IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SCOTTS VALLEY BAND OF POMO INDIANS, *Plaintiff*, v. UNITED STATES DEPARTMENT OF THE INTERIOR, et al., *Defendants*.	Case No. 1:19-CV-01544-ABJ

MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Congress enacted the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. ("IGRA"), "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702. IGRA bans gaming on lands that tribes acquire after 1988 (the year of IGRA's enactment), but creates an exception for lands restored to a once-terminated tribe that was restored to Federal recognition. *Id.* § 2719. In 2008, the Secretary of the Interior ("Secretary") promulgated regulations to define and place reasonable limits on IGRA's so-called restored lands exception.

Plaintiff, the Scotts Valley Band of Pomo Indians ("Scotts Valley" or "the Tribe"), was restored to Federal recognition in 1991. In 2016, Scotts Valley asked the Department of the Interior ("Interior") to take a 128-acre parcel in Vallejo, California ("the Vallejo Parcel" or "the Parcel") into trust for gaming purposes as restored lands. Interior denied that request in February 2019 upon determining that Scotts Valley failed to demonstrate the necessary "significant historical connection" to the parcel so as to qualify it as restored lands under the IGRA regulations.

Scotts Valley challenges Interior's February 2019 decision ("Decision") under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, claiming that Interior's restored lands regulations are unlawful, and that the Decision is arbitrary for a litany of procedural and substantive reasons. But the challenged regulations requiring a "significant historical connection" between a restored tribe and restored lands reflect a reasonable interpretation of IGRA, and are entitled to *Chevron* deference. Moreover, Interior appropriately applied the regulations to conclude that Scotts Valley failed to show the requisite connection to the Vallejo Parcel. Interior followed proper procedures in issuing the Decision, and, even if it had not, Scotts Valley cannot show that the alleged deficiencies actually prejudiced the Tribe in violation of any law. Finally, Interior applied the same standard to Scotts Valley that has been applied to other restored tribes both before and after the Department's promulgation of restored lands regulations.

The Decision rests on lawful regulations, articulates a rational connection between the facts found and the choice made, and should be upheld.

BACKGROUND

I. Legal Background

A. The Indian Gaming Regulatory Act

Congress enacted IGRA in 1988 to provide a statutory basis for the operation and regulation of Indian gaming, finding that existing federal law did not "provide clear standards or regulations for the conduct of gaming on Indian lands," 25 U.S.C. § 2701(3). In general, IGRA prohibits gaming "on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988." *Id.* § 2719(a). IGRA, however, contains exceptions to this general prohibition, including the "restored lands" exception at issue here for lands "taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition." *Id.* § 2719(b)(1)(B)(iii). IGRA does not define "restoration of lands," nor does it provide any mechanisms by which the Secretary might "restore" lands to an Indian tribe.

B. 25 C.F.R. Part 292 Regulations and the "Restored Lands" Exception

For many years, Interior implemented the restored lands exception on a case-by-case basis. Then, in 2006, Interior published a proposed rule (71 Fed. Reg. 58,769 (Oct. 5, 2006)) to establish procedures for IGRA's exceptions to the general prohibition on gaming on lands acquired after 1988. A year and a half later, Interior promulgated its Final Rule, codifying its interpretation of 25 U.S.C. § 2719. *Gaming on Trust Lands Acquired After October 17, 1988*, 73 Fed. Reg. 29,354 (May 20, 2008) ("Part 292"). The regulations implement this section of IGRA by articulating the standards Interior "will follow in interpreting the various exceptions to" the prohibition on gaming on lands acquired after 1988. *Id*.

Part 292 establishes "[w]hat must be demonstrated to meet the 'restored lands' exception" found at 25 U.S.C. § 2719(b)(1)(B)(iii). 25 C.F.R. § 292.7. Tribes must meet four conditions to be eligible to game on newly acquired lands under the restored lands exception: (1) the tribe was federally recognized at one time; (2) the tribe subsequently lost that recognition in

one of the ways specified in the regulations; (3) the tribe later "was restored to Federal recognition;" and finally (4) "[t]he newly acquired lands meet the criteria of 'restored lands' in § 292.11." 25 C.F.R. §§ 292.7(a)-(d). There is no dispute that Scotts Valley satisfied the first three criteria; the question that Interior's decision addressed was whether the Tribe's newly acquired lands could be considered "restored" under Part 292.

To show that lands qualify as "restored," a tribe must establish: (1) a modern connection to the lands; (2) a significant historical connection to the lands; and (3) a temporal connection between the date of acquisition and the tribe's restoration. 25 C.F.R. § 292.12. To demonstrate a "significant historical connection" under Part 292, a tribe can either (1) show that "the land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty"; or (2) "demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land." 25 C.F.R. § 292.2.

C. The Indian Reorganization Act

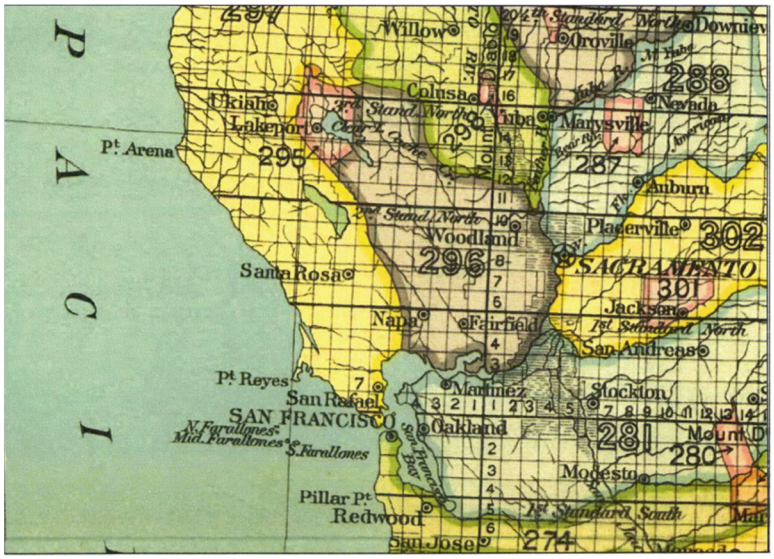
IGRA itself does not authorize Interior to take land into trust for a tribe. That authority is found in the Indian Reorganization Act, 25 U.S.C. §§ 5101 et seq. ("IRA"). The IRA vests the Secretary with authority to take land into trust "for the purpose of providing land for Indians." 25 U.S.C. § 5108. In addition to allowing Interior to acquire lands in trust, the IRA prohibits Interior or any other agency from promulgating regulations or rendering decisions that "classif[y], enhance[], or diminish[] the privileges and immunities available to a federally recognized Indian tribe relative to the privileges and immunities available to other federally recognized tribes by virtue of their status as Indian tribes." 25 U.S.C. § 5123(g).

II. Factual Background

A. Brief History of the Scotts Valley Tribe.

Scotts Valley is a Federally recognized Indian tribe located in California. Indian Entities Recognized by and Eligible To Receive Services From the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554, 7557 (Jan. 29, 2021). The Tribe maintains its headquarters near Lakeport, California, on the western shore of Clear Lake. AR0006386; AR0011601.

The present-day Tribe is a successor-in-interest to the historical Ca-la-na-po and Mo-al-kai tribes. AR0011600-01. In 1851, Scotts Valley's predecessor entities were among eight tribal signatories to an unratified treaty with the United States ("1851 Treaty"). AR0011601. Under that treaty, the signatory tribes ceded their interests to certain lands in California in exchange for a tract of land to be set apart as an Indian reservation. *Id*. In the late 1800s map included below, the ceded lands are in the area marked "296," and the planned reservation lands are in the area marked "295" near Clear Lake. AR0011602.



While Congress never ratified the 1851 Treaty, in 1911 the United States acquired for the Tribe a parcel of land in the vicinity of Clear Lake known as the Scotts Valley, or Sugar Bowl, Rancheria. AR0011602; *see also* AR0006386 (depicting site of former Rancheria); AR004468 (discussing 1911 acquisition). Subsequently, the Sugar Bowl Rancheria was disestablished, and the Tribe's Federally-recognized status was terminated pursuant to the 1958 California Rancheria Act. AR0011599. In 1991, the Tribe was restored to Federal recognition following a court-approved settlement between the Tribe and the United States. *Id.*

B. Scotts Valley's 2012 Restored Lands Request for the Richmond Parcels.

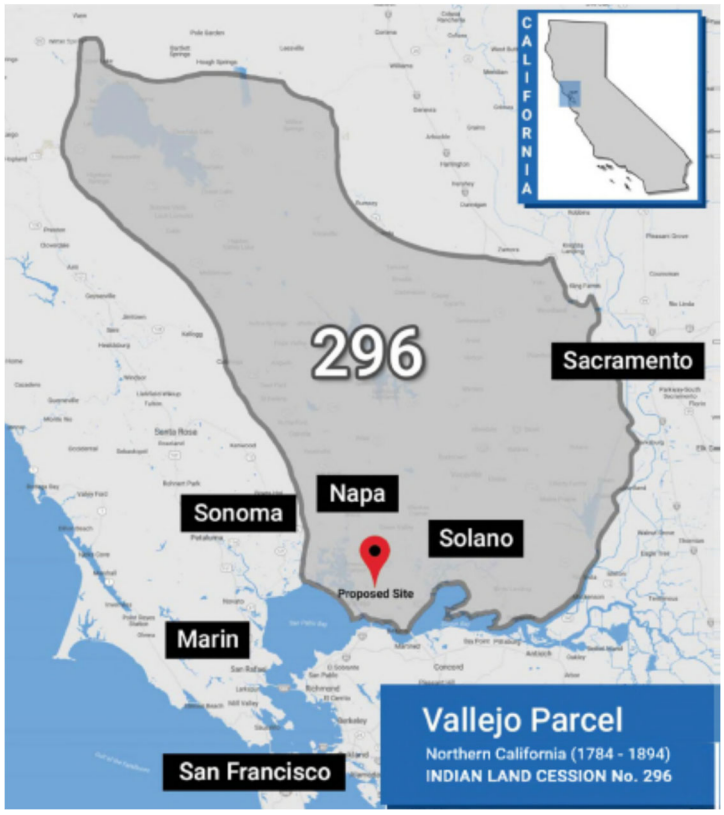
In 2005, Scotts Valley submitted its first request to acquire lands in trust for gaming. AR0006387. Scotts Valley sought a determination from Interior (sometimes called an "Indian

Lands Opinion" or "restored lands determination")[1] that a set of lands termed the Richmond Parcels would, if acquired in trust, be eligible for gaming as restored lands under IGRA. *Id.* In 2012, Interior concluded that the Tribe failed to establish a "significant historical connection" to the Richmond Parcels as required by Part 292. Interior informed the Tribe, however, that it could pursue gaming on the Richmond Parcels via IGRA's other allowances for lands acquired after 1988. *See* AR0006403 (stating that "[s]hould the Band wish to continue to pursue gaming on the Parcels, it will need to submit an application for a Secretarial Determination pursuant to 25 U.S.C. § 2719(b)(1)(A)"). The Tribe chose not to challenge the determination that it had failed to demonstrate a "significant historical connection" to the Richmond Parcels.

C. Scotts Valley's 2016 Restored Lands Request for the Vallejo Parcel.

Rather than continuing to pursue gaming on the Richmond Parcels, in 2016, Scotts Valley requested that Interior acquire a different site — the Vallejo Parcel — in trust for the Tribe for gaming purposes. The Vallejo Parcel consists of about 128 acres of land in the City of Vallejo, Solano County, California. AR0011597. The location of the Vallejo Parcel relative to the area ceded under the unratified 1851 Treaty (Area 296) is depicted below. AR00005038.

