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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

THE COYOTE VALLEY BAND OF POMO INDIANS OF CALIFORNIA and THE ROUND VALLEY INDIAN TRIBES OF CALIFORNIA, Plaintiffs, v. UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*, Defendants.	No. 4:15-cv-04987-JSW FEDERAL DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT, ECF NO. 66 Date: December 2, 2016 Time: 9:00 a.m. Courtroom No. 5 Hon. Jeffrey S. White

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitution

Rules

Miscellaneous

NOTICE OF MOTION

Federal Defendants Federal Highway Administration ("FHWA"), FHWA Administrator Gregory G. Nadeau, U.S. Department of Transportation ("USDOT"), and Secretary of Transportation Anthony Foxx move to dismiss Plaintiffs' First Amended Complaint ("Amd. Compl."), ECF No. 66, as to the Federal Defendants under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Their motion is scheduled for December 2, 2016, at 9:00 a.m., in Courtroom No. 5, U.S. Courthouse, Oakland, California, before the Honorable Jeffrey S. White.

I. SUMMARY OF ARGUMENT

The background facts of this action are set out in the Federal Defendants' motion to dismiss Plaintiffs' initial Complaint, ECF No. 31, at 1–5. Briefly, Plaintiffs are two California Indian tribes that sue under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4370h, the National Historic Preservation Act ("NHPA"), 54 U.S.C. § 306108, Section 4(f) of the Department of Transportation Act, *now codified at* 49 U.S.C. § 303(c), and Section 18(a) of the Federal-Aid Highway Act, 23 U.S.C. § 138, challenging the Willits Bypass Project ("Project"). Plaintiffs name the California Department of Transportation ("Caltrans") and Caltrans Director Malcolm Dougherty, in addition to the Federal Defendants. The Federal Defendants moved to dismiss Plaintiffs' initial Complaint, ECF No. 1, because responsibility for evaluating the Project and for defending any resulting litigation has been assigned to and assumed by Caltrans, under 23 U.S.C. § 327, and because Caltrans is therefore the only proper defendant under that statute, *id.* § 327(d), (e). *See* ECF No. 31. This Court granted that motion, but also granted Plaintiffs leave to amend with certain stringent conditions. ECF No. 58. First, the Court made clear that Plaintiffs were "to specifically identify which defendant has acted, or failed to act, in particular manner. . . . [and] . . . not refer to the Defendants collectively in an amended complaint." *Id*. at 7, 8. Plaintiffs have violated that condition and, instead, continue to refer to the "Defendants" collectively.[1] Second, although the Court suggested Plaintiffs might allege a claim that the FHWA has

[1] The Court's Order also required Plaintiffs to amend their Complaint "no later than August 23, 2016." ECF No. 58, at 9. Plaintiffs filed their First Amended Complaint in the early hours of August 24 and then were required to refile it, *see* Text Entry ("Electronic filing error") (Aug. 24, 2016), which they did (Footnote continued)

failed to reassume all or part of the responsibilities for the Project under Section 3.2.3 of the Memorandum of Understanding ("MOU"[2]) between Caltrans and the FHWA, Plaintiffs have not brought such a claim and, instead, continue to complain of how the Project has been implemented by Caltrans. *See* ECF No. 58, at 6, 8. Finally, even if Plaintiffs had brought a claim that the FHWA has improperly failed to reassume some or all of the Project responsibilities, the MOU does not grant enforceable rights to the Plaintiffs, and Plaintiffs cannot therefore sue for an alleged failure of the FHWA to take the (mostly completed) Project away from Caltrans. Indeed, Plaintiffs do not seek such relief from the Court, and therefore they fail to seek a remedy that will redress their alleged injuries and lack standing to pursue their claims. In short, Plaintiffs' Amended Complaint, just as their initial Complaint, must be dismissed.

