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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED AUBURN INDIAN COMMUNITY OF THE AUBURN RANCHERIA,

Plaintiff

v.

S.M.R. JEWELL, et al.

Defendants

CITIZENS FOR A BETTER WAY, et al.

Plaintiffs

v.

UNITED STATES DEPARTMENT OF INTERIOR, et al.,

Defendants

CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY,

Plaintiff,

v.

S.M.R. JEWELL, et al.,

Defendants

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

ARGUMENT

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

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

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

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

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

[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.

Respectfully submitted this 8th day of September, 2014.

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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