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UNITED STATES DISTRICT COURT
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; ANTHONY FOXX in his official capacity as the Secretary of the Department of Transportation; FEDERAL HIGHWAY ADMINISTRATION; GREGORY NADEAU in his official capacity as the Acting Administrator of the Federal 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 MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT OF THE FEDERAL DEFENDANTS

Date: **December 2, 2016**
Time: **9:00 a.m.**
Location: **Courtroom 5**

Judge: **Hon. Jeffrey S. White**

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I. INTRODUCTION

Plaintiffs, two federally recognized Native American tribes, are entitled to have a good faith government-to-government relationship with the United States. This action for declaratory and injunctive relief, as well as damages, challenges the failure of Defendants the Federal Department of Transportation ("DOT") and the Federal Highways Administration ("FHWA") (collectively the "Federal Defendants") to properly and timely consult with Plaintiffs pursuant to the National Historic Preservation Act ("NHPA"), to prevent damage to Plaintiffs' cultural and archaeological sites, and to supplement the environmental impact analysis in the course of constructing the federally funded Willits Bypass Project, along with the Willits Mitigation Project to mitigate impacts to wetlands and biological resources as a result of the Bypass construction (the "Willits Bypass Project").

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

In 2006, at the time the Final Environmental Impact Statement/Environmental Impact Report ("Final EIS/EIR") for the Willits Bypass Project was approved, Caltrans only identified *one* archaeological site eligible for registry on the National Register of Historic Places ("NRHP"): CA-MEN-2645/H. Since construction commenced, Defendant California Department of Transportation ("Caltrans") has identified at least *thirty* additional archaeological sites eligible for registry on the NRHP. The California State Office of Historic Preservation ("SHPO") indicated the entire area of the Willits Bypass Project might have to be designated as an "archaeological district" of ancestral sites. Ground disturbing activities have damaged Plaintiffs' historic properties, cultural resources,

and sacred sites before the Federal Defendants complied with Section 106 of the NHPA and prior to executing and implementing an MOA with Plaintiffs stipulating how the adverse effects of Federal actions on the Willits Bypass Project, especially the Willits Mitigation Project, will be resolved.

As alleged in the First Amended Complaint ("FAC"), Caltrans and the Federal Defendants have not developed or implemented a process for identifying historic properties, cultural resources, or sacred sites, assessing effects and resolving adverse effects to historic properties, cultural resources, and sacred sites that may be discovered or inadvertently affected, and therefore subject to 36 C.F.R. § 800.13, during the implementation of the undertaking. One of the core claims in the FAC is this failure by the Federal Defendants to fulfill their Section 106 responsibilities "prior to" approving the Project. This abrogation of responsibility included failing in good faith to negotiate and implement a written MOA or Programmatic Agreement. As a result, the Federal Defendants and Caltrans destroyed the ancestral village site known as Yami Village, CA-MEN-3571.

The Federal Defendants move to dismiss Plaintiffs' FAC on three grounds: alleged failure to comply with this Court's Order of September 8, 2016; alleged failure to allege that the FHWA "has failed to reassume all or part of the responsibilities for the Project under Section 3.2.3 of the Memorandum of Understanding ("MOU"); and alleged lack of rights in Plaintiffs to reassume some or all of the Project responsibilities. However, the Federal Defendants fail to acknowledge Plaintiffs' amendments to the original Complaint. In addition, as more fully described herein, Plaintiffs respectfully request leave to amend, so that they may articulate a more thorough basis for their damage claim. This Motion to Dismiss should be denied.

II. STANDARD OF REVIEW

A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) raises a challenge to the Court's subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). "Article III . . . gives the federal courts jurisdiction over only cases and controversies." *Public Lan for thePeople, Inc. v. United States Dep't of Agric.*, 697 F.3d 1192, 1195 (9th Cir. 2012). Under Rule 12(b)(1), a defendant may seek to dismiss a complaint for "lack of jurisdiction over the subject matter." Fed.R.Civ.P. 12(b)(1). Plaintiffs acknowledge that, as the parties seeking to invoke the jurisdiction of the federal court, they have the burden of establishing that jurisdiction exists. *See Kokkonen v.*

Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994). Federal courts possess federal question jurisdiction over "any civil action arising under the Constitution, laws, or Treaties of the United States." 28 U.S.C. § 1331. To determine whether a federal question is presented, this Court must examine the literal language of the complaint as well as "whether federal jurisdiction would exist under a properly pleaded complaint." *Sparta Surgical Corp. v. National Ass'n of Sec. Dealers, Inc.*, 159 F.3d 1209, 1212 (9th Cir.1998).