II. INTRODUCTION

Despite the Court's admonition that Plaintiffs not simply lump the "Defendants" in with one another, ECF No. 58, at 7, 8, Plaintiffs have clearly done so. A simple word-search of their Amended Complaint yields over 70 instances where Plaintiffs refer to the Defendants collectively.[3] Although in a few places Plaintiffs have attempted to allege failings by the FHWA, those allegations fall far short of stating a redressable claim. Instead, Plaintiffs continue to complain about how Project operations are being implemented. *See, e.g.*, ECF No. 66, ¶¶ 113–19, 156–68 (alleging that Caltrans instituted improper procedures governing tribal monitors); ¶¶ 130–33, 137–55 (alleging that Caltrans failed to adequately protect allegedly historical sites); ¶¶ 134–36, 175–81 (alleging that "Defendants" and, later, Caltrans failed to prepare a supplemental environmental impact statement ("EIS") and perform archeological surveys). Plaintiffs do sprinkle in a few make-weight allegations against the FHWA in those paragraphs, asserting, for instance, that Caltrans's alleged failure to properly handle tribal monitoring

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on August 26, ECF No. 66. Plaintiffs therefore appear to be out of time.

[2] Previously submitted as Exhibit A to the Federal Defendants' first motion to dismiss, ECF No. 32-1. The MOU is the governing document under which Caltrans agreed to accept assignment of environmental review responsibilities, including those under NEPA, the NHPA, Section 4(f) of the Department of Transportation Act, and Section 18(a) of the Federal-Aid Highway Act.

[3] That figure includes some instances where Plaintiffs refer to "Caltrans" and "the FHWA" together, rather than simply as "Defendants." *See, e.g.*, ECF No. 66, ¶¶ 24, 91, 92.

was "[c]ontrary to the representations of Caltrans, FHWA, and DOT during government-to-government consultations with Plaintiffs[.]" ECF No. 66, ¶¶ 161, 164–68. Plaintiffs nevertheless are still complaining of alleged failures on the part of Caltrans, not the FHWA.

Elsewhere, Plaintiffs complain of actions or omissions that clearly fall outside the statute of limitations.[4] *See* ECF No. 66, ¶ 17 (alleging improper review under Section 106 of the National Historic Preservation Act in 2005), ¶¶ 91.a, 98, 101, 110, 112, 172–74 (alleging Section 106 noncompliance at the time the final EIS was issued and the Project was approved in December 2006[5]). Claims based on such untimely allegations are not actionable, as the Court has held in the related case, *Center for Biological Diversity v. Federal Highway Administration*, No. C 12-02172 JSW, 2012 U.S. Dist. LEXIS 129294, at *8–9 (N.D. Cal. Sept. 11, 2012).

When they do purport to direct their allegations specifically to the Federal Defendants, Plaintiffs still fail to present a case that the FHWA has neglected some alleged duty to take back the Project under the MOU. In the section of their Amended Complaint headed "Failures to Properly Engage in Consultation," Plaintiffs begin by complaining of alleged failures on the part of Caltrans and the U.S. Army Corps of Engineers (not a defendant in this case), rather than the FHWA. *See* ECF No. 66, ¶¶ 182–206. Then, when Plaintiffs allege that they specifically requested the FHWA to reassume responsibility for Section 106 compliance for the Project, they claim the request was made under Article IV, Section E(3) of the Statewide Programmatic Agreement implementing Section 106 in California[6] *not* the MOU. *See*

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[4] Under 23 U.S.C. § 139(*l*), a suit challenging a permit, license, or approval must be brought within 150 days after publication in the Federal Register of a notice announcing such permit, license, or approval. In this case, the FHWA published a "Notice of Final Federal Agency Actions on Proposed Highway in California" in the Federal Register on January 5, 2007, 72 Fed. Reg. 607 (Jan. 5, 2007), which required that suit be brought by July 5, 2007, 72 Fed. Reg. 608. Beyond that, any alleged acts or omissions before October 20, 2009, would be outside even the general six-year statute of limitations of 28 U.S.C. § 2401(a), applicable to actions brought under the Administrative Procedure Act, 5 U.S.C. § 701–706. *See City of Oakland v. Lynch*, 798 F.3d 1159, 1166 (9th Cir. 2015); *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 930 (9th Cir. 2010).

