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-1544 ABJ Judge Amy Berman Jackson

SCOTTS VALLEY'S COMBINED BRIEF IN OPPOSITION TO FEDERAL DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT AND REPLY BRIEF IN SUPPORT OF SCOTTS VALLEY'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiff Scotts Valley Band of Pomo Indians ("Plaintiff" or "Tribe") has moved for summary judgment in this action challenging the Federal Defendants' denial ("Decision") of the Tribe's requested Indian lands opinion that a 128-acre parcel of land located in Vallejo, California ("the Parcel") qualifies as Indian lands for gaming purposes under the Indian Gaming Regulatory Act of 1988 ("IGRA") as restored lands ("the ILO request"). 25 U.S.C. §2719(b)(1)(B)(iii); 25 CFR §292.7-.12. The Tribe moved for summary judgment that the Federal Defendants' regulation defining restored lands exceeded the Secretary's statutory authority under IGRA and violates the Privileges and Immunities provision of the Indian Reorganization Act ("IRA"). The Tribe also established that the Decision signatory lacked redelegated authority to make the decision and that the decision-making process violated past practice and guidelines by excluding the Office of Indian Gaming ("OIG"). Finally, the Tribe identified specific violations of the Administrative Procedure Act ("APA") arbitrary and capricious standard: the Federal Defendants failed to faithfully apply their regulation; the Federal Defendants failed to take into account all relevant data before them and governing policy considerations; and the Federal Defendants failed to consider all data before them *in toto* ("Tribe's Opening Memorandum"). For all these reasons, a remand for reconsideration by the Federal Defendants is necessary and appropriate.

The Federal Defendants have filed a cross-motion for summary judgment and their opposition to the Tribe's motion for summary judgment ("Federal Defendants' Memorandum"). The Federal Defendants seek to shield their regulation and their adverse Decision on the Tribe's ILO by deference that courts extend to federal agencies' interpretation of statutes that they administer under certain circumstances. In Part I, below, the Tribe demonstrates that those circumstances do not exist here. The statutory language does not contain the "significant

historical connection" demanded by the Federal Defendants and, even if deemed to be ambiguous, the claimed deference is trumped by the canon of construction resolving ambiguities in favor of an Indian tribe. In any event, the IRA prohibits the imposition of the "significant historical connection" as imposing a greater burden on the Tribe than on other tribes similarly situated. In Part II, the Tribe establishes the analytical flaws in Federal Defendants' attempts to refute the procedural defects in the Decision identified by the Tribe. In Part III, the Tribe shows that the Federal Defendants failed to meet the Tribe's arguments that the analysis of the historical data in the Decision was arbitrary and capricious. In Part IV, the Tribe shows that the Federal Defendants also failed to meet the Tribe's arguments that the Decision did not consider all relevant considerations and data. The Federal Defendants' cross-motion should be denied and the Tribe's motion granted, with the Decision remanded to the Department for reconsideration.

I. The Federal Defendants are not entitled to deference on a regulatory provision that exceeds their statutory authority under IGRA and violates the IRA.

The parties agree that when an agency adopts a regulation under a statute that it administers, the regulation is entitled to deference by the courts if the statutory language is ambiguous. *Chevron USA v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 (1984). Federal Defendants insist that, under this rule, the restored lands for restored tribes exception to the prohibition on gaming for post-1988 trust acquisitions in IGRA[1] is ambiguous and this Court must defer to the regulation in that respect. Federal Defendants' Memorandum at 11-19. But the Federal Defendants rely upon a rule adopted by the Ninth Circuit Court of

[1] IGRA authorizes gaming on Indian lands, which are defined to include reservations and trust land acquired before October 17, 1988, the date of IGRA's enactment. 25 U.S.C. §§2703(4), 2719. IGRA states four exceptions to this prohibition, one of which applies to "the restoration of lands for an Indian tribe that is restored to Federal recognition" and is the exception at issue in this litigation. *Id.,* §2719(b)(1)(B)(iii).

Appeals, not a rule that applies in this Circuit. Further, even if the restored lands exception were ambiguous, the deference rule is trumped in this Circuit by the canon of construction that Indian statutes must be construed for the benefit of the Tribe if there is ambiguity.

A. The District of Columbia Circuit does not follow the Ninth Circuit rule that the restored lands exception is ambiguous so that the Federal Defendants' regulation thereunder is entitled to deference.

The Tribe acknowledged in its opening memorandum that the Ninth Circuit Court of Appeals has determined that the restored lands exception in IGRA is ambiguous, entitling the Federal Defendants to deference regarding the Part 292 regulation on the exception in that circuit. Tribe's Opening Memorandum at n. 16. Citing the same Ninth Circuit case noted by the Tribe, the Federal Defendants now insist that this Court should extend deference to the Federal Defendants in their interpretation of the restored land exception set out in Part 292. Federal Defendants' Memorandum at 11, citing *Redding Rancheria v. Jewell*, 776 F.3d 706 (9th Cir. 2015).[2] But there is no like authority in this Circuit.

The other authority cited by the Federal Defendants in support of court deference to the Department's interpretation of the restored lands exception is overstated. *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney for W. Dist. of Mich.*, 198 F. Supp. 2d 920 (W.D. Mich. 2002), *aff'd* 369 F.3d 960 (6th Cir. 2004) was decided before adoption of the Part 292 regulation and simply observed that the term restoration is not defined in IGRA. *Id.* at 928. The court there went on to reject the proposition that it must extend deference to a decision by the National Indian Gaming Commission under IGRA, instead holding that the decision was only

[2] The only authority cited by the Federal Defendants from this Circuit on this basic point is *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460 (D.C. Cir. 2007). But this case arose before the adoption of the Part 292 regulations in 2008, obviously did not involve those regulations, and instead merely rejected the proposition that only the National Indian Gaming Commission, not the Secretary of the Interior, had authority to administer IGRA and the general deference on decisions made under the act that accompanies that authority.

entitled to substantial weight. *Id.* Similarly, the court in *Confederated Tribes of Coos v. Babbitt*, 116 F. Supp. 2d 155, 161 (D.D.C. 2000) also only observed that the term restoration is not defined in IGRA. And in *City of Roseville v. Norton*, 348 F.3d 1020, 1024 (D.C. Cir. 2003), the court observed that IGRA did not define the term restoration and that there were competing dictionary definitions; but the court had no difficulty concluding that the term must be broadly construed and cannot be limited to land formerly owned by the Indian tribe. Again, all three cases arose before adoption of the Part 292 regulation and the courts obviously did not hold that the Secretary's regulation further limiting the restored tribes exception in IGRA is entitled to deference. *See* Federal Defendants' Memorandum at 11-12.