III. ARGUMENT

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

The Federal Defendants argue Plaintiffs' FAC violates this Court's August 2, 2016 Order and Fed. R. Civ. Proc. 8 by occasionally referring to "Defendants" collectively.[1] However, Plaintiffs properly followed this Court's instructions when amending their Complaint. 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 Order. As the Federal Defendants concede, the FAC has numerous instances where Plaintiffs refer to the FHWA and the DOT:

FHWA: ¶¶ 12-15, 17, 24, 64-66, 79, 91, 92, 97, 104, 105, 108, 110, 112, 113, 118, 124-126, 134, 147, 151, 161, 162, 164-169, 171-174, 182, 183, 188, 189, 192, 193, 198, 200-207, 210-213.

DOT: ¶¶ 62-64, 91, 105, 108, 110, 112, 113, 118, 125, 126, 134, 161, 162, 164, 165-168, 172, 174, 206, 210-213.

Where reasonable, Plaintiffs refrained from referring to "Defendants" collectively in the FAC.

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

[1] Counsel for Plaintiffs experienced issues with the ECF system, both in their initial attempt to file the First Amended Complaint on August 23 and later in attempting to re-file the First Amended Complaint. Counsel believes the issues were due to the size of the file. Counsel for Plaintiffs was not able to file the First Amended Complaint until August 26, 2016. While pointing out this issue, the Federal Defendants cite to no prejudice that they suffered due to these filing issues.

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 the Federal Defendants "fair notice" of the claims against them. *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 with this Court's order, Plaintiffs respectfully request leave to amend pursuant to Fed. Rule Civ. Proc. R 15.

2. Plaintiffs Gave the Federal Defendants Fair Notice of the Claims Against Them Pursuant to Fed. Rules Civ. Proc. Rule 8

The Federal Defendants further contend Plaintiffs' FAC should be dismissed due to violating Rule 8 for failure to identify each Defendant specifically. In making this argument, Federal Defendants improperly conflates Rule 8 with the heightened pleading standards under Rule 9(b), which prohibits the "lumping together of multiple defendants." *United States ex rel. Lee v. Corinthian Colleges,* 655 F.3d 984, 997 (9th Cir. 2011). Rule 8 sets forth the requirement for a Complaint: "A pleading that states a claim for relief must contain. . . a short and plain statement of the claim showing that the pleader is entitled to relief; and . . a demand for the relief sought, which may include relief in the alternative or different types of relief." This is not a case for fraud and, therefore, Rule 8 is the operative legal standard before this Court in this case.

Under Rule 8, "a pleading [must] give 'fair notice' of the claim being asserted and the 'grounds upon which it rests.'" *Herrejon v. Ocwen Loan Servicing, LLC,* 980 F.Supp.2d 1186, 1196 (E.D.Cal. 2013), citing *Yamaguchi,* 109 F.3d at 1481. The Federal Rules of Civil Procedure have a "flexible pleading policy." *Herrejon*, 980 F.Supp.2d at 1196. A complaint must "state the

elements of the claim plainly and succinctly," *Jones v. Community Redev. Agency*, 733 F.2d 646, 649 (9th Cir. 1984), and "allege with at least some degree of particularity overt facts which defendant engaged in that support plaintiff's claim." *Id.*, quoting *Sherman v. Yakahi*, 549 F.2d 1287, 1290 (9th Cir. 1977). Plaintiff's FAC satisfies the Rule 8 pleading requirements. As such, by the FAC, the Federal Defendants had "fair notice" of its involvement in the claims being asserted, *Yamaguchi*, 109 F.3d at 1481, as well as "grounds upon which [the claims] rest[]." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007).

