No. 16-5240

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

BUTTE COUNTY, CALIFORNIA,

Plaintiff-Appellant

v.

JONODEV OSCEOLA CHAUDHURI, IN HIS OFFICIAL CAPACITY AS CHAIRMAN, NATIONAL INDIAN GAMING COMMISSION et al.,

Defendants-Appellees

v.

MECHOOPDA INDIAN TRIBE OF CHICO RANCHERIA, CALIFORNIA, A FEDERALLY RECOGNIZED INDIAN TRIBE,

Intervenor for Defendants – Appellees.

On Appeal From the United States District Court for the District Of Columbia in

Case No. 08-00519, Frederick J. Scullin, United States District Judge

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APPELLEE-INTERVENOR'S RESPONSE BRIEF

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to this Court's August 22, 2016 Order, Plaintiff-Appellant Butte County, California hereby certifies as follows:

I. PARTIES

The parties in this case are: (a) Plaintiff - Appellant Butte County, California, (b) Defendant-Appellees Jonodev Osceola Chaudhuri, in his official capacity as Chairman, National Indian Gaming Commission; Sally Jewell, in her official capacity as Secretary, United Stated Department of the Interior; Lawrence S. Roberts, in his official capacity as Assistant Secretary-Indian Affairs, United States Department of the Interior, the United States Department of the Interior, and (c) Intervenor for Defendant-Appellee Mechoopda Indian Tribe of Chico Rancheria, California, a federally recognized Indian Tribe.

II. RULING UNDER REVIEW

The ruling under review in this case is the July 15, 2016, "Memorandum-Decision and Order" entered by Judge Frederick J. Scullin in the United States District Court for the District of Columbia denying Plaintiff-Appellant Butte County's Motion for Summary Judgment (Docket No. 115), granting Defendant-Appellees' Cross-Motion for Summary Judgment (Docket No. 117) and granting Intervenor-Defendant Mechoopda Indian Tribe of Chico Rancheria's Cross-Motion

for Summary Judgment (Docket No. 119). *Butte County v. Chaudhuri et al.*, No. 08-00519-FJS, Doc. No. 128 (D.D.C. Jul. 15, 2016). Plaintiff-Appellant Butte County filed a Notice of Appeal in this Court on August 15, 2016 which was docketed in this Court on August 22, 2106.

III. RELATED CASES

This Court first addressed this matter in *Butte County. v. Hogen*, 613 F.3d 190, 194 (D.C. CIR. 2010). Plaintiff-Appellants challenged a 2008 decision of the Secretary ("2008 Decision"). The United States District Court for the District of Columbia upheld the Secretary's decision. *Butte County v. Hogen*, 609 F. Supp. 2d 20 (D.D.C. 2009). On July 13, 2010, this Court reversed the District Court and remanded the case for the Secretary to include a 2006 report from Appellant in the consideration of its decision. *Butte County v. Hogen*, 613 F.3d 190, 194 (D.C. CIR. 2010).

CORPORATE DISCLOSURE STATEMENT

Anderson Indian Law is a sole proprietorship; it is not a partnership and has no partners or silent partners. There is no parent corporation or any publicly held corporation that owns 10% or more of its stock.

APPELLEE-INTERVENOR'S BRIEF

Comes now the Appellee-Intervenor, Mechoopda Indian Tribe of Chico Rancheria, California, a federally recognized Indian tribe, by and through its undersigned Counsel of record, pursuant to this Court's December 12, 2016 Order, and submits its brief.

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STATEMENT OF ISSUES FOR REVIEW

I. **Whether the District Court Properly Determined that the Secretary of Interior's Administrative Process in Issuing his January 24, 2014 Decision ("2014 Decision") was Neither Arbitrary Nor Capricious Under the Administrative Procedures Act ("APA") When It Included Instructions to Allow Final Submissions of "Any and All" Information to Appellant Butte County ("County") and Permitted Appellee-Intervenor, the Mechoopda Indian Tribe of Chico Rancheria of California ("Tribe") to Respond to This Submission.**

II. **Whether the District Court Properly Determined that the Administrative Procedures Act Was Not Violated Where the Secretary Granted Both Parties an Extension Request to Provide Additional Information During the Remand Process.**

III. **Whether the District Court Properly Determined that the Secretary's January 24, 2014 Decision Considered the Submissions of the Parties, Documented the Agency's Thorough Review, and Reached Conclusions Consistent with the Requirements of the Administrative Procedures Act.**

STANDARD OF REVIEW

The Administrative Procedure Act requires courts to affirm an agency's action "if a rational basis exists for the agency's decision." *Am. Fin. Servs. Ass'n v. FTC*, 767 F.2d 957, 985 (D.C. CIR. 1985). The standard of review is "highly deferential" and "presumes agency action to be valid." *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 997 (D.C. CIR. 2008).

Courts may set aside agency action where it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). A decision is not arbitrary and capricious unless there is no rational basis. "It is not enough for the agency decision to be incorrect; so long as it has some rational basis, the court is bound to uphold the decision." *New Life Evangelistic Ctr., Inc. v. Sebelius*, 753 F. Supp. 2d 103, 112 (D.D.C. 2010)(citing *Hosp. of Univ. of Pa. v. Sebelius*, 634 F. Supp. 2d 9, 13 (D.D.C. 2009). Further, the reviewing court cannot substitute its judgment for the agency's. *New Life*, 753 F. Supp.2d at 112 (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971).

