No. 16-5240

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

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BUTTE COUNTY, CALIFORNIA,

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

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

Intervenor For Defendants – Appellees.

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

# APPELLANT'S OPENING BRIEF

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*Submitted By*

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## CERTIFICATE AS TO PARTIES, RULINGS UNDER REVIEW, AND RELATED CASES

### (1) Parties and Amici

The parties in this case are (a) Appellant Butte County, California (the "County"); (b) Appellees Jondev Osceola Chaudhuri, in his official capacity as Chairman, National Indian Gaming Commission ("NIGC"); E. Sequoyah Simermeyer, in his official capacity as Commissioner, NIGC; Sally Jewell, in her official capacity as Secretary, United States Department of the Interior ("DOI"); Lawrence S. Roberts, in his official capacity as Assistant Secretary-Indian Affairs, DOI; DOI (collectively referred to as the "Secretary"); and (c) Intervenor-Appellee Mechoopda Indian Tribe of the Chico Rancheria, a federally recognized Indian Tribe located in Butte County.

### (2) Ruling Under Review

The ruling under review in this case is the July 15, 2016, Memorandum-Decision and Order entered by the Honorable Frederick J. Scullin, Jr in the United States District Court for the District of Columbia denying Butte's Motion for Summary Judgment, granting the Secretary's Cross Motion for Summary Judgment, granting the Mechoopda's Cross Motion for Summary Judgment, and entering final judgment in favor of Appellees and Intervenor-Appellees. *Butte Cnty. v. Chaudhuri, et al.*, No. 1:08-CV-00519-FJS (D.C.C. Jul. 15, 2016) (Doc.

No. 128). Plaintiff-Appellant filed a Notice of Appeal on August 15, 2016 (Doc. No. 130).

**(3) Related Cases**

Appellant is not aware of any other pending cases related to this matter.

/s/ Dennis J. Whittlesey
Dennis J. Whittlesey

## CORPORATE DISCLOSURE STATEMENT

Appellant County is not a corporation and no third party holds any ownership interest in Appellant.

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## GLOSSARY OF ABBREVIATIONS

| | |
|---|---|
| County | Plaintiff-Appellant Butte County, California |
| Secretary | Collectively, Defendants-Appellees Jondev Osceola Chaudhuri, in his official capacity as Chairman, National Indian Gaming Commission ("NIGC"); E. Sequoyah Simermeyer, in his official capacity as Commissioner, NIGC; Sally Jewell, in her official capacity as Secretary, United States Department of the Interior ("DOI"); Lawrence S. Roberts, in his official capacity as Assistant Secretary-Indian Affairs, DOI; DOI |
| Mechoopda or Tribe | The Mechoopda Indian Tribe of the Chico Rancheria |
| IGRA | Indian Gaming Regulatory Act |
| Interior | Department of the Interior |

## INTRODUCTION

This is the second time for this case to be considered by this Court. The first resulted in the Court remanding the matter to the Department of the Interior with directions to reconcile any decision with the historical facts documented in the County's Expert Report published in 2006 by the noted ethnohistorian Dr. Stephen Dow Beckham (known as the"2006 Beckham Report"). That report was consciously and admittedly ignored by the Secretary in its previous decision to approve the Mechoopda Tribe's eligibility to develop the casino project at issue.

Now before this Court is the subsequent approval decision rendered by the Secretary who for the second time again failed to reconcile its decision without satisfying the requirements of the remand. Specifically, the Secretary again ignored evidence directly relevant and contrary to its apparent desired result. Land Determination Decision dated January 24, 2014, AR NEW 5384 (the "2014 Interior Decision").[1]

The County does not challenge the Tribe's status as a federally-recognized tribe. However, it does challenge the tribal casino development on land to which its only connection is a claim that it has rights to conduct gaming at the site that is

[1] The Secretary rendered the 2014 Interior Decision under both the pre-regulation and post regulation authority. AR NEW 5390. Under either analysis the Secretary's decision was arbitrary and capricious as more fully set forth in this brief.

within the land area ceded to the United States through an unratified treaty with the United States that was executed in 1851 by a small village tribelet known as "Machopda" for its chief. If the modern Mechoopda Tribe (the name of which is a derivative of (Machopda") cannot establish a direct tribal connection to the treaty tribe, it cannot pursue gaming on any of ceded territory under the strict requirements of the applicable provisions of the Indian Gaming Regulatory Act of October 17, 1988, 25 U.S.C. §2701, *et seq.* ("IGRA").

The issue is framed by the 2006 Beckham Report, and goes to whether the Mechoopda Tribe can trace its modern membership to the 1851 Machopda tribelet. The County contends that the Secretary arbitrarily and capriciously found the requisite historical connection by relying on assumptions that contradict historical facts documented by Dr. Beckham through, *inter alia*, a series of federal censuses conducted among the purported Mechoopda ancestors in 1906, 1910, 1914 and 1928-33. Consistent among these census records is documented evidence that very few of the modern tribe's ancestors identified themselves as having any Mechoopda ancestry; to the contrary, most identified their ancestry as being either non-Indian or from tribes other than Machopda. Those detailed Census records, which Dr. Beckham reported in great detail were ignored by the Secretary, although three of them were conducted by the Department of the Interior and the fourth was the Indian Population Schedule of the 13th Decennial Census of the

United States conducted in 1910. Instead, the Secretary accepted and relied on undocumented conclusions rendered in a "surprise" 11th hour report submitted by the Tribe in June 2011. That new report was written by an entirely new team of "experts" retained to replace the Tribe's original three person "expert" team. The new expert team abandoned the original basis for the tribal claims and replaced it with an entirely new report supporting its claimed historical connection to the land. The new report which was premised on undocumented conclusions is herein referred to as the "Mechoopda Replacement Report." The County was neither aware of the Tribe's plan to present an entirely new justification for its claims, nor permitted a reasonable period of time to respond. Even then, the Secretary failed to reconcile the contradictory facts in the new report with 2006 Beckham Report, despite the fact that the original failure to reconcile the conclusions with Dr. Beckham's work was the basis for the remand. Just as before, the Secretary's action simply cannot withstand review by this Court.

## JURISDICTIONAL STATEMENT

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 2201 because the action presented questions arising under federal law. The United States consented to the action under the Administrative Procedure Act, 5 U.S.C. §§ 701-706. This Court of Appeals has jurisdiction pursuant to 28 U.S.C. § 1291, in which Congress legislated appellate jurisdiction from all final decisions of federal district

courts. The Memorandum-Decision and Order on appeal constitutes a final decision of the United States District Court for the District of Columbia, disposing of all the parties' claims. The Memorandum-Decision and Order was entered on July 15, 2016. The Notice of Appeal was timely filed on August 15, 2016, and docketed in this court on August 22, 2016.

## STATUTES AND REGULATIONS

The relevant statutes and regulations are set forth in an addendum to this Opening Brief.

## STATEMENT OF ISSUES FOR REVIEW

The issues raised in this Appeal are whether the district court erred in determining that:

(a) the Secretary did not exceed the scope of the remand ordered by this Court (*Butte Cnty. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010)) or the District Court when it accepted the conclusions of June 28, 2011, the Mechoopda Replacement Report without reconciling the report's undocumented conclusions with the documented facts in the County's 2006 Beckham Report;

(b) the Secretary's procedure on remand imposing an unrealistically-short extension of time to allow reasonable County research and preparation of a substantive response to the Mechoopda Replacement Report was not arbitrary and capricious; and

(c) the Secretary's January 24, 2014 Decision approving the Tribe's trust application on the basis of the Mechoopda Replacement Report while neither researching nor considering official periodic federal reports and census records compiled between 1890 and 1933 reporting facts directly contradicting the Replacement Report's "conclusions" was not arbitrary and capricious.

