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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 DEFENDANTS CALIFORNIA DEPARTMENT OF TRANSPORTATION AND MALCOLM DOUGHERTY

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Rules

I. SUMMARY OF ARGUMENT

In constructing the Willits Bypass Project, Defendant California Department of Transportation ("Caltrans") failed to: (a) adequately address the direct, indirect, and cumulative impacts on cultural, sacred, and historic resources; (b) identify and finalize the details of the mitigation plan or its environmental and cultural impacts; (c) commit to necessary mitigation measures; and (d) properly engage in government-to-government consultation with the Federally-recognized Indian Tribes with ancestral lands in the Little Lake Valley. As a result, Caltrans violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, et seq., the National Historic Preservation Act ("NHPA"), 54 U.S.C. §§ 300101, et seq., and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. The failure of Caltrans to properly mitigate adverse impacts also violates the pertinent provisions of the statutes governing the federal highway system (the "Federal Highway Statutes"), 49 U.S.C. § 303; 23 U.S.C. § 138.

In preparing for and constructing the Bypass and in working on the mitigation lands, Caltrans improperly handled the post-review discoveries, the unanticipated inadvertent effects, and the potential adverse effect on the subject cultural, sacred, and historic properties. Further, Caltrans did not engage in government-to-government consultation with Plaintiffs as required by Section 106. Also, Caltrans failed to fulfill its statutory obligations to resolve adverse effects upon historic properties and failed to fulfill its statutory mitigation obligations.

Plaintiffs request a declaration that Caltrans violated NEPA, the NHPA, the APA, and the Federal Highway Statutes; an Order requiring Caltrans to comply with Section 106 of the NHPA and negotiate, execute, and implement a Programmatic Agreement with Plaintiffs stipulating how the adverse effects of Federal actions on the Project, especially the Mitigation Project, will be resolved; an Order requiring Caltrans to supplement the Environmental Impact Statement ("EIS") for the Project; and a further Order enjoining any activities in furtherance of the Project until Caltrans complies with federal law.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS[1]

Caltrans and the FHWA are constructing improvements to U.S. Highway 101 within and in the vicinity of Willits, CA. The undertaking consists of 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. Because of funding constraints, the Project is being constructed in two phases. Phase 1 entailed construction of an interim facility consisting of four lanes at the southern end of the Bypass Project, which taper to a two-lane highway at approximately 500 feet north of the Haehl Creek interchange. Although only two functional lanes continue north to the Project limits, the northern interchange for the full four-lane freeway, with all its consequent impacts, is being constructed in Phase 1.

Phase 2 will construct a second 2-lane mile long viaduct and will include minimal changes to the fill prism and the northern interchange design. Phase 2 is presently unfunded. Although only the two southbound lanes will be constructed in Phase 1, and although Caltrans claims that it will implement mitigation for the impacts of Phase 1 as well as advance mitigation for Phase 2 concurrently with the beginning of Phase 1 construction, the 404 Permit issued in conjunction with the January 2012 MMP covers only Phase 1 impacts to protected wetlands.

The Willits Bypass Project is a federal undertaking subject to 36 C.F.R. Part 800, the implementing regulations for Section 106 of the NHPA. The Willits Bypass Final Environmental Impact Statement/ Environmental Impact Report ("Final EIS/EIR") was approved in 2006. The Final EIS/EIR purports to set forth the joint efforts of Defendant Federal Highway Administration ("FHWA") and Caltrans to examine the potential environmental impacts of the alternative routes for the proposed Willits Bypass Project. In 2005, FHWA concluded its Section 106 review for the Willits Bypass Project with a finding of conditional No Adverse Effect to historic properties. This finding was issued without any government-to-government consultation with Plaintiffs. However, in 2006, at the time of approval of the Final Environmental Impact

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

Statement/Environmental Impact Report ("Final EIS/EIR") for the Willits Bypass Project, Caltrans had only identified one archaeological site eligible for registry on the National Register of Historic Places: CA-MEN-2645/H. Again, this identification was made without any government-to-government consultation with Plaintiffs.

The FINAL EIS/EIR failed to properly conduct cultural studies and failed to properly plan for the implementation of archeological monitoring of the Willits Bypass Project. As a result, FHWA and Caltrans failed to identify at least 30 archeological sites within the boundaries of the Willits Bypass Project. Based on a purported No Adverse Effect with Standard Conditions determination and the accompanying measures provided for in the Final EIS/EIR, FHWA and Caltrans concluded the NEPA, CEQA, and Section 106 reviews for the Project.

Effective on October 1, 2012, FHWA assigned, and Caltrans assumed, FHWA responsibility for environmental review, consultation, and coordination pursuant to 23 U.S.C. § 327. Caltrans and FHWA entered into a NEPA Assignment Memorandum of Understanding concerning the State of California's participation in the Federal-aid Highway Program, in which FHWA assigned and Caltrans assumed FHWA's responsibilities under Section 106 of the NHPA ("Section 106") and associated implementing regulations at 36 C.F.R. Part 800.[2]

In 2010 and 2011, after the construction contract for the Willits Bypass Project was awarded, but before the start of construction, and without any government-to-government consultation with Plaintiffs, Caltrans carried out a geoarchaeological investigation in order to determine the potential for obscured and buried archaeological resources within the Project alignment's areas of direct impact. This investigation showed that there is a high-to-moderate likelihood for subsurface deposits. A number of buried cultural deposits were identified as a result of the study.

