because the Department's governing regulations do not detail any particular process the Department must follow. For example, Part 292 subpart B which is titled "Exceptions to Prohibitions on Gaming on Newly Acquired Lands," does not outline a particular process the Department must employ, rather it explains how a tribe may request an opinion from the Department on whether its land meets an exception. *See* 25 C.F.R. § 292.3. While the regulation identifies whom the tribe is to submit the request, it does not outline any process that the Department must take in reviewing that request. *See id.* Nor do the subparts related to the restored lands exception lay out a process the Department must follow. *See id.* § 292.7 (outlining criteria a tribe must meet to meet the "restored lands" exception); *see also* §§ 292.8-12. By contrast, the Department's Part 151 regulations, which govern land to trust determinations, do outline a specific process the Department must follow. *See* 25 § C.F.R. 151.9(d) (outlining a process for notice and comment

on a tribe's application). That was the process the Department followed preceding its issuance of the January 10 Decision. But the Trust Determination is not presently being reconsidered.

Moreover, Scotts Valley attempts to divorce the Department's decision to initiate a reconsideration process from the end result of the reconsideration process. *See* Pl. Opp. 11-12. But adopting a process for an informal adjudication is not final agency action; it is an interim step that *may* lead to a reviewable final agency action. The Court should reject the Tribe's suggestion that choosing a decision-making process is the culmination of the agency's decision-making itself. Adopting such logic would mean that an agency could be sued every time it decides on a process for a particular informal adjudication.

And any grievance Scotts Valley has with the ongoing reconsideration process is premature as there is no "final word" on the process. *See* Defs. Mem. 21-22. The March 27 Letter invited the Tribe and other interested parties to resubmit evidence so that the Department could confirm whether it considered all the evidence. SV-0676. The March 27 Letter does not lay out the process in any finality. It does not detail every step of the Department's reconsideration process, presumably because the nature of the submissions may dictate how the Department will proceed with its reconsideration. At any rate, it is too early to air these grievances before the Department's reconsideration process is complete. The Tribe cites no legal precedent requiring the Department to list out every detail of its reconsideration process when it begins such process.

C. The Department's reconsideration process remains ongoing; and an ongoing process cannot be final agency action.

Finally, the Tribe concedes—as it must—that the reconsideration process remains ongoing and thus is not final agency action, Pl. Opp. 11; *see also id.* at 3 n.1. Indeed, an ongoing process, by its terms, cannot be final agency action. It is too soon to know how the Department's

reconsideration process will play out. Put another way, it is not yet known whether Scotts Valley will be foreclosed from participating in the reconsideration process. *See id.* at 11 ("The Tribe has no opportunity to review or rebut these submissions."). Though the Tribe appears to acknowledge that it does not challenge the non-final "unmade decision" resulting from the reconsideration process, Pl. Opp. 2, Scotts Valley still fails to appreciate the fact that not only is the reconsidered decision unknown and not final, but the reconsideration process itself is ongoing and thus cannot be final agency action.

An ongoing process cannot be the consummation of the Department's decision-making. *See Alaska Dep't of Env'tl Conservation v. EPA*, 540 U.S. 461, 483 (2004) (agency action marks the consummation of the relevant administrative process when the agency "ha[s] asserted its final position on the factual circumstances underpinning" the agency action). "The core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties." *Franklin v. Mass.*, 505 U.S. 788, 797 (1992). The March 27 Letter is better framed as the beginning, *not* the end, of the Department's decision-making process. The March 27 Letter does not represent the Department's "final word" on the process to be applied in reconsidering gaming eligibility. *See, e.g.*, *Ciga-Geigy*, 801 F.2d at 437; *Vill. of Bald Head Island v. U.S. Army Corps of Eng'rs*, 714 F.3d 186 (4th Cir. 2013) (finding the Corps' ongoing implementation of the project was not the consummation of the agency's decision-making process and was thus not reviewable final agency action).

