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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	Civil Action No. 2:12-CV-3021-TLN-AC (Consolidated)
CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY, Plaintiff, v. S.M.R. JEWELL, et al., Defendants	**FEDERAL DEFENDANTS' RESPONSE AND OBJECTION TO STATEMENT OF FACTS FILED BY UNITED AUBURN INDIAN COMMUNITY**

This is an administrative record review case and "when a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal. The 'entire case' on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001). Therefore there are no material facts for the Court to resolve in the first instance, and the statement of facts required by Local Rule 260(a) is "generally redundant because all relevant facts are contained in the agency's administrative record." *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), citing *San Joaquin River Grp. Auth. v. Nat'l Marine Fisheries Serv.*, 819 F.Supp.2d 1077, 1083–84 (E.D. Cal.2011). Nevertheless, Plaintiffs have filed an extensive Statement of Material Facts incorrectly presuming this Court sits as a fact-finder in the administrative record review context rather than an "appellate tribunal" reviewing a record created before the agency.

Federal Defendants accordingly object to the Statement of Facts filed by plaintiff United Auburn Indian Community of the Auburn Rancheria ("Auburn") as a transparent attempt to circumvent the page limits applicable to a summary judgment brief without seeking leave of Court. We nonetheless here respond to those assertions in the Statement of Facts ("SOF") that we regard as germane to the resolution of this case, without waiving the right to contest any and all factual assertions there made.

We also object to Auburn's frequent citation to, and reliance upon, extra-record evidence, which is plainly improper. *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 Court may not refer to or rely upon such materials. *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).[1]

Our paragraph references correspond to those in the SOF.

¶ 1. It is true that Auburn is a federally recognized tribe that may have historic links to the Yuba Site. AR NEW 29810.

[1] 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. Dept. of the Interior*, 927 F.Supp.2d 949, 995 (S.D.Cal.,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, as explained in greater detail in the Motion to Strike (and supporting memorandum) filed concurrently herewith.

¶ 2. The Guerrero affidavit, and the facts offered in this paragraph based on it, were not before the Secretary during the administrative proceedings challenged here, and therefore are extra-record and should not be considered by this Court. *Fla. Power & Light Co.*, 470 U.S. at 743–44.

¶ 3. It is true that Yuba County is included in Auburn's non-exclusive "service area," as provided by the Auburn Indian Restoration Act, and the Yuba Site is geographically closer to Auburn's reservation. *See* 25 U.S.C. § 13001-6; AR NEW 28524. It is also true that the 25 C.F.R. 292 Record of Decision ("ROD") concluded that Enterprise also has significant historical connections to the land in the vicinity of the Yuba Site. AR NEW 29798-29799.

¶ 4. It is true that Enterprise has a reservation consisting of only 40 acres located ten miles east of Orville and accessed by a dirt road. AR NEW 30214. It is also true that Enterprise has a land base north of Olivehurst, but it is not true that historically Enterprise ancestors have not lived in Yuba County or that Enterprise ancestors' remains have not been found near the Yuba Site. AR NEW 29798. It is incorrect that Enterprise I could accommodate a class III gaming facility because, as the Secretary explained after thorough analysis of the issue, "the topography, existing conditions, and soil characteristics of the property make it difficult to accommodate a casino and ancillary components, such as a wastewater treatment plant." AR NEW 29758; *see also* AR NEW 518. For the reasons listed in Paragraph 2, facts offered on the basis of the Guererro affidavit should not be considered by this Court.

¶ 5. This fact does not seem material, but in any event the record source does not support the factual assertions of this paragraph. "The division line between the Konkow and their Maiduan neighbors, the Nisenan, lacks clarity for a diversity of reasons . . . . In fact, the people living along Honcut Creek, between the Yuba and Feather rivers, appear as possibly being

dialectically transitional between the Konkow and the Nisenan." AR NEW 26867; AR NEW 23465 (extensive trade between Maidu and Nisenan groups). For the reasons listed in Paragraph 2, facts offered on the basis of the Guererro affidavit should not be considered by this Court.

