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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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AS TO AS TO THE FEDERAL DEFENDANTS

Date: **December 15, 2017**
Time: **9:00 a.m.**
Location: **Courtroom 5**

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

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I. SUMMARY OF ARGUMENT

This case arises out of the failure to consult, the failure to protect, and the failure to reassume responsibilities during construction of the Willits Bypass Project. Summary judgment should be granted in favor of Plaintiffs the Coyote Valley Band of Pomo Indians of California ("Coyote Valley") and the Round Valley Indian Tribes of California ("Round Valley") (collectively "Plaintiffs") as against the Federal Highway Administration and the federal Department of Transportation ("USDOT") (collectively the "Federal Defendants") under the National Environmental Protection Act, Section 4(f) of the Department of Transportation Act, 49 U.S.C. Section 303(c) ("Section 4(f)"), Section 18(a) of the Federal-Aid Highway Act, 23 U.S.C. Section 138 ("Section 18(a)"), and the National Historic Preservation Act.

On July 1, 2007, the FHWA entered into a Memorandum of Understanding ("MOU") with Defendant California Department of Transportation ("Caltrans"), in which the FHWA assigned certain responsibilities and liabilities for various projects, including the Willits Bypass Project, to Caltrans, pursuant to the Surface Transportation Project Pilot Delivery Program (the "Pilot Program"), 23 U.S.C. Section 327. While the parties agreed the FHWA would assign and Caltrans would assume "all of the USDOT Secretary's responsibilities for environmental review, consultation, or other such action pertaining to the review or approval" of the Project under specific federal environmental laws including, Section 4(f), Section 18(a), and the NHPA. However, Caltrans did not assume the Federal Defendants' responsibilities for government-to-government consultation under the NHPA.

The Federal Defendants are liable for failing to properly identify and protect Plaintiffs' sacred, cultural, and archeological sites and resources, for destroying certain sites during the construction of the Project for failing to properly consult in good faith, and for refusing to reassume regulatory jurisdiction over the Project when requested by Plaintiffs. Given the current state of the Project is uncertain, this Court should require Defendants to take additional mitigating actions to protect cultural, sacred, or historical resources. Plaintiffs believe that the determination as to the appropriate remedy should be made at a later, remedial phase of this

litigation. While Plaintiffs recognize major parts of this Project are substantially complete, there remain important tasks in areas containing cultural, sacred, and historical resources.

II. STATEMENT OF RELEVANT FACTS[1]

This lawsuit concerns the failure of Defendants California Department of Transportation ("Caltrans") and Federal Highway Administration ("FHWA") to properly identify and protect cultural and sacred resources located on the Willits Bypass Project and its mitigation area. The reasons for the lack of proper protective measures as they apply to the FHWA include issues with the failure of the FHWA to reassume responsibility pursuant to a Memorandum of Understanding, failure to engage in good faith government-to-government consultations, disagreement over standards to identify and protect sites, conflict over proposed mitigation measures to manage and compensate for the multiple site damages that has already occurred, and failure to comply with Section 106 of the NHPA when construction commenced in June 2013 and when the Federal Defendants failed to correct these errors once additional archeological sites were discovered. The FHWA also failed to retain its duty to consult with Plaintiffs under the NHPA until 2013, when consultation commenced, and from that point, the FHWA failed to properly consult with Plaintiffs.

By their Complaint, Plaintiffs Coyote Valley Band of Pomo Indians of California ("Coyote Valley") and Round Valley Indian Tribes of California ("Round Valley") (collectively "Plaintiffs") allege the FHWA violated the National Environmental Policy Act ("NEPA"), Section 4(f) of the Department of Transportation Act, 49 U.S.C. Section 303(c) ("Section 4(f)"), Section 18(a) of the Federal-Aid Highway Act, 23 U.S.C. Section 138 ("Section 18(a)"), and the National Historic Preservation Act ("NHPA"). [2]

[1] Unless otherwise indicated, all facts are taken from the Declaration of Priscilla Hunter, filed herewith.

[2] In its Order on the Federal Defendants' Motion to Dismiss, this Court concluded Plaintiffs stated claims against the Federal Defendants under NEPA, Section 4(f), Section 18(a), and the NHPA to the extent those claims are premised on the Federal Defendants' action, or inaction, occurring after February 18, 2015.

