UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BUTTE COUNTY, CALIFORNIA, Plaintiff, v. JONODEV OSCEOLA CHAUDHURI, in his official capacity as Chairman of the National Indian Gaming Commission, et al., Defendants. MECHOOPDA INDIAN TRIBE OF CHICO RANCHERIA, CALIFORNIA, a federally recognized Indian Tribe, Intervenor.	Case No. 1:08-cv-00519 FJS

UNITED STATES' REPLY
IN SUPPORT OF ITS CROSS MOTION FOR SUMMARY JUDGMENT

The Mechoopda Indian Tribe of Chico Rancheria ("Mechoopda" or "Tribe") has worked towards spurring economic development through gaming on the Chico Parcel for over ten years. See AR NEW 3078. Butte County ("County") has obstructed that effort at every turn. First, the County challenged the Department of the Interior's ("Department" or "Secretary") initial approval of the Tribe's application to have the Chico Parcel[1] taken into trust for gaming purposes ("2008 Decision"). After the 2008 Decision was remanded, the County attempted to

[1] The Chico Parcel is located approximately 10 miles from the Tribe's former Rancheria, AR NEW 5405, and is also located within the reservation boundaries that would have been created by a treaty negotiated and signed in 1851 ("1851 Treaty"), AR NEW 5396.

interfere with the remand process by filing its "Motion to Clarify December 22, 2010 Remand Order and/or Limit the Administrative Record Upon Remand" ("Motion to Clarify"). Dkt. No. 75. This Court denied the County's Motion to Clarify, explaining that it was the Department's prerogative to determine what materials were relevant to its decision on remand. Dkt. No. 101-1, at 13.

After thorough consideration, the Secretary again approved Mechoopda's application to take the Chico Parcel into trust for gaming purposes ("2014 Decision"). AR NEW 5384-5436. The County thereafter tried to attack the 2014 Decision with a "Motion for Remand to Defendants for Reconsideration of January 2014 Trust Acceptance" ("Motion for Remand"). Dkt. Nos. 89, 90. In disregard of the basic administrative law principle that judicial review is to be based on the administrative record, the County attached to the Motion for Remand an extra-record expert report that significantly post-dates the 2014 Decision and had never been submitted to the Department during the decision-making process ("2014 Beckham Report"). Dkt. Nos. 91-1, 92-1, 93-1. This Court denied the County's Motion for Remand as premature. Dkt. No. 113.

Now the parties have cross-moved for summary judgment. Butte County filed its Motion for Summary Judgment on July 10, 2015. Dkt. No. 115. On September 11, 2015, the United States filed its Opposition and Cross-Motion for Summary Judgment.[2] Dkt. No. 117 [hereinafter "U.S. Cross-Motion"]. On October 26, 2015, Butte County filed its Opposition and Reply. Dkt. No. 121 [hereinafter "Reply"].

The Chico Parcel is in trust, but the cloud of the County's constant challenges has prevented development of the Tribe's casino. It is time for that cloud to be lifted so that the Mechoopda Tribe can provide for its people. As the Court denied the County's Motion to

[2] The Tribe also filed a Cross-Motion for Summary Judgment. Dkt. Nos. 119, 119-1.

Clarify and its Motion for Remand, so too should the Court deny the County's Motion for Summary Judgment, and grant the United States' Cross-Motion for Summary Judgment.

ARGUMENT

The County's Reply is off-base: it continues to cite to the extra-record 2014 Beckham Report despite no authority to do so; it cites to rulemaking cases that have no applicability to the informal adjudication here; it ignores the 25 C.F.R. Part 292 regulations; it mistakenly focuses on the Tiley Report;[3] and it misstates the Tribe's early history. In summary, the United States responds as follows.

- The County had no right to submit the 2014 Beckham Report in rebuttal to the Tiley Report, so the Department was well within its discretion to close the record when it did. See infra Part I.

