IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTTS VALLEY BAND OF POMO INDIANS, *Plaintiff*, v. DOUGLAS BURGUM, *et al.*, *Defendants.*	Civil Action No.: 1:25-cv-00958-TNM Judge Trevor N. McFadden

BRIEF OF AMICUS CURIAE GTL PROPERTIES, LLLP IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTEREST OF AMICUS CURIAE[1]

GTL Properties, LLLP ("GTL") submits this brief as amicus curiae in support of the Motion for Summary Judgment filed by Scotts Valley Band of Pomo Indians ("Scotts Valley" or "Plaintiff") and urges this Court to grant Scotts Valley's Motion. GTL operates in the real estate industry as an owner of properties as well as a management and development company. GTL is the former owner of a 32-acre parcel of land in Vallejo, California ("32-Acre Parcel"), and GTL also provided a loan to Scotts Valley to purchase an approximately 128-acre parcel of land in Vallejo, California. Together, the 32-Acre Parcel and the 128-acre parcel comprise an approximately 160-acre parcel ("Vallejo Parcel") that is directly at issue in this case. The Vallejo Parcel is located within the San Francisco Bay Area, where land values are some of the highest nationwide.

On January 10, 2025, the U.S. Department of the Interior ("Department") issued a decision ("January 10 Decision") containing two interconnected decisions that relate directly to the Vallejo Parcel and to GTL.

First, after nearly a decade of process, the Department determined that the Vallejo Parcel qualified as restored lands under 25 U.S.C. § 2719(b)(1)(B)(iii) and 25 C.F.R. § 292.12, meaning that Scotts Valley could "conduct gaming on the Vallejo [Parcel]" pursuant to the Indian Gaming Regulatory Act ("IGRA") ("Eligibility Determination"). ECF 1-1 at 2.

Second, and as a direct consequence of the Eligibility Determination under § 2719(b)(1)(B)(iii), the Department determined that it would take the Vallejo Parcel "into trust for [Scotts Valley]," and further explained that Scotts Valley "may conduct gaming on the Vallejo

[1] No counsel for any party authored this brief in whole or in part, and no party, nor counsel for any party, nor any other person besides GTL contributed money to fund the preparation or submission of this brief. *See* LCvR 7(o)(5); Fed. R. App. P. 29(a)(4)(E).

[Parcel] once it is acquired in trust . . . ." *Id.* at 23–24; *see also id.* at 30. To be abundantly clear, the Department would not have taken the parcel into trust unless it had also determined that Scotts Valley could permissibly conduct gaming on the parcel based on the restored lands exception to IGRA.

In reliance on the January 10 Decision, GTL entered into multiple commercial agreements, including with Scotts Valley and with the Department. Indeed, because of the Department's Eligibility Determination, the United States, through the Department, accepted and recorded the deed to the 32-Acre Parcel from GTL. *See* Exhibit A (Declaration of Gregory T.H. Lee "Lee Decl.") ¶ 5; Exhibit B (Deed for Parcel); 90 Fed. Reg. 3,906, 3,906–07 (Jan. 15, 2025). In accepting the deed, the Department expressly accepted the conveyance in accordance with 25 C.F.R. § 151.16. Exhibit B at 5 (approving deed transfer "in accordance with authority delegated to the Assistant Secretary"); *see also* 25 C.F.R. § 151.14(a)(1) (providing that if the applicant for a trust acquisition does not yet have title, then applicant will provide evidence of transferor's title).

This transfer of the 32-Acre Parcel would not have occurred *but for* the entirety of the January 10 Decision. That is because, under the terms of an agreement entered into by Scotts Valley and GTL, GTL's payment for the transfer of land is dependent on gaming occurring. *See* Exhibit A, Lee Decl. ¶ 4. The Eligibility Determination cleared the way for gaming to occur. Similarly, GTL will only receive repayment of the loan it made to Scotts Valley once gaming occurs on the Vallejo Parcel. *See id.*

In an attempt to undercut Scotts Valley's and GTL's reliance interests, however, the Department, via a March 27, 2025 letter ("March 27 Letter"),[2] purported to rescind the Eligibility

[2] GTL refers to the Department's action as the March 27 Letter. However, a substantively identical letter was prepared on March 26, 2025, and only a "typographical error" was corrected in the

Determination. *See* ECF 1-2 at 1. Despite purporting to rescind the Eligibility Determination, the Department did not rescind its determination to hold the Vallejo Parcel in trust for Scotts Valley. *See id.* In short, the Department intends to continue holding GTL's former land in trust (and the land for which GTL provided a loan), but will not allow gaming thereon, which was the express purpose for the trust acquisition in the first place. Thus, the Vallejo Parcel is stripped of its economic value, and GTL is left both without its real property and without the agreed mechanism for loan repayment that relied on the Eligibility Determination.

For the reasons set forth in Scotts Valley's Memorandum in support of Summary Judgment ("Memorandum") and the additional reasons herein, GTL respectfully urges this Court to grant summary judgment in Plaintiff's favor.

INTRODUCTION AND BACKGROUND

GTL is the former owner of the 32-Acre Parcel that GTL deeded to the United States to be held in trust for Scotts Valley. *See* Exhibit A, Lee Decl. ¶¶ 3–4; Exhibit B (Deed for Parcel). GTL also loaned Scotts Valley substantial funds to acquire the adjoining approximately 128-acre parcel, which two parcels collectively comprise the approximate 160-acre Vallejo Parcel. *Id*. As a direct result of the January 10 Decision, the United States now holds title to the Vallejo Parcel, and is to hold that title in trust for the benefit of Scotts Valley.