Since June 2013, Caltrans and FHWA have been constructing improvements to U.S. Highway 101 in the vicinity of Willits, CA. The undertaking consists of both the ***Willits Bypass Project***, a 5.9-mile long rerouting of Highway 101 through Little Lake Valley, along with the ***Willits Mitigation Project*** to mitigate impacts to biological resources as a result of the bypass construction (collectively the "Project"). The Project is a federal undertaking subject to 36 CFR 800, the implementing regulations for Section 106 of the NHPA. The Project also is subject to state historic preservation laws and regulations set forth in the California Environmental Quality Act ("CEQA") (Public Resources Code [PRC] §21000 et seq.) and PRC Section 5024 for state-owned historical resources. The environmental review, consultation, and any other action required in accordance with applicable federal laws for this project should have been conducted under the NEPA.

On July 1, 2007, the FHWA entered into a Memorandum of Understanding ("MOU") with Caltrans, in which the FHWA assigned certain responsibilities and liabilities for various projects, including the Willits Bypass Project, to Caltrans, pursuant to the Surface Transportation Project Pilot Delivery Program (the "Pilot Program"), 23 U.S.C. Section 327. (*See* Dkt. No. 32-1, Declaration of David B. Glazer ("Glazer Decl."), Ex. A (MOU), §§ 1.1.1, 3.1.1.) The parties agreed the FHWA would assign and Caltrans would assume "all of the USDOT Secretary's responsibilities for environmental review, consultation, or other such action pertaining to the review or approval of a specific project as required under" other specific federal environmental laws including, Section 4(f), Section 18(a), and the NHPA. (MOU §§ 3.2.1.I, 3.2.1.Y.) Caltrans did not assume the FHWA's responsibilities for government-to-government consultation under the NHPA. (MOU § 3.2.3.)

In 2005 the Federal Defendants concluded a Section 106 review and issued a finding of conditional No Adverse Effect to historic properties. The Federal Defendants issued that finding without any government-to-government consultation with Plaintiffs. In 2006 Caltrans identified only one archaeological site eligible for registry on the National Register of Historic Places ("NRHP"). Since 2013 Caltrans has identified over thirty (30) additional archeological sites that

are eligible for registry on the NRHP. Following a government-to-government consultation in 2015, Plaintiffs requested the FHWA to require that Caltrans prepare a supplemental EIS to address proper identification, protection, and avoidance of the tribes' ancestral cultural sites in the Project area and mitigation lands and asked the FHWA to reassume regulatory jurisdiction over the Willits Bypass Project. On September 8, 2016, Coyote Valley reiterated that request. That request was never granted.

Round Valley also raised issues relating to the fact that it was not an "invited signatory party" to a programmatic agreement entered into in 2014. That Programmatic Agreement is entitled "First Amended Programmatic Agreement Among the Federal Highway Administration, the Advisory Council on Historic Preservation, the California State Historic Preservation Officer, and the California Department of Transportation Regarding Compliance with Section 106 of the National Historic Preservation Act, as it Pertains to the Administration of the Federal-Aid Highway Program in California." (See Glazer Decl., Ex. C ("Programmatic Agreement").)

III. LEGAL STANDARD

Summary judgment is appropriate when the record demonstrates "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). An issue is "genuine" if there is sufficient evidence for a reasonable fact finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248-49 (1986). "[A]t the summary judgment stage the judge's function is not ... to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Id*. at 249. The party moving for summary judgment bears the initial responsibility of identifying those portions of the record which demonstrate the absence of a genuine issue of a material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In the absence of such facts, "the moving party is entitled to a judgment as a matter of law." *Celotex*, 477 U.S. at 323.

Once the moving party meets this initial burden, the non-moving party "may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing

that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). If the non-moving party fails to make this showing, the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323.