- The 2014 Beckham Report can play no part in the Court's decision-making because neither the law of supplementation nor the law regarding extra-record evidence permits consideration of the document. See infra Part II.

- The 2014 Decision should be upheld because the Part 292 regulations, the City of Roseville decision,[4] and the Department's consideration of all the relevant facts regarding the Tribe's history (the 2006 Beckham Report,[5] the Tiley Report, and its own independent research) support the Secretary's conclusion that the Mechoopda Tribe has a significant historical connection to the Chico Parcel. See infra Part III.

I. Because the County Had No Right to Rebuttal, the Secretary's Process Was Proper

The County alleges that the Department acted improperly by not allowing the County to rebut the Tiley Report. However, the applicable law is straightforward. "An agency conducting an informal adjudication has no statutory obligation to prematurely disclose the materials on

[3] "Tiley Report" refers to the Tribe's expert report by Dr. Shelly Tiley. AR NEW 4131-54. Dr. Tiley's resume can be found at AR NEW 4155-62.

[4] 348 F.3d 1020 (D.C. Cir. 2003).

[5] "2006 Beckham Report" refers to the County's first expert report prepared by Dr. Stephen Dow Beckham. AR NEW 3171-233.

which it relies so that affected parties may pre-rebut the agency's ultimate decision." Southwest Airlines Co. v. TSA, 650 F.3d 752, 757 (D.C. Cir. 2011). Put succinctly, participants in informal adjudication have no right to rebuttal. Or in other words, an agency conducting an informal adjudication does not act arbitrarily or capriciously when it refuses to receive rebuttal submissions.

Under Southwest Airlines, the County had no right to rebut the Tiley Report with the 2014 Beckham Report. In fact, the Department was under no obligation to even reveal the existence of the Tiley Report, much less allow the County to mount a response. Nevertheless, the Department granted the County a 20-day extension in which to file a rebuttal. AR NEW 4262. The County did not avail itself of this generous opportunity.[6] AR NEW 4263-65.

Now the County fails to grapple with the applicable law. In addition to citing to Southwest Airlines, the United States' Cross-Motion goes into great detail discussing and applying Bean Dredging, LLC v. United States, 773 F. Supp. 2d 63 (D.D.C. 2011) and New Life Evangelistic Center, Inc. v. Sebelius, 753 F. Supp. 2d 103 (D.D.C. 2010). U.S. Cross-Motion at 15-20. The County makes no attempt to distinguish these cases or explain away this controlling precedent. Nor does the County cite to any additional cases that are on-point.

Sensing its weakness, the County instead seizes on select phrases in several cases involving informal rulemaking. First, the County misconstrues Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Company, 463 U.S. 29 (1983). One of the principles espoused by this case is that an agency must "*examine* the relevant data." State Farm, 463 U.S. at 42 (emphasis added). The County attempts to take this

[6] Nor did the County ever inform the Department of an intention to eventually submit a new report. Instead, the County filed its meritless Motion to Clarify. See AR NEW 4263-65.

principle one step further, stating that "[t]he agency's responsibility to *collect* the relevant data upon which to base its decision . . . is self-evident." Reply at 6 (emphasis added). Applied to this case, so the County's story goes, State Farm required the Department to delay its decision until the 2014 Beckham Report was submitted, so as to collect the "relevant data." As an initial matter, State Farm does not say that an agency must "collect" the relevant data. Secondly, the on-point cases (Southwest Airlines, Bean Dredging, and New Life) make clear that an agency conducting an informal *adjudication* has no obligation to collect or accept rebuttal materials like the 2014 Beckham Report. Finally, if Dr. Stephen Dow Beckham is as infallible a researcher as the County makes him out to be, see Reply at 1, then all the "relevant data" the Department needed to consider would have been included in his 2006 Report and there would have been no need for an additional report.