[1] When a tribe acquires new lands, it may seek an "Indian Lands Opinion" from Interior as to whether those lands meet one of the IGRA's exceptions, include the "restored lands" exception. 25 C.F.R. § 292.3.



On January 28, 2016, Scotts Valley submitted a request to Interior for an Indian Lands Opinion that the Vallejo Parcel would qualify for gaming as "restored lands" under IGRA. AR0011597; *see also* AR000001-04 (letter from Scotts Valley requesting Indian Lands Opinion). The Tribe supplemented its request in May 2018, AR0004411-12, and December 2018, AR10793-869. The Tribe also submitted a Fee-to-Trust Application for the Vallejo Parcel to Interior in August 2016, AR0006681-719, and supplemented that application in December 2017, AR0010720-81. Scotts Valley's Fee-to-Trust applications described the Tribe's plans to develop the Vallejo Parcel with offices, residences, and a casino resort. *See, e.g.,* AR0006690.

D. Interior's 2019 Restored Lands Decision for the Vallejo Parcel.

On February 7, 2019, Interior issued its Decision concluding that the Vallejo Parcel "does not qualify as restored lands within the meaning of applicable law," AR0011598, and stating that the agency would decline to take the parcel in trust for gaming purposes, AR 11615. Interior explained that Scotts Valley had demonstrated the required "modern" and "temporal" connections to the Vallejo Parcel, but had failed again to demonstrate the requisite "significant historical connection" to the land. AR0011599-600. In reaching its decision, Interior reviewed

documentation submitted by the Tribe, as well as materials submitted by groups opposed to the request, including Yocha Dehe Wintun Nation and the United Auburn Indian Community. AR0011597-98. Following its review of the record, Interior concluded that the significant historical connection requirement was not satisfied.

To start, Interior explained that the Vallejo Parcel is not located within the boundaries of the Tribe's last reservation under a ratified or unratified treaty, so the Tribe could not meet Part 292's first method of establishing a significant historical connection to the land. AR0011601-02; *see also,* 25 C.F.R. § 292.2 (noting that a tribe can establish a significant historical connection to a parcel if "the land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty"). Interior further noted that the Parcel is not proximate to the Tribe's last reservation, which can in some cases help to establish the requisite connection to a parcel. AR0011602-03. In Scotts Valley's case, however, the agency explained that "the distance between the Vallejo Parcel and the [Tribe's] historic Rancheria, standing alone, does not evince a significant historical connection." AR0011603.

Interior next analyzed the Tribe's ties to the Parcel pursuant to Part 292's second method for establishing a significant historical connection, which requires a tribe to demonstrate "the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land." 25 C.F.R. § 292.2. Interior first rejected Scotts Valley's claim that the joint and several cession of the area (Area 296) encompassing the Parcel by eight tribes (including the Tribe's predecessor entities) *per se* demonstrated occupancy or subsistence use in the vicinity of the land. AR00011603-06. Interior explained that a parcel's location within ceded territory does not automatically qualify it as restored lands. *Id.* However, Interior recognized that the Parcel's location in Area 296 did create a favorable inference for the Tribe. *Id.*

Second, Interior disagreed with Scotts Valley's claim that its ancestors' collection of provisions promised under the 1851 Treaty at a site near the Parcel met the definition of occupancy or subsistence use. AR0011606-08. Interior explained that occupancy or subsistence use requires "something more than a transient presence in an area," AR0011607 (quoting

Guidiville Restored Lands Determination 14 (Sept. 1, 2011), *available at* https://www.bia.gov/sites/bia.gov/files/assets/public/pdf/idc015051.pdf)), and that the Tribe's ancestors' "short-term right to collect provisions at Vallejo differs significantly from a treaty reserved right that would demonstrate occupancy or subsistence use, such as a right to hunt, fish, or gather at a designated site in perpetuity." AR0011608.

Third, and finally, Interior addressed Scotts Valley's most factually intensive body of evidence related to one of the Tribe's ancestors, a man named Chief Augustine. AR0011608-15. Born in the 1830s near Clear Lake (the Tribe's aboriginal territory, and location of the former Rancheria), Augustine traveled to and from the North Bay region (the region of the Vallejo Parcel) throughout his life. AR0011609-11. When he was around six years old, he may have been baptized alongside other tribal members in Sonoma, seventeen miles from the Vallejo Parcel. AR0011609. In the ensuing decades, Augustine worked as a ranch-hand and migrant laborer at various "ranchos" in the North Bay, possibly as an enslaved laborer or indentured servant. AR0011609-11. According to the Tribe, Augustine's biography was representative of the experience of its other ancestors and demonstrated occupancy and subsistence use in the vicinity of the Vallejo Parcel (and thereby the required significant historical connection to the land). AR0011608-09.

After considering the Tribe's evidence regarding Augustine, Interior concluded that Augustine's on-again, off-again presence in the North Bay did not indicate a broader presence of the Tribe's ancestors as a whole in the area. AR0011611-13. Interior explained that the nature of Augustine's contacts with the North Bay did not meet the definition of occupancy or subsistence use, even if extended to the Tribe's other ancestors. In doing so, Interior distinguished Augustine's seasonal work in the North Bay from the much more consistent connections established by other tribes to which Scotts Valley had tried to compare itself. AR0011613.

Finally, Interior concluded that even if Scotts Valley's other ancestors shared Augustine's pattern of behavior, and even if those connections amounted to occupancy or subsistence use in the North Bay area, there was insufficient evidence to conclude that such occupancy or use took

place on the Vallejo Parcel, as opposed to other lands in the general vicinity. AR001114-15. Specifically, Interior explained that none of the evidence submitted linked Augustine or the Tribe's other ancestors to Rancho Suscol, the boundaries of which would have surrounded the Vallejo Parcel. *Id.*

In closing, Interior noted that its decision was limited to the question of whether the Vallejo Parcel would fall under the "restored lands" exception and offered no opinion on whether the IGRA's other exceptions for lands acquired after 1988 could apply. AR0011615. The agency also explained that "an unfavorable restored lands determination does not preclude the Band from considering, if it so chooses, alternative, nongaming uses for the Parcel." *Id*.

III. Procedural Background

In May 2019, Scotts Valley filed the instant suit challenging Interior's February 2019 Decision, alleging violations of IGRA, the IRA, and the APA. Compl., ECF No. 1. In October 2019, Interior lodged the index to the administrative record for the Decision with the Court. ECF No. 23. Thereafter, Scotts Valley moved the Court to complete the record with several documents related to the Tribe's request to Interior to reconsider the February 2019 Decision, as well as a May 22, 2008 internal guidance memorandum ("2008 guidance"). *See* ECF No. 28. The Court denied Scotts Valley's motion in September 2020, holding that the February 2019 Decision is the operative final agency action for the Court's review, and that Scotts Valley's proffered post-decisional documents should not be added to the record. *See* Op. & Order, ECF No. 34 at 9-10. Further, the Court held that the 2008 guidance should not be added to the record because "departmental regulations, policies, and procedures are not generally made part of the administrative record." *Id.* at 10.

STANDARD OF REVIEW

Because IGRA does not provide a private right of action, judicial review is governed by the APA. The APA authorizes a reviewing court to "hold unlawful and set aside" final agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989). The

arbitrary and capricious standard of review is a narrow one under which the reviewing court merely ensures that the agency examined the relevant data and articulated a satisfactory explanation for its action. *See Motor Vehicle Mrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The court may not substitute its judgment for that of the agency and must uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned. *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

Review under the APA is confined to "the whole record or those parts of it cited by a party." 5 U.S.C. § 706. The "whole record" consists of "materials that were before the agency at the time its decision was made," *IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997), and "were directly or indirectly" considered by agency decisionmakers, *Pac. Shores Subdivision, Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 7 (D.D.C. 2006).

ARGUMENT

Interior's February 2019 Decision is factually and procedurally sound, and fully complies with the law. The Decision rests on Interior's permissible interpretation of IGRA's restored lands exception in Part 292. Those regulations — including the "significant historical connection" requirement — are entitled to *Chevron* deference and should be upheld. Further, the Decision properly applied Part 292 and considered all available evidence in concluding that Scotts Valley failed to establish the required significant historical connection to the Vallejo Parcel. While Scotts Valley disagrees with Interior's weighing of the evidence, the Tribe's complaints do not establish that the Decision was arbitrary under the APA. Scotts Valley also fails to demonstrate that the Decision suffered from any meaningful procedural deficiencies. Despite the Tribe's claims, Interior's Principal Deputy Assistant Secretary – Indian Affairs held the delegated authority to author the Decision, and the Office of Indian Gaming played its proper role in the decisionmaking process. In any event, Scotts Valley cannot show that it has been treated differently from any other similarly situated tribes in violation of the IRA. Because Scotts Valley fails to demonstrate that the Decision was arbitrary and capricious, an abuse of discretion, or

otherwise not in accordance with law, the Court should deny the Tribe's motion for summary judgment and grant summary judgment in Interior's favor.

I. The Court Must Defer to the Secretary's Permissible Construction of IGRA in Part 292.

Prior to challenging the Decision's merits, Scotts Valley claims as a threshold matter that Part 292's requirement that a tribe show a "significant historical connection" to a parcel of land in order for it to qualify as restored lands "exceed[s] [Interior's] statutory authority" under IGRA. Pl. Br. 20. According to the Tribe, because IGRA "does not limit restored lands to those exhibiting a 'significant historical connection,'" Part 292's requirement that Tribes so demonstrate is unlawful. *Id.*

Chevron USA, Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), provides the guiding principles for determining the deference due to an agency's interpretation of a statute it administers. Under *Chevron*, a court must first determine whether "Congress has directly spoken to the precise question at issue." *Id*. at 842-43. If Congress did not specifically address the matter, the court "must respect the agency's construction of the statute so long as it is permissible." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Courts have accorded Interior *Chevron* deference in interpreting ambiguous language in IGRA generally, *see Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 465 (D.C. Cir. 2007), and the restored lands exception specifically, *see Rancheria v. Jewell*, 776 F.3d 706, 712 (9th Cir. 2015).

As discussed below, IGRA's reference to "restoration of lands," 25 U.S.C. § 2719(b)(1)(B)(iii), is ambiguous, and Interior's requirement that a restored tribe show a "significant historical connection" to a parcel in order for it to qualify as a "restoration of lands" is a permissible construction of the statute. Under *Chevron*, therefore, the Court must defer to Interior's reasonable interpretation of IGRA.

A. IGRA's reference to "restoration of lands" is ambiguous and subject to interpretation by Interior.

The statutory interpretation question presented in this case focuses specifically on the Interior's interpretation of the phrase "the restoration of lands." 25 U.S.C. § 2719(b)(1)(B)(iii). As many courts have recognized, IGRA does not define the term "restoration of lands," and the language is susceptible to multiple meanings. *See, e.g., Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney for W. Dist. of Mich.* ("*Grand Traverse II*") 198 F. Supp. 2d 920, 928 (W.D. Mich. 2002), *aff'd* 369 F.3d 960 (6th Cir. 2004) ("Neither 'restored' nor 'restoration' is defined under § 2719(b)(1)(B)(iii)." (citations omitted)); *Confederated Tribes of Coos v. Babbitt*, 116 F. Supp. 2d 155, 161 (D.D.C. 2000) ("'Restoration' is not defined in the statute."); *Oregon v. Norton*, 271 F. Supp. 2d 1270, 1277 (D. Or. 2003) ("No statutory provision defines the terms 'restore' or 'restoration of lands' and no provision expressly limits the Secretary's authority to interpret these terms."). Accordingly, courts that have directly considered the terms "restoration of lands" have held that the language is ambiguous, and subject to interpretation by Interior through regulation. *See Redding Rancheria v. Salazar*, 881 F. Supp. 2d 1104, 1116 (N.D. Cal. 2012), *aff'd in part, rev'd in part on other grounds sub nom. Rancheria v. Jewell*, 776 F. 3d 706 (9th Cir. 2015) ("The Restored Lands Exception is therefore ambiguous."); *Norton*, 271 F. Supp. 2d at 1277 (finding the term "restoration of lands" ambiguous).