In 2013, Caltrans opened the Section 106 consultation with the Sherwood Valley Tribe only (and not Plaintiffs) for the Willits Bypass Project to consult on archaeological post-review

[2] Pursuant to 23 C.F.R. § 771.30(a)(2), "a draft EIS, final EIS or supplemental EIS may be supplemented at any time. An EIS shall be supplemented whenever the Administration determines that: … (2) New information or circumstances relevant to the environmental concerns and bearing on the proposed action could result in significant impacts not evaluated in the EIS."

discoveries, change the area of potential effects for the Willits Bypass Project, and resolve adverse effects to historic properties, cultural resources, and sacred sites. As a result, Caltrans improperly engaged in consultation, which is defined as "the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process." 36 CFR Section 800.16 (f).

Further, Caltrans commenced ground disturbing activities which damaged Plaintiffs' historic properties, cultural resources, and sacred sites prior to complying with Section 106 of the NHPA and prior to executing and implementing an MOA with Plaintiffs stipulating how the adverse effects of Federal actions on the Willits Bypass Project, especially the Willits Mitigation Project, will be resolved. While Defendants circulated several versions of a Draft Programmatic Agreement, there is no fully executed MOA or Programmatic Agreement with any Tribe.

Even after Defendants had been constructing the Willits Bypass Project for over two years, they had yet to develop or implement a process for identifying historic properties, cultural resources, or sacred sites, or resolving adverse effects to historic properties, cultural resources, and sacred sites that may be discovered or inadvertently affected, and therefore subject to 36 C.F.R. § 800.13, during the implementation of the undertaking.

Caltrans also failed to disclose to Plaintiffs the presence of numerous cultural resources and the potential impacts of the Project on these resources, and failed to prepare and circulate a Supplemental EIS. Further, Caltrans has failed to notify tribal monitors that excavation activities are being conducted in and around such sites. Caltrans has failed to properly implement cultural resource protection and archaeological mitigation measures.

Caltrans has determined that the Willits Bypass Project will have an adverse effect on Post-Review Discovery ("PRD") -1 (CA-MEN-3635), PRD -2 (CA-MEN-3636), and PRD -4 (CA-MEN-3638) which Caltrans has, under 36 C.F.R. § 800.13(c), assumed for the purposes of the Willits Bypass Project to be eligible for the NRHP under Criterion A and/or D and are each therefore a "historic property" as defined at 36 C.F.R. § 800.16(l)(1).

As of December 31, 2014, Caltrans determined that the Willits Bypass Project has the potential to affect archaeological sites CA-MEN-3567, CA-MEN-3568, CA-MEN-3569, CA-

MEN-3570, CA-MEN-3594, and Semphor 1 on the Bypass alignment which Caltrans has, under 36 C.F.R. § 800.13(c), assumed for the purposes of the Willits Bypass Project to be eligible for the NRHP under Criterion D and are therefore "historic properties" as defined at 36 C.F.R. § 800.16(l)(1) and must be protected as Environmentally Sensitive Areas ("ESAs").

Caltrans has determined that the Willits Bypass Project has the potential to affect archaeological sites CA-MEN-2645/H on the Bypass alignment which Caltrans has determined, by consensus on December 6, 2005, to be eligible for the NRHP under Criterion D (CA-MEN-2645/H) and A and C (CA-MEN-3111H) are therefore "historic properties" as defined at 36 C.F.R. § 800.16(l)(1) and must be protected as ESAs.

As of December 31, 2014, Caltrans determined the following archaeological sites exist on the Willits Mitigation Project parcels: CA-MEN-1324, CA-MEN-2623, CA-MEN-2624, CA-MEN-2647/H, Plasma 1, Plasma 2, Plasma 3, Plasma 4, Plasma 7, Plasma 8, Watson 2, Frost 1, Frost 2, Wildlands 1, Wildlands 2, Benbow 1, Benbow 2, Benbow 3, and Taylor 1. Caltrans identified PRD Niesen 1 in a potentially disturbed context within the Bypass alignment that was further affected by Project construction

Caltrans's Final EIS/EIR for the Project includes mitigation measures for "Unanticipated archaeological discoveries," "Unanticipated discovery of human remains," and "Establishment of Environmentally Sensitive Area Action Plan" intended to address archaeological resources. These mitigation measures are required for all aspects of the Project, including the MMP. However, these mitigation measures were not implemented by Defendants.

On February 18, 2015, during their government-to-government consultation with Caltrans, Plaintiffs requested a Supplemental EIS to contend with the numerous historic properties, cultural resources, and sacred sites that have been discovered in the Project area and the Mitigation parcels subsequent to the 2006 approval of the original EIS. Plaintiffs have since learned that their historic properties, cultural resources, and sacred sites have either been damaged or are threatened by construction activities related to the Willits Bypass Project, with site identification occurring after grading activities are completed. Defendants have failed to adequately protect these historic properties, cultural resources, and sacred sites discovered

subsequent to approval of the original EIS. Plaintiffs hereby request this Court take immediate steps to protect these historic properties, cultural resources, and sacred sites.

Because Defendants failed to fulfill their Section 106 responsibilities "prior to" approving the Project, including but not limited to, failing in good faith to negotiate and implement a written MOA or Programmatic Agreement, which documents how Defendants would avoid, minimize, or mitigate adverse effects, the ancestral village site known as Yami Village, CA-MEN-3571, was destroyed. The Yami Village site was located at the northern end of the Project, on the eastern side of Highway 101.