While there is no authority in this Circuit directly on point, there is authority in this Circuit indicating that courts need not defer to the Secretary's explication of the IGRA restored tribes exception in the regulation.[3] In *TOMAC, Tax of Mich. Against Casinos v. Norton*, 433 F.3d 852, 865 (D.C. Cir. 2006), another case that arose before the Part 292 regulation was adopted, the Circuit Court noted that IGRA does not define 'restore' but indicated that the common use of the term is "to put back into a former or proper position." This Court relied upon *TOMAC*, in part, to conclude that the Secretary had, indeed, exceeded his statutory authority under IGRA when the regulation narrowed the restored tribe provision in the exception to exclude reaffirmed tribes. *Koi Nation of Northern California v. US Dep't of Interior,* 361 F. Supp.3d 14, 43 (D.D.C. 2019). The *Koi Nation of Northern California* court also relied upon *City of Roseville* and *Grand Traverse* to find that the terms 'restore' and 'restored' are plain as

[3] In *Stand Up for California! v. U.S. Dep't of Interior,* 879 F.3d 1177, 1187 (D.C. Cir. 2018), the Circuit Court held that it would defer to a reasonable reading of the distinct, IGRA exception for two-part determinations as set out in the Part 292 regulation. But there was no challenge in that case to the Secretary's authority to refine the exception in the regulation, only a challenge to whether the regulatory requirements for the two-part determination had been met.

applied to restored tribes and include the meanings to give back, return, make restoration. *Id.* Relying upon these latter cases, this Court concluded that the restored lands exception must be broadly read and the Secretary lacks authority to narrow the definition of restored tribes to exclude reaffirmed tribes. *Id.* at 47. By the same reasoning, the Secretary cannot narrow the definition of restored lands, just as the pre-2008 cases cited in *Koi Nation* suggest.

Further, there is one clear difference between this Circuit and the Ninth Circuit that counsels in favor of rejecting the Ninth Circuit rule that deference to the Secretary is required on the restored tribe exception. Both circuits have considered the balance between *Chevron* deference and the Indian canon of construction that statutory ambiguities must be resolved in the tribe's favor. In the Ninth Circuit, courts decline to apply this Indian canon of construction in the face of claimed deference to an agency interpretation. *Redding Rancheria v. Jewell,* 776 F.3d at 713 ("In this circuit, an agency's legal authority to interpret a statute appears to trump any practice of construing ambiguous statutory provisions in favor of Indians.") This Circuit applies the opposite rule. When a statute intended to benefit Indians, such as IGRA, is deemed ambiguous, the Indian canon of construction resolves the ambiguity in favor of the tribe:

> Over time, the D.C. Circuit has clarified the relationship between *Chevron* deference and the Indian canon of construction when an agency and tribe disagree about the proper interpretation of an ambiguous statute. . . Thus, *Chevron* deference may be 'trumped by the requirement that statutes are to be construed in favor of the Indians with ambiguous provisions interpreted for their benefit.

Koi Nation, 361 F. Supp. 3d at 48-49, quoting *Cobell v. Salazar,* 573 F.3d 808, 812 (D.C. Cir. 2009); *Albuquerque Indian Rights v. Lujan,* 930 F.2d 49, 59 (D.C. Cir. 1991) (noting the difference between this Circuit and the Ninth Circuit on the issue); *Muscogee (Creek) Nation v. Hodel,* 851 F.2d 1439, n. 8 (D.C. Cir. 1988); *Sault Ste Marie Tribe of Chippewa Indians v. Bernhart,* 442 F. Supp.3d 53, 78-80 (D.D.C. 2020). Accordingly, even if the restored tribes

exception is deemed ambiguous on the restored land definition, the Indian canon of construction resolves the ambiguity in the Tribe's favor. *Koi Nation* at 50.

The Federal Defendants dispute the suitability of this Circuit's rule on the Indian canon of construction here if the restored lands provision is deemed ambiguous; according to them, the rule is inapplicable because there is no single construction of the term that would benefit *all* Indians. Federal Defendants' Memorandum at 20. This is simply wrong. First, *Montana v. Blackfeet Indian Tribe,* 471 U.S. 759 (1985) does not hold, as the Federal Defendants suggest, that the Indian canon of construction only applies if the proposed construction benefits Indians in the collective rather than a single tribal party. The *Blackfeet Tribe* excerpt quoted by the Federal Defendants is taken out of context. The full sentence reads, "Nor would the State's interpretation satisfy the rule requiring that statutes be construed liberally in favor of the Indians." *Id.* at 767. This is just a statement of the general rule; there is nothing in it or elsewhere in the decision suggesting that the canon only applies if Indians in the collective will benefit as opposed to the tribal party which invokes the rule. Second, the speculative claims of injury by Yocha Dehe Wintun Nation have already been found by this Court to present no real interest that might be impaired by the Tribe's proposed construction of IGRA. *Scotts Valley v. U.S. Dep't of the Interior,* 337 F.R.D. 19 (D.D.C. 2020), *aff'd* 3 F.4th 427 (D.C. Cir. 2021).[4]

[4] As one might expect, Yocha Dehe also argues as *amicus* that the Indian canon of construction is inapplicable because of the same speculative interests it claimed in support of its motion to intervene. Brief of the Yocha Dehe Wintun Nation as *Amicus Curiae* ("Yocha Dehe *Amicus*") at 14. But this Court distinguished *Connecticut v. U.S. Dep't of Interior,* 344 F. Supp.3d 279 (D.D.C. 2018), cited again by Yocha Dehe on these motions for summary judgment, and found that Yocha Dehe's claimed interests were remote, speculative, conjectural, or hypothetical and, as such, were insufficient to support even permissive intervention. 337 F.R.D. at 24-26. Those same interests, claimed by a non-party that is not a restored tribe, are also insufficient to avoid application of the Indian canon of construction in favor of a tribal party clearly intended to receive special consideration by Congress. *Koi Nation* at 50 (claimed harm to other non-party tribes is speculative and falls short of a showing that application of the canon of construction

And there is no question that the restored lands provision was intended by Congress to particularly benefit restored Indian tribes, further justifying application of the Indian canon of construction to such tribes. *See City of Rosevill,*348 F. 3d at 1030 (restored lands exception intended to equalize circumstance for restored tribes); *Sault Ste. Marie Tribe*, 442 F. Supp.3d at 80. In the absence of any evidence that any such tribe would be harmed by the application of the Indian canon, the canon applies in favor of the Tribe, speculative indications to the contrary being insufficient. *Koi Nation,* 361 F. Supp. 3d at 50.

