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9 **UNITED STATES DISTRICT COURT**

10 **EASTERN DISTRICT OF CALIFORNIA**

11 CACHIL DEHE BAND OF WINTUN INDIANS )  
OF THE COLUSA INDIAN COMMUNITY, a )  
12 federally recognized Indian Tribe, et al. )

13 Plaintiffs, )

14 v. )

15 SALLY JEWELL, Secretary of the Interior, et al., )

16 Defendants )

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

**PLAINTIFF CACHIL DEHE BAND  
OF WINTUN INDIANS OF THE  
COLUSA INDIAN COMMUNITY'S  
OPPOSITION TO FEDERAL  
DEFENDANTS' AND INTERVENOR'S  
MOTIONS TO STRIKE  
DECLARATION OF ALAN P.  
MEISTER, PHD**

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

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1 **ARGUMENT**

2 **The Court Should Admit the Declaration and Report of Dr. Alan P. Meister Because they**  
3 **Demonstrate that Federal Defendants Completely Ignored Relevant Area of Socioeconomic**  
4 **Inquiry that Congress intended them to Consider under NEPA and IGRA**

5 Generally, review of the Department's EIS and decision "is limited to the administrative  
6 record and may only be expanded beyond the record to explain agency decisions," not to determine  
7 the correctness of the agency's decision. *Northwest Env'tl. Advocates v. Nat'l Marine Fisheries Serv.*,  
8 460 F.3d 1125, 1144 (9th Cir. 2006). However, the Court should not "straightjacket" itself with the  
9 administrative record. *Asarco, Inc. v. U.S. Env'tl. Prot. Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980)  
10 ("The court cannot adequately discharge its duty to engage in a 'substantial inquiry' if it is required  
11 to take the agency's word that it considered all relevant matters"). The Court may consider extra-  
12 record material to "ascertain[] whether the agency considered all the relevant factors or fully  
13 explicated its course of conduct or grounds of decision." *Id.*

14 The detriment to Colusa of the proposed Yuba County casino is relevant to both the NEPA  
15 requirement that Federal Defendants analyze the adverse impacts on the human environment and the  
16 requirement that Federal Defendants determine whether an off-reservation casino would be  
17 detrimental to surrounding Indian tribes. Defendants did not inquire into the impacts on Colusa, but  
18 instead relied the conclusory statements of a stale socioeconomic report that despite the  
19 "cannibalization" of millions of dollars of Colusa's casino business by the proposed Enterprise  
20 casino in Yuba County the effects on its tribal government would be "minimal." ARN0024799. The  
21 lack of any analysis based on any revenue figures, renders the so-called study contained in Appendix  
22 M to the EIS an exercise in mere speculation. ARN0024811 (guessing at Colusa's market); ECF 106  
23 at 5 (EIS study did not have access to any revenue figures). The author of Appendix M, Gaming  
24 Market Advisors, did not attempt to obtain any revenue figures from Colusa or other Indian tribes,  
25 and it "did not validate or verify" the data upon which its report was based – data primarily from the  
26 gaming developer. ARN0024814.

27 The Court does not owe deference to an agency "when the agency has completely failed to  
28 address some factor consideration of which was essential to [making an] informed decision."

*National Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 798-99 (9th Cir. 2005)

1 (quoting *Brower v. Evans*, 257 F.3d 1058, 1067 (9th Cir. 2001) (internal quotation marks omitted,  
2 insertion in original). The Meister Declaration and the report it summarizes are "necessary to  
3 determine 'whether the agency has considered all relevant factors and has explained its decision,' and  
4 'to explain ... complex subject matter.'" *Southwest Ctr. for Biological Diversity v. U.S. Forest Serv.*,  
5 100 F.3d 1443, 1450 (9th Cir. 1996) (quoting *Inland Empire*, 88 F.3d at 703-04)); *Lands Council*,  
6 395 F.3d at 1030. The RODs, however, relied solely upon the conclusory statement that there would  
7 be only minimal impacts on the tribes to whom the Department owes a fiduciary responsibility equal  
8 to that it owes to Enterprise despite the fact that the statement was based on guesses about other  
9 casinos' markets and revenues. Moreover, those guesses only addressed extent of the impacts on  
10 other Indian tribes' casinos, and gave no consideration whatsoever to the devastating impacts on the  
11 tribal governments dependent upon revenues from those casinos. ARN0024799 ("decline in tribal  
12 revenue ... [not] anything more than minimal"); compare ECF 106 at 6 (finding that the relationship  
13 between casino and government revenues is not linear).

14 The conflict between the Appendix M analysis in the EIS and Dr. Meister's analysis of the  
15 impacts on Colusa is not a mere difference of opinion in which a federal agency is entitled to rely  
16 upon its own experts – not that the Department is entitled to deference on economic matters, and in  
17 any event, the Department had no experts of its own – but the utter failure of the Department to  
18 consider a core matter within its responsibility, that is, the welfare of its other tribal beneficiaries.

19 The EIS's purported analysis of the impacts on other casinos targeted for cannibalization is  
20 unscientific in the extreme, based as it is on factually unfounded assumptions rather than evidence.  
21 *E.g.*, ARN0024811. Worse still, the analysis of the likely impacts on the Indian tribes, their  
22 governments, and their tribal members is *nonexistent*. By relying upon what is essentially a market  
23 analysis promoting the Enterprise Casino, the Department entirely failed to consider an important  
24 aspect of the problem committed to its care by Congress. *Motor Vehicle Mfrs.*, 463 U.S. at 43;  
25 *National Wildlife Fed'n*, 422 F.3d at 798-99.

26 Although the Department bears the primary responsibility to develop the facts on its own  
27 initiative, in this case it did not. *Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1092 (9th  
28 Cir. 2006). The sensitivity of the information about the impacts on the Colusa casino made it

1 impracticable to submit public comments on the matter because doing so would have affected  
2 Colusa'S ability to obtain financing and compete in the market. The Supreme Court opined that  
3 while "[t]he Department is surely right in saying that confidentiality in communications with tribes  
4 is conducive to a proper discharge of its trust obligation," that confidentiality does not apply at least  
5 where tribes are in competition with other stakeholders. *Department of the Interior v. Klamath*  
6 *Water Users Protective Ass'n*, 532 U.S. 1, 11 & 16 (2001). Because of the sensitivity of the  
7 information contained within Dr. Meister's report, Colusa submitted his declaration and summary of  
8 his report with its MPA, but not the report itself. ECF 106.

9 While the Meister Declaration and Report post-date the RODs, they analyze information that  
10 was available to Federal Defendants during the decade prior to their final decisions. *Tri-Valley*  
11 *CAREs v. United States Dep't of Energy*, 671 F.3d 1113, 1130 (9th Cir. 2012). Dr. Meister's analysis  
12 does not advance a "new rationalization ... attacking" the Federal Defendants' decisions, but points  
13 out the faultiness of the process they followed in reaching their decisions. *Southwest Ctr for*  
14 *Biological Diversity v. United States Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996).

15  
16 **CONCLUSION**

17 For the forgoing reasons, the Court should deny the motions to strike the Declaration of Alan  
18 P. Meister, PhD and the attached summary report.

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20 Dated: August 25, 2014

FORMAN & ASSOCIATES

21 By: /s/ Jeffrey R. Keohane  
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23 Attorneys for Plaintiff  
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