

1 **JOSEPH W. COTCHETT**  
 (36324; jcotchett@cpmlegal.com)  
 2 **PHILIP L. GREGORY**  
 (95217; pgregory@cpmlegal.com)  
 3 **PAUL N. MCCLOSKEY**  
 (24541; pmccloskey@cpmlegal.com)  
 4 **COTCHETT, PITRE & McCARTHY, LLP**  
 5 840 Malcolm Road, Suite 200  
 Burlingame, CA 94010  
 6 Telephone: (650) 697-6000  
 7 Facsimile: (650) 697-0577

8 **SHARON E. DUGGAN**  
 (105108; foxsduggan@aol.com)  
 9 ATTORNEY AT LAW  
 336 Adeline Street  
 10 Oakland, CA 94607  
 11 Telephone: (510) 271-0825  
 Facsimile: By Request

12 *Attorneys for Plaintiffs*

13 **UNITED STATES DISTRICT COURT**

14 **NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO DIVISION**

15 **THE COYOTE VALLEY BAND OF**  
 16 **POMO INDIANS OF CALIFORNIA; and**  
 17 **THE ROUND VALLEY INDIAN TRIBES**  
 18 **OF CALIFORNIA,**

19 **Plaintiffs,**

20 **v.**

21 **UNITED STATES DEPARTMENT OF**  
**TRANSPORTATION; ANTHONY FOXX**  
 22 **in his official capacity as the Secretary of**  
**the Department of Transportation;**  
 23 **FEDERAL HIGHWAY**  
**ADMINISTRATION; GREGORY**  
 24 **NADEAU in his official capacity as the**  
**Acting Administrator of the Federal**  
 25 **Highway Administration; CALIFORNIA**  
 26 **DEPARTMENT OF TRANSPORTATION;**  
 27 **MALCOLM DOUGHERTY in his official**  
**capacity as Director of the California**  
 28 **Department of Transportation,**

**Defendants.**

**Case No.**

**COMPLAINT:**

- 19 (1) **VIOLATIONS OF NEPA AND THE APA;**
- 20 (2) **VIOLATIONS OF THE FEDERAL HIGHWAYS STATUTES AND THE APA; AND**
- 21 (3) **VIOLATIONS OF THE NATIONAL HISTORIC PRESERVATION ACT**

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1 **I. INTRODUCTION**

2 1. Defendants in this case must not be allowed to destroy historic properties, cultural  
3 resources, and sacred sites to build the Willits Bypass Project. This case challenges Defendants'  
4 ongoing failure to properly identify and protect Plaintiffs' ancestral, sacred, cultural, and  
5 archaeological sites and resources in the construction of the Willits Bypass Project. As a result  
6 of Defendants' ground-disturbing activity both along the route and in the mitigation lands of the  
7 Willits Bypass Project, Defendants have destroyed the ancestral Native American sacred and  
8 cultural sites of Plaintiffs the Coyote Valley Band of Pomo Indians and the Round Valley Indian  
9 Tribes of California and failed to protect such places in the area of the Project, including the  
10 mitigation lands.

11 2. Caltrans has failed to implement cultural resource protection and archaeological  
12 mitigation measures, only using a January 2012 Mitigation and Monitoring Plan (the "MMP").  
13 MMPs are typically submitted as part of the Clean Water Act's Section 404 required application  
14 to fill wetlands, and the Clean Water Act's Section 401 required Water Quality Certification  
15 application. The Willits Bypass Project application included only the January 2012 MMP that  
16 was never properly approved.

17 3. As a result, Caltrans is destroying the wetlands. The following photos  
18 demonstrate examples of Caltrans destruction. The first two pictures show naturally occurring  
19 wetlands ponds before construction on the northern side Willits Bypass Project:



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4. The following photo is an example of Caltrans' destruction of the wetlands ponds shown above. The bulldozer is demolishing the wetlands ponds so that Caltrans can build "created wetlands" pursuant to the unapproved draft MMP:



1           5.       Another example of the devastation being inflicted by Caltrans is shown in the  
2 following two photos. The first photo is of seasonal wetlands with naturalized plant  
3 communities in the middle of Little Lake Valley prior to Caltrans' commencement of  
4 construction on the Project:



16           6.       Caltrans determined to obliterate the seasonal wetlands in order to develop a  
17 “wetland creation area” in an spot that already was wetlands:



1           7.       This action for declaratory and injunctive relief, as well as damages, challenges  
2 the failure of the California Department of Transportation (“Caltrans”), the Federal Department  
3 of Transportation (“DOT”), and the Federal Highways Administration (“FHWA”) to supplement  
4 their environmental impact analysis in the course of constructing the federally funded Willits  
5 Bypass Project, a 5.9 mile long rerouting of Highway 101 through Little Lake Valley, in and  
6 near the city of Willits, in Mendocino County, along with the Willits Mitigation Project to  
7 mitigate impacts to wetlands and biological resources as a result of the Bypass construction (the  
8 “Willits Bypass Project”). A map showing the Willits Bypass Project alignment is attached  
9 hereto as **Exhibit 1**.

10           8.       Defendants failed to: (a) adequately address the direct, indirect, and cumulative  
11 cultural, environmental, and historic impacts of the Willits Bypass Project; (b) identify and  
12 finalize the details of the mitigation plan or its environmental and cultural impacts; and (c)  
13 commit to necessary mitigation measures. As a result, Defendants violated the National  
14 Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321, *et seq.*, the National Historic  
15 Preservation Act (“NHPA”), 54 U.S.C. §§ 300101, *et seq.*, and the Administrative Procedure Act  
16 (“APA”), 5 U.S.C. § 706. Defendants’ failure to properly mitigate adverse impacts also violates  
17 the pertinent provisions of the statutes governing the federal highway system (the “Federal  
18 Highway Statutes”), 49 U.S.C. § 303; 23 U.S.C. § 138.

19           9.       By this Complaint, Plaintiffs request a declaration that Defendants have violated  
20 NEPA, the NHPA, the APA, and the Federal Highway Statutes; an Order requiring Defendants  
21 to comply with Section 106 of the NHPA and negotiate, execute, and implement a “Memoranda  
22 of Agreement” (“MOA”) or Programmatic Agreement with Plaintiffs stipulating how the adverse  
23 effects of Federal actions on the Willits Bypass Project, especially the Willits Mitigation Project,  
24 will be resolved; an Order requiring Defendants to supplement the Environmental Impact  
25 Statement (“EIS”) for the Willits Bypass Project; a further Order enjoining any activities in  
26 furtherance of the Willits Bypass Project until Defendants comply with federal law; and damages  
27 for destruction of Plaintiffs’ ancestral Native American sacred and cultural sites.

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1           10. NEPA is “our basic national charter for protection of the environment.” 40 C.F.R.  
2 § 1500.1(a). NEPA ensures informed decision-making by federal agencies by requiring agencies  
3 to study and evaluate the environmental impacts of proposed major Federal actions before  
4 undertaking those actions. 42 U.S.C. § 4332(2)(C). The “heart” of NEPA is its requirement that  
5 federal agencies prepare an EIS, in which the federal agencies examine the proposed action and  
6 alternatives to the proposal and compare the environmental impacts of the proposed action and  
7 the alternatives. 40 C.F.R. § 1502.14.

8           11. NEPA requires federal agencies to supplement a past EIS whenever there are  
9 “significant new circumstances or information relevant to environmental concerns and bearing  
10 on the proposed action or its impacts.” 40 C.F.R. § 1502.9(c)(1)(ii). The obligation imposed by  
11 this regulation is mandatory and nondiscretionary and is triggered whenever the remaining  
12 governmental action would be environmentally significant.

13           12. Effective on October 1, 2012, FHWA assigned, and Caltrans assumed, FHWA  
14 responsibility for environmental review, consultation, and coordination pursuant to 23 U.S.C. §  
15 327. Caltrans and FHWA entered into a NEPA Assignment Memorandum of Understanding  
16 concerning the State of California’s participation in the Federal-aid Highway Program, in which  
17 FHWA assigned and Caltrans assumed FHWA’s responsibilities under Section 106 of the NHPA  
18 (“Section 106”) and associated implementing regulations at 36 C.F.R. Part 800.

19           13. Executive Order 13175 (2000), *Consultation and Coordination with Indian Tribal*  
20 *Governments*, lists as one of its purposes “to strengthen the United States’ government-to-  
21 government relationships with Indian tribes...” Thus, the government-to-government  
22 consultation process continues to embody the unique relationship between the United States and  
23 Indian tribes.

24           14. In 2005, FHWA concluded its Section 106 review for the Willits Bypass Project  
25 with a finding of conditional No Adverse Effect to historic properties. This finding was issued  
26 *without* any government-to-government consultation with Plaintiffs. However, in 2006, at the  
27 time of approval of the Final Environmental Impact Statement/Environmental Impact Report  
28 (“Final EIS/EIR”) for the Willits Bypass Project, Caltrans had only identified one archaeological



1 site eligible for registry on the National Register of Historic Places: CA-MEN-2645/H. This  
2 identification was made *without* any government-to-government consultation with Plaintiffs. A  
3 map showing the Project impact area and mitigation area is attached hereto as **Exhibit 2**.

4 15. Pursuant to 23 C.F.R. § 771.30(a)(2), “a draft EIS, final EIS or supplemental EIS  
5 may be supplemented at any time. An EIS **shall** be supplemented whenever the Administration  
6 determines that: ... (2) New information or circumstances relevant to the environmental concerns  
7 and bearing on the proposed action could result in significant impacts not evaluated in the EIS.”  
8 (Emphasis added).

9 16. Since 2013, Caltrans has identified at least *thirty* additional archaeological sites  
10 eligible for registry on the National Register of Historic Places (“NRHP”). The California State  
11 Office of Historic Preservation (“SHPO”) has indicated that the entire area of the Willits Bypass  
12 Project might have to be designated as an “archaeological district” of ancestral sites.

13 17. In 2010 and 2011, after the construction contract for the Willits Bypass Project  
14 was awarded, but before the start of construction, and *without* any government-to-government  
15 consultation with Plaintiffs, Caltrans carried out a geoarchaeological investigation in order to  
16 determine the potential for obscured and buried archaeological resources within the Project  
17 alignment’s areas of direct impact. This investigation showed that there is a **high-to-moderate**  
18 **likelihood** for subsurface deposits. A number of buried cultural deposits were identified as a  
19 result of the study.

20 18. In 2013, Caltrans opened the Section 106 consultation with the SHPO *only* (and  
21 *not* Plaintiffs) for the Willits Bypass Project due to archaeological post-review discoveries, to  
22 change the area of potential effects for the Willits Bypass Project, and to resolve adverse effects  
23 to historic properties, cultural resources, and sacred sites. As a result, Defendants improperly  
24 engaged in consultation, which is defined as “the process of seeking, discussing, and considering  
25 the views of other participants, and, where feasible, seeking agreement with them regarding  
26 matters arising in the Section 106 process.” 36 CFR Section 800.16 (f).

1 19. Further, Defendants commenced ground disturbing activities which damaged  
2 Plaintiffs' historic properties, cultural resources, and sacred sites prior to complying with Section  
3 106 of the NHPA and prior to executing and implementing an MOA with Plaintiffs stipulating  
4 how the adverse effects of Federal actions on the Willits Bypass Project, especially the Willits  
5 Mitigation Project, will be resolved. While Defendants have circulated several versions of a  
6 Draft Programmatic Agreement, there is no fully executed MOA or Programmatic Agreement.

7 20. The Caltrans map illustrating the Willits Bypass Project alignment and the offsite  
8 mitigation sites is attached as **Exhibit 3**.

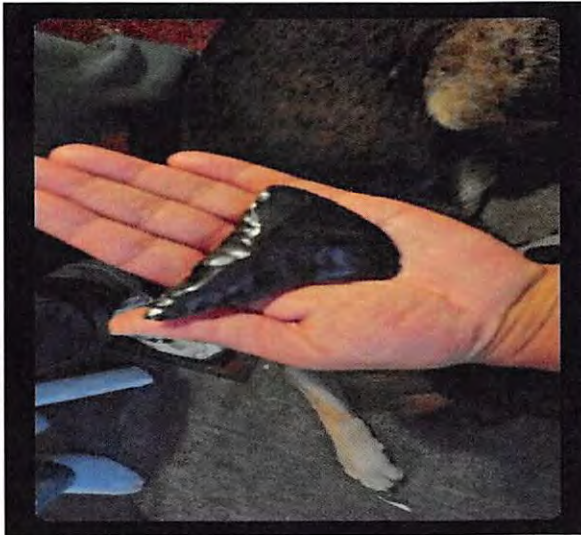
9 21. Even though Caltrans and FHWA have been constructing the Willits Bypass  
10 Project for over two years, they have yet to develop or implement a process for identifying  
11 historic properties, cultural resources, or sacred sites, assessing effects and resolving adverse  
12 effects to historic properties, cultural resources, and sacred sites that may be discovered or  
13 inadvertently affected, and therefore subject to 36 C.F.R. § 800.13, during the implementation of  
14 the undertaking. These Historic Properties include archaeological and ethnographic resources, as  
15 well as human burial sites.

16 22. This photo is of topsoil that was bulldozed by Caltrans on mitigation lands  
17 *without* being surveyed, scraped into a huge pile *without* determining if the area contained  
18 Plaintiffs' artifacts:

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23. The following photos show examples of the artifacts that are being found in the Project area that are Plaintiffs' historic properties, cultural resources, or sacred sites. The first photo is of a worked obsidian piece:



Sample Photographs of Initial Finds



Lanceolate  
Obsidian  
Projectile Point

Chert Biface  
End Fragment

Chert Biface  
End Fragment

Igneous Cobble Tool  
Possible Hammerstone

1           24.     In addition to these discoveries, the improper re-opening of consultation, and the  
2 commencement of construction prior to executing and implementing an MOA or Programmatic  
3 Agreement, Caltrans also failed to disclose to Plaintiffs, the public, and the permitting agencies  
4 the presence of numerous cultural resources and the potential impacts of the Project on these  
5 resources, and failed to prepare and circulate a Supplemental EIS. Rather, Caltrans destroyed  
6 and continues to destroy known archaeological sites allegedly based on “mis-mapping” and  
7 failure to properly fence off and protect such sites and transmit their locale to construction crews.  
8 Further, Caltrans has failed to notify tribal monitors that excavation activities are being  
9 conducted in and around such sites.