III. LEGAL STANDARD

A court must grant a motion for summary judgment "if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A motion for summary judgment calls for a "threshold inquiry" into whether "any genuine factual issues . . . properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 250 (1986). The court does not weigh evidence or assess the credibility of witnesses; rather, it determines which facts the parties do not dispute, then draws all inferences and views all evidence in the light most favorable to the nonmoving party. *See Id*. at 255; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 587–88 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Id*. at 587.

The moving party bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the party opposing summary judgment bears the burden of proof at trial, the moving party need only illustrate the "absence of evidence to support the non-moving party's case." *In re Oracle Corp. Sec. Litig*.,627 F.3d 376, 387 (9th Cir. 2010). The burden then shifts to the nonmoving party to "go beyond the pleadings" and "designate specific facts showing that there is a genuine issue for trial." *See* Fed. R. Civ. P. 56(e). The non-moving party "must do more than

simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."

IV. ARGUMENT

A. STATUTORY AND REGULATORY FRAMEWORK

1. The Administrative Procedure Act

The Administrative Procedure Act ("APA") provides a right to judicial review against an agency or official which "acted or failed to act acted or failed to act in an official capacity or under color of legal authority." 5 U.S.C. § 706. The APA provides that a court shall compel an agency action that is "unlawfully withheld or unreasonably delayed," and shall hold unlawful and set aside agency actions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(1) & (2)(A). To determine whether the agency action was arbitrary and capricious, a court must review whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 105 (1983). Agency action must be reversed where the agency has "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfgs. Ass'n v. State Farm Mutual Auto Ins. Co.,* 463 U.S. 29, 43 (1983). The agency must engage in "reasoned decision-making." *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 859 (9th Cir.).

2. The National Environmental Policy Act

NEPA is our "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). Its purpose is to "help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." *Id*. at § 1500.1(c). Under NEPA, federal agencies are required to prepare an environmental impact statement ("EIS") regarding all "major Federal actions significantly affecting the quality of the human environment . . . ." 42 U.S.C. § 4332(C). The Council for

Environmental Quality promulgated regulations implementing NEPA that are binding on all federal agencies. 40 C.F.R. § 1500.3. Those regulations require the NEPA process be completed "before decisions are made and before actions are taken," (*id*. § 1500.1(b)) and the process begin with the agency properly "specify[ing] the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." *Id*. § 1502.13.

Once the project purpose is properly defined, the agency must consider the relevant environmental impacts of the proposed action and all reasonable alternatives. *Id*. § 1502.14. The EIS must then meaningfully address the direct, indirect, and cumulative environmental impacts of the proposed action and reasonable alternatives. *Id*. §§ 1508.7, 1508.8. Indirect effects are those "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable [and which] may include growth inducing effects and other effects related to induced changes in the pattern of land use." *Id*. § 1508.8(b). Federal agencies are required to consider the "reasonably foreseeable" effects of the proposed major Federal action, including effects that are direct, indirect, or cumulative. *Id*. §§ 1508.7, 1508.8, 1508.25.

Federal agencies also must "[r]igorously explore and objectively evaluate all reasonable alternatives" to the proposed agency action, including a "no-action" alternative. *Id*. § 1502.14(a), (d). The alternatives analysis is the "heart" of the EIS. *Id*. § 1502.14. Each alternative must be "considered in detail . . . so that reviewers may evaluate their comparative merits." *Id*. § 1502.14(b). In addition to alternatives, the EIS must "[i]nclude appropriate mitigation measures not already included in the proposed action or alternatives." *Id*. § 1502.14(f).

An EIS also must "include appropriate mitigation measures." Id. § 1502.14(f). The FHWA has also promulgated NEPA implementing regulations, which similarly require that "[m]easures necessary to mitigate adverse impacts be incorporated into the action." 23 C.F.R. § 771.105(d). Consistent with the CEQ requirements, the FHWA NEPA regulations also require that "[a]lternative courses of action be evaluated and decisions be made in the best overall public interest based upon a balanced consideration of the need for safe and efficient transportation; of the social, economic, and environmental impacts of the proposed transportation improvement; and of national, State, and local environmental protection goal." 23 C.F.R. § 771.105(b).

Once done, an EIS "shall" be supplemented if "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). An agency "[m]ay also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so." 40 C.F.R. § 1502.9(c)(2). In other words, [i]f there remains major Federal action to occur, and if the new information is sufficient to show that the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared. 42 U.S.C. § 4332(2)(C).

3. The National Historic Preservation Act

Section 106 of the NHPA requires that the agency shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470f. The NHPA is designed to ensure that federal decision-makers thoroughly evaluate the impacts of their proposed actions on NHPA-eligible resources prior to taking action. *Te-Moak Tribe of Western Shoshone of Nevada v. Department of the Interior*, 608 F.3d 592, 607 (9th Cir. 2010).

Federal agencies are required to consult with Indian Tribes such as Plaintiffs on a government-to-government basis pursuant to Executive Orders, Presidential memoranda, and other authorities. Section 800.2(c)(2)(ii)(B) of the ACHP's regulations remind federal agencies that "the Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty. Nothing in this part alters, amends, repeals, interprets or modifies tribal sovereignty, any treaty rights, or other rights of an Indian tribe, or preempts, modifies or limits the exercise of such rights."

