Courtney Bateman (pro hac vice)
REED SMITH LLP
1301 K St. N.W.
Washington, DC 20005
Tel. No. (202) 414-9265
cbateman@reedsmith.com

Attorneys for the Winnemem Wintu Tribe

IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

WINNEMEM WINTU TRIBE, in their tribal and individual capacities; CALEEN SISK, et al., Plaintiffs, v. UNITED STATES FOREST SERVICE, Defendant.	Case No. 2:09-cv-01072 KJM KJN **PLAINTIFF WINNEMEM WINTU TRIBE'S MOTION TO STRIKE THE DECLARATIONS OF PETER SCHMIDT, KRISTY COTTINI, AND WINFIELD HENN** Date: March 27, 2015 Time: 2:00 p.m. Place: Courtroom 3, 15th Floor 501 I Street, Sacramento Judge: Hon. Kimberly J. Mueller

Plaintiffs Winnemem Wintu and Caleen Sisk, through their attorneys Reed Smith LLP, and pursuant to Federal Rules of Civil Procedure 12(f) and 56(e), hereby move the Court to strike the Declaration of Peter Schmidt – and those declarations of former Forest Service employees that it affirms – appended to the United States Forest Service's Motion for Summary Judgment in this matter. In support of the motion, the Winnemem state as follows:

1. In support of its Motion for Summary Judgment, Defendant Forest Service submitted a declaration of Peter Schmidt, Archaeologist on the Shasta Lake Ranger District for the Shasta-Trinity National Forest. In this declaration, Mr. Schmidt affirms the prior declarations of Kristy Cottini, former District Ranger, and Winfield Henn, former Heritage Program Manager/Tribal Relations Program Manager.

2. In support of its Motion for Summary Judgment, Defendant relies upon an October 12, 2012 memo purporting to conclude the "sacred prayer rock" at Bucks Saddle was not an archaeological feature, and that "it would be difficult to determine if this sacred prayer rock is a traditional cultural property." AR 339-342, cited at p. 10 of Defendant's motion. That memo was drafted six years after the Decision Memo regarding the Clikapudi Trail Loop, and three years after this litigation began.

3. This Court reviews agency action in accordance with the standards of the Administrative Procedure Act ("APA"). 28 U.S.C. § 1491(b)(4) ; 5 U.S.C. § 706.2. Only the existing administrative record should serve as the basis for a review of agency action under the APA. *Florida Power & Light Co. v. Lorion, et al.*, 470 U.S. 729, 743-44; 105 S.Ct. 1598, 1607 (1985); *Camp v. Pitts*, 411 U.S. 138, 141-42; 93 S.Ct. 1241, 1242-1244 (1973).

4. The Ninth Circuit has repeatedly limited the ability of parties to supplement a factual or administrative record after-the-fact**.** *See Sierra Club v. Bosworth*, 510 F.3d 1016, 1026 (9th Cir 2007) ("post-hoc" rationale for decisions based on an inadequate record is improper); *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir.1996) ("[P]ost-decision information [ ] may not be advanced as a new rationalization either for sustaining or attacking an agency's decision."). In *Inland Empire Pub. Lands Council v. Glickman*, 88 F.3d 697, 703–04 (9th Cir.1996), the Court held that a reviewing court may consider extra-record materials only: (1) if necessary to determine whether the agency has considered all relevant factors and explained its decision, (2) when the agency has relied on documents not in the record, (3) when supplementing the record is necessary to explain technical terms or complex subject matter, or (4) when plaintiffs make a showing of agency bad faith. *See also Tri-Valley Cares v. Department of Energy*, 671 F.3d 1113, 11130 (9th Cir. 2012).

5. The Forest Service has not satisfied the *Inland* factors. First, it is not necessary here to determine whether the agency considered all relevant factors to explain its decision. The Administrative Record, standing alone, must be adequate to support all of the Forest Service's claims. The Forest Service cannot plug important factual gaps in the record with unsubstantiated statements from former Forest Service officers. Anything outside of the Record's scope would

constitute a "post-hoc" rationale to supplement the record. *Bosworth*, 510 F.3d at 1026. Second, the Forest Service has not relied on documents that are not in the record. The declarations from Peter Schmidt, Kristy Cottini, and Winfield Henn do not make explicit reference to the pressing need for documents outside the record. The only document they purport to introduce is a map of the sites at issue. *See* EX. 1 to Cottini Declaration. The third and fourth prongs of *Inland* are entirely inapplicable.

6. Similarly, the Forest Service's attempt to rationalize a poor initial section 106 evaluation by pointing to a memo drafted six years after the fact should be denied. *See Sierra Club v. Bosworth*, 510 F.3d 1016, 1026 (9th Cir 2007) ("post-hoc" rationale for decisions based on an inadequate record is improper); *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir.1996) ("[P]ost-decision information [ ] may not be advanced as a new rationalization either for sustaining or attacking an agency's decision.").

8. Plaintiffs therefore request that the Court strike the declarations of Peter Schmidt, Kristy Cottini, and Winfield Henn from the Defendant's Motion for Summary Judgment, and strike the October 16, 2012 memo (AR 339-342) from the record, and the reference thereto from Defendant's Motion.

DATED: January 30, 2015

/S/

Courtney Bateman (pro hac vice)
REED SMITH LLP
1301 K St. N.W.
Washington, DC 20005
Tel. No. (202) 414-9265
cbateman@reedsmith.com