10           25.     Caltrans has determined that the Willits Bypass Project will have an adverse  
11 effect on Post-Review Discovery (“PRD”) -1 (CA-MEN-3635) which Caltrans has, under 36  
12 C.F.R. § 800.13(c), assumed for the purposes of the Willits Bypass Project to be eligible for the  
13 NRHP under Criterion D and is therefore a “historic property” as defined at 36 C.F.R. §  
14 800.16(l)(1).

15           26.     Caltrans has determined that the Willits Bypass Project will have an adverse  
16 effect on PRD -2 (CA-MEN-3636) and PRD -4 (CA-MEN-3638) which Caltrans has, under 36  
17 C.F.R. § 800.13(c), assumed for the purposes of the Willits Bypass Project to be eligible for the  
18 NRHP under Criteria A and D and are therefore “historic properties” as defined at 36 C.F.R. §  
19 800.16(l)(1).

20           27.     As of December 31, 2014, Caltrans determined that the Willits Bypass Project has  
21 the potential to affect archaeological sites CA-MEN-3567, CA-MEN-3568, CA-MEN-3569, CA-  
22 MEN-3570, CA-MEN-3594, and Semphor 1 on the Bypass alignment which Caltrans has, under  
23 36 C.F.R. § 800.13(c), assumed for the purposes of the Willits Bypass Project to be eligible for  
24 the NRHP under Criterion D and are therefore “historic properties” as defined at 36 C.F.R. §  
25 800.16(l)(1) and must be protected as Environmentally Sensitive Areas (“ESAs”).

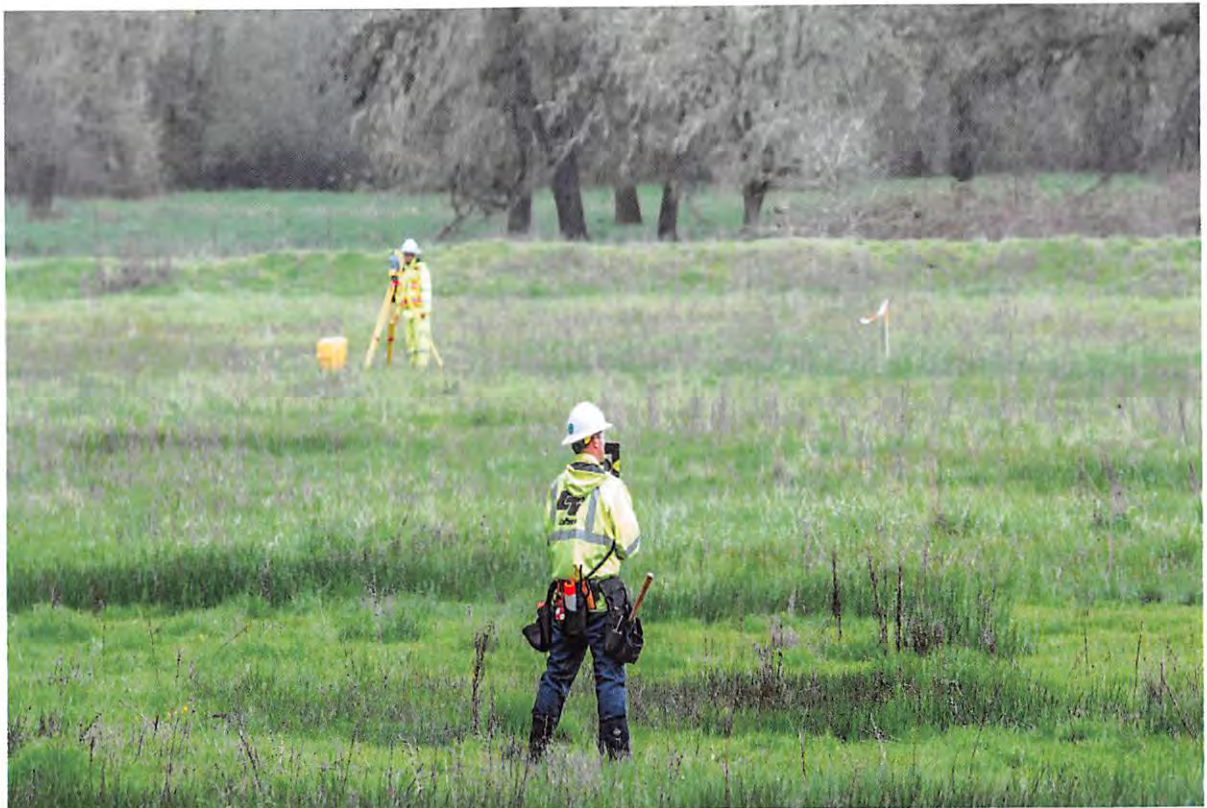
26           28.     Caltrans has determined that the Willits Bypass Project has the potential to affect  
27 archaeological sites CA-MEN-2645/H on the Bypass alignment which Caltrans has determined,  
28 by consensus on December 6, 2005, to be eligible for the NRHP under Criterion D (CA-MEN-

1 2645/H ) and A and C (CA-MEN-3111H ) are therefore “historic properties” as defined at 36  
2 C.F.R. § 800.16(l)(1) and must be protected as ESAs.

3 29. Caltrans has determined that previously unidentified properties within the Willits  
4 Bypass Project’s Area of Potential Effects (“APE”) will be affected by the Project. **Exhibit 4** is  
5 a detailed map showing the offsite mitigation actions for wetlands and other waters of the United  
6 States.

7 30. Caltrans has determined that the Willits Bypass Project had an adverse effect to  
8 CA-MEN-3571 due to wick drain installation, which, under 36 C.F.R. § 800.13(c), Caltrans  
9 assumed for the purposes of the Willits Bypass Project to be eligible for the National Register  
10 under Criterion D and is now protected as an ESA.

11 31. The following pictures show the effect that Caltrans’ installation of wick drains  
12 has on historic properties in the northern end of the Willits Bypass Project. The first picture  
13 shows a wetlands area in the Project *before* Caltrans installed wick drains:



1           32.     The next two photos show the adverse effect on historic properties when Caltrans  
2 ruins the site by installing wick drains:



1           33. As of December 31, 2014, Caltrans determined the following archaeological sites  
2 exist on the Willits Mitigation Project parcels: CA-MEN-1324, CA-MEN-2623, CA-MEN-2624,  
3 CA-MEN-2647/H, Plasma 1, Plasma 2, Plasma 3, Plasma 4, Plasma 7, Plasma 8, Watson 2, Frost  
4 1, Frost 2, Wildlands 1, Wildlands 2, Benbow 1, Benbow 2, Benbow 3, and Taylor 1. However,  
5 Caltrans has yet to finally develop or implement a plan to manage these archaeological sites.

6           34. Caltrans identified PRD Niesen 1 in a potentially disturbed context within the  
7 Bypass alignment that was further affected by Project construction. However, Caltrans has yet to  
8 finally develop or implement a plan to manage this archaeological site.

9           35. Caltrans's Final EIS/EIR for the Project includes mitigation measures for  
10 "Unanticipated archaeological discoveries," "Unanticipated discovery of human remains," and  
11 "Establishment of Environmentally Sensitive Area Action Plan" intended to address  
12 archaeological resources. These mitigation measures are required for all aspects of the Project,  
13 including the MMP. However, these mitigation measures were not implemented by Defendants.

14           36. Because Caltrans is only operating under a January 2012 MMP that was never  
15 properly approved, Caltrans has failed to properly implement cultural resource protection and  
16 archaeological mitigation measures. The effects of a lack of a final MMP can be seen  
17 throughout the Project. The following two photos are a small set of examples of how Caltrans is  
18 devastating the Little Lake Valley, and is failing to fulfill its statutory obligations to resolve  
19 adverse effects upon historic properties and failing to fulfill its statutory mitigation obligations.

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1           37.     The first photo is of Haehl Creek, in the southern portion of the Project. Haehl  
2 Creek is a historic salmon passage, used by Plaintiffs for centuries. This photo demonstrates the  
3 state of Haehl Creek post-construction: Caltrans has blocked the historic salmon passage and  
4 caused serious issues of drainage from landslides due to Caltrans' tree root removal:



14           38.     The following photo is also of the Haehl Creek area, again extremely important to  
15 Plaintiffs due to historic salmon passage. This photo depicts Haehl Creek during the spring of  
16 2014 in mid-construction by Caltrans. Caltrans was cited for causing serious water quality and  
17 drainage violations:





1           39. Defendants have not properly engaged in government-to-government consultation  
2 with the Federally-recognized Indian Tribes with ancestral lands in Mendocino County, CA  
3 about the Willits Bypass Project and the construction process, the post-review discoveries, the  
4 unanticipated inadvertent effects, and the potential adverse effect on the subject historic  
5 properties. These Tribes include Plaintiffs. Such government-to-government consultation with  
6 Plaintiffs is required by Section 106. Also, Defendants have failed to fulfill their statutory  
7 obligations to resolve adverse effects upon historic properties and failed to fulfill their statutory  
8 mitigation obligations.

9           40. On February 18, 2015, during their government-to-government consultation with  
10 Defendants, Plaintiffs requested a Supplemental EIS to contend with the numerous historic  
11 properties, cultural resources, and sacred sites that have been discovered in the Project area and  
12 the Mitigation parcels subsequent to the 2006 approval of the original EIS. In the government-  
13 to-government consultations with Defendants, Plaintiffs stated that Defendants had failed to  
14 exercise due diligence in their initial archaeological survey efforts for the Willits Bypass Project,  
15 conducting surface surveys only in a wetlands area covered by grass.

16           41. Plaintiffs have learned that their historic properties, cultural resources, and sacred  
17 sites have either been damaged or are threatened by construction activities related to the Willits  
18 Bypass Project, with site identification occurring *after* grading activities are completed.  
19 Defendants have failed to adequately protect these historic properties, cultural resources, and  
20 sacred sites discovered subsequent to approval of the original EIS. Plaintiffs hereby request this  
21 Court take immediate steps to protect these historic properties, cultural resources, and sacred  
22 sites.

23           42. Because Defendants failed to fulfill their Section 106 responsibilities “prior to”  
24 approving the Project, including but not limited to, failing in good faith to negotiate and  
25 implement a written MOA or Programmatic Agreement, which documents how Defendants  
26 would avoid, minimize, or mitigate adverse effects, the ancestral village site known as Yami  
27 Village, CA-MEN-3571, was destroyed. The Yami Village site was located at the northern end  
28 of the Project, on the eastern side of Highway 101.

1           43.     The following pictures show elders and spiritual leaders praying at the destroyed  
2 Yami Village site on June 12, 2013:



1           44.     The contempt with which Caltrans treats Plaintiffs' historic properties, cultural  
2 resources, and sacred sites with its Project construction activities can best be shown by the  
3 following photo. The orange netting was installed by Caltrans, supposedly to protect an area  
4 which Caltrans' readily acknowledges is one of Plaintiffs' historic properties, cultural resources,  
5 and sacred sites. Caltrans has staged its construction activities so that large trucks drive right  
6 though Plaintiffs' historic property:



1           45.     While not a plaintiff in this action, on October 28, 2015, the Sherwood Valley  
2 Band of Pomo took the position that, after 18 months of effort, Caltrans has indefinitely stalled,  
3 if not altogether abandoned, the finalization of a crucial agreement related to the Willits Bypass  
4 Project. The Sherwood Valley Band of Pomo is a federally-recognized Indian Tribe. Sherwood  
5 Valley Rancheria is located within the Sherwood Valley Tribe's aboriginal homelands and is  
6 headquartered in Willits, CA. The Rancheria was established under Secretarial Order in 1909  
7 and is governed under a Constitution and Bylaws duly adopted and approved by the Secretary of  
8 the Interior on July 25, 1974. The Sherwood Valley Tribal Council, as representatives of the  
9 Tribe's membership, strives to promote and perpetuate the protection of natural and cultural  
10 resources for future generations.

11           46.     From January – December 2014, the Sherwood Valley Tribe worked closely with  
12 Caltrans to attempt to create a Programmatic Agreement that would mitigate the adverse effects  
13 to historic properties occurring within the footprint of the Willits Bypass Project, as well as set  
14 forth protocols for how to best manage any new discoveries of cultural resources during  
15 construction of the Project. When Caltrans installed new Project staff in 2015, substantial  
16 internal agency edits to a nearly complete Programmatic Agreement began in earnest. According  
17 to the Sherwood Valley Tribe, Caltrans' District 3 staff worked tirelessly to revise the  
18 Programmatic Agreement "*in ways that have moved the document further and further away*  
19 *from an agreement that responsibly manages the historic properties in Little Lake Valley.*"  
20 The Sherwood Valley Tribe also reports that each of the five draft versions of the Programmatic  
21 Agreement provided in 2015 by Caltrans to the Sherwood Valley Tribe "has been substantially  
22 worse than its predecessor, leaving the Tribe without a document it can sign."

23           47.     On September 2, 2015, the Sherwood Valley Tribe provided comments to  
24 Caltrans on the last version of a draft Programmatic Agreement. These comments highlighted  
25 the reasons for the Sherwood Valley Tribe's lack of concurrence and concern: "Sherwood Valley  
26 Band of Pomo's Tribal Council cannot agree to or accept [Caltrans'] July 2015 version of the  
27 [Programmatic Agreement] because the execution of [Caltrans'] proposals will:  
28

- 1 (1) appreciably and inappropriately limit the number of archaeological deposits  
2 across the [Willits Bypass Project] APE that will constitute a site qualifying for  
3 in-field NRHP-eligibility assessment;
- 4 (2) significantly decrease the number of archaeological sites within the [Willits  
5 Bypass Project] that will meet the threshold for NRHP-eligible status;
- 6 (3) replace necessary (i.e., legally mandated, professionally- and ethically-best)  
7 NRHP assessments and data recovery with cursory construction-based  
8 monitoring; and
- 9 (4) drastically diminish (if not altogether divest [Caltrans] of) [Caltrans'] legal  
10 obligation to consult with federally-recognized Indian Tribes that are culturally  
11 affiliated with the lands encompassed by the [Willits Bypass Project] APE  
12 regarding inadvertent discoveries of archaeological resources made on the [Willits  
13 Bypass Project].

14 Furthermore, *agreeing to [Caltrans'] proposed processes would create an exceedingly*  
15 *troublesome precedent for all California Indian Tribes* with regard to (1) their legal rights to  
16 government-to-government consultation and (2) the legally compliant and culturally appropriate  
17 management of cultural resources on all current and forthcoming Caltrans-managed  
18 undertakings....” (Emphasis added).

