



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, DC 20240

FEB 07 2019

The Honorable Shawn Davis
Chairman, Scotts Valley Band of Pomo Indians
1005 Parallel Drive
Lakeport, California 95453

Dear Chairman Davis:

I am writing regarding the Scotts Valley Band of Pomo Indians' (Scotts Valley Band or Band) request that the Department of the Interior (Department) acquire 128.32 acres of land in the City of Vallejo, Solano County, California (Vallejo Parcel or Parcel) into trust on its behalf pursuant to 25 C.F.R. § 151.9.¹ On January 28, 2016, the Band further requested a "restored lands" determination with regard to the Parcel.² I have therefore considered whether the Parcel, if taken into trust, would qualify as "restored lands" within the meaning of Federal regulations governing Indian gaming.³ If the Parcel does qualify, then it would be exempt from the general prohibition on gaming on lands acquired by the Secretary of the Interior (Secretary) in trust after October 17, 1988.⁴

I. DECISION

I have considered the Band's application pursuant to the Indian Gaming Regulatory Act (IGRA) and the Department's regulations at 25 C.F.R. Part 292, which implement Section 2719 of IGRA. I have also reviewed the voluminous documentation that the Band submitted in support of its Request,⁵ as well as materials submitted by parties opposed to the Request. Alongside local

¹ Letter and accompanying application from Gabriel Ray, Chairman, Scotts Valley Band of Pomo Indians, to Amy Dutschke, Reg'l Dir., Pac. Reg'l Office, Bureau of Indian Affairs (Aug. 11, 2016); *see also* 25 U.S.C. § 5108 (previously codified at 25 U.S.C. § 465) (authorizing the Secretary to acquire land for the purpose of providing land to Indians). The United States does not currently hold any land in trust for the Band.

² Letter from Gabriel Ray, Chairman, Scotts Valley Band of Pomo Indians, to Lawrence S. Roberts, Acting Assistant Sec'y – Indian Affairs, Dep't of the Interior (Jan. 28, 2016) [hereinafter, the "Request"]. *See also* 25 C.F.R. § 292.3(b) (regarding gaming on "newly acquired lands that require a land-into-trust application").

³ *See* 25 C.F.R. § 292.7 (setting forth the criteria for meeting the requirements of the "restored lands" exception).

⁴ *See* 25 U.S.C. § 2719(b)(1)(B)(iii) (listing the exception from the prohibition for restored lands). Alongside tribal member housing, a governmental headquarters, and health facilities, the Band is interested in developing an "integrated casino resort" on the Parcel to serve as the "economic engine" for its tribal community. Letter from Shawn Davis, Chairman, Scotts Valley Band of Pomo Indians, to John Tahsuda III, Principal Deputy Assistant Sec'y – Indian Affairs, Dep't of the Interior (May 3, 2018). The casino would offer class II and III gaming, as defined in the Indian Gaming Regulatory Act ("IGRA"). 25 U.S.C. §§ 2701–2721, 18 U.S.C. § 1166.

⁵ *See, e.g.,* Letter and accompanying materials from Shawn Davis, Chairman, Scotts Valley Band of Pomo Indians, to John Tahsuda III, Principal Deputy Assistant Sec'y – Indian Affairs, Dep't of the Interior (May 3, 2018); Memorandum and accompanying materials from Steven J. Bloxham, Fredericks Peebles & Morgan LLP, to Lawrence S. Roberts, Acting Assistant Sec'y – Indian Affairs (Nov. 14, 2016); Letter from Steven J. Bloxham, Fredericks Peebles & Morgan LLP, to Eric Shepard, Assoc. Solicitor, Div. of Indian Affairs, Office of the Solicitor, Dep't of the

governments,⁶ objecting parties include the Yocha Dehe Wintun Nation (Yocha Dehe) and the United Auburn Indian Community of the Auburn Rancheria.⁷

Upon review of these various submissions, I regret to inform you that the Department has determined that the Parcel does not qualify as restored lands within the meaning of applicable law. Specifically, the Band has failed to provide sufficient evidence of a “significant historical connection” to the Parcel, as required to qualify this particular property for the restored lands exception.⁸ I have set forth the bases for my decision below.

II. LEGAL FRAMEWORK

The IGRA was enacted “to provide express statutory authority for the operation of such tribal gaming facilities as a means of promoting tribal economic development, and to provide regulatory protections for tribal interests in the conduct of such gaming.”⁹ Section 20 of IGRA generally prohibits gaming on lands taken into trust after October 17, 1988.¹⁰ However, Congress expressly carved out the restored lands exception to this prohibition, which authorizes gaming on lands that were “taken into trust as part of the restoration of lands for an Indian tribe that is restored to Federal recognition.”¹¹ One of the purposes behind the restored lands exception is “ensuring that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones.”¹²

Part 292 of Title 25, Code of Federal Regulations, implements Section 20 of IGRA. For a parcel to meet the requirements of the restored lands exception, a tribe must demonstrate the following:

- (1) the tribe has been restored to Federal recognition, as defined in 25 C.F.R. §§ 292.7(a)-(c), 292.8–292.10; and

Interior (Sept. 15, 2016); Letter and accompanying table from Patrick R. Bergin, Fredericks Peebles & Morgan LLP, to Paula L. Hart, Dir., Office of Indian Gaming (Apr. 5, 2016); Legal Analysis by Steven J. Bloxham, Fredericks Peebles & Morgan LLP (Jan. 29, 2016); Report by Albert L. Hurtado, Historian (Jan. 29, 2016); Report by Dorothea J. Theodoratus, Anthropological Consultant (Jan. 29, 2016); Consolidated Report by Heather H. Howard et al. (Steven J. Bloxham ed. 2016).

⁶ See, e.g., Letter from Erin Hannigan, Chairwoman, Bd. of Supervisors, Solano Cnty., to Lawrence S. Roberts, Acting Assistant Sec’y – Indian Affairs, Dep’t of the Interior (Aug. 23, 2016); Letter from Claudia Quintana, City Attorney, City of Vallejo, to Lawrence S. Roberts, Acting Assistant Sec’y – Indian Affairs, Dep’t of the Interior (July 28, 2016).

⁷ See, e.g., Letter and accompanying report from Gene Whitehouse, Chairman, United Auburn Indian Cmty. of the Auburn Rancheria, to Lawrence S. Roberts, Principal Deputy Assistant Sec’y – Indian Affairs, Dep’t of the Interior (Nov. 7, 2016); Letter, legal memorandum, and accompanying materials from James Kinter, Tribal Sec’y, Yocha Dehe Wintun Nation, to Lawrence S. Roberts, Principal Deputy Assistant Sec’y – Indian Affairs, Dep’t of the Interior (Nov. 8, 2016); Letter, legal memorandum, and accompanying materials from Leland Kinter, Tribal Chairman, Yocha Dehe Wintun Nation, to Lawrence S. Roberts, Principal Deputy Assistant Sec’y – Indian Affairs, Dep’t of the Interior (Nov. 22, 2016).

⁸ See 25 C.F.R. § 292.12(b).

⁹ *Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attorney for the W. Dist. of Mich.*, 198 F. Supp. 2d 920, 933 (W.D. Mich. 2002), *aff’d*, 369 F.3d 960 (6th Cir. 2004); see also 25 U.S.C. § 2702(1) (stating that one purpose of IGRA is to “provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments”).

¹⁰ 25 U.S.C. § 2719(a).

¹¹ 25 U.S.C. § 2719(b)(1)(B)(iii).

¹² *City of Roseville v. Norton*, 348 F.3d 1020, 1030 (D.C. Cir. 2003).

- (2) the lands qualify as restored lands, as defined in 25 C.F.R. §§ 292.7(d), 292.11–292.12.

(a) Restored Tribe Criteria

In a memorandum dated November 18, 2008, the Solicitor’s Office opined that the Band qualified as a restored Tribe for the purposes of the restored lands exception.¹³ The Band was terminated pursuant to the California Rancheria Act¹⁴ and restored to Federal recognition pursuant to a Stipulation for Entry of Judgment in *Scotts Valley Band of Pomo Indians of the Sugar Bowl Rancheria v. United States* (the “1991 Stipulated Judgment”).¹⁵ The Department published the notice of the Band’s Federal recognition status in the Federal Register on February 12, 1992.¹⁶ Therefore, the Band is a restored Tribe and has met the requirement of the first part of the two-part restored lands exception analysis.

