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)

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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This memorandum is submitted in support of Plaintiff Scotts Valley Band of Pomo Indians' (Scotts Valley or Tribe) Motion for Summary Judgment. For the reasons set forth herein, Scotts Valley urges this Court to grant summary judgment in its favor, and to vacate the Defendants' March 27, 2025, Decision (Rescission Letter), which unlawfully rescinded the gaming eligibility of the Tribe's trust parcel.

STATEMENT OF FACTS

This case concerns the Department of the Interior's unlawful and politically driven reversal of a final agency decision that confirmed Scotts Valley's right to conduct gaming on its trust land in Vallejo, California. Yielding to a covert pressure campaign orchestrated by lobbyists representing a competing Indian tribe, the Department issued a decision that was politically expedient but legally indefensible. The Administrative Record (AR) serves as a roadmap of back-channel lobbying efforts that culminated in the Rescission Letter that was drafted, timed, and justified at the direction of those same lobbyists. The Department rescinded the Tribe's rights without prior notice or an opportunity to be heard and announced a vague, procedurally deficient reconsideration process. The rationale offered in the Rescission Letter finds no basis in the governing federal statutes or regulations, and the decision lacks even a semblance of a reasoned, record-based process.

The January 10 Decision

On January 10, 2025, the Department announced its decision (January 10 Decision) to place the Vallejo Site into trust for the Tribe and to declare the Vallejo Site to be gaming eligible as restored lands, one of the Indian Gaming Regulatory Act (IGRA) exceptions to the prohibition against gaming on trust land acquired after 1988. SV-0001. The thirty-page January 10 Decision detailed the lengthy administrative deliberations on Scotts Valley's request for trust acquisition and a determination of gaming eligibility over the past nine years, discussed in detail the statutory

and regulatory factors that are determinative, and explained its analysis and conclusion regarding each. SV-0002-0030. Specifically regarding gaming eligibility, the Department concluded that the Tribe had demonstrated the three required factors of 25 C.F.R. § 292.12. First, the January 10 Decision confirmed the Department's earlier determination that the Tribe has demonstrated a modern connection to the Vallejo Site. SV-0006. Second, the January 10 Decision also confirmed the Department's earlier determination that the Tribe has demonstrated the necessary temporal connection.[1] *Id.* Third, the January 10 Decision reversed the Department's earlier determination that the Tribe had not demonstrated the required significant historical connection to the Vallejo Site. That determination had been remanded for failure to apply the Indian canons of construction to the Department's application of the regulations to the historical record. *Scotts Valley Band of Pomo Indians v. U.S. Dep't of the Interior*, 633 F.Supp.3d 132, 171 (D.D.C. 2022). The Department described its January 10 Decision as:

> based on the extensive documentation in the administrative record for the 2019 ILO [Indian Lands Opinion], which includes materials submitted by the Band [Tribe] and parties opposed to the Band's request,[2] as well as publicly available documents and records. We note that, in reconsidering the 2019 ILO on remand, the Department neither solicited nor considered any additional evidentiary materials from outside parties, including the Band and those opposed to the Band's request.

SV-0003-04. That same day, the United States executed the trust deed, formally placing the Vallejo Site into trust. Second Amended Complaint (SAC) ¶ 21.

[1] The Part 292 regulations require that a restored tribe make the proposed trust acquisition within 25 years of the tribe's restoration. The Department observed that the Tribe made its trust application for the Vallejo Site on August 11, 2016, and had been restored on September 6, 1991, thus satisfying the temporal connection. SV-0006.

[2] In particular, the January 10 Decision identifies the body of evidence in opposition submitted by Yocha Dehe and other tribes that have since filed lawsuits to challenge the January 10 Decision. SV-0003 at n. 32.

The Tribe's reliance on the January 10 Decision

Following and based upon the January 10 Decision, the Tribe took actions to move forward with the authorized gaming project on the Vallejo Site. The Tribe entered, and authorized its development team to enter into, contracts with third parties, including contracts for infrastructure work related to water and wastewater systems, environmental analysis, and related technical studies. ECF 3-2, ¶ 12. The Tribe has authorized the payment of $1,889,688 in project related invoices under these contracts and other agreements. *Id.* ¶ 13. On January 17, the Tribe requested the Governor of California to commence negotiations for a class III gaming compact that would apply to the Vallejo Site and the Governor accepted the Tribe's request on March 4.[3] *Id.* ¶ 16. On January 28, the Tribe initiated the process before the National Indian Gaming Commission (NIGC) to obtain approval of a tribal ordinance to govern gaming on the Vallejo Site; on March 7, the NIGC approved a revised ordinance for the Tribe. *Id.* ¶ 15. On March 26, the Tribe presented the City of Vallejo with a signed agreement to reimburse the city for its costs to evaluate and analyze potential impacts and proposed financial payments that will be memorialized in a forthcoming intergovernmental agreement between the Tribe and the City respecting the Vallejo Site. *Id.* ¶ 14. All of these actions were taken in reliance upon the finality of the January 10 Decision.

The March 27 Rescission Letter

Almost immediately after the 2025 Presidential Inauguration, Ashley Gunn of Miller Strategies, a lobbyist for the Yocha Dehe Wintun Nation, emailed Alexander Meyer, Director of the White House Office of Intergovernmental Affairs. The January 31, 2025, email stated that Scotts Valley was about to break ground at the Vallejo Site and requested a meeting with White

[3] After the March Rescission Letter, the Governor wrote the Tribe, indicating that he had become aware of the rescission of gaming eligibility for the Vallejo Site and indicating that compact negotiations should be placed on hold. ECF 40.

House staff handling Native American issues; the email included an attachment titled "White Paper for Trump DOI." (White Paper). SV-0127; SV-0055. The White Paper argued the January 10 Decision should be "reconsidered and overturned" for alleged "legal errors," including the complaint that the Department had not considered material Yocha Dehe and other tribes submitted after the 2022 Remand. SV-0055. It spelled out the limits of the Department's authority to reconsider agency decisions. SV-0056. Finally, it proposed two corrective measures: first, that the Department immediately notify Scotts Valley that the January 10 Decision had been "flagged" for reconsideration due to legal error and "Scotts Valley should not invest resources in developing the Vallejo Site"; and second, that the Department "issue a new decision to correct the legal errors contained in the Scotts Valley Approval." SV-0057.

On February 3, lobbyist Gunn followed up with another email to Director Meyer, warning that "it will be a terrible situation" if the Tribe breaks ground at the Vallejo Site. SV-0127. Later that day, Gunn also emailed Christine Glassner, Deputy Director of the White House Office of Intergovernmental Affairs, expressing her appreciation for Glassner's involvement and requesting a call with Gunn's team. SV-0126. That same day, Deputy Director Glassner forwarded the Meyer email to Laura Rigas and Daniel Gustafson, White House Liaison and Deputy Director of External Affairs, respectively, at the Department of the Interior. Glassner asked them to "shed some light on this situation and the urgency of it." SV-0126.

On February 4, Gustafson forwarded Gunn's email to Bryan Mercier, Bureau of Indian Affairs Director (and acting Assistant Secretary - Indian Affairs) at the Department of the Interior. Gustafson advised that he and Rigas had received items requiring attention, asked for a meeting that afternoon, and attached the "White Paper for Trump DOI." SV-0054. In turn, BIA Director Mercier forwarded Gustafson's email to Jason Freihage and Philip Bristol, Deputy Assistant

Secretary of Management - Indian Affairs and Acting Director, Office of Indian Gaming at Interior, respectively. SV-0058. Acting Director Bristol responded to Mercier that same day. SV-0062.

On February 5, Ches McDowell, Managing Partner of Checkmate Government Relations and another lobbyist for Yocha Dehe Wintun Nation, contacted then Chief of Staff at Interior, Wynn Radford, transmitting two documents: the "White Paper for Trump DOI" and a "Scotts Valley Draft Reconsideration Letter for Trump DOI." SV-0065; SV-0055, SV-0065.1. Chief of Staff Radford then forwarded the email to Rigas, White House Liaison at Interior, and other senior management personnel at Interior. Radford's email asked, "[i]s a letter for administrative stay to prevent potential litigation for review possible to receive this evening?" SV-0069 (emphasis added). The next day, Eric Shepard, Associate Solicitor for Indian Affairs at Interior, emailed a background briefing memo on Scotts Valley to those same senior personnel. SV-0089.

On February 22, Aurene Martin, Managing Partner of Spirit Rock Consulting and a third lobbyist representing the Yocha Dehe Wintun Nation, contacted the scheduler for the Assistant Secretary - Indian Affairs Office to arrange a meeting for her client with Kennis Bellmard, Deputy Assistant Secretary - Indian Affairs. Martin attached the "White Paper for Trump DOI" to the meeting request. SV-0093. The scheduler advised Martin that lobbyists were not permitted to attend meetings with principals at Interior; as a result, the scheduler agreed to list Martin as a lawyer. The meeting took place on March 11, 2025. SV-0175.