19 48. According to the Sherwood Valley Tribe, the September 2, 2015 communication  
20 included a request for Caltrans to contact the Tribe to bring the Programmatic Agreement to  
21 finalization. An October 2, 2015 letter from the Sherwood Valley Tribe made a similar plea.  
22 The Tribe is now reporting that Caltrans has not responded to either correspondence. The  
23 Sherwood Valley Tribe stated: “Such reticence is *deeply disturbing*” to Sherwood Valley.  
24 However, according to the Tribe, Caltrans’ failure to respond has not altered the Tribe’s resolve  
25 to continue its demands for the successful execution of a Project-based agreement, as evidenced  
26 by the following statement from Tribal Council:

1 “Sherwood Valley Band of Pomo’s leadership has consulted in good faith with  
 2 Caltrans regarding the Willits Bypass Project for over two years and acted in a  
 3 trustworthy manner with unimpeachable integrity. We have tried to build  
 4 consensus, attempting to understanding Caltrans’ limitations while championing  
 5 our unwavering goal of being responsible stewards to our aboriginal lands—the  
 6 Little Lake Valley—and the natural and cultural resources that this landscape  
 7 contains. Sherwood Valley has spent hundreds of hours and tens of thousands of  
 8 dollars in an attempt to create a Programmatic Agreement that adequately  
 9 manages resources of concern to our community and offers some restitution for  
 10 the great harm inflicted upon Mitom Kai and its people, the Mitom Kai Poma and  
 11 their descendants. ***It has been a grief-filled process, punctuated by disrespectful,  
 12 subversive, and cavalier attitudes and acts on the part of Caltrans. We find this  
 13 behavior particularly egregious*** given the fact that the Tribe has not attempted to  
 14 delay or stop construction of the bypass, despite it being a project that has never  
 15 been supported by Sherwood Valley. Rather, the Tribe has only asked for the  
 16 State and its agents to merely comply with the letter and spirit of existing statutes,  
 17 regulations, and directives while undertaking the Project—most notably Section  
 18 106 of the National Historic Preservation Act and Presidential and Gubernatorial  
 19 Executive Orders and Memoranda, as well as [United States Department of  
 20 Transportation] and [Caltrans’] policies, on the subject of Tribal consultation and  
 21 environmental justice. ***The Tribe finds Caltrans’ refusal to continue conducting  
 22 the consultation required to finalize a mitigation-based agreement for the  
 23 Willits Bypass Project unjustifiable and unacceptable. Despite the agency’s  
 24 recalcitrance and lack of integrity on this matter***; however, Sherwood Valley  
 25 will remain steadfast in our efforts to exact satisfactory mitigation for the adverse  
 26 impacts to our community’s resources within the Little Lake Valley. Our Tribe  
 27 will not quietly or idly stand by and permit a failed Programmatic Agreement to  
 28 be yet another tragic outcome of the Willits Bypass Project.”

(Emphasis added).

49. Related to those efforts, the Sherwood Valley Tribe stated that it will continue to reach out to Caltrans, as well as other consulting parties on the Project—including the Advisory Council on Historic Preservation, the Office of Historic Preservation, and the Federal Highways Administration—to finalize an agreement document that secures mitigation for those historic properties negatively impacted by the Willits Bypass Project. The Sherwood Valley Tribe has also indicated that it will maintain an in-field monitoring presence and persist in advocating for more substantial and valuable archaeological investigations and more meaningful and transparent consultation moving forward.

1           50. By this Complaint, Plaintiffs hereby request that all construction activities on the  
2 Willits Bypass Project be temporarily suspended and subject to public hearings and tribal  
3 consultations to address damage to historic properties, cultural resources, and sacred sites.  
4 Further, Plaintiffs request that this Court issue an order requiring Defendants to protect historic  
5 properties, cultural resources, and sacred sites encountered on the mitigation lands under Section  
6 106 of the National Historic Preservation Act. Plaintiffs request that Defendants be ordered to  
7 prepare a Supplemental EIS/EIR to address historic properties, cultural resources, and sacred  
8 sites assumed to be eligible for listing of the National Register of Historic Places but that were  
9 not identified in the Final EIS/EIR. Finally, Plaintiffs request damages as a result of Defendants'  
10 construction activities on the Willits Bypass Project that have harmed Plaintiffs' historic  
11 properties, cultural resources, and sacred sites.

## 12 **II. PARTIES**

### 13 **A. PLAINTIFFS**

14           51. Plaintiff the Coyote Valley Band of Pomo Indians of California ("Coyote  
15 Valley") is federally recognized through the Secretary of the Interior as a sovereign Indian Tribe  
16 possessed with inherent powers of tribal self-government.

17           52. Plaintiff the Round Valley Indian Tribes of California ("Round Valley") is  
18 federally recognized through the Secretary of the Interior as a sovereign Indian Tribe possessed  
19 with inherent powers of tribal self-government.

20           53. Plaintiffs' tribal members live, work, recreate, and conduct other activities in  
21 areas adjacent to tracts where the ground disturbing activities of the Willits Bypass Project are  
22 occurring. Plaintiffs' tribal members are affected by Defendants' failure to protect historic  
23 properties, cultural resources, and sacred sites encountered during construction activities and on  
24 the mitigation lands. Plaintiffs' tribal members use and enjoy areas adjacent to tracts subject to  
25 construction activities and on the mitigation lands for recreational, scientific, cultural, aesthetic,  
26 conservation, and other public purposes, and are harmed by the local aesthetic and environmental  
27 impacts of the ground disturbing activities there.

28

1           54. Plaintiffs and their respective tribal members also have a substantial interest in  
2 insuring that Defendants comply with federal law, including the requirements of NEPA.

3           55. The interests of Plaintiffs and their respective tribal members have been, are  
4 being, and will continue to be irreparably harmed by Defendants' decisions to fail to protect  
5 historic properties, cultural resources, and sacred sites encountered during construction activities  
6 and on the mitigation lands of the Willits Bypass Project.

7           56. Under 36 C.F.R. § 800.2 and 36 C.F.R. § 800.13, as well as Executive Order  
8 13175, Defendants are required to involve and consult with Plaintiffs because Plaintiffs are  
9 Native American tribes that attach religious, ancestral, and cultural significance to historic  
10 properties that may be affected by the Willits Bypass Project. Defendants have an obligation to  
11 ensure that each Plaintiff is treated in a respectful manner and each Plaintiff is provided a  
12 reasonable opportunity to identify its concerns regarding the identification and treatment of  
13 historic properties that this undertaking could possibly affect. Defendants are required to provide  
14 Plaintiffs with all information necessary to understand the potential effects of the Willits Bypass  
15 Project on historic properties. Each Plaintiff must be provided with the opportunity to comment  
16 and contribute to the resolution of any of these effects.

17           57. In violation of 36 C.F.R. § 800.2 and 36 C.F.R. § 800.13, as well as Executive  
18 Order 13175, Defendants have failed to properly involve and consult collaboratively with each  
19 Plaintiff during the course of the Willits Bypass Project.

20           **B. DEFENDANTS**

21           58. Defendant UNITED STATES DEPARTMENT OF TRANSPORTATION  
22 (“DOT”) is the executive department of the federal government responsible for approval of  
23 highway projects.

24           59. Defendant ANTHONY FOXX is the Secretary of DOT, and is sued in his official  
25 capacity. Secretary Foxx is ultimately responsible for all DOT decision-making, including  
26 decisions of the Federal Highway Administration.

27           60. Defendant FEDERAL HIGHWAY ADMINISTRATION (“FHWA”) is the  
28 agency within DOT principally responsible for highway planning and funding. FHWA, through



1 its California Division, was responsible with California DOT for preparing, reviewing, and  
2 approving the EIS and Record Of Decision (“ROD”) for the Willits Bypass Project, and is  
3 responsible for ensuring compliance with NEPA and other laws for the Willits Bypass Project  
4 through implementation and discovery of new information.

5 61. Defendant GREGORY NADEAU is the Acting Administrator of FHWA, and is  
6 sued in his official capacity. Administrator Nadeau is ultimately responsible for all FHWA  
7 decisions, including approval of the EIS and ROD, supplemental NEPA compliance, and other  
8 agency decisions for the Willits Bypass Project.

9 62. Defendant CALIFORNIA DEPARTMENT OF TRANSPORTATION  
10 (“Caltrans”) is a public and state agency within the State of California. Caltrans is the lead  
11 agency for the Willits Bypass Project under NEPA. Caltrans is using federal funding from the  
12 FHWA. Caltrans has executed a Memorandum of Understanding Between the Federal Highway  
13 Administration and the California Department of Transportation (the “MOU”) under which  
14 FHWA assigned to and Caltrans assumed the delegation of authority, pursuant to 23 U.S.C. §  
15 327, to provide environmental review, consultation, or other such action pertaining to the review  
16 or approval of a specific project such as the Willits Bypass Project, as required by federal  
17 environmental laws, including NEPA, 42 U.S.C. § 4331 *et seq.*; Section 4(f) of the Department  
18 of Transportation Act of 1966, codified at 23 U.S.C. § 138 and 49 U.S.C. § 303, and  
19 implementing regulations at 23 C.F.R. Part 774; and Section 106 of the National Historic  
20 Preservation Act (“NHPA”), 54 U.S.C. § 306108 and 36 C.F.R. Part 800. Pursuant to this  
21 MOU, Caltrans is the agency which prepared and adopted the Final EIS/EIR for the Willits  
22 Bypass Project.

23 63. Defendant MALCOLM DOUGHERTY is the Director of Caltrans, and is sued in  
24 his official capacity. Mr. Dougherty is ultimately responsible for all decisions of Caltrans,  
25 including the preparation and approval of the EIS and ROD for the Willits Bypass Project,  
26 ongoing NEPA compliance for the Project as it is implemented, compliance with federal  
27 highway statutes including 49 U.S.C. § 302(c) and 23 U.S.C. § 138(a), and Section 106 requiring  
28

1 effective government to government consultation with recognized Native American Tribes and  
2 protection of tribal sacred and cultural resources.

3 **III. JURISDICTION**

4 64. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, as this action arises  
5 under the laws of the United States.

6 65. An actual controversy exists between the parties within the meaning of 28 U.S.C.  
7 § 2201. Defendants have failed to act and unlawfully withheld required action, including  
8 preparation of a Supplemental EIS, and actions required under Section 106 of the NHPA, subject  
9 to review pursuant to 5 U.S.C. § 706(1). This Court may grant declaratory relief, and additional  
10 relief, including an injunction, pursuant to 28 U.S.C. §§ 2201 and 2202, and 5 U.S.C. §§ 705,  
11 706(1), and 706(2)(A) & (D), as an actual and present controversy exists between the parties  
12 within the meaning of the Declaratory Judgment Act, 28 U.S.C. § 2201.

13 **IV. VENUE**

14 66. Venue lies in this judicial district pursuant to 28 U.S.C. § 1391(b) and (e),  
15 because a substantial part of the events or omissions giving rise to the claims at issue in this  
16 action occurred in this judicial district due to decisions made by Defendants. The Willits Bypass  
17 Project is located within this judicial district. Plaintiffs reside and have offices in this judicial  
18 district and certain of their organizational members reside within this judicial district.  
19 Defendants reside in this judicial district.

20 **V. INTRADISTRICT ASSIGNMENT**

21 67. A substantial part of the events and omissions giving rise to the claims in this case  
22 impact all of Northern California and have occurred in various counties throughout the Northern  
23 District, including the Counties of San Francisco and Mendocino.

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1 **VI. STATUTORY FRAMEWORK AND FACTS GIVING RISE TO PLAINTIFFS'**  
 2 **CLAIMS FOR RELIEF**

3 **A. STATUTORY AND REGULATORY FRAMEWORK**

4 **1. The Administrative Procedure Act**

5 68. The Administrative Procedure Act (“APA”) provides a right to judicial review to  
 6 against an agency or official which “acted or failed to act acted or failed to act in an official  
 7 capacity or under color of legal authority.” 5 U.S.C. § 702. The APA provides that a court shall  
 8 compel an agency action that is “unlawfully withheld or unreasonably delayed,” and shall hold  
 9 unlawful and set aside agency actions found to be “arbitrary, capricious, an abuse of discretion,  
 10 or otherwise not in accordance with law.” 5 U.S.C. § 706(1) & (2)(A).

11 **2. The National Environmental Policy Act**

12 69. Enacted in 1922, NEPA is our “basic national charter for protection of the  
 13 environment.” 40 C.F.R. § 1500.1(a). Its purpose is to “help public officials make decisions that  
 14 are based on understanding of environmental consequences, and take actions that protect, restore,  
 15 and enhance the environment.” *Id.* at § 1500.1(c). Under NEPA, federal agencies are required  
 16 to prepare an environmental impact statement (“EIS”) regarding all “major Federal actions  
 17 significantly affecting the quality of the human environment . . . .” 42 U.S.C. § 4332(C). This  
 18 EIS must describe (1) the “environmental impact of the proposed action,” (2) “any adverse  
 19 environmental effects which cannot be avoided should the proposal be implemented,” (3) any  
 20 “alternatives to the proposed action,” (4) “the relationship between local short-term uses of  
 21 man’s environment and the maintenance and enhancement of long-term productivity,” and (5)  
 22 “any irreversible and irretrievable commitments of resources which would be involved in the  
 23 proposed action should it be implemented.” *Id.*

24 70. The Council for Environmental Quality (“CEQ”), an agency within the Executive  
 25 Office of the President, has promulgated regulations implementing NEPA that are binding on all  
 26 federal agencies. 40 C.F.R. § 1500.3. Those regulations require the NEPA process be completed  
 27 “before decisions are made and before actions are taken,” *Id.* § 1500.1(b), and the process begin  
 28

1 with the agency properly “specify[ing] the underlying purpose and need to which the agency is  
2 responding in proposing the alternatives including the proposed action.” *Id.* § 1502.13.

3 71. Once the project purpose is properly defined, the agency must consider the  
4 relevant environmental impacts of the proposed action and all reasonable alternatives. *Id.* §  
5 1502.14. As the regulations set forth, alternatives are the “heart of the” EIS, and must be  
6 presented along with the proposed action “in comparative form, thus sharply defining the issues  
7 and providing a clear basis for choice among options by the decision maker and the public.” *Id.*  
8 § 1502.14.

9 72. The EIS must then meaningfully address the direct, indirect, and cumulative  
10 environmental impacts of the proposed action and reasonable alternatives. *Id.* §§ 1508.7,  
11 1508.8. Indirect effects are those “caused by the action and are later in time or farther removed  
12 in distance, but are still reasonably foreseeable [and which] may include growth inducing effects  
13 and other effects related to induced changes in the pattern of land use.” *Id.* § 1508.8(b).  
14 Cumulative effects are impacts “from the incremental impact of the action when added to other  
15 past, present, and reasonably foreseeable future actions . . . .” *Id.* § 1508.7.

