Scotts Valley Band of Pomo Indians v. U.S. Department of Interior, ___ F. Supp. 3d ___, 2022 WL 4598687 (D.D.C. Sept. 30, 2022)

- **Holding:** Although the "restored lands" regulation in 25 C.F.R. § 292 constitutes a valid interpretation of 25 U.S.C. § 2719(b)(1)(B)(iii), an Indian Lands Opinion denying a restored tribe's request for a 128-acre parcel to be taken into trust for gaming purposes was arbitrary and capricious because it failed to apply the Indian canon.
- **Summary:** Plaintiff Scotts Valley Band of Pomo Indians was terminated in 1958 under the California Rancheria Termination Act. As a result of a litigation settlement, its federally recognized status was restored in 1991. That restoration, however, was not accompanied by any reservation. In 2016, the Band requested the Department of the Interior to take a 128-acre parcel in the City of Vallejo into trust for gaming purposes as "restored lands" under 25 U.S.C. § 2719(b)(1)(B)(iii). Several years later, the Principal Deputy to the Assistant Secretary-Indian Affairs issued an Indian Lands Opinion denying the application because

  > the [Scotts Valley] Band ... failed to provide sufficient evidence of a 'significant historical connection' to the [Vallejo] Parcel, as required to qualify this particular property for the restored lands exception." ... Although Scotts Valley "met the [first] requirement of the two-part restored lands exception analysis," because it was a restored tribe, and also "demonstrated the required modern and temporal connections to the Parcel," ... the agency concluded that the Band had not shown evidence of a "significant historical connection" as required by [25 C.F.R.] Part 292 because: (1) "[t]he Vallejo Parcel is not located within the boundaries of the Band's last reservation under a ratified or unratified treaty[]" ...; (2) "[t]he Vallejo Parcel is not proximate to the boundaries of the Band's last reservation under a ratified or unratified treaty," which could help establish the necessary connection to the Parcel ...; and (3) "[t]he 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 thereafter sought judicial review of the ILO under the Administrative Procedure Act and, on cross-motions for summary judgment, lost on every issue that it raised except the one that counted the most: whether the ILO's determination that the Vallejo parcel qualified for the "restoration of lands" exception in the Indian Gaming Regulatory Act for after-acquired lands.

  The district court decision contains an exhaustive discussion of various issues, including whether the Department's adoption of the regulations in Part 292 dealing with the "restoration of lands" exception satisfied *Chevron* standards. It found § 2719(b)(1)(B)(iii) ambiguous and that the Department's regulatory interpretation was reasonable and "intended to codify and explain Interior's existing practice of requiring tribes to have a significant historical connection to a parcel for the land to be considered 'restored lands' under the IGRA." The court did reject the Department's contention that the Indian canon—i.e., that statutes relating to Indians be construed favorably to them when ambiguous—had no application to the Band's challenge, observing that it "will not set aside a settled principle of statutory construction based on out-of-circuit authority or dicta in non-binding district court opinions[] and ... will include the Indian canon as a factor in its analysis."

Turning to the merits, the court engaged in a detailed analysis of the ILO and concluded that

> the agency provided a reasoned basis for its decision, which was based on the record. It did not overlook or ignore materials supplied by the Band; it considered them and supplied a rational connection between its assessment of those facts and its conclusions. ... Interior's findings cannot be said to be conclusory, unexplained, or unsupported, and therefore, from a pure administrative law perspective, the agency's application of Part 292 to the facts presented by Scotts Valley comports with the APA, whether the deference accorded is "muted" or robust.

Nevertheless, it immediately added that "the review of agency action does not operate in a vacuum, and the equally important evaluation of the decision through the lens of the Indian canon of construction requires that the decision be vacated and remanded to the agency."

It was on this point that the ILO foundered. The court reasoned:

> there is ample material in the ILO to support a finding in the Band's favor if all inferences are resolved to its benefit. The agency cited facts that weighed in the Band's favor, but then chose to devalue them. [¶] First and foremost, this land was part of the territory that the Band's ancestors ceded to the United States in 1851. ... [¶] Also, the agency declined to attribute Augustine's [a tribal ancestor] connections to the land to the Band as a whole, and it did so, in part, by characterizing the evidence as if it related to just one man, when even the information it described clearly indicated the presence of others in the region.

It then explained that "while one can read the [ILO] with only a *Chevron* hat on and nod along, a different outcome is required if one gives the Band the benefit of every inference and interprets the restored lands exception and the regulation adopted to clarify–but not narrow–it in a manner that resolves any doubt in the Band's favor."

The court concluded by rejecting the Band's argument that Principal Deputy lacked authority to issue the ILO, finding that the Interior's Departmental Manual "clearly accords the Principal Deputy Assistant Secretary "all program and administrative authorities" of the Assistant Secretary necessary to fulfill the responsibilities in Part 110, subject only to the limitations set out in 200 DM 1, which do not bear on the issue at hand."

- **Relevant (2022) Deskbook Sections:** 1:9 n.15; 12:18 n.5
- **Comment:** The district court's analysis applied the Indian canon to overturn what it held to be a reasonable application of Part 292. This approach effectively supersedes the deferential standard of review applicable to agency decisions under the APA—a task not logically within the scope of a rule aimed at properly construing statutes dealing with Indians. This is an interesting decision, and an appeal would not be surprising.