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

As set forth in Paragraph 3 of the Gregory Declaration filed herewith, Plaintiffs and their counsel have just completed their initial review of the Administrative Record produced by Caltrans in July 2016. In the course of that review, it became apparent that the FAC should be further amended to add additional claims and allege additional facts specific to each Defendant supporting existing claims and the additional claims. Counsel for Plaintiffs is currently drafting that proposed Second Amended Complaint, which should be completed on or before September 30, 2016. Thus, should this Court find that Plaintiff's FAC falls out of compliance with Rule 8, Plaintiffs respectfully request further leave to amend based on the documents in the Administrative Record in order to fix this deficiency.

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B. PLAINTIFFS HAVE ADEQUATELY ALLEGED VIOLATIONS OF NEPA, SECTION 4(F), AND THE APA

1. Legal Background

The National Historic Preservation Act of 1966, as amended, 54 U.S.C. Section 300101 *et seq*. is the basis for the tribal consultation provisions as outlined in the regulations of the Advisory Council on Historic Preservation (ACHP). The sections of NHPA that have a direct bearing on the Section 106 review process for purposes of this action are:

- Section 101(d)(6)(A), which clarifies that historic properties of religious and cultural significance to Indian tribes may be eligible for listing in the National Register of Historic Places; and
- Section 101(d)(6)(B), which requires that Federal agencies, in carrying out their Section 106 responsibilities, consult with any Indian tribe that attaches religious and cultural significance to historic properties that may be affected by an undertaking.

Further, Section 106 of NHPA requires Federal agencies to consider the effects of their actions on historic properties and to seek comments from the ACHP. Also known as the Section 106 review process, it avoids unnecessary harm to historic properties from Federal actions. The procedure for meeting Section 106 requirements is defined in the ACHP's regulations, 36 CFR Part 800, "Protection of Historic Properties." The ACHP's regulations incorporate these provisions and reflect other directives about tribal consultation from Executive orders, Presidential memoranda, and other authorities. The regulations include both general direction regarding consultation and specific requirements at each stage of the review process.

Pursuant to Executive Order 13175, the federal government, through the Bureau of Indian Affairs, adopted a set of internal policies to define the requirements for government-to-government consultation between tribes and the federal government for proposed federal actions affecting tribes. *See* BIA Government-To Government Consultation Policy at http://www.bia.gov/cs/groups/public/documents/text/idc-002000.pdf. The goal of this policy, through government-to-government dialogue, is "to secure meaningful and timely tribal input." Under this policy, "consultation" includes that tribes are:

1. To receive timely notification of the formulated or proposed Federal action;

2. To be informed of the potential impact on Indian tribes of the formulated or proposed Federal action;

3. To be informed of those Federal officials who may make the final decisions with respect to the Federal action;

4. To have the input and recommendations of Indian tribes on such proposed action be fully considered by those officials responsible for the final decision; and

5. To be advised of the rejection of tribal recommendations on such action from those Federal officials making such decisions and the basis for such rejections.

Id. The policy farther declares that "[c]onsultation does not mean merely the right of tribal officials, as members of the general public, to be consulted, or to provide comments, under the Administrative Procedures Act or other Federal law of general applicability." *Id*.

Finally, the NEPA requires the preparation of an environmental impact statement ("EIS") for any proposed major Federal action that may significantly affect the quality of the human environment. The statutory language of NEPA does not mention Indian tribes. However, the Council on Environmental Quality regulations do require agencies to contact Indian tribes and provide them with opportunities to participate in various stages of preparation of an EIS.

When analyzing the statutory consultation requirements, the Indian law canons of construction require the court to construe the statutes liberally in favor of the Tribe, and ambiguous provisions are to be interpreted to the Tribe's benefit. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 (1985). This Court must also consider the requirements created by a defendants' own consultation policies in assessing the plausibility of the Tribe's complaint. *See Yankton Sioux Tribe v. Kempthorne*, 442 F. Supp. 2d 774, 784 (D.S.D. 2006).