16 73. Federal agencies are required to consider the “reasonably foreseeable” effects of  
17 the proposed major Federal action, including effects that are direct, indirect, or cumulative. 40  
18 C.F.R. §§ 1508.7, 1508.8, 1508.25.

19 74. Federal agencies also must “[r]igorously explore and objectively evaluate all  
20 reasonable alternatives” to the proposed agency action, including a “no-action” alternative. 40  
21 C.F.R. § 1502.14(a), (d). The alternatives analysis is the “heart” of the EIS. 40 C.F.R. §  
22 1502.14. The Federal agencies must consider a reasonable alternative even if it is not currently  
23 within that agency’s power. 40 C.F.R. § 1502.14(c). “[F]or alternatives that were eliminated  
24 from detailed study, [the agency must] briefly discuss the reasons for their having been  
25 eliminated.” 40 C.F.R. § 1502.14(a). Each alternative must be “considered in detail . . . so that  
26 reviewers may evaluate their comparative merits.” 40 C.F.R. § 1502.14(b). The discussion of  
27 alternatives is to be based on information and analysis regarding the environment to be affected  
28 by the Federal action and its environmental consequences. 40 C.F.R. § 1502.14; *see also* 40

1 C.F.R. §§ 1502.15, 1502.16. The discussion must include the environmental impacts of the  
 2 alternatives including the proposed action, any adverse environmental effects which cannot be  
 3 avoided should the proposal be implemented, the relationship between short-term uses of man’s  
 4 environment and the maintenance and enhancement of long-term productivity, and any  
 5 irreversible or irretrievable commitments of resources which would be involved in the proposal  
 6 should it be implemented. C.F.R. § 1502.16. In addition to alternatives, the EIS must “[i]nclude  
 7 appropriate mitigation measures not already included in the proposed action or alternatives.” 40  
 8 C.F.R. § 1502.14(f).

9 75. An EIS also must “include appropriate mitigation measures.” *Id.* § 1502.14(f).  
 10 The FHWA has also promulgated NEPA implementing regulations, which similarly require that  
 11 “[m]easures necessary to mitigate adverse impacts be incorporated into the action.” 23 C.F.R. §  
 12 771.105(d). Consistent with the CEQ requirements, the FHWA NEPA regulations also require  
 13 that “[a]lternative courses of action be evaluated and decisions be made in the best overall public  
 14 interest based upon a balanced consideration of the need for safe and efficient transportation; of  
 15 the social, economic, and environmental impacts of the proposed transportation improvement;  
 16 and of national, State, and local environmental protection goal.” 23 C.F.R. § 771.105(b).

17 76. Once done, an EIS “shall” be supplemented if “[t]here are significant new  
 18 circumstances or information relevant to environmental concerns and bearing on the proposed  
 19 action or its impacts.” 40 C.F.R. § 1502.9(c)(1)(ii). An agency “[m]ay also prepare supplements  
 20 when the agency determines that the purposes of the Act will be furthered by doing so.” 40  
 21 C.F.R. § 1502.9(c)(2). In other words, [i]f there remains major Federal action to occur, and if the  
 22 new information is sufficient to show that the remaining action will affect the quality of the  
 23 human environment in a significant manner or to a significant extent not already considered, a  
 24 supplemental EIS must be prepared. 42 U.S.C. § 4332(2)(C).

### 25 3. The National Historic Preservation Act

26 77. In 1966, Congress enacted the NHPA, 54 U.S.C. §§ 300101 *et seq.*, to preserve  
 27 America's historic and cultural heritage. Congress declared both that “the historical and cultural  
 28 foundations of the Nation should be preserved as a living part of our community life and

1 development in order to give a sense of orientation to the American people”; and that “the  
2 preservation of [our] irreplaceable heritage is in the public interest so that its vital legacy of  
3 cultural, educational, esthetic, inspirational, economic, and energy benefits will be maintained  
4 and enriched for future generations of Americans.” Section 1 of the National Historic  
5 Preservation Act, Pub. L. No. 89-665, as amended by Pub. L. No. 96-515.

6 78. Section 106 of the NHPA requires all federal agencies to “take into account” the  
7 impact of their actions on historic properties, including sites listed on and eligible for the  
8 National Register of Historic Places (“NRHP”), and to do so “prior to” approving the action. 16  
9 U.S.C. § 306108. Section 106 also requires that the agency afford the Advisory Council on  
10 Historic Preservation “a reasonable opportunity to comment” on the project. *Id.*

11 79. Federal agencies are required to consult with Indian Tribes such as Plaintiffs on a  
12 government-to-government basis pursuant to Executive Orders, Presidential memoranda, and  
13 other authorities. Section 800.2(c)(2)(ii)(B) of the ACHP’s regulations remind federal agencies  
14 that “the Federal Government has a unique legal relationship with Indian tribes set forth in the  
15 Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian  
16 tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this  
17 part alters, amends, repeals, interprets or modifies tribal sovereignty, any treaty rights, or other  
18 rights of an Indian tribe, or preempts, modifies or limits the exercise of such rights.”

19 80. Section 800.2(c)(2)(ii)(C) of the ACHP’s regulations further states “consultation  
20 with an Indian tribe must recognize the government-to-government relationship between the  
21 Federal Government and Indian tribes. The agency official shall consult with representatives  
22 designated or identified by the tribal government.”

23 81. Moreover, Section 302706(b) of the NHPA specifically requires that “in carrying  
24 out its responsibilities under [Section 106], a Federal agency shall consult with any Indian tribe  
25 ... that attaches religious and cultural significance to [historic properties that may be affected by  
26 the undertaking].”

27  
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1           82.     Finally, Section 800.2(c)(4) of the ACHP’s regulations states that “Federal  
2 agencies that provide authorizations to applicants [to initiate consultation] remain responsible for  
3 their government-to-government relationships with Indian tribes.”

4           83.     The ACHP promulgated regulations implementing Section 106, which regulations  
5 are binding on all federal agencies. 16 U.S.C. § 470s; 36 C.F.R. Part 800. The Section 106  
6 regulations require the federal agency to engage in a consultation process that involves the State  
7 Historic Preservation Office, the ACHP, Native American tribes, consulting parties, and  
8 interested members of the public. 36 C.F.R. §§ 800.1(a) and 800.2.

9           84.     According to the Section 106 regulations, an adverse effect occurs when an  
10 undertaking “may alter, directly or indirectly, any of the characteristics of a historic property that  
11 qualify the property for inclusion in the National Register in a manner that would diminish the  
12 integrity of the property's location, design, setting, materials, workmanship, feeling, or  
13 association .... Adverse effect may include reasonably foreseeable effects caused by the  
14 undertaking that may occur later in time, be farther removed in distance or be cumulative.” 36  
15 C.F.R. § 800.5(a)(I). Examples of adverse effects in the Section 106 regulations include:  
16 “[c]hange of the character of the property's use ... that contribute[s] to its historic significance.”  
17 *Id.* § 800.5(a)(2)(iv).

18           85.     When an undertaking will adversely affect one or more historic properties, the  
19 federal agency must engage in consultation to “develop and evaluate alternatives or  
20 modifications to the undertaking that could avoid, minimize or mitigate [those] adverse effects,”  
21 36 C.F.R. § 800.6(a). If the federal agency, Indian Tribes, and other consulting parties are able  
22 to reach consensus on ways to resolve the adverse effects, that consensus is reflected in a written  
23 MOA or Programmatic Agreement, which documents how the federal agency will avoid,  
24 minimize, or mitigate adverse effects. *Id.* § 800.6. The federal agency must fulfill its Section  
25 106 responsibilities “prior to” approving the project.

26           86.     The Section 106 regulations stress the importance of considering the effects of a  
27 federal project at the earliest possible time during project planning, “so that a broad range of  
28 alternatives may be considered during the planning process for the undertaking.” 36 C.F.R. §

1 800.I(c). The regulations reiterate the statutory requirement that Section 106 review must be  
2 completed “prior to” the approval of any expenditure of federal funds on the project, and prohibit  
3 actions that may “restrict the subsequent consideration of alternatives to avoid, minimize or  
4 mitigate” the project's adverse effects on historic properties. *Id.* The Section 106 regulations  
5 state that a “[c]hange of the character of the property's use ... that contribute[s] to its historic  
6 significance” is an adverse effect. 36 C.F.R. § 800.5(a)(2)(iv).

7 87. Defendants improperly addressed the mandate to comply with Section 106 of the  
8 NHPA at four stages:

- 9 a. At the Final EIS/EIR stage, when Defendants stated there would be “no  
10 effect” when they did not know what the effects would be;
- 11 b. When Defendants commenced ground-disturbing activities without  
12 properly completing the Section 106 process;
- 13 c. When Defendants commenced construction without taking appropriate  
14 steps to protect Plaintiffs’ historic properties, cultural resources, and  
15 sacred sites encountered during construction activities and on the  
16 mitigation lands of the Willits Bypass Project; and
- 17 d. When Defendants failed to correct these egregious errors once they  
18 discovered additional archaeological sites eligible for registry on the  
19 NRHP.

20 **B. THE WILLITS BYPASS PROJECT**

21 88. Caltrans and the FHWA are constructing improvements to U.S. Highway 101  
22 within and in the vicinity of the City of Willits, Mendocino County, California. The undertaking  
23 consists of the Willits Bypass Project, a 5.9-mile long rerouting of Highway 101 through Little  
24 Lake Valley, along with the Willits Mitigation Project to mitigate impacts to biological resources  
25 as a result of the bypass construction (collectively referred to herein as the “Willits Bypass  
26 Project”).



1           89.     The Willits Bypass Project is a four-lane highway with several bridges spanning  
2 creeks and local roads, viaducts spanning a floodplain, and interchanges with existing U.S.  
3 Highway 101 at each end of the bypass. The southern portion of the bypass alignment meanders  
4 through the southwestern portion of Little Lake Valley, just east of Willits. The 5.9-mile bypass  
5 begins approximately 0.6 mile south of the current Haehl Creek crossing of U.S. Highway 101  
6 and ends approximately 1.8 miles south of Reynolds Highway. The bypass alignment passes  
7 through the 100-year floodplains of Haehl, Baechtel, Broaddus, Mill, and Upp Creeks, all of  
8 which are tributaries of Outlet Creek, a tributary of the Eel River. To avoid increasing the base  
9 flood elevation of the floodplain, the bypass design incorporates 1.2 miles of viaduct consisting  
10 of two parallel elevated structures (one for each direction of traffic) spanning the floodplain.  
11 Elevated structures will be constructed in two phases.

12           90.     Because of funding constraints, the Willits Bypass Project is being constructed in  
13 two phases. Phase 1 entails construction of an interim facility consisting of four lanes at the  
14 southern end of the Willits Bypass Project, which taper to a two-lane highway at approximately  
15 500 feet north of the Haehl Creek interchange. Although only two functional lanes will continue  
16 north to the Project limits, the northern interchange for the full four-lane freeway, with all its  
17 consequent impacts, is being constructed in Phase 1.

18           91.     Phase 2 will construct a second 2-lane mile long viaduct and will include minimal  
19 changes to the fill prism and the northern interchange design. Phase 2 is presently unfunded.  
20 Although only the two southbound lanes will be constructed in Phase 1, and although Caltrans  
21 claims that it will implement mitigation for the impacts of Phase 1 as well as advance mitigation  
22 for Phase 2 concurrently with the beginning of Phase 1 construction, the 404 Permit issued in  
23 conjunction with the January 2012 MMP covers only Phase 1 impacts to protected wetlands.  
24 This Complaint addresses the mitigation needs for the entire four-lane bypass (*i.e.*, Phases 1 and  
25 2).

26           92.     For the purpose of this Complaint, bypass refers to the Phase 1 bypass alignment  
27 footprint, which comprises the area disturbed by construction activities and the footprint of  
28 completed structures. Parcels located within the bypass alignment footprint are referred to as the

1 onsite mitigation area throughout this Complaint. Parcels located outside the bypass alignment  
2 footprint that are included in the bypass project's compensatory mitigation package are referred  
3 to as offsite mitigation parcels. Because the bypass alignment footprint passes through several  
4 offsite mitigation parcels (Benbow, Brooke, Ford, Lusher, and Niesen), these locations are  
5 referred to in both onsite and offsite parcel discussions.

6 93. The Willits Bypass Project is a federal undertaking subject to 36 C.F.R. Part 800,  
7 the implementing regulations for Section 106 of the NHPA. The Willits Bypass Project also is  
8 subject to state historic preservation laws and regulations set forth in the California  
9 Environmental Quality Act ("CEQA") (Public Resources Code ["PRC"] §21000 et seq.) and  
10 Public Resources Code § 5024 for state-owned historical resources. The environmental review,  
11 consultation, and any other action required in accordance with applicable federal laws for the  
12 Willits Bypass Project are being, or have been, carried out by Caltrans as part of its NEPA  
13 assignment of federal responsibilities by FHWA, effective on October 1, 2012, and pursuant to  
14 23 U.S.C. § 327.

15 94. As part of the environmental review process, several project alternatives were  
16 developed, and Modified Alternative J1T was selected as the preferred alternative. However,  
17 this alternative was **not** identified as an alternative in the Draft Environmental Impact  
18 Statement/Environmental Impact Report (the "Draft EIS/EIR"). Since publication of the Final  
19 EIS/EIR in December 2006, Modified Alternative J1T has undergone several significant design  
20 revisions. These design revisions to Modified Alternative J1T have important implications for  
21 minimizing impacts on Plaintiffs' historic properties, cultural resources, and sacred sites  
22 encountered during construction activities and on the mitigation lands.

23 95. The depth of planned road construction disturbance within the bypass portion of  
24 the Area of Potential Effects ("APE") ranges from 10 cm (4 in) for topsoil removal to 1.0–6.5 m  
25 (3.28–21.7 ft.) for footings of viaduct bents and 24.4 m (80 ft.) for wick drains. The depth of  
26 planned soil excavations within the mitigation parcels ranges from 0 cm to 1 m (0 in to 3.3 ft.).  
27  
28

1           96.     Despite the request of Plaintiffs during government-to-government consultations,  
2 Defendants have failed to prepare or implement a Post-Review Discovery and Monitoring Plan  
3 (“PRDMP”) to address the identification and management of cultural resources during  
4 construction and other project-related ground-disturbing activities, and in response to concerns  
5 raised during the course of Native American consultation for the Willits Bypass Project. More  
6 specifically, Caltrans has failed to prepare or implement any document that sets forth the  
7 procedures to be followed for newly discovered historic properties, as defined under 36 C.F.R. §  
8 800.16(l)(1), as well as for managing unanticipated or inadvertent effects to known properties.  
9 In other words, Caltrans has no guidance for planning excavations and analyses of recovered  
10 cultural materials specifically for the Willits Bypass Project.

