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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY, *et al.*,

Plaintiffs,

v.

SALLY JEWELL, Secretary of the Interior, *et al.*,

Defendants.

CASE NO. 2:12-CV-03021-TLN-AC

PLAINTIFF UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA'S OPPOSITION TO MOTIONS TO STRIKE FILED BY FEDERAL DEFENDANTS AND ENTERPRISE

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

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I. INTRODUCTION

The Federal Defendants and Intervenor-Defendant Estom Yumeka Maidu Tribe of the Enterprise Rancheria ("Enterprise") move to strike certain documents cited by the United Auburn Indian Community of the Auburn Rancheria ("UAIC") in its statement of facts. *See* Docket No. 115; Docket No. 120. Specifically, the Federal Defendants move to strike:

1. Affidavit of Marcos Guerrero (Docket No. 49-2 in Case No. 2:13-cv-00064) (attached hereto as Exhibit A);
2. Declaration of Gina S. Young (Docket No. 49-5 in Case No. 2:13-cv-00064) and attached Exhibits 3 (Consulting Services Agreement between AES and Enterprise, entered into August 12, 2002), 5 (e-mail from Chad Broussard (AES) to John Maier (counsel for Enterprise) and others, dated October 13, 2005), 7 (e-mail from Chad Broussard (AES), to John Maier (counsel for Enterprise) and others, dated September 14, 2007), 9 (letter from the Regional Director of the BIA to David Zweig (AES), dated September 5, 2012), and 10 (e-mail from Chad Broussard (AES), to John Maier (counsel for Enterprise) and others, dated April 16, 2007) (attached hereto as Exhibit B); and,
3. Declaration of Bryan M. Killian (Docket No. 54) and attached Exhibit 3 (letter from David Keyser (UAIC Chair) to Amy Dutschke (BIA Regional Director), dated November 3, 2010) (attached hereto as Exhibit C).

Enterprise also moves to strike the Guerrero Affidavit. Although each of these documents was submitted to the Court previously, the Federal Defendants and Enterprise contend that these documents are not properly before the Court on summary judgment because they were not included in the administrative record. For the reasons discussed below, however, each of these documents can and should be considered by the Court.

II. THE REFERENCED DOCUMENTS ARE PROPERLY BEFORE THE COURT.

While review of agency decisions generally is limited to the administrative record, *Asarco, Inc. v. U.S. Envtl. Prot. Agency*, 616 F.2d 1153, 1159 (9th Cir. 1980), this general rule is not intended to "straightjacket" courts with the administrative record. *Bunker Hill Co. v. E.P.A.*,

572 F.2d 1286, 1292 (9th Cir. 1977). Courts often need to consider extra-record evidence to fully understand and properly adjudicate an administrative record case. *Id.* The documents at issue here are those kinds of extra-record materials. Due to the BIA's own actions, the record is insufficient for the Court to undertake a proper review. UAIC's documents are properly before the Court and should not be stricken.

A. UAIC's documents are necessary for determining whether the Federal Defendants have considered all relevant factors and explained their decision.

There are several exceptions to the general rule that review of agency decisions is limited to the administrative record, including when extra-record evidence is "necessary to determine whether the agency has considered all relevant factors and has explained its decision." *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006) (quoting *Sw. Ctr. for Biological Diversity v. United States Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir.1996)). Particularly in cases brought under the National Environmental Policy Act ("NEPA"), it may be impossible for a court to determine whether an agency failed to consider relevant factors if judicial review is strictly limited to the administrative record. *Asarco*, 616 F.2d at 1160. Indeed, "[t]he court cannot adequately discharge its duty to engage in a 'substantial inquiry' if it is required to take the agency's word that it considered all relevant matters." *Id.* Review of extra-record documents is therefore essential when an agency allegedly failed to consider a relevant issue, so that the agency cannot "swe[ep] stubborn problems or serious criticism under the rug." *Nat'l Audubon Soc'y v. U.S. Forest Serv.*, 46 F.3d 1437, 1448 (9th Cir. 1993) (quoting *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir.1988)).

