No. 16-5240

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BUTTE COUNTY, CALIFORNIA,

Plaintiff-Appellant
v.
JONODEV OSCEOLA CHAUDHURI, IN HIS OFFICIAL CAPACITY AS CHAIRMAN, NATIONAL INDIAN GAMING COMMISSION; *et seq.*,

Defendants-Appellees,
v.
MECHOOPDA INDIAN TRIBE OF THE CHICO RANCHERIA, CALIFORNIA, A FEDERALLY RECOGNIZED INDIAN TRIBE,

Intervenor For Defendants – Appellees.

On Appeal From the United States District Court for the District Of Columbia in Case No. 08-00519, Frederick J. Scullin, United States District Judge

APPELLANT'S REPLY BRIEF

Submitted By

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I. INTRODUCTION

This Court's remand directed the Secretary to reconsider and reconcile its decision to accept certain land within Butte County, California into trust with the 2006 Beckham Report. Instead of complying with this Order, the Secretary, following what appears to be admitted *ex parte* communications between itself and the Tribe, granted the Tribe an unwarranted extension of time for it to submit, and for the Secretary to accept, the Mechoopda Replacement Report. This Report, drafted by a previously undisclosed, new expert team, set forth an entirely new case claiming a historical connection to the land.

To establish this connection, the Tribe now claims it is the successor in interest to an 1851 Treaty. It is true that one of several signatories to the (never ratified) 1851 Treaty with the United States was a group of Indians constituting a small tribe ("tribelet") known as "Mi-chop-da." The modern Tribe's adoption of a treaty signatory's name does not, however, automatically convey legal rights that may have accrued to the 1851 Treaty tribelet. The Tribe must demonstrate a continuous tribal existence between it and the Treaty signatory. Each of Dr. Beckham's reports (the 2006 and 2014 Beckham Reports), as well as federal documents, disprove that connection.

Although the County ultimately developed the 2014 Beckham Report, the fact remains the Secretary denied the County's request for a reasonable period in

which to do so. Thus, the Secretary ensured that its Decision would be based in substantive part on inaccurate and incomplete data. The documented historical facts are directly contrary to the Secretary's 2014 Interior Decision, including, without limitation, federal censuses and enrollments conducted by both the Department of Commerce and Interior Department's Bureau of Indian Affairs. Nowhere in that Decision is there a reconciliation between the tribal claims of near-exclusive Mi-chop-do ancestry and the contradictory documented facts personally collected by Interior federal agents. Those facts contradict both (1) tribal claims and (2) undocumented claims of ancestry relied on by the Secretary in the 2014 Decision.

II. ARGUMENT

A. Defendants' view of the scope of remand contradicts this Court's remand order and runs afoul of the APA.

After reviewing the D.C. Circuit order, and having solicited input from all parties regarding the scope of remand, the District Court ordered "that this case is remanded to the Secretary of the Interior to reconsider his decision to acquire the Chico Parcel into trust for gaming purposes. The Secretary shall include and consider the '[2006] Beckham Report' as part of the administrative record on remand." (**Docket No. 74**) (emphasis added). From the plain text of the order, the purpose of remand was to consider the 2006 Beckham Report previously ignored.

To "reconsider" the prior arbitrary decision, the Secretary was to evaluate the 2006 Beckham Report and reassess the information pertaining to the case then before it, *i.e.*, the case grounded on the trust application relying on the Tribe's subsequently-fired and impeached expert team of Bibby, Bates, and Currie, and related materials.

Nowhere in the remand order did the Court invite the Secretary to "supplement" the record with an entirely new trust application. The Department thus had no valid reason to believe that it possessed unchecked discretion to tailor the record after having been so recently admonished by the D.C. Circuit. And yet, the crux of Defendants' argument is that the agency had unfettered discretion to reopen the proceedings to craft the evidence before it. The Secretary's hand is not so free.

1. Defendants' did not have unfettered discretion to accept and review on remand unrelated materials, *i.e.* the Mechoopda Replacement Report.

To accept the abject claims that the "Court of Appeals did not place any other requirements or restrictions on the scope of the remand," (Intervenor Br., p. 26; *see also* Fed. Br., p. 30), would ignore the entire D.C. Circuit opinion, in which the Court explained with specificity how Defendants violated the law, failed to

provide a satisfactory statement of the denial, and failed to consider key evidence weighing on the question before them. The D.C. Circuit stated:

> Two legal propositions are important to the disposition of this case. First, under § 555(e), the agency must provide an interested party—here Butte County—with a "brief statement of the grounds for denial" of the party's request. As this court [previously held], the agency must explain why it decided to act as it did. The agency's statement must be one of "reasoning"; it must not be just a "conclusion"; it must "articulate a satisfactory explanation" for its action.
>
> Second, an agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action within the meaning of § 706. This proposition may be deduced from case law applying the substantial evidence test, under which an agency cannot ignore evidence contradicting its position. The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.

