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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

NISENAN MAIDU TRIBE OF THE NEVADA CITY RANCHERIA, Plaintiff, v. KENNETH L. SALAZAR, Secretary of the Department of the Interior; et al., Defendants.	No. C 10-270 JW NOTICE OF MOTION AND MOTION TO STRIKE DECLARATIONS AND/OR PORTIONS OF DECLARATIONS AND EXHIBITS Date: September 9, 2011 Time: 9:00 a.m. Courtroom No. 3, 5th Floor

TO THE PLAINTIFF AND ITS ATTORNEYS OF RECORD:

NOTICE IS HEREBY GIVEN, that on September 9, 2011 at 9:00 a.m., or as soon thereafter as counsel may be heard, in the Courtroom of the Honorable Jeremy Fogel, United States District Court, 280 S. First Street, San Jose, California 95113, the defendants named above ("Defendants") will move the Court for an order striking the declarations or the inadmissable portions of the declarations offered by Plaintiffs, as well as certain documents offered as exhibits in support of the "Plaintiff's Notice of Motion and Motion to Proceed in the Matter of *Tillie Hardwick* v. *United States of America, et al.,* No. C 79-1710 JF (PVT)" ("*Tillie Hardwick")*(hereafter "Plaintiff's Motion" or "Motion").

This motion to strike is made on grounds that declarations and documents offered in support of Plaintiff's Motion must meet all requirements for admissibility of evidence that would be required, if offered at trial. Fed. R. Civ. P. 56(e); ND CA Civil Local Rule (hereafter, "L.R.") 7-5. Many parts of the various declarations offered in support of the Motion, a number of the documents offered, and many factual allegations within the Plaintiff's Motion which rely on those materials, fail to satisfy the evidentiary rules for admissibility of evidence and must be rejected from consideration by this Court. It is also made on the grounds that a large majority of the materials and declarations filed go to the issue of the validity of the termination of the Nevada City Rancheria and review of that subject matter is limited to the administrative record, pursuant to the Administrative Procedure Act. Further, the motion is made on the grounds that, insofar as Plaintiff's Motion offers alleged facts and argument on the issue of the termination, it goes beyond the scope of the motion authorized by the Court's minute order.

The motion is supported by this Notice of Motion and Motion to Strike Declarations and/or Portions of Declarations Offered in Support of Motion to Proceed in *Tillie Hardwick*. (hereafter, "Defendants' Motion" or "Motion to Strike"), the following Memorandum of Points and Authorities, the other pleadings and papers on file herein, and upon such further information and oral argument as may be presented at the hearing of this motion.

In the alternative, should the Court deny this motion to strike and instead consider those matters which are subject of this Motion to Strike, for any purpose, the Defendants move the Court

to stay this motion and the hearing on same until such time as Defendants can conduct discovery on the issues raised by Plaintiff's Motion and prepare declarations and exhibits which may be offered by them in opposition, for the same purposes and to the same extent as the Plaintiff's declarations and exhibits.

A proposed form of Order is submitted, herewith, in accordance with L.R. 7-2(c).

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

Defendants hereby files this memorandum in support of its Motion to Strike all materials offered in connection with Plaintiff's Motion which do not conform to the requirements of the Federal Rules of Evidence ("FRE"), which materials are identified in the following paragraphs. In addition, this Motion to Strike seeks an order striking all those materials presented by Plaintiff's Motion which pertain to issues outside the scope of the motion authorized by the Court, e.g., all those materials containing proffered evidence and argument concerning the decision which terminated the Nevada City Rancheria.

One of the most basic rules of motion practice is that the evidence submitted to the Court by way of declaration or otherwise must meet all requirements for admissibility of evidence, if offered at the time of trial. Fed. R. Civ. P. 56(e); L.R. 7-5(b). *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 (9th Cir. 1989). This means that declarations, to be admissible, must:

- be made by a declarant having personal knowledge of the facts stated therein;
- set out facts that would be admissible in evidence (rather than hearsay statements or the declarant's opinions or conclusions); and,
- affirmatively show that the declarant is competent to testify on the matters at trial.