GTL and Scotts Valley agreed to the terms of a purchase and sale agreement ("Agreement") on November 2, 2024, in anticipation of a potential determination by the Department that the Vallejo Parcel may host gaming operations subject to IGRA. *See* Exhibit A, Lee Decl. ¶ 4. However, because the Department's decision was not finalized, the deed for the 32-Acre Parcel

March 27 Letter. ECF 1-2 at 1 (noting correction and re-issuance); *see also* ECF 92-1 at 149 (AR0621) (original March 26 letter).

was held in escrow, not to be released unless and until the Department issued the Eligibility Determination. *Id.* ¶ 5. Other material terms of the Agreement were contingent on the Eligibility Determination. *Id.* The Agreement was thus structured such that the deed to the United States would not be accepted and recorded until after the Department had determined that the Vallejo Parcel qualified as restored lands and was therefore eligible for gaming under IGRA. Upon satisfaction of that condition, the Department would take title to the Vallejo Parcel and hold it in trust for Scotts Valley. *Id.* The full execution of the Agreement was thereby contingent on the January 10 Decision, *as a complete package*. *See id.* ¶¶ 5–7 (describing structure of transaction being tied to January 10 Decision). After the Department issued the January 10 Decision, the Department accepted the deed to the Vallejo Parcel to be held in trust for Scotts Valley, *see* 90 Fed. Reg. at 3,907; Exhibit B at 5, thereby establishing a trust relationship to promote Scotts Valley's welfare, *see* 25 C.F.R. § 151.12(b)(8). The Department's acceptance of the deed directly from GTL demonstrates that the Department was keenly aware of the underlying arrangement between GTL and Scotts Valley, but GTL has not received a penny from Scotts Valley (or the Department) in exchange for the Department holding title to GTL's former real property. *See* Exhibit A, Lee Decl. ¶ 4.

In addition to the Agreement for the 32-Acre Parcel and the loan allowing Scotts Valley to acquire the remaining 128 acres of the Vallejo Parcel, GTL also has in place certain development agreements with Scotts Valley. *See id.* ¶ 9. These additional arrangements are also contingent upon gaming being conducted on the Vallejo Parcel because payment to GTL depends on gaming at the site. *Id.* ¶ 4.

Despite the Department's awareness of Scotts Valley's and GTL's reliance, and despite the trust relationship between the Department and Scotts Valley, the Department abruptly reversed

itself without warning, with only the barest of explanations, and without consulting Scotts Valley. On March 27, 2025, the Department issued a two-page letter where it claimed to be "temporarily rescinding the . . . Eligibility Determination for reconsideration." ECF 1-2 at 1. The only basis for this action was a purported "concern[]" that not enough information had been considered during the prior near-decade-long process. *Id.* The Department also solicited further information relevant to the reconsideration process, to be submitted by Scotts Valley "and other interested parties" by May 30, 2025. *Id.* Notably, the March 27 Letter states that the action to take title to the Vallejo Parcel and hold it in trust is not being reconsidered. *Id.* The March 27 Letter does not state how long the Department intends to take in reconsidering the Eligibility Determination. *See id.*

ARGUMENT

Plaintiff's Memorandum sets forth why the March 27 Letter should be set aside as unlawful under the Administrative Procedure Act ("APA"). *See* 5 U.S.C. § 706(2). This Brief further supports Scotts Valley's Memorandum with the following additional arguments.

First, the March 27 Letter—as a whole—is final agency action subject to judicial review. It is blackletter law in this Circuit and others that an agency's decision to indefinitely rescind or stay its earlier action is itself final agency action. And even if the Department had only decided to reconsider the Eligibility Determination, that decision is also final agency action subject to judicial review based on the particular facts and circumstances presented here.

Second, the March 27 Letter is unlawful because the sole basis offered by the Department for its decision to reconsider is pretextual, and agency action based on pretext does not withstand APA review. The Department's only stated reason for its decision to reconsider the January 10 Decision is the Secretary's purported "concern[] that the Department did not consider additional evidence submitted after the 2022 Remand" from this court in *Scotts Valley v. DOI*, 633 F. Supp.

3d 132 (D.D.C. 2022). ECF 1-2 at 1. However, the evidence from the Administrative Record ("AR") attached to Plaintiff's Second Amended Complaint (ECF 92-1) clearly reveals the extra-statutory and political factors that constitute the Department's *actual* basis for its decision while further demonstrating that the *stated* basis for decision is pretextual: the Department crumbled under an intense lobbyist pressure campaign and then invented a reason to support its about-face.

Third, the Department unlawfully failed to consider Scotts Valley's and GTL's substantial reliance interests in determining to undertake its reconsideration process. Both Scotts Valley and GTL have substantial reliance interests engendered by the January 10 Decision. Nevertheless, the March 27 Letter does not demonstrate that the Department considered either Scotts Valley's or GTL's reliance interests before deciding to reconsider the January 10 Decision. For example, the March 27 Letter does not explain why the alleged need to consider additional, post-remand materials should outweigh the importance of protecting existing reliance interests. If anything, the Department did just the opposite; the March 27 Letter affirmatively attempts to cut-off Scotts Valley's and GTL's reliance interests. *See id.* That attempt—made long after the land had been accepted into trust by the Department and after significant funds had been dispersed—was far too late, and therefore fails.

I. The March 27 Letter—in Its Entirety—Constitutes Final Agency Action.

The March 27 Letter constitutes final agency action for the purposes of judicial review because it marks the consummation of the agency's decision to reconsider—and stay—the January 10 Decision and because legal consequences flow from those intertwined decisions.

Agency action is final for the purposes of judicial review where the action marks the consummation of the agency's decision-making process and where the action either determines rights or obligations or is an action from which legal consequences will flow. *See Bennett v. Spear*, 520 U.S. 154, 178 (1997). The March 27 Letter satisfies both criteria.

A. The Temporary Rescission Is Final Agency Action.

The Department has suspended or stayed the Eligibility Determination. This fact is undisputed. Federal appellate courts repeatedly hold that agency stays of their own earlier actions are final agency actions subject to judicial review. *See, e.g.*, *NRDC v. NHTSA*, 894 F.3d 95, 113 (2d Cir. 2018) (collecting cases); *Clean Air Council v. Pruitt*, 862 F.3d 1, 6 (D.C. Cir. 2017) (holding stay of agency decision is final agency action); *Public Citizen v. Steed*, 733 F.2d 93, 98 (D.C. Cir. 1984) (holding "indefinite suspension" of agency action is final agency action).