Scotts Valley disagrees, arguing that the phrase "restoration of lands" is unambiguous, and asks this Court to adopt a "straightforward reading of 'restored' as applied to lands." Pl. Br. 21. But there is nothing straightforward about the Tribe's contention that the provision must be interpreted broadly as encompassing a "historical connection between the restored tribe and restored lands" but not simultaneously permitting Interior to require "any particular quality of historical relationship" between a tribe and the land. *Id.* at 21-22. The Tribe's own attempt to explain the allegedly "straightforward reading" of "restoration of lands" refutes any notion that the provision is unambiguous on its face. Indeed, the D.C. Circuit, when confronted with

competing explanations of the "plain meaning" of the term "restoration of lands" in 25 U.S.C. § 2719(b)(1)(B)(iii), held that "neither side c[ould] prevail by quoting the dictionary." *City of Roseville v. Norton*, 348 F.3d 1020, 1027 (D.C. Cir. 2003).

Scotts Valley relies on several cases to support its claim that "restoration of lands" is unambiguous because it has a "plain meaning that may be applied." Pl. Br. 20-21 (quoting *Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 437 F. Supp. 2d 1193, 1213 (D. Kan. 2006)). But the question for this Court is not whether the statutory language has *a meaning* that may or even has been applied, but rather whether the statutory language has *only one meaning* that can be applied. The Supreme Court has made clear that "[a] court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., Inc.*, 545 U.S. 967, 982 (2005). None of the Tribe's cited authorities, all of which predate Interior's 2008 enactment of Part 292, show that "restoration of lands" is unambiguous. To the contrary, one of the Tribe's cited cases specifically held that "restoration of lands" is ambiguous, and that Interior's reasonable interpretation of that language is entitled to *Chevron* deference. *Norton*, 271 F. Supp. 2d at 1277-80 (holding that "restoration of lands" is ambiguous and deferring to Interior's reasonable construction of the statute). And the Tribe's other cited authority similarly recognized the "varying possibilities" for interpreting the phrase. *Confederated Tribes,* 116 F. Supp. 2d at 162 (noting that "[t]he varying possibilities [of interpreting the "restored lands" exception] highlight the ambiguity of section 2719(b)(1)(B)(iii)"); *Grand Traverse II*, 198 F. Supp. 2d at 935 (stating that "the term 'restoration' may be read in numerous ways to place belatedly restored tribes in a comparable position to earlier recognized tribes while simultaneously limiting after-acquired property in some fashion").

Because IGRA's reference to "restoration of lands" is ambiguous, this Court need only consider whether Part 292's requirement for a "significant historical connection" reflects a

permissible construction of the statute. *See Redding Rancheria*, 881 F. Supp. at 1113 ("Congress unambiguously intended to authorize the Secretary to promulgate regulations interpreting § 2719."); *Norton*, 271 F. Supp. 2d at 1278 (noting that IGRA "contains an implicit delegation of authority to the Secretary to provide meaning to the terms 'restore' and 'restoration' of lands."). As detailed below, it does.

B. Interior's interpretation of "restoration of lands" in Part 292, including the "significant historical connection" requirement, is entitled to *Chevron* deference.

Part 292's provisions addressing the "restored lands exception," including the "significant historical connection" requirement, were the result of extensive deliberations on the part of Interior to balance competing concerns embodied in IGRA. As the Ninth Circuit explained,

> The restored lands exception . . . must be read in the context of IGRA's general prohibition against gaming on lands acquired after 1988. The exception was not intended to give restored tribes an open-ended license to game on newly acquired lands. Rather, its purpose was to promote parity between established tribes, which had substantial land holdings at the time of IGRA's passage, and restored tribes, which did not. In administering the restored lands exception, the Secretary needs to ensure that tribes do not take advantage of the exception to expand gaming operations unduly and to the detriment of other tribes' gaming operations.

Rancheria, 776 F.3d at 711 (citing *City of Roseville*, 348 F.3d at 1030). To achieve this balance between restored and established tribes, Part 292 sets forth requirements for a newly acquired parcel to qualify as a "restoration of lands." "Essentially, the regulation requires the [restored] tribe to have modern connections to the land, historical connections to the area where the land is located, and requires a temporal connection between the acquisition of the land and the tribe's restoration." 73 Fed. Reg at 29,354. As discussed above, the regulations specifically require that restored tribes have a "significant historical connection" to the sought-after land.

With respect to that requirement, the preamble to the rule explains that the "significant" qualifier was meant to "reinforce[] the notion that the [tribe's] connection must be something more than 'any' connection" to the land. *Id.* at 29,366. This concept is in keeping with case law predating Part 292's enactment, which concluded that Interior should consider such connections

in analyzing what constitutes "restored lands" within the meaning of IGRA. The preamble notes that Interior considered prior case law in formulating the rule, specifically mentioning *Confederated Tribes* and *Grand Traverse II* as decisions that "provid[ed] guidance for the interpretation of section 2719(b)(1)(B)(iii)." *Id.* at 29,365. Both cases discuss the importance of a tribe's historical connection to a parcel for the purpose of a restored lands determination. *Confederated Tribes*, 116 F. Supp. 2d at 165 (stating that the Department should take a tribe's historic connection to a parcel into consideration in determining whether lands qualify as restored); *Grand Traverse II*, 198 F. Supp. 2d at 936 (stating that, in light of "evidence of [a site's] historical significance" to the Grand Traverse Band, the site "may be reasonably considered to be part of a restoration of lands in an historic, archeologic and geographic sense").

In addition to considering prior judicial interpretations of what would qualify as "restored lands" under IGRA, Interior solicited public comment on the "significant historical connection" language before finalizing the rule. Interior received comments suggesting "that the tests for significant historic connections and modern connections are deficient because they allow tribes without true historic ties and with inadequate modern ties to game on lands under the restored lands exception." 73 Fed. Reg at 29,361. But Interior also "received comments suggesting the opposite of this argument as well," and its response was to adopt "final regulations [that] consider both sides of this issue." *Id.* Interior's ultimate construction of IGRA is one that requires "something more than 'any' connection" to a parcel or simply "evidence that a tribe merely passed through a particular area," but does not restrict a tribe to areas that were historically exclusively used and occupied by the tribe. *Id.* at 29,366.

Accordingly, in including the "significant historical connection" requirement in Part 292, Interior struck a reasonable balance between IGRA's competing goals with respect to gaming by restored tribes. That requirement embodies a permissible construction of IGRA's ambiguous restored lands exception. Interior's years of expertise administering IGRA, coupled with the agency's explanation of the "significant historical connection" language, give this Court every reason to defer to Interior's appropriate interpretation of the statute.

Scotts Valley argues otherwise, claiming that the "significant historical connection" requirement is an impermissible construction of IGRA because the "regulatory requirement that the historical connection be a 'significant' one does not appear in IGRA" and the requirement arbitrarily "narrows the availability of the restored lands exception to restored tribes." Pl. Br. 22. Both arguments lack merit.

As an initial matter, the Tribe's suggestion that the "significant historical connection" requirement is per se impermissible because that precise phrase does not appear in IGRA is off-base. As the Ninth Circuit explained in rejecting a similar argument in *Redding Rancheria*, IGRA "merely creates an exception for restored lands, without attempting to define the term or dictate how it should be administered. Congress authorized the Secretary to promulgate regulations to achieve those purposes, as is standard practice in today's understanding of administrative law." 776 F.3d at 712; *see also* 25 U.S.C. § 9 (permitting the President, through the Secretary, to prescribe regulations implementing "the various provisions of any act relating to Indian affairs"). If Scotts Valley were correct that Interior could not impose specifications beyond IGRA's exact language, the agency would be "limit[ed] . . . to parroting the statutory text." *Redding Rancheria*, 881 F. Supp. 2d at 1118. "Delegation, and *Chevron,* assume that agencies will apply criteria not found on the face of the statute." *Id.* Moreover, Scotts Valley undercuts its own claim by admitting that IGRA's "restoration of lands" terminology "contemplates an historical connection between the restored tribe and restored lands." Pl. Br. 22. But of course, neither "historical connection" nor "significant historical connection" appear in IGRA's statutory language.

Scotts Valley points the Court to *Koi Nation of Northern California v. United States Department of the Interior*, 361 F. Supp. 3d 14 (D.D.C. 2019). Pl. Br. 23. *Koi* interpreted a different statutory term than the one at issue in this case, and ultimately provides little guidance to this Court. *Koi* concerned a tribe that Interior inadvertently treated as terminated for a period of almost fifty years. 361 F. Supp. 3d at 27-28. The question in *Koi* was whether the tribe qualified as a "restored tribe" under IGRA after Interior administratively "reaffirmed" its status

as a federally recognized tribe. *Id.* at 29. IGRA states only that the restored lands exception applies to "the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii). Part 292, however, defined "restored to Federal recognition" as including only tribes that were (1) restored by Congress, (2) recognized through the Federal acknowledgment process set out at 25 U.S.C. Part 83, or (3) recognized by court order. *Koi*, 361 F. Supp. 2d at 32 (citing 25 C.F.R. § 292.10(b)). The government argued that because the tribe was administratively restored, it did not meet the criteria for "restored to Federal recognition" under Part 292. *Id.* at 21. The court rejected this argument, finding that the language in IGRA was unambiguous as applied to the Koi Nation and that Interior's interpretation of that language in Part 292 was too narrow and "contrary to the plain language of the statute." *Id.* at 42. The court also found that even if the language was ambiguous, Interior's interpretation of it violated the Indian canon of construction, "which counsels that statutory ambiguities are to be resolved in favor of Indians." *Id.*

Koi is inapposite here. It involved a different statutory term — "restored to federal recognition" — that the court found was unambiguous. *Koi* did not concern or otherwise discuss the "restoration of lands" component of the "restored lands" provision. Courts have recognized that the term "restoration of lands" as used in IGRA is ambiguous and subject to multiple meanings. *See, e.g., Redding Rancheria*, 881 F. Supp. 2d at 1116; *Oregon*, 271 F. Supp. 2d at 1277; *Confederated Tribes of Coos*, 116 F. Supp. 2d at 162. Thus, *Koi Nation*'s holding that Interior violated the plain language of IGRA is not relevant here, where the term at issue is ambiguous.

Likewise without merit is the Tribe's claim that the "significant historical connection" requirement is an impermissible "narrowing" of the restored lands exception. First, Scotts Valley has not shown that requiring a "significant historical connection" is in fact a "narrowing" of the circumstances under which a tribe could claim lands are restored pursuant to IGRA. Scotts Valley argues that the "significant" moniker "substantially increases the evidentiary burden on restored tribes" as compared to IGRA itself, Pl. Br. 22, but points to no evidence to support that

assertion, other than a general argument that "the adjective 'significant' connotes a qualitative difference." *Id.* As Interior explained in the preamble to Part 292, the word "significant" was used because it "reinforces the notion that the connection must be something more than 'any' connection." 73 Fed. Reg. at 29,366.