Next, the County relies on Chamber of Commerce of the United States v. Securities & Exchange Commission, 443 F.3d 890 (D.C. Cir. 2006), for the principle that when an agency relies heavily on new information on remand, it must provide opponents an opportunity to comment on the new information. Reply at 11. Chamber of Commerce was a rulemaking case that is simply not applicable to the case at bar. At issue in the case was whether the SEC needed to provide additional notice and comment when it relied on new materials on remand. 443 F.3d at 901. The court explained that the Administrative Procedure Act, 5 U.S.C. § 553, requires that agencies provide public notice of the "technical studies and data" upon which the agency relies. Because the SEC relied on new data on remand, the court ruled that Section 553 required that the SEC conduct additional notice and comment. Id. Section 553, which deals only with rulemaking, is not applicable to the informal adjudication at issue here. The Chamber of Commerce court itself recognized this distinction. It rejected the SEC's attempt to rely on

Association of Data Processing Service Organizations, Inc. v. Board of Governors of the Federal Reserve System, 745 F.2d 677, 684 (D.C. Cir. 1984) for the proposition "that the administrative record might well include crucial material that was neither shown to nor known by the private parties in the proceeding." Chamber of Commerce, 443 F.3d at 903. The court scolded that such reliance "is misplaced, for the [Association of Data Processing] court was addressing judicial review of all informal agency actions . . . not addressing an agency's independent requirement to provide notice and comment under Section 553(c)." Id. at 903-04. The reverse is true here. The County's reliance on the rulemaking case of Chamber of Commerce in the context of the informal adjudication present here is misplaced.[7]

Lastly, the County cherry-picks some choice words from Connecticut Light & Power Co. v. NRC, 673 F.2d 525 (D.C. Cir. 1982) for the idea that an agency must not base its decision on a record that is "one-sided" or that reflects a "mistaken picture of the issues at stake." Reply at 12, 15 (quoting Connecticut Light, 673 F.2d at 530). Again, the County mistakenly relies on a rulemaking case that is governed by Section 553. In discussing the requirement of Section 553 that agencies provide notice of the technical basis for a rule, the court explained that such notice

[7] The County attempts to excuse its own misplaced reliance on Chamber of Commerce by noting that the United States "rel[ied] heavily" on the case. However, the United States cited to Chamber of Commerce as the origin of the principle, developed and applied properly in the informal adjudication context in Bean Dredging and New Life, that an agency has discretion to determine whether and how fact gathering should be accomplished on remand. U.S. Cross-Motion at 15-16. It is not uncommon for litigants to cite to such "cases of origin" to assist the court in discerning the path of the law. It bears repeating that the County does not attempt to distinguish Bean Dredging and New Life, the cases that the United States discusses in depth.

Moreover, Chamber of Commerce is further distinguishable, even if the principle announced has any applicability in informal adjudication cases, because at issue there was whether there were procedural irregularities that tainted the agency rule reached on remand. In particular, the SEC reissued its new rule within "a matter of days" and "decided it was unnecessary to reopen the rulemaking record for further comment." 443 F.3d at 894-95. It was this procedural irregularity that led the court to be less deferential. As discussed, no such procedural irregularity exists here.

is necessary to prevent a situation where "the agency may operate with a one-sided or mistaken picture of the issues at stake *in a rulemaking*." Connecticut Light, 673 F.2d at 530 (emphasis added). Had the County forthrightly quoted from the case, the inapplicability of the quote would have been clear. Moreover, even if this principle were to be applied in the informal adjudication context, the 2014 Decision was not based on a one-sided record. The Department examined the 2006 Beckham Report and other submissions by the County, the Tiley Report and other submissions by the Tribe, and conducted its own independent research.[8]

The Department did not act in an arbitrary and capricious manner when it declined to leave the record open for an undefined period of time to allow the County to submit a response to the 2014 Beckham Report. The County had no right to rebuttal. Southwest Airlines, Bean Dredging, and New Life make this clear, and the County does not distinguish those cases. The cases to which the County cites are unavailing.[9] The Department's process was proper.