11           97.     Defendants failed in good faith to negotiate, and have completely failed to  
12 implement, a written MOA or Programmatic Agreement with Plaintiffs, which documents how  
13 Defendants will avoid, minimize, or mitigate adverse effects. *Id.* § 800.6. Defendants were  
14 required to fulfill these Section 106 responsibilities “prior to” approving the Project.

15           98.     The Section 106 regulations stress the importance of considering the effects of a  
16 federal project at the earliest possible time during project planning, “so that a broad range of  
17 alternatives may be considered during the planning process for the undertaking.” 36 C.F.R. §  
18 800.I(c). The regulations reiterate the statutory requirement that Section 106 review must be  
19 completed “prior to” the approval of any expenditure of federal funds on the project, and prohibit  
20 actions that may “restrict the subsequent consideration of alternatives to avoid, minimize or  
21 mitigate” the project's adverse effects on historic properties. *Id.* The Section 106 regulations  
22 state that a “[c]hange of the character of the property's use ... that contribute[s] to its historic  
23 significance” is an adverse effect. 36 C.F.R. § 800.5(a)(2)(iv).

24           99.     The only APE ever in place was based only on an evaluation of “cultural  
25 resources” visible on the ground. The evaluation referenced geoarchaeological studies which, in  
26 particular, showed that sediments in much of the APE consist of stratified Holocene deposits that  
27 have **a moderate to high potential for buried archaeological remains**. For the most part,  
28 prehistoric and/or ethnohistoric sites identified within and in the immediate vicinity of the APE

1 consisted of surface and subsurface scatters of flaked stone artifacts, subsurface midden deposits,  
2 and isolated thermal features. In addition, historic-period resources have been recorded and  
3 include logging and/or railroad construction-related sites as well as the remains of homesteads.

4 100. Defendants represented during government-to-government consultations that  
5 Plaintiffs would have tribal representatives or monitors working in a decision making capacity  
6 with Caltrans' consultant archaeological monitor(s). Defendants represented during government-  
7 to-government consultations that the tribal monitors would have independent authority to  
8 investigate the nature and extent of any archaeological finds uncovered during monitoring,  
9 independent authority to make post-review discovery determinations, and independent authority  
10 to halt ground-disturbing activities in any area where the tribal monitor believed historic  
11 properties, cultural resources, and sacred sites were being encountered during construction  
12 activities and on the mitigation lands of the Willits Bypass Project.

13 101. Contrary to Defendants' representations, Caltrans has no tribal representatives or  
14 monitors with independent authority working with Caltrans' consultant archaeological  
15 monitor(s). Plaintiffs' tribal monitors have no independent authority to investigate the nature  
16 and extent of any archaeological finds uncovered during monitoring; no independent authority to  
17 make post-review discovery determinations; and no independent authority to halt ground-  
18 disturbing activities in any area where the tribal monitor believed historic properties, cultural  
19 resources, and sacred sites were being encountered during construction activities and on the  
20 mitigation lands of the Willits Bypass Project. Final authority for all such decisions remains  
21 with Caltrans, a true case of the fox guarding the henhouse!

22 102. Also, Caltrans has failed to develop guidelines for the proper treatment of historic  
23 properties that may be uncovered, or of unanticipated effects to known properties that may occur,  
24 during the course of Project construction. "Historic properties," as defined by the Advisory  
25 Council on Historic Preservation, include "any prehistoric or historic district, site, building,  
26 structure, or object included in, or eligible for inclusion in, the National Register of Historic  
27 Places maintained by the Secretary of the Interior." 36 C.F.R. § 800.16(l)(1). The eligibility for  
28 inclusion in the National Register of Historic Places is determined by applying the following

1 criteria, developed by the National Park Service as per provision of the NHPA: The quality of  
 2 significance in American history, architecture, archaeology, engineering, and culture is present in  
 3 districts, sites, buildings, structures, and objects that possess integrity of location, design, setting,  
 4 materials, workmanship, feeling, and association and

5 (a) That are associated with events that have made a significant contribution  
 6 to the broad patterns of our history; or

7 (b) That are associated with the lives of persons significant in our past; or

8 (c) That embody the distinctive characteristics of a type, period, or method of  
 9 construction, or that represent the work of a master, or that possess high artistic values, or  
 10 that represent a significant and distinguishable entity whose components may lack  
 11 individual distinction; or

12 (d) That have yielded, or may be likely to yield, information important in  
 13 prehistory or history. 36 C.F.R. § 60.4.

14 103. For CEQA-compliance purposes, the State of California's Public Resources Code  
 15 establishes the definitions and criteria for "historical resources," which require similar  
 16 management to what Section 106 of the NHPA mandates for historic properties. CEQA  
 17 guidelines state that the term "historical resource" applies to any resource listed in or determined  
 18 to be eligible for listing in the California Register of Historical Resources, included in a local  
 19 register of historical resources, or determined to be historically significant by the Lead Agency.  
 20 14 C.C.R. § 15064.5(a)(1)-(3). The criteria for listing in the California Register are essentially  
 21 similar to those for the National Register (14 C.C.R. § 15064.5(a)(3)), yet Caltrans has failed to  
 22 apply the determinations of National Register-eligibility to its findings of historical significance  
 23 under CEQA.

24 104. Given the ubiquitous presence of lithic artifacts across Little Lake Valley, and  
 25 Defendants' representations during government-to-government consultations, there should be  
 26 extensive tribal archaeological monitoring efforts during ground-disturbing activities in the  
 27 Willits Bypass Project. For example, tribal monitors should be present for all ground-disturbing  
 28 activities so that they can identify discrete archaeological features and/or deposits (*e.g.*, hearths,

1 middens, or artifact-laden sediments such as surface and subsurface concentrations of lithic  
2 materials) that can provide important information on human lifeways in the Little Lake Valley  
3 during the prehistoric and/or historic periods. Based on Defendants' representations to Plaintiffs,  
4 the issues where tribal monitors are crucial pertain to chronology, settlement and land-use  
5 patterns, subsistence, and sociopolitical complexity.

6 105. Contrary to both federal and state cultural resource protection laws and  
7 regulations, Caltrans has failed to make reasonable efforts to avoid, minimize, or mitigate  
8 adverse effects to archaeological sites within the project area and mitigation lands of the Willits  
9 Bypass Project. By way of example, on February 18, 2015, while in government-to-government  
10 consultation with Caltrans, representatives of the Coyote Valley Tribe were told that Caltrans:

- 11 a. will conduct no more surveys in the mitigation parcels; and
- 12 b. will only do data extraction, rather than identification, avoidance, or  
13 protection, of sites that Caltrans encounters in the course of future construction and other  
14 ground disturbing activities in the mitigation lands.

15 106. Plaintiffs strongly objected to this proposed process of data recovery only. Such a  
16 process will not provide for adequate surveying and protection of Plaintiffs' ancestral sites.  
17 Plaintiffs explicitly stated that Defendants had failed in good faith to negotiate, and had  
18 completely failed to implement, a written MOA or Programmatic Agreement, which documents  
19 how Defendants will avoid, minimize, or mitigate adverse effects. *Id.* § 800.6. Plaintiffs also  
20 notified Defendants that Defendants were required to fulfill these Section 106 responsibilities  
21 "prior to" approving the Project. The regulations reiterate the statutory requirement that Section  
22 106 review must be completed "prior to" the approval of any expenditure of federal funds on the  
23 project, and prohibit actions that may "restrict the subsequent consideration of alternatives to  
24 avoid, minimize or mitigate" the project's adverse effects on historic properties. *Id.* The Section  
25 106 regulations state that a "[c]hange of the character of the property's use ... that contribute[s] to  
26 its historic significance" is an adverse effect. 36 C.F.R. § 800.5(a)(2)(iv).

1           107. On October 28, 2015, the Sherwood Valley Band of Pomo took a similar position  
2 that, after 18 months of effort, Caltrans has indefinitely stalled, if not altogether abandoned, the  
3 finalization of a MOA or Programmatic Agreement related to the Willits Bypass Project.

4           108. Contrary to their obligations under the NHPA, Defendants have completely  
5 disregarded their responsibilities and have failed to sign or implement an MOA or Programmatic  
6 Agreement. While Defendants have circulated various versions of a Draft Programmatic  
7 Agreement, they have yet to execute either an MOA or a Programmatic Agreement.

8           109. Another example is the use of tribal monitors. Contrary to Defendants’  
9 representations during government-to-government consultations, Caltrans unilaterally decided  
10 that Caltrans will have the sole discretion to determine the level of participation of tribal  
11 monitors on site at the Willits Bypass Project and the wetlands creation areas. Since the  
12 commencement, there is a grossly inadequate number of tribal monitors to oversee activities of  
13 Caltrans that are causing adverse impact to ancestral cultural sites.

14           110. For example, it was not until September 10, 2015, that Plaintiffs learned of a  
15 Contract Change Order to perform heavy treatment on 84 acres of mitigation lands. Caltrans  
16 defined “heavy treatment” as consisting of “scraping as much as 6 inches of topsoil to remove  
17 non-native plants and seeds.”

18           111. In the September 10, 2015 email, Caltrans indicated that this change “includes a  
19 number of parcels”; however, Caltrans failed to indicate which parcels would be affected by the  
20 change and the likelihood of encountering ancestral cultural sites on those parcels. The  
21 September 10, 2015 email also stated that Caltrans has been in negotiations with the Army Corps  
22 of Engineers with regards to mitigation requirements on these parcels. Despite months of  
23 government-to-government consultations that were supposedly in good faith, it is troubling that  
24 Plaintiffs had no notice of these negotiations.

25           112. This problem is exacerbated because Plaintiffs have stated that mitigation plan  
26 requirements should not be used as an excuse to avoid properly protecting the numerous tribal  
27 historic properties, cultural resources, and sacred sites that have been discovered in the Project  
28 area and the Mitigation parcels. Yet Caltrans is now on record as stating that the mitigation

1 requirements will result in destruction of numerous historic properties, cultural resources, and  
2 sacred sites that have been discovered in the Project area and the Mitigation parcels, which  
3 destruction could be avoided if the mitigation requirements were changed. As has been  
4 consistent throughout the history of the Willits Bypass Project, Tribal concerns have been  
5 ignored.

6 113. Further, the tribal monitors have been apprised by the construction contractor,  
7 Flatiron Construction Corporation, that Flatiron has commenced working night shifts on the  
8 Willits Bypass Project, without the presence of tribal monitors to oversee night time activities.  
9 In the past, site CA MEN 3571 was destroyed during Flatiron's night time earth moving  
10 activities without the presence of tribal monitors. The professed reason offered to tribal monitors  
11 as to why they are being excluded is "safety concerns." Yet Defendants refuse to provide the  
12 reasons why it is safe for workers to perform ground disturbing activities, but unsafe for tribal  
13 monitors, who have been trained by Caltrans in safety practices, to observe that same activity.

14 114. Based on the representations of Defendants during government-to-government  
15 consultations, Plaintiffs were to be provided with:

16 a. An analysis and consultation of whether or not this work will have adverse  
17 effects on any known archaeological ESA's and how, should this be the case, the  
18 requirements of 36 C.F.R. Part 800 are being met;

19 b. Construction layouts, grading, and planting sheets for each of the parcels  
20 which include illustrations of known archaeological site boundaries; and

21 c. The protocol employed in the field with regard to inadvertent discoveries  
22 of previously unknown archaeological resources in the absence of an agreed upon,  
23 executed PRDMP Plan for this Project.

24 115. Given the unacceptable number of tribal monitors, it is completely objectionable  
25 for Caltrans to diminish the hours of the remaining tribal monitors to 5 hours a week during the  
26 winter. Such a serious reduction in tribal monitors would require Plaintiffs to rely on  
27 determinations by Caltrans alone of what should be deemed a culturally significant site eligible  
28 for listing on the NRHP.



1           116. Based on historical dealings, Plaintiffs have reason to believe Caltrans will not  
2 exercise good faith in the identification, protection, and avoidance of culturally significant  
3 ancestral sites. Caltrans has already arbitrarily skewed the professional standards used by  
4 archaeologists in California concerning the concentration of lithics that qualifies for the  
5 designation of a site as eligible for listing. Caltrans has drastically deviated from the  
6 professionally established norm and arbitrarily made up its own rules after the discovery of  
7 numerous ancestral sites of Plaintiffs that were identified after construction began.

8           117. Another example of Caltrans' bad faith negotiation technique with Plaintiffs is  
9 Caltrans' insistence on complete confidentiality concerning *any* information about historic  
10 properties, cultural resources, and sacred sites, as well as requiring a waiver of sovereign  
11 immunity and a waiver of Plaintiffs' ability to bring legal action against Caltrans. There is no  
12 federal requirement for Plaintiffs to sign a Confidentiality Agreement pursuant to 36 C.F.R. Part  
13 800. The decision of whether to waive sovereign immunity and sign is discretionary for each  
14 Plaintiff. Although Plaintiffs were willing to follow federal and state law regarding the  
15 confidentiality of site information, Plaintiffs were and are unwilling to be prohibited from  
16 discussing Caltrans' numerous problems with the public and the press. The insistence by  
17 Caltrans on an overly broad Confidentiality Agreement was a clear attempt to use site protection  
18 laws to silence Plaintiffs and their ability to advocate for the protection of their cultural ancestral  
19 sites.

20           118. Because Plaintiffs have previously refused to sign the Confidentiality Agreement,  
21 exercising their rights under federal law, Plaintiffs were severely penalized by Caltrans,  
22 including being denied access to important information on Project redesign for the Northern  
23 Interchange. Such harsh retribution by Caltrans was but one of many obstacles to meaningful  
24 government to government consultation Plaintiffs have encountered in seeking to protect their  
25 ancestral cultural sites.

26           119. There also has been a total failure to properly consult with Plaintiffs. In the course  
27 of their administration of this Project, both Caltrans and the Army Corps of Engineers (who has  
28 jurisdiction over the wetlands) have failed to comply with the standards of 36 C.F.R. § 800.2(B):

1 “Consultation with Indian Tribes should be conducted in a sensitive manner respectful of Tribal  
2 sovereignty.” Moreover, these agencies also violated 36 C.F.R. § 800.2(C): “Consultation with  
3 an Indian Tribe must recognize the government to government relationship between the Federal  
4 government and Indian Tribes. The Agency **shall** consult with the representatives designated or  
5 identified by the Tribal government.” (Emphasis added). Pursuant to 36 C.F.R. § 800.2(C)  
6 “Consultation with an Indian Tribe must recognize the government to government relationship  
7 between the Federal government and Indian Tribes. The Agency **shall** consult with the  
8 representatives designated or identified by the Tribal government.” (Emphasis added).