(b) Restored Lands Criteria

Section 292.11 sets forth the criteria for newly acquired lands to qualify as restored lands. Relevant here, the Band was restored pursuant to a Federal court determination in which the United States was a party or by a court-approved settlement agreement entered into by the United States (specifically, the 1991 Stipulated Judgment). The Band therefore must demonstrate that the Parcel meets the requirements of 25 C.F.R. § 292.12.¹⁷

Under 25 C.F.R. § 292.12, the tribe must demonstrate (a) “modern connections” to the newly acquired land; (b) “a significant historical connection to the land”; and (c) “a temporal connection between the date of the acquisition of the land and the date of the tribe’s restoration.”

The Band has demonstrated the required modern¹⁸ and temporal¹⁹ connections to the Parcel. The question is therefore whether the Band has demonstrated that it has a “significant historical connection” to the Parcel. Section 292.12(c) states that one of the criteria that a tribe must meet for the purposes of the restored lands exception is a significant historical connection to the land. A

¹³ Memorandum from Edith R. Blackwell, Assoc. Solicitor, Div. of Indian Affairs, Office of the Solicitor, Dep’t of the Interior, to George T. Skibine, Acting Assistant Sec’y for Policy & Econ. Dev., Dep’t of the Interior (Nov. 18, 2008).

¹⁴ Act of Aug. 18, 1958, Pub. L. No. 85-671, 72 Stat. 619, *amended by* Act of Aug. 11, 1964, Pub. L. 88-419, 78 Stat. 390.

¹⁵ No. C-86-3660 WWS (N.D. Cal. Mar. 15, 1991).

¹⁶ Notice of Reinstatement to Former Status for the Guidiville Band of Pomo Indians, the Scotts Valley Band of Pomo Indians and Lytton Indian Community of CA, 57 Fed. Reg. 5,214 (Feb. 12, 1992).

¹⁷ 25 C.F.R. § 292.11(c).

¹⁸ In relevant part, the Band has demonstrated that (1) both the Parcel and the Band are located in the same state, 25 C.F.R. § 292.12(a), and that the Parcel is within a 25-mile radius of the tribe’s headquarters or other tribal governmental facilities that have existed at that location for at least 2 years at the time of the application for land-into-trust. 25 C.F.R. § 291.12(a)(3). *See generally* Memorandum from Scotts Valley Band of Pomo Indians 1 n.3, 4 n.6 (May 3, 2018); Fee-to-Trust Application, Scotts Valley Band of Pomo Indians, 16–18 (Aug. 11, 2016).

¹⁹ In relevant part, the Band requested to take the Parcel into trust on August 11, 2016, *see* Letter and accompanying application from Gabriel Ray to Amy Dutschke, *supra* note 1, within 25 years of its restoration to Federal recognition, *see* 57 Fed. Reg. 5,214 (listing the “[e]ffective” date of reinstatement to pre-termination status as September 6, 1991), and the Band is not gaming on other lands. 25 C.F.R. § 292.12(c)(2).

tribe can establish a “significant historical connection” where (1) “the land is located within the boundaries of the tribe’s last reservation under a ratified or unratified treaty, . . .” or (2) “a tribe can demonstrate by historical documentation the existence of the tribe’s villages, burial grounds, occupancy or subsistence use in the vicinity of the land.”²⁰

The Band has not made the required showing, and the Parcel therefore does not qualify as “restored lands” within the meaning of IGRA. I elaborate below.

III. APPLICATION OF RESTORED LANDS CRITERIA TO THE VALLEJO PARCEL

(a) As a preliminary matter, the evidence indicates that the Scotts Valley Band is a successor-in-interest to the Ca-la-na-po and the Mo-al-kai.

If a tribe is seeking to establish a historical connection to a parcel through evidence of subsistence use or occupancy by the tribe’s predecessors, as the Band is here, it is important to identify those predecessors. As the Department acknowledged in a 2012 restored lands determination concerning an unrelated set of parcels submitted by the Band, the Band has established a line of political succession and significant genealogical descent from the Ca-la-na-po tribelet, and it is a successor-in-interest to the Ca-la-na-po.²¹ Additionally, the Band has provided persuasive evidence of political succession or significant genealogical descent from another tribelet, the Mo-al-kai.

Dorothea Theodoratus, an anthropologist commissioned by the Band, wrote in her report that kin groups among Pomo Indians “were both ambilateral and ambilocal, which allowed for movement of members among the tribelets . . .”²² An analysis relating to the connection between an alleged predecessor of the Band and the Band itself must acknowledge the “flexibility of Pomo social and political structure.”²³

Here, the evidence suggests such fluidity existed between the Ca-la-na-po (also known as the Kulanapo or Hoolanapo) and the Mo-al-kai (also known as the Molkai, Yimaba, or Yimabak). In a 1928 interview with Scotts Valley Band’s ancestor Joe Augustine, anthropologist Omer Stewart explained: “Joe Augustine was identified as being chief of the ‘Yimaba of Scotts Valley,’ with parents from the ‘village of Kulanapo.’”²⁴ Aside from the bloodline tying the Mo-al-kai to the Band, the fact that the aboriginal territory of the Mo-al-kai overlaps with the land presently

²⁰ 25 C.F.R. § 292.2.

²¹ See Letter from Donald E. Laverdure, Acting Assistant Sec’y – Indian Affairs, Dep’t of the Interior, to Donald Arnold, Chairperson, Scotts Valley Band of Pomo Indians 12 (May 25, 2012) [hereinafter, the “2012 Restored Lands Determination”], available at <https://www.bia.gov/sites/bia.gov/files/assets/public/pdf/idc-018517.pdf> (“According to the record, when the Scotts Valley Rancheria was established in 1911, the Band existed as a strong political entity led by the Augustine family, both politically and genealogically descended from the Ca-la-na-po.”).

²² Report by Dorothea J. Theodoratus, *supra* note 5, at 3.

²³ Comments on Documents Regarding “Restored Lands” in the Vicinity of Vallejo, Solano County, CA by Dorothea J. Theodoratus 2 (Nov. 13, 2016).

²⁴ Memorandum from Steven J. Bloxham, Fredericks Peebles & Morgan LLP, to Lawrence S. Roberts, Acting Assistant Sec’y – Indian Affairs 11 (Nov. 14, 2016). That Joe Augustine is related to members of the present-day is undisputed. See, e.g., Scotts Valley Band of Pomo: Preliminary Report for “Indian Lands Determination,” Vallejo, Solano County, California from Stephen D. Beckham to United Auburn Indian Cmty. 26–26 (Nov. 7, 2016) [hereinafter, the “Beckham Report”] (in report submitted to tribe opposing the Band’s Request, stating that Joe Augustine is “a collateral relative of several current members of the Scotts Valley Band of Pomo”).

occupied by the Band is also significant. The Mo-al-kai were located in Scotts Valley, west of Lakeport, on the western shore of Clear Lake,²⁵ and the Band continues to reside there, with a tribal government headquarters at Lakeport.²⁶

In light of this information, evidence of both the Ca-la-na-po's and Mo-al-kai's historical connection to the Vallejo Parcel is relevant to this analysis.²⁷

(b) The Vallejo Parcel is not located within the boundaries of the Band's last reservation under a ratified or unratified treaty.

Because the Vallejo Parcel is not located within the boundaries of the Band's last reservation (or the reservation promised to its ancestors), the Band cannot establish a significant historical connection through the first method listed above. As background, the Ca-la-na-po tribelet was one of eight tribal signatories to an unratified treaty with the United States, signed in August 1851.²⁸ The tribal signatories "jointly and severally" ceded "their right, title, claim, or interest of any kind" to lands in California.²⁹ In exchange, the United States designated a tract of land to be set apart as an Indian reservation, on the western shore of Clear Lake, Lake County, California.³⁰ In the late 1800s, cartographer Charles Royce compiled maps depicting Indians' land cessions in the United States, including the land that would have been ceded under the 1851 Treaty, as well as tracts set apart for reservations, including the reservation at Clear Lake.³¹ The area numbered "296" (Area 296) in the map below shows the ceded territory, and the area numbered "295" (Area 295) shows the Clear Lake reservation, in relation to San Francisco and Sacramento.

²⁵ Memorandum from Steven J. Bloxham to Lawrence S. Roberts, *supra* note 24, at 12; *see also* Comments on Reports Submitted by the Yocha Dehe Nation Regarding SVBI Request for Determination from Albert L. Hurtado, Historian, to Lawrence S. Roberts, Acting Assistant Sec'y – Indian Affairs 8 (Nov. 14, 2016) [hereinafter, the "Hurtado Comments"] ("Scotts Valley . . . was the home of Molkai and Yimabak Pomo.").

²⁶ Report by Dorothea J. Theodoratus, *supra* note 5, at 5.

