IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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

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

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I. INTRODUCTION

The Scotts Valley Band of Pomo Indians (the "Tribe") argues that it meets one of the exceptions in the Indian Gaming Regulatory Act ("IGRA") to the prohibition on gaming on lands acquired after October 17, 1988. But the record supports the Department of the Interior's ("Interior's") finding that the Tribe did not show a "significant historical connection" to the parcel of land (the "Vallejo Parcel" or the "Parcel") that the Tribe sought to have Interior take into trust as "restored lands" on which gaming could occur as an exception to IGRA.

As demonstrated in Interior's memorandum in support of its summary judgment motion ("Federal Defendants' Memorandum"), ECF No. 54-1, the Tribe has not shown that Interior acted outside of its authority by requiring a showing of significant historical connection in order for the Vallejo Parcel to be considered "restored lands" under IGRA, or that the requirement violates the Privileges and Immunities provision of the Indian Reorganization Act ("IRA"). The relevant authority also shows that the signatory of the February 2019 negative restored lands determination (the "Decision") had the appropriate re-delegated authority, and Interior was not required to follow the internal guidance contained in a May 22, 2008 memorandum ("2008 Guidance"). Finally, the Decision considered all the relevant evidence and explained Interior's reasoning in compliance with the Administrative Procedure Act ("APA"). The Tribe has not met its burden under the APA. The Court should therefore grant summary judgment in favor of Interior, and deny the Tribe's cross-motion.

II. ARGUMENT

A. Interior's permissible construction of IGRA in the Part 292 regulations is entitled to deference.

The Tribe argues that Interior exceeded its authority by requiring tribes to show a "significant historical connection" to a parcel of land in order for the land to be considered "restored lands" under IGRA. Pl. Reply 2–9. According to the Tribe, Interior's interpretation of

IGRA's restored lands exception, as reflected in its implementing regulations, located at 25 C.F.R. Part 292 ("Part 292"), is not entitled to deference because the phrase "restoration of lands" in 25 U.S.C. § 2719(b)(1)(B)(iii) is not ambiguous. *Id.* at 3–8. The case law, however, refutes this argument. In addition, the governing regulations do not result in disparate treatment in violation of the IRA.

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

IGRA's restored lands exception allows gaming on lands "taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii). It is beyond question that "IGRA does not define 'restoration of lands'; therefore, courts have held it to be ambiguous and interpreted it broadly." *Butte Cnty. v. Hogen*, 609 F. Supp. 2d 20, 29 (D.D.C. 2009) (citing *City of Roseville v. Norton,* 348 F.3d 1020, 1026–27 (D.C. Cir. 2003)); *Confederated Tribes of Coos v. Babbitt*, 116 F. Supp. 2d 155, 161 (D.D.C. 2000) ("'Restoration' is not defined in the statute."); *see also 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); *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." (citation omitted)); *Grand Traverse Band of Ottawa & Chippewa Indians v. U.S. Att'y for W. Dist. of Mich.*, 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)."). In fact, Interior's present interpretation of the restored lands exception was adopted in response to court opinions rejecting Interior's initial, narrower reading of the phrase. *See* Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354, 29,365 (May 20,2008) (noting in preamble to Part

292 that *Confederated Tribes of Coos*, 116 F. Supp. 2d at 165 and *Grand Traverse*, 198 F. Supp. 2d at 936 "provided guidance for the interpretation of section 2719(b)(1)(B)(iii)"). The Tribe itself has noted the ambiguity of the phrase in its briefing. For example, it stated in its Memorandum that "agencies may change their interpretation of ambiguous statutory language, as the agency plainly did with the adoption of the Part 292 regulation and the imposition of the 'significant' historical connection." ECF No. 48-1 at 24 n.20 ("Pl. Mem.").

The Tribe admits that the Ninth Circuit and other courts have explicitly held that Interior is entitled to deference regarding the restored lands exception, but argues for a different finding here on the basis that the D.C. Circuit "does not follow the Ninth Circuit rule." Pl. Reply 3. The Tribe admits that there is no authority in the D.C. Circuit directly supporting this proposition. *Id.* at 4. The D.C. Circuit, however, has implicitly recognized the restored lands exception as ambiguous. In *City of Roseville*, the D.C. Circuit considered both broad and narrow interpretations of the term "restoration of lands," stated that "neither side c[ould] prevail by quoting the dictionary," and discussed case law for resolving "ambiguities in federal statutes." *City of Roseville*, 348 F.3d at 1027, 1032. Thus, underlying this decision is a recognition that "restoration of lands" is ambiguous. Several district court decisions in the D.C. Circuit also either explicitly find the phrase ambiguous or implicitly do so by discussing the various interpretations to which the phrase is subject. *See E. Band of Cherokee Indians v. U.S. Dep't of the Interior*, No. 20-cv-757-JEB, 2021 WL 1518379, at *14–*16 (D.D.C. Apr. 16, 2021) (discussing how restored lands exception is susceptible to different interpretations); *Butte Cnty.*, 609 F. Supp. 2d at 29 (noting that courts have found "restoration of lands" to be ambiguous); *Confederated Tribes of Coos*, 116 F. Supp. 2d at 162 (noting that the term "restoration" can be read in numerous ways).