Butte Cnty., Cal. v. Hogen, 613 F.3d 190, 194 (D.C. Cir. 2010) (emphasis added).

Having been recently admonished for acting arbitrarily, Defendants now seek to convince this Court that its exercise of "discretion" to tailor the evidence before it had been "approved." Such circuitous reasoning is simply wrong. As explained in the County's principal brief, the Mechoopda Replacement Report sets forth an entirely new justification for establishing a historical connection to the land unrelated to its original trust application. The Report was not, as Defendants argue, supplemental or related to the Tribe's previous submission – the Report

replaced it. The Secretary's claim that the Report addresses "the exact same legal question," and thus, is only supplemental, misses the point. (Fed. Br., p. 35). The legal question would be same. It was the factual case employed by the Tribe to resolve the legal question of whether there was a historical connection to the land that effectively vanished when the Mechoopda Replacement Report was submitted.

Interestingly, in defense of its new trust application, the Tribe accuses the County of "beginning the entire process all over again," apparently to absolve itself of responsibility, (Intervenor Br., p. 31), but such brazen accusations are incongruous with the facts. It was the acceptance of the never-before-seen Mechoopda Replacement Report going far beyond the edicts of the remand order that effectively restarted this process. The Department could have complied with the remand order and denied the admission of the Report – it chose not to. Alternatively, it could have made a reasonable effort to ensure, upon notice by the County, that appropriate and correct data was relied upon in its Decision – again, it chose not to. *See Resolute Forest Products, Inc. v. U.S. Department of Agriculture*, 187 F. Supp. 3d. 100, 123 (D.C. 2016). Therein lies the present predicament.

2. After accepting the Mechoopda Replacement Report, the Secretary arbitrarily narrowed the evidentiary base.

It follows that when the Mechoopda Replacement Report was submitted, Defendants were on notice that the record was a "one-sided or mistaken picture of the issues at stake." *Connecticut Light & Power Co,* 673 F.2d 525, 530 (D.C. Cir. 1982). If they did not reach that conclusion themselves, the letter from the County regarding the submission[1] should certainly have triggered that conclusion. **AR_NEW_0004253**. Instead, the flaws of the Mechoopda Replacement Report were disregarded. By the Secretary's own doing, it tainted the 2014 Interior Decision by excluding relevant evidence testing the accuracy of the Report's statements. *See Fund for Animals v. Williams*, 391 F. Supp. 2d 191, 197 (D.D.C. 2005) ("The agency may not skew the record in its favor by excluding pertinent but unfavorable information.").

Defendants' oft-quoted language referring to agency discretion does not relieve the Department from its obligation to consider all relevant data and articulate a satisfactory explanation for its action, including a rational connection

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[1] The letter explained: "The tribal submission went far beyond the scope of (a) the materials upon which the original Indian Land Determination was made, (b) the District Court litigation record, (c) opinion of the D.C. Circuit, (d) scope-of-remand submissions to the District Court by the parties and (e) remand order of the District Court." *Id.*

between the facts found and choice made. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983). Nor does it excuse the Department from making a reasonable effort to ensure appropriate and correct data is relied upon in its decision. *Resolute Forest Products*, 187 F. Supp. 3d. at 123. It is plain that without an examination of the *relevant and correct data*, the agency's explanation connecting the facts found and the choice made is meaningless. The agency's responsibility to collect the relevant data upon which to base its decision – rather than assume without examination that the evidence before it is accurate, sufficient and complete – is self-evident. *Id.* ("[W]here an agency has relied on incorrect or inaccurate data or has not made a reasonable effort to ensure that appropriate data was relied upon, its decision is arbitrary and capricious and should be overturned.").

Repeating history, the Department chose to ignore relevant data. To quote the Tribe, although "[f]ederal agencies [may] not [be] required to continually receive new reports nor begin an analysis over again," (Intervenor Br., p. 31), discretion does not empower an agency to tailor the evidence to yield a pre-determined conclusion, particularly not where, as here, the decision has already once been remanded for failing to consider all relevant data. *See Butte Cnty.*, 613 F.3d at 205. The inevitable conclusion: the Secretary erred in excluding from the

record relevant data debunking the Mechoopda Replacement Report – presumably to claim substantial evidence supported its Decision. The *Cross-Sound Ferry* court found such tailoring unlawful: the "stubborn refusal to expand the evidentiary base by requiring greater specificity from [the applicant] or by permitting [the petitioner] to ferret out relevant evidence through discovery or oral hearing [was] unsupportable [pursuant to APA procedural requirements]." *Cross-Sound Ferry Servs., Inc. v. I.C.C.*, 738 F.2d 481, 484 (D.C. Cir. 1984) (emphasis added).