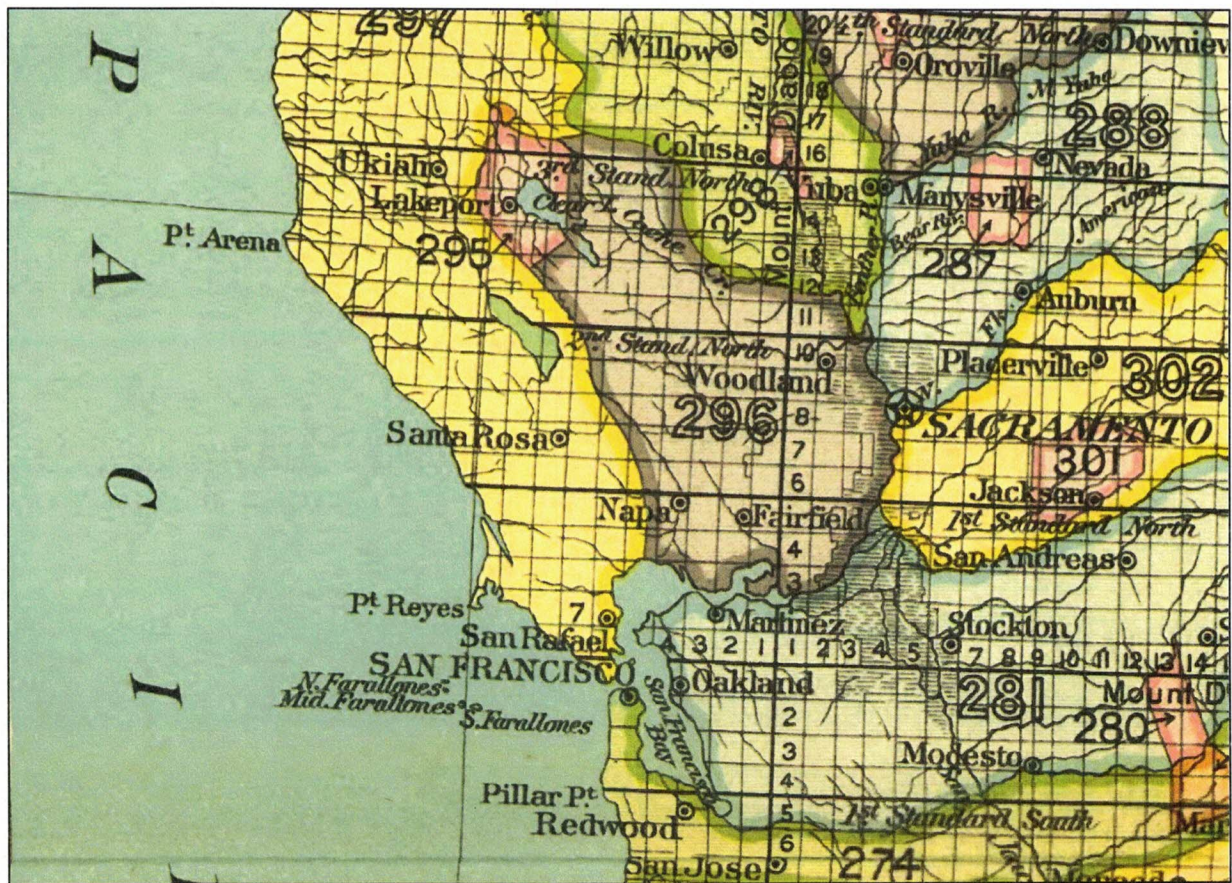
²⁷ The Band also claims a connection to the Ha-bi-na-po tribelet that occupied the eastern portion of Big Valley, as discussed in Legal Analysis by Steven J. Bloxham, *supra* note 5, at 12; however, the evidence is insufficient to establish such a finding. Furthermore, as discussed below in Part III.d.iii.B, whether or not the connection exists is not dispositive in this restored lands determination.

²⁸ Treaty with Ca-la-na-po, etc. (Aug. 20, 1851), in 4 *Indian Affairs, Laws and Treaties* (Charles J. Kappler ed., 1927) [hereinafter, the "1851 Treaty"], available at <https://dc.library.okstate.edu/digital/collection/kapplers/id/24015>.

²⁹ *Id.* art. 3.

³⁰ *Id.* art. 4.

³¹ Charles C. Royce & Cyrus Thomas, *Indian Land Cessions in the United States* (1899), available at <https://www.loc.gov/resource/g3701em.gct00002> (select "Image 7 of 67" ("California 1")).



The Vallejo Parcel is located in the southwestern portion of Area 296, south of Napa, clearly outside of the boundaries of the reservation under the 1851 Treaty. The Parcel is similarly far from the rancheria that the United States acquired for the Band in 1911 (Scotts Valley Rancheria), which Area 295 encompasses.³²

(c) The Vallejo Parcel is not proximate to the boundaries of the Band's last reservation under a ratified or unratified treaty.

In previous restored lands determinations relating to California tribes, the Department has noted that “[a] parcel’s proximity to a tribe’s historic reservation or rancheria is evidence that the tribe has a significant historical connection to that parcel.”³³ For example, in reaching a favorable determination on the Wilton Rancheria’s restored lands request, the Department noted that the tribe’s proposed site was less than six miles from the tribe’s historic rancheria.³⁴ Similarly, in reaching a favorable restored lands determination regarding the Mechoopda Indian Tribe of the Chico Rancheria, the Department explained that the land at issue was only ten miles from the

³² Consolidated Report by Heather H. Howard et al., *supra* note 5, at 4 (stating that “in the 1910s, the federal government established the Scotts Valley (or Sugar Bowl) Rancheria, on lands southwest of Clear Lake”).

³³ Record of Decision, Trust Acquisition of 35.92 +/- Acres in the City of Elk Grove, California, for the Wilton Rancheria 67 (Dep’t of the Interior Jan. 2017).

³⁴ *Id.*

tribe's former Rancheria.³⁵ Here, the Parcel is located approximately 90 driving miles (75 straight-line miles) southeast of the former Scotts Valley Rancheria, near the present-day city of Lakeport. As such, the distance between the Vallejo Parcel and the Band's historic Rancheria, standing alone, does not evince a significant historical connection.

(d) The Band has not demonstrated the existence of the Band's villages, burial grounds, occupancy or subsistence use in the vicinity of the Parcel.

The Band does not assert that the Parcel is in the vicinity of the Band's villages or burial grounds.³⁶ Therefore, the Band must establish a significant historical connection to the Vallejo Parcel by demonstrating its occupancy or subsistence use in the vicinity of the land. As noted in the 2012 Restored Lands Determination, "[t]he tribe's history of use and occupancy inherently includes the use and occupancy of its tribal predecessors, even if those tribes had different political structures and were known under different names."³⁷ Evidence of use and occupancy by the Ca-lana-pa and Mo-al-kai is therefore relevant to this determination, as well.

- (i) The joint and several cession of the large area encompassing the Vallejo Parcel by the eight tribal signatories does not automatically demonstrate occupancy or subsistence use in the vicinity of the Parcel by the specific signatories related to the Band.

First, the Band argues that its ancestors' cession of land pursuant to the 1851 Treaty "*per se*" demonstrates use and occupancy sufficient to establish a significant historical connection to the Vallejo Parcel, given that the ceded land (Area 296) encompasses the Parcel.³⁸ In support of its argument, the Band cites the district court's decision in *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan*,³⁹ as well as the Office of the Solicitor's M Opinion concerning the Pokagon Band of Potawatomi Indians' (Pokagon Band) request for restored lands.⁴⁰ According to the Band, these opinions establish that lands ceded by treaty and subsequently returned to a tribe qualify, *per se*, as restored lands for the purposes of the restored lands exception.⁴¹ However, the Band misconstrues the reasoning in both *Grand Traverse Band* and the Pokagon Band Opinion.

³⁵ Letter from Kevin K. Washburn, Assistant Sec'y – Indian Affairs, Dep't of the Interior, to Dennis Martinez, Chairman, Mechoopda Indian Tribe of Chico Rancheria 25 (Jan. 24, 2014). Additionally, the land at issue was located within the boundaries of a reservation that would have been established through an unratified treaty, thus establishing a significant historical connection through the first method listed above. *Id.*

³⁶ See, e.g., Legal Analysis by Steven J. Bloxham, *supra* note 5, at 20 (stating that, prior to the 1850s, "the area in and around what is now the City of Vallejo and adjacent portions of southern Napa and Solano counties were part of the territory of the Patwin people" and that "the record indicates that by 1851 there were no surviving Patwin (*or any other Indian*) villages, and not independent bands or tribes, in southern Napa and Solano Counties") (emphasis added) (citations omitted).

³⁷ 2012 Restored Lands Determination, *supra* note 21, at 7.