Finally, the Federal Defendants insist that use of the adjective "significant" in the Part 292 regulation is unimportant, that it does not materially up the evidentiary ante, that it is the same evidentiary standard as that used by the court in *Grand Traverse* in 2002. This strains credulity. As the Tribe demonstrated in its Opening Memorandum, 'significant' as an adjective reflects a qualitative difference; the simple presence of the word connotes a higher level of proof. Tribe's Opening Memorandum at 22-23. And read carefully, the *Grand Traverse* court's analysis of the historical connection does not support the imposition of this higher burden of proof. The word "significant," or similar such words, are not used by the court anywhere to indicate the necessity of a particular quality of historic relationship: "Any lands taken into trust that are located within the areas historically occupied by the tribes are properly considered to be lands taken into trust as part of the restoration of lands under §2719." *Grand Traverse,* 198 F. Supp.2d at 936. Almost by definition, areas ceded by tribes in treaties to the United States are

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would be detrimental to tribes generally); *see* Yocha Dehe Wintun Nation Environmental Assessment, May 2011, at 3-57, available at https://www.yolocounty.org/home/showdocument?id=21117 (stating that Yocha Dehe, unlike other Northern California tribes, "was never 'terminated' by the federal government"). The only other authority cited by Yocha Dehe is not from this Circuit and is distinguishable for the reasons discussed above. *See* Yocha Dehe *Amicus* at 13-14.

those areas historically occupied by tribes.[5] And the first indication of an historical connection cited by the court in *Grand Traverse* was the location of the parcel within an area previously ceded by the tribe to the United States. *Id.*[6] The court even observed that there may be other areas of greater historical importance to the tribe, but this did not undermine the existence of an historical connection. *Id.*[7] There is nothing in any of this analysis indicating that the level of historical connection must be "significant," rather than simply exist.

It defies common sense to suggest that the addition of the adjective "significant" does not represent a narrowing of the definition of restored lands. It plainly does and the Secretary, under *Koi Nation*, lacks authority to narrow the availability of the restored lands exception in IGRA in this manner. Even if the term is deemed ambiguous, the Indian canon of construction overcomes any deference owed to the Secretary. The Ninth Circuit's contrary precedent does not support a different outcome here.

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[5] The Tribe relies upon C. Royce, *Indian Land Cessions in the United States, Part 2* (GPO 1899) at California 1 for location of the Parcel. Royce is accepted by courts as authoritative on the location of ceded and reserved lands in Indian treaties. *See United States v. Southern Ute Tribe,* 402 U.S. 159, 162 (1971); *United States v. Santa Fe Pacific R. Co.,* 314 U.S. 339 n. 3 (1946); *Ottawa Tribe of Oklahoma v. Logan,* 577 F.3d 634, 635 (6th Cir. 2009); *Devil's Lake Sioux Tribe v. State of ND,* 917 F.2d 1049, 1051 (8th Cir. 1990); *United States v. Elliott,* 131 F.2d 720, 722 (10th Cir. 1942). Yocha Dehe disputes the accuracy of the Royce maps. Yocha Dehe *Amicus* at 12-13. But the Decision does not dispute the accuracy of the Royce maps and the court "may not supply a reasoned basis for the agency's decision that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983).

[6] Of course, in this respect, the Tribe's historical connection to the Parcel is identical, *i.e.*, it is located within an area ceded by the Tribe to the United States in the unratified 1851 treaty.

[7] It is easily conceivable that an Indian tribe would cede to the United States territory that the tribe regarded as less than significant, as compared to other ceded areas. Nonetheless, as the *Grand Traverse* court indicated, such areas would still be deemed a restoration of the tribe's land by definition.

B. The Part 292 regulation violates the IRA in its disparate treatment of restored tribes before and after adoption of the regulation.

The Federal Defendants insist that the Part 292 regulation, both in the imposition of the "significant" historical connection requirement and in the application of that standard to the Tribe, is consistent with the interpretation of the restored tribes exception applied before adoption of the regulation. *See* Federal Defendants' Memorandum at 14-15, 42-45. This is simply not true as a general proposition, as *Koi Nation* demonstrates. It is also not true with respect to the historical connection requirement. Try as it might, the Federal Government cannot avoid two plain indications of this disparate treatment.

First, that the Parcel is located within the area ceded by the Tribe by treaty under the Part 292 regulation is clearly treated differently from that same historical fact for tribes before the adoption of the regulation. It is correct, as the Federal Defendants argue, that the Tribe views this historical fact as *per se* proof of a significant historic connection. Federal Defendants' Memorandum at 42-43. But the Federal Defendants overlook that the Tribe also argued that, at a minimum, this single fact is entitled to great weight in the significant historical connection inquiry, citing the agency decisions for the Grand Traverse and Pokagon Tribes. AR0004413-4419. There is no question that this historical fact was treated as the single most important indication of an historical connection, with other evidence treated as corroborating this important fact. *See* Tribe's Opening Memorandum at 25-26. So it is beside the point that other, corroborating evidence was also cited in those decisions. The point is that, under the "significant historical connection" standard in the Part 292 regulation, this single fact was not deemed important or weighty and was not weighed in tandem with other evidence for the Tribe. As a result, the Federal Defendants fail to meet the Tribe's argument that the Part 292 regulation resulted in disparate treatment for the Tribe, in violation of the IRA.

Second, the Federal Defendants cannot avoid the effective admission that the Tribe was treated differently on this issue precisely because the Decision was made under the Part 292 regulation, rather than before its adoption as it was in the Pokagon decision. On its face, the Decision distinguishes Pokagon first and foremost on that basis, a clear indication of disparate treatment. Again, that other evidence was also cited in Pokagon does not cure this fatal defect, as the Federal Defendants suggest. Federal Defendants' Memorandum at 45. It is indisputable that the Decision considered it probative that Pokagon was decided before the adoption of the Part 292 regulation and the Tribe's decision was made after. This before-and-after distinction plainly influenced the analysis of the Tribe's evidence. This is sufficient to demonstrate a violation of the IRA. *See Koi Nation* at 55-57 (the Department violated the IRA when it acknowledged that the primary distinction between Koi Nation and Ione Band was the before-and-after distinction).

In the end, the Federal Defendants engage in classic straw man reasoning to argue against the Tribe's IRA claim. "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." Federal Defendants' Memorandum at 45. Even if correct, this fails to meet the Tribe's objection that location within the ceded territory was given great weight, with other evidence treated as corroborating and considered as a whole, in the pre-Part 292 decisions but not for the Tribe.[8]

[8] The Tribe takes exception to the suggestion by the *Amicus* that the Tribe has misrepresented the historical record to the Court on this point. Yocha Dehe *Amicus* at 6. The *Amicus* suggestion is beside the point and is wrong. It is beside the point because the regulation, even as applied in the Decision to the Tribe, does not require aboriginal title or exclusive occupancy to establish a significant historical connection. *See* AR0011611 ("As a starting point, the fact that the Parcel falls within aboriginal territory of the Patwin people, and not the Pomo, is not, *ipso facto*, a barrier to a favorable determination for the Band.") It is wrong because the Tribe never claimed

II. The Federal Defendants do not refute the Tribe's arguments that the Decision violated the APA arbitrary and capricious standard in its decision-making process.

