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14 UNITED STATES DISTRICT COURT FOR THE
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 SAN FRANCISCO DIVISION

17 _____)
 18 UNITED STATES OF AMERICA and)
 19 NORTH COAST UNIFIED AIR)
 20 QUALITY MANAGEMENT DISTRICT)

21 Plaintiffs,)

22 v.)

23 BLUE LAKE POWER, LLC,)

24 Defendant.)

No. 3:16-cv-00961-JD

25 **UNITED STATES' NOTICE OF**
 26 **MOTION AND MOTION TO ENTER**
 27 **PROPOSED CONSENT DECREE;**
 28 **MEMORANDUM OF POINTS AND**
AUTHORITIES IN SUPPORT

Judge: Hon. James Donato

Courtroom: 11

Hearing Date (Preliminary):

December 15, 2016

Hearing Time (Preliminary): 10:00am

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

NOTICE OF MOTION AND MOTION.....1

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT.....1

 I. INTRODUCTION.....1

 II. PUBLIC COMMENTS AND REVISION OF THE CONSENT DECREE.....2

 III. BACKGROUND.....3

 A. Requirements of the Clean Air Act.....3

 B. The Complaint.....4

 C. Summary of Consent Decree Requirements.....5

 1. Injunctive Relief Provisions.....5

 2. Penalty and Mitigation Project.....8

 3. Resolution of Claims.....8

 IV. LEGAL STANDARD FOR ENTRY OF A CONSENT DECREE.....8

 V. ARGUMENT: THE PROPOSED CONSENT DECREE IS FAIR,
 CLEAN AIR ACT.....9

 A. The Settlement is Fair.....9

 1. Procedural Fairness.....9

 2. Substantive Fairness.....12

 B. The Settlement is Reasonable and Adequate.....13

 1. Injunctive Relief.....13

 2. Civil Penalty.....15

 C. The Settlement is Consistent with the Objectives of the Clean Air Act
 and in the Public Interest.....16

 D. The Public Comments to the Proposed Consent Decree Do Not Provide
 a Basis for Rejecting the Settlement.....17

CONCLUSION.....21

TABLE OF AUTHORITIES

CASES

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

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23

24

25

26

27

28

Aro Corp. v. Allied Witan Co., 531 F.2d 1368 (6th Cir. 1976).....16

Citizens for a Better Env’t v. Gorsuch, 718 F.2d 1117 (D.C. Cir. 1983).....9

Officers for Justice v. Civil Serv. Comm’n, 688 F.2d 615 (9th Cir. 1982).....9

SEC v. Randolph, 736 F.2d 525 (9th Cir. 1984).....14

Speed Shore Corp. v. Denda, 605 F.2d 469 (9th Cir. 1979).....9

Turtle Island Restoration Network v. U.S. Dep’t of Commerce, 672 F.3d 1160 (9th Cir. 2012)..16

United States v. Akzo Coatings of Am., Inc., 949 F.2d 1409 (6th Cir. 1991).....13

United States v. Cannons Eng’g Corp., 899 F.2d 79 (1st Cir. 1990).....9

United States v. Chevron U.S.A. Inc., 380 F. Supp. 2d 1104 (N.D. Cal. 2005).....9, 10

United States v. Cinergy Corp., 623 F.3d 455 (7th Cir. 2010).....13

United States v. Colorado, 937 F.2d 505 (10th Cir. 1991).....10

United States v. EME Homer City Generation, L.P., 727 F.3d 274 (3rd Cir. 2013).....13

United States v. Jicarilla Apache Nation, 564 U.S. 162 (2011).....11

United States v. McInnes, 556 F.2d 436 (9th Cir. 1977).....9, 16

United States v. Montrose Chem. Corp., 50 F.3d 741 (9th Cir. 1995).....1, 9

United States v. Navajo Nation, 537 U.S. 488 (2003).....11

United States v. Oregon, 913 F.2d 576 (9th Cir. 1990).....8, 12

United States v. Rohm & Haas Co., 721 F. Supp. 666 (D.N.J. 1989).....13

United States v. Pacific Gas & Elec., 776 F. Supp.2d 1007 (N.D. Cal. 2011).....12

United States v. Wallace, 893 F. Supp. 627 (N.D. Tex. 1995).....10

United States v. Wis. Elec. Power Co., 522 F. Supp. 2d 1107 (E.D. Wis. 2007).....13, 16

1
2
3
4
5
6
7
8
9
10
11
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14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

STATUTES

18 U.S.C. § 401(3).....19

Clean Air Act, 42 U.S.C. §§ 7401 to 7671q (“CAA”)

CAA Section 101(b)(1), 42 U.S.C. § 7401(b)(1).....3, 16

CAA Section 110, 42 U.S.C. § 7410.....4

CAA Section 113, 42 U.S.C. § 7413.....4

CAA Section 113(e), 42 U.S.C. § 7413(e).....15, 16

CAA Section 160, 42 U.S.C. § 7470.....3

CAA Section 165, 42 U.S.C. § 7475(1).....4

CAA Section 167, 42 U.S.C. § 7477.....4

CAA Section 169(1), 42 U.S.C. § 7479(1).....3

REGULATIONS

28 C.F.R. § 50.7.....2, 3

40 C.F.R. § 52.23.....4

RULES

Fed. R. Civ. P. 70.....19

MISCELLANEOUS AUTHORITY

50 Fed. Reg. 19,529 (May 9, 1985).....4

50 Fed. Reg. 30,941 (July 31, 1985).....4

81 Fed. Reg. 11,591 (March 4, 2016).....2

Department of Justice Policy on Tribal Consultation,
DOJ Policy Statement 0300.01 (Aug. 29, 2013),
www.justice.gov/sites/default/files/otj/docs/doj-memorandum-tribal-consultation.pdf11

