ORAL ARGUMENT SET FOR DECEMBER 10, 2009

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

---

APPELLANT BUTTE COUNTY, CALIFORNIA'S REPLY BRIEF SUBMITTED BY DENNIS J. WHITTLESEY, (DC Bar No. 053322), 1875 Eye Street, NW - Suite 1200, Washington, DC 20006, 202-659-6928

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

A. Introduction.

This case deals with two federal agencies ignoring more than 80 years of non-tribal history to create a fiction of "restored land" which is directly contradicted by tribal records, federal records, previous admissions in federal court pleadings and the report of Butte County's ethnohistory expert that was not even reviewed by the federal agencies let alone impeached. Their decisions were wrong and, consequently, illegal.

Federal records timely identified by Appellants show that the Mechoopda Indian Tribe of the Chico Rancheria ("Tribe") is not descended from a band of Indians from a small village named "Me-Chop-Da" which was signatory to a treaty with the United States in 1851 but never ratified. Lack of such descendency means that the Tribe has no connection *as a tribe* to the lands historically occupied by that ancient village band, and – for that reason – cannot conduct at that site the casino gaming approved by the Federal Appellees. Indeed, the approvals directly violate the federal Indian gaming statute, meaning that they were illegal agency decisions and must be reversed.

The Tribe claimed to be the continuum of the 1851 tribe in pursuit of approval for gaming on land far from the former Chico Rancheria. The Department of the Interior ("Interior") and National Indian Gaming Commission ("NIGC") accepted the "continuum claim" in the gaming approvals rendered by

their final agency actions. This litigation seeks review pursuant to the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* ("APA").[1]

The decisions relied exclusively on a "land determination opinion" rendered several years before. The land determination opinion in turn relied exclusively on, and quoted, the tribal application to conclude that the Tribe has historical connection to the gaming site, thus satisfying the "restored land" provisions of Section 20(b)(1)(B)(iii) of the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2719(b)(1)(B)(iii). That opinion, dated March 14, 2003, was written by NIGC Acting General Counsel Penny S. Coleman. J.A. 00425-436. The County did not comment to the NIGC at that time for the simple reason that it was neither requested to do so nor even aware of the review process underway.

Following promulgation of the Coleman Land Determination, the Tribe requested NIGC and Interior decisions effectively approving gaming on land not within the former Chico Rancheria as Section 20 "restored lands." Both agencies approved the request despite having received from Appellant documentation proving that the land was not "restored." This documentation was in a report prepared for Appellant Butte County by the noted ethnohistorian Dr. Stephen Dow Beckham of Lewis & Clark College, in which he carefully examined the history of the modern Tribe and its membership ("Beckham Report"). J.A. 00474-536. As

---

[1] The approvals are at J.A. 00679-680 (Interior) and J.A. 00593-94 (NIGC).

has been previously stated in this litigation, the County retained Dr. Beckham to examine the Mechoopda tribal history after learning of the its gaming plans.

The research yield from that project is fully explained and identified in the Beckham Report and included 50 sources, *42 of which are from Interior's own files*, which demonstrate beyond question that the Tribe is not related to the historic village band but rather is descended from a disparate group of Indians and non-Indians who were employees at the ranch of John and Annie Bidwell and allowed to live on the Ranch during their employment in a village established by the Bidwells. Those records include reports of federal officials dating from the early 20th Century that *no tribal entity* existed on the ranch prior to 1939; indeed, they document the *nonexistence* of a tribal entity during that time.

The existence of a tribal entity is critical to the agency actions taken because both agencies assumed the ancient village band's *continuing existence* as a tribe from 1851 to the date of the final agency decisions. Coleman's opinion was based on anecdotal evidence and assumptions of undocumented facts. Her analysis began with the 1851 tribe and *assumed* that the tribe *relocated* to the Bidwell Ranch. However, Dr. Beckham started with the modern Tribe and traced back in time to discover the absence of any tribal entity at the Ranch site at any time in history. He found that the Bidwells (1) hired the residents to live and work on their property and (2) established the village as a place of residency for them during

their employment. Dr. Beckham assumed nothing, conducted extensive research in federal records and documented everything published in his Report and reached a conclusion, directly contrary to Coleman who assumed many critical facts, conducted no research and adopted the tribal arguments virtually *verbatim* as the text for the substantive portion of her opinion. *See* J.A. 00020-41.

The Tribe previously concurred with Dr. Beckham's findings. In 1987, it filed an Amended Complaint in federal court alleging facts which contrave facts it now asserts. Those federal allegations asserted the same historical facts of nontribal presence and lack of federal recognition independently developed by Dr. Beckham from federal records. These allegations are discussed *infra* at Section F – "The Facts Alleged by the Tribe in the *Scotts Valley* Complaint Are to Be Accepted as True." It is significant that the litigation was settled on the basis of the facts before the court and parties, a settlement which directly resulted in the Tribe gaining federal recognition. The Tribe now proposes to rewrite the very facts which it so successfully advanced just a few years ago.