¶ 6. Because the Yuba Parcel will be used as a site for the Enterprise's gaming facility and hotel, Auburn is correct in noting that the site is not intended to house Enterprise members. AR NEW 520.

¶ 7. It is true that the Enterprise Constitution establishes lineal membership and non-lineal membership in the Tribe, and that non-lineal members "shall not have the rights and privileges to vote, hold any elected or appointed offices of the Rancheria, or receipt of non-discretionary funds of the Enterprise Rancheria." AR NEW 1569. Otherwise Auburn paragraph 7 is inaccurate. The record does not provide specifics on which kinds of members live in Yuba County, but it is clear that historically Enterprise has a connection with the area and that remains of tribal ancestors have been located near the Yuba site. AR NEW 29798; AR NEW 22955 (seven of 51 tribal members in 1915 lived in Yuba County). For the reasons listed in Paragraph 2, facts offered on the basis of the Guererro affidavit should not be considered by this Court.

¶ 12. It is true that Enterprise's MOUs with Yuba County and the City of Marysville do not consider matters extraneous to the concerns of the parties involved in negotiating the MOUs.

¶ 14. It is true that Auburn was consulted with as a "nearby tribe" pursuant to the Department's IGRA regulations.

¶ 15. It is true that, on March 12, 2009, Auburn wrote in a letter to the Department and stated that it had "only recently learned that the BIA was soliciting comments." AR NEW 22903-4. On the basis of that representation, Auburn was granted an extension to enable it to submit comments to the BIA.

¶ 17. It is true that in August 2002, Enterprise indicated that it had retained Analytical Environmental Services ("AES") to prepare an environmental assessment. AR NEW 522. However, the Young declaration and exhibits, and the facts offered in this paragraph based on them, were not before the Secretary during the administrative proceedings challenged here, and therefore are extra-record and should not be considered by this Court. *Fla. Power & Light Co.*, 470 U.S. at 743–44.

¶ 18. The Young declaration and exhibits, and the facts offered in this paragraph based on them, were not before the Secretary during the administrative proceedings challenged here, and therefore are extra-record and should not be considered by this Court. *Fla. Power & Light Co.*, 470 U.S. at 743–44.

¶ 19. It is true that BIA "reviewed and adopted" the EA, publicized that fact, and announced a period during which comments from the public would be accepted. AR NEW 2298, 2313.

¶ 20. The announcement of BIA's intent to prepare an EIS stated:

> The BIA previously prepared an Environmental Assessment (EA) that analyzed the potential environmental effects of the proposed action. The EA was made available for public comments in July 2004. Upon consideration of the public and agency comments received during the 30-day public comment period, the BIA, in consultation with the Enterprise Rancheria, decided to prepare an EIS to further analyze the environmental effects which may result from the proposed action.

AR NEW 2704. The EA listed the following as "preparers" of the EA:

Analytical Environmental Services
David Zweig, Principal in Charge
Chad Broussard, Project Manager
Larry Wymer, Senior Transportation Engineer
Leanne Canevaro, Associate
Bret Sampson, Associate
Josh Ferris, Associate
Dana Hirschberg, Graphics Artist
Mark Wuestehube, Senior Biologist

John Howe, Associate Biologist
Susan Engelke, Associate

HydroScience Engineers, Inc.
George Harris, Principal
Dennis S. Sanchez, Associate Engineer
Byron Nishimura, Associate Engineer Brian Watanabe, Associate Engineer

Claybar Engineering
Alan Vail, Principal

John F. Salter Consulting
John F. Salter, Consulting Anthropologist

AR NEW 1780. The notion that the EA does not identify Enterprise as an entity consulted is absurd; Enterprise was the project proponent, is referred to on every single page of the EA, and Enterprise's participation in the review process is repeatedly highlighted. *See, e.g.*, AR NEW 1648 ("Before selecting the 40-acre site near Olivehurst, the Tribe evaluated a number of other potential sites throughout its aboriginal territory. Most of these sites were soon eliminated for a variety of reasons, environmental and otherwise. After much deliberation, the Tribe narrowed its range of sites down to the project site and the four sites discussed below.")