Failing to meet the *Bennett* prongs, the Tribe fails to challenge reviewable agency action under the APA. The Court should thus grant summary judgment in Federal Defendants' favor.

II. The Department did not violate Scotts Valley's procedural due process rights.

If there was reviewable final agency action here, Scotts Valley's due process claim fails for lack of a property interest protected by the Due Process Clause. "[N]ot every legal interest is

a constitutionally protected one." *Urb. Sustainability Directors Network v. U.S. Dep't of Agric.*, No. 25-CV-1775, 2025 WL 2374528, at *23 (D.D.C. Aug. 14, 2025). And "a mere violation of law does not give rise to a due process claim." *Am. Fed. of Gov't Emps., AFL-CIO, Loc. 446 v. Nicholson*, 475 F.3d 341, 353 (D.C. Cir. 2007). The Tribe's interest in Indian gaming does not rise to the level of a protected property interest.

Given that the Gaming Eligibility Determination is not a traditional form of property, the Tribe attempts to equate it to an entitlement to government benefits. But Scotts Valley has not shown an entitlement to government benefits created by law. *See Bd. of Regents v. Roth,* 408 U.S. 564, 577 (1972) ("Property interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ."). Not all government programs create constitutionally protected property interests. "A [due process] property interest only arises when an entitlement to benefits exists." *Ridgely v. FEMA*, 512 F.3d 727, 735 (5th Cir. 2008). A due process property interest only arises when an entitlement to benefits exists. *Id.* The "mere existence of a governmental program or authority empowered to grant a particular type of benefit to one such as the plaintiff does not give the plaintiff a property right, protected by the due process clause, to receive the benefit, absent some legitimate claim of *entitlement*—arising from statute, regulation, contract, or the like—to the benefit." *Blackburn v. City of Marshall,* 42 F.3d 925, 941 (5th Cir.1995) (emphasis in original).

Scotts Valley's purported interest in the Gaming Eligibility Determination differs from an entitlement in government benefits. The entitlement to government benefits where courts have found protected property interests involve the actual provision of services or payment by the government. *See, e.g.*, *O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 787 (1980) (distinguishing between the provision of direct benefits, which are property rights, and indirect

benefits) ; *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 767–68 (2005) ("We held that, while the withdrawal of 'direct benefits' (financial payments under Medicaid for certain medical services) triggered due process protections, the same was not true for the 'indirect benefits' conferred on Medicaid patients when the Government enforced 'minimum standards of care' for nursing-home facilities." (citing *O'Bannon*) (internal citations removed)). For example, in *NB ex rel. Peacock v. Dist. of Columbia*, the court found a property right in direct benefits being provided by Medicaid in the form of payment for certain prescription drugs. 794 F.3d 31, 38 (D.C. Cir. 2015). Here, the government is not directly providing any services. The Gaming Eligibility Determination does not entitle Plaintiff to receive any government benefit, such as federal funds. Instead, the gaming eligibility determination is just that—a determination that the property is eligible for gaming. It follows that the Gaming Eligibility Determination is not a "property interest" in the same way that Medicaid payments are.

In addition, "[t]he Due Process Clause only provides protection if the statute or implementing regulations place substantive limits on official discretion." *Am. Ass'n of Physics Tchrs., Inc. v. Nat'l Sci. Found.*, No. 25-CV-1923, 2025 WL 2615054, at *18 (D.D.C. Sept. 10, 2025) (internal quotation omitted). To demonstrate a "a legitimate claim of entitlement" to a government benefit, the Tribe must demonstrate "explicitly mandatory language, *i.e.*, specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow.'" *Urb. Sustainability*, 2025 WL 2374528, at *23 (quoting *Tarpeh-Doe v. United States*, 904 F.2d 719, 722-23 (D.C. Cir. 1990) (alteration in original) and *Ky. Dep't of Corr. v. Thompson*, 490 U.S. 454 (1989)). Scotts Valley has not done so here.