The 2014 Beckham Report calls into question whether the Department could reasonably have made the determination it did if it had allowed reasonable time for the County to respond. It documents extensive information regarding the predominantly non-Mi-chop-da composition of the tribal community going back to the 19th Century. But, irrespective of its admission, Defendants should have independently discovered the substantial flaws apparent in the Mechoopda Replacement Report:

Alteration of Source Maps

The integrity of the Mechoopda Replacement Report upon which the 2014 Interior Decision relies is undermined by Tiley's undisclosed alterations of her source maps – alterations that were apparently missed by the Secretary's staff since they were not even mentioned in the 2014 Decision. Tiley's principal source map

is found at **AR_NEW_0004136** and is titled **"Figure 1. Mechoopda Tribelet Territory and Villages and Lands Granted[2] in the Treaty of 1851."** It is identified by Tiley as "Map adapted from Riddell 1978." In truth, the map appears to be a composite map based on Hill 1978:13; Hill 1978:22; Heizer and Hester 1970; and Riddell 1978. **Docket No. 92-1** at 12.

Beckham examined all of the identifiable resources from which Tiley prepared her Figure 1 and stated:

> **Comment:** Tiley provides no rationale for the creation of Figure 1. She has taken a highly generalized and alleged map of "Mechoopda Territory" (Hill 1978:13) [See Figure 2 of this report][3] and conflated it into a map on which she has identified "Mechoopda Indian Village on Bidwell's Chico Rancheria, a "dot" along with fifteen other unidentified "dots" inside a line defined by hyphens. Tiley's composite Figure 1 (at p. 3 in her report) has deleted identifications from the maps of

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[2] This Reply Brief quotes the title of Tiley's Figure 1 as is. The reality is, however, that Tiley never understood that the unratified treaty of 1851 did not "grant" anything to the Mechoopda or any other signatory tribelet or define what lands were to be ceded. It purported to reserve aboriginal lands in the mid-Sacramento Valley for a reservation that was never created.

[3] 2014 Beckham Report Figure 2 is at **Docket No. 92-1**, p.13. Tiley identifies the Mi-chop-da tribelet as a Maidu Indian village. In the 2014 Report which was primarily prepared from readily-available Department documents and records, Beckham reproduced the map identified as Hill (1978:13) at his Figure 2, and it places the Maidu land to the east of the area of the 16 "dots" on Tiley's Figure 1 map. Beckham's Figure 3 is the second map referenced on Tiley's Figure 1 relied on by Hill (Hill 1978:22), **Docket No. 92-1**, p. 14. Like Hill's 1978:13 map, Hill's 1978:22 map also places the Maidu land to the east of the area of the 16 "dots" on Tiley's Figure 1 map.

> Heizer and Hester in 1970 and from Riddell in 1978.[4] She provides no explanation about her alteration of these base maps nor the source of information for the "dots."
>
> *Id.*

Regardless of the reason for the wholly inaccurate map, the Secretary's staff clearly failed to examine Tiley's work for accuracy. The result of this failure was the Secretary's reliance on a Mi-chop-da occupancy area that was manufactured by Tiley and contrary to the materials used in creating the altered source maps.

Failure to Identify the Other Treaty Signatories and Their Territory

Critical to Beckham's testing of the accuracy of Tiley's work is a question not answered by the 2014 Decision**:** "What was the basis for Dorothy Hill's 'Mechoopda Territory' (shown with dotted line in Tiley's Fig. 1) and 'Boundary of Lands Granted by the 1851 Treaty' (shown with solid line in Tiley's Fig. 1)?" **Doc. 92-1**, pp. 15-17. In responding to that question, Beckham explained that the two Hill maps used by Tiley "are generalized" and apparently were drawn by Hill (with no explanation) from the language of the unratified treaty. Moreover, they failed to identify the territories of the eight other villages or tribelets located within the

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[4] Beckham's Figure 8 is at **Docket No. 92-1**, p. 30, and it is the 1978 Riddell Map from which Tiley adapted her source map. It places the Maidu land to the northeast of the area of the 16 "dots" on Tiley's Figure 1 map.

Treaty cession area that were signatories (along with Mi-chop-da) to the 1851 Treaty. As Beckham explained, "The mapping is thus unclear, especially because it is presented without explanation for the boundaries and the exclusion of the eight other villages, tribelets or groups who were signatories to the unratified treaty of 1851." *Id.* at 15.