Notwithstanding Dr. Beckham's credentials and careful and thorough work, the Beckham Report was ignored by the NIGC to the point of its exclusion from the NIGC Administrative Record ("AR"). While the Beckham Report *was* included in the Interior AR, it was summarily dismissed by a senior Interior official with the explanation that the Department had concurred in the Coleman

Land Determination years before and would not "revisit" it in light of that Report. *See* letter to Appellant from George T. Skibine, Interior's Acting Deputy Secretary for Policy and Economic Development, dated August 28, 2006 ("Skibine Letter") (J.A. 00554.)

In a nutshell, it is a matter of the record of this litigation that documented facts directly affecting and contradicting the agencies' conclusions were never considered. Indeed, the Beckham Report was not even mentioned in either agency's final decision documents.

B. Interior Proposes to Weaken the Applicable Standard of Review After Ostensibly Confirming It.

1. The Standard of Review articulated by the parties mandates careful judicial scrutiny of the agency actions at issue.

The Appellees essentially argue that this Court should not engage in any meaningful, careful or searching review of the agency decisions at issue. This is despite their agreement with Appellant, that this Court must set aside the agencies' actions if it finds they were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). The Federal Appellees initially asserted that the agency decisions should only be upheld if all the relevant factors were considered and the agency "articulated a rational connection between the facts found and the choice made." *Transcon. Gas Pipe Line Corp. v. FERC*, 518 F.3d 916, 919 (D.C. Cir. 2008) (emphasis added).

At the same time, Federal Appellees propose diluting that standard by limiting judicial review to "identification of the policy issues ventilated" and the reason for the agencies' reaction thereto. *See* Federal Appellee Brief ("U.S. Br.") at 17 (citing *Milk Indus. Found. v. Glickman*, 132 F.3d 1467, 1476 (D.C. Cir. 1998)). Appellant agrees that the APA requires agencies to identify the issues and the reasons for their reaction but accepting the Federal Appellees' limited scope of review would effectively result in *no* judicial review.

Contrary to Appellees' contention that *any* explanation will do, an agency must provide a "satisfactory explanation" for its decision (*i.e.,* its reaction to the issues before it). *Milk Indus. Found.*, 132 F.3d at 1476. Indeed, a reviewing court must determine that the agency decision was not only *reasonable* but also *based on substantial record evidence*. Substantial evidence "means such relevant evidence as a *reasonable* mind might accept as adequate to support a conclusion," *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951), and while it may be less than a preponderance, it must be "more than a scintilla." *Cellular Phone Taskforce v. FCC*, 205 F.3d 82, 89 (2d Cir. 2000). As such, this Court should look beyond the agencies' bare assertions and ensure the decisions are, in fact, reasonable based on the record.

Despite this well-established standard, Appellees contend that the agency actions at issue are entitled to deference and strongly suggest that the agencies'

findings and conclusions accordingly are, *ipso facto,* correct and proper. In effect, the Appellees propose a standard of review that would create an administrative slippery slope where anything goes and courts merely "rubber-stamp" agency decisions. *Cf. Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 272 (1968).

Contrary to their assertions, this Court has the right – if not the duty – to conduct a careful study of the record to ensure that the agencies exercised a reasoned discretion in the decisions at issue. *Greater Boston Tel. Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970). Indeed, the APA mandates that courts engage in a "substantial inquiry into the facts, one that is searching and careful." *See Ethyl Corp. v. EPA*, 541 F.2d 1, 34-35 (D.C. Cir. 1976); *see also Nat'l Cable Tel. Assoc., Inc. v. FCC*, 479 F.2d 183, 193 n. 27 (D.C. Cir. 1973). And a court should only defer to an agency's findings and conclusions once it concludes the agency really took a "hard look" at the issues and "genuinely engaged in reasoned decision-making." *Greater Boston*, 444 F.2d at 851. This is especially true where, as here, the agency decisions are not only woefully lacking in factual support but the agencies refused to consider documented evidence, raising "danger signals" of agency failure to examine the issues. *Id.*

All of this follows from the premise that expertise is strengthened in its proper role as the servant of government when denied the opportunity to "become a

monster which rules with no practical limits on its discretion." *Id.* at 850 (quoting *Burlington Truck Lines v. U.S.*, 371 U.S. 156, 167 (1962)). In failing to consider all the evidence before them at the time of the agency actions, the Federal Appellees morphed into such a monster and thereby forfeited the right to claim judicial deference.

2. The Standard of Review applicable to the Beckham Report is whether the agencies conducted meaningful review of, and gave consideration to, its evidence and findings.

Appellees defend the agency decisions as not arbitrary and capricious since they relied on tribal consultants' reports. U.S. Br. at 45-46; Mechoopda Tribe's Brief ("Tribal Br.") at 15-16. However, the applicable standard of review requires meaningful review of, and consideration to, all relevant evidence and contradictory findings in the Beckham Report. Rational decision-making requires that an agency consider all relevant evidence before it, *Fund for Animals v. Williams,* 391 F. Supp. 2d 191, 197 (D.D.C. 2005), because "evidence that is substantial viewed in isolation may become insubstantial when contradictory evidence is taken into account." *Landry v. Fed. Deposit Ins. Corp.*, 204 F.3d 1125, 1140 (D.C. Cir. 2000).