IGRA sets forth a process by which gaming may eventually occur, but it is far from the mandatory scheme required to create an entitlement to a gaming eligibility determination that is

protected by the Constitution. Scotts Valley presents IGRA as a checklist that establishes entitlement to "benefits," but the Tribe itself has acknowledged the many steps and uncertainty involved in the IGRA process even after a determination that the land is eligible for gaming. The Tribe now argues that once the Department determined that the land was eligible for gaming and took the land into trust, gaming became inevitable. But Scotts Valley portrayed this differently when opposing intervention by the amici tribes. There, Scotts Valley stated that:

> Several critical contingencies stand in the way of Scotts Valley conducting any Class III gaming. Before any such gaming may lawfully occur, Scotts Valley must first negotiate and execute a tribal-state gaming compact with the State of California, and the compact must be approved by the Secretary of the Interior. 25 U.S.C. § 2710(d)(1)(C), (d)(3), (d)(8). This negotiation process is inherently uncertain [because] the State retains discretion to negotiate or withhold agreement, and the Secretary must approve the compact for it to be effective. Without these approvals, Scotts Valley cannot lawfully conduct Class III gaming. Should negotiations fail, Scotts Valley would have to initiate litigation alleging that the State failed to negotiate in good faith, which, *if successful*, triggers a court-ordered mediation process under 25 U.S.C. § 2710(d)(7), and if the State rejects the resulting tribal proposal, the Secretary of the Interior may prescribe procedures for gaming under 25 U.S.C. § 2710(d)(7)(B)(vii).

Dkt. No. 31 at 31 (emphasis added). The Tribe also stated that it "must secure prior approval of its management contract by the Chair of the National Indian Gaming Commission," and acknowledged that "approval is not a formality." *Id.* at 32. And it noted that it must comply with the mitigation measures set forth in the Final Environmental Assessment and Finding of No Significant Impact: "Failure to comply could invite enforcement actions or litigation, potentially delaying or derailing the project entirely." *Id.* In short, Scotts Valley has previously represented to this Court that IGRA requires a complicated process with inherent uncertainty. Given this, Scotts Valley cannot credibly assert the Gaming Eligibility Determination gave it a protected entitlement to game on the Vallejo Site. As the Supreme Court noted, the loss of "something important" does not necessarily trigger the Due Process Clause. *See Kerry v. Din*, 576 U.S. 86, 101 (2015) (internal quotations omitted).

Contrast IGRA's language with the social security disability statute, which courts have held does create an entitlement to continuing benefits. That statute states that eligible individuals "shall be entitled" to monthly payments "for each month beginning with the first month . . . in which he becomes so entitled to such insurance benefits" until the individual dies, attains retirement age, or is determined to be ineligible. 42 U.S.C. § 423; *Ridgely v. Fed. Emergency Mgmt. Agency*, 512 F.3d 727, 738 (5th Cir. 2008) ("The mandatory language found in the social security disability statute makes it clear that an individual who satisfies the eligibility criteria has a legitimate expectation of receiving continuing benefits."). In other words, the statute provides conditions, establishes an "entitlement," and provides specific conditions upon which the benefits cease. IGRA does not reference "entitlement," or even use mandatory language dictating that if certain conditions are met, a gaming eligibility determination must issue. Unlike the social security disability statute, IGRA's conditions are not a straightforward checklist. It follows that IGRA does not create an entitlement. *See Tarpeh-Doe*, 904 F.2d at 722–23.

The Tribe argues that even if IGRA involves discretionary decisions in reaching a gaming eligibility determination, once that determination was made, due process protections attached. In support, Scotts Valley cites only a non-binding out-of-circuit case. *See* Pl. Opp. 16 (citing *Spinelli v. City of New York*, 579 F.3d 160, 169 (2d Cir. 2009)). This argument is belied by two recent cases in this district, which found that grants awarded on a discretionary basis by the government do not create protected property rights even when they have been awarded and received. *See Am. Ass'n of Physics Tchrs.*, 2025 WL 2615054, at *18 ("Plaintiffs have failed to identify any provisions in the governing NSF statutes or regulations cabining the agency's discretion so dramatically as to confer a constitutional entitlement."); *Urb. Sustainability*, 2025 WL 2374528, at *23 (holding that grants "still leave[ ] officials with far too much discretion to

confer a constitutionally protected entitlement"). IGRA simply does not establish the substantive limits on official discretion required to make the gaming eligibility determination a property interest.