II. The 2014 Beckham Report Should Play No Part in the Court's Review

The United States maintains that the 2014 Beckham Report and all accompanying references in the County's briefs should not be considered by the Court. See U.S. Cross-Motion at 10-11. A reviewing court "should have before it neither more nor less information than did the agency when it made its decision." Walter O. Boswell Mem'l Hosp. v. Hecker, 749 F.2d 788, 792 (D.C. Cir. 1984). The 2014 Beckham Report post-dates the 2014 Decision and was not submitted to the Department, so it should play no part in the Court's review.

[8] Of note, the Department's 2014 Decision cites to the 2006 Beckham Report more than it cites to the Tiley Report. The 2006 Beckham Report is cited twelve times, while the Tiley Report is only cited seven times.

[9] The County's distortion of the substantial evidence rule is also unavailing. See Reply at 7-9. The United States maintains that the substantial evidence rule does not apply to the question of whether an agency's remand process was conducted properly. U.S. Cross-Motion at 18-19. Instead, Southwest Airlines, New Life, and Bean Dredging control.

In its Opposition and Reply, the County argues that the Court may nevertheless accept the 2014 Beckham Report. Reply at 12-14. However, the County fails to make a proper distinction between the law of supplementation and the law regarding extra-record evidence. In its confusion, the County cites to a test that is no longer recognized by the D.C. Circuit and additionally fails to apply that test to the case at bar. As discussed below, the County cannot make a showing that the record should be supplemented with the 2014 Beckham Report, and the County has not made a showing that the 2014 Beckham Report should be accepted as extra-record evidence.

A. Because the 2014 Beckham Report Was Not Before the Secretary at the Time of the 2014 Decision, the Record Cannot Be Supplemented with the 2014 Beckham Report

Supplementation of the record with the 2014 Beckham Report is impossible here. As a matter of logic, the administrative record for the 2014 Decision cannot include a report that was written after the decision. The law regarding supplementation of the administrative record bears this out. "[A] clear distinction must be drawn between the Court's allowing supplementation of the administrative record and the Court's considering extra-record evidence." Sara Lee Corp. v. American Bakers Ass'n, 252 F.R.D. 31, 33 (D.D.C. 2008). "For a court to supplement the record, the moving party must rebut the presumption of administrative regularity and show that the documents to be included were before the agency decisionmaker." Pac. Shores Subdivision, California Water Dist. v. U.S. Army Corps of Eng'rs, 448 F. Supp. 2d 1, 6 (D.D.C. 2006); see also Marcum v. Salazar, 751 F.Supp.2d 74, 78 (D.D.C. 2010) ("a plaintiff must put forth concrete evidence that the documents it seeks to 'add' to the record were *actually before* the decisionmakers.") (emphasis added). There is no dispute that the 2014 Beckham Report did not exist at the time of the 2014 Decision and was not before the Secretary. See, e.g., Reply at 3

("The 2006 Beckham Report is part of the Administrative Record in this case. The 2014 Beckham Report is not.") Accordingly, the record cannot be supplemented with the 2014 Beckham Report.

B. Because the Record Supports the 2014 Decision, the Court Should Not Take the Extraordinary Step of Accepting the 2014 Beckham Report as Extra-Record Evidence

Nor has the County made a showing that an exception to the rule against extra-record review applies. "A separate standard governs extra-record evidence, which consists of evidence outside of or in addition to the administrative record that was not necessarily considered by the agency." Styrene Info. & Research Ctr., Inc. v. Sebelius, 851 F. Supp. 2d 57, 63 (D.D.C. 2012) (internal quotations omitted). The County cites to Esch v. Yeutter, 876 F.2d 976 (D.C. Cir. 1989) for a laundry list of situations where a court might accept extra-record evidence. However, "Esch's vitality even within the D.C. Circuit is questionable in light of more recent opinions by that court which demonstrate a more restrictive approach to extra-record evidence." Axiom Res. Mgmt v. United States, 564 F.3d 1374, 1380 (Fed. Cir. 2009). Indeed, extra-record review is only appropriate "'when there has been a strong showing of bad faith or improper behavior or when the record is so bare that it prevents effective judicial review.'" Theodore Roosevelt Conservation P'ship v. Salazar, 616 F.3d 497, 514 (D.C. Cir. 2010) (quoting Commercial Drapery Contractors, Inc. v. United States, 133 F.3d 1, 7 (D.C. Cir. 1998)). The County has not met its burden to show that either of these situations are true here.