The burden of proof lies with the party challenging the agency action. *New Life*, 753 F. Supp.2d at 112. In this case, the County, which is challenging the Secretary's Decision, must show that there was no rationale for the Secretary's 2014 Decision or the process used to reach the Decision.

STATEMENT OF THE CASE

On March 13, 2008, the Secretary of the United States Department of the Interior ("Secretary") issued a Decision ("2008 Decision") authorizing the acceptance of a parcel of the Tribe's land in trust for the benefit of the Tribe, which the Secretary is authorized to do under Section 5 of the Indian Reorganization Act, 25 U.S.C § 465.[1] The County challenged the decision on the premise that a report prepared by its consultant Stephen Beckham, was not considered in the Decision ("2006 Beckham Report"). *Butte County, California v. Hogen et al.*, 609 F. Supp. 2d 20 (D.D.C. 2009). The District Court rejected the County's argument and the County appealed to this Court. This Court accepted the County's argument and found that the failure of the Secretary to consider the 2006 Beckham report violated the Administrative Procedures Act. This Court remanded the decision back to the District Court with instructions to proceed consistent with its opinion. *Butte County v. Hogen*, 613 F.3d 190 (D.C. Cir. 2010).

The District Court allowed the County, the Tribe and the Secretary to provide their respective views on the appropriate scope of the remand. Docket No. 70 at 1. The County took a broad approach and sought a directive to the Secretary

[1] The initial March 13, 2008 Decision was rendered under the tenure of Secretary of Interior Dirk Kempthorne. The January 24, 2014 Decision which is the subject of this appeal was issued during the tenure of Secretary Sally Jewell but was signed by Assistant Secretary – Indian Affairs Kevin K. Washburn. Therefore, references to the Secretary will utilize the masculine pronoun.

"to review and consider all materials to be considered as a matter of law." Docket No. 72 at 1. By contrast, the Tribe proposed that the remand be solely focused on the 2006 Beckham Report. Docket No. 73. These positions are in many ways the mirror opposite of the positions held by the parties today. Following all three parties' respective recommendations, the District Court on December 10, 2010 ordered the Secretary to include the 2006 Beckham Report in any further proceedings but did not otherwise limit or restrict the Secretary's review. Docket No. 74. Neither the County nor the Tribe appealed this decision.

After the decision of the District Court, but before the structured remand process began, both the County and the Tribe unilaterally submitted materials to the Secretary. *See* Docket No. 74. *See* Docket No. 75-4 (summarized in April 12, 2011 Deputy Solicitor-Indian Affairs Patrice Kunesh letter to County). The Tribe submitted an analysis of its history in light of the intervening United States Supreme Court case *Carcieri v. Salazar*, 555 U.S. 379 (2009). Docket No. 114. The County submitted "assorted court filings" from the preceding litigation, a critique of a 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 proceedings. *Id.*

On April 12, 2011, the Deputy Solicitor-Indian Affairs sent correspondence to the County (with a copy to the Tribe) setting forth the procedural process the

Secretary would utilize on remand. Docket 75-4; Docket 79-1. On the same date, an almost identical letter was sent to the Tribe (with a copy to the County). AR_NEW_0004045. First, the Secretary acknowledged and accepted the above noted interim filings by both the County and the Tribe. Second, the Secretary allowed the County to submit "any and all new information that its wishes the Secretary to consider on remand …" Docket 75-4. The Tribe was permitted to respond to the Beckham Report "and the County's new submissions." AR_NEW_0004045.

On May 12, 2011, the County provided its submission to the Secretary and included a number of documents. Docket 75-5. These included an October 2010 report prepared by Stephen Dow Beckham, his resume, a letter to then Interior Assistant Secretary for Indian Affairs Larry Echo-Hawk, an Index of fourteen (14) documents from the earlier District Court pleadings filed in *Butte County v. Hogen*, and an incorporation by reference of the 2006 Beckham Report. *Id.*

On June 28, 2011, following a fifteen(15) day extension request that was granted, the Tribe filed a "Report and Response of the Mechoopda Tribe of the Chico Rancheria to the May 12, 2011 Response of Butte County Filed with the Office of the Solicitor for the Department of Interior." Docket No. 75-7 to 75-20. This response included a document entitled "Rebuttal to the Beckham Report Regarding the Mechoopda Indians" by Shelley Tiley, Ph.D. and edited by Pat

Mikkleson, M.A., RPA, Far Western Anthropological Research Group (the "Tiley Report"). After this submission, the Secretary closed the record on July 12, 2011. Docket No. 75-21.

On July 18, 2011, the County submitted a response to the Tribe's submission. Docket No. 75-22. This correspondence also asked the Secretary to either reject the Tribe's submission or reopen the record to allow the County to respond. *Id.* On August 11, 2011, the Deputy Solicitor granted the County's request and allowed the County an additional twenty days until August 31, 2011 to respond to the Tribe's submission. Docket 25-23.