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INDEX OF EXHIBITS

1. Revised CD (copy of ECF 41-1)
2. Redline comparing Revised Consent Decree to original proposed Consent Decree.
3. Collection of 27 public comment letters
4. United States' Response to Public Comments
5. Declaration of Mark Sims
6. Declaration of Shaun Burke
7. Declaration of Laura Ebbert
8. Declaration of Brian Wilson
9. Declaration of Nancy Diamond

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on December 15, 2016, at 10:00am, or at such other date as may be agreed upon, in Courtroom 11 of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, San Francisco, California, Plaintiff the United States of America (“United States”) will and hereby do move this Court to enter, as a final judgment in this matter, the Consent Decree attached to this Motion as Exhibit 1 by signing it on page 41 and filing it.¹

As set forth in the accompanying Memorandum in Support of this Motion, the Court should sign and enter the proposed Consent Decree, because it is fair, reasonable, consistent with the goals of the Clean Air Act (“CAA”), and in the public interest.

Defendant Blue Lake Power, LLC (“Defendant”) and co-Plaintiff the North Coast Unified Air Quality Management District (“District”) have consented to entry of the decree without further notice. (Exh. 1 at ¶ 103). However, under this Court’s September 8, 2016 Minute Order (ECF No. 43), this Motion will be opposed by Proposed Plaintiff-Intervenor Blue Lake Rancheria (the “Tribe”).

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

I. INTRODUCTION

A court should approve a consent decree if it is fair, reasonable, and consistent with the public interest and objectives of the statute at issue. *United States v. Montrose Chem. Corp.*, 50 F.3d 741, 743 (9th Cir. 1995). The revised Consent Decree requires Defendant to undertake the following actions related to its biomass (wood-fired) power plant, in Blue Lake, California:

¹ The Consent Decree attached as Exhibit 1 is identical to the one lodged as ECF No. 41-1, with one edit to allow the Court’s signature to be on one page.

- 1 • keep the facility shut down until its broken electrostatic precipitator is fixed;
- 2 • install and operate new, repaired, or improved, pollution control equipment to reduce
- 3 emissions of oxides of nitrogen, carbon monoxide, and particulate air pollutants from the
- 4 wood-fired boiler;
- 5 • develop and comply with operating procedures to minimize carbon monoxide and dust
- 6 from wood piles and roads;
- 7 • obey new emission limits;
- 8 • pay \$10,000 into a Wood Stove Incentive program (to reduce particulate matter
- 9 emissions from other properties); and pay a nominal civil penalty.

10 The Court's approval of the Consent Decree will also resolve Plaintiffs' claims in this case; the

11 alternative to the consent decree is likely several years of litigation, with uncertain results.

12 Indeed, under the Defendant's likely litigation posture, the court might not impose any relief.

13 And, during that period of litigation, Defendant might continue to operate its facility with old

14 equipment, under the less stringent emission limits of its extant permit. The Consent Decree is

15 thus an appropriate path forward and should be approved.

16 **II. Public Comments and Revision of the Consent Decree**

17 On February 26, 2016, Plaintiffs filed a complaint alleging violations of the CAA at

18 Defendant's facility (ECF No. 1), and simultaneously lodged a proposed Consent Decree. (ECF

19 No. 2). Under 28 C.F.R. § 50.7, the proposed Consent Decree was subject to a 30-day period for

20 the Department of Justice to receive public comment on the proposed settlement. Notice of the

21 proposed Decree was published in the Federal Register in March, 81 Fed. Reg. 11,591 (March 4,

22 2016), and the comment period closed in April. The United States received 26 public comments

23 (*i.e.*, 26 unique letters or emails, excluding one duplicate submission) on the Consent Decree,

24 which are attached as Exhibit 3 to this Motion (with personal contact information redacted). The

25 majority of these letters are variations on a standard form letter. The United States has responded

26 to the concerns raised by the public comments at length in a "Response to Comments," attached

27 as Exhibit 4. This memorandum explains the bases for the United States' position that this Court

28

1 should approve the revised Consent Decree and responds to the issues raised by the
2 commenters.²

3 In response to the comments on the original Consent Decree and new information
4 received post-lodging, the three Parties agreed to revise the Consent Decree.³ That revised
5 Decree is attached as Exhibit 1, and the revisions are shown in red-line as Exhibit 2. This Motion
6 and Memorandum relate to the revised Decree.
7

8 **III. BACKGROUND**

9 **A. Requirements of the Clean Air Act**

10 The CAA establishes a statutory scheme designed “to protect and enhance the quality of
11 the Nation’s air so as to promote the public health and welfare and the productive capacity of its
12 population.” 42 U.S.C. § 7401(b)(1). The Act’s “Prevention of Significant Deterioration of Air
13 Quality” (“PSD”) provisions, 42 U.S.C. §§ 7470-7492, are designed to protect public health and
14 welfare, to assure that economic growth will occur in a manner consistent with the preservation
15 of existing clean air resources, and to assure that any decision to permit increased air pollution is
16 made only after careful evaluation of all the consequences of such a decision and after adequate
17 opportunities for public participation in the decision making process. See 42 U.S.C. § 7470.
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19

20 The PSD provisions prohibit owners and operators of large air pollutant emission sources
21 from making certain modifications to those sources, without also obtaining a permit and
22 installing and employing pollution controls. Specifically, a “major emitting facility,” 42 U.S.C. §
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24

25 ² Exhibit 4 combines the individual letters into thematic statements of concern: where several
26 comment letters discuss the penalty amount, those are responded to as one “comment.” A chart
27 at the end of the Response to Comments indicates which comments are implicated by which
28 “comment” in the Response to Comments document.

