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MAIDU of the Auburn Rancheria

Gene Whitehouse, Chairman | John L. Williams, Vice Chairman | Gabe Cayton, Secretary | Jason Camp, Treasurer | Leonard Osorio, Council Member

June 27, 2023

The Honorable Deb Haaland
Secretary
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240

Subject: *Scotts Valley Band of Pomo Indians v, U. S. Department of the Interior,* 2022 U.S. Dist. LEXIS 179819 (D.D.C. Sept. 30, 2022)

Dear Secretary Haaland:

On behalf of the United Auburn Indian Community ("United Auburn"), I am writing to urge the Federal government to appeal a troubling District Court decision in the case noted above.[1]

The Scotts Valley Band of Pomo Indians ("Scotts Valley" or "Band") initiated this lawsuit to challenge a 2019 Indian Lands Determination that Scotts Valley did not provide sufficient evidence to justify a proposed gaming site in Solano County, California. This site was located more than 90 miles driving distance from the former Scotts Valley Rancheria and the Band's homelands in Lake County, California.[2] The proposed site was also within the aboriginal territory of the Yocha Dehe Wintun Nation and other Indians of Patwin heritage.

After reviewing "voluminous documentation" submitted by Scotts Valley and other interested parties, including United Auburn, the Department concluded that "the Band has failed to provide sufficient evidence of a 'significant historical connection' … to qualify this particular property for the restored lands exception [under the Indian Gaming Regulatory Act]"[3]

The Department also denied similar historical arguments by Scotts Valley in a 2012 Indian Lands Determination involving a fee-to-trust application for a casino in Contra Costa County, more than 75 miles from the former Scotts Valley Rancheria and the Band's homelands in Lake

[1] *See Scotts Valley Band of Pomo Indians v. U.S. Department of the Interior*, 2022 U.S. Dist. LEXIS 179819 (D.D.C. Sept. 30, 2022) (hereinafter "2022 District Court Opinion"). *See also* Transcript of Bench Ruling, *Scotts Valley*, May 8, 2023 (Denial of Motion for Reconsideration) (hereinafter "2023 Bench Ruling Transcript").
[2] Letter from John Tahsuda, Principal Deputy Assistant Secretary—Indian Affairs, to The Honorable Shawn Davis, Chairman, Scotts Valley Band of Pomo Indians. February 7, 2019.
[3] *Id* at 1-2. *See also* Gaming on Trust Lands Acquired After October 17, 1988, 73 Fed. Reg. 29,354, at 29,366 (May 20, 2008) ("The definition of 'significant historical connection' establishes criteria which requires something more than evidence that a tribe merely passed through a particular area.").

County.[4] In this 2012 decision, the Department rejected the Band's contention that it was a successor-in-interest to the Suisun Patwin Indians.[5] The Department also found that the unratified 1851 Treaty signed by Scotts Valley's ancestors did not substantiate the Band's claims in the San Pablo Bay area. Eight different tribes signed this 1851 Treaty, and the land ceded by the Band's ancestors could have existed anywhere within the Treaty's boundaries.[6] Additionally, the Department expressed skepticism about the Band's arguments about possible employment by some of its members as cattle drivers at the Vallejo Ranchos in the 1840's and whether such transient activity would meet the rigorous standard of "subsistence use and occupancy" under Interior regulations.[7]

As a newly restored tribe, Scotts Valley was permitted 25 years by Interior regulations to submit a gaming trust application under the restored lands exception.[8] Instead of submitting a trust proposal for a parcel near the former Scotts Valley Rancheria in Lake County, the Band has spent more than 15 years attempting to secure gaming approvals from the Department for lands closer to San Francisco and between 75 and 90 miles from its homelands.

In its September 2022 ruling, the District Court correctly concluded that the Department's restored lands regulation was a proper interpretation of the Indian Gaming Regulatory Act ("IGRA") under *Chevron*. The Court also concluded that the Department's denial of Scotts Valley's application was defensible under the Administrative Procedure Act ("APA"). Unfortunately, the District Court also held that the Department was required in its decision-making process to weigh the historical evidence in the Band's favor under the Indian canon of construction.