Misplacement of Maidu Historical Territory

Dr. Beckham proceeded to express another substantive problem with Tiley's map work: "Of concern is that Tiley's base map Fig. 1, 'Tribal Territory and Village Locations' (Riddell 1978[8]:370) has been altered to remove the occupancy areas of 'KONCOW' (on the floor of the Sacramento Valley in western Butte County) and 'MAIDU' (the upper foothill and Sierra portion of eastern Butte County)." Tiley's alteration of maps was deliberate and designed to support her conclusions. In making alterations, she identified the critical land area as "Maidu" and, consequently, attributed it to the Mi-chop-da. As Dr. Beckham confirmed, that area was not Maidu land at all, it was Koncow tribal territory.

Identification of Mechoopda Indian Village Residents

Tiley's "Table 1. Families of Mechoopda Indian Village 1897-1955" consists of a chart of some 97 names that apparently are found on one or more lists of six vaguely identified sources. **AR_NEW_0004147-4149**. The lists are named (1)

"Bidwell's Will 1897," (2) "Kelsey Census," (3) "A. Bidwell Provisions 1909," (4) "Randolph 1914," (5) "1828-1933 Rolls"[5] and (6) "Heads of Family 1955." *Id.* No ancestral tribal identification for any person named on Tiley's Table 1 chart is provided on the chart; not one of the 97 people named on the chart is identified as having any Indian ancestry at all. The chart merely recites names of people who were living on the Bidwell Ranch over a long period, and nothing else.

By citing to some element of BIA Agent C.W. Randolph's work in 1914, Tiley surely reviewed the very material Beckham cited in his 2006 Report, including Randolph's first-hand observation: "I [Randolph] 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." **AR_NEW_0003189-3990**. Yet, Tiley's Table 1 avoids mentioning the text of Randolph's report or reviewing the federal 1928-33 BIA Enrollment of California Indians. As noted, the 2006 Beckham Report discussed this Enrollment in detail and reproduced the information *in toto*, listing each village resident and his attested self-identified Indian ancestry. **AR_NEW_0003192-3198**.

Beckham based his Conclusion No. 5 on the specific facts recorded in the Enrollment conducted and published by the Department of the Interior:

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[5] This likely is a typographic error; Tiley likely meant the 1928-33 Enrollment of the Indians of California.

> 5. The BIA enrollment of California Indians, 1928-33, enumerated many of the Indians of the Chico Rancheria. The affidavits executed by these people confirmed the observation made in 1914 by Agent Randolph. The village was made up of people of Wailaki, Concow, Noi-ma (emuck), Mi-chop-da, Sioux, Pit River, Yuki (Ukie), Wintun, Hawaiian, African-American, and white ancestry. Some were unable to name the Indian band from which they were descended. **AR_NEW_0003222**.

This fact-based conclusion has never been addressed by Defendants, let alone reconciled with the Tribe's claims to be the modern successor to the Mi-chop-da 1851 Treaty tribelet.

In Table 1, Tiley also avoided inclusion of the "Indian Population Schedule" of the Thirteenth Decennial Census of the United States (1910), although she did make use of sources developed in 1897, 1909, 1914, 1928-33 and 1955. Compiled by the Bureau of the Census, Department of Commerce, this Schedule enumerated 49 residents (by family and tribal ancestry) of the worker village on Bidwell Ranch. *See* 2014 Beckham Report at Table 1 – Indian Population Schedule, 13th Census, 1910. **Docket No. 93-1** at pp. 65-67. The Schedule reported six columns of information collected by the Census Agents: Name, Gender, Age, Tribe of Individual, Tribe of Father, and Tribe of Mother. *Id.* Dr. Beckham summarized the facts reported on the 1910 Indian Population Schedule:

> In 1910 only seven of forty-nine residents of the village self-identified as "Mechoopda" or "Mydoo/Mechoopda."

> The 1910 census provided the following population self-identification:
>
> | | |
> |---|---|
> | Mydoo | 19 |
> | Mechoopda/Mydoo | 5 |
> | Mydoo/Nishinam | 3 |
> | Wailaki/Mydoo | 2 |
> | Mechoopda | 2 |
> | Nishinam | 3 |
> | Patawan | 4 |
> | Nomelacki | 4 |
> | Wailaki | 1 |
> | Wintun | 1 |
> | Wintun/Yuki | 4 |
> | Illegible | 1 |
>
> Several were Nishinam (Nisenen) and Mydoo from other parts of the Central Valley. Only five (Mechoopda and Mechoopda/Mydoo) self-identified with the Koncow (valley floor area of Butte County). Twenty-four self-identified as Mydoo (Mydoo, Mydoo/Nishinam, Wailaki/Mydoo (foothill area of Butte County). The remainder of the population included Wintun, Yuki, Nomelacki, and Patawan (Patwin), people with different languages and practices than those of the Mechoopda (Bureau of the Census 1910) *Id*. at 67-68.