And, as discussed in Federal Defendants' opening brief, Scotts Valley is not actually entitled to game on its property because it had not met the statutory requirements as of March 27. Thus, even if a protected property right attaches to a right to game on Indian land, it had not yet vested in the Tribe at the time the March 27 Letter was issued because IGRA's requirements for Class II and III gaming had not been met.[1] As the *Roth* court noted, a plaintiff's unilateral expectation that he will receive or retain something of value is not enough to create a protectable property interest. 408 U.S. at 576. As such, due process does not apply here because it safeguards interests already acquired in benefits and applicants for benefits do not have a legitimate claim of entitlement under the Due Process Clause. *See Muwekma Ohlone*, 708 F.3d at 219–20.

Moreover, Scotts Valley's citation to *California v. U.S. Dep't of the Interior*, 2025 WL 2459355 (N.D. Cal. Aug. 26, 2025) is inapposite. Pl. Mem. at 13. The facts of that case are similar to the facts here: the state of California and the Governor of California challenged the Department's decision to take land into trust for the purpose of authorizing gaming under IGRA's restored lands exception. The court found that the tribe had an interest in the gaming eligibility

[1] Scotts Valley argues that it was entitled to engage in Class II gaming immediately upon the issuance of the Gaming Eligibility Determination, but NIGC regulations require tribes to notify the Chair at least 120 days before opening any new facility, place or location on Indian lands where class II or III gaming will occur. 25 C.F.R. § 559.2. The Tribe did not comply with that requirement following the January 10 Decision. And, even if Scotts Valley had notified NIGC on January 10, 2025, the Tribe still would not have been able to Class II game by March 27 because it was less than 120 days after January 10. Scotts Valley would also be subject to the regulations at 25 C.F.R. Part 556 regarding background investigations for primary management officials and key employees.

determination sufficient to demonstrate that it was entitled to intervene as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure. But the interest necessary for intervention as of right is a lesser standard than to show a constitutionally protected property interest. Rule 24 requires only that a proposed intervenor demonstrate that it has "an interest relating to the property or transaction that is the subject of the action" that may be impaired unless it is allowed to intervene. Clearly, Rule 24 defines "interest" much more broadly than interests protected by the Due Process Clause. Thus, that case has no bearing on whether Plaintiff has shown a constitutionally protected property interest here.

Even if Scotts Valley had identified a protected property or liberty interest, the Department has not deprived the Tribe of those interests. The Vallejo Site remains in trust. And now, the temporary rescission of the Gaming Eligibility Determination, standing alone, does not have any legal consequences under IGRA until and unless the Department takes some action to reverse the Trust Determination. Scotts Valley thus cannot demonstrate that the Department deprived it of a protected property or liberty interest.

Finally, the Department provided Scotts Valley with the process it is due. Given the temporary nature of the rescission, the notice the Department provided was sufficient.

III. The Department's March 27 Letter complied with the APA.

Scotts Valley also fails to carry its burden to prove that the March 27 Letter was arbitrary and capricious under the APA. *See* 5 U.S.C. § 706(2)(A); *Lomak Petroleum, Inc. v. FERC*, 206 F.3d 1193 (D.C. Cir. 2000). The Department's March 27 Letter was reasonable and in accordance with law.

A. Section 4.5 recognizes the Secretary's inherent authority to reconsider prior decisions.

Scotts Valley does not dispute that the Department has inherent authority to reconsider decisions. Instead, the Tribe focuses on 43 C.F.R. § 4.5's subparts to support its position that § 4.5 restricts the agency's inherent authority to reconsider. *See* Pl. Opp. 21-23. The Tribe's claim fails.