³⁸ Memorandum from Scotts Valley Band of Pomo Indians, *supra* note 18, at 24–25 (citations omitted).

³⁹ 198 F. Supp. 2d 920 (W.D. Mich. 2002), *aff'd*, 369 F.3d 960 (6th Cir. 2004) [*"Grand Traverse Band"*].

⁴⁰ Sol. Op. M-36991 (Sept. 19, 1997) [hereinafter, the "Pokagon Band Opinion"], available at <https://solicitor.doi.gov/opinions.html>.

⁴¹ Legal Analysis by Steven J. Bloxham, *supra* note 5, at 7–8, 27; see also Memorandum from Steven J. Bloxham to Lawrence S. Roberts, *supra* note 24, at 2.

A. *Grand Traverse Band*

In holding that a casino site qualified for gaming under the restored lands exception, the Federal district court in *Grand Traverse Band* concluded that “the Band’s evidence clearly established that the parcel was of historic, economic and cultural significance to the Band.”⁴² The 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 that conclusion, but it was not a stand-alone proposition, as the Band asserts. The court further observed:

The land, located on the east shore of Grand Traverse Bay, is at the heart of the region that comprised the core of the Band’s aboriginal territory and was historically important to the economy and culture of the Band. . . . The Band itself has occupied the region continuously from at least 100 years before treaty times until the present. . . . In the late nineteenth century, Band members continued to reside on the east shore of Grand Traverse Bay and sought title to land in order to remain in the region.⁴³

The facts here are distinguishable from those supporting the favorable decision in *Grand Traverse Band*. First, the court found that the land at issue was located only 1.5 miles outside of the reservation contemplated by the 1836 treaty between the United States and the Ottawa and Chippewa, of which representatives of the Grand Traverse Band were signatories.⁴⁴ The court additionally found evidence suggesting that the proposed acquisition site was located within the boundaries of the contemplated reservation at the time the treaty was signed.⁴⁵ As noted above, such evidence—not present here—helps establish a significant historical connection. Second, while the land in *Grand Traverse Band* lies at the core of that tribe’s aboriginal territory, the Vallejo Parcel is 90 miles by road (75 straight-line miles) away from the Band’s aboriginal territory. Finally, as explained below in Part III.d.ii–iii, unlike the tribe in *Grand Traverse Band*, which had continuously resided on the land in question for uninterrupted centuries, the Scotts Valley Band has failed to establish a comparable level of historical connection to the parcel in question. *Grand Traverse Band* therefore does not establish the bright line rule concerning ceded territory that the Band asserts.

B. Pokagon Band Opinion

As in *Grand Traverse Band*, the fact that the Pokagon Band parcel fell within an area ceded by one or more of the Pokagon Band’s predecessors was an important, but non-dispositive, reason why the Office of the Solicitor recommended a favorable restored lands determination. As background, Congress restored the Pokagon Band through the Pokagon Restoration Act (Act).⁴⁶ The Act directed the Secretary to “acquire real property for the Band” and named ten counties in Michigan and Indiana that would comprise the Band’s “service area.”⁴⁷

⁴² 198 F. Supp. 2d at 925.

⁴³ *Id.*

⁴⁴ *Id.* at 936.

⁴⁵ *Id.* at 925.

⁴⁶ Restoration of Federal Services to the Pokagon Band of Potawatomi Indians, Pub. L. No. 103-323, 108 Stat. 2152 (previously codified at 25 U.S.C. §§ 1300j) (1994).

⁴⁷ *Id.* §§ 6–7, 108 Stat. at 2154.

In the Pokagon Band Opinion, the Office of the Solicitor concluded that the parcel in question qualified as restored lands because (1) the parcel fell within the ten-county service area identified in the Act and (2) the service area was part of the territory that the Band's predecessors had ceded to the United States through treaties.⁴⁸ In contrast, the Vallejo Parcel does not fall within the Scotts Valley Band's service area, which includes the counties of Mendocino, Lake, Sonoma, and Contra Costa, but not Solano.⁴⁹ Additionally, whereas Congress established the Pokagon Band's service area through the Act, the Bureau of Indian Affairs (BIA) designated the Scotts Valley Band's service area pursuant to 25 C.F.R. Part 20.

Furthermore, there are fundamental differences between the legal analysis in the Pokagon Band Opinion and the one required here. First, the Pokagon Band Opinion predated the implementation of 25 C.F.R. Part 292 by more than ten years,⁵⁰ and it did not discuss the modern, temporal, and significant historical connections described in § 292.12 that are central to the Scotts Valley Band determination.⁵¹ Even if the Pokagon Band Opinion established a standard whereby lands ceded by treaty qualify, *per se*, as restored lands—which it does not—the Department did not incorporate that standard into the criteria deemed necessary for lands to qualify as restored when it promulgated Part 292, which the Band must now satisfy.⁵²

Second, even if the Pokagon Band's request had been reviewed under Part 292, the Pokagon Band was restored by Congressional legislation, whereas the Scotts Valley Band was restored under the terms of a stipulated judgment. Consequently, lands sought by the Scotts Valley Band must qualify as restored under § 292.11(c) and § 292.12, whereas lands sought by tribes restored in the manner of the Pokagon Band must meet the standards established in § 292.11(a).⁵³ Also, § 292.11(a)(1) sets out criteria that would not have required the Pokagon Band to establish the modern, temporal, and significant historical connections that the Scotts Valley Band must show under § 292.12.

Restored lands determinations issued after the Pokagon Band Opinion confirm that a parcel's location within an area ceded by treaty is not a dispositive factor in establishing a significant historical connection. For example, as early as 2004, prior to the implementation of Part 292, the National Indian Gaming Commission (NIGC) concluded that the Karuk Tribe of California (Karuk Tribe) failed to show a "sufficient historical nexus" to a parcel even though the parcel was located within the cessation area of a treaty. In reaching a decision unfavorable to the Karuk Tribe, the NIGC explained, in part, that evidence of "aboriginal settlements" at the location of the parcel was

⁴⁸ Pokagon Band Opinion, *supra* note 40, at 7–8.

⁴⁹ See Notice of Near-Reservation Designations for California Tribes, 65 Fed. Reg. 31,188 (May 16, 2000) (listing "near-reservation designations" that are "appropriate for the extension of BIA financial assistance and/or services" for certain California tribes).

⁵⁰ Compare 73 Fed. Reg. at 29,354 (listing the effective date of Part 292 as June 19, 2008), with Pokagon Band Opinion, *supra* note 40 (stating date of issuance as September 19, 1997).

⁵¹ See Pokagon Band Opinion, *supra* note 40, at 7–8 (containing a brief analysis—limited to only one paragraph—as to whether the parcel in question was restored).

⁵² For a discussion on the Department's authority to exclude non-legislatively created, ad hoc standards from its regulations, see *Miami Nation of Indians of Indiana, Inc. v. Babbitt*, 887 F. Supp. 1158, 1169–70 (N.D. Ind. 1995).

⁵³ See Record of Decision, Trust Acquisition of 165.81± Acres in the City of South Bend, Indiana, for the Pokagon Band of Potawatomi Indians 57–59 (Dep't of the Interior Nov. 2016).

“scant and based largely on the speculation of an ethnologist.”⁵⁴ Similarly, when the NIGC issued an updated, favorable Indian Lands Opinion to the Karuk Tribe in 2012, the NIGC based the change in its opinion on new evidence showing a history of Karuk activity around the parcel, not on the location of the parcel within the cessation area.⁵⁵ Specifically, a historian commissioned by the Karuk Tribe had uncovered a decades-old BIA report finding that “the aboriginal subentities of the Karok [sic] Tribe consisted of the communities at Happy Camp, Orleans and Siskiyou (Yreka),” Yreka being the location of the parcel at issue in that matter.⁵⁶ The BIA report, combined with additional correspondence from the BIA acknowledging “aboriginal camp sites” in those communities, as well as oral history corroborating the written record, established a historical connection between the Karuk Tribe and the parcel in question.⁵⁷

Based upon the different laws and facts at issue in both *Grand Traverse Band* and the Pokagon Band Opinion as compared to those of Scotts Valley Band, those two opinions do not establish a *per se* rule that parcels within ceded territory are “restored lands.” While that may create a favorable inference for the Band here, the Band must still demonstrate additional historical connection comparable to that identified in *Grand Traverse Band* and for the Pokagon Band and the Karuk Tribe. As discussed *infra*, the Scotts Valley Band has failed to establish such historical connection.

(ii) Vallejo’s designation in the 1851 Treaty as a pick-up site for promised provisions and the subsequent collection of provisions at that site do not demonstrate occupancy or subsistence use in the vicinity of the Parcel by the Band or its ancestors.

