No. 16-5240

Oral Argument Not Yet Scheduled

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 al.,
Defendants-Appellees,

and

MECHOOPDA INDIAN TRIBE OF CHICO RANCHERIA, CALIFORNIA, a federally recognized Indian Tribe,
Intervenor-Appellee.

On Appeal from the United States District Court, District of Columbia
No. 08-cv-00519-FJS
Honorable Frederick J. Scullin, Jr.

BRIEF OF THE FEDERAL APPELLEES

JEFFREY H. WOOD
Acting Assistant Attorney General

WILLIAM B. LAZARUS
ROBERT P. STOCKMAN
LAURA L. MAUL
JEFFREY S. BEELAERT
Attorneys, U.S. Dep't of Justice
Env't & Nat. Res. Div.
P.O. Box 7415
Washington, DC 20044
(202) 307-6250
Jeffrey.Beelaert@usdoj.gov

Of Counsel:

JENNIFER TURNER
Office of the Solicitor,
U.S. Dep't of the Interior

CERTIFICIATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) **Parties and amici**. Plaintiff-Appellant is Butte County, California.

Defendants-Appellees are: Jonodev Osceola Chaudhuri, in his official capacity as Chairman, National Indian Gaming Commission; E. Sequoyah Simermeyer, in his official capacity as Commissioner, National Indian Gaming Commission; Ryan Zinke in his official capacity as Secretary, United Stated Department of the Interior; Michael Black, in his official capacity as Acting Assistant Secretary-Indian Affairs, United States Department of the Interior; and the United States Department of the Interior.*

Intervenor for Defendants-Appellees is the Mechoopda Indian Tribe of Chico Rancheria, California, a federally recognized Indian Tribe.

(B) **Rulings under review**. Butte County seeks review of the district court's final order and memorandum opinion entered on July 15, 2016, denying Butte County's motion for summary judgment and granting the cross motions filed by the federal defendants and intervenor Mechoopda Tribe.

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* Secretary Zinke and Acting Assistant Secretary Black are "automatically substituted" as parties under Fed. R. App. P. 43(c)(2).

(C) **Related cases**. Counsel is unaware of any related cases. No related proceedings are currently pending in this or other courts of which counsel is aware.

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GLOSSARY

APA	Administrative Procedure Act
JA	Joint Appendix

INTRODUCTION

The Mechoopda Indian Tribe of Chico Rancheria is a federally recognized tribe that, for the past twenty years, has sought to become economically self-sufficient by acquiring land for gaming.

The Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721, allows an Indian tribe to conduct gaming on a parcel of land acquired after October 17, 1988 if the Department of the Interior takes the parcel into trust as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition." *Id.* § 2719(b)(1)(B)(iii); *see also Butte Cty., Cal. v. Hogan*, 613 F.3d 190, 193 (D.C. Cir. 2010) ("the restored lands exception").

The Mechoopda Tribe is a "restored" tribe recognized by the federal government. *Butte Cty.*, 613 F.3d at 192. The Tribe acquired a parcel of land located near the city of Chico in Butte County, California, and in 2004 requested that the Department take the land into trust for gaming.

In 2008, the Department issued a decision approving the trust acquisition. This Court set aside that decision because there was no indication that the Department had considered a historical report—referred to in this appeal as the "2006 Beckham report"—prepared by Dr. Stephen Dow Beckham, a history professor at Lewis & Clark College. *Id.* at 193–94. The Court remanded the case for the Department to consider Beckham's report.

Consistent with this Court's opinion, the Department considered the 2006 Beckham report as well as additional information received from the parties on remand. After considering all the evidence and materials in the administrative record, the Department issued a new decision on January 24, 2014, to acquire the Chico parcel in trust for gaming purposes on behalf of the Mechoopda Tribe. Joint Appendix (JA)__(AR_NEW_5384-5436).

In this appeal, Butte County raises both a procedural and a substantive challenge to the Department's decision.

JURISDICTIONAL STATEMENT

Butte County sought review of the Department's decision in the district court under the Administrative Procedure Act (APA), 5 U.S.C. § 701, et seq.; the district court had jurisdiction under 28 U.S.C. § 1331.

The parties moved for summary judgment, and, on July 15, 2016, the district court granted judgment in favor of the federal defendants and intervenor Tribe. JA__(DDC_Dkt128). Butte County timely filed a notice of appeal on August 15, 2016. JA__(DDC_Dkt130). This Court has jurisdiction under 28 U.S.C. § 1291.

PERTINENT STATUTES AND REGULATIONS

Butte County included an addendum to its opening brief with relevant statutes and regulations, but it omitted 25 C.F.R. § 292.2. That provision can be found in an addendum to this brief.

STATEMENT OF THE ISSUES

(1) Whether, in the informal adjudication considering the trust acquisition of the Chico parcel for gaming purposes, the Department violated the minimal procedural requirements imposed by the Administrative Procedure Act or otherwise failed to comply with the district court's broad remand order.

(2) Whether the Department's decision to take the Chico parcel into trust for gaming purposes on behalf of the Mechoopda Tribe was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

STATEMENT OF THE CASE

I. Factual background

A. Chico Rancheria

Before Spanish colonists arrived in the area now known as California, many tribes (including the Mechoopda) lived in small village communities in the Sacramento Valley. JA_(NEW_5391-92). These tribes shared a common language group known as "Maidu," yet each tribe was "wholly autonomous." JA_(NEW_5391); *see also* JA_(NEW_5394) ("highly autonomous political entities" that "demarcated territories among themselves"). By the mid-nineteenth century, the average Maidu tribe had about 100 to 200 members with a political structure based primarily on kinship. JA_(NEW_5390, 92).

Maidu tribes, including the Mechoopda, typically refer to themselves by their village. JA_(NEW_5391). Pertinent here, the Mechoopda Tribe traces its history to a village located near what is now Chico, California.

Bidwell ranch. In 1842, two settlers arrived in Mechoopda territory and set up camp on the banks of a stream they referred to as Chico Creek. JA_(NEW_5394). Two years later, the Mexican government issued a land grant to the settlers. *Id.*

In 1845, John Bidwell, a wealthy businessman, purchased an interest in the land grant. *Id.* Bidwell constructed a ranch—Rancho Del Arroyo Chico—on the property and hired local Indians to work and live there. JA_(NEW_5395). *Id.* The local Indians established a village, referred to as "Mikchopdo," close to Bidwell's house. *Id.* Although some non-Mechoopda Indians settled in the village, "the majority of inhabitants were Mechoopda and Mechoopda cultural traditions continued at Mikchopdo throughout the Nineteenth Century." JA_(NEW_5395).

In 1848, the United States and Mexico ended the Mexican War, and California became a territory. That same year, gold was discovered and tens of thousands of miners and settlers poured into California. John Bidwell had a mining operation, and he employed between twenty to fifty Mechoopda and other local Indians at his mine. JA_(NEW_5395); *see also* JA_(NEW_3181).

For many Maidu tribes, only a small remnant "survived much of the depredation that came with the settlement of California." *City of Roseville v. Norton*, 348 F.3d 1020, 1022 (D.C. Cir. 2003). The Mechoopda Tribe, however, "persevered and prevailed" by living in the village on Bidwell's ranch. JA_(NEW_5404).

1851 Treaty. A federal commissioner appointed by President Millard Fillmore came to Bidwell's ranch in 1851 to negotiate treaties with Indian tribes. JA_(NEW_5396). Bidwell personally helped bring local tribes to his ranch, where the negotiations occurred. *Id.* Leaders from thirteen tribes met with the commissioner for several days, and nine tribes, including the Mechoopda, eventually signed a treaty with the federal government on August 1, 1851. *Id.*

The tribes agreed to cede much of their land to the United States, and, in exchange, the federal government agreed to set aside "approximately 227 square miles of land, reaching roughly from Chico to Nimshew to Oroville." JA__(NEW_2748); *see also* JA__(NEW_2842) (map). But the Senate never ratified the treaty, so the tribes never acquired a reservation. JA_(NEW_5395).

The 626-acre parcel of land at issue in this appeal (the Chico parcel) falls within the boundary of the reservation that would have been created by the 1851 Treaty. *Id.*

Trust land. John Bidwell died in 1900 and left the ranch to his wife Annie. JA__(NEW_5397). In their wills, both John and Annie

Bidwell protected the Mechoopda village through a private trust. *Id.* When Annie died in 1918, she "conveyed 26 acres of the ranch where the Indians were living—the 'rancheria'—to a private board in trust for the Indians." *Butte Cty.*, 613 F.3d at 192; *see also* JA_(NEW_5397) (citing JA_(NEW_3183–88).

The private trust did not last long. In 1933, the Mechoopda Tribe learned that the executors could no longer pay necessary taxes, so the Tribe sought assistance from the federal government. JA_(NEW_5397). Six years later, in 1939, the United States took the land into trust on behalf of the Mechoopda Tribe and formally established the Chico Rancheria. *Id.*

Termination. Two decades later, under then-prevailing policies on Indian assimilation, Congress passed the California Rancheria Act, Pub. L. No. 85–671, 72 Stat. 619 (1958), and created procedures to strip rancherias of their federal trust status. *See Redding Rancheria v. Jewell*, 776 F.3d 706, 709 (9th Cir. 2015). Under the amended Act, 78 Stat. 390 (Aug. 11, 1964), the United States officially terminated the trust for the Chico Rancheria. Notice of Termination, 32 Fed. Reg. 7,981 (June 2, 1967). Most of the Tribe's property was then liquidated. JA_(NEW_5401).

B. Reinstatement of trust status

After the federal government terminated the trust relationship, the Mechoopda Tribe, joined by other tribes, brought suit to restore

their federal trust status. *See Scotts Valley Band of Pomo Indians of the Sugar Bowl Rancheria, et al. v. United States*, 921 F.2d 924, 925–26 (9th Cir. 1990). The parties settled, and the United States recognized that the Mechoopda Tribe is "eligible for all rights and benefits extended to other federally recognized Indian tribes and their members." Reinstatement, 57 Fed. Reg. 19,133, 19,134 (May 4, 1992); *see also* Recognized Entities, 58 Fed. Reg. 54,364, 54,367 (Oct. 21, 1993).