Instead of taking the opportunity granted to it, the County waived its right to respond and the August 31, 2011 deadline passed. Thereafter, on September 19, 2011, the County filed a Motion to Clarify December 22, 2010 Remand Order and/or Limit the Administrative Record on Remand in the District Court and again sought to limit the scope of the evidence accepted in the remand process. Docket No. 75. Specifically the County sought to "include Plaintiff County's May 12, 2011 submission and previous submissions in its review and exclude the Tribe's June 28, 2011 submission." Docket No. 75 at 3. On March 19, 2012, the District Court denied the County's Motion. Docket No. 86. With respect to the acceptance of the Tiley Report, the Court noted: "Whatever else the Department of Interior

may feel may be relevant to the decision as to the issues involved, I think that's their prerogative." *See* Docket No. 101-1 at 13.

The District Court's Order was not appealed and the Secretary proceeded to spend the next eighteen months evaluating the County and Tribe's submissions and conducting its own individual research. On January 24, 2014, the Secretary issued a new decision to take the subject land in trust for the Mechoopda Tribe, a notice of which was published on February 5, 2015. 79 Fed. Reg. 6917 (Feb. 5, 2014). ("2014 Decision").

On November 20, 2014, over nine months after the Secretary had issued his Decision, the County once again filed a Motion in the District Court to remand the matter back to the Secretary of Interior. This Motion repeated many of the same arguments that had previously been rejected by the District Court. On July 15, 2016, the Memorandum-Decision and Order entered by Judge Frederick J. Scullin, Jr. denied the County's Motion and granted the Secretary's (and Tribe's) respective Cross Motions for Summary Judgment. Final judgment was entered in favor of Appellees and Intervenor-Appellees. *Butte County. v. Chaudhuri, et al.*, No. 1:08-CV-00519-FJS (D.D.C. July15, 2016); Docket No. 128. Plaintiff-Appellant filed a Notice of Appeal on August 15, 2016. Docket No. 130.

STATEMENT OF THE FACTS

The County's appeal in this matter derives from the scope of the administrative process following the District Court's remand, certain procedural decisions of the Secretary during the remand process, and the sufficiency of the Secretary's analysis as contained in his January 24, 2014 Decision.

On July 13, 2010, this Appeals Court found that the Secretary of Interior's March 13, 2008 Decision authorizing the Tribe's acquisition of land in trust was procedurally deficient because it did not consider the Appellee's 2006 Beckham Report. *Butte County v. Hogen, 613 F.3d 190* (D.C. Cir. 2010). The Court remanded the matter to the Secretary for further proceedings consistent with the opinion. *Id.* at 196-97.

On November 12, 2010, upon remand to the District Court, the Court ordered "that the parties inform the Court not later than November 23, 2010 of their positions regarding how the Court should proceed to comply with the D.C. Circuit's remand for further proceedings consistent with its opinion." Docket No. 70 at 1. On or about November 22, 2010, the parties each submitted their positions on how the Court should proceed. The County urged that "[t]he Court should direct the United States Department of Interior ("Interior") to review and consider all materials required to be considered as a matter of law." *Id.* In contrast, the

Tribe asked the Department to simply reconsider its decision with the addition of the Beckham Report. Docket No. 73 at 2.

On December 22, 2010, the District Court ordered "that this case is remanded to the Secretary of Interior to reconsider his decision... The Secretary shall include and consider the 'Beckham Report' as part of the administrative record on remand." Docket No. 74 at 1. No other direction or limitation was provided to the Secretary regarding the scope of the remand, thus leaving agency discretion to the Secretary on how to conduct the remand process.

On April 12, 2011, the Secretary through his Deputy Solicitor-Indian Affairs issued correspondence setting forth the process the Department would use in the remand. Docket No.79-1. The letter stated "[o]n remand, the Secretary must make a new trust decision – a new final agency action based on the administrative record that exists at the time of the new decision. After the D.C. Circuit issued its opinion in this case, the Tribe and Butte County both submitted information to the Secretary for consideration." *Id.* at 1. The Department went further to state, "we are requesting that the County officially submit or resubmit within 30 days any and all new information that it wishes the Secretary to consider on remand, with a copy to the Tribe." *Id.* The Tribe then had thirty days "to respond to the Beckham Report and the County's new submissions." *Id.* The letter also accepted various

other submissions made by the parties following the District Court's order but prior to the start of the remand process.

In a letter to the Secretary on April 21, 2011, the Tribe again proposed to limit the scope of the review, specifically to the current administrative record "and nothing more" other than the 2006 Beckham report, so as not to begin another lengthy process. *Butte County. v. Chaudhuri, et al.*, No. 1:08-CV-00519-FJS at 4 (D.D.C. July15, 2016); Administrative Record 4049-52. Through an April 29, 2011 letter, the Secretary declined to reconsider the remand process, explaining that "[t]he process set forth was judiciously crafted and thoroughly vetted within the Department of the Interior and with the Department of Justice in order to ensure that the Secretary's decision on remand avoids the same procedural deficiencies that the D.C. Circuit had identified in the preceding litigation and forecloses any new bases for a challenge that may have arisen since the Secretary's original decision." *Id.*

On May 12, 2011 the County submitted two reports from its consultant Stephen Beckham, his 2006 Report and a newer October 2010 report, his resume, an Index listing fourteen documents from the pleadings in *Butte County v. Hogen*, 613 F.3d 190 (D.C. CIR. 2010), and a letter to Interior Assistant Secretary Larry Echo-Hawk. Docket No. 75-5. The three page transmittal letter from County

counsel Dennis Whittlesey to the Deputy Solicitor also contained summary arguments from the 2006 and 2010 Beckham Reports. *Id.*