Next, the Band argues that Vallejo’s designation in the 1851 Treaty as a pick-up site for promised provisions and the subsequent collection there of such provisions demonstrate the Band’s occupancy and subsistence use in the vicinity of the Parcel.⁵⁸ Under Article 5 of the 1851 Treaty, the United States promised to furnish the signatory bands with supplies such as cattle, bread, and clothing for pick-up “at or near Vallejo.”⁵⁹ Albert Hurtado, a historian commissioned by the Band to prepare a report in conjunction with its Request, identified the likely pick-up site for the supplies as the ranch of J.M. Estelle, a general in the California State Militia.⁶⁰ The location of Gen. Estelle’s ranch is 2.4 miles from the Vallejo Parcel.⁶¹ The Band asserts that the 1851 Treaty reserved rights to those pick-up site lands akin to reserved hunting, fishing, and gathering rights found in other treaties.⁶² According to the Band, its ancestors made use of the lands by exercising

⁵⁴ Indian Lands Opinion from Penny J. Coleman, Acting Gen. Counsel, Nat’l Indian Gaming Comm’n, to Bradley G. Bledsoe Downes, Dorsey & Whitney LLP 7–8 (Oct. 12, 2004), *available at* https://www.nigc.gov/images/uploads/indianlands/17_karuktribeofcalifornia.pdf.

⁵⁵ Memorandum from John R. Hay, Senior Attorney, to Tracie Stevens, Chairwoman, Nat’l Indian Gaming Comm’n 10 (Apr. 3, 2012), *available at* <https://www.nigc.gov/images/uploads/indianlands/Karuk4912.pdf>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Memorandum from Steven J. Bloxham to Lawrence S. Roberts, *supra* note 24, at 9; *see also* Legal Analysis by Steven J. Bloxham, *supra* note 5, at 21–25.

⁵⁹ 1851 Treaty, *supra* note 28, art. 5.

⁶⁰ Report by Albert L. Hurtado, *supra* note 5, at 84–86.

⁶¹ *Id.* at 102–05.

⁶² Legal Analysis by Steven J. Bloxham, *supra* note 5, at 21–25.

treaty-reserved rights in the vicinity of the Parcel and by camping at the Estelle ranch while awaiting the delivery of the provisions promised under Article 5.⁶³

The Band's argument is unavailing. The activities described here do not constitute occupancy or subsistence use of the lands in the vicinity of the Vallejo Parcel. In the restored lands determination relating to the Guidiville Band of Pomo Indians' (Guidiville Band) request for restored lands, the Department explained:

Subsistence use and occupancy requires something more than a transient presence in an area. . . . Accordingly, activities that would tend to show a tribe was using land for subsistence purposes might include sowing, tending, harvesting, gathering and hunting on lands and waters. "Occupancy" can be demonstrated by a consistent presence in a region supported by the existence of dwellings, villages or burial grounds, as alluded to in the regulations.⁶⁴

The Guidiville Band had sought to establish a significant historical connection to a parcel near an aboriginal trade route that, according to the Guidiville Band, its ancestors had used to engage in commerce and harvest natural resources. In response, the Department concluded that "the Band cannot establish its subsistence use or occupancy based on the fact that its ancestors traveled to various locations to trade and interact with other peoples and then returned to the Clear Lake region."⁶⁵

The situation here is analogous; the encampments at the Estelle ranch for the purpose of picking up supplies—pursuant to an arrangement that was to last only three years (1851–1853)—do not

⁶³ *Id.* at 23–25.

⁶⁴ Letter from Larry Echo Hawk, Assistant Sec'y – Indian Affairs, Dep't of the Interior, to Merlene Sanchez, Chairperson, Guidiville Band of Pomo Indians 14 (Sept. 1, 2011) [hereinafter, the "Guidiville Restored Lands Determination"], available at <https://www.bia.gov/sites/bia.gov/files/assets/public/pdf/idc015051.pdf>. For an example of the kinds of activities that constitute occupancy and subsistence use, see Record of Decision, Secretarial Determination Pursuant to the Indian Gaming Regulatory Act for the 305.49-Acre Madera Site in Madera County, California, for the North Fork Rancheria of Mono Indians 60–61 (Dep't of the Interior Sept. 2011), explaining that the tribe's predecessors: "hunted game in the areas of the San Joaquin Valley near the Site," "gathered plants and other materials from the areas of the San Joaquin Valley near the Site," "occupied the Fresno River Farm in the vicinity of the Site," and "earned a living from activities, such as logging and agriculture, conducted on lands in the vicinity of the Site." For another example, see *Confederated Tribes of Grand Ronde Cmty. of Oregon v. Jewell*, stating that the Secretary found the following evidence of the Cowlitz occupancy and use in the vicinity of the parcel at issue:

(1) the Cowlitz's occupancy, namely hunting camp sites and "treaty-time" villages, at Warrior's Point, a site on the Columbia River and only three miles from the Parcel; (2) the Cowlitz reliance on the natural resources of the Columbia River for subsistence use and trade; (3) Cowlitz' "extensive and intensive" trading activities at both Bellevue Point (ten miles from the Parcel), and the intersection of the Lewis River and Columbia River (three miles from the Parcel); (4) a major battle between the Cowlitz and the Chinook at a site three miles from the Parcel; (5) historical report about an individual Cowlitz who used the Lewis River area for subsistence hunting, (about 6 miles from the Parcel); (6) the fact that Cowlitz were expert boatmen and helped guide large boats carrying goods through the mouth of the Lewis River, less than three miles from the Parcel; (7) census information showing that the Cowlitz occupied the lands in the vicinity of the Parcel.

75 F. Supp. 3d 387, 413–14 (D.D.C. 2014), *aff'd*, 830 F.3d 552 (D.C. Cir. 2016).

⁶⁵ Guidiville Restored Lands Determination, *supra* note 64, at 14.

demonstrate subsistence use or occupancy. The plain language of the 1851 Treaty and the related minutes of the treaty negotiations indicate that the United States chose Vallejo as the pick-up location because it was convenient for federal officials⁶⁶ who were reluctant to deliver provisions to the Clear Lake bands in the mountainous territory where they lived.⁶⁷ Contrary to the Band's assertion, the short-term right to collect provisions at Vallejo differs significantly from a treaty-reserved right that would demonstrate occupancy or subsistence use, such as a right to hunt, fish, or gather at a designated site in perpetuity.⁶⁸

(iii) Evidence of the Band's ancestor Augustine living and laboring on ranchos north of San Pablo Bay does not demonstrate occupancy or subsistence use in the vicinity of the Vallejo Parcel.

Lastly, the Band argues that its documented, historical connection to the Vallejo Parcel has existed since the 1840s or earlier, upon the advent of the ranching economy in the San Pablo Bay region.⁶⁹ In support of its claim, the Band has submitted documentation concerning an individual named Augustine, a "chief of the Hoolanapo Indians" who lived and worked in the North Bay region during the mid-1800s.⁷⁰ "Many in the Scotts Valley Tribe trace ancestry back to Augustine," and the Band contends that Augustine's biography helps establish the Band's significant historical connection to the Parcel.⁷¹ According to the Band's anthropologist, Augustine's whereabouts and activities are representative of those of the Band's ancestors in general and shed light on their shared experiences.⁷² Furthermore, Augustine's life is relatively well-documented, which is unique given the disruption in Pomoan village life, economy, and culture that occurred during the timeframe at issue.⁷³ The Band's documentation includes contemporaneous accounts and

⁶⁶ 1851 Treaty, *supra* note 28, art. 5 (designating the pick-up site "at or near Vallejo, or elsewhere, as may be most convenient").

⁶⁷ Legal Analysis by Steven J. Bloxham, *supra* note 5, at 23 (quoting an excerpt from the minutes, which read: "[A]ny flour and beef given [to the Clear Lake bands] this fall the chiefs must send runners for as the mountains surrounding this lake are impassable for wagons, and it would cause the President great expense to send it here now.").

⁶⁸ See, e.g., Treaty with the Ottawa, etc. (Mar. 28, 1836), in 2 *Indian Affairs, Laws and Treaties* (Charles J. Kappler ed., 1904), available at <https://dc.library.okstate.edu/digital/collection/kapplers/id/26291> (stating that the perpetual right of fishing at the falls of St. Mary's reserved by an earlier treaty "remains unaffected"); see also 73 Fed. Reg. at 29,366 ("The definition of 'significant historical connection' establishes criteria which require something more than evidence that a tribe merely passed through a particular area.").

⁶⁹ Memorandum from Scotts Valley Band of Pomo Indians, *supra* note 18, at 11 (stating that "the record is clear that between 1842 and 1847, Clear Lake Indians became a significant source of labor on all of the ranchos north of San Francisco").