In its Opening Memorandum, the Tribe demonstrates that there are two procedural flaws in the Decision: first, that the Principal Deputy lacked authority to make the decision; and second, that the OIG was improperly excluded from the decision-making process under a binding departmental guideline at the time. *See* Tribe's Opening Memorandum at 11-15 and 15-19, respectively. The Federal Defendants respond that the general language creating the office of Principal Deputy is sufficient to redelegate decision-making authority yet the specific, directive language in the 2008 Guidance is insufficient to designate OIG as the primary office to advise the Assistant-Secretary on the significant historical connection inquiry. The Federal Defendants are wrong on both counts.

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aboriginal title to the area in the vicinity of the Parcel. *See* Tribe's Opening Memorandum at n. 3 ("There was a native village on Rancho Suscol, originally occupied by Patwin natives, not the Tribe's ancestors.") The Tribe acknowledged that its villages were located further north, around Clear Lake, in pre-contact times, with Patwin villages located in the south near the Parcel. AR0002875-76. Even so, the Tribe had aboriginal connections with the area through its contacts with the Patwin and other tribes, by intermarriage, trade, and ceremonial activities. AR0002879; AR0002979. After white contact, and well before the beginning of the American period around 1850, traditional village life and subsistence patterns in the region were broken down as the region was missionized under Spanish control. AR0002982-85. Portions of the region in the south were also depopulated by disease; in particular, smallpox devastated the Patwin communities on Rancho Suscol. AR0003015. As a result, Indians from Clear Lake, very likely including the Tribe's ancestors, were enslaved for the purpose of or enticed to work upon Rancho Suscol. AR0003021. Further, the Tribe's historical leader Augustine can be documented as resident and/or working in the vicinity of the Parcel at different times in his life. AR0004568-74. And an overwhelming majority of current members of the Tribe trace descent from Augustine and other tribal children baptized and resident in close proximity to the Parcel. AR0005303-04. This evidence is sufficient to qualify as restored lands within the meaning of IGRA and as a significant historical connection as applied before adoption of the regulation. Tribe's Opening Memorandum at 19-26.

A. The Federal Defendants' circular reasoning does not demonstrate that the Principal Deputy had redelegated authority to issue the Tribe's ILO.

The Federal Defendants first cite the general delegation of responsibilities to the Principal Deputy set out in 209 Departmental Manual ("DM") 8.4. This paragraph delegates "all program and administrative authorities of the Assistant Secretary-Indian Affairs necessary to fulfil the responsibilities identified in 110 DM 8.2." Next, Federal Defendants refer to 110 DM 8.2, which provides that the Principal Deputy "serves as the first assistant and principal advisor to the Assistant Secretary-Indian Affairs...and discharges the duties assigned by the Assistant-Secretary Indian Affairs." Federal Defendants' Memorandum. 37-38. From these provisions, the Federal Defendants conclude that because the Principal Deputy holds authority necessary to fulfil his responsibilities to advise the Assistant Secretary and discharge duties assigned to him, he held authority to issue the Decision. *Id.* at 38. Stated otherwise, the Principal Deputy holds redelegated authority because his office was created to advise and discharge any redelegated authority. This reading of the relevant DM provisions is wrong for three reasons.

First, there is nothing in any of these provisions that approaches an actual express redelegation to make decisions on ILO requests. By way of contrast, the Assistant Secretary-Indian Affairs "is authorized to exercise all of the authority of the Secretary including, but not limited to..." specified subjects. 209 DM 8.1 Delegation. None of the provisions cited by the Federal Defendants authorizes the Principal Deputy to exercise any specific authority, but provide more of a job description and specify that he *may* hold authority to discharge duties *if assigned by the Assistant Secretary*. The Federal Defendants do not identify a specific assignment or redelegation by the Assistant Secretary to make ILO decisions.

Second, while the Principal Deputy is responsible for "the regulation of Indian gaming," this responsibility similarly does not authorize him to exercise all authority under IGRA or otherwise. 110 DM 8.2. The Federal Defendants overlook the operative language of that sentence. It reads "The PDAS manages, directs and coordinates functions. . ." on subjects that are identified, including Indian gaming. Again, there is no reference to a redelegation of authority or the actual exercise of authority, comparable to that to the Assistant Secretary by the Secretary. Further, the DM goes on to identify offices that "report to the PDAS," including the OIG. *Id.* 8.2 D. The OIG is responsible for "development of policies and procedures used for implementing gaming-related activities," specifically including "requests to take land into trust for the purpose of conducting gaming." *Id*. This is the only express reference in any DM to gaming eligibility of trust land, such as the Tribe's ILO request. Plainly, read together, these provisions anticipate that OIG does the actual work on ILO requests, which reports its recommendations to the PDAS, who manages that office and advises the Assistant Secretary-Indian Affairs on the matter, and the Assistant Secretary makes the actual decision.

Third, the Federal Defendants' interpretation of the governing DM provisions proves too much. The Federal Defendants urge that this Court need not "decide the full breadth of the Principal Deputy's delegated authority." Federal Defendants' Memorandum at 38. They obviously do so because there is no limiting principle in their interpretation. If read as the Federal Defendants propose, then 209 DM 8.4 would redelegate authority over all subject matters expressly delegated to the Assistant Secretary. This would be a wholly unworkable organizational scheme, effectively making the Principal Deputy equal in authority to the Assistant Secretary-Indian Affairs. This cannot be the intent and meaning of the relevant DM provisions.

Given the importance of decisions such as the Tribe's ILO request, the tribes are entitled to clarity on the decision-making authority over the issue. The Federal Defendants' proposed interpretation of the governing DM provisions creates a muddle, leaving tribes uncertain of the line of authority and the appropriate focus of their efforts.

B. The Federal Defendants cannot avoid the 2008 Guidance and the requirement of primary involvement of OIG.

Because of the Federal Defendants' dismissive treatment of the 2008 Guidance, it is important to note at the outset how that guidance determination was made and precisely what it states. It is nothing like a general statement of policy, an expression of tentative intentions for the future, or just a piece of paper emanating from the Assistant Secretary-Indian Affairs. *Cf.* Federal Defendants' Memorandum at 41. To the contrary, it was the result of a deliberative process and announced a clear and binding procedural rule governing the issuance of ILOs for restored tribes.

