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14  
15 **UNITED STATES DISTRICT COURT**

16 **EASTERN DISTRICT OF CALIFORNIA**

17 **SACRAMENTO DIVISION**

18  
19 UNITED AUBURN INDIAN  
COMMUNITY OF THE AUBURN  
20 RANCHERIA

21 Plaintiff.

22 vs.

23 KENNETH LEE SALAZAR, et al

24 Defendants, and

25 THE ESTOM YUMEKA MAIDU TRIBE  
OF THE ENTERPRISE RANCHERIA,  
CALIFORNIA,

26 Intervenor Defendant.  
27

CASE NO. 12-CV-03021-TLN-AC

(Consolidated Cases)

**INTERVENOR-DEFENDANT'S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION TO STRIKE AFFIDAVIT OF  
MARCOS GUERRERO**

28 CASE NO. 12-CV-03021-TLN-AC

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF MOTION TO  
STRIKE AFFIDAVIT OF MARCOS  
GUERRERO

1 CITIZENS FOR A BETTER WAY, et al.  
2 Plaintiffs.

3 vs.

4 UNITED STATES DEPARTMENT OF  
5 INTERIOR, et al.,

6 Defendants, and

7 THE ESTOM YUMEKA MAIDU TRIBE  
8 OF THE ENTERPRISE RANCHERIA,  
9 CALIFORNIA,

10 Intervenor Defendant.

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11 CACHIL DEHE BAND OF WINTUN  
12 INDIANS OF THE COLUSA INDIAN  
13 COMMUNITY, a federally recognized  
14 Indian Tribe,

15 Plaintiff,

16 vs.

17 S.M.R. JEWELL, Secretary of the Interior,  
18 et al.,

19 Defendants, and

20 THE ESTOM YUMEKA MAIDU TRIBE  
21 OF THE ENTERPRISE RANCHERIA,  
22 CALIFORNIA,

23 Intervenor Defendant.

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1 **I. Introduction**

2 This is an Administrative Procedure Act case in which all parties have agreed that judicial  
3 review should be based on the United States Department of the Interior's administrative record.  
4 *See* Stipulation and Order Governing Further Proceedings (Doc. 69) at ¶ 7.

5 On June 24, 2014, Plaintiff United Auburn Indian Community ("UAIC") nonetheless filed  
6 a Memorandum in Support of Motion for Summary Judgment ("MSJ") that relies on the extra-  
7 record Affidavit of Marcos Guerrero. For example, the MSJ relies on paragraphs 2 and 39 of  
8 UAIC's Separate Statement of Facts. *See* Memorandum in Support of Motion for Summary  
9 Judgment (Doc. 98-1) at 12-13. And those two paragraphs, in turn, rely on the Affidavit of  
10 Marcos Guerrero. *See* UAIC Statement of Facts (Doc. 98-2) at ¶ 2 n.2, ¶ 39 n.39.

11 UAIC originally submitted the Guerrero Affidavit in connection with its unsuccessful  
12 attempt to secure preliminary injunctive relief. The Guerrero Affidavit is not part of the  
13 administrative record in this case, does not qualify for any of the narrow exceptions to the well-  
14 recognized rule that judicial review of agency action must be confined to the administrative  
15 record, and was never submitted to the Department of the Interior during the decade-long public  
16 process that led to the agency decisions UAIC has challenged.

17 Accordingly, Intervenor-Defendant the Estom Yumeka Maidu Tribe of the Enterprise  
18 Rancheria, California (the "Tribe"), respectfully requests that this Court strike (i) the Guerrero  
19 Affidavit, (ii) the portions of UAIC's Statement of Facts (Doc. 98-2) referring to the Guerrero  
20 Affidavit, and (iii) the portions of UAIC's MSJ (Doc. 98-1) relying on the Guerrero Affidavit.

21 **II. Factual and Procedural Background**

22 This lawsuit is one of three consolidated challenges to the United States Department of the  
23 Interior's decision to accept title to a 40-acre parcel in Yuba County, California in trust for the  
24 Tribe for economic development purposes (the "Project"). Interior made that decision after  
25 completing more than ten years of analysis, public review, and tribal consultation pursuant to  
26 National Environmental Policy Act, the Indian Gaming Regulatory Act, and other statutes. *See*  
27 AR 29749-29820, 30166-30220 (Records of Decision).