Courts in this Circuit frequently allow plaintiffs in NEPA cases to use extra-record information to show that agencies failed to consider certain factors in an Environmental Impact Statement ("EIS") or an Environmental Assessment ("EA"). *See, e.g., Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1058 (9th Cir. 2010) (admitting extra-record EAs related to fisheries to demonstrate inconsistencies in fisheries analysis of challenged EA); *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1162 (9th Cir. 2006) (admitting scientist's declaration to show Forest Service failed to consider information that would affect its estimate of tree mortality)

abrogated on other grounds by Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 129 (2008); *Nat'l Audubon Soc'y*, 46 F.3d at 1448 (admitting affidavit describing tracts of land to establish Forest Service had not considered that tracts were roadless); *Soda Mountain Wilderness Council v. U.S. Bureau of Land Mgmt.*, 945 F. Supp. 2d 1162, 1174 (D. Or. 2013) (admitting set of maps to show agency had not considered that existing roads might return to wilderness after wilderness designation); *Border Power Plant Working Grp. v. Dep't of Energy*, 467 F. Supp. 2d 1040, 1050 (S.D. Cal. 2006) (admitting declaration to indicate agency failed to consider existence of alternative technologies available to power plants).[1]

The BIA's record does not disclose sufficient information on the issue of American Environmental Services' ("AES") conflict of interest to enable the court to meaningfully review the BIA's decision. Indeed, the BIA did not follow its own guidance requiring that "records of contractual work related to the project" be included in the administrative record. *See* Bureau of Indian Affairs, *Indian Affairs National Environmental Policy Guidebook*, 59 IAM 3-H, at 44 (Aug. 2012), *available at* http://www.bia.gov/cs/groups/xraca/documents/text/idc009157.pdf. Exhibits 3, 5, 7, 9, and 10 to the Young Declaration are therefore necessary to show how the BIA failed to consider AES's conflict of interest and its impact on the preparation of the EIS. For example, Exhibit 7 contains an email from AES's Chad Broussard to Enterprise stating that "we may want to have a conference call to discuss strategy for pushing the [notice of Availability for the Draft EIS] through," showing that Enterprise had excessive involvement in the EIS process. Similarly, Exhibit 10 contains an email proposing monthly meetings for AES and Enterprise representatives to discuss changes to the Draft EIS. These documents allow the Court to properly evaluate the nature of AES's conflict and whether the BIA failed in its duty to investigate the conflict.

[1]The Federal Defendants argue that a "strong showing of bad faith" is required before extra-record evidence can be considered when a party contends that an agency failed to consider relevant factors. Defs.' Mem. in Supp. of Mot. to Strike (Rec Doc. 115-1) at 6. But that is not the law in the Ninth Circuit. Bad faith is a separate exception for admitting extra-record evidence, and none of the cases cited above required a showing of bad faith. If bad faith were needed, the BIA's turning a blind eye to the concerns of a nearby tribe under IGRA and failing to follow its own guidance and procedures with respect to ensuring against a conflict of interest here would constitute bad faith.

The BIA also essentially ignored the concerns raised by UAIC regarding its connections to the project site. The Guerrero Affidavit and Exhibit 3 to the Killian Declaration therefore explain UAIC's strong historical connections to the area and illustrate the impacts from the Proposed Action that the BIA failed to adequately consider. The Guerrero Affidavit in particular shows that the proposed project would interfere with UAIC's cultural practices and impair its views of spiritually significant geological features. The Federal Defendants have attempted to minimize UAIC's connections to Yuba County and the project site, arguing that Enterprise is the tribe "most closely connected with Yuba County." Docket No. 116-1 at 23 n. 17. Although UAIC raised these issues to the BIA during the comment period and prior to issuing the Record of Decision, the Federal Defendants continued to refuse to consider them. The BIA's failure to adequately consult with UAIC as a nearby tribe forced UAIC to request additional information on the application, which resulted in its filing of supplemental comments (Exhibit 3 to the Killian Declaration) after the "close of the comment period." It was well within the agency's discretion, if not obligation, to consider these comments. Yet it declined to do so. The Guerrero Affidavit and Exhibit 3 to the Killian Declaration thus show that UAIC's cultural interests were being "swept under the rug" by the Federal Defendants.

B. UAIC's documents are necessary to provide background information.

The documents subject to the motion to strike are also properly before the Court as background information. Extra-record background information may be necessary to enable the court to fully understand the issues before it. *Bunker Hill Co.*, 572 F.2d at 1292. Extra-record evidence can be used to explain and clarify the original record without resulting in second-guessing of an agency's decision. *Id.*

Courts rely on a variety of extra-record background documents to inform their decisions in NEPA cases. *See, e.g.*, *Conservation Northwest v. Rey*, 674 F. Supp. 2d 1232, 1242 (W.D. Wash. 2009) (considering declaration that explained technical terms and data associated with land management decisions); *Border Power Plant Working Grp.*, 467 F. Supp. 2d at 1050 (considering declaration describing power plant technology that would "help the Court

understand the technical issues in [the] case"); *Cascadia Wildlands Project v. U.S. Forest Serv.*, 386 F. Supp. 2d 1149, 1158 (D. Or. 2005) (considering declaration explaining information included in Forest Service database); *Sierra Club v. Babbitt*, 69 F. Supp. 2d 1202, 1209 (E.D. Cal. 1999) (considering declarations that court found "helpful in understanding the factual complexities of [the] case"); *Env't Now! v. Espy*, 877 F. Supp. 1397, 1404 (E.D. Cal. 1994) (considering declaration explaining technical matters involved in NEPA review of timber sale); *Friends of the Earth v. Hall*, 693 F. Supp. 904, 921 (W.D. Wash. 1988) (considering several extra-record declarations and state board decisions explaining data considered by Army Corps of Engineers and the Navy in their NEPA analysis).