The Tribe downplays the significance of *City of Roseville, Confederated Tribes of Coos*, and *Grand Traverse*, all of which found ambiguity in the phrase "restoration of lands," by pointing out that those cases were decided before Part 292 was promulgated. Pl. Reply 3–4. But that is irrelevant to the question of whether the phrase in IGRA is ambiguous. That is, if the phrase was ambiguous before the regulations interpreted it, then it continues to be ambiguous after because the statute has not changed. Thus, the Tribe's argument that the D.C. Circuit does not find "restoration of lands" to be ambiguous is without merit.

The Tribe next argues that D.C. Circuit's decision in *TOMAC, Taxpayers of Michigan Against Casinos v. Norton*, 433 F.3d 852, 865 (D.C. Cir. 2006), suggests that the phrase "restoration of lands" is unambiguous because, in that case, the court noted that although IGRA did not define the term "restore," the court nevertheless found a "common use of the term" to apply, undercutting Interior's discretion to interpret that term. Pl. Reply 4. But *TOMAC* focused on the "tribe restored to federal recognition" portion of the restored lands exception, which is not at issue here. The case, therefore, does not contradict the cases cited above deeming the "restoration of lands" portion of the restored lands exception ambiguous.

Finally, the Tribe also relies on *Koi Nation of Northern California v. U.S. Department of the Interior*, 361 F. Supp. 3d 14 (D.D.C. 2019), which similarly interpreted the "tribe restored to federal recognition" portion of the restored lands exception. Pl. Reply at 4–5. *Koi* thus is distinguishable because it does not address the "restoration of lands" portion of the exception. However, even if *Koi* were relevant, Interior's interpretation of the phrase "restoration of lands" at issue here accords with the decision in *Koi* favoring of a broad interpretation of the restored lands exception. While the Court held that Interior's interpretation of the "restored tribe" portion of the restored lands exception was unduly narrow, *Koi Nation*, 361 F. Supp. 3d at 47, the same

cannot be said of Interior's interpretation of the "restoration of lands" portion of the exception. As noted above, when Interior promulgated Part 292, it adopted an already broadened interpretation of that phrase that accorded with court opinions that had rejected a previously narrower interpretation. Thus, the Tribe's argument that the *Koi* provides a basis to reject Interior's interpretation of "restoration of lands" in IGRA is unpersuasive.

In conclusion, the phrase "restoration of lands" is ambiguous and Interior acted within its authority in interpreting the language.

2. The Indian canon of construction does not compel a different interpretation of the phrase "restoration of lands."

The Tribe argues in the alternative that even if the phrase "restoration of lands" is ambiguous, the Secretary's interpretation is not entitled to deference because the Indian canon of construction requires the phrase be read in favor of the Tribe. Pl. Reply 5–6. This argument is meritless.

The Indian canon of construction does not negate *Chevron* deference in every circumstance, and IGRA does not restrict "the Secretary's general authority to interpret laws governing Indian tribes." *Oregon*, 271 F. Supp. 2d at 1277. The blanket removal of agency deference that the Tribe seeks here is at odds with Congress's delegation of broad authority to Interior to prescribe regulations relating to Indian affairs. *See* 25 U.S.C. § 9 ("The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs."); *id.* § 2 ("The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.").

The Tribe's argument that the Indian canon of construction automatically "overcomes any deference owed to the Secretary," Pl. Reply 8, ignores that courts in this district have applied *Chevron* deference in cases involving IGRA provisions. *See, e.g.*, *Citizens Exposing Truth about Casinos v. Kempthorne*, 492 F.3d 460, 466–67 (D.C. Cir. 2007) (applying *Chevron* deference to the Secretary's determination that certain lands constituted "initial reservation" under IGRA); *Forest Cnty. Potawatomi Cmty. v. United States*, 330 F. Supp. 3d 269, 282 (D.D.C. 2018) (concluding "that, if it is reasonable, the [Assistant Secretary of Indian Affairs'] interpretation of IGRA's catchall provision for tribal-state compacts is entitled to *Chevron* deference"); *City of Duluth v. Nat'l Indian Gaming Comm'n*, 89 F. Supp. 3d 56, 64–65 (D.D.C. 2015) (applying *Chevron* deference to the National Indian Gaming Commission's interpretation of IGRA in a suit challenging a notice of violation issued to an Indian tribe), *dismissed per joint stipulation*, No. 15-5162, 2016 WL 3615257 (D.C. Cir. July 1, 2016). The Tribe's argument also would deprive the Secretary of the discretion to put into place reasonable criteria when promulgating regulations implementing statutes applicable to Indian tribes. But obviously, this cannot be the case, because much of Title 25 of the Code of Federal Regulations does exactly that.

In particular, courts have recognized an exception to the application of the Indian canon of construction when Indian interests are not aligned. *See Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015). While the D.C. Circuit has not adopted this exception to the Indian canon, several "judges in this District have done so," *Eastern Band of Cherokee Indians*, 2021 WL 1518379, at *10 (quoting *Sault Ste. Marie Tribe of Chippewa Indians v. Bernhardt*, 442 F. Supp. 3d 53, 80 (D.D.C. 2020)), and have cited *Rancheria*. *Id.*; *see also Connecticut v. U.S. Dep't of the Interior*, 344 F. Supp. 3d 279, 314 (D.D.C. 2018) (noting that "the canon 'does not apply for the benefit of one tribe if its application would adversely affect the interests of another tribe,' and

it is not clear that applying" the tribe's preferred interpretation in that case "would benefit tribes generally"); *Forest Cnty. Potawatomi*, 330 F. Supp. 3d at 280 (D.D.C. 2018) (same); *Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, 75 F. Supp. 3d 387, 396 (D.D.C. 2014) (same (citing *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996)). "The canon has been applied only when there is a choice between interpretations that would favor Indians on the one hand and state or private actors on the other." *Rancheria*, 776 F.3d at 713.