Indeed, the D.C. Circuit has noted that Interior's test for "significant historical connection" under Part 292 is essentially the same as the test used before Part 292 was promulgated, indicating that Interior's use of the word "significant" did not have a material difference in the showing required. *See Butte Cnty., Cal. v. Chaudhuri*, 887 F.3d 501, 508 (D.C. Cir. 2018) (noting that the historical connection consideration is the same in "both the *Grand Traverse Band* test and the test established by the regulation"). Before the enactment of Part 292, the *Grand Traverse Band* case laid out the factors to be considered in assessing whether a parcel could qualify as a "restoration of lands": "the factual circumstances of the acquisition, the location of the acquisition, [and] the temporal relationship of the acquisition to the tribal restoration." 46 F. Supp. 2d 689, 700 (W.D. Mich. 1999); *see also Confederated Tribes,* 116 F. Supp. 2d at 164 (discussing the *Grand Traverse* factors as appropriate limitations on the "restoration of lands"); *Wyandotte Nation*, 437 F. Supp. 2d at 1214 (applying the *Grand Traverse* factors). The preamble to Part 292 notes that Interior considered prior case law in formulating the rule, specifically mentioning *Confederated Tribes* and *Grand Traverse II* as decisions that "provid[ed] guidance for the interpretation of section 2719(b)(1)(B)(iii)." 73 Fed. Reg. at 29,365. Given therefore that the "significant historic connection" test is based on the same test used and approved by courts before the promulgation of Part 292, Scotts Valley has failed to show that the use of the word "significant" resulted in an impermissible narrowing of the availability of the restored land exception to restored tribes.

Wyandotte Nation provides an illustrative example. There the court considered the *Grand Traverse* factors in upholding the National Indian Gaming Commission's[2] conclusion that the

[2] Under 25 C.F.R. § 292.3, a "tribe may submit a request for an opinion to either the National Indian Gaming Commission or the Office of Indian Gaming" as to whether newly acquired lands that are already

tribe there did not have a "sufficient historical nexus" to their desired tract "to qualify it as restored land." *Wyandotte Nation,* 437 F. Supp. 2d at 1215. The National Indian Gaming Commission explained that "in all of the cases that have analyzed the restored lands exception, there was a 'significant, longstanding historical connection to the land — sometimes even an ancient connection.'" *Id*. Based on that precedent, the Commission found that the tribe's occupation of the tract for eleven years was insufficient to establish a historical connection. *Id.* *Wyandotte Nation* was decided before Part 292's enactment, and yet the Court still upheld the agency's demand for a "sufficient historical nexus" under IGRA. Scotts Valley, therefore, cannot show that Part 292's "significant historical connection" requirement is actually a "narrowing" of the restored lands exception because as *Wyandotte Nation* held, such a requirement was permissible pre-Part 292, and as *Butte County* found, the requirement is common to both Part 292 and the pre-Part 292 requirements.

Finally, it is telling that the Tribe makes no attempt to argue that, in the absence of the significant historical connection requirement, the Vallejo Parcel would have qualified as restored lands either under the *Grand Traverse* factors or under some other interpretation of IGRA itself. This is unsurprising given that Scotts Valley purports to make a "plain meaning" argument, but never provides a "plain meaning" of the phrase "restoration of lands." The Secretary's interpretation must be upheld under *Chevron*.

C. The Indian canon of construction does not overrule Interior's permissible interpretation of the restored lands exception.

Scotts Valley argues that even if IGRA were "deemed ambiguous with regard to the restored lands exception," the Court should not afford *Chevron* deference to Interior's interpretation in Part 292. Instead, the Tribe asserts, *Chevron* deference should be "trumped," Pl. Br. 23, by the Indian canon of construction, under which "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Montana v.*

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in trust meet, or will meet, one of the exceptions in Part 292. Thus, in the case of lands that are already in trust, a final opinion as to whether a tribe meets the restored lands exception may be authored either by Interior (within which the Office of Indian Gaming sits) or the National Indian Gaming Commission.

Blackfeet Tribe of Indians, 471 U.S. 759, 766 (1985) (citation omitted). According to Scotts Valley, the "significant" historical connection requirement, when construed in accordance with the Indian canon of construction, violates IGRA because it "conflicts with the best interests of a restored Tribe that Congress intended to benefit." Pl. Br. 24.

The Indian canon does not change the reasonableness of Interior's interpretation here. Several judges in this district have held that "the Indian canon of construction does not apply for the benefit of one tribe if its application would adversely affect the interests of another tribe." *Confederated Tribes of Grand Ronde Cmty. of Or. v. Jewell*, 75 F. Supp. 3d 387, 396 (D.D.C. 2014), *aff'd*, 830 F.3d 552 (D.C. Cir. 2016); *see also E. Band of Cherokee Indians v. U.S. Dep't of the Interior*, No. CV 20-757 (JEB), 2021 WL 1518379, at *10 (D.D.C. Apr. 16, 2021) (noting that while the D.C. Circuit has not ruled that the Indian canon does not apply when all tribal interests are not aligned, several district court judges have so ruled); *Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 442 F. Supp. 3d 53, 80 (D.D.C. 2020) (same); *Connecticut v. U.S. Dep't of the Interior*, 344 F. Supp. 3d 279, 314 (D.D.C. 2018) (holding that where all tribal interests were not aligned, Indian canon did not apply); *Forest Cnty. Potawatomi Cmty. v. United States*, 330 F. Supp. 3d 269, 280 (D.D.C. 2018) ("The Court declines to apply the Indian law canon where the interests of all tribes are not aligned." (citation omitted)). Indeed, most cases finding that this exception from the Indian canon apply "dealt with statutes that benefit all Indians generally, such as IGRA." *E. Band of Cherokee Indians*, 2021 WL 1518379, at *10 (citing *Sault Ste. Marie Tribe*, 442 F. Supp. 3d at 80).

Here, the Indian canon is inapplicable because no single interpretation of "restoration of lands" would be "in favor of the Indians" in the collective. *Blackfeet Tribe*, 471 U.S. at 767. Were this Court to agree with the Tribe that the Indian canon should be applied to IGRA's restored lands exception, it is not clear how this Court would apply the canon in a manner that would benefit all Indians, rather than simply Scotts Valley. Indeed, the Yocha Dehe Wintun Nation's attempt to intervene as a defendant in this litigation provides an easy example of how applying the canon to benefit Scotts Valley would not benefit all Indians.

Further, although IGRA's purpose overall is to facilitate Indian gaming subject to federal regulation, the portion of the statute at issue here limits that purpose by prohibiting gaming on lands acquired after 1988. 25 U.S.C. § 2719(a). The restored lands exception represents Congress's attempt to ensure that this prohibition does not overly burden restored tribes in comparison to tribes that were more established when IGRA passed. *See City of Roseville,* 348 F.3d at 1030 (noting that "the exceptions in IGRA § 20(b)(1)(B) serve purposes of their own, ensuring that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones"). As the Ninth Circuit noted, the restored lands exception's "purpose was to promote parity between established tribes . . . and restored tribes," which meant in part not giving restored tribes "an unfair advantage over established tribes who generally cannot game on any lands acquired after IGRA was passed." *Rancheria*, 776 F.3d at 711-12 (citation omitted).

Part 292 reflects this intent to ensure that no tribe is unfairly disadvantaged relative to others by balancing competing sets of tribal interests. If Interior were to interpret the restored lands exception in a highly restrictive manner, imposing requirements that few tribes could satisfy, it could be viewed as an interpretation adverse to the interests of restored tribes that did not have trust lands in 1988. Those tribes would be at a disadvantage compared to tribes that had reservations when IGRA was passed (and therefore would be able to conduct gaming much more readily). This interpretation would be "favorable" to those latter tribes, but not to the former. Similarly, if Interior were to eliminate the requirement for a "significant" historical connection (which the Scotts Valley implies, but does not explicitly state, is the result that it seeks), that interpretation would also favor some tribal interests over others as well. Restored tribes would potentially be able to game on later-acquired lands with little regard for the tribes' historical connection to those lands, providing them with a significant advantage over other tribes that would be limited to gaming on lands held in trust before IGRA's enactment or meeting one of IGRA's other exceptions for lands acquired after 1988.

Further, even where the Indian canon might be applicable, "*Chevron* deference does not disappear," but simply applies with "muted effect." *Cobell v. Salazar*, 573 F.3d 808, 812 (D.C. Cir. 2009). Here, even that "muted" application should lead the Court to defer to Interior's interpretation, which appropriately balances the interests of both restored and established tribes and generally "favor[s] the Indians," thus, falling within the range of permissible interpretations. *Massachusetts v. U.S. Dep't of Transp.*, 93 F.3d 890, 893 (D.C. Cir. 1996) (citing *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1444–45 (D.C. Cir. 1988)). Interior's interpretation of the restored lands exception in Part 292 is sufficiently broad, incorporating limitations that this Court has suggested are consistent with "the plain meaning of [IGRA], the statutory context, and the principle of liberal construction in favor of Indians." *Confederated Tribes*, 116 F. Supp. 2d at 164; *see also* 73 Fed. Reg. at 29,365 (explaining that *Confederated Tribes* "provide[d] guidance for the interpretation of section 2719(b)(1)(B)(iii)").

In short, the Indian canon cannot save Scotts Valley where its preferred interpretation of IGRA could very well be to the detriment of other tribes. *See Forest Cnty. Potawatomi*, 330 F. Supp. 3d at 280 ("The Court declines to apply the Indian law canon where the interests of all tribes are not aligned."). Part 292 permissibly balances IGRA's competing goals and should be upheld under *Chevron.*

II. Interior's application of the "restored lands" exception to Scotts Valley properly applied the Part 292 requirements and was not arbitrary or capricious.

Scotts Valley claims that, even if its facial attack on the validity of Part 292's significant historical connection requirement fails, the Decision should still be overturned because it violates the APA in a number of respects. Scotts Valley contends that the Decision is arbitrary because it "failed to comply with the governing regulation, failed to take relevant considerations and data into account, and failed to consider the Tribe's evidence *in toto.*" Pl. Br. 27. None of the Tribe's arguments withstand scrutiny. As detailed below, in reaching its Decision, Interior properly applied Part 292, examined all relevant data, and ultimately reached a conclusion that articulated a "rational connection between the facts found and the choice made." *State Farm*, 463 U.S. at 43

(citation omitted). While Scotts Valley may be dissatisfied with the Decision, that alone does not constitute an APA violation. *See, e.g.*, *New York v. DHS*, 414 F. Supp. 3d 475, 579–80 (S.D.N.Y. 2019) (noting that the "true gravamen of an APA claim is not that the agency has exercised its discretion to select a policy with which the plaintiff disagrees and to promulgate a rule that the plaintiff does not endorse") (citations omitted). Interior's Decision is well within the bounds of reasoned decisionmaking and should be upheld.

A. Interior properly applied Part 292's requirement that the Tribe establish a "significant historical connection" to the Vallejo Parcel.

Assuming that Part 292's significant historical connection standard is valid as a matter of law, Scotts Valley nevertheless argues that Interior held the Tribe to standards beyond those required in 25 C.F.R. § 292.12. According to Scotts Valley, Interior's failure to apply its own regulations as written resulted in an arbitrary decision. As discussed below, the record and the regulations themselves refute the Tribe's argument. Interior properly applied Part 292.

i. Interior appropriately required Scotts Valley to show a "significant historical connection" to the Vallejo Parcel itself.

Scotts Valley asserts that Interior violated § 292.12 by requiring the Tribe to show a significant historical connection to the Vallejo Parcel specifically, rather than accepting a demonstrated historical connection "in the vicinity of the land." Pl. Br. 28. Interior appropriately applied its regulations in requiring Scotts Valley to provide evidence that connected the Tribe to the Vallejo Parcel itself.