As the D.C. Circuit has explained, granting a requested interim modification of an earlier decision while purporting to reconsider that earlier decision is "a modification . . . for the entire period of time that the" agency reconsiders the underlying action and "represents the final agency position on this issue, has the status of law, and has an immediate direct effect on the parties." *Int'l Union, United Mine Workers of Am. v. MSHA*, 823 F.2d 608, 614–15 (D.C. Cir. 1987).

Applying *Clean Air Council* outside of a rulemaking context, this Court has held that an agency's decision to "reconsider and stay" an earlier decision "marked the consummation of the agency's decisionmaking process." *Nat'l Women's Law Ctr. v. OMB*, 358 F. Supp. 3d 66, 85 (D.D.C. 2019) (quoting *Clean Air Council*, 862 F.3d at 6) (alteration omitted).

In *National Women's Law Center*, the Office of Management and Budget ("OMB") had approved an aspect of an Equal Employment Opportunity Commission's ("EEOC") data collection effort. *Id.* at 73–74. Then, in an about-face, and only one year later, OMB purported to stay the earlier approval while initiating a review period to reconsider the EEOC's data collection. *Id.* at 74–75. This Court held that OMB's stay marked the consummation of the agency's decision-making process. *Id.* at 85. As relevant here, "OMB's stay [was] not interlocutory simply because OMB [would] conduct future administrative proceedings . . . ." *Id.*; *see also id.* (noting that OMB did not need to stay earlier decision to undertake review).

Legal consequences also flow from the Department's ploy to upset reliance interests. As in *Sackett v. EPA*, 566 U.S. 120, 126 (2012), where the agency's determination limited the plaintiff's ability to obtain a permit, here, the March 27 Letter purports to limit Scotts Vally's and GTL's (and "any other entity['s]") ability to undertake any gaming development at the Vallejo Parcel based on the Eligibility Determination. The State of California has gotten the message loud and clear. *See* ECF 40-2 at 2 ("put[ting] on hold" compact negotiations with Scotts Valley). Prior to the March 27 Decision, Scotts Valley was proceeding with the necessary approvals to initiate Class II gaming at the Vallejo Parcel. But for the March 27 Decision, Scotts Valley would likely have obtained the necessary approvals to initiate Class II gaming as of the date of filing this brief. And of course, once gaming is initiated, GTL would begin to receive repayment. Thus, the agency's suspension of its earlier decision impacts the affected "parties' rights or obligations." *Clean Air Council*, 862 F.3d at 7. Furthermore, had Scotts Valley been able to promptly begin generating gaming revenues, the reliance interests generated therefrom would have made the Department's reversal even more blatantly unlawful at the end of any reconsideration process (legitimate or not). *See infra* at 21–25. The Department's transparent litigation tactic therefore also has direct legal consequences in that way.

National Women's Law Center is again on point, where this Court explained that the stay of the earlier approval "creat[ed] legal consequences for the regulated entities, no matter whether OMB ultimately decide[d] to" reconsider its earlier decision. 358 F. Supp. 3d at 86. *National Women's Law Center* also considered—but rejected—arguments that an agency determination outside of the rulemaking context is somehow distinguishable for purposes of analyzing what legal

consequences flow from agency action. *See id.* & n.6 (concluding that the rulemaking-versus-other-action distinction makes no difference).[3]

B. The Determination to Reconsider Constitutes Final Agency Action.

This Court observed that a potentially closer question is whether the decision to reconsider—were there to be assurances that rights in the interim are unaffected—is final agency action. *See* Transcript of May 23, 2025 Preliminary Injunction Hearing (Hr. Tr.) at 5:8-11 ("[I]f they had just sent a letter saying, we're reconsidering this, but we haven't made any decision and this . . . has no impact on your rights for now . . . would that even be actionable?"). There are multiple responses.

First, this is a purely hypothetical question. Here, the Department's March 27 Letter both stated that the Department is reconsidering the January 10 Decision *and* that such reconsideration impacts Scotts Valley's "and any other entity['s]" rights. The APA does not allow courts to re-fashion the agency's action. *See* 5 U.S.C. § 706(2) (providing authority to "set aside" action).

Second, and relatedly, the Department decided to "*temporarily rescind[]* the Gaming Eligibility Determination *for reconsideration*." ECF 1-2 at 1 (emphasis added). Even in the Department's own framing, the decision to reconsider resulted directly in the agency's temporary rescission. The agency tied the two actions together; they are not now severable.

Third, notwithstanding the above, the March 27 Letter marks the consummation of the Department's process in deciding to undertake a reconsideration process. The Department did not argue otherwise in its opposition to Scotts Valley's request for a preliminary injunction. Rather,

[3] The March 27 Letter's claim that the Department has not taken final action is also legally meaningless. *See Ctr. for Biological Diversity v. Haaland*, 58 F.4th 412, 417 (9th Cir. 2023) (Analysis of finality focuses on "the practical and legal effects of the agency action, not on labels" (internal quotation and citations omitted)).

the Department focused on the fact that it "has not *completed* its reconsideration process." ECF 47 at 11 (emphasis added). In this context, where the Department has not even offered a proposed schedule for completing the reconsideration process, that is brittle grounds.

Fourth, as discussed *infra* at 21–25, the Department must consider the substantial reliance interests engendered by the January 10 Decision. The Department is likely to argue in any future litigation that the pronouncement of reconsideration—standing alone—is enough to put Scotts Valley and GTL on notice that any prospective reliance on the January 10 Decision is not properly cognizable, starting after March 27.[4] The plain terms of the March 27 Letter support this understanding. The March 27 Letter states, "During the pendency of this reconsideration [i.e., not during the period of temporary rescission], neither the Tribe nor any other entity or person should rely on the Gaming Eligibility Determination." ECF 1-2 at 1. Notably, the Department did not explain the basis for that warning statement. The government could have explicitly tied the warning to the temporary rescission by stating, for example, "*Because the January 10 Decision has been temporarily rescinded*, no entity or person should rely on the Gaming Eligibility Determination." In this way, this case is distinct from those where an agency undertakes a reconsideration process where the underlying decision did not engender any reliance interests.