## STATEMENT OF THE CASE

### A. The First Arbitrary and Capricious Agency Decision

In 2006, the County furnished the Tribe and the Secretary with the 2006 Beckham Report that was prepared by renowned ethnohistorian Dr. Stephen Dow Beckham, Pamplin Professor of History at Lewis & Clark College, entitled *Mechoopda Indian Tribe of the Chico Rancheria* (the "2006 Beckham Report"). That report extensively cited to, and relied on, numerous primary source documents, including the aforementioned federal census records, demonstrating that the modern Tribe's direct ancestors living on the Bidwell Ranch lands were not descended from the treaty tribe. Rather the official ancestral evidence demonstrates that the population consisted of disparate group of people Indians and non-Indians living and working on the Bidwell Ranch. There is no evidence going back to the 19th Century that as a group they ever occupied any other land. *See generally* AR NEW 3171. This report has not been rebutted by documented

historical evidence by either the Tribe or Secretary. Significantly, the Secretary has retained Dr. Beckham as an expert on a number of occasions.[2]

Rather than evaluate the 2006 Beckham Report, the Secretary concededly ignored it and rendered its first trust acceptance of the subject land on May 8, 2008 (the "2008 Interior Decision"). AR NEW 3282. The 2008 Interior Decision relied exclusively on materials generated by the Tribe's three former experts who lacked the credentials and expertise to render ethnohistory opinions and conclusions. *See id.*; *see also* "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" (Oct. 2010), Dr. Stephen Dow Beckham (the "2010 Beckham Analysis"), AR NEW 3810.[3]

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[2] See fn.4, *infra*.

[3] In this analysis, which was neither rebutted not even discussed by the Tribe or the Secretary, Dr. Beckham determined that the Tribe's original "experts" failed to conduct the research and analysis that would have supported a Secretarial determination that the Tribe had the requisite historic connections to the gaming site that would qualify it for gaming as "restored land" to a "restored tribe." To this point, Dr. Beckham reported that they failed to (i) examine the membership and ancestry of the Mechoopda Tribe, (ii) identify or assess the functioning of the Tribe, except for Currie who noted that as of 1957 there was no tribal government of any kind, (iii) link the federally-recognized Mechoopda Tribe with the requisite "use and occupancy" of the Bidwell Ranch, (iv) visit the archives of the BIA, National Archives, San Bruno, or (v) use the historical writings and field notes to connect the modern Mechoopda Tribe to the lands proposed for fee-to-trust

The 2006 Beckham Report, which the Secretary ignored in making the 2008 Interior Decision, relied on and reproduced facts from federal census reports contradicting the historic and ethnographic conclusions found.

This Court concluded that the Secretary's admitted failure to even read the 2006 Beckham Report in rendering the 2008 Interior Decision was a clear violation of the Administrative Procedure Act (the "APA"). *Butte Cnty,* 613 F.3d 190. The matter was subsequently remanded and the Secretary ordered to reconsider the 2008 Interior Decision in light of the 2006 Beckham Report. *Id.* at 194.

**B. The Remand**

Following remand, on April 12, 2011, the Department's Deputy Solicitor for Indian Affairs Patricia Kunesh advised the Tribe and County that she had arbitrarily imposed a 30-day deadline for each party to submit "all information that it wishe[d] the Secretary to consider on remand that was not within the original administrative record filed with the court in the preceding litigation." AR NEW 4044. There was nothing, however, to suggest the Secretary was inviting an unrestrained expansion of the Administrative Record ("AR"). Indeed, the Tribe had previously represented that the remand was to be "narrowly focused on the specific issue addressed by the D.C. Circuit, namely consideration of the 2006

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conversion for the purpose of gaming in Butte County, miles from the Bidwell Ranch and former Chico Rancheria. AR NEW 3810.

Beckham Report, and also narrowly focused on the administrative record as it existed at the time the Department failed to give adequate consideration to the 2006 Beckham Report, and nothing more." Docket No. 73 ¶2 (emphasis supplied).

In light of the specific provisions of the remand order, the AR should have consisted solely of (a) the AR promulgated herein by Interior on August 27, 2008, (b) the 2006 Beckham Report, and (c) any materials directly connected to these two categories. Anticipating a tribal submission reconciling the Tribe's already-submitted "expert" materials with the 2006 Beckham Report the Secretary was ordered to consider on remand, the County submitted limited materials on May 12, 2011, responsive to the Deputy Solicitor's request that addressed the problems with the 2008 Interior Decision based on the AR filed by the Department. The only document submitted on May 12, 2011 not previously available to the Tribe was Dr. Beckham's *Curriculum Vitae.* AR NEW 4068.[4]

At the time of this submission, the Tribe had – unbeknownst to the County, but apparently known to Deputy Solicitor Kunesh – abandoned its original "expert" team and corresponding materials upon which the 2008 Interior Decision relied in favor of a new set of consultants consisting of Dr. Shelly Tiley and – to a

[4] The County also resubmitted the 2010 Beckham Analysis with its May 12 submission, although that report was previously filed and made available to the Tribe and Secretary seven months earlier. *See* AR NEW 3810.

much lesser degree – Patricia Mikkelsonm, both of whom are archaeologists without the qualifications or experience as ethnohistorians. Nothing in the remand orders of the D.C. Circuit or this Court even contemplated – let alone suggested – that the Tribe would be permitted to present an entirely new case developed by a professional archaeologist "expert" with citation to, and inclusion of, materials never previously mentioned. The Tribe, however, did precisely that.

The history of the Tiley replacement expert report merits some scrutiny. In a letter dated May 27, 2011, the Tribe contacted the Secretary indicating that it was unable to meet its deadline and requesting a 15-day extension. *See* AR NEW 4108. The Tribe never informed the County of this request. In fact, the County first learned by carbon copy email only after the Secretary had already and unilaterally agreed to grant the request on the same day the Tribe's letter was purportedly sent. AR NEW 4108- 4109.

In requesting the extension, the Tribe claimed the following: "Now that we have received and reviewed the Butte County submission [of May 12, 2011], we are in process of preparing a response to Butte County's challenges to our tribal history."[5] (Emphasis supplied.) *See id.* The Tribe further claimed it (a) was

[5] As stated previously, the only document submitted on May 12, 2011, that was not previously furnished was Dr. Beckham's *Curriculum Vitae*, which recited his credentials and professional experience and expertise, credentials well-known to the Secretary given that he previously had been retained as an expert for the

"impoverished", (b) had "lost our investor" and (c) was "proceeding with very limited resources." *Id*. (emphasis supplied). These claims of insolvency were contrary to the fact the Tribe had already hired Tiley to write a new report. The Tribe concealed what can only be described as a "sneak attack" to enable it to present an entirely new case to support its flawed original trust application – a new case which neither the County nor Dr. Beckham had ever previously seen and one far beyond the scope of the remand. Effectively, the case upon which the County mounted its challenge vanished.

On June 28, 2011 – only 32 days after receiving the extension of time – the Tribe submitted the new 291-page Mechoopda Replacement Report.[6] AR NEW

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Department for a variety of ethnohistory projects. AR NEW 4068. Nowhere in that document was there any new challenge to the Tribe's history, meaning that the Tribe's justification for seeking additional time in order to respond to the purported new "challenges to [Mechoopda] tribal history" in the County's May 12 submission was at best misleading to the point of bordering on fiction. This "justification" language was repeated in the title to the Mechoopda Replacement Report: "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 the Interior." AR NEW 4110.

[6] To believe the representations of the Tribe's May 27 request for time, one would have to accept that within a period of only 32 days the Tribe: (a) found a new investor, (b) secured funding, and (c) hired Far Western Anthropological Research Group, which then (d) was able to immediately assemble a professional team that in turn (e) was able to mount a major research and writing project ready to (f) publish the finished product prior to June 28. This feat not only strains credibility, it defies reality

4110. The County protested, but on July 12, 2011, Kunesh sent a letter to the Tribe and County rejecting the County's request for a reasonable extension of time to develop a response to the Tribe's new theory claiming "restored land" status. AR NEW 4248. In rejecting the request, Kunesh said only that the County was "already provided a sufficient opportunity . . . to submit its expert reports and legal analyses" and that the record was now closed. *Id.* The County again strenuously objected to the closure of the record in a letter dated July 18, 2011, and explained just some of the misrepresentations made in the Mechoopda Replacement Report that were evident on their face (and clearly indicated the need for a response). *See generally* AR NEW 4251. In response, Kunesh granted a mere 20-day extension. AR NEW 4260.

The 20-day extension was unreasonably short. The Secretary was well aware preparing a response to the 291-page filing would consume months, not days. The County explained to Kunesh that 20 days was simply insufficient to mount a reasoned review of the Tribe's entirely new case. AR NEW 4264. Deputy Solicitor Kunesh refused to enlarge the time.