The Ninth Circuit has emphasized that "courts of equity have broad discretion in shaping remedies." *Garcia v. Lawn*, 805 F2d 1400, 1403 (9th Cir 1986). The Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701-706 (2006), governs this Court's review of Plaintiffs' claims under NEPA, Section 4(f), Section 18(a), and the NHPA. The APA permits this Court to "hold unlawful and set aside agency action, findings and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). *See, e.g., N. Idaho Cmty. Action Network v. U.S. Dep't of Transp*., 545 F.3d 1147, 1152 (9th Cir.2008) (APA governs the court's review under NEPA and the DTA § 303); *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1098-99 (9th Cir.2005) (APA governs the court's review under § 106 of the NHPA). Section 706(2) of the APA confers broad equitable authority on courts to remedy violations of public law by governmental agencies. *See, e.g., Northwest Envtl. Def. Ctr. v. Bonneville Power Admin*., 477 F.3d 668, 689-71 (9th Cir.2007) (When "the public interest is involved, 'equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.'")(citing *United States v. Alisal Water Corp.*, 431 F.3d 643, 654 (9th Cir. 2005)); *Tinoqui-Chalola Council of Kitanemuk and Yowlumne Tejon Indians v. U.S. Dep't of Energy*, 232 F.3d 1300, 1305 (9th Cir.2000)(the court retains "broad discretion to fashion equitable remedies" under APA § 706(2)).

This Court's equitable authority in this case is substantial and may take different forms to remedy violations of federal law. *See Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1397-98 (9th Cir.1992) (concluding a court could enjoin state actors pursuant to NEPA under a number of circumstances where a project involves federal-state cooperation). Moreover, the Ninth Circuit has held in the context of a NEPA claim that the removal of portions of a highway project is within the remedial powers of the court under the APA. *West v. Sec'y of Dep't of Transp*., 206

F.3d 920, 925 (9th Cir.2000) ("[O]ur remedial powers would include remanding for additional environmental review and, conceivably, ordering the interchange closed or taken down.").

IV. ARGUMENT

There is no question that, before commencement of construction of the Project, the FHWA did not notify Plaintiffs who were required to be involved in the developmental process of the Project and the FHWA did not adequately study the impact of the Project on cultural, sacred, and historical resources. Summary judgment should be granted to Plaintiffs whether or not these governmental agencies moved swiftly and without appropriate consideration to complete a project before lawsuits challenging the improper aspects of the Project could have been brought. *See Cantrell v. City of Long Beach*, 241 F3d 674, 678-79 (9th Cir 2001) ("[W]e have repeatedly emphasized that if the completion of the action challenged under NEPA is sufficient to render the case nonjusticiable, entities `could merely ignore the requirements of NEPA, build its structures before a case gets to court, and then hide behind the mootness doctrine. Such a result is not acceptable.'") (citing *West v. Sec'y of Dep't of Transp.*, 206 F.3d 920, 925 (9th Cir.2000)).

A. The NHPA Claim

Congress passed the NHPA in order to ensure that the public interest in our collective history is properly protected. *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434, 437-38 (9th Cir. 1976). Like NEPA, the NHPA requires federal agencies to "stop, look, and listen" so that adverse impacts can be considered before projects are approved. *Apache Survival Coalition v. United States*, 21 F.3d 895, 906 (9th Cir 1994). *Illinois Commerce Comm'n v. ICC*, 848 F.2d 1246, 1261 (D.C. Cir. 1988); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999). Instead of following the guidance of these directives, the FHWA acted like a driver speeding down the new bypass: FHWA failed to stop, failed to look, and failed to listen by allowing construction to go forward before any form of government-to-government consultation had been conducted with Plaintiffs. Then, after Coyote Valley conducted its peaceful protest with the Army Corps, and the Army Corps suspended construction, FHWA gave only lip service

to Plaintiffs, effectively saying they were too late, as the bypass was already under construction. However, these excuses are beside the point. By not following the required procedures, in the proper order, FHWA broke the law.

Section 106 of the NHPA requires

> [t]he head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, . . . prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. . . .

54 U.S.C. § 306108. FHWA is mandated to comply with Section 106 as it is a federal agency with direct jurisdiction over this federal project. FHWA was required to "take into account the effect of the [Project] on any historic property" prior to giving the green light. 54 U.S.C. § 306108. Unfortunately, that is not what happened in the Little Lake Valley. The implementing regulations for Section 106 give federal agencies some flexibility about the timing of certain "nondestructive project planning activities", but that limited flexibility comes with an important caveat that was violated here.

> (c) Timing. The agency official must complete the section 106 process . . . prior to the issuance of any license. This does not prohibit agency official from conducting or authorizing nondestructive project planning activities before completing compliance with section 106, provided that such actions do not restrict the subsequent consideration of alternatives to avoid, minimize or mitigate the undertaking's adverse effects on historic properties.