The District Court has misinterpreted the Indian canon. The canon states that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."[9] Instead of limiting the canon to questions of statutory (or treaty) interpretation, the District Court expanded its use to require the Department to resolve evidentiary issues in favor of Scotts Valley in this administrative proceeding.[10]

The Indian canon was intended to benefit Indians in general and *not* be applied in a manner that benefits one tribe over the interests of other tribes. In its opinion, the District Court

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[4] *See* Letter from Donald E. Laverdure, Acting Assistant Secretary—Indian Affairs, to the Honorable Donald Arnold, Chairperson, Scotts Valley Band of Pomo Indians, May 25, 2012.
[5] *Id.* at 13
[6] *Id.* at 14.
[7] *Id.* at 13.
[8] *See* 25 C.F.R. § 292.12(c)(2).
[9] *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).
[10] *But see Mashpee Wampanoag Tribe v. Bernhardt*, 466 F. Supp. 3d 199, 216-217 (D.D.C. 2020) ("The Mashpee Tribe invokes the Indian canon of construction in order to suggest that the Secretary's application of the M-Opinion's two-part test should be favorable to the Tribe. This argument misunderstands the canon. … With the statutory interpretation resolved, however, the canon's role is complete.")

acknowledges that the basis of the canon is the "unique trust relationship between the United States and the Indians."[11] However, the United States has a trust responsibility to *all* Federally recognized tribes, including those with existing land bases that are confined to gaming within their homelands as well as to restored and terminated tribes.

This important distinction in applying the Indian canon was best explained in a 2015 decision by the 9th Circuit Court of Appeals:

> Even if the *Blackfeet* [Indian canon] presumption might be applied in some circumstances in our circuit, however, it would not apply in this case. This is because all tribal interests are not aligned. An interpretation of the restored lands exception that would benefit this particular tribe, by allowing the unlimited use of restored land for gaming purposes, would not necessarily benefit other tribes also engaged in gaming. It might well work to their disadvantage.
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> The canon should not apply in such circumstances. 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. … This court has explained that the *Blackfeet* presumption does not apply when tribal interests are adverse because '[t]he government owes the same trust duty to all tribes.' It cannot favor one tribe over another. The district court therefore correctly refused to apply the Indian canon in the circumstances of this case.[12] (citations omitted)

Additionally, several District Courts within the D.C. Circuit have held that the Indian canon of construction does *not* apply in circumstances where tribal interests are either in conflict or not completely aligned:

- In *Confederated Tribes of the Grand Ronde Community v. Jewell*, the Court stated that "the Indian canon of construction does not apply for the benefit of one tribe if its application would adversely affect the interests of another tribe."[13]

- In *Forest County Potawatomi Community v. United States*, the Court stated that "applying the Indian canon as Plaintiff suggests would benefit Plaintiff at the expense of another tribe, Menominee. The Court declines to apply the Indian law canon where the interests of all tribes are not aligned."[14]

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[11] *2022 District Court Opinion* at 20.
[12] *Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015).
[13] *Confederated Tribes of the Grand Ronde Community v. Jewell*, 75 F. Supp. 3d 387, 396 (D.D.C. 2014) (citing *Confederated Tribes of Chehalis Indian Reservation v. Washington*, 96 F.3d 334, 340 (9th Cir. 1996)).
[14] *Forest County Potawatomi Community v. United States*, 330 F. Supp. 3d 269, 280 (D.D.C. 2018).

- In *Connecticut v. U.S. Department of the Interior*, the Court held that the Indian canon should not apply where "its application would adversely affect the interests of another tribe, and it is not clear that applying [the] tribal-state compact approval deadlines to secretarial procedures would benefit tribes generally."[15]

The most significant problem created by the District Court's decision in *Scotts Valley* is that it removes the Department's discretion in making decisions involving tribal gaming applications in a manner that overrides the reasonableness standard in the APA. The Court's ruling imposes a new, unbounded standard on the Department to weigh the loss of land and disbursement of tribal communities in its restored lands decisions, without any grounding in IGRA or the Department's Part 292 regulations.

