ORAL ARGUMENT NOT YET SCHEDULED

United States Court of Appeals
for the
District of Columbia Circuit

No. 09-5179

BUTTE COUNTY, CALIFORNIA,

Appellant,

v.

PHILIP N. HOGEN, Chairman, National Indian Gaming Commission; NORMAN H. DESROSIERS, Commissioner, National Indian Gaming Commission; KEN SALAZAR, Secretary, United States Department of Interior; GEORGE T. SKIBINE, Deputy Assistant Secretary for Policy and Economic Development – Indian Affairs, United States Department of Interior; UNITED STATES DEPARTMENT OF INTERIOR; MECHOOPDA INDIAN TRIBE OF CHICO RANCHERIA, CALIFORNIA,

Appellees

Appeal from the United States District Court for the District of Columbia in Case No. 08cv00519 Henry H. Kennedy, Jr., United States District Judge

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AMENDED AND CORRECTED APPELLANT BUTTE COUNTY, CALIFORNIA'S INITIAL BRIEF

SUBMITTED BY DENNIS J. WHITTLESEY, (DC Bar No. 053322), 1875 Eye Street, NW - Suite 1200, Washington, DC 20006, 202-659-6928

CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES PURSUANT TO RULE 28(A)(1)

The undersigned counsel of record certifies as follows:

A. Parties and Intervenor

The Parties to this case are Appellant Butte County and Appellees Philip N. Hogen, Chairman of the National Indian Gaming Commission ("NIGC"); Norman H. DesRosiers, NIGC Commissioner; Ken Salazar, Secretary of the Interior; Larry Echohawk, Assistant Secretary of the Interior for Indian Affairs; and the U.S. Department of the Interior. Also participating in this litigation as an Appellee is the Defendant-Intervenor Mechoopda Indian Tribe of the Chico Rancheria.

B. Rulings Under Review

Appellant seeks review of the *Memorandum Opinion and Judgment* rendered below in the United States District Court for the District of Columbia, (Civil Action No. 1:08-cv-00519, Docket Nos. 65 and 66 (Apr. 13, 2009)) (J.A. 00043 – 58).

C. Related Cases

The only case related to this appeal is the matter appealed herein.

D. Certificate Pursuant to Circuit Rule 26.1

Plaintiff-Appellant is a county government within the State of California.

Dennis J. Whittlesey
Counsel for Plaintiff-Appellant

CERTIFICATE OF PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES PURSUANT TO RULE 32(a)(1)

The undersigned counsel of record certifies as follows:

A. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8953 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

Dennis J. Whittlesey
Counsel for Plaintiff-Appellant

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GLOSSARY OF ABBREVIATIONS

Amended Ordinance	The Amended Tribal-Gaming Ordinance of the Mechoopda Indian Tribe of the Chico Rancheria
APA	Federal Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*
AR	Administrative Records for this Dispute prepared by NIGC and Interior
Assistant Secretary	United States Department of Interior – Assistant Secretary of Indian Affairs
Beckham Report	Ethnohistorian Report entitled "Mechoopda Indian Tribe of the Chico Rancheria," by Dr. Stephen Dow Beckham, Pamplin Professor of History, Lewis & Clark College, Portland, Oregon (January 2006)
BIA	Bureau of Indian Affairs
Bidwell Ranch	Property in Butte County owned in the 19th and early 20th Centuries by John and Annie Bidwell which was acquired by the United States in 1939 and taken into trust status as the Chico Rancheria
Chairman	NIGC Chairman Philip N. Hogen
Coleman Land Determination	NIGC Acting General Counsel Penny Coleman's Land Determination opinion dated March 14, 2003
Department	United States Department of the Interior
DOI AR	Administrative Record prepared by the United States Department of the Interior
Environmental Assessment or EA	Mechoopda Tribe's Environmental Assessment submitted to Interior

IGRA	Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701, *et seq.*
Interior	United States Department of the Interior
IRA	Indian Recognition Act of 1934, 25 U.S.C. § 461, *et seq.*
Mechoopda Tribe	Mechoopda Indian Tribe of the Chico Rancheria
NIGC	National Indian Gaming Commission
NIGC AR	Administrative Record prepared by the National Indian Gaming Commission
Rancheria Termination Act	California Rancheria [Termination] Act of August 18, 1958 (Pub.L. 85-671), 72 Stat. 619, *as amended by* Act of August 11, 1964 (Pub.L. 88-419), 78 Stat. 390
Scotts Valley Litigation	Federal litigation filed by the Mechoopda Tribe, one other tribe and various individual Indians, *Scotts Valley Band of Pomo Indians of the Sugar Bowl Rancheria, et al. v. United States, et al.,* No. C-86-3660 WWS (U.S.D.C. N.D.Calif.). The settlement of this litigation is claimed by the Tribe as constituting "restoration" of its federal recognition previously terminated by the Rancheria Termination Act
Secretary	Secretary of the Department of the Interior
Site	Proposed casino site in Butte County consisting of 630 acres and located approximately 15 miles from the former Chico Rancheria. The Site is owned by the tribal developer, and the Tribe holds an option to purchase the land.

Skibine Letter	August 28, 2006: Correspondence from George T. Skibine, DOI Acting Deputy Secretary for Policy and Economic Development, to Dennis J. Whittlesey, Re: DOI's refusal to revisit Coleman Land Determination.
Tribe	Mechoopda Indian Tribe of the Chico Rancheria

JURISDICTIONAL STATEMENT

(A) The district court had jurisdiction over this case pursuant to the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* in that Appellant Butte County is challenging final agency actions by the National Indian Gaming Commission ("NIGC") and the U.S. Department of the Interior ("Interior"). The agency actions at issue are (1) NIGC approval of an Amendment to the Tribal Gaming Ordinance ("Amended Ordinance") of the Mechoopda Indian Tribe of the Chico Rancheria ("Tribe" or "Mechoopda Tribe") authorizing casino gaming on land ("Site") in Butte County, consisting of 630 acres and located approximately 15 miles from the former Chico Rancheria (J.A. 00593-94) and (2) Interior approval of an application of the Mechoopda Tribe to take the Site into trust for a casino. (J.A. 00679 – 680.)

(B) The Notice of Appeal having been filed within the 30-day period of Fed. R. App. P. 4(a), this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

(C) The district court Memorandum Opinion (J.A. 00043-58) and Judgment granting Defendants' and Intervenor-Defendant's Motions to Dismiss, or in the Alternative for Summary Judgment, was entered on April 13, 2009. (J.A. 00042.) The Notice of Appeal was filed on May 13, 2009, or within 30 days from the entry of judgment.

(D) This appeal is from a final order or judgment that disposes of all parties' claims.