The Assistant Secretary described the deliberative process resulting in the 2008 Guidance at the beginning of his memorandum. The Assistant Secretary sought and obtained a briefing/options paper prepared by OIG. After review, the Assistant Secretary chose option #2 as presented by that office and he attached that option paper to his decision. The Assistant Secretary addressed his memorandum to both the Associate Solicitor, who oversees the lawyers in the Division of Indian Affairs ("DIA"), and to the Director of OIG. Then, at the end of the background summary of the issue, the Assistant Secretary "directs" that a particular process be employed in making the decision on requests for a restored tribes ILO. Bergin Declaration, Ex. 1, Dkt. #48-3. Further, this direction "should be implemented" as set out in the guidance. This implementation directs that the lawyers "should prepare a legal memorandum regarding whether or not the tribe is a restored tribe" within the meaning of IGRA. Then, "[i]f the DIA concludes

that the tribe is a restored tribe, the Office of Indian Gaming (OIG) should consult with DIA and prepare a recommendation to the Assistant Secretary regarding whether or not the land should be taken into trust as part of the restoration of lands...." *Id.*

There is nothing in any of this language indicating that it is merely a general statement of policy or is only a "suggested internal process. . ." Federal Defendants' Memorandum at 41. Indeed, the main authority cited by the Federal Defendants establishes the 2008 Guidance as a norm that is binding upon the Department. In *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533 (D.C. Cir. 1986), the court laid out the rules to determine whether an internal procedural rule is binding or merely a general statement of policy. The latter leaves the administrator free to exercise discretion while the former is a substantive rule establishing a standard of conduct. *Id.* at 536-37. Whether the statement uses "may" or other such discretionary language or uses "will" or other such directive language is given decisive weight in this determination. *Id*. at 538. The language used in the 2008 Guidance is clearly directive. As a result, the 2008 Guidance is binding upon the Department. Agencies cannot violate their own rules and regulations, including gratuitous procedural rules and internal agency guidance. *Damus v. Nielsen*, 313 F.3d 317, 336 (D.C. Cir. 2018). When an internal guideline imposes a norm, courts require the agency to abide by it. *Doe v. U.S. Dep't of Justice,* 735 F.3d 1092, 1098 (D.C. Cir. 1985). Thus, the Federal Defendants cannot avoid the 2008 Guidance.

Further, the administrative record does not show compliance with the 2008 Guidance. It is true, as the Federal Defendants emphasize, that the Tribe attempted to include OIG in its efforts to demonstrate the sufficiency of the historical connection. *See* Federal Defendants' Memorandum at 40-41. But the administrative record also reflects the primary role that the lawyers assumed in assessing the sufficiency of the historical connection, in clear violation of the

2008 Guidance. *See* AR0010449 (Solicitor's Office declined Tribe's request to include OIG in meeting on the ILO request), AR0010783 (OIG requesting meeting with Solicitor's Office to discuss "policy considerations" regarding Tribe's ILO request and no evidence in the AR of the meeting having taken place). In fact, the Federal Defendants admitted in their papers in opposition to the Tribe's motion to complete the administrative record that the Federal Defendants did not consider or rely upon the 2008 Guidance. Dkt. #30 at 12. While that admission may be awkward for the Federal Defendants now, it conclusively establishes failure to comply with the Guidance in the decision-making process resulting in the Decision.

Finally, The Federal Defendants' desperation to avoid the 2008 Guidance is evident in their final argument that, even if binding, the Guidance has been withdrawn. Federal Defendants' Memorandum at 41. The 2008 Guidance was not revoked by the Checklist cited by the Federal Defendants. *Id.* at n.6. This Checklist does not reference the 2008 Guidance at all; it merely identifies the Solicitor's Office as the sole authority to perform legal work. This is consistent with the 2008 Guidance; the 2008 Guidance provides that the Solicitor's Office (identified there as the DIA, or Division of Indian Affairs in the Solicitor's Office) performs the legal work of determining whether a tribe qualifies as a restored tribe, but the remaining question of the sufficiency of the historical connection is a policy determination, not legal work. The Federal Defendants are correct that the 2008 Guidance was, in fact, withdrawn on February 27, 2019. But this occurred after the Decision at issue here, which is dated February 7, 2019. And as the Federal Defendants themselves observe, something that post-dates the decision being challenged cannot be included the court's review of the decision. *Id.* As result, at the time of the Decision, the 2008 Guidance was a binding procedural rule that was in effect and was admittedly not followed by the Department.

III. The Federal Defendants failed to meet the Tribe's arguments that the Decision was arbitrary and capricious in its analysis of the historical data.

The Federal Defendants purport to find it "telling" that the Tribe does not attempt to argue that, in the absence of the significant historical requirement, the Parcel would have qualified as restored lands. Federal Defendants' Memorandum at 19. This is simply not true and reflects a basic misunderstanding of the standard governing the inquiry. In fact, the Tribe argues that the requirement of the significant historical connection was outcome-determinative in the Decision on the Tribe's ILO request. Tribe's Opening Memorandum at 19, 22. It is true that the Tribe did not engage in a detailed analysis of the complete historical record on the issue in its opening memorandum. But this is due to the nature of the inquiry under the arbitrary and capricious standard. As the Tribe has acknowledged, the APA does not allow the court to substitute its own judgment for that of the agency. Tribe's Opening Memorandum at 32; *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.,* 463 U.S. at 43. As a result, a court can correct an error of law made by the agency but the re-analysis of the data is done by the agency upon remand by the court for that purpose. *See Koi Nation, supra.* That the Tribe did not ask the court to make its own analysis of the historical data is a function of the APA standard; it does not reflect any doubt on the Tribe's part that it has sufficient historical connection to the Parcel, one that would result in a favorable ILO under the regulation as written and upon remand to the agency following the court's determination that the Decision violated the APA standard.

A. The Decision failed to abide by the regulation as written in three important respects.

The Federal Defendants do not dispute that an agency is obliged to abide by its own regulation under the APA arbitrary and capricious standard. Instead, the Federal Defendants dispute either the requirements stated in the regulation as read by the Tribe or the analysis of the

data in the Decision as understood by the Tribe. The plain language of both supports the Tribe's reading as correct.[9]

1. On its face, the regulation does not require a significant historical connection to the Parcel itself.

The Federal Defendants rely primarily upon the provision stating the requirement that a restored tribe must demonstrate a significant historical connection "to the land" as support for the proposition that the connection must be demonstrated as to the particular parcel, not just nearby. Federal Defendants Memorandum at 22. Further, they insist that the structure of the section indicates that the connection must be established as to the specific parcel itself, not the general area. *Id.* The problem for the Federal Defendants is that this flies in the face of the literal language of the regulation. In the definition section, the regulation defines the term "significant historical connection" as evidence "in the vicinity of the land." 25 CFR § 292.2. And the administrative history of the provision shows that the Department intended exactly what the definition states, *i.e.*, that a historical connection in the vicinity is sufficient.

In 2006, the Department first proposed the rule leading to the regulation. The proposed rule required a significant historical connection to land to qualify as restored land. 71 Fed. Reg. 58769, 58774 (Oct. 5, 2006). It proposed two means by which the connection can be established, either by location within the boundaries of the tribe's last treaty reservation, or:

> (2) The land is located *in an area* to which the tribe has significant documented historical connections, significant weight being given to historical connections

[9] As a general proposition, the Federal Defendants are entitled to deference by the court in interpreting its own regulation. *Stand Up for California! v. U.S. Dept. of Interior,* 879 F.3d at 1187 (agency interpretation of the so-called two-part exception in the regulation). However, such deference is not necessary where the agency's interpretation is contrary to the regulation's plain language. *Conf. Tribe of Grande Ronde Community of Oregon v. Jewell,* 830 F.3d 552, 559 (D.C. Cir. 2016). As discussed herein, that is clearly the case with regard to the "in the vicinity" provision in the regulation.