Accordingly, the impact on Scotts Valley's and GTL's ability to continue relying on the January 10 Decision, absent an express assurance that parties may still rely on the January 10 Decision (as in this Court's hypothetical), is a "direct and appreciable legal consequence" that results from the Department's decision to reconsider. *U.S. Army Corps of Eng'rs v. Hawkes*, 578

[4] To the extent the Department argues that the Decision to reconsider alone does not undermine prospective reliance, then the Department is estopped from reversing that litigation position later. *See New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (explaining that judicial estoppel is appropriate when a party's "later position [is] clearly inconsistent with its earlier position").

U.S. 590, 598 (2016) (quoting *Bennett*, 520 U.S. at 178). It does not matter that the consequence may depend on future actions that the Department takes. In *Hawkes*, and taking a "pragmatic approach," the Supreme Court held that negative jurisdictional determinations issued by the agency amount to a "safe harbor" from *future* enforcement actions, while affirmative jurisdictional determinations represent the denial of the safe harbor. *Id.* at 599 (internal quotation omitted) (citation omitted). So too, the decision to reconsider—without more—removes the safe-harbor analog of relying on the January 10 Decision.

Further, recall that the January 10 Decision also approved the Department taking the Vallejo Parcel in trust *for the benefit of Scotts Valley*. *See, e.g.*, 25 C.F.R. § 151.12(b)(8) (providing that the Department "shall give great weight to acquiring land that . . . [f]acilitates Tribal self-determination, *economic development, or Indian housing*" (emphasis added)). Here, the primary *benefit* for Scotts Valley is the economic value of successful gaming, along with needed housing development. The Department, in its capacity as Trustee, did not consult, confer, or even give advance notice to Scotts Valley that it was considering initiating a process to reconsider the entire purpose of the trust acquisition—the ability to conduct gaming on the Vallejo Parcel. *Contra* 43 C.F.R. § 4.5(c). Thus, as beneficiary of the trust relationship, the Department's decision to even reconsider immediately affected Scotts Valley's "rights" and "obligations" as the trustee beneficiary. *Bennett*, 520 U.S. at 178.

And if all that were not enough, the result of the so-called reconsideration process is pre-ordained. *See infra* at 13–20. What purpose did the rescission serve other than to attempt to minimize the risk of a reliance-interest argument in future litigation? If the Department actually intended to hold the Vallejo Parcel in trust *for the benefit of Scotts Valley*, and fairly consider any newly submitted information in an even-handed way, then it did not need to direct that Scotts

Valley and GTL stop relying on the January 10 Decision. This Court need not allow the Department to leverage any additional evidence in an outcome-driven process focused on propping up the Department's prebaked outcome. This Court may consider the Department's end goal because the finality inquiry is "pragmatic" and "flexible." *Rhea Lana, Inc. v. Dep't of Labor*, 824 F.3d 1023, 1027 (D.C. Cir. 2016).

C. All Writs Act.

Even if this Court concludes that the Department's determination to reconsider the January 10 Decision is not final agency action, the Court may still grant relief under the All Writs Act. 28 U.S.C. § 1651; *see also State of N.C. Env't Pol'y Inst. v. EPA*, 881 F.2d 1250, 1257 (4th Cir. 1989); 33 Wright & Miller, Fed. Practice & Proc. § 8362 (2d ed.).

The D.C. Circuit has upheld interlocutory review "where the district court was dealing with an agency proceeding in which it had reason to believe something may have gone fundamentally awry with the way in which the proceeding itself was being conducted." *Gulf Oil Corp. v. U.S. Dep't of Energy*, 663 F.2d 296, 309 (D.C. Cir. 1981). Not only has the D.C. Circuit allowed for interlocutory review, but it has *required* review in agency proceedings "where the agency proceedings suffer from a fundamental infirmity requiring a court to act immediately to protect appellees' rights to a fair proceeding." *Id.* at 312. Such fundamental infirmities include, as relevant here, manifest bias of administrative decision makers and improper *ex parte* contacts between interested parties and responsible agency officials. *See State of N.C. Env't Pol'y Inst.*, 881 F.2d at 1257 (citing *Ass'n of Nat'l Advertisers v. FTC*, 627 F.2d 1151, 1157 (D.C. Cir. 1979); and *Gulf Oil Corp.*, 663 F.2d at 313).

Here, fundamental infirmities in the agency proceedings exist both from manifest bias and improper *ex parte* contacts. First, as discussed in Section II, *infra*, the agency demonstrated manifest bias in kowtowing to lobbyist pressure. This bias demonstrates the Department is intent

on permanent reversal, meriting intervention now. Second, the agency's repeated *ex parte* contacts with tribes that run existing gaming facilities but are not even the object of the agency action—in contrast with Scotts Valley—demonstrates that Scotts Valley cannot be ensured of a fair "process" while the Department attempts to build a record to reverse itself. That reason alone also justifies intervention now. Because of these fundamental infirmities in the agency proceedings, the Court must "act immediately to protect [Scotts Valley's and GTL's] rights to a fair proceeding." *Gulf Oil Corp.*, 663 F.2d at 312.

II. The Department's Sole Explanation Justifying the March 27 Letter Is Pretextual, Rendering the March 27 Letter Unlawful.