For purposes of this Motion, the Federal Defendants do not dispute that the loss of sacred sites and destruction of the cultural heritage of an Indian Tribe can be an irreparable injury for which the Tribe can obtain legal relief. *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Department of the Interior,* 755 F. Supp. 2d 1104, 1108-9 (S.D. Cal. 2010). Courts have repeatedly confirmed that protection of historic sites and preservation of Tribal culture are in the public

interest. *Colorado River Indian Tribes v. Marsh,* 605 F. Supp. 1425, 1440 (C.D. Cal. 1985) (tribal sites "represent a means by which to better understand the history and culture of the American Indians in the past, and hopefully to provide some insight and understanding of the present day American Indians."). Similarly, the Court in *Quechan Tribe* found an injunction against a major development project to be in the public interest in an NHPA case: "The Tribe itself is a sovereign, and both it and its members have an interest in protecting their cultural patrimony. The culture and history of the Tribe and its members are also part of the culture and history of the United States more generally…. [I]n enacting NHPA Congress has adjudged the preservation of historic properties and the rights of Indian Tribes to consultation in the public interest… The Court must adopt the same view. *Quechan Tribe*, 755 F. Supp.2d at 1121-22.

Thus, the issue in this case comes down to: which Defendant agency is responsible. The Federal Defendants assert that they have no responsibility. However, the answer, for purposes of this Motion to Dismiss, is each named Defendant is responsible. Section 106 of the NHPA requires that prior to issuance of any federal funding, permit, or license, agencies must take into consideration the effects of the underlying "undertaking" on historic properties. 54 U.S.C. § 306108; 36 C.F.R. §§ 800.1, § 800.2(c)(2). Consultation must occur regarding sites with "religious and cultural significance" to Tribes. *Id*. § 800.2(c)(2)(ii)(D). Consultation must consider impacts on the "area of potential effects," defined as the area "within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties." 36 C.F.R. § 800.16(d).

The work on this Project is an "undertaking" as defined in the NHPA. 54 U.S.C. § 300320; 36 C.F.R. § 800.16(y). Federal agencies must consult under § 106 consultation to determine the effect of undertakings on historic properties. 54 U.S.C. § 306108 (federal agencies "shall take into account" the effect of actions on historic properties); 36 C.F.R. § 800.1(c). Under ACHP regulations, "it is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance…." 36 C.F.R. § 800.2(a) (emphasis added). The Advisory Council's regulations prescribe steps for identifying, evaluating, and determining the

undertaking's effects on potentially affected sites, and at every one of these steps, the agency must consult with Indian tribes. *Id*. § 800.3(f); § 800.4(a); § 800.5(c)(2); § 800.6; *id*. § 800.2(c)(ii)(D).

As the FAC alleges, when construction commenced under this Project, the Federal Defendants did not consult and did not consider—nor could they have considered—the impacts of the Project on sacred sites of importance to the Tribes. The FAC asserts the Federal Defendants made the threshold determination of impact in a manner completely inconsistent with the structure of Section 106, which requires the determination to be made by the agency in consultation with Tribes. The Council's regulations direct that agencies "shall ensure" the Section 106 process provides Tribes a reasonable opportunity to participate in each of the Section 106 steps of identifying, evaluating, and determining effects. 36 C.F.R. § 800.2(c)(2)(ii)(A). It is the "responsibility of the agency official to make a reasonable and good faith effort to identify Indian Tribes" to be consulted in the Section 106 process. *Id*. § 800.2(c)(4).

There is no question that these requirements are not satisfied where the Federal Defendants authorize action that may destroy historic sites, and leave it to Caltrans (who has a vested interested in moving forward with the Project) to determine for itself the Project's impacts on historic properties. As the FAC alleges, no § 106 consultation at all occurred with Plaintiffs prior to commencement of construction on the Project. Thus, the consultation process was fundamentally flawed, triggering the instant dispute.

The NHPA makes it clear that "undertaking" includes projects "in whole or in part under the direct or indirect jurisdiction of a Federal agency." 54 U.S.C. § 300320; 36 C.F.R. § 800.16(y). Similarly, the area of potential effects includes the area "within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties…." 36 C.F.R. § 800.16(d). Congress and the Advisory Council envisioned that Section 106 applies both to the components of the project directly giving rise to federal permitting jurisdiction, but also to indirect impacts, including areas outside the direct jurisdiction that are affected by permits.