The documents that the Federal Defendants and Enterprise move to strike provide the Court with important background information. Perhaps the most obvious examples of documents containing purely background information are the Killian and Young Declarations. As the Federal Defendants note, these documents merely help authenticate their attached exhibits, including documents that were obtained through a Freedom of Information Act request, and explain the contents of these exhibits to the Court. *See* Docket No. 115-1 at 6.

The Guerrero Affidavit and Exhibit 3 to the Killian Declaration provide information about the history of Yuba County and UAIC's cultural practices that allow the Court to properly evaluate whether the Federal Defendants took a "hard look" at the cultural and historic impacts of the project. For example, the fact that the Sutter Buttes are spiritually important to UAIC and are associated with the myth of the woman is background information that will inform the Court's analysis.

Likewise, the exhibits to the Young Declaration will help the Court understand the longstanding relationship between AES and Enterprise. The fact that they were not in the administrative record is evidence that the agency declined to follow its own guidance and procedures to ensure against improper influence by the project applicant, rendering its actions arbitrary and capricious and in violation of law. Without those exhibits, the Court would not be

aware of important details regarding how AES and Enterprise viewed their relationship and how AES was selected to work on the EIS.

C. The BIA was and should have been aware of the information in the referenced documents during the decision-making process.

Enterprise also argues that the Guerrero Affidavit should not be admitted simply because it post-dates the BIA's decision. Docket No. 120-1 at 2. The date of the affidavit is not so critical. Extra-record evidence may be admitted if it contains "information available at the time, not post-decisional information." *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1130 (9th Cir. 2012). Extra-record evidence "may not be advanced as *a new rationalization* either for sustaining or attacking an agency's decision." *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) (emphasis added).

Enterprise's rule that would bar any document created after the time of an administrative decision is illogical and unworkable. It "would leave no room for the established exception allowing courts to consider extra-record evidence where necessary to determine if the agency has considered all relevant factors." *Border Power Plant Working Grp.*, 467 F. Supp. 2d at 1049. For that reason, many declarations and other documents created after the relevant agency decision have been admitted to illustrate or explain previously existing information. *See, e.g., id.* at 1050; *Nat'l Audubon Soc.*, 46 F.3d at1441; *Nw. Ecosystem Alliance*, 380 F. Supp. 2d at 1184.

Courts that have excluded extra-record information on the ground that it post-dated the decision have done so because the evidence contained post-decision information. *See, e.g., Tri-Valley CAREs*, 671 F.3d at 1131 (involving report on inadequacy of models used to measure environmental impacts of terrorist attacks prepared nearly two years after commencement of litigation); *Sw. Ctr. for Biological Diversity*, 100 F.3d at 1450 (involving letter describing interagency consultation procedures drafted by Regional Forester after relevant timber sale had been approved). *Tri-Valley CAREs* and *Southwest Center for Biological Diversity* thus both involved situations in which it would be unfair to the agency to fault it for not considering information created after its decision was made. It is not unfair to the BIA to show that it did not consider information that was readily available to it.

There is no post-decisional information in the Guerrero Affidavit. The information provided to the Court was available to the BIA, and does not constitute new analysis. The Guerrero Affidavit contains information regarding the history of UAIC and Enterprise that was available long before the BIA issued the EIS or the RODs in this case. The BIA, as the agency whose mission it is to "enhance the quality of life" and "protect and improve the trust assets" of Indian tribes, should have been familiar with all of this information. *See* Bureau of Indian Affairs, *Mission Statement*, http://www.bia.gov/WhoWeAre/BIA/ (last visited Aug. 18, 2014). UAIC is a federally recognized tribe, and Yuba County is part of its service area. *See* SOF ¶ 3. Moreover, UAIC has highlighted its historical connections to Yuba County multiple times in its comments to the BIA. *See* AR NEW 26208-26209, 22311. Rather than raising a "new rationalization," the Guerrero Affidavit helps the Court understand important historical information and helps show that the BIA did not properly consider information that was available to it when it made its decisions.

