

BENJAMIN B. WAGNER
United States Attorney
LYNN TRINKA ERNCE
Assistant United States Attorney
501 I Street, Suite 10-100
Sacramento, CA 95814
Telephone: (916) 554-2720
Facsimile: (916) 554-2900

Attorneys for Defendant

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

**REPLY BRIEF IN SUPPORT OF
MOTION TO STRIKE SIXTH
CLAIM FOR RELIEF IN THIRD
AMENDED COMPLAINT**

Hearing vacated per 02/04/2013
minute order [Docket 92]

The Court should strike the Antler's Bridge claim in its entirety because it includes new allegations and claims under the Native American Graves Protection and Repatriation Act (NAGPRA) and the Archaeological Resources Protection Act (ARPA) that exceed the scope of leave to amend granted by the Court and because plaintiffs did not seek leave to assert new claims. The Court only granted plaintiffs leave to file an amended ARPA claim based on the allegations in the Second Amended Complaint (SAC). And in its order, the Court found that NAGPRA "no longer forms a basis for any of plaintiffs' claims." *Franco v. United States Dep't of Interior*, 2012 WL 3070269, *1 n.2 (E.D. Cal. 2012). To give full effect to its order the Court should strike the new, unauthorized Antler's Bridge claims in their entirety. Nor should the Court grant plaintiffs' belated request to add the new claims nearly four years after they filed this action.

Contrary to plaintiffs' argument, the Forest Service's motion to strike is neither untimely nor procedurally improper. The Forest Service timely answered all of the claims in the TAC that survived

its motion to dismiss. For all Antler's Bridge allegations, the Forest Service stated that, "[c]oncurrently with the filing of this answer, defendant is moving to strike plaintiffs' claims related to Antler's Bridge. Therefore, no response is required." See Docket 89, ¶¶ 33-40, 68-74. Plaintiffs' argument that the motion to strike is untimely because the Forest Service filed an answer and the motion to strike on the same day ignores that the Forest Service did not respond to the Antler's Bridge claim in its answer, but instead deferred its responses because it was filing its motion to strike. The Forest Service met its obligations to answer the surviving claims and filed an appropriate motion to strike the Antler's Bridge claim. Plaintiffs' contention that the motion is untimely is meritless.

So is their contention that the motion is procedurally improper. Indeed, plaintiffs' argument that the Forest Service is using Rule 12(f) to obtain dismissal in lieu of Rule 12(b)(6) is not only incorrect, but it misses the point. The Forest Service is not seeking dismissal of the Antler's Bridge claim because the allegations in the TAC fail to state a plausible claim for relief or because the claim is precluded as a matter of law. Fed. R. Civ. P. 12(b)(6), 56(a); see *Low v. City of Sacramento*, 2011 WL 2935858 (E.D. Cal. 2011) (stating that Rule 12(f) should not be used as a substitute for Rule 12(b)(6)); *Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 974-75 (9th Cir. 2010) (holding that "Rule 12(f) does not authorize district courts to strike claims for damages on the ground such claims are precluded as a matter of law"). The Forest Service is arguing that plaintiffs' new Antler's Bridge claims are unauthorized in violation of the Court's prior order and, therefore, should be stricken.

Moreover, plaintiffs have utterly ignored the multiple cases cited by the Forest Service in which courts have granted motions to strike under Rule 12(f) where, as here, an amended complaint asserted new claims that exceeded the scope of leave to amend granted and where, as here, the plaintiffs did not seek and obtain leave of court to assert the new claims under Rule 15. See Docket 88 at 5 (citing *Crane v. M. Yarborough*, 2012 WL 1067965, *13 and n.14 (C.D. Cal. 2012); *Kennedy v. Full Tilt Poker*, 2010 WL 3984749, *1 (C.D. Cal. 2010); *PB Farradyne, Inc. v. Peterson*, 2006 WL 2578273, *3 (N.D. Cal. 2006); *Serpa v. SBC Telecommunications, Inc.*, 2004 WL 2002444, *3 (N.D. Cal. 2004); *Concerned Citizens for a Safe Community*, 2011 WL 2971000, *2 (D. Nev. 2011)). Nor have plaintiffs addressed *Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545 (9th Cir. 2009), in which the Ninth Circuit expressly affirmed as proper under Rule 12(f) a district court's striking of claims that "exceeded

the bounds” of its earlier order. *Id.* at 559-60. The Forest Service’s motion to strike the Antler’s Bridge claim, which exceeds the bounds of this Court’s order, is proper under this legal authority.