⁷⁰ Lyman L. Palmer, *History of Napa and Lake Counties* 49 (1881).

⁷¹ Dorothea J. Theodoratus et al., *Clear Lake Indian Census Data Early 1800s to 1911 (Emphasis on Eastern Pomo)* 81 (2018) (stating, further, that by 1958, "when the tribe was terminated under the Rancheria Act, 90.1% of the tribe were Augustine descendants"); see also Supplemental Report: History of the Scotts Valley Band of Pomo Indians and the San Pablo Bay Region by Albert L. Hurtado et al. 15 (May 3, 2018) [hereinafter, the "Supplemental Report"] (explaining how that percentage was calculated).

⁷² See Albert L. Hurtado, *Chief Augustine: Significant Ancestor of the Scotts Valley Band of Pomo Indians* 11 (2018) ("Augustine's history illustrates a significant connection between [the Band's ancestors] and the region that includes the [Vallejo Parcel].").

⁷³ See Theodoratus et al., *supra* note 71, at 5 (stating that, in the mid-1800s, "[a]lthough some concentrated village life continued to exist among Indian communities, many previous Indian village-life patterns were forced into a new, somewhat dispersed, living pattern accompanied by new labor patterns"); see also Lowell J. Bean & Dorothea J. Theodoratus, Western Pomo and Northeastern Pomo, in 8 *Handbook of North American Indians* 299 (Robert F. Heizer ed., 1978) (explaining that, in the 1830s, "diseases, plus displacement, enslavement, massacres, raids, and the

anecdotal evidence tracking his movement, as well as genealogical data about his family.⁷⁴ What follows is an abbreviated discussion of Augustine's life and the surrounding context as submitted by the Band, followed by an analysis of the information presented.

A. Augustine and the Agricultural Economy in the North Bay Region

The earliest reference to Augustine suggested by the Band seems to be on a list of Indian children baptized in 1837 at Mission San Francisco Solano, located in the city of Sonoma, 17 miles from the Parcel.⁷⁵ The list includes a six year-old child named Agustin who "could have been [the Band's ancestor] Augustine, but this is not verified."⁷⁶ According to the Band, 29 other Pomo children were baptized at the mission at that time, at least 14 of whom were from the same village as Augustine, and at least two of whom were ancestors of the present-day Band.⁷⁷ The Band alleges that the children "were instructed in the Roman Catholic faith and trained to do manual labor, including ranch work," at the mission.⁷⁸

Based on an 1880 interview with historian Lyman Palmer, Augustine had returned to the Clear Lake area by around 1840, where he observed Salvador Vallejo take "formal possession" of the valley where the Band's ancestors lived.⁷⁹ Salvador Vallejo's older brother was Mariano Vallejo, a Mexican military commander who, according to the Band's historian, "exercised nearly absolute personal and official power over land and life in the North Bay region."⁸⁰ Mariano Vallejo acquired huge swaths of land formerly associated with Mexican missions,⁸¹ including Ranchos Suscol and Petaluma.⁸² Andrés Reséndez, a historian commissioned by the Yocha Dehe (which opposes the Band's Request), states that Rancho Suscol (the rancho within which the Vallejo Parcel is located) was an 84,000-acre property, and Rancho Petaluma was 66,000 acres.⁸³ The Band's historian estimates that by 1846 the Vallejo family's landholdings totaled 220,000 acres "from the Pacific Ocean to Suisun Bay and north to Clear Lake."⁸⁴

The livestock operations on those ranchos were labor-intensive, and, according to the Yocha Dehe's historian, a study of Rancho Petaluma estimates that "at any one time there may have been between 600 and 1000 Indian laborers living there."⁸⁵ Although Rancho Suscol was located in

beginnings of Anglo-American migration set the stage for the ever more rapid decline of the Pomo people and their cultural heritage" in the ensuing decades).

⁷⁴ See generally Hurtado, *supra* note 72 (containing excerpts from such material); Theodoratus et al., *supra* note 71, at 29–31 (summarizing census data pertaining to Augustine and his family).

⁷⁵ Memorandum from Scotts Valley Band of Pomo Indians, *supra* note 18, at 14–15.

⁷⁶ Theodoratus et al., *supra* note 71, at 29.

⁷⁷ Supplemental Report by Albert L. Hurtado et al., *supra* note 71, at 7–8.

⁷⁸ *Id.* at 8.

⁷⁹ Palmer, *supra* note 70, at 49; see also Beckham Report, *supra* note 24, at 106 (discussing Palmer's interview with Augustine); Hurtado Comments, *supra* note 25, at 8 (explaining that Salvador Vallejo oversaw the creation of Rancho Lup-Yomi in an area known as Big Valley, near Clear Lake).

⁸⁰ Report by Albert L. Hurtado, *supra* note 5, at 23.

⁸¹ Hurtado Comments, *supra* note 25, at 7.

⁸² Report by Albert L. Hurtado, *supra* note 5, at 42–43.

⁸³ Comments About the Historical Basis for the Scotts Valley Band of Pomo Indians' Request for Indian Lands Determination in the City of Vallejo by Andrés Reséndez, Professor, Dep't of History, Univ. of Cal., Davis 3 (Nov. 2016) [hereinafter, the "Reséndez Comments"].

⁸⁴ Report by Albert L. Hurtado, *supra* note 5, at 43.

⁸⁵ Reséndez Comments, *supra* note 83, at 3.

traditional Patwin territory,⁸⁶ and Rancho Petaluma was located in traditional Coast Miwok territory,⁸⁷ Salvador Vallejo raided Pomo Indian communities “in order to force them to work on the ranchos owned by the Vallejos and others.”⁸⁸ Ultimately, Indians from the Clear Lake area, Coast Miwok, Southern Patwin, and Wappo all labored on ranchos established in what had been Coast Miwok and Patwin territory.⁸⁹ According to the Band’s historian, the Band’s ancestors, including Augustine, helped “tend the thousands off [sic] animals that roamed in Big Valley” and drove cattle to slaughter grounds on San Pablo Bay.⁹⁰ In 1847, Salvador Vallejo sold Rancho Lup-Yomi to new owners,⁹¹ who at one point used Augustine and other Indians as forced labor to build adobe houses in Sonoma.⁹² Augustine escaped after about a month and fled back to Clear Lake where his wife and infant child resided.⁹³

Augustine next appears in an 1850 census (created in 1926 by anthropologist E.W. Gifford) that identifies him as a “Kulanapo” chief,⁹⁴ living at Clear Lake in an Eastern Pomo village.⁹⁵ The historical record is then scant in regard to Augustine’s whereabouts and activities between 1850 and 1870. During those decades, farming became an increasingly important part of the economy, and Indians from the Clear Lake area started engaging in a pattern of migrant labor on ranchos south of their aboriginal territory.⁹⁶ By the 1860s, Clear Lake Indians mixed seasonal work on ranchos in Napa Valley and elsewhere in the North Bay region with subsistence farming and fishing at Clear Lake.⁹⁷

The next reference to Augustine seems to be in the 1870 census data for Napa City Township, Napa County, which indicates that, at age 38, Augustine was living in a household of 17 Indians of varying ages, a “collection of native people working out from the household.”⁹⁸ The Band also identifies a few other possible or confirmed ancestors living in Napa in 1870.⁹⁹ In total, the 1870 census lists 43 Indians living in Napa County at the time, compared with 17 in Lake County (with

⁸⁶ Hurtado Comments, *supra* note 25, at 6; *see also* Jennifer Whiteman, *Native American Ethnogeography and Ethnohistory in the Vicinity of Vallejo, California* 33 (2016) (“The Yocha Dehe and Cortina Indian Rancheria are recognized by the Native American Heritage Commission (NAHC) as Most Likely Descendants for the City of Vallejo and vicinity.”).

⁸⁷ Reséndez Comments, *supra* note 83, at 3.

⁸⁸ Hurtado Comments, *supra* note 25, at 8; *see also* Supplemental Report by Albert L. Hurtado et al., *supra* note 71, at 3 (explaining that, between the 1830s and 1860s, some Pomo Indians worked voluntarily for white ranchers as a matter of economic necessity, but others were enslaved as children and transported southward to Solano, Napa, and Sonoma counties); Report by Albert L. Hurtado, *supra* note 5, at 89 (stating that, in the early 1850s, “[t]he Indians were subject to . . . a law that gave whites legal authority to indenture Indian adults and children as farm workers and domestic servants”).

⁸⁹ Reséndez Comments, *supra* note 83, at 5.

⁹⁰ Supplemental Report by Albert L. Hurtado et al., *supra* note 71, at 4–5.

⁹¹ Report by Albert L. Hurtado, *supra* note 5, at 57.