It will be difficult for the Department to implement this District Court decision because it requires Interior to replace the reasoned decision-making standard under the APA with a new standard that limits its ability to apply its own regulations to a specific set of facts. And the precedent established by this District Court decision could implicate other regulatory decisions and responsibilities the Department has over Indian affairs not only in gaming-related matters, but with regard to other decisions that the Department handles that impact Indian affairs, such as land use authorizations, water management, self-determination contracts, and natural resources management. It is improper for the judicial branch to usurp the executive branch's ability to interpret and apply statutes within its jurisdiction based on carefully-balanced, well-established standards.

Recognizing the unorthodox nature of the District Court's application of the Indian canon to factual evidence, the Department asked the Court to reconsider. In May 2023, the District Court denied the motion to reconsider in a bench ruling during a status conference.[16] The Court concluded that Interior improperly failed to apply the Indian canon of construction to the Indian Lands Determination by not giving "fair consideration of the historical circumstances that severed the Band's connection with [its land] …."[17]

In essence, the District Court is using the Indian canon to substitute its judgment for that of the Department, which is exactly what the APA counsels against. The Department does take into consideration historical circumstances when it evaluates gaming applications under its "significant historical connection" regulatory standard. Whether the Department's analysis is reasonable is the measure of its legality. The canon is a tool of statutory and treaty interpretation, not a tool for second guessing the Department's expertise in applying well-established legal standards to the particular facts at hand.

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[15] *Connecticut v. U.S. Department of the Interior*, 344 F. Supp. 3d 279, 314 (D.D.C. 2018) (citing *Confederated Tribes of Grand Ronde Community v. Jewell*, 75 F. Supp. 3d 387, 396 (D.D.C. 2014)).
[16] *See 2023 Bench Ruling Transcript*, *supra* note 1.
[17] *Id.* at 4.

Notably, the District Court does not provide any legal authority for applying the canon to factual determinations. The Court also glosses over the fact that the canon should not apply when it would be to the detriment of other tribes. Instead, it turns that issue into whether the government was applying this inter-tribal principle at the Indian Lands Determination level versus the statutory stage. The Court misses the point that the Department has long-standing regulatory standards adopted pursuant to IGRA that reflect its consideration of the unique historical experiences of tribes, with favorable provisions in support of restored and terminated tribes. Under such circumstances, there is no basis to apply the Indian canon.

In other words, there is no ambiguity within the IGRA legal regime warranting additional, beneficial weight being given to tribal applicants. And there is certainly no basis to apply the canon to the Department's individual evaluation of factual evidence. The Court's ruling creates the untenable situation of deferring to the agency under APA standards when a tribal applicant is granted approval, but requiring application of the Indian canon when a tribe may face the risk of a denial. There is no authority in IGRA to create such favoritism over and above IGRA's existing framework that does provide relief for restored and terminated tribes.

For all these reasons, United Auburn joins other California tribes to respectfully request that the Department make a recommendation to the U.S. Department of Justice to appeal the September 2022 ruling and the May 2023 denial of reconsideration. The District Court also acknowledged that its denial of reconsideration ruling was a question of law, making it ripe for appeal.[18]

Sincerely,

Gene Whitehouse
Chairman

cc: Robert Anderson, Solicitor
Wizipan Garriott, Principal Deputy Assistant Secretary—Indian Affairs
Kathryn Isom-Clause, Deputy Assistant Secretary—Indian Affairs
Ann Marie Bledsoe-Downs, Principal Deputy Solicitor—Indian Affairs
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Todd Kim, Assistant Attorney General, Environment and Natural Resources Division, Department of Justice

[18] *See also Dupree v. Younger*, 598 U.S. ____, slip op. at 6 (May 25, 2023) ("While factual issues addressed in summary-judgment denials are unreviewable on appeal, the same is not true of purely legal issues—that is, issues that can be resolved without reference to any disputed facts.").

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