[5] To the extent Plaintiffs allege a failure to enter into a Section 106 Programmatic Agreement prior to Project approval, those claims are not only untimely, but they also are not actionable under the NHPA. *See* ECF No. 31, at 10–11; ECF No. 36 (Reply) at 4–5 & n.6.

[6] Previously submitted as ECF No. 32-2, Glazer Decl. Exh. B.

ECF No. 66 ¶¶ 202(3), 203.c. Beyond that, the provision of the Statewide Programmatic Agreement upon which Plaintiffs rely merely states that "[i]f *FHWA* determines that any project-specific tribal issues or concerns will not be satisfactorily resolved by Caltrans when Caltrans is deemed to be a federal agency, then FHWA *may* reassume all or part of the federal responsibilities for environmental review pursuant to the MOUs." ECF No. 32-2, Glazer Decl. Exh. B at 6 (emphasis added). Nothing in that Agreement provides a basis for Plaintiffs to sue the FHWA in this case.

The sole allegations specifically addressing the MOU merely recite that the *Plaintiffs* determined that alleged issues surrounding government-to-government consultation were not being adequately addressed by Caltrans and that the FHWA failed to reassume responsibilities for the Project. ECF No. 66, ¶ 207. But as explained below, those allegations fail to track the governing provisions of the MOU, provisions that do not afford a role to Plaintiffs in allocating Project responsibilities between Caltrans and the FHWA. Even more critical, in none of their three Claims do Plaintiffs allege a failure by the FHWA to take back Project responsibilities under the MOU; instead, Plaintiffs again complain about Project *implementation*, in some instances lumping the FHWA in with Caltrans, *see, e.g.*, ECF No. 66, ¶¶ 211–13, 215–16, 219, and in others specifically naming Caltrans, not the FHWA, *see, e.g.*, *id.*, ¶¶ 220–22. Tellingly, Plaintiffs do not seek *any* relief from the Court that would direct the FHWA to take back Project responsibilities. *See id.*, at 72, Prayer for Relief.[7] In short, Plaintiffs have not pled the one claim for relief that the Court suggested might save them from dismissal.

[7] Indeed, Plaintiffs confusingly refer to Section 402 of the NHPA, formerly codified at 16 U.S.C § 470a-2 and now appearing at 54 U.S.C. § 307101(e), ECF No. 66, Prayer for Relief ¶ 3, but that statutory provision applies only to actions taken outside the United States having potential effects on World Heritage sites, and Plaintiffs bring no allegations concerning any such actions in their Amended Complaint. Federal Defendants pointed out the same error in Plaintiffs' initial Complaint in their motion to dismiss that complaint, *see* ECF No. 31, at 10 n.11, but the error remains unaddressed.

III. ARGUMENT

A. Plaintiffs Have Failed to Invoke the Court's Article III Jurisdiction

A defendant may move under Rule 12(b)(1) to dismiss a claim for lack of federal subject matter jurisdiction. Fed. R. Civ. P. 12(b)(1). "It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (internal citations omitted). "A suit brought by a plaintiff without Article III standing is not a 'case or controversy,' and an Article III federal court therefore lacks subject matter jurisdiction over the suit." *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998)). Such a case must be dismissed under Fed. R. Civ. P. 12(b)(1). *Id.*

Similarly, a complaint must be dismissed for failure to state a claim upon which relief can be granted under Rule 12(b)(6) if it suffers from either the "lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Where a complaint fails to state a cognizable claim, it must be dismissed. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Finally, claims against the Federal Defendants are precluded by 23 U.S.C. § 327(e); there is therefore neither a waiver of sovereign immunity under the Administrative Procedure Act ("APA"), 5 U.S.C. § 702(2) (judicial review unavailable if another statute precludes relief), nor subject matter jurisdiction in this Court. *See United States v. Sherwood*, 312 U.S. 584, 586–88 (1941) (where sovereign immunity bars suit against the United States, the Court lacks subject matter jurisdiction over the barred claims); *Clinton v. Babbitt*, 180 F.3d 1081, 1087 (9th Cir. 1999) (same).