The Tribe requested an extension on May 27, 2011. *Butte County. v. Chaudhuri, et al.*, No. 1:08-CV-00519-FJS at 5 (D.D.C. July15, 2016). The Secretary allowed a fifteen (15) day extension and the Tribe submitted a Report and transmittal letter. *Id.* The Tribe's Report was entitled "Report and Response of the Mechoopda Tribe of the Chico Rancheria to the May 12, 2011 Response of Butte County Filed With the Office of the Solicitor for the Department of Interior." Docket Nos. 75-7 to 75-20. The Response included a Report entitled "Rebuttal to the Beckham Report Regarding the Mechoopda Indians" by Dr. Shelly Tiley and edited by Pat Mikkelsen, M.A., RPA, Far Western Anthropological Research Group, Inc. The cover letter to the Response stated "The Tribe submits this Report to answer questions posed in the Solicitor's Office's April 12, 2011 letter and to rebut Butte County's assertions and its expert report, filed May 12, 2011." *Id.* The transmittal noted "The Tiley Report reinforces the previously reviewed expert opinions of Craig Bates and Brian Bibby." *Id.* Docket No. 75-8.

On July 12, 2001, the Deputy Solicitor sent letters to the County and the Tribe closing the record. Docket No. 75-21. On July 18, 2011, the County submitted a letter requesting the Secretary to either reject the Tribe's submission or

reopen the record "to provide the County adequate time in which to respond to" the Tribe and attacked Dr. Tiley's report. Docket No. 75-22.

On August 11, 2011, the Deputy Solicitor granted the County's request to reopen the record for a twenty (20) day period until August 31, 2011. The County waived its right to respond and chose not to submit any more documentation. *Butte County. v. Chaudhuri, et al.*, No. 1:08-CV-00519-FJS at 4 (D.D.C. July15, 2016); New Administrative Record ("AR NEW") at 4262. This failure occurred even though the County in effect had sixty-five (65) days from June 28, 2011 to August 31, 2011 to respond to the Tiley report.

On September 19, 2011, the County filed a "Motion to Clarify December 22, 2010 Remand Order and/or Limit the Administrative Record Upon Remand," essentially asking the Court to strike the Tiley Report. Docket 75. Specifically, the County requested the District Court to limit the remand and "include Plaintiff County's May 12 submission and previous submissions in its review and exclude the Tribe's June 28 submission." *Id*. at 3; *Butte County v. Hogen*, No. 1:08-cv-00519 at 1 (D.D.C. March 19, 2012). On March 19, 2012, the District Court denied the County's request for relief. Docket No. 86.

The District Court ruled there was "ample time to submit whatever other information" the County wanted to submit to the Department. Docket. No. 101-1 at

14 cited in D.D.C. at 6. The Court also explained it was "the Department's prerogative to determine what materials were relevant to its decision." *Id.*

Over the next eighteen months following the District Court's ruling on the remand process, the Secretary evaluated both the materials submitted by the County and the Tribe. The Department also conducted its own extensive independent research. On January 24, 2014, the Secretary issued a new Decision authorizing the acquisition of the subject land in trust for the Tribe. *See* 79 Fed. Reg. 6917 (Feb. 5, 2014). This Decision was a fifty-three (53) page, single space document with 320 footnotes and numerous citations of government sources, historical books, and historian reports. The Decision analyzed the 2006 Beckham Report throughout the Decision and rejected its assertion that the Mechoopda Tribe was no more than an amalgamation of various Indian tribes and non-Indians brought together on a ranch owned in the 1840s by John Bidwell. 2014 Decision at 37-39.

On November 20, 2014, over nine months after the Secretary issued his Decision, the County filed a Motion with the District Court to once again challenge the remand process and the Secretary's Decision. See Docket Nos. 89, 90. Together with the Motion, the County filed a new report of the same author

Beckham, dated July 9, 2014 ("2014 Beckham Report").[2] The District Court issued a seventeen (17) page opinion on July 15, 2016 rejecting the County's APA challenge to the Secretary's Decision. The Appellant's Notice of Appeal was docketed with this Court on August 22, 2016.

SUMMARY OF THE ARGUMENT

The District Court's ruling that the Secretary's administrative process did not exceed the scope of the remand, and his 2014 Decision was not arbitrary and capricious, is based on a finite set of documents. The appropriate scope of the remand is contained in the District of Columbia Circuit Court of Appeals Order and the District Court's Order remanding the matter back to the Secretary.

The Appellate Court's Order provided no specific instructions on how the remand should be conducted simply stating: "For all these reasons, we set aside the Secretary's final action to take the Tribe's land into trust. This case is remanded for further proceedings consistent with this opinion." *Butte County v. Hogen*, 613 F.3d 190 (D.C. CIR. 2010). To be "consistent with this opinion," the Secretary was required to include the 2006 Beckham Report on remand. *Id*. "The Court of Appeals did not place any other requirements or restrictions on the scope of the

[2] The District Court initially denied the Motion as premature as the Administrative Record had not yet been filed. Once that Record was filed on May 5, 2015, the parties then filed cross-motions for summary judgment. *Butte County. v. Chaudhuri, et al.*, No. 1:08-CV-00519-FJS at 6 (D.D.C. July15, 2016).

remand." *Butte County. v. Chaudhuri, et al.*, No. 1:08-CV-00519-FJS (D.D.C. July15, 2016).