By 1992, California State University, Chico, had developed most of the land that comprised the original Chico Rancheria, so the land was not suitable for reacquisition by the Tribe. The Mechoopda Tribe therefore agreed as part of the settlement that it would not seek to reestablish the boundaries of the original Chico Rancheria. JA_(NEW_5401). The Tribe acknowledged that "only a small cemetery within the bounds of the former Chico Rancheria is eligible to be held in trust by the United States for the Tribe." *Id.*

C. The Chico parcel

Working with the Bureau of Indian Affairs in 1996, the Mechoopda Tribe identified a parcel of land that it wanted to acquire and transfer to the United States to hold in trust for gaming purposes. JA_(NEW_2743). But that effort failed, primarily because the Department of the Interior had adopted a narrow interpretation of the restored lands exception. JA_(NEW_5401).

Five years later, in 2001, the Mechoopda Tribe acquired the 626-acre Chico parcel, which is located northeast of California State Highway 99 outside the city limits of Chico but still inside Butte County. JA_(NEW_2743); JA_(NEW_5385). The Chico parcel is about ten miles from the former Chico Rancheria and historic Mechoopda cemetery. JA_(NEW_5408).

In 2002, the Tribe requested an advisory legal opinion from the National Indian Gaming Commission as to whether the Chico parcel would qualify for gaming under the Indian Gaming Regulatory Act. JA_(NEW_5385-86). Butte County had "long been involved" in this process. *Butte Cty.*, 613 F.3d at 198. And, at that time, the County supported the Tribe's efforts to acquire land for gaming. *See id.* (urging the Commission to take the Chico parcel into trust).

The Commission issued its opinion in 2003, concluding that the Chico parcel qualified for gaming under the Act's "restored lands exception." *Butte Cty.*, 613 F.3d at 193; *see also* JA_(NEW_5386). The Department concurred with the Commission's opinion. JA_(NEW_5386).

In 2004, the Mechoopda Tribe asked the Department to take the Chico Parcel into trust. *Id.* Two years later, in 2006, Butte County informed the Department that it no longer supported the Tribe's application. *Butte Cty.*, 613 F.3d at 200. This lawsuit eventually followed.

II. Legal background

For most Indian tribes, real property is "the single most important economic resource." Cohen's Handbook of Federal Indian Law § 15.01 (Nell Jessup Newton ed., 2012).

A. Indian Reorganization Act

The Indian Reorganization Act, ch. 576, 48 Stat. 984–988, authorizes the Secretary of the Interior to acquire a parcel of land "for the purpose of providing land for Indians." § 5, 48 Stat. 985 (codified at 25 U.S.C. § 5108). Title to land acquired under this section is "taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." *Id.*

The Department's regulations at 25 C.F.R. part 151 establish procedures and substantive criteria to govern the Secretary's discretionary authority to acquire land in trust. The Secretary can acquire land for a tribe in trust status "[w]hen the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." *Id.* § 151.3(a)(3). When a tribe asks the Secretary to take land into trust, the Secretary notifies state and local governments so they may provide comments regarding potential impacts on "regulatory jurisdiction, real property taxes and special assessments." *Id.* §§ 151.10, 151.11(d).

B. Indian Gaming Regulatory Act

Congress enacted the Indian Gaming Regulatory Act in 1988 to "provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments," 25 U.S.C. § 2702(1), and "to ensure that the Indian tribe is the primary beneficiary of the gaming operation," *id.* § 2702(2).

A tribe may conduct gaming only on "Indian lands" within the tribe's jurisdiction. *Citizens Exposing Truth About Casinos v. Kempthorne*, 492 F.3d 460, 462 (D.C. Cir. 2007) (quoting 25 U.S.C. § 2710(b)(1), (d)(1)). The Act generally prohibits a tribe from conducting gaming on Indian lands that the Secretary acquired in trust after October 17, 1988—the date Congress passed the Act—unless one of the statutory exceptions applies. *See* 25 U.S.C. § 2719(a).

Relevant here, one exception allows gaming on lands taken into trust after Congress enacted the Act as part of "the restoration of lands for an Indian tribe that is restored to Federal recognition." *Id.* § 2719(b)(1)(B)(iii); *see also Butte Cty.*, 613 F.3d at 193. This exception, along with the other statutory exceptions, "ensur[es] that tribes lacking reservations when [the Act] was enacted are not disadvantaged relative to more established ones." *City of Roseville*, 348 F.3d at 1030.

Congress did not define "restoration of lands" or explain how the Secretary should restore lands to an Indian tribe. *See Butte Cty.*, 613

F.3d at 192; *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of the U.S. Att'y for W. Dist. of Mich.*, 369 F.3d 960, 967 (6th Cir. 2004).

In the *Grand Traverse Band* litigation, the district court analyzed the Act and held, "if a tribe is a restored tribe under the statute, any lands taken into trust that are located within the areas historically occupied by the tribes are properly considered to be lands taken into trust as part of the restoration of lands under § 2719." 198 F. Supp. 2d 920, 935 (W.D. Mich. 2002). To determine whether a parcel is restored land under the Act, the Michigan district court considered three factors: (1) "the factual circumstances of the acquisition;" (2) "the location of the acquisition;" and (3) "the temporal relationship of the acquisition to the tribal restoration." *Id.*

The Sixth Circuit adopted this three-factor analysis, *Grand Traverse Band*, 369 F.3d at 967–68, and so did the Department of the Interior and the National Indian Gaming Commission, JA_(NEW_5400); *see also Butte Cty.*, 613 F.3d at 192.

In 2008, shortly after the Secretary decided to take the Chico parcel into trust on behalf of the Mechoopda Tribe, the Secretary codified regulations at 25 C.F.R. part 292. These regulations provide guidance specific to the restored lands exception. *See id.* §§ 292.2, 292.7–292.12. A tribe must demonstrate, among other things, "a

significant historical connection to the land" for the exception to apply. *Id.* § 292.12(b).

The part 292 regulations include a grandfather provision: the new regulations do not apply to agency actions based on written opinions pre-dating the regulations. *See id.* § 292.26(b). In this case, the Department based its decision on the National Indian Gaming Commission's 2003 opinion, so the new regulations do not apply. *See id.*; JA_(NEW_5385)_n.5.

C. Informal agency adjudication

The Department's decision to take a parcel of land into trust on behalf of a tribe is an "informal agency adjudication." *Butte Cty.*, 613 F.3d at 194. Unlike a formal adjudication, which requires trial-type procedures under the APA, *see* 5 U.S.C. §§ 554, 556–557, an informal adjudication imposes only "minimal requirements" that "do not include such elements," *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990).

For example, a party in an informal agency adjudication does not have the right to "present his case or defense by oral or documentary evidence, to submit rebuttal evidence, [or] to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. § 556(d). Nor does the agency have a "statutory obligation to prematurely disclose the materials on which it relies so

that affected parties may pre-rebut the agency's ultimate decision." *Sw. Airlines Co. v. TSA*, 650 F.3d 752, 757 (D.C. Cir. 2011).

Only a few procedural rules govern informal agency adjudications. *Butte Cty.*, 613 F.3d at 194. The agency must: (1) give prompt notice when it denies "in whole or in part . . . a written application, petition, or other request of an interested person made in connection with any agency proceeding;" and (2) accompany that notice with "a brief statement of the grounds for denial." 5 U.S.C. § 555(e).

At a minimum, the agency's statement must "provide an explanation adequate to give a reviewing court a basic understanding—and not a very detailed one—of its action." *Hudson v. FAA*, 192 F.3d 1031, 1036 (D.C. Cir. 1999) (citing *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (per curiam)). In an informal adjudication, the APA "requires neither agency findings of fact nor conclusions of law." *Am. Bioscience, Inc. v. Thompson*, 243 F.3d 579, 582 (D.C. Cir. 2001).

The agency's decision is "entitled to a presumption of regularity," yet that presumption does not shield the agency's decision from a court's "thorough, probing, in-depth review." *Indep. U.S. Tanker Owners Comm. v. Lewis*, 690 F.2d 908, 922 (D.C. Cir. 1982) (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977)).

To be sure, "the agency's decision still must be supported by substantial evidence—otherwise it would be arbitrary and capricious." *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007). Under the substantial evidence test, the agency cannot ignore evidence in the record that contradicts its position. *See Butte Cty.*, 613 F.3d at 194 (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487–88 (1951)).

III. Procedural background

This Court vacated the Department's 2008 decision to take the Chico parcel into trust because the Department violated the minimal procedural requirements imposed by the APA in an informal adjudication. *Butte Cty.*, 613 F.3d at 194. The Court remanded the case for further proceedings consistent with its opinion. *Id.* at 197.

A. The district court's remand order

In November 2010, the district court asked the parties how it should craft a remand order consistent with this Court's opinion. JA_(DDC_Dkt70). In response:

- The Tribe proposed a narrow review limited only to the existing administrative record and the 2006 Beckham report, JA_(Dkt.73at1);
- The County suggested review of "all materials required to be considered as a matter of law," including the 2006 Beckham report and "all supplemental materials" that the County had

filed in the district court after this Court's decision in July 2010, JA_(Dkt72at1-2); and

- The Department proposed that the district court simply remand the matter to the Secretary "with instructions to reconsider his decision to acquire the Chico Parcel into trust for gaming purposes" and include the 2006 Beckham report in the administrative record, JA_(Dkt71).

The district court accepted the Department's proposal and remanded the case to the Department. JA_(Dkt74).

B. The administrative record on remand

"Although there was no requirement to open the record for additional materials, given the unique circumstances and procedural posture of this particular case," the Department gave the parties an opportunity to supplement the record. JA_(NEW_5386). The parties could submit materials addressing "the restored land analysis" and any issues related to *Carcieri v. Salazar*, 555 U.S. 379 (2009).[1] *Id.*

The Department explained the procedural process in a letter to each party. JA_(NEW_4044)(County); JA_(NEW_4045-46)(Tribe). The County had thirty days to submit any "new or updated information" it wished to present, including analysis of the new part 292 regulations.