STATEMENT OF ISSUES

Appellant will present the following issues:

1. Whether the determination made by the NIGC and the Department – that the taking of the Site into trust for the benefit of the Tribe constitutes a "restoration of lands" under Section 20(b)(1)(B)(iii) of the Indian Gaming Regulatory Act of 1988, 25 U.S.C. § 2701, *et seq.* ("IGRA"), thus making the Chico Land Parcel eligible for Indian gaming – is supported by the Administrative Records prepared by the NIGC and Interior ("AR").

2. Whether, in the absence of specific legislative authorization, the NIGC and Interior can recognize "restoration of land" status under IGRA for land never previously owned or occupied by the Tribe.

3. Whether the NIGC could render a final agency action while ignoring information before the agency directly contradicting the statutory requirement for that action.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set forth in this Appellant's Opening Brief at the Table of Authorities.

STATEMENT OF FACTS

Before this Court are two final agency actions: NIGC's approval of the Mechoopda Tribe's Amended Tribal Ordinance and Interior's acceptance of the Site as land qualifying for gaming under IGRA. Each of these approves tribal construction and operation of a casino on the Site on the premise that an exception to IGRA's general prohibition of gaming on land taken into trust after October 17, 1988. The statutory exception relied on mandates that the gaming site must have been historically occupied by the Tribe.

The two agency actions accepted, despite the submission of the relevant evidence in the Beckham Report, a legal opinion rendered on March 14, 2003 by NIGC's Acting General Counsel Penny Coleman which concluded as a matter of fact that the Site had been historically occupied by the Tribe, thus qualifying for gaming under IGRA's "restored land" exception ("Coleman Land Determination"). (J.A. 00425-436.) Subsequent to the date on which the Coleman Land Determination was rendered, but prior to the dates on which the NIGC and Interior rendered their actions now before this Court, both agencies received uncontradicted documented evidence from federal records (J.A. 00474-536)

demonstrating that the Tribe had no historical connection to the Site at all. Nonetheless, both agencies ignored and refused to consider this evidence, and proceeded to render final decisions accepting only the conclusions of the Coleman Land Determination.

A. The Coleman Land Determination.

The March 14, 2003 Coleman Land Determination acknowledged the statutory restraints for the required analysis, noting that there are "limits to what constitutes restored land" and that "restoration of land is a difficult hurdle and may not necessarily be extended . . . to any lands that the tribe conceivably once occupied throughout its history." (J.A. 00431-432.) Moreover, it identified the critical factors applied by federal courts in assessing restored land status for gaming, particularly the requirement for a historical connection between a tribe and the land. The AR indicates that Acting General Counsel Coleman exclusively relied on the materials submitted by the Tribe and concluded that the Site qualified for IGRA's restored land exception in her March 14, 2003 decision. In order to qualify as a restoration of land, there also must be substantial evidence tending to establish that the land has been important to the tribe throughout its history. (J.A. 00433.) Further relying on the tribal materials and without any indication in the AR of independent research on this point (J.A. 00020-41), the Coleman Land

Determination concluded the Tribe had proven, by way of substantial evidence, that it satisfied this factor. (J.A. 00435.)

The district court focused its review on the "location" factor, when determining whether the Agencies properly determined the Site constituted a "restoration of lands." (J.A. 00053.) With respect to the Site's location, the Coleman Land Determination (which both Agencies relied upon to find the Site was restored lands) found it significant that the Site was within land ceded by Tribe's 1851 treaty; within the boundaries of the locations of the 23 villages identified as Mechoopda; near three buttes[1] and a "historic trail" which were both of "cultural significance" to the Tribe; and that it encompassed land that was "likely used" for hunting and gathering. (J.A. 00433-34.)

Part of the tribal submission to NIGC was an 11 page historical report prepared by tribal consultant Brian Bibby, identified in the Coleman Land Determination as "the Tribe's ethnographer and an expert on California Indian Communities." (J.A. 00433.) Of particular relevance to this dispute is Bibby's

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[1] Citing Bibby's report, the Coleman Land Determination concluded that the Site has cultural significance to the Tribe because three buttes, located one mile north of the Site, figure prominently in the Tribes' Onkoitopeh myth. (J.A. 00434-435.) Biddy claims the Onkoitopeh myth includes "[t]wo separate events; the slaying of the She-Devil and the defeat of a giant Black Eagle." (J.A. 00282.) Bibby's cites to and includes as exhibits two "documented sources for the Okoitopeh myth" – Stephen Powers' Indian Tribes of California published in 1877 and a typed manuscript of Henry Azbill – but neither source contains any reference whatsoever to three buttes. (J.A. 00296-302 (Powers); J.A. 00303-305 (Azbill).)

discussion of the findings of C. Hart Merriam, an ethnologist and botanist who visited the Bidwell Ranch in the early 20th Century. (J.A. 00280) Bibby asserted that Merriam offered two "distinct perspectives regarding Mechoopda tribal territory" that: (1) "Mechoopda" identifies a village 4 ½ miles south of Chico and (2) the historic Mechoopda tribe was made up of 23 different villages. *Id.* Biddy then sets out the list of 23 villages which Merriam identified as Mechoopda. *Id.*

The Coleman Land Determination accepted the majority of Bibby's representations of Merriam's work. (J.A. 00034-36 and accompanying endnotes.) In addition, it accepted as historical fact that the villages of Holopai, Taimkoyo and Boga were among the 23 Mechoopda villages Merriam identified, leading to an unsupported assumption that those three villages were located within close proximity to the Site. (J.A. 00434.)

However, Holopai, Taimkoyo and Boga were not included on Merriam's list of 23 Mechoopda Villages; indeed, Bibby never identified them as "Mechoopda." (J.A. 00280; J.A. 00286 (Holopai); J.A. 00287 (Taimkoyo); J.A. 00288 (Boga).) Actually, the AR indicates that the people of Taimkoyo (the location of which has never been established) were Konkow-Maidu and its residents were "removed to [the] Round Valley Reservation in Mendocino County in 1863." (J.A.00287.) With regard to Boga and Holopai, Bibby reported that a BIA Indian Sub-agent identified the "Bogas" and "Holil-le-pas" as two of the "several tribes" he visited

along the Feather River. (J.A. 00288 (emphasis added); J.A. 00286 ("the 'Ho-lil-le-pas' reside at the base of the mountains near the Feather River, and number about 150").)

B. The Beckham Report.

On March 19, 2004, the Tribe requested Interior take the Site into trust as restored land. (J.A. 00448.) In response to Appellant's concerns about a major commercial development on the Site, the Tribe asserted it had the right to develop and conduct gaming on the Site, citing the Coleman Land Determination. (J.A. 00548.) In order to determine for itself whether the Site was land to which the Mechoopda Tribe had a historical connection, the County hired Dr. Beckham to research the Tribe's historical occupancy of land. (J.A. 00548-549; J.A. 00474-536 ("Beckham Report")).