Despite political pressures that surround tribal gaming determinations, Scotts Valley is still "entitled to . . . an agency decision on the merits without regard to extra-statutory, political factors." *Aera Energy LLC v. Salazar*, 642 F.3d 212, 214 (D.C. Cir. 2011). Federal courts may set aside agency action where the agency's decision "does not match the rationale [the agency] provided" or where "the evidence tells a story that does not match the explanation the [agency] gave for [its] decision." *Dep't of Commerce v. New York*, 588 U.S. 752, 783, 784 (2019). In *Department of Commerce*, the Supreme Court, "viewing the evidence as a whole," found "a significant mismatch between the decision the Secretary made and the rationale he provided." *Id.* at 783. Because the circumstances demonstrated an "explanation for agency action that [was] incongruent with what the record reveal[ed] about the agency's priorities and decisionmaking process," the agency failed the "reasoned explanation requirement of administrative law, [which] after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public." *Id.* at 785. In the end, "Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case." *Id.*

Whereas federal courts do not generally "reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons," *Department of Commerce* made clear that this general rule may yield when "the sole stated reason" for the agency's action "seems to have been contrived." *Id.* at 781, 784. The Supreme Court relied on several factors in finding pretextual motivations in *Department of Commerce*, including: (1) timing (i.e., the Commerce Secretary's action soon after taking office), and (2) communications with agency personnel and the Department of Justice to identify a rationale for the action. *Id.* Based on those circumstances, the Court affirmed the district court's vacatur of the agency's action. *Id.* at 785; *see also id.* ("Our review is deferential, but we are 'not required to exhibit a naiveté from which ordinary citizens are free.'" (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.))); *see also Aera Energy LLC*, 642 F.3d at 224 ("[S]ometimes political pressure crosses the line and prevents an agency from performing its statutorily prescribed duties.").

The D.C. Circuit has also held unlawful certain agency action that was based on extra-statutory factors. In *D.C. Federation of Civic Associations v. Volpe*, the Secretary of Transportation approved a bridge project where members of Congress exerted significant political pressure on the agency. 459 F.2d 1231, 1235–36 (D.C. Cir. 1971). Going even further than *Department of Commerce*, the D.C. Circuit held the agency's action unlawful where its rationale was based even *in part* on extra-statutory factors because that would result in political pressure "usurp[ing]" the function of the agency. *Id.* at 1248–49.[5]

[5] Other federal courts of appeals have also held agency action unlawful when based on pretext. *See, e.g.*, *Texas v. United States*, 809 F.3d 134, 173–76 (5th Cir. 2015) (upholding district court preliminary injunction based in part on pretext finding), *aff'd by an equally divided court*, 549 U.S. 547 (2016) (per curiam); *Woods Petroleum Corp. v. DOI*, 18 F.3d 854, 859 (10th Cir. 1994) (holding unlawful the Department's action where "sole reason" offered for action was pretextual), *adhered to on reh'g* 47 F.3d 1032 (1995).

This Court likewise recently granted a preliminary injunction after determining that the government's stated "justification [was] pretextual" where the government's actions were inconsistent with its stated purpose. *Am. Bar Ass'n v. DOJ*, No. 25-cv-1263-CRC, 2025 WL 1388891, at *8 (D.D.C. May 14, 2025).

Applying these cases and "viewing the evidence as a whole," there is a "significant mismatch between the [Department]'s decision and the rationale [it] provided," which reveals that "the [agency]'s sole stated reason . . . seems to have to have been contrived." *Dep't of Commerce*, 588 U.S. at 755, 783–85.

Let's start with the decision: the Department determined to reconsider its January 10 Decision while at the same time purporting to "temporarily rescind[]" the Eligibility Determination. ECF 1-2 at 1. The justification for doing so? The supposed "concern[] that the Department did not consider additional evidence submitted after the 2022 Remand." *Id.* That justification runs headlong into several crucial facts, demonstrating that the claimed concern is simply a "contrived reason[]." *Dep't of Commerce*, 588 U.S. at 785.

First, the timeline here is strong evidence of a contrived reason, as in *Department of Commerce*. After a nearly decade-long process that included one previous appeal to and remand from this Court, the Department concluded on January 10, 2025, that the Vallejo Parcel satisfied the restored-lands exception criteria in 25 C.F.R. § 292.12. Then, just days after the change in presidential administration, high-powered lobbyists for incumbent tribes began their pressure campaign with the agency, including urging the Department to take action before Scotts Valley could "break ground." ECF 92-1 at 71 (AR0129).

The agency also reversed itself only days after other tribes challenged the January 10 Decision in this Court. *See Yocha Dehe Wintun Nation v. DOI*, No. 1:25-cv-00867-TNM (filed

Mar. 24, 2025); *United Auburn Indian Cmty. v. DOI*, No. 1:25-cv-00873-TNM (filed Mar. 24, 2025). Contrary to the supposedly "obvious conclusion" maintained by opposing tribes that the Department "took a fresh look" after "facing a wave of" challenges to the January 10 Decision, ECF 57 at 13, the AR shows the "wave" the Department faced was actually a wave of lobbying pressure. *See, e.g.*, ECF 92-1 at 69 (AR0127) (on January 31, lobbyist emailing White House staff on behalf of Yocha Dehe), *id.* at 67 (AR0093) (on February 22, Yocha Dehe lobbyist emailing Department staff with a "briefing paper" recommending action), *id.* at 73 (AR0154) (on March 5, Yocha Dehe lobbyist emailing to confirm a meeting between Yocha Dehe and the Department), *id.* at 90 (AR0238) (on March 19, Yocha Dehe lobbyist emailing Department staff urging the Department to act *before* Yocha Dehe files suit).

Second, and just as in *Department of Commerce*, the agency communications (and lack thereof) demonstrate the contrived explanation. Nothing in the AR demonstrates that the Department reviewed any post-2022 remand submissions before making its determination. *See* ECF 92 ¶ 47. In fact, agency staff pushed back against the incumbent tribe's assertions. *See* ECF 92-1 at 59 (AR0062) ("rebutting one of the allegations in the white paper"). Further, the agency took a course of action that hewed closely to the plan set forth by lobbyists in an unsuccessful attempt to stop Scotts Valley and GTL from reasonably relying on the January 10 Decision, *see id.* at 57 (AR0057), and to dress up the reconsideration with a justification to shield against accusations of "[i]mproper [m]otive," *id.* If the agency's *actual* concern was the claimed need to consider late-submitted evidence, then the agency could have evaluated any additional evidence submitted after the 2022 remand *without* having claimed to rescind the Eligibility Determination. That is also the process 43 C.F.R. § 4.5(c) requires (if it even applies): "[i]f the Secretary or Director assumes jurisdiction of a case or reviews a decision, the parties and the appropriate

Departmental personnel will be advised of such action, the administrative record will be requested, and, after the review process is *completed*, the Secretary or Director will issue a decision." *Id.* (emphasis added).