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[1] Butte County does not discuss *Carcieri* and has thus waived any *Carcieri* challenge in this appeal. *McKinley v. Bd. of Governors of Fed. Reserve Sys.*, 647 F.3d 331, 335 (D.C. Cir. 2011).

JA_(NEW_4044). The Tribe would then have thirty days to respond with any "new information" it wished the Secretary to consider, including analysis of the new regulations. JA_(NEW_4045).

The County did not object to the procedural process, but the Tribe did. *See* JA_(NEW_4048–52). The Department declined to reconsider the procedures. JA_(NEW_4059).

County's submission. On May 12, 2011, the County provided its submission, which referred to many documents that it had previously submitted, including, among other things, pleadings and briefs filed in the district court, the 2006 Beckham report, and a supplemental report (the 2010 Beckham report) prepared after this Court's 2010 decision and titled, "An Assessment of the Credentials, Alleged Expertise, and Controversies of the Three 'Experts' Retained by the Mechoopda Indian Tribe of the Chico Rancheria to Establish Historical Tribal Connections to Land Proposed to Be Used for Indian Gaming." JA_(NEW_3810-31); JA_(NEW_4063–67).

Tribe's submission. The Tribe sought and received a fifteen-day extension of time, JA_(NEW_4108–09), and submitted its response on June 28, 2011. JA_(NEW_4110–29). To refute Beckham's analysis, the Tribe submitted an expert report by Dr. Shelly Tiley, titled "Rebuttal to the Beckham Report Regarding the Mechoopda Indians." JA_(NEW_4113); JA_(NEW_4130–54).

The record. The County then "requested an opportunity to submit materials in reply to the Tribe's most recent submission," but the Department explained that it had "already provided a sufficient opportunity" for each party to submit expert reports and legal analyses. JA_(NEW_4248). The Department thanked the parties for their submissions and closed the record on July 12, 2011. JA_(NEW_4248).

Butte County "strenuously objected." Opening Br. 11. On July 18, 2011, the County asked the Department either to reject the Tribe's submission or to reopen the record and provide the County with "adequate time to respond." JA_(NEW_4257). In its view, "[f]ailure to exercise one of these options [would] deny the County both fairness and due process." *Id.*

The Tribe, "in the spirit of cooperation," did not oppose the County's request to reopen the record. JA_(NEW_4261). The Department therefore agreed to reopen the record to provide Butte County with an opportunity to respond to the Tribe's June 2011 submission. *Id.* In its August 11, 2011 letter, the Department gave the County twenty days to submit its response and provided the Tribe with ten days to reply to the County's additional submission. *Id.*

The County responded the next day, August 12, 2011. JA_(NEW_4263–65). Instead of explaining why twenty days was insufficient or asking for an extension of time, the County informed the Department that its decision to reopen the record was "simply not

acceptable." JA_(NEW_4263). Butte County stressed that it "cannot and will not accept" the Department's decision. JA_(NEW_4264).

C. The district court's 2012 order

A few weeks later, in September 2011, the County moved the district court to clarify its remand order and/or to limit the administrative record to the materials submitted before June 28, 2011—*i.e.*, the record would have included only the supplemental materials submitted by the County on May 12, 2011 and "specifically exclude[d] the Tribe's June 28 Submission." JA_(Dkt75at3).

The Mechoopda Tribe and the Department opposed. *See* JA_(Dkt78,79). In March 2012, the district court denied Butte County's motion. JA_(Dkt101-1). Among other things, the district court found that the remand order was "clear on its face" and that the Department could consider the 2006 Beckham report, the parties' submissions, and whatever else it deemed relevant to its decision. *Id.* at 13. Regarding the procedural process, the district court found that the County "had ample time to submit" information and, if the County needed more time, the County could ask for it. *Id.* at 14.

Butte County never asked for additional time and failed to respond to the Tribe's submission before the Department issued its decision.

D. The Department's 2014 decision

On January 24, 2014, the Department issued a decision approving the trust acquisition of the Chico parcel for gaming purposes. JA_(NEW_5384–436); *see also* Land Acquisition, 79 Fed. Reg. 11,122 (Feb. 27, 2014).

Because of the unique circumstances in this case—and in an abundance of caution—the Department analyzed the trust acquisition under both pre-2008 authority (*i.e.*, applying the *Grand Traverse Band* factors) and the part 292 regulations. Either way, the Department's conclusion was the same: it could take the Chico parcel into trust for gaming under the restored lands exception to the Indian Gaming Regulatory Act. *See* JA_(NEW_5400–06) (pre-2008 authority); JA_(NEW_5406–09) (part 292 regulations).

In his 2006 report, Beckham suggested "that the Mechoopda Tribe is no more than an amalgamation of members of various Indian tribes and non-Indians brought together and shaped by the Bidwells" and that the modern "Mechoopda Tribe is not the successor-in-interest to the Tribe that negotiated the 1851 Treaty." JA_(NEW_5420); *see also* JA_(NEW_3221–25). The Department disagreed. Based on the Tribe's history and the evidence in the record, the Department did not find Beckham's analysis persuasive. JA_(NEW_5420).

For instance, Beckham relied on a 1914 report submitted by W.C. Randolph, a clerk employed by the Bureau of Indian Affairs.

JA_(NEW_5421); JA_(NEW_3189–92). Randolph visited the Mechoopda village at Bidwell's ranch and wrote: "I do not believe that these Indians belong to any particular band, but are remnants of various small bands, originally living in Butte and nearby counties." JA_(NEW_3191).

The Department acknowledged Randolph's statement and explained that Randolph's view "was not adopted by other Department officials." JA_(NEW_5421). And in any event, Randolph's statement, standing alone, could not terminate the trust relationship between the United States and the Tribe. *Id.* The Department reviewed other historical information, including several federal censuses as well as sworn affidavits, and found that information more persuasive than Randolph's report. JA_(NEW_5420).

Based on its review of the historical record, the Department concluded "that the Mechoopda were a tribal polity that had significant historical connections to the region prior to John Bidwell's arrival, and those connections were not severed when the Tribe resided at Chico Rancheria." JA_(NEW_5403). The Department acknowledged that the Mechoopda village "had a diverse Indian population," but many new residents "integrated themselves into the Mechoopda culture and political structure." JA_(NEW_5397). The Department concluded that the Mechoopda Tribe "remained culturally and politically intact" even

though, over the years, it had "absorbed a succession of other Indians into the Tribe." JA_(NEW_5404).

Throughout its 2014 decision, the Department considered Beckham's analysis and explained why it was not persuasive. *See, e.g.*, JA_(NEW_5402–05; 5408–09; 5420–23).

E. The district court's order on the 2014 Beckham report

In November 2014—nine months after the Department issued its decision to take the Chico parcel into trust for gaming purposes—Butte County filed a motion in the district court for remand and reconsideration. JA_(DktNos89-90). In support of its motion, the County attached yet another report prepared by Beckham, dated July 2014 and titled, "Problems with Shelly Tiley's 'Rebuttal to the Beckham Report Regarding the Mechoopda Indians' (2011): Why It Is Impossible to 'Restore Lands' to the 'Restored Mechoopda Tribe.'" JA_(DktNos92-1,93-1). The County had never submitted this report to the Department before filing its motion.

According to Butte County, the 2014 Beckham report "competently challenges both Tiley's sources and conclusions." JA_(Dkt90_¶18). Yet the County also acknowledged—as it must—that it never submitted this report for the Department's consideration before the 2014 decision to take the Chico parcel into trust. *See* JA_(Dkt90_¶19). In fact, the report did not even exist when the

Department issued its decision. *Compare* JA_(NEW_5384) (issued January 24, 2014), *with* JA_(DktNos92-1,93-1) (dated July 9, 2014).

The Tribe and the Department opposed the County's motion. JA_(DktNos101,103). The Department argued that the motion was premature since it had not yet lodged the administrative record in the district court and that the motion was nothing more than an attempt to re-litigate an issue already decided (*i.e.*, the procedural process on remand). JA_(Dkt101).

The district court denied the County's motion, ordered the Department to file the administrative record, and set the schedule for summary judgment motions. JA_(Dkt113). The 2014 Beckham report was never part of the administrative record.

F. The district court's decision on summary judgment

In July 2016, the district court granted judgment in favor of the federal defendants and intervenor Mechoopda Tribe. *See* JA_(Dkt128). The district court addressed the scope of the remand; whether it should consider the 2014 Beckham report; and whether the Department's 2014 decision was arbitrary and capricious.

<u>Scope of the remand</u>. Aside from requiring the Department to consider the 2006 Beckham report, the district court found that this Court "did not place any other requirements or restrictions on the scope of the remand." JA_(Dkt128_at_7). So the district court issued a "very broad" remand order. *Id.*

It is well established, the district court recognized, that agencies may supplement the administrative record with additional evidence on remand. JA_ (Dkt128_at_8) (citing *Union Elec. Co. v. FERC*, 890 F.2d 1193, 1196 (D.C. Cir. 1989), and *PPG Indus., Inc. v. United States*, 52 F.3d 363, 366 (D.C. Cir. 1995)).

The district court concluded that the Department, consistent with this longstanding principle, was "well within [its] discretion to request additional information from the parties and to consider such new information, together with the 2006 Beckham Report and other information that was already in the record, as a basis for [its] decision." JA_(Dkt128_at_8). Butte County characterized the Tribe's submission as a "new application" to take the Chico parcel into trust, but the district court found this characterization "to be without merit." JA_(Dkt128_at_9).

Although the APA did not require the Department to reopen the record or allow the County to respond to the Tribe's submission, the Department gave the County a chance to respond. Because Butte County "decided not to take advantage of the opportunity," the district court rejected its attempt to "now argue that it did not have an opportunity to respond." *Id.* The district court further explained that "the law applicable to informal adjudications under the APA does not support" the County's argument that it should have been allowed to

submit rebuttal evidence. JA_(Dkt128_at_10) (discussing the "modest obligations" of 5 U.S.C. § 555(e)).