⁹² *Id.* at 64.

⁹³ *Id.*

⁹⁴ Theodoratus et al., *supra* note 71, at 29.

⁹⁵ *Id.* at 5.

⁹⁶ Supplemental Report by Albert L. Hurtado et al., *supra* note 71, at 13.

⁹⁷ *Id.* at 14 (quoting a federal agent who witnessed the “integration of wage labor in Napa Valley and subsistence farming at Clear Lake”).

⁹⁸ Theodoratus et al., *supra* note 71, at 30.

⁹⁹ Addendum to the Supplemental Report: History of the Scotts Valley Band of Pomo Indians and the San Pablo Bay Region by Albert L. Hurtado et al. 7–8 (Dec. 2018) [hereinafter, the “Addendum to the Supplemental Report”].

only one in Big Valley and one in Lakeport).¹⁰⁰ Augustine and the other Indians in the household may have been working at nearby Rancho Tulucay at the time,¹⁰¹ approximately 11 miles north of the Vallejo Parcel.¹⁰² The name listed next to Augustine's on the census is that of Chi-Bem, who may have signed the 1851 Treaty on behalf of the How-ru-ma (one of the eight tribal signatories to the treaty).¹⁰³

Augustine's name next appears in the 1880 census data for Lakeport Township, Lake County, which places him, age 50, in a household with his wife Mary, his brother or Mary's brother, and two younger males, ages 15 and 40.¹⁰⁴ The 1880 Lakeport census lists many other households occupied by Indian families in the area, which is approximately 90 miles by road (75 straight-line miles) northwest of the Vallejo Parcel, including the household next to Augustine's consisting of Augustine's brother Pete, Pete's wife, and their son.¹⁰⁵ By 1911, the year that the United States acquired the Scotts Valley Rancheria for the Band, "a number of Augustine descendants and relatives were present at the rancheria" and "continued to reside at Lakeport" through the mid-1900s,¹⁰⁶ although the Band contends that it also maintained a connection with Napa County through 1918, as demonstrated by a contemporaneous record indicating that several Scotts Valley people contracted the Spanish influenza there.¹⁰⁷ Augustine died around 1919 at or near the age of 89.¹⁰⁸

B. Analysis of the Narrative Presented Above

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. As the NIGC explained in its 2012 Karuk Indian Lands Opinion, "IGRA's restored lands exception does not require the [tribe] to demonstrate that it was the only tribe with historical connections to the area, or that the subject area was the only place where the [tribe] has historical connections."¹⁰⁹ Nevertheless:

evidence of the presence of . . . Pomos, generally, on ranchos in the Bay Area, by itself, does not demonstrate the Band's occupancy or subsistence use on or in the vicinity of the Parcel. The Band must offer historical documentation of its significant historical

¹⁰⁰ *Id.* at 10. The 1870 census data, which documents a sizeable Indian presence in the North Bay region but a noticeable absence around Clear Lake, is consistent with the conclusion drawn by the Band's historian and anthropologist that "the period from 1837 to 1870 was an era of diaspora" for the Band's ancestors, followed by a period of repatriation to the Clear Lake area. Supplemental Report by Albert L. Hurtado et al., *supra* note 71, at 4.

¹⁰¹ Hurtado, *supra* note 72, at 9 (stating that the census recorded Augustine living "just one household away" from Cayetano Juarez, the owner of Rancho Tulucay); *see also* Beckham Report, *supra* note 24, at 112 (stating that the 17 Indians in the household "were probably workers on Rancho Tulucay," and, in regard to Augustine, stating that "[i]t is not known if he was identical to the Augustine of the Scotts Valley Rancheria or was another Indian named Augustine").

¹⁰² Memorandum from Scotts Valley Band of Pomo Indians, *supra* note 18, at 15.

¹⁰³ Theodoratus et al., *supra* note 71, at 53.

¹⁰⁴ *Id.* at 30, 78.

¹⁰⁵ *Id.* at 30, 71–78.

¹⁰⁶ *Id.* at 31.

¹⁰⁷ Addendum to the Supplemental Report, *supra* note 99, at 8–9.

¹⁰⁸ Report by Dorothea J. Theodoratus, *supra* note 5, at 11.

¹⁰⁹ Memorandum from John R. Hay to Tracie Stevens, *supra* note 55, at 12.

connection to the Parcel, not simply evidence of Pomoan presence in the much larger Bay Area.¹¹⁰

The first shortcoming in the Band's evidence is the inability of the Band to demonstrate that its specific predecessors (the Ca-la-na-po and Mo-al-kai)—as opposed to Indians generally (Pomo or otherwise) in the Clear Lake area—occupied land or engaged in subsistence use in the vicinity of the Parcel. The lack of an identifiable Ca-la-na-po or Mo-al-kai presence in the vicinity of the Parcel contrasts with the descriptions in favorable decisions of tribes occupying land or using land for subsistence in the vicinity of a parcel.¹¹¹ In addressing the lack of such identifying information, the Band's historian points out that “[t]he historical record frequently refers to ‘Clear Lake Indians’” and that “[i]n all cases that have come to [his] attention ‘Clear Lake Indians’ taken as captives were Habenapo, Kulanapo, and Yimabak/Molakai who were associated with Rancho Lup-Yomi and Scotts Valley.”¹¹² The historian's suggestion that the term “Clear Lake Indians” refers only to those tribelets to which the Band claims a connection is unpersuasive in light of other information provided about Indians traditionally associated with the Clear Lake area. For example, Peter Kunkel, an anthropologist cited by the Band's anthropologist who conducted significant ethnographic research on Pomo subdivisions,¹¹³ observed:

[T]here may have been seven to twelve tribelets in residence in the ‘lake zone.’ . . . Four of these tribelets spoke an Eastern dialect, one spoke Southeastern, and two spoke both Northern and Eastern dialects. The non-Pomo groups included the Lake Miwok located southeast of the Lake and a small area . . . of a Wappo use area located on the Lake in the southern portion In general, data show the Clear Lake area to be one of fluctuating diversity.”¹¹⁴

Even if the Band were a successor-in-interest not only to the Ca-la-na-po and Mo-al-kai, but also to the Ha-bi-na-po, the Department cannot assume without more information that references to Clear Lake Bands and to the Band's predecessors are one and the same given the variety of ethnic groups and the number of tribelets that lived around the lake and worked on North Bay ranchos.

Likewise, it would be erroneous to attribute the connections made by a specific tribal member like Augustine, or a handful of members, to the entire Band, or to its predecessors. In support of its request for restored lands, the Guidiville Band had sought to establish a significant historical connection to a parcel in the Bay Area based, in part, on approximately a dozen of its ancestors' participation in the federally-sponsored BIA Outing Program.¹¹⁵ That “[a]llegedly ‘voluntary’” program had relocated young Indian women to the Bay Area in the first decades of the twentieth

¹¹⁰ Guidiville Restored Lands Determination, *supra* note 64, at 17.

¹¹¹ See, e.g., Record of Decision, Trust Acquisition of, and Reservation Proclamation for the 151.87-Acre Cowlitz Parcel in Clark County, Washington, for the Cowlitz Indian Tribe 128–29 (Dep't of the Interior Apr. 2013) (mentioning the Cowlitz Indian Tribe's “villages and/or hunting camp sites along the Columbia River,” which a contemporaneous account described as “several large lodges of [Cowlitz] Indians; in all probably one hundred persons,” in the vicinity of the parcel at issue in that decision).

¹¹² Report by Albert L. Hurtado, *supra* note 5, at 99–100.

¹¹³ Report by Dorothea J. Theodoratus, *supra* note 5, at 2.

¹¹⁴ *Id.* at 4.

¹¹⁵ Guidiville Restored Lands Determination, *supra* note 64, at 13.

century to work as domestic servants for white middle-class families.¹¹⁶ In rejecting the Band's argument, the Department explained: "As regrettable as the Outing Program was, the relocation of some of the Band's members to various locales throughout the Bay Area does not equate to the Band itself establishing subsistence use or occupancy in the region apart from its Rancheria in Ukiah."¹¹⁷ While the historical treatment of the local Indians here is similarly inexcusable, and even assuming *arguendo* that all of the sometimes inconclusive references to Augustine that the Band provided did in fact refer to the same individual, Augustine's varied and singular experiences—his possible baptism at Mission San Francisco Solano in 1837, his construction of houses in Sonoma in the late 1840s, his dwelling in Napa in 1870, among others—are of limited evidentiary value in establishing the significant historical connections of Band *in toto*.¹¹⁸

Furthermore, even assuming that Augustine's living and labor patterns are representative of those of the Band's ancestors, such patterns do not constitute occupancy or subsistence use. In fact, 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 Band's claim to occupancy and subsistence use of the Parcel. Returning to the examples in the previous paragraph, although allegedly baptized at Mission San Francisco Solano in Sonoma, Augustine returned to Clear Lake shortly thereafter to witness Salvador Vallejo's takeover.¹¹⁹ Although forced to work in Sonoma, Augustine escaped after about a month and returned to Clear Lake, where his wife and infant child were living.¹²⁰ Also, although part of a household in Napa, Augustine appears to have lived not in a family dwelling, like the one at Clear Lake reflected in the 1880 census data,¹²¹ but in a house of migrant workers,¹²² with at least one person of an unrelated tribelet or ethnic group.¹²³ While the definition of a "significant historical connection" does not include a temporal requirement,¹²⁴ Augustine's on-again, off-again presence in the North Bay region over a 30- to 40-year span stands in stark contrast to the description of, for example, the Grand Traverse Band's continuous, centuries-old connection to the parcel of land at issue in *Grand Traverse Band*.