According to the Tribe, § 4.5 sets the stage for the Department's inherent authority. Pl. Opp. 22-23. That is inconsistent with what the regulation says. The regulation *recognizes* the inherent authority, it does not *establish* it. Section 4.5(a) may list out different powers conferred to the Secretary of the Interior. But that list is not exhaustive. *See* 43 C.F.R. § 4.5(a) ("Nothing in this part may deprive the Secretary of any power . . . *including* . . . ." (emphasis added)).

Nor is the Tribe correct that, because the circumstances here do not fit cleanly under those listed in § 4.5, the inherent authority evaporates. The Tribe is correct that the circumstances here are not an adjudicatory proceeding, and do not involve the Secretary taking jurisdiction from the Office of Hearings and Appeals or the Secretary directing the Office of Hearings and Appeals to reconsider a decision. Pl. Opp. 22-23 (relying 43 C.F.R. §§ 4.5(a)(1)-(2), (b), (c)). But that is beside the point given that § 4.5 separately confirms the Department's inherent authority to reconsider its prior decisions. *See* 43 C.F.R. § 4.5(a). It is that authority that is at issue here. And none of the case law the Tribe cites diminishes that inherent authority.[2]

[2] The Tribe appears to imply that the Department, by not explicitly stating it was acting consistent with its inherent authority, extinguished that authority. Not so. As Scotts Valley acknowledges, an agency's inherent authority is a "statutorily implicit" authority. Pl. Opp. 32 (citing *Nat. Res. Def. Council v. Regan*, 67 F.4th 397, 401 (D.C. Cir. 2023)). Here, that authority would be IGRA. "[T]he general rule is that an agency has inherent authority to reconsider its decision, provided that reconsideration occurs within a reasonable time after the first decision." *Belville Mining Co. v. United States*, 999 F.2d 989, 997 (6th Cir. 1993); *see also United Gas Improvement Co. v. Callery Properties*, 382 U.S. 223, 229 (1965) ("[a]n agency, like a court, can undo what is wrongfully done by virtue of its order").

B. The rescission was within the scope of the Department's inherent authority.

Having the inherent authority to reconsider, the Department acted well within that authority in temporarily rescinding the Gaming Eligibility Determination. *See* Defs. Mem. 30-34. Scotts Valley does not dispute that an agency's inherent authority to reconsider includes its ability to temporarily rescind a prior decision during the reconsideration. And there is no dispute that an agency has broad inherent authority to reconsider if the agency acts within a timely manner. *See id.*; Pl. Opp. 23. Here, as we explained, the Department's reconsideration and temporary rescission was timely because the Department temporarily rescinded the Gaming Eligibility Determination only two months after the January 10 Decision. *See* Defs. Mem. 32-34. And though what constitutes a "reasonable" period of time is case-specific, the *Belville* factors also confirm timeliness here. The Tribe's reply recites its arguments from the opening brief, but none changes the calculus.

First, the Department did not act contrary to its regulations. As noted above, § 4.5 recognizes the Secretary's inherent authority; it does not limit that authority. *See* Defs. Mem. 32. Contrary to Scotts Valley's assertion, the March 27 Letter did not commit to processes outlined in § 4.5(a) or (b). Nor does § 4.5 govern the Department's reconsideration of what is, at most, an informal adjudication.

Next, the Tribe asserts that the Gaming Eligibility Determination "immediately" conferred a legally cognizable interest. Pl. Opp. 23-24. But as we have explained, the Gaming Eligibility Determination is not a property interest protected by the Fifth Amendment. *See supra* Section II; Defs. Mem. 22-28. As of the March 27 Letter, there were conditions precedent to the Tribe's ability to game and the Trust Determination remains intact. *Id.* at 22-25, 32-33. The

Tribe does not cite any authority supporting its contention that the alleged "legal effect" of a decision "limits" the Department's inherent authority to reconsider, Pl. Opp. 24.