2014 Beckham report. To the extent Butte County sought to supplement the administrative record with the 2014 Beckham report, the district court denied its request. JA_(Dkt128_at_11-13). Absent clear evidence to the contrary, the district court explained that it must presume that an agency "properly designated the administrative record." JA_(Dkt128_at_12) (quoting *Styrene Info. & Research Ctr., Inc. v. Sebelius*, 851 F. Supp. 2d 57, 62 (D.D.C. 2012)). To overcome this presumption, Butte County needed "concrete evidence that the documents it [sought] to 'add' to the record were actually before the decisionmakers." *Id.* (quoting *Styrene Info.*, 851 F. Supp. 2d at 63). It was "impossible" for the County to satisfy this requirement since the 2014 Beckham report postdated the Department's decision "by more than six months." *Id.*

Insofar as Butte County asked the district court to consider the 2014 Beckham report as extra-record evidence, the district court also denied the County's request. JA_(Dkt128_at_13-15). Courts generally cannot consider information outside of the agency's record, but this Circuit has four narrow exceptions: "(1) when the agency failed to examine all relevant factors; (2) when the agency failed to explain adequately its grounds for decision; (3) when the agency acted in bad faith; or (4) when the agency engaged in improper behavior."

JA_(Dkt128_at_13) (quoting *Styrene Info.*, 851 F. Supp. 2d at 63, citing *IMS, P.C. v. Alvarez*, 129 F.3d 618, 624 (D.C. Cir. 1997)).

None of the exceptions applied. The district court concluded that Butte County failed to provide any reason "to ignore the APA's requirement that, in reviewing the Secretary's 2014 Decision, the [district court] should limit its review to the record that was before the Secretary and that the Secretary considered in reaching his decision." JA_(Dkt128_at_14-15).

<u>The Department's 2014 decision</u>. Contrary to Butte County's arguments, the district court found that the Department thoroughly discussed the evidence that it considered and explained each of its conclusions. JA_(Dkt128_at_16).

Butte County complained about the Tiley report, but the district court found that the Department had cited "many sources to support [its] conclusions, only one of which is the Tiley Report." *Id.* For example, when describing the Tribe's history, the Department relied not only on the documents submitted by the parties but also on its "own independent research." *Id.* (citing JA_(NEW_5390)).

The district court concluded that the Department's decision "was thorough and well-reasoned." JA_(Dkt128_at_17). The district court thus held that the Department's 2014 decision to take the Chico parcel into trust was neither arbitrary nor capricious. *Id.*

SUMMARY OF ARGUMENT

Butte County raises a procedural and a substantive challenge to the Department's decision in an informal adjudication to take the Chico parcel into trust for gaming on behalf of the Mechoopda Tribe. Neither challenge has merit. This Court should affirm the judgment in favor of the federal defendants and intervenor Mechoopda Tribe.

As to procedure, the Department reasonably exercised its discretion on remand and gave each party the opportunity to submit new or updated information related to the trust acquisition of the Chico parcel. The County's contrary argument would turn longstanding precedent on its head.

In this appeal, Butte County attempts to mask its own failure to comply with reasonable deadlines by portraying the Department as committing the same error as before: failing to consider evidence appropriately before it. This argument misses the mark, as the Department considered all the evidence and materials in the administrative record.

The Department complied with the district court's remand order and considered the 2006 Beckham report as well as the additional materials submitted by the parties. Butte County offends black-letter principles of administrative law by urging this Court to consider a report that it submitted *nine months after* the Department's decision.

Contrary to Butte County's argument, the Department did not abuse its discretion when it gave the Tribe an extra fifteen days to file its submission. Nor did the Department deny Butte County an adequate opportunity to respond to the Tribe's submission. Although not required by the APA in an informal adjudication, the Department gave the County twenty days to respond to Tribe's submission. Butte County flatly rejected this opportunity.

As to substance, the Department reasonably concluded that the Chico parcel qualified as restored lands eligible for gaming under the Indian Gaming Regulatory Act. *See* 25 U.S.C. § 2719(b)(1)(B)(iii). Butte County provides no valid reason to vacate this conclusion.

This is not a de novo trial for the Court to jettison the Department's reasonable interpretation of the evidence in favor of Butte County's preferred interpretation. In its decision, the Department considered contradictory evidence in the administrative record and reasonably rejected that evidence to conclude that it could take the Chico Parcel into trust for gaming purposes on behalf of the Mechoopda Tribe. This Court cannot set aside the Department's reasonable decision, supported by substantial evidence, simply because Butte County prefers a different outcome.

STANDARD OF REVIEW

The Court reviews de novo a district court's grant of summary judgment on an agency's administrative decision. *Enter. Nat'l Bank v. Vilsack*, 568 F.3d 229, 233 (D.C. Cir. 2009).

When reviewing an agency's informal adjudication, this Court has an "essentially two-fold" responsibility to: (1) "review the record to ensure that [the agency's] decision is not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,'" (quoting 5 U.S.C. § 706(2)(A)); and (2) "examine the procedures [the agency] employed in reaching its decision to ensure that they comply with the APA and any applicable statutory or constitutional requirements." *Indep. U.S. Tanker Owners Comm.*, 690 F.2d at 922; *see also Butte Cty.*, 613 F.3d at 194.

Under the APA, this Court's review "is highly deferential" and "must presume the validity of agency action." *Kisser v. Cisneros*, 14 F.3d 615, 618 (D.C. Cir. 1994). The review is "narrow," as the Court cannot "substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm*, 463 U.S. 29, 43 (1983). The challenger "carries a heavy burden indeed." *Village of Bensenville v. FAA*, 457 F.3d 52, 70 (D.C. Cir. 2006) (quotation marks omitted).

The agency must "explain why it decided to act as it did," *Butte Cty.*, 613 F.3d at 194, so the Court can "evaluate the agency's rationale at the time of [the] decision," *Pension Benefit Guar. Corp.*, 496 U.S. at

654. "That low hurdle is cleared where the agency 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Van Hollen v. FEC*, 811 F.3d 486, 497 (D.C. Cir. 2016) (quoting *State Farm*, 463 U.S. at 43).

The agency's decision need not "be a model of analytic precision to survive a challenge." *Dickson v. Sec'y of Defense*, 68 F.3d 1396, 1404 (D.C. Cir. 1995). This Court "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974).

ARGUMENT

I. The Department properly defined the scope and process of the informal adjudication on remand

Butte County contends that the Department "exceeded the scope of the remand order from this Court or the district court by permitting the Tribe to take a second bite at the apple" in the informal adjudication to take the Chico parcel into trust. Opening Br. 23 (quotation marks omitted). Butte County further contends that the Department "arbitrarily refused" to give the County "a reasonable opportunity to respond to the Tribe's" submission. *Id.*

These arguments lack merit. The County misreads the remand order, misconstrues the Tribe's submission, and misinterprets the Department's actions.

A. Consistent with this Court's opinion, the district court issued a broad remand order that the Department followed

Contrary to Butte County's argument (Br. 7–9, 27–28), "there is no principle of administrative law that restricts an agency from reopening proceedings to take new evidence after the grounds upon which it relied are determined by a reviewing court to be invalid." *PPG Indus.*, 52 F.3d at 366. An agency retains on remand the "administrative discretion" to decide whether additional evidence is needed "and how its prior decision should be modified in light of such evidence." *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976); *see also Fly v. Heitmeyer*, 309 U.S. 146, 148 (1940) (agencies have discretion "to reopen the record and take new evidence" on remand).

Butte County reads the district court's remand order as authorizing the Department to consider the administrative record that existed in 2008, the 2006 Beckham report, and "any materials *directly connected*" to the first two categories. Opening Br. 8 (original emphasis). The County misreads the remand order because it does not limit the Department's discretion to consider other relevant materials.

Even if it did, the Department only considered materials directly connected to the categories Butte County identifies. *Id.*

1. This Court required the Department to consider the 2006 Beckham report on remand

This Court set aside the Department's first decision to take the Chico parcel into trust because the Department violated the minimal procedural requirements imposed by the APA in an informal adjudication. *Butte Cty.*, 613 F.3d at 194 (citing 5 U.S.C. § 555(e)). Butte County had submitted the 2006 Beckham report and explained why it believed the Chico parcel did not constitute restored lands while "that issue was still pending before the Secretary." *Id.* at 195. An Acting Deputy Assistant Secretary responded to the County's submission and stated that the Department was "not inclined to revisit" the opinion of the National Indian Gaming Commission as to the status of the parcel as restored land. *Id.* at 193.

The Department's response provided the Court with "no basis upon which [it] could conclude that [the Department's decision] was the product of reasoned decisionmaking," *id.* (quoting *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001)), as there was "no indication" that the Department "actually considered" the 2006 Beckham report, *id.* at 194. This Court therefore set aside the Department's decision to take the Chico parcel into trust and remanded the case "for further proceedings consistent with [its] opinion." *Id.* at 197.

On remand, the district court correctly concluded that, aside from requiring the Department to consider the 2006 Beckham report, this Court "did not place any other requirements or restrictions on the scope of the remand" to the Department. JA_(Dkt128_at_7).

2. The district court's remand order did not limit the Department's discretion to consider additional evidence relevant to the trust acquisition

Responding to the district court's request, JA_(Dkt70), each party submitted proposed instructions for remand to the Department. *See* JA_(DktNos71,72,73). The district court "considered the submissions of the parties" and remanded this case to the Department "to reconsider [its] decision to acquire the Chico Parcel into trust for gaming purposes." JA_(Dkt74). The district court's remand order further stated: "The Secretary shall include and consider the [2006] 'Beckham Report' as part of the administrative record on remand." *Id.*

Butte County points out that the Tribe sought a narrower remand order. Opening Br. 7–8 (quoting JA_(Dkt73)). But that is irrelevant here; the district court *did not adopt* the Tribe's suggestion and instead accepted the Department's proposal verbatim. JA_(Dkt74).