> documented by official records of the Bureau of Indian Affairs or the Department of the Interior, or by the Indian Claims Commission, other Federal court, or congressional findings.

Id. (emphasis added.) The Department repeated the reference to the area in its background statement for the proposed rule: "Essentially, the regulation requires the 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." *Id.* at 58770. There was no definition of significant historical connection in the proposed rule.

Following a comment period, the Department published the final regulation on May 20, 2008. In response to comments, the final rule included the definition of "significant historical connection." 73 Fed. Reg. 29354, 29360 (May 20, 2008). The definition adopted included the "in the vicinity" language quoted above. Further, the Department specifically rejected comments that would have restricted the available area as historically significant to "ancestral homelands" or to land "close to aboriginal homelands." *Id.* at 29360, 29361. The Department did so because "the actual land to which a tribe has significant historical connection may not be available" and significant historical connections may exist to land not close to aboriginal homelands. *Id.* Thus, the Department purposefully required the historical connection to the vicinity of the proposed trust parcel, not proof as to the proposed parcel itself.[10]

[10] This is also the only reasonable way to approach the issue, given the geographic extent of areas that might exhibit a historic connection to the restored tribe. In the case of the Tribe, for example, the Parcel is 128 acres in size. It is wholly unrealistic to expect a restored tribe to locate documents demonstrating a connection to these specific 128 acres out of the literally millions of acres where a significant historical connection may theoretically exist in the ceded area under the 1851 treaty. *See* AR0003060 (reserved area under the treaty was hundreds of thousands of acres, which was roughly one-fifth the size of the ceded area); *see* C. Royce, *Indian Land Cessions in the United States*, GPO (1899), Part II, plate 1, California. The Decision acknowledged that a favorable inference of a significant historical connection exists as to this area - an inference the Federal Defendants now deny. *See* AR0011599; Federal Defendants'

Neither is there any support in pre-regulation restored lands decisions for the proposition that there must be evidence of an historical connection to the precise parcel at issue. *See* Federal Defendants' Memorandum at 24-26. As noted above, the court in *Grand Traverse* described restored lands as "[a]ny lands taken into trust that are located *within the areas historically occupied* by the tribes..." 198 F. Supp.2d at 936. This reads more like the "in the vicinity" formulation of the regulation than as a requirement that the evidence must relate to the specific parcel. And the Bear River decision, relied upon by the Federal Defendants, is similar. *See* Federal Defendants' Memorandum at 24-25. Citing *Grand Traverse,* the Bear River decision concluded that restored land has been in some respect recognized as the Band's. Both cited the presence of the land within the area ceded by the tribes to the United States as evidence of the required historic connection. To be sure, the court in *Grand Traverse* and the Department in Bear River also found other, corroborating evidence of an historical connection and, in the case of Bear River, evidence relating to the specific parcel in question. But there is nothing in either *Grand Traverse* or Bear River indicating that there *must* be evidence of a significant historical connection to the precise parcel itself.[11]

Butte County, California v. Chaudhuri, 887 F.3d 501 (D.C. Cir. 2018) is similar. The primary evidence of a sufficient historical connection was based on the parcel's proximity to the tribe's former rancheria. And again, the court cited additional evidence of what it described of a

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Memorandum at 24. It would make no sense for the Department to require a restored tribe to demonstrate an actual record of connection to every acre within such areas.

[11] In fact, it is odd that the Federal Defendants would rely upon these decisions. Both referred to the location of the parcel within the ceded area as the primary evidence of an historical connection, like the Tribe here. Both also noted the presence of additional, corroborating evidence, like the Tribe here. And both the court opinion and the Department's decision considered the body of evidence as a whole and found sufficient historic connection. But the Department failed to consider the body of historical evidence as a whole for the Tribe, another indication of the arbitrary and capricious nature of the decision here. *See* discussion below.

direct historical connection to the parcel, again citing evidence of use in very close proximity to the land. *Id.* at 508. As the Tribe acknowledged, *Butte County* does not directly address whether the historical evidence must relate to the particular parcel in question, but clearly suggests by its primary reliance on evidence of proximately located land that "in the vicinity" is sufficient. There is certainly nothing in the decision indicating, as the Federal Defendants argue, that an historical connection to the particular parcel must exist. *Cf.* Federal Defendants' Memorandum at 25-26. The same is true for the Guidiville Indian Lands Opinion, also relied upon by the Federal Defendants. Federal Defendants' Memorandum at 25. That was a negative decision under the regulation because the parcel was not located within the area ceded by the Band to the United States and the Band did not otherwise prove its presence in the vicinity of the proposed trust parcel. Guidiville at 12. Of course, the Tribe's Parcel is located within the ceded territory and the Tribe's other evidence placed it historically in the vicinity of the Parcel.

In short, the Decision violated the plain language of the regulation by insisting that the Tribe's evidence of an historical connection relate to the Parcel itself, rather than "in the vicinity" of the Parcel as the regulation states. Neither does the existence of additional evidence in other cases distinguishes the Tribe's evidence. The Tribe also cited a substantial body of additional evidence, some of which the Decision ignored altogether and all of which the Decision failed to consider *in toto*. *See* discussion below.

2. The Decision effectively imposed an unauthorized requirement of continuous historical evidence on the Tribe.

The parties agree that the regulation does not require that a restored tribe demonstrate continuous use of a parcel to qualify it as restored land. As the Tribe has already noted, the Decision admitted that the significant historical connection need not be continuous. Tribe's Opening Memorandum at 30. Nonetheless, the Decision effectively imposed this requirement on

the Tribe and concluded that the absence of such continuity justified, in part, the negative conclusion on the Tribe's ILO request. *Id.*

The Federal Defendants' objection to the Tribe's argument on this issue appears to be a semantical one. There is no question that, by comparison to the evidence of continuous use relied upon in *Grand Traverse*, the Tribe's evidence was found insufficient because of its "on-again, off-again" quality for a 30 or 40 year time span. AR0011613. Thus, that the absence of continuous evidence was a basis for the unfavorable Decision is another, albeit indirect, way of requiring proof of continuity by the Tribe. *See id.* (proof of Tribe's "inconsistent" or "transitory" presence would be "at odds" with its "occupancy" of Parcel). Further, the Decision ignored the Karuk decision on this point.[12] There, the favorable restored lands opinion relied principally upon the location of the parcel in the ceded area and additional evidence of sporadic tribal use, such as payments for county enrollment of tribal children for a ten year period and the presence of camp sites. Karuk, at 11. The Decision contrasts the Tribe's allegedly inconsistent evidence against the continuous evidence of Grand Traverse use but ignores the Karuk decision's indication that sporadic evidence is sufficient. Both indicate that the Department effectively imposed a continuity requirement on the Tribe, a requirement that does not appear either on the face of the regulation or as applied in other cases.