Section 292.12 provides that "[t]o establish a connection to the newly acquired lands [for the purposes of the restored lands exception] . . . [t]he tribe must demonstrate a significant historical connection *to the land*." *Id.* (emphasis added). The structure of Section 292.12 indicates that the connection demonstrated must be to the newly acquired land itself, not simply its surrounding area. To be sure, § 292.2 provides that a tribe can show a "significant historical connection" to a parcel by providing evidence of "the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land." But Interior has always

interpreted Part 292 (as well as the restored lands exception prior to the enactment of Part 292) as necessitating evidence that the tribe actually used or occupied the parcel itself. As Interior explained in its 2012 decision regarding the Tribe's request concerning the Richmond Parcels:

> The Department used the word "vicinity" in the Part 292 regulations to permit a finding of restored land on parcels where a tribe lacks any direct evidence of actual use or ownership of the parcel itself, but where the particular location and circumstances of available direct evidence on other lands cause a natural inference that the tribe historically used or occupied the subject parcel as well. *Part 292's inclusion of the word "vicinity" was not meant to expand IGRA's definition of "restored land," which always has been limited to lands that a tribe used or occupied.* It was included because it would be unduly burdensome and unrealistic to require a tribe to produce direct evidence of actual use or occupancy on every parcel within a tribe's historic use and occupancy area.

AR0006399 (emphasis added). After considering all of the Tribe's evidence here, Interior concluded that Scotts Valley failed to establish an inference that the Tribe's ancestors used or occupied the Vallejo Parcel, as opposed other land in the North Bay or at Clear Lake. AR0011614-15.[3]

Interior's interpretation of the significant historical connection requirement as necessitating evidence of a connection to the Vallejo Parcel itself is consistent with the agency's prior Indian lands opinions. For example, in the Decision, Interior cited to the Bear River Indian Lands Determination from 2002, which also concerned a restored California tribe that sought to game on a parcel outside the boundaries of the tribe's last reservation. AR0011614. In authoring a positive restored lands opinion for the Bear River Band, Interior explained that the parcel in question was located among many sites known to have been used by the tribes' ancestors, and, accordingly, Interior could assume that the parcel itself was also used by the tribe. *Id.*[4] By

[3] Before this Court, the Tribe does not argue that its evidence in fact established a "significant historical connection" to the Vallejo Parcel itself. Thus, there is no reason for the Court to revisit or review Interior's determination on that account.

[4] *See also* Memorandum from NIGC Acting General Counsel to NIGC Chairman Deer 12-13 (Aug. 5, 2002), *available at* https://www.nigc.gov/general-counsel/indian-lands-opinions ("Because the parcel is located in the middle of these many sites that were used by the [tribe's ancestors], we can assume that the parcel, too, was used by the [tribe's ancestors] . . . . The Tribe has therefore proven a historical and cultural nexus to the land sufficient to show that the parcel was not merely an acquisition but a restoration of previously used lands.").

contrast, as the Decision explained, even if several favorable assumptions were granted to the Tribe, the evidence provided by Scotts Valley would "place the Band's ancestors in the vicinity of the Parcel, [but] it [would] not create the necessary, natural inference that they occupied or used the parcel itself." AR0011615. Indeed, Interior compared Scotts Valley's evidence to that submitted by the Guidiville Band, which received a negative restored lands opinion because it "did not provide historical documentation of the Band's presence on the Parcel, or lands in its vicinity." *Id.* (quotations omitted).

Interior's interpretation is also in keeping with precedent. In *Confederated Tribes of Grand Ronde Community*, the D.C. Circuit explained that Interior has historically "interpreted 'vicinity' in . . . [the] restored-lands context to mean 'those circumstances' of use and occupancy lead[ing] to the natural inference that the tribe also made use of the parcel in question.'" 830 F.3d at 566. In that case, the court contrasted Interior's regulations regarding the so-called "initial reservation" exception, which requires "that the land in question is '*within* an area where the tribe has significant historical connections'" with "the restored-lands exception, which requires at least 'a significant historical connection *to the land*' itself." *Id.* (quoting 25 C.F.R. § 292.6(d); § 292.12(b)).

Scotts Valley disagrees, citing *Butte County* to argue that the historical connection need only "be *in the vicinity* of the parcel, not necessarily to the parcel itself." Pl. Br. 29. According to the Tribe, the *Butte County* court found sufficient that tribal members lived in several villages "that were either on or 'very close to' the parcel and that tribal members had 'almost certainly traversed' the parcel even though they did not actually live upon it." *Id.* (citing *Butte County*, 887 F. Supp. 3d at 508. *Butte County*, however, supports Interior's position, not the Tribe's. In *Butte County*, Interior "determined that the Tribe . . . *had direct historical connections to the* . . . *parcel*, not just the nearby [land]." *Butte County*, 887 F.3d at 508 (emphasis added). Specifically, Interior found that the parcel was situated just one mile from a site of spiritual significance to the tribe, and that the tribe (1) had historically lived in villages on or very close to the parcel, (2) had "hunted, fished, and gathered on the parcel," and (3) had "traversed [the parcel] to reach other

tribes with whom they traded and participated in joint religious ceremonies." *Id.* Thus, the evidence cited by Interior and quoted by the *Butte County* court supported the tribe's connection to the parcel itself, not simply the surrounding area as Scotts Valley suggests. *Butte County*, thus, is of no help to the Tribe.

At bottom, Interior appropriately construed Part 292 as requiring evidence that supports a finding that a tribe actually used or occupied the land is seeks to have "restored." That is reasonable interpretation of the regulation, reflects the agency's considered judgment in its area of expertise, and is entitled to deference by this Court. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2411 (2019) (upholding the general rule that courts "should defer to the agency's construction of its own regulation"). Scotts Valley's arguments to the contrary should be rejected.

ii. Interior did not demand that Scotts Valley show a "continuous" connection to the Vallejo Parcel for it to qualify as restored lands.

Scotts Valley next argues that the Decision should be remanded because Interior improperly "required that the Tribe demonstrate *continuous* historical connection to the Vallejo Parcel" in order to prove a significant historical connection to the land. Pl. Br. 29 (emphasis added). Interior did nothing of the kind.

As the Tribe correctly notes, *see id.*, and the Decision itself acknowledged, AR0011613, Part 292's "significant historical connection" requirement does not require a tribe to show an uninterrupted or continuous connection to the land. Rather, as explained in the preamble to the final rule promulgating Part 292, what is required is "something more than evidence that a tribe merely passed through a particular area." 73 Fed. Reg at 29,366. But evidence of an uninterrupted or continuous connection, should it exist, is certainly relevant to Interior's analysis of whether a parcel qualifies as "restored lands" for a restored tribe because such a connection is inherently more than "transitory or brief in nature," and thus helpful in establishing a significant historical connection. *Id.* For example, in the context of the Decision here, Interior referenced the Grand Traverse Band's connection to its requested parcel as part of a previous restored lands determination, pointing out that the Band "had continuously resided on the land in question for

uninterrupted centuries." AR0011604. Interior noted that this fact supported the *Grand Traverse II* court's conclusion in that "'the Band's evidence clearly established that the parcel was of historic, economic and cultural significance to the Band'" and that the site qualified as a restoration of lands. *Id.* (quoting *Grand Traverse II,* 198 F. Supp. 2d at 937).

Scotts Valley suggests that by favorably referencing the Grand Traverse Band's "continuous, centuries-old connection" to its land, AR0011613, Interior mandated that Scotts Valley show a continuous connection to the Vallejo Parcel in order for it to qualify as restored lands. But Interior only referenced the Grand Traverse Band's longstanding historical connection to serve as a contrast to Scotts Valley's comparatively weaker evidence of an "inconsistent, if not transitory, presence" of a single tribal member (Augustine) in the North Bay region. *Id.* Interior highlighted that contrast in the context of a broader discussion about the Tribe's ancestors' living and labor patterns, all of which Interior explained fell short of demonstrating occupancy or subsistence use in the North Bay region or on the Vallejo Parcel itself. AR0011613-14. Interior merely drew a comparison between evidence present in a successful restored lands request to highlight the comparative factual weakness of the Tribe's request. But in no way did Interior require, or even suggest, that uninterrupted connection is a factual pre-requisite to a finding of significant historical connection, or otherwise cite the lack of such an uninterrupted connection as dispositive in the 2019 Decision.

Likewise, Scotts Valley's attempted comparison to Interior's 2012 positive restored lands opinion for the Karuk Tribe does nothing to support the Tribe's argument. To start, the Tribe's contention that Interior "overlooked . . . [the] decision for the Karuk Tribe," Pl. Br. 30, is simply wrong. Rather, the Decision specifically discussed the evidence submitted by the Karuk Tribe to establish a significant historical connection that ultimately resulted in a favorable restored lands determination in for the tribe. AR0011606. That evidence consisted of a government report — corroborated with additional correspondence and oral history — that linked the Karuk Tribe to the specific parcel it sought to have restored. *Id.* And while Scotts Valley claims that the Karuk Tribe's evidence indicated only "episodic tribal activity in the area" of its parcel, Pl. Br. 30, the

decision for the Karuk Tribe actually states that the tribe had a "long-standing presence" at the parcel's location that "preceed[ed] federal record keeping" and persisted through the 1970s. *See* Karuk Indian Lands Op. at 10, ECF No. 48-10.

Thus, the Tribe's attempt to paint itself with the same brush as the Karuk Tribe is unavailing. And in any event, Interior's favorable decision for the Karuk Tribe is beside the point, given that neither Karuk, nor Scotts Valley, were required to show evidence of an "uninterrupted or continuous" historical connection to their chosen parcels. Again, Scotts Valley's disagreement with Interior's weighing of available evidence does not, without more, constitute an APA violation. Scotts Valley's claim this on this count fails.

iii. Interior properly considered geographic distance between the Vallejo Parcel and the Tribe's former Rancheria in reaching the Decision.

Scotts Valley's final basis for claiming that Interior violated Part 292 is its argument that Interior improperly considered the geographic distance between the Tribe's former Rancheria and the Vallejo Parcel in reaching the Decision. Pl. Br. 31-32. Scotts Valley argues that "if lands are historically significant and located within the same state as the tribe, the distance of restored lands from the tribe's aboriginal territory or reservation is irrelevant." *Id.* at 31. The Tribe's argument confuses Interior's inquiry.

As Interior explained in response to comments on the proposed Part 292 regulations, "[n]ewly acquired lands with significant historical and cultural connections may or may not include those that are close to aboriginal homelands." 73 Fed. Reg. at 29,361. Thus, if a tribe establishes a significant historical connection to a parcel that is geographically distant from its aboriginal lands or reservation, that distance would not preclude the tribe from claiming the parcel as restored lands. But that does not mean geographic distance is "irrelevant" to the "significant historical connection" inquiry if a tribe has not yet established a historical connection to its desired parcel. As Interior explained in the Decision, "[a] parcel's proximity to a tribe's historic reservation or rancheria" can serve as evidence that the tribe has a significant historical connection to that parcel. AR0011602.

In the Decision here, Interior discussed the distance between the Vallejo Parcel and the site of Scotts Valley's former Rancheria because, in some cases, having a short distance between a tribe's former reservation/rancheria and its desired parcel helped the tribe to establish a historical connection. *Id.* (discussing two favorable restored lands determinations for tribes whose former rancherias were ten miles or less from their desired parcels); *see also* AR0011604 (explaining that the fact that the Grand Traverse Band's parcel was "at the core of that tribe's aboriginal territory" was a factor that helped establish a significant historical connection). But as Interior noted, in this case, the Vallejo Parcel "is located approximately 90 driving miles (75 straight- line miles) southeast of the former Scotts Valley Rancheria." AR0011603. Hence, the agency determined that the distance between the Vallejo Parcel and the former Rancheria, "standing alone, d[id] not evince a significant historical connection" to the parcel. *Id.* That distance did not, as the Tribe argues, impose "greater . . . evidentiary burden" on the Tribe or count as evidence against a significant historical connection; it simply did not affirmatively help Scotts Valley's case as it had in the case of other tribes.