Butte County also points out that the district court's remand order did not "invite the Secretary to 'supplement the record,'" yet the County draws the wrong conclusion from this omission. Opening Br. 28. Though the remand order specifically required the Secretary to consider

the 2006 Beckham report, the district court properly refrained from "dictating to the agency the methods, procedures, and time dimension" for considering any additional evidence. *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 545 (1978) (quoting *Transcon. Gas Pipe Line*, 423 U.S. at 333). The Department thus retained its administrative discretion to decide whether it needed to consider additional evidence. *See Transcon. Gas Pipe Line*, 423 U.S. at 333; *Fly*, 309 U.S. at 147.

Given the circumstances of this case, JA_(NEW_5386), the Department properly exercised its discretion when it afforded Butte County and the Tribe the opportunity to submit any new or updated information for its consideration on remand.

The Department, moreover, reasonably explained its decision to reopen the record. After this Court issued its decision, both parties submitted additional evidence even before the Department had decided to reopen the record. Butte County submitted court filings, "a critique of the National Indian Gaming Commission's Indian lands opinion, and an assessment of the credentials of the historians who worked with the Tribe during the original fee-to-trust proceedings." JA_(NEW_4044). The Tribe submitted an analysis of its history in light of *Carcieri v. Salazar*, 555 U.S. 379 (2009). JA_(NEW_4045-46). The Department explained that the record on remand already had "expanded beyond the original record" and that it would be arbitrary under the APA, 5 U.S.C.

§ 706, for the Department to refuse to consider the additional evidence already submitted, *see* JA_(NEW_4045) (citing *Butte Cty.*, 613 F.3d at 194).

The Mechoopda Tribe objected and argued that it would be "fundamentally unfair" for the Department to reopen the administrative record. JA_(NEW_4049). The Tribe asked the Department simply to "reconsider the land into trust decision with the addition of the [2006] Beckham Report." *Id.* The Department declined to reconsider its decision to accept additional information on remand. JA_(NEW_4059).

Butte County did not object to reopening the administrative record. In fact, the County did not attack the Department's decision to reopen the record until *after* the Tribe had filed its submission. JA_(NEW_4251-58). Now, the County says that the Tribe submitted "a 'surprise' 11th hour report" (Br. 3) as part of a "sneak attack" (Br. 10). Throughout its brief, the County characterizes the Tribe's submission as a "Replacement Report" (*e.g.*, Br. 10–12, 14, 19–20, 27) that presents an entirely new case for the trust acquisition. It is not. Butte County mischaracterizes the Tribe's submission.

As a factual matter, the Tribe's submission was not a new application. The Tribe responded to the questions in the Department's April 2011 letter, *see* JA_(NEW_4045-46), and refuted assertions made by Butte County in its submission, JA_(NEW_4113). Tiley's report

addresses the *exact same legal question* that was addressed in all previous submissions by the Tribe: whether the Chico Parcel qualifies for gaming under the restored lands exception. JA_(NEW_4130–54).

Tiley's report contains facts not mentioned in the Tribe's previous submissions, yet that is both appropriate and expected. The Department gave the Tribe an opportunity—just like Butte County—to provide additional evidence for the Department's consideration. JA_(NEW_4044); JA_(NEW_4045-46). Tiley's report is appropriately titled a "Rebuttal to the Beckham Report." JA_(NEW_4131).

As a legal matter, the County provides no valid support for its claim that the Tribe's submission impermissibly expanded the administrative record. *See* Opening Br. 27–28. Butte County cites *Tennis Channel, Inc. v. FCC*, 827 F.3d 137 (D.C. 2016), yet that decision does not support the County's argument. On the contrary, *Tennis Channel* confirms that the Department exercised its discretion consistent with controlling principles of administrative law. An agency has the discretion to reopen an administrative proceeding on remand and the Court's review of the agency's decision "is highly deferential." *Tennis Channel*, 827 F.3d at 144.

Butte County cannot overcome this standard of review. In line with well-established precedent, the Department reasonably exercised its discretion and gave each party the opportunity to submit any new or updated information it wished the Department to consider on remand.

JA_(NEW_4044); JA_(NEW_4045); *see also Transcon. Gas Pipe Line*, 423 U.S. at 333; *Fly*, 309 U.S. 147; *PPG Indus.*, 52 F.3d at 366.

B. The Department gave Butte County a reasonable opportunity to respond to the Tribe's submission

Butte County argues that it was denied "an adequate opportunity to respond to the Tribe's" submission on remand. Opening Br. 33. As a legal matter, the County fails to grasp the distinction between the procedures in a formal adjudication and the procedures in an informal adjudication. Even so, as a factual matter, the Department provided Butte County with an opportunity to respond to the Tribe's submission. The County rejected that opportunity.

Contrary to Butte County's argument, it does not have the right to "submit rebuttal evidence," 5 U.S.C. § 556(d), in an informal adjudication, *see Pension Benefit Guar. Corp.*, 496 U.S. at 655 (informal adjudication does not require these "trial-type procedures"). Nor does the Department have an obligation to "disclose the materials" that it finds persuasive so that Butte County can "pre-rebut" its decision. *Sw. Airlines Co.*, 650 F.3d at 757.

Under Butte County's (incorrect) view of the APA, an agency could never issue a decision in an informal adjudication unless the agency gave an opposing party the last word on a timeline dictated by that party. *See* Opening Br. 33. Tellingly, Butte County offers no legal authority to support its self-serving view. There is none, as the APA

does not require an agency to engage in endless reexamination and re-analysis. *See, e.g.*, *Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 511 (D.C. Cir. 2010).

This Court should reject any argument that the Department nonetheless should have allowed the County to respond to the Tribe's submission under notions of fairness or due process. *See Vermont Yankee*, 435 U.S. at 543–44 (courts cannot order agencies to undertake procedures that are not specifically required by statute or regulation). In an informal adjudication, the APA does not require the Department to provide the County with *any* opportunity to respond to the Tribe's submission.

The APA, in an informal adjudication, requires the Department to: (1) give prompt notice if it denies a written request submitted by a party to the proceeding; and (2) accompany that notice with "a brief statement of the grounds for denial." 5 U.S.C. § 555(e). The Department complied with these "minimal procedural requirements," *Butte Cty.*, 613 F.3d at 194, when it issued a fifty-three page, single-spaced decision supported by substantial evidence to take the Chico parcel into trust for gaming on behalf of the Mechoopda Tribe, JA_(NEW_5384-5436).

Putting aside the procedural requirements for an informal adjudication, Butte County's failure to present rebuttal evidence was "a problem of its own making." *Tennis Channel*, 827 F.3d at 144. Though

not required by the APA, the Department actually gave Butte County "the opportunity to put such evidence in the record," *id.*, when the Department agreed to provide twenty days for the County to respond to the Tribe's submission, JA_(NEW_4260-61). Butte County flatly rejected this opportunity, never explained why twenty days was insufficient, and failed to ask the Department for an extension of time. The County instead told the Department that its decision allowing the County to respond was "simply not acceptable." JA_(NEW_4263); *see also* JA_(NEW_4264) ("cannot and will not accept").

Instead of submitting rebuttal evidence to the Department during the administrative process, Butte County chose litigation. *See* JA_(Dkt75). It should come as no surprise that the County did not prevail: the district court correctly concluded that the County "had ample time to submit" rebuttal information. JA_(Dkt101-1_at_14). Having chosen its litigation strategy, Butte County cannot demonstrate in this appeal that the Department clearly abused its discretion. *See Tennis Channel*, 827 F.3d at 144.

C. The Department properly granted the Tribe a fifteen-day extension of time to file its submission

The Department reasonably exercised its discretion and did not violate the procedural requirements imposed by the APA in informal adjudications when it gave the Mechoopda Tribe an extra fifteen days to

file its submission. *Butte Cty.*, 613 F.3d at 194. Butte County offers no legal authority to support its contrary argument. Opening Br. 28–30.

Perhaps daunted by the lack of legal authority to support its argument, Butte County hurls a barrage of baseless accusations. The County contends that the Tribe "acted in bad faith" and "intentionally misled the Department" into granting the Tribe's fifteen-day extension. Opening Br. 28; *see also id.* at 10 (the Tribe's "claims of insolvency" improperly "concealed" its "sneak attack"). On top of that, the County insinuates impropriety as to the Department, which, through alleged "*ex parte*" communications, *id.* at 28, "apparently" knew that the Tribe had already "abandoned its original 'expert' team . . . in favor of a new set of consultants," *id.* at 8.

Even assuming the validity of Butte County's accusations, the Department's "actual subjective motivation . . . is immaterial as a matter of law," unless the County can establish "bad faith or improper behavior" by the Department. *In re Subpoena Duces Tecum*, 156 F.3d 1279, 1279 (D.C. Cir. 1998); *see also Overton Park*, 401 U.S. at 420 ("inquiry into the mental processes of administrative decisionmakers is usually to be avoided" unless there is "a strong showing of bad faith or improper behavior").

The County's unfounded accusations fall well short of satisfying this requirement. Butte County has failed to overcome the

"presumption of honesty and integrity in those serving as [Department] adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975).

II. The Department's decision to take the Chico parcel into trust for gaming was neither arbitrary nor capricious

On remand, the Department reconsidered whether the Chico parcel qualified for gaming under the restored lands exception of the Indian Gaming Regulatory Act. *See* 25 U.S.C. § 2719(b)(1)(B)(iii). The Department analyzed the trust acquisition by applying the *Grand Traverse Band* factors and the part 292 regulations, and it reached the same conclusion under both analyses: the Chico Parcel qualifies as restored lands. *See* JA_(NEW_5389-90).

In this appeal, Butte County never directly discusses, much less critiques, the Department's analysis of the *Grand Traverse Band* factors or the part 292 regulations. The County merely asserts, in a footnote, that the Department's decision is arbitrary and capricious under both pre- and post-regulation authority. Opening Br. 1 n.1. The gravamen of Butte County's argument is that the Department "again ignored evidence directly relevant and contrary to its apparent desired result." *Id.* at 1. That is not so.