Section 800.2(c)(2)(ii)(C) of the ACHP's regulations further states "consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated

or identified by the tribal government." Moreover, Section 302706(b) of the NHPA requires that "in carrying out its responsibilities under [Section 106], a Federal agency shall consult with any Indian tribe … that attaches religious and cultural significance to [historic properties that may be affected by the undertaking]." Finally, Section 800.2(c)(4) of the ACHP's regulations states that "Federal agencies that provide authorizations to applicants [to initiate consultation] remain responsible for their government-to-government relationships with Indian tribes."

According to the Section 106 regulations, an adverse effect occurs when an undertaking "may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association .... Adverse effect may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative." 36 C.F.R. § 800.5(a)(I). Examples of adverse effects in the Section 106 regulations include: "[c]hange of the character of the property's use ... that contribute[s] to its historic significance." *Id*. § 800.5(a)(2)(iv).

When an undertaking will adversely affect one or more historic properties, the federal agency must engage in consultation to "develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate [those] adverse effects." 36 C.F.R. § 800.6(a). If the federal agency, Indian Tribes, and other consulting parties are able to reach consensus on ways to resolve the adverse effects, that consensus is reflected in a written MOA or Programmatic Agreement, which documents how the federal agency will avoid, minimize, or mitigate adverse effects. *Id*. § 800.6. The federal agency must fulfill its Section 106 responsibilities "prior to" approving the project.

The Section 106 regulations stress the importance of considering the effects of a federal project at the earliest possible time during project planning, "so that a broad range of alternatives may be considered during the planning process for the undertaking." 36 C.F.R. § 800.I(c). The regulations reiterate the statutory requirement that Section 106 review must be completed "prior to" the approval of any expenditure of federal funds on the project, and prohibit actions that may "restrict the subsequent consideration of alternatives to avoid, minimize or mitigate" the project's

adverse effects on historic properties. *Id*. The Section 106 regulations state that a "[c]hange of the character of the property's use ... that contribute[s] to its historic significance" is an adverse effect. 36 C.F.R. § 800.5(a)(2)(iv).

B. CALTRANS INFLICTS HARM ON THE TRIBES

1. A Failure to Comply with Section 106.

Caltrans improperly addressed the mandate to comply with Section 106 at four stages:

a. At the Final EIS/EIR stage, when Caltrans and FHWA stated there would be "no effect" when they did not know what the effects would be;

b. When Caltrans commenced ground-disturbing activities without properly completing the Section 106 process;

c. When Caltrans, FHWA, and DOT commenced construction without taking appropriate steps to protect Plaintiffs' historic properties, cultural resources, and sacred sites encountered during construction activities and on the mitigation lands of the Willits Bypass Project; and

d. When Caltrans failed to correct these egregious errors once they discovered additional archaeological sites eligible for registry on the NRHP.

Defendants failed in good faith to negotiate, and have completely failed to implement, a written MOA or Programmatic Agreement with Plaintiffs, which documents how Defendants will avoid, minimize, or mitigate adverse effects. *Id*. § 800.6. Defendants were required to fulfill these Section 106 responsibilities "prior to" approving the Project. Also, Caltrans has failed to develop guidelines for the proper treatment of historic properties that may be uncovered, or of unanticipated effects to known properties that may occur, during the course of Project construction.

On June 4, 2013, the Coyote Valley Tribe wrote Charles Fielder, District 1 Director of Caltrans, to request government-to-government consultation with Caltrans regarding the Coyote Valley Tribe's concern for the protection of ancestral cultural sites located in the Project area. In the June 4 letter, the Coyote Valley Tribe stated it knew that many archaeological sites existed in the Project area: "One of the rules of thumb in discovering the location of village and grave sites

attached thereto is where there are rivers and creeks there are sites. Several creeks and rivers run through the proposed site." The June 4 Letter requested information about the archaeological surveys of ancestral cultural sites that had been done by state or federal authorities in the permitting process, as well as a copy of such reports and findings. Incidentally, neither Caltrans nor the FHWA ever provided the Coyote Valley Tribe with this information.

It was not until April 29, 2014, after ground disturbing activities had commenced, that Defendants first sat down with representatives of Plaintiffs for government-to-government consultation. Thus, the first government-to-government consultation was after CA MEN 3571 had been destroyed in September 2013. Since then, neither Caltrans nor the FHWA have provided Plaintiffs with any information about how previously destroyed sites could have been protected or their destruction avoided.

Given the ubiquitous presence of lithic artifacts across Little Lake Valley, and the representations of Caltrans, during government-to-government consultations, there should be extensive tribal archaeological monitoring efforts during ground-disturbing activities in the Project. For example, tribal monitors should be present for all ground-disturbing activities so that they can identify discrete archaeological features and/or deposits (e.g., hearths, middens, or artifact-laden sediments such as surface and subsurface concentrations of lithic materials) that can provide important information on human lifeways in the Little Lake Valley during the prehistoric and/or historic periods. Based on the Declaration of Eddie Knight, filed herewith, Plaintiffs' tribal monitors simply have no on-site authority to either choose when and where to observe or to interrupt ground disturbing activities.