Regardless of whether the proper procedure is a Rule 12(f) motion to strike or a Rule 12(b)(6) motion to dismiss, however, the purpose of this motion is to give effect to the Court’s order. If the Court deems that the proper procedure is a Rule 12(b)(6) motion, the Forest Service asks the Court to treat the motion to strike as a motion to dismiss and to dismiss the Antler’s Bridge claim for the same reasons they have argued warrant striking of the new allegations and claims.

Plaintiffs’ assertion that “there is nothing new” about their Antler’s Bridge claims is belied by their immediately following statement that “it is true that Plaintiffs did not previously allege a stand-alone claim tethered to NAGPRA.” Docket 91 at 7. Comparisons of the allegations in the SAC and in the TAC in both the Forest Service’s motion and plaintiffs’ opposition brief demonstrate that the Antler’s Bridge allegations and claims in the TAC are indeed new.

Gone from the TAC are plaintiffs’ allegations that the Forest Service violated ARPA by failing to proactively manage the Antler’s Bridge site, by allowing CalTrans to violate its Memorandum of Understanding with plaintiffs, by not adequately preserving midden material, by removing and retaining artifacts without a record or plan, and by refusing to disclose the disposition of the artifacts. SAC, ¶¶ 160-163. Now, plaintiffs assert that the Forest Service violated NAGPRA because it allegedly did not halt work after CalTrans inadvertently discovered “sacred objects,” it did not consult with plaintiffs or return the objects, and it did not inform plaintiffs about how the midden was handled and placed, among other information. TAC, ¶ 71. They also assert a brand new ARPA claim alleging that, after the inadvertent discovery of “sacred objects,” the Forest Service excluded plaintiffs from meetings and did not consult with them about the granting of a new ARPA permit to CalTrans and about excavation under the new permit. TAC, ¶ 72. While plaintiffs argue that the new claims in the TAC relate “to the same subject matter” as their claims in the SAC, the allegations and claims in the TAC are undoubtedly new and were not previously included in the SAC.

In dismissing plaintiff’s Antler’s Bridge ARPA claim, the Court was very specific and did not grant plaintiffs unlimited leave to amend. Rather, the Court focused on the allegations that “the USFS has retained possession of artifacts from the site without plan or record as required by ARPA and refuses

1 to disclose the disposition of these items” and regarding the Memorandum of Understanding between
2 plaintiffs and CalTrans. *See Franco*, 2012 WL 3070269 at *11. For these specific allegations, the Court
3 stated, “[w]hile the allegations are not tethered to a legal basis for relief, the SAC is the first opportunity
4 plaintiffs have had to allege this claim. They should be granted leave to amend.” *Id.* The Court
5 dismissed all of plaintiffs’ ARPA claims without leave to amend, “except with respect to the *ARPA*
6 *claim* as to which leave to amend is granted.” *Id.* (emphasis added). Thus, the Court’s order only
7 granted plaintiffs leave to file an amended ARPA claim for Antler’s Bridge based on the allegations
8 contained in the SAC. The Court did not authorize plaintiffs to assert brand new NAGPRA and ARPA
9 claims based on new facts not previously alleged in the SAC.

10 Plaintiffs impliedly concede that they violated Rule 15(a)(2) by not seeking leave of court
11 to include new claims in their TAC because they ask the Court now to treat their opposition as a request
12 for leave to assert a new NAGPRA claim. The Court should deny plaintiffs’ request under the
13 authorities cited herein which hold that it is proper to strike claims that exceed the scope of leave to
14 amend and where plaintiffs failed to seek leave prior to amendment under Rule 15. Moreover, despite
15 plaintiffs’ argument to the contrary, the Forest Service has been and will continue to be prejudiced if
16 plaintiffs are allowed to add their new claims at this late date. This litigation was filed nearly four years
17 ago, and defendants have had to file four motions to dismiss and this motion to strike to date. The
18 Forest Service has answered the claims that the Court has determined will go forward, and the case
19 should be allowed to proceed on those claims. Finally, striking the new Antler’s Bridge claims will give
20 full effect to this Court’s order.

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1 For all of the reasons argued by the Forest Service, the Court should strike the sixth claim for
2 relief in the TAC regarding Antler's Bridge in its entirety.¹

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4 DATED: February 8, 2013

BENJAMIN B. WAGNER
United States Attorney

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6 By: /s/ Lynn Trinka Ernace
LYNN TRINKA ERNACE
Assistant United States Attorney
7

8 Of Counsel:
Marnie G. Ganotis
9 U.S. Department of Agriculture
Office of the General Counsel
10 33 New Montgomery Street, 17th Floor
San Francisco, CA 94105
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28 ¹ If the Court allows plaintiffs to assert the new Antler's Bridge claims, the Forest Service respectfully requests that the Court allow it sufficient time to answer or move to dismiss the new claims.