³ A second public comment period is not required, because the revisions were made to respond to
comments and only strengthen the obligations and substance of the originally-lodged Consent
Decree. 28 C.F.R. § 50.7.

1 7479(1), must not be “constructed” or modified⁴ without first meeting several requirements,
2 including: (1) obtaining a permit setting forth “emission limitations”; and (2) being subject to the
3 “best available control technology” (“BACT”). 42 U.S.C. § 7475(a)(1), (4). BACT reduces
4 emission of pollutants from such sources, including pollutants such as nitrogen oxides (“NOx”),
5 carbon monoxide (“CO”) and particulate matter of less than 10 microns in diameter (“PM₁₀”). A
6 BACT determination is made on a case-by-case basis for each source by the permitting authority
7 (here, the District). (Exh. 5, Declaration of Mark Sims (“Sims Decl.”) at ¶ 11).
8

9
10 Under the CAA, each State must adopt and submit to EPA for approval a State
11 Implementation Plan that includes, among other things, regulations that contain a PSD program.
12 42 U.S.C. §§ 7410, 7471. Upon EPA approval, State Implementation Plan requirements are
13 federally enforceable under 42 U.S.C. § 7413, and 40 C.F.R. § 52.23. EPA approved the
14 District’s PSD Rules as part of the California State Implementation Plan in 1985. *See* 50 Fed.
15 Reg. 30,941 (July 31, 1985) and 50 Fed. Reg. 19,529 (May 9, 1985). The District Rules
16 incorporate the PSD requirements set forth above. *See* Complaint (ECF No. 1) ¶¶ 34-48.
17

18 B. The Complaint

19
20 Plaintiffs’ Complaint was filed pursuant to §§ 113(b) and 167 of the CAA, 42 U.S.C. §§
21 7413(b) and 7477, and seeks injunctive relief and civil penalties for violations of the PSD
22 provisions of the Act and the regulations promulgated thereunder, and the federally-approved
23 District regulations incorporated into the California State Implementation Plan. Defendant’s
24 facility consists of a biomass-fired electricity generating unit, which began operations in 1987.
25 (ECF No. 1, at ¶ 64). The Complaint alleges that the facility shut down between 1999 and 2010
26 and that, prior to restarting it in 2010, Defendant carried out major modifications of the facility.
27
28

⁴ The term “construction” includes “modification,” 42 U.S.C. § 7479(2)(C), which is further defined in EPA’ CAA regulations. 40 C.F.R. § 52.21(b)(2)(i).

1 (ECF No. 1, at ¶¶ 77-88). The Complaint further alleges that these modifications resulted in
2 significant net emissions increases, thus triggering PSD requirements, including the obligations
3 to obtain permits and install and operate BACT for CO, NO_x and PM₁₀. (ECF No. 1, at ¶¶ 87-
4 90). Defendant denies the violations alleged in the Complaint. (Exh. 1 at 1). Nonetheless, the
5 Parties entered into extensive negotiations with hopes to resolve Defendant's potential liability at
6 the Facility. The proposed revised Consent Decree is that settlement.
7

8 C. Summary of Revised Consent Decree Requirements

9
10 Through installation and operation of pollution control devices and imposition of
11 stringent pollution limits, the Consent Decree will secure reductions in NO_x, CO, and PM₁₀, and
12 yield substantial benefits to the environment and the public. EPA estimates these reductions will
13 be between 226 to 301 tons per year of CO, 13 to 25 tons per year of NO_x, and 5 to 10 tons per
14 year of PM₁₀. (Sims Dec., at ¶ 29). The Consent Decree also secures a civil penalty, and requires
15 Defendant to contribute to the District's Wood Stove Replacement program in order to mitigate
16 harm to public health and the environment caused by its emissions. (Exh. 1 at ¶¶ 8, 41).
17

18 1. *Injunctive Relief Provisions*

19
20 To control NO_x and CO emissions from the Facility, the Decree requires Defendant to
21 install and continuously operate a Selective Non-Catalytic Reduction ("SNCR") system and an
22 improved forced overfire air ("OFA") system for its boiler. (Exh. 1, at ¶ 15). This technology has
23 been determined to be BACT for boilers for at least one new biomass facility. (Sims Dec. at
24 ¶ 40). Retrofitting new pollution control equipment to an existing boiler can require additional
25 engineering analysis to determine the optimal configuration of the new equipment with the boiler
26 and the necessary design requirements for the pollution control equipment. (Sims Dec. at ¶ 47).
27 Defendant must conduct such a study and submit a report to EPA for approval that includes those
28

1 recommendations. (Exh. 1 at ¶ 13). Once approved by EPA, in consultation with the District, the
2 Defendant is required to take all actions recommended by the report. *Id.* at ¶¶ 13 and 35.