In January 2006, Dr. Beckham published the Beckham Report and all of his conclusions are based on federal records and other competent and readily-accessible historical materials that the NIGC and Interior affirmatively chose to ignore. (J.A. 00524-528 ("Conclusions"); J.A. 00529-536 ("Sources Consulted").) The following is a sample of his findings with regard to the Tribe's historic connection to the Site.

In 1914, a BIA employee visited the Ranch and concluded, "these Indians do not belong to any particular band, but are remnants of various small bands, original living in Butte and nearby counties." (J.A. 00524-525.)

BIA enrollment records indicated that no one tribe was prevalent among the residents at the Ranch, in fact the residents hailed from many different tribes (some located as far away as Oregon and the Dakotas) and some were even unable to name the Tribe from which they were descended. And the remainder were non-Indian Hawaiians, African-Americans and whites. (J.A. 00495-501.)

In 1935 BIA Commissioner John Collier determined that the Chico Rancheria (as the Bidwell Ranch was then known), was not a government reservation. (J.A. 00525.)

From at least 1939 until 1950, there was no evidence of any tribal community at the Chico Rancheria. (J.A. 00526.)

C. The Final Agency Actions At Issue.

On June 16, 2006, Appellant submitted the Beckham Report to the Secretary of Interior and NIGC. (J.A. 00548-554.) While making clear that Appellant was not challenging tribal recognition, Appellant summarized the Beckham Report's salient findings with emphasis on the facts establishing that the only land to which the Tribe could prove a historic connection was the Bidwell Ranch and requesting

Interior to reject the Coleman Land Determination and reconsider the "restored land" status of the Site. *Id.*

By letter dated August 28, 2006, George T. Skibine, Interior's Acting Deputy Secretary for Policy and Economic Development, advised Appellant that Interior was "not inclined to revisit [the Coleman Land Determination] now because the Office of the Solicitor reviewed this matter in 2003, and concurred in the NIGC's determination of March 14, 2003." ("Skibine Letter"). (J.A. 00554.) Thus, Mr. Skibine flatly stated that Interior would ignore material and relevant uncontradicted facts presented by Appellant which were never considered in 2003 because they were not submitted to the NIGC by the Mechoopda Tribe. This communication confirms that Interior consciously ignored competent evidence submitted in 2006 contradicting the selective presentation of facts by attorneys for the Tribe in 2003. The Beckham Report impeached the conclusions of the Coleman Land Determination, but Interior never considered revisiting the earlier and, by then, out-of-date, decision rendered by the NIGC Acting General Counsel.

On February 8, 2007, NIGC approved the Tribe's Amended Gaming Ordinance based on the premise that the land qualified for restored land status under IGRA Section 20(b)(1)(B)(iii). (J.A. 00593-594.)

On March 14, 2008, Interior approved the Tribe's application to take the Site into trust as restored land for gaming. (J.A. 00679-680.)

On May 18, 2008, Appellant filed its First Amended Complaint challenging the agency actions of NIGC and Interior approving gaming on the Site as restored land. (J.A. 00001-19.)

Pursuant to the APA, NIGC and Interior produced the Administrative Records for this litigation. While the NIGC AR contained historical information submitted by the Tribe prior to the Coleman Land Determination and the Determination itself, it did not include the Beckham Report or even material indicating that Appellant's concerns were even considered. The NIGC AR contained a copy of the Skibine Letter. (J.A. 00554.)

The DOI AR did include the Beckham Report (J.A. 00474-536), as well as a copy of the Skibine Letter. (J.A. 00554.)

SUMMARY OF ARGUMENT

Appellants challenge decisions by the NIGC and Interior to approve gaming for the Mechoopda Tribe on land to which the Tribe has no historical connection in direct violation of federal court analysis of IGRA Section 20(b)(1)(B)(iii) and the agencies' own stated requirements. In rendering those decisions, the agencies ignored uncontradicted and documented facts which prove the absence of the required historical connection between the Tribe and the land. When agencies ignore statutory requirements and make illegal decisions – as they have done in

this case – the APA requires that their actions be reversed because there is no administrative discretion allowing them to do so.

The modern Mechoopda Tribe was never federally recognized as a tribe until subsequent to the date in 1939 when the Chico Rancheria was taken into trust by the Secretary.

The Tribe lost its federal status in 1967 pursuant to the California Rancheria [Termination] Act of August 18, 1958 (Pub.L. 85-671), 72 Stat. 619, *as amended by* the Act of August 11, 1964 (Pub.L. 88-419), 78 Stat. 390. It subsequently regained federal status and was again recognized by the Secretary. By being recognized a second time, the Tribe qualifies as a "restored" tribe for the purposes of IGRA Section 20(b)(1)(B)(iii), 25 U.S.C. § 2719(b)(1)(B)(iii), and has a right to conduct gaming on any land satisfying the legal requirements for "restored land" status.

Restored land status does not attach to any land a restored tribe may acquire. It only applies to land to which the tribe can prove prior tribal occupancy and ownership, two elements which are absent in this case. Indeed, the evidence before NIGC and Interior disproved the very elements required for the decisions they made.

The federal courts, NIGC and Interior have uniformly declared that "restored" status can only apply to land historically occupied by a tribe seeking

gaming approval under Section 20(b)(1)(B)(iii). In doing so, each of the agencies failed to reconcile the decision with evidence documented by federal records that the Mechoopda Tribe never occupied the Site

Those decisions accepted without question a land determination of "restored land" status rendered March 14, 2003 by the NIGC Acting General Counsel Penny Coleman ("Coleman Land Determination"). (J.A. 00425 – 436.) The Coleman Land Determination accepted without question or independent analysis various materials submitted to NIGC by the Tribe, to the point of *verbatim* recitation of tribal statements and reciting as fact undocumented assumptions of tribal consultants.[2] In the process, Coleman not surprisingly concluded that the modern Tribe is the successor in interest to the village band signatory to the treaty of 1851, as well as that the treaty band later relocated to the Bidwell Ranch, maintaining a clear and identifiable tribal status. However, it is significant that the only materials before the NIGC in 2003 were those submitted by the Tribe itself, meaning that the only interest represented was tribal and the federal agencies were then free to authorize any desired result. This changed dramatically in 2006 with delivery to

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[2] In the district court action, Appellant documented Acting General Counsel Coleman's absence of any independent research and virtual *verbatim* adoption of tribal statements and assumptions at Exhibit A to its Motion for Summary Judgment. *See* "Examination of the Depth of Independent Review, Analysis and Decision-Making in the Coleman Land Determination of March 14, 2003" at J.A. 00020 - 41.

the NIGC and Interior of an expert report commissioned by Appellant, which meant that the agencies either had to consider its evidence or ignore it. They elected the latter action.

That report entitled "Mechoopda Indian Tribe of the Chico Rancheria," by Dr. Stephen Dow Beckham, Pamplin Professor of History, Lewis & Clark College, Portland, Oregon (January 2006)[3] relied on records in federal archives, most of which are Interior's own files. The Report, which was ignored by NIGC and Interior, documented and concluded that the modern Tribe (1) has no historical connection to the Site and (2) can only trace its tribal existence to the Bidwell Ranch located some 15 miles from the Site.