Finally, Scotts Valley ignores the Department's valid concern that it did not consider all the evidence for its Gaming Eligibility Determination and the agency's conclusion that, in light of that fact, the Department's desire to reconsider the decision. The Tribe's mere disagreement with the Department's reasons, Pl. Opp. 24-25, does not render them pretextual. The administrative record supports the Department's concerns. *See* SV-0058, 80, 91, 185, 236, 291; *see also* SV-0055. Scotts Valley complains the Department did not analyze "surrounding circumstances." Pl. Opp. 24. But the Tribe never explains what those circumstances are.

The Tribe also argues the agency was not "required" to consider the submissions from interested parties and protests that none of potentially missing submissions are a part of the record. *Id*. But this makes little sense. We have not argued the Department was required to consider the additional submissions,[3] just that the Department did not act arbitrarily in exercising its discretion to do so. The fact that submissions are missing from the record is the whole point. And contrary to Scotts Valley's suggestion, the Department need not take *more* time to make a preliminary finding before it decides to exercise its inherent authority. *See* Pl. Opp. 25 (asserting "the record reveals no effort by the Department to assess the data or determine whether the data was relevant or helpful"). That is particularly true here, where the Department undertook its effort in order to confirm whether it had considered all the "relevant" evidence. *See Belville*, 999 F.2d at 1002 ("[T]he public interest in achieving a correct result . . . especially tips the scales in

[3] But we note that the D.C. Circuit has previously held, in the context of restored lands opinions, that the Department committed legal error by not considering third-party submissions bearing on the question of an applicant tribe's significant historical connection to a parcel. *Butte Cty. v. Hogen*, 613 F.3d 190, 194-96 (D.C. Cir. 2010).

favor of a finding that reconsideration was timely."). Without clear evidence to support its pretext theory, Scotts Valley's argument fails. *See Latif v. Obama*, 677 F.3d 1175, 1178 (D.C. Cir. 2012).

Scotts Valley's reliance on *Tesoro* is also misplaced. That unpublished, out-of-circuit opinion did not conclude that notice is the end-all-be-all factor when assessing the timeliness of an agency's reconsideration. *See Tesoro High Plains Pipeline Co., LLC v. United States*, No. 1:21-cv-90, 2024 WL 3359433, at *6 (D.N.D. July 19, 2024) (discussing the six factors courts consider when assessing the timeliness of an agency's reconsideration); *see also Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014). Courts examine several factors when determination whether reconsideration is timely. *See, e.g.*, *Ivy Sports Med., Inc. v. Sebelius*, 938 F. Supp. 2d 47, 62 (D.D.C. 2013) (reciting *Belville* factors), *vacated and remanded on other grounds sub nom. Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81 (D.C. Cir. 2014); *Macktal v. Chao*, 286 F.3d 822, 826 (5th Cir. 2002). Again, the Tribe cites no authority that the notice factor alone shows untimeliness. Pl. Opp. 23.

For these reasons, Scotts Valley fails to meet its burden of proving the rescission was untimely. Because the Department acted in a timely fashion, and no statutory limitation exists, the Department acted well within its inherent authority to rescind the Gaming Eligibility Determination.

C. Scotts Valley has not demonstrated improper political influence.

Scotts Valley's reply offers nothing new in support of its argument that the Department's decision was the result of improper political influence. Instead, the Tribe repeats its argument that "an *ex parte* pressure campaign by opposition lobbyists" drove the decision-making here. Pl. Opp. 26. Plaintiff has not overcome the presumption of regularity that accompanies agency

decision-making. Nor has it demonstrated that the Department issued a decision based on pretext or on factors that Congress did not intend for it to consider.