First, the County does not allege that the United States acted in bad faith. See Reply at 14 ("Defendants state that the County has neither alleged nor proved allegations of bad faith on the part of the Department. This is true.")

Second, the County has not shown that the record is so bare that it prevents effective judicial review. To the contrary, the 53-page single-spaced decision document exhibits thorough research and careful reasoning. AR NEW 5384-436. The Secretary considered expert reports from both the County—the 2006 Beckham Report—and the Tribe—the Tiley Report. AR NEW 5384; 5420. The Department also conducted its own independent research. AR NEW 5390. The connections "between the facts found and the choice made" are clearly outlined, enabling proper judicial review. Motor Vehicle Mfrs. Ass'n of U.S., Inc. v, State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

In support of its argument that extra-record review is appropriate here, the County cites to Public Citizen v. Heckler, 653 F. Supp. 1229 (D.D.C. 1986), and Fund for Animals v. Williams, 391 F. Supp. 2d 191 (D.D.C. 2005). Reply at 13-14. However, both of these cases involved motions to supplement the administrative record and are not relevant to the present question of extra-record review.[10] The County cites to no further cases relevant to extra-record review. Even if Esch provided the proper test here, the County does not argue that any of the specific Esch exceptions applies. The County's only support is the conclusory statement that "[t]his Court has accepted extra-record documents in circumstances similar to those here." Reply at 13. The County thus fails to meet its burden to prove that this is an exceptional situation warranting extra-record review.

[10] The County further misreads the cases to argue that documents "known to the agency" would include a document such as the 2014 Beckham Report, which the Department theoretically "knew" about, even though the document did not yet exist. Reply at 13-14. However, Public Citizen and Fund for Animals make clear that documents "known to the agency" are those documents actually in the agency's files. Public Citizen, 653 F. Supp. at 1237; Fund for Animals, 391 F. Supp. 2d at 198. The 2014 Beckham Report was not in the Department's files because it did not exist at the time of the 2014 Decision.

III. The Secretary's 2014 Decision Was Neither Arbitrary nor Capricious

The Secretary properly determined that the Mechoopda Tribe has a significant historical connection to the Chico Parcel, and therefore, that the Chico Parcel qualifies as restored lands under the Indian Gaming Regulatory Act ("IGRA"). The restored lands exception to IGRA's general prohibition against gaming on lands acquired after IGRA's enactment provides that gaming may be conducted on "lands that are taken into trust as part of . . . the restoration of lands for an Indian tribe that is restored to Federal recognition." 25 U.S.C. § 2719(b)(1)(B)(iii). In order for a parcel to qualify as a "restoration of lands," IGRA's accompanying regulations require that the tribe have a significant historical connection to the parcel. 25 C.F.R. § 292.12(b). A "significant historical connection" is further defined to mean that the "land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty," or that the parcel is located in the vicinity "of the tribe's villages, burial grounds, occupancy or subsistence use." Id. § 292.2. Here, the Secretary concluded that the Tribe has a significant historical connection to the Chico Parcel under either prong of the definition. AR NEW 5408-09.

The United States already thoroughly discussed why the Secretary's conclusion was substantively proper and incorporates those arguments here. U.S. Cross-Motion at 24-37. Additional clarification is required as to the County's interpretation of IGRA in light of the Part 292 regulations, the County's misplaced emphasis on the Tiley Report, and the County's misstatement of the facts.

