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14 **UNITED STATES DISTRICT COURT**
 15 **NORTHERN DISTRICT OF CALIFORNIA – OAKLAND DIVISION**

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

19 **Plaintiffs,**

20 **v.**

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

28 **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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1 **I. SUMMARY OF ARGUMENT**

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

11 On July 1, 2007, the FHWA entered into a Memorandum of Understanding (“MOU”)
12 with Defendant California Department of Transportation (“Caltrans”), in which the FHWA
13 assigned certain responsibilities and liabilities for various projects, including the Willits Bypass
14 Project, to Caltrans, pursuant to the Surface Transportation Project Pilot Delivery Program (the
15 “Pilot Program”), 23 U.S.C. Section 327. While the parties agreed the FHWA would assign and
16 Caltrans would assume “all of the USDOT Secretary’s responsibilities for environmental review,
17 consultation, or other such action pertaining to the review or approval” of the Project under
18 specific federal environmental laws including, Section 4(f), Section 18(a), and the NHPA.
19 However, Caltrans did not assume the Federal Defendants’ responsibilities for government-to-
20 government consultation under the NHPA.
21

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

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

3 **II. STATEMENT OF RELEVANT FACTS¹**

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

17
18 By their Complaint, Plaintiffs Coyote Valley Band of Pomo Indians of California
19 (“Coyote Valley”) and Round Valley Indian Tribes of California (“Round Valley”) (collectively
20 “Plaintiffs”) allege the FHWA violated the National Environmental Policy Act (“NEPA”),
21 Section 4(f) of the Department of Transportation Act, 49 U.S.C. Section 303(c) (“Section 4(f)”),
22 Section 18(a) of the Federal-Aid Highway Act, 23 U.S.C. Section 138 (“Section 18(a)”), and the
23 National Historic Preservation Act (“NHPA”).²

24
25
26 ¹ Unless otherwise indicated, all facts are taken from the Declaration of Priscilla Hunter, filed
herewith.

27 ² In its Order on the Federal Defendants’ Motion to Dismiss, this Court concluded Plaintiffs
28 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.

1 Since June 2013, Caltrans and FHWA have been constructing improvements to U.S.
2 Highway 101 in the vicinity of Willits, CA. The undertaking consists of both the *Willits Bypass*
3 *Project*, a 5.9-mile long rerouting of Highway 101 through Little Lake Valley, along with the
4 *Willits Mitigation Project* to mitigate impacts to biological resources as a result of the bypass
5 construction (collectively the “Project”). The Project is a federal undertaking subject to 36 CFR
6 800, the implementing regulations for Section 106 of the NHPA. The Project also is subject to
7 state historic preservation laws and regulations set forth in the California Environmental Quality
8 Act (“CEQA”) (Public Resources Code [PRC] §21000 et seq.) and PRC Section 5024 for state-
9 owned historical resources. The environmental review, consultation, and any other action
10 required in accordance with applicable federal laws for this project should have been conducted
11 under the NEPA.

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

23 In 2005 the Federal Defendants concluded a Section 106 review and issued a finding of
24 conditional No Adverse Effect to historic properties. The Federal Defendants issued that finding
25 without any government-to-government consultation with Plaintiffs. In 2006 Caltrans identified
26 only one archaeological site eligible for registry on the National Register of Historic Places
27 (“NRHP”). Since 2013 Caltrans has identified over thirty (30) additional archeological sites that
28

1 are eligible for registry on the NRHP. Following a government-to-government consultation in
2 2015, Plaintiffs requested the FHWA to require that Caltrans prepare a supplemental EIS to
3 address proper identification, protection, and avoidance of the tribes' ancestral cultural sites in
4 the Project area and mitigation lands and asked the FHWA to reassume regulatory jurisdiction
5 over the Willits Bypass Project. On September 8, 2016, Coyote Valley reiterated that request.
6 That request was never granted.