Rule 56(c). Admissibility is determined under the Federal Rules of Evidence ("FRE"). *Sarno v. Douglas Elliman-Gibbons & Ives., Inc.*, 183 F.3d 155, 160 (2d Cir. 1999)(a hearsay assertion that would not be admissible at trial is not competent material for a Rule 56 declaration). Pursuant to the rules of evidence and the Court's order authorizing Plaintiff's Motion, all or portions of the most of the declarations, exhibits, exhibits, and arguments submitted by Plaintiff are inadmissable.

ARGUMENT

A. The Declaration of Shelly Covert ("Covert") Fails to Present Admissible Evidence and Must be Stricken.

Under Rule 802 of the FRE, hearsay is not admissible, except as specifically provided for elsewhere in the rules. Hearsay is defined as an oral or written statement made out-of-court, offered to prove the truth of the matter asserted. Rule 801 FRE.

Ms. Covert states that she was born in 1966 (See Covert, ¶ 5), which was two years after the Nevada City Rancheria ("Rancheria") was terminated and therefore much of what she relates about the Rancheria and issues affecting it is not known to her by personal observation. To be admissible as evidence, the statements must be based on such personal observation of the declarant, and the declaration itself must contain facts showing the declarant' s personal connection with the matters stated therein, establishing the source of his or her information. It is not enough for the declarant simply to state that he or she has personal knowledge of the facts stated. FRE 602; *US. v. Shumway*, 199 F.3d 1093, 1104 (9th Cir. 1999); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). In this case, Covert fails to even state or claim that she has personal knowledge of the matters she discusses, or to otherwise satisfy this basic requirement for personal knowledge of the facts.

The objectionable and inadmissable features in the remainder of Covert are discussed by reference to the numbered paragraphs of that declaration, below.

Paragraphs 3 and 4: Exhibits 2 and 3 to Covert contain uncertified and unauthenticated copies of two documents, which the Plaintiff alleges as evidence of the history of the Rancheria. Clearly, the Plaintiff offers these out-of-court documents as proof of the matters asserted in its "Points and Authorities" ("Ps & As"), at pages 2-5. Equally clear is that both documents, Exhibit 2 & 3, constitute inadmissable hearsay, pursuant to FRE 801 and 802. The Defendants object to Paragraphs 3 and 4 on the ground that Exhibits 2 and 3 have not been authenticated or certified and do not constitute admissible evidence.

All documentary evidence must be properly certified or authenticated (which can be done through a declaration by someone with personal knowledge of the document's genuineness and authenticity). In other words, in order for evidence to be admitted, it is necessary to lay a proper

foundation showing that the material is the same as that in the original document and that its condition has not materially changed. *See Hal Roach Studios, Inc. v. Richard Feiner & Co.*, Inc., 896 F.2d 1542, 1550-51 (attorney's summary of a registration statement inadmissible). A document is not authenticated simply because it is attached to an affidavit or declaration. *Beyenne v. Coleman Security Services, Inc*. 854 F.2d 1179, 1182 (9th Cir. 1988). Here, the two documents marked Exhibits 2 and 3, respectively, are not certified or authenticated but are merely attached to and referenced by Covert without supplying any information as to their source, identification, and accuracy which would authenticate them or otherwise support their reliability. Moreover, it is unstated and therefore not demonstrated that Covert has personal knowledge as to the genuineness and authenticity of Exhibits 2 and 3 or that there is any other basis on which they might be considered reliable as evidence in this matter. Accordingly, Exhibits 2 & 3 must be stricken.

Paragraphs 5 through 10. Covert relates information about her family and the leadership of the Tribe from about 1820 to the present without attribution or reference to any admissible source documents (with the exception of a reference to Exhibit 3 in ¶ 9,[1] which document is itself hearsay; see above), or even references to her own personal observation. Consequently, all of these statements are inadmissible hearsay. To be admissible as evidence, the statements must be based on the personal knowledge of the declarant, and the declaration itself must contain facts showing the declarant' s personal connection with the matters stated therein, establishing the source of his or her information. It is not enough for the declarant simply to state that he or she has personal knowledge of the facts stated. FRE 602; *United States v. Shumway*, 199 F.3d at 1104; *Taylor v. List*, 880 F.2d at 1045. In this case, Covert fails to even state or claim that she has personal knowledge of the information she relates or to otherwise satisfy this basic requirement for personal knowledge of the facts. Consequently, paragraphs 5 - 10 should be disregarded and stricken.

