JEANNE SCHERER, Chief Counsel
G. MICHAEL HARRINGTON, Deputy Chief Counsel
LUCILLE Y. BACA, Assistant Chief Counsel
DEREK S. VAN HOFTEN (SBN 226880)
STACY LAU (SBN 254507)
BRANDON WALKER (SBN 254581)
111 Grand Avenue, Suite 11-100, Oakland, CA 94612
Telephone: (510) 433-9100; Facsimile: (510) 433-9167

Attorneys for Defendants CALIFORNIA DEPARTMENT OF TRANSPORTATION; MALCOLM DOUGHERTY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

THE COYOTE VALLEY BAND OF POMO INDIANS OF CALIFORNIA and THE ROUND VALLEY INDIAN TRIBES OF CALIFORNIA

Plaintiffs,

vs.

FEDERAL HIGHWAY ADMINISTRATION; UNITED STATES DEPARTMENT OF TRANSPORTATION, et al.

Defendants.

Case No.: 4:15-CV-04987-JSW

DEFENDANTS CALIFORNIA DEPARTMENT OF TRANSPORTATION AND MALCOLM DOUGHERTY'S NOTICE OF MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES

Date: January 12, 2018
Time: 9:00 a.m.

Judge: Hon. Jeffrey S. White
Courtroom: 5

CALIFORNIA DEPARTMENT OF TRANSPORTATION - LEGAL DIVISION
111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

CALIFORNIA DEPARTMENT OF TRANSPORTATION - LEGAL DIVISION
111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

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111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

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CALIFORNIA DEPARTMENT OF TRANSPORTATION - LEGAL DIVISION
111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

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111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

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111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

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CALIFORNIA DEPARTMENT OF TRANSPORTATION - LEGAL DIVISION
111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

NOTICE OF MOTION AND CROSS-MOTION FOR SUMMARY JUDGMENT

TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on Friday, January 12, 2018, at 9:00 a.m., or as soon thereafter as the matter may be heard, in the courtroom of the Honorable Jeffrey S. White, located in the United States District Court for the Northern District of California, 1301 Clay Street, 2nd Floor, Courtroom 5, Oakland, California, the California Department of Transportation ("Caltrans") and Malcolm Dougherty, in his official capacity as Director of the California Department of Transportation (collectively, "Caltrans"), will and hereby do move the Court to issue an order granting summary judgment in their favor and denying Plaintiffs' Motion for Summary Judgment (ECF 132).

Caltrans seeks an order of the Court granting summary judgment in their favor on the claims set forth in Plaintiffs' Second Amended Complaint (ECF 99), and denying the relief sought in Plaintiffs' Motion. This Cross-Motion is made on the grounds that Caltrans has fully complied with all applicable laws with respect to the Willits Bypass Project, including the National Historic Preservation Act and National Environmental Policy Act.

This Cross-Motion is brought under Fed. R. Civ. P. 56 and is based on this Notice of Motion, the attached Memorandum of Points and Authorities, Caltrans' Administrative Record and Supplemental Administrative Record filed with the Court (ECF 55, 103), all of the pleadings, filings and records in this matter, and all other matters of which the Court may take judicial notice, and on such other and further arguments, documents, and grounds Caltrans may advance in this matter.

CALIFORNIA DEPARTMENT OF TRANSPORTATION - LEGAL DIVISION
111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

CALIFORNIA DEPARTMENT OF TRANSPORTATION - LEGAL DIVISION
111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

I. INTRODUCTION

In their summary judgment brief, Plaintiffs fail to make even a single citation to the administrative record in this case, fail to support their arguments with any applicable case law, and altogether fail to identify any legal duty that Caltrans allegedly violated. Instead, Plaintiffs largely cut and paste – literally – from their Complaint in this action, and ask the Court to provide them relief and enjoin a project that is completed and has been operational for nearly a year.

Most of Plaintiffs' claims, if one can even discern what they are, are also barred by the statute of limitations, sovereign immunity, laches, and mootness. Even if Plaintiffs could bring these claims, they are meritless. The record in this case amply demonstrates that Caltrans fully complied with NEPA, the NHPA and all other relevant and applicable laws. Planning for the Willits Bypass Project began decades ago, including extensive and inclusive public outreach and consideration of potential impacts on the environment and historic resources, and fully complied with all laws.

By failing to cite to the record, Plaintiffs have essentially abandoned their lawsuit, which had no merit to begin with, and this Court should grant summary judgment in favor of Caltrans.

II. FACTUAL AND PROCEDURAL BACKGROUND[1]

This is the second of two lawsuits challenging the Willits Bypass Project ("Project") in Mendocino County. The first lawsuit, alleging violations of NEPA for failure to prepare a supplemental environmental impact statement, was filed in 2010, and resulted in a judgment in favor of Caltrans. (*Center for Biological Diversity, et al. v. California Department of Transportation, et al.*, Case No. 3:12-02172-JSW ("*Willits I*").) This lawsuit was filed on October 30, 2015, and the two cases were ordered related on December 15, 2015. (*Willits I*, Dkt. 160.) Much of the factual and procedural background regarding the Project is set forth in the pleadings and orders in *Willits I*. (See, e.g., *Willits I*, Dkt. 138 at 2-4 (Caltrans' summary judgment brief); 148 at 2:10-6:3 (Order on MSJ).)

A. Project history, environmental compliance and completion of Phase I.

As the pleadings and Order in *Willits I* document, the origin of the Project dates back to the

[1] As discussed below, Plaintiffs' brief does not cite to the administrative record and Plaintiffs have therefore waived their arguments. Although Caltrans has no burden in this lawsuit, it provides this statement of facts for the Court's edification and to rebut Plaintiffs' unfounded assertions.

mid-1950s. (*Willits I*, Dkt. 148 at 2:7, n 4.) In 2006, the Final EIS for the Project was finalized by FHWA and the Project was approved. (Id.; CT AR 5:1929-49.)[2] Between then and commencement of Project construction in 2013, Caltrans obtained a host of permits and approvals from numerous regulatory agencies, and conducted additional environmental review under various environmental laws. (*Willits I*, Dkt. 138 at 3:6-4:8; CT AR 76:6510-114:6968.) These included a Mitigation and Monitoring Plan and section 404 permit issued in 2012 by the U.S. Army Corps of Engineers, and a Lake and Streambed Alteration section 1602 permit issued in 2014 by the California Department of Fish and Wildlife. (*Willits I*, Dkt. 148 at 5:8-28; CT AR 78:6565-84:6601; 85:6602-108:6787.)