2. National Historic Preservation Act

Congress enacted the NHPA in 1966 to "foster conditions under which our modern society and our historic property can exist in productive harmony." 54 U.S.C. § 300101(1). To this end,

Section 106 of the NHPA requires a federal agency to consider the effect of its "undertakings" on property of historical significance, which includes property of cultural or religious significance to Indian tribes. *Id*. §§ 306108, 302706(b). An undertaking is defined broadly to include any "project, activity, or program" that requires a federal permit. *Id*. § 300320.

Section 106, like NEPA, is often described as a "stop, look, and listen" provision. *See Narragansett Indian Tribe v. Warwick Sewer Auth.,* 334 F.3d 161, 166 (1st Cir. 2003) (quoting *Muckleshoot Indian Tribe v. U.S. Forest Serv*., 177 F.3d 800, 805 (9th Cir. 1999) (per curiam)). The agency must also give the Advisory Council on Historic Protection, which is charged with passing regulations to govern the implementation of Section 106, "a reasonable opportunity to comment on the undertaking." 54 U.S.C. § 306108. The agency must further consult with, inter alia, tribes "that attach religious or cultural significance to [affected] property." *Id*. § 302706(b). Until this is done, Section 106 is not satisfied.

The Federal Defendants must complete a multi-step "consultation" process before they permit the undertaking. *Id*. § 800.16(f). Indian tribes that "attach religious and cultural significance to historic properties" that may be affected by the "undertaking" are a consulting party in this process even when the properties are located outside reservation lands. *Id*. § 800.2(a)(4), (c)(2)(ii). The regulations in fact instruct agencies to recognize that property of importance to Indian tribes is "frequently" located on "ancestral, aboriginal, or ceded lands." *Id*. § 800.2(c)(2)(ii)(D). Once its interests are implicated, the affected tribe must be given a reasonable opportunity: "to identify its concerns about [these] properties"; to "advise on the identification and evaluation of" them; to "articulate its views on the undertaking's effects"; and to "participate in the resolution of adverse effects." *Id*. § 800.2(c)(2)(ii)(A). The agency is further directed to conduct these consultations "early in the planning process," *id*., in a "sensitive manner respectful of tribal sovereignty," and recognizing "the government-to-government relationship between the Federal Government and Indian tribes." *Id*. § 800.2(c)(2)(ii)(B)-(C).

Because the Project was "permitted" by the Federal Defendants, the Project falls within the NHPA's definition of a federal "undertaking." *See* 54 U.S.C. § 300320; 36 C.F.R. § 800.16(y). As federal undertakings, they triggered the duty of the Federal Defendants under the NHPA to

consider, prior to the issuance of any permit, their effects on properties of cultural or historic significance. *See* 54 U.S.C. § 306108 ("[P]rior to the issuance of any license, [the federal agency] shall take into account the effect of the undertaking on any historic property.").

According to the FAC, these obligations were not fulfilled, because construction started on the Project before any consultation with Plaintiffs. Thus the issue is: which Defendant agency had the obligation to fulfill the responsibilities. The Advisory Council's regulations provide that the "agency official should plan consultations appropriate to the scale of the undertaking and the scope of the Federal involvement." 36 C.F.R. § 800.4(a). The FAC alleges that the MOU sets forth the required scope of the involvement by the Federal Defendants.

The Federal Defendants claim that, under Section 3.2 of the Memorandum of Understanding ("MOU"), their role with the tribes was limited. *See* MOU at ECF 32-1. The express language of Section 3.2.3 states:

> The USDOT Secretary's responsibilities for government-to-government consultation with Indian tribes as defined in 36 C.F.R. 800.16(m) may not be assumed by Caltrans under this MOU. FHWA remains responsible for all government-to-government consultation, including initiation of tribal consultation, unless otherwise agreed as described in this section. A notice from Caltrans to an Indian tribe advising the tribe of a proposed activity is not considered "government-to-government consultation" within the meaning of this MOU. lfFHWA determines based on the consultation process that Caltrans has adequately resolved any project-specific tribal issues or concerns, then the FHW A's role in the environmental process shall be limited to carrying out the government-to-government consultation process. If a project-related concern or issue is raised in a government-to-government consultation process with an Indian tribe, as defined in 36 CFR 800. l 6(m), 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 FHW A 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.