¹¹⁶ *Id.* at 18.

¹¹⁷ *Id.* at 19.

¹¹⁸ The Band also seeks to establish its historical connection to the North Bay region by highlighting marriages between certain members and non-Band members, Indian or otherwise, who happen to hail from the North Bay region. *See, e.g.*, Supplemental Report by Albert L. Hurtado et al., *supra* note 71, at 15–18. By the same logic applied to Augustine's connections, it would erroneous to attribute such individual connections to the Band as a whole. *See* Beckham Report, *supra* note 24, at 97 (stating, "While this documentation is a measure of the mixed ancestry of modern tribal members, it misrepresents who were the Scotts Valley Band of Pomo of Lakeport, California.").

¹¹⁹ Palmer, *supra* note 70, at 49. The record does not disclose how long Augustine or any other children remained in residence at the mission. Memorandum from Scotts Valley Band of Pomo Indians, *supra* note 18, at 15, 17. Nor does the record document the extent of religious instruction or vocational training received by the Band's ancestors, which the Band alleges took place. *See* Supplemental Report by Albert L. Hurtado et al., *supra* note 71, at 8; *see also* Addendum to the Supplemental Report, *supra* note 99, at 1–3. Thus, insofar as the Band seeks to establish a close connection with the Parcel based on its ancestors' presence at the mission, the evidence is insufficient.

¹²⁰ Report by Albert L. Hurtado, *supra* note 5, at 64.

¹²¹ Theodoratus et al., *supra* note 71, at 30, 78.

¹²² *Id.* at 30.

¹²³ *Id.* at 53.

¹²⁴ 73 Fed. Reg. at 29,366. However, this requirement, while not creating a *per se* temporal requirement (i.e., a minimum of 40 years), nevertheless contemplates the length of connection factoring into the overall consideration of historical ties. *Id.*

Finally, even if Augustine's experience as migrant worker extended to the Band's other ancestors, and even if such work constituted occupancy or subsistence use, there is no evidence—direct or inferential—indicating that the Band's ancestors conducted such activity on the Parcel (as opposed to elsewhere). As the Department noted in the 2012 Restored Lands Determination, “IGRA’s definition of ‘restored land’ . . . always has been limited to lands that a tribe used or occupied.”¹²⁵ If the Band cannot provide direct evidence of historic use or occupancy on the Parcel itself, then it must provide direct evidence of historic use or occupancy close enough to the vicinity of the Parcel that one could naturally infer that the Band also used or occupied the Parcel.¹²⁶ The Bear River Indian Lands Determination offers an instructive example of direct evidence leading to a natural inference of historic use or occupancy.¹²⁷ Like the Scotts Valley Band, the Bear River Band of the Rohnerville Rancheria, a restored California Tribe, sought to game on a parcel located outside the boundaries of the reservation contemplated by the tribe’s unratified treaty.¹²⁸ The Bear River Band demonstrated that the parcel in question is located among many sites known to have been used by the tribes’ ancestors.¹²⁹ Based on the presence of such surrounding sites, the NIGC concluded that it could assume that the parcel, too, was used by the tribes’ ancestors.¹³⁰

Here, the Band asserts that evidence of the Band’s ancestors working at various ranchos owned by the Vallejos creates an inference that those ancestors must have also worked at Rancho Suscol.¹³¹ (As noted above, the boundaries of Rancho Suscol would have surrounded the Vallejo Parcel). However, such an inference, even if granted, is insufficiently broad and cannot serve as the basis to connect the Band with the Parcel itself. Rancho Suscol extended over “approximately 84,000 acres — an area equal to more than 130 square miles”; in contrast, the Vallejo Parcel comprises only 128 acres.¹³² Similarly, the Band’s alleged, generalized connection with Napa County through 1918 falls short of establishing a significant historical connection to the Parcel itself.

The shortcomings in the Band’s evidence here are analogous to those described in the Guidiville Restored Lands Determination, which concerned a nearby group of Pomo Indians that endured some of the same consequences from non-Indian contact in the 1800s that the Band’s ancestors

¹²⁵ 2012 Restored Lands Determination, *supra* note 21, at 15.

¹²⁶ *Id.*

¹²⁷ See Memorandum from NIGC Acting General Counsel to NIGC Chairman Deer 12–13 (Aug. 5, 2002), *available at* <https://www.nigc.gov/general-counsel/indian-lands-opinions>.

¹²⁸ *Id.* at 12.

¹²⁹ *Id.* (listing, in part: within a one-mile radius of the parcel, “a mythic pond that is the setting of an old tribal story” and “two (2) aboriginal villages . . . that were major [tribal ancestor] settlements in 1850”; within a three-mile radius of the parcel, “five (5) aboriginal villages”; and, within a six-mile radius of the parcel, “the first [tribal ancestor] town established after European contact; eleven aboriginal villages . . . and the Rohnerville Rancheria”).

¹³⁰ *Id.* at 13.

¹³¹ See, e.g., Hurtado Comments, *supra* note 25, at 3 (“The record does not place any identifiable individual Indians on . . . Rancho Suscol, but it is natural to infer that some of the Clear Lake Indians worked there. . . . Suscol was claimed by Mariano, and it is reasonable to think that Salvador sent some of his Indian workers to assist when needed. . . . The case for Clear Lake Indians working on Suscol is a natural inference from the historical record.”); Legal Analysis by Steven J. Bloxham, *supra* note 5, at 2–3 (“The Tribe has a ‘significant historical connection’ to the land because . . . the land is within Rancho Suscol . . . where the Tribe’s ancestors were *probably* enslaved and held as captive labor”) (emphasis added); Report by Albert L. Hurtado, *supra* note 5, at 45 (“Given the amount of work associated with the cattle industry in the 1840s it is *probable* that Mariano Vallejo employed Clear Lake Indians on Rancho Soscol as well as his other properties.”) (emphasis added).

¹³² Supplemental Legal Memorandum in Opposition to the Scotts Valley Band of Pomo Indians’ Request for “Restored Lands” in the City of Vallejo, Solano County, California from Yocha Dehe 10 (Nov. 22, 2016).

did. In that determination, the Department acknowledged that “the mission and rancheria eras were marked by significant displacement of Indian peoples in present-day northern California”; nevertheless, the Department found that Guidiville Band’s ethno-historian did not provide “reliable historical documentation of the Band’s presence on the Parcel, or lands in its vicinity.”¹³³ Here, while the Band’s narrative concerning its ancestors’ dispersal throughout the North Bay region during the mid-1800s is compelling, missing from this Request is the identification of significant historical sites in the vicinity of the Parcel, similar to that provided by the applicant tribe the Bear River Indian Lands Determination. While a general connection to Rancho Suscol would place the Band’s ancestors in the vicinity of the Parcel, it does not create the necessary, natural inference that they occupied or used the Parcel itself.

IV. CONCLUSION

Based upon the reasoning detailed above, I have concluded that the tribe has failed to demonstrate the required significant historical connection to the Vallejo Parcel. Consequently, the Department should decline to take the Vallejo Parcel in trust for gaming purposes as the Parcel does not meet the regulatory requirements necessary to qualify for the restored lands exception under IGRA.

I note that this decision is limited to whether or not the parcels could be considered restored lands. I offer no opinion on whether the tribe could use other IGRA exemptions for gaming on lands acquired after 1988, specifically 25 U.S.C. § 2719(b)(1)(A). Further, an unfavorable restored lands determination does not preclude the Band from considering, if it so chooses, alternative, non-gaming uses for the Parcel.

I regret that our decision could not be more favorable at this time.

Sincerely,



John Tahsuda
Principal Deputy Assistant Secretary – Indian Affairs

¹³³ Guidiville Restored Lands Determination, *supra* note 64, at 17.