9 120. Plaintiff Coyote Valley Tribe sent two requests for government-to-government  
10 consultation to the Army Corps of Engineers, supported by two Tribal Council resolutions.  
11 Without the courtesy of an explanation, the Army Corps of Engineers failed to respond. As a  
12 result, in order to focus attention of the this crucial issue, members of the public and the Tribe  
13 were required to participate in a non-violent protest (facing the risk of arrest) in front of the San  
14 Francisco Office of the Army Corps of Engineers. The protest finally compelled the Army  
15 Corps of Engineers to live up to its obligations under General Condition 3 of the 404 Permit for  
16 the Project. General Condition 3 required the Army Corps of Engineers to not only participate in  
17 government to government consultations with Plaintiffs, but to facilitate consultations between  
18 Plaintiffs, on the one hand, and Caltrans and the FHWA, on the other hand.

19 121. In May 2015, Defendants refused and have continued to refuse to engage in face-  
20 to-face government-to-government consultation with Plaintiffs.

21 122. In short, Plaintiffs’ efforts at government-to-government consultation have not  
22 been met with good faith by Defendants.

23 **C. A SUPPLEMENTAL EIS SHOULD BE CREATED**

24 123. In the 2006 EIR/EIS for the Willits Bypass Project, Caltrans only identified one  
25 tribal archaeological site. An extremely inadequate archaeological investigation by Caltrans led  
26 to this conclusion. The surveys conducted for the 2006 EIR/EIS by Caltrans were conducted in  
27 alluvial wetlands in the spring when the grasses were high and consisted only of surface view  
28

1 based surveys. While surveying, the individuals conducting the survey failed to put a trowel in  
2 the soil at any point!

3 124. Surface views were taken at 50 meter transits. An appropriate archaeological  
4 survey for lands designated with “a moderate to high probability of encountering Native  
5 American gravesites” is 15 to 20 meter transits at the maximum with shovel tests. Shovel tests  
6 should have been performed because of the soil sedimentation that accumulated over many years  
7 in the Little Lake Valley wetlands.

8 125. Further, since the EIR/EIS was approved in 2006, thirty (30) culturally significant  
9 sites eligible and assumed eligible for listing on the NRHP in the Bypass alignment and  
10 Mitigation parcels have been discovered. Project approval was based on the assumption that  
11 there was only 1 site; since that time, the location of an additional 30 sites has shown the 2006  
12 EIR/EIS for the Willits Bypass Project was fundamentally flawed. Defendants failed to disclose  
13 new and potentially significant information and failed to circulate a Supplemental EIS, thus  
14 violating the most fundamental principle of NEPA: the disclosure of impacts.

15 **1. History of Sites Identified by Caltrans Subsequent to the EIS/EIR**  
16 **Approval in 2006**

17 126. Subsequent to the 2006 EIS/EIR approval and prior to commencement of  
18 construction activities, Caltrans discovered the following sites during implementation of a Buried  
19 Site Testing Program. Caltrans failed to follow CEQA and NEPA protection efforts for these  
20 sites. Surveying of these sites and the establishment of ESA’s for these sites did not occur until  
21 after commencement of construction. These sites are:

- 22 • CA-MEN-3567 and determined to be assumed eligible for listing on the  
23 NRHP;
- 24 • CA-MEN-3568 and determined to be assumed eligible for listing on the  
25 NRHP;
- 26 • CA-MEN 3569 and determined to be assumed eligible for listing on the  
27 NRHP;
- 28 • CA-MEN-3570 and determined to be assumed eligible for listing on the  
NRHP;

- 1 • CA-MEN-3571 and determined to be assumed eligible for listing on the
- 2 NRHP;
- 3 • CA-MEN-3594 and determined to have a Finding of No Effect with
- 4 Standard Conditions based on the condition that no work occur outside of
- 5 a vertical ESA, as well as outside of the area tested; and
- 6 • CA-MEN- 5386/H Found ineligible for listing on the NRHP and SHPPO
- 7 concurred.

## 2. The Mitigation and Monitoring Plans

8 127. In 2012 and 2014, Caltrans issued mitigation and monitoring plans (“MMPs”) that  
 9 were supposed to decrease the net harm the Bypass caused the plants, animals, and water in the  
 10 Little Lake Valley and supposed to improve the existing wetlands in the Little Lake Valley  
 11 sufficiently to compensate for the destruction of approximately 80 acres of functioning wetlands.  
 12 These MMPs, however, call for substantial environmental impacts of their own on Valley lands  
 13 reserved for mitigation projects (*e.g.*, construction of new wells and water pipes for cows grazing  
 14 on the parcels; topsoil disruption to replace existing vegetation with more wetlands-friendly  
 15 native plants; the excavation of over 50 acres of seasonal wetlands and pasture for the purpose of  
 16 wetland “creation”).

17 128. Under the MMPs, Caltrans supervised roughly 200 acres of earth-moving activity,  
 18 with the disruption ranging from six inches to several feet below the surface. This is in an area  
 19 of the Little Lake Valley known to have housed more than 1,600 Pomo in nine villages up until  
 20 the 1830s. In spite of the clear likelihood that these ancestral lands hold Pomo artifacts and,  
 21 quite possibly, Native American human remains:

- 22 a. Caltrans did not consider the impact of mitigation on such sites in the
- 23 2012 MMP;
- 24 b. The issue received a cursory and vague one-paragraph in the 2014 MMP
- 25 (a document that is hundreds of pages long);
- 26 c. Caltrans failed to address this glaring issue in its 2010 and 2011 Re-
- 27 Validation documents.

1           129. Caltrans willfully ignored the uncontested fact that certain sites in harm's way  
2 have been documented since 2011. The agency destroyed one such site, CA-MEN-3571, in the  
3 summer of 2013, when it scraped it of topsoil, skewered the site with scores of wick drains, and  
4 finally covered the whole site with 10 feet of fill dirt and, during the summer of 2015, another 20  
5 feet of fill dirt was added on top. This destruction was done even though the Sherwood Valley  
6 Band of Pomo Indians had been advising Caltrans for weeks that this was a known site on the  
7 state archaeological maps. Subsequent to the total destruction of this invaluable site, Caltrans  
8 falsely claimed it had "mis-mapped" the site in its construction plans. In spite of condemnation  
9 from the National Congress of American Indians and local members of Congress, Caltrans then  
10 proceeded to damage another known site in June 2014, digging a ditch through a marked-off site  
11 in a mitigation parcel.

12                           **3. The Need for a Supplemental EIS**

13           130. Defendants have paid only lip service to the local Tribes, whose cultural resources  
14 are impacted by this Project, by engaging in hollow government to government consultations.  
15 During these face-to-face consultations, the Tribes have repeatedly requested that a  
16 Supplemental EIS be prepared given the substantial number of sites discovered since the  
17 EIS/EIR was approved in 2006. One example are March 17, 2015 letters from the Coyote Valley  
18 Tribe to the FHWA, Caltrans and the Army Corps providing a recap of issues raised in  
19 government to government consultation, including the ongoing request for a Supplemental EIS.  
20 Pursuant to 23 CFR 771.30 (a)(2):

21                           A draft EIS, final EIS or supplemental EIS may be supplemented at any  
22 time. An EIS **shall** be supplemented whenever the Administration  
23 determines, that:

24                           (2) New information or circumstances relevant to the environmental  
25 concerns and bearing on the proposed action could result in significant  
26 impacts not evaluated in the EIS.

27                           (Emphasis added).

28           131. There have been other situations where Caltrans prepared a Supplemental EIS for  
this Project. For example, when one grass type was left out in the Final EIS/EIR, Caltrans  
prepared a Supplemental EIS. Without explanation, Caltrans has failed to explain why a

1 Supplemental EIS is unnecessary for the many ancestral Pomo cultural sites identified by  
2 Caltrans in the APE for the Project and the Project's mitigation parcels subsequent to the  
3 EIS/EIR approval in 2006. This is a troubling double standard. While Plaintiffs recognize that  
4 biologic protections are an essential part of the Mitigation Plans, the protection of Native  
5 American cultural resources was left unaddressed in these plans. In fact, Caltrans is now using  
6 the biologic protection components of the Mitigation Plans as a justification as to why it cannot  
7 avoid and protect culturally significant Native American ancestral sites.

#### 8 **4. Failure to Perform Surveys**

9 132. Whereas grossly inadequate surveys were done in the EIS process, absolutely no  
10 archaeological surveys were done on the Mitigation properties during the CEQA/NEPA  
11 evaluations that went into the Final EIS/EIR approval for the Project. Surveys at that time were  
12 only conducted for the footprint or APE of the Project and were limited to inadequate surface  
13 surveys. An EIS addressing the avoidance and protection of culturally significant ancestral  
14 Native American sites was never prepared for the Project's mitigation parcels. The requirements  
15 of the Mitigation plan for the project involve substantial ground disturbance and soil removal  
16 activities, including the removal of invasive weeds via bulldozer blade and the digging of water  
17 retention areas. In the Mitigation parcels most of the sites that have been identified subsequent  
18 to construction and mitigation efforts began were discovered by bulldozer blade.

#### 19 **D. CALTRANS' FAILURE TO PROTECT KNOWN SITES**

20 133. Based on studies referenced at p. 6 of the June 2014 Draft Post Review Discovery  
21 and Monitoring Plan 01-MEN-101 and in the most current draft Programmatic Agreement and  
22 PRDMP, at least as early as 2011, Caltrans was aware of culturally significant ancestral Native  
23 American sites both on the Bypass footprint and in the mitigation properties through a  
24 studies/literature search.

25 134. In the June 2014 PRDMP at p. 6, 14 known sites were identified in the footprint  
26 of the Willits Bypass: Two which were historical and 10 of which were designated eligible or  
27 assumed eligible for listing on the NRHP.  
28

1 135. On page 15 of the June 2014 PRDMP, there are 6 known sites listed in the  
2 mitigation lands, 5 of which are archaeological sites.

3 136. Based on the dates of the referenced literature/studies pertaining to the above  
4 known sites in the June 2014 PRDMP, many of the site locations were known or should have  
5 been known by Caltrans prior to construction in 2013. For the known mitigation sites, the  
6 referenced literature/studies even go back to 2009.

7 137. During the time frame between the EIS/EIR approval in 2006 and commencement  
8 of construction activities on the Project, Caltrans discovered 6 additional sites as part of a Buried  
9 Site Testing Program, Caltrans intentionally failed to undertake any CEQA or NEPA compliance  
10 efforts regarding these 6 additional sites, such as surveying and establishing ESA's for their  
11 protection. Finally, Caltrans failed to notify any representative of Plaintiffs about the discovery  
12 of these 6 additional sites.

13 **1. List of Sites Discovered Subsequent to EIS/EIR Approval**

14 138. Attachment A to the April 10, 2015 Draft Programmatic Agreement circulated by  
15 Caltrans identifies areas in the Bypass alignment that were discovered subsequent to the EIS/EIR  
16 approval, such as an ancestral site deemed eligible for listing on the NRHP agreed upon by  
17 consensus in 2005, 10 additional sites assumed eligible for listing, and 1 site yet to be  
18 determined.

19 139. Attachment B to the April 10, 2015 Draft Programmatic Agreement circulated by  
20 Caltrans identifies 19 sites in the mitigation parcels.

21 140. Caltrans' April 10, 2015 Draft Programmatic Agreement identifies the following  
22 sites:

23 a. **Known Sites In the Bypass Alignments:**

24 [All but one of these sites was discovered or identified by Caltrans  
25 subsequent to the EIS/EIR approved for the Project in 2006].

- 26 • MEN-2645/H Eligible for listing on the NRHP;  
27 • MEN-3567 (SRI-1) Assumed eligible for listing on the NRHP;  
28 • MEN 3658 (SRI-2) Assumed eligible for listing on the NRHP;

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- MEN 3569 (SRI-3) Assumed eligible for listing on the NRHP;
- MEN 3570 (SRI-4) Assumed eligible for listing on the NRHP;
- MEN 3571 (SRI-5) Assumed eligible for listing on the NRHP;
- MEN 3594 (SRI 6) Assumed eligible for listing on the NRHP;
- MEN 3635 (PRD 1) Assumed eligible for listing on the NRHP;
- MEN 3636 (PRD 2) Assumed eligible for listing on the NRHP;
- MEN 3637 (PRD 3) Assumed eligible for listing on the NRHP;
- MEN 3638 (PRD 4) Assumed eligible for listing on the NRHP;
- Semphor-1 Assumed eligible for listing on the NRHP;
- Niesen-1 Assumed eligible for listing on the NRHP;

b. **Known Sites in the Willits Mitigation parcels:**

- MEN-1324 Assumed eligible for listing on the NRHP;
- MEN-2623 Assumed eligible for listing on the NRHP;
- MEN-2624 Assumed eligible for listing on the NRHP;
- MEN-2647/H Assumed eligible for listing on the NRHP;
- Benbow-1 Assumed eligible for listing on the NRHP;
- Benbow-2 Assumed eligible for listing on the NRHP;
- Benbow-3 Assumed eligible for listing on the NRHP;
- Taylor-1 Assumed eligible for listing on the NRHP;
- Watson-2 Assumed eligible for listing on the NRHP;
- Wildlands-1 Assumed eligible for listing on the NRHP;
- Wildlands-2 Assumed eligible for listing on the NRHP;
- Frost-1 Assumed eligible for listing on the NRHP;
- Frost-2 Assumed eligible for listing on the NRHP;
- Plasma-1 Assumed eligible for listing on the NRHP;
- Plasma -2 Assumed eligible for listing on the NRHP;
- Plasma-3 Assumed eligible for listing on the NRHP;
- Plasma-4 Assumed eligible for listing on the NRHP;



- Plasma-7 Assumed eligible for listing on the NRHP; and
- Plasma-8 Assumed eligible for listing on the NRHP.

141. What is conspicuously absent from this list (or in any other portion of the 2015 drafts of the Programmatic Agreement or PRDMP) is the date Caltrans discovered the sites. This material deficiency is probably due to Caltrans' reluctance to draw attention to the sites discovered in the Buried Site Testing Program, subsequent to EIS/EIR approval and prior to construction. Remember: Caltrans undertook no legally required CEQA protection measures prior to the start of ground disturbing activities.

