JOHN C. CRUDEN
Assistant Attorney General
Environment & Natural Resources Division
United States Department of Justice

DAVID B. GLAZER (D.C. 400966)
Natural Resources Section
Environment & Natural Resources Division
United States Department of Justice
301 Howard Street, Suite 1050
San Francisco, California 94105
TEL: (415) 744–6491
FAX: (415) 744-6476
e-mail: david.glazer@usdoj.gov

Attorneys for Federal Defendant

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' REPLY MEMORANDUM IN SUPPORT OF THEIR 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

I. OVERVIEW 1
II. ARGUMENT 1
A. Plaintiffs Have Failed to Invoke the Court's Article III Jurisdiction 1
1. Plaintiffs Have No Cause of Action Under the MOU 2
2. Plaintiffs Fail to Meet the Redressability Requirements of Standing Doctrine 4
B. Plaintiffs Have Failed to Comply with the Conditions of the Court's Order 5
III. CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Balla v. Idaho State Bd. of Corr.,
869 F.2d 461 (9th Cir. 1989) 5

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 5

Conley v. Gibson,
355 U.S. 41 (1957) 5

Ferdik v. Bonzelet,
963 F.2d 1258 (9th Cir. 1992) 5

Gonzales v. Gorsuch,
688 F.2d 1263 (9th Cir. 1982) 4

Grand Canyon Tr. v. Williams,
98 F. Supp. 3d 1044 (D. Ariz. 2015) 3

Klamath Water Users Protective Ass'n v. Patterson,
204 F.3d 1206 (9th Cir. 1999) 4

McHenry v. Renne,
84 F.3d 1172 (9th Cir. 1996) 5

Mtn. States Legal Found. v. Espy,
833 F. Supp. 808 (D. Idaho 1993) 4

Orff v. United States,
358 F.3d 1137 (9th Cir. 2004) 4

Quechan Indian Tribe v. U.S. DOI,
547 F. Supp. 2d 1033 (D. Ariz. 2008) 3

Schmidt v. Herrmann,
614 F.2d 1221 (9th Cir. 1980) 5

Smith v. Marsh,
194 F.3d 1045 (9th Cir. 1999) 4

Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 4

Te-Moak Tribe of W. Shoshone of Nev. v. U.S. DOI,
608 F.3d 592 (9th Cir. 2010) 3

Teutscher v. Woodson,
No. 13-56411, No. 13-56659, 2016 U.S. App. LEXIS 15790 (9th Cir. Aug. 26, 2016) 5

Townley v. Miller,
722 F.3d 1128 (9th Cir. 2013) 4

United States v. Romm,
455 F.3d 990 (9th Cir. 2006) 4

Yamaguchi v. U.S. Dep't of the Air Force,
109 F.3d 1475 (9th Cir. 1997) 5

Statutes

23 U.S.C. § 138 (2012) 1

23 U.S.C. § 327 (2012) 1, 2

42 U.S.C. §§ 4321–4370h (2012) 1

49 U.S.C. § 303(c) (2012) 1, 2

54 U.S.C. § 306108 (2012) 1

Regulations

36 C.F.R. § 800.2(c) (2013) 3

36 C.F.R. § 800.6(c) (2013) 3

36 C.F.R. § 800.14(b) (2013) 3

Miscellaneous

Fed. R. Civ. P. 8 5

I. OVERVIEW

Plaintiffs' Amended Complaint, ECF No. 66, purports to bring claims against the Federal Defendants 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,[1] challenging the Willits Bypass Project ("Project"). It names the Federal Defendants, even though the California Department of Transportation ("Caltrans") is the responsible party under 23 U.S.C. § 327 and the Memorandum of Understanding ("MOU")[2] entered into between Caltrans and the Federal Highway Administration ("FHWA"). The Federal Defendants move to dismiss, ECF No. 68, because (1) Plaintiffs have not properly alleged a claim under Section 3.2.3 of the MOU,[3] much less under any of the statutes they plead as a basis for their claims; (2) Plaintiffs have no right to enforce Section 3.2.3 of the MOU in any event; (3) Plaintiffs have not sought relief relating to Section 3.2.3 of the MOU and therefore fail to establish their standing; and (4) Plaintiffs have failed to satisfy the conditions set out in the Court's Order granting them leave to amend, ECF No. 58, at 7, 8. In their opposition to Federal Defendants' motion, ECF No. 74, Plaintiffs fail to even address Federal Defendants' arguments concerning Section 3.2.3 of the MOU and fail to demonstrate that their Amended Complaint is any less deficient than their original complaint. For that reason, and because the Court gave Plaintiffs ample opportunity to produce a conforming complaint (as well as providing them a roadmap for doing so), Plaintiffs' Amended Complaint should be dismissed with prejudice and without leave to amend.