Here, by contrast, the "decision" to reconsider and rescind the Eligibility Determination—for an indefinite period—was reached at the very start of the review process, far before the process was "completed." *Id.* Also contrary to § 4.5(c), neither Scotts Valley nor GTL were "advised in writing" of the Department's intention to rescind the Eligibility Determination until the March 27 Letter purported to do so. *See Tesoro High Plains Pipeline Co. v. United States*, No. 1:21-cv-90, 2024 WL 3359433, at *6 & n.5 (D.N.D. July 10, 2024) (observing that "[g]iven this lack of notice and an opportunity for Tesoro to respond, it appears the Acting Secretary may have pretextual reasons for summarily vacating all the prior orders" and that the Department's claimed basis for reversal (due process concerns) "seems a squirrely justification for an order that itself lacked the requisite notice and opportunity to respond"). The lack of communication with Scotts Valley stands in stark contrast to the repeated *ex parte* communications that the Department had with competing tribes.

Third, in addition to the direct evidence in the AR, the politically charged circumstances of these agency decisions make them more susceptible to influence based on non-statutory factors, especially where tribes with existing gaming operations have strong financial incentives to oppose new gaming operations. *See, e.g.*, Declaration of Sarah R. Choi, ECF 16-2 ¶ 11 (noting Cache Creek Casino Resort revenues); *cf.* Cache Creek, https://perma.cc/8DW9-V2AN. Thus, the January 10 Decision has more than its fair share of opponents, as demonstrated by the three cases (*Yocha Dehe*, *United Auburn*, and *Lytton Rancheria of Calif. v. DOI*, No. 1:25-cv-01088-TNM (filed Apr. 10, 2025)) challenging the January 10 Decision. Indeed, as the opposing tribes note,

"For nearly a decade, Scotts Valley's Project has been vigorously disputed and heavily litigated." ECF 57 at 16. Whether to allow for tribal gaming under IGRA has been a politically charged issue for decades, nationwide. *See, e.g.*, *Stand Up for California! v. DOI*, 204 F. Supp. 3d 212, 226 (D.D.C. 2016) (noting litigants "vehement[] oppos[ition]" to proposed casino and their efforts in "state and federal litigation as well as statewide political efforts . . . to halt the . . . casino development."), *aff'd* 879 F.3d 1177 (D.C. Cir. 2018). To be sure, policy differences attendant to changes in presidential administration may spur agency changes in some contexts. *See Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1043 (D.C. Cir. 2012). Such changes, in contrast to the present case, must be permitted under the APA, the relevant substantive acts, and any other applicable law. Further, determining whether the criteria in 25 C.F.R. § 292.12 are satisfied "present[s] a fact-based inquiry"—not one of policy. 73 Fed. Reg. 29,354, 29,361 (May 20, 2008).

Fourth, the existing AR underlying the 2019 Indian Lands Opinion ("ILO") contained voluminous submissions from those opposed to Scotts Valley. *See* 2019 ILO, Exhibit C at 2 n.7 (noting letters and accompanying materials submitted), at 13–14 (citing historical work commissioned by Yocha Dehe). These tribes had adequate time to submit these comments and analyses because Scotts Valley submitted its request to the Department on January 28, 2016, with supporting historical materials submitted on January 29, 2016, and members of the opposing tribes submitted their comments and analyses in November 2016, approximately ten months later. *Id.* at 1–2 & nn.5–6. Likewise, the historian commissioned by Yocha Dehe submitted her report in November 2016. *Id.* at 13 n.83. Other tribes therefore have already had an opportunity to submit evidence. What's more, the Department clearly considered and analyzed the originally submitted materials in the January 10 Decision. *See* ECF 1-1 at 3–4 & n.32 ("Our conclusion is based on the extensive documentation in the administrative record for the 2019 ILO, which includes materials

submitted by . . . parties opposed to [Scotts Valley]'s request . . . ."), at 10 (expressly considering Yocha Dehe input), at 12–13 (expressly considering historical work commissioned by Yocha Dehe), at 23 (considering amicus brief submitted by Yocha Dehe in preceding litigation). Opposing tribes had a meaningful opportunity to participate in the Department's consideration of restored lands, and they *did* participate.[6]

Moreover, given the inquiry focused on "historical documentation," whatever additional information that other tribes would now want the Department to evaluate could have been developed with reasonable diligence in the first instance. 25 C.F.R. § 292.2. Raising a "concern[]" that calls for repeated comment periods is a strange rationale for an agency to assert given the inefficiency of constantly reconsidering past actions. ECF 1-2 at 1. Requiring agencies to consider newly submitted information at every turn would result in a paralyzing process of never-ending reevaluation. *Cf. Habitat Educ. Ctr. v. U.S. Forest Serv.*, 673 F.3d 518, 526 (7th Cir. 2012) (agencies not required to update analysis with information not available at the time of decision).