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

14 **III. LEGAL STANDARD**

15 Summary judgment is appropriate when the record demonstrates "that there is no genuine
16 issue as to any material fact and that the moving party is entitled to judgment as a matter of law."
17 Fed. R. Civ. P. 56(c). An issue is "genuine" if there is sufficient evidence for a reasonable fact
18 finder to find for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49
19 (1986). "[A]t the summary judgment stage the judge's function is not ... to weigh the evidence
20 and determine the truth of the matter but to determine whether there is a genuine issue for trial."
21 *Id.* at 249. The party moving for summary judgment bears the initial responsibility of identifying
22 those portions of the record which demonstrate the absence of a genuine issue of a material fact.
23 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In the absence of such facts, "the moving
24 party is entitled to a judgment as a matter of law." *Celotex*, 477 U.S. at 323.

25
26 Once the moving party meets this initial burden, the non-moving party "may not rest
27 upon the mere allegations or denials of the adverse party's pleading, but the adverse party's
28 response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing

1 that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). If the non-moving party fails to make
2 this showing, the moving party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at
3 323.

4 The Ninth Circuit has emphasized that "courts of equity have broad discretion in shaping
5 remedies." *Garcia v. Lawn*, 805 F.2d 1400, 1403 (9th Cir 1986). The Administrative Procedures
6 Act ("APA"), 5 U.S.C. §§ 701-706 (2006), governs this Court's review of Plaintiffs' claims
7 under NEPA, Section 4(f), Section 18(a), and the NHPA. The APA permits this Court to "hold
8 unlawful and set aside agency action, findings and conclusions" that are "arbitrary, capricious, an
9 abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). *See, e.g., N.*
10 *Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1152 (9th Cir.2008) (APA
11 governs the court's review under NEPA and the DTA § 303); *San Carlos Apache Tribe v. United*
12 *States*, 417 F.3d 1091, 1098-99 (9th Cir.2005) (APA governs the court's review under § 106 of
13 the NHPA). Section 706(2) of the APA confers broad equitable authority on courts to remedy
14 violations of public law by governmental agencies. *See, e.g., Northwest Envtl. Def. Ctr. v.*
15 *Bonneville Power Admin.*, 477 F.3d 668, 689-71 (9th Cir.2007) (When "the public interest is
16 involved, 'equitable powers assume an even broader and more flexible character than when only
17 a private controversy is at stake.')(citing *United States v. Alisal Water Corp.*, 431 F.3d 643, 654
18 (9th Cir. 2005)); *Tinoqui-Chalola Council of Kitanemuk and Yowlumne Tejon Indians v. U.S.*
19 *Dep't of Energy*, 232 F.3d 1300, 1305 (9th Cir.2000)(the court retains "broad discretion to
20 fashion equitable remedies" under APA § 706(2)).
21

22 This Court's equitable authority in this case is substantial and may take different forms to
23 remedy violations of federal law. *See Fund for Animals, Inc. v. Lujan*, 962 F.2d 1391, 1397-98
24 (9th Cir.1992) (concluding a court could enjoin state actors pursuant to NEPA under a number of
25 circumstances where a project involves federal-state cooperation). Moreover, the Ninth Circuit
26 has held in the context of a NEPA claim that the removal of portions of a highway project is
27 within the remedial powers of the court under the APA. *West v. Sec'y of Dep't of Transp.*, 206
28

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

3 **IV. ARGUMENT**

4 There is no question that, before commencement of construction of the Project, the
5 FHWA did not notify Plaintiffs who were required to be involved in the developmental process
6 of the Project and the FHWA did not adequately study the impact of the Project on cultural,
7 sacred, and historical resources. Summary judgment should be granted to Plaintiffs whether or
8 not these governmental agencies moved swiftly and without appropriate consideration to
9 complete a project before lawsuits challenging the improper aspects of the Project could have
10 been brought. *See Cantrell v. City of Long Beach*, 241 F.3d 674, 678-79 (9th Cir 2001) ("[W]e
11 have repeatedly emphasized that if the completion of the action challenged under NEPA is
12 sufficient to render the case nonjusticiable, entities `could merely ignore the requirements of
13 NEPA, build its structures before a case gets to court, and then hide behind the mootness
14 doctrine. Such a result is not acceptable.") (citing *West v. Sec'y of Dep't of Transp.*, 206 F.3d
15 920, 925 (9th Cir.2000)).