142. To date at least 30 culturally significant ancestral Pomo sites have been found that were not identified prior to the Final EIS/EIR approval in 2006. Moreover, as wetland creation activities continue, Plaintiffs have reasonable grounds to believe that more ancestral sites are being and will be encountered. The number of archaeological sites spread throughout the Project area and mitigation parcels is so extensive that the Little Lake Valley should be designated as an entire archaeological district of sites. In a September 19, 2013 letter from Carol Roland-Nawi PhD, State Historic Preservation Officer, to Annmarie Medin, SHPO Chief, Cultural Studies, Ms. Roland-Nawi stated: "There is the real potential that the valley may become an archaeological district as more information emerges."

143. 29 ancestral sites have been discovered since the EIS/EIR was approved in 2006, yet none of the agencies involved in this Project have suggested a Supplemental EIS is justified. Pursuant to 23 CFR 771.30 (a)(2), a Supplemental EIS is mandatory. Since the initiation of government-to-government consultations over a year ago, Plaintiffs have requested that Caltrans, the FHWA, and the Army Corps of Engineers issue a Supplemental EIS. To date Plaintiffs have received absolutely no response to this request. Plaintiffs have been provided with no justification from any of these agencies as to why a Supplemental EIS should not be undertaken for the Mitigation parcels. This request is particularly justified given that a Supplemental EIS is required by the MMP's.

1                   2.       **Caltrans Has Used the Mitigation Plan to Avoid Protection of**  
2                                   **Ancestral Cultural Sites and Has Limited its Efforts to Data Recovery**  
3                                   **Only**

4                   144.    In the April 10, 2015 Draft Programmatic Agreement, Caltrans stated it will  
5                   conduct data recovery investigations *only* on the following sites in the Willits Bypass Mitigation  
6                   parcels: Plasma 1, Plasma 7, Plasma 8, Wildlands 1, and Watson 2. The justification for limiting  
7                   its activities to data recovery only, as opposed to site avoidance and protections, is:

8                                   Should wetlands creation requirements change, Caltrans will make every  
9                                   effort to avoid further affecting these properties and will determine if  
10                                  establishing additional ESA's is warranted to protect the properties.

11                   145.    However, later in the same April 10, 2015 Draft Programmatic Agreement,  
12                   Caltrans deleted the following paragraph which had been contained in a previous draft:

13                                  Caltrans has completed archaeological identification, investigations at the  
14                                  biological mitigation parcels that are within the APE for this Undertaking  
15                                  (See attachment B for list of properties). In the event that additional  
16                                  potential historic properties are found that may be affected during  
17                                  implementation of the mitigation requirements, Caltrans shall make every  
18                                  effort to alter the biological mitigation activities so as to avoid these  
19                                  properties, including establishing additional ESA's under Stipulation II.B  
20                                  If avoidance of adverse effects is not possible, Caltrans will follow the  
21                                  PRDMP that is attachment C to this [Programmatic Agreement].

22                   Thus, Caltrans has used the current requirements of the mitigation plan as the reason to avoid  
23                   protection of ancestral cultural sites and has limited its efforts to data recovery only.

24                   3.       **Caltrans Revised The Rules On The Amount Of Lithic**  
25                                   **Concentrations Used To Signify The Presence Of Potentially**  
26                                   **Culturally Significant Sites And The Perimeters Of Its Data Recovery**  
27                                   **Efforts To Avoid Further Site Identification And Protection**

28                   146.    Lithic concentration ratios were changed midstream by Caltrans after construction  
commenced to avoid having to identify sites as culturally significant under CEQA and NEPA

147.    During government to government consultations in March 2015, Plaintiffs  
brought to the attention of the FHWA and the Army Corps that Tim Keefe, the prior Caltrans  
project archaeologist, had arbitrarily upped the concentration ratio of artifacts necessary to define  
an archaeological site for the entire Project. The concentration ratios were raised from 3 to 5  
within 100 square meters, which is the established state professional standard, up to 20 to 25

1 within an area of 20 square meters. Plaintiffs believe this radical shift was implemented solely to  
2 thwart the identification and protection of newly discovered ancestral sites. When caught,  
3 Caltrans removed the revised standard from drafts of the Programmatic Agreement. However,  
4 the improper standard is the one being used on the ground; it is merely not mentioned in the draft  
5 Programmatic Agreements.

6 148. Plaintiffs request that artifact concentration ratios return to the commonly  
7 accepted statewide professional archaeological site identification standard. While there may be  
8 room for some professional discretion, such a substantial increase project wide is appalling.

9 149. Plaintiffs did not agree with the assertion in a prior draft Programmatic  
10 Agreement that this increased ratio for site identification criteria was crafted by Plaintiffs and  
11 Caltrans. Caltrans made the following false statement in the Draft Programmatic Agreement:  
12 “Caltrans is adopting a more flexible set of criteria developed in consultation with tribal  
13 representatives.” Plaintiffs never agreed in government-to-government consultation to this new,  
14 arbitrarily imposed criteria. In fact, no California Tribe has agreed to this criteria.

15 150. Bore hole/auger testing in data recovery efforts deviates from the state  
16 professionally established norm for archaeologists and is being used by Caltrans to avoid  
17 identifying sites as culturally significant under CEQA and NEPA

18 151. The established process in statewide archaeology for control unit bore sampling  
19 testing is 3 meters between bore holes. Caltrans has arbitrarily shifted this standard to 10 meter  
20 spreads. Currently, data recovery efforts are ongoing in the Niessen and Watson mitigation  
21 parcels employing this arbitrarily and unilaterally imposed criteria. Caltrans’ purpose behind  
22 using this criteria is to avoid site identification. In fact, there is no data recovery plan for the  
23 Niessen and Watson mitigation parcels as was previously done for PRD 4. A general approach  
24 to data recovery is in the PRDMP at p. 56, but the document does not contain any site specific  
25 plans prepared in consultation with the local Tribes as was done previously for PRD 4. Caltrans  
26 has indicated that it is feeling great pressure to increase its mitigation wetlands creation efforts;  
27 but Caltrans should not use its tardiness in complying with mitigation requirements to deviate  
28 from adequate efforts to identify and protect ancestral cultural sites.

1           **E. TRIBAL MONITORS**

2           152. As a result of the limited information that has been provided to Plaintiffs by  
3 Caltrans, Plaintiffs have learned that, in the event that historic properties, cultural resources, and  
4 sacred sites are found that may be affected during implementing mitigation requirements,  
5 Caltrans will no longer make efforts to alter the biological mitigation activities so as to avoid  
6 these properties. Plaintiffs are extremely concerned of the results of this failure by Caltrans,  
7 especially given the statements of Caltrans' archaeologist in government-to-government  
8 consultation that:

9           a. During ground disturbance activities, there will be no further efforts  
10 undertaken to protect or avoid culturally significant sites within the mitigation parcels;

11           b. Caltrans will only do data extraction from these sites as the sites are  
12 encountered and not survey the sites to establish any boundaries; and

13           c. Caltrans is committing to site identification only after grading is  
14 completed.

15           153. Further, Caltrans has unilaterally determined that data recovery efforts only will  
16 be conducted on certain parcels of land in the wetlands creation areas. Plaintiffs should not have  
17 to have their ancestral sites in the mitigation parcels destroyed via data recovery in order for  
18 Caltrans to obtain mitigation credits for the wetlands that Caltrans has destroyed.

19           154. Caltrans has expressed frustration with the "ubiquitous presence" of  
20 archaeological artifacts in the mitigation lands. Caltrans' frustration with cost overruns and  
21 delays due to encountering so many previously unknown culturally significant sites should not  
22 be allowed to serve as an excuse to continue to fail to completely identify and protect Plaintiffs'  
23 ancestral sites in the Project area and mitigation creation areas under the protection of federal  
24 and state laws.

25           155. **Plaintiffs' ancestral heritage should not be left unprotected in the name of**  
26 **expediency to complete the Willits Bypass Project.**

27           156. Caltrans has previously stated its intent to curate artifacts in the County Museum  
28 as opposed to returning artifacts to Plaintiffs for curation. There is nothing in the Secretary of

1 Interior's Standards and Guidelines for Archaeology and Historic Preservation which would  
2 prohibit Plaintiffs from assuming curation of the artifacts discovered in the Willits Bypass  
3 Project.

4 157. If an archaeological feature or deposit has the potential to inform on one or more  
5 of these topics or it is of a relatively unique nature and can provide insights into topics not  
6 addressed in the research design, Caltrans must involve tribal monitors and consult with the  
7 tribal representatives in every aspect of the post-review discovery to determine if the feature or  
8 deposit is eligible for listing in the National Register as per 36 C.F.R. § 800.13(c) and, thus,  
9 constitutes a historic property. **Contrary to Defendants' representations during government-**  
10 **to-government consultations, to date, Caltrans has failed to involve the tribal monitors and**  
11 **consult with the tribal representatives on this important aspect of construction.** If post-  
12 review discoveries are made during construction, Caltrans must involve tribal monitors and  
13 consult with the tribal representatives to avoid or minimize the impacts to the property. Caltrans  
14 does not have a cultural resource policy in place to avoid and, if avoidance is not possible, to  
15 minimize adverse effects of the Willits Bypass Project upon significant cultural resources.

16 158. The purpose of tribal monitoring and consulting with the tribal representatives of  
17 ground-disturbing activities within the Willits Bypass Project is to ensure proper treatment of  
18 historic properties, cultural resources, and sacred sites uncovered during construction as well as  
19 management of unanticipated or inadvertent effects to known properties. Defendants have failed  
20 to implement any appropriate measures to avoid or lessen significant impacts to known and/or  
21 unknown properties during implementation of the Willits Bypass Project.

22 159. Defendants have not provided tribal monitors with timely locational information  
23 on ground disturbing activities that could adversely impact historic properties, cultural resources,  
24 and sacred sites during the course of Project construction. Specifically, Defendants have not  
25 provided tribal monitors with timely locational information on ground disturbing activities at or  
26 near known ESAs during the course of Project construction.

27  
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1           160. Contrary to Defendants' representations during government-to-government  
2 consultations with Plaintiffs, Defendants have failed to provide for at least one tribal monitor  
3 will be on the Project site during ground-disturbing activities in areas of native soils that may  
4 contain cultural deposits. In fact, if ground-disturbing activities are occurring simultaneously in  
5 different areas of the Project, Defendants prevent tribal monitors from observing any of these  
6 ground-disturbing activities absent permission by Caltrans. Caltrans does not inform tribal  
7 monitors of the locations of ground-disturbing activities and tribal monitors are not allowed to  
8 decide where they should expend their efforts. Tribal monitors must be allowed to observe all  
9 ground-disturbing activities in areas of native soils that may contain cultural deposits. In fact,  
10 tribal monitors can only participate at locations where they are specifically assigned by Caltrans.

11           161. Contrary to Defendants' representations during government-to-government  
12 consultations with Plaintiffs, Defendants have failed to provide tribal monitors with a current and  
13 accurate APE map depicting the locations of Environmentally Sensitive Areas (*i.e.*, known  
14 archaeological sites), nor have Defendants provided tribal monitors with global positioning  
15 system units containing information on ESA boundaries.

16           162. Contrary to Defendants' representations during government-to-government  
17 consultations with Plaintiffs, Caltrans has failed to provide tribal monitors with timely  
18 information on construction scheduling and procedures as these become available. As discussed  
19 above, it was not until September 10, 2015, that Plaintiffs learned of a Contract Change Order to  
20 perform heavy treatment on 84 acres of mitigation lands.

21           163. Contrary to Defendants' representations during government-to-government  
22 consultations with Plaintiffs, tribal monitors are not allowed to review archaeological or  
23 construction field notes or logs of observations and other pertinent information obtained for  
24 ground-disturbing activities in areas of native soils that may contain cultural deposits.

25           164. Contrary to Defendants' representations during government-to-government  
26 consultations with Plaintiffs, tribal monitors do not have the authority to immediately halt  
27 construction at specific locations should an archaeological feature and/or deposit, including  
28 human remains, be encountered in non-fill sediments at those locations.

1           **F.       EFFORTS TO PROTECT ANCESTRAL SITES**

2           165.    On June 4, 2013, the Coyote Valley Tribe wrote Charles Felder, District 1  
3 Director of Caltrans, to request government-to-government consultation with Caltrans regarding  
4 the Willits Bypass Project. The June 4 Letter requested immediate government-to-government  
5 consultation to address the Coyote Valley Tribe's concern for the protection of ancestral cultural  
6 sites located in the Project area. In the June 4 letter, the Coyote Valley Tribe stated it knew that  
7 many archaeological sites existed in the Project area: "One of the rules of thumb in discovering  
8 the location of village and grave sites attached thereto is where there are rivers and creeks there  
9 are sites. Several creeks and rivers run through the proposed site." The June 4 Letter requested  
10 information about the archaeological surveys of ancestral cultural sites that had been done by  
11 state or federal authorities in the permitting process, as well as a copy of such reports and  
12 findings. Incidentally, neither Caltrans nor the FHWA ever provided the Coyote Valley Tribe  
13 with this information.

14           166.    It was not until April 29, 2014, after ground disturbing activities had commenced,  
15 that Defendants first sat down with representatives of Plaintiffs for government-to-government  
16 consultation. Defendants only came to the table to enter into government to government  
17 consultations with Plaintiffs after the Coyote Valley Tribe passed a Tribal Resolution of April  
18 17, 2014 once again requesting government to government consultations with Caltrans. *See*  
19 April 17, 2014 Tribal Resolution attached as **Exhibit 5**. It was at this April 29, 2014  
20 consultation that the Coyote Valley Tribe was provided, for the first time, with maps of the  
21 location of known and after construction discovered sites.

22           167.    Thus, the first government-to-government consultation was after CA MEN 3571  
23 had been destroyed in September 2013. Since then, neither Caltrans nor the FHWA have  
24 provided Plaintiffs with any information about how previously destroyed sites could have been  
25 protected or their destruction avoided.

26           168.    Because Defendants failed to fulfill their Section 106 responsibilities "prior to"  
27 approving the Project, including but not limited to, failing in good faith to negotiate and  
28 implement, a written MOA or Programmatic Agreement, Caltrans destroyed the ancestral village

1 site known as Yami Village, CA-MEN-3571. In fact, Defendants knew that the ancestral Yami  
2 Village, CA-MEN-3571, was directly located within the area of the Northern Interchange of the  
3 Willits Bypass Project and did nothing to protect this irreplaceable ancestral site.