In 2007, Caltrans chose to proceed with phased construction of the Project, the first phase of which would consist of a two-lane bypass, with plans to complete the remaining two lanes as funding becomes available. (*Willits* I, Dkt. 148 at 3-4.) Construction of Phase I began in 2013, and was completed and opened to traffic on November 3, 2016. (CT Supp. AR 11:1041; Dkt. 79 at 4:14-16.)

Mitigation work undertaken pursuant to the mitigation plans and permits described above is essentially complete as well, with only minimal additional planting and weed abatement work remaining. (See, e.g., CT Supp. AR 66:1954-56; CT Supp. AR 28:1219-78:2067.) Phase II of the Project remains unscheduled and unfunded through fiscal year 2022/23; there is no current timeline for funding or moving forward with Phase II, which would require additional review and approvals before construction could commence. (Dkt. 95 at 4:21-23; CT Supp. AR 337:2883-340:2901.)

B. NHPA Section 106 compliance and consultation.

The process of considering the Project's possible effects on historic properties and historical resources, as required under Section 106 of the National Historic Preservation Act ("NHPA") and NEPA began in the late 1980s with the involvement of the public and stakeholders to seek and consider information on potential effects on cultural resources, including the establishment of Technical Advisory Groups. (See, e.g., CT AR 26:2298.) That continued through the duration of

[2] Citations to "CT AR [document number : page number]" are to Caltrans's administrative record in this action, lodged on July 7, 2016. (Dkt. 55.) The record in this action also consists of Caltrans's supplemental administrative record lodged on May 8, 2017 (Dkt. 103) ("CT Supp. AR"), as well as the administrative record lodged on December 21, 2012 in *Willits I*. (*Willits I*, Dkt. 103-106.)

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111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

Project development, including thorough coordination and consultation with the State Historic Preservation Officer ("SHPO"), Native American Heritage Commission, Federally recognized Indian tribes, including Plaintiffs, Mendocino Archaeological Commission, and more. (CT AR 26:2298.)

The lengthy history of Section 106 compliance and consultation, both before and after the 2006 EIS and Project approval, is well-documented in the record. (CT AR 26:2298-29:2392 (NEPA re-validation describing history of consultation); 250:11459-263:11579 (consultation logs); 1:1-4:1928 (EIS); 264:11580-981:14372 (correspondence with Tribes, including Plaintiffs); 982:14373-1188:14892 (correspondence with agencies); 1189:14893-2057:17343 (additional correspondence); 2058:17344-2133:17556 (meetings and teleconferences); 2134:17557-2140:17649 (MOUs and agreements); 2220:19448-3864:27266 (monitoring logs); 3865:27268-5040:32237 (site information); 5041:32238-5302:42294 (technical reports and studies); and maps, plans, memoranda, photos and more (5303:42313-7608:207453); see also, CT Supp. AR 80:2068-328:2873).)

From the beginning of Project scoping in the 1980s until Project approval and completion of the EIS in 2006, archaeological surveys and consultation with the NHAC, state and Federal agencies, Indian Tribes, and other agencies and stakeholders, provided information on known cultural and prehistoric sites and enthographic village locations, as well as the potential for encountering additional cultural resources within the proposed alignments, and resulted in narrowing alternatives and addressing the possibility of uncovering buried deposits. (CT AR 26:2299.) Once the Least Environmentally Damaging Practical Alternative was identified, archaeological and architectural properties were evaluated, which included four historical / archaeological sites and 14 historical properties or structures. (*Id.*) Only two resources were found to be eligible for inclusion in the National Register of Historic Places, and the Project could avoid them. (*Id.*)

The EIS determined the Project will have no adverse effect on historic properties and identified protective measures, including halting work in the area if buried cultural materials are encountered during construction, as well as an Environmentally Sensitive Area Action Plan, included as part of the Historic Property Survey Report, which ensured avoidance and protection of historic properties during construction. (CT AR 26:2300.)

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111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

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111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

After completion of the EIS, as the Project proceeded, a number of developments warranted additional consideration of cultural resources, as anticipated by the EIS and the protective measures described above, including: archaeological surveys in 2008-09 for biological and wetland mitigation commitments; implementation of a Buried Site Testing Program between October 2010 and April 2013, resulting in a Supplemental Historic Property Survey Report; submittal of a Finding of Effects document to SHPO regarding potential effects to the Northwestern Pacific Railroad, an eligible resource, and requesting concurrence on the effects finding; identification of 18 archaeological sites during the 2013 and 2014 construction seasons; and a possible inadvertent effect to a possible archaeological resource. (CT AR 26:2300-10.)

Of all the sites identified during this process, the Project was able to avoid altogether all but nine. (CT AR 2307.) Caltrans initially assumed those nine sites were eligible for listing in the National Register of Historic Places, and proceeded to consult with all stakeholders to develop measures to minimize or resolve any potential adverse effects to the sites, including data recovery and ethnographic research. (CT AR 26:2307-08.) Although Caltrans had assumed the sites to be NRHP-eligible, subsequent data recovery excavations consistently showed the sites did not yield important archaeological data. (CT AR 26:2308.) The data confirmed that the Project had not destroyed or significantly altered any potentially important characteristics of historic properties or resources, so Caltrans determined the Project had not and would not have an adverse effect on historic properties. (Id.) Caltrans then concluded that the Project did not have the potential to significantly alter or affect the quality of the human environment with regard to historic properties; that no significant archaeological features or cultural deposits had been impacted by the Project; and that no supplemental EIS was warranted under NEPA. (CT AR 26:2308.)

On January 1, 2004, Caltrans, FHWA and the Advisory Council on Historic Preservation entered into a programmatic agreement regarding compliance with Section 106 as it pertained to the administration of the Federal-aid Highway Program in California, which included the Project. (CT AR 2138:17578.) An agency is authorized to execute a programmatic agreement to govern the implementation of a particular program, and compliance with the procedures established by an

approved programmatic agreement satisfies the agency's Section 106 responsibilities. (36 C.F.R. § 800.14(b).) This agreement was amended and extended, effective January 1, 2014 ("Statewide PA"). (CT AR 2138:17577-17630.) Provisions for post-review discoveries are provided in Stipulation XV.B in the Statewide PA. (CT AR 2138:17592-93.)