III. UAIC DID OBJECT TO THE RECORD, AND WAS NOT REQUIRED TO MOVE TO SUPPLEMENT.

The Federal Defendants and Enterprise both contend that UAIC should have attempted to supplement the administrative record with certain extra-record material. Docket No. 115-1 at 6; Docket No. 120-1 at 4. The Federal Defendants argue that UAIC has "waived any right to supplement the record." Docket No. 115-1 at 6. But the administrative record is supposed to contain only the documents the agency purported to consider. It would make little sense to supplement the record with all of the evidence at issue in the motions to strike because the evidence provides background information and shows facts that the BIA did *not* consider (or even purport to consider). Moreover, 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.

Requiring plaintiffs to move to supplement the administrative record for any document they seek to use in support of their arguments would eradicate the recognized exceptions allowing the use of extra-record evidence. The cases cited by the Federal Defendants do not stand for such a proposition. *Tri Valley CAREs*, for example, merely observed that the district

court had properly denied a motion to supplement because it violated a local rule requiring an explanation of why a stipulation could not be obtained. 671 F.3d at 1131. Numerous cases have allowed plaintiffs to rely on extra-record evidence without first supplementing the administrative record. *See, e.g.*, *Earth Island Inst.*, 442 F.3d at 1162; *Border Power Plant Working Grp.*, 467 F. Supp. 2d at 1049; *Sierra Club*, 69 F. Supp. 2d at 1209.

Moreover, UAIC *has* requested that the Federal Defendants add Exhibits 3, 5, 7, and 10 to the Young Declaration and Exhibit 3 to the Killian Declaration, and the Federal Defendants refused. *See* SOF ¶ 28. It would be unjust to strike UAIC's extra-record documents from the Court's record as a result of the Federal Defendants' failure to include those documents in the administrative record. This would allow the BIA to claim that any documents or information available to it were simply not considered and, thus, not available to the Court to conduct judicial review, making such review meaningless.

IV. STRIKING THE DOCUMENTS CITED BY UAIC AND ANY RELATED ARGUMENTS IS NOT THE PROPER REMEDY.

This Court may consider UAIC's documentary evidence for some purposes but not others, without striking the documents in their entirety. *See Bair v. California State Dep't of Transp.*, 867 F. Supp. 2d 1058, 1068 (N.D. Cal. 2012) (considering a declaration for purposes of determining whether an agency had considered all relevant factors even though the declaration also contained inadmissible post-hoc attacks on the decision); *Border Power Plant Working Grp.*, 467 F. Supp. 2d at 1050-52 (admitting portions of extra-record declarations despite the fact that portions of the declarations did not fall within any recognized exception).

The Federal Defendants and Enterprise move to strike documents that serve multiple purposes and fall under multiple exceptions to the general rule against extra-record evidence. For example, the Guerrero Affidavit and Exhibit 3 to the Killian Declaration inform the Court about UAIC's history and cultural practices and show that the BIA failed to consider highly relevant information. These two documents also demonstrate UAIC's prudential standing, which Enterprise contests in its Motion for Summary Judgment. Docket No. 119-1 at 10-12.

The Federal Defendants and Enterprise suggest the Court should not consider any argument in UAIC's motion for summary judgment that relies on any extra-record document.[2] *See* Docket No. 115 at 2; Docket No. 120 at 1. That would be even more inappropriate. While the documents that Federal Defendants and Enterprise move to strike provide important information to the Court and help demonstrate UAIC's contentions, they are far from the only support that UAIC has cited for its arguments. For example, the Guerrero Affidavit and Exhibit 3 to the Killian Declaration are just two of six documents cited in support of UAIC's statements regarding its historical ties to Yuba County in Paragraph 1 of its statement of facts. *See* Docket No. 98-2 ¶ 1. Thus, even the striking of an extra-record document would not require the exclusion of UAIC's arguments.

DATED: August 25, 2014

Respectfully submitted,

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[2] The Federal Defendants claim that they are not seeking the most "drastic" remedy, observing that one court has required plaintiffs to re-file a brief without reference to a stricken extra-record document. *See Desert Protective Council v. U.S. Dep't of the Interior*, 927 F. Supp. 2d 949, 955 (S.D. Cal. 2013). But requiring UAIC to re-file its motion for summary judgment without reference to certain documents would at least allow UAIC to assert its arguments using other support. Striking certain arguments in their entirety, as the Federal Defendants encourage, is indeed the most drastic remedy.

I HEREBY CERTIFY that, on this 25th day of August, 2014, copies of the above and foregoing Plaintiff United Auburn Indian Community of the Auburn Rancheria's Opposition to Motions to Strike Filed by Federal Defendants and Enterprise 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.

DATED: August 25, 2014

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