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THE ESTOM YUMEKA MAIDU TRIBE OF THE
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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.
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CASE NO. 12-CV-03021-TLN-AC

(Consolidated Cases)

**INTERVENOR-DEFENDANT’S REPLY
IN SUPPORT OF MOTION TO STRIKE
EXTRA-RECORD DECLARATION OF
ALAN MEISTER**

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

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

12 In response, Colusa argues that the Meister Declaration is admissible (i) to determine
13 whether Interior considered all relevant factors and (ii) to explain complex subject matter.
14 Colusa Opp. at 2:2 to 2:4. It is mistaken on both counts.

15 The Meister Declaration is not admissible to determine whether interior considered "all
16 relevant factors" for the following reasons:

17 (1) It is undisputed that the Meister Declaration and the report it purports to describe post-
18 date the agency decisions about which Colusa complains. It is also undisputed that neither the
19 Meister Declaration nor the report it purports to describe were submitted to the Department of
20 the Interior during the agency's administrative process. Post-decision information "may not be
21 advanced as a new rationalization for attacking an agency's decision." *Ctr. for Biological*
22 *Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943-44 (9th Cir. 2006); *Sw. Ctr. for*
23 *Biological Diversity v. United States Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996).¹

24
25 ¹ Contrary to Colusa's representation, *Tri-Valley CAREs v. U.S. Dep't of Energy* does not stand
26 for the proposition that extra-record evidence can be considered if it was "available to the
27 Federal Defendants...prior to their final decisions." *See* Colusa Opp. at 3. In fact, *Tri-Valley*
28 explicitly rejected a plaintiff's request for judicial consideration of post-decisional information,
noting that post hoc evidence does not fit within any exception to the general rule against extra-

1 (2) In order to fit within the "relevant factors" exception to the general rule against extra-
2 record evidence, a document must do more than raise "nuanced points" about an existing issue.
3 *Pinnacle Armor v. United States*, 923 F. Supp. 2d 1226, 1234 (E.D. Cal. 2013). Rather, the
4 document must identify "an entirely new general subject matter that the defendant agency failed
5 to consider." *Id.* Meister Declaration does not raise an "entirely new" subject matter; instead, it
6 presents Colusa's perspective on a subject (namely, socioeconomic impacts) already covered in
7 Interior's Environmental Impact Statement. *See* AR 23648-75(analysis); AR 24681-24897
8 (technical appendix).

9 The Meister Declaration is not admissible "to explain complex subject matter" for the
10 following reasons:

11 (1) As noted above, the Meister Declaration and the report it purports to describe (i) post-
12 date the relevant agency decisions and (ii) were never submitted to the agency during its
13 administrative process.

14 (2) Colusa does not use the Meister Declaration to "explain complex subject matter";
15 rather, it impermissibly relies on the Declaration to attack the substance of Interior's decision-
16 making.

17 The Tribe's Motion to Strike explained that when a party improperly submits and relies on
18 material outside the administrative record, the appropriate remedy is to strike the extra-record
19 material and all arguments based thereon. Enterprise Motion to Strike at 4 (citing multiple
20 Ninth Circuit decisions). Colusa does not claim otherwise. Colusa Opp. at 1-3. Accordingly,
21 the Tribe respectfully requests that this Court strike (i) the Meister Declaration (Doc. 106) and
22 (ii) the portions of Colusa's MSJ briefs (Doc. 102-1 and 130) relying thereon.²

24 record evidence. *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1130-31 (9th Cir.
25 2012).

26 ² The Tribe's Motion to Strike identified the following portions of Colusa's MSJ as appropriately
27 stricken: page 1, lines 24-26; page 10, lines 17-24; and page 11, lines 3-9. Tribe's Motion to
28 Strike at 4, n.1. Subsequently, Colusa filed a combined Opposition/Reply brief relying heavily
on the Meister Declaration. The following portions of Colusa's Opposition/Reply (Doc. 102-1)

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Dated: September 8, 2014

Respectfully Submitted,

DENTONS US LLP

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

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are appropriately stricken: page 10, lines 17 to 23; page 11, line 19 to page 12, line 16; and page 12, line 23 to page 13, line 5.

CERTIFICATE OF SERVICE

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

DENTONS US LLP

By: /s/ Matthew Adams

MATTHEW G. ADAMS

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