While Caltrans attempted to negotiate a separate project-specific programmatic agreement with certain Indian tribes, including Plaintiffs, and the California SHPO, the parties were unable to finalize that agreement. (CT AR 1188:14890.) Accordingly, as the Advisory Council acknowledged, pursuant to its inherent authority, it was proper for Caltrans to proceed with the Project without a project-specific agreement by continuing to follow the provisions of Stipulation XV.B of the Statewide PA. (Id.)

C. 23 U.S.C. § 327 MOU with FHWA.

This Court has previously set forth some of the background of the 23 U.S.C. section 327 Memorandum of Understanding between Caltrans and FHWA ("MOU") in *Willits I*. (See, e.g., *Willits I*, Dkt. 58 at 3:19-4:16.) As explained therein, effective July 1, 2007, the Secretary of the USDOT assigned, and Caltrans assumed, the Secretary's responsibilities under NEPA and all of the Secretary's responsibilities for environmental review, consultation, or other such action required under enumerated federal environmental laws with respect to most highway projects within the State of California. (Dkt. 32-1 (2007 MOU).) In connection with and as a condition of entering into the MOU, the State of California enacted a limited waiver of sovereign immunity and consented to the jurisdiction of the federal courts with regard to the compliance, discharge, or enforcement of the responsibilities assumed pursuant to the MOU. (Id.; Cal. Sts. & Hwy Code § 820.1.) The MOU was renewed in 2012 (Dkt. 32-1 at p. 26-31), which then expired of its own terms on December 31, 2016. (CT Supp. AR 342:2905-31.) On December 23, 2016, Caltrans and FHWA entered into a subsequent MOU renewing Caltrans's participation in the program, which MOU took effect on January 1, 2017 ("2017 MOU"). (Id.) However, because the California Legislature did not renew the State's waiver of sovereign immunity under Streets and Highways Code section 820.1 until March 30, 2017, Caltrans's assumption of responsibilities was suspended under section 12.3.2 of the

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111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

2017 MOU until that date. (Cal. Sts. & Hwy Code § 820.1; CT Supp. AR 342:2929-30.)

Plaintiffs filed this lawsuit on October 30, 2015. (Dkt. 1.)

III. STANDARD OF REVIEW

This Court reviews Plaintiffs' claims under the Administrative Procedure Act ("APA"). (5 U.S.C. § 706; *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002); *Pitt River Tribe v. U.S. Forest Service*, 469 F.3d 768, 778 (9th Cir. 2006).) The Ninth Circuit has endorsed the use of summary judgment under Rule 56 of the Federal Rules of Civil Procedure when reviewing agency decisions under the limitations of the APA. (*See, e.g., Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471–72 (9th Cir. 1994) (review under the APA does not require "fact finding" by the court).) Under the APA, the Court neither sits as an evidentiary fact-finder nor resolves allegedly disputed facts. Rather, the Court sits as an appellate tribunal and determines, as a matter of law, whether the facts found by the agency and the agency's decision as a whole are supported by the administrative record. (*Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985).)

Under the APA, a court may set aside an agency action only if it determines that the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." (*Turtle Island Restoration Network v. Natl. Marine Fisheries Serv.*, 340 F.3d 969, 973 (9th Cir. 2003). Under this standard, the "court is not to substitute its judgment for that of the agency," (*Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)), and "the ultimate standard of review is a narrow one." (*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971).) A court "will reverse a decision as arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation 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." (*The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008), *overruled on other grounds by Winter v. NRDC*, 555 U.S. 7 (2008), (internal quotations and citations omitted).)

Plaintiffs set forth the wrong standard in their brief, ignoring the applicable APA standard and the requirement that claims under the APA be reviewed on the administrative record, and cite

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111 Grand Avenue, Suite 11-100, Oakland, California 94612
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only the law governing summary judgment in non-APA cases. (Dkt. 133 at 6:10.)

IV. EVIDENTIARY OBJECTIONS AND MOTION TO STRIKE DECLARATIONS

Preliminarily, this Court should strike the Declarations of Priscilla Hunter, Eddie Knight, and Mike Knight (Dkt. 134-36), because they constitute improper extra-record evidence in this APA review case, for which Plaintiffs have failed to set forth any exception or justification, and because they otherwise consist of improper speculation, argument, legal conclusion and hearsay, and lack foundation and personal knowledge. (*San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 992-93 (9th Cir. 2014); *Burch v. UC Regents*, 433 F.Supp.2d 1110, 1119 (E.D. Cal., 2006).)

As set forth above, review in this case is limited to the administrative record, where the Court neither sits as an evidentiary fact-finder nor resolves allegedly disputed facts. (*San Luis & Delta-Mendota*, 776 F.3d at 992-93.) Accordingly, to the extent Plaintiffs' declarations include purported facts, they constitute improper extra-record evidence. Nearly the entire Hunter Declaration, for instance, contains unsupported assertions such as, "A representative of Caltrans present at the meeting assured our tribe that Caltrans and FHWA had taken steps to protect these cultural and sacred sites and stated that Caltrans had a separate addendum/chapter that tells how to manage the mitigation areas. I responded by underscoring that a Programmatic Agreement and a PRDMP were supposed to be in place…." (Dkt. 134 at ¶ 43.) Likewise, the Eddie Knight Declaration includes factual assertions such as, "I have made Caltrans aware numerous times that Caltrans is not regularly allowing the tribal monitors or our Tribes with the foregoing opportunities…" (Dkt. 135 at ¶ 20.) These are merely two examples, and space precludes highlighting them all, but Caltrans objects to the entirety of the declarations.

While there are certain limited exceptions to the rule precluding extra-record evidence, such as when necessary to determine whether the agency has relied on documents not in the record or to explain technical terms or complex subject matter, these exceptions are to be narrowly construed and the party seeking to admit the extra-record evidence bears the burden of establishing that an exception applies. (*San Luis & Delta-Mendota, supra,* 776 F.3d at 992-93.)