The foregoing discussion reports historical facts collected by federal census agents during the development of the Thirteenth Decennial Census of the United States. They contradict Tiley's undocumented conclusions, and, correspondingly, the 2014 Interior Decision, which rotely adopted the conclusions without analyzing the generalized assumptions of ancestry.

The Secretary's staff clearly failed to independently review federal census records for both the Thirteenth Decennial Census of 1910 and the federal Enrollment of California Indians of 1928-33 even though it purportedly relied on both. The Secretary thus relied on incomplete and misleading data resulting in an arbitrary and capricious decision.

3. Defendants relied on an improper process to issue its 2014 Interior Decision.

To advance the assertion that Defendants acted properly, they conflate the Tribe's request for an extension of time to complete and submit the Mechoopda Replacement Report with the Secretary's refusal to grant an adequate time to respond to the new trust application submitted by the Tribe. Each inquiry deserves separate consideration, but neither supports their claim.

As noted, the Secretary arbitrarily imposed a 30-day deadline for each party to submit "all information that it wishe[d] the Secretary to consider on remand that was not within the original administrative record . . . ." **AR_NEW_0004044**. Given the scope of the remand – consideration of the prior decision in light of the 2006 Beckham Report – the information that should have been considered on remand was information pertaining to the case then before the Secretary. Nowhere in the remand order did this Court invite the Tribe to substitute an entirely new

application without reconciling the new application with the facts reported in the 2006 Beckham Report.

To secure a 15-day extension to complete its secret Mechoopda Replacement Report, the Tribe does not deny that it and the Secretary communicated *ex parte*. (*See* Intervenor Br., p. 33). In defense of this maneuvering, Defendants argue that the County has not proven allegations of bad faith on the part of the Department. (Fed. Br., p. 39; Intervenor Br., p. 32). While the evidence on whole arguably lends itself to bad faith, bad faith is not an element the County must prove to show improper process. The Tribe's letter requesting more time due to the Tribe's lack of resources and assertion that it had only recently received the County's submission challenging its "tribal history" appeared to mislead Defendants.[6] **AR_NEW_0004109**. The Tribe declined to address this issue, claiming only it "did its best." (Intervenor Br., p. 33). Its best, of course, despite its "impoverished" status, **AR_NEW_0004108-09**, was the 291-page Mechoopda Replacement Report presenting a new case, which neither the County nor Dr. Beckham had previously seen, written by a new expert team of archaeologists (not ethnohistorians).

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[6] The Tribe's misleading letter is quoted in the County's principal brief.

When the County objected to the admission of the Report – for reasons already discussed – the Secretary rejected the County's request to deny admission of the Report or otherwise allow the County an opportunity to respond. **AR_NEW_0004248**. Upon renewal of its objection, Defendants granted a mere 20-day extension, provided that the Tribe had 10 days to respond, again following what appear to be *ex parte* communications between the Tribe and Secretary. **AR_NEW_0004260**. The County objected once again. **AR_NEW_0004263-4264**. The Secretary claims the County did not "explain[] why twenty days was insufficient or ask[] for an extension of time," (Fed. Br., p. 17), but the County specifically explained that 20 days provided "no time to research and write a response" to "an entirely new case that featured a new 'expert' team and cited documents totally unrelated to the original record." **AR_NEW_0004263-4264**.

In sum, the County objected numerous times to the admission of the Mechoopda Replacement Report and repeatedly explained the need for a sufficient period of time to respond. Defendants still somehow fault the County for never submitting a report. (Fed. Br., p. 38-39). The flaw with Defendants' argument is that the County did try – Defendants' improper procedural process prevented it.

Defendants also suggest that the County should not be permitted to provide the Secretary with pertinent evidence in an informal adjudication, notwithstanding

the Tribe's new submission, lest it spur an endless cycle of reexamination. (Fed. Br., p. 37). To begin, it is worth noting that no "reexamination" would be required if the Secretary had properly included the 2006 Beckham Report in its initial analysis. No "reexamination" would be required if the Secretary, following its first failing, had not arbitrarily granted an extension of time and accepted the Tribe's new expert report, which went far beyond the scope of remand order. And no "reexamination" would be required now if the Secretary had properly collected and reviewed the relevant data upon which to rendered its current decision. *See Resolute Forest Products*, 187 F. Supp. 3d at 123.