II. ARGUMENT

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

Plaintiffs have ignored the Court's direction to allege facts that would support claims under

---

[1] Section 4(f) of the Department of Transportation Act and Section 18(a) of the Federal-Aid Highway Act are substantively similar and therefore are referred to collectively as "Section 4(f)."

[2] Previously submitted as ECF No. 32-1 (Glazer Decl. Exh. A).

[3] The Court observed as much in its Order granting Federal Defendants' motion to dismiss Plaintiffs' original complaint with leave to amend. *See* ECF No. 58, at 8.

NEPA, Section 4(f), and the NHPA against the Federal Defendants notwithstanding the FHWA-Caltrans MOU. *See* ECF No. 58, at 7–8. Instead, the Amended Complaint mostly restates earlier allegations surrounding Project implementation and, where it does mention Section 3.2.3 of the MOU, it fails to allege that the FHWA must take back Project responsibilities and it fails even to seek such relief from the Court. *See* Federal Defendants' opening memorandum, ECF No. 68, at 3, 4, 8. As discussed below, because of those failures, Plaintiffs fail to establish federal subject matter jurisdiction and standing.

1. Plaintiffs Have No Cause of Action Under the MOU

Under 23 U.S.C. § 327 and the FHWA-Caltrans MOU, Project responsibilities have been assigned to and assumed by Caltrans, with the exception of "government-to-government" consultation obligations with federally recognized Indian tribes. Those obligations, however, do not exist in a vacuum. As relevant here, the duty to "consult" arises under the NHPA and its implementing regulations,[4] which require agencies to provide a federally recognized Indian tribe "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, . . . articulate its views on the undertaking's effects on such properties, and participate in the

[4] Neither NEPA nor Section 4(f) entail consultation obligations independent of those relevant under the NHPA, and Plaintiffs cite no valid authority to the contrary. Executive Order No. 13175, 65 Fed. Reg. 67,249, 2000 WL 34508356(Pres.) (Nov. 6, 2000), cited in ECF No. 74, at 6, expressly states in Section 10 ("Judicial Review") that it is "intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person." The Executive Order therefore cannot be the basis for a substantive right of action. *See City of Carmel-by-the-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1166 (9th Cir. 1997) (executive order may be judicially reviewable *only if* (1) the order is based upon statutory authority, (2) there is a legal standard or "law to apply" by which the agency's action may be judged, and (3) the executive order does not expressly disclaim any right of review). Plaintiffs also cite, ECF No. 74, at 6–7, the Bureau of Indian Affairs Government-to-Government Consultation Policy, *available at* http://www.bia.gov/cs/groups/public/documents/text/idc-002000.pdf (last visited Sept. 28, 2016), which by its terms applies to the Bureau of Indian Affairs. Also, as a "policy," it no more creates enforceable rights than does Executive Order No. 13175, pursuant to which it was adopted. And although heading III.B of Plaintiffs' opposition memorandum suggests that they are pleading "violations" of the Administrative Procedure Act ("APA"), the APA is not a statute an agency can "violate," unless it has not followed the correct procedures in conducting a rule-making, which is not relevant here. *See* ECF No. 31, at 6 n.7. The APA is not an independent grant of subject matter jurisdiction, *Califano v. Sanders*, 430 U.S. 99, 105–07 (1977), or a source of substantive rights, *El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review*, 959 F.2d 742, 753 (9th Cir.1991) ("There is no right to sue for a violation of the APA in the absence of a relevant statute whose violation forms the legal basis for [the] complaint.") (internal quotation marks and citations omitted).

resolution of adverse effects." 36 C.F.R. § 800.2(c)(2)(ii)(A). Such obligations may be satisfied, as here, by a Programmatic Agreement under 36 C.F.R. § 800.14(b). *See Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 608–10 & n.20 (9th Cir. 2010); *Grand Canyon Trust v. Williams*, 98 F. Supp. 3d 1044, 1066–69 (D. Ariz. 2015), *appeal docketed*, No. 15-15857 (9th Cir. Apr. 28, 2015). And even though a tribe, as here, may refuse to enter into a Programmatic Agreement, the Programmatic Agreement remains valid. *See Quechan Indian Tribe of the Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 547 F. Supp. 2d 1033, 1049 (D. Ariz. 2008); 36 C.F.R. §§ 800.6(c)(2)(iv), (c)(3), 800.14(b)(3); ECF No. 36 (Reply in support of motion to dismiss) at 4 & n.6. As pointed out in Federal Defendants' motion to dismiss Plaintiffs' initial complaint, a State-wide Programmatic Agreement covering the Willits Bypass Project is in place and was before Project activities began. *See* ECF No. 31, at 10–11; ECF No. 36 at 4; ECF No. 32-2 (Glazer Decl. Exh. B).