Plaintiffs have not even attempted to satisfy that burden here; instead, they simply submit the

CALIFORNIA DEPARTMENT OF TRANSPORTATION - LEGAL DIVISION
111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

CALIFORNIA DEPARTMENT OF TRANSPORTATION - LEGAL DIVISION
111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

declarations without justification or explanation. At the same time, though, Plaintiffs cannot even attempt to satisfy that burden here, because the time to challenge the contents of the record or seek to add extra-record evidence in this case has long since passed. (Dkt. 53 (setting July 25, 2016 deadline for disputes regarding content of record).) This Court should therefore strike the declarations. (*San Luis & Delta-Mendota, supra,* 776 F.3d at 992-93 (striking declarations as improper extra-record evidence); *see also, Ent. Research Group, Inc. v. Genesis Creative Group* 122 F.3d 1211, 1217 (9th Cir. 1997) (court should not make arguments for Plaintiffs when they failed to do so).)[3]

The declarations are also improper on multiple evidentiary grounds, including hearsay (e.g., Hunter Decl. ¶¶ 42-57, 83-112 regarding statements at meetings); improper argument and legal conclusion (e.g., Hunter Decl., ¶ 82 ("Pursuant to 23 CFR 771.30(a)(2), a Supplemental EIS is mandatory," E. Knight Decl. ¶ 16); inadequate foundation (e.g., E. Knight Decl. ¶ 12 ("in June 2014, Caltrans, without tribal monitors present, trenched a ditch through a known ESA site on the Project."); insufficient personal knowledge (e.g., Hunter Decl. ¶ 69 ("An appropriate archaeological survey… is 15 to 20 meter transects…"), ¶ 19 ("In September 2013, a known archaeological site… was destroyed by Caltrans initially by the insertion of over 1,000 wick drains…"); and speculation (e.g., Hunter Decl. ¶ 82 ("our Tribe has reasonable grounds to believe that more ancestral sites are being and will be encountered").) The declarations fail to comply with the Federal Rules of Evidence and the Local Rules of the Northern District and should be stricken. (Fed.R.Evid. 602, 701, 802, 901; Civ. Local R. 7-5(b).) Again, space precludes identifying all the evidentiary infirmities in the declarations (Civ. Local R 7-3(a)), but Caltrans objects to them in their entirety.

V. LEGAL ARGUMENT

A. This Court should refuse to consider Plaintiffs' Motion for Summary Judgment and dismiss the case, as Plaintiffs have waived their arguments by failing to support them with ANY citations to the record or applicable case law.

[3] The "facts" contained in the declarations are also readily and flatly contradicted by the record. For instance, Hunter declares that "our Tribe first heard of a proposed Willits Bypass Project in the 1998-1999 time frame." (Dkt. 134 at ¶ 5.) Yet, the record shows that, in fact, both Coyote Valley and Hunter herself were not only notified as early as Dec. 7, 1987, but that Hunter even attended a public project meeting in 1988, and was part of a Technical Advisory Group as far back as 1992. (CT AR 2058:17344-48; 2062:17362-65; 5674:43019.)

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By failing to include a single citation to Caltrans's 50,000-page administrative record, and failing to rely on applicable case law, Plaintiffs have altogether waived their arguments. Accordingly, on that basis alone, this Court should dismiss the case and enter Judgment in Caltrans's favor. (*N/S Corp. v. Liberty Mutual Ins. Co.*, 127 F.3d 1145, 1146 (9th Cir. 1997) (court struck brief and dismissed appeal for "mere handful of generalized record citations"); *see also, Dela Rosa v. Scottsdale Mem'l Health Sys., Inc.*, 136 F.3d 1241, 1243 n. 1 (9th Cir. 1998) (courts have not hesitated to strike briefs, dismiss appeals.) In essence, Plaintiffs' brief is mostly cut-and-pasted verbatim from their Complaint,[4] and arguably constitutes a motion for judgment on the pleadings, in which case all the allegations in Caltrans's pleading would be accepted as true. (*Ventress v. Japan Airlines*, 486 F.3d 1111, 1114 (9th Cir. 2007).)

It is well-settled in the Ninth Circuit that arguments not supported by citations to the administrative record or to case authority are generally deemed waived. (*United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010); *Alaskan Independence Party v. Alaska*, 545 F.3d 1173, 1181 (9th Cir. 2008) ("because Appellants have provided no citation to the record or support for their claim… we hold that this argument is waived").) This is especially the case in record review cases such as this one, where the court "sits as an appellate tribunal and determines, as a matter of law, whether the facts found by the agency and the agency's decision as a whole are supported by the administrative record." (*Occidental Eng. Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985).) In such a context, the Federal Rules of Appellate procedure apply, which require an opening brief to include citations to the authorities and parts of the record on which the appellant relies. (Fed. R. App. Proc. 28(a)(8)(A); *see also, Olenhouse v. Commodity Credit Corp.*, 42 F.3d 1560, 1580 (10th Cir. 1994).)

Plaintiffs' complete failure to cite to the record is even more egregious in light of the procedural history of this case. Caltrans lodged its administrative record over a full year before Plaintiffs filed their summary judgment brief. (Dkt. 55, 133.) The parties also filed dozens of

[4] Compare Dkt. 133 at 17:12-17 with Dkt. 1 ¶ 167; Dkt. 133 at 17:17-18:15 with Dkt. 1 ¶¶ 161-165; Dkt. 133 at 18:16-19 with Dkt. 1 ¶ 66; Dkt. 133 at 18:20-19:11 with Dkt. 1 ¶¶ 168-173; Dkt. 133 at 19:12-16 with Dkt. 1 ¶ 182; Dkt. 133 at 19:16-26 with Dkt. 1 ¶¶ 185-186; Dkt. 133 at 19:27-21:3 with Dkt. 1 ¶¶ 211-212.

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stipulations, motions and oppositions regarding the timing of the record, whether and how to file it under seal, and the scope of its contents. (Dkt. 38, 40, 41, 43, 46-57, 61-64, 96, 98, 104, 109, 112.) Plaintiffs have clearly acknowledged and understood throughout this litigation that review of agency actions would be governed by the administrative record.[5]

At the same time, Plaintiffs failed to support their arguments with any citations to applicable case law. The section containing "arguments" includes reference to just two cases – one from the 10th Circuit, and one from a district court in Oklahoma – and makes no effort to analogize the facts or explain their applicability. (Dkt. 133 at 11-22.) This, too, constitutes waiver of their arguments. (*Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) (rejecting assertions unsupported by legal authority).) In similar circumstances, courts have struck a party's brief and dismissed the case. (*N/S Corp., supra*, 127 F.3d at 1146 ("this is a time when appellant has approached our rules with such insouciance that we cannot overlook its heedlessness").) That remedy is appropriate here as well.