Paragraph 12. Covert states that "the BIA did nothing for another five (5) years," all of

[1] It is also to be noted that Covert is inconsistent and not supported by the cited reference to Exhibit 3, p. 59, which asserts that Louis Dick Kelley succeeded someone known as "Long Charley" and not Chief Charlie ("Old Charlie") Cully as asserted in Covert, at ¶ 8.

which period occurred two years before her birth. Thus, her statement is not based upon personal observation or any other acceptable foundation, rendering it totally conjectural, and inadmissable. FRE 602. Therefore, that statement should be stricken.

Paragraphs 13-20. These paragraphs identify a series of alleged potential members of the Rancheria, without any evidence or other substantiation that those individuals are indeed members. Covert contends that those persons were, variously, "not consulted" or "never approached" or "never contacted" by BIA regarding the termination or distribution of the assets of the Rancheria. She also contends that she "heard stories" (¶ 19) that some of her own family members lived on the reservation but were never contacted by BIA. Without any doubt, the information in Paragraphs 13-20 is conclusory in that it is not based upon Covert's personal observation, is completely lacking in foundation, and, at most, constitute inadmissable hearsay which Covert simply repeats in her declaration. FRE 602, 801 and 802; *National Steel Corp. v. Golden Eagle Ins. Co.*, 121 F.3d 496, 502 (9th Cir. 1997) (Any and all conclusory allegations, without factual support, are insufficient as evidence and not admissible). To the extent Covert references and relies upon Exhibit 6 as the source of her allegation that the information was "known" by BIA, Exhibit 6 is neither certified nor authenticated and therefore, it constitutes hearsay, as well. FRE 801 and 802. Accordingly, Paragraphs 13-20 must be disregarded and should be stricken.

Paragraph 21. Covert relates alleged facts by reliance on two additional documents, Exhibits 7 and 8 which, like all the other documents offered, are neither certified nor authenticated. Thus, they constitute more inadmissable hearsay which must be stricken. FRE 801 and 802. Moreover, Covert's conclusion that any of BIA's alleged actions or inactions "failed to follow proper procedures" or "violated the Rancheria Act" is a legal conclusion for which she is unqualified to render, and should be stricken and disregarded. The Defendants object to the introduction of Covert's legal conclusions on the ground that she is incompetent to testify as to those facts or her opinions because she has not included sufficient admissible evidence about the matter to provide a foundation for the opinion she offers. Furthermore, she failed to provide any evidence of legal education, training, or experience which would qualify her as an expert regarding the legal matters for which she has offered an opinion. *See* FRE 601, 701, and 703.

Paragraphs 22 and 23. In Paragraph 22, Covert relies on talks "with the Elders" as the basis for the information she offers, and in Paragraph 23, she offers the writings of one unnamed "white settler" as the source of the circumstances she describes. Without question, both Paragraph 22 and 23 amount to hearsay rather than evidence that the Court can rely upon, and both paragraphs must be stricken from consideration. FRE 602, 801, and 802.

Paragraph 24. Exhibits 9 and 10 are offered as the basis for the statements contained in this paragraph of Covert, but neither of those exhibits are certified or authenticated. Consequently, both those exhibits and the statements in paragraph 24, which rely upon them, are inadmissable hearsay and must be rejected and stricken. FRE 602, 801, and 802.

Paragraph 25. Covert relies on Exhibit 11, the Declaration of Josie Cully, dated April 15, 1913, as support for the statements made in this paragraph, including that "Chief Charlie's intention was that the property should be used by all of the Indians with the area." However, while Josie Cully's Declaration describes living on the land that was "allotted" to her husband Charlie Cully, it does not contain any statement whatsoever that supports the theory that Chief Charlie's intention was that the property should be used by all of the Indians within the area. Indeed, it says nothing even remotely similar to that. Accordingly, that statement by Covert in Paragraph 25 is not supported by anything in the Cully Declaration, and no other factual basis is offered or available. Therefore, Covert's statement amounts to no more than a conclusory allegation, without any factual foundation whatsoever, and it must be stricken. The established rule is that any and all conclusory allegations, without factual support, are insufficient as evidence and not admissible. *National Steel Corp. v. Golden Eagle Ins. Co.*, 121 F.3d, at 502.