That the agencies ignored the Beckham Report's evidence is particularly egregious given the fact that *40 of the 52 sources cited are BIA records* (J.A. 00529-536), documenting what federal employees observed at the Bidwell Ranch

during the 19th and 20th Centuries. *See, e.g.,* J.A. 00483-501, 00524-528. Denying the relevance of these documents is both irresponsible and "inconsistent with rational decision-making." *Kent County, Delaware Levy Court v. EPA,* 963 F.2d 391, 396 (D.C. Cir. 1992).

Nonetheless, Appellees argue that it was proper for the agencies to render their decisions exclusively relying on the Coleman Land Determination, while ignoring *relevant and contradictory* evidence. Although they might not have been bound by Beckham's documented facts and conclusions, the APA mandates that they deal with them precisely because Appellant provided a study which "pointed to serious flaws in the [Coleman opinion]." *Cf. SUWA v. Norton*, 326 F. Supp. 2d 102, 113 (D.D.C. 2004). By providing evidence to the court that the agency conclusions were unsound, Appellant has the right to "cry foul." *Id.*

When the agencies failed to consider all the evidence before them, they failed to act in a reasonable manner. Their failings mandate a careful scrutiny by this Court of the agencies' conduct and the harm directly resulting therefrom.

C. The Indian Canon of Construction Does Not Prescribe the Outcome of This Matter.

The Appellees argue that the agency actions must be confirmed because the Indian Canon of Construction dictates that statutory ambiguities be resolved in favor of the Indians even to the point of disregarding IGRA's specific statutory requirements. The argument ignores the applicable law and judicial history which

are both well-known and dispositive on the question of what constitutes restored land in this case.

Underlying this argument is whether the Section 20 (b)(1)(B)(iii) term "restoration of land" is ambiguous. While there may be elements to any given dispute where a term could be deemed ambiguous, there is one element to this term which unquestionably is not ambiguous: *there must be a* ***historical connection*** *between (a) any tribe seeking gaming approval and (b) its land proposed as "restored" for gaming under Section 20(b)(1)(B)(iii).*

The meaning of "restored" and "restoration" is not ambiguous on the single most critical factor of statutory application, which is an absolute requirement of an evidenced historic connection between the Tribe and its proposed Gaming Parcel. To confirm this point, courts have turned to the dictionary to confirm the meaning of the statutory words "restore" and "restoration" and concluded that land qualifies for "restored" status only when the tribes can establish a historic connection to it. *See, e.g., Grand Traverse Band of Ottawa and Chippewa Indians v. U.S. Attn'y for the W. Dist. of Mich.,* 198 F. Supp. 2d 920, 928 (W.D.Mich. 2002); *Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians v. Babbitt,* 116 F. Supp. 2d 155, 162 (D.D.C. 2000); *Wyandotte Nation v. Nat'l Indian Gaming Comm'n*, 437 F.Supp.2d 1193, 1205 at n.104 (D.Kan. 2004). Moreover, as Appellant detailed in its Brief, the NIGC has uniformly required evidence of a historical connection for

any land to qualify as "restored land" for gaming. Appellant Br. at 21-22. Significantly, Interior has applied the identical test to its land determination opinions. *See, e.g.,* Interior Department's final Land Determination Opinion confirming restored land status for the Confederated Tribes of Coos, Lower Umpqua & Siuslaw Indians dated December 5, 2001. J.A. 000174; Appellant Br. 21.

Simply stated there is no ambiguity as to IGRA's requirement that there be evidence of a historic connection between the Tribe and the Gaming Parcel. That requirement has been consistently applied by the federal courts and the Federal Appellees. Nothing in this litigation calls for application of the Indian Canon of Construction because the meaning of the words "restored" and "restoration" in the context of this case is not ambiguous.

D. There Is No Evidence of Tribal Existence Between 1851 and 1939.

The Appellees say they assumed that the Indian and non-Indian individuals working on the Bidwell Ranch constituted a continuum of the small village band which executed the 1851 treaty. Of course, they *have* to say this now, for that is not only the *critical element* connecting the historic village band to the modern Tribe, it is the *only element* doing so. Yet, there are no indicia of tribal existence until sometime after the land was taken into trust for the residents of the Bidwell land in 1939.

An Indian tribe is more than a voluntary organization or collection of people with Indian ancestry: *it is a sovereign that has continuously regulated its members and its territory from time immemorial. U.S. v. Mazurie*, 419 U.S. 544, 557 (1975). The law of tribal existence is well-established and is discussed in Appellant's Brief at 35-36. There must be evidence of a continuous "organized tribal structure" and some defining tribal characteristics of the original tribe. *Id.* And, as the Federal Appellees correctly declare, one of the critical ingredients to tribal existence is that tribes have the right to determine their own membership. U.S. Br. at 49.