It is actually somewhat charitable to label the issues raised by Plaintiffs as "arguments." In many instances, as noted above, they are merely cut and pasted from the Complaint (see, e.g., Dkt. 99 at ¶ 142; Dkt. 133 at 16:4); in others, they appear to be nothing more than airings of grievances, untethered to any legal duty alleged to have been violated, and with no reference to any final agency action. Issues raised in a brief which are not supported by argument are deemed abandoned. (*Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988).) This Court should not manufacture arguments for Plaintiffs, when they have failed to present cogent, specific arguments for the Court's consideration. (*Ent. Research Group, Inc. v. Genesis Creative Group, Inc.* 122 F.3d 1211, 1217 (9th Cir. 1997).)

Because Plaintiffs have the burden in this lawsuit, the waiver of their arguments in their summary judgment motion means they have failed to carry that burden, and Judgment must be entered in favor of Caltrans. (*Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 64-65 (2004); *High Tech Gays v. Defense Indus. Sec. Clearance Off.*, 895 F.2d 563, 574 (9th Cir. 1990).)

[5] The few citations to the record included in the Hunter declaration (Dkt. 134) do not save Plaintiffs, because the declaration must be stricken and, in any case, arguments and citations must be included in the brief itself. (*Juarez v. Jani-King of Cal., Inc.*, No. 09-3495 SC, 2010 WL 3766649 (N.D. Cal. Sept. 24, 2010) (impermissible end-run around page limits). Moreover, none of the citations or

Moreover, Plaintiffs may not rehabilitate or revive these issues in their reply brief. (*Alaska Center for Environment v. U.S. Forest Service*, 189 F.3d 851, 858 n. 4 (9th Cir. 1999).)

B. Many of Plaintiffs' "arguments" are barred by sovereign immunity, the statute of limitations, mootness, laches, or ripeness grounds.

Although Plaintiffs do not clearly articulate their arguments, most of them, even when charitably construed, are barred by various legal doctrines, including sovereign immunity, applicable statutes of limitations, laches, mootness and ripeness. In other instances, Plaintiffs fail altogether to state a claim, which itself is fatal. For instance, Plaintiffs claim that Caltrans failed to comply with Section 106 "at the Final EIS/EIR stage," which ended in 2006, and conclude that "the Final EIS/EIR is arbitrary, capricious, an abuse of discretion." (Dkt. 133 at 11:6-8, 22:20-22.) Yet challenges to the Final EIS are barred by the statute of limitations (23 U.S.C. 139(*I*)(1)). (See also, *Willits I*, Dkt. 94 at 13:23-28, n. 13). Similarly, Plaintiffs object to – although they fail to articulate coherent claims regarding – Caltrans' 2010 and 2011 "re-validation documents," and 2012 and 2014 MMPs, as well as the 2006 "approval" of the Project. (Dkt. 133 at 14:25-16:2, 19:24-26.) Even if Plaintiffs did, or could, articulate claims against final agency actions, the statute of limitations has long since passed.

Similarly, Plaintiffs object to Caltrans' compliance with Section 106 "prior to the approval" of the Project, and "when Caltrans commenced ground-disturbing activities" and "commenced construction," actions that took place between 2006 and 2012. (Dkt. 133 at 9:10-12, 11:6-17; *Willits I*, Dkt. 138-1, ¶ 6.) The statute of limitations for challenging such actions had long since passed at the time this action was filed in October 2015. Separately, Plaintiffs' challenge to Caltrans's execution of the 2017 MOU is barred by sovereign immunity, as explained below. (*In re Jackson*, 184 F.3d 1046, 1048-49 (9th Cir. (1999); Cal. Sts. & Hwy Code § 820.1.)

Also, Plaintiffs' NHPA and NEPA claims are barred by laches, as Plaintiffs have asserted their rights with inexcusable tardiness, and allowing their claims to proceed at this juncture would result in undue prejudice to Caltrans. (*Apache Survival Coalition v. U.S.*, 21 F.3d 895 (9th Cir. 1994).) The facts here are strikingly similar to those in *Apache Survival Coalition*, as Plaintiffs

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paragraphs of the declaration are cited in the brief itself in support of any particular arguments.

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Telephone: (510) 433-9100, Facsimile: (510) 433-9167

ignored much of the process they now contend was inadequate. (*Id*. at 907 (measuring laches from the onset of the NHPA review process beginning with agency's first attempts to elicit Tribe's input).) As the Ninth Circuit explained in *Apache Survival Coalition*, had the Tribes participated in the process during the initial review and approval stage – for example, during the NEPA process and project approval process – it could have brought issues to Caltrans's attention sooner. (*Id*. at 911-912.) Accordingly, the Court declined to treat the asserted violation of an "ongoing duty" under NHPA as distinct from the claim that the original 106 process was defective. (*Id*. (noting that contrary result would provide incentive *not* to participate in the process, and hold back evidence of cultural resources).) As in *Apache Survival Coalition*, Plaintiffs here were content to stand on the sidelines while Section 106 and NEPA duties were fulfilled, only filing suit after substantial work on the Project had been completed, and failing to seek any injunctive relief even after filing suit, as project construction commenced and was completed. (*Id*. at 914; CT AR 263:11520-32.)