### C. Dr. Beckham Has Documented Key Flaws in the Mechoopda Replacement Report

Dr. Beckham did subsequently prepare a response to the Mechoopda Replacement Report entitled "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'" ("2014 Beckham Report"). Docket No. 92-1. While this report was not considered by the Secretary in 2014, it extensively discussed Department and federal records that were readily available and should have been known to both Tiley and the Department. There were anecdotal references to some of these materials but no discussion of documented facts disproving the Tribe's critical claims of tribal ancestry.

The Mechoopda Replacement Report relies heavily and primarily on Dorothy Hill's THE INDIANS OF CHICO RANCHERIA (1978). 2014 Beckham Report at 9. *Id.* Significantly, Hill herself understood the Indians of the Chico Rancheria to be a multi-ethnic, polyglot group – not a "Mechoopda Tribe" in direct contravention of Dr. Tiley's assertions. *Id.*

In the Mechoopda Replacement Report, Tiley attempted to establish the continuity between the Tribe and the 1851 tribelet by crafting her "Table 1" to track some sort of conclusive proof of Machopda descendancy. However, she provides no explanation regarding the content of the table or the significance thereof. AR NEW 4147-48. Upon review of Table 1, note that a 55-year gap exists between the signing of the unratified Treaty of 1851 by "Mi-chop-da" residents of the tribelet village and the 1906 Kelsey census of the worker village, a census on which Tiley and, in turn, the Secretary relied. *Id.*; *see also* 2014

Beckham Report at 41. The document, written in 1906 by Charles E. Kelsey, Special Indian Agent for the California Indians, lists 27 "heads of household" as residents of "Bidwell Ranch," but the "census" does not specify the specific tribal affiliation or ancestry of any resident, contrary to the Secretary's statement in the 2014 Interior Decision that "Kelsey's census names Captain Lafonso and William Conway as the head of the list of Mechoopda families." AR NEW 5416 (emphasis added).

Conspicuously missing in Tiley's work, as well as the 2014 Decision, is any use of the Thirteenth Decennial Census of the United States conducted in 1910 only four years after Kelsey's visit to the Bidwell Ranch. In fact and contrary to Tiley's conclusions, the 1910 Census reveals almost a complete absence of Mechoopda presence at the site in its "Indian Census Schedule, Chico, California." *See* 2014 Beckham Report at 71-73. Indeed, by 1910, "only seven of 49 residents of the village self-identified as 'Mechoopda' or 'Mydoo/Mechoopda,'" *Id.* at 71, and 17 heads of household identified in the Kelsey Census four years earlier apparently were no longer residing on the Bidwell Ranch because they were missing when the Federal Census team visited Chico. *Id.* at 73. A comparison between the 1906 Kelsey census and 1910 census only four years later "illustrates the transitory nature of the worker village on the Bidwell Ranch." *Id.* at 72.

The Secretary based the 2014 Interior Decision on, *inter alia*, a predicate that requires one to ignore the 1906 Kelsey census and 1910 federal census reports. Specifically, the Secretary stated:

> The historical record indicated that the [treaty tribelet] headman brought 250 Mechopda to live in the village on Bidwell's ranch for the dual purposes of employment and protection…. While some non-Mechoopda Indian laborers settled in the community, the majority of inhabitants were Mechoopda…. (Emphasis supplied.)

These statements are based on a secondary (and not primary) primary source that simply is at odds with the primary source census records. Nowhere in the record of this case is there any competent evidence documenting an influx of 250 Mechoopda to the Ranch. Indeed, by the time of Kelsey's official trip to conduct a census of the Indian population at Chico, he reported the presence of only 26 families present, and a total Indian population of 80 people, the vast majority of whom were children. Accepting, *arguendo*, that was a treaty village population of 250 people, virtually all of them disappeared without leaving descendants. Finally, Kelsey did not identify the Indian ancestry of any Indian resident of the Bidwell Ranch. *See* Kelsey Census at Tab 8 of the Mechoopda Replacement Report. AR NEW 4206.

Other federal records reported the absence of a Mechoopda tribal presence at the Bidwell Ranch throughout the 20th Century. In 1914, BIA employee W. C.

Randolph conducted an official visit to the Bidwell Ranch, observed the residents, 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." *See* 2006 Beckham Report at p. 46, AR NEW 3221. To this point, Randolph identified no tribe as having a beneficial interest or control over the village on the Bidwell ranch. *Id*. While Tiley did identify the Randolph presence at the Bidwell Ranch, she did not disclose that his written report based on eyewitness observation directly impeached her conclusion that there was a historical tribal connection between the Bidwell residents in 1914 and the 1851 treaty village residents. AR NEW 4146-4147.

With respect to the 1928-33 Federal Census at Chico, the 2006 Beckham Report reproduced the entire 1928-33 census roll which confirmed the multi-tribal and mixed ethnic heritage of the community and the presence of residents identifying themselves as descendants from eight tribes (including Mechoopda) as well as people of Hawaiian, African-American, and white ancestry. 2006 Beckham Report at 17, AR NEW 3191; *Id.* at 47, AR NEW 3222:

> Each head of family filed a witnessed affidavit with a BIA enrollment officer. The affidavit sought information on blood quantum, tribal affiliation, ancestry of parents and grandparents, and other information. The following data documents a majority of the families resident on the Bidwell property at Chico between 1928 and 1933. The data unequivocally

> confirmed the conclusion of W. [C.] Randolph that the Indian community was made up of "remnants of various small bands, originally living in Butte and nearby counties." The data actually went further in documenting the mixed ancestry and places of origin of the people who worked for the Bidwells and lived on their ranch.
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> * * *
>
> 5. The BIA enrollment of California Indians, 1928-33, enumerated many of the Indians occupying Chico Rancheria located on a portion of the former Bidwell Ranch. The affidavits executed by these people confirmed the observation made in 1914 by Agent Randolph. The village was made up of people of Wailaki, Concow, Noi-ma (Nue-muck), Mi-chop-da, Sioux, Pit River, Yuki (Ukie), Wintun, Hawaiian, African-American, and white ancestry. Some were unable to name the Indian band from which they were descended. [2006 Beckham Report at 17, AR NEW 0003191; *Id*. at 47, AR NEW 0003222.]

The Mechoopda Replacement Report also used these same census records on Table 1 to purportedly establish Mechoopda descendancy, but Tiley (and subsequently the Secretary) ignored Dr. Beckham's factual recitation of information recorded in the BIA's census collections (as provided above), or explain how the census does, in fact, demonstrate a historical connection to the land when they confirmed the absence thereof. *Cf.* Mechoopda Replacement Report, pp. 13-14, AR NEW 4146-4147; 2006 Beckham Report at 17, AR NEW 3192; *Id*. at 47, AR NEW 3222.

In 1935, Commissioner of Indian Affairs John Collier also determined that the residents at Chico Rancheria were "not now a gov't reservation hence ineligible for election at present." 2006 Beckham Report, 47, AR NEW 3222. The absence of a tribe at the Bidwell Ranch was explained as follows:

> In 1955, sixteen years after federal ownership, the BIA found no government. Commissioner Greenwood wrote: "It is apparent that this group has never submitted a definite membership roll; that no official and accepted survey of the lot and block subdivision of this rancheria is available and that the group does not have an approved land code." That same year Area Director Hill noted that no formal election has ever been held or any organization perfected."

*Id*. at 48, AR NEW 3222. The Mechoopda Replacement Report does not rebut this historical fact, further confirming the absence of a formal functioning tribal government.

Without question, the Rancheria was never formally organized, did not vote on the IRA, had no constitution or bylaws, and had no membership regulations. Not until 1957 did the BIA create a constitution and by-laws – 10 months subsequent to the passage of the California Rancheria Termination Act in order to devise a way to dispose of the real property of the Bidwell Rancheria. None of these actions were "tribal." Rather, they were part of an administrative initiative of the BIA staff in Sacramento necessitated by the absence of any tribal organization or government. 2006 Beckham Report at 35-38, AR NEW 3210-3213. At the

point of termination of the Chico Rancheria in 1958, no organized Mechoopda community existed on the site in question. 2014 Beckham Report at 72.