A. The County's Interpretation of IGRA is Foreclosed by the Part 292 Regulations

The County argued in its Memorandum in Support of Summary Judgment that "IGRA's 'restored lands' provision requires that the Tribe must have historically *owned and occupied* the

newly-acquired casino site for the 'restoration of lands' exception to apply." Dkt. No. 116 at 3 (emphasis added). According to the County, the only land previously occupied by the Mechoopda was the Tribe's former Rancheria, and because the Chico Parcel is ten miles away from the former Rancheria rather than within the former Rancheria, the Chico Parcel cannot qualify as a restoration of lands.[11] Id. The County's interpretation is plainly incorrect on the face of the Part 292 regulations, which contain no requirement that the subject parcel have been "owned or occupied" by the Tribe. See 25 C.F.R. § 292.2. The regulations provide that a significant historical connection may be demonstrated, *inter alia*, if the subject parcel is within the vicinity of "the tribe's [historic] villages, burial grounds, occupancy *or* subsistence use." 25 C.F.R. § 292.2 (emphasis added). The use of the word "or" shows that occupancy is not a prerequisite to a finding of a significant historical connection.

Now the County faults the United States for "rely[ing] heavily" on City of Roseville v. Norton, 348 F.3d 1020 (D.C. Cir. 2003). However, the United States' discussion of City of Roseville was an alternative argument to its reliance on the plain language of the Part 292 regulations. U.S. Cross-Motion at 31. The D.C. Circuit decided City of Roseville prior to the promulgation of the Part 292 regulations, but its exposition of the "restored lands" provision of IGRA is relevant here.

As far as the County is concerned, City of Roseville is completely inapplicable to the present case because City of Roseville turned on certain provisions in the Auburn Indian Restoration Act ("AIRA"), and there is no comparable enactment here. Reply at 23-30. It is true that the AIRA contributed to the court's ultimate conclusion that the Auburn Tribe would be

[11] The former Rancheria has been developed and is no longer available to the Tribe. AR NEW 5401.

eligible to game on its selected parcel. But to reach that ultimate decision, the court first had to decide a pure question of statutory interpretation: whether a tribe must have owned a parcel as part of its former reservation for that land to qualify as "restored lands" under IGRA, 25 U.S.C. § 2719(b)(1)(B)(iii). City of Roseville, 348 F.3d at 1024. The D.C. Circuit concluded that IGRA is not so limited. Id. at 1027-28. The United States discussed City of Roseville in its Cross-Motion because the County raised that same question of statutory interpretation. The United States thus wanted to make clear that the City of Roseville court had already rejected the County's narrow interpretation of IGRA. U.S. Cross-Motion at 31-34. In addition, City of Roseville is a thorough and thoughtful decision that examines the "language, structure, and purpose" of IGRA's restored lands exception.[12] City of Roseville, 348 F.3d at 1022, 1032. It is therefore relevant to cases involving the restored lands exception, including the one at bar.

In sum, the Part 292 regulations foreclose the County's argument that the only land that would qualify under the restored lands exception is the Tribe's former Rancheria. The United States' discussion of City of Roseville serves to further illustrate this principle.

B. The County's Attacks on the Tiley Report Should be Disregarded

The County devotes much of its brief to attacking the Tribe's expert report. See, e.g., Reply at 4-5; 18-23. The County's story is that the Tiley Report is unreliable, that the Department should have allowed the County to rebut the Tiley Report, and that by not allowing such a rebuttal, the 2014 Decision is flawed because it is based on the Tiley Report. Reply at 32. However, the County's focus on the Tiley Report is a red herring.

[12] For example, City of Roseville explains that the purpose of the restored lands exception is to "ensur[e] that tribes lacking reservations when IGRA was enacted are not disadvantaged relative to more established ones." City of Roseville, 348 F.3d at 1030.