With regard to tribal control of its membership, the Federal Appellees assert that a disparate tribal background among tribal members does not preclude tribal existence (*Id.),* and the Tribal Appellee states that the village on the Bidwell Ranch was a "traditional, pre-existing Mechoopda village *relocated* to the Ranch with Bidwell's assistance." Tribal Br. at 22. However, the documented facts firmly demonstrate that there was no tribe at the Ranch and the Tribe's statements about the village history are fiction.

It cannot be seriously disputed that the Bidwells established the village as a place where their workers could reside while employed. This not only was reported by Dr. Beckham on the basis of federal records, but affirmatively corroborated by the Tribe in its *Scotts Valley* pleadings and in the Coleman Land

Determination. J.A. 00430. The Bidwells not only decided who could work and live there, but they also had the power to exclude those who did not meet their personal standards of behavior. This was documented in John Bidwell's Will, which Dr. Beckham cited and quoted and the Federal Appellees apparently have never read.

Bidwell wrote his will in 1897 at the age of 67. J.A. 00486. At Article 21, he explained his relationship with, and treatment of, the village's Indian population: "any Indians who may become dissipated, criminal or troublesome, forfeit the right to live thereon." J.A. 00486-487. The will left no doubt as to how the Bidwells then controlled, and would continue to control, the residents of the Ranch: "Indians who had the privilege of living on *the Bidwells' land* had to conform to their standards of behavior. Any Indian who appeared 'dissipated' or who became a 'criminal or troublesome' forfeited the right of residency. The Bidwells–not the Indians–established the standard (Bidwell 1897)." J.A. 00487

Thus, in Bidwell's own words, the village population consisted of individuals he hired and allowed to live there. This was not a "tribal village" for which a "tribe" determined the population and exercised sovereignty and control over the "members." Rather, the land, the resident population and every element of occupancy were controlled by the Bidwells in their capacities as landowners and employers.

Dr. Beckham carefully reported the establishment of the village by the Bidwells for their employees, a group of (a) Indians from eight different tribal groups and (b) non-Indian individuals who were allowed to reside in that village while employed as workers on the Ranch. J.A. 000492-501, 000486-487. He also carefully reported that various federal officials visited the Ranch throughout the four decades prior to 1939 and without exception reported the absence of any tribe or tribal entity. Those federal reports included first-hand observations that the residents were homeless Indians and non-Indians allowed to live on the Ranch as an element of employment, as well as that some of the Indians had no knowledge of the Indian tribe or band from which they were descended. Appellant Br. at 26-27. Significantly, the absence of any tribal entity or tribal activity continued to be observed and formally reported to Interior through 1935. *Id.*

A group of individuals cannot just select a tribal name and become that tribe. Much more than that is required. Yet, the information before the agencies when they rendered their final actions strongly evidences that such occurred here. There was no "relocation" of the small village named Mechoopda, as Appellees assert. To the contrary, that village and the band occupying it became extinct sometime after 1851; it disappeared without a trace. The Bidwells did create an occupancy area on their Ranch for their employees, but those people had nothing to do with its establishment and had no rights or other entitlements of ownership. Again, this

was reported by John Bidwell and Dr. Beckham, and confirmed by Tribe's Amended Complaint in *Scotts Valley*. While those specific facts may not have been noticed by Coleman when she wrote her opinion and Interior concurred, they were plainly stated by Dr. Beckham before the agencies rendered final decisions at issue. Neither agency even attempted to reconcile the dramatic contradictions between (i) Dr. Beckham's yield from federal documents and reports and (ii) the anecdotal conclusions articulated by the tribal consultants and adopted virtually *verbatim* by Coleman.

The standard of review applicable to this case does not permit agencies to ignore factual material from their own files when rendering decisions requiring facts directly contrary to that material. This is particularly true here since the information from those files demonstrates the absence of any tribal entity on the Bidwell Ranch and, in turn, the absence of any link to the treaty tribe which may have had a historical connection to the Gaming Parcel. Without a tribal connection to that land, the restored land determination was unlawful and should never have been made.

E. The Land Is Not Restored for the Modern Tribe.

The critical element to this case is whether the modern Tribe can claim the historic lands of the 1851 village band. Such necessitates evidence that there was a *continuous tribal existence* from the treaty date to the present. Dr. Beckham's

Report and the federal documents upon which it is extensively grounded puts the focus squarely on the makeup of the group of people working at and permitted to live on the Bidwell Ranch, a focus not even addressed in the tribal submissions before Ms. Coleman and, accordingly, never addressed by her in rendering the Coleman Land Determination.

The documented facts showing an absence of any tribal existence associated with the Bidwell-permissive and Bidwell-controlled residency on the Ranch are stunning and not controverted by anything in the AR. Assumptions and post-hoc rationalizations by the Appellees do not substitute for documented facts to the contrary. Absent a historic connection, the land does not and cannot qualify for "restored" status pursuant to Section 20(b)(1)(B)(iii).