As reflected in the Declaration of Mike Knight, the Sherwood Valley Band of Pomo took a similar position that, after 18 months of effort, Caltrans indefinitely stalled, if not altogether abandoned, the finalization of a MOA or Programmatic Agreement related to the Project. Contrary to the representations of Caltrans, FHWA, and DOT during government-to-government consultations, Caltrans unilaterally decided that Caltrans will have the sole discretion to determine the level of participation of tribal monitors on site at the Project and the wetlands

creation areas. Since the commencement, there is a grossly inadequate number of tribal monitors to oversee activities of Caltrans that are causing adverse impact to ancestral cultural sites.

Contrary to the representations of Caltrans, no tribal monitors have independent authority to investigate the nature and extent of any archaeological finds uncovered during monitoring; no independent authority to make post-review discovery determinations; and no independent authority to halt ground-disturbing activities in any area where the tribal monitor believed historic properties, cultural resources, and sacred sites were being encountered during construction activities and on the mitigation lands of the Project.

Further, the tribal monitors were apprised that the construction contractor would work night shifts on the Project, without the presence of tribal monitors to oversee night time activities. In the past, site CA MEN 3571 was destroyed during a contractor's night time earth moving activities without the presence of tribal monitors. The professed reason offered to exclude tribal monitors is "safety concerns." Yet Caltrans refuses to provide the reasons why it is safe for workers to perform ground disturbing activities, but unsafe for tribal monitors, who have been trained by Caltrans in safety practices, to observe that same activity.

There also has been a total failure to properly consult with Plaintiffs. In the course of their administration of this Project, Caltrans has failed to comply with the standards of 36 C.F.R. § 800.2(B): "Consultation with Indian Tribes should be conducted in a sensitive manner respectful of Tribal sovereignty." Moreover, Caltrans also violated 36 C.F.R. § 800.2(C): "Consultation with an Indian Tribe must recognize the government to government relationship between the Federal government and Indian Tribes. The Agency shall consult with the representatives designated or identified by the Tribal government." Pursuant to 36 C.F.R. § 800.2(C), "Consultation with an Indian Tribe must recognize the government to government relationship between the Federal government and Indian Tribes. The Agency shall consult with the representatives designated or identified by the Tribal government." Starting in May 2015, Caltrans refused and has continued to refuse to engage in face-to-face government-to-government consultation with Plaintiffs. In short, Plaintiffs' efforts at government-to-government consultation have not been met with good faith by Caltrans.

2. A Supplemental EIS Should Be Created

In the 2006 EIR/EIS for the Project, Caltrans only identified one tribal archaeological site. The surveys conducted for the 2006 EIR/EIS by Caltrans were conducted in alluvial wetlands in the spring when the grasses were high and consisted only of surface view based surveys. While surveying, the individuals conducting the survey failed to put a trowel in the soil at any point! Surface views were taken at 50 meter transits. An appropriate archaeological survey for lands designated with "a moderate to high probability of encountering Native American gravesites" is 15 to 20 meter transits at the maximum with shovel tests. Shovel tests should have been performed because of soil sedimentation that accumulated over many years in the Little Lake Valley wetlands.

Further, since the EIR/EIS was approved in 2006, thirty (30) culturally significant sites eligible and assumed eligible for listing on the NRHP in the Bypass alignment and Mitigation parcels have been discovered. Project approval was based on the assumption that there was only 1 site; since that time, the location of an additional 30 sites has shown the 2006 EIR/EIS for the Willits Bypass Project was fundamentally flawed. Defendants failed to disclose new and potentially significant information and failed to circulate a Supplemental EIS, thus violating the most fundamental principle of NEPA: the disclosure of impacts.

During these face-to-face government-to-government consultations, the Tribes have repeatedly requested that a Supplemental EIS be prepared given the substantial number of sites discovered since the EIS/EIR was approved in 2006. One example are March 17, 2015 letters from the Coyote Valley Tribe to the FHWA, Caltrans, and the Army Corps providing a recap of issues raised in government to government consultation, including the ongoing request for a Supplemental EIS. Caltrans never prepared a Supplemental EIS.

3. The Mitigation and Monitoring Plans

In 2012 and 2014, Caltrans issued mitigation and monitoring plans ("MMPs") that were supposed to decrease the net harm the Bypass caused the plants, animals, and water in the Little Lake Valley and supposed to improve the existing wetlands in the Little Lake Valley sufficiently to compensate for the destruction of approximately 80 acres of functioning wetlands. These

MMPs, however, call for substantial environmental impacts of their own on Valley lands reserved for mitigation projects (e.g., construction of new wells and water pipes for cows grazing on the parcels; topsoil disruption to replace existing vegetation with more wetlands-friendly native plants; the excavation of over 50 acres of seasonal wetlands and pasture for the purpose of wetland "creation").

Under the MMPs, Caltrans supervised roughly 200 acres of earth-moving activity, with the disruption ranging from six inches to several feet below the surface. This is in an area of the Little Lake Valley known to have housed more than 1,600 Pomo in nine villages up until the 1830s. In spite of the clear likelihood that these ancestral lands hold Pomo artifacts and, quite possibly, Native American human remains:

a. Caltrans did not consider the impact of mitigation on such sites in the 2012 MMP;

b. The issue received a cursory and vague one-paragraph in the 2014 MMP (a document that is hundreds of pages long);

c. Caltrans failed to address this glaring issue in its 2010 and 2011 Re-Validation documents.