36 C.F.R. § 800.1(c). Here FHWA approved the Project long before it completed the Section 106 process. This situation is exactly what Congress meant to avoid when it passed the NHPA, and why federal agencies were mandated to "take into account the effect of the undertaking on any historic property" prior to approving construction. 54 U.S.C. § 306108.

In addition to its statutory requirements, FHWA also owes a fiduciary duty to Native American Tribes. Justice Marshall described this trust relationship over 185 years ago, and case law, statutes, executive orders, and regulations have reinforced this federal duty since then. *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) ("Their relation to the United States resembles that of a ward to his guardian."). *See United States v. Mitchell*, 463 U.S. 206, 225 (1983) ("This

Court has previously emphasized 'the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people.'"); *Covelo Indian Community v. FERC*, 895 F.2d 581, 586 (9th Cir. 1990) ("The trustee must always act in the interests of the beneficiaries. . . ."); Exec. Order 13,175 § 2(a), Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67249 (Nov. 6, 2000) ("The Federal Government has enacted numerous statutes and promulgated numerous regulations that establish and define a trust relationship with Indian tribes.").

When a federal agency violates a statute or regulation, it also breaches its fiduciary duty. *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 788 (9th Cir. 2006) ("Because we conclude that the agencies violated both NEPA and NHPA during the leasing and approval process, it follows that the agencies violated their minimum fiduciary duty to the Pit River Tribe when they violated the statutes."). FHWA's violation of the NHPA is also a breach of its fiduciary duty to Plaintiffs.

The duty to consult with Native American Tribes is greater than the right to procedural due process under the Fifth Amendment. *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dept. of Interior*, 755 F.Supp.2d 1104, 1119 (S.D. Cal. 2010). What is similar between due process and consultation is the requirement that the process – or consultation – be meaningful. *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 720 (8th Cir. 1979) ("We do not believe that the two meetings of the tribal delegates with Washington officials fulfilled the requirement of 'meaningful consultation' with tribal governing bodies as contemplated by the guidelines."). FHWA's behavior here, like the Department of the Interior's in *Quechan Tribe* or the Bureau of Indian Affairs' in *Oglala Sioux Tribe*, violates due process rights. Government-to-government consultation begins when a federal agency invites a Tribe to participate in good faith, not when a project proponent tells another governmental body to handle the meeting. Official federal consultation on this Project began months after construction commenced. It was FHWA's responsibility, not Caltrans', because FHWA's consultation requirement stems from its position as a federal agency and its government-to-government responsibility cannot be delegated to a

project proponent. The issue is not what Caltrans did, it is what FHWA did – or, in this case, did not do. Tribal consultation is supposed to entail something much deeper and more complex than being notified about a project and being given an opportunity to comment about potential or proposed impacts. *Yakima Indian Nation*, 746 F.2d at 475 ("It is not enough the FERC gave notice of Chelan's application to the agencies and Indian tribes. The consultation obligation is an affirmative duty.") For this Project, once a determination was made that construction of the bypass or work on the mitigation lands had an adverse effect, FHWA was required to consult with Plaintiffs to resolve it. 36 C.F.R. § 800.5(d)(2) ("If an adverse effect is found, the agency official shall consult further to resolve the adverse effect pursuant to 800.6.") The regulations describe what is required: "The agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties." 36 C.F.R. § 800.6(a). Here the record is clear: FHWA did not do any of these things and therefore did not comply with 36 C.F.R. § 800.6(a). Instead, FHWA attempted to delegate its federal responsibility to Caltrans.

If the Court determines additional study of cultural, sacred, or historical resources is required by law, it has the authority to require Defendants to take additional mitigating actions to protect cultural, sacred, or historical resources. It is difficult purely at the summary judgment stage to set the precise parameters of this Court's equitable authority. Plaintiffs believe such determination should best made at a later, remedial phase of this litigation after the facts have been established and the legal issues have been decided. While Plaintiffs recognize that major parts of this Project are substantially complete, there are remaining tasks in areas containing cultural, sacred, or historical resources. Thus, notwithstanding the state of this Project, this case still involves as basis on which this Court is empowered to provide equitable relief.