After the March 11 meeting, things moved quickly. On March 18, Deputy Assistant Secretary - Indian Affairs Bellmard requested a briefing "on what's going on with [Scotts] Valley? ASAP!" from Acting Director of Indian Gaming Bristol. SV-0231 (emphasis added). Bristol responded immediately, forwarding an internal briefing paper and the "White Paper for Trump

DOI" that Bristol described as "submitted by an interested opposing 3d party." SV-0232. The next day, lobbyist Gunn emailed Deputy Assistant Secretary Bellmard, following up on a conversation they had held earlier in the day. This email bears quoting:

> Ken,
>
> Thank you so much for speaking with me today and I know you met with folks on 3/12 on the issue. Again, we appreciate your focus on this. Please see the background and draft litigation [that were attached].
>
> RECONSIDERATION
>
> Obviously, important to note that this is a decision the agency would "reconsider" (as distinguished from a regulation they could "withdraw"). The white paper (attached) might be helpful on this point - it explains that the best practice is a two-step approach, where the first step is a letter informing Scotts Valley of the reconsideration and the second step is the substantive reconsideration process.
>
> Also attached is a draft notice letter that DOI could get out to take that first step. The second step could potentially wait until the Asst Sec is seated, if that's the Secretary's preference.
>
> The white paper also explains why it's important for the notice (the first step) to get out quickly: if too much time passes, or if Scotts Valley starts breaking ground (or otherwise relies on the decision), there's a real risk Interior might not be successful and/or could be tied up in court.
>
> LITIGATION
>
> Another consideration: By its own admission, Interior did not consult with local tribes before making this decision and did not consider any of the evidence local tribes provided. A coalition of local Tribes, led by Yocha Dehe, has a legal challenge all teed up.
>
> But *we have refrained from filing the lawsuit because we would prefer not to sue the Trump Administration - instead, we want the Trump Administration to be able to claim full credit for pulling back this erroneous, antitribal decision.* We want the Administration to get the win for this rather than being forced into something through litigation.
>
> We can't hold off forever, though. Without a case on file, we would not be able to stop the project from moving forward.

SV-0238.

The next day, March 19, Deputy Assistant Secretary - Indian Affairs Bellmard confirmed

to Acting Director of Indian Gaming Bristol that he had requested material from the Solicitor's Office for an upcoming briefing with Senior Advisor to the Secretary Scott Davis on the Scotts Valley issue. SV-0289. Bellmard added that "I do need something on Scott's Valley by tomorrow am." SV-0291 (emphasis added). On March 26, Department staff finalized the decision letter addressed to the Tribe; it was signed by Davis and copied to the opposing tribes as well as the City of Vallejo and Solano County. SV-0621.

On March 27, George Skibine, an attorney for Yocha Dehe Wintun Nation, emailed Acting Indian Gaming Director Bristol to advise that "[w]e received a copy of the reconsideration letter yesterday" and asking whether it would be posted on the Office's website. SV-0622. Acting Director Bristol responded that the rollout was still under consideration. Later that morning, Bristol noticed a typographical error in the letter, and asked that the rollout be held up so the letter could be corrected, if it had not yet "been distributed outside of DOI," or a separate correction issued, if the letter had already gone out. SV-0636. Aware of the letter's distribution, Deputy Assistant Secretary Bellmard told Bristol to issue a correction. SV-0649. The error was corrected by the end of the day and the rollout was delayed until the following day. SV-0678, SV-0689. The Tribe's Chairman Davis received a phone call from the Department on March 28, advising him that the Rescission Letter had been signed; this was the Tribe's first notice that the matter was under consideration at the Department. SAC ¶ 45; ECF 3-2, ¶ 18.

The final Rescission Letter did three things. *See* SV-0669. First, it announced an immediate, "temporary" rescission of the January 10 Decision that the Vallejo Site is gaming eligible. The only rationale stated for the rescission was the Department's concern that "the Department did not consider additional evidence submitted after the 2022 Remand." *Id.* Second, the Letter announced there would be reconsideration of the gaming eligibility of the Vallejo Site,

during which time "neither the Tribe nor any other entity or person should rely on the Gaming Eligibility Determination." *Id.* The Letter did not expressly limit the reconsideration to the significant historical connection that was the subject of the 2022 Remand; to the contrary, the Letter solicited "interested parties" and the Tribe "to submit evidence and/or legal analysis regarding whether the Vallejo Site qualified as restored lands..." generally. *Id.* These submissions were to be made by May 30, 2025 - the only step in the process to govern the reconsideration. The Tribe was not given an opportunity to see the "additional evidence submitted after the 2022 Remand" in advance; nor was it given an opportunity to see or respond to any evidence that might have been submitted by May 30. Third, the Letter indicated that there will be a reconsidered gaming eligibility determination at some unspecified date in the future.

The AR establishes with chilling clarity that the decision-making process on the Rescission Letter was driven by lobbyists who supplied the agency with briefing documents and draft decision documents. The record is devoid of the hallmarks of a reasoned decision based on relevant and lawful factors. It contains no evidence that the Department gave any consideration to the significant interests engendered by reliance upon the January 10 Decision, nor any thought to the effects of rescinding the previous final action. There is no evidence in the AR that the Department evaluated the merits of reversing their previous decision, stated in both the agency's regulations and the January gaming eligibility determination, that additional submissions from third parties would not be necessary to decide the matter. There is nothing that shows the decisionmaker considered the so-called "additional evidence submitted after the 2022 Remand" that ostensibly justified the March Rescission, and the AR does not contain any such submissions. The AR reveals no agency communications with Scotts Valley whatsoever.

The Tribe moved for preliminary relief to block the announced reconsideration from going

forward during the pendency of this litigation. ECF 1. The motion was denied. ECF 83. As far as the Tribe is aware, the Department has closed the record upon which its reconsideration of the Vallejo Site gaming eligibility will be based, as stated in the Rescission Letter, and that reconsideration remains on-going.

LEGAL STANDARD

In deciding a motion for summary judgment in an APA case, "the court must decide as a matter of law 'whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review.'" *Powder River Basin Resource Council v. U.S. Dep't of Interior*, 749 F.Supp.3d 151, 159 (D.D.C. 2024) (quoting *Coe v. McHugh*, 968 F.Supp.2d 237, 240 (D.D.C. 2013)). Under the APA, the Court must set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. The Court considers whether "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see Powder River* at 159-60. In a case like this one, in which the agency has changed course in the challenged action, the Court also considers whether the agency ignored significant reliance interests engendered by the agency's previous decision. *Dep't of Homeland Security v. Regents of the Univ. of Calif.*, 591 U.S. 1, 30 (2020).

The reviewing court "may not supply a reasoned basis for the agency's action that the agency itself has not given." *State Farm* at 43; *see also Regents*, 591 U.S. at 20-21 (explaining that "[i]t is a foundational principle of administrative law that judicial review of agency action is limited to the grounds that the agency invoked when it took the action," and that agency's "*post*

hoc rationalization" is impermissible) (cleaned up)). Review under the arbitrary and capricious standard asks, in short, "whether the agency action was reasonable and reasonably explained." *Seven Cnty. Infrastructure Coalition v. Eagle Cnty., Colo.*, 145 S.Ct. 1497, 1511 (2025).

ARGUMENT

I. The Rescission Letter is final agency action subject to review under the APA.

The APA provides that "final agency action for which there is no other adequate remedy in a court [is] subject to judicial review." 5 U.S.C. § 704. To be "final," two conditions generally must be met: "First, the action must mark the consummation of the agency's decisionmaking process," rather than having a "tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (cleaned up); *see also POET Biorefining v. EPA*, 970 F.3d 392, 404 (D.C. Cir. 2020). "[S]econd, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett* at 178 (cleaned up). An action that "alter[s] the legal regime" governing the agency's or another person's conduct satisfies this condition, while a "purely advisory" action does not. *Id.* Finality is "governed by a pragmatic and flexible approach" by which the Court is empowered "to ensure justice" is done. *Friedman v. F.A.A.*, 841 F.3d 537, 543 (D.C. Cir. 2016).

The Rescission Letter contains two decisions by the Department that constitute final agency action on the matter.[4] First, the Department immediately and "temporarily" rescinded the gaming eligibility of the Vallejo Site, which eligibility had been announced as part of final agency action on January 10, 2025, pursuant to IGRA and implementing regulations at 25 C.F.R. Part 292. Of course, the Department's declaration that the rescission is temporary does not make it so for

[4] The Rescission Letter also promises a third decision, that is, a reconsidered Indian lands opinion on the Vallejo Site. That decision remains outstanding, is plainly not final, and is not challenged here by the Tribe.

purposes of the APA. *Nat. Res. Def. Council v. Wheeler*, 955 F.3d 68, 78 (D.C. Cir. 2020). Second, the Department determined that it would reconsider the gaming eligibility of the Vallejo Site, employing a process that is wholly inconsistent with 25 C.F.R. Part 292. Reconsideration under this new procedure is currently underway. The finality of both decisions subjects them to this Court's immediate review.

A. The decision to rescind gaming eligibility is final agency action.

The Department's decision to rescind gaming eligibility of the Vallejo Site meets both prongs of the finality inquiry.

1. The decision to rescind marks the consummation of the Department's decision making as to whether the Vallejo Site is currently eligible for gaming in accordance with the rationale set out in, and record developed for, the January 10 Decision. The Rescission Letter was signed by the "Senior Advisor to the Secretary of the Interior Exercising by delegation the authority of the Assistant-Secretary - Indian Affairs"[5] and invokes the authority of "the Secretary" under 43 C.F.R. § 4.5. SV-0669. Nothing suggests the decision was the ruling of a subordinate official or is subject to further administrative consideration or appeal. *See Sackett v. E.P.A.*, 566 U.S. 120, 127 (2012); *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 823 F.2d 608, 615 (D.C. Cir. 1987). To the contrary, decisions made under authority of the Assistant Secretary are deemed by regulations to "be final for the Department and effective immediately unless the Assistant Secretary - Indian Affairs provides otherwise in the decision." 25 C.F.R. § 2.6(c).