For that reason, most of Plaintiffs' claims and requests for relief are now moot or unripe, and therefore non-justiciable. Plaintiffs seek to enjoin the Project and request an order, albeit vaguely, requiring Caltrans to take certain actions with respect to the Project going forward. (Dkt. 133 at 1:19-25.) However, the Project consists of two distinct phases, the first of which is already complete, and the second of which is unscheduled and unfunded. (CT Supp. AR 11:1041; 63:1948-49; 66:1954-56.) Phase I of the Project was fully completed and became operational in the fall of 2016, rendering moot any requested relief in relation to Phase I. (CT Supp. AR 11:1041; *Friends of the Earth v. Bergland*, 576 F.2d 1377, 1379 (9th Cir. 1978) ("where activities sought to be enjoined have already occurred, and appellate courts cannot undo what has already been done, action is moot."); s*ee also, Headwaters, Inc. v. BLM*, 893 F.2d 1012, 1013 (9th Cir. 1989).) At the same time, challenges to Phase II are not ripe, as it remains unfunded, unscheduled, and subject to future approvals. (CT Supp. AR 337:2883-340:2901; Dkt. 133 at 2:12-17.) Accordingly, Plaintiffs cannot obtain any relief as to Phase II. (*Ohio Forestry v. Sierra Club*, 523 U.S. 726, 733 (1998).)

C. Caltrans fully complied with Section 106, and Plaintiffs have failed to set forth any valid claims.

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111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

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111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

As explained above, Plaintiffs waived any arguments regarding Section 106 by failing to support them with citations to the record and the law. (Dkt. 133 at 11:4-13:28.) Moreover, Plaintiffs do not articulate any coherent claims or identify any actual legal duties that were allegedly violated; instead, they simply list various general complaints unconnected to any law, and unsupported by any facts. Even when construed charitably, many of Plaintiffs' claims are barred by the statute of limitations or sovereign immunity. Ultimately, Plaintiffs misunderstand what Section 106 requires an agency to do, or are unsatisfied with the scope of those requirements. In any case, the record shows Caltrans has not only complied with Section 106, but has gone above and beyond.

1. Overview of NHPA Section 106 requirements.

Section 106 has been described as a "'stop, look, and listen' provision that requires each federal agency to consider the effects of its programs." (*Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999).) The primary focus of Section 106 compliance is prior to project approval: "prior to approval of the expenditures of any Federal funds… or prior to the issuance of any license…." (54 U.S.C. § 306108; see also Dkt. 99 Second Amended Complaint (SAC) ¶ 11:19-20 (alleging that Caltrans was required to fulfill Section 106 requirements prior approving the Project).

At the same time, the regulations recognize that an obligation to undertake additional Section 106 compliance can be triggered upon subsequent discovery of previously unidentified properties that are eligible for inclusion in the National Register. (*See, e.g., Apache Survival, supra*, 12 F.3d at 911; 36 C.F.R. § 800.11(b)(2).) A federal agency must make a reasonable and good faith effort to identify historic properties, determine whether identified properties are eligible for listing on the National Register based on criteria in 36 C.F.R. § 60.4, assess the effects of the undertaking on any eligible historic properties found, determine whether the effect will be adverse, and avoid or mitigate any adverse effects. (*Id.*, *see also, Quechan Tribe of Ft. Yuma Indian Reservation v. U.S. Dept. of Interior*, 927 F.Supp.2d 921, 928 (S.D. Cal. 2013). In doing so, "the agency must confer with the State Historic Preservation Officer ("SHPO") and seek the approval of the Advisory Council on Historic Preservation." (*Id.*)

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Telephone: (510) 433-9100, Facsimile: (510) 433-9167

Under Section 106's implementing regulations, agencies are authorized to negotiate a programmatic agreement with the Advisory Council "to govern the implementation of a particular program… [w]hen nonfederal parties are delegated major decisionmaking responsibilities" or "[w]here other circumstances warrant…." (36 C.F.R. § 800.14(b).) Compliance with the procedures "established by an approved programmatic agreement satisfies the agency's Section 106 responsibilities for all individual undertakings of the program covered by the agreement…." (36 C.F.R. § 800.14(b)(2)(iii).)

Effective January 1, 2004, Caltrans, FHWA, and the Advisory Council entered into a programmatic agreement regarding compliance with Section 106 as it pertains to the administration of the Federal-aid Highway Program in California. (CT AR 2138:17578.) The 2004 Statewide PA was amended and extended, effective January 1, 2014 ("2014 Statewide PA"). (CT AR 2138:17577-630.) Provisions for post-review discoveries are provided in "Stipulation XV.B" in both the 2004 Statewide PA and the 2014 Statewide PA. (CT AR 2138:17592-593.) Pursuant to Stipulation XV.B, Caltrans is required to promptly stop construction in the vicinity of a newly discovered property and implement all reasonable measures to avoid, minimize, or mitigate harm while the property is assessed and a course of action is determined. (CT AR 2138:17592.) If the discovery is determined to be potentially eligible, Caltrans is required to notify interested parties and provide those parties an opportunity to comment on the property and the proposed course of action. (CT AR 2138:17592-593.) Caltrans is then required to "take all comments received into account and may carry out actions to resolve any affects." (CT AR 2138:17593.) Consistent with Section 106, the programmatic agreements are procedural and retain Caltrans's discretionary authority over its projects and the post-review resources it discovers.

2. Any claims alleging failure to comply with Section 106 prior to Project approval are barred by the statute of limitations and sovereign immunity.

Plaintiffs purport to challenge Caltrans's compliance with Section 106 prior to the 2006 project approval. (Dkt. 133 at 11:19-20; Dkt. 99 ¶ 17.) However, Caltrans did not even assume

responsibilities for compliance with federal environmental laws, including Section 106, until the 327 MOU became effective on July 1, 2007. (Dkt. 32-1 (MOU); Cal. Sts. & Hwy Code § 820.1.) As Plaintiffs acknowledge, "in 2005, FHWA concluded its Section 106 review for the Willits Bypass Project…." (Dkt. 133 at 2:20-24; Dkt. 99 ¶ 17; CT AR 5:1929-49, 7:2021-22 (FHWA approval).) Accordingly, Plaintiffs cannot state a claim against Caltrans for failure to comply with Section 106 prior to the effective date of the MOU, because Caltrans had no such responsibilities then. More importantly, any claims in this lawsuit based on actions before the effective date of the 327 MOU would be barred by the State's sovereign immunity under the Eleventh Amendment to the U.S. Constitution, as Caltrans's limited waiver did not even take effect until then. (*In re Jackson*, *supra*, 184 F.3d at 1048-49; Dkt. 32-1 (MOU); Cal. Sts. & Hwy Code § 820.1.)