3 To control PM₁₀ emissions from the Facility's stack, the Decree requires Defendant to
4 ensure that it is efficiently operating its ESP, which is widely-used pollution control technology
5 for PM₁₀ from a boiler. (Sims Dec. at ¶ 40). First, prior to restarting operations at the Facility,
6 Defendant must take certain steps: fix the broken plates;⁵ hire a consultant to inspect its ESP and
7 boiler, recommend optimized parameters for the ESP; and train Defendant's employees on
8 proper ESP operation. (Exh. 1 at ¶ 16). Defendant must submit the recommended parameters to
9 EPA and the District and immediately operate its ESP in compliance with those parameters. *Id.*
10 Second, within 60 days of restarting its boiler, Defendant must submit to EPA and the District
11 for approval a comprehensive ESP optimization plan that meets Compliance Assurance
12 Monitoring plan requirements, including real-time monitoring of its ESP operating parameters.
13 (*Id.* at ¶ 16.d; Sims Dec. ¶ 44). Proper operation of the ESP should reduce emissions of PM₁₀,
14 as well as emissions of pollutants that are not a subject of this enforcement action, such as
15 particulate matter with a diameter of 2.5 microns or less (PM_{2.5}). (Sims Dec. ¶ 35). As of
16 September 22, 2016, Defendant has submitted a draft ESP Optimization Plan to EPA and the
17 District. (Sims Dec. ¶ 45).

18 Once installed, Defendant must operate the SNCR, the improved OFA, and the ESP at all
19 times and meet specified emission rates for NO_x, CO, and PM₁₀. (Exh. 1 at ¶¶ 15, 16, 18, 19).
20 After the SNCR and OFA are installed and have been continuously operated for a year (the
21 "demonstration period"), if Defendant cannot meet the emission limits set forth in Paragraphs
22 18-19 of the Decree, it may petition EPA and the District for less stringent limits not to exceed
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⁵ This provision was added by the revisions to the original Consent Decree. Exh. 2 (redline).

1 specified limits. (Exh. 1 at ¶ 21). EPA and the District will only grant such a petition if
2 Defendant can demonstrate that, even when properly maintaining and operating its equipment
3 and pollution controls, it is technically infeasible for the Facility to meet the initial limits. *Id.* at
4 ¶¶ 21-22. EPA may deny the petition, grant the petition, or approve a final achievable limit
5 different from that proposed based on its analysis of emissions data. *Id.* During the
6 demonstration period, Defendant will not be subject to stipulated penalties for exceeding the
7 emission limitations in the Decree unless it fails to continuously operate any of the pollution
8 control equipment or fails to maintain and operate its equipment in a manner that optimizes
9 combustion and minimizes emissions. *Id.* at ¶ 20.

12 To control fugitive dust and ash from leaving the Facility's property, Defendant has
13 submitted to EPA and the District for approval the following plans: 1) a Fuel Management Plan
14 to keep its fuel source dry (burning wet wood is a source of CO from the boiler) and to minimize
15 fugitive dust from other fuel handling activities; and 2) a Fugitive Road Dust Plan to minimize
16 fugitive dust emissions from vehicle traffic on dirt roads.⁶ (Exh. 1 at ¶¶ 25-27). Once approved,
17 Defendant must comply with these plans at all times. *Id.* at ¶ 35. Finally, Defendant must
18 implement the ash handling provisions in Paragraph 27 upon recommencing operation of the
19 boiler. *Id.* at ¶ 27. Although the emission reductions that will result from the implementation of
20 these plans cannot be quantified, both EPA and District personnel believe these steps will
21 decrease fugitive dust and ash from the Facility. (Sims Dec. ¶ 60-63; Wilson Dec. ¶ 22).

25 Finally, once the final emission limits are established under the Decree, Defendant is
26 required to apply for a federally-enforceable permit from the District that includes all the
27

28 ⁶ Paragraphs 25 and 26 of the revised Decree reflect that Defendant has already submitted to EPA and the District its Fuel Management Plan and the Fugitive Dust from Roads Plan. (Exh. 1 at ¶¶ 25-26).

1 requirements and limitations established in the Consent Decree (e.g., compliance with the Fuel
2 Management Plan, ESP Optimization Plan, emission limits, etc). (Exh. 1 at ¶ 78). The
3 requirements of that permit will be incorporated into the Facility's Title V permit and will,
4 therefore, survive the termination of the Consent Decree. *Id.*

6 *2. Penalty and Mitigation Project*

7 The Consent Decree requires Defendant to pay a \$5,000 civil penalty to the United States
8 and the District. (Exh. 1 at ¶ 8). As a means of mitigating the environmental harm caused by
9 BLP's alleged violations, the Consent Decree requires Defendant to contribute \$10,000 to the
10 District's Wood Stove Incentive Replacement Program. *Id.* at 41. This program replaces older
11 wood stoves with cleaner heating devices and, thus, reduces emissions of particulate matter.
12 (Sims Dec. ¶ 29; Wilson Dec ¶ 22). The Decree provides that the District will prioritize the use
13 of Defendant's contribution in the area immediately surrounding the Facility. (Exh. 1 at ¶ 41).

16 *3. Resolution of Claims*

17 The Consent Decree resolves the United States' and the District's civil claims that arose
18 from the modifications undertaken at the Facility between 2008 and 2010 through the date of
19 lodging of the Decree (February 26, 2016). (*Id.* at ¶ 87).