Paragraphs 26 and 27. These two paragraphs rely almost exclusively on Exhibit 2 for support of the statements made therein. However, as demonstrated above, Exhibit 2 is a document which is neither certified nor authenticated and therefore, it constitutes inadmissable hearsay which can provide no support whatsoever for the statements in Paragraphs 26 and 27. Accordingly, those statements lack any admissible factual support and should be disregarded and stricken. FRE 801 and 802.

The last three sentences of Paragraph 26 cite to Exhibit 12 for support, i.e., the Declaration

of John Ragon. Review of the Ragon Declaration discloses that the portion quoted in Paragraph 26 is based entirely upon hearsay information, i.e., "it was the understanding of the Indians . . . , etc." Therefore, this part of Paragraph 26 is also based upon inadmissable hearsay and cannot be considered as evidence before this Court. Consequently, this part should also be stricken from the record, pursuant to FRE 602, 801, and 802

Paragraphs 30, 31, 32, 34, and 35. No facts or law are cited to support the statements in these paragraphs. The contents of these paragraphs, in part, represent the declarant's sentiments and personal opinions, which are irrelevant and immaterial to the issues before this Court. *United States v. Blackstone*, 56 F.3d 1143, 1146 (9th Cir. 1995). Moreover, these paragraphs also lack foundation in fact or law, and furthermore, they are argumentative and constitute inadmissable lay opinion testimony and conclusions. *See* FRE 601, 701 and 703. Accordingly, all five of those paragraphs should be disregarded and stricken.

B. Portions of the Declaration of Michael E. Vinding ("Vinding") Fail to Present Admissible Evidence and Must be Stricken.

Several paragraphs of Mr. Vinding's Declaration are objectionable and should be stricken for the reasons stated below.

Paragraphs 4, 5. 8, and 9. In each of these paragraphs, Vinding relates oral and/or written statements of four different attorneys formerly associated with the *Tillie Hardwick* case, made out-of-court, and offers them to prove the truth of the matters asserted regarding *Tillie Hardwick.* Without question, the statements offered are hearsay under Rule 801, FRE. Pursuant to Rule 802, FRE, these hearsay statements are not admissible and should be stricken from the record and not considered by the Court in connection with Plaintiff's Motion.

Paragraphs 5 and 15. These paragraphs contain the conclusory personal opinions of David Rapport and Mr. Vinding, respectively, which are inadmissable pursuant to Rule 403, FRE. Admission of those personal opinions would be unduly prejudicial and should be excluded. *See, Bank of Melli Iran v. Pahlavi,* 58 F.3d 406, 1412 (9th Cir. 1995).

C. Portions of the Declaration of Richard D. Johnson ("Johnson") Fail to Present Admissible Evidence and Must be Stricken.

Paragraph 10. In this paragraph, Johnson offers a documents marked as Exhibit 10 for the

truth of the matters therein, which is uncertified and unauthenticated and therefore, it constitute inadmissable hearsay and should be stricken, pursuant to Rules 801 and 802, FRE.

D. Portions of the Declaration of Rose Kelly Enos ("Enos") Fail to Present Admissible Evidence and Must be Stricken.

Paragraphs 20, 21, 22, 23, 24, 27, 33, 35, 36, 38, 45, and 46. Enos fails to establish that the matters discussed in these paragraphs are based upon the declarant's own personal observation and therefore, all of the statements within the paragraphs are inadmissable. FRE 602; *United States v. Shumway*, 199 F.3d at 1104; *Taylor v. List*, 880 F.2d at1045. Accordingly, those paragraphs should be disregarded and stricken.

Paragraphs 24, 27, 44, and 45. Paragraphs 24 and 27 reference and rely upon documents marked as Exhibit 1 and 2 to Enos, respectively. Paragraphs 44 and 45 reference and rely upon Exhibits 2 and 3 to Covert, respectively. However, with regard to all of those documents marked as exhibits, they have been neither certified nor authenticated and constitute inadmissable hearsay pursuant to FRE 801 and 802. Again, no document is authenticated simply because it is attached to an affidavit or declaration. *Beyenne v. Coleman Security Services, Inc*., 854 F.2d at 1182. Those out-of-court hearsay documents are offered in Enos as proof of the matters asserted in paragraphs 24, 27, 44, and 45, respectively. Therefore, Defendants object to Paragraphs 24, 27, 44 and 45 on the grounds that they are all based upon exhibits that do not constitute admissible evidence and those paragraphs should be stricken.