In *Pueblo of Sandia v. United States*, 50 F.3d 856 (10th Cir. 1995), the Tenth Circuit addressed the question of what constitutes a "reasonable and good faith effort" to identify and evaluate Traditional Cultural Properties (TCPs") that may be affected by a project. The Pueblo asserted the United States Forest Service failed to comply with the NHPA when the Forest Service approved a road project and related improvements in the Cibola National Forest without first evaluating the canyon as a TCP eligible for inclusion in the National Register. In reversing a district court decision in favor of the Forest Service, the Court of Appeals found the Forest Service did not make a reasonable and good faith effort to identify historic properties and, therefore, could not make a proper determination as to whether the area contained TCPs. In assessing what constitutes a reasonable effort to identify TCPs, the court observed that the level of effort depends on the likelihood that properties may exist. *Id*. at 861. Finally, the court observed that "consultation with the [State Historic Preservation Officer (SHPO")] is an integral part of the Section 106 process" and determined that consultation with the SHPO "would be

meaningless unless the SHPO had access to available, relevant information." *Id*. at 862. The court interpreted the consultation requirement to mean "informed consultation." *Id*.

4. Caltrans' Failure to Protect Known Sites

Based on studies referenced at p. 6 of the June 2014 Draft Post Review Discovery and Monitoring Plan, at least as early as 2011, Caltrans was aware of culturally significant ancestral Native American sites both on the Bypass footprint and in the mitigation properties through a studies/literature search. In the June 2014 PRDMP at p. 6, 14 known sites were identified in the footprint of the Willits Bypass: Two which were historical and 10 of which were designated eligible or assumed eligible for listing on the NRHP. On page 15 of the June 2014 PRDMP, there are 6 known sites listed in the mitigation lands, 5 of which are archaeological sites. Based on the dates of the referenced literature/studies pertaining to the above known sites in the June 2014 PRDMP, many of the site locations were known or should have been known by Caltrans prior to construction in 2013. For the known mitigation sites, the referenced literature/studies even go back to 2009.

During the time frame between the EIS/EIR approval in 2006 and commencement of construction activities on the Project, Caltrans discovered 6 additional sites as part of a Buried Site Testing Program, Caltrans intentionally failed to undertake any CEQA or NEPA compliance efforts regarding these 6 additional sites, such as surveying and establishing ESA's for their protection. Finally, Caltrans failed to notify any representative of Plaintiffs about the discovery of these 6 additional sites.

To date at least 30 culturally significant ancestral Pomo sites have been found that were not identified prior to the Final EIS/EIR approval in 2006. Moreover, as wetland creation activities continue, Plaintiffs have reasonable grounds to believe that more ancestral sites are being and will be encountered. The number of archaeological sites spread throughout the Project area and mitigation parcels is so extensive that the Little Lake Valley should be designated as an entire archaeological district of sites. In a September 19, 2013 letter from Carol Roland-Nawi PhD, State Historic Preservation Officer, to Annmarie Medin, SHPO Chief, Cultural Studies,

Ms. Roland-Nawi stated: "There is the real potential that the valley may become an archaeological district as more information emerges."

29 ancestral sites have been discovered since the EIS/EIR was approved in 2006, yet none of the agencies involved in this Project have suggested a Supplemental EIS is justified. Pursuant to 23 CFR 771.30 (a)(2), a Supplemental EIS is mandatory. Since the initiation of government-to-government consultations over a year ago, Plaintiffs have requested that Caltrans issue a Supplemental EIS. To date Plaintiffs have received no response to this request. Plaintiffs have been provided with no justification from any of these agencies as to why a Supplemental EIS should not be undertaken for the Mitigation parcels. This request is particularly justified given that a Supplemental EIS is required by the MMP's.

5. Tribal Monitors

The purpose of tribal monitoring and consulting with the tribal representatives of ground-disturbing activities within the Project is to ensure proper treatment of historic properties, cultural resources, and sacred sites uncovered during construction as well as management of unanticipated or inadvertent effects to known properties. Caltrans failed to implement any appropriate measures to avoid or lessen significant impacts to known and/or unknown properties during implementation of the Project. As a result of the limited information that has been provided to Plaintiffs by Caltrans, Plaintiffs have learned that, in the event that historic properties, cultural resources, and sacred sites are found that may be affected during implementing mitigation requirements, Caltrans will no longer make efforts to alter the biological mitigation activities so as to avoid these properties. Plaintiffs are extremely concerned of the results of this failure by Caltrans, especially given the statements of Caltrans' archaeologist in government-to-government consultation that:

a. During ground disturbance activities, there will be no further efforts undertaken to protect or avoid culturally significant sites within the mitigation parcels;

b. Caltrans will only do data extraction from these sites as the sites are encountered and not survey the sites to establish any boundaries; and

c. Caltrans is committing to site identification only after grading is completed.

Further, Caltrans has unilaterally determined that data recovery efforts only will be conducted on certain parcels of land in the wetlands creation areas. Plaintiffs should not have to have their ancestral sites in the mitigation parcels destroyed via data recovery in order for Caltrans to obtain mitigation credits for the wetlands that Caltrans has destroyed.

Caltrans has expressed frustration with the "ubiquitous presence" of archaeological artifacts in the mitigation lands. Caltrans' frustration with cost overruns and delays due to encountering so many previously unknown culturally significant sites should not be allowed to serve as an excuse to continue to fail to completely identify and protect Plaintiffs' ancestral sites in the Project area and mitigation creation areas under the protection of federal and state laws. Plaintiffs' ancestral heritage should not be left unprotected in the name of expediency to complete the Willits Bypass Project.