Neither does the possibility of renewed gaming eligibility at the end of a reconsideration

[5] The Assistant Secretary - Indian Affairs, in turn, exercises by delegation all the authority of the Secretary, regarding Indian affairs. 209 Department of the Interior Manual 8.1.

process (even assuming there is such a possibility) indicate lack of finality. As the D.C. Circuit has held, "an interim agency resolution counts as final agency action despite the potential for a different permanent decision, as long as the interim decision is not itself subject to further consideration by the agency. In that event, the interim resolution is the final word from the agency on what will happen up to the time of any different decision." *Wheeler,* 955 F.3d at 78. Further, there is nothing indicating that the rescission is "inoperative" pending any further internal appeal. 5 U.S.C. § 704. Indeed, "[o]nce the agency publicly articulates an unequivocal position ... and expects regulated entities to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review." *Ciba-Geigy Corp. v. E.P.A.*, 801 F.2d 430, 436 (D.C. Cir. 1986). This is precisely what the Department has done here. It advised in the Rescission Letter that "neither the Tribe nor any other entity or person should rely on the [January 10] Gaming Eligibility Determination" while the Department engages in its reconsideration. SV-669. By taking this step, the Department subjected its action to immediate judicial review.[6]

2. The decision to rescind gaming eligibility also affects Scotts Valley's "rights and obligations," giving rise to "legal consequences," and thereby satisfies the second prong of the finality requirement. *Bennett*, 520 U.S. at 178. It "alter[s] the legal regime" that governs gaming on the Vallejo Site. *Id.* This inquiry requires a "pragmatic approach." *U.S. Army Corps of*

[6] For all practical purposes, unless the Rescission Letter is vacated, the January 10 decision on gaming eligibility of the Vallejo Site is a dead letter. Even were the Department to determine that the site is gaming eligible upon reconsideration, it would be based upon a new record including third party submissions and, necessarily, a new rationale. As discussed below, this theoretical new record is of grave concern to the Tribe; it will be developed in violation of the Tribe's right to procedural due process since it provides the Tribe no opportunity to respond to the third-party submissions. But the proposed new decision on gaming eligibility, even if favorable, demonstrates the finality of the rescission of the January 10 gaming eligibility determination.

Engineers v. Hawkes Co., Inc., 578 U.S. 590, 599 (2016) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)); *see also POET Biorefining*, 970 F.3d at 405 (in examining the second *Bennett* prong "we pragmatically focus on the concrete consequences the action has or does not have as a result of the specific statutes and regulations that govern it" (cleaned up)). Thus, the Supreme Court has held that even an order carrying "no authority except to give notice of how the [agency] interpreted the relevant statute," which "would have effect only if and when" an action might be brought against a regulated person, was "nonetheless immediately reviewable." *Hawkes* at 599-600 (cleaned up) (citing *Abbott Labs.* at 150; *Frozen Food Express v. United States*, 351 U.S. 40, 44-45 (1956)). In particular, an administrative order that effectively "warns" affected parties that certain conduct will place them at risk of incurring criminal or civil penalties thereby gives rise to legal consequences satisfying the second *Bennett* prong. *Hawkes* at 599-600. The Rescission Letter does just this.

Before the Rescission Letter, the Vallejo Site was deemed gaming eligible under the IGRA "restoration of lands" exception to the general prohibition against gaming on lands acquired in trust after 1988. *See* 25 U.S.C. § 2719(a) (general prohibition); *id.* § 2719(b)(1)(B)(iii) (restoration of lands exception). Clear rights came with this eligibility, with no further action by the Department needed to confirm the land is eligible for gaming. For instance, the Tribe could build a casino on the Vallejo Site and, after satisfying other IGRA prerequisites, begin class II or class III gaming there without risk that the NIGC would fine the Tribe or shut down its casino for violating the prohibition against gaming on post-1988 trust land. In addition, the State of California was obliged under IGRA to negotiate a class III tribal-state gaming compact with the Tribe, or risk the Tribe's operation of a class III facility under procedures issued by the Secretary of the Interior without the State's agreement. 25 U.S.C. § 2710(d)(3)(A); *see Chicken Ranch*

Rancheria of Me-Wuk Indians v. California, 42 F.4th 1024, 1032-33 (9th Cir. 2022). The Tribe also had the right to regulate all gaming activity on the Vallejo Site in accordance with IGRA and pursuant to its gaming ordinance, which the NIGC Chair approved just days before the March Rescission. *See* 25 U.S.C. § 2710(d)(1)(A).

After the Rescission Letter, the Tribe no longer had these rights. Now, the Tribe does not enjoy safe harbor against an NIGC action for violating the post-1988 trust land gaming prohibition under 25 U.S.C. § 2719. Instead, IGRA's general prohibition against gaming on post-1988 trust land now presumptively bars class II and class III gaming on the Vallejo Site. 25 U.S.C. § 2719(a). The Tribe's operation of class II or class III gaming on the Vallejo Site would also subject the Tribe to federal prosecution for violating federal and state gambling laws. 18 U.S.C. § 1166; *see United States v. E.C. Investments, Inc.*, 77 F.3d 327 (9th Cir. 1996) (upholding federal indictment charging Indian casino operators on tribal trust land with violations of California and federal criminal gambling statutes). Also, the State of California now advises that it is no longer obligated to negotiate a gaming compact with the Tribe. ECF 61-7 (State cancelling compact negotiation because it "remain[s] unconvinced that the State currently has a duty to negotiate under IGRA"). And the federally approved Tribal gaming ordinance is rendered meaningless without gaming-eligible Indian lands on which to operate. Thus, the Department's action has concrete consequences for the Tribe, displacing pre-existing rights regarding the conduct and governance of gaming sufficient to subject the action to judicial review.[7]

[7] Defendants suggest that the continuing trust status of the Vallejo Site mitigates against these legal consequences. *See* Defs.' Opp. to Pl.'s Mtn for Prelim. Inj. (ECF 47) at 15. But the contrary is true; trust status sharpens the significance of the decision to rescind gaming eligibility. Because the Vallejo Site is now in trust and governed by the Tribe, the only significant impediment to gaming on the Site is the prohibition against gaming on post-1988 trust acquisitions. The January 10 gaming eligibility decision removed this final impediment. The Rescission Letter strips the

The Tribe need not test the imposition of civil and criminal laws prohibiting gaming on the parcel for the Rescission Letter to constitute final agency action in this regard. In *Hawkes,* for example, the Supreme Court reiterated the long-standing rule that "parties need not await enforcement proceedings before challenging final agency action where such proceedings carry the risk of serious criminal and civil penalties," nor must they apply for permission to conduct regulated activity and only "then seek judicial review in the event of an unfavorable decision." *Hawkes*, 578 U.S. at 600-01.

In short, the Rescission Letter is the Department's final word on the status of the January 10 determination that the Vallejo Site is gaming eligible while the reopened agency evaluation is underway, has immediate and profound legal consequences for the Tribe, and is immediately reviewable by this Court.

B. The Rescission Letter's implementation of a new rule authorizing review and consideration of third-party submissions, without an opportunity for the Tribe to respond thereto, is final agency action.

The Tribe's complaint seeks to overturn the Rescission Letter as a violation of its procedural due process rights, a violation of the APA decision-making process, and *ultra vires*; in other words, the challenge is process-based, not on the merits of reconsideration. SAC ¶¶ 49-80. The Rescission Letter sets up a new process for the restored lands determination – a process that departs from the Part 292 regulations, that is the final culmination of agency decision-making in this regard, and that immediately violates the Tribe's procedural due process rights. The Rescission Letter, then, meets both prongs of the *Bennett* test for final agency action on this issue.

1. The new procedure adopted for the restored lands inquiry in the Rescission Letter

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Tribe of its ability to conduct gaming on the Site and eliminates the only BIA-approved economic development venture for the land and the very basis of the trust acquisition.

is plainly the culmination of the agency's decision-making on this important procedural question. It authorizes the "Tribe and other interested parties to submit evidence and/or legal analysis regarding whether the Vallejo Site qualifies as restored lands under 25 U.S.C. § 2719(b)(B)(iii) and 25 C.F.R. Part 292." SV-0669. It does not limit these submissions to the significant historical connection issue, which is the only issue considered on the 2022 Remand and which ostensibly justified reconsideration, according to the Department.[8] Further, the new process sets a single deadline for these submissions, May 30, 2025. The new process does not allow the Tribe to either see the third-party submissions or respond to them. This process is the Department's final word on this important procedural issue; indeed, the process is already under way and the Department plainly expects the parties to comply with its terms. *See Clean Air Council v. Pruitt*, 882 F.3d 1, 7 (D.C. Cir. 2017) ("Once the agency articulates an unequivocal position...and expects regulated parties to alter their primary conduct to conform to that position, the agency has voluntarily relinquished the benefit of postponed judicial review") (quoting *Ciba-Geigy Corp.*, 801 F.2d at 436).

The new process set out in the Rescission Letter is the final and definitive statement of the Department for the same reasons discussed above as the rescission of gaming eligibility. The new process was established by the official with authority to bind the Department, is not subject to further administrative consideration, and is the agency's "unequivocal position." *Ciba-Geigy Corp.,* above. In this respect, the new process set out in the Rescission Letter is indistinguishable

[8] This is important because the Tribe had prevailed in the original ILO on the other two factors - the temporal connection (request must be made within 25 years of the tribe's restoration) and the modern connection (such as geographic proximity of tribal members or tribal offices). 25 C.F.R. § 292.12; *see Scotts Valley*, 633 F.Supp.3d at 139. As a result, the new process adopted for reconsideration expands the issues upon which the Tribe now faces jeopardy over and above the single one that the Department claimed justified reconsideration.

from the rescission of gaming eligibility in that Letter. While the outcome of the new process itself is as yet unknown (although predictable), the process by which the Department will undertake that reconsideration is known, firmly set, and underway. The new process, then, is the consummation of the Department's decision-making on the issue and is subject to immediate review. *Sackett*, 566 U.S. at 127; *Delaware Valley Regional Center v. USDHS*, 678 F.Supp.3d 73, 82 (D.D.C. 2023).