The Ninth Circuit has addressed the issue of relief available even if a project is substantially completed. In *Columbia Basin Land Protection Assoc. v. Schlesinger*, 643 F2d 585 (9th Cir 1981), the plaintiffs sued to enjoin the construction of a 500-kilovolt power transmission

line across their lands. By the time the appeal was decided, all 191 towers required for the line had been built and the line was operational. Nevertheless, the Ninth Circuit concluded it could still grant effective relief to the plaintiffs. "The building of the towers has not made the case hypothetical or abstract – the towers still cross the fields of the Landowners, continually obstructing their irrigation systems – and this Court has the power to decide if they may stay or if they may have to be removed." *Id.* at 591 n1 (citations omitted). The Ninth Circuit observed that if a project's completion were enough to render a case moot, a federal agency "could merely ignore the requirements of NEPA, build its structures before a case gets to court, and then hide behind the mootness doctrine." *Id*. The court found that possibility "unacceptable." *Id*.

In *Nw. Envt'l. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1245 (9th Cir 1988), environmentalists sued several federal agencies over management procedures for the 1986 salmon fishing season. The district court dismissed the case as moot because the 1986 season had concluded. The Ninth Circuit reversed because possible remedies remained. The district court could order the 1989 management plan to allow more spawning because the salmon allegedly over-fished in 1986 would return to spawn in 1989. "In a case such as this, where the violation complained of may have caused continuing harm and where the court can still act to remedy such harm by limiting its future adverse effects, the parties clearly retain a legally cognizable interest in the outcome." *Nw. Envt'l. Def. Ctr.*, 849 F.2d at 1245. It did not matter that the plaintiffs had not specifically asked for injunctive relief as to the 1989 season because their request for "such other equitable relief as [the court] deemed necessary 'to repair any damages incurred'" was broad enough to include such a remedy. *Id*.

Cantrell concerned a joint reuse plan by the Navy and State of California to lease a former naval base to a company to convert it into a container terminal. The navy base contained buildings listed on the National Register and habitat for several protected species of birds. The plaintiffs challenged the reuse plan as violating state law and NEPA. The district court found the plaintiffs lacked standing, After the plaintiffs appealed, the historic buildings and bird habitats were destroyed. Defendants argued the case was thus moot. The Ninth Circuit disagreed,

concluding the destruction of the specific buildings and habitat did not leave the plaintiffs without a remedy. Instead, if the defendants were ordered to "undertake additional environmental review," it was possible that "defendants could consider alternatives to the current reuse plan, and develop ways to mitigate the damage to the birds' habitat . . . ." *Cantrell*, 241 F.3d at 678-79.

In *West v. Sec'y of the Dep't of Transp*., 206 F.3d 920, 925 (9th Cir 2000), the plaintiffs challenged a two-stage highway construction project, claiming the FHWA violated NEPA by determining the project satisfied a categorical exclusion from NEPA. They sought a declaration that the project was not excluded and an injunction against further work on the project until a valid Environmental Impact Statement was completed. During the pendency of the case, Stage 1 of the project was completed and the interchange was opened to traffic. The defendants then argued the case was moot. The Ninth Circuit rejected that argument, because Stage 2 was not yet completed and the court had "remedial powers" to remand the case for additional environmental review and even order the interchange closed or taken down. *West*, 206 F.3d at 925.

"The common thread in these cases" is the existence of a "continuing harm" after the completion of the project where "the court can still act to remedy such harm by limiting its future adverse effects." *Feldman v. Bowmar*, 518 F.3d 637, 643 (9th Cir 2008). There remains here secondary, continuing injury that this Court should alleviate.

In view of these cases, the issue is whether this Project causes continuing harm to Plaintiffs' existing interest that can be redressed through equitable relief available under the APA. There are continuing harms to Plaintiffs' cultural and sacred resources, particularly given the ongoing issues with tribal monitors, curation, and the ongoing government-to-government consultation obligations. A legally sufficient NEPA and NHPA review, including proper government-to-government consultations with Plaintiffs, will document the precise character of the Project as endangering cultural and sacred property. Similarly, appropriate consultation with Plaintiffs would reveal the precise character of the work on the mitigation lands. Plaintiffs propose that remediation for these harms could include a revised mitigation plan that addresses the numerous artifacts already uncovered and establishes procedures going forward to protect

these invaluable resources. In addition, Plaintiffs believe appropriate government-to-government consultation would address curation concerns, as well as other ecological issues in the area. Even though Yami Village has been destroyed, Defendants could agree to (or be ordered to) place commemorative monuments or other structures in its place, such as a museum discussing the history of the Tribes in the Little Lake Valley. Finally, Plaintiffs broadly seek any other relief this Court deems necessary and appropriate, bringing this Court's "broad discretion" to shape an equitable remedy to bear.