4 169. This destruction is an example of the arbitrary and capricious nature of the  
5 conclusion by FHWA contained in the approval of the 2006 EIS/EIR that the documentation  
6 submitted for the Willits Bypass Project was adequate regarding the identification and evaluation  
7 of historic properties pursuant to 36 CFR § 800.4.

8 170. In fact, Defendants have never made a “reasonable good faith effort to identify  
9 and evaluate cultural resources within the project limits” as required by Section 106 of NEPA,  
10 nor are they properly protecting Plaintiffs’ ancestral cultural sites located in the Project area.

11 **VII. CLAIMS FOR RELIEF**

12 **CLAIM ONE**

13 **VIOLATIONS OF NEPA AND THE APA**

14 171. Plaintiffs hereby reallege and incorporate each and every allegation set forth  
15 above.

16 172. NEPA requires federal agencies to take a “hard look” at the direct, indirect, and  
17 cumulative impacts of proposed major Federal actions, and at alternatives that could reduce or  
18 eliminate those environmental impacts. 42 U.S.C. § 4332(2)(C)(i)-(ii); 40 C.F.R. §§ 1502.16,  
19 1508.7, 1508.8, 1508.25. NEPA imposes a mandatory, nondiscretionary duty on agencies to  
20 supplement an already completed analysis when “[t]here are significant new circumstances or  
21 information relevant to environmental concerns and bearing on the proposed action or its  
22 impacts.” 40 C.F.R. § 1502.9(c).

23 173. Where “[t]here are significant new circumstances or information relevant to  
24 environmental concerns and bearing on the proposed action or its impacts,” NEPA requires  
25 Defendants to prepare a supplement to their Final EIS/EIR. 40 C.F.R. § 1502.9(C)(1)(ii).

26 174. Since the issuance of the Final EIS/EIR in 2006, there have been multiple and  
27 extensive archaeological post-review discoveries and a change in the area of potential effects for  
28 the Willits Bypass Project, as detailed above. In addition, Defendants have failed to implement



1 any necessary cultural resource protection and archaeological mitigation measures to effectively  
2 address and mitigate harm to the extensive historical and cultural resources which are now being  
3 adversely impacted by the Project activities.

4 175. By not properly performing an evaluation of Plaintiffs' ancestral and  
5 archeological sites in the construction of the Willits Bypass Project, and otherwise deferring  
6 resolution of important environmental impact issues until long after the NEPA process was  
7 complete, Defendants violated NEPA and its implementing regulations and acted in a manner  
8 that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" in  
9 violation of the APA. *Id.*

10 176. Despite the significant new information bearing on Plaintiffs' ancestral and  
11 archeological sites learned during the course of construction of the Willits Bypass Project,  
12 Defendants failed to prepare a supplement to the Final EIS/EIR disclosing these sites and  
13 explaining their consideration and analysis of the handling of these sites. This failure leads to  
14 the conclusion that the Final EIS/EIR is arbitrary, capricious, an abuse of discretion, and not in  
15 accordance with NEPA and its implementing regulations. *See* 5 U.S.C. § 706(2)(A).

16 WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.

17 **CLAIM TWO**

18 **VIOLATIONS OF THE FEDERAL HIGHWAYS STATUTES AND THE APA**

19 177. Plaintiffs hereby reallege and incorporate each and every allegation set forth  
20 above.

21 178. By failing to adequately minimize the Willits Bypass's adverse impacts on  
22 Plaintiffs' ancestral and archeological sites and by failing to properly act on the increasingly  
23 obvious knowledge that cultural sites were being discovered in substantial numbers with  
24 potentially significant impacts to protected cultural resources, Defendants violated the Federal  
25 Highway Statutes, 49 U.S.C. § 303(c); 23 U.S.C. § 138(a), and implementing regulations, and  
26 have acted in a manner that is "arbitrary, capricious, an abuse of discretion, or otherwise not in  
27 accordance with law" in violation of the APA. 5 U.S.C. § 706(2)(a).

28

1 179. By failing to disclose the cumulative impacts of the MMP on Plaintiffs' ancestral  
2 and archeological sites and by failing to hold a "public hearing" in the manner required by the  
3 Federal Highways Statutes, 23 U.S.C. § 128(a), Defendants have acted in a manner that is  
4 "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" in  
5 violation of the APA. 5 U.S.C. § 706(2)(a).

6 WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.

7 **CLAIM THREE**

8 **VIOLATIONS OF THE NATIONAL HISTORIC PRESERVATION ACT**

9 180. Plaintiffs hereby reallege and incorporate each and every allegation set forth  
10 above.

11 181. Section 106 of the NHPA requires that the "head of any Federal agency having  
12 direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any  
13 State and the head of any Federal department or independent agency having authority to license  
14 any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking  
15 or prior to the issuance of any license, shall take into account the effect of the undertaking on any  
16 historic property. The head of the Federal agency shall afford the Council a reasonable  
17 opportunity to comment with regard to the undertaking." 54 U.S.C. § 306108. The  
18 implementing regulations at 36 C.F.R. Part 800 set forth requirements which Defendants must  
19 meet where historic properties are located, including the duty to involve and consult with  
20 Plaintiffs, and each of them, because Plaintiffs are Native American communities that attach  
21 religious and cultural significance to historic properties that may be affected by the Willits  
22 Bypass Project. *See* 36 C.F.R. § 800.2 and 36 C.F.R. § 800.13, as well as Executive Order  
23 13175.

24 182. Defendants have failed to comply with Section 106 of the NHPA and its  
25 implementing regulations, in several respects. These include:

- 26 a. Commencing ground disturbing activities which damaged Plaintiffs'  
27 historic properties, cultural resources, and sacred sites prior to complying  
28 with Section 106 of the NHPA and prior to executing and implementing

1 an MOA or Programmatic Agreement with Plaintiffs stipulating how the  
2 adverse effects of Federal actions on the Willits Bypass Project, especially  
3 the Willits Mitigation Project, will be resolved.

- 4 b. Failure to prepare or implement a PRDMP plan to address the  
5 identification and management of cultural resources during construction  
6 and other Project-related ground-disturbing activities, and in response to  
7 concerns raised during the course of Native American consultation for the  
8 Willits Bypass Project, including any document that sets forth the  
9 procedures to be followed for newly discovered historic properties, as  
10 defined under 36 C.F.R. § 800.16(l)(1), as well as for managing  
11 unanticipated or inadvertent effects to known properties.
- 12 c. Failure to provide guidance for planning excavations and analyses of  
13 recovered cultural materials specifically for the Willits Bypass Project.
- 14 d. Failure to allow tribal representatives or monitors working together with  
15 Caltrans' consultant archaeological monitor(s). Caltrans refuses to give  
16 tribal monitors independent authority to investigate the nature and extent  
17 of any archaeological finds uncovered during monitoring and an  
18 independent authority to make post-review discovery determinations.
- 19 e. Failure to develop guidelines for the proper treatment of historic properties  
20 that may be uncovered, or of unanticipated effects to known properties  
21 that may occur, during the course of Project construction.
- 22 f. Failure to apply the determinations of National Register-eligibility to its  
23 findings of historical significance under CEQA.
- 24 g. Failure to make reasonable efforts to avoid, minimize, or mitigate adverse  
25 effects to archaeological sites within the project area and mitigation lands  
26 of the Willits Bypass Project, in violation of both federal and state cultural  
27 resource protection laws and regulations.
- 28

- 1           h.     Failure to properly protect the numerous historic properties, cultural  
2                   resources, and sacred sites that have been discovered in the Project area  
3                   and the Mitigation parcels. Caltrans is now on record as stating that the  
4                   mitigation requirements will result in destruction of the numerous historic  
5                   properties, cultural resources, and sacred sites that have been discovered in  
6                   the Project area and the Mitigation parcels, which destruction could be  
7                   avoided if the mitigation requirements were changed.
- 8           i.     Failure to exercise good faith in the identification, protection, and  
9                   avoidance of culturally significant ancestral sites.
- 10          j.     Failure to properly consult with Plaintiffs and comply with the standards  
11                   of 36 C.F.R. § 800.2(B).
- 12          k.     Failure to have a cultural resource policy in place to avoid and, if  
13                   avoidance is not possible, to minimize adverse effects of the Willits  
14                   Bypass Project upon significant cultural resources.

15           183.   Defendants have not provided tribal monitors with timely locational information  
16                   on ground disturbing activities that could adversely impact historic properties, cultural resources,  
17                   and archeological sites during the course of Project construction. Specifically, Defendants have  
18                   not provided tribal monitors with timely locational information on ground disturbing activities at  
19                   or near known ESAs during the course of Project construction.

20           184.   Defendants have failed to ensure that at least one tribal monitor will be on the  
21                   Project site during ground-disturbing activities in areas of native soils that may contain cultural  
22                   deposits. In fact, if ground-disturbing activities are occurring simultaneously in different areas  
23                   of the Project, Defendants prevent tribal monitors from observing any of these ground-disturbing  
24                   activities absent permission by Caltrans. Caltrans does not inform tribal monitors of the  
25                   locations of ground-disturbing activities and tribal monitors are not allowed to decide where they  
26                   should expend their efforts. Defendants have failed to provide tribal monitors with a current and  
27                   accurate APE map depicting the locations of Environmentally Sensitive Areas (*i.e.*, known  
28

1 archaeological sites), nor have Defendants provided tribal monitors with global positioning  
2 system (GPS) units containing information on ESA boundaries.

3 185. Plaintiffs and their tribal members have and will continue to suffer grievous  
4 economic and cultural harm as a direct result of Defendants' ground disturbing activities which  
5 damaged Plaintiffs' historic properties, cultural resources, and sacred sites. Plaintiffs assert this  
6 claim in their own right and in *parens patriae* on behalf of their respective members. Plaintiffs  
7 are entitled to compensatory damages for the harms inflicted by Defendants.

8 WHEREFORE, Plaintiffs pray for relief as hereinafter set forth.

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**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in their favor and against Defendants and provide the following relief:

1. Declare that the Willits Bypass Project violates NEPA, the NHPA, and the APA;
2. Declare that Defendants violated NEPA by failing to issue a supplemental EIS in light of the significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts that have developed since the EIS was initially issued;
3. Enjoin Defendants from taking any action in furtherance of implementing the Willits Bypass Project and relying on the Final EIS/EIR until Defendants come into compliance with Federal and California law, including, but not limited to, granting permits or approvals for contractor entry into the Willits Bypass Project and/or the proposed FRF project area, and that Defendants rescind any such permits or approvals already granted, until Defendants comply with section 402 of the NHPA;
4. Retain jurisdiction of this action to ensure compliance with the Court's decree;
5. Award Plaintiffs compensatory damages in their own right and in *parens patriae* on behalf of their respective members for the destruction of and damage to Plaintiffs' historic properties, cultural resources, and sacred sites;
6. Award Plaintiffs their attorneys' fees, costs, and expenses pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, the NHPA, 16 U.S.C. § 470w-4, or other authority; and
7. Award such other and further relief as the Court may deem just and proper.

DATED: October 30, 2015

**COTCHETT, PITRE & McCARTHY, LLP**

By: /s/ Philip L. Gregory  
**PHILIP L. GREGORY**  
*Attorneys for Plaintiffs*

JS 44 (Rev. 12/12) cand rev (1/15/13)

### CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

**I. (a) PLAINTIFFS**  
 THE COYOTE VALLEY BAND OF POMO INDIANS OF CALIFORNIA;  
 AND THE ROUND VALLEY INDIAN TRIBES OF CALIFORNIA

**DEFENDANTS**  
 UNITED STATES DEPARTMENT OF TRANSPORTATION, et al.

(b) County of Residence of First Listed Plaintiff **MENDOCINO**  
 (EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant \_\_\_\_\_  
 (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorneys (Firm Name, Address, and Telephone Number)  
 Philip L. Gregory (95217; pgregory@cpmllegal.com; 650-697-6000)  
 COTCHETT, PITRE & McCARTHY, LLP  
 840 Malcolm Road, Suite 200, Burlingame, CA 94010

Attorneys (If Known)

**II. BASIS OF JURISDICTION** (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant
- 4 Diversity (Indicate Citizenship of Parties in Item III)

**III. CITIZENSHIP OF PRINCIPAL PARTIES** (Place an "X" in One Box for Plaintiff and One Box for Defendant)

	PTF	DEF		PTF	DEF
Citizen of This State	<input type="checkbox"/> 1	<input type="checkbox"/> 1	Incorporated or Principal Place of Business In This State	<input type="checkbox"/> 4	<input type="checkbox"/> 4
Citizen of Another State	<input type="checkbox"/> 2	<input type="checkbox"/> 2	Incorporated and Principal Place of Business In Another State	<input type="checkbox"/> 5	<input type="checkbox"/> 5
Citizen or Subject of a Foreign Country	<input type="checkbox"/> 3	<input type="checkbox"/> 3	Foreign Nation	<input type="checkbox"/> 6	<input type="checkbox"/> 6

**IV. NATURE OF SUIT** (Place an "X" in One Box Only)

CONTRACT	TORTS	LABOR	IMMIGRATION	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	<b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input checked="" type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
<b>REAL PROPERTY</b> <input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	<b>Habeas Corpus:</b> <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <b>Other:</b> <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement			

**V. ORIGIN** (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (specify)
- 6 Multidistrict Litigation

**VI. CAUSE OF ACTION**

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

5 U.S.C. §§ 701-706 et seq.; 54 U.S.C. §§ 300101 et seq.

Brief description of cause:

Defendants failed to protect plaintiffs' ancestral sites violating the APA, NEPA, NHPA, and other federal statutes

**VII. REQUESTED IN COMPLAINT:**

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

**DEMAND \$**

CHECK YES only if demanded in complaint:

**JURY DEMAND:**  Yes  No

**VIII. RELATED CASE(S) IF ANY**

(See instructions):

JUDGE \_\_\_\_\_

DOCKET NUMBER \_\_\_\_\_

DATE  
10/30/2015

SIGNATURE OF ATTORNEY OF RECORD



**IX. DIVISIONAL ASSIGNMENT (Civil L.R. 3-2)**

(Place an "X" in One Box Only)

- SAN FRANCISCO/OAKLAND
- SAN JOSE
- EUREKA

**INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44****Authority For Civil Cover Sheet**

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.  
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.  
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.  
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.  
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.  
 Original Proceedings. (1) Cases which originate in the United States district courts.  
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.  
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.  
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.  
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.  
 Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.  
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.  
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- Date and Attorney Signature.** Date and sign the civil cover sheet.