2. The new process set out in the Rescission Letter for reconsideration of the Tribe's ILO also has concrete consequences, as determined by reference to the unique constellation of statutes and regulations that govern the action at issue. *Racing Enthusiasts and Suppliers v. EPA*, 45 F.3d 353, 358 (D.C. Cir. 2022); *Delaware Valley*, 678 F.Supp.3d at 81. The regulations at 25 C.F.R. § 292.12 set out a closed process, one that involves only the applicant tribe and the Department in determining whether the restored lands exception applies. This closed process was purposefully adopted by the Department in the formal notice-and-comment rulemaking process. As proposed, the Part 292 regulations required that the applicant tribe establish the identified factors to qualify a parcel as restored lands; it made no provision for either public comment or participation by nearby tribes.[9] In promulgating the final rule, the Department explicitly rejected a comment that the public, and especially nearby tribes, be allowed to participate in the consideration of restored lands applications. According to the Department, there was no need for public comment "since they [restored lands exception] present a fact-based inquiry." Gaming on

[9] In this respect, the restored lands exception, along with those for tribes claiming the settlement of a land claim exception and the initial reservation exception, stood in sharp contrast to those governing the so-called two-part exception (i.e., a finding of gaming eligibility based upon a determination that the proposed gaming project is in the best interest of the tribe and is not detrimental to the surrounding community, followed by gubernatorial consent). 25 C.F.R. §§ 292.19, 292.20.

Trust Lands Acquired After Oct. 17, 1988, 73 Fed. Reg. 29375, 19261 (May 20, 2008). Importantly, the regulation tracked Congress' direction in IGRA that, while the two-part process required "consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes," Congress did not require such consultation in the restored lands inquiry. *Compare* 25 U.S.C. § 2719(b)(1)(A) *with* § 2719(b)(1)(B).

Whether agency action alters legal rights and obligations, thereby falling subject to immediate court review, is determined by reference to the regulated parties' rights and obligations under the status quo. *Wheeler*, 955 F.3d at 80. The Part 292 regulations are legislative rules that are binding upon the regulated parties. *See Perez v. Mortgage Bankers Assn.*, 575 U.S. 92 (2015). The Department could have amended those regulations through the same notice-and-comment process to extend rights to third parties in the process governing the restored lands inquiry. The Department could also have invoked the regulation that allows it to waive a regulation, based upon a determination that "such waiver or exception is in the best interest of the Indians." 25 C.F.R. § 1.2. *See Cherokee Nation of Okla. v. Norton*, 389 F.3d 1074, 1087 (10th Cir. 2004); *Cherokee Nation of Okla. v. Babbitt*, 117 F.3d 1489, 1499 (D.C. Cir. 1997).[10] The Department did neither. Instead, it adopted a new process to be applied to Scotts Valley, without regard to those binding regulations.

Most importantly, parties' rights are clearly altered in the Rescission Letter from those set out in the governing regulations. First, third parties are given rights in the Rescission Letter to participate in the restored lands inquiry, a right those parties do not hold under the governing

[10] The *Cherokee Nation* cases did not discuss finality of agency actions but found that a reviewable violation of the APA occurred whether the Department failed to follow the process set out in 25 C.F.P. Part 83 and failed to make the finding required in 25 C.F.R. § 1.2 to waive those regulations. The same failure exists here and is not less final than in those cases.

regulations.[11] *See Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015) (final agency action creates new rights). Second, the Tribe's rights are substantially restricted in the new process. The Tribe has not seen any third-party submissions, will not be allowed to see any third-party submissions, and is given no opportunity to respond to any objections that might be made in those submissions. In short, the Tribe is given no notice at all of the potential objections and, hence, no meaningful opportunity to comment upon them. As discussed below, these restrictions on the Tribe's right amount to a violation of the Tribe's Due Process protections for its valuable, and vested, entitlement to game on the Vallejo Site. The final agency action imposing this new process is complete (without regard to the outcome of the reconsideration), has concrete legal consequences for the parties' legal rights, and is reviewable. *Racing Enthusiasts and Suppliers*, 45 F.4th at 358 (final agency action results in concrete consequences); *Wheeler*, 955 F.3d at 80 (final agency action determines legal rights and obligations).

II. The Rescission Letter violated the Due Process Clause of the Fifth Amendment in depriving the Tribe of a property interest, both immediately and in the reconsideration process, without giving the Tribe notice and an opportunity to be heard.

In the January 10 Decision, the Department announced its final agency action on the gaming eligibility and trust status of the Vallejo Site. That same day the Department accepted the Vallejo Site into trust. SAC ¶ 21. Thus, the Department established the Tribe's entitlement to conduct gaming on trust land in accordance with the governing federal statutes and regulations. Nonetheless, on March 27, the Department rescinded the gaming eligibility of the Vallejo Site

[11] As the January 10 Decision notes, third party submissions were received and considered in the original deliberations on the Vallejo Site gaming eligibility. SV-0003 n.31. But those submissions were part of the deliberations between the Tribe and Department; they were reviewed by the Tribe and the Tribe responded to objections made therein. The Tribe has no such opportunity in the new process set out in the Rescission Letter.

without providing the Tribe prior notice or an opportunity to be heard. SV-0669; ECF 3-2 ¶¶ 18-20. At the same time, the Department announced a reconsideration process that contemplates permanent revocation of the gaming eligibility of the Vallejo Site without providing the Tribe an opportunity to respond to negative comments from "other interested parties." SV-0669. These actions violated the Fifth Amendment prohibition against deprivation of property without due process of law. U.S. Const., Amendment V.

A. The gaming eligibility of the Vallejo Site is a species of property within the protection of the Due Process Clause.

The Supreme Court has long made it clear that property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972). Property interests can take different forms, including interests arising from federal or state law that secure certain benefits to individuals. *Id.* at 576; *Wash. Legal Clinic for the Homeless v. Barry*, 107 F.3d 32, 36 (D.C. Cir. 1997). Property interests arise from, and due process protections attach to, statutorily authorized benefits when there is more than a mere expectation of a benefit, but a legitimate claim of entitlement to the benefit. *Bd. of Regents*, 408 U.S. at 577. The statute and/or regulations governing the benefit determine whether, or when, there is a legitimate claim of entitlement that then falls subject to due process protection. Once the administrative decision-maker makes a binding, substantive determination that the predicates for a statutory benefit exist, though, any agency discretion is limited and a constitutionally protected property interest exists. *Wash. Legal Clinic for the Homeless*, 107 F.3d at 36 (statutes or regulations limit agency discretion when a particular outcome must follow the regulations' substantive predicates and protected property interests in the benefit

attach at that point); *Conset Corp. v. Cmty. Servs. Admin.*, 655 F.2d 1291, 1295 (D.C. Cir. 1981).[12]

The deprivation need not be permanent[13] or particularly grievous to trigger due process protections. In *Goss v. Lopez*, 419 U.S. 565 (1975), the Court considered whether a ten-day suspension of high school students required due process. There, the property interest was created under state law, which guaranteed a public education to its students. The Court held that so long as the deprivation was not *de minimis*, due process protections applied. "A 10-day suspension from school is not *de minimis* in our view and may not be imposed in complete disregard of the due process clause." *Goss* at 576. Similarly, a property interest of limited monetary value remains subject to due process protections. In *Gray Panthers v. Schweiker*, 652 F.2d 146 (D.C. Cir. 1980), the court considered whether the administrative appeal process for disputed coverage under Medicare complied with due process. The complaint involved claims of $100 or less value; those of greater value were admittedly given full due process protection. *Id.* at 150. But the court held that due process protection applied, even to those claims of $100 or less in value. *Id.* at 158. In both *Goss* and *Gray Panthers,* the courts held that a property interest existed and the property interest under consideration was entitled to due process protection. The temporary deprivation in *Goss* and the small amount in dispute in *Gray Panthers* did not avoid the application of due

[12] The Court distinguishes between these property interests and claims that depend upon only a unilateral expectation. For this reason, the *Board of Regents* Court held that a professor with a one-year appointment, who was not rehired the second year, had no property interest subject to due process protection. *Id.* at 579; *see also Meacham v. Fano*, 427 U.S. 215 (1976) (state prisoner had no due process protected property interest in transfer to another state prison).

[13] The Rescission Letter refers to the rescission of gaming eligibility as "temporary." SV-0669. But as discussed above, unless vacated, the rescission of the January 10 determination is permanent for all practical purposes. The Department states that it *will* reconsider the gaming eligibility and that the reconsideration *will* be based upon a historical record that includes additional and, as yet unknown, submissions by third parties, i.e., a record different from that underlying the January 10 determination on gaming eligibility. Under no circumstances, then, will the January 10 determination on gaming eligibility be reinstated, even if the reconsidered determination is positive.

process. The courts indicated that those circumstances would be considered in determining what level of process was due, but not whether due process applied. *Goss*, 419 U.S. at 575-76; *Gray Panthers*, 652 F.2d at 158.

In this case, federal statutes and regulations promulgated under them determine whether Scotts Valley has a legitimate claim of entitlement to gaming eligibility for the Vallejo Site - the Indian Reorganization Act (IRA) and regulations at 25 CFR Part 151, and the IGRA and regulations at 25 CFR Part 292.[14] *See Bd. of Regents of State Colleges v. Roth*, above. Under the IRA and governing regulations, the Department identifies criteria and a process for determining whether to accept land into trust for a federally recognized Indian tribe. The statute and its implementing regulations contemplate uses of land for business purposes, such as gaming. Indeed, the land-into-trust provision of the IRA plays a key role in Congress's effort "to rehabilitate the Indian's economic life." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 226 (2012). And the implementing regulations specifically require that, for off-reservation business acquisitions such as the Vallejo Site, "the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use." 25 C.F.R. § 151.11(c). The Scotts Valley trust application for the Vallejo Site identified gaming as a primary purpose of the acquisition and the Tribe submitted the required business plan for the Site. SV-0025, 0029. The January 10 Decision specifically found that the Tribe's application for trust status met the requirements of the IRA and regulations for placing the Vallejo Site into trust for purposes

[14] That the IRA and IGRA are federal statutes that grant the Department discretionary authority is of no moment. Once the Federal Defendants exercised that discretion and determined that the Vallejo Site was gaming eligible when placed into trust, Scotts Valley acquired a property interest within the meaning of the Due Process Clause. *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 the government authority to issue the license in the first instance was discretionary).