Finally, the Appellees *heavily* rely on a single document as authority for their argument that the modern Tribe is descended from the 1851 village band. This document is an article published in a 1957 edition of the California Historical Society Quarterly entitled "Bidwell Rancheria" and written by Anne H. Currie. J.A. 187-201. The Quarterly is a pamphlet publication containing various articles, but not identifying any credentials establishing Currie as a trained historian or reporting academic background relevant to the task at hand. Nonetheless, her article is repeatedly cited by Appellees, while they denigrate Dr. Beckham's work

and conclusions which were based on and quoted federal records. U.S. Br. at 6, 26, 27, 29-30, 44; Tribal Br. at 1, 2, 3, 7, 10, 11, 12, 14, 15, 16, 20, 21.

F. The Facts Alleged by the Tribe in the *Scotts Valley* Complaint Are To Be Accepted as True.

In the litigation which led to the Tribe's federal recognition, it detailed a tribal history which is totally at odds with its current version of tribal history. Remarkably, the Tribe's first version – to which Dr. Beckham did not have access – is virtually identical to the tribal history which he constructed from the federal records. It now seems clear that the agencies failed to review the Tribe's first version of its history or the independently-developed corroboration of Dr. Beckham in rendering their final decisions. They merely accepted Coleman's acceptance of the second tribal version.

Appellant's Brief quoted the factual allegations of Mechoopda tribal history from the Tribe's Second Amended Complaint ("Complaint") in *Scotts Valley.* Those allegations directly contradict the tribal consultants' assumed facts of the tribal history which were adopted by Ms. Coleman in her opinion. And those same tribal allegations directly contradict Appellees' statements to this Court. *See* discussion at Appellant Br. at 14-16.

In its Brief, the Tribe *absolutely ignored* its prior formal allegations. There simply was not even a scintilla of explanation of how or why its history in this litigation differs from its history in prior litigation, the settlement of which resulted

in its gaining federal recognition. At the same time, the Federal Appellees dismissed that inconsistent recitation of tribal history as totally irrelevant, ignoring the fact that restoration of the Tribe's federal recognition was *solely* the direct product of the facts set forth in the Complaint and consequent settlement of that litigation. Notwithstanding the Tribe's silence and the Federal Appellees' inexplicable defense, this Court should deem the Tribe's allegations in the *Scotts Valley Litigation* admitted as true.

It is adjudicated that factual allegation in litigation are considered an admission of the party who made them. *Schott Motorcycle Supply, Inc. v. Amer. Honda Motor Co.*, 976 F.2d 58, 61 (1st Cir. 1992) (cited in *U.S. v. Insurance Co. of North Am.*, 83 F.3d 1507, 1510 n.6 (D.C. Cir. 1996)); *see also Dartez v. Owens-Illinois, Inc.*, 910 F.2d 1291, 1293 (5th Cir. 1990). Moreover, courts can appropriately "treat statements in briefs as binding judicial admissions of fact," (because false statements can be treated as perjury), *Purgess v. Sharrock*, 33 F.3d 134, 144 (2d Cir. 1994), and in light of the strict requirements imposed on legal counsel by Rule 11 of the Federal Rules of Civil Procedure, which states that in presenting a pleading to the court, an attorney as an agent of the client is certifying that to the best of his/her knowledge, information, and belief, formed after reasonable inquiry, *that the factual contentions therein are true.*

Indeed, this Court has held that factual assertions set forth in a party's pleading were admissible against that party in a different action as "a solemn admission by him of the truth of the facts stated." *U.S. v. Sec. Corp. Gen.*, 4 F.2d 619, 623 (D.C. Cir. 1925). Also, *see Jelleff v. Braden*, 233 F.2d 671, 675-676 (D.C. Cir. 1956).

While the Tribe maintains silence on its prior judicial allegations, the Federal Appellees argue that the Tribe's *Scotts Valley* Complaint contains no concession with regard to the date of the Tribe's federal recognition, and then back up that assertion with the alternative argument that, *even if it did*, the United States would not be bound by those formal judicial allegations. U.S. Br. 51. And, remarkably, the "concession either didn't happen or didn't mean what it said" response is coupled with simultaneous statements that the Tribe was extended federal recognition as the direct result of the Tribe's *Scotts Valley* lawsuit. *See* U.S. Br. at 7; Tribal Br. at 3 (the Stipulation "reinstated the Tribe's federally-recognized sovereign status"). And, Appellant agrees that the Stipulation was entered into for the purpose of settling that litigation. J.A. 00147-161 (the "Stipulation for Entry of Judgment").

//

//

//

In its *Scotts Valley* Complaint, the Tribe self-identified as follows:

> Plaintiff[] . . . Me-Choop-Da Indians of the Chico Rancheria . . . [is an] American Indian band consisting of the Indians and their descendants . . . *[and previously was] recognized by the United States Government . . . from 1939* until June 2, 1967 . . . .

J.A. 00241 (emphasis supplied). In addition to confirming Dr. Beckham's finding of evidence that there was no tribal recognition at the Chico Rancheria prior to 1939, the Complaint corroborated other facts developed by him showing the absence of tribal existence prior to 1939:

- Prior to 1909, the Me-Choop-Da Indian Village was *originally established* in Butte County . . . *by General and Mrs. John Bidwell* for their Indian employees. J.A. 00245 (emphasis added).