This Court should find the Federal Defendants violated the NHPA, NEPA, and Section 4(f) by failing to properly engage in government-to-government consultation with Plaintiffs on the Project, by failing to identify or protect Plaintiffs' cultural, sacred, and historical resources or attempt to mitigate the impact the Project had on them, and by refusing to reassume the Project. For purposes of summary judgment, this Court also should find that the cultural, sacred, and historical resources exist and the project has had an adverse impact upon them. *See Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 26 (1st Cir 2007) (beginning analysis by considering whether agency's actions violated federal obligations to Native Americans who lived near and used the affected site for a variety of ceremonial and community purposes).

Once it makes these findings, this Court has the power to grant Plaintiffs a project-appropriate remedy. That remedy includes enjoining further work on the Project until good faith government-to-government consultations occur. This Court also could order that Defendants complete a new NEPA Section 106 review and include consultation with Plaintiffs as part of that review. After this additional review, Defendants may not reach the same conclusion or may be able to work with Plaintiffs to minimize past injuries, for instance, by creating a memorial to designate and honor the now lost cultural, sacred, and historical resources. There could be easements for Plaintiffs ordered over the mitigation lands.

Plaintiffs' harm is serious and continuing, especially while work still affects areas with cultural, sacred, and historical property. Plaintiffs continue to want to work with the FHWA, despite Defendants' disregard and destruction. Also, this Court retains the power to provide

some remedy given the scope of this Court's authority under Section 706(2)(A) of the APA (which permits this Court to "hold unlawful and set aside agency actions.") and Section 706(1) of the APA (which allows this court to "compel agency action unlawfully withheld or unreasonably delayed."). Such relief is available because Plaintiffs have established that one of the defendant agencies "failed to take a discrete agency action that it [was] required to take." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

The NHPA, NEPA, and Section 4(f) are intended to assure that federal agencies analyze the impacts of their projects based on the cultural, historical, and environmental resources of our nation. *See San Carlos Apache Tribe*, 417 F.3d at 1097 ("what § 106 of NHPA does for sites of historical import, NEPA does for our natural environment"); *Apache Survival Coalition v. United States*, 21 F.3d 895, 906 (9th Cir 1994) (finding NHPA and NEPA "closely related" as "[b]oth are 'stop, look, and listen' provisions . . . that are design[ed] to ensure that Federal agencies take into account the effect of Federal or Federally-assisted programs"). This provisions allows Plaintiffs to provide input to assure that the agency has all the information needed to make an informed decision about a project's impacts prior to undertaking the project. These are key requirements in any federal project which cannot casually be set aside. By failing to include Plaintiffs who were clearly key stakeholders in this process, the Federal Defendants acted without information necessary for them to comply with their obligations under these provision. This Court should not reward Defendants' alacrity in completing the Project by shielding them from their obligations under these provisions.

The NHPA and its implementing regulations are intended not only to protect previously identified resources, but also to aid in the discovery of previously unknown or uncertain resources which are eligible for protection. See 36 C.F.R. § 800.4(b)(1) ("the agency official shall take the steps necessary to identify historic properties within the area of potential effects" including "make[ing] a reasonable good faith effort to carry out appropriate identification efforts.") Indeed, one of the concerns motivating passage of the NHPA was that "historic properties significant to the Nation's heritage [were] being lost or substantially altered, often

inadvertently . . . ." 16 U.S.C. § 470(3). Plaintiffs have come forward with evidence that Defendants failed to identify and protect their cultural, sacred, and historical resources in the bypass and mitigation areas. Plaintiffs also have submitted evidence that the Federal Defendants failed in their duties under the NHPA by completely not engaging in good faith government-to-government consultation, by not reassuming responsibilities, and by conducting an incomplete analysis, resulting in the failure to identify and assess cultural, sacred, and historic resources.