21 **IV. LEGAL STANDARD FOR ENTRY OF A CONSENT DECREE**

22 Approval of a proposed consent decree is within the informed discretion of the district
23 court. *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990). The court reviews the decree
24 to determine whether it is fair, reasonable, and consistent with the objectives of the statute at
25 issue. *Montrose Chem. Corp.*, 50 F.3d at 743 (citation omitted). A court may not modify a
26 proposed consent decree before entry; it must either approve or reject the settlement agreed upon
27 by the parties. *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 630 (9th Cir. 1982).
28

1 The court's review is informed by the "overriding public interest in settling and quieting
2 litigation." *United States v. McInnes*, 556 F.2d 436, 441 (9th Cir. 1977); *see also Speed Shore*
3 *Corp. v. Denda*, 605 F.2d 469, 473 (9th Cir. 1979) ("Settlement agreements conserve judicial
4 time and limit expensive litigation."). In reviewing a consent decree, the court "need not inquire
5 into the precise legal rights of the parties nor reach and resolve the merits of the claims or
6 controversy, but need only determine that the settlement is fair, adequate, reasonable and
7 appropriate under the particular facts and that there has been valid consent by the concerned
8 parties." *Citizens for a Better Env't v. Gorsuch*, 718 F.2d 1117, 1126 (D.C. Cir. 1983) (internal
9 citation omitted). Especially when reviewing a consent decree involving a federal agency, as is
10 the case here, a district court "must refrain from second-guessing the Executive Branch."
11 *Montrose Chem. Corp.*, 50 F.3d at 746 (quoting *United States v. Cannons Eng'g Corp.*, 899 F.2d
12 79, 84 (1st Cir. 1990)). The court's "deference is particularly strong where the decree has been
13 negotiated by the Department of Justice on behalf of an agency like EPA which is an expert in its
14 field." *United States v. Chevron U.S.A. Inc.*, 380 F. Supp. 2d 1104, 1111 (N.D. Cal. 2005).

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19 **V. ARGUMENT: THE PROPOSED CONSENT DECREE IS FAIR, REASONABLE,
20 AND CONSISTENT WITH THE OBJECTIVES OF THE CLEAN AIR ACT.**

21 A. The Settlement is Fair.

22 In assessing a proposed settlement, courts consider both procedural and substantive
23 fairness. *Cannons Eng'g Corp.*, 899 F.2d at 86-88.

24 *1. Procedural Fairness*

25 Typically, courts examine procedural fairness to determine whether the negotiation
26 process was "fair and full of adversarial vigor." *Chevron U.S.A. Inc.*, 380 F.Supp. 2d at 1111
27 (internal quotation omitted). Procedural fairness calls for consideration of the "candor, openness,
28 and bargaining balance" of the negotiations. *United States v. Wallace*, 893 F. Supp. 627, 632

1 (N.D. Tex. 1995). In this case, the parties were represented by counsel with experience
2 negotiating Clean Air Act settlements and engaged in good faith, arm's-length negotiations for a
3 period of almost two years following issuance of a March 2014 Notice of Violation by EPA
4 before reaching the proposed settlement. (Sims Dec. ¶¶ 13-15). In addition to counsel, to resolve
5 complicated technical issues, all parties relied on technical expertise: for the agencies,
6 experienced engineers, and for the Defendant, an experienced technical consultant. (Sims Dec.
7 ¶¶ 1, 3, 14, 16; Wilson Dec. ¶¶ 1, 18, 19; Burke Dec. ¶¶ 1, 6). Indeed, negotiations continued
8 after the public comment period closed. (Sims Dec. ¶ 27). The proposed settlement is not the
9 "product of collusion," but rather a reflection of the efforts all Parties to reach a just and
10 equitable resolution. *See Chevron*, 380 F. Supp. 2d at 1111; *United States v. Colorado*, 937 F.2d
11 505, 509 (10th Cir. 1991).

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15 Commenters raised two issues that appear to relate to procedural fairness; neither of these
16 issues provide a basis for concluding the Consent Decree is procedurally unfair.⁷ First, a few
17 commenters mentioned that District Counsel may have a conflict of interest and others
18 mentioned the District was biased towards the Facility. *See* Exh. 3 and 4 (Response to Issue #4).⁸
19 The District disputes these allegations. (Exh. 9, Declaration of Nancy Diamond ("Diamond
20 Dec."), ¶¶ 4-12; Wilson Dec. ¶¶ 11-18). Notwithstanding these comments, there is no suggestion
21 that the United States had a conflict of interest or bias during negotiations, and the United States
22 was central to the negotiation of all terms of this Consent Decree. (Sims Dec. ¶ 28). Negotiations
23 involving DOJ, the District, and Defendant have been constant and ongoing for at least the last
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28 ⁷ As noted above, in addition to the discussion here, the United States has also provided detailed responses to all comments in its Response to Comments, Exhibit 4. *See* Responses to Issues #2, 13.

⁸ Where individual comments are identified by the "Response to Comment" number in Exhibit 4, individual comments related to the topic may be identified by the chart at the end of that exhibit.

1 20 months and, indeed, continued after the public comment period closed. (Sims Dec. ¶ 13-27).
2 Thus, this comment does not provide a basis for concluding the Consent Decree negotiations
3 were procedurally unfair.
4