- In 1909, Mrs. Bidwell deeded Parcel 1 to the Board of Home Missions in trust for the . . . Ranch residents. Mrs. Bidwell's will left Parcel 2 to the same Board of Home Missions of the Presbyterian Church. *Id.*

- On or about March 1938, the court order of partial distribution in the Estate of Annie Bidwell, Butte County Superior No. 3026, appointed a trustee for both parcels. *Id.*

- In 1939, under the authority of the appropriation for "homeless California Indians" of 1925, reappropriated in 1939, . . . both parcels were conveyed to the United States in trust for the Indians of the Me-Choop-Da Indian Village. J.A. 00245-246.

- *From [1939] until its purported termination in 1967* the Chico Rancheria was considered an Indian reservation

> under the Indian Reorganization Act and "Indian country" under 18 U.S.C. §1151. J.A. 00246 (emphasis added).

The Tribe is bound by these admissions. While the Federal Appellees may claim they did not know of them and, thus, should not similarly be bound, the fact remains that the Complaint and the Stipulation are part of the AR (J.A. 00239-269, 00147-161), and the Tribe's admissions are directly at odds with the factual basis for the Coleman Land Determination upon which they relied. The egregiousness of the agencies' failure to address these admissions is underscored by the fact that the same information was before them in the form of the Beckham Report which they saw fit to ignore.

The extent to which Appellees seek to avoid the allegations is shown by their proposed distortion of e language of the Tribe's Complaint. U.S. Br. 50-51.

Scotts Valley was a class action lawsuit which identified the recognition history of the four tribal plaintiffs with the following language:

> The Bands were recognized by the United States Government **[1]** *from at least 1911* until September 3, 1965 *in the case of the Sugar Bowl Rancheria*, **[2]** ***from 1939*** until June 2, 1967 ***in the case of Chico Rancheria***, **[3]** *from 1926* until August 1, 1961 *in the case of Lytton Rancheria* and **[4]** *from 1909* until September 3, 1965 *in the case of the Guidiville Rancheria.*

J.A. 00241 (emphasis added). The Federal Appellees propose that this Court should read the phrase "from at least" to apply not just to the Sugar Bowl

Rancheria but also to the other three tribal plaintiffs. U.S. Br. 50-51. In response, it can only be said that the allegations clearly set out different time lines of recognition for each of the four. Furthermore, the Complaint's General Factual Allegations echo this language by stating that the Chico Rancheria was treated as an Indian Reservation and "Indian country" *from 1939* until termination. J.A. 00246. There is no allegation that the Chico Rancheria was treated as either an Indian Reservation or "Indian country" at any time prior to 1939.

To reiterate, the Complaint unambiguously states that the Tribe – identified as the "Chico Rancheria" – was recognized by the United States "*from* 1939 until June 2, 1967." J.A. 00241 (emphasis added). The term "at least" was uniquely used to suggest possible recognition earlier than 1911 for Sugar Bowl, and not the other three plaintiff tribes.

G. *City of Roseville* Is Not This Case.

Appellees argue this case is controlled by the Court's decision in *City of Roseville v. Norton*, 348 F.3d 1020 (D.C. Cir. 2003), proposing that Appellant (like the plaintiff in *Roseville*) seeks to strictly limit the "restoration of lands" exception to former reservation lands. U.S. Br. 30-31; Tribal Br. 14-15. Appellees further argue that Appellant distinguishes *City of Roseville* on some notion that "restored land" status will vary depending on whether a tribe's recognition came though

congressional, judicial or executive action.[2] U.S. Br. at 31-32; Tribal Br. at 14. Appellant has neither made nor even suggested either of those arguments.

Appellant does not ask this Court to limit the definition of "restored lands" to a tribe's former reservation, an argument which *was* made in *City of Roseville*. To the contrary, Appellant repeatedly has stated that the "restoration of lands" exception *can and does* apply to lands outside of a tribe's former reservation so long as the tribe has the requisite historic connection to such land. Appellant Br. 11-12, 19-22. Contrary to Appellees' proposed broadening of Appellant's argument in an apparent effort to confuse its claims with those rejected in *City of Roseville*, the County narrowly argues that this Tribe does not have a historic connection to the Gaming Parcel, and nothing in either the judicial or administrative records support the agencies' findings to the contrary. *Id.* at 23-28. Simply stated, the County has never, and does not now, propose an overarching rule that would "read the 'restoration of lands' provision out of existence" and Federal Appellees' suggestion that the County is making that argument is fanciful and deliberately false. U.S. Br. 30. The Federal Appellees know or should know that the County is insisting that they follow the well-established precedent uniformly applied by the courts, NIGC and Interior requiring *evidence* of a historic

---

[2] Of importance to *City of Roseville* was that the tribal recognition act at issue legislated "reservation" status for any new tribal trust land within a specific area which included the casino site. 348 F.3d at 1036.

connection between a tribe and a proposed gaming parcel before it can be taken into trust pursuant to the "restored lands" exception. Appellant Br. at 19-22.

