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11
 12 **UNITED STATES DISTRICT COURT**
 13 **NORTHERN DISTRICT OF CALIFORNIA – OAKLAND DIVISION**

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

18 **Plaintiffs,**

19 **v.**

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

Defendants.

Case No. 3:15-cv-04987-JSW

OPPOSITION OF PLAINTIFFS TO THE
MOTION TO DISMISS OF DEFENDANTS
CALIFORNIA DEPARTMENT OF
TRANSPORTATION AND MALCOLM
DOUGHERTY

Date: December 2, 2016

Time: 9:00 a.m.

Location: Courtroom 5

Judge: Hon. Jeffrey S. White

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1 **I. INTRODUCTION**

2 Plaintiffs are two federally recognized Native American tribal entities which have a
3 government-to-government relationship with the United States. This action for declaratory and
4 injunctive relief, as well as damages, challenges the failure of Defendants California Department of
5 Transportation (“Caltrans”), the Federal Department of Transportation (“DOT”), and the Federal
6 Highways Administration (“FHWA”): (1) to properly and timely consult with Plaintiffs pursuant to
7 the National Historic Preservation Act (“NHPA”); (2) to prevent damage to cultural and
8 archaeological sites; and (3) to supplement Defendants’ environmental impact analysis in the course
9 of constructing the federally funded Willits Bypass Project, a 5.9 mile long rerouting of Highway
10 101 through Little Lake Valley, in Mendocino County, along with the Willits Mitigation Project to
11 mitigate impacts to wetlands and biological resources as a result of the Bypass construction (the
12 “Willits Bypass Project”).

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

21 In 2006, at the time the Final Environmental Impact Statement/Environmental Impact
22 Report (“Final EIS/EIR”) for the Willits Bypass Project was approved, Caltrans had identified only
23 **one** archaeological site eligible for registry on the National Register of Historic Places (“NRHP”):
24 CA-MEN-2645/H. Since 2013, Caltrans has identified at least **thirty** additional archaeological sites
25 eligible for registry on the NRHP. The California State Office of Historic Preservation (“SHPO”)
26 indicated the entire area of the Willits Bypass Project might have to be designated as an
27 “archaeological district” of ancestral sites. Caltrans commenced ground disturbing activities
28 resulting in damage to Plaintiffs’ historic properties, cultural resources, and sacred sites *prior to*

1 complying with Section 106 of the NHPA and prior to executing and implementing an MOA with
2 Plaintiffs stipulating how the adverse effects of Federal actions on the Willits Bypass Project,
3 especially the Willits Mitigation Project, will be resolved.

4 Even though Caltrans has been constructing the Willits Bypass Project for over two years, it
5 has yet to develop or implement a process for identifying historic properties, cultural resources, or
6 sacred sites, assessing effects and resolving adverse effects to historic properties, cultural resources,
7 and sacred sites that may be discovered or inadvertently affected, and therefore subject to 36 C.F.R.
8 § 800.13 during the implementation of the undertaking. Caltrans failed to fulfill its Section 106
9 responsibilities “prior to” approving the Project. Caltrans failed in good faith to negotiate and
10 implement a written MOA or Programmatic Agreement, which documents how Caltrans would
11 avoid, minimize, or mitigate adverse effects. The failure to have a written MOA or Programmatic
12 Agreement resulted in the destruction of the ancestral village site known as Yami Village, CA-
13 MEN-3571. The Yami Village site was located at the northern end of the Project, on the eastern
14 side of Highway 101.

15 For the first time, Caltrans has moved to dismiss Plaintiffs’ First Amended Complaint on
16 three grounds: failure to comply with this Court’s Order of September 8, 2016; failure to comply
17 with Federal Rule of Civil Procedure 8; and sovereign immunity as a bar to damages. However,
18 Caltrans fails to apply the correct pleading standard, or to acknowledge Plaintiffs’ amendments to
19 the original Complaint. In addition, as more fully described herein, Plaintiffs respectfully request
20 leave to amend, so that they may articulate a more thorough basis for their damage claim.

21 Therefore, Caltrans’ Motion to Dismiss should be denied.

22 **II. STANDARD OF REVIEW**

23 A motion to dismiss is proper under Federal Rule of Civil Procedure 12(b)(6) only where
24 the pleadings fail to state a claim upon which relief can be granted. The complaint is construed in
25 the light most favorable to the non-moving party and all material allegations in the complaint are
26 taken to be true. *Sanders v. Kennedy*, 794 F.2d 478, 481 (9th Cir. 1986). “A claim has facial
27 plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable
28 inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S.662,

678 (2009). If the allegations are insufficient to state a claim, a court should grant leave to amend, unless amendment would be futile. *See, e.g., Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296 (9th Cir. 1990); *Cook, Perkiss & Liehe, Inc. v. N. Cal. Collection Serv., Inc.*, 911 F.2d 242, 246-47 (9th Cir. 1990).

