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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 CITIZENS FOR A BETTER WAY, et al.  
28

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

(Consolidated Cases)

**INTERVENOR-DEFENDANT'S REPLY  
IN SUPPORT OF MOTION TO STRIKE  
AFFIDAVIT OF MARCOS GUERRERO**

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Plaintiffs.

vs.

UNITED STATES DEPARTMENT OF  
INTERIOR, et al.,

Defendants, and

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

Intervenor Defendant.

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

Plaintiff,

vs.

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

Defendants, and

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

Intervenor Defendant.

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1 In moving to Strike the Affidavit of Marcos Guerrero, the Estom Yumeka Maidu Tribe  
2 of the Enterprise Rancheria ("Enterprise" or "Tribe") explained that (i) Plaintiff United Auburn  
3 Indian Community ("UAIC") has already stipulated that this Administrative Procedure Act case  
4 is "an action for review on an administrative record" (*see* Doc. 69, ¶ 7); (ii) the Guerrero  
5 Affidavit is not in the administrative record; (iii) the Guerrero Affidavit does not qualify for any  
6 of the narrow exceptions to the well-recognized rule that judicial review under the APA must be  
7 confined to the administrative record; (iv) the Guerrero Affidavit was never submitted to the  
8 Department of the Interior during the decade-long public process that led to the agency decisions  
9 UAIC has challenged; (v) the Guerrero Affidavit post-dates the decisions about which UAIC has  
10 complained; and (vi) despite ample opportunity, UAIC never requested that the Guerrero  
11 Affidavit be added to the administrative record.

12 In response, UAIC invites the Court to carve out broad exceptions to the rule against  
13 extra-record evidence, suggesting that judicial consideration of such material is routine. *See*,  
14 *e.g.*, UAIC Opp. at 2:1 ("Courts often need..."), 2:22-23 ("Courts in this Circuit frequently  
15 allow..."), 4:23 ("Courts rely on..."). That is simply not the law. The Ninth Circuit has made it  
16 very clear that any exceptions to the general rule against extra-record evidence must be narrowly  
17 construed and applied so as not to undermine the deferential standard of review mandated by the  
18 APA. *See, e.g., San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602-03 (9th  
19 Cir. 2014) ("we have approached these exceptions with caution, lest the exception undermine the  
20 general rule"); *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125,1131 (9th Cir. 2010)  
21 ("heavy burden" to invoke exception); *Nw. Env'tl. Advocates v. Nat'l Marine Fisheries Serv.*, 460  
22 F.3d 1125, 1145 (9th Cir. 2006) (exceptions are "discrete" and "narrow"); *Ctr. for Biological  
23 Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943-44 (9th Cir. 2006) (exceptions  
24 undermine proper standard of review); *Lands Council v. Regional Forester*, 395 F.3d 1019,  
25 1030 (9th Cir. 2005) ("narrowly construed and applied").

26 UAIC also argues that Guerrero Affidavit is admissible because it demonstrates that  
27 Interior failed to consider "that the [Tribe's] proposed project would interfere with UAIC's  
28

1 cultural practices and impair its views of spiritually significant geological figures." UAIC Opp.  
2 at 4. The argument is flawed in two fundamental respects. First, UAIC did not submit the  
3 Guerrero Affidavit (or the information therein) to Interior during the agency's decision-making  
4 process; thus, Interior can hardly be faulted for "failing" to consider it. Second, the Affidavit  
5 does not, in fact, demonstrate that the Tribe's project will impact UAIC. *See* Intervenor-  
6 Defendant's Reply In Support of Cross-Motion for Summary Judgment (filed herewith) at 2-3.

7 UAIC further alleges that the Guerrero Affidavit is admissible as explanatory  
8 "background information." UAIC at 4-6. But this case (unlike those cited by UAIC) does not  
9 involve complex data analysis or technical issues requiring clarification or explanation. *See*,  
10 *e.g.*, *Pinnacle Armor v. United States*, 923 F. Supp. 2d 1226, 1244-45 (E.D. Cal. 2013) (extra-  
11 record background inadmissible in the absence of complex technical matters). Moreover, UAIC  
12 does not proffer the Guerrero Affidavit as mere "background"; rather, it impermissibly relies on  
13 the Affidavit to attack the substance of Interior's decision-making. *See Asarco v. EPA*, 616 F.2d  
14 1153, 1160 (9th Cir. 1980) (even if admissible as "background," extra-record evidence cannot be  
15 used to dispute agency decision-making).