16 **A. The NHPA Claim**

17 Congress passed the NHPA in order to ensure that the public interest in our collective
18 history is properly protected. *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434, 437-38 (9th Cir. 1976).
19 Like NEPA, the NHPA requires federal agencies to "stop, look, and listen" so that adverse
20 impacts can be considered before projects are approved. *Apache Survival Coalition v. United*
21 *States*, 21 F.3d 895, 906 (9th Cir 1994). *Illinois Commerce Comm'n v. ICC*, 848 F.2d 1246, 1261
22 (D.C. Cir. 1988); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir.
23 1999). Instead of following the guidance of these directives, the FHWA acted like a driver
24 speeding down the new bypass: FHWA failed to stop, failed to look, and failed to listen by
25 allowing construction to go forward before any form of government-to-government consultation
26 had been conducted with Plaintiffs. Then, after Coyote Valley conducted its peaceful protest
27 with the Army Corps, and the Army Corps suspended construction, FHWA gave only lip service
28

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

4 Section 106 of the NHPA requires

5
6 [t]he head of any Federal agency having direct or indirect jurisdiction over a
7 proposed Federal or federally assisted undertaking in any State and the head of
8 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. . . .

9 54 U.S.C. § 306108. FHWA is mandated to comply with Section 106 as it is a federal
10 agency with direct jurisdiction over this federal project. FHWA was required to “take into
11 account the effect of the [Project] on any historic property” prior to giving the green light. 54
12 U.S.C. § 306108. Unfortunately, that is not what happened in the Little Lake Valley. The
13 implementing regulations for Section 106 give federal agencies some flexibility about the timing
14 of certain “nondestructive project planning activities”, but that limited flexibility comes with an
15 important caveat that was violated here.

16 (c) Timing. The agency official must complete the section 106 process . . .
17 prior to the issuance of any license. This does not prohibit agency official
18 from conducting or authorizing nondestructive project planning activities
19 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.

20 36 C.F.R. § 800.1(c). Here FHWA approved the Project long before it completed the
21 Section 106 process. This situation is exactly what Congress meant to avoid when it passed the
22 NHPA, and why federal agencies were mandated to “take into account the effect of the
23 undertaking on any historic property” prior to approving construction. 54 U.S.C. § 306108.

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

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

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

14 The duty to consult with Native American Tribes is greater than the right to procedural
15 due process under the Fifth Amendment. *Quechan Tribe of Fort Yuma Indian Reservation v. U.S.*
16 *Dept. of Interior*, 755 F.Supp.2d 1104, 1119 (S.D. Cal. 2010). What is similar between due
17 process and consultation is the requirement that the process – or consultation – be meaningful.
18 *Oglala Sioux Tribe of Indians v. Andrus*, 603 F.2d 707, 720 (8th Cir. 1979) (“We do not believe
19 that the two meetings of the tribal delegates with Washington officials fulfilled the requirement
20 of ‘meaningful consultation’ with tribal governing bodies as contemplated by the guidelines.”).
21 FHWA’s behavior here, like the Department of the Interior’s in *Quechan Tribe* or the Bureau of
22 Indian Affairs’ in *Oglala Sioux Tribe*, violates due process rights. Government-to-government
23 consultation begins when a federal agency invites a Tribe to participate in good faith, not when a
24 project proponent tells another governmental body to handle the meeting. Official federal
25 consultation on this Project began months after construction commenced. It was FHWA’s
26 responsibility, not Caltrans’, because FHWA’s consultation requirement stems from its position
27 as a federal agency and its government-to-government responsibility cannot be delegated to a
28