Not only does the Beckham Report establish that the Mechoopda Tribe is not descended from the 1851 treaty signatory, but it shows that there was no Mechoopda Tribe prior to 1939 when the land was taken into trust. (J.A. 00241 (tribal admission that the federal government first recognized the Indians at Chico Rancheria as a tribe from 1939 to 1967).) Rather than Mechoopda tracing to a tribal entity, its members are descended from a group of Indians of eight different tribal groups and non-Indian individuals of Hawaiian, African-American and white ancestry who were working and residing in the late 19th and early 20th Centuries on a private ranch owned by John and Annie Bidwell. (J.A. 00492 – 501.) These

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[3] The Beckham Report is at J.A. 00474 - 536.

residents were allowed by the Bidwells to live on the Ranch (which subsequently became the Chico Rancheria and home to the modern Tribe) only while they maintained their status as Bidwell employees. (J.A. 00486 – 487.) This was neither Indian land nor tribal land prior to 1939.

Thus, it is clear now – and was clear at the time NIGC and Interior rendered their final agency actions – that the federal records cited in the Beckham Report demonstrate that the only land the residents ever collectively occupied was Bidwell Ranch. Moreover, these same records document that the group did not constitute a "tribe" until sometime after the Chico Rancheria was taken into trust in 1939. There is no evidence that either the modern Tribe or the individual Indians and non-Indian Hawaiians, African-Americans and whites working and residing at the Ranch even saw the Site, let alone establish a historical connection. To ignore these facts and accept the out-of-date and incomplete Coleman Land Determination in declaring a historical connection between the Tribe and the Site was arbitrary and capricious.

The Beckham Report is not the only relevant material ignored by NIGC and Interior. They also ignored the Tribe's own recitation of its tribal history found in the AR as pleadings in *Scotts Valley Band of Pomo Indians of the Sugar Bowl Rancheria, et al. v. United States, et al.*, No. C-86-3660 WWS (U.S.D.C. N.D.Calif.) ("*Scotts Valley Litigation*"), the settlement of which directly resulted in

the Tribe regaining federal recognition. (J.A. 00239 – 269.) In its Second Amended Complaint, the Tribe alleged that it is an American Indian band, consisting of Indians and their descendants for whose benefit the United States acquired and created the Chico Rancheria, but which was not recognized by the federal government until 1939. (J.A. 00241-242.) The tribal allegations also confirm that the Chico Rancheria was not historic tribal land: "Prior to 1909, the Me-Chop-Da Indian Village was originally established . . . by General and Mrs. John Bidwell for their Indian employees." (J.A. 00245 – 246.) (emphasis added). This litany is identical to the Beckham Report's conclusion that the Rancheria was occupied by a non-tribal group of Indians, Hawaiians, African-Americans and whites allowed to live on the Bidwell Ranch as a condition of their employment. (J.A. 00524 – 528.) It was not until they were recognized as a tribe after the land went into trust in 1939 that any tribal entity existed as a tribe at the Chico Rancheria. The Beckham Report and *Scotts Valley* pleadings confirm that the only land historically occupied by the group became the Chico Rancheria.

This is not a case of the agencies resolving factual disputes in favor of the Tribe. Rather, it is a case in which the agencies utterly failed to meet their duty to take a "hard look" at all the relevant facts supported by substantial evidence. The Beckham Report (citing relevant documents readily available from Interior's own files) and the *Scotts Valley Litigation* contradict the assumptions on which the

Coleman Land Determination relied, yet it was the foundation for the final actions. This failure to consider competent material at odds with the Coleman Land Determination was arbitrary and capricious, and an abuse of discretion.[4]

STANDING

That Appellant has standing to maintain this litigation is not in dispute. The District Court specifically determined its standing (J.A. 00050) and Appellees did not appeal that determination.

ARGUMENT

I. Standard of Review.

Standard of Review for Issues 1 and 3:

The agencies rendered their final decisions in the fact of uncontradicted evidence supported by federal records before both establishing that the well-defined requirements for "restored land" status do not exist. However, neither agency has ever stated, and nothing in the AR indicates, that it carefully considered those facts or reconciled its final decision with that substantial evidence running counter to the out-of-date Coleman Land Determination.

The APA provides that the court shall overturn agency actions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

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[4] The extent to which NIGC ignored the Beckham Report is underscored by the fact that it was not even included in the NIGC AR, although that agency had received multiple copies.

the law. 5 U.S.C. § 706(2)(A). Reviewing courts generally owe deference to agency decisions, but this Court has recognized that "no deference is due when the agency has stopped shy of carefully considering disputed facts." *See Cities of Carlisle & Neola, IA v. F.E.R.C.,* 741 F.2d 429, 433 (D.C. Cir. 1984); *see also Wheaton Van Lines, Inc. v. I.C.C.*, 671 F.2d 520, 527 (D.C. Cir. 1982) ("deference to an expert tribunal cannot be allowed to slip into a judicial inertia").

Any decision based on factual findings or assumptions not supported by substantial evidence constitutes an abuse of discretion. *Star Fruits S.N.C. v. U.S.*, 393 F.3d 1277, 1281 (Fed. Cir. 2005).

Standard of Review for Issue No. 2:

The district court implied that this Court's decision in *City of Roseville* eviscerates the well-established requirement that there must be a historic nexus between a tribe and the land parcel claimed as restored in order to qualify for IGRA's "restoration of land" exception. (J.A. 00056.) Indeed, the court's reasoning suggests that *Roseville* permits a finding of restored land status – if the tribe lacks a historic connection to that land – so long as the subject parcel is "nearby" land to which the tribe has a historic connection. *Id.* The agencies relied on the Coleman Land Determination's finding that as a matter of fact there was a direct historical connection to the Site itself without suggesting that land to which there was no

actual historical connection was being approved for gaming because it "near" the Ranch.

An agency determination is arbitrary and capricious if it fails to consider an important aspect of the matter before it, offers an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

This Court must assure that NIGC and Interior gave reasoned consideration to the facts they were to determine, the conclusions based thereon and judgments made on the basis of evidence in the AR, *Wheaton Van Lines, supra,* 671 F.2d at 527. The courts may not affirm an agency action on "a reasoned basis different from the rationale actually put forth by the agency." *Pub. Media Ctr. v. F.C.C.*, 587 F.2d 1322, 1332 (D.C. Cir. 1978); *Motor Vehicle Ass'n of U.S. v. State Farm , supra*, 463 U.S. at 43. This means that advocacy of legal counsel cannot save an arbitrary and capricious agency action on review by supplying a rationale that the agency's decision itself did not provide. *KeySpan-Ravenswood, LLC v. FERC*, 348 F.3d 1053, 1059 (D.C. Cir. 2003); *Balt. & Annapolis R.R. Co. v. WMATC*, 642 F.2d 1365, 1370 (D.C. Cir. 1980).