16 UAIC also claims that the Guerrero Affidavit is admissible despite the fact that it post-  
17 dates Interior's decision to approve the Tribe's project. Not so. Extra-record evidence "may not  
18 be advanced as a new rationalization for...attacking an agency's decision." *Ctr. for Biological*  
19 *Diversity*, 450 F.3d at 943; *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443,  
20 1450 (9th Cir. 1996). And it is undisputed that UAIC failed to submit the Guerrero Affidavit to  
21 Interior during the agency's decision-making process.

22 Contrary to UAIC's representation, *Tri-Valley CAREs v. U.S. Dep't of Energy* does not  
23 stand for the proposition that "[e]xtra-record evidence may be admitted if it contains information  
24 available at the time, not post-decisional information." UAIC Opp. at 6:6 to 6:7. In fact, *Tri-*  
25 *Valley* explicitly rejected a plaintiff's request for judicial consideration of post-decisional  
26 information, noting that *post hoc* evidence does not fit within any exception to the general rule  
27 against extra-record evidence. *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1130-

1 31 (9th Cir. 2012). Moreover, UAIC's proposed distinction between post-decisional information  
2 and post-decisional documents has already been rejected by the Ninth Circuit. *See Sw. Ctr.*, 100  
3 F.3d at 1450-51.

4 Finally, UAIC claims that the Guerrero Affidavit should be considered because it  
5 establishes UAIC's standing. UAIC Opp. at 8-9. It is mistaken in multiple respects. First, the  
6 Guerrero Affidavit does not, in fact, establish UAIC's standing. *See* Intervenor-Defendant's  
7 Reply In Support of Cross-Motion for Summary Judgment (filed herewith) at 2-3. Second,  
8 UAIC's Motion for Summary Judgment does not rely on the Guerrero Affidavit for purposes of  
9 establishing standing; rather, the Affidavit is cited in support of UAIC's substantive arguments.<sup>1</sup>  
10 Therefore, even if the Court were inclined to consider the Guerrero Affidavit for the limited  
11 purpose of evaluating UAIC's standing, the portions of UAIC's motion for summary judgment  
12 relying on the Affidavit to attack Interior's decision-making is properly stricken. *Nw. Envtl.*  
13 *Advocates*, 460 F.3d at 1144-45.<sup>2</sup>

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22 <sup>1</sup> For example, UAIC's Motion for Summary Judgment relies on paragraphs 2 and 39 of UAIC's  
23 Separate Statement. *See* Memorandum in Support of Motion for Summary Judgment (Doc. 98-  
24 1) at 12-13. And the Separate Statement, in turn, relies on the Affidavit. *See* UAIC Statement  
of Facts (Doc. 98-2) at ¶ 2 n.2, ¶ 39 n.39.

25 <sup>2</sup> The Tribe's Motion to Strike identified the following portions of UAIC's MSJ (Doc. 98-1) as  
26 appropriately stricken: page 11, lines 14-20; page 12, lines 20-27; page 13, lines 4-9; and page  
27 14, lines 7-15. Subsequently, UAIC filed a combined Opposition/Reply brief further relying on  
28 the material in the Guerrero Affidavit. The following portions of UAIC's Opposition/Reply  
(Doc. 126) are appropriately stricken: page 4, lines 4-9; page 10, lines 12-25; page 11, lines 1-  
13; page 15, lines 20-27.

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1 Dated: September 8, 2014

Respectfully Submitted,

2  
3 DENTONS US LLP

4 By /s/ Matthew G. Adams  
5 MATTHEW G. ADAMS

6 Attorneys for Intervenor-Defendant  
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**CERTIFICATE OF SERVICE**

I hereby certify that on September 8, 2014, true and correct copies of **INTERVENOR-DEFENDANT'S REPLY 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: September 8, 2014

DENTONS US LLP

By: /s/ Matthew Adams

MATTHEW G. ADAMS

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