[12] The Federal Defendants are correct that the Decision did discuss the Karuk precedent on another issue, *i.e.*, whether the location of the parcel in an area ceded by the tribe to the United States is itself sufficient historical connection. *See* Federal Defendants' Memorandum at 27; AR0011606. But the Decision did not discuss the Karuk decision on the continuity requirement it effectively imposed on the Tribe, presumably to avoid dealing with the Karuk conclusion that sporadic evidence is sufficient.

3. There is nothing in the regulation authorizing a negative inference to be drawn from geographic distance from a former rancheria.

The Federal Defendants do not deny that the Decision considered the geographic distance between the Tribe's former rancheria and the Parcel as negative evidence of the significant historical connection. And the Federal Defendants do not deny that there is no requirement of geographic proximity between former tribal land and a restored parcel in the regulation. But the Federal Defendants insist that this absence is nonetheless relevant. Federal Defendants' Memorandum at 28-29.

However, that close proximity of a parcel to a former reservation or rancheria is positive evidence in other cases does not mean that the greater geographic distance between the Parcel and the Tribe's former rancheria should count in the balance sheet against the Tribe. Were this the case, then the absence of every form of evidence ever used in any other positive determination could also be counted as relevant to an analysis of the evidence in the Tribe's case. In such an analysis, the negative side of the balance sheet would always be weighted so heavily with missing evidence that no tribe could ever makes its case on the significant historical connection requirement.

The Department considered and rejected the notion that geographic proximity should be required as part of the historical connection when it adopted the regulation. *See* Tribe's Opening Memorandum at 31. If the Department is now allowed to count the absence of geographic proximity as negative evidence against a tribe, the Department is effectively allowed to impose a requirement that admittedly does not appear in the regulation. The Decision did so in violation of the regulation.

IV. The Federal Defendants cannot establish that the Decision considered all relevant considerations and data.

The Federal Defendants dispute that the Decision failed to consider relevant policy considerations, all relevant data, and the weight of the evidence viewed *in toto*. Federal Defendants' Memorandum at 29-37. As a general matter, the Federal Defendants suggest that such issues exceed the narrow review permitted under the APA arbitrary and capricious standard, citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc., v. State Farm Mut. Auto Ins. Co.,* 463 U.S. at 43. Federal Defendants' Memorandum at 29. But the error of this suggestion is evident in the sentence following the *State Farm* point cite relied upon by the Federal Defendants: "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Id; see also Dep't of Homeland Security v. Regents of Univ. of Cal.*, 140 S. Ct. 1891, 1913, 591 U.S. __ (2020) (citing *State Farm* for the proposition that the agency must consider policy alternatives.) The agency decision under review here failed to consider all relevant considerations in three respects.

A. The Federal Defendants mischaracterize the nature of the restored lands inquiry to avoid addressing policy considerations.

The Federal Defendants insist that the restored lands determination is a purely "factual inquiry that is distinct from the broad policy goals articulated in IGRA." Federal Defendants' Memorandum at 30. Based upon this characterization of the issue, the Federal Defendants conclude that IGRA's broad policy considerations are not an important aspect of the problem. *Id.* This is wrong for two reasons.

First, the Department itself distinguished between legal and policy considerations in the restored lands inquiry for restored tribes in the 2008 Guidance, which as established above, was binding upon the Department at the time of the Decision under review here. According to that

guidance, there are two components of the restored-lands-for-restored-tribes inquiry. The first - whether a tribe qualifies as a restored tribe - is a legal decision properly made by the lawyers in the Division of Indian Affairs of the Solicitor's Office. If the tribe does qualify as a restored tribe, then the guidance provides that the second question - whether the land qualifies as restored land - is "a significant policy determination. . . [and the regulation] provides the regulatory framework for this decision but it does not eliminate the policy choices." Bergin Declaration, Ex. 1. As such, the restored lands inquiry is properly made by the OIG and the recommendation by OIG "should include both an analysis pursuant to the regulations and a discussion of any policy choices that will affect the Assistant Secretary's decision." *Id.* There is no pretense that the Decision took such considerations into account.

Second, as the Federal Defendants acknowledge in a back-handed manner, the D.C. Circuit has directed that the restored tribe exception should be construed broadly to accomplish the intent of IGRA to compensate for what was lost by the termination of the tribe and for lost opportunities in the interim. *See* Federal Defendants' Memorandum at 31, citing *City of Roseville v. Norton,* 348 F.3d at 1030. To be sure, *City of Roseville* pre-dates the adoption of the regulation. But this does not obviate the Department's obligation to consider the policy underlying IGRA in the assessment of restored lands. To the contrary, as the Federal Defendants insist elsewhere, the regulation was guided by prior case law. Federal Defendants' Memorandum at 15. If this is so, then the regulation reflects this same approach to the restored lands inquiry.

Finally, the Federal Defendants complain that the Tribe has not explained how such policy considerations might be evaluated. Federal Defendants' Memorandum at 31. Of course, such an explanation by the Tribe amounts to speculation, but the Tribe can certainly imagine

how such considerations might be evaluated upon remand in at least two respects - first, that IGRA reflects the need for distinct treatment of restored tribes in order to place them on a level playing field with tribes having a long-standing reservation; and second, that IGRA gives due regard to the needs of landless tribes. With respect to restored tribes, IGRA is a remedial statute that should be broadly read for such tribes. *City of Roseville*, 348 F.3d at 1029-30. Yet, the Decision and the Federal Defendants suggest that the so-called two-part exception is an acceptable substitute for the restored tribe exception for the Tribe. AR0011615; Federal Defendants' Memorandum at 9. This is plainly not true and does not take IGRA's special regard for restored tribes into account.[13] With respect to landless tribes, as the Tribe has pointed out, it was historically and remains without a land base. In the absence of a land base to support a physical community of tribal members, one would expect the historical dispersion of tribal members (which occurred with the Tribe) and restricted ability of tribal leaders to mobilize and physically bring together tribal members (which occurred with Augustine) to be reflected in the historical documentation. Yet, the Decision failed to assess the historical evidence in light of the absence of a land base for the Tribe. *See* Rohnerville Indian Lands Opinion (BIA appropriately

[13] The two-part exception is available to tribes which do not qualify for the three exceptions intended to place the specified categories of tribes on a level playing field. *See* 25 U.S.C. §2719(b)(1)(A). Unlike these three exceptions (including the restored tribes exception), the two-part exception allows states to effectively veto a proposed project by withholding the required gubernatorial concurrence. *Id.* The experience of tribes under the two-part exception demonstrates the difficulty of the process, as compared to that for restored tribes. For example, North Fork Rancheria submitted a trust application in 2005 under the two-part exception. Following a favorable Department of the Interior determination, the tribe's request to game on the parcel was denied in 2021 after three federal lawsuits, the negotiation of a gaming compact, the conduct of a referendum on the compact's ratification, and state litigation on the meaning of the successful referendum. *See Stand Up for California! v. State of California*, 64 Cal.App.5th 197, 202-06 (2021) (setting out the protracted history of the North Fork two-part acquisition). Congress did not intend that restored tribes face such a tortured and uncertain process fraught with political pressure such as that Yocha Dehe has marshaled against the Tribe. *See* Yocha Dehe *Amicus* at 9.