Plaintiffs fail to plead a viable claim that the Federal Defendants failed in some specific manner to satisfy their government-to-government consultation obligations. The closest they come is the allegation that a Project-specific Programmatic Agreement was not finalized before Caltrans began construction, *see* ECF No. 74, at 11–13. But, as explained above, that allegation does not support a viable NHPA claim. And while Plaintiffs insist that the Amended Complaint "is replete with allegations that the Federal Defendants failed to engage in proper government-to-government consultation under the NHPA[,]" *id.* at 13, merely lumping the FHWA in with Caltrans is not the same as explaining how the Federal Defendants engaged in specific conduct that violated the NHPA. Plaintiffs' dissatisfaction with the results of the government-to-government consultation that took place does not, without more, support an NHPA claim. *See Quechan Indian Tribe*, 547 F. Supp. 2d at 1049.

To the extent that Plaintiffs complain of how the Project is being implemented on a day-to-day basis and of alleged violations of NEPA, Section 4(f), or the NHPA, Plaintiffs fail to plead a valid claim that the Federal Defendant should have reassumed Project responsibilities or that the Court should order them to do so. *See* ECF No. 68, at 3–4, 8. Nor do they have any rights to insist that the Federal Defendants reassume Project responsibilities, either under the State-wide Programmatic Agreement or under the MOU. Both Agreements leave reassumption to the discretion of the FHWA, and as incidental

beneficiaries of those Agreements (at most), Plaintiffs have no rights to enforce them. *See id.* at 4–7; *Orff v. United States*, 358 F.3d 1137, 1145–47 (9th Cir. 2004), *aff'd*, 545 U.S. 596 (2005); *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1211–12 (9th Cir. 2000). Plaintiffs never address that argument and therefore concede it. *See United States v. Romm*, 455 F.3d 990, 997 (9th Cir. 2006) ("[A]rguments not raised by a party in its opening brief are deemed waived.") (quoting *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999)); *Mountain States Legal Found. v. Espy*, 833 F. Supp. 808, 813 n.5 (D. Idaho 1993) (deeming claims not raised in summary judgment motion abandoned and granting judgment for defendants); ECF No. 58, at 8 (argument not addressed by Plaintiffs here is deemed conceded).[5]

In short, Plaintiffs have not—and, more importantly, *cannot*—plead claims against the Federal Defendants under NEPA, Section 4(f), or the NHPA.

2. Plaintiffs Fail to Meet the Redressability Requirements of Standing Doctrine

As noted above and in Federal Defendants' opening memorandum, ECF No. 68, at 8, Plaintiffs do not seek an order from this Court that would redress any alleged failure to reassume Project responsibilities. They therefore fail to establish a critical element of standing, and their claims must therefore be dismissed for failure to come within this Court's Article III jurisdiction. *See* ECF No. 68, at 7–8; *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("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). Plaintiffs have not responded to that argument in their opposition memorandum and, therefore, concede it. *See Romm*, 455 F.3d at 997; *Marsh*, 194 F.3d at 1052; *Mountain States Legal Found.*, 833 F. Supp. at 813 n.5; ECF No. 58, at 8.

[5] Similarly, Plaintiffs must concede that allegations of acts or omissions occurring before October 20, 2009, if not before July 5, 2007, are time-barred. *See* ECF No. 68, at 3 n.4.

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

As Federal Defendants pointed out in their opening memorandum, Plaintiffs' Amended Complaint continues the lump the Federal Defendants and Caltrans together. *See* ECF No. 68, at 2–4. In their defense, Plaintiffs insist that they "took all reasonable steps within their power to comply with this Court's order," ECF No. 74, at 4, and that they therefore cannot be faulted, citing *Balla v. Idaho State Bd. of Corrections*, 869 F.2d 461, 466 (9th Cir. 1989). But *Balla* discussed the standard for civil contempt; that is not the standard here. Plaintiffs here are masters of their complaint, *Teutscher v. Woodson*, Nos. 13-56411, 13-56659, 2016 U.S. App. LEXIS 15790, at *49 (9th Cir. Aug. 26, 2016); there is no reason they cannot produce an acceptable document that complies with the Court's Order (other than that they simply have no legitimate claim against the Federal Defendants). Merely lumping the Defendants together does not comply with the Court's Order, which expressly prohibited such muddled pleading, ECF No. 58, at 7, 8, nor does it comply with Rule 8 of the Federal Rules of Civil Procedure. *McHenry v. Renne*, 84 F.3d 1172, 1177–80 (9th Cir. 1996) (dismissing overly prolix complaint that fails to clearly allege wrongful conduct supporting a viable claim for relief).