1           Shortly after Interior's decision, UAIC sought, unsuccessfully, to halt the Project through a  
2 Temporary Restraining Order ("TRO"). Motion for Temporary Restraining Order (Case No. 13-  
3 cv-00064, Doc. 49). UAIC filed the Guerrero Affidavit in connection with that request for a  
4 TRO. *Id.* UAIC's request for a TRO (and its filing of the Guerrero Affidavit) took place before  
5 Enterprise was allowed to intervene in this litigation. *See* Minute Order (Doc. 64).

6           On March 4, 2013, all parties (including UAIC) entered a stipulation governing further  
7 proceedings in the consolidated cases. *See* Stipulation and Order Governing Further  
8 Proceedings (Doc. 69). As part of that stipulation, UAIC agreed that this is "an action for review  
9 on an administrative record" pursuant to the Administrative Procedure Act ("APA"). *Id.* at ¶ 7;  
10 *see also* UAIC MSJ (Doc. 98-1) at 4 (admitting that claims are governed by APA).

11           In the months that followed, Interior prepared the administrative record for the  
12 consolidated cases. At various points in that process, UAIC had opportunities to review,  
13 comment on, and suggest additions to the contents of the administrative record. *See, e.g.,*  
14 Stipulation and Order Governing Further Proceedings (Doc. 85); Stipulation for Substitution of  
15 Administrative Record (Doc. 86). UAIC never requested that the Guerrero Affidavit be added to  
16 the administrative record.

### 17 **III. Argument**

18           The Guerrero Affidavit is not part of the administrative record and it significantly post-  
19 dates the Department of the Interior's November, 2012 decision to approve the Project. UAIC  
20 nonetheless relies on the Guerrero Affidavit as "evidence" that Interior failed properly to evaluate  
21 the potential impacts of the Project on its cultural activities and environmental resources. *See,*  
22 *e.g.,* UAIC MSJ (Doc. 98-1) at 12-13.

23           In doing so, UAIC has violated the fundamental rule that "the focal point for judicial  
24 review should be the administrative record already in existence, not some new record made  
25 initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see also* *Vt. Yankee*  
26 *Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 549 (1978). Post-decisional  
27 extra-record information such as the Guerrero Affidavit "may not be advanced as a new

1 rationalization...attacking an agency's decision." *Sw. Ctr. for Biological Diversity v. U.S. Forest*  
2 *Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996).

3 This general rule against extra-record evidence arises from the narrow scope of judicial  
4 review under the APA. In reviewing agency action under the APA, the role of the courts is  
5 limited to determining whether the decision-maker "has considered the relevant factors and  
6 articulated a rational connection between the facts found and the choice made." *Balt. Gas & Elec.*  
7 *Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 29, 29 (1983). Reviewing courts are not to  
8 substitute their judgment for that of the agency and an agency has "discretion to rely on the  
9 reasonable opinions of its own qualified experts even if, as an original matter, a court might find  
10 contrary views more persuasive. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989);  
11 *Lands Council v. McNair*, 537 F.3d 981, 987 (en banc) (review "is narrow, and we do not  
12 substitute our judgment for that of the agency"). Extra-record evidence is inadmissible because it  
13 would impermissibly transform the narrow, deferential inquiry mandated by the APA into a broad,  
14 de novo review. See, e.g., *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d  
15 930, 943-44 (9th Cir. 2006) (cautioning that extra-record evidence "inevitably lead[s]...the  
16 reviewing court to substitute its judgment for that of the agency").

17 The fact that Mr. Guerrero's Affidavit was originally submitted in support of an equitable  
18 proceeding for injunctive relief does not change or weaken application of the general rule against  
19 extra-record evidence.