Ultimate Standard of Review for This Case:

With this, it is settled that the agencies' decisions at issue should only be affirmed if this Court concludes that they NIGC and Interior took a hard look at the issues by considering the relevant factors and articulating a rational connection between the facts found and the choice made. *Transcon. Gas Pipe Line Corp. v. F.E.R.C.*, 518 F.3d 916, 919 (D.C. Cir. 2008).

II. The Administrative Record Does Not Support the Determinations that the Site Is "Restored Land" for the Modern Mechoopda Tribe.

A. The Tribe Must Prove a Historic Connection to the Site in Order for It To Qualify for "Restored Land" Status.

The federal courts, NIGC and Interior have all determined that IGRA Section 20(b)(1)(B)(iii) requires a "historic connection" between a tribe and land taken into trust as "restored land" for gaming. Yet, both agencies rendered final decisions based on the out-of-date Coleman Land Determination which assumed such a connection despite newly-presented documented evidence to the contrary, as well as tribal allegations in the *Scotts Valley Litigation* (J.A. 00241 – 242; J.A. 245 – 246).

The Courts Require a Historical Connection Between the Tribe and the Land

The federal courts have articulated the requirements for "restored" status under IGRA: (1) the tribe must have owned and/or occupied the gaming site historically, (2) the land must have been important to the Tribe throughout history,

(3) the tribe lost ownership and/or occupancy of the land and (4) the tribe acquired title to the land subsequent to having its federal recognition restored. Three defining decisions have confirmed these elements as essential for gaming approval under Section 20(b)(1)(B)(iii): *Grand Traverse Band of Ottawa and Chippewa Indians v. United States Attorney for the Western District of Michigan,* 198 F. Supp. 2d 920 (W.D.Mich. 2002) ("*Grand Traverse II*"); *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians,* 116 F. Supp. 2d 155 (D.D.C. 2000) ("*Coos*"); *Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 437 F. Supp. 2d 1193 (D. Kan. 2004) ("*Wyandotte*"). Each court concluded that "restored" status requires that (a) the land has been recognized over time as the tribe's land, and (b) there must be a historical connection between the tribe and the land itself. It is adjudicated that the historical component cannot be ignored in any agency determination of "restored lands" status for gaming.[5] Since federal officials cannot take illegal actions, any decision permitting gaming on restored land which does not satisfy the legal predicates is not in accordance with the law and, thus, shall be rejected on APA review.

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[5] There are circumstances under which this particular inquiry is not appropriate, such as when a tribe has been recognized by an Act of Congress and land acquisition was either mandated or authorized, as in the case of the Auburn Indian Community of California. *See City of Roseville v. Norton,* 348 F.3d 1020 (D.C. Cir. 2003). However, in the absence of a specific statute negating the need to show an actual "historical connection," the requirement must be satisfied.

The NIGC Requires a Historical Connection Between the Tribe and the Land

The NIGC applies the same standards in determining "restored land" status. NIGC Indian Land Determinations are public records published on the agency's web site. *See* NIGC, *Indian Land Opinions*, *available at* http://www.nigc.gov/ReadingRoom/IndianLandOpinions/tabid/120/Default.aspx. All of the following NIGC land determination decisions discussed below are published at that site.

In considering restored land status for the *Bear River Band of Rohnerville Rancheria* (Aug. 5, 2002), the NIGC concluded: "there must be indicia that the land has in some respect been recognized as the Band's," (*id.* at 11) and emphasized the requirement that establish that the gaming site "has been important to the tribe throughout its history." *Id* at 12. Following the judicial remand to the agency following the court ruling in *Coos, supra*, Interior's Associate Solicitor for Indian Affairs confirmed restored land status for the *Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians* (Dec. 5, 2001), citing the documented historical significance of the site to the tribes. Historical connections to the land were also the foundation of affirmative rulings for the *Cowlitz Tribe of Washington* (Nov. 22, 2005), and the *Elk Valley Rancheria Band of Tolowa Indians* (July 13, 2007). *See Elk Valley Rancheria, supra*, at 7 (the NIGC stated that the gaming site must have been recognized as having a "significant relation" to the tribe).

Ignoring critical evidence is not condoned. The NIGC recognized the importance of carefully examining relevant records in assessing restored land status in the case of *Grand Traverse Band of Ottawa and Chippewa Indians* (Aug. 31. 2001), concluding that a site must have been important to the tribe through its history and not merely have been among lands the tribe conceivably once occupied. This same requirement was critical to the positive ruling for the *Ione Band of Miwok Indians of California*, at 4 (Sept. 19, 2006) ("[t]he tribe must have a modern and historical connection to the land"), as well as the rulings for the *Mooretown Rancheria of Maidu Indians,* at 10 (Oct. 18, 2007), the *Poarch Band of Creek Indians*, at 26 (May 19, 2008) and the *United Auburn Indian Community*, at 2 (Jan. 3, 2002).

There also must be evidence of a continuing tribal connection with the land for "restored" status. The Coleman Land Determination itself states "restored land does not mean any aboriginal land that the restored tribe ever occupied" (J.A. 00432), emphasizing the requirement for a "continuing tribal connection." (*See* J.A. 00433 (recognizing there must be substantial evidence that the "site has been important to the tribe throughout its history and remained so immediately on resumption of federal recognition").)

B. The AR Does Not Support the Conclusion that the Tribe Is the Successor to the Band Which Signed the 1851 Treaty.

Nothing in the AR connects the historic "Mich-op-da Band" which signed the treaty in 1851 to the Indians living on the Bidwell Ranch seven decades later other than undocumented assumptions and conclusions in reports written by two tribal consultants, Brian Bibby and Craig Bates. Bibby's first historical report contains discussion of other (non-Mechoopda) villages that he assumed were "affiliated" with the treaty village band (*see, generally*, J.A. 00284 – 289), and then claims that several Ma-chop-da individuals settled at the Bidwell Ranch: Billy Preacher of Hololopai (not among the 23 Mechoopda Villages) (J.A. 00286 – 287); Mary Azbill of Taimkoyo (not among Merriam's 23 villages) (J.A.00287);[6] and Ann and George Barber of Boga (not among Merriam's 23 villages) (J.A. 00288 – 289). In fact, Bibby only identified one known resident of the Bidwell Ranch that ever resided in any of the 23 villages Merriam identified as Mechoopda, noting