On that point, the Secretary is splitting hairs, arguing the County has waived its argument that the Court should consider the 2014 Beckham Report upon review of the Secretary's woefully insufficient Decision. The County, however, has argued that the Secretary arbitrarily narrowed the evidence base by failing to consider evidence bearing on the issue before it, including evidence from the 2014 Beckham Report, which constituted an abuse of discretion. Of note, the D.C. Circuit recognizes eight exceptions to the presumption against extra-record review, *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989), including, for example, where the documents were "known to [the agency] at the time of their decisionmaking, [were] directly related to the decision made, and [were] adverse to the agency's

position." *Public Citizen v. Heckler*, 653 F. Supp. 1229, 1237 (D.C.C. 1986). Certainly, in *Public Citizen* the Court accepted extra-record because the documents were "indicative of a lack of rationality on the part of [the agency] in the decisionmaking process." *Id.* Here, Defendants knew or should have known the facts memorialized in their own Department records contained contradictory information adverse to the tribal submission – evidence subsequently discovered in those federal records by Dr. Beckham and reported in the 2014 Beckham Report. That research directly contradicts the Mechoopda Replacement Report that Interior otherwise should have had before it.

B. The Department's arbitrary and capricious process resulted in an unsupportable conclusion that the land should be accepted into trust for gaming.

Defendants make the same mistake as before – they stop shy of carefully considering the disputed facts and simply assume, without support, that the Tribe restored via court settlement is the historical continuation of the Mechoopda tribelet of the 1851 Treaty. The Department goes so far to claim that it is irrelevant whether the Tribe is the historical continuation of the tribelet. (Fed. Br., p. 49). This contravenes the law applicable to IGRA's restored lands exception; the modern tribe's historical connection to the land is a prerequisite to accepting the land into trust pursuant to both the *Grand Traverse* factors and Part 292. *See Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Att'y for*

W. Dist. Of Mich., 198 F. Supp. 2d 920, 935 (W.D. Mich. 2002); 25 C.F.R. § 292.12(b). The record, taken as a whole, does not establish that connection.

This is not, as the Tribe suggests, a situation of dueling experts. (Intervenor Br., p. 35). Federal documents, including the federal censuses on which the Secretary relied, including the 1928-33 Federal Enrollment of the California Indians conducted by the Department itself – "institutional knowledge" – do not support, but rather contradict, the conclusion of the 2014 Interior Decision. It is well-settled that an agency decision is arbitrary and capricious if it runs counter to the evidence or is so implausible that it cannot be ascribed to a difference in view or product of agency expertise. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.

Irrespective of whether the 2014 Beckham Report is considered, the Secretary is obligated to make a reasonable effort to ensure that appropriate data is relied upon when issuing a decision. *Resolute Forest Products*, 187 F. Supp. 3d. at 123. The Secretary's acceptance and reliance on the Mechoopda Replacement Report fell short of that responsibility. *See id.* ("[D]ecision is arbitrary and capricious and should be overturned" "where the agency has relied on incorrect or inaccurate data or has not made a reasonable effort to ensure that appropriate data was relied upon."). Not only was critical data that was the foundation for Tiley's conclusions "incorrect or inadequate," it was forged by Tiley – a fact Interior did

not discover because it did not conduct research in readily-available records that would have disclosed the forgery. The record before Defendants, which shows that the Bidwell Ranch was a multi-ethnic community, does not support Defendants' conclusion under either the *Grand Traverse* factors or Part 292.

1. The Secretary failed to reconcile the 2014 Decision with contradictory facts that were part of the Department's institutional knowledge.

For the Secretary's 2014 Decision to survive scrutiny under the APA, the Court must find that the Secretary (1) examined relevant data and (2) articulated a satisfactory explanation for its action including a rational connection between the facts found and choice made. *Motor Vehicle Mfrs. Ass'n.*, 463 U.S. at 43. As described *supra*, the County was denied the fair opportunity to provide a response to the flawed Mechoopda Replacement Report, so the facts in the record – the predicate for any "rational connection" – are incomplete. But, the 2014 Decision failed to rely on accurate data or articulate a rational connection between those facts already in the record (namely, the 2006 Beckham Report) and the Secretary's conclusions.

For instance, in *Grand Traverse,* a federal district court determined that a court could determine the extent of restored lands by examining "factual circumstances of the acquisition, the location of the acquisition, or the temporal relationship of the acquisition to the tribal restoration." *Grand Traverse*, 198 F.

Supp. 2d at 935. Finding that the land at issue was part of the lands ceded by the Grand Traverse Band to the United States in the Treaty of 1836, and that "the Band's evidence clearly established that the parcel was of historic, economic and cultural significance to the Band," the Court held that the site "may be reasonably considered to be part of a restoration of lands in an historic, archeologic and geographic sense." *Id.* at 936.