"Likewise, the District Court's remand was very broad. After asking for and reviewing the parties' positions with respect to the scope of the remand, the District Court (Kennedy, J) ordered the matter 'remanded to the Secretary of the Interior to reconsider his decision to acquire the Chico Parcel into trust for gaming purposes. The Secretary shall include and consider the [2006] 'Beckham Report' as part of the administrative record on remand.'" *Id*.

The District Court (Scullin, J) noted in rejecting the County's 2011 challenge to the scope of the remand that "I think the remand is clear on its face that the matter goes back to the Department of the Interior for [its] consideration, taking into consideration the [2006] Beckham report and other submissions you've made since then. Whatever else the Department of Interior may feel may be relevant to the decision as to the issues involved, I think that's [its] prerogative." *Butte Cty. v. Hogen*, No. 1:08-cv-00519 at 13, 14 (D.D.C. March 19, 2012); *See* Docket No. 101-1 at 14.

In including the 2006 Beckham Report, the County's additional submissions, the Tribe's Response and the Tiley Report, the Secretary met the

requirements of the remand. His process to accept such submissions was within his discretion, as the District Court has now clarified twice.

The time frames for submission granted to each of the parties, along with their extension requests, was also within the discretion of the Secretary. The County was given the opportunity to file additional information in response to the Tribe but failed to do so. "Having decided not to take advantage of the opportunity to file additional submissions with the Department, Plaintiff County cannot now argue that it did not have an opportunity to respond to the Tiley Report." *Butte County. v. Chaudhuri, et al.*, No. 1:08-CV-00519-FJS at 9 (D.D.C. July15, 2016).

The District Court noted that the "Court has reviewed the Secretary's 2014 Decision thoroughly and has taken into consideration Plaintiff County's arguments. The 2014 Decision is more than fifty (50) pages in length, thoroughly discusses the evidence before the Department, and provides an explanation for each of the Secretary's conclusions." *Id.* at 16. In addition, "In his 2014 Decision, the Secretary cites to many sources to support his conclusions, only one of which is the Tiley Report. In particular, the Secretary analyzed Plaintiff County's view of the Tribe's historical connection to the land, declined to adopt Plaintiff County's conclusions that the Tribe was a creation of the Bidwells, and explained his reasons for doing so…." *Id.* The District Court cited many of the reasons substantiating the Secretary's January 14, 2014 Decision. This extensive decision

documented the evidence relied on, and carefully weighed and rejected the County's arguments. The decision was not based on any single report but included the Department's independent research, and weighed all issues the County alleges were not addressed. Accordingly, the Court held that the Secretary's Decision was not arbitrary or capricious. The District Court did not err in this judgment.

ARGUMENT

I. The District Court Properly Determined that the Secretary of Interior's Administrative Process in Issuing his January 24, 2014 Decision ("2014 Decision") was Neither Arbitrary Nor Capricious under the Administrative Procedures Act ("APA") When it Included Instructions to Allow Final Submissions of "any and all" Information by the County and an Opportunity to Respond to the Tribe

A. The Scope of the Remand Was Very Broad

The heart of this case is the Secretary's remand process and whether the District Court properly found that it was within the scope of its remand and was not arbitrary and capricious under the Administrative Procedures Act.

The Appellate Court "remanded for further proceedings consistent with this opinion." *Butte County v. Hogen*, 613 F.3d at 196-97 (D.C. CIR. 2010). The opinion explained that the reasons provided in the Secretary's original August 26, 2006 rejection of the 2006 Beckham report[3], namely that it would not revisit the issues that the 2006 Beckham Report raised because both the Solicitor and the National Indian Gaming Commission had already considered them and provided decisions, were not a sufficient "brief statement of the grounds for" its decision not

[3] Letter from George T. Skibine, Acting Deputy Assistant Secretary for Policy and Economic Development, Department of Interior, to Dennis J. Whittlesey, Jackson Kelly PLLC, Counsel for Butte County (Aug. 26, 2006).

to include the Beckham Report in the record at that late date.[4] Further, the mention of the issues raised in the Beckham Report in the Department's August 26, 2006 letter and an earlier Environmental Assessment of the subject land acquisition were not a sufficient articulation on the record that that the issues in the Beckham report were considered. *Butte County. v. Hogen*, 613 F.3d at 11 (D.C. Cir. 2010)("[A]n agency's action must be upheld, if at all, on the basis articulated by the agency itself.")

The Court of Appeals did not place any other requirements or restrictions on the scope of the remand. (D.D.C. p. 7, July 15, 2011). The District Court requested the parties' positions regarding compliance with the Court of Appeal's remand order. Docket No. 70. The parties proposed the following:

The Tribe proposed that the Department's review be limited to the existing administrative record, including the 2006 Beckham Report, and that the Department be given a 45 day deadline to reissue its decision. *See* Docket No. 73.

The County proposed that Department should be instructed to review "all materials required to be considered as a matter of law," including the 2006 Beckham Report and "all supplemental materials delivered by [the County} to

[4] "A brief statement is required when an agency declines to consider information in its decisions. *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001).

Interior subsequent to the Appellate Court's Order of July 13, 2010." Docket No. 72.

The Secretary proposed that "the Court remand the matter to the Secretary of Interior with instructions to reconsider his decision to acquire the Chico Parcel into trust for gaming purposes. The Department of Interior shall include and consider the 'Beckham Report' as part of the agency administrative record on remand." Docket No. 71.