III. ARGUMENT

A. PLAINTIFFS COMPLIED WITH THIS COURT'S ORDER AND SATISFIED THEIR PLEADING OBLIGATIONS UNDER RULE 8

Caltrans argues Plaintiffs' FAC violates this Court's August 2, 2016 Order and Fed. R. Civ. Proc. 8 by referring to "Defendants" collectively. However, Plaintiffs carefully followed this Court's instructions when amending their complaint, and as such, the FAC complies with this Court's August 2, 2016 Order and the pleading standards in Rule 8.

1. Plaintiffs Followed This Court's Order to Amend Their Complaint

Plaintiffs diligently complied with this Court's proscription to refrain from referring to Defendants collectively in an amended complaint.

To violate a court order, a party must have failed to take "all the reasonable steps within [one's] power to insure compliance with the order[]." *Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461, 466 (9th Cir. 1989), quoting *Sekaquaptewa v. MacDonald*, 544 F.2d 396, 406 (9th Cir. 1976). The relevant evidentiary standard for making this determination is clear and convincing. *FTC v. Affordable Media*, 179 F.3d 1228, 1239 (9th Cir. 1999).

The redlined version of the FAC is attached as **Exhibit 1** to the Declaration of Philip Gregory. This redlined version illustrates the changes Plaintiffs made to the original Complaint, pursuant to this Court's order. Plaintiffs in good faith attempted to set forth the specific acts of each Defendant which gave rise to Plaintiffs' claims. Plaintiffs took all reasonable steps within their power to comply with this Court's order, and it is Plaintiffs' good faith belief that these amendments satisfy this Court's prescriptions. Accordingly, Plaintiffs' FAC gives Caltrans "fair notice" of the claims against it. *Yamaguchi v. United States Department of Air Force*, 109 F.3d 1475, 1481 (9th Cir. 1997). However, should this Court find that the FAC is not in compliance

1 with this Court’s order, Plaintiffs respectfully request leave to amend pursuant to Fed. Rule Civ.
2 Proc. Rule 15.

3 **2. Plaintiffs’ Gave Caltrans Fair Notice of the Claims Against It Pursuant**
4 **to Fed. Rules Civ. Proc. Rule 8**

5 Caltrans further contends Plaintiffs’ FAC should be dismissed due to violating Rule 8 for
6 failure to identify each Defendant specifically. In making this argument, Caltrans improperly
7 conflates Rule 8 with the heightened pleading standards under Rule 9(b), which prohibits the
8 “lumping together of multiple defendants.” *United States ex rel. Lee v. Corinthian Colleges*, 655
9 F.3d 984, 997 (9th Cir. 2011).

10 Rule 8 sets forth the requirement for a Complaint: “A pleading that states a claim for relief
11 must contain. . . a short and plain statement of the claim showing that the pleader is entitled to
12 relief; and . . . a demand for the relief sought, which may include relief in the alternative or different
13 types of relief.” This is not a case for fraud and, therefore, Rule 8 is the operative legal standard
14 before this Court in this case.

15 Under Rule 8, “a pleading [must] give ‘fair notice’ of the claim being asserted and the
16 ‘grounds upon which it rests.’” *Herrejon v. Ocwen Loan Servicing, LLC*, 980 F.Supp.2d 1186,
17 1196 (E.D.Cal. 2013), citing *Yamaguchi*, 109 F.3d at 1481. The Federal Rules of Civil Procedure
18 have a “flexible pleading policy.” *Herrejon*, 980 F.Supp.2d at 1196. A complaint must “state the
19 elements of the claim plainly and succinctly,” *Jones v. Community Redev. Agency*, 733 F.2d 646,
20 649 (9th Cir. 1984), and “allege with at least some degree of particularity overt facts which
21 defendant engaged in that support plaintiff’s claim.” *Id.*, quoting *Sherman v. Yakahi*, 549 F.2d
22 1287, 1290 (9th Cir. 1977).

23 Plaintiff’s FAC satisfies the Rule 8 pleading requirements. “Where . . . there are multiple
24 defendants, the complaint should specify what conduct by each defendant gives rise to the asserted
25 claim.” *Weiszmann v. Kirkland & Ellis*, 732 F. Supp. 1540, 1549 (D. Colo. 1990). The FAC states
26 with particularity the factual allegations causing Caltrans to violate the EPA, NHPA, the Federal
27 Highway Statutes and the APA. As an example, Plaintiffs described Caltrans’ specific violative
28 conduct on several dozen occasions in the first half of the FAC alone. *See e.g.*, Plaintiff’s FAC ¶¶

1 2-7, 12-14, 17-19, 20, 21, 23-25, 28-42, 48-54, 97, 100, 104-114; *see also* ¶ 91, in which Plaintiffs
 2 specifically describe the four stages in which Caltrans failed to comply with Section 106 of the
 3 NHPA.