"mindful" that the tribe was landless). It is entirely conceivable that, if the policy embodied in IGRA in these respects had been properly taken into account in the Decision, there would have been a different outcome.

B. The Federal Defendants do not address the relevant evidence identified by the Tribe that was not considered in the Decision.

The Tribe identified specific evidence that the Decision failed to take into account. *See* Tribe's Opening Memorandum at 35-36. In turn, the Federal Defendants assert that the referenced data were, indeed, considered in the Decision. But the Federal Defendants do not discuss the data identified by the Tribe.

The particular data identified by the Tribe were specific and detailed. However, this does not signify that the data was unimportant. To the contrary, the data were particularly important, given the bases for the Decision. For example, the Decision insisted that the Tribe provided no evidence of a connection with the Parcel that could be attributed to the Tribe as a whole. But in addition to the evidence discussed by the Federal Defendants, the Tribe also submitted evidence that the tribal children identified close by the Parcel at the Mission in 1837 represented 60% of the Tribe's child-aged population at the time and that 94% of the Tribe's current membership trace descent from these same children. AR0005303-4. This indisputably reflects a tribal-wide presence but the Decision and the Federal Defendants fail to mention it. Further, the Decision also complained that the Tribe had not presented evidence of aboriginal occupancy. But in addition to the evidence discussed by the Federal Defendants, the Tribe also submitted evidence that the entire nature of aboriginal occupancy had been altered by the time of the American period, with the original subsistence pattern wholly replaced by one dependent upon part-time employment at the ranchos, including the one comprehending the Parcel. AR0005026. There is

no explanation in the Decision as to why this was not deemed evidence of aboriginal occupancy and the Federal Defendants fail to address its absence in the Decision.

As the Federal Defendants suggest, the Tribe strongly disagrees with the conclusion that it lacks a sufficient historical connection to the Parcel. But the Tribe does not insist that the court substitute its judgment for that of the Department in assessing this data. Instead, the Tribe insists that the Department is obliged to take into account all relevant data, as the APA standard requires. Because the Decision failed to do so, a remand for that purpose is necessary.

C. The Department is obliged, but failed, to view the Tribe's evidence of an historical connection to the Parcel as a whole.

The Federal Defendants argue, on the one hand, that the Department is not obliged to consider the evidence of a significant historical connection as a whole. The Federal Defendants also argue that, on the other hand, the Decision did consider the evidence of a significant historical connection as a whole. Federal Defendants' Memorandum at 36. The Federal Defendants are wrong on both counts.

The Department has explicitly acknowledged that the evidence must be viewed as a whole in determining whether there is a sufficient historical connection to the parcel in question. Due to long-running litigation over the matter, the Department had occasion to consider the nature of the analysis on the historical connection both before and after the adoption of the regulation in its assessment of a request by the Mechoopda Tribe. In its final opinion on the matter in 2014, the Department first assessed the historical evidence under the pre-regulation standard. It expressly indicated that the evidence must be viewed as a whole. Bergin Declaration, Ex. 9 (Mechoopda Indian Lands Opinion, Jan. 24, 2014) at 22, Dkt # 48-3. Then, the Department assessed the evidence under the regulation, it having been adopted since the Department's first consideration of the issue. The Department concluded that the analysis under

the regulation is the same as that before the rule and reached the same result as under the regulation. *Id.* at 25.

The Federal Defendants overlook the Mechoopda decision, focusing instead on whether *Mashpee Wampanoag Tribe v. Bernhardt*, 466 F. Supp.3d 199 (D.D.C. 2020) compels that the review under the regulation assess all the historical evidence together. Federal Defendants' Memorandum at 36. But the Tribe acknowledged that *Mashpee* involved a different historical question and relied upon it only secondarily. Tribe's Opening Memorandum at 37. Nonetheless, *Mashpee* does indicate that failure to make this assessment, if necessary under the governing federal standard, requires a remand for a re-evaluation. The Department indicated in its Mechoopda decision that this assessment is necessary on the restored lands inquiry, both before and after adoption of the regulation. Its failure to do so in the Decision requires a remand for re-evaluation.

Finally, the Federal Defendants insist that the Decision did assess the Tribe's historical evidence as a whole, if such is required under the regulation. Federal Defendants' Memorandum at 36. But the focus there is solely on the evidence related to Augustine, an admitted leader of the Tribe who was clearly resident and/or employed as a laborer in very close proximity to the Parcel. Just as did the Decision, the Federal Defendants failed to assess the evidentiary record as a whole in light of the admitted inference of an historical connection arising from the location of the Parcel in the Tribe's ceded territory. *See* AR0011606 ("While that may create a favorable inference for the Band here, the Band must still demonstrate additional historical connection...") A re-evaluation of the total historical record, considered against this favorable inference, could result in a different outcome and the matter should be remanded for that purpose, just as in *Mashpee.*

CONCLUSION

The Decision on the Tribe's ILO request is fundamentally at odds with the language and intent of the IGRA exception for restored tribes. The Tribe is admittedly restored and remains landless after the Department's illegal termination of the Tribe and forced loss of tribal lands. As such, the Tribe is within the class of restored tribes to which Congress intended to extend distinct treatment and within the class of tribes for which IGRA should be broadly construed. Yet, the Decision imposed requirements upon the Tribe that do not appear in IGRA, ignored the literal language of the Department's own regulation and internal guidance, failed to fully assess all of the Tribe's evidence, and violated the IRA obligation to treat the Tribe the same as restored tribes before the adoption of the regulation. The Tribe is entitled to better treatment at the hands of its trustee and, fortunately, the law requires better treatment. The Decision should be remanded to the Department for re-evaluation in light of IGRA as written by Congress, the IRA, and the arbitrary and capricious standard of the APA.

Dated: November 1, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of November 2021, I caused the service of the attached Combined Brief in Opposition to Federal Defendants' Cross Motion for Summary Judgment and Reply Brief in Support of Scotts Valley's Motion for Summary Judgment by filing it with the Clerk of the Court via the CM/ECF System, which sends a Notice of Electronic Filing to all parties with an e-mail address of record who have appeared and consented to electronic service. To the best of my knowledge, all parties to this action receive such notices.

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