1. Plaintiffs Have No Cause of Action Under the MOU

The Caltrans-FHWA MOU provides in Section 3.2.3 that

> [i]f a project-related concern or issue is raised in a government-to-government consultation process with an Indian tribe . . . and is related to NEPA or another federal environmental law for which Caltrans has assumed responsibilities under this MOU, and either the Indian tribe or the FHWA determines that the issue or concern will not be satisfactorily resolved by Caltrans, then the FHWA shall reassume all or part of the responsibilities for processing the project. In this case, the provisions of section 9.1 concerning FHWA initiated reassumptions shall apply.

ECF No. 32-1, Glazer Decl. Exh. A, at 4. Section 9.1 of the MOU provides that

> [t]he FHWA *may*, at any time, reassume all or part of the USDOT Secretary's responsibilities that have been assumed by Caltrans under part 3 of this MOU for any highway project or highway projects upon the *FHWA's* determination that:
>
> * * * *
>
> C. Caltrans cannot satisfactorily resolve an issue or concern raised in a government-to-government consultation process, as provided in section 3.2.3.

Id. at 16 (emphasis added). Nothing in Section 9.1 of the MOU provides any right of enforcement or oversight to any non-signatory third party or evinces any intent to do so.

Because the MOU is an agreement with the federal government, federal common law applies to its interpretation. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 2000). Under federal common law, a non-signatory to a federal agreement is not deemed to be a third-party beneficiary and cannot overcome that presumption "absent a clear intent" to grant such third party "enforceable rights." *Orff v. United States*, 358 F.3d 1137, 1145 (9th Cir. 2004) (emphasis and quotation omitted), *aff'd*, 545 U.S. 596 (2005). The Restatement of Contracts describes an intended beneficiary under common law as one for whom a right to performance effectuates the intent of the parties, and the circumstances indicate that the promisee intended to give the beneficiary the benefit of the promised performance.[8] However, when one of the contracting parties is a governmental entity, a "more

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[8] The RESTATEMENT (SECOND) OF CONTRACTS § 302 states in full:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
>
> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
>
> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

RESTATEMENT (SECOND) OF CONTRACTS § 302 (AM. LAW INST. June 2016 Update), *available at* www.westlawnext.com.

stringent test applies." *Minshew v. Donley*, 911 F. Supp. 2d 1043, 1060 (D. Nev. 2012) (citation omitted). Third-party beneficiaries to a government contract are presumptively incidental beneficiaries who may not enforce the contract "absent a clear intent to the contrary." *Orff*, 358 F.3d at 1145 (emphasis and quotation omitted). The contract must establish both an intent to confer a benefit on the third party and an intent to grant the third party "enforceable rights." *Id*. (quotation and citation omitted). "Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested." *Patterson*, 204 F.3d at 1211 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 313, cmt. a).

In *Orff*, the Ninth Circuit held that individual irrigators could not enforce, as third-party beneficiaries, a water-delivery contract between the United States and the water district that serviced the irrigators, *id*. at 1145–47, notwithstanding that the contract mentioned the individual irrigators as a class. It was not enough to make them intended beneficiaries that the contract operated to the irrigators' benefit and was entered into with them "in mind." *Id*. at 1147 (citing *Patterson*, 204 F.3d at 1212 (contract provision relied on by plaintiffs merely allowed enforcement rights to government)). Indeed, as here, the relevant contract provisions may underscore that a third party is *not* intended to be able to enforce the contract. *Patterson*, 204 F.3d at 1211–12. Section 9.1 of the MOU expressly provides that the FHWA, at its discretion, *may* (upon, for instance, hearing from a tribe that it believes Caltrans is not properly resolving issues) determine that it should reassume all or part of project responsibilities under the MOU. But nothing in Section 9 provides any enforcement rights to non-signatories. Under governing Ninth Circuit law, Plaintiffs simply are not able to demand that the FHWA take Project responsibilities away from Caltrans.