The research of primary source documents as more fully documented in the 2014 Beckham Report directly led to Dr. Beckham's conclusion that "[a]lthough the federal government has recognized a restored Mechoopda Tribe, that tribe does not have a political succession in interest to the aboriginal Mechoopda nor to the aboriginal lands ceded in the unratified treaty of 1851." *Id*. at 71. This conclusion was previously reported by Dr. Beckham in the 2006 Beckham Report. Noting the absence of primary source materials documenting the continuous tribal existence of a "Mechoopda tribe" with a direct descendancy as a tribe from the 1851 Treaty aboriginal tribelet, Dr. Beckham indicated that:

> [t]he Chico Rancheria was a <u>place of residency</u> of Indians whose entitlement to live there was a function <u>not of tribe, nor language, nor ethnicity</u>, but <u>of the dictates of John and Annie E. K. Bidwell</u> of the moral behavior of their former employees. The federal government accepted the Bidwells' definition when, in distribution of the assets of the Chico Rancheria, it excluded the family of Bud Bain, excepting for ownership of the two lots where family members resided in 1958.

(Emphasis supplied.) AR NEW 3225. This conclusion, based on documented historical fact, directly contradicts Tiley's ultimate <u>assumption</u> that the Indians living on the Bidwell Ranch (a portion of which became the Chico Rancheria)

constituted the 1851 treaty tribe. And, significantly, this conclusion is neither impeached nor even questioned by the Secretary.

**D. The Arbitrary and Capricious 2014 Interior Decision**

On January 24, 2014, the Secretary promulgated the 2014 Interior Decision accepting the land into trust for gaming, extensively citing undocumented conclusions of purported historical facts of the tribal ancestry as articulated in the Mechoopda Replacement Report, and ignoring the relevant federal censuses. In this Decision, the Secretary again failed to reconcile its speculative conclusions about the tribal ancestry of the residents of the Bidwell Ranch and the Chico Rancheria with the still unrebutted 2006 Beckham Report, which documented historical facts and reproduced the entire 1928-33 Chico census. Instead, the 2014 Interior Decision, in a perfunctory manner, recited general denials of Beckham's documented historical facts (and conclusions based thereon) stating only that the "arguments" were not "persuasive":

> Butte County submitted the Beckham Report to the Department asserting 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…. We do not find these arguments persuasive based on the history of the Mechoopda and the record.
>
> ….

> The restored lands section above addresses and refutes the assertions concerning the historical connection between the present-day Mechoopda Tribe and the Mechoopda Tribe that negotiated the 1851 Treaty, relying in part on a report prepared by Dr. Shelly Tiley…. We find Dr. Tiley's report more persuasive and as discussed above, determine that, on the whole, the record supports the conclusions in Dr. Tiley's report.

2014 Interior Decision at 37. As a result, the 2014 Interior Decision was substantively based on the unsupported conclusions of the Mechoopda Replacement Report without reconciling those conclusions with the facts reported in the various federal census collections and accurately quoted and analyzed in the 2006 Beckham Report. AR NEW 5384

Other sources cited in the 2014 Interior Decision to support the conclusory opinion include the self-serving advocacy of the Tribe's legal counsel as well as materials proffered by unqualified individuals, such as the original "expert team" consisting of Bibby, Bates, and Currie, that was replaced after Dr. Beckham analyzed and impeached their credentials to render opinions in the 2010 Beckham Analysis. AR NEW 3810.

Tiley's and the Secretary's conclusions as to continuing Mechoopda tribal existence are impeached by Federal Census records developed in separate surveys conducted in 1906 (Kelsey), 1910 (Indian Population Schedule, 13th Decennial Census of the United States), 1914 (Randolph) and 1928-1933 (Indians of

California Census). The 2014 Interior Decision is the product of speculation that once again failed to discuss, let alone respond to, the documented facts of the 2006 Beckham Report, including the facts that the Indian population at the Bidwell Ranch in 1928-1933 consisted of people who executed affidavits identifying their own family tribal ancestry as people from eight tribes: Wailaki, Concow, Noi-ma (Nue-muck), Mi-chop-da, Sioux, Pit River, Yuki (Ukie) and Wintun, and non-Indian Hawaiian, African-American, and white ancestry. Some were unable to name the Indian band from which they were descended. AR NEW 3193-98, 3222. These Bidwell Ranch residents were allowed to reside on the Bidwell Ranch so long as they followed behavior rules established in Mrs. Bidwell's will. AR NEW 3222. At no place did the Secretary reconcile its general conclusions of exclusive Mechoopda occupancy with the specific federal census information from that official census and reported *verbatim* by Dr.Beckham:

> Between 1928 and 1933 the Bureau of Indian Affairs mounted an enrollment program of [all] California Indians in anticipation of settlement of the aboriginal land claims in the state in the United States claims Court. Each head of a family filed a witnessed affidavit with a BIA enrollment officer. The affidavit sought information on blood quantum, tribal affiliation, ancestry of parents and grandparents and other information." AR NEW 3192.

Dr. Beckham then noted that the results "unequivocally confirmed" the conclusion of BIA Agent W. A. Randolph in 1914 that the Indian community at

the Bidwell Ranch "was made up of 'remnants of various small bands, originally living in Butte and nearby counties.'" AR NEW 3191-92.

On November 20, 2014, Plaintiff filed a Motion for Remand to Defendants for Reconsideration of the January 2014 Trust Acceptance, Docket No. 89, but the motion was denied as premature on April 9, 2015. The Secretary was then ordered to lodge a new Administrative Record. Docket No. 113. On May 5, 2015, when the second Administrative Record ("AR NEW") was lodged, it contained 5,845 pages of materials. Docket No. 114. It is apparent to any reader that the Secretary copied and entered entire volumes into the record, including comprehensive overviews of Indian culture, language and history in California. However, pages pertinent to the Mechoopda are very limited and essentially irrelevant to the issues before this Court.

The resulting AR consists of an extremely large number of pages which are simply irrelevant to the 2014 Decision and the issues before this Court. Not one page of the materials in the new AR relied on by the Secretary either: (a) confirms the Tribe's claim to be the political continuation of and successor-in-interest to the small 1851 Treaty tribelet at Mechoopda village, or (b) refutes Beckham's documented conclusion that the modern Tribe can only 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. The Secretary cited "conclusions" to support the

2014 Interior Decision, but there is no factual reconciliation between the documents facts of the 2006 Beckham Report and the decision rendered. Nowhere is there evidence documenting a direct and unequivocal tribal connection between the modern Mechoopda Tribe and the 1851 Treaty tribe.

## SUMMARY OF THE ARGUMENT

Plaintiff-Appellant Butte County appeals the district court's Memorandum-Decision and Order of July 15, 2016, which denied its Motion for Summary Judgment (Doc. No. 115) and granted the Defendants-Appellees Cross-Motion for Summary Judgment (Doc. No. 119).

The County challenges the second trust acceptance of the proposed gaming site on the basis that the Defendants-Appellees (i) 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" via its submission of a new expert report that abandoned the Tribe's prior experts and justification for finding a historical connection to the land; (ii) arbitrarily refused to expand the evidentiary base to permit the County a reasonable opportunity to respond to the Tribe's new case presented on remand; and (iii) failed to give reasoned consideration to official federal reports and records in the administrative record that directly contradicted the decision rendered.

The district court erred in finding that the Defendants-Appellees did not exceed the scope of the remand order. Instead of responding to the 2006 Beckham

Report the Court ordered the Secretary to consider on remand, the Tribe submitted the Mechoopda Replacement Report grounded on theories and documents not previously presented. In order to complete the Mechoopda Replacement Report and submit it to the Secretary, the Tribe apparently engaged in *ex parte* communications with the Secretary and intentionally misrepresented its financial resources and scope of proposed submission.

Although the County ultimately objected to the admission of the Mechoopda Replacement Report, Deputy Solicitor Kunesh overruled the objections. In the process, she also denied the County an opportunity to respond to the new case being advanced by the Tribe, stating only that the "record was closed." After what ostensibly appears to be *ex parte* communications with the Tribe, Kunesh agreed to extend the County a mere 20 days to respond to the Tribe's new submission, with an additional tribal reply to follow. By any measure, 20 days is an impossible deadline for reviewing, researching and responding to a 291-page "expert" report. By finding otherwise, the district court erred.