Here, even if the Court concludes that the exception to the Indian canon of construction discussed above does not apply, the Court nevertheless should reject the Tribe's argument that the canon prohibits Interior from interpreting the restored lands exception to require that the Tribe demonstrate a significant historical connection to the Parcel. *See* Pl. Reply 7–8. As one district court judge stated, "I fail to discern any detriment to Native Americans arising from a construction of IGRA authorizing the Secretary to declare as restored those lands bearing a significant connection to an Indian tribe, in addition to lands specifically identified in a restoration act." *Oregon*, 271 F. Supp. 2d at 1278. The restored land exception "strikes a balance between allowing restored tribes to game on newly acquired lands, while at the same time protecting the interests of established tribes." *Rancheria*, 776 F.3d at 712; *see also* 73 Fed. Reg. at 29,367 (noting "IGRA's balancing of the gaming interests of newly acknowledged and/or restored tribes with the interests of nearby tribes and the surrounding community"). If the restored lands exception were interpreted so broadly as to not require a significant historical connection to a parcel, tribes might "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. Thus, the Indian canon of construction does not override the deference otherwise due Interior's permissible interpretation of the restored lands exception.

3. Interior has not improperly narrowed the definition of restored lands through the significant historical connection requirement.

Finally, the Tribe argues that the use of the term "significant" in Part 292 improperly narrows the definition of restored lands. Pl. Reply 7–8. Specifically, the Tribe argues that the *Grand Traverse* court, 198 F. Supp. 2d. at 936, did not "indicat[e] that the level of historical connection must be 'significant,' rather than simply exist." Pl. Reply 7–8. This argument is unpersuasive. As noted above, *Grand Traverse* and *Confederated Tribes of Coos*, 116 F. Supp. 2d at 165, "provided guidance" for Interior's broad interpretation of the restored lands exception. 73 Fed. Reg. at 29,365; *see also Butte Cnty. v. Chaudhuri*, 887 F.3d 501, 508 (D.C. Cir. 2018) (noting that the historical connection consideration is "common to" "both the *Grand Traverse Band* test and the test established by the regulation"); Mechoopda Indian Lands Opinion, ECF No. 48-12 at 25 (analyzing a tribe's connection to a parcel under both Part 292 and the pre-regulatory standards and stating that the analysis of the tribe's historical connection under Part 292 "is the same as that which we conducted . . . in the pre-regulatory analysis of historic connections").

As the Decision explained, "restored land . . . always has been limited to lands that a tribe used or occupied." AR0011614. Interior's regulations ensure that the connection between tribe and parcel is more than "transitory or brief in nature." 73 Fed. Reg. at 29,366. The Tribe has not shown that use of the term "significant" to describe the requisite historical connection imposed a higher evidentiary burden than previously required, and its argument should be rejected. And even if the Department's interpretation of the historical connection requirement changed in Part 292, the Department is permitted to make such a change. *See Motor Vehicles Mfrs. Ass'n v.*

State Farm Mut. Auto. Inc., 463 U.S. 29, 42 (1983) (noting "that regulatory agencies do not establish rules of conduct to last forever, and that an agency must be given ample latitude to adapt their rules and policies to the demands of changing circumstances").

B. Interior's application of the restored lands exception to the Tribe did not result in disparate treatment of restored tribes before and after adoption of Part 292.

The Tribe argues that Interior has treated tribes that received restored lands determinations before the adoption of Part 292 differently than tribes that received such determinations after adoption of Part 292, Pl. Reply 9–10, in violation of the IRA's prohibition of disparate treatment between similarly situated recognized tribes. 25 U.S.C. § 5123(g). Specifically, the Tribe alleges that Interior treated the Tribe differently than the Grand Traverse Band of Ottawa and Chippewa Indians ("Grand Traverse") and Pokagon Band of Potawatomi Indians ("Pokagon") when Interior did not find a significant historical connection despite the Vallejo Parcel's location within a larger area ceded by the Tribe's predecessors by treaty. Pl. Reply 9. But, as the Decision explained, the tribes were not similarly situated. AR0011603–06. Thus, even assuming the privileges and immunities clause were applicable here, Interior would not have acted contrary to the provision.

The criteria in Part 292 requiring a tribe to establish modern, historical, and temporal connections to a parcel are based on the criteria that Interior evaluated prior to the adoption of the regulations, which, in turn, are based on criteria listed in *Confederated Tribes of Coos*. *See supra.* While Part 292 introduced some new bright-line rules (for example, placing a twenty-five year limit on the length of time between the date of a tribe's recognition and the date of the tribe's application for a parcel), the criteria are consistent with those in Interior's determinations predating Part 292, especially in regard to the "significant historical connection" requirement. For example, in 2004, Interior required the Karuk Tribe to establish a "sufficient historical

nexus" to a parcel for it to qualify as restored lands. Karuk Tribe of California Op. 8 (Oct. 12, 2004), found at www.nigc.gov/images/uploads/indianlands/17_karuktribeofcalifornia.pdf (last visited November 22, 2021). Thus the Tribe is incorrect to the extent it argues that issuing the regulations themselves amounted to disparate treatment.