5 Second, the Tribe commented that the EPA, in negotiating the Consent Decree, failed to
6 act in accordance with trust responsibilities owed to the Tribe, and that the Tribe should have
7 been included in the negotiation of the Consent Decree. (Exh. 3; Exh. 4, Response to Issue #3).
8 Although the United States was not required to include the Tribe in settlement discussions,⁹ it
9 nonetheless conducted significant outreach to the Tribe from September 22, 2015 onwards. DOJ
10 and EPA met with the Tribe to discuss the notice of violation and the Facility in September 2015
11 and considered the Tribe's concerns and information prior to signing and lodging the proposed
12 Consent Decree in February 2016. (Sims Dec. ¶ 20; Ebbert Decl. ¶ 3-6). DOJ and EPA made an
13 effort to ensure the Tribe was able to take full advantage of the public comment process for the
14 Consent Decree, including sending the Tribe a copy of the Decree upon lodging and traveling to
15 Blue Lake, California to meet with the Tribe prior to the close of the public comment period.
16 (Ebbert Dec. ¶ 8; Sims Decl. ¶ 21). Finally, EPA and DOJ met with the Tribe after the comment
17 period was closed and before negotiations on the revised Consent Decree were concluded, and
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22 ⁹ Though we agree that the United States has an ongoing trust relationship with the Tribe, we
23 disagree that the EPA or DOJ has acted contrary to any specific trust obligation to the Tribe or its
24 members, including with respect to tribal participation in settlement negotiations with Defendant.
25 Trust duties are imposed by statute and regulation rather than the common law. *See United*
26 *States v. Jicarilla Apache Nation*, 564 U.S. 162, 173–74 (2011) (citing *United States v. Navajo*
27 *Nation*, 537 U.S. 488, 506 (2003)). We are aware of no statute or regulation requiring tribal
28 participation in settlement negotiations for Clean Air Act violations at non-tribal facilities not
located on Indian lands. Similarly, the action here is an enforcement matter that EPA referred to
the U.S. Department of Justice (DOJ). The DOJ Policy on Tribal Consultation states that DOJ
will consult on policies that have tribal implications but makes clear that “policies” does not
include matters (like the one here) that are the subject of investigation, anticipated or active
litigation, or settlement negotiations. *See* Department of Justice Policy on Tribal Consultation,
DOJ Policy Statement 0300.01 at 4 (Aug. 29, 2013);
www.justice.gov/sites/default/files/otj/docs/doj-memorandum-tribal-consultation.pdf.

1 made revisions to the Consent Decree based, in part, on the Tribe's comments. (ECF No. 21 at 8;
2 Exh. 2 (highlighting changes including expedited timelines and an earlier particulate matter stack
3 test, among other concerns raised in the Tribe's comments); Sims Dec. ¶ 23).

4
5 Therefore, the Consent Decree negotiations were procedurally fair and the comments do
6 not provide a basis to conclude otherwise.

7 2. *Substantive Fairness*

8
9 In considering substantive fairness, "the Court does not determine whether 'the
10 settlement is one which the court itself might have fashioned, or considers ideal.'" *United States*
11 *v. Pacific Gas & Elec.*, 776 F. Supp.2d 1007, 1025 (N.D. Cal. 2011) (citation omitted). Rather,
12 "[t]he court need only be satisfied that the decree represents a reasonable factual and legal
13 determination." *State of Oregon*, 913 F.2d at 581 (internal quotation omitted). Here, while the
14 United States has extensive authority to seek permanent injunctive relief to rectify and mitigate
15 Clean Air Act violations, obtaining injunctive relief in litigation would depend upon both a
16 finding of liability and a judicial assessment of the necessary relief. While successful in pursuing
17 litigation in enforcement actions involving similar claims, the United States has received adverse
18 rulings in some cases. *See United States v. Cinergy Corp.*, 623 F.3d 455 (7th Cir. 2010); *United*
19 *States v. EME Homer City Generation, L.P.*, 727 F.3d 274, 291 (3rd Cir. 2013); *see also United*
20 *States v. Wis. Elec. Power Co.*, 522 F. Supp. 2d 1107, 1118 (E.D. Wis. 2007) (discussing
21 defenses and risks associated with this type of litigation in context of approving a CAA consent
22 decree). The proposed Consent Decree reflects the parties' careful and informed assessment of
23 the relative merits of each other's claims, while taking into consideration the costs and risks
24 associated with litigation.

25 B. The Settlement is Reasonable and Appropriate.

1 #9-16). Moreover, the revised Consent Decree addresses some commenters' concerns related to
2 the timelines under the Consent Decree by expediting requirements that could be implemented
3 prior to restart and adding requirements to ensure that the Facility's particulate matter control
4 equipment is operating properly at restart. (Exh. 2, ¶¶ 12, 13, 16, 25, 26, 33.a).

5
6 The comments related to the injunctive relief do not, however, persuade the United States
7 that the injunctive relief required under the Consent Decree is unreasonable or inadequate. If the
8 United States were to litigate these claims, it would likely ask the Court to order the Facility to
9 determine BACT, including emission limits. While EPA has not done a full BACT analysis for
10 the Facility, it believes that the emission rates and control technology required by the Decree are
11 comparable to those for similarly-situated facilities that have gone through a full BACT analysis.
12 (Sims Dec. ¶ 32, Exh. 1). When determining the appropriate injunctive relief, the United States
13 must weigh the possibility that it could get more protective emission controls after litigation
14 against the risks that it will not prevail at all on its claims or that the Court could order less
15 protective controls. In the litigation scenario in any case, any emission reductions from the
16 Facility would be delayed by lengthy litigation. The Consent Decree unquestionably secures
17 prompt and appropriate environmental benefits by requiring the Defendant to take immediate
18 steps to reduce emissions of the pollutants at issue in the United States' claims (CO, NO_x, and
19 PM₁₀).