The Federal Appellees literally propose to read the historic connection requirement out of existence for this case, something which this Court should not sanction.

In a further attempt to shoehorn this case into *Roseville*, Appellees argue that the agency actions at issue are proper because restored lands *can* include "restitution" lands as replacement for land taken from, but now unavailable to, a tribe. U.S. Br. at 29-30; Tribal Br. at 15. It is true that *City of Roseville* found that a restoration of lands may encompass new lands under a theory of restitution. *City of Roseville*, 348 F.3d at 1027. However, that notion was not articulated as a new universal rule for restored lands determination. Rather, the Court qualified the application of that theory, stating that "restored land" review should include examination of land historically occupied not only at the time of termination but *further back in time*. *Id.* The Court thus stated that land can be "restored" if historically occupied, and not merely occupied at the time of termination, and this has been the County's position throughout the litigation. The problem for the Appellees is that they are proposing *post hoc* rationale for agency decisions to avoid having to admit that they simply accepted anecdotal evidence and conclusions in place of actual evidence of historic connection between this Tribe

and the Gaming Parcel. The basis for the Coleman opinion was that the Gaming Parcel actually was historic land to the Tribe – not that it was "restitution" land.

The issue of historic connection is central to this case, but it was not even raised in *City of Roseville*. That the Court found that the Auburn Tribe was descended from Maidu and Meiwok has no bearing on the instant case because there was no issue of "historic connection." *Id.* at 1027.

Appellees suggest that the *City of Roseville*'s general concept of "restitution" renders the agency actions appropriate because the Chico Rancheria is unavailable for tribal acquisition. As an initial matter, the fact that the Chico Rancheria is "unavailable" for casino development is, at least in part, because the Tribe agreed it would be so as part of the *Scotts Valley* Settlement, which granted its federal recognition. Indeed, the Tribe agreed that acceptance into trust of any future tribal land acquisitions "within the exterior boundaries of the former Chico Rancheria" would be subject to the condition that its use be and remain consistent with the land use element of the General Plans of the City of Chico or the County. J.A.00152. Moreover, the Tribe "agreed . . . not [to] seek . . . to reestablish the former boundaries of the Chico Rancheria." J.A.00157. The Appellees should not now be permitted to disclaim any role in the Rancheria's unavailability.

Moreover, permitting the agency actions to stand based on a general concept of "restitution" would ignore the legal precedent followed by the courts, NIGC and

Interior which plainly requires evidence of a historic connection to the land for the "restored lands" exception. Indeed, the Coleman Land Determination is based on her conclusion that the Tribe established the requisite historic and cultural connections. J.A. 00435. Because Coleman did not justify the exception as a restitution of lands without the historic connection requirement, the Court cannot now substitute that new and different rationale to confirm the agency decisions. *See Pub. Media Ctr. v. FCC*, 587 F.2d 1322, 1332 (D.C. Cir. 1978).

The absence of some restitution justification for the two "restored land" approvals at issue underscores how critical the historic connection component is to a Section 20(b)(1)(B)(iii) determination. Of the three "*Grand Traverse* factors," the second has consistently been applied to require tribes seeking restored lands status *to demonstrate a historic connection* to the land. One court pointedly described that factor as "arguably [the] most important, component of the test for restoration of land exception [because it] relates to the tribe's historical connection." *Wyandotte Nation,* 437 F. Supp. 2d at 1214 (citing *Coos*, *Grand Traverse* and *City of Roseville*).

Finally, neither Federal Appellee suggested its decision was outside of, or reversing, its historic connection requirement. *Balt. & Annapolis R.R. Co. v. WMATC*, 642 F.2d 1365, 1370 (D.C. Cir. 1980) ("when an agency decides to reverse its course, it must provide an opinion or analysis indicating that the

standard is being changed and not ignored . . . ."). The Coleman opinion cited a historic connection and the agencies relied on that finding in rendering their decisions. They cannot now effectively rewrite their rationale.

H. This Court Should Not Allow Illegal Agency Decisions to Stand.

A court may set aside an agency action if it is "not in accordance with the law." 5 U.S.C. § 706(2)(A).

IGRA authorizes land to be taken into trust for Indian gaming after October 17, 1988, only if one of several exceptions applies. The actual acceptance of land into trust is authorized by the Indian Reorganization Act, 25 U.S.C. § 465, but that provision does not give the Secretary authority to violate federal law in the process.

The applicable exception here permits gaming on newly-acquired "restored lands." Thus, if the Gaming Parcel does not qualify as "restored lands" for the Tribe, then the two agency decisions will have approved illegal gaming. The agencies have no discretion to render illegal approvals.