20 It is true that the courts have identified a small number of "narrowly construed and  
21 applied" exceptions to the general rule against extra-record evidence. *Lands Council v. Powell*,  
22 395 F.3d 1019, 1030 (9th Cir. 2005). But these exceptions are limited to situations where it is  
23 necessary to "explain the record [and] where a failure to do so might frustrate effective judicial  
24 review." *Envtl. Def. Fund v. Costle*, 657 F.2d 275, 286 n.36 (D.C. Cir. 1981). None of the  
25 exceptions applies where, as here, a plaintiff seeks to rely on extra-record evidence to attack the  
26 merits of the underlying agency decision. *Id.*; see also *Nw. Env'tl. Advocates v. Nat'l Marine*

1 *Fisheries Serv.*, 460 F.3d 1125, 1144-45, 1151 (9th Cir. 2006). In any event, UAIC has not even  
2 bothered to make a *prima facie* showing that one of the exceptions applies.

3 It is also true that courts may consider evidence outside of the administrative record when  
4 fashioning an appropriate equitable remedy. *See, e.g., Warm Springs Dam Task Force v. Gribble*,  
5 621 F.2d 1017, 1025-26 (9th Cir. 1980). While that rule may justify UAIC's original submission  
6 of the Guerrero Affidavit, it does not authorize UAIC to rely on the Affidavit to attack the merits  
7 of Interior's decision.

8 Nor has UAIC explained why it did not or could not submit the information in the  
9 Guerrero Declaration during the ten-year public process leading to approval of the Project. That  
10 process provided UAIC with numerous opportunities to submit Mr. Guerrero's testimony for  
11 consideration by Department of the Interior and inclusion in the administrative record.

12 Finally, it is also worth noting that even though UAIC had opportunities to review,  
13 comment on, and suggest additions to the contents of the administrative record, it never requested  
14 that the Guerrero Affidavit be included.

15 When a party improperly submits and relies on material outside the administrative record,  
16 the appropriate remedy is to strike the extra-record material and all arguments based thereon. *See*,  
17 *e.g., Ctr. for Biological Diversity*, 450 F.3d at 943-44; *Nw. Env'tl. Advocates*, 460 F.3d 1125, 1144  
18 (9th Cir. 2006); *Rybachek v. U.S. Env'tl. Prot. Agency*, 904 F.2d 1276, 1296 n.25 (9th Cir. 1990);  
19 *Friends of the Earth v. Hintz*, 800 F.2d 822, 829 (9th Cir. 1986).

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1 The Tribe respectfully requests that this Court strike (i) the Guerrero Affidavit, (ii) the  
2 portions of UAIC's Statement of Facts (Doc. 98-2) referring to the Guerrero Affidavit,<sup>1</sup> and (iii)  
3 the portions of UAIC's MSJ (Doc. 98-1) relying on the Guerrero Affidavit.<sup>2</sup>  
4

5 Dated: July 24, 2014

Respectfully Submitted,

6 DENTONS US LLP  
7

8 By /s/ Matthew G. Adams  
9 MATTHEW G. ADAMS

10 Attorneys for Intervenor-Defendant  
11 THE ESTOM YUMEKA MAIDU TRIBE OF  
12 THE ENTERPRISE RANCHERIA,  
13 CALIFORNIA

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25 <sup>1</sup> Specifically, the Tribe requests that the following portions of UAIC's Statement of Facts be  
26 stricken: ¶ 1 and fn.1a; ¶ 2 & fn.2; ¶ 4 & fn.4; ¶ 5 & fn.5; ¶ 7 & fn.7; ¶ 39 & fn.39; ¶ 40 &  
27 fn.40a; ¶ 41 & fn.41.

28 <sup>2</sup> Specifically, the Tribe requests that the following portions of UAIC's MSJ be stricken: page  
11, lines 14-20; page 12, lines 20-27; page 13, lines 4-9; and page 14, lines 7-15.

**CERTIFICATE OF SERVICE**

I hereby certify that on July 24, 2014, true and correct copies of **INTERVENOR-  
DEFENDANT’S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
MOTION TO STRIKE AFFIDAVIT OF MARCOS GUERRERO** were served electronically  
on all parties for which attorneys to be noticed have been designated, via the CM/ECF system for  
the U.S. District Court for the Eastern District of California.

Respectfully submitted,

Dated: July 24, 2014

DENTONS US LLP

By: /s/ Matthew Adams

MATTHEW G. ADAMS

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