In explaining its Decision, it was entirely appropriate under Part 292 for Interior to discuss the distance between the Vallejo Parcel and the former Rancheria as a relevant factual component of the restored lands inquiry. Scotts Valley's argument otherwise should be rejected.

B. Interior's Decision on the Vallejo Parcel considered all relevant factors and appropriately weighed the evidence submitted by the Tribe.

Scotts Valley argues that even if Interior properly applied the significant historical connection requirement, the Decision is nonetheless arbitrary because Interior failed (1) to consider IGRA's policy goals, (2) to assess relevant evidence submitted by the Tribe, and (3) to weigh the Tribe's evidence in total. The record shows otherwise, and the Tribe's argument amounts to an invitation to this Court to substitute its assessment of the evidence for that of the expert agency, which is prohibited by the APA. *See State Farm,* 463 U.S. at 43. The Court should decline.

i. Interior did not improperly fail to consider IGRA's policy goals.

Scotts Valley asserts that Interior violated the APA because it "failed to take into account basic policy considerations underpinning IGRA" in reaching the Decision here. Pl. Br. 32. The Tribe's argument misses the mark.

In considering an agency's decision under the APA, a reviewing court must determine whether the challenged decision was "based on consideration of the relevant factors . . . ." *State Farm,* 463 U.S. at 42. In this respect, an agency action should only be deemed arbitrary "if the agency . . . entirely failed to consider an important aspect of the problem." *Id.* at 43. Here, "the problem" faced by Interior was whether the Vallejo Parcel would qualify as a restoration of lands under IGRA. To answer that question, Part 292 mandates that the agency consider whether the factual evidence shows that the tribe has a modern, temporal, and significant historical connection to the parcel. 25 C.F.R. § 292.12.

This factual inquiry is distinct from the broad policy goals articulated in IGRA. It is true that IGRA generally embodies a policy of promoting tribal economic development and self-sufficiency, 25 U.S.C. § 2702(1), and that the restored lands exception has a purpose of promoting "parity between established tribes . . . and restored tribes." *Rancheria*, 776 F.3d at 711. But those general policy goals cannot help Interior answer the factual and legal question of whether a tribe has a modern, temporal, and significant historical connection to a particular parcel such that it can serve as a restoration of lands. Hence, IGRA's generic policy goals were not "an important aspect of the problem" in this case, and Interior's failure to discuss those goals to the Tribe's satisfaction cannot be a violation of the APA. In addition, as described above, although IGRA's purpose overall is to facilitate Indian gaming subject to federal regulation, the general prohibition on gaming on lands acquired after 1988 introduces a competing policy goal of placing reasonable limits on Indian gaming. 25 U.S.C. § 2719(a).

In any event, to the extent IGRA's general policy goals could be considered relevant to Interior's analysis of whether a particular parcel qualifies as a restoration of lands, those considerations are already embedded in Part 292. *See, e.g.*, 73 Fed. Reg. at 29,367 (explaining

that "the regulation's requirement of a modern, historical and temporal connection adequately implements the policy goals of IGRA."). Interior applied those policy-minded standards in rendering its Decision on the Vallejo Parcel in this case.

Scotts Valley does not explain how Interior should have evaluated IGRA's policy goals here, except to suggest that the agency should have considered the Tribe's "landless" status[5] and need for "economic development" when determining whether the Vallejo Parcel constituted restored lands. Pl. Br. 33-34. But Part 292 does not include landless status or a tribe's financial status as relevant considerations and, thus, Interior did not violate the APA by failing to consider them. To the extent that the Tribe argues that the agency was required to consider those factors, it would need to be in the form of a facial attack on Part 292, which the Tribe has not pled or argued. In any event, Interior did not ignore these considerations. In the Decision, Interior explicitly acknowledged that "[t]he United States does not currently hold any land in trust for the Band." AR0011597. And with regard to tribal economic development and self-sufficiency, while the Decision concluded that the Vallejo Parcel was not appropriate for gaming, the Decision noted that the Tribe could consider "alternative, non-gaming uses for the Parcel." AR0011615.

What Scotts Valley appears to actually want is for Interior to have used IGRA's broad goals to somehow excuse the Tribe from meeting the Part 292 requirements or to otherwise tip the scale of the restored lands inquiry in the Tribe's favor. While case law in this Circuit may contemplate that the restored lands exception should be read "broadly," *City of Roseville*, 348 F.3d at 1030, that does not mean that Interior can or should permit a restored tribe to game on a

[5] The Tribe cites Interior's Bear River Indian Lands Opinion (Aug. 5, 2002), ECF No. 48-11, in support of its argument that the "continuing status of a restored tribe as landless is obviously a relevant consideration in making the restored lands inquiry." Pl. Br. 33. But the fact that the tribe was landless in that case had no bearing on Interior's analysis of whether the parcel in question was a restoration of lands. ECF No. 48-11 at 11 (noting that "the fact that officials within the [Bureau of Indian Affairs] recommended that land be taken into trust for a landless Tribe does not in itself indicate that the land was, in fact, restored. . . . We therefore must look further for indicia that the land acquisition in some way restores to the Tribe what it previously had."). This underscores the point that IGRA's broad policy goals with respect to landless tribes are not relevant to the factual inquiry of whether a particular parcel qualifies as a restoration of lands.

parcel that does not in fact qualify under Part 292. Ignoring or diminishing IGRA or Part 292's requirements in favor of policy considerations would necessarily result in arbitrary (and unlawful) decisionmaking. Here, Interior applied the appropriate statutory and regulatory requirements and did not violate the APA.

ii. Interior's considered all relevant evidence submitted by Scotts Valley.

Scotts Valley next contends that the Decision should be overturned because Interior failed to consider relevant evidence that was indicative of the Tribe's connection to the Vallejo Parcel. The record shows, however, that Interior considered the Tribe's evidence, but concluded that it was insufficient to establish a significant historical connection to the parcel. Because Scotts Valley's argument "can be distilled to mere disagreements with the decision[] reached by the agency," Scotts Valley has not shown an APA violation. *Cayuga Nation v. Zinke*, 302 F. Supp. 3d 362, 365 (D.D.C. 2018) (denying a temporary restraining order in an APA case because plaintiff was unlikely to succeed on the merits); *see also Wyandotte Nation*, 437 F. Supp. 2d at 1216 ("[T]he Court's role in reviewing the [agency's] . . . restoration analysis is not to inject its own views or pick sides, but rather, to ascertain whether the [agency] examined the relevant data and articulated a rational connection between the facts found and the decision made." (citation omitted)).

First, Scotts Valley argues that Interior ignored evidence "which showed the presence of a likely majority of tribal members in close vicinity to the Parcel in 1837, including Augustine who would later become the tribal leader." Pl. Br. 35. The evidence the Tribe claims supports this assertion is a list of "about thirty Pomo Indian children [who] were baptized at the Mission San Francisco Solano in Sonoma" in September 1837. AR0004568. Contrary to the Tribe's claim, Interior directly considered this evidence in reaching the Decision, noting:

> The earliest reference to Augustine suggested by the Band seems to be on a list of Indian children baptized in 1837 at Mission San Francisco Solano, located in the city of Sonoma, 17 miles from the Parcel. The list includes a six year-old child named Agustin who could have been the Band's ancestor Augustine, but this is not verified. According to the Band, 29 other Pomo children were baptized at the

> mission at that time, at least 14 of whom were from the same village as Augustine, and at least two of whom were ancestors of the present-day Band.

AR0011609 (quotation marks and citations omitted). In considering whether this evidence was indicative of "occupancy or subsistence" use of the Vallejo Parcel, Interior noted that "although allegedly baptized at Mission San Francisco Solano in Sonoma, Augustine returned to Clear Lake shortly thereafter." AR0011613. The Decision further states that "the record does not disclose how long Augustine or any other children remained in residence at the mission. . . . [n]or does the record document the extent of religious instruction or vocational training received by the Band's ancestors, which the Band alleges took place." *Id.* Thus, Interior weighed the Tribe's referenced evidence and ultimately concluded that it was insufficient "insofar as the [Tribe] seeks to establish a close connection with the Parcel based on its ancestors' presence at the mission." *Id.* Plainly, Scotts Valley does not agree with Interior's conclusion, but that does not mean that the "evidence was ignored." Pl. Br. 35.

Second, the Tribe asserts that Interior ignored "evidence of Augustine and other [tribal] members' actual residence as ranch laborers in the vicinity of the Vallejo Parcel." *Id.* In support, Scotts Valley points to the report of its historian which states that the Tribe's "ancestors and their families occupied private ranchos at Clear Lake *and* the Napa Valley." AR0005026. That report asserts further that "by the 1860s there was a well-established pattern: Indians from Clear Lake lived part of the time on ranches around the lake and part of the time they took their families to Napa and other places in the south to do agricultural labor for wages." *Id.* Again, the Decision shows that Interior considered this evidence, but concluded that it did not show "occupancy or subsistence use in the vicinity of the land" to support a finding of a significant historical connection to the Vallejo Parcel. 25 C.F.R. § 292.2

Specifically, the Decision referenced evidence of Augustine's "back-and-forth movements between the Clear Lake area and the North Bay region." AR0011613. However, the Decision explained that these movements, even if "representative of those of the [Tribe's]

ancestors," were indicative of an "inconsistent, if not transitory, presence at odds with the Band's claim to occupancy and subsistence use of the Parcel." *Id.* The Decision went on to state that:

> even if Augustine's experience as migrant worker extended to the Band's other ancestors, and even if such work constituted occupancy or subsistence use, there is no evidence — direct or inferential — indicating that the Band's ancestors conducted such activity on the Parcel (as opposed to elsewhere).

AR0011613. Interior further discussed the Band's claim that "evidence of the Band's ancestors working at various ranchos . . . creates an inference that those ancestors must have also worked at Rancho Suscol . . . . the boundaries of [which] would have surrounded the Vallejo Parcel." *Id.* Without accepting that the Tribe actually had demonstrated that its members labored on the Rancho Suscol, Interior explained that:

> such an inference, even if granted, is insufficiently broad and cannot serve as the basis to connect the [Tribe] with the Parcel itself. Rancho Suscol extended over "approximately 84,000 acres — an area equal to more than 130 square miles"; in contrast, the Vallejo Parcel comprises only 128 acres.

Id. Accordingly, once more, the record shows that Interior considered the evidence the Tribe claims it ignored. *See NLRB v. Beverly Enters.–Mass., Inc.,* 174 F.3d 13, 26 (1st Cir. 1999) (agency decision maker "can consider all the evidence without directly addressing in his written decision every piece of evidence submitted by a party"); *see also Accrediting Council for Indep. Colls. & Schs. v. DeVos*, 303 F. Supp. 3d 77, 111 (D.D.C. 2018) ("[A]n agency 'need not address every aspect of [a] plaintiff's [claims] at length and in detail' so long as it 'provide[s] enough information to ensure the Court that [it] properly considered the relevant evidence underlying [a] plaintiff's request[.]'" (quoting *Mori v. Dep't of the Navy*, 917 F. Supp. 2d 60, 65 (D.D.C. 2013))). Where Interior considered the relevant data and articulated a rational basis for its Decision, the Tribe's disagreement with Interior's treatment of that evidence does not constitute a violation of the APA.

iii. Interior properly evaluated Scotts Valley's evidence in total.

Scotts Valley's final basis for claiming that Interior failed to consider relevant data is that the agency "failed to undertake analysis of the historical record *in toto*, instead considering each

form of historical evidence separately and dismissing each as insufficient." Pl. Br. 37. The record shows Interior properly evaluated the evidence in considering whether Scotts Valley had demonstrated a significant historical connection to the Vallejo Parcel.