But in any event, the IRA's privileges and immunities clause requires "only that Interior apply the same legal rule in the same manner, not that Interior necessarily reach the same outcome." *Native Village of Eklutna v. U.S. Dep't of Interior*, No. 19-cv-2388 DLF, 2021 WL 4306110, *7 (D.D.C. Sept. 22, 2021). Interior's Decision addressed the Tribe's argument regarding Grand Traverse and Pokagon, and explained that the Tribe was not similarly situated. AR0011603–06. In Grand Traverse's case, "[t]he fact that the parcel fell within the boundaries of land the Band's predecessors had ceded via treaty was merely one of several facts supporting" the conclusion that the Band had established the "historic, economic, and cultural significance" of the parcel. AR0011604 (citation and internal quotation marks omitted). Grand Traverse also showed, for example, that its ancestors had occupied the region from at least 100 years before treaty times until the present, and that the parcel was within the boundaries of the contemplated reservation at the time the treaty was signed and within the tribe's aboriginal territory. *Id.* (citations omitted). The Tribe's claim that the Grand Traverse decision was solely based on the land being within ceded territory is simply false.

Likewise, Interior's restored lands determination for Pokagon was not decided simply on the basis of the land lying within ceded territory. AR0011604–05. Pokagon was restored to federal status by legislation that required the Secretary to "acquire real property for [Pokagon]" and named ten counties in Michigan and Indiana that would comprise Pokagon's "service area." AR0011604. The Decision notes that Pokagon received a favorable determination not only

because the parcel at issue was located within territory that Pokagon's predecessors had ceded through treaties but also because the parcel was located within a service area identified in Pokagon's restoration act. AR0011605. As discussed in Federal Defendants' Memorandum, Pokagon's service area "corresponds to [Pokagon's] ancestral home." Fed. Defs. Mem. 44 (citing *TOMAC*, 433 F.3d at 867). Here, by contrast, the Vallejo Parcel is not within the Tribe's service area. AR0011605. The Decision states that the Pokagon restored lands determination did not establish "a standard whereby lands ceded by treaty qualify, *per se*, as restored lands," and cited several subsequent decisions confirming that a parcel's location within an area ceded by treaty is not a dispositive factor. AR0011605–06.

In addition, Pokagon's restoration by Congress is another significant, distinguishing factor. Under the regulations, tribes restored by congressional legislation that requires the Secretary to take land into trust for the benefit of the tribe within a specific geographic area are analyzed under 25 C.F.R. § 292.11(a), and not § 292.11(c), under which the Tribe was analyzed that, in turn, requires the Tribe to establish modern, significant historical, and temporal connections to the Parcel under § 292.12. Unlike tribes proceeding under § 292.12, tribes proceeding under § 292.11(a) do not need to establish a significant historical connection because "Congress has made a determination which lands are restored" and that geographic area is outside Interior's control. 73 Fed. Reg. at 29,364. Thus, the means of restoration of the tribe is relevant to Interior's restored lands determinations, and Pokagon and the Tribe are not similarly situated in that regard. AR0011605. Disparate treatment under these circumstances would not violate the IRA because it stems from congressional action, not from agency action. *See* 25 U.S.C. § 5123(f)-(g) (prohibiting disparate treatment by United States departments or agencies).

Finally, *Koi* does not support the Tribe's IRA claim. Pl. Reply 10. In *Koi*, Interior denied the Koi Nation's request "for a determination that it is 'an Indian tribe that is restored to Federal recognition' for purposes of IGRA, as that exception is defined by the Part 292 regulations, 25 C.F.R. § 292." 361 F. Supp. 3d at 32 (citation omitted). Interior conceded in *Koi* that the only difference between the Koi Nation and another tribe, the Ione Band, was that the latter was "grandfathered into the restored lands exception" because it was restored before the promulgation of Part 292 in 2008. *Id.* at 55. Here, as discussed above and as the Decision explained, the Tribe differed from Pokagon for reasons other than simply the passage of the regulations. Further, in *Koi*, the difference between the manner in which the tribes were restored to federal recognition was due in part to Interior's actions. Interior had denied the Koi Nation access to Interior's administrative process for federal acknowledgment, located at 25 C.F.R. Part 83, but then treated the tribe differently from Grand Traverse based on the fact that Grand Traverse was acknowledged through Part 83. *Id.* at 54–55. Interior also "ignored the Koi Nation's request in 2006, prior to the 2008 promulgation of the Part 292 regulations, for a formal determination as to the tribe's restored status." *Id.* at 55. The court rejected Interior's attempts to explain disparate treatment given that Interior itself was responsible for the differing situations. Here, the tribes have different factual situations in part due to Congress, not Interior.

In conclusion, Interior did not treat similarly situated tribes differently in violation of the IRA's privileges and immunities clause.

C. Interior's decision-making process complied with the APA.

The Federal Defendants' Memorandum explains that the Principal Deputy Assistant Secretary – Indian Affairs ("Principal Deputy") had authority to make the Decision, and that the Office of Indian Gaming was not excluded from the deliberations. Fed. Defs. Mem. 37–42. The Tribe argues that the Departmental Manual does not support such delegation and that Interior

violated the APA by not following its own guidance documents. Pl. Reply 12–14, 14–16. These arguments fail.