¶ 21. It is standard agency practice for the project applicant to fund the preparation of the EA's and EIS's. *See, e.g.*, BIA NEPA Handbook Section 8.7.3 ("A project applicant may fund the EIS and solicit proposals from consulting firms.").[2] *See also* response to SOF ¶ 36.

¶ 22. It is true that Yuba County Entertainment tried to persuade BIA to defend its EA and not to "undertake and perform a much more elaborate Environmental Impact Study," and in so doing suggested some form of indemnity. AR NEW 2340. It is apparent that BIA found these efforts unpersuasive. *See, e.g.*, AR NEW 2396, 2401.

¶ 24. Auburn's selective quotations are misleading. The actual language from the Notice, from which Auburn quotes, is: "This notice advises the public that the Bureau of Indian Affairs (BIA) as lead agency, with the Estom Yumeka Maidu Tribe (Enterprise Rancheria) as a

[2] http://www.bia.gov/cs/groups/xraca/documents/text/idc009157.pdf at 40.

cooperating agency, intends to gather information necessary for preparing an Environmental Impact Statement (EIS) for a proposed 40 acre fee-to-trust transfer and casino and hotel project to be located in Yuba County, California." AR NEW 2704. The actual language from the Third Party Services Agreement, from which Auburn quotes, is: "To expedite the preparation of the EIS and other required project approvals, the Tribe and the BIA have agreed to use third-party consultants to prepare the technical studies, the EIS, and other project-related analyses and documents." AR NEW 2396.

¶ 25. Federal Defendants object to Auburn's citation to documents, such as the referenced Broussard email, that are not part of the administrative record. *Fla. Power & Light Co.*, 470 U.S. at 743–44.

¶ 27. Federal Defendants object to Auburn's citation to documents, such as the referenced Broussard emails, that are not part of the administrative record. *Fla. Power & Light Co.*, 470 U.S. at 743–44.

¶¶ 28-29. Federal Defendants object to Auburn's citation to documents that are not part of the administrative record. *Fla. Power & Light Co.*, 470 U.S. at 743–44.

¶ 30. Federal Defendants deny that there was any secret as to the role played by AES. The EA itself states that it was prepared by AES (AR NEW 1616) and the EA was made available for public comment. AR NEW 2313. The Draft EIS references AES more than one hundred times (*see* AR NEW 11782 *et seq*.); the Draft EIS identifies AES as the preparer of both the traffic impact study and the cultural resources study (AR NEW 12608); and the appendices show that AES prepared the key biological assessment (AR NEW 13206) ("Prepared By: Analytical Environmental Services."). Perhaps most tellingly, at the public hearing on the Draft EIS Chad

Broussard of AES was among the hosts and "Analytical Environmental Services" was identified by BIA as "our contractor for the EIS." AR NEW 26554.

¶ 31. The statements are misleadingly taken out of context. The cited Enterprise memo states: "P.1. S.1: (1) For better readability and persuasiveness, this section would benefit from a brief introduction of the Tribe. This first paragraph should also include the current population of the Tribe, i.e. the number of tribal members." AR NEW 9200. In general, the Enterprise memo reflects a helpful and very close proofreading of the draft EIS. AR NEW 9199-9204.

¶ 32. The FEIS listed no less than twenty-two employees of AES as consultants involved in preparing the FEIS, AR NEW 23890, and the text of the FEIS refers to AES 159 times. And it is standard agency practice for the project applicant to fund the preparation of the EA's and EIS's. *See, e.g.*, BIA NEPA Handbook Section 8.7.3 ("A project applicant may fund the EIS and solicit proposals from consulting firms.").[3] *See also* response to ¶ 30.

¶ 35. Auburn omits the fact that the FEIS includes a more detailed alternatives analysis than did the Draft EA.

¶ 36. It is true that the referenced memorandum (AR NEW 1605-1512) records many criticisms of, questions about, and suggested improvements for, the Draft EA. That is the purpose of preparing drafts and having them critically reviewed. Auburn paragraph 36 ignores the fact internal review and criticism such as is reflected in the referenced memorandum led to the vastly more detailed analysis of the FEIS.