2. Plaintiffs Have Failed to Meet the Redressability Prong of Standing Doctrine

"Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010) (citation omitted); *accord Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The

burden is on the plaintiff to make the necessary showing, *Lujan*, 504 U.S. at 561, and mere conclusory allegations, unsupported by particularized facts, will not suffice, *Summers*, 555 U.S. at 495–97.

Plaintiffs allege that they are injured because the claimed deficiencies in Project review and implementation have damaged cultural resources and threaten further damage. *See* ECF No. 66, ¶¶ 211, 215, 222. Even if Plaintiffs' allegations could be generously read to connect those claimed injuries to the FHWA's purported failure to reassume Project responsibilities, because Plaintiffs do not seek judicial review of that supposed failure, they fail to plead for relief that will redress their alleged injuries. They therefore fail to establish the third prong of Article III standing. *See Steel Co.*, 523 U.S. at 107 ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."); *Townley v. Miller*, 722 F.3d 1128, 1134 (9th Cir. 2013) ("The proposition that plaintiffs must seek relief that actually improves their position is a well-established principle."); *Gonzales v. Gorsuch*, 688 F.2d 1263, 1263 (9th Cir. 1982) (relief sought from court must be capable of redressing injury alleged). Instead, Plaintiffs' Prayer for Relief asks the Court to halt Project activities pending further environmental review, which under the MOU remains Caltrans's responsibility. The sole allegations Plaintiffs make about the MOU are divorced from any relief they seek from the Court. *See* ECF No. 66, ¶ 207, Prayer for Relief. Plaintiffs therefore lack standing to pursue a claim under Section 3.2.3 of the MOU.[9]

B. Plaintiffs Have Failed to Comply with the Conditions of the Court's Order

"Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss an action for failure to comply with any order of the court." *Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992). That includes failure to comply with conditions imposed on leave to file an amended complaint. *Id.* This Court's Order on the Federal Defendants' first motion to dismiss required that Plaintiffs plead allegations against the Federal and State Defendants individually and with specificity and not merely direct allegations to the "Defendants collectively." ECF No. 58, at 7, 8. As set out in Section II, above,

[9] As noted in Section III.A.1, above, judicial review of a determination not to reassume Project responsibilities is not available, because Plaintiffs are not granted any right to enforce the MOU.

Plaintiffs have failed to comply with those directives. That failing provides an independent basis for dismissing Plaintiffs' Amended Complaint. Such dismissal is all the more appropriate where, as here, Plaintiffs have failed to adequately plead a claim for relief under the one theory that the Court offered them as a means of avoiding dismissal: that the FHWA improperly failed to reassume all or part of Project responsibilities. *See* ECF No. 58, at 6, 8. Given that failing, and given that Plaintiffs may proceed to press their claims against Caltrans, the party against whom their allegations are really directed, the Federal Defendants should be dismissed from this case.

IV. CONCLUSION

For the reasons set forth above, Federal Defendants respectfully request that the Court dismiss Plaintiffs' claims against them and enter judgment in the Federal Defendants' favor.

Respectfully submitted,

DATED: September 7, 2016

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CERTIFICATE OF SERVICE

I, David B. Glazer, hereby certify that, on September 7, 2016, I caused the foregoing to be served upon counsel of record through the Court's electronic service.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 7, 2016

/s/*David B. Glazer*
David B. Glazer