1. The Principal Deputy had authority to issue the Decision.

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." 209 DM 8.4, ECF No. 48-9 at 1. Under 110 DM 8.2, the Principal Deputy "is responsible for . . . regulation of Indian gaming." ECF No. 48-6 at 1–2. This provision also establishes that the Office of Indian Gaming is one of four offices that report directly to the Principal Deputy. The Office of Indian Gaming is "responsible for the development of policies and procedures used for implementing gaming-related activities authorized by the Indian Gaming Regulatory Act and other Federal laws" and "requests to take land into trust for the purpose of conducting gaming." 110 DM 8.2(D). Thus, because the Principal Deputy has delegated responsibility over the "regulation of Indian gaming" and over the Office of Indian Gaming, he was authorized to render the Decision here.

According to the Tribe, these provisions do not, standing alone, give the Principal Deputy authority but instead "specify that he *may* hold authority to discharge duties *if assigned by the Assistant Secretary*." Pl. Reply 12 (emphasis in original). The Tribe does not cite any support for its strained interpretation that the DM's general delegation to the Principal Deputy then requires, in turn, *additional* and *specific* delegations to the Principal Deputy, other than noting that the Assistant Secretary's delegation from the Secretary under 209 DM 8.1 is broader than the delegation to the Principal Deputy under 209 DM 8.4. *Id.* (citing 209 DM 8.1, ECF No. 48-9 at 1). But it is neither surprising nor determinative that the Assistant Secretary has delegation of broader authority than the Principal Deputy, and 209 DM 8.4(A) states that the Principal Deputy "*is delegated* all program and administrative authorities" of the Assistant Secretary necessary for

the responsibilities in 110 DM 8.2. 209 DM 8.4(A) (emphasis added). Contrary to the Tribe's assertion, this language is not conditioned on other events. Further, to the extent the Tribe relies on the provision in 110 DM 8.2 that the Principal Deputy "discharges the duties assigned by the Assistant Secretary" to infer that a direct assignment by the Assistant Secretary is necessary, that argument is belied by 110 DM 8.1, which states that the Assistant Secretary "discharges the duties assigned by the Secretary." Given that the Tribe accepts that the Assistant Secretary has express delegated authority without further action by the Secretary, this language cannot mean that the Principal Deputy has no authority until assigned by the Assistant Secretary.

The Tribe also misreads 110 DM 8.2 as giving the Principal Deputy authority to "manage[], direct[], and coordinate[] functions" related to Indian gaming, but not actual delegation of authority. Pl. Reply 13. The Tribe's assertion that the Principal Deputy position is simply a middle management position without actual authority is belied by 209 DM 8.4(A) and 110 DM 8.2. In particular, nothing in 209 DM 8.4 suggests that the Principal Deputy's role is merely to advise the Assistant Secretary and the Court should reject Plaintiff's argument otherwise.

Finally, the Tribe's argument that, under Interior's interpretation, the Principal Deputy has the same authority as the Assistant Secretary is also wrong. Pl. Reply 13. 209 DM 8.4(B) provides examples of matters over which the Assistant Secretary has authority that the Principal Deputy does not absent further action. In addition, the Assistant Secretary has the authority to "exercise all of the authority of the Secretary," 209 DM 8.1, whereas the Principal Deputy has authority over the specific topics and offices listed in 110 DM 8.2. 209 DM 8.4(A). The Tribe's argument is simply not supported by the Departmental Manual. In addition, there is a presumption of regularity accorded to agency action, *see Citizens to Pres. Overton Park, Inc. v.*

Volpe, 401 U.S. 402, 415 (1971), *abrogated on other grounds by Califano v. Sanders,* 430 U.S. 99, and Interior's interpretation of its own manuals therefore should be upheld.

2. The 2008 Guidance did not establish a binding procedure.

The Tribe also argues that the 2008 Guidance coupled with the Part 292 regulations establishes binding procedure for Interior and gives the Office of Indian Gaming the primary responsibility for Indian Land Opinions. Pl. Reply 14. The Tribe asserts that Interior's decision is arbitrary and capricious because the Office of Indian Gaming did not take a primary role in making a recommendation to the decisionmaker as required by the 2008 Guidance. *Id.* at 14–15.

First, the 2008 Guidance is not a binding agency rule the violation of which creates a cause of action. Internal agency policy manuals that describe procedure do not have the force of law. *See, e,g.*, *Batterton v. Marshall*, 648 F.2d 694, 700–02 (D.C. Cir. 1980) (holding that documents that "merely express[] an agency's . . . internal practice or procedure" or "internal house-keeping measures organizing agency activities" do not have the force of law); *Watervale Marine Co. v. U.S. Dep't of Homeland Sec.*, 55 F. Supp. 3d 124, 146 (D.D.C. 2014) (finding that Coast Guard policy manuals were not binding), *aff'd on other grounds*, 807 F.3d 325 (D.C. Cir. 2015); *Beshir v. Holder*, 10 F. Supp. 3d 165, 180 (D.D.C. 2014) (finding that agency memorandum was a non-binding statement of internal policy); *Beverly Health & Rehab. Servs., Inc. v. Thompson*, 223 F. Supp. 2d 73, 101 (D.D.C. 2002) (finding internal agency guidelines not to be substantive and listing cases where agency guidebooks and handbooks were held to be exempt from notice and comment proceedings). In considering whether the 2008 Guidance is a binding and enforceable norm, the Court should consider "whether the agency has (1) imposed any rights and obligations, or (2) genuinely left the agency and its decisionmakers free to exercise discretion.'" *Wilderness Soc'y v. Norton*, 434 F.3d 584, 595 (D.C. Cir. 2006) (internal quotations and alterations omitted). The Court can look to the "agency's expressed intentions,"

including "(1) the [a]gency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency." *Id.* (quoting *Molycorp, Inc. v. EPA,* 197 F.3d 543, 545 (D.C. Cir. 1999)). The use of mandatory language is not decisive, contrary to the Tribe's argument. Pl. Reply 15; *Wilderness Soc'y*, 434 F.3d at 595 (holding that policies were not binding despite some mandatory language).