Finally, the district court erred in concluding that the Secretary's decision was not arbitrary and capricious. The Secretary was obligated to conduct a reasoned review of the entire record and render a decision based on reliable evidence that fairly took into account and reconciled contradictory facts in the record. The Secretary's 2014 Interior Decision failed to do just that. The

Secretary's Decision is based on an assumption that is contradicted by the 2006 Report, which documented historical fact. The Decision is arbitrary and capricious because it fails to rationally connect the facts reported in the Secretary's own federal censuses to the conclusion made.

## STANDING

The County has standing pursuant to the Administrative Procedure Act, 5 U.S.C. § 702.

## STANDARD OF REVIEW

When conducting a review of the legal sufficiency of an agency's action in light of the record, this Court's task is "precisely the same as the district court's." *Dr. Pepper/Seven-Up Companies, Inc. v. FTC*, 991 F.2d 859, 862 (D.C. Cir. 1993). As such, the district court's decision is "not entitled to any particular deference" and this Court should proceed as though the County had appealed the Secretary's decision directly to this Court. *Id*.

The APA provides that a court shall overturn agency actions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2)(A). Reviewing courts generally owe deference to agency decisions, but "no deference is due when the agency has stopped shy of carefully considering disputed facts." *Cities of Carlisle & Neola, IA v. F.E.R.C.*, 741 F.2d 429, 433 (D.C. Cir. 1984); *see also Wheaton Van Lines, Inc. v. I.C.C.*,

671 F.2d 520, 527 (D.C. Cir. 1982). Any decision based on factual findings or assumptions not supported by substantial evidence constitutes an abuse of discretion. *Star Fruits S.N.C. v. U.S.*, 393 F.3d 1277, 1281 (Fed. Cir. 2005). Moreover, an agency determination is arbitrary and capricious if it fails to consider an important aspect of the matter before it, offers an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

It is settled that the agency's decision at issue should only be affirmed if this Court concludes that Interior took a hard look at the issues by considering the relevant factors and articulating a rational connection between the facts found and the choice made. *Transcon. Gas Pipe Line Corp. v. F.E.R.C.*, 518 F.3d 916, 919 (D.C. Cir. 2008). An agency decision cannot be affirmed on "a reasoned basis different from the rationale actually put forth by the agency." *Pub. Media Ctr. v. F.C.C.*, 587 F.2d 1322, 1332 (D.C. Cir. 1978); *Motor Vehicle Ass'n of U.S.*, 463 U.S. at 43. This means that advocacy of legal counsel cannot save an arbitrary and capricious agency action on review by supplying a rationale that the agency's decision itself did not provide. *KeySpan-Ravenswood, LLC v. FERC*, 348 F.3d 1053, 1059 (D.C. Cir. 2003).

## ARGUMENT

### A. The Secretary's Consideration of the Tribe's New Application on Remand Violated the Clear Standard Set by the D.C. Circuit.

#### 1. The Mechoopda Replacement Report Presented an Entirely New Case.

Although the district court determined that the Secretary had the discretion to supplement the record, an agency is generally permitted to supplement a record only where the administrative record is found insufficient to support the agency's finding. *See Tennis Channel, Inc. v. FCC*, 827 F.3d 137 (D.C. Cir. 2016). It is an abuse of discretion to reopen the administrative record to receive brand new evidence unrelated to the case on remand.

Here, the D.C. Circuit previously found the Secretary's bald refusal to consider the 2006 Beckham Report – "we [the Secretary] are not inclined to revisit this decision" – was neither informed nor even-handed, and violated the APA requirements that the Secretary (1) present a "brief statement of the grounds for denial" and (2) consider all evidence bearing on the issue before them. The Court thus ordered "that this case [be] remanded . . . [and t]he Secretary shall include and consider the '[2006] Beckham Report' as part of the administrative record on remand." AR NEW 3832 (emphasis supplied). As discussed more fully above, following the remand where the Secretary was specifically directed to consider the 2006 Beckham Report, the Secretary arbitrarily imposed a 30-day deadline for

each party to submit "all information that it wishe[d] the Secretary to consider on remand that was not within the original administrative record filed with the court in the preceding litigation." Of note, the information that should have been considered on remand was information pertaining to the case then before the Secretary, *i.e.*, the case grounded on the trust application relying on the subsequently-fired impeached expert team of Bibby, Bates, and Currie. Nowhere in the remand order did this Court invite the Secretary to "supplement the record" with an entirely new application unrelated to the case that had been litigated and remanded.

**2. The Secretary Improperly Granted the Tribe's Misleading Request for an Extension of Time.**

In order to secure an extension of the Department's previously announced deadlines for the purpose of completing the Mechoopda Replacement Report, the Tribe appears to have communicated *ex parte* with the Secretary and acted in bad faith and – in the process – intentionally misled the Department regarding (1) tribal resources and (2) the scope of the proposed tribal submission. *See* AR NEW 4108-4109. Despite the Tribe's claimed lack of funds, just 32 days after receiving the extension of time the Tribe was able to submit the Mechoopda Replacement Report, an entirely new report 291 pages long, which abandoned its first three

experts following Dr. Beckham's exposure of their lack of credentials and expertise.[7]

The Mechoopda Replacement Report was clearly a project months in the making and reflects an investment of considerable funds far beyond an entity with "limited" resources. AR NEW 4130. Even with this additional material at hand, the Secretary did not reconcile the 2014 Decision with the documented facts of ancestry from the 1928-33 Indian Census. Indeed, the Secretary failed to even disclose the existence of the various federal census collections at the Bidwell Ranch Indian village. To reiterate, the Department actually conducted three of those reports – the Kelsey census of 1906, the Randolph report of 1914 and the California Indians Judgment Roll Census of 1928-33 – and each of them reports

[7] In the 2010 Beckham Analysis, Dr. Beckham determined that the Tribe's original "experts" failed to conduct the analysis that would have allowed the Secretary to determine the Tribe had the requisite historic connections to the gaming site that would qualify it for gaming as "restored land" to a "restored tribe." To this point, Dr. Beckham reports that they failed to (i) examine the membership and ancestry of the Mechoopda Tribe, (ii) identify or assess the functioning of the Tribe, except for Currie who noted that as of 1957 there was no tribal government of any kind, (iii) link the federally-recognized Mechoopda Tribe with the requisite "use and occupancy" of the Bidwell Ranch, (iv) visit the archives of the BIA, National Archives, San Bruno, or (v) use the historical writings and field notes to connect the modern Mechoopda Tribe to the lands proposed for fee-to-trust conversion for the purpose of gaming in Butte County, miles from the Bidwell Ranch and former Chico Rancheria. "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." AR NEW 3810.

the fact that a majority of the then-current Indian population identified no Machopda ancestry. The omission by the Secretary to disclose these recorded facts was either negligent or intentional. The Secretary's decision to ignore these facts was arbitrary and capricious.

**B. The Secretary Abused Its Discretion by Arbitrarily Narrowing the Evidentiary Base.**

Judicial review of agency decisions "ensures that the agency has 'taken a `hard look' at the salient problems,' and has 'engaged in reasoned decision-making' essential to the informed and even-handed implementation of public policy." *Cross-Sound Ferry Servs., Inc. v. I.C.C.*, 738 F.2d 481, 483 (D.C. Cir. 1984) (emphasis supplied) (quoting *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970)). To determine whether an agency has taken the requisite "hard look," the APA requires a federal agency articulate a non-conclusory reasoned explanation for its actions that does not exclude or ignore evidence contradicting its position. *Butte Cnty*, 613 F.3d at 194.

Moreover, it is established that when an agency "balk[s] at gathering sufficient record evidence to permit a reasoned [review]," it has abused its discretion. *Cross-Sound Ferry Services, Inc.*, 738 F.2d at 484. In this case, the Secretary ignored the series of federal Census Reports concerned exclusively with documenting the population of Indians living on the Bidwell Ranch. The failure to

examine these materials and reconcile them with the 2006 Beckham Report is simply inexcusable since the Secretary admittedly knew there were census rolls of Indians residing at the Bidwell Ranch over time: "[T]he Tribe was included on Federal census rolls and various individual tribal members attended BIA schools." AR NEW 5410. While acknowledging the fact that census rolls were developed over time, the kindest explanation is that the Secretary simply never even read them to determine whether they validated the modern claims of entitlement to the 1851 treaty lands. If the Census records had impeached the 2006 Beckham Report and those facts published, we would have a different case. However, the Secretary undertook no analysis of the facts reported in the various Census records and whether they impeached the conclusions of the 2006 Beckham Report. Although every Beckham conclusion was supported by recorded facts and sworn census data, the Secretary merely declared without analysis that the various federal census rolls "proved" the existence of a Mechoopda Tribe that was descended from the treaty tribe.