An Indian tribe is "recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 36 C.F.R. § 800.16(m); 16 U.S.C. § 470w(4). Consultation with Indian tribes, under the NHPA and other similar statutes, is a government-to-government consultation between the federal government and the governments of federally recognized Indian tribes. *See Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1215-16 (9th Cir 2008); *Te Moak Tribe v. United States Dep't of the Interior*, 608 F.3d 592, 608 n19 (9th Cir 2010) (under the NHPA, an agency must engage in government-to-government consultations with recognized tribes and tribal representatives duly designated by the governing tribal body). Plaintiffs are federally-recognized Indian tribes. Consequently they have an absolute right to consultation under Section 106.

Section 106 requires federal agencies to "take into account the effect of any undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register" prior to expending federal funds on or issuing any federal license for the project. The § 106 review process consists of (1) identifying the resource that is eligible for listing on the National Register that would be affected by the federal undertaking; (2) determining if the effect could be adverse; and (3) if so, consulting with the State Historic Preservation Officer ("SHPO") and other appropriate parties to develop alternatives to mitigate any adverse effects on the historic properties. *Tyler v. Cuomo*, 236 F.3d 1124, 1128-29 (9th Cir 2000), citing 36 CFR §§ 800.4(b) & (c) & 800.5(e); see also 36 CFR §§ 800.2 (parties to the § 106 process) & 800.3 (initiation of the § 106 process).

Contact is not consultation, and "consultation with one tribe doesn't relieve the [agency] of its obligation to consult with any other tribe." *Quechan Tribe of Fort Yuma Indian Reservation*, 755 F.Supp.2d at 1112, 1118. The NHPA's implementing regulations require federal agencies to consult with Tribes about the effects of undertakings on historic properties of religious or cultural significance to those tribes. *See* 36 CFR §§ 800.2(c)(2) & 800.4(c)(1). Consultation with Tribes must occur even if the proposed project will take place on non-Indian lands. 16 USC §470a(d)(6); 36 CFR § 800.2(c)(2)(ii); *see Muckleshoot Indian Tribe*, 177 F.3d 800, 806 (9th Cir 1999). The federal agency proposing a project subject to the NHPA must "make a reasonable and good faith effort to identify Indian tribes" to be consulted, 36 CFR § 800.2(c)(2)(ii)(A), and consultation must be "initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking." 36 CFR § 800.1(c).

B. The NEPA Claim

NEPA "prevent[s] or eliminate[s] damage to the environment and biosphere by focusing government and public attention on the environmental effects of proposed agency action." *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371 (1989). "NEPA establishes 'action-forcing' procedures that require agencies to take a 'hard look' at environmental consequences. *Center for Biological Diversity v. Dept. of Interior*, 623 F.3d 633, 642 (9th Cir. 2010). By focusing the agency's attention on the environmental consequences of the proposed action, NEPA "ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

NEPA and its implementing regulations require federal agencies to file an EIS before undertaking "major Federal actions significantly affecting the quality of the human environment." 42 USC § 4332(C); see 40 CFR §§ 1500.1-1508.25. An agency that believes its action is not a "major Federal action," and therefore does not require the preparation of a full EIS, may prepare a more limited environmental review, or EA, to determine whether the full EIS

is necessary. 40 CFR § 1501.4(b) & (c). NEPA is purely a procedural statute: "[it] does not mandate particular results but simply provides the necessary process to ensure that federal agencies take a hard look at the environmental consequences of their actions." *Muckleshoot Indian Tribe*, 177 F.3d at 814, quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

The Complaint alleges the FHWA violated NEPA in numerous ways, including failing to prepare a full EIS given the known scope of cultural, sacred and historic resources, not consulting with these Tribes, and relying completely on the unilateral determination of Caltrans that there is no potential cultural or sacred resource that will be injured by its permitted activity. The issue here is FHWA never established a baseline to determine the known scope of cultural, sacred and historic resources, and Plaintiffs did not know there was no baseline. "Without establishing the baseline conditions . . . there is simply no way to determine what effect the [action] will have on the environment, and consequently, no way to comply with NEPA." *Half Moon Bay Fisherman's Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988).