Here, the 2008 Guidance is an internal communication to Interior employees providing a process for making recommendations to the agency decisionmakers, ECF No. 48-4 at 1–2, and was not meant to establish a binding norm. It was not promulgated pursuant to the APA or published anywhere outside the agency, much less in the Federal Register or Code of Federal Regulations. In addition, there is no statutory provision regarding the Office of Indian Gaming. *See Wilderness Soc'y*, 434 F.3d at 596.

The Guidance also does not give any individual rights or prescribe substantive rules. The 2008 Guidance "is very unlike a substantive rule that, as a practical matter, requires the parties affected to adjust their conduct as soon as the rule is issued." *Fund for Animals, Inc. v. U.S. Bureau of Land Mgmt.*, 460 F.3d 13, 20 (D.C. Cir. 2006). It does not require an applicant for an Indian Lands Opinion to submit new or different evidence and does not dictate any particular result in any given case. The guidance merely addresses which office provides the recommendation to the decisionmaker. In sum, "[t]here is no indication that the agency meant for these internal directives to be judicially enforceable at the behest of members of the public who question the agency's management." *Wilderness Soc'y*, 434 F.3d at 596. Therefore, the 2008 Guidance is non-binding and cannot be enforced by the Tribe. *See id.*

The cases the Tribe cites are not relevant here. In *Damus v. Nielsen*, 313 F. Supp. 3d 317 (D.D.C. 2018), the district court (not the D.C. Circuit as the Tribe erroneously states) addressed an Immigration and Customs Enforcement Directive that established the process by which the agency would determine whether an individual would be released from detention on parole before a full hearing. *Id.* at 323. The Directive "was intended — at least in part — to benefit asylum-seekers navigating the parole process," and the agency admitted at oral argument that the guidance was binding agency policy. *Id.* at 338. Here, the 2008 Guidance does not benefit individuals and was in fact meant to insulate agency decisions from stricter judicial review. ECF No. 48-4 at 5. Similarly, *Doe v. U.S. Department of Justice* (found at 753 F.2d 1092, not 735 F.3d 1092 as the Tribe cites) does not support the Tribe's argument. That case, which dealt with agency regulations for addressing employee problems and misconduct, held that where the regulations did not create explicit or formal procedural protection for employees, they were not binding. 753 F.2d 1092, 1098–99 (D.C. Cir. 1985). The case does not apply here.

Further, even if the 2008 Guidance creates a binding norm (and had not been withdrawn or superseded, Fed. Defs. Mem. 40–41), the Tribe has not demonstrated that Interior violated the Guidance or that the Tribe was injured as a result of any such violation. The 2008 Guidance provides for the Solicitor's Office's involvement in restored lands determination, either through consultation with the Office of Indian Gaming or by drafting the recommendation as stated in the options paper underlying the Guidance. ECF No. 48-4 at 5 ("In practice, the Solicitor's office will draft the recommendation for the Office of Indian Gaming [on the "restoration of lands" component of the restored lands exception] in addition to the legal opinion as to whether the tribe is a restored tribe."). Further, as demonstrated in the Federal Defendants' Memorandum, the

Office of Indian Gaming was not excluded from the process of considering the Tribe's request. Fed. Defs. Mem. 41–42.

Interior's Decision is well within the bounds of reasoned decisionmaking. Nothing about the 2008 Guidance changes that conclusion, and the Decision should be upheld.

D. Federal Defendants properly applied the regulations.

The Tribe's arguments that Interior failed to follow its own regulations, Pl. Reply 17–23, are unavailing. The Decision comports with Part 292.

1. The Tribe did not show a significant historical connection to land in the vicinity of the Parcel.

The Decision shows that Interior did not require the Tribe to show proof of occupancy or subsistence use of the Vallejo Parcel itself. AR0011614–15. Under the definition of "[s]ignificant historical connection" in 25 C.F.R. § 292.2, the Tribe need not provide evidence of occupancy or use on the Parcel itself; documentation of occupancy or subsistence use "in the vicinity of the land" is sufficient.

The express language of 25 C.F.R. § 292.12(b) states that the tribe must demonstrate a significant historical connection to the "newly acquired lands." Thus, the Tribe's documentation must support a connection to the Parcel itself, even if only by inference. Fed. Defs. Mem. 23–26. That requirement in § 292.12(b) is consistent with the phrase "restoration of lands" in IGRA. 25 U.S.C. § 2719(b)(1)(B)(iii). For the parcel to be considered "restored," the Tribe must have had a previous connection to it. *See Confederated Tribes of Coos*, 116 F. Supp. at 162 (explaining that "[u]nder a natural (and broad) reading of the provision, . . . [t]he 'restoration of lands' could be construed to mean just that; the tribe would be placed back in its former position by *reacquiring* lands" previously held by the tribe (emphasis added)). In this case, the Tribe

simply did not provide evidence of occupancy or subsistence use in the vicinity of the Parcel that was sufficient for Interior to infer use of the Parcel itself.