1 project proponent. The issue is not what Caltrans did, it is what FHWA did – or, in this case, did
2 not do. Tribal consultation is supposed to entail something much deeper and more complex than
3 being notified about a project and being given an opportunity to comment about potential or
4 proposed impacts. *Yakima Indian Nation*, 746 F.2d at 475 (“It is not enough the FERC gave
5 notice of Chelan's application to the agencies and Indian tribes. The consultation obligation is an
6 affirmative duty.”) For this Project, once a determination was made that construction of the
7 bypass or work on the mitigation lands had an adverse effect, FHWA was required to consult
8 with Plaintiffs to resolve it. 36 C.F.R. § 800.5(d)(2) (“If an adverse effect is found, the agency
9 official shall consult further to resolve the adverse effect pursuant to 800.6.”) The regulations
10 describe what is required: “The agency official shall consult with the SHPO/THPO and other
11 consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and
12 evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate
13 adverse effects on historic properties.” 36 C.F.R. § 800.6(a). Here the record is clear: FHWA did
14 not do any of these things and therefore did not comply with 36 C.F.R. § 800.6(a). Instead,
15 FHWA attempted to delegate its federal responsibility to Caltrans.
16

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

26 The Ninth Circuit has addressed the issue of relief available even if a project is
27 substantially completed. In *Columbia Basin Land Protection Assoc. v. Schlesinger*, 643 F.2d 585
28 (9th Cir 1981), the plaintiffs sued to enjoin the construction of a 500-kilovolt power transmission

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

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

22 *Cantrell* concerned a joint reuse plan by the Navy and State of California to lease a
23 former naval base to a company to convert it into a container terminal. The navy base contained
24 buildings listed on the National Register and habitat for several protected species of birds. The
25 plaintiffs challenged the reuse plan as violating state law and NEPA. The district court found the
26 plaintiffs lacked standing, After the plaintiffs appealed, the historic buildings and bird habitats
27 were destroyed. Defendants argued the case was thus moot. The Ninth Circuit disagreed,
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1 concluding the destruction of the specific buildings and habitat did not leave the plaintiffs
2 without a remedy. Instead, if the defendants were ordered to “undertake additional environmental
3 review,” it was possible that “defendants could consider alternatives to the current reuse plan,
4 and develop ways to mitigate the damage to the birds’ habitat” *Cantrell*, 241 F.3d at 678-79.

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

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

18 In view of these cases, the issue is whether this Project causes continuing harm to
19 Plaintiffs’ existing interest that can be redressed through equitable relief available under the
20 APA. There are continuing harms to Plaintiffs’ cultural and sacred resources, particularly given
21 the ongoing issues with tribal monitors, curation, and the ongoing government-to-government
22 consultation obligations. A legally sufficient NEPA and NHPA review, including proper
23 government-to-government consultations with Plaintiffs, will document the precise character of
24 the Project as endangering cultural and sacred property. Similarly, appropriate consultation with
25 Plaintiffs would reveal the precise character of the work on the mitigation lands. Plaintiffs
26 propose that remediation for these harms could include a revised mitigation plan that addresses
27 the numerous artifacts already uncovered and establishes procedures going forward to protect
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1 these invaluable resources. In addition, Plaintiffs believe appropriate government-to-government
2 consultation would address curation concerns, as well as other ecological issues in the area. Even
3 though Yami Village has been destroyed, Defendants could agree to (or be ordered to) place
4 commemorative monuments or other structures in its place, such as a museum discussing the
5 history of the Tribes in the Little Lake Valley. Finally, Plaintiffs broadly seek any other relief
6 this Court deems necessary and appropriate, bringing this Court's "broad discretion" to shape an
7 equitable remedy to bear.

8 This Court should find the Federal Defendants violated the NHPA, NEPA, and Section
9 4(f) by failing to properly engage in government-to-government consultation with Plaintiffs on
10 the Project, by failing to identify or protect Plaintiffs' cultural, sacred, and historical resources or
11 attempt to mitigate the impact the Project had on them, and by refusing to reassume the Project.
12 For purposes of summary judgment, this Court also should find that the cultural, sacred, and
13 historical resources exist and the project has had an adverse impact upon them. *See*
14 *Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 26 (1st Cir 2007) (beginning analysis
15 by considering whether agency's actions violated federal obligations to Native Americans who
16 lived near and used the affected site for a variety of ceremonial and community purposes).