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[6] Bibby's work indicates that the 1880 Census lists a "Mary" at Chico but "there is no way to confirm her identity." (J.A. 00287.) Bibby's speculation is directly at odds with BIA's 1914 accounting of the Ranch residents (J.A. 00492-493), and the 1928-33 BIA enrollment records, extensively cited in the Beckham Report. The 1914 accounting indicates that Mary Azbill, born in 1863, was then living in Chico and identified herself as 1/2 Concow and 1/2 Hawaiian (but not Ma-chop-da) (J.A. 00496). The interviews of the Ranch residents led the BIA to conclude that they were "remnants of various small bands, originally living in Butte and nearby counties." (J.A. 00495.) Bibby's assumptions of descendancy are contradicted BIA documents and federal Census records.

that Jack Frango (1840-1923) lived for a brief, but undetermined period of time, around 1855. (J.A. 00285.) "I later lived at Esken, Durham, and . . . then I lived at Chico").) Such a vague and undocumented "affiliation" between ancient village bands, (*i.e.* citing to an individual who ostensibly resided at or purportedly had some unsubstantiated connection to village band and who subsequently worked and/or lived on the Bidwell Ranch) in no way constitutes a historic nexus between the modern Tribe and various autonomous villages. As for Bibby's conclusion – accepted by the NIGC – that the modern Tribe is the political successor to the Ma-chop-da village band, he cited no supporting documentation, nor did he document any tribal existence at the Bidwell Ranch prior to 1939 when the land was taken into trust.

In contrast, the Beckham Report quoted federal officials as stating that there was no evidence of a tribal entity at the Bidwell Ranch and then Chico Rancheria from the early 20th Century until Termination[7]. While the tribal consultants and Dr. Beckham stated differing conclusions as to a tribal connection between the historic Ma-Chop-da and modern Mechoopda, the tribal consultants based theirs on

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[7] *See, e.g.* (J.A. 00494 (after visiting the Ranch in 1914, BIA Clerk W.C. Randolph concluded "I do not believe that these Indians belong to any particular band but there are remnants of various small bands"); J.A. 00505 (recalling the history of Chico Rancheria after a 1935 visit, BIA Agent Edward Post stated that "a group of Indians were kept at Chico by General Bidwell to work his ranch holdings as a result the present village came into being and was maintained by General ad Mrs. Bidwell during their lifetime")).

assumptions while Dr. Beckham cited facts reported in federal records to support his. Although the documented facts upon which Dr. Beckham based his conclusions are not contradicted anywhere in the AR, NIGC and Interior ignored them and "cherry picked" from tribal arguments and assumptions to reach their decisions. These actions ignored their own agency's contemporaneous reports that no "tribe" existed on the land from the early 20th Century until long after 1939, and Census records reporting statements to federal Census takers of Bidwell Ranch residents that they were not descended from the historic Ma-chop-da village band.

The Beckham Report documents that the modern Mechoopda Tribe can trace its history only to the Bidwell Ranch going back to the late 19th Century, which was not an "Indian reservation" but rather only a place where the Mechoopda ancestors were allowed to live only so long as they were employees of General and Mrs. Bidwell. The federal records identified in the Beckham Report also make clear that there was no tribal entity at the Ranch prior to 1939 when the land was taken into trust as the Chico Rancheria. These same historical facts were stated by the Mechoopda Tribe's in describing its tribal history in its Second Amended Complaint in the *Scott's Valley Litigation*. (J.A. 00241, J.A. 00245 – 246.)

Thus, the Tribe has confirmed Dr. Beckham's conclusion that the only land ever occupied by its ancestors as a group was the Bidwell Ranch. And it also

confirmed that the group had no tribal existence or federal tribal recognition and the Bidwell Ranch property land had no identification as "Indian land" prior to 1939.

Historic occupancy of the Site by various village signatories to the 1851 treaty does not and cannot constitute the documented historical connection between the Site and individuals working and residing on a Ranch some 15 miles away. The modern Tribe consisted of a disparate group of Indians and non-Indians which was recognized in 1939 as the "Mechoopda Indian Tribe of the Chico Rancheria." It was not recognized as the "Mechoopda Indian Tribe of Land Ceded by an Unratified 1851 Treaty."

The authority documenting the tribal history to the Bidwell Ranch and nowhere else consists of federal records showing that the residents (i) were homeless Indians and non-Indians who were allowed to live on the Ranch as an element of employment (J.A. 00494 – 495; J.A. 00505 – 512; J.A. 00513 – 516), and (ii) consisted of "people of Wailaki, Concow, Noi-ma (Mue-muck), Mi-chop-da, Sioux, Pit River, Yuki (Ukie), Wintun, Hawaiian, African-American, and white ancestry. " (J.A. 00496 - 501.)[8] This information is in the records of the BIA's formal enrollment of California Indians in 1928-33, including affidavits executed

[8] Of the 52 Sources Consulted identified in the Beckham Report, 40 are from Interior's files. (J.A. 00529 - 536.)

by the Bidwell Ranch residents as an integral element of the Census data collection. And some were unable to even identify the Indian band or tribe from which they were descended. (J.A. 00525 at ¶ 5.)

The Beckham Report further exposes the absence of any evidence showing a tribal connection between the 1851 treaty tribe and the modern Tribe's ancestors residing on the Bidwell Ranch, citing official reports as to absence of a tribal entity at the Ranch. In 1914, W. C. Randolph of the Bureau of Indian Affairs ("BIA") visited the Indian village on the Bidwell Ranch and observed: "I do not believe that these Indians belong to any particular band, but are remnants of various small bands, originally living in Butte and nearby counties." (J.A. 00494.) Randolph identified no tribe as having a beneficial interest or control over the village on the Bidwell Ranch. (J.A. 00524 ¶ 4.) In 1935, only four years before the Tribe's claimed date of federal recognition, BIA Commissioner John Collier determined that the Chico Rancheria was not a government reservation and its residents were ineligible to vote on acceptance or rejection of the Indian Reorganization Act. ("IRA"). (J.A. 00504 ¶ 8.) The Collier decision is particularly significant to the historical existence of the modern Mechoopda Tribe because the IRA mandated that such a vote be extended to all members of tribes and individual Indians occupying federal reservations throughout the United States. Of additional

significance is that the continuing lack of a community government was reported in 1955 by BIA Area Director Leonard W. Hill. (J.A. 00526 ¶ 10.)

Prior to and after receiving the Beckham Report, the agencies ignored its conclusions. Instead, they accepted the Coleman Land Determination's conclusion that the modern Tribe did historically occupy the Site which was written without the benefit of the information reported by, and documents cited in, the Beckham Report. However, the APA does not allow the agencies to ignore the fact that no record evidence substantiates the connection between the modern Tribe and the ancient treaty village. This is especially true when that assumed connection is the basis for determining a historic and cultural nexus to the Site for the purposes of IGRA Section 20. Neither agency attempted to reconcile the assumptions relied on with the contrary facts in the government records identified and reported in the Beckham Report, nor did they explain why approval was appropriate when well-established precedent makes clear that there must be "substantial evidence" of a historic nexus to the land. The conclusion is inescapable that the agencies were intent on approving the tribal request and did not bother to consider documentation contradicting their predetermined result. This is a classic case of "administrative arrogance" and it cannot be condoned.

