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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA,

Plaintiff

v.

S.M.R. JEWELL, et al.

Defendants

CITIZENS FOR A BETTER WAY, et al.

Plaintiffs

v.

UNITED STATES DEPARTMENT OF INTERIOR, et al.,

Defendants

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY,

Plaintiff,

v.

S.M.R. JEWELL, et al.,

Defendants

Civil Action No. 2:12-CV-3021-TLN-AC
(Consolidated)

FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO STRIKE

Date: Thursday, October 9, 2014
Time: 2:00 p.m.
Courtroom: 2, 15th Floor
Hon. Troy L. Nunley

BACKGROUND

This is an APA case. The administrative record in this case was initially lodged more than a year ago. *See, e.g.*, ECF 35. Over the ensuing twelve months, Plaintiffs repeatedly challenged the completeness of the administrative record, and Federal Defendants carefully considered, and responded to, Plaintiffs' concerns. When all was said and done, Federal Defendants, seeking to err on the side of inclusion and compromise, had added dozens of documents to the administrative record and reconsidered, in whole or in part, dozens of privilege assertions.[1] All of this was accomplished under the auspices of scheduling orders to which all parties stipulated. The most recent (and currently effective) scheduling order provided that Federal Defendants would re-lodge the administrative record (with certain additions to which the parties had agreed) and that "[a]ny objections to, including motions to supplement, the second amended Administrative Record shall be filed on or before the 7th day following Federal Defendants' delivery to Plaintiffs of a copy of the second amended Administrative Record and index as lodged with the Court." ECF 95 at 2. The revised AR was sent by federal express on May 23. *See* ECF 96 and Text Docket Entry entered 5/27/2014, "ACKNOWLEDGEMENT OF RECEIPT of Compact Disc of Revised Administrative Record from Defendants Secretary of the Interior, et al." No objections to the new administrative record were filed.

ARGUMENT

In connection with their summary judgment papers, Plaintiff United Auburn Indian Community ("Auburn") has cited, and Plaintiff Cachil Dehe Band Of Wintun Indians of The

[1] Not wanting to burden the Court with the parties' extensive correspondence on the subject, the Court can get a clear sense of the scope of Federal Defendants' conciliatory efforts by reviewing the administrative record index that has been lodged as part of the administrative record CD. All documents bearing the bates prefix "EN_AR_NEW," that do not also have a bates number with the prefix "EN_AR," are documents that Federal Defendants have agreed to add during the months following the original lodging of the record.

Colusa Indian Community ("Colusa") has submitted, affidavits and other documents that are not part of the administrative record and that therefore cannot, in this APA review case, play any role in the Court's resolution of the parties' cross-motions for summary judgment. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard of review . . . to the agency decision based on the record the agency presents to the reviewing court."). The documents at issue are:

1. Declaration of Alan P. Meister and attached exhibit 1,"Economic Impacts" analysis (ECF 106);
2. Affidavit of Marcos Guerrero (ECF 49-2 in Case No. 2:13-cv-64);
3. Affidavit of Gina S. Young (ECF 49-5 in Case No. 2:13-cv-64) and attached exhibits 3, 5, 7, 9, and 10;
4. Declaration of Bryan M. Killian (ECF 54) and attached exhibit 3.

A. Evidence Not Included in the Administrative Record Should Be Stricken

Under the Administrative Procedure Act a "reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *Fla. Power*, 470 U.S. at 744. Courts therefore normally refuse to consider evidence not before the agency at the time it made its decision. *See Asarco, Inc. v. U.S. Envtl. Prot. Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980); *Wiechers v. Moore*, 1:13-CV-00223-LJO, 2014 WL 1400843 (E.D. Cal. Apr. 10, 2014) *recons. denied in part*, 1:13-CV-00223-LJO, 2014 WL 1922237 (E.D. Cal. May 14, 2014).

Extra-record materials are typically stricken. *Conservation Cong. v. U.S. Forest Serv.*, No. CIV. S-13-0832 LKK/DAD, 2013 WL 4829320 at *1 n.3 (E.D.Cal., Set.6, 2013) (granting motion to strike extra-record material in NEPA case) ("[t]he court has considered only material in the Administrative Record, and accordingly the motion to strike, treated as an evidentiary objection to the consideration of that material, will be granted."); *Sequoia Forestkeeper v. U.S. Forest Serv.*,

No. CV F 09-392 LJO JLT, 2010 WL 5059621 at *7 (E.D. Cal. Dec. 3, 2010) ("this Court STRIKES the declarations and exhibits submitted by Sequoia Forestkeeper, and considers only the administrative record in these cross-motions for summary judgment") *opinion modified on recons.*, 2001 WL 902120 (E.D. Cal. Mar. 15, 2011); *Ventana Wilderness Alliance v. Bradford*, No. C 06-5472 PJH, 2007 WL 1848042 at *11 (N.D. Cal. July 27, 2007) ("Defendants have stated that if the court strikes all of plaintiffs' declarations, they will voluntarily withdraw their rebuttal declarations, leaving the administrative record as the sole basis for the decision on the cross motions for summary judgment, as is proper under the APA. The court has not considered plaintiffs' declarations, nor has it considered the government's rebuttal declaration . . . These materials are all STRICKEN"), *aff'd*, 313 F. Appx. 944, 947 (9th Cir. 2009).