Throughout its decision, the Department "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United*

States, 371 U.S. 156, 168 (1962)). And the Department properly considered the 2006 Beckham report that presented contradictory evidence from which opposing inferences could be drawn. *See Siegel v. SEC*, 592 F.3d 147, 155 (D.C. 2010).

Even if this Court concludes that Butte County has offered "a plausible alternative interpretation of the evidence," *Throckmorton v. NTSB*, 963 F.2d 441, 444 (D.C. Cir. 1992) (quoting *Chritton v. NTSB*, 888 F.2d 854, 856 (D.C. Cir. 1989)), the County still cannot prevail. This Court cannot substitute its views—or those of Butte County—for the views of the Department even if the Court would "justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera*, 340 U.S. at 488.

Of course, judicial review of the Department's decision is "not by trial *de novo*." *Am. Bioscience*, 243 F.3d at 582. The APA does not permit this Court "to decide which side of the factual dispute it thinks the preponderance of the evidence in the administrative record falls on." *Ctr. for Auto Safety v. Dole*, 828 F.2d 799, 804 (D.C. Cir. 1987) (quotation marks omitted). That is, however, exactly what Butte County asks this Court to do.

Butte County misunderstands what it means for an agency to support its decision by substantial evidence. The Supreme Court defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolo v.*

Fed. Maritime Comm'n, 383 U.S. 607, 620 (1966) (quotation marks omitted). Because substantial evidence "is something less than the weight of the evidence," *id.*, "[t]his standard leaves open the possibility of sustaining the agency's determination even though one might draw 'two inconsistent conclusions from the evidence,'" *United Steel, Paper, & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Pension Benefit Guaranty Corp.*, 707 F.3d 319, 325 (D.C. Cir. 2013) (quoting *Consolo*, 383 U.S. at 620).

The Department reasonably concluded that the Chico Parcel qualifies as restored lands that can be taken into trust on behalf of the Tribe. The Department considered contradictory evidence in the record and supported its conclusion with substantial evidence. Butte County's preference for a different outcome cannot override the Department's "reasonable and reasonably explained" decision. *Jackson v. Mabus*, 808 F.3d 933, 936 (D.C. Cir. 2015).

A. This Court should disregard the 2014 Beckham report

Butte County repeatedly relies on the 2014 Beckham report that it filed in the district court nine months after the Department issued its decision taking the Chico parcel into trust. *See, e.g.*, Opening Br. 13, 18, 39, 41–42. Yet the County admits that "this report *was not considered* by the Secretary," *id.* at 12 (emphasis added), and that admission dooms any reliance on the report in this appeal.

As a factual matter, it was "impossible" for the Department to consider the 2014 Beckham report because the report postdates the Department's decision "by more than six months." JA_(Dkt128_at_12). Butte County never submitted the 2014 Beckham Report to the Department, and the Department never included the report in the administrative record (as it did not yet exist).

The district court did not abuse its discretion when it refused to allow the County to supplement the record with the 2014 Beckham report. *See Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1002 (D.C. Cir. 2008). Butte County has waived any argument to the contrary. *See New York v. EPA*, 413 F.3d 3, 20 (D.C. Cir. 2005) (per curiam) (an argument not raised in an opening brief is waived).

This appeal concerns the review of an agency action, and the only substantive question before this Court is whether it can sustain that action based on the record certified by the Department. *See, e.g.*, *Envtl. Def. Fund v. Costle*, 657 F.2d 275, 284 (D.C. Cir. 1981). Indeed, "it is black-letter administrative law that in an APA case, a reviewing court 'should have before it neither more nor less information than did the agency when it made its decision.'" *Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (per curiam) (quoting *Walter O. Boswell Mem'l Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984)); *see also IMP*, 129 F.3d at 623 (same).

This Court's task is simply "to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985) (citing *Overton Park*, 401 U.S. 402). The Court cannot consider extra-record information like the 2014 Beckham report, submitted in post-decision litigation, because "the focal point for judicial review should be the administrative record *already in existence*, not some new record made initially in the reviewing court." *Pitts*, 411 U.S. at 142 (emphasis added).

This Court must therefore disregard all references to the 2014 Beckham report, including all facts drawn from the report and all arguments based on those facts.

B. The Department properly concluded that the Chico parcel qualifies for gaming under the restored lands exception

The Indian Gaming Regulatory Act authorizes the Department to take lands into trust after 1988 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) (emphasis added).

This statutory exception has two requirements: (1) the Mechoopda Tribe must qualify as a restored tribe; and (2) the Chico parcel must qualify as restored lands. JA_(NEW_5398); *see also City of Roseville*, 348 F.3d at 1026–28. The Department analyzed both

requirements, considered contradictory evidence in the record, and concluded that it could take the Chico parcel into trust for gaming on behalf of the Tribe. *See* JA_(NEW_5398-5409). The Department's decision was neither arbitrary nor capricious.

1. The Mechoopda Tribe is a restored tribe

The first question is whether the Mechoopda Tribe is a "restored" tribe under the Act. It is. *See* JA_(NEW_5398-5400). This Court acknowledged that "the government restored the Tribe to federal recognition in 1992." *Butte Cty.*, 613 F.3d at 192 (citing Reinstatement, 57 Fed. Reg. 19,133 (May 4, 1992)). Butte County does not challenge the Tribe's status as a restored tribe. *See* Opening Br. 18.

2. The Chico parcel qualifies as restored lands

The Department analyzed the restored lands exception applying pre-2008 authority (*i.e.*, analyzing the *Grand Traverse Band* factors) and also applying the regulations at 25 C.F.R. part 292. Either way, the Chico parcel qualifies as restored lands under 25 U.S.C. § 2719(b)(1)(B)(iii).

a. Pre-2008 authority

To determine whether the Chico parcel qualified as restored lands under pre-2008 authority, the Department considered three factors: (1) the factual circumstances of the acquisition; (2) the location of the acquisition; and (3) the temporal relationship of the acquisition to the tribal restoration. JA_(NEW_5400) (citing *Grand Traverse Band* 198 F.

Supp. 2d at 935–36). The Department reasonably concluded that each factor weighed in favor of classifying the Chico parcel as restored lands.

Factual circumstances. The Department explained that Congress included statutory exceptions for newly acquired lands in the Indian Gaming Regulatory Act so that tribes without reservations or trust lands when the Act was enacted in 1988 would "not be disadvantaged relative to more established tribes." JA_(NEW_5401) (citing *City of Roseville*, 348 F.3d at 1030). The Mechoopda Tribe previously had tribal trust land; the United States took the Chico Rancheria into trust on behalf of the Tribe in 1939. *Id.* But the United States terminated the Chico Rancheria in 1967 and liquidated most of the Tribe's communal property. *Id.*

Since the United States restored the Mechoopda Tribe, the Tribe has tried to acquire tribal trust lands. *Id.* The Department therefore concluded: "As a tribe without restored lands eligible for gaming, but which has pursued such lands since its restoration, the factual circumstances factor weighs in favor of finding that the [Chico parcel] qualifies as restored." *Id.* Butte County waived any challenge to this conclusion. *See New York*, 413 F.3d at 20.

Location. To assess the location factor, the Department considered the Tribe's historical and modern connections to the Chico parcel. JA_(NEW_5401-05). Butte County challenges this analysis, suggesting that there is no "evidence documenting a *direct and*

unequivocal tribal connection between the modern Mechoopda Tribe and the 1851 Treaty tribe." Opening Br. 23 (original emphasis).

As an initial matter, Butte County fails to recognize that there are inherent "limitations" vis-à-vis "the extent of primary historical resources prior to the Nineteenth Century that are available," JA_(NEW_5390), to provide the "direct and unequivocal" historical connection that it demands, Opening Br. 23.

In any event, there is no requirement for the Department to insist on evidence that establishes a direct and unequivocal historical connection. Instead, in assessing a tribe's historical connection to the land, the Department "look[s] for indicia that, *on the whole*, connect the Tribe to the land" near the Chico parcel. JA_(NEW_5402) (emphasis); *see also Kaufman v. Perez*, 745 F.3d 521, 527 (D.C. Cir. 2014) (this Court sets aside factual findings "only if unsupported by substantial evidence on the record *as a whole*") (quoting *Chippewa Dialysis Servs. v. Leavitt*, 511 F.3d 172, 176 (D.C. Cir. 2007) (emphasis added).

Butte County argued that the Tribe should not be allowed to rely on historical connections pre-dating the Mechoopda village on Bidwell's ranch, but the Department properly rejected this argument. JA_(NEW_5402-03). The 2006 Beckham report, the Department explained, "does not acknowledge the existence of the Mechoopda as a tribe prior to Euro-American settlement." JA_(NEW_5403). Beckham noted that Maidu Indians lived in "autonomous" "village communities,"

JA_(NEW_3177), yet he refused to characterize the Mechoopda as a tribe, JA_(NEW_5403). The Department reviewed "the same primary sources" discussed in Beckham's report and found that those sources "point[ed] to the contrary conclusion." JA_(NEW_5403).

Before settlers arrived, Mechoopda Indians lived in several villages to the south of Chico Creek. JA_(NEW_5395). Indeed, "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." JA_(NEW_5393).

In 1851, the Mechoopda Tribe, joined by eight other tribes, signed a treaty with the United States that would have established a reservation for the tribes. JA_(NEW_5396). The treaty negotiations occurred on Bidwell's ranch, where many Mechoopda Indians then lived. JA_(NEW_5395-96). "Through the treaty negotiations, the United States recognized the Mechoopda Tribe as a sovereign political entity with whom it had a government-to-government relationship." JA_(NEW_5403). In his analysis, Beckham failed to acknowledge that even unsuccessful treat negotiations provide evidence that the United States treated the Mechoopda as a political entity. Unlike Beckham, the United States in 1851 "did not treat the Mechoopda as a village locality or a dialect." *Id.*

The Department "decline[d] to adopt the County's conclusions that the Mechoopda Tribe was a creation of the Bidwells." JA_(NEW_5403). Reviewing the historical evidence, the Department concluded "that the Mechoopda were a tribal polity that had significant historical connections to the region prior to John Bidwell's arrival, and those connections were not severed when the Tribe resided at Chico Rancheria." *Id.*

Even assuming there is a distinction between the federally recognized "modern tribe" (Br. 32) and the "historic Mechoopda tribelet" that signed the 1851 Treaty (Br. 35), it is a distinction without a difference. Butte County acknowledges that the "modern" Mechoopda Tribe can "trace its historical lineage to the multi-ethnic worker village at the Bidwell Ranch going back to the *late 19th Century* or early 20th Century." Opening Br. 22 (discussing Beckham's "documented conclusion") (emphasis added).