The FAC clearly alleges the Federal Defendants failed to comply with the MOU. *See* Paragraphs 184, 188-89, 192-93, 202, 204, and 206-07. One example is the lack of good faith negotiations concerning a Programmatic Agreement. A programmatic agreement is an "agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings" that is negotiated by the Advisory Council

and the permitting agency. *See* 36 C.F.R. § 800.14(b). *See, e.g., Karst Envtl. Educ. & Prot., Inc. v. EPA*, 475 F.3d 1291, 1294-95 (D.C. Cir. 2007) ("Because of the 'operational similarity' between NEPA and NHPA, both of which impose procedural obligations on federal agencies after a certain threshold of federal involvement, courts treat 'major federal actions' under NEPA similarly to 'federal undertakings' under NHPA.").

Section 106 analysis is designed to "discourage[e] federal agencies from ignoring preservation values in projects they initiate, approve funds for or otherwise control." *Lee v. Thornburgh*, 877 F.2d 1053, 1056 (D.C. Cir. 1989). The FAC clearly alleges these Federal Defendants ignored "preservation values" before permitting the commencement of construction on the Willits Bypass Project. The FAC alleges the Federal Defendants violated multiple federal statutes in connection with the Project, including NEPA and NHPA. The alleged violations of the NHPA involve sites of cultural or religious significance to Plaintiffs. These Federal Defendants failed to properly consult with Plaintiffs prior to allowing commencement of construction.

Further, as set forth in the Programmatic Agreement, *see* Glazer Decl., ¶ 3, Ex. B, p. 3, given the FHWA's "unique legal relationship with Indian tribes," the FHWA remains "legally responsible for government-to-government consultation with Indian tribes." Part of that responsibility is to "take into account the effects of the Program on historic properties in California and that these stipulations shall govern compliance of the Program with Section 106 of the NHPA until this Agreement expires or is terminated." *Id.*

The Programmatic Agreement goes on to provide that FHWA shall retain responsibility for government-to-government consultation with Indian tribes for Program undertakings. *Id.* at p. 5. That same page goes on to state: "Notwithstanding any other provision of this stipulation, FHWA … shall honor the request of any Indian tribe at any time in the 36 CFR Part 800 process for government-to-government consultation regarding an undertaking covered by this Agreement. *Id.* Caltrans merely assists FHWA "in project specific government-to-government consultation, if an Indian tribe does not object." *Id.* at p. 6. Finally, nothing in the Programmatic Agreement was intended to "limit the ability of Indian tribes to consult directly with parties to [the Programmatic] Agreement when they have a concern about an undertaking or about historic properties that may be

affected by an undertaking, including properties to which they might ascribe religious or cultural significance." *Id.* The instant Complaint is replete with allegations that the Federal Defendants failed to engage in proper government-to-government consultation under the NHPA.

Nothing in the MOU or Section 327 of the Surface Transportation Project Delivery Pilot Program precludes the Federal Defendants from being named in an action brought for violations of the NHPA as the claims relate to Indian Tribes.

In the MOU with Caltrans, the Federal Defendants admit:

> The USDOT Secretary's responsibilities for government-to-government consultation with the Indian tribes as defined in 36 C.F.R. 800.16(m) may not be assumed by Caltrans under this MOU . . . FHWA remains responsible for all government-to-government consultation, including initiation of tribal consultation, unless otherwise agreed as described in this section.

See Glazer Decl., ¶ 2, **Ex. A**, p. 4; *see also* Glazer Decl., ¶ 3, **Ex. B**, p. 3 (". . . the FHWA and the Corps Districts remain legally responsible for government-to-government consultation with Indian tribes"); *id.* at p. 4 ("Notwithstanding any other provision of this stipulation, FHWA, and the Corps Districts shall honor the request of any Indian tribe at any time in the 36 CFR Part 800 process for government-to-government consultation regarding an undertaking covered by this Agreement.").