Contrary to Plaintiffs' insistence, Federal Defendants are not requiring a heightened standard of pleading, *see* ECF No. 74, at 4, but rather the opposite: allegations that are "simple, concise, and direct." Fed. R. Civ. P. 8(d)(1); *see McHenry*, 84 F.3d at 1178 (dismissal warranted "for failure to obey a court order to file a short and plain statement of the claim as required by Rule 8") (citing *Schmidt v. Herrmann*, 614 F.2d 1221, 1223–24 (9th Cir. 1980)); *see also Ferdik v. Bonzelet*, 963 F.2d 1258, 1260 (9th Cir. 1992) (dismissal for failure to comply with conditions on leave to amend). Federal Defendants are entitled to such a clear and simple statement of Plaintiffs' claims so that they may have fair notice of what allegations those claims are based on.[6]

---

[6] *Yamaguchi v. United States Department of Air Force*, 109 F.3d 1475, 1481 (9th Cir. 1997), cited in Plaintiffs' opposition at 4, relies on *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (providing that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"), a standard that was retired by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007). Instead, Plaintiffs must set forth "enough facts to state a claim to relief that is plausible on its face." 550 U.S. at 570.

Plaintiffs insist they have complied with Rule 8 and the Court's Order, citing paragraphs from their Amended Complaint in which they mention the FHWA or U.S. Department of Transportation. ECF No. 74, at 3.[7] But a quick review of those paragraphs reveals that they are either not relevant to the Federal Defendants' alleged liability, *see, e.g.*, ECF No. 66, ¶¶ 15, 66 (discussing entry into the MOU), ¶ 79 (discussing FHWA's promulgation of NEPA regulations); ¶ 182 (discussing NHPA Programmatic Agreement); or allege actions outside the relevant statute of limitations, *see, e.g.*, *id.* ¶¶ 12–13, 91.a (discussing the 2006 final Environmental Impact Statement ("EIS"); *id.* ¶ 17 (discussing NHPA review in 2005 and 2006); or plainly include the Federal Defendants in allegations going to Caltrans's activities, *id.* ¶ 64 (concerning NEPA review); ¶¶ 24, 91 (concerning construction activities and ongoing NHPA review obligations), ¶¶ 113, 164–68 (concerning Caltrans's oversight of tribal monitors), ¶ 147 (concerning alleged need to prepare a supplemental EIS), ¶¶ 151, 161, 162 (concerning alleged omissions of Caltrans archaeologist); ¶¶ 172–74 (concerning alleged failure to identify historic properties). The problem remains that, apparently unsure of a basis for naming the Federal Defendants in this lawsuit, Plaintiffs largely repeat their earlier allegations that day-to-day Project activities have not, in their view, been appropriately handled, which are allegations that the Court has already deemed deficient. ECF No. 58, at 7, 8. As noted in Federal Defendants' opening memorandum, ECF No. 68, at 2–4, where Plaintiffs attempt to allege acts or omissions on the part of FHWA, they fall short of alleging actionable claims *and* fail to follow up any such allegations in their Prayer for Relief. In short, Plaintiffs' allegations against the Federal Defendants are merely make-weight, and the Federal Defendants should be dismissed from this action.[8]

---

[7] The Court directed Plaintiffs to submit a redline of their Amended Complaint against their original complaint, ECF No. 70 (Order of Sept. 8, 2016). The document submitted, ECF No. 75, does not satisfy the purpose the Court undoubtedly had in mind, since it is plainly not a "redline" but a confusing document that summarizes each of the changes made between the two documents, including a great many nonsubstantive formatting changes.

[8] Curiously, Plaintiffs assert that they are currently drafting yet another proposed amended complaint, ECF No. 74, at 5, but they fail to suggest in what ways that proposed amendment would cure the deficiencies that have plagued Plaintiffs' first two complaints.

III. CONCLUSION

For the reasons set forth above, the Court should dismiss Plaintiffs' claims against the Federal Defendants, without leave to amend.

Respectfully submitted,

DATED: September 28, 2016

JOHN C. CRUDEN

Assistant Attorney General
Environment & Natural Resources Division

/s/*David B. Glazer*
DAVID B. GLAZER
Natural Resources Section
Environment & Natural Resources Division
United States Department of Justice
301 Howard Street, Suite 1050
San Francisco, California
Tel: (415) 744-6491
Fax: (415) 744-6476
E-mail: David.Glazer@usdoj.gov

Attorneys for Federal Defendant

OF COUNSEL

BRETT J. GAINER
Senior Attorney
Federal Highway Administration

CERTIFICATE OF SERVICE

I, David B. Glazer, hereby certify that, on September 28, 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 28, 2016

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