It is therefore "undisputed that during the late Nineteenth Century, the Mechoopda resided on the Bidwell Ranch, which later became the center of the Town of Chico and the *Tribe's Rancheria*." JA_(NEW_5404) (emphasis added). The Department reasonably explained that the Chico Parcel is "approximately 10 miles from the Tribe's former Rancheria," which "is *historically significant* to the Tribe." JA_(NEW_5402) (emphasis added).

Butte County insists that twentieth century census records disprove any connection between the modern Mechoopda Tribe and the Tribe that signed the 1851 treaty. *See, e.g.*, Opening Br. 16, 29–32. The Department disagreed:

> [The Mechoopda Tribe] persisted after the 1851 Treaty negotiations through to and after 1934, as evidenced by the enrollment of Mechoopda children in [Bureau of Indian Affairs] schools between 1899-1902; the report and censuses prepared by California Indian Agent Charles F. Kelsey in 1905-1906; the Department's efforts to investigate the issues facing the Tribe in 1914 and 1927; and the Department's efforts to acquire land in trust for the Tribe in 1934, culminating in the acquisition of the Mikchopdo [village] in trust to establish the Chico Rancheria in 1939.

JA_(NEW_5415).

The Department acknowledged that the Mikchopdo village "had a diverse Indian population," yet "[m]any of these newcomers integrated themselves into the Mechoopda culture and political structure." JA_(NEW_5397). The Mechoopda "absorbed a succession of other Indians into the Tribe" but "remained culturally and politically intact." JA_(NEW_5404). Contrary to Beckham's assessment, the Department viewed the Mechoopda village "as a dynamic community that was willing to change in order to survive." *Id.*

Tribal members later referred to the village as "Bahapki" (Maidu for "mixed"), but that "did not signal an end to the Tribe's traditions and political structure." JA_(NEW_5404); *see also* JA_(NEW_5395).

The Department concluded that "it was quite the opposite—the Tribe persevered and prevailed through the Bidwells' lives and after Federal involvement with the Tribe." JA_(NEW_5404).

Other evidence supported the Tribe's historical connection to the land. The Department noted that the Chico parcel is "located only one mile from three buttes called the Pentz Hills that have noted cultural significance to the Tribe." JA_(NEW_5405). On one of these buttes, the Mechoopda mythic hero "Oankoitupeh fought the fierce Black Eagle," and on another "he slew an evil female being." *Id.* n.144. The Department further noted that the Chico parcel is "within the reservation boundaries that would have been created for the Tribe under the Treaty of 1851, had that treaty been ratified." JA_(NEW_5405).

In sum, the Department concluded that the evidence in the record, on the whole, demonstrated the Mechoopda Tribe's "significant historical connection" to the Chico parcel. JA_(NEW_5405). This conclusion is neither arbitrary nor capricious.

As to the Tribe's modern connection to the land, the Department explained that a majority of the tribal members live in and around Chico and most of them "share a direct genealogical link to the Mechoopda Indians who resided at the Mechoopda Indian Village." JA_(NEW_5405). The Department reasonably concluded that these

modern connections weigh in favor of the Tribe. *Id.* Butte County waived any challenge to this conclusion. *See New York*, 413 F.3d at 20.

Temporal relationship. Though "the time period between restoration of the Tribe and restoration of the land has been lengthy," the Department explained that is "through no fault of the Tribe." JA_(NEW_5405-06). The temporal factor, the Department concluded, thus does not weigh against the Mechoopda Tribe. *Id.* Butte County waived any challenge to this conclusion. *See New York*, 413 F.3d at 20.

* * *

Considering the evidence in administrative record, the Department reasonably concluded under its pre-2008 authority that all three factors from *Grand Traverse Band* supported taking the Chico parcel into trust for gaming as a "restoration of lands" under the Indian Gaming Regulatory Act. *See* 25 U.S.C. § 2719(b)(1)(B)(iii). This conclusion must stand, as the Department articulated a rational connection between the evidence and its conclusion. *See State Farm*, 463 U.S. at 43.

This Court's precedent further supports the Department's conclusion. In *City of Roseville*, 348 F.3d at 1022, the Court held that the Department properly took a parcel of land into trust for the United Auburn Indian Community as a "restoration of lands" under 25 U.S.C. § 2719(b)(1)(B)(iii) by applying pre-regulation authority. Local cities opposed the trust acquisition because the parcel of land was "possibly as

far as 40 miles away" from the Auburn Tribe's former rancheria. *Id.* at 1023. The cities argued that the tribe did not have a connection to the parcel, but this Court rejected that argument as "ahistorical"—the Auburn Tribe descended from Maidu tribes that "occupied much of central California." *Id.* at 1027.

The Court similarly should reject Butte County's ahistorical argument, as the Mechoopda Tribe's "unbroken history and cultural presence in the area is well documented." JA_(NEW_5397).

b. Part 292 regulations

The Department also supported its conclusion to take the Chico parcel into trust under the regulations at 25 C.F.R. part 292. *See* JA_(NEW_5406-09).

For the Chico parcel to qualify as restored lands under the regulations, the Mechoopda Tribe must satisfy "the requirements of paragraph (a), (b), or (c)" found in 25 C.F.R. § 292.11. Paragraph (c) applies here because the United States restored the Mechoopda Tribe's status "by a court-approved settlement agreement." *Id.* § 292.11(c). And paragraph (c) simply says that the Tribe must satisfy the requirements of Section 292.12.

Like the *Grand Traverse Band* factors, this provision requires the Tribe to demonstrate a modern connection to the land, § 292.12(a), "a significant historical connection to the land," § 292.12(b), and "a temporal connection between the date of the acquisition of the land and

the date of the tribe's restoration," § 292.12(c). The Department analyzed each requirement and concluded that the Chico parcel qualifies as restored land that can be taken into trust for gaming under 25 U.S.C. § 2719(b)(1)(B)(iii). *See* JA_(NEW_5406-09).

Butte County challenges only the Tribe's historical connection to the Chico parcel. *See, e.g.*, Opening Br. 2 (arguing that the Department "arbitrarily and capriciously found the requisite historical connection"). Butte County waived any challenge to the Tribe's modern or temporal connection to the land. *See New York*, 413 F.3d at 20.

Under the regulations, a tribe can establish a significant historical connection to a parcel of land in two ways. The tribe can demonstrate: (1) "the land is located within the boundaries of the tribe's last reservation under a ratified or *unratified* treaty," or (2) through historical evidence showing "the existence of the tribe's villages, burial grounds, occupancy or subsistence use *in the vicinity* of the land." 25 C.F.R. § 292.2 (emphasis added). The Department concluded that the Mechoopda Tribe demonstrated a historical connection under either criterion. JA_(NEW_5408-09).

In an addendum to its opening brief, Butte County included several provisions of the part 292 regulations, but it left out 25 C.F.R. § 292.2. The County never discusses Section 292.2, much less presents an argument regarding the Department's application of this regulation.

For the first criterion under Section 292.2, the Department reasonably explained that the Chico parcel is located "within the boundaries of the reservation that would have been created by the unratified Treaty of 1851." JA_(NEW_5408). The Mechoopda Tribe can therefore demonstrate a historical connection to the Chico parcel "under this criterion alone." *Id.*

But that is not all. The Department also found sufficient evidence in the record to satisfy the second criterion to establish a historical connection. JA_(NEW_5409). Among other things, the Department noted:

- The former Chico Rancheria and the Tribe's historic cemetery are located about ten miles from the Chico parcel, JA_(NEW_5408);
- Before the Mechoopda Tribe came into contact with settlers, the Tribe had a village about eight miles from the Chico parcel, *id.*;
- The Chico parcel is located one mile from the three buttes at Pentz Hills, which have cultural significance to the Tribe, JA_(NEW_5405); and
- Even if the Tribe's historical territory did not extend to the Chico parcel, the Department deduced that the Tribe ventured near the parcel "for trade, ceremonies, and . . . sustenance," JA_(NEW_5409).

The Department reasonably concluded that the Mechoopda Tribe demonstrated a historical connection to the Chico parcel under the part 292 regulations. *Id.* Because the Department articulated a rational connection between the evidence and its conclusion, this conclusion must be upheld. *See State Farm*, 463 U.S. at 43.

C. The Department considered the 2006 Beckham report and the County's other material

Butte County argues that the Department "again failed to reconcile its decision" with the 2006 Beckham report. Opening Br. 1. The County misreads the Department's decision.

This Court vacated the Department's earlier decision because there was no indication that the Department "actually considered" the 2006 Beckham report. *Butte Cty.*, 613 F.3d at 194. The exact opposite is true here. On the very first page of its decision, the Department stated that it had reviewed "the [2006] Beckham Report, as well as other information received from the parties." JA_(NEW_5384).

The APA certainly requires an agency "to *consider* contradictory record evidence where such evidence is precisely on point." Opening Br. 38 (quoting *Morall v. DEA*, 412 F.3d 165, 167 (D.C. Cir. 2005)) (emphasis added). But that does not mean that the agency must *accept* all contrary evidence.

Butte County confuses what it means for an agency to consider contrary evidence. The Department did not "ignore" contradictory

evidence simply because it disagreed with Beckham's interpretation of that evidence. *See, e.g.*, Opening Br. 14, 30, 35, 38. The APA does not require the Department to accept all countervailing interpretations of record evidence. Likewise, this Court's function is simply to determine whether the Department "could fairly and reasonably find the facts as it did." *Throckmorton*, 963 F.2d at 444 (quoting *Chritton*, 888 F.2d at 856).