Fifth, the remand in 2022 was based on an issue of law, and so it was perfectly reasonable and efficient for the Department to apply the legal conclusions from that case to the *existing* administrative record. *See Scotts Valley Band of Pomo Indians*, 633 F. Supp. 3d at 165–68 (reversing based on legal determination). This is not uncommon when a court remands to apply a different legal rule. *See, e.g.*, Report of the Special Master, *Florida v. Georgia*, No. 142, 2019 WL 13148211, at *3 (Dec. 11, 2019) (not taking additional evidence after remand to special master

[6] Further, the Department is vigorously defending its decision issued on January 13, 2025 to take land into trust for the Koi Nation of Northern California to conduct gaming under IGRA's restored lands exception. *See, e.g.*, Defs.' Mot. Summ. J. at 30–37, *Federated Indians of Graton Rancheria v. U.S. DOI*, No. 3:24-cv-08582 (N.D. Cal. June 5, 2025) (ECF 115) (arguing that the Department properly consulted with opposing tribe and that the opposing tribe had an opportunity to articulate its views). Apparently, the Department has only had "concerns" over the process when it comes to the January 10 Decision and Scotts Valley.

from Supreme Court on issue of law), *aff'd* 592 U.S. 433, 444 (2021); 81 Fed. Reg. 24,420, 24,428–29 (Apr. 25, 2016) (agency basing decision on the "*prior record*" updated with a consideration of cost as required by Supreme Court remand (emphasis added)), *on remand from Michigan v. EPA*, 576 U.S. 743 (2015). Doing otherwise is inefficient, and there is no legal requirement to give parties a second bite at the apple.

Sixth, the Department's 2008 rulemaking setting forth the regulations governing restored lands applications notes that 25 U.S.C. § 2719(b)(1)(B) does "not reference an opportunity for public comment" because the "exceptions . . . present a fact-based inquiry." 73 Fed. Reg. at 29,361; *see also id.* (noting availability of public comment for analyses conducted under the National Environmental Policy Act, which statute expressly calls for public comment). Thus, the Department—through a notice-and-comment rulemaking process conducted nearly twenty years ago—has already concluded that public input on restored lands applications is not legally required. "[D]epart[ing] from a prior policy *sub silentio*," the March 27 Letter arbitrarily and capriciously reversed course on the agency's long-held interpretation by immediately rescinding the Eligibility Determination on the premise that it should solicit further public comment on what should be a fact-based inquiry. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

At bottom, the portions of the AR attached to the Second Amended Complaint demonstrate the Department's failure to "turn square corners in dealing with the people," *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 591 U.S. 1, 24 (2020) (quoting *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229 (1961) (Black, J., dissenting)), and "tells a story that does not match the explanation the [agency] gave for [its] decision." *Dep't of Commerce*, 588 U.S. at 784. Rather, political pressures "usurp[ed]" the function of the agency. *Volpe*, 459 F.2d at 1248–49. That is grounds for granting Summary Judgment in favor of Scotts Valley.

III. In Making Its About-Face, the Department Failed to Consider Scotts Valley's and GTL's Reliance Interests.

The costly actions that Scotts Valley and GTL undertook in reliance on the January 10 Decision are critical in evaluating the lawfulness of the Department's reconsideration process. The Supreme Court has repeatedly recognized that previous agency actions "may have engendered serious reliance interests that must be taken into account." *Encino Motorcars LLC v. Navarro*, 579 U.S. 211, 221–22 (2016) (quoting *Fox Television Stations Inc.*, 556 U.S. at 515) (internal quotation marks omitted); *see also Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988) (Scalia, J., concurring) (noting that altering agency approach "in a manner that makes worthless substantial past investment incurred in reliance [thereon] . . . may for that reason be 'arbitrary' or 'capricious'"); *McAllister v. United States*, 3 Cl. Ct. 394, 398 (1983) (holding agency may reconsider only if "parties have not adversely changed their positions in reliance on [the previous] decision").[7] Under *Fox Television*, the agency must recognize the change in position and "provide a more detailed justification than would suffice" to support agency action on a blank slate. 556 U.S. at 515. The incumbent tribes are acutely aware of these precedents. *See* ECF 92-1 at 57 (AR0057) (noting the importance of "[d]etrimental [r]eliance" in this context).

Although the Department was certainly aware of Scotts Valley's and GTL's reliance interests, the record shows that the Department only considered such interests so far as it sought to undercut them by following the "best practice . . . two-step approach" pushed by Yocha Dehe.

[7] In addition to reliance on consistent agency "policies," agency actions themselves may also engender reliance interests. *See, e.g.*, *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 717, 719–20 (D.C. Cir. 2016) (analyzing *Fox Television* factors in context of revocation of permit based on new factual findings). This Court, too, recognized at the preliminary injunction hearing that reliance on the January 10 Decision is a critical consideration in evaluating the March 27 Letter. *See* Hr. Tr. 46:11-14 ("I'm struggling to see how you can respond, then, to Mr. Schulte's [i.e., counsel for Scotts Valley] claim that some[thing]'s de facto arbitrary and capricious if you don't consider reliance interest.")

ECF 92-1 at 90 (AR0238). Further, the Department's decision to reconsider represents a change in policy because the Department has previously made it very clear that it does not provide "opportunity for public comment" for restored lands applications. 73 Fed. Reg. at 29,361.

As noted above and in its previous filings in this case, GTL reasonably—and significantly—relied on the January 10 Decision. The January 10 Decision was the condition precedent under the terms of GTL's agreement with Scotts Valley triggering the transfer of GTL's deed to the 32-Acre Parcel to the Department. *See* Exhibit A, Lee Decl. ¶ 4. Further, because repayment of GTL's loan to Scotts Valley depends on gaming occurring at the Vallejo Parcel, GTL also relied on the January 10 Decision in issuing the loan to Scotts Valley. *See id*.

The Department was undoubtedly aware of GTL's reliance interest given that the deed to the 32-Acre Parcel transferred directly to the Department. *See* Exhibit B at 2 ("The acquiring agency is the Department of Interior, Bureau of Indian Affairs."). The Department has emphasized repeatedly that the United States still holds GTL's former property in trust for the benefit of Scotts Valley. *See* ECF 47 at 5, 9, 17, 20, 23, 26. Despite its awareness, the Department never asked GTL to provide information on the extent of GTL's reliance. The 32-Acre parcel, located in the San Francisco Bay Area, where real estate values are some of the highest in the country, has a market value in the millions of dollars. *See* Exhibit A, Lee Decl. ¶ 4. With the ability to further develop the site unlawfully put on hold indefinitely, and with the Department acquiescing to outside parties' schemes to undercut GTL's reliance interests, GTL may never be paid.