Based on the foregoing, the Federal Defendants could not assign obligations under NEPA and Section 4(f) that entailed government-to-government consultation with Plaintiffs. Even assuming *arguendo* that, ***originally***, pursuant to the MOU, the Federal Defendants' liability for government-to-government consultation with Plaintiffs was limited to alleged violations of the National Historic Preservation Act, once Project-related concerns were raised by Plaintiffs in government-to-government consultation, the Federal Defendants became liable for inaction and action taken in violation of NEPA and Section 4(f):

> If a project-related concern or issue is raised in a government-to-government consultation process with an Indian tribe, as defined in 36 CFR 800.16(m), 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.

See Glazer Decl., ¶ 2, **Ex. A**, p. 4. The FAC is replete with allegations that Plaintiffs raised such Project-related concerns related to violations of NEPA and other federal environmental law, including Section 4(f):

- "Defendants have not properly engaged in government-to-government consultation with the Federally-recognized Indian Tribes with ancestral lands in Mendocino County, CA about the Willits Bypass Project and the construction process, **the post-review discoveries, the unanticipated inadvertent effects, and the potential adverse effect on the subject historic properties."** FAC, ¶ 43 (emphasis added).

- "On February 18, 2015, during their government-to-government consultation with Defendants, Plaintiffs requested a Supplemental EIS to contend with the numerous historic properties, cultural resources, and sacred sites that have been discovered in the Project area and the Mitigation parcels subsequent to the 2006 approval of the original EIS. In the government-to-government consultations with Defendants, Plaintiffs stated that Defendants had failed to exercise due diligence in their initial archaeological survey efforts for the Willits Bypass Project, conducting surface surveys only in a wetlands area covered by grass." *Id.* at ¶ 44.

- "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." *Id*. at ¶ 151.

- Since September 2013, "neither Caltrans nor the FHWA have provided Plaintiffs with any information about how previously destroyed sites could have been protected or their destruction avoided." *Id*. at ¶ 171.

- "The Coyote Valley Band of Pomo Indians has requested that Cal Trans and the Federal Highway Administration involved in the Willits By Pass [*sic*] construction enter into government to government consultations with the Tribe in regards to this project and with particular emphasis on the grossly negligent and illegal manner in which Cal Trans construction activities completely destroyed our ancestral village . . ." Ex. 5 to FAC.

The fact that the Federal Defendants failed to "reassume all or part of the responsibilities for the project" in light of the foregoing allegations cannot insulate them from liability for their misdeeds; quite the opposite, the Federal Defendants' refusal to act in the face of clear violations of law and brazen disregard for Plaintiffs' sovereignty forms the basis for this lawsuit. This view finds support not just in 23 U.S.C. § 327, 36 C.F.R. 800.16, and Executive Order 13175, rather, it is

required under the plain meaning of the MOU (*see* Glazer **Ex. A**) and the First Amended FHWA Section 106 Programmatic Agreement (the "Programmatic Agreement") (*id.* at **Ex. B**).

The assertion that Caltrans is solely liable and that this Court lacks jurisdiction over the Federal Defendants boldly contradicts the plain language of Section 327 and the MOU. For example, Section 327(a)(2)(B)(i) clearly articulates that states "**may** assume, **all or part** of the responsibilities of the Secretary for environmental review, consultation, or other action required under any Federal environmental law pertaining to the review or approval of a specific project." (Emphasis added). As the MOU concedes, it does not apply to government-to-government consultation, including consultation regarding environmental review, with Plaintiffs. Glazer Decl., **Exs. A-B**. Accordingly, as Section 327(a)(2)(D) makes crystal clear: "Federal responsibility. Any responsibility of the Secretary not explicitly assumed by the State by written agreement under this section shall remain the responsibility of the Secretary." Therefore, as the MOU expressly concedes: "FHWA remains responsible for all government-to-government consultation, including initiation of tribal consultation, unless otherwise agreed as described in this section." *See* Glazer Decl., ¶ 2, Ex. A, p. 4.

IV. CONCLUSION

For the foregoing reasons, the Motion to Dismiss of the Federal Defendants should be **DENIED** in its entirety.

Dated: September 21, 2016

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