Butte County does not really argue that the Department's decision was arbitrary and capricious under the APA. What the County really argues is that the Department did not "give a fuller explanation" for rejecting Beckham's interpretation of the evidence. *Hudson*, 192 F.3d at 1036. For instance, Butte County faults the Department for failing "to reconcile . . . the entire 1928-33 Chico census" that Beckham reproduced in his report. Opening Br. 19. Yet this argument misses the forest for the trees.

First, the APA does not require the Department to identify and refute every piece of contrary evidence or opposing argument in its decision. A "curt" explanation may suffice, *Pitts*, 411 U.S. at 143, just as "not a very detailed" explanation survives APA review, *Hudson*, 192 F.3d at 1036. In an informal adjudication, the APA requires only that the Department provide Butte County a "brief statement of the grounds for denial." *Butte Cty.*, 613 F.3d at 194 (quoting 5 U.S.C. § 555(e).

Second, the Department considered and rejected Beckham's attempt to rely on census data in concluding "that the Mechoopda Tribe is no more than an amalgamation of members of various Indian tribes and non-Indians brought together and shaped by the Bidwells, and, further, that the contemporary Mechoopda Tribe is not the successor-in-interest to the Tribe that negotiated the 1851 Treaty." JA_(NEW_5420); *see also* JA_(NEW_3221-25).

The Department explained that it did not find Beckham's "arguments persuasive based on the history of the Mechoopda" and other evidence in the record. JA_(NEW_5420). The Department found "Dr. Tiley's report more persuasive" and reasonably explained why: the evidence in the record "on the whole" supported Tiley's conclusions. *Id.*

Butte County's myopic attack on Tiley's report falls apart upon inspection. *See* Opening Br. 8–9, 11–16, 18–20, 37–41. While analyzing the historical background of the Mechoopda Tribe, the Department relied "in part" on Tiley's report, JA_(NEW_5420), but it also relied on its "own independent research," JA_(NEW_5390); *see also* JA_(Dkt128at16). The district court rightly recognized that the Department cited "many sources to support [its] conclusions, only one of which is the Tiley Report." JA_(Dkt128at16).

The Department carefully considered and reasonably rejected other arguments advanced by Butte County and the 2006 Beckham report. For example:

- "[W]e address and reject the argument raised by the County that the current Mechoopda Tribe should be precluded from using any historical accounts that pre-date the Bidwell Ranch to demonstrate a significant historical connection to the [Chico parcel]," JA_(NEW_5388);
- "We decline to adopt the County's conclusions that the Mechoopda Tribe was a creation of the Bidwells," JA_(NEW_5403);
- After reviewing "the same primary sources" discussed in Beckham's report, the Department found that those sources "point[ed] to the contrary"; it therefore "reject[ed] the County's conclusion that the Mechoopda Tribe had no political existence before moving onto Chico Rancheria," JA_(NEW_5403); *see also* JA_(NEW_5408) (rejecting Beckham's analysis of the Tribe's pre-contact history).

These examples illustrate that, contrary to the County's arguments, the Department's decision "was thorough and well-reasoned." JA_(Dkt128at17).

Butte County claims that the Mechoopda Tribe never had "a formal functioning tribal government" and points out that the Tribe "did not vote on the [Indian Reorganization Act], had no constitution or bylaws, and had no membership regulations." Opening Br. 17. But context matters. In 1934, "the Mechoopda themselves requested an

election to vote on the [Indian Reorganization Act]." JA_(NEW_5418). At that time, the United States was still in the process of taking the Chico Rancheria into trust, so the Tribe was told to wait. *Id.* Even so, the Department reasonably explained that the lack of an election "does not alter" the Mechoopda Tribe's status. *Id.*

Butte County suggests that the Tribe formed a government "to devise a way to dispose of the real property of the Bidwell Rancheria" under the California Rancheria Termination Act. Opening Br. 17. But the Department reasonably explained that the County misreads the historical record. JA_(NEW_5422). Residents of the Chico Rancheria had started drafting a constitution in 1955, three years *before* Congress passed the California Rancheria Act. *Id.*

As a last-gasp argument, Butte County attacks the credentials of the Tribe's experts. *See, e.g.*, Opening Br. 6, 20, 29. But this Court should not pick a winner among "dueling experts." *Sw. Airlines*, 650 F.3d at 756. The Department reasonably explained why it relied on analysis provided by some experts and rejected the analysis provided by others. Under the APA's standard of review, this Court may not "displace the [Department's] choice between conflicting views." *Id.* (quoting *Am. Wrecking Corp. v. Sec'y of Labor*, 351 F.3d 1254, 1261 (D.C. Cir. 2003)).

CONCLUSION

This Court should affirm the district court's decision granting judgment in favor of the federal defendants and intervenor Mechoopda Tribe.

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General

WILLIAM B. LAZARUS
ROBERT P. STOCKMAN
LAURA L. MAUL
JEFFREY S. BEELAERT
Attorneys, U.S. Dep't of Justice
Env't & Nat. Res. Div.
P.O. Box 7415
Washington, DC 20044
(202) 307-6250
Jeffrey.Beelaert@usdoj.gov

Of Counsel:

JENNIFER TURNER
Office of the Solicitor,
U.S. Dep't of the Interior

March 7, 2017
DJ # 90-6-16-00973

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 12,838 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and D.C. Cir. R. 32(e)(1).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because I prepared it using Microsoft Word in a proportionally-spaced typeface, Century Schoolbook 14-point.

/s/ Jeffrey S. Beelaert
JEFFREY S. BEELAERT
U.S. Dep't of Justice
Env't & Nat. Res. Div.
P.O. Box 7415
Washington, DC 20044
(202) 307-6250
Jeffrey.Beelaert@usdoj.gov

STATUTORY AND REGULATORY ADDENDUM

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25 C.F.R. § 292.2, How are key terms defined in this part?

For purposes of this part, all terms have the same meaning as set forth in the definitional section of IGRA, 25 U.S.C. 2703. In addition, the following terms have the meanings given in this section.

Appropriate State and local officials means the Governor of the State and local government officials within a 25-mile radius of the proposed gaming establishment.

BIA means Bureau of Indian Affairs.

Contiguous means two parcels of land having a common boundary notwithstanding the existence of non-navigable waters or a public road or right-of-way and includes parcels that touch at a point.

Former reservation means lands in Oklahoma that are within the exterior boundaries of the last reservation that was established by treaty, Executive Order, or Secretarial Order for an Oklahoma tribe.

IGRA means the Indian Gaming Regulatory Act of 1988, as amended and codified at 25 U.S.C. 2701–2721.

Indian tribe or tribe means any Indian tribe, band, nation, or other organized group or community of Indians that is recognized by the Secretary as having a government-to-government relationship with the United States and is eligible for the special programs and services provided by the United States to Indians because of their

status as Indians, as evidenced by inclusion of the tribe on the list of recognized tribes published by the Secretary under 25 U.S.C. 479a–1.

Land claim means any claim by a tribe concerning the impairment of title or other real property interest or loss of possession that:

(1) Arises under the United States Constitution, Federal common law, Federal statute or treaty;

(2) Is in conflict with the right, or title or other real property interest claimed by an individual or entity (private, public, or governmental); and

(3) Either accrued on or before October 17, 1988, or involves lands held in trust or restricted fee for the tribe prior to October 17, 1988.

Legislative termination means Federal legislation that specifically terminates or prohibits the government-to-government relationship with an Indian tribe or that otherwise specifically denies the tribe, or its members, access to or eligibility for government services.

Nearby Indian tribe means an Indian tribe with tribal Indian lands located within a 25-mile radius of the location of the proposed gaming establishment, or, if the tribe has no trust lands, within a 25-mile radius of its government headquarters.

Newly acquired lands means land that has been taken, or will be taken, in trust for the benefit of an Indian tribe by the United States after October 17, 1988.

Office of Indian Gaming means the office within the Office of the Assistant Secretary–Indian Affairs, within the Department of the Interior.

Regional Director means the official in charge of the BIA Regional Office responsible for BIA activities within the geographical area where the proposed gaming establishment is to be located.

Reservation means:

(1) Land set aside by the United States by final ratified treaty, agreement, Executive Order, Proclamation, Secretarial Order or Federal statute for the tribe, notwithstanding the issuance of any patent;

(2) Land of Indian colonies and rancherias (including rancherias restored by judicial action) set aside by the United States for the permanent settlement of the Indians as its homeland;

(3) Land acquired by the United States to reorganize adult Indians pursuant to statute; or

(4) Land acquired by a tribe through a grant from a sovereign, including pueblo lands, which is subject to a Federal restriction against alienation.

Secretarial Determination means a two-part determination that a gaming establishment on newly acquired lands:

(1) Would be in the best interest of the Indian tribe and its members; and

(2) Would not be detrimental to the surrounding community.

Secretary means the Secretary of the Interior or authorized representative.

Significant historical connection means the land is located within the boundaries of the tribe's last reservation under a ratified or unratified treaty, or a tribe can demonstrate by historical documentation the existence of the tribe's villages, burial grounds, occupancy or subsistence use in the vicinity of the land.

Surrounding community means local governments and nearby Indian tribes located within a 25-mile radius of the site of the proposed gaming establishment. A local government or nearby Indian tribe located beyond the 25-mile radius may petition for consultation if it can establish that its governmental functions, infrastructure or services will be directly, immediately and significantly impacted by the proposed gaming establishment.

CERTIFICATE OF SERVICE

I certify that on March 7, 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. All case participants are CM/ECF users, so they will be served by the CM/ECF system.

/s/ Jeffrey S. Beelaert

JEFFREY S. BEELAERT
U.S. Dep't of Justice
Env't & Nat. Res. Div.
P.O. Box 7415
Washington, DC 20044
(202) 307-6250
Jeffrey.Beelaert@usdoj.gov