As the Decision explained, because the Vallejo Parcel is not "located within the boundaries of the tribe's last reservation under a ratified or unratified treaty," and the Tribe "d[id] not assert that the Parcel is in the vicinity of the Band's villages or burial grounds," the Tribe had to "establish a significant historical connection to the Vallejo Parcel by demonstrating its occupancy or subsistence use in the vicinity of the land" under the Part 292 requirements. AR0011601-03; *see also* 25 C.F.R. § 292.2. As discussed above, Interior evaluated three general bodies of evidence to determine whether the Tribe had shown occupancy or subsistence use: (1) the contemplated cession of an area encompassing the Vallejo Parcel in the 1851 Treaty, (2) the designation in the 1851 Treaty of an area approximately two miles from the Parcel as a provisions pickup site, and (3) the history of Augustine's movements between Clear Lake and various ranchos in the North Bay region throughout the mid to late 1800s. AR0011603-15.

In the case of the 1851 cession, the Decision explained that there is no "*per se* rule that parcels with ceded territory are 'restored lands.'" AR0011606. While the Vallejo Parcel's location in a ceded territory created a "favorable inference," the agency noted that the Tribe "must still demonstrate additional historical connection to the parcel." *Id.* Interior then determined that the designation of Vallejo in the 1851 Treaty as a "pick-up site for . . . supplies" did not show the additional historical connection required, in part because the arrangement was to last only three years and was not indicative of occupancy or subsistence use by the Tribe in the vicinity of the Parcel. AR0011606-08. Finally, as referenced above, Interior evaluated the wide-ranging evidence submitted pertaining to Augustine's alleged presence on certain missions and ranchos in the North Bay region, and concluded that Augustine's behavior could not be extrapolated to the Tribe as a whole, nor could it serve to connect the Tribe to the vicinity of the Vallejo Parcel. AR0011611-15.

There can be no serious argument that the Interior did not evaluate the relevant evidence "in toto" in reaching the Decision here. Pl. Br. 37. For example, the Decision engaged with the evidence as a collective whole by hypothetically taking some of the Tribe's arguments and evidence as true prior to engaging with others. *See, e.g.*, AR0011613 ("even assuming arguendo that all of the sometimes inconclusive references to Augustine . . . did in fact refer to the same individual . . ."); *id.* ("even assuming that Augustine's living and labor patterns are representative of those of the Band's ancestors . . ."); AR0011614 ("even if Augustine's experience as migrant worker extended to the Band's other ancestors, and even if such work constituted occupancy or subsistence use . . ."). The Decision also stated that "while the [Tribe's] narrative concerning its ancestors' dispersal throughout the North Bay region during the mid-1800s is compelling, missing from this Request is the identification of significant historical sites in the vicinity of the Parcel[.]" Ultimately, Interior concluded, "based upon the reasoning" contained throughout the Decision, "that the [T]ribe . . . failed to demonstrate the required significant historical connection to the Vallejo Parcel." AR0011615.

Scotts Valley's claim that the "administrative process require[s] that the Department evaluate the complete record, all the historical evidence together, to make the determination" is equally without merit. Pl. Br. 38. The Tribe relies upon *Mashpee Wampanoag Tribe v. Bernhardt*, 466 F. Supp. 3d 199, 218 (D.D.C. 2020), where this Court found that Interior acted arbitrarily by "evaluat[ing] each piece of evidence in isolation." That case is distinguishable, however. First, in *Mashpee*, Interior had issued formal guidance in the form of an M-Opinion for assessing whether a tribe was "under federal jurisdiction" and the guidance specifically required evidence to be "viewed in concert." *Id.* at 209. Here, there is no such requirement that the evidence be viewed "in concert." Rather, the APA requires simply that the agency "examine the relevant data." *State Farm*, 463 U.S. at 43. Second, as discussed above, the record makes clear that Interior considered all the evidence submitted by the Tribe as a collective whole before concluding that Scotts Valley failed to establish a significant historical connection to the Vallejo Parcel.

Further, even if Interior could be faulted for not specifically stating in the Decision that the Tribe's evidence was considered in its totality, which the APA does not require, that alone would not prove fatal. The Court may "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned," *Bowman Transp., Inc. v. Arkansas–Best Freight Sys., Inc*., 419 U.S. 281, 286 (1974). The Court's role is to examine the record to determine whether the agency has articulated a rational basis for its decision, not to assess whether the agency could have more boldly emphasized any particular element of its rationale. *State Farm*, 463 U.S. at 50. The record articulates a rational basis for Interior's conclusion regarding the Tribe's historical connection to the Vallejo Parcel. The APA does not require more.

III. Interior Followed Appropriate Procedures.

In addition to challenging the merits of the Decision, Scotts Valley argues that Interior's action was procedurally deficient because (1) the Principal Deputy Assistant Secretary – Indian Affairs ("Principal Deputy") did not have the authority to make the challenged Decision, and (2) Interior's Office of Indian Gaming was purportedly excluded from the deliberations. Pl. Br. 11-19. Both arguments lack merit. Under Interior's internal guidance, the Principal Deputy has delegated authority to issue restored lands determinations, and the Office of Indian Gaming played an appropriate role in the Decision. The Court should reject Scotts Valley's claims.

A. The Principal Deputy had the delegated authority to issue the Decision.

Scotts Valley claims that Interior's action should be set aside because the Principal Deputy allegedly lacked the delegated authority to render the Decision in the first instance. Scotts Valley does not dispute that the Assistant Secretary – Indian Affairs ("Assistant Secretary") holds delegated authority from the Secretary to issue a restored lands opinion. Pl. Br. 15. So the sole question for the Court is whether that same authority has been delegated to the Principal Deputy. A review of Interior's Departmental Manual ("DM") shows it has.

Under 209 DM 8.4, the Principal Deputy "is delegated all program and administrative authorities of the Assistant Secretary - Indian Affairs necessary to fulfill the responsibilities

identified in 110 DM 8.2." ECF No. 48-9 at 1. 110 DM 8.2, in turn, states that the Principal Deputy "serves as the first assistant and principal advisor to the Assistant Secretary – Indian Affairs in developing and interpreting program policies affecting Indian Affairs (IA) and discharges the duties assigned by the Assistant Secretary – Indian Affairs." 110 DM 8.2 further provides that the Principal Deputy "is responsible for . . . regulation of Indian gaming," and notes that the Office of Indian Gaming is one of four offices that report to the Principal Deputy. ECF No. 48-6 at 1-2. Pursuant to his delegated responsibility over the "regulation of Indian gaming," the Principal Deputy was authorized to render the final agency action here.

Scotts Valley offers three reasons why the delegation of authority to the Principal Deputy in 209 DM 8.4 in conjunction with the responsibilities identified in 110 DM 8.2 "cannot be read to include redelegated authority to actually make decisions on whether lands are eligible for gaming under Part 292." Pl. Br. 14. None of the Tribe's arguments are persuasive.

First, the Tribe argues that reading 110 DM 8.2 to allow the Principal Deputy to render the Decision here "would constitute an effective redelegation of the [Principal Deputy] of *all* authority held by the [Assistant Secretary]." *Id.* That contention is without support. Although the authority of the Principal Deputy is understandably broad, that authority is cabined by 110 DM 8.2. 110 DM 8.2 not only identifies the Principal Deputy's responsibility over the regulation of Indian gaming but also identifies the Office of Indian Gaming as one of only four offices under the Principal Deputy's direct supervision. The Tribe argues that "the general delegation of authority to [the Principal Deputy] clearly establishes an advisory role only and merely restates the need for a specific redelegation of any particular authority to actually discharge a duty." Pl. Br. 13-14. But the Tribe declines to mention the Principal Deputy's *express* delegated responsibility over the regulation of Indian gaming. This Court need not decide the full breadth of the Principal Deputy's delegated authority, where the DM expressly contemplates his authority over the kind of decision — e.g., one that involves Indian gaming — at issue here.

Next, the Tribe contends that the term "assigned" in 110 DM 8.2 "cannot be read to constitute a redelegation of authority to make decisions on tribal [Indian lands opinions]

requests." Pl. Br. 14. But contrary to the Tribe's assertion, there is an express delegation of authority in 209 DM 8.4, which states that "the Principal Deputy . . . is delegated all program and administrative authorities of the Assistant Secretary . . . necessary to fulfill the responsibilities identified in 110 DM 8.2." In addition, 110 DM 8.2 lists the assigned responsibilities to which the Assistant Secretary's delegated authority applies, including "regulation of Indian gaming." Thus, the Tribe's argument falls flat.

Finally, Scotts Valley asserts that interpreting 209 DM 8.4 and 110 DM 8.2 to encompass the delegated authority for the Decision here would run afoul of the DM's "clear policy preference in favor of express publication of redelegation of authorities that may impact the public." Pl. Br. 14. The Tribe also suggests that if Interior wanted the Principal Deputy to have authority over Indian lands opinions, Interior should have published as express redelegation in the form a DM release as required by 209 DM 8.3. But there is no need for the agency to issue a new DM release articulating the delegation to the Principal Deputy, given that the already published version of the DM includes the express delegation of responsibility to the Principal Deputy over the regulation of Indian gaming.

B. The Office of Indian Gaming was not improperly excluded from the Decision.

The Tribe also claims that the Decision is procedurally deficient and should be set aside because Interior improperly "excluded" the Office of Indian Gaming from the decisionmaking process. Pl. Br. 15. Scotts Valley's argument fails for at least four reasons.

First, neither IGRA nor Part 292 make the Office of Indian Gaming "primarily" or exclusively responsible for determining whether a parcel qualifies as restored lands. The ultimate authority to determine whether an acquisition qualifies for IGRA's restored lands exception rests with the Secretary. 25 U.S.C. § 2719. As discussed above, that authority has been properly delegated to the Assistant Secretary and thereon to the Principal Deputy. Other Interior components have the ability to support the Principal Deputy's analysis in various ways. For example, under 25 C.F.R. § 292.3(b), if a "tribe seeks to game on newly acquired lands that require a land-into-trust application . . . the tribe must submit a request for an opinion to the

Office of Indian Gaming" to obtain "an opinion on whether its newly acquired lands meet, or will meet, one of the exceptions in" Part 292, including the restored lands exception. Interior interprets the Office of Indian Gaming's role in restored lands opinions to be a primarily administrative one: the Office processes incoming "requests to take land into trust for the purpose of conducting gaming," ECF No. 48-6 at 2, and "serves as the keeper of the administrative record" for such requests, AR0010783. But while the Office has the ability to offer policy insight on request to the Principal Deputy, that does not confer on the Office the authority to offer legal advice to the Principal Deputy as to whether a particular acquisition meets the statutory and regulatory criteria to qualify as restored lands under IGRA. That authority rests exclusively with Interior's Solicitor's Office, which is authorized to "conduct all needed legal work concerning whether . . . land is eligible for gaming pursuant to the Indian Gaming Regulatory Act . . . and 25 C.F.R. Part 292."[6] And overall, the only Interior officials authorized to actually decide whether a tribe has met IGRA's restored lands exception are the Secretary, the Assistant Secretary, and her Principal Deputy. Because the Principal Deputy issued the Decision here, there was nothing deficient about the process.