Lastly, any claims regarding compliance with Section 106 prior to Project approval would be barred by the statute of limitations. Any claim seeking judicial review of approval for a highway project "shall be barred unless it is filed within 180 days after publication of a notice in the Federal Register . . . ." (23 U.S.C. 139(l)(1); Pub. L. No. 109-59, Title VI, § 6002(a), 119 Stat. 1857 (2005) (prior to 2012 amendment shortening the limitations to 150 days).) FHWA published that notice on January 5, 2007 and any claim seeking review of the approval of this Project must have been brought by July 5, 2007. (CT AR 7:2021-2022.) This action was not brought until 2015. (Dkt 1).

3. Even Plaintiffs' post-MOU allegations fail to state a claim, and the record shows Caltrans fully satisfied Section 106 through compliance with its Statewide PA.

Plaintiffs' claims regarding Caltrans's post-MOU compliance with Section 106 are premised on a misunderstanding of what the law requires, and a disregard for Caltrans's well-documented history of compliance. While Plaintiffs claim Caltrans (a) failed to implement a programmatic agreement with Plaintiffs, (Dkt. 133 at 11:17-23), (b) allowed insufficient tribal monitoring (at 12:12-21), and (c) refused to engage in government-to-government consultation (at 13:26), Section 106 imposes no such requirements on Caltrans. As discussed below, Caltrans satisfied Section 106 by executing and complying with the Statewide PA.

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111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

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111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

a. There is no requirement to enter into a project-specific programmatic agreement with an Indian tribe.

Stipulation XV.B of the Statewide PA requires that Caltrans provide notification to interested parties, allow a period of time for those parties to comment, and take any comments received into consideration as it decides how to proceed. (CT AR 2138:17592-593.) There is no requirement in Stipulation XV.B that Caltrans negotiate and enter into an additional agreement with Plaintiffs. Plaintiffs cite 36 C.F.R. section 800.6, but that section is inapplicable here, as the memorandum of agreement requirement in section 800.6(b)(2) is only triggered when Caltrans, the SHPO, and the Advisory Council on Historic Preservation all "agree on how the adverse effects will be resolved . . ." There is no requirement to enter into an agreement with an Indian tribe. Moreover, the record shows Caltrans and the Advisory Council did not come to such an agreement. (CT AR 1188:14890.)

Again, Stipulation XV.B specifies certain procedures that Caltrans must follow before it determines how to address post-review discoveries. (CT AR 2138:17592-593.) Contrary to Plaintiffs' unfounded allegations, neither Stipulation XV.B nor Section 106 requires that Caltrans develop guidelines for the treatment of historic properties; indeed, Stipulation XV.B explicitly applies to situations where "a plan for subsequent discoveries is not in place . . . ." (CT AR 2138:17592.) Plaintiffs cite no authority for its position that such plans or guidelines are required. (Dkt. 133 at 11:20-23.)

Plaintiffs ignore the Statewide PA and its conclusive effect regarding compliance with Section 106. (36 C.F.R. § 800.14(b)(2)(iii).) They do not allege Caltrans violated any aspect of Stipulation XV.B, and do not allege, let alone prove, any facts that would support an alleged violation of Stipulation XV.B. Instead, they only allege Caltrans failed to enter into an additional agreement with Plaintiffs, but cite no authority for that requirement. (Dkt. 133 at 11:17-19).

b. There is no requirement that Caltrans utilize tribal monitors.

Plaintiffs express dissatisfaction with tribal monitoring, but again fail to identify any actual legal duty. (Dkt. 133 at 12:12-13:16.) In fact, neither Stipulation XV.B nor Section 106 requires that Caltrans utilize tribal monitors either before or after post-review discoveries. (CT AR 2138:17592-593.) Nor is there any requirement that Caltrans pay for tribal monitors to be present (Dkt. 133 at

12:26-27), to have authority to make determinations under Stipulation XV.B (at 13:5), or to have any authority over construction activities (at 13:6). Nonetheless, as a factual matter, Caltrans has extensively utilized tribal monitors, which is well-documented in the record. Among other things, Caltrans entered into agreements with the Sherwood Valley Rancheria, a federally recognized tribe, for tribal monitoring services (CT AR 2134:17559, 2135:17567, 2137:17575-17576), and extensively used monitors (CT AR 3831:25655-3864:27266), including Owen Knight (e.g. CT AR 3849:26531) and Neil Britton (e.g. CT AR 3846:26309), who are monitors from the Plaintiff tribes.

c. Caltrans has no "government-to-government" consultation duties, which are reserved to the federal government.

Plaintiffs improperly conflate two distinct types of consultation: (1) Section 106 consultation, which has been assigned to Caltrans under the MOU, and (2) Federal government-to-tribal government consultation, which was not assigned to Caltrans and for which FHWA remains responsible. With respect to the first, Plaintiffs again fail to identify any final agency action, or any specific legal duty that Caltrans has allegedly violated, and they ignore altogether the lengthy history of Section 106 consultation for the Project. With respect to the second, Plaintiffs may not bring claims against Caltrans for legal duties it does not have.

Section 106 consultation with Indian tribes is carried out by Caltrans under the Statewide PA and the 327 MOU. (CT AR 2138:17581.) The MOU expressly recognizes the government-to-government relationship between the Federal government and Indian tribes, and assigns authority to Caltrans to conduct 36 C.F.R. Part 800 consultations in a sensitive manner respectful of tribal sovereignty. (CT Supp AR 342:2910 (3.2.1 of current MOU); see also 36 C.F.R. 800.2(c)(2)(ii) (suggesting that "[c]onsultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty" and requiring that consultation "must recognize the government-to-government relationship between the Federal Government and Indian tribes").)

Section 106 consultation focuses on identifying and resolving a project's adverse effects on historic properties of religious or cultural significance to the tribes. (36 C.F.R. 800.2(c)(2)(ii).) Federal government-to-tribal government consultation, on the other hand, is based on the "unique legal relationship with Indian tribes as set forth in the Constitution of the United States, treaties,

CALIFORNIA DEPARTMENT OF TRANSPORTATION - LEGAL DIVISION
111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

CALIFORNIA DEPARTMENT OF TRANSPORTATION - LEGAL DIVISION
111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

statutes, Executive Orders, and court decisions." (Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 9, 2000).) It is, in part, through this government-to-government consultation that the Federal government fulfills its fiduciary duties to the tribes and addresses "issues concerning Indian tribal self-government, tribal trust resources, and Indian tribal treaty and other rights." (*Id.*)

Although Section 106 consultation is assigned to Caltrans, the Statewide PA and the 327 MOU reserve government-to-government consultation with Indian tribes to FHWA. (CT AR 2138:17581; Dkt. 32-1; CT Supp AR 342:2911) Under the Statewide PA, the federal signatories, not Caltrans, are required to honor requests of any Indian tribe for government-to-government consultation. (CT AR 2138:17581.) Any challenge related to the manner in which government-to-government consultation was conducted by the federal agencies not only fails to state a claim against Caltrans, but falls outside the waiver of sovereign immunity. (Cal. Sts. & Hwy Code § 820.1.)