E. All Declarations or Portions of Declarations Filed in Support of Plaintiff's Motion Which Offer Evidence Pertaining to Termination of the Nevada City Rancheria Should be Disregarded and Stricken.

Without exception, a review of the Plaintiff's Motion demonstrates that the great bulk of the matters contained and proffered in the declarations, exhibits, and arguments submitted in support of the Plaintiffs' Motion pertains to the *termination* of the Nevada City Rancheria and not to proceeding in the *Tillie Hardwick* case. Defendants move to strike all those materials and arguments which concern issues relating to the subject of termination, for the reasons explained below.

The Complaint challenges the validity of the termination of the Nevada City Rancheria pursuant to the Administrative Procedure Act (APA) and under the APA, review of the termination decision is limited to the Administrative Record (AR). The AR for the termination decision is near

completion and it should be ready for filing shortly. *See*, Transcript of Proceedings, July 29, 2011 ("TR"), at p. 4, ll.23-25. Copies of excerpts of the transcript are attached to Declaration of Charles O'Connor, filed herewith. Notwithstanding the lack of an AR at this time, the Court authorized briefing and hearing of a motion by Plaintiff to reopen and proceed in the *Tillie Hardwick* case. *Id*. at pp. 5-6. Plaintiffs' motion ensued.

Disregarding the limitations the Court placed on the scope of the authorized motion, most of the evidence and argument offered by Plaintiff is directed toward its challenge to the validity of the termination decision and not its quest to re-open and participate in the *Tillie Hardwick* case. *See,* the declarations, exhibits, and arguments submitted in support of Plaintiff's Motion. This could well be a back-door attempt to litigate the termination issue by offering otherwise inadmissable, extra-record evidence, but regardless, it has improperly forced the Court and Defendants to confront alleged evidence and issues pertaining to termination at this time, without benefit of a filed AR. Based upon the limitations the Court intended and placed upon the scope of the motion it authorized, Defendants ask the Court to hold Plaintiff to the authorized limits of its order and to strike all declarations, exhibits, and arguments filed by Plaintiff which pertain to the termination decision.

In addition to the limitations the Court imposed on the motion that Plaintiff was authorized to file, the law regarding proceedings under the APA restricts the consideration of the Court to the AR pertaining to the termination decision. As an APA case, this matter must proceed according to the requirements of the APA. Whenever a court reviews a final agency action pursuant to the deferential standard of review dictated by the judicial review chapter of the APA, 5 U.S.C. §§ 701-706, the APA requires the court to look no further for evidence than the administrative record compiled by the agency and upon which the agency based its decision. Accordingly, the only relevant and admissible evidence in a case seeking judicial review of agency action is the administrative record.

> "[T]he focal point for judicial review [of an informal agency decision] should be the administrative record already in existence, not some new record made initially in the reviewing court." The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court.

Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743-44, 105 S.Ct. 1598 1985) (quoting

Camp v. Pitts, 411 U.S.138, 142, 93 5.Ct. 1241, 36) (1973).

The Ninth Circuit has repeatedly articulated and enforced this rule. *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991), *cert. denied*, 503 U.S. 959 (1992) (affirming district court's limitation of scope of its review to administrative record); *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1436 (9th Cir.1988), modified, 867 F.2d 1244 (9th Cir.1989) (affirming district court's limitation of review to administrative record and prohibition of discovery); *Friends of the Earth v. Hintz*, 800 F.2d 822, 827-29 (9th Cir. 1986) (affirming district court's order limiting review to administrative record). Given the thrust of Plaintiff's proffered evidence and argument, it appears to be seeking to force the Court and Defendants into that kind of prohibited "full-fledged and independent evidentiary hearing" of the termination decision. However, whenever reviewing such administrative decisions, the review must be based on the administrative record before the agency, the district court operates more like an appellate court than a trial court, and supplementation of that record should not be allowed.

Based upon the foregoing principles which are applicable to the BIA's termination decision regarding the Nevada City Rancheria, the extensive declarations, exhibits, and arguments presented by Plaintiff, which pertain to the termination decision, are clearly improper and out-of-order, and the Court should issue an order striking all matters filed which concern the termination decision.

Respectfully submitted,

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/s/

Dated: August 19, 2011

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