Likewise, this Court has expressly recognized GTL's reliance interest: "Under [GTL's agreement with Scotts Valley], GTL's land deed only transferred after the Department made a land-in-trust designation, so that document *was* signed *in reliance on the January decision*." Memorandum Order, ECF 83 at 8 (first emphasis in original, second emphasis added). Although

this Court concluded that such reliance did not constitute a sufficient showing for preliminary relief, the Court based that decision on a lack of *ongoing* irreparable injury *as to Scotts Valley*. *See id.* (evaluating "monetary harms on the tribe *now*" (emphasis added)). The Court's earlier analysis at the preliminary relief stage did not consider Scotts Valley's and GTL's already-incurred reliance and injury.

At this merits stage, however, evaluating reliance—including GTL's reliance—is required. *See Regents of the Univ. of Calif.*, 591 U.S. at 31 (emphasizing reliance interests of entities not directly affected by agency action, including "the schools where . . . recipients study and teach [and] the employers who have invested time and money in training [and employing] them").

In the face of the clear duty to consider reliance, along with Scotts Valley's and GTL's clear showing of reliance, GTL anticipates that the Government may attempt to downplay GTL's reliance. For instance, the Department may argue that even if GTL did rely on the January 10 Decision as a factual matter, the reliance was not reasonable and therefore does not merit consideration. That argument fails.

First, in *Regents of the University of California*, the Supreme Court rejected the agency's argument that, because the rescinded program "conferred no substantive rights" and provided "benefits only in two-year increments" (according to the government), beneficiaries lacked legally cognizable reliance interests. *Id.* at 30–31. The Court explained that such features that might attenuate the certainty of the governmental action do not "automatically preclude reliance interests." *Id.* at 31. Here, the January 10 Decision provides far more assurance, stating that Scotts Valley "*may* conduct gaming on the Vallejo Site pursuant to Section 20 of IGRA, 25 U.S.C. § 2719(b)(1)(B)(iii)" and that "the Department *will* acquire the Vallejo Site in trust for [Scotts Valley]." ECF 1-1 at 30 (emphases added). The Department, in turn, did accepted the deed to the

32-Acre Parcel and the remaining 128 acres (for which GTL provided the necessary loan) to place those lands into trust for Scotts Valley, thereby demonstrating a concrete intent and a tangible step to follow-through indefinitely on the January 10 Decision.

Second, the Department's own action in purporting to temporarily rescind the January 10 Decision—along with the evidence in the AR urging the Department to do so—is evidence that the Department was indeed aware of Scotts Valley's and GTL's reliance interests. However, rather than properly consider those reliance interests in determining whether reconsideration would be proper, the Department attempts, through the purported rescission, to end-run the reliance considerations required under *Fox Television*. That end-run also fails. GTL (and the Department for that matter) relied on the January 10 Decision *immediately*; the Department itself accepted the deed to the 32-Acre Parcel from GTL on January 10, 2025. *See* Exhibit B at 5 (listing January 10, 2025 as "[a]pproval date" of the Department's acceptance of conveyance). For its part, Scotts Valley also relied on the January 10 Decision well before the March 27 Letter was issued: "The Tribe has committed millions of dollars to regulatory compliance, project planning, intergovernmental agreements, and compact negotiations in reliance on the Department's final January 10 Decision." ECF 63 at 20 (citing Declarations of Scott Davis).

Third, Scotts Valley and GTL justifiably relied on the January 10 Decision because, as a practical matter, the Eligibility Determination allows Scotts Valley to conduct Class II gaming (in contrast with Class III gaming) *without* negotiating a gaming compact with the State of California. *See* 25 U.S.C. § 2710(b)(1) (permitting Class II gaming without a state compact); *Cabazon Band of Mission Indians v. NIGC*, 14 F.3d 633, 634–35 (D.C. Cir. 1994) (describing differences between Class I, II, and III gaming). Without the rescission, Scotts Valley would have been free to deploy

at-the-ready resources to have gaming up and running at the Vallejo Parcel. Scotts Valley (and GTL) likely would have begun generating revenue as early as the third quarter of 2025.

Accordingly, the January 10 Decision marked the last significant agency (state or federal) determination before some gaming could occur, and before GTL could receive payments for the land sale and the loan. Class II gaming has an independent, and strong, potential for economic development. In fact, the Lytton Rancheria of California ("Lytton") operates a casino in nearby San Pablo, California, with Class II gaming only. *See* Compl. ¶¶ 50–51, *Lytton*, No. 1:25-cv-01088-TNM (D.D.C. Apr. 10, 2025) (noting operation of the casino "as a Class II casino"); Lytton Amicus Br., ECF 58 at 1 ("Lytton operates a successful Class II bingo facility . . . ."). Annual revenues from Lytton's Class II-only operation are sizeable, having paid approximately $31.5 million in taxes to the City of San Pablo in fiscal year 2024.[8] Without the rescission, Scotts Valley would likely have already been able to develop Class II gaming facilities and generate revenue therefrom. *See* Hr. Tr. at 12 (noting that Scotts Valley could conduct gaming in "a matter of months").

CONCLUSION

For the foregoing reasons, and for those provided in Scotts Valley's Memorandum, GTL respectfully urges the Court to grant Plaintiff's Motion for Summary Judgment.

[8] City of San Pablo, *FY 2024-25 & FY 2025-26 – Budget Book* (May 20, 2024) https://city-san-pablo-ca-budget-book.cleargov.com/17781/funding-sources/funding-sources (last visited July 24, 2025). *See also* ECF 58 at 13 (Lytton noting its gaming revenue).

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7(o), which incorporates Federal Rule of Appellate Procedure 29(a)(4)(G), I certify that this brief complies with the page-length limitation of Local Rule 7(o)(4) because it is no longer than 25 pages.

/s/ Jasmine G. Chalashtori
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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2025, I electronically filed the foregoing using the Court's CM/ECF system, which will send notification of such filing to the parties.

/s/ Jasmine G. Chalashtori
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