This Court held in *Voyageur* that "reconsideration cannot be a pure policy reversal masquerading as error correction." 2021 WL 1929123, at *3. None of the Tribe's evidence suggests that was the case here. An interested party raised a concern; the Department determined the issue could be a concern; and the Department decided to reconsider. Scotts Valley attempts to distinguish *Voyageur Outward Bound School v. United States*, No. 18-cv-1463 (TNM), 2021 WL 1929123, at *3, by arguing that in that case, the agency's reconsidered decision came after months of review and analyzed "anew" the pertinent documents. Pl. Opp. 26. But this only illustrates our point. Here, the Department has not yet issued a new decision, but is in the process of doing so.

Similarly, the Tribe takes issue with the fact that the agency has not yet analyzed "the materials submitted, how those materials might ultimately change the outcome of the gaming decision, [or any] other assessment that might justify immediately withdrawing the completed final gaming determination." Pl. Opp. 26. First, events after March 27 are not relevant to the question of whether the March 27 Letter was arbitrary when it was made. But even if relevant, the Department here indicated that it was concerned that relevant evidence had not been considered and set a deadline for providing that evidence to the agency. It is premature to argue that the Department did not explain the relevance of the new material.

The record does not support Scotts Valley's assertion that "government officials accept[ed] well-connected opposition lobbyists' directives at the drop of a hat." Pl. Opp. 28. The record demonstrates that Department officials received materials from and met with Yocha Dehe, but the Department did not just accede to Yocha Dehe's wishes. Instead, the Department

considered the materials itself before making a decision. *See, e.g.*, SV-0058, 69, 73, 80 (Solicitor's Office review), 90–91 (Solicitor's Office background briefing memo). The record also shows that the Department drafted its own notice to initiate the reconsideration process instead of issuing the proposed letter provided by Yocha Dehe. SV-288–89, 295–96, 320–23, 669–75. And "even if third parties had solely policy-based reasons for urging Interior to reconsider, that far from proves that Interior's ultimate decision was not a good-faith exercise . . . ." *Voyageur*, 2021 WL 1929123, at *4.

Further, the Tribe's Opposition misstates the evidence in the record. Scotts Valley wrongly states that the March 27 Letter does not identify any legal error in the prior decision. Pl. Opp. 26. While not raising to the level of confessing error, the Letter states that the Department was concerned that relevant evidence had not been considered in the Department's Gaming Eligibility Determination. SV-0676. The underlying record also demonstrates that the Department was independently aware of the issue. An agency's ability to reconsider a decision is not limited to circumstances in which it has identified an error. *See Utility Solid Waste Activities Grp. v. EPA*, 901 F.3d 414, 436 (D.C. Cir. 2018).

Scotts Valley again states its belief that the Department did not need to consider additional evidence after the remand from this Court in 2020. But the Tribe has no response for the point that the Department was *not prohibited* from considering additional evidence on remand. *See, e.g.*, 73 Fed. Reg. at 29360–61; *Butte Cty. v. Chaudhuri*, 197 F. Supp. 3d 82, 88 (D.D.C. 2016) (agency has discretion to gather additional facts on remand). Scotts Valley's Opposition also argues that the prior remand was limited to the then-existing record, with the Department interpreting evidence in favor of Scotts Valley under the Indian canon of construction. Pl. Opp. 27. But the court did not prevent the Department from considering

additional evidence in its remand order. Such a requirement would be improper, in any event, because under the APA, the proper remedy is remand to the agency for reconsideration without dictating what that reconsideration entails. *Fox Television Stations, Inc. v. F.C.C.*, 280 F.3d 1027, 1047 (D.C. Cir. 2002), *opinion modified on reh'g,* 293 F.3d 537 (D.C. Cir. 2002) ("Under the APA reviewing courts generally limit themselves to remanding for further consideration an agency order wanting an explanation adequate to sustain it.").

In short, Scotts Valley's Opposition offers no basis to conclude that the Department's justification for the March 27 Letter was pretextual or the result of undue political influence. Nor has the Tribe overcome the presumption of regularity that accompanies agency action.