4 Additionally, Plaintiffs link Caltrans' conduct to specific causes of action on a number of
 5 occasions. (*See e.g.*, ¶¶ 216, 219, 220). For example, Claim One of the FAC alleges "Violations of
 6 NEPA and the APA." Plaintiffs state: "Caltrans, FHWA, and DOT" failed to fulfill their duties
 7 under these statutes. In fact, Caltrans is specifically identified four times in this paragraph, which
 8 describes how Caltrans' conduct violated NEPA and the APA. FAC, ¶¶ 208-213. Any mention of
 9 "Defendants" collectively in the FAC, is to describe conduct that Plaintiffs believe, in good faith,
 10 that all of the Defendants jointly participated in.

11 As such, by the FAC, Caltrans had "fair notice" of its involvement in the claims being
 12 asserted, *Yamaguchi*, 109 F.3d at 1481, as well as "grounds upon which [the claims] rest[]." *Bell*
 13 *Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

14 However, if this Court should find that the FAC is insufficiently specific with respect to the
 15 claims against Caltrans, Plaintiffs request leave to amend, pursuant to Rule 15. Leave to amend
 16 "should [be] freely give[n] . . . when justice so requires," Fed. R. Civ. P. 15(a), and generally shall
 17 be denied only upon showing of bad faith, undue delay, futility, or undue prejudice to the opposing
 18 party. *Chudacoff v. Univ. Med. Ctr.*, 649 F.3d 1143, 1152 (9th Cir. 2011). "This policy is applied
 19 with 'extraordinary liberality.'" *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079
 20 (9th Cir. 1990)). Rule 15(a) is designed "to facilitate decision on the merits, rather than on the
 21 pleadings or technicalities." *Chudacoff*, 649 F.3d at 1152, quoting *United States v. Webb*, 655 F.2d
 22 977, 979 (9th Cir. 1981).

23 As set forth in Paragraph 3 of the Gregory Declaration filed herewith, Plaintiffs and their
 24 counsel have just completed their initial review of the Administrative Record produced by Caltrans
 25 in July 2016. In the course of that review, it became apparent that the FAC should be further
 26 amended to add additional claims and allege additional facts specific to each Defendant supporting
 27 existing claims and the additional claims. Counsel for Plaintiffs is currently drafting that proposed
 28 Second Amended Complaint, which should be completed on or before September 30, 2016. Thus,

1 should this Court find that Plaintiff’s FAC falls out of compliance with Rule 8, Plaintiffs
2 respectfully request further leave to amend based on the documents in the Administrative Record in
3 order to fix this deficiency.

4 Based on the foregoing, Caltrans’ Motion to Dismiss should be **denied**.

5 **B. PLAINTIFFS REQUEST LEAVE TO AMEND TO STATE A CLAIM FOR**
6 **DAMAGES AGAINST CALTRANS**

7 Caltrans correctly asserts that the Eleventh Amendment to the United States Constitution
8 generally provides sovereign immunity to states against suits in federal court, absent the state’s
9 consent or waiver. *Hans v. Louisiana*, 134 U.S. 1, 17 (1890). However, Caltrans had not
10 previously raised the sovereign immunity issue in this case.

11 Under Rule 15, a plaintiff may amend its pleading “with . . .the court’s leave. The court
12 should freely give leave when justice so requires.” Fed Rules Civ Proc Rule 15.

13 Plaintiffs respectfully request this Court to allow them, pursuant to Fed. R. Civ. P. 15, to file
14 a Second Amended Complaint to assert such a basis for a waiver of sovereign immunity.

15 Contrary to Caltrans’ assertions, Plaintiffs have a viable cause of action for damages under
16 the Federal Tort Claims Act (“FTCA”). The Federal Government waives its sovereign immunity as
17 to claims under the FTCA, and Caltrans, pursuant to the MOU, assumed federal obligations for the
18 purposes of the Willits Bypass Project. Moreover, Plaintiff has standing to assert FTCA claims
19 against the government. *See, e.g., Indian Towing Co. v. United States*, 350 U.S. 61 (1955), and
20 *Berkovitz v. United States*, 486 U.S. 531 (1988), in which FTCA claims made by tribes were not
21 dismissed due to standing, but on other grounds. Accordingly, Plaintiffs respectfully request leave
22 to amend the Complaint, pursuant to Rule 15, in order to specify their grounds for monetary relief
23 from Caltrans.

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1 **IV. CONCLUSION**

2 For the foregoing reasons, the Motion to Dismiss of Caltrans should be **DENIED** in its
3 entirety.

4 Dated: September 21, 2016

COTCHETT, PITRE & McCARTHY, LLP

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