Again, the criteria for "restored land" status requires that there be a historical connection between the Tribe and the Gaming Parcel. This point is critical to this Court's consideration because the AR shows that the Secretary relied exclusively on the Coleman Land Determination and its "restored land" conclusion. In doing so, he apparently ignored the Beckham Report and its evidence that there was no

tribal entity – and, thus, no tribe – at the Chico Rancheria from the time the Bidwells established the residential village and allowed their employees to live there until 1939 when the land was taken into trust. There is no statement in the entire record that the Secretary even looked at, let alone considered, the Beckham Report. Rather than having to attempt reconciliation of the Coleman Land Determination with Dr. Beckham's documented evidence impeaching its conclusions, the Secretary simply dismissed the Beckham Report and directed Acting Deputy Secretary Skibine to so inform Appellant. Skibine did so in the Skibine Letter with a brush off that the Secretary would not "revisit" the Coleman conclusions because he had concurred in them several years before. In short, the Secretary elected to not be bothered by facts.

While the Secretary's conduct was merely disdainful, the NIGC Chairman's conduct constituted nonfeasance bordering on malfeasance. The Chairman has no authority to approve a site-specific tribal gaming ordinance unless the land qualifies for gaming as a matter of law: "Class III gaming activities shall be lawful on Indian lands only if such activities are... authorized by an ordinance or resolution that . . . is approved by the Chairman." 25 U.S.C. § 2710(d)(1)(A)(iii). In order for the Chairman to approve a site-specific gaming ordinance, he must find that the site qualifies for gaming under IGRA. Here, the Chairman approved an ordinance authorizing the Tribe to conduct gaming operations at the Gaming

Parcel on the basis of Coleman's "restored lands" conclusion. In doing so, he so totally ignored the facts impeaching Coleman's conclusions that the Beckham Report was not even included in the NIGC AR.

The Chairman's admitted failure to insure that he was making the correct decision goes to the heart of APA review. His conduct and approval was arbitrary and capricious.

I. It Is Undisputed that the Mechoopda Tribe Was Recognized in 1939, Lost Its Recognition in 1967 and Was Recognized a Second Time Through Settlement of the *Scotts Valley* Litigation.

Curiously, the Federal Appellees contend that Appellant has challenged the Tribe's recognition. U.S. Br. at 33-40. That there is no challenge to the Tribe's status as a recognized tribe was stated in the Preliminary Statement to the Complaint and First Amended Complaint herein: "it is emphasized that the County does not question the Tribe's recognition or sovereignty." Similarly, nothing said by Appellant in this litigation has even suggested that the Secretary should "revisit" the Tribe's status as a recognized Tribe as contended by the Federal Appellees. U.S. Br. at 37.

For one more time, Appellant states the following: (1) the Tribe was recognized in 1939 when the former Bidwell Ranch was taken into trust for Indians living thereon; (2) the Tribe was terminated in 1967; and (3) the Tribe regained its federal recognition following settlement of the *Scotts Valley Litigation*.

With that issue no longer in question, the parties and this Court can focus on the real question, which is whether the Federal Appellees illegally extended restored land status to a parcel to which the modern Tribe has no historic relationship.

CONCLUSION

As stated in Appellant's Initial Brief, 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 28th day of October 2009.

DICKINSON WRIGHT PLLC
Dennis J. Whittlesey (DC Bar No. 053322)
1875 Eye Street, NW - Suite 1200
Washington, DC 20006
202-659-6928
dwhittlesey@dickinsonwright.com

Bruce S. Alpert (*Pro Hac Vice*)
BUTTE COUNTY, CALIFORNIA
Butte County Counsel
25 County Center Drive
Oroville, CA 95965
530-538-7621
balpert@buttecounty.net

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 limitations of Fed. R. App. P. 32(a)(7)(8) because this brief contains 6964 words, excluding the parts of the brief exempt by Fed. R. App. P. 32(a)(7)(B)(iii).

Dennis J. Whittlesey
Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the ***APPELLANT BUTTE COUNTY, CALIFORNIA'S REPLY BRIEF*** has been filed with this Court and served via ECF, Hand Delivery or U.S. First Class Mail (as indicated below) upon counsel of record, as identified on this 28th day of October 2009.

Via Hand Delivery:

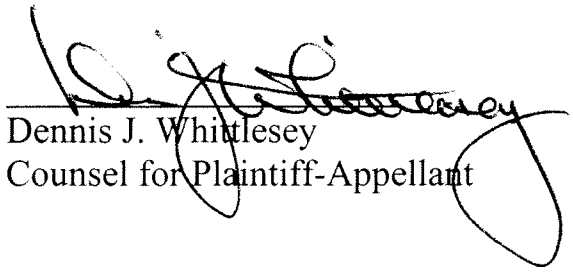
Aaron Peter Avila
R. Craig Lawrence
Robert Parke Stockman
U.S. Attorney's Office
(USA) Civil Division
555 4th Street, NW
Washington, D.C. 20530
(2 Copies)

Via U.S. First Class Mail:

Nicholas Churchill Yost
Sonnenschein Nath & Rosenthal, LLP
525 Market Street, 26th Floor
San Francisco, CA 94105
(2 Copies)

Via Hand Delivery (Courtesy Copy):

Michael Jon Anderson
Matthew Justin Kelly
Anderson Tuell, LLP
503 C Street, NE
Washington, D.C. 20002
(1 Copy)



Dennis J. Whittlesey
Counsel for Plaintiff-Appellant

DC 35614-1 144928