Caltrans has previously stated its intent to curate artifacts in the County Museum as opposed to returning artifacts to Plaintiffs for curation. There is nothing in the Secretary of Interior's Standards and Guidelines for Archaeology and Historic Preservation which would prohibit Plaintiffs from assuming curation of the artifacts discovered in the Project.

Caltrans has failed to involve the tribal monitors and to consult with the tribal representatives on post-review discoveries made during construction. Caltrans does not have a cultural resource policy in place to avoid and, if avoidance is not possible, to minimize adverse effects of the Project upon significant cultural resources.

Caltrans has not provided tribal monitors with timely locational information on ground disturbing activities that could adversely impact historic properties, cultural resources, and sacred sites during the course of Project construction. Specifically, Caltrans has not provided tribal monitors with timely locational information on ground disturbing activities at or near known ESAs during the course of Project construction.

Caltrans failed to provide for at least one tribal monitor to be on the Project site during ground-disturbing activities in areas of native soils that may contain cultural deposits. In fact, if ground-disturbing activities are occurring simultaneously in different areas of the Project, Caltrans prevent tribal monitors from observing any of these ground-disturbing activities absent

permission by Caltrans. Caltrans does not inform tribal monitors of the locations of ground-disturbing activities and tribal monitors are not allowed to decide where they should expend their efforts. Tribal monitors must be allowed to observe all ground-disturbing activities in areas of native soils that may contain cultural deposits. In fact, tribal monitors can only participate at locations where they are specifically assigned by Caltrans. Also, Caltrans does not provide tribal monitors with current and accurate APE maps depicting the locations of Environmentally Sensitive Areas (i.e., known archaeological sites), nor has Caltrans provided tribal monitors with global positioning system units containing information on ESA boundaries. Finally, tribal monitors do not have the authority to immediately halt construction at specific locations should an archaeological feature and/or deposit, including human remains, be encountered in non-fill sediments at those locations.

Under NEPA, the agency must consider all direct, indirect, and cumulative environmental impacts of the proposed action. 40 CFR §§ 1502.16; 1508.7; 1508.8; 1508.25(c). "NEPA imposes on federal agencies a continuing duty to supplement existing … EISs in response to 'significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.' 40 CFR 1509(c)(1)(ii). As the Ninth Circuit stated in *Idaho Sporting Congress, Inc. v. Alexander,* 222 F.3d 562 (9th Cir. 2000): "Moreover, 'EAs and EISs "must be 'prepared early enough so that [they] can serve practically as an important contribution to the decision making process and will not be used to rationalize or justify decisions already made.'" *See Metcalf v. Daley* 214 F.3d 1135, 1145 (9th Cir.2000) ("NEPA's effectiveness depends entirely on involving environmental considerations in the initial decisionmaking process."). 'The phrase "early enough" means "at the earliest possible time to insure that planning and decisions reflect environmental values."' *Metcalf*, 214 F.3d at 1142." Just as in *Idaho Sporting Congress*, the Willits documentation does "not remedy the fact that at the time [Caltrans] approved the [Willits Bypass Project, it] did not have all the information available and analysis" it was required to consider. 222 F.3d 562, 568.

As previously alleged, the FHWA entered into an MOU with Caltrans, in which FHWA assigned certain responsibilities and liabilities for the Willits Bypass Project to Caltrans,

pursuant to the Surface Transportation Project Pilot Delivery Program, 23 U.S.C. Section 327. The MOU, in part, provides that "[t]he USDOT Secretary's responsibilities for government-to-government consultation with Indian tribes as defined in 36 C.F.R. 800.16(m) may not be assumed by Caltrans under this MOU. FHWA remains responsible for all government-to-government consultation, including initiation of tribal consultation, unless otherwise agreed as described in this section." MOU § 3.2.3.

As a result, the Federal Defendants could not have assigned any obligations under NEPA, Section 4(f), and Section 18(a) that would require government-to-government consultation with Plaintiffs. As the MOU provides in Section 3.2.3: "If a project-related concern or issue is raised in a government-to-government consultation process with an Indian tribe, as defined in 36 CFR 800.16(m), and is related to NEPA or another federal environmental law for which Caltrans has assumed responsibilities under this MOU, and either the Indian tribe or the FHWA determines that the issue or concern will not be satisfactorily resolved by Caltrans, then the FHWA shall reassume all or part of the responsibilities for processing the project." As more fully set forth above, Plaintiffs raised specific concerns with Caltrans during government-to-government consultation. Plaintiffs reasonably determined that the issues and concerns they described will not be resolved by Caltrans in a satisfactory manner. After Plaintiffs determined that their specific concerns related to NEPA or another federal environmental law for which Caltrans had assumed responsibilities under the MOU, and after Plaintiffs determined that the concerns would not be satisfactorily resolved by Caltrans, Plaintiffs requested the FHWA reassume all or part of the responsibilities for processing the Project. The Federal Defendants thereafter failed to reassume any part of their responsibilities for processing the Willits Bypass Project, including but not limited to, (a) taking steps to protect the "[p]roperty of traditional religious and cultural importance to" Plaintiffs that "may be determined to be eligible for inclusion on the National Register" (54 U.S.C. § 302706(a)); (b) properly and in good faith consulting with Plaintiffs who attach "religious and cultural significance to property described in subsection (a)" (54 U.S.C. §302706(b)); and (c) providing Plaintiffs, as federal recognized Indian tribes, with "a reasonable opportunity to identify … concerns about historic properties, advise on the identification and

evaluation of historic properties, including those of traditional religious and cultural importance, articulate … views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 C.F.R.§ 800.2(c)(2)(ii)(A).