In contrast to the Treaty of 1836, the unratified 1851 Treaty did not specify any Mechoopda lands. Further, the only parcel that was of "historic, economic and cultural significance" to the Tribe is the Rancheria itself. The Rancheria's residents in the 1928-33 Indian Enrollment identified themselves as being descended from tribes native to a wide swath of central California and the Great Plains, as well as residents of African-American and Hawaiian origin. While some Mechoopda members may be able to trace connections to the immediate area through their individual heritage, the recognized Tribe can solely claim the Rancheria as the only place the "modern Tribe" ever occupied as a group.

The Secretary claims the "Department reviewed other historical information, including several federal censuses as well as sworn affidavits" in concluding that there was a historical connection to the land. **AR_NEW_0005420**. The Department neither cites to, nor identifies, any of these federal censuses or sworn

affidavits in its Decision, nor does it explain how this information supports its conclusion of a cohesive and continuous existence, particularly in light of the fact that the very federal censuses presumably relied upon documented the absence of Mechoopda. Moreover, it does not reconcile its conclusions with the facts of tribal ancestry reported in both those censuses and the 2006 Beckham Report. Instead, the first critical link the Secretary relies upon to establish a connection between the 1851 Treaty tribelet and the modern Tribe is a misrepresentation of the facts. The Secretary claims in the 2014 Interior Decision that "Kelsey's [1906] census names Captain Lafonso and William Conway as the head of the list of Mechoopda families." **AR_NEW_0005416** (emphasis added). The word "Mechoopda" is nowhere to be found on the Kelsey Census.

Though purportedly relying on federal census data, the 2014 Interior Decision likewise fails to address the Thirteenth Decennial Census of 1910, which documented almost a complete absence of Mechoopda presence at the Bidwell Ranch at that early date, 2014 Beckham Report at 71-74, and "illustrate[d] the transitory nature of the worker village on the Bidwell Ranch." *Id.* at 72. The Secretary's Decision also failed to address how the 1928-33 Enrollment of California Indians supports the Decision when it undermines the validity of its conclusion as a matter of fact. The 1928-33 BIA Federal Census confirmed the

multi-tribal and mixed ethnic heritage of the community and verified the lack of Mechoopda tribal descendancy, a confirmation which was never rebutted and runs counter to the Decision. **AR_NEW_0003191**; **AR_NEW_0003222**. The 2006 Beckham Report reproduced these records in their entirety for the Secretary's benefit even though they were institutional knowledge for the agency. Despite relying on these records, the 2014 Interior Decision neither cites nor refers to them to reconcile its contradictory facts.

The census data the Secretary purportedly relied upon disproves the Secretary's essential assumption – the Tribe was the political continuation of and successor in interest to the historical tribelet. The data from all of the federal censuses and the 1928-33 Enrollment project undermines the Secretary's conclusion that the Tribe's members "share a direct genealogical link to the Mechoopda Indians who resided at the Mechoopda Indian Village." **AR_NEW_0005405**. Before the Secretary could conclude that the Tribe could "use its early history to demonstrate a significant historical connection to the land," there was an obligation to use reliable and accurate evidence to actually establish an ongoing historical connection.

2. The Secretary's Decision fails to consider the 2006 Beckham Report as required by the Court's remand order.

Defendants' recitation of quotes from the 2014 Decision purporting to show adequate consideration of the 2006 Beckham Report falls short of demonstrating that the 2006 Beckham Report was considered in the Decision. (Fed. Br. at 59). In each of the cited passages, the Decision authors simply state they "reject" or "decline to adopt" or "believe the evidence in the record points to the contrary conclusion" *vis-à-vis* the conclusions in the 2006 Beckham Report. *Id.* For example, one such passage cited by Defendants states, "[w]e decline to adopt the County's conclusions that the Mechoopda Tribe was a creation of the Bidwells." *Id.*, citing **AR_NEW_0005403**. The Decision authors then dismissed Dr. Beckham's determination that the Bidwells controlled every aspect of life on the Bidwell Ranch with a single conclusory sentence:

> 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_0005404. The summary dismissal of a five-page discussion in the 2006 Beckham Report, **AR_NEW_0003183-3188**, which cited extensive facts showing the Indian village on the Bidwell Ranch was a worker community and that

the workers were subject to the conditions imposed by the Bidwells rather than any independent political leadership, introduced no new facts nor did it articulate any reasoning. The type of "consideration" Defendants afforded the factual conclusions of the 2006 Beckham Report fell short of a satisfactory articulation of a rational connection between relevant facts and conclusions drawn ordered by this Court. *Butte Cnty*, 613 F.3d at 194 ("[T]he agency must explain why it decided to act as it did. The agency's statement must be one of 'reasoning'; it must not be just a 'conclusion'; it must 'articulate a satisfactory explanation' for its action.").