of economic development. In IGRA, Congress identified restored land acquisitions as an exception to the prohibition against gaming on trust land acquired after 1988. 25 U.S.C. § 2719(b)(1)(B)(iii). The governing regulations set out specific criteria for restored lands and Scotts Valley submitted voluminous historical and other material to demonstrate its eligibility for gaming eligibility under those criteria. 25 C.F.R. §§ 292.11, 292.12. As also noted above, the Department specifically found that the Tribe and the Vallejo Site met these eligibility criteria and the site was, therefore, gaming eligible. The Department expressly announced that its decision was final, all discretion exercised and exhausted. Thus, Scotts Valley acquired at that moment a "legitimate claim of entitlement," one which became a property interest to which due process protection attached. *Bd. of Regents*, 408 U.S. at 577.[15]

Further, this particular species of property interest – gaming eligibility - is quantifiable and valuable, as well as being an established entitlement.[16] Scotts Valley was obliged to estimate the net revenues to be expected from the project proposed for the Vallejo Site; this proposed project and its projected economic benefit were approved by the Department. *See* 25 C.F.R. § 151.11(c). The business plan projects net revenues from the Vallejo Site three years out from opening (projected year that stable operations and revenues are reached) of $243.5 million per year. Business Plan, cited at SV-0029, n. 262. Thus, the gaming eligibility of the Vallejo Site is established and valuable, with no further discretion in that regard to be exercised by the Department as of January 10, 2025. It is, therefore, a property interest of which the Band cannot

[15] It is insignificant that further steps, such as negotiating a compact, remain before the Tribe can operate the proposed class III facility on the Vallejo Site. As the case law demonstrates, the key determination is the Tribe's *entitlement* to conduct the proposed gaming. The January 10 decision establishes this entitlement.

[16] According to the National Indian Gaming Commission, the Indian gaming industry produced net revenues for the operating tribes totaling $41.9 billion in Fiscal Year 2023. https://www.nig.gov/images/uploads/reports/GGR23_Final.pdf.

be deprived without due process of law. *Bd. of Regents*, 408 U.S. at 569-70; *Wash. Legal Clinic for the Homeless*, 107 F.3d at 36.

Finally, this particular species of property interest now held by Scotts Valley is inextricably linked to the only trust land held by the United States for the Tribe. Indeed, the United States accepted the Vallejo Site into trust for the very purpose of authorizing Scotts Valley to conduct gaming upon it. In the Department's words, "the [Tribe] will be able to provide needed housing for its members and pursue economic development that will encourage these ends." SV-0025. Without gaming eligibility of the Vallejo Site, these goals are unattainable. As a result, the United States now holds obligations to Scotts Valley that center around this trust land, obligations that have been described as similar to those of a trustee toward its ward. *See generally* Cohen's Handbook of Federal Indian Law § 18.03[1] (Nell Jessup Newton & Kevin K. Washburn eds., 2024) (tracing origins of the United States' obligations involving trust lands to the Royal Proclamation of 1763 and the well-known Marshall trilogy of Supreme Court cases). One would think that, at a minimum, the Scotts Valley trustee would at least consult with the Tribe before impairing the value of its trust land. Sadly, it did not. Fortunately, the Due Process Clause provides enforceable protections against such shameful conduct respecting the Scotts Valley property interests.

B. The Tribe did not receive the most basic procedural due process in the rescission of the Tribe's property interest in the gaming eligibility of the Vallejo Site.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendments." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Once a protected interest is established, the only remaining question is to what process is the individual entitled. *Id.*; *Goss v. Lopez*, 419 U.S. at 578; *Reeve Aleutian Airways, Inc. v. United States*, 982

F.2d 594, 598 (D.C. Cir. 1993). "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews* at 333; *Goss* at 579 (no doubt that the deprivation of a liberty or property interest must be preceded by notice and an opportunity to be heard); *Reeve Aleutian Airways*, 982 F.2d at 599 (due process requires "notice 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"); *Gray Panthers*, 652 F.2d at 158 (due process entitles claimant to notice and a hearing of some type on their claims, a "principle...ingrained in our notion of due process...").

The Supreme Court identified three factors that are balanced to determine the specific requirements of due process in a given context in *Mathews v. Eldridge.* Those are: first, the interest that will be affected by the government action; second, the risk of erroneous deprivation of a due process protected interest through the procedure used by the government; and third, the nature of the government interest, including the functions involved and the fiscal and administrative burdens of additional procedures. *Id.* at 335. The timing and content of the required notice and the nature of the necessary hearing depend upon these competing interests. *Goss*, 419 U.S. at 579. Typically, claimed due process violations turn upon specifics regarding the adequacy of notice or whether the opportunity to be heard can be paper-based or must be an evidentiary hearing, the ability to call expert witnesses at a hearing, and the ability to confront an agency's opposing experts. *See Mathews* at 338; *Reeve Aleutian Airways* at 601; *Gray Panthers* at 158.

Because of the blatant nature of the Department's disregard for Scotts Valley procedural rights, a granular analysis is not necessary here to balance the three *Mathews* factors. First, the nature of the Tribe's property interest is substantial and valuable. Indeed, the gaming eligibility of the Vallejo Site was central to the Department's entire decision-making process on the trust

application. It was part of the assessment by the Department under the IRA and implementing regulations - the suitability of the Site for the proposed uses and the projected revenues for the proposed gaming project were regulatory factors addressed and resolved in a positive manner by the Department, as well as the determination on eligibility to game as restored land. Second, the consequences of an erroneous determination by the Department are nothing less than devastating for Scotts Valley. By the Department's own determination, the trust acquisition and its gaming eligibility were needed for the Tribe's governmental operations and economic development. SV-0024, 0025. Third, the government's interest in limiting the process afforded to the Tribe is negligible, at best. Advance notice of the Rescission Letter would have cost the government little, if any. And providing the Tribe with an opportunity to be heard in advance of the Rescission Letter would have cost the government nothing in terms of fiscal outlays or administrative burden. Yet, *none* of the usual due process protections for the deprivation of a substantial property interest were provided to Scotts Valley, neither a whisper of advance notice and no form of an opportunity to be heard. The AR bears out this breathtaking failure. And there is no precedent justifying the total absence of even the most basic due process protections before the government deprives a party of a substantial and valuable property interest such as the gaming eligibility of the Vallejo Site. *See Mathews v. Eldridge*, above.

C. The reconsideration process established in the Rescission Letter lacks important Due Process protections for the Tribe's gaming eligibility of the Vallejo Site.

In the second decision made in the Rescission Letter, the Department adopted a new process to govern its reconsideration of the gaming eligibility of the Vallejo Site. The process is remarkably bare-bones, given the stakes for the Tribe. There is only one step - the Tribe and any other "interested parties" must "submit evidence and/or legal analysis regarding whether the Vallejo Site qualifies as restored lands...[and] the deadline for submissions is Friday, May 30,

2025." SV-0669. There is nothing regarding rebuttals, evaluation of interested parties' submissions, or any opportunity by Scotts Valley to respond to those submissions at all. The Department will presumably announce its reconsidered decision on the gaming eligibility of the Vallejo Site following this single set of submissions at some unspecified time. On its face, this "process" fails to provide either the notice or opportunity to respond required by the Due Process Clause.

With regard to the notice requirement, it must be reasonably calculated under all the circumstances to apprise the claimant of the pendency of the action "and afford them an opportunity to present their objections." *Reeve Aleutian Airways*, 982 F.2d at 599. This generally includes an explanation of the evidence against the property holder. *See Goss*, 419 U.S. at 581. Here, the Rescission Letter advises that reconsideration of the gaming eligibility will take place and states generally that the basis for that reconsideration is concern "that the Department did not consider evidence submitted after the 2022 Remand." SV-00669. That evidence is not described by date, the material contained therein, or the party submitting it. That evidence has not been provided to the Tribe and it does it appear in the AR. Because of the failure to provide the Tribe any information at all on the general nature of the objections to gaming eligibility, much less the substance of those objections, the Rescission Letter fails to provide sufficient notice to the Band to comply with Due Process. *Goss* at 581 (notice must provide some explanation against the property interest owner); *Gray Panthers v. Schweiker*, 716 F.2d 23, 32 (D.C. Cir. 1983) (in second appeal following remand order in *Gray Panthers,* above, court held revised notice insufficient because it required supplementation by recipient, failing to clearly inform recipient of proposed act and the grounds for it).

With regard to the opportunity to be heard requirement, the "fundamental requirement of

due process is the opportunity to be heard in at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. at 333. Often, the dispute in due process cases involves whether written comment is sufficient or whether an oral hearing is necessary. *See Gray Panthers*, 652 F.2d at 158. In any event, the property interest owner must be given an opportunity, either orally or in writing, to rebut charges made against his property interest. *Reeve Aleutian Airways*, 982 F.2d at 601. Here, Scotts Valley has not been, and will not be, provided with any information regarding the nature of the objections to the gaming eligibility of the Vallejo Site before it must submit its own evidence on reconsideration. *See* SV-0669. Finally, the Department fails to provide an opportunity to rebut the evidence of third-party submissions in the reconsideration process it has adopted. This is the most basic protection necessary to allow Scotts Valley an opportunity to vindicate its clear property interests in the gaming eligibility of the Vallejo Site. *Bd. of Regents v. Roth*, 408 U.S. at 577.

Scotts Valley's due process claim is not complicated - there is a clear property interest held by the Tribe of which it was deprived without any pretense of advance notice or an opportunity to be heard. Further, the process imposed by the Department to govern the reconsideration process fails to provide the Tribe any, much less meaningful, notice of the evidence against gaming eligibility of the Vallejo Site or an opportunity to rebut that evidence. Defendants do not dispute these straightforward facts. These facts present a blatant violation of the most fundamental principles of procedural due process on both the rescission of gaming eligibility and the process for reconsideration of gaming eligibility currently underway. And unless vindicated, Scotts Valley could well be left with no opportunity as a restored tribe to ever conduct class III gaming, on this or any other parcel. The Tribe is now out of time under the regulatory regime to apply for trust land for the purpose of gaming. *See* 25 C.F.R. § 292.12(c)(2). The 25-year temporal connection

has passed and, absent gaming on the Vallejo Site, the window for Scotts Valley to game as a restored tribe has permanently closed.