The District Court accepted the Secretary's proposal verbatim. Docket No. 74. It rejected the proposals put forward by the County and the Tribe and in so doing, actively declined to limit the remand. *Id.*

B. The Secretary's Remand Process Was Approved by the District Court

After the Secretary's remand process concluded, the County on September 19, 2011 once again requested that the District Court clarify the remand Order and/or limit the Administrative Record. *See* Motion to Clarify December 22, 2010 Remand Order and/or Limit the Administrative Record Upon Remand. Docket No. 75. The Court denied the motion on the grounds it was premature as the Administrative Record had not yet been filed.

C. The Secretary's Remand Was Approved Again by the District Court

Following the lodging of the Administrative Record, the Court not only found its Order to be clear upon its face, but specifically chose not to add limits to the remand again. "Having carefully reviewed the entire record in this matter, the parties' submissions and oral arguments, and the applicable law, the Court hereby orders that Plaintiff's motion to clarify the Court's December 22, 2010 remand order and/or to limit the administrative record on remand is denied." *Butte County v. Hogen*, No. 1:08-cv-00519 at 3 (D.D.C. March 19, 2012). "I think the remand is clear on its face that the matter goes back before the Department of the Interior for [its] consideration, taking into consideration the [2006] Beckham report and other submissions you've made since then. Whatever else the Department of Interior may feel may be relevant to the decision as to the issues involved, I think that's [its] prerogative." *See* Docket. No. 101-1 at 14; *Transcript of Status Conference* at 13, *Butte County v. Hogen*, Civ. No. 08-519 (D.D.C. Mar. 12, 2012).

C. The Scope of the Remand Was Approved a Third Time by the District Court

On July 15, 2016, the District Court issued its third ruling approving the scope of the remand. *Butte County. v. Chaudhuri, et al.*, No. 1:08-CV-00519-FJS at 9 (D.D.C. July15, 2016). Because the District Court specifically declined to limit or reopen the record, the Secretary's earlier request for final submissions from either party on April 12, 2011, was found within the scope of the remand and

the District Court's Order. *See* Letter from Patrice Kunesh, former Deputy Solicitor - Indian Affairs, to Appellant (New Administrative Record ("AR NEW") at 4044); to the Appellee (AR NEW at 4045-46)(Apr. 12, 2011). The Court had earlier explained that the process was left to the discretion of the Secretary, although an agency's action cannot be arbitrary or capricious in violation of the Administrative Procedures Act. 5 U.S.C § 706(2)(A). *See Transcript of Status Conference* at 13, *Butte County v. Hogen*, Civ. No. 08-519 (D.D.C. Mar. 12, 2012). As long as an agency's rationale can be deduced, the Court cannot replace its reasoning for the agency's. *New Life*, 753 F. Supp.2d at 112. The District Court noted "courts are not free to impose upon agencies specific procedural requirements that have no basis in the APA." *Butte County v. Chaudhuri*, et al., No. 1:08-CV-00519-FJS at 10 (D.C. CIR. July 15, 2016)(citing *New Life*, 753 F. Supp. 2d at 120).

The Administrative Record demonstrates that within the broad parameters of the remand orders, the Secretary properly outlined a process which he delivered to both parties in a letter. Letter from Patrice Kunesh, former Deputy Solicitor - Indian Affairs, to Appellant (New Administrative Record ("AR NEW") at 4044); to the Appellee (AR NEW at 4045-46)(Apr. 12, 2011). The letter outlined that to avoid the perceived earlier procedural deficiencies in the 2008 Decision, he would open the record for a specified time before he would close it to make a decision.

Id. This was a rational process with a rational reason given and documented in the record. He specifically noted that to avoid the procedural deficiencies the Court found in the 2008 Decision, he would hear any and all information before making a decision. *Id.* He specified that there had been a significant time delay from 2006 where new information may have surfaced and the law bearing on the case had changed. *Id.* Given the parties history of litigation, and years of time from the original 2008 Decision, and a change in Federal Indian law regarding holding land in trust for tribes, the Secretary's decision to hear all parties' new information was rational and documented in the record. *Id.*

While the record was opened completely, it was necessary to close it at a date certain so the information could be reviewed and a decision could be made. Even so, in its brief, the County references a new post administrative record document, another report by Stephen Beckham. This 2014 Beckham Report was prepared and submitted in 2014 almost nine (9) months after the 2014 Decision was issued. It is impossible for the Secretary to now address this Report since it was not before it when the Decision was made. It would also be waste of judicial resources for this Court to now deliberate the new arguments the County attempts to insert. The County now argues that the Secretary improperly narrowed its evidentiary base when it did not consider information from its 2014 Beckham Report. Appellant's Opening Brief at 31 (D.C. Cir. 2017). The Secretary could

not consider anything that was not before it and did consider all that was before it. While the Secretary did not cite every document it considered in the 5000 plus page Record, the agency stated repeatedly that it thoroughly considered and reviewed the entire record and concluded with extensive rational reasons for its decision.