Beckham's facts establishing that, for a significant epoch of the Tribe's purported history, the Bidwell Indians were proven to be a multiethnic worker community subject to the Bidwells' control rather than a functioning tribe, break the chain of continuity and disprove that the modern Tribe has the required relation to the land. While the federally recognized, modern Tribe has a connection to the Bidwell Ranch, the lack of political leadership as well as the multi-ethnic nature of the worker community described *infra* contradicts any connection to the proposed gaming site meeting the standard of a "significant historical connection" as required by 25 CFR 292.12(b) or the *Grand Traverse* factors.

3. Defendants' reliance on *City of Roseville* is inappropriate and does not save the Decision from reversal.

Defendants' reliance on *City of Roseville v. Norton,* 348 F.3d 1020 (D.C. Cir. 2003) is misplaced and does not support trust acceptance. That opinion, in which the Court sustained the Secretary's decision to accept land into trust for gaming for the United Auburn Indian Community of Placer County, California, is clearly distinguishable from this case because the Auburn Indian Restoration Act of Oct. 31, 1994, 25 U.S.C. §§1300l-1300l-7 ("AIRA"), mandated that land placed in trust for the Tribe would be considered part of the Tribe's reservation. The AIRA was central to the D.C. Circuit decision – the opinion's opening sentence reads, "[t]his appeal involves the intersection of two statutes [AIRA and IGRA] concerning Indian tribes." *City of Roseville*, 348 F.3d at 1021. The D.C. Circuit ultimately determined that AIRA's language, in concert with IGRA's exception for "restoration of lands for an Indian tribe that is restored to Federal recognition," 25 U.S.C. §2719(b)(1)(B)(iii), entitled the Tribe to game on the land. *Id.* The Mechoopda Tribe can cite to no such act of Congress mandating the same here.

Defendants accuse the County of relying on an ahistorical argument, but as the above analysis reveals, their reliance on *City of Roseville* is ahistorical. Unlike the *City of Roseville*, the Tribe in this matter was restored not by an Act of Congress but by a court settlement. Defendants cannot cite to any parallel

Congressional authorization or remedial purpose designating the land to be taken into trust as eligible for gaming. While Congress is entitled to review a Tribe's history and determine on behalf of the United States that a gratuitous restitution is due the Tribe, that authority was never delegated to the Secretary in the Indian Reorganization Act of 1934, IGRA, or any other act of Congress. It is likely that the D.C. Circuit's anticipation that the Secretary might interpret its opinion as such is the reason it took pains to limit its decision to those facts presented.

III. CONCLUSION

Defendants allowed the Tribe to submit extensive new materials through the Mechoopda Replacement Report and voluminous attached documents without allowing a reasonable amount of time for the County to conduct research and respond. While this action contradicted the D.C. Circuit's contemplated scope of remand, which was to supplement the record in the context of the 2006 Beckham Report, the County reacted by simply requesting time sufficient for professional research to test the materials developed by Tiley.

After initially refusing to grant the County time to respond, the Department did later extend 20 days to the County to develop a response. The magnitude of the work in research and writing required by any knowledgeable professional ethnohistorian was far greater than could have been performed within 20 days. It follows that the County was denied a reasonable opportunity to respond, and the

record was promptly closed. The result is that the Secretary reviewed the Mechoopda Replacement Report with a predetermined decision in mind and without credence to the inaccuracies of the report.

Remarkably, nothing in the Mechoopda Replacement Report rebuts or addresses the critical facts of tribal ancestry recorded in federal reports cited in the 2006 Beckham Report, which the Secretary was ordered to consider on remand. And, notwithstanding the fact that the Secretary blocked the development of what ultimately became the 2014 Beckham Report, the Secretary failed to reconcile the documented facts of the 2006 Beckham Report with Tiley's undocumented conclusions in the 2014 Interior Decision.

The record evidence, including federal censuses the Secretary apparently relied on, directly contradicts the 2014 Interior Decision. Because the district court erred in its conclusions that the Secretary's unreasoned 2014 Interior Decision was not arbitrary, capricious, and without observance of the law, that Decision should be reversed.

DATED this 22nd day of March 2017.

BUTTE COUNTY, CALIFORNIA

By Counsel

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FRAP 31(A)(7) CERTIFICATE OF COMPLIANCE

In compliance with Federal Rule of Appellate Procedure 31(a)(7), I certify that the forgoing contains 6456 words, excluding parts of the document that are exempted by the Rule.

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all listed counsel of record.

/s/ *Dennis J. Whittlesey*
Dennis J. Whittlesey

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