III. The Rescission Letter was arbitrary and capricious.

The Rescission Letter violates the APA standard summarized above in the respects discussed below.

A. The Rescission Letter exceeded the decisionmaker's authority.

On its face, the Rescission Letter cites 43 C.F.R. § 4.5 as authorizing reconsideration of the January 10 final agency action on the gaming eligibility of the Vallejo Site. SV-0669 ("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.") In addition, Defendants have claimed inherent authority "to reconsider its decision and did so in a timely manner and for an appropriate reason." ECF 47 at 23 (Defs.' Opp. to Pl.'s Mtn for Prelim. Inj.).[17] Defendants are wrong on both counts.

1. The Rescission Letter exceeds the scope and purpose of 43 C.F.R. § 4.5.

The Department's reliance on 43 C.F.R. § 4.5 is legally misplaced and procedurally defective. Part 4 of Title 43 is the Department's adjudicatory rulebook; it is captioned "Department Hearings and Appeal Procedures." It identifies the Office of Hearings and Appeals, along with other specialized appeal boards, as "the authorized representative of the Secretary for the purpose of hearing, considering, and deciding matters within the jurisdiction of the Department involving

[17] Judicial review of agency action is generally limited to "the grounds that the agency invoked when it took the action." *Dep't of Homeland Security v. Regents of the Univ. of Calif.*, 591 U.S. at 20. "[C]ourts may not accept [litigation] counsel's *post hoc* rationalizations for agency action." *State Farm,* 463 U.S. at 50. The Court should reject the Department's claim of inherent authority on this basis alone.

hearings, appeals, and other review functions of the Secretary." 43 C.F.R. § 4.1. The subsection cited by Defendants here, § 4.5, reserves authority for the Secretary in certain circumstances. Subsection 4.5(a)(1) provides that the Secretary has authority "to take jurisdiction at any stage of any case before any employee or employees of the Department..." Subsection 4.5(a)(2) reserves the Secretary's "authority to review any decision of any employee or employees of the Department..." Neither predicate for the Secretary's authority is present here.

As noted above, the Department's January 10 Decision was final agency action made under authority of the Secretary, as delegated to the Assistant Secretary - Indian Affairs. There was no hearing, appeal, or other form of review on-going or even possible in the Department. The Secretary's authority under 43 C.F.R. § 4.5(a)(1) is premised upon some form of adjudicatory proceeding over which the Secretary can take jurisdiction. *Marathon Oil Co. v. U.S.*, 807 F.2d 759, 763 (9th Cir. 1986); *Aleknagik Natives Ltd. v. Andrus*, 648 F.2d 496, 501 (9th Cir. 1980). Because there was no pending case or other matter on the January 10 Decision, the Secretary lacks authority under § 4.5(a)(1) to reconsider the decision. *See Silver State Land LLC v. United States*, 148 Fed.Cl. 217, 255 (2020) (finding § 4.5 "appears to provide the Secretary with the specified authority only when a party has filed an administrative appeal").

Similarly, the Secretary's authority under § 4.5(a)(2) is not available here. That subsection authorizes the Secretary to review any decision of an employee of the Department. *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"). But the Rescission Letter purported to reconsider a final decision made by a predecessor Secretary; it does not refer to (and there is not) any decision of a subordinate employee to be reviewed. Subsection 4.5(a)(2) does not authorize reconsideration of a prior Secretary's final action.

Finally, even if a factual predicate existed here for the Secretary to either assume jurisdiction over an appeal or review the decision of a subordinate under 43 C.F.R. § 4.5, the Rescission Letter failed to properly do so. Subsection (c) specifies how the Secretary is to exercise his authority under either 4.5(a)(1) or (2). It requires that the Secretary advise the affected parties in writing, request the administrative record, and provide a written decision after the review process is completed. 43 C.F.R. § 4.5(c). Written notice under the subsection means notice *before* the vacatur takes effect, not afterwards. *Tesoro High Plains Pipeline Co., LLC v. United States*, No. 1:21-cv-90, 2024 WL 3359433, *6 (D.N.D. July 10, 2024) (holding that § 4.5 (c) requires notice and an opportunity to respond before the decision takes effect). Obviously, the Secretary did not provide such notice here; the only notice given the Tribe was on the same day that the "temporary" rescission took effect. The Tribe had no opportunity to respond before the Secretary rescinded the Vallejo Site gaming eligibility. Furthermore, the Rescission was based on opponents' submissions post-dating the subject decision, not on the existing administrative record as contemplated by § 4.5(c). And the Secretary made the decision to rescind gaming eligibility at the outset of a promised review process, rather than after review was completed.

Simply stated, 43 C.F.R. § 4.5 has nothing to do with what occurred here - reconsideration of final agency action undertaken by a prior Secretary and with no pending appeal or review before the current Secretary or any employee of the Department. And even if § 4.5 is relevant, the Secretary failed to properly invoke his authority to reconsider under 43 C.F.R. § 4.5. The Secretary's reconsideration of the January 10 Decision, final agency action purportedly on that basis must be reversed.

2. The Rescission Letter was not within the Secretary's inherent authority to reconsider the January 10 Decision.

While the Secretary may have inherent authority to reconsider decisions under certain

circumstances, that authority is not unlimited. Specifically, the agency may undertake reconsideration only if it does so within a short and reasonable time and provides notice to the affected party of its intent to reconsider the decision. *Ivy Sports Med., LLC v. Burwell*, 767 F.3d 81, 86 (D.C. Cir. 2014); *Mazaleski v. Truesdell*, 562 F.2d 701, 720 (D.C. Cir. 1977); *Dun & Bradstreet Corp. Found. v. United States Postal Serv.*, 946 F.2d 189, 193 (2d Cir. 1991); *Belville Mining Co. v. United States*, 999 F.2d 989, 997-999 (6th Cir. 1993); *Voyageur Outward Bound School v. United States*, 444 F.Supp.3d 182, 193 (D.D.C. 2020) (vacated on other grounds); *Tesoro High Plains Pipeline Co.*, 2024 WL 3359433, *6-7. The Department's Rescission Letter is not timely, provided the Tribe no advance notice at all, and thereby exceeds the Department's inherent authority to reconsider the January 10 Decision.

Courts have consistently indicated that reconsideration is authorized only if it takes place within a reasonable time, depending upon the circumstances of each case, but typically measured in weeks, not years. *Mazaleski,* 562 F.2d at 720; *Belville Mining,* 999 F.2d at 1000. If the reconsideration takes place within the time period allowed for court or administrative rules for appeals in such cases, a presumption of timeliness arises. *Albertson v. FCC,* 182 F.2d 397, 399 (D.C. Cir. 1950). Had the January 10 Decision been subject to an administrative appeal (which it was not), the time limit would have been 30 days from receipt. 25 C.F.R. § 2.203; *see* 25 C.F.R. § 151.13(c), (d). The Rescission Letter came ten weeks after the January 10 Decision, well beyond the period for presumptive timeliness.

As a result, the circumstances surrounding the Rescission Letter must be examined to determine timeliness. While variously formulated by courts, seven factors have been identified as

relevant.[18] Here, the reconsidered decision is relatively simple, questioning only the Department's discretionary decision at the time of the 2022 remand to not reopen the historical record. It identified no abuse of discretion at that time and proposed to reconsider a factual rather than a legal question. These factors mitigate against timeliness. But there are four circumstances that weigh heavily against the Department's timeliness.

First, the proposed reconsideration was not undertaken in accordance with regulations that authorize reconsideration. The Rescission Letter specifically invoked 25 U.S.C. § 4.5 as authorizing reconsideration. But as discussed above, the Department did not and cannot comply with the requirements of those regulations. The Department should not be allowed to effectively end run its own regulations by relying on claimed inherent authority to reconsider. This is not to say that there will be no review of the January 10 Decision. To the contrary, as a final agency action it can be challenged in court, as Yocha Dehe and other opposing tribes have already done. *See* Case Nos. 25-cv-1088; 25-cv-873; 25-cv-867 (D.D.C.).[19] Having waited 10 weeks to propose reconsideration and in the face of litigation, the Department's Rescission Letter should be deemed untimely.

Second, the combined factors of the important property interest for the Tribe that was

[18] According to a survey of court decisions, these factors include: 1) complexity of the issue; 2) whether reconsideration is based on an issue of fact or of law; 3) whether the agency followed any regulations for review; 4) whether the parties relied upon the original decision; 5) whether the agency's reconsideration is simply a pretext for a change in policy; 6) whether the agency provided notice; and 7) the probable impact of an erroneous decision on the public if not corrected by reconsideration. D. Bress, *Note, Administrative Reconsideration,* 91 Va.L.Rev. 1737, 1761-62 (2005).

[19]Further, the AR demonstrates that the Department was aware of litigation raising in court the very basis it claims for reconsideration, among others. SV-0238 (Yocha Dehe lobbyist provides Department draft complaint on March 19). As Deputy Assistant Secretary Bellmard received the draft Rescission Letter, he also received copies of two complaints already filed by opposing tribes challenging the January Decision. SV-0323. It seems the Department was just intent on providing Yocha Dehe and other opposing tribes two bites at this apple.

created in the January 10 Decision and the Tribe's reliance upon it weigh heavily against timeliness. *Belville Mining,* 999 F.2d at 999. The January 10 Decision was significant, authorizing the first trust land for the Tribe since restoration and determining eligibility to game on that land. As discussed above, this eligibility determination created a valuable property right for the Tribe, one that is protected by the Fifth Amendment. The Rescission Letter directly and expressly withdrew this property interest, permanently for all practical purposes. Obviously, Scotts Valley relied upon this established entitlement to make commitments, fiscal and otherwise, toward opening the gaming project. *See* III, B, above.