The extra-record materials cited by Colusa and UAIC should be stricken and arguments based upon those materials disregarded.[2]

B. Plaintiffs Give no Reason to Believe That Their Extra-Record Evidence Fits Any of the Four Narrow Exceptions

Courts admit extra-record evidence in only four limited situations, such as when: "[1] necessary to determine whether the agency has considered all relevant factors and has explained its decision; [2] the agency has relied on documents not in the record; [3] supplementing the record is necessary to explain technical terms or complex subject matter; [or 4] plaintiffs make a showing of agency bad faith." *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th

[2] A more drastic remedy is certainly available in a NEPA case where plaintiffs improperly rely upon extra-record evidence. *See Desert Protective Council v. U.S. Dep't of the Interior*, 927 F.Supp.2d 949, 955 (S.D.Cal. Feb. 27, 2013) ("On December 21, 2012, 2012 WL 6678056, the Court granted all Defendants' motion to strike the extra-record declaration of Scott Cashen and set a new briefing schedule for Plaintiffs to re-file their opening brief without reference to Cashen's declaration and accompanying exhibits."). Instead, Federal Defendants only request that the Court strike the extra-record materials submitted and disregard arguments based upon those materials.

Cir. 1996) (internal quotation marks and citations omitted). On their face the documents Colusa and UAIC seek to use fit none of these exceptions.

Colusa's material (the Declaration of Alan P. Meister and attached "Economic Impacts" analysis (ECF 106)) offers opinions and calculations regarding the likely impact of an Enterprise casino on Colusa's existing casino revenues. There is no hint that this material will explain technical matters already in the record, or shows extra-record material Federal Defendants relied upon, or somehow suggests bad faith. Indeed, because the documents themselves, and the economic data they reflect, post-date the decisions at issue, they are of necessity irrelevant to those decisions and preclude application of the first exception as well. *Tri-Valley CAREs v. U.S. Dept. of Energy*, 671 F.3d 1113, 1131 (9th Cir. 2012).

Colusa's extra-record offering must be rejected for the additional reason that, by not participating in any way in the administrative processes Colusa now seeks to challenge, its challenge has been waived. *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 965 (9th Cir. 2002) ("Since the Forest Service was not given notice of this claim sufficient to allow it to resolve the claim, the claim was not properly exhausted and is not subject to judicial review"); *Grand Canyon Trust v. U.S. Bureau of Reclamation*, 623 F. Supp. 2d 1015, 1030 (D. Ariz. 2009) ("Failure to raise an objection in response to a draft NEPA document forfeits that objection for purposes of later litigation") (*citing Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 764-65 (2004)); *High Sierra Hikers Ass'n v. U.S. Forest Serv.*, 436 F.Supp.2d 1117, 1147-48 (E.D. Cal. 2006).

Auburn's Guerrero declaration (ECF 49-2 in Case No. 2:13-cv-64) purports to describe Auburn's cultural ties to the site. Because this material was not provided to the agency below, the subject has been waived. AR NEW 29810. And it is impossible to see how this material could fit any of the four exceptions to the record review rule.

The Young declaration (ECF 49-5 in Case No. 2:13-cv-64) and Killian declaration (ECF 54) serve only to identify their exhibits. Auburn doesn't claim that any of these exhibits was before the decisionmaker, precluding application of the second exception. *See* Auburn Statement of Facts at fns. 1a, 17, 18, 25, 27a, 29 & ¶ 28 (ECF 98-2). There is no suggestion that the documents explain technicalities, barring the third exception. As to the remaining exceptions, where, as here, there is a contemporaneous administrative record and no need for additional explanation of the agency decision, "there must be a strong showing of bad faith or improper behavior" before the reviewing court may permit a party to add extra-record evidence. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977); *Glasser v. NMFS*, No. C06-0561BHS, 2008 WL 114913, at *1 (W.D. Wash. Jan. 10, 2008) (plaintiffs seeking to supplement the administrative record must present "clear evidence sufficient to overcome the presumption of administrative regularity . . . ."). No such showing has been attempted, let alone made.

C. Plaintiffs Have Waived Any Right to Supplement the Record

The parties agreed upon, and the Court adopted, a specific timetable for asserting a claim that the administrative record should be supplemented. The deadline has come and gone; indeed, Plaintiffs have not even bothered to file a motion to supplement or otherwise attempted to justify consideration of their extra-record materials. They may not do so now. *Tri-Valley CAREs*, 671 F.3d at 1131 (district court properly denied motion to supplement for failure to comply with Local Rules); *Bullwinkel v. U.S. Dep't of Energy*, 899 F. Supp. 2d 712, 716 (W.D. Tenn. 2012) (to overcome the presumption of regularity through clear evidence, the plaintiff must properly file a timely motion.)

Respectfully submitted this 24th day of July, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2014, I electronically filed the foregoing Federal Defendants' Notice of Motion and Motion to Strike with the Clerk of the Court using the CM/ECF system which will send notification of such to counsel of record.

/s/*Peter Kryn Dykema*
PETER KRYN DYKEMA