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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
Defendants, and
24 THE ESTOM YUMEKA MAIDU TRIBE
OF THE ENTERPRISE RANCHERIA,
25 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 EXTRA-
RECORD DECLARATION OF ALAN
MEISTER**

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

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF MOTION TO
STRIKE EXTRA-RECORD DECLARATION
OF ALAN MEISTER

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.

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 Colusa Indian Community ("Colusa") nonetheless filed several
6 extra-record declarations and exhibits, including the Declaration of Alan P. Meister (Doc. 106), in
7 support of its Motion for Summary Judgment ("MSJ") (Doc. 102).

8 The Meister Declaration is not part of the administrative record in this case, does not
9 qualify for any of the narrow exceptions to the well-recognized rule that judicial review of agency
10 action must be confined to the administrative record, and was never submitted to the Department
11 of the Interior during the decade-long public process that led to the agency decisions challenged in
12 this case.

13 Accordingly, Intervenor-Defendant the Estom Yumeka Maidu Tribe of the Enterprise
14 Rancheria, California (the "Tribe"), respectfully requests that this Court strike (i) the Meister
15 Declaration (Doc. 106) and (ii) the portions of Colusa's MSJ (Doc. 102-1) relying thereon.

16 **II. Factual and Procedural Background**

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

23 Shortly after Interior's decision, Colusa filed this lawsuit and sought, unsuccessfully, to
24 halt the Project through a Temporary Restraining Order. *See* Motion for Temporary Restraining
25 Order (Doc. 18); Order Denying Motions for Temporary Restraining Order (Doc. 57).

26 On March 4, 2013, all parties (including Colusa) entered a stipulation governing further
27 proceedings in the consolidated cases. *See* Stipulation and Order Governing Further Proceedings

1 (Doc. 69). As part of that stipulation, Colusa agreed that this is "an action for review on an
2 administrative record" pursuant to the Administrative Procedure Act ("APA"). *Id.* at ¶ 7; *see also*
3 Colusa MSJ (Doc. 102-1) at 7 (admitting that claims are governed by APA).

4 In the months that followed, Interior prepared the administrative record for the
5 consolidated cases. At various points in that process, Colusa had opportunities to review,
6 comment on, and suggest additions to the contents of the administrative record. *See, e.g.,*
7 Stipulation and Order Governing Further Proceedings (Doc. 85); Stipulation for Substitution of
8 Administrative Record (Doc. 86). Colusa never requested that the Meister Declaration be added to
9 the administrative record.

10 **III. Argument**

11 The Meister Declaration is not part of the administrative record. Indeed, both the
12 Declaration and the information cited therein significantly post-date the Department's November,
13 2012 decision to approve the Project. Meister Declaration at 4 (Declaration executed June 24,
14 2014), Meister Declaration Ex. 1 (analysis dated May, 2013).

15 Colusa nonetheless relies on the Meister Declaration as "evidence" that Interior failed
16 properly to evaluate the potential impacts of the Project on Colusa's existing casino business. In
17 doing so, it has violated the fundamental rule that "the focal point for judicial review should be the
18 administrative record already in existence, not some new record made initially in the reviewing
19 court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see also Vt. Yankee Nuclear Power Corp. v.*
20 *Natural Res. Def. Council*, 435 U.S. 519, 549 (1978). Post-decisional information such as the
21 Meister Declaration "may not be advanced as a new rationalization...attacking an agency's
22 decision." *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir.
23 1996).

24 This general rule against extra-record evidence arises from the narrow scope of judicial
25 review under the APA. In reviewing agency action under the APA, the role of the courts is
26 limited to determining whether the decision-maker "has considered the relevant factors and
27 articulated a rational connection between the facts found and the choice made." *Balt. Gas & Elec.*

1 *Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 29, 29 (1983). Reviewing courts are not to
2 substitute their judgment for that of the agency and an agency has "discretion to rely on the
3 reasonable opinions of its own qualified experts even if, as an original matter, a court might find
4 contrary views more persuasive. *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989);
5 *Lands Council v. McNair*, 537 F.3d 981, 987 (en banc) (review "is narrow, and we do not
6 substitute our judgment for that of the agency"). Extra-record evidence is inadmissible because it
7 would impermissibly transform the narrow, deferential inquiry mandated by the APA into a broad,
8 *de novo* review. *See, e.g., Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d
9 930, 943-44 (9th Cir. 2006) (cautioning that extra-record evidence "inevitably lead[s]...the
10 reviewing court to substitute its judgment for that of the agency").

11 It is true that the courts have identified a small number of "narrowly construed and
12 applied" exceptions to the general rule against extra-record evidence. *Lands Council v. Powell*,
13 395 F.3d 1019, 1030 (9th Cir. 2005). But these exceptions are limited to situations where it is
14 necessary to "explain the record [and] where a failure to do so might frustrate effective judicial
15 review." *Env'tl. Def. Fund v. Costle*, 657 F.2d 275, 286 n.36 (D.C. Cir. 1981). None of the
16 exceptions applies where, as here, a plaintiff seeks to rely on extra-record evidence to attack the
17 merits of the underlying agency decision. *Id.*; *see also Nw. Env'tl. Advocates v. Nat'l Marine*
18 *Fisheries Serv.*, 460 F.3d 1125, 1144-45, 1151 (9th Cir. 2006).

19 In any event, Colusa has not even bothered to make a *prima facie* showing that one of the
20 exceptions applies. In fact, it has made no attempt whatsoever to justify its *post hoc* submission of
21 information from Mr. Meister.

22 Nor has Colusa explained why it did not or could not submit the information in the Meister
23 Declaration during the ten-year public process leading to the Project. That process provided
24 Colusa with numerous opportunities to submit Mr. Meister's testimony for consideration by
25 Department of the Interior and inclusion in the administrative record.

1 Finally, it is also worth noting that even though Colusa had opportunities to review,
2 comment on, and suggest additions to the contents of the administrative record, it never requested
3 that the Meister Declaration be included.

4 When a party improperly submits and relies on material outside the administrative record,
5 the appropriate remedy is to strike the extra-record material and all arguments based thereon. *See,*
6 *e.g., Ctr. for Biological Diversity*, 450 F.3d at 943-44; *Nw. Env'tl. Advocates*, 460 F.3d 1125, 1144
7 (9th Cir. 2006); *Rybachek v. U.S. Env'tl. Prot. Agency*, 904 F.2d 1276, 1296 n.25 (9th Cir. 1990);
8 *Friends of the Earth v. Hintz*, 800 F.2d 822, 829 (9th Cir. 1986).

9 The Tribe respectfully requests that this Court strike (i) the Meister Declaration (Doc. 106)
10 and (ii) the portions of Colusa's MSJ (Doc. 102-1) relying thereon.¹

11
12 Dated: July 24, 2014

Respectfully Submitted,

DENTONS US LLP

13
14
15 By /s/ Matthew G. Adams
16 MATTHEW G. ADAMS

17 Attorneys for Intervenor-Defendant
18 THE ESTOM YUMEKA MAIDU TRIBE OF
THE ENTERPRISE RANCHERIA,
19 CALIFORNIA

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26 _____
27 ¹ Specifically, the Tribe requests that the following portions of Colusa's MSJ be stricken: page
28 1, lines 24-26; page 10, lines 17-24; and page 11, lines 3-9.

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2014, true and correct copies of **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO STRIKE EXTRA-RECORD DECLARATION OF ALAN MEISTER** 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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