Moreover, contrary to the Tribe's portrayal, the Decision did not turn on the narrow issue of connection to the Parcel rather than connection to the vicinity. Instead, the Decision explains at length that the Tribe did not demonstrate the requisite historical connection even to the land in the vicinity of the Parcel. AR0011603–15. The Tribe did not have villages or burial grounds in the vicinity of the Parcel, AR0011603, and did not show occupancy or subsistence use in the vicinity that would allow Interior to make an inference that the Tribe also occupied or used the Parcel. AR0011614–15. For example, there is no evidence that the Tribe's ancestors labored on Rancho Suscol, the rancho that would have encompassed the Parcel. AR0011614. The Decision distinguished this case from the favorable restored lands determination for the Bear River Band of the Rohnerville Rancheria, where the tribe showed evidence of its ancestors' presence at several sites surrounding the parcel at issue and Interior could therefore make a natural inference that the tribe must have also used the parcel itself. AR0011614–15. Interior also found evidence of Tribal ancestor Augustine's presence in the North Bay region to be insufficient to show a significant historical connection, not only because of the lack of evidence linking Augustine to the vicinity of the Parcel, AR0011614, but also because Augustine's presence in the region did not indicate a broader presence of the Tribe's ancestors as a whole in the area. AR 11611–13. Even granting the several assumptions necessary to determine that the Tribe's documentation shows occupancy or subsistence use of land in the vicinity of the Parcel, the Tribe's evidence was not sufficient to infer that the Tribe used the Parcel itself. AR0011615.

The Tribe asserts that it is "wholly unrealistic" to expect it to demonstrate a connection to the Parcel "out of the literally millions of acres where a significant historical connection may

theoretically exist," Pl. Reply 19. However, the Tribe's subjective frustration with a binding regulatory requirement does not render decisions made under that regulation arbitrary and capricious under the APA. Nothing in IGRA, Part 292, case law, or Interior's prior restored lands determinations supports the Tribe's overly expansive view of the restored lands exception.

2. The Decision did not require that the Tribe show a continuous connection to the Vallejo Parcel.

The Tribe next argues that the Decision should be remanded because Interior "effectively imposed" a requirement of continuous historical connection to the Vallejo Parcel in order to prove a significant historical connection to the land. Pl. Reply 21. An examination of the Decision, however, shows that Interior did not require such a showing.

The Tribe's argument is based on the Decision's finding that the Tribe had shown at best a transient presence in the vicinity of the Parcel. *Id.* at 22 (citing AR0011613). This language mirrors language in the preamble of the final rule promulgating Part 292. *See* 73 Fed. Reg. at 29,366. The preamble explains that a continuous presence is not required, but contact that is "transitory or brief in nature" is insufficient to demonstrate significant historical connection. *Id.* The preamble states that the definition of "significant historical connection" requires "something more than evidence that a tribe merely passed through a particular area." *Id.* Prior restored lands determinations likewise "require[d] something more than a transient presence in an area." AR0011607 (quoting the restored lands determination for the Guidiville Band of Pomo Indians). Thus Interior followed both the regulations and its precedent in requiring a showing of more than a transient presence. This requirement is far from a requirement to show a continuous presence.

The Tribe suggests that the Decision should be overturned because it does not specifically discuss "the Karuk decision's indication that sporadic evidence is sufficient." Pl. Reply 22. However, this suggestion is without merit because the Decision does not turn on the

Tribe's lack of continuous presence in the area. Indeed, the Decision specifically states that there is no temporal requirement necessary to show significant historical connection. AR0011613. Rather, it focuses on the Tribe's overarching failure to demonstrate occupancy or subsistence use in the vicinity of the land. In doing so, the Decision discusses thoroughly Augustine's possible connections with various locations in the North Bay region, AR0011609–11, and ultimately concludes that Augustine's "back-and-forth movements between the Clear Lake area and the North Bay region reveal an inconsistent, if not transitory, presence at odds with the [Tribe's] claim to occupancy and subsistence use of the Parcel." AR0011613. The Decision also discusses other shortcomings, such as the absence of evidence of activities associated with occupancy or subsistence use. AR0011607–08. In addition, Interior also determined that the Tribe did not meet the significant historical connection requirement because "the connections made by a specific tribal member like Augustine, or a handful of members" cannot be imputed to show that the Tribe as a whole has the requisite connection to the land. AR0011612–13.

Moreover, the Decision adequately distinguished the Karuk Tribe on other grounds. Specifically, the Decision discusses that the Karuk decision was based in part on a BIA report showing that the Karuk Tribe had "aboriginal camp sites" on the parcel in question, as well as additional supporting correspondence and oral history, which established a connection to the parcel, AR0011606. The Decision determined, by contrast, that the Tribe has no comparable connection to the Vallejo Parcel.

In light of the numerous shortcomings in the Tribe's documentation discussed in the Decision, as well as the factual distinctions underlying the Decision and the restored lands determination for the Karuk Tribe, the Decision's lack of discussion of the temporal aspect of the

Karuk decision does not make the Decision arbitrary, capricious, or otherwise not in accordance with law. The Decision fully analyzed the Tribe's evidence and explained its decision.