C. The *City of Roseville* Decision Is Not Applicable Because the There Is No Statutory Waiver of the Requirement that the Tribe Must Prove a Historic Connection to the Site.

Appellant's argument in the district court was that the only land historically occupied by the modern Mechoopda Tribe was the Bidwell Ranch which evolved into the Chico Rancheria, and, accordingly, the Chico Rancheria is the only land for which this restored tribe has a historic connection. Yet, the court misstated Appellant's argument as contending that "the term 'restoration of lands' should be interpreted as including only a restored tribe's former Rancheria." (J.A. 00056.) (emphasis added) Citing *City of Roseville v. Norton,* 348 F.3d 1020, 358 U.S. App. D.C. 282 (D.C. Cir. 2003), which turned on a federal statute giving the Auburn Tribe a right to acquire land "nearby" its former Rancheria so long as it was within a defined area, the district court then ruled that the Mechoopda Tribe could claim "restored" status for land other than the Bidwell Ranch since NIGC and Interior said the Site was "ancestral homeland" (J.A. 00056.)

The decision in *City of Roseville* was firmly grounded in the Auburn Indian Restoration Act deeming land within the Auburn Tribe's multi-county "service area" as land which could be taken into trust for gaming and reservation status without specific evidence of historic occupancy by the tribe. Although there is no statute extending to Mechoopda that same avenue of resolution, the district court nonetheless endorsed the *Roseville* principle for the proposition that the agencies

were entitled to ignore uncontradicted evidence that the Site was not historic to the Tribe in order to render decisions illegal under IGRA. Required to justify that ultimate conclusion is acceptance of the notion that each agency could assume without evidence that the modern Tribe is the political successor in interest to the ancient treaty village and, thus, entitled to claim "restored" status for any land ceded by that treaty. Also required would be acceptance that Interior can ignore its own records disproving the assumption, including the pleadings in the *Scott's Valley Litigation,* in which the Tribe affirmatively admitted that occupancy of the Chico Rancheria land solely was the product of the Bidwells allowing them to reside thereon as part of their employment: "Prior to 1909, the Me-Choop-Da Indian Village was originally established . . . by General and Mrs. John Bidwell for their Indian employees. " (J.A. 00245.)

While the United States took the Bidwell Ranch into trust status in 1939, the fact remains that the 1939 residents were the same people who moved to the Ranch only a few decades earlier solely in their individual capacities as Bidwell employees and not collectively as a tribal entity. The Secretary has authority under the IRA to recognize as a tribe a collection of individuals residing in a common place. That is what the Secretary did here. Thus, the Secretary exercised his

authority to recognize a new non-historic tribe comprised of individuals with various tribal and non-Indian Hawaiian, African-American and white ancestries.[9]

This is not a case in which the agencies assessed conflicting evidence and made decisions. There was no evidence that the modern Tribe has a historic nexus to any land other than the Bidwell Ranch but, rather, evidence that it does not. By ignoring the evidence, the agencies rendered decisions counter to the evidence before them and contrary to *Cities of Carlisle & Neola, IA v. F.E.R.C., supra; Wheaton Van Lines, Inc. v. I.C.C., supra.; Star Fruits S.N.C. v. U.S., supra.*

Moreover, by applying the *Roseville* principle that the Site would qualify as "restored" because it was "nearby" the Rancheria, the district court supplied a "reasoned basis different from the rationale actually put forth" by NIGC and Interior which was that the Tribe had proven historic and cultural connections to the Site itself and not land "nearby," contrary to the law of *Public Media Center v.*

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[9] Not directly before this Court, but probably dispositive of Interior's decision to take land into trust is the tribal admission in *Scotts Valley* that it did not have a government-to-government relationship with the United States prior to 1939. This puts the Secretary's trust decision squarely at odds with the Supreme Court's February 2009 decision in *Carcieri v. Salazar,* 555 U.S. __, 129 S.Ct. 1059 (2009), that the Secretary can only take land into trust for tribes "under federal jurisdiction" on June 18, 1934, the date on which the IRA became law. Thus, by the Tribe's well-pled allegations in *Scotts Valley,* any trust acceptance is illegal. The *Carcieri* issue was not before the district court because the ruling came after briefing was complete and oral argument scheduled. But this Court *sua sponte* can take judicial notice of that decision's impact on this case.

F.C.C., supra, and *Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto. Ins. co. supra.*

III. In the Absence of Specific Legislative Authorization, the NIGC and Interior Cannot Recognize and Proclaim "Restored" Status for Land Never Occupied by the Mechoopda Tribe.

The district court decision was apparently influenced by several critical conclusions all of which were incorrect as a matter of fact or law. Those conclusions are in bold italic type:

1. ***It is not necessary to distinguish between the historic Mechoopda Band which was party to the 1851 treaty and the modern Tribe.*** (J.A. 00043 at n.1.) This statement suggests that the court concluded that it could sidestep the central issue before the court, which is that the historic Ma-chop-da village band and modern Mechoopda Tribe must be one and the same for the Site to qualify as "restored' land of the modern Tribe under IGRA. The modern Tribe's only connection to the Site even suggested in the AR is through the historic treaty band.

2. ***That there may not have been a tribe on the Bidwell Ranch during the 19th and early 20th Centuries is irrelevant because the modern Tribe was terminated in 1967 and its recognition was restored by the Stipulation in the Scotts Valley Litigation, making it a "restored" tribe for the purposes of restored lands status.*** (J.A. 00045.) The Tribe's status as "restored" has never been contested by Appellant. (J.A. 00002.) The question is whether this restored Tribe

can conduct gaming on this land which it never occupied as a tribe. The only relevant documentation is in the Beckham Report. The agencies cannot decide the land is "restored" by ignoring uncontradicted evidence to the contrary.

3. ***In the Scotts Valley Stipulation, the United States agreed to "consider" taking other lands into trust for the benefit of the Tribe.*** (J.A. 00045.) Any federal decision to acquire any land in trust for the Tribe must be pursuant to the authority of the IRA (the only federal law authorizing trust acceptance, in this case). While that law gives the Secretary broad general authority to acquire land in trust for tribes, IGRA sharply limits that authority when the land is to be used for gaming. Nothing in the Scotts Valley Stipulation either (a) requires Secretarial trust acceptance of land outside the Rancheria boundaries or (b) modifies IGRA's stricter requirements for trust acceptance when the land is to be used for gaming. This is in direct contrast to the situation in *City of Roseville* where the Auburn Indian Restoration Act included language mandating Secretary acceptance of trust acquisitions and reservation status for such land. *See City of Roseville*, 348 F.3d at 1022 (under the Auburn Restoration

Act, "all land taken into trust pursuant to its terms 'shall be part of the Tribe's reservation'"). [10]