As can be seen in the Declaration of Priscilla Hunter, the Federal Defendants failed to perform an appropriate analysis of the cultural, sacred and historic resources, nor did they implement any necessary cultural resource protection and archeological mitigation measures to effectively address and mitigate harm to the extensive historical and cultural resources which are now being adversely impacted by the Project. The Federal Defendants did no analysis or evaluation of Plaintiffs' ancestral and archeological sites prior to construction of the Project. Instead, they deferred resolution of important environmental impact issues until long after the NEPA process was complete.

Prior to EIS approval, the Tribes should have been provided maps of location of known archaeological sites within the various proposed project design areas. This would have enabled the Tribes to meaningfully consult on design alternatives that could have avoided and protected sites. Only 1 site was designated as culturally significant and eligible for listing on the National

Register of Historic Places prior to the EIS approval and over thirty such sites were so designated since the EIS approval.

Given the large amount of sites discovered by bulldozer *after* construction activities commenced, a Supplemental EIS should have been required. A Supplemental EIS was conducted for one blade type of indigenous grass left out in the EIS. The FHWA should have reassumed jurisdiction and compelled the creation of a Supplemental EIS. As it now stands given a transfer memo with Caltrans whereby the FHWA has divested itself of Section 106 responsibilities, Caltrans has unfettered discretion in the manner in which it conducts archaeology on the site and in its determination of whether a site should be deemed culturally significant enough to be listed on the National Register of Historic Places and thus avoided and protected.

C. The Section 4(F) Claim

Section 4(f) of the Department of Transportation Act of 1966, 49 U.S.C. §303, declares that "[i]t is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites."

Federal regulations require that Section 4(f) property be identified and evaluated for potential use "as early as practicable in the development of the action when alternatives to the proposed action are under study." 23 C.F.R. § 774.9(a). Sites are identified as eligible so long as they are included in, or eligible for inclusion in the National Register of Historic Places. *See* 23 C.F.R. §§ 774.11(f), 774.17. The process for identifying historic sites for the National Register is outlined in Section 106 of the NHPA. Section 106 requires the agency official to "make a reasonable and good faith effort to carry out appropriate identification efforts." 36 C.F.R. § 800.4(b)(1).

The same analysis that applies to the NHPA and NEPA claims applies to this claim. There is no question that the Federal Defendants failed to perform the appropriate analysis regarding Plaintiffs' cultural, sacred, and historic resources. *See N. Idaho Cmty. Action Network v. U.S. Dep't of Transp*., 545 F.3d 1147 (9th Cir. 2008) (finding a violation of Section 4(f) where

an agency approved a project when analysis had only been conducted for one of the project's four phases and the remaining phases would be analyzed only after the project had begun).

The Federal Defendants not only did not perform the analysis, they did not have the appropriate procedures or protocols in place to either perform the analysis or to address cultural, sacred, or historic resources once they were discovered after construction started. Defendants must "make a reasonable and good faith effort" to identify cultural, sacred, or historic sites as required by Section 106. 36 C.F.R. § 800.4(b)(1); *See N. Idaho Cmty. Action Network*, 545 F.3d at 1159 (noting that a Section 4(f) evaluation necessarily requires the agency to follow the Section 106 identification process); *City of Alexandria v. Slater*, 198 F.3d 862, 871 (D.C. Cir. 1999) (noting that a Section 4(f) evaluation is predicated on completion of a Section 106 identification process). The Federal Defendants did not make a good faith and reasonable effort to identify known archaeological sites along the proposed Project route; in fact, they made virtually no effort. They also did not develop an appropriate plan for dealing with sites that may be (and were) discovered during construction. These Federal Defendants violated Section 4(f).

V. CONCLUSION

For the foregoing reasons, Plaintiffs are entitled to summary judgment as to the Federal Defendants. The Court should conclude that, for the time frame after February 18, 2015, the Federal Defendants are directly liable for violations of NEPA, Section 4(f), Section 18(a), and non-consultation related violations of the NHPA and that such claims are not barred on the basis of the terms of the current or former MOU or the Pilot Program. Under NEPA and NHPA, FHWA cannot delegate its government-to-government responsibility and overall consultation and coordination duties with Tribes whose historic properties are impacted by a federally funded State Transportation Department Project. While FHWA may rely on State Transportation Agencies to carry out day to day, project specific coordination and consultation with Indian Tribes, FHWA remains legally responsible for all findings and determinations charged to Caltrans.

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