The County relies on the erroneous assumption that the "foundation" of the 2014 Decision is built on facts and conclusions from the Tiley Report. Reply at 6. However, out of 320 footnotes to the decision, only seven of them are to the Tiley Report. The text of the 2014 Decision also clarifies that the Tiley Report did not serve as the sole basis for the Decision: "The restored lands section above addresses and refutes the assertions concerning the historical connection between the present-day Mechoopda Tribe and the Mechoopda Tribe that negotiated the 1851 Treaty, relying *in part* on a report prepared by Dr. Shelly Tiley." AR NEW 5420 (emphasis added). And the 2014 Decision also cites to the County's 2006 Beckham Report to establish certain historical facts. See, e.g., AR NEW 5391 n.41, 5397 n.90, 5399 n.105.

In focusing on the Tiley Report, the County argues that "[t]he modern Mechoopda Tribe must demonstrate a continuous tribal existence between it and the Treaty group signatory . . . ." But the standard of review under the Administrative Procedure Act ("APA") is not whether *the Tribe* has proved anything; rather, the standard is whether *the Secretary* has drawn a "rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v, State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (internal quotations omitted). The Department may accept materials from the interested parties, but the Department may also conduct its own independent research, as it did here. AR NEW 5390. As the United States illustrated in its Cross-Motion, the record supports the Secretary's determination to take the Chico Parcel into trust. U.S. Cross-Motion at 26-31.

Similarly, the County argues that "nothing in Dr. Tiley's research and written report rebutted the critical facts . . . in the 2006 Beckham Report." Reply at 33. Setting aside that this is an incorrect statement, the County again focuses on the wrong actor. Neither the APA nor the Indian Reorganization Act require the proponent's expert to rebut the opponent's expert report.

Again, the proper question is whether "there is such relevant evidence [in the record] as a reasonable mind might accept as adequate to support [the] conclusion." Verizon v. FCC, 740 F.3d 623, 643-44 (D.C. Cir. 2014). This "standard of review does not permit a reviewing court to displace the [agency's] choice between conflicting views." Southwest Airlines Co. v. TSA, 650 F.3d 752, 756 (D.C. Cir. 2011) (upholding agency's choice between dueling expert reports) (quoting American Wrecking Corp. v. Sec'y of Labor, 351 F.3d 1254, 1261 (D.C. Cir. 2003). Here, the Secretary adequately considered the 2006 Beckham Report and the Tiley Report in determining that the Chico Parcel qualifies as restored lands. U.S. Cross-Motion at 34-37.

Because the County mistakenly assumes that the Secretary relied solely on the Tiley Report, and because the County wrongly believes that the Court must determine whether the Tribe adequately proved its own significant historical connection to the Chico Parcel, and because the County incorrectly asserts that the Tiley Report needed to rebut the 2006 Beckham Report, the County spends seven pages of its Opposition and Reply attacking the substance of the Tribe's expert report. Reply at 4-5; 18-23. However, these sections of the brief are based on the extra-record 2014 Beckham Report and should be disregarded. See supra at Part I.B.

In sum, while the Tiley Report played a part in the Secretary's 2014 Decision, it was far from the sole basis for the decision. The Court should disregard the County's attacks against the Tiley Report because (1) the County has not met its burden to show that the Court may consider the extra-record 2014 Beckham Report, and (2) the question at bar is whether *the Secretary* properly concluded that the Chico Parcel qualifies as restored lands.