20 21 22 23 24 *2. Civil Penalty*

25 The civil penalty assessed under the Consent Decree is also reasonable. To arrive at the
26 penalty amount of \$5,000, the Department of Justice and EPA applied the Clean Air Act's
27 statutory penalty factors contained in 42 U.S.C. § 7413(e)(1), which includes "the economic
28 impact of the penalty on the business." Defendant submitted financial documentation, including

1 tax returns and balance sheets, to the United States in support of a claim that it was financially
2 unable to pay a penalty. (Sims Dec. ¶ 17). A qualified financial analyst reviewed those
3 documents and opined to DOJ and EPA that Defendant had no ability to pay more than a
4 nominal civil penalty. *Id.* The United States weighed the statutory penalty factors against the
5 evidence and risks of litigation, including the potential delay in securing injunctive relief to
6 reduce emissions from the Facility. The United States also considered the cost of installing the
7 required injunctive relief, which was originally estimated to be \$700,000. *Id.* ¶ 18 (noting that
8 the cost of injunctive relief under the revised Consent Decree is now \$800,000). Weighing these
9 factors, the civil penalty required by the Decree is reasonable and consistent with the statutory
10 factors set forth in Section 113(e) of the CAA, 42 U.S.C. § 7413(e).

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14 Although almost every commenter objected that the civil penalty was too low and the
15 Tribe specifically argued the penalty was inadequate for deterrence and failed to take into
16 account willfulness or negligence, these comments do not provide a basis for concluding the
17 Consent Decree is unreasonable or inadequate. The Consent Decree favors expenditures on
18 pollution control over a higher penalty amount, in a circumstance in which the defendant has
19 limited financial resources. In litigating to judgment, the United States might or might not secure
20 a larger civil penalty judgment against BLP; but even if a larger sum were secured, payment may
21 not have been received for years, if ever, while the case was litigated, during which time the
22 Facility would not be required to install pollution controls.

23
24
25 C. The Settlement is Consistent with the Objectives of the Clean Air Act and in the
26 Public Interest.

27 A primary purpose of the Clean Air Act is “to protect and enhance the quality of the
28 Nation’s air resources so as to promote the public health and welfare and the productive capacity
of its population.” 42 U.S.C. § 7401(b)(1). This settlement serves the Act’s goals of reducing air

1 pollution, including NO_x, CO, and PM₁₀, and does so without the need for costly and time-
2 consuming litigation. *See Wis. Elec.*, 522 F. Supp. 2d at 1121. Additionally, the Consent Decree
3 furthers the public interest by encouraging voluntary settlement and providing a “speedy and
4 reasonable remedy for the dispute.” *Aro Corp. v. Allied Witan Co.*, 531 F.2d 1368, 1372 (6th Cir.
5 1976); *see also Turtle Island Restoration Network v. U.S. Dep’t of Commerce*, 672 F.3d 1160,
6 1167 (9th Cir. 2012) (“Settlement is to be encouraged.”) (citing *McInnes*, 556 F.2d at 441). The
7 Consent Decree furthers the public interest by achieving emission reductions without the burdens
8 and uncertainties of trial.
9

11 **D. The Public Comments to the Proposed Consent Decree Do Not Provide a Basis**
12 **for Rejecting the Settlement.**

13 The United States has carefully considered the comments received in response to the
14 Consent Decree, and determined that they do not provide a basis for withdrawing the consent
15 decree or modifying it beyond those amendments described above. The United States does not
16 believe the comments justify any delay in the Court’s approval of this settlement. A brief
17 response to some of the comments not already addressed above is included below, while a more
18 comprehensive response is attached in Exhibit 4. As noted above, all technical comments are
19 addressed in detail in Exhibit 4.
20

21 **Comment:** A number of commenters, including the Tribe, requested that the Facility be
22 shut down permanently, or that the Facility be shut down temporarily pending either issuance of
23 a new permit or implementation of the injunctive relief. (Exh. 3).
24

25 **Response:**¹⁰ In response to the information that the Facility’s ESP was damaged and the
26 comments, the Parties revised the Consent Decree to require the Defendant to delay restart until
27

28 _____
¹⁰ For a more detailed response, see Exhibit 4, Response to Issue #9.

1 the ESP was repaired and for BLP to take steps prior to restart to optimize the operation of the
2 ESP. (Exh. 1 at ¶ 16.a). These amendments directly address, in a reasonable fashion, the
3 comments concerning the timing of facility re-start. But, the revised Consent Decree still does
4 not entirely prohibit operation of the Facility. First, as a matter of engineering, the Facility must
5 be operating to examine and test the equipment and design the appropriate retrofitting
6 equipment. (Sims Dec. ¶ 47). Second, this comment essentially presumes that the Defendant has
7 already been found liable for violating the Clean Air Act. Although EPA's March 2014 Notice of
8 Violation and the Complaint in this action allege that BLP's restart, and subsequent operation
9 without a permit that incorporated PSD requirements, violated the Clean Air Act, these
10 allegations have not been proven in an administrative or judicial forum. The Decree is a
11 settlement and all settlements necessarily involve some compromise. In a settlement of Clean Air
12 Act violations, it is reasonable to include a compliance schedule whereby the settlement
13 defendant is given some time to design and install pollution control equipment. (Sims Dec. ¶ 5;
14 Burke Dec. ¶ 7). Thus, this comment does not provide a basis to conclude that the settlement
15 should not be entered.

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20 **Comment:** A few commenters, including the Tribe, stated that the Consent Decree
21 should require BLP to obtain a new permit that complies with the PSD permitting process. (Exh.
22 3).

23
24 **Response:**¹¹ Again, this comment presumes that the Defendant has already been found
25 liable, and ignores that the Decree is, at bottom, and product of a negotiated compromise. There
26 has been no finding that the Facility triggered the PSD permitting process. Instead, the parties
27 have settled their claims and, as part of that settlement, the United States has obtained an
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¹¹ For a more detailed response, see Exhibit 4, Response to Issue #16.