Federal agencies are not required to continually receive new reports nor begin an analysis over again every time new information arises, as the cycle would never conclude and a final decision could never be reached. *Cf. Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1059 (D.C. Cir. 2001); *Pers. Watercraft Indus. Ass'n v. Dep't of Commerce*, 48 F.3d 540, 542–43 (D.C. Cir. 1995)(*See also Western Coal Traffic League v. ICC*, 735 F.2d 1408, 1411 (D.C. Cir. 1984)(…parties could "unravel[ling] each day's work to start the web again the next day"). The County's request to the Court to admit more information into the record would have the effect of beginning the entire process all over again. The County has had ample opportunities, including over six (6) years since the Secretary first rendered his 2008 Decision, to assemble any data it felt was missing from the record. The County had opportunities to add to the record and did so with its submissions on May 12, 2011 before a final decision was rendered, ensuring the Secretary's process was fair and reasonable.

II. Whether the District Court Properly Determined that the Administrative Procedures Act Was Not Violated Where the Secretary Granted Both Parties an Extension Request to Provide Additional Information During the Remand Process.

Granting extension requests is within the discretion of the Secretary, although it cannot be arbitrary or capricious. The Court applied this standard to the twenty (20) day extension the County was granted to provide the Secretary with "any and all information" to make its decision. Docket 75-23. While "any and all information" can never be completely accomplished, an extension was granted to the County until August 31, 2011, after the County was first notified of this opportunity on August 11, 2011. *Id*. Both parties initially had the same time allotment to submit information, both were granted extensions, with the County's twenty (20) day extension even longer than the Tribe's fifteen (15) day extension. The District Court agreed that this was "ample time to submit whatever other information" the County wanted to be considered. *Transcript of Status Conference* at 14, *Butte County v. Hogen*, Civ. No. 08-519 (D.D.C. Mar. 12, 2012). The extension requests were reasonable to grant, regardless of the reasons proferred, and particularly benefitted the County.

Although The County argues that granting the extension request to the Tribe was "improper," it cites no standard in law for the purported restriction.

Appellants Opening Brief at 28. The County further alleges that the Tribe's financial circumstances affirmed in an Affidavit were misleading or false. *Id.* at 9, 10. The Tribe's statement that it lacked financial resources in requesting an extension did not mean the Tribe had no financial resources. The facts of this issue were not worthy of discussion in the District Court and are meritless here.

The Tribe did its best with its limited resources to present relevant information to the Secretary and address issues raised in the 2006 Beckham Report. That it chose not to resubmit information from its earlier experts when that information was already in the record is reasonable. For the Tribe to build on this record and supplement it with a twenty (20) page report from Dr. Tiley with sources attached, was also reasonable. The County's misleading allegations that that information on record was "abandoned" and that the Tribe conceded to a lack of credentials and expertise is without foundation in the record. The County's speculations are meritless.

Another de minimis side issue the County raises is its lack of notification of the Tribe's extension request to the Secretary. Appellant's Opening Brief at 9. Had it not been granted, informing the County would have been moot. Because it was granted, notice was sent to both the Tribe and the County. The County cites no legal requirements of the public, including tribes, to notify stakeholders of routine extension request letters sent to the government.

In summary, the Secretary 1) properly allowed final submissions from all parties before making his January 24, 2014 Decision; 2) granted each party reasonable extension requests; and 3) closed the record thereafter. This is a reasonable and rational process under the Adminstrative Procedures Act.

III. Whether the District Court Properly Determined that the Secretary's January 24, 2014 Decision Considered the Submissions of the Parties, Documented his Thorough Review, and Reached Conclusions Consistent with the Standards of the Administrative Procedures Act.

The decision-making authority for issues regarding American Indian tribes, like the Mechoopda Tribe, is delegated by the Secretary to the Office of the Assistant Secretary of Indian Affairs based on the depth of the expertise of that Office regarding federal Indian law. The Secretary holds a large base of institutional knowledge from previous decisions. He is familiar with the details of the history of tribes and their lands from reviewing petitions, requests, and litigation that goes into extensive detail on the history of specific tribal groups like the Mechoopda.

There are often disparities in facts presented to agency decision-makers which require an analysis among competing views. The factual dispute alleged in

the Secretary's 2014 Decision is another of many "'classic example[s] of a factual dispute the resolution of which implicates substantial agency expertise.'" *See Wis. Valley Improvement Co. v. FERC*, 236 F.3d 738, 747 (D.C. Cir. 2001) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376 (1989))(internal quotation marks and citation omitted). In such regularly occurring circumstances, courts may "only inquire whether the agencies have based their policy choices on reasonable expert evidence," and "sufficient expert evidence to establish [the decision] it was not arbitrary and capricious for them." *Wis. Valley Improvement Co. v. FERC*, 236 F.3d 738, 747 (D.C. Cir. 2001) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376 (1989))(internal quotation marks and citation omitted). Competing expert opinions frequently arise and the Secretary is competent to deal with them.

The Administrative Procedures Act, 5 U.S.C. § 706, requires the Secretary to "explain her reasoning" so the Court can "infer her reasoning." 5 U.S.C. § 706(2)(A) limits agency decisions, which must not be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Reliance Elec. Co. v. Consumer Prod. Safety Comm'n*, 924 F.2d 274, 277 (D.C. Cir. 1991). Decisions are not arbitrary or capricious that are based on expertise, expert evidence, and articulated reasoning. The Secretary included the Beckham Report and numerous census data, but the Report did not negate the ample additional evidence the Secretary considered when viewing the Tribe's history in its entirety.