The virtual absence of any Machopda ancestry at the Bidwell Ranch was recorded in the 1910. If the Secretary had conducted even a cursory review of the 1910 Indian Schedule for the 13th Decennial Census, it would have known that 42 of the 49 Indian residents of the Bidwell Ranch enrollees admitted to the federal census agents that they had no Mechoopda ancestry. Beckham 2014 Report p.67.

That fact alone contradicts the Secretary's conclusion that the modern tribe was the same tribe as the 1851 tribelet. To emphasize, there is no question that the modern tribe is federally recognized. But there is no fact-based support for the argument that the modern tribe can claim rights under a treaty executed by a small village tribelet from which virtually no living tribal members can claim ancestry.

In *Cross-Sound Ferry*, the court held in a license application proceeding that the Interstate Commerce Commission's "stubborn refusal to expand the evidentiary base by requiring greater specificity from [the applicant] or by permitting [the petitioner] to ferret out relevant evidence through discovery or oral hearing [was] unsupportable [pursuant to APA procedural requirements]." *Id*. at 484 (emphasis added). The court specifically stated the agency:

> could have ordered [the applicant] to provide more specificity with respect to [the application]. Or it could have granted [the petitioner's] request for discovery (or at least an oral hearing) to permit [the petitioner] to learn [the applicant's] specific plans. The one course not reasonably open to the [agency] was to evaluate [the applicant's] application on the incomplete administrative record the Commission had before it." [*Id.* at 486 (Emphasis supplied).]

Thus, the one action the agency could not take was to deny the petitioner an adequate opportunity to investigate the license application. To do so would be an abuse of discretion. *See id.*

Just as in *Cross-Sound Ferry*, where the agency abused its discretion by failing to expand the evidentiary base before making its decision, the Secretary has likewise abused its discretion in this case. Following remand, the Tribe was, unbeknownst to the County, effectively authorized by the Secretary to present a new and unchallenged case in support of its trust application. The Tribe never responded to the documented facts reported in the 2006 Beckham Report.

The Secretary overruled the County's objection to the report's admission and denied it an adequate opportunity to respond to the Tribe's entirely new case. At first, the Secretary outright refused to permit the County to file a response. AR NEW 4248. Then, following what apparently were *ex parte* discussions between the Secretary and the Tribe's legal counsel, the Secretary allotted a mere 20 days for a response to the surprise report on the condition the Tribe was thereafter able to reply. AR NEW 4260. Among other things, the County informed the Secretary that 20 days was woefully insufficient to mount a reasoned analysis to a 291-page long expert report, an analysis that was warranted in light of the facially-obvious faults in that document because of its abject failure to respond to the 2006 Beckham Report.. *See* AR NEW 4264; AR NEW 4251. The Secretary, however, disregarded the County's objection. Its refusal to grant the County a reasonable extension of time effectively constituted a second "refusal to consider evidence bearing on the issue before it" in violation of the APA.

### C. The Administrative Record Does Not Support the Determinations that the Site is "Restored Land" for the Mechoopda Tribe.

At a minimum, the APA requires any agency to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Assn of United States, Inc.* 463 U.S. at 43. It is obvious that ignoring critical evidence to issue a desired result is not condoned. *Butte Cnty*, 613 F.3d at 194. "The substantiality of evidence [of an agency decision] must take into account whatever in the record fairly detracts from its weight," and the failure to consider and reconcile the contradictory facts with the decision rendered constitutes arbitrary decision-making. *Id.* (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951)). Moreover, as further explained in *Resolute Forest Products, Inc. v. U.S. Department of Agriculture*, "where an agency has relied on incorrect or inaccurate data or has not made a reasonable effort to ensure that appropriate data was relied upon, its decision is arbitrary and capricious and should be overturned." 187 F. Supp. 3d. 100, 123 (D.C. 2016). Ultimately, "the agency must explain why it decided to act as it did. The agency's statement must be one of 'reasoning'; it must not be just a 'conclusion'; it must 'articulate a satisfactory explanation' for its action." *Butte Cnty*, 613 F.3d at 194 (emphasis supplied).

The 2014 Interior Decision wholly failed to give reasoned consideration to the contradictory facts in the record and census data in the Secretary's files. It also failed to articulate an explanation for ignoring ancestry data critical to this dispute that was readily available through its own census records. The Secretary's Decision, based upon unsubstantiated and incomplete data, assumes there is a historical connection to the land, but assumption is not reasoned decision-making. It is the hallmark of arbitrary and capricious action.

### 1. Federal Census Records Included in the Administrative Record Verify the Lack of Mechoopda Tribal Descent from the 1851 Treaty Tribe.

In issuing the 2014 Interior Decision the Secretary failed to explain how there was a historical connection to the land notwithstanding the contradictory census record evidence *verbatim* reported in Dr. Beckham's reports. Although the 2014 Decision indicates that the Secretary found the Mechoopda Replacement Report "more persuasive," it simply ignores facts in the record and within the Department's historical census collections.

Ostensibly, to support Interior's declared existence of a cohesive "Mechoopda" community on the Bidwell Ranch the Decision intentionally misrepresents the facts in the record. For example, in an attempt to establish the first critical link between the historic Mechoopda tribelet and the Tribe, the 2014 Interior Decision declared that "Kelsey's [1906] census names Captain Lafonso

and William Conway as the head of the list of Mechoopda families." AR NEW 5416 (emphasis added). This was nothing short of a conscious misrepresentation of facts. While the Kelsey census[8] does identify Lafonso and Conway as "heads of family" at the Indian village on the Bidwell Ranch, it does not identify ancestral tribal affiliation for any family at the Ranch. The word "Mechoopda" is nowhere to be found in the Kelsey documents. To learn more about either of those individuals, it is necessary to consult other materials, such as the other census projects identified in this Brief.

The 1910 Indian Census Schedule named an individual named Elmer Lafonso who identified his Indian ancestry as "Mechoopda." It also identified an individual named William Conway who identified his only Indian ancestry as "Wintun/Yuki." Beckham 2014 Report at 67.

In addition, individuals named "Elmer N. Lafonso" and William Jennings Conway were included in the 1928-33 Census conducted some 14-19 years later. Lafonso identified his Indian ancestry as "3/4 Mi-shop-da, the son of Lafonso (Ho-lai), a Mi-chop-da and Mandy Wilson, 1/2 Indian." AR NEW 3195. Conway identified his Indian ancestry as "1/2 Yuki." (It is noted that seven other enrollees named "Conway" are named in the same Census Roll. The seven variously self-

[8] The Kelsey Census is at Tab 8 of the Mechoopda Replacement Report. AR NEW 4206.

identified their Indian ancestry as “Ukie,” “Wintun” “Wailaki,” but none of them identified or claimed any Mechoopda ancestry.) AR NEW 3194

Likewise, it is unknown how the Tribe or the Secretary used information from the 1914 Report made by BIA employee W.C. Randolph to find a historical connection to the land when it is directly contrary to their conclusion. In the 2006 Beckham Report, Dr. Beckham recounted Randolph’s 1914 conclusion: "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." *See* 2006 Beckham Report at p. 46, AR NEW 3221. To this point, Randolph identified no tribe as having a beneficial interest or control over the village on the Bidwell Ranch. *Id*.

Instead of refuting or explaining how this evidence actually establishes a historical connection, Tiley summarily cited it as “evidence” proving continuity, but provided no reasoned analysis to address the inherent contradiction between the conclusions and the facts of the census. In accepting the Mechoopda Replacement Report as proof of historical connection, the Secretary repeated this failure.

