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10
11 **UNITED STATES DISTRICT COURT**
12 **FOR THE EASTERN DISTRICT OF CALIFORNIA**
13

14 UNITED AUBURN INDIAN COMMUNITY)
15 OF THE AUBURN RANCHERIA,)
16)
17 Plaintiff)
18 v.)
19)
20 S.M.R. JEWELL, et al.)
21)
22 Defendants)
23 _____)
24)

25 CITIZENS FOR A BETTER WAY, et al.)
26)
27 Plaintiffs)
28 v.)
29)
30 UNITED STATES DEPARTMENT OF)
31 INTERIOR, et al.,)
32 Defendants)
33 _____)
34)

35 CACHIL DEHE BAND OF WINTUN INDIANS)
36 OF THE COLUSA INDIAN COMMUNITY,)
37)
38 Plaintiff,)
39)
40 v.)
41)
42 S.M.R. JEWELL, et al.,)
43)
44 Defendants)
45)
46)

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

**FEDERAL DEFENDANTS’
CONSOLIDATED REPLY
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

1 **ARGUMENT**

2 Auburn argues that exhibits 3, 5, 7, and 10 to the Gina Young declaration may be
3 considered for the light they shed on the question whether AES had a conflict of interest. ECF 127
4 at 3. The documents shed no such light, except to reflect that AES and Enterprise were working
5 cooperatively as one would expect of contracted parties. The leading case on the subject,
6 *Associations Working for Aurora's Residential Environment ("AWARE") v. Colorado Dept. of*
7 *Trans.*, 153 F.3d 1122, 1127 (10th Cir. 1998), noted that "absent an agreement to perform
8 construction on the proposed project or actual ownership of the construction site, it is 'doubtful
9 that an inherent conflict of interest will exist' unless 'the contract for EIS preparation ... contains ...
10 incentive clauses or guarantees of any future work on the project.'" *Id.* at 1127 (quoting Guidance
11 Regarding NEPA Regulations, 48 Fed. Reg. 34,263, 34,266 (Council on Env'tl. Quality 1983)).
12 Because the documents in question do not so much as hint at an improper relationship, there is no
13 basis for expanding the record to include them.

14 The second category of documents with which Auburn wishes to expand the record are
15 those that, Auburn contends, show the tribe's "strong historical connections to the area" and its
16 "cultural practices." ECF 127 at 4, 5. But this is *precisely* the kind of *post hoc* argumentation the
17 record rule is designed to exclude. In both *Center for Biological Diversity v. U.S. Fish & Wildlife*
18 *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, 450 F.3d 930, 943-44 (9th Cir.
19 2006) and *Sw. Ctr. for Biological Diversity v. United States Forest Serv.*, 100 F.3d 1443, 1450 (9th
20 Cir.1996) the Ninth Circuit affirmed decisions striking exhibits submitted by NEPA plaintiffs
21 because post-decision information "may not be advanced as a new rationalization for attacking an
22 agency's decision" (internal quotation marks and ellipsis omitted). Evidence of Auburn's alleged
23 cultural ties to the site was not provided to the agency during the decision-making process. AR

1 NEW 29810. Such evidence may not be submitted now, and any argument that BIA should have
2 considered such alleged ties has been waived.¹

3 Auburn (ECF 127 at 6-7) responds that the information does not post-date the decision,
4 which completely misses the point. The alleged information was not put before the agency, and
5 therefore may not be considered by the Court. For the Court to base a decision upon material not
6 presented to the agency “inevitably leads the reviewing court to substitute its judgment for that of
7 the agency.” *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980).²

8 Everything that we have said regarding Auburn’s “cultural ties” materials applies with
9 equal force to the Meister declaration and report submitted by Colusa. The Court cannot consider
10 evidence and arguments never put before the agency whose decision is under review. *Havasupai*
11 *Tribe v. Robertson*, 943 F.2d 32, 33 (9th Cir. 1991); *Idaho Sporting Congress, Inc. v. Rittenhouse*,
12 305 F. 3d 957, 965 (9th Cir. 2002). Colusa’s extra-record submissions are improper for the
13 additional reason that they are irrelevant, as purely economic harms are not cognizable under
14 NEPA. *See* Federal Defendants’ Consolidated Reply in Support of Summary Judgment
15 (September 8, 2014, ECF 134) at 12-13.

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¹ Auburn’s argument that it asked Federal Defendants to add Killian Exhibit 3 to the administrative record is irrelevant to the fact that they have waived the point. Killian Exhibit 3 was submitted to the BIA regional office six months after the Part 292 comment period had closed and after the regional office had sent its recommendation package to DC headquarters. In any event, the parties’ stipulated scheduling order (ECF 95 at 2) provided Plaintiffs an opportunity to ask the Court to order supplementation of the record, which Auburn did not do.

² Auburn’s argument (ECF 127 at 7) that “the documents have already been presented to the Court in the preliminary injunction papers and so are properly a part of this Court’s record” has no merit. The fact that evidence may be germane to irreparable harm issues, or the balance of equities, does not create a license for APA plaintiffs to circumvent the record rule at their whim when the court reviews an agency’s decision on the merits.

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Respectfully submitted this 8th day of September, 2014.

SAM HIRSCH
Assistant Attorney General

/s/ Peter Kryn Dykema
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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2014, I electronically filed the foregoing Federal Defendants' Consolidated Reply Memorandum in Support of 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