4. ***The court stated that the requisite connection to the Site could be established if the modern Tribe proved that "its members are descendants of members of the [historic] Mechoopda tribe,"*** (J.A. 00047 at n.3) ***citing tribal arguments that a tribal historian had "indicated" that "the members of the [modern] Tribe were in fact descendants of the [historic Ma-chop-da band]."*** (J.A. 00054.) First, the Tribe provided no documentation of descendancy between the historic treaty band and the modern Tribe. Indeed, the tribal historian's account contains scant, if any, reference or documentation of any kind later in time than 1910, and it is significant that the court could only quote tribal argument (of legal counsel) that the tribal consultants had "indicated" descendancy, but not cite to any AR materials. Of further significance is the court's ignoring the Indian Census records from 1928-33 reporting the residents claimed no common place of occupancy beyond the Ranch and while a few claimed to be "Mi-chop-da," all of the others identified their ancestry as being (a) of other tribes, (b) Indian, but without knowledge of tribal history, or (c) non-Indian. (*See* J.A. 00525; *see also* J.A. 00492 - 494 (findings of BIA employee with regard to residents of Chico

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[10] Nothing in the *Scotts Valley Stipulation* in 1992 proposed a special provision to permit gaming on the Site. The agencies cannot now administratively repair the Tribe's failure 17 years ago to negotiate a deal which might have done so.

Rancheria); J.A. 00495 - 501 (1933 BIA census results and information provided on self-executed affidavits); J.A. 00511 - 512 ("List of Assignees" of the Chico Rancheria developed by the BIA in 1955).)

Second, descendancy by itself means nothing in the absence of evidence of continuous existence of a tribal entity from the historic epoch. The agencies assumed, without supporting evidence, the Mechoopda Tribe's status as the successor-in-interest to the 1851 village. They failed to require the Mechoopda to prove that it had continuously "maintained an organized tribal structure" since 1851, a critical element since tribal status is preserved only if "some defining characteristic of the original tribe persists in an evolving tribal community." *Native Village of Venetie, I.R.A. Council v. Alaska*, 944 F.2d 548, 557 (9th Cir. 1991; *U.S. v. Washington*, 641 F.2d 1368, 1373 (9th Cir. 1981). A tribe is a "good deal more than a private voluntary" organization of individuals; it is a sovereign that has continuously regulated its members and its territory. *U.S. v. Mazurie*, 419 U.S. 544, 557 (1975). BIA records report an absence of a sovereign tribal government at the Ranch, confirming Dr. Beckham's report that the residents were a group of individuals who did not constitute a tribal entity.

For much of the first half of the 20th Century, federal reports document the absence of a tribal government at the Bidwell Ranch. Illustrating the nature of a tribal government is the current administrative process through which Interior

today extends federal recognition to unrecognized Indians, by requiring that they can produce evidence that a tribal political entity has existed over a historical period. It is insufficient to satisfy "tribal" status for a group by showing ancestry to members of a historic tribe without more. Indeed, Interior has promulgated clear and objective recognition standards at 25 C.F.R. Part 83. Section 83.7 explains the mandatory criteria for federal acknowledgment of tribal status, and the first criterion requires a tribal group to demonstrate that it has been continuously identified as an American Indian entity since 1900, evidence not found in the AR. *See* 25 C.F.R. § 83.7(a). The second requires evidence that a predominant portion of the petitioning group comprises a distinct community and has existed as a community from historical times to the present. (25 C.F.R. § 83.7(b)). The third requires evidence that the petitioning group "has maintained political influence or authority over its members as an autonomous entity from historical times until the present." (25 C.F.R. § 83.7(c)) (emphasis added).

5. ***The court apparently did not understand the issue, as shown by its statement Appellant was contending that only "a restored tribe's former Rancheria" ever could qualify for "restored land" status.*** (J.A. 00056.) Appellant has never made that statement. Its position is, and always has been, that "restored land" status can only be extended to land which a restored tribe previously occupied and had a historic relationship. (*Cf.* J.A. 000010 ¶ 48, J.A.

000012 ¶ 60.) For the modern Mechoopda Tribe, that status is limited to land within its former Rancheria because that is the only land previously occupied by this restored tribe.

IV. The NIGC Cannot Render a Final Agency Action on the Basis of Conclusions Premised on Assumed "Facts" That Are Contradicted by Competent Evidence in the Administrative Record.

The Standard of Review defined at Section I makes clear that an agency decision is not entitled to deference when the agency stopped short of carefully considering disputed facts. *Cities of Carlisle & Neola, supra; Wheaton Van Lines, Inc. v. I.C.C., supra.* Moreover, this Court must assure that NIGC and Interior gave reasoned consideration to the facts they were to determine, the conclusions based thereon and judgments made on the basis of evidence in the AR. *Wheaton Van Lines, supra.* Finally, the agencies' decisions at issue should only be affirmed if this Court concludes that NIGC and Interior took a hard look at the issues by considering the relevant factors and articulating a rational connection between the facts found and the choice made. *Transcon. Gas Pipe Line Corp. v. F.E.R.C., supra.*

The Coleman Land Determination was rendered in 2003 and relied on materials the Tribe submitted to the NIGC. Even a cursory review by the NIGC of the subsequently written Beckham Report would have shown that he worked with federal records not before Coleman when she rendered her opinion (J.A. 00529 –

536), including records showing that the Ranch residents consisted of Indians without a common tribal ancestry or a tribal government, and non-Indian Hawaiians, African-Americans and whites. Since the tribal consultants did not report having reviewed these records (J.A. 00293 – 294), the record upon which the Coleman Land Determination was written did not lead the NIGC staff to examine the makeup of the people from whom the Tribe claims ancestry. However, when documented facts came to NIGC's attention which directly impeached the foundation for every critical conclusion of the Coleman Land Determination, NIGC did not have the option to ignore them, yet it ignored those facts to the point of not even including the Beckham Report in the NIGC AR with the stated explanation that it was not included because it was not considered as part of the final decision.

By ignoring documentation contradicting the basis required by IGRA itself for its agency action, NIGC is decision was arbitrary and capricious action and contrary to law to the point of illegality. No deference is appropriate here.

CONCLUSION STATING THE RELIEF SOUGHT

The NIGC and Interior rendered final agency actions by either (a) ignoring the federal government's documented facts cited by the Beckham Report establishing that the Site cannot be "restored land" for the modern Mechoopda Tribe or (b) failing to reconcile their conclusions with those documented facts.

The decision-making of both agencies failed to satisfy the requirements of the APA.

This Court should reverse the decision of the district court, enter judgment for Appellant and remand the decisions of the agencies for a new and complete consideration of the record.

DATED this 14th day of September 2009.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the ***APPELLANT BUTTE COUNT, CALIFORNIA'S INITIAL BRIEF*** has been served via ECF, Hand Delivery or and U.S. First Class Mail (as indicated below) upon counsel of record, as identified below, on this 14th day of September 2009.

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