Third, the Rescission Letter appears to be pretextual, unsupported by its stated concern. The Letter claims that reconsideration was necessary because "the Department did not consider additional evidence submitted after the 2022 Remand." SV-0669. However, the final agency action that the Rescission Letter purports to rescind was issued on January 10, 2025 -- while the decision to close the record occurred years earlier, in 2022, and was a discretionary one.[20] *See Essar Steel Ltd v. United States*, 678 F.3d 1268, 1278 (Fed. Cir. 2012) ("The decision to reopen the record is best left to the agency...").

The Rescission Letter fails to explain how the 2022 decision not to reopen the administrative record was an abuse of discretion. Nor does the Letter explain how the alleged "additional evidence" would be relevant to or capable of altering the Department's analysis of the Tribe's significant historical connection. Most importantly, the AR contains no indication that this was the actual rationale driving the decision to reconsider. To the contrary, the record is replete

[20] There is no explanation in the AR as to why Yocha Dehe and other opposing tribes did not seek reconsideration of the Department's decision not to reopen the record at that time, that is, in 2022. At that point, there may have been an arguable basis under either inherent authority or § 4.5 to do so.

with expressions of alarm over the potential competitive threat posed by Scotts Valley's authorized gaming facility to other tribes' casinos. *See*, *e.g.*, SV-0127 ("terrible situation" if the Tribe breaks ground before gaming eligibility is withdrawn); SV-0093 (January 10 Decision made at the last minute, need to withdraw it "time sensitive"); SV-0238 (framing matter as urgent and politically advantageous for the Trump Administration).

By contrast, references to the Department's 2022 decision not to reopen the record are sparse and fleeting, and none provides explanation of how that omission resulted in an erroneous decision. *See*, *e.g.*, SV-0238 (asserting Interior did not consult with local tribes before making this decision). (This assertion was false. *See* SV-0061-64 (listing four meetings with six local tribes in October-December 2024).) The AR lacks any substantive assessment of the 2022 record closure or its relevance to the gaming eligibility determination. The inescapable conclusion is that the Department was presented with a pretext to justify the Rescission Letter and took it.

Finally, there was no notice - formal or informal - of the Department's intent to reconsider or rescind the January 10 Decision. The Tribe had no knowledge that the Department was reviewing the January 10 Decision, let alone planning to rescind its gaming eligibility. This single factor should be conclusive in determining whether the Department's reconsideration was timely. *See Tesoro High Plains Pipeline Co.*, 2024 WL 3359433, *6 (holding that equitable authority to reconsider erroneous decisions must afford a claimant proper notice of the agency's intent to reconsider). As a result, the Tribe had no opportunity to respond before the rescission took effect. This result is contrary to the agency's inherent authority to reconsider. *Id.*

B. The Rescission Letter was the product of improper political influence.

As applied in the context of political influence directed at agency decision-making, the requirements of the APA standard are clear. The test is whether "extraneous factors intruded into the 'calculus of consideration' of the individual decision-maker." *ATX, Inc. v. U.S. Dep't of*

Transp., 41 F.3d 1522, 1527 (D.C. Cir. 1994), quoting *Peter Kiewet Sons' Co.*, *v. U.S. Army Corps of Eng'rs.*, 714 F.2d 163, 170 (D.C. Cir. 1983); *see also D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971) (extraneous pressure cannot intrude into the calculus of considerations on which the Secretary's decision was based). Thus, there are two components to the inquiry: there must be outside political pressure and there must be evidence that the outside pressure shaped, in whole or part, the judgment of the decision-maker. *Aera Energy LLC v. Salazar*, 642 F.3d 121, 220 (D.C. Cir. 2011). If this can be demonstrated, then the decision cannot be said to be the result of reasoned decision-making, one that is based upon a "rational connection between the facts found and the choice made," and is a violation of the APA as a result. *Connecticut v. U.S. Dep't of the Interior*, 363 F.Supp.3d 45, 57 (D.D.C. 2019).

In undertaking this inquiry, courts are respectful of the role that congressional oversight plays with respect to administrative agencies. *Peter Kiewit Sons' Co.*, 714 F.2d at 170-71. Similarly, courts give due regard to executive oversight of agencies. *Sokaogon Chippewa Cmty. v. Babbitt*, 929 F.Supp. 1165, 1173 (W.D. Wis. 1996). But Congress delegates powers to agencies with the expectation that decisions will not be dictated by political whims but in accordance with the governing statute and regulations. *Id.* And if the outside communications contain matters outside the record, which the parties did not have an opportunity to rebut, those outside communications suggest undue political influence. *Power Auth. of N.Y. v. FERC*, 743 F.2d 93, 110 (2d Cir. 1984) (citing *Pro. Air Traffic Controllers Org. v. FLRA*, 672 F.2d 109, 112-13 (D.C. Cir. 1982) and *United States Lines v. Federal Maritime Comm'n*, 584 F.2d 519, 533-34 (D.C. Cir. 1978)). In particular, if the agency suddenly reverses course or reaches a weakly supported determination, a court may infer that outside political pressure from members of Congress or the Executive branch unduly influenced the agency decision. *Press Broadcasting Co. v. FCC,* 59 F.3d

1365, 1370 (D.C. Cir. 1995); *ATX, Inc.*, 41 F.3d at 1529.

The Rescission Letter is a classic example of agency decision-making driven by outside political influence. A principal in Miller Strategies[21] initiated the process that resulted in the Rescission Letter through outreach to the White House on January 31. SV-0127. The lobbyist provided a White Paper, which explicitly proposed that the January 10 Decision be "reconsidered and overturned due to legal error." SV-0055. The White Paper concluded with 2 steps that should be undertaken: first, notify Scotts Valley that the decision has been "flagged for potential reconsideration due to legal error" and, second, "issue a new decision to correct the legal errors contained in the Scotts Valley Approval." SV-0057. Importantly, the January 10 Decision was "flagged" by the outside lobbyist here; there is nothing in the AR even hinting at interest in or concern about the Vallejo Site at the agency before the lobbyist made the initial request for reconsideration. The lobbyist expanded her outreach at the White House on the issue and those White House staff brought the issue to the attention of Department personnel. SV-0126.

On February 5, a second well-connected lobbyist and founding partner from Checkmate Government Relations[22] contacted the then Chief of Staff at the Department. SV-0065. He also shared the White Paper, laying out the requested reconsideration of the January 10 Decision. That same day, the Chief of Staff emailed staff to request a letter for that purpose "this evening," and copied the Department's White House Liaison. SV-0069. This lobbyist's email, in other words,

[21] Miller Strategies is a lobbying firm that trades on its close connections to the Trump Administration. Its website contains a quoted endorsement of the firm by the President and advertises its fund-raising prowess in the 2024 Trump campaign. *See* http://www.millerstrategies.com.

[22] Like Miller Strategies, Checkmate Government Relations advertises its connections with the Trump Administration. "Miller Strategies, one of the lobbying firms closest to the White House, is partnering with Checkmate Government Relations, which has state and local muscle, & strong Trump relationships." *See* http://www.checkmategr.com/achievements.

triggered immediate internal agency discussion about issuing a stay letter that same day, with no record-based justification and no engagement with the affected Tribe, for whose benefit the United States held the affected property in trust. Deference to political actors was the impetus and justification for acting contrary to that trust responsibility.

On February 22, a third lobbyist, Managing Partner of Spirit Rock Consulting,[23] requested a meeting with the Deputy Assistant Secretary - Indian Affairs, at the Department. She attached the same White Paper. SV-0093. The meeting took place on March 11, with the third lobbyist in attendance along with the Yocha Dehe Tribe.[24]

On March 18, and for the first time, the Deputy Assistant Secretary requested a briefing paper from his own staff on Scotts Valley. SV-0231. The next day, the Deputy Assistant Secretary received from the first lobbyist, who had initiated the whole matter at the White House, a draft notice letter that the Department could use to take the first step identified in the ubiquitous White Paper. SV-0238. At the same time, the lobbyist provided the Department with a draft copy of the lawsuit Yocha Dehe Tribe proposed to file to challenge the January 10 Decision. *Id.* The lobbyist laid out for Deputy Assistant Secretary Bellmard a detailed two-step roadmap for Interior to follow in reversing the Scotts Valley trust decision:

> The white paper ... explains that the best practice is a two-step approach, where the first step is a letter informing Scotts Valley of the reconsideration and the second step is the substantive reconsideration process... Also attached is a draft notice letter that DOI could get out to take that first step.

SV-0238. The lobbyist urged speed, warning that if the Tribe began construction, Interior "might

[23] Spirit Rock Consulting is a government relations firm specializing in Native American policy issues. *See* http://www.spiritrockllc.com/who-we-are.

[24] In arranging the meeting, the scheduler advised the third lobbyist that there was a new rule prohibiting lobbyists from attending meetings with principals. She advised the lobbyist that she would put her down as an attorney. SV-0154, 0159. The lobbyist clarified that she was serving as an attorney for the Yoche Dehe Tribe. SV-0159.

not be successful and/or could be tied up in court." She then framed the decision in starkly political terms:

> We would prefer not to sue the Trump Administration – instead, we want the Trump Administration to be able to claim full credit for pulling back this erroneous, antitribal decision.

AR SV-0238. The "two step approach" quickly became a directive in the hands of Bellmard. Within 24 hours, Bellmard relayed that urgency to staff: "I do need something on Scott's Valley by tomorrow am." SV-0291. That same day, the Solicitor's office provided a draft rescission letter mirroring the lobbyists' roadmap. SV-0295-97.

On March 26, Interior issued the rescission in the very form the lobbyists outlined, matching their "first step." SV-0618. That same day, a lawyer representing Yocha Dehe received a copy of the letter. SV-0621-22.[25] The next day, staff found an error in the letter and a corrected letter was signed. SV-0649, 0669. On March 28, the Scotts Valley Chairman received a call from the Department, informing him of the letter. ECF 3-2, ¶ 18.