D. The Department did not act unlawfully by not specifically calling out the Tribe's purported reliance interest.

The Department did not err by not explicitly mentioning Scotts Valley's purported reliance interest. The record establishes the agency acted reasonably and quickly so that the Tribe or other interested parties did not continue to rely on a decision that the Department is reconsidering. *See* SV-238 (March 27 Letter). Scotts Valley maintains its argument that the Department acted unlawfully by not considering its "serious" reliance interest, which it claims includes starting negotiations with the State of California, initiating financial discussions, and advancing an intergovernmental agreement with the City of Vallejo. Pl. Opp. 29. The Tribe fails to prove sufficient reliance interests to render the Department's rescission unlawful.

To begin, the Tribe does not dispute that this case is far from *Regents.* *See* Pl. Opp. 29-30. Nor does Scotts Valley rebut our position that agencies need not always account for reliance interest in complying with the APA. *See* Defs. Mem. 40-41. Indeed, as the Tribe acknowledges, *see* Pl. Opp. 30 n.21, this case does not involve a rescission of a "longstanding policy" like that in *Regents* or a revocation of a license or other cognizable property interest that may warrant the

agency's consideration of reliance interests. Here, the Department simply temporarily rescinded a prior Gaming Eligibility Determination during its reconsideration process. *See* SV-0632 (March 27 Letter). And, in doing so, the Department has not declared that the Vallejo Site is ineligible for gaming.

Scotts Valley also fails to prove it had sufficient reliance interest to render the Department's rescission unlawful. The Tribe knew litigation was virtually certain but still actively chose to incur costs. *See* Defs. Mem. 41. Plus, the land remains in trust and the March 27 Letter did not invalidate any contracts. And Scotts Valley has not supported its assertion that its contracts are in danger or provided any evidence that it will suffer any other harm from the March 27 Letter. This is far from the "engendered serious reliance interests" recognized in *Regents*. The Court should reject the Tribe's conclusory assertion that its reliance interests are precisely the kind of "serious reliance interests" that the Department must take into account. Pl. Opp. 29.

IV. The Court should allow the reconsideration to proceed and not vacate the March 27 Letter.

As explained above, summary judgment should be granted in favor of Federal Defendants. But even if the Court concludes that the temporarily rescission of the Gaming Eligibility Determination was unlawful, that should have no effect on those portions of the March 27 Letter that began the reconsideration process. The Department has inherent authority to reconsider its decisions and should be allowed to exercise that authority here, particularly because the Tribe has not demonstrated that considering additional evidence regarding the January 10 Decision would be legal error. In addition, preventing the Department from reconsidering the January 10 Decision would be disruptive, given that the Department has already received additional evidence from interested parties and has begun its reconsideration.

See Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n, 988 F.2d 146, 151 (D.C. Cir. 1993) (noting that whether to vacate depends in part on the "disruptive consequences of an interim change that may itself be changed"). The reconsideration will be resolved with a new decision that can be challenged as appropriate. *Ethyl Corp. v. Browner*, 989 F.2d 522, 524 (D.C. Cir. 1993) (granting remand to "allow the agency to consider . . . new evidence and make a new decision").

Thus, even if the Court finds that the March 27 Letter was inadequately supported, it need not vacate the Letter. Remand without vacatur is appropriate when "there is at least a serious possibility that the [agency] will be able to substantiate its decision on remand." *Allied-Signal, Inc.*, 988 F.2d at, 15. The Tribe's argument relies in large part on a purported lack of explanation in the March 27 Letter, which is something that can be remedied. *See id.*; *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1332 (D.C. Cir. 2021) (remanding without vacatur finding "it reasonably likely that on remand the [agency] can redress its failure of explanation"). And even if the Court decides to vacate the temporary rescission, the Department should be allowed to proceed with the reconsideration effort.

CONCLUSION

For these reasons, the Court should grant Federal Defendants' motion and deny Plaintiffs' motion.

Respectfully submitted this 26th day of September, 2025.

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