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

25 Plaintiffs' harm is serious and continuing, especially while work still affects areas with
26 cultural, sacred, and historical property. Plaintiffs continue to want to work with the FHWA,
27 despite Defendants' disregard and destruction. Also, this Court retains the power to provide
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1 some remedy given the scope of this Court’s authority under Section 706(2)(A) of the APA
2 (which permits this Court to “hold unlawful and set aside agency actions.”) and Section 706(1)
3 of the APA (which allows this court to “compel agency action unlawfully withheld or
4 unreasonably delayed.”). Such relief is available because Plaintiffs have established that one of
5 the defendant agencies “failed to take a discrete agency action that it [was] required to take.”
6 *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

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

21 The NHPA and its implementing regulations are intended not only to protect previously
22 identified resources, but also to aid in the discovery of previously unknown or uncertain
23 resources which are eligible for protection. See 36 C.F.R. § 800.4(b)(1) (“the agency official
24 shall take the steps necessary to identify historic properties within the area of potential effects”
25 including “make[ing] a reasonable good faith effort to carry out appropriate identification
26 efforts.”) Indeed, one of the concerns motivating passage of the NHPA was that “historic
27 properties significant to the Nation’s heritage [were] being lost or substantially altered, often
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1 inadvertently” 16 U.S.C. § 470(3). Plaintiffs have come forward with evidence that
2 Defendants failed to identify and protect their cultural, sacred, and historical resources in the
3 bypass and mitigation areas. Plaintiffs also have submitted evidence that the Federal Defendants
4 failed in their duties under the NHPA by completely not engaging in good faith government-to-
5 government consultation, by not reassuming responsibilities, and by conducting an incomplete
6 analysis, resulting in the failure to identify and assess cultural, sacred, and historic resources.

7 An Indian tribe is “recognized as eligible for the special programs and services provided
8 by the United States to Indians because of their status as Indians.” 36 C.F.R. § 800.16(m); 16
9 U.S.C. § 470w(4). Consultation with Indian tribes, under the NHPA and other similar statutes, is
10 a government-to-government consultation between the federal government and the governments
11 of federally recognized Indian tribes. *See Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207,
12 1215-16 (9th Cir 2008); *Te Moak Tribe v. United States Dep’t of the Interior*, 608 F.3d 592, 608
13 n19 (9th Cir 2010) (under the NHPA, an agency must engage in government-to-government
14 consultations with recognized tribes and tribal representatives duly designated by the governing
15 tribal body). Plaintiffs are federally-recognized Indian tribes. Consequently they have an
16 absolute right to consultation under Section 106.

17 Section 106 requires federal agencies to “take into account the effect of any undertaking
18 on any district, site, building, structure, or object that is included in or eligible for inclusion in
19 the National Register” prior to expending federal funds on or issuing any federal license for the
20 project. The § 106 review process consists of (1) identifying the resource that is eligible for
21 listing on the National Register that would be affected by the federal undertaking; (2)
22 determining if the effect could be adverse; and (3) if so, consulting with the State Historic
23 Preservation Officer (“SHPO”) and other appropriate parties to develop alternatives to mitigate
24 any adverse effects on the historic properties. *Tyler v. Cuomo*, 236 F.3d 1124, 1128-29 (9th Cir
25 2000), citing 36 CFR §§ 800.4(b) & (c) & 800.5(e); see also 36 CFR §§ 800.2 (parties to the §
26 106 process) & 800.3 (initiation of the § 106 process).