The 2014 Interior Decision also fails to address the 1928-33 census records that absolutely undermine the validity of its ultimate conclusion of Mechoopda tribal continuity. The 1928-33 Federal Census confirmed the multi-tribal and

mixed ethnic heritage of the community and verified the lack of Mechoopda tribal descendancy, a confirmation which was not rebutted by either Tiley or the Secretary. 2006 Beckham Report at 17, AR NEW 3191; *Id*. at 47, AR NEW 3222. The 2006 Beckham Report reproduced the entire text of these records for the Secretary's benefit, but the 2014 Interior Decision neither cites nor refers to the 1928-33 BIA Census Roll, apparently in a conscious decision to ignore both (1) the facts reported in that Census and (2) Dr. Beckham's *verbatim* reproduction of them. Instead, the Secretary rejected her own Department's recordation of facts reported by the individual residents of the Bidwell Ranch and mischaracterized them simply as Dr. Beckham's "conclusions." It is settled law that the agency's decision "cannot withstand review [when] it fails to consider contradictory record evidence where such evidence is precisely on point." *Morall v. Drug Enf't Admin.*, 412 F.3d 165, 167 (D.C. Cir. 2005).

Evidently, the Secretary also ignored the substantive content of census data in order to support a conclusion that the Tribe was the political continuation of and successor in interest to the historical Mechoopda tribe. To the contrary, this census data disproves the Secretary's essential assumption. Before the Secretary could conclude that the Tribe could "use its early history to demonstrate a significant historical connection to the land," there was an obligation to use reliable and

accurate evidence to actually establish an ongoing historical connection. The Secretary failed to do so.

### 2. Federal Census Records Included in the Administrative Record Verify the Lack of Mechoopda Tribal Descendancy.

The 2014 Interior Decision assumed that the Tribe was the successor in interest to the 1851 Machopda tribelet. It cannot, however, point to any primary source documents that support this connection which is indispensable to the conclusion reached. Even more disconcerting, the Secretary failed to consider the an important aspect of the problem by consciously ignoring evidence that disproves its assumption, including the Thirteenth Decennial Census of 1910, which documented almost a complete absence of Mechoopda presence at the Bidwell Ranch, 2014 Beckham Report at 71-74, and "illustrates the transitory nature of the worker village on the Bidwell Ranch." *Id.* at 72. With this said,

> 'the requirement that agency action not be arbitrary or capricious includes a requirement that the agency adequately explain its result.' This standard 'mandat[es] that an agency take whatever steps it needs to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision.' [*Resolute Forest Products, Inc.*, 187 F. Supp. 3d at 123 (emphasis supplied).]

The Secretary's wholesale rejection of the County's documented facts and concurrent acceptance of Tiley's generalized summary of the relevant census data without considering all relevant factual content, including review of the 1910

Indian Census Schedule of the Thirteenth Decennial Census that the Secretary, as a federal agency, should have known existed,[9] was a failure to "take whatever steps it need[ed] to provide an explanation that w[ould] enable the court to evaluate the agency's rationale at the time of decision." *Id.*

### 3. The 2014 Interior Decision Fails to Reconcile the Lack of a Functioning Mechoopda Tribe at the Site with Its Ultimate Conclusion Finding a Historical Connection.

Perhaps not surprisingly, the Secretary declared a historical connection to the Machopda treaty tribelet of 1851 by completely ignoring the very evidence in the 2006 Beckham Report that was required to be considered on remand. The Secretary compounded that error by ignoring federal census records documenting the lack of any functioning government among the Indians of the Chico Rancheria in the 1910s, 1930s, and 1950s, or at any time in the 20th Century except briefly in 1957. For example, as more fully explained above, in 1935, Commissioner of Indian Affairs John Collier determined that the residents were "not now a gov't

[9] Table 1 of the Mechoopda Replacement Report conveniently ignored the 13th Decennial Census, perhaps because it inconveniently reported in 1910 that only seven of 49 Indian residents self-identified as "Mechoopda" or "Mydoo/Mechoopda," demonstrating both (a) the small percentage of residents identifying any Machopda ancestry and – via the comparison of primary source evidence through the census records of 1906 and 1910 – (b) the fluidity of the Indian population at the Bidwell Ranch. And as the Secretary conceded in the 2014 Interior Decision, transiency does not lend itself to a finding of historical connection to the land. AR NEW 5402.

reservation hence ineligible for election at present." 2006 Beckham Report, 47, AR NEW 3222. This fact was neither rebutted nor addressed by either Tiley or the Secretary. Indeed, despite the numerous primary source documents the County presented to the Secretary in the 2006 Beckham Report, such as contemporaneous census records and government officials' first-hand reports establishing that the worker community on the Bidwell Ranch was a multi-tribal, multi-ethnic, polyglot group of employees and their families whose residence and conduct was totally controlled by the Bidwells, the Secretary apparently did not find it necessary either to address these points in its 2014 Interior Decision or reconcile them with the factual contradictions upon which the Decision rested. *See generally* 2006 Beckham Report, AR NEW 3171; *see also* 2014 Beckham Report at 71.

Contained within the record are documented historical facts that directly contradict the Mechoopda Replacement Report and Secretary's ultimate assumption that the Indians living on the Bidwell Ranch (a portion of which became the Chico Rancheria) constituted the 1851 treaty tribe. This decision was based on the use of secondary source documents and failure to reconcile the assumption with primary source documents. The facts of the 2006 Beckham Report have neither been refuted nor "explained away" by primary source documents. In accepting Tiley's inadequately-documented assumptions of a continued Mechoopda tribal existence and failing to reconcile those conclusions

with the 2006 Beckham Report – let alone the 2014 Beckham Report – both of which relied on primary source documents, the Secretary acted in an arbitrary and capricious manner because it failed to make a reasoned decision rationally connecting the facts – no political continuity or Mechoopda descendancy – to the conclusion made – a historical connection to the land.

## CONCLUSION

Because the district court erred in its conclusions that the Secretary's unreasoned 2014 Interior Decision was not arbitrary, capricious, and without observance of the law, that decision should be reversed and the 2014 Interior Decision should be remanded to the Secretary for further consideration.

**DATED** this 30th day of January 2017.

**BUTTE COUNTY, CALIFORNIA**

By Counsel

s/ Dennis J. Whittlesey

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## FRAP 31(A)(7) CERTIFICATE OF COMPLIANCE

In compliance with Federal Rule of Appellate Procedure 31(a)(7), I certify that the forgoing contains 9,853 words, excluding parts of the document that are exempted by the Rule.

## CERTIFICATE OF SERVICE

I hereby certify that on January 30, 2017, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all listed counsel of record.

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

## ADDENDUM: STATUTES AND REGULATIONS

**25 U.S. Code § 2719 - Gaming on lands acquired after October 17, 1988**

(a) **Prohibition on lands acquired in trust by Secretary**. Except as provided in subsection (b), gaming regulated by this chapter shall not be conducted on lands acquired by the Secretary in trust for the benefit of an Indian tribe after October 17, 1988, unless—

(1) such lands are located within or contiguous to the boundaries of the reservation of the Indian tribe on October 17, 1988; or

(2) the Indian tribe has no reservation on October 17, 1988, and—

(A) such lands are located in Oklahoma and—

(i) are within the boundaries of the Indian tribe's former reservation, as defined by the Secretary, or

(ii) are contiguous to other land held in trust or restricted status by the United States for the Indian tribe in Oklahoma; or

(B) such lands are located in a State other than Oklahoma and are within the Indian tribe's last recognized reservation within the State or States within which such Indian tribe is presently located.

(b) **Exceptions**

(1) Subsection (a) will not apply when—

(A) the Secretary, after consultation with the Indian tribe and appropriate State and local officials, including officials of other nearby Indian tribes, determines that a gaming establishment on newly acquired lands would be in the best interest of the Indian tribe and its members, and would not be detrimental to the surrounding community, but only if the Governor of the State in which the gaming activity is to be conducted concurs in the Secretary's determination; or

(B) lands are taken into trust as part of—

(i) a settlement of a land claim,

(ii) the initial reservation of an Indian tribe acknowledged by the Secretary under the Federal acknowledgment process, or

(iii) the restoration of lands for an Indian tribe that is restored to Federal recognition.