C. The Secretary Properly Concluded that the Mechoopda Tribe Has a Significant Historical Connection to the Chico Parcel

The County challenges the link between the "historic" Mechoopda Tribe, i.e. the tribe that signed the 1851 Treaty, and the "modern" Mechoopda Tribe, i.e. the tribe that lived on the

Bidwell Ranch. Reply at 2. The U.S. Cross-Motion has already demonstrated that the Secretary's 2014 Decision properly concluded that this is a distinction without a difference. U.S. Cross-Motion at 26-31. Now the County claims that "[t]here is no evidence that the Mi-chop-da membership moved to the Bidwell Ranch as a tribe, meaning that the modern Mechoopda Tribe cannot claim the required tribal historical relationship with the proposed 'restored land' casino site." Reply at 27. This statement is flat-out wrong. The United States will clarify the relevant timeline here, as supported by the administrative record:

- 1840s: "The Mechoopda Tribe had a summer camp on the south bank of Big Chico Creek, which later became John Bidwell's property, while its main village was located approximately 5 miles south of that summer camp." AR NEW 5393. In other words, the Mechoopda's traditional territory overlapped the land that would later become the Bidwell Ranch.

- 1849: John Bidwell purchases Bidwell Ranch. "According to Mechoopda oral tradition, their chief Sa-wi-le approached Bidwell with whom they negotiated the arrangement by which they would remain on their traditional grounds in exchange for labor on the ranch." AR NEW 4139.

- 1851: John Bidwell invites the Mechoopda and other neighboring tribes to his ranch to negotiate and sign a treaty that would set aside a reservation for their use. AR NEW 5396. In other words, the Mechoopda Tribe that signed the 1851 Treaty was on the Bidwell Ranch when they signed it.

- 1852: "[T]he [Mechoopda] headman brought 250 Mechoopda to live in the village" that was established 100 yards from the site of Bidwell's house. AR NEW 5395. See also AR NEW 4140.

- 1860s: "Sometime after 1860, as more Indians from other tribes sought refuge at Mikchopdo, residents began referring to the village as Bahapki, the Maidu word for 'unsifted' or 'unmixed.'" AR NEW 3029 n.20. See also AR NEW 5395.

In sum, the tribe that lived in the area prior to Bidwell's arrival and signed a treaty with the United States in 1851 is the same tribe that packed up its nearby village and moved to the Bidwell Ranch in 1852. Contrary to the County's assertion, there is evidence that the Mechoopda moved to the Bidwell Ranch as a tribe in the early 1850s.

A decade later, as more laborers moved to the village, the name of the village changed to reflect the changed composition. However, the addition of new people to the village does not mean that the original 250 Mechoopda suddenly disappeared or lost their culture or connection to the village. To the contrary, the Secretary concluded: "That the Mechoopda lived and worked on the ranch, absorbed a succession of other Indians into the Tribe, and were affected by the dictates of the Bidwells signifies to us a dynamic community that was willing to change in order to survive, but remained culturally and politically intact." AR NEW 5404.

In light of this early history, the Secretary properly found a significant historical connection between the Tribe and the Chico Parcel under the Part 292 regulations because "the land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty." 25 C.F.R. § 292.2. Second, the Secretary also found that the Chico Parcel is within the vicinity of "the tribe's [historic] villages, burial grounds, occupancy or subsistence use." 25 C.F.R. § 292.2. The Secretary's conclusion that the Tribe has a significant historical connection to the Chico Parcel was neither arbitrary nor capricious.

CONCLUSION

"At some point, litigation must come to an end." Facebook, Inc. v. Pac. Nw. Software, Inc., 640 F.3d 1034, 1042 (9th Cir. 2011). That time has come. The 2014 Decision must be upheld because the Department's remand process was proper and because its decision, reached after a detailed and extensive historical review, was neither arbitrary nor capricious. Accordingly, this Court should grant summary judgment in favor of the United States[13] on all

[13] The United States argued in its Cross-Motion that the National Indian Gaming Commission is no longer part of this case and that its officers should therefore be removed from the caption. U.S. Cross-Motion at 9 n.3; see also United States' Proposed Order, Dkt. No. 117-1. The County apparently agrees because it does not discuss or refute this point.

claims and deny the County's Motion for Summary Judgment. In reaching its conclusion, the Court should disregard all references to and assertions based on the 2014 Beckham Report.

Dated: November 24, 2015

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