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1 Contact is not consultation, and “consultation with one tribe doesn’t relieve the [agency]
 2 of its obligation to consult with any other tribe.” *Quechan Tribe of Fort Yuma Indian*
 3 *Reservation*, 755 F.Supp.2d at 1112, 1118. The NHPA’s implementing regulations require
 4 federal agencies to consult with Tribes about the effects of undertakings on historic properties of
 5 religious or cultural significance to those tribes. *See* 36 CFR §§ 800.2(c)(2) & 800.4(c)(1).
 6 Consultation with Tribes must occur even if the proposed project will take place on non-Indian
 7 lands. 16 USC §470a(d)(6); 36 CFR § 800.2(c)(2)(ii); *see Muckleshoot Indian Tribe*, 177 F.3d
 8 800, 806 (9th Cir 1999). The federal agency proposing a project subject to the NHPA must
 9 “make a reasonable and good faith effort to identify Indian tribes” to be consulted, 36 CFR §
 10 800.2(c)(2)(ii)(A), and consultation must be “initiated early in the undertaking’s planning, so that
 11 a broad range of alternatives may be considered during the planning process for the
 12 undertaking.” 36 CFR § 800.1(c).

13 **B. The NEPA Claim**

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

23 NEPA and its implementing regulations require federal agencies to file an EIS before
 24 undertaking “major Federal actions significantly affecting the quality of the human
 25 environment.” 42 USC § 4332(C); *see* 40 CFR §§ 1500.1-1508.25. An agency that believes its
 26 action is not a “major Federal action,” and therefore does not require the preparation of a full
 27 EIS, may prepare a more limited environmental review, or EA, to determine whether the full EIS
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1 is necessary. 40 CFR § 1501.4(b) & (c). NEPA is purely a procedural statute: “[it] does not
2 mandate particular results but simply provides the necessary process to ensure that federal
3 agencies take a hard look at the environmental consequences of their actions.” *Muckleshoot*
4 *Indian Tribe*, 177 F.3d at 814, quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S.
5 332, 350 (1989).

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

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

23
24 Prior to EIS approval, the Tribes should have been provided maps of location of known
25 archaeological sites within the various proposed project design areas. This would have enabled
26 the Tribes to meaningfully consult on design alternatives that could have avoided and protected
27 sites. Only 1 site was designated as culturally significant and eligible for listing on the National
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1 Register of Historic Places prior to the EIS approval and over thirty such sites were so designated
2 since the EIS approval.

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

11 **C. The Section 4(F) Claim**

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

16 Federal regulations require that Section 4(f) property be identified and evaluated for
17 potential use “as early as practicable in the development of the action when alternatives to the
18 proposed action are under study.” 23 C.F.R. § 774.9(a). Sites are identified as eligible so long as
19 they are included in, or eligible for inclusion in the National Register of Historic Places. *See* 23
20 C.F.R. §§ 774.11(f), 774.17. The process for identifying historic sites for the National Register is
21 outlined in Section 106 of the NHPA. Section 106 requires the agency official to “make a
22 reasonable and good faith effort to carry out appropriate identification efforts.” 36 C.F.R. §
23 800.4(b)(1).
24

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

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

3 The Federal Defendants not only did not perform the analysis, they did not have the
4 appropriate procedures or protocols in place to either perform the analysis or to address cultural,
5 sacred, or historic resources once they were discovered after construction started. Defendants
6 must "make a reasonable and good faith effort" to identify cultural, sacred, or historic sites as
7 required by Section 106. 36 C.F.R. § 800.4(b)(1); *See N. Idaho Cmty. Action Network*, 545 F.3d
8 at 1159 (noting that a Section 4(f) evaluation necessarily requires the agency to follow the
9 Section 106 identification process); *City of Alexandria v. Slater*, 198 F.3d 862, 871 (D.C. Cir.
10 1999) (noting that a Section 4(f) evaluation is predicated on completion of a Section 106
11 identification process). The Federal Defendants did not make a good faith and reasonable effort
12 to identify known archaeological sites along the proposed Project route; in fact, they made
13 virtually no effort. They also did not develop an appropriate plan for dealing with sites that may
14 be (and were) discovered during construction. These Federal Defendants violated Section 4(f).

16 V. CONCLUSION

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