(2) Subsection (a) shall not apply to—

(A) any lands involved in the trust petition of the St. Croix Chippewa Indians of Wisconsin that is the subject of the action filed in the United States District Court for the District of Columbia entitled St. Croix Chippewa Indians of Wisconsin v. United States, Civ. No. 86–2278, or

(B) the interests of the Miccosukee Tribe of Indians of Florida in approximately 25 contiguous acres of land, more or less, in Dade County, Florida, located within one mile of the intersection of State Road Numbered 27 (also known as Krome Avenue) and the Tamiami Trail.

(3) Upon request of the governing body of the Miccosukee Tribe of Indians of Florida, the Secretary shall, notwithstanding any other provision of law, accept the transfer by such Tribe to the Secretary of the interests of such Tribe in the lands described in paragraph (2)(B) and the Secretary shall declare that such interests are held in trust by the Secretary for the benefit of such Tribe and that such interests are part of the reservation of such Tribe under sections 5108 and 5110 of this title, subject to any encumbrances and rights that are held at the time of such transfer by any person or entity other than such Tribe. The Secretary shall publish in the Federal Register the legal description of any lands that are declared held in trust by the Secretary under this paragraph.

(c) **Authority of Secretary not affected**

Nothing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust.

(d) **Application of title 26**

(1) The provisions of title 26 (including sections 1441, 3402(q), 6041, and 6050I, and chapter 35 of such title) concerning the reporting and withholding of taxes

with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter, or under a Tribal-State compact entered into under section 2710(d)(3) of this title that is in effect, in the same manner as such provisions apply to State gaming and wagering operations.

(2) The provisions of this subsection shall apply notwithstanding any other provision of law enacted before, on, or after October 17, 1988, unless such other provision of law specifically cites this subsection.

**25 C.F.R. § 151.3 Land acquisition policy.**

Land not held in trust or restricted status may only be acquired for an individual Indian or a tribe in trust status when such acquisition is authorized by an act of Congress. No acquisition of land in trust status, including a transfer of land already held in trust or restricted status, shall be valid unless the acquisition is approved by the Secretary.

(a) Subject to the provisions contained in the acts of Congress which authorize land acquisitions, land may be acquired for a tribe in trust status:

(1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or

(2) When the tribe already owns an interest in the land; or

(3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

(b) Subject to the provisions contained in the acts of Congress which authorize land acquisitions or holding land in trust or restricted status, land may be acquired for an individual Indian in trust status:

(1) When the land is located within the exterior boundaries of an Indian reservation, or adjacent thereto; or

(2) When the land is already in trust or restricted status.

**25 C.F.R. § 151.10 On-reservation acquisitions.**

Upon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. The notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. If the state or local government responds within a 30-day period, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply and/or request that the Secretary issue a decision. The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;

(b) The need of the individual Indian or the tribe for additional land;

(c) The purposes for which the land will be used;

(d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;

(e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

(h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy

Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations. (For copies, write to the Department of the Interior, Bureau of Indian Affairs, Branch of Environmental Services, 1849 C Street NW., Room 4525 MIB, Washington, DC 20240.)

**25 C.F.R. § 151.11 Off-reservation acquisitions.**

The Secretary shall consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation, and the acquisition is not mandated:

(a) The criteria listed in § 151.10 (a) through (c) and (e) through (h);

(b) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.

(c) Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.

(d) Contact with state and local governments pursuant to § 151.10 (e) and (f) shall be completed as follows: Upon receipt of a tribe's written request to have lands taken in trust, the Secretary shall notify the state and local governments having regulatory jurisdiction over the land to be acquired. The notice shall inform the state and local government that each will be given 30 days in which to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

**25 C.F.R. § 292.7 What must be demonstrated to meet the "restored lands" exception?**

This section contains criteria for meeting the requirements of 25 U.S.C. 2719(b)(1)(B)(iii), known as the "restored lands" exception. Gaming may occur on newly acquired lands under this exception only when all of the following conditions in this section are met:

(a) The tribe at one time was federally recognized, as evidenced by its meeting the criteria in § 292.8;

(b) The tribe at some later time lost its government-to-government relationship by one of the means specified in § 292.9;

(c) At a time after the tribe lost its government-to-government relationship, the tribe was restored to Federal recognition by one of the means specified in § 292.10; and

(d) The newly acquired lands meet the criteria of "restored lands" in § 292.11.

**25 C.F.R. § 292.8 How does a tribe qualify as having been federally recognized?**

For a tribe to qualify as having been at one time federally recognized for purposes of § 292.7, one of the following must be true:

(a) The United States at one time entered into treaty negotiations with the tribe;

(b) The Department determined that the tribe could organize under the Indian Reorganization Act or the Oklahoma Indian Welfare Act;

(c) Congress enacted legislation specific to, or naming, the tribe indicating that a government-to-government relationship existed;

(d) The United States at one time acquired land for the tribe's benefit; or

(e) Some other evidence demonstrates the existence of a government-to-government relationship between the tribe and the United States.

**25 C.F.R. § 292.9 How does a tribe show that it lost its government-to-government relationship?**

For a tribe to qualify as having lost its government-to-government relationship for purposes of § 292.7, it must show that its government-to-government relationship was terminated by one of the following means:

(a)Legislative termination;

(b) Consistent historical written documentation from the Federal Government effectively stating that it no longer recognized a government-to-government relationship with the tribe or its members or taking action to end the government-to-government relationship; or

(c) Congressional restoration legislation that recognizes the existence of the previous government-to-government relationship.

**25 C.F.R. § 292.10 How does a tribe qualify as having been restored to Federal recognition?**

For a tribe to qualify as having been restored to Federal recognition for purposes of § 292.7, the tribe must show at least one of the following:

(a) Congressional enactment of legislation recognizing, acknowledging, affirming, reaffirming, or restoring the government-to-government relationship between the United States and the tribe (required for tribes terminated by Congressional action);

(b) Recognition through the administrative Federal Acknowledgment Process under § 83.8 of this chapter; or

(c) A Federal court determination in which the United States is a party or court-approved settlement agreement entered into by the United States.

**25 C.F.R. § 292.11 What are “restored lands”?**

For newly acquired lands to qualify as ”restored lands” for purposes of § 292.7, the tribe acquiring the lands must meet the requirements of paragraph (a), (b), or (c) of this section.

(a) If the tribe was restored by a Congressional enactment of legislation recognizing, acknowledging, affirming, reaffirming, or restoring the government-to-government relationship between the United States and the tribe, the tribe must show that either:

(1) The legislation requires or authorizes the Secretary to take land into trust for the benefit of the tribe within a specific geographic area and the lands are within the specific geographic area; or

(2) If the legislation does not provide a specific geographic area for the restoration of lands, the tribe must meet the requirements of § 292.12.

(b) If the tribe is acknowledged under § 83.8 of this chapter, it must show that it:

(1) Meets the requirements of § 292.12; and

(2) Does not already have an initial reservation proclaimed after October 17, 1988.

(c) If the tribe was restored by a Federal court determination in which the United States is a party or by a court-approved settlement agreement entered into by the United States, it must meet the requirements of § 292.12.

**25 C.F.R. § 292.12 How does a tribe establish connections to newly acquired lands for the purposes of the "restored lands" exception?**

To establish a connection to the newly acquired lands for purposes of § 292.11, the tribe must meet the criteria in this section.

(a) The newly acquired lands must be located within the State or States where the tribe is now located, as evidenced by the tribe's governmental presence and tribal population, and the tribe must demonstrate one or more of the following modern connections to the land:

(1) The land is within reasonable commuting distance of the tribe's existing reservation;

(2) If the tribe has no reservation, the land is near where a significant number of tribal members reside;

(3) The land is within a 25-mile radius of the tribe's headquarters or other tribal governmental facilities that have existed at that location for at least 2 years at the time of the application for land-into-trust; or

(4) Other factors demonstrate the tribe's current connection to the land.

(b) The tribe must demonstrate a significant historical connection to the land.

(c) The tribe must demonstrate a temporal connection between the date of the acquisition of the land and the date of the tribe's restoration. To demonstrate this connection, the tribe must be able to show that either:

(1) The land is included in the tribe's first request for newly acquired lands since the tribe was restored to Federal recognition; or

(2) The tribe submitted an application to take the land into trust within 25 years after the tribe was restored to Federal recognition and the tribe is not gaming on other lands.

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