¶¶ 39-40. Federal Defendants object to Auburn's reliance on extra-record declarations, which the Court may not consider. *Fla. Power & Light*, 470 U.S. at 743–44. These paragraphs also contain misleading statements. The Yuba site has already been plowed for farming and swell

[3] http://www.bia.gov/cs/groups/xraca/documents/text/idc009157.pdf at 40.

potential would be less than significant. *See* AR NEW 23595. "The Proposed Project buildings would be located outside of the 100-year flood zone at least 3.5 feet above the 100-year flood surface water elevation." AR NEW 23600. In addition, the site is part a 900-acre "Sports and Entertainment Zone . . . zoned for purposes of sports and entertainment purposes, including a NASCAR racetrack, outdoor amphitheater, hotels, and other compatible uses." AR NEW 30010.

¶ 41. Federal Defendants object to Auburn's reliance on extra-record declarations, which the Court may not consider. *Fla. Power & Light*, 470 U.S. at 743–44. Federal Defendants deny that economic impacts on Auburn's casino will be as Auburn asserts. AR NEW 24810-24812.

¶ 42. Federal Defendants object to Auburn's reliance on Auburn's Nov. 3, 2010, letter, which was submitted to the agency outside of the appropriate comment period and is therefore extra-record, which the Court may not consider. *Fla. Power & Light*, 470 U.S. at 743–44.

¶ 44. It is true that the AES analysis projects a 13.8% revenue reduction from projected base case revenues of $220,781,228. AR NEW 24810.

¶ 46. Federal Defendants object to Auburn's reliance on Auburn's Nov. 3, 2010, letter, which is extra-record and which the Court may not consider. *Fla. Power & Light*, 470 U.S. at 743–44. The statement quoted in paragraph 46 has no record support whatsoever.

¶ 47. The Part 292 ROD speaks for itself. The Secretary noted that Auburn failed to present "specific evidence that is sufficient to demonstrate that it has an exclusive significant historical connection to the Site." AR NEW 29818. That comment addresses Auburn's assertions that legal rights and sovereignty will be encroached. Federal Defendants deny that the contemplated actions will cause any "potential encroachment on the Auburn's legal rights and sovereignty."

¶ 48. The Part 292 ROD speaks for itself. Auburn's concerns were addressed either directly in a discussion of its comments submitted as a "nearby Indian tribe," AR NEW 29817-29818, or, where warranted, they were addressed more generally when a topic raised by Auburn (e.g., environmental concerns) coincided with a topic separately addressed in the ROD (e.g., discussion of mitigation of environmental impacts).

¶ 52. The statement is accurate but misleading, because sixteen of the twenty one did not respond at all. AR NEW 29811. The office of the California Governor (which ultimately supported the Enterprise casino) responded but did not at that time take a position. *Id.*; AR NEW 22832. The remaining three responders opposed. AR NEW 29811.

¶ 54. Denied. The Secretary explained that 25 C.F.R. § 292.18(g) provides the Secretary authority to consider other relevant information and concluded that the "Department must give weight to the democratically-expressed will of affected voters as one of many factors when considering when considering a tribal application for off-reservation gaming." However, as the Secretary explained, she must also give weight to the factors expressly mentioned by the regulations, which include "memoranda of understanding and inter-governmental agreements with affected local governments." 25 C.F.R. § 292.18(g); AR NEW 29817. The portion of the Part 292 ROD cited by Auburn did not purport to catalogue all "Local Opposition."

¶ 56. It is true that the legal description in the original notice erroneously described the entire approximately eighty-acre tract (AR NEW 30165), and that that error was promptly corrected by an amended notice. *See* 78 Fed. Reg.114 (January 2, 2013). And it is not possible that anyone was misled by the technical error. The ROD refers to the "40-acre" site eighteen times, AR NEW 30166-30220; the IGRA ROD, nineteen times. AR NEW 29749-820.

¶ 57. It is true that in various documents in the Administrative Record the legal description of the subject land erroneously described the entire approximately 80 acre tax assessor parcel of which the subject land is only a 40 acre portion. It is also true that all relevant parties were aware of the error and understood it to be nothing more than an error.

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' Response and Objection to Auburn Statement of Facts 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