1 agreement on specific emission limits and the installation of specified pollution control
2 equipment immediately, in lieu of proceeding to trial and its inherent uncertainties. The Decree
3 efficiently secures real emission reductions through control technology and emission limits that
4 are not subject to the uncertainties of the litigation and permitting processes. (Sims Dec. ¶ 29).
5 Thus, this comment does not provide a basis for concluding that the Consent Decree is not fair,
6 reasonable, consistent with the Clean Air Act, or in the public interest.
7

8 **Comment:** A number of commenters raised concerns about BLP's financial ability and
9 intent to comply with the proposed Consent Decree. Commenters pointed to BLP's outstanding
10 debts to the City of Blue Lake for rent, to the District for permit fees, and to BLP's history of
11 non-compliance. Both the Tribe and the Bureau of Indian Affairs suggested that the Consent
12 Decree should require BLP to provide a bond to cover the costs of compliance and penalties.
13 (Exh. 3).
14

15 **Response:**¹² The United States shares the commenters' concerns regarding BLP's
16 financial resources. BLP is a relatively small operation, the control equipment and engineering
17 will be expensive, and BLP has not been operating (or generating income) for over a year. The
18 United States acknowledges BLP's outstanding debt, although it notes that BLP paid its
19 outstanding permit fees through June 30, 2016 in May. (Wilson Dec. ¶ 10). However, even
20 assuming that BLP is in financial difficulty, it is reasonable to proceed with the Consent Decree,
21 even without a financial bond.
22
23

24 First, BLP's recent actions have evinced an intent and ability to perform the Consent
25 Decree requirements. BLP has submitted three required plans to EPA and the District that
26 demonstrate an understanding of the requirements of the Consent Decree and an ability to
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¹² For a more detailed response, please see Exhibit 4, Response to Issues #20-23.

1 comply with those technical requirements. (Sims Dec. ¶ 36; Wilson Decl. ¶ 20, 22). BLP has
2 also informed EPA that it has purchased equipment to repair the ESP. (Sims Dec. ¶ 41).

3
4 Second, the provisions of the Consent Decree, and the consequences of non-compliance,
5 provide sufficient enforcement mechanisms to ensure compliance. If Defendant fails to comply
6 with any of its terms, including deadlines, it will be subject to stipulated penalties under the
7 Consent Decree. *See* (Exh. 1, Section IX). Defendant will not be excused from any obligations
8 based on its financial inability to comply with the Decree. *Id.* ¶ 62. In the event stipulated
9 penalties are insufficient to enforce compliance, the United States may return to court to seek
10 sanctions for contempt of a court order. *See* Fed. R. of Civ. P. 70. Third, it is in the public
11 interest to have an entered Consent Decree, with specific and certain requirements, that provides
12 for enforcement by this Court, rather than to litigate against a financially unstable entity that can
13 continue to operate without the Consent Decree restrictions in the meantime.

14
15
16 **Comment:** Commenters, including those submitting a form letter, raised issues regarding
17 smoke from the stack, fugitive ash on their properties, and public health impacts of the
18 particulate matter deposition from the Facility. The Tribe commented that the Consent Decree
19 should require Defendant to pay for joint particulate matter monitoring stations. (Exh. 3)

20
21 **Response:**¹³ The United States recognizes and is aware of the community's concerns
22 regarding fugitive ash and dust and particulate matter from the Facility. The emission reductions
23 obtained through the Consent Decree, including through BLP's contribution to the Wood Stove
24 Replacement Program, will provide environmental benefits to the community surrounding the
25 Facility. Although PM_{2.5} is not a pollutant at issue in this action, the same control equipment
26 (ESP) that reduces PM₁₀ emissions also is used to control PM_{2.5} emissions. (Sims Dec. ¶ 40). In
27
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¹³ For a more detailed response, please see Exhibit 4, Response to Issues #17-18.

1 addition, the reductions of CO and NO_x will provide pollution reduction benefits to the
2 surrounding community. As to the joint monitoring stations, this Consent Decree is the product
3 of a negotiated resolution and prioritizes spending on pollution control equipment.
4

5 **Comment:** Commenters noted that the Consent Decree should address a number of
6 additional issues, including greenhouse gas emissions, lead, odors, noise, traffic, impacts to
7 waterways, sulfur dioxide (SO_x), VOC, arsenic, and opacity. (Exh. 3)

8 **Response:**¹⁴ This action only resolves PSD claims for CO, NO_x, and PM₁₀. Defendant is
9 not receiving a covenant not to sue for any other claims under this settlement. (Exh. 1, ¶ 87).
10

11 CONCLUSION

12 The terms of the Consent Decree are fair, reasonable, and consistent with applicable law
13 and the public interest. Further, the Defendant has consented to entry of the settlement without
14 condition. The United States, therefore, respectfully requests that this Court approve and enter
15 the proposed Consent Decree by signing page 41 of the proposed Consent Decree submitted with
16 this Motion as Exhibit 1.
17

18 Respectfully submitted this 22nd day of September, 2016
19

20 /s/ Sheila McAnaney
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¹⁴ For a detailed response, please see Exhibit 4, Responses to Issues # 25-28.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September 2016, I caused the foregoing MOTION TO ENTER CONSENT DECREE to be electronically filed with the Clerk of the Court using this Court's CM/ECF system, which will send notice of such filing to counsel of record for all parties.

/s/ Sheila McAnaney
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