6. Failure to Properly Renew the MOU

On November 30, 2016, FHWA published a "Proposed Amendment to the Third Renewed Memorandum of Understanding (MOU) Assigning Certain Federal Environmental Responsibilities to the State of California, Including National Environmental Policy Act (NEPA) Authority for Certain Categorical Exclusions (CEs)." 81 Fed. Reg. 86376-78 (Nov. 30, 2016). According to the Federal Register, the FHWA and Caltrans proposed an amendment to the original MOU authorizing the State's participation in the 23 U.S.C. 326 program. The parties proposed to amend the MOU to make its provisions consistent with the 23 U.S.C. 327 program MOU and to allow a 90 day suspension of the program, giving the State of California an opportunity to renew its waiver of sovereign immunity and acceptance of Federal court jurisdiction. The program was to resume upon the State's recertification that the sovereign immunity waiver and acceptance of Federal court jurisdiction is in place.

According to the Federal Register, the FHWA and Caltrans proposed three modifications to the MOU. No mention was made in the Federal Register of any potential amendments to Section 3.2.3 of the original MOU.

According to the Federal Register, comments were to be received on or before December 30, 2016. Among Coyote Valley's comments was that, since a formal government-to-government consultation occurred on August 30, 2016, neither FHWA nor Caltrans had formally responded to any of the concerns raised in the government-to-government consultation. Also among Coyote Valley's comments was a strenuous objection to the new discretionary language afforded in the proposed MOU for Re-assumption of FHWA jurisdiction over a Caltrans project due to irreconcilable disputes with Tribes regarding the protection of a Tribe's cultural and natural resources. This issue was the most important objection articulated by the Tribes at the August 30, 2016 government-to-government consultation.

However, much to Plaintiffs' alarm, given their history with Caltrans and FHWA in failing to respond to requests for and issues raised in government-to-government consultations, the mandatory language in Section 3.2.3 in the existing MOU was radically changed to the detriment of Tribes. Under the new draft, the prior mandatory requirement for FHWA to re-assume jurisdiction triggered by a Tribe's unresolvable concerns has been removed without explanation, and the issue of whether FHWA re-assumes jurisdiction is left solely to the discretion of FHWA.

As Coyote Valley pointed out in its December 12 comment letter, its experience with government-to-government consultations with Caltrans is, as the Court stated in *Comanche Nation et.al v the United States of America*, 5:08CV-0849-D, U.S District Court for the Western District of Oklahoma, in its order of September 23, 2008: "NHPA requires an agency to 'stop, look and listen' (but) in the present case… [d]efendants, merely, paused, glanced and turned a deaf ear." Government-to-government consultation should not amount to merely listening to the Tribes and not responding at all to the Tribes' objections. Yet this treatment is what Plaintiffs have experienced to date.

V. CONCLUSION

Despite the significant information bearing on Plaintiffs' ancestral and archeological sites learned during the course of construction of the Willits Bypass Project, Caltrans refuses to prepare a supplement to the Final EIS/EIR disclosing these sites and explaining their consideration and analysis of the handling of these sites. This failure leads to the conclusion that the Final EIS/EIR is arbitrary, capricious, an abuse of discretion, and not in accordance with NEPA and its implementing regulations. See 5 U.S.C. § 706(2)(A).

This Court should determine that, under Section 3.2.3 of the MOU, Plaintiffs correctly stated that their concerns were not being satisfactorily resolved by Caltrans and that Plaintiffs properly requested the FHWA reassume all or part of the responsibilities for processing the Project. As set forth in the related Motion for Summary Judgment as to the Federal Defendants, this Court should determine the FHWA thereafter failed to reassume any part of its responsibilities for processing the Project, including but not limited to: (a) failed to take steps to protect the

"[p]roperty of traditional religious and cultural importance to" Plaintiffs that "may be determined to be eligible for inclusion on the National Register" (54 U.S.C. § 302706(a)); (b) failed to properly and in good faith consult with Plaintiffs who attach "religious and cultural significance to property described in subsection (a)" (54 U.S.C. §302706(b)); and (c) failed to provide Plaintiffs, as federal recognized Indian tribes, with "a reasonable opportunity to identify … concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate … views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." 36 C.F.R§ 800.2(c)(2)(ii)(A).

Further, by signing the new MOU on December 23, 2016, before the comment period expired on December 30, 2016, Defendants failed to afford Plaintiffs the good faith opportunity to comment on the new MOU. Defendants also failed to adequately consider, respond to, or address in any meaningful way important comments and proposed alternatives relating to the new MOU, particularly as to Section 3.2.3. By executing the new MOU with provisions that will have severe and disruptive effects on Plaintiffs without fairly addressing comments relating to the legality and effectiveness of the new MOU, Defendants "failed to consider an important aspect of the problem" in violation of the APA. For all these reasons, summary judgment should be entered in favor of Plaintiffs.

Dated: July 24, 2017

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