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

The Tribe's final basis for claiming that Interior violated Part 292 is to argue that Interior improperly considered the geographic distance between the Tribe's former Rancheria and the Vallejo Parcel. Pl. Reply 23. According to the Tribe, the regulations do not require that the parcel be located near a former reservation or Rancheria, so Interior erred by considering the distance of the Parcel from the Tribe's former Rancheria as "negative evidence of the significant historical connection." *Id.*

Nothing in the Decision indicates that Interior weighed distance as a factor against the Tribe. The preamble of the final rule promulgating Part 292 states that "[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. 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 (citation omitted). In other words, Interior discussed the distance between the Vallejo Parcel and the site of the Tribe's former Rancheria only because if it had been a shorter distance, it might have supported a finding of a historical connection. AR0011602 – 03. Here, the distance did not show a significant historical connection. But nothing in the Decision suggests that the Tribe was therefore subject to a greater evidentiary burden or otherwise penalized.

Because Interior reasonably found that the Tribe has not shown a significant historical connection to the land and did not base the Decision on impermissible considerations, the Tribe's argument should be rejected.

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

1. Interior was not required to explicitly consider IGRA's broad goals in making its Decision.

In the final part of its Reply Brief, the Tribe appears to argue that instead of considering whether the Tribe's evidence factually meets Part 292's standards for establishing a significant historical connection, the Decision should have considered whether a favorable restored lands determination would meet IGRA's broad policy goals. Pl. Reply 24–25. The Tribe argues that the Office of Indian Gaming should have made the restored lands inquiry and discussed policy choices affecting the decision. Pl. Reply 25. Much of the Tribe's argument in this regard mirrors its argument related to the 2008 Guidance and should be similarly rejected. That Guidance, even if in effect at the time of the Decision (and has not been withdrawn or superseded, Fed. Defs. Mem. 40–41), does not carry the force of law.

But the Tribe's argument also makes little sense. IGRA identifies certain exceptions to the gaming prohibition for later-acquired lands, and the regulations "articulate[] the standards that the [Department] will follow in interpreting the various exceptions." 73 Fed. Reg. at 29,354. The regulations already take into account IGRA's goals. *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."). Thus, in applying the regulations, the Department necessarily considers IGRA's broad goals. The Department properly considered whether the Tribe's evidence met the regulations' standards. The APA requires no more.

2. Interior did not ignore relevant evidence.

The Tribe argues that Interior failed to considered evidence regarding the presence of the Tribe's ancestors as children at Mission San Francisco Solano in the North Bay region. Pl. Reply 27. Contrary to the Tribe's assertion, Interior considered such evidence. AR0011609,

11613. The Decision explains that the record does not indicate how long any of the children remained at the mission, undercutting the value of that evidence in establishing a significant historical connection. AR0011613 n.119. Again, the Tribe's disagreement with Interior's interpretation of relevant evidence neither means that Interior failed to consider such evidence nor that the disagreement, without more, constitutes an APA violation.

Interior also considered the Tribe's purported evidence of aboriginal occupancy and the Tribe's specific circumstances, including the pattern of season work on ranchos in the North Bay region that developed in the mid-1800s. AR0011609–10. The Decision observed that such evidence did not link the Tribe's ancestors to Rancho Suscol, the boundaries of which encompassed the Parcel, undercutting the Band's claim to a significant historical connection to the Parcel through such evidence. AR0011614. While noting that the Tribe's "narrative concerning its ancestors' dispersal throughout the North Bay region during the mid-1800s is compelling," the Decision ultimately concluded that the Tribe failed to identify "significant historical sites in the vicinity of the Parcel." AR0011615.

In short, the Tribe disagrees with Interior's weighing of the evidence. The record, however, shows that Interior considered all relevant data the Tribe presented. Interior therefore complied with the APA. *See Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 437 F. Supp. 2d 1193, 1216 (D. Kan. 2006) ("The 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." (citations omitted)).

3. Interior's analysis of the evidence was reasonable.

Finally, the Tribe argues that Interior was obligated to analyze the evidence "as a whole," based on Interior's restored lands determination for the Mechoopda Indian Tribe of Chico

Rancheria. Pl. Reply 28. However, that decision merely states at the end of its historical connection analysis that "[a]s a whole, [the] evidence demonstrates the Tribe's significant historic connection to the land at issue." ECF No. 48-12 at 22. The Mechoopda decision is not an example of a situation in which Interior deemed the historical connection requirement met when considering the evidence "as a whole" but not when considering each particular piece of evidence in isolation. Instead, the opinion concludes the opposite and discusses multiple ways in which the Mechoopda met the significant historical connection standard. *Id.* at 19–22. The Tribe therefore reads too much into a passing reference to the evidence "[a]s a whole." Neither IGRA nor Part 292 contains a requirement that evidence be analyzed "as a whole," and Interior is not required to do so to comply with the APA.

But in any event, the record shows that Interior analyzed the relevant evidence and found it to be lacking. The Tribe's evidence did not establish occupancy or subsistence use in the vicinity of the Parcel or otherwise establish the requisite historical connection to the Parcel. Nothing suggests that the evidence taken "as a whole" would meet the standard. Interior's Decision was reasonable and should be upheld.

III. CONCLUSION

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

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