The decision-making process leading to the Rescission Letter is breathtaking in its brevity and simplicity. The AR shows beyond dispute that the whole process originated with and was driven by lobbyists for Yocha Dehe. There is no indication of agency concern about the January 10 Decision until outside lobbyists pushed for its rescission. There is nothing in the AR that supports the claim made by the lobbyists that there had been a "binding commitment" from the Department to consider submissions made after the 2022 Remand. *Power Auth. of N.Y.*, 743 F.2d at 110 (absence from the record of stated reason for decision suggests undue political influence).

[25] After the AR was certified, counsel for the Tribe inquired about the apparent omission of an email communicating the March 26 letter that day to the attorney for Yoche Dehe. The Department of Justice advised, "Interior does not know how Yocha Dehe received the copy of the March 26 letter. Interior has conducted additional searches and hat not located any email transmitting the March 26 letter." Letter dated July 10, 2025.

The lobbyists proposed two administrative steps to end with a reversal of the January 10 Decision. The lobbyists drafted the letter initiating these steps - a notice of reconsideration to the Tribe. The final Rescission Letter followed the process recommended in the lobbyists' White Paper. The terms of the Rescission Letter are just a simplified version of those suggested in the White Paper. And this all took place without notice to or participation of the Tribe. Indeed, the Tribe received the Rescission Letter itself after representatives of the Yocha Dehe Tribe.

The AR in this case shows it to be not merely a case where outside political influence intruded into the decisionmaking process. Rather, outside political influence *created* the extra-regulatory process and *produced* the administrative result sought by the influencers. Simply put, this administrative process would not have taken place but for the outside political process brought to bear upon a previous, final agency decision. The Department had expressed no concern with the January 10 Decision until outside lobbyists intervened, drafted documents the agency adopted, and dictated the procedural path Defendants would follow. Further, the resulting Rescission Letter relies on considerations not relevant to the factors identified in IGRA and the Part 292 regulations. There is no discussion of the three regulatory requirements for restored land - modern connection, temporal connection, or significant historical connection. *See* 25 C.F.R. § 292.11. Instead, there is only an expressed "concern" that the Department did not consider submissions of third parties following the 2022 remand. This is not a factor or a step in the Part 292 deliberations on restored lands. Plainly, this process, the resulting letter, and the sudden reversal of an earlier decision demonstrate improper political influence. The Department's uncritical adoption of a lobbyist talking point as the rationale for upending the careful, fact-intensive decision finalized months earlier is not permitted under the APA. This outcome was preordained: the stated "reconsideration" process is a façade designed to effectuate the reversal sought by the competing

tribe and its lobbyists. The Department's course is unmistakable—it intends to permanently revoke the Vallejo Site's gaming eligibility. This is precisely the type of arbitrary, politically motivated agency action that the APA forbids and that the Constitution's Due Process Clause prohibits. The Court should vacate the Rescission Letter and restore the Tribe's rights under the final, January 10 Decision.

C. The Department ignored the significant reliance interests engendered by the January 10 Decision.

"When an agency changes course," as the Department did when it rescinded its previous restored lands decision, it "must be cognizant" that its previous action "may have engendered serious reliance interests that must be taken into account." *Dep't of Homeland Security v. Regents of the Univ. of Calif.*, 591 U.S. 1, 30 (2020) (cleaned up). It is "arbitrary and capricious to ignore such matters." *F.C.C. v. Fox Tele. Stations, Inc.*, 556 U.S. 502, 515 (2009). This obligation arises from "[o]ne of the basic procedural requirements of administrative rulemaking," that "an agency must give adequate reasons for its decisions," *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016), as well as the established "axiom[] that an agency adjudication must either be consistent with prior adjudications or offer a reasoned basis for its departure from precedent," *Brusco Tug & Barge Co. v. N.L.R.B.*, 247 F.3d 273, 278 (D.C. Cir. 2001); *see also Jicarilla Apache Nation v. U.S. Dep't of Interior*, 613 F.3d 1112, 1119 (D.C. Cir. 2010). An action that disregards "facts and circumstances that underlay or were engendered by the prior [action]" must state a reasoned explanation for doing so. *Encino Motorcars* at 222. Since the Department obviously "was not writing on a blank slate" in withdrawing the January 10 ILO, "it was required to assess whether there were reliance interests, determine whether they were significant, and weigh any such interests against competing policy concerns." *Regents* at 33. And when the initial decision has caused parties to change their positions, only a showing that the decision was erroneous can justify

the agency reversing it. *McAllister v. United States*, 3 Cl.Ct. 394, 398 (1983).

Scotts Valley had substantially relied upon the January 10 Decision. After the Decision, Scotts Valley entered and authorized its development team to enter several contracts with third parties to further the development of its gaming project, including contracts for infrastructure work related to water and wastewater systems, environmental analysis, and technical studies. Declaration of Shawn Davis ¶ 12 (Apr. 1, 2025, ECF No. 3-2); Second Declaration of Shawn Davis ¶ 11-12 (May 19, 2025, ECF No. 63-2); SAC ¶ 25. The Tribe authorized the payment of millions of dollars in project related expenses pursuant to these contracts and other agreements. Shawn Davis Decl. ¶ 13; Second Shawn Davis Decl. ¶ 13. The Tribe signed an agreement to reimburse the City of Vallejo's costs to evaluate and analyze potential impacts of the Tribe's development. Shawn Davis Decl. ¶ 14. The Tribe amended its gaming ordinance and obtained NIGC approval of the ordinance on March 25, 2025, just days before the Tribe's gaming eligibility was rescinded. *Id.* ¶ 15. The Tribe formally requested the commencement of gaming compact negotiations with the State of California on January 17, 2025, and the Tribe held a negotiation session with the State on March 27, 2025. *Id.* ¶ 16.

Defendants plainly expect parties to rely upon ILO decisions, such as the January 10 Decision. When it promulgated the Part 292 regulations, the Department observed that "[i]t is expected that in those cases, the tribe and perhaps other parties may have relied on the legal opinion to make investments into the subject property or taken some other actions that were based on their understanding that the land was eligible for gaming." Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29354, 29372 (May 20, 2008). For the same reason, the Department included a grandfather clause to ensure that the new rule would not disturb these important reliance issues. *Id.* Yet, the Department failed to consider any of the Scotts Valley's

reasonable reliance on the favorable ILO in its Rescission Letter. There is no assessment of whether those reliance interests existed and no attempt to explain why the January 10 Decision should be reconsidered notwithstanding the parties' expected reliance upon the favorable ILO. Indeed, the Defendants have conceded that "there is nothing before the court" demonstrating the Department's consideration of Scotts Valley's reliance upon the January 10 Decision. Transcript of Prelim. Inj. Hearing 46:2-15 (May 23, 2025). Without more, this failure violates the APA and justifies setting the Recission Letter aside. *Dep't of Homeland Security v. Regents of the Univ. of Calif.*, 591 U.S. at 30.

D. The Rescission Letter established a new procedure for restored lands determinations, in conflict with the existing regulatory framework.

In the Rescission Letter, the Department claimed it was necessary to "consider additional evidence submitted after the 2022 Remand," and invited "the Tribe and other interested parties to submit evidence and/or legal analysis regarding whether the Vallejo Site qualifies" under the "restored lands" exception of IGRA as defined in 25 U.S.C. § 2719(b)(1)(B)(iii) and 25 C.F.R. Part 292. In doing so, the Department created a new, *ad hoc* process with no basis in law—and one that conflicts with the mandatory criteria and procedures set forth in 25 C.F.R. § 292.12. This deviation violates the APA. *FCC v. Fox Tele. Stations, Inc.*, 566 U.S. at 515 (agency must acknowledge departure from previous policy and show there are good reasons for new policy).

As explained above, the Department purposefully established a closed process for restored land determinations in the Part 292 regulations - one that involves only the Department and the applicant tribe, not third parties. *See* I, B ,2, above. The Rescission Letter contravenes this regulatory framework by inviting open ended submissions from undefined "interested parties." This not only contradicts the regulatory structure, but also departs from the statutory design of IGRA. Congress expressly mandated an open consultation process for two-part determinations,

requiring engagement with state and local officials and nearby tribes. *See* 25 U.S.C. § 2719(b)(1)(A). No such consultation is required—or authorized—for restored lands determinations under § 2719(b)(1)(B). The distinction is intentional and must be respected.

By inventing a new procedure and disregarding the governing regulations, the Department violated the foundational APA principle that agencies must follow their own rules. *Nat'l Small Shipments Traffic Conf., Inc. v. I.C.C.*., 725 F.2d 1442, 1449 (D.C. 1984) (citing *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). For this reason alone, the Rescission Letter must be vacated.[26]

Furthermore, as discussed above, the Department's informal, unheralded amendment of its existing regulatory framework for assessing the restored lands exception, which the Department had promulgated through formal rulemaking, violates the Department's rulemaking obligations under the APA. 5 U.S.C. § 553; *see Perez v. Mortgage Bankers Ass'n*, 575 U.S. at 97. This violation requires vacating the Rescission Letter and halting further proceedings under the unlawfully revised rule.

CONCLUSION

The Rescission Letter was unauthorized, unjustified by the facts in the record, contrary to governing law, and devoid of adequate process to protect Scotts Valley's rights. The record lays bare the Department's alignment with opponents of Scotts Valley and its willingness to seize upon any excuse to undo the January 10 Decision. Scotts Valley therefore respectfully requests the Court hold unlawful and set aside the Rescission Letter.

Dated: July 25, 2025

Respectfully submitted,

By: /s/ Patrick R. Bergin

[26] The Rescission Letter not only adopted an unauthorized process for reconsideration but, in doing so, failed to provide Scotts Valley any opportunity to review third party submissions and comment upon them. As discussed above, this violates fundamental due process protection for property interests. *See* II, above.

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