In his 2014 Decision, the Secretary specified that he had considered the Beckham Report throughout the Decision and outlined his reasoning, as the District Court documented throughout its Decision and Order. *Butte County v. Chaudhuri*, et al., No. 1:08-CV-00519-FJS at 16 (D.C. CIR. July 15, 2016)(Doc No. 128). The District Court noted that the Department "thoroughly discusses the evidence before the Department, and provides an explanation for each of the Secretary's conclusions." *Id.* "The Secretary begins by noting that his decision includes his 'review of the [2006] Beckham Report, as well as other information received from the parties, and incorporates the findings and conclusions of the 2008 Decision and supporting materials.' *Id.* Furthermore, when considering the Tribe's history to determine its historical connection to the land that the Tribe wanted the Department to take into trust, the Secretary noted that he had derived the recitation of the Tribe's history from his 'review of all of the documents submitted by the Tribe and the Plaintiff County, as well as his own independent research.' *See Id.* at 78 (AR NEW 0005390). In his 2014 Decision the Secretary cites many sources to support his conclusions, only one of which is the Tiley Report. In particular, the Secretary analyzed the County's view of the Tribe's historical connection to the land, declined to adopt the County's conclusions that the Tribe was a creation of the Bidwells, and explained his reasons for doing so. *See Id.* At 91 (AR NEW 0005403). Although these are only a few examples of the

Secretary's review of the record and the conclusions he drew therefrom, they serve to demonstrate that, contrary to Plaintiff County's arguments, the Secretary's 2014 Decision was thorough and well-reasoned." *Butte County v. Chaudhuri, et al.*, No. 1:08-CV-00519-FJS p. 16 (D.C. Cir. July 15, 2016)(Doc No. 128)." *Id.*

In the 2014 Decision, the Secretary did not agree with the County's position that the Tribe's existence did not predate the Bidwell Ranch and was merely "a creation of the Bidwells." *Id.* "Based on our review of the record, we conclude 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." 2014 Decision at 20. Docket 114. It cites the recognition of the political existence of Tribe by the United States government when it signed a treaty in 1851 with the Tribe, among eight other distinct tribes in the region. 2014 Decision at 20. Docket 114.

The Tiley Report, which the County acknowledges was reviewed by the Secretary, specifically addresses all of the issues the County raised repeatedly, not only extensively in the Report, but was also summarized succinctly in nine (9) conclusions at the end of its Report. Tiley Report at 17-18. Docket 114. The Tribe also specifically addressed the same issues again in D – F of its transmittal Report. Docket 114. While the Administrative Procedures Act leaves the analysis to the expertise of the Secretary, it is important to note that all data was considered.

Various census reports involving the Mechoopda were included in a chart referenced in the Tiley report and evaluated. Moreover, other evidence was presented such as the interviews by ethnologist C. Hart Merriam in 1903, 1919, and 1923 of residents of the Chico Rancheria where the Mechoopda resided, of the locations of the Mechoopda villages; the Tribe's historical and cultural nexus to that land; the location of the Chico parcel (roughly 10 miles from the Chico Rancheria), within the boundaries of historical Mechoopda village locations and within the boundaries of the land promised to the Mechoopda in the unratified Treaty of 1851; the 2001 Declaration of Craig Bates, the curator of ethnography for Yosemite National Park who has published over one hundred articles on Native Americans including the Mechoopda Tribe, that the Tribe is the sole surviving group of the Northwestern Valley Maidu Indians and has historical and cultural connections to the Chico parcel; and reports of ethnographer and historian Brian Bibby, an expert on California Indian communities, describing historical connections of the Tribe and the Chico parcel. The Secretary did review and consider all information in the Decision. Acknowledging the 2006 Beckham Report did not outweigh the substantial evidence in the record of the Tribe's history and connection to the land. His decision is supported by substantial evidence in the record and was not arbitrary or capricious. All of these reasons

documented in the record show that the Secretary's reasoning was rational under the Administrative Procedures Act.

The record in this matter was also reviewed in the County's prior case before this Court in 2010. While the Appellate Court found error in the failure of the Secretary to review the 2006 Beckham Report, it is noteworthy that the dissenting opinion of Judge Rodgers acknowledged that the Secretary's earlier 2008 decision was well-reasoned and thoroughly supported. *Butte County v. Hogen*, 613 F.3d 190 (D.C. Cir. 2010); Docket 68.

Because the Secretary's 2014 review was not arbitrary and capricious and complied with the remand Orders, the District Court's decision was sound and must be affirmed.

CONCLUSION

Appellant does not proffer any new information or arguments that have not been previously heard and rejected over and again since 2006. The County is essentially attempting to relitigate a final judicial ruling of which the facts have already been litigated and decided upon, while seeking to overrule the federal government's expertise and the principal of finality in court decisions, culminating in an exhaustive waste of judicial resources. The Secretary complied with both regulatory and Court-ordered process requirements in developing his decision

regarding the Tribe; it was not made arbitrarily or capriciously. This Court should affirm the District Court's ruling.

DATED this 8th day of March, 2017.

MECHOOPDA INDIAN TRIBE

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CERTIFICATE OF COMPLIANCE

In compliance with Federal Rules of Appellate Procedure 32(g)(1), 32(a)(7), and Circuit Rule 32(e)(2)(B)(i), I certify that the forgoing contains 8,227 words, under the 9,100 allowed for a principal brief of an Intervenor.

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all listed counsel of record. In addition, I mailed an electronic copy to their electronic mail addresses at:

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