Second, to the extent Interior's 2008 guidance cited by the Tribe, *see* ECF No. 48-4, suggests that the Office of Indian Gaming is the only component authorized to make a recommendation to the Assistant Secretary (or her Principal Deputy) regarding whether a particular parcel should qualify as "restored lands," that guidance is not binding on the agency. The 2008 guidance was almost immediately superseded by subsequent guidance that made clear the role of the Solicitor's Office in restored lands opinions.[7] Moreover, in February 2019,

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[6] *See* Checklist for Solicitor's Office Review of Fee-to-Trust Applications from Hilary C. Tompkins, Solicitor 2 (Jan. 5, 2017), attached as Ex. 1. *See also* 43 U.S.C. § 1455 (noting that Federal law vests the Solicitor's Office with the sole authority to perform "the legal work of the Department of the Interior"). The DM accordingly delegates to the Solicitor "all the authority of the Secretary, including . . . all the legal work of the Department." 209 DM 3.1. In addition, 200 DM 1.6(c) provides that "[w]ith the exception of specified legal functions, the authority of the Secretary respecting the legal work of the Department is delegated to the Solicitor in 209 DM 3."

[7] *See* Memorandum of Agreement between Office of the General Counsel of the National Indian Gaming Commission and the Office of the Solicitor 1 (Sept. 11, 2012), attached as Ex. 2 (noting

Interior withdrew the 2008 guidance, finding that it "d[id] not comport with the law," given that Federal law "vests the Solicitor's Office with the sole authority to 'perform the legal work of the Department of the Interior.'"[8] That legal work includes the analysis of whether a particular parcel meets Part 292's criteria.

Finally, even if the 2008 guidance had not been superseded or withdrawn, Interior's failure to follow that guidance would not undermine the Decision. While it is "axiomatic that an agency must adhere to its own regulations," agencies "need not adhere to mere general statement[s] of policy." *Brock v. Cathedral Bluffs Shale Oil Co*. 796 F.2d 533, 536 (D.C. Cir. 1986) (citations and quotations omitted); *see also City of Williams v. Dombeck*, 151 F. Supp. 2d 9, 22 (D.D.C. 2001). The 2008 guidance laid out a suggested internal process by which Interior could make the restored lands determinations. It did not "establish a 'binding norm'" on the agency, rather, it merely "announces the agency's tentative intentions for the future." *City of Williams*, 151 F. Supp. 2d at 22 (citations and quotations omitted). Because the 2008 guidance never had the "weight of law," Interior's failure to follow that guidance—by allegedly declining to demand that *only* the Office of Indian Gaming advise the Principal Deputy as to whether the Vallejo Parcel constituted restored lands—cannot be violation of the APA. *Id.* at 23; *see also Jolly v. Listerman*, 672 F.2d 935, 940 (D.C. Cir. 1982) (explaining that not "every piece of paper emanating from a Department or Independent Agency is a regulation").

Third, the record belies any notion that the Office was "excluded" from the process. To start, the Court cannot consider the Tribe's self-serving declaration arguing that the Office was "excluded from . . . deliberations on the Tribe's requested Indian lands opinion." Locklear Decl. ¶ 6, ECF No. 48-2. The declaration is outside the administrative record, post-dates the Decision, and thus cannot be a basis for this Court's review, particularly without a showing that it falls within any of the accepted exceptions to the principle that the court cannot consider information

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that the Solicitor's Office provides advice to the Secretary as to whether "lands are eligible for gaming pursuant to IGRA").

[8] Withdrawal of 2008 guidance on restored lands for restored tribes (Feb. 25, 2019), attached as Ex. 3, (quoting 43 U.S.C. § 1455).

that falls outside the agency record. *See IMS, P.C. v. Alvarez*, 129 F.3d 618, 623 (D.C. Cir. 1997). Further, the record shows the Office of Indian Gaming[9] was involved in processing Scotts Valley's request, *see, e.g.,* AR0010783-85 (setting meeting between the Office of Indian Gaming and the Solicitor's Office to coordinate on the Indian Lands Opinion); AR0011492 (receiving correspondence from the State of California); AR0011505 (receiving correspondence from the Solano County); AR0011563 (receiving requests from Congress); AR0011152 (communicating suspension of Indian Lands Opinion request to the Tribe), and that the Tribe itself regularly submitted materials to and held meetings with the Office, *see, e.g.,* AR0009900; AR0010151; AR0010161; AR0010384; AR0011512; AR0010531; AR0010684; AR0010687; AR0010690; AR0011509; AR0011518; AR0011523. The record is thus at odds with the notion that the Office of Indian Gaming played no role in Scotts Valley's request.

IV. The Decision does not violate the IRA.

Finally, Scotts Valley argues that the Decision is invalid because the application of Part 292's significant historical connection requirement violates the "privileges and immunities" clause of the IRA by treating the Tribe "differently from restored tribes (and requests for an [Indian Lands Opinion]) considered by [Interior] before the adoption of the regulation in 2008." Pl. Br. 25. The IRA states that

> [A]gencies of the United States shall not promulgate any regulation or make any decision or determination pursuant to the [IRA] . . . or any other act of Congress, with respect to a federally recognized Indian tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.

25 U.S.C. § 5123(f). As evidence of alleged violation of its "privileges and immunities . . . relative to other federally recognized tribes," *id*., Scotts Valley points the Court to Interior's favorable restored lands opinion for the Pokagon Band of Potawatomi Indians ("the Pokagon Band"). The Tribe claims the Pokagon Band's decision shows Scotts Valley was treated

[9] Paula Hart is the Director of the Office of Indian Gaming; references to correspondence with Ms. Hart in the administrative record are indicative of the Office's involvement.

differently from a "similarly situated tribe[]" that sought restored lands prior to Part 292's enactment. Scotts Valley is not "similarly situated" to the Pokagon Band and the Tribe's privileges have not been diminished by Part 292.

In 1994, Congress restored the Pokagon Band to Federal recognition via the Pokagon Restoration Act. Restoration of Federal Services to the Pokagon Band of Potawatomi Indians, Pub. L. No. 103-323, 108 Stat. 2152 (previously codified at 25 U.S.C. §§ 1300j) (1994). That Act directed Interior to "acquire real property for the Band" and named ten counties in Michigan and Indiana that would comprise the Band's "service area." *Id*. §§ 6-7, 108 Stat. at 2154. In 1997, Interior issued a favorable restored lands opinion to the Pokagon Band, concluding "that the parcel in question qualified as restored lands because (1) the parcel fell within the ten-county service area identified in the [Pokagon Restoration] Act and (2) the service area was part of the territory that the Band's predecessors had ceded to the United States through treaties." AR0011605; *see also* Pokagon Band Opinion (Sept. 19, 1997), 7-8, *available at* https://www.nigc.gov/general-counsel/indian-lands-opinions.

Scotts Valley argues that but for Interior's enactment of the significant historical connection requirement, the Vallejo Parcel would have been considered restored lands *per se* because the parcel falls within a large tract of land "ceded by the Tribe and others in the 1851 unratified treaty." Pl. Br. 25. The Tribe contends that a similar scenario — a parcel's location within a ceded area — was enough for the Pokagon Band to obtain a favorable restored lands determination prior to Part 292's enactment. As evidence, the Tribe cites *Grand Traverse II*'s observation that, in the Pokagon Band decision, Interior "concluded that the lands at issue [for Pokagon] were part of a restoration simply on the basis that the lands at issue were within the twenty-county area ceded by the tribe to the United States." *Id.* (quoting *Grand Traverse II*, 198 F. Supp. 2d at 935). But there was more to the Pokagon Band's favorable decision than the brief summary quoted from the *Grand Traverse II* court. Indeed, in the sentence immediately following the one quoted above, the court in *Grand Traverse II* noted that Interior more broadly considered whether the parcel in question is "located within the areas historically occupied by

the tribe[].” 198 F. Supp. 2d at 935. As the Decision here explained, Interior has never held the position that “lands ceded by treaty and subsequently returned to a tribe qualify, *per se*, as restored land for the purposes of the restored lands exception.” AR0011603; *see also* AR0011605 (explaining that the National Indian Gaming Commission reached an unfavorable restored lands decision for the Karuk Tribe, even though the parcel sought by the Karuk “was located within the cessation area of a treaty”).

Indeed, the Decision explicitly distinguished the instances that Scotts Valley claimed established some sort of *per se* rule regarding ceded lands. *See* AR0011603-06 (discussing why the prior favorable decisions for the Grand Traverse and Pokagon Bands did not establish a *per se* rule about previously ceded territory). With respect to the Pokagon Band in particular, the Decision noted that, in addition to being within previously ceded lands, the parcel in question was also in the ten county service area identified by Congress in the Pokagon Restoration Act, AR0011604-05. Both the D.C. Circuit and Interior have interpreted the Pokagon Restoration Act as authorizing the Secretary to acquire restored lands for the Pokagon within that service area, which “corresponds to the Tribe’s ancestral home.” *Taxpayers of Mich. Against Casinos v. Norton*, 433 F.3d 852, 867 (D.C. Cir. 2006); *see also id.* at 866 (stating that, in light of the Pokagon Restoration Act and the history of the Pokagon Band, “it is clear that Congress set forth appropriate boundaries to guide the Secretary in her acquisition of land in trust for the [Pokagon Band]”). The Vallejo Parcel, by contrast, “does not fall within the Scotts Valley Band’s service area, which includes the counties of Mendocino, Lake, Sonoma, and Contra Costa, but not Solano.” AR0011605. Thus, there was no *per se* rule applied to the Pokagon Band. Rather, there are important factual distinctions between the Vallejo Parcel from the Pokagon’s restored lands; factual distinctions that have nothing to do with the requirements of Part 292.

Scotts Valley argues otherwise, claiming that the Decision’s “first and presumably most important distinction between the Pokagon and the Tribe[]” was the applicability of Part 292’s requirements to the Tribe’s request. Pl. Br. 25-26. The Decision refutes the Tribe’s argument, given that the factual differences between the Vallejo Parcel and the Pokagon Band’s desired

land were the first and primary distinguishing factors relied on by Interior. AR0011604-05. True, the Decision went on to discuss the different legal environment applicable to Scotts Valley under Part 292. But Interior never suggested that those requirements were the reason the agency would not consider the Vallejo Parcel's "location within an area ceded by treaty" to be a "dispositive factor in establishing a significant historical connection." AR0011605. Rather, Interior explained that had never been the rule, and that the Tribe would still need to "demonstrate [an] additional historical connection comparable to that identified in *Grand Traverse Band* and for the Pokagon Band and Karuk Tribe" for the Vallejo Parcel to qualify as restored lands. AR0011606.

At bottom, Scotts Valley's claim to disparate treatment rests on two premises (1) that Interior once — for the Pokagon Band — regarded a parcel's location within ceded lands to be dispositive in determining that the parcel qualified as restored lands, and (2) that Interior refused to apply the same rule to the Tribe because of the subsequent enactment of Part 292. The Decision appropriately explained that the Tribe's *per se* dispositive rule regarding ceded territory never existed, not for the Pokagon Band nor for the agency writ large prior to the enactment of Part 292. *See* AR0011603-06.

Interior's refusal to apply that nonexistent rule to the Tribe, whether under Part 292 or otherwise, does not show any violation of Scotts Valley's privileges or immunities relative to other tribes under the IRA. Rather, Scotts Valley seeks to bootstrap its subjective disagreement with Interior's weighing of Scotts Valley's proffered evidence under guise of an IRA violation. Scotts Valley is not similarly situated to Pokagon Band, and this claim accordingly fails.

CONCLUSION

For the foregoing reasons, the Court should reject Scotts Valley's motion for summary judgment and enter summary judgment for Interior.

Respectfully submitted this 1st day of October, 2021.

TODD KIM
Assistant Attorney General
Environment & Natural Resources Division

/s/ Devon Lehman McCune
DEVON LEHMAN McCUNE
Colorado Bar No. 33223
Senior Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
999 18th St., South Terrace, Suite 370
Denver, CO 80202
Tel: (303) 844-1487
Fax: (303) 844-1350
devon.mccune@usdoj.gov

Counsel for Federal Defendants

OF COUNSEL
John-Michael Partesotti
United States Department of the Interior
Office of the Solicitor