It is unclear what specific final agency action, aside from Project approval, Plaintiffs are actually challenging. Without identifying a final agency action, this Court lacks jurisdiction, and Plaintiffs cannot meet their burden of proving that their claims are justiciable, timely, ripe, not moot, and not otherwise barred. Plaintiffs' allegations relate to either completed construction activities, which were authorized by the Project approval that is beyond this Court's reach to review, or speculative effects of future construction activities that may occur at some future date.

Although Plaintiffs ignore it, the record demonstrates that Caltrans complied with, and went well beyond, the requirements in Stipulation XV.B. Stipulation XV.B requires that Caltrans provide notification and provide an opportunity to interested parties to comment. (CT AR 2138:17592-593.) It does not require that Caltrans engage in face-to-face consultation. It expressly allows Caltrans to provide information to interested parties "through correspondence, hard copy, electronic media, telephone, or meetings, at its discretion . . . ." (CT AR 2138:17593.) Additionally, Plaintiffs acknowledge that Caltrans accompanied FHWA when it engaged in government-to-government consultation (Dkt. 133 at 12:13, 12:25), but they ignore the extensive consultation efforts between Caltrans and the interested tribes (e.g. CT AR 250:11459-263:11579) and fail to demonstrate how that consultation does not fulfill the procedural requirements of Stipulation XV.B. Plaintiffs' Section

106 claims against Caltrans should be denied and judgment should be granted in Caltrans' favor.

D. No supplemental EIS was required.

Without citing to controlling law or any portion of the record, Plaintiffs claim Caltrans should have prepared a Supplemental EIS ("SEIS") for 29 potential cultural sites identified after issuance of the November 2006 EIR/EIS. Caltrans's decision not to do so was based on extensive archaeological studies and analyses, set forth and summarized in its June 2016 re-validation, which concluded that the Project would not affect any important cultural features or deposits at the sites. (CT AR 26:2297-2312.) But notably, Plaintiffs do not mention, let alone address, any of Caltrans's studies or the 2016 re-validation, which is fatal to their claim that Caltrans acted arbitrarily and capriciously.

As a preliminary matter, before challenging Caltrans's decision not to prepare an SEIS, Plaintiffs take issue with the 2006 EIS. (Dkt. 133 at 7:26-3:10; 19:2-10.) But any claim regarding the EIS is barred by the statute of limitations. (CT AR 7:2021-22.) Furthermore, Plaintiffs cannot bring any claim based on the EIS against Caltrans, because Caltrans did not waive its sovereign immunity for NEPA or assume NEPA responsibilities from the FHWA until July 1, 2007.[6]

Plaintiffs then allege Caltrans should have prepared an SEIS to evaluate newly-identified cultural sites, but this claim also lacks merit. To require preparation of an SEIS, new information must be "significant," "relevant to environmental concerns," and bear on the proposed project or its impacts. (40 C.F.R. §1502.9(c)(ii); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989).) As explained below, Caltrans determined the sites were not "significant" in the context of potential Project impacts. This decision is reviewed under the APA's arbitrary and capricious standard. (*Marsh*, 490 U.S. at 376; 5 U.S.C. §706(2).)

Caltrans's decision not to prepare an SEIS was based on archaeological surveys spanning many years, and analyzed in hundreds of pages of technical studies. Contrary to Plaintiffs'

[6] In addition to being time-barred, Plaintiffs' allegations regarding the EIS are inaccurate. Without citing to the record, Plaintiffs claim Caltrans conducted archaeological surveys at 50 meter transects without performing shovel tests. The record contradicts these allegations, and reflects that surveyors walked more than 60 miles of proposed alignments at varying transects as narrow as 5 meters, and periodically used hoes and soil probes. (CT AR 5046:32920-22, 5063:35124.)

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111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

mischaracterizations, Caltrans proactively identified 24 of the 29 cultural sites through planned archaeological investigations from 2008 to 2014, before construction in those areas began. (CT AR 26:2301-04, 45:3315-3651.)[7] Caltrans identified another five sites during construction monitoring. Of these 29 total sites, 16 were either outside the Area of Direct Impact, or could otherwise be avoided during construction, and therefore would not be affected by the Project. (CT AR 26:2301-04, 27:2313-16.) With respect to the other 13 potential sites, Caltrans conducted further analysis and concluded that four of them were not eligible for listing in the NHRP, which means that they are not "historic properties" protected under the NHPA. (54 U.S.C. §300308; CT AR 26:2301-04.)

For eight of the remaining sites, Caltrans assumed (but did not find) eligibility for listing in the NRHP, but after extensive data recovery excavations, found no pre-historic or Native American features or definable archaeological deposits at these sites. (CT AR 47:3779-48:3869, 50:4012-4221, 59:5582-63:5606.) Finally, Caltrans identified one site during a subsurface archaeological study, but due to inconsistent mapping, proceeded with construction at the site. Caltrans later determined that this construction work did not adversely affect potential cultural resources, because it involved removal of a thin layer of soil and placement of fill above the strata where any such resources would have been located, and placement of flexible wick drains (fabric strips 10 cm. wide and 6 mm. thick) which had little potential to displace buried deposits. (CT AR 26:2306-07.)

Based on that, Caltrans determined the Project did not adversely affect important cultural features or deposits at any of the sites. (CT AR 26:2304-06.) In June 2010, Caltrans issued a re-validation document setting forth its determination that there would be no adverse effect to cultural sites identified up to that date. (CT AR 13:2092.) In June 2016, Caltrans issued another re-validation summarizing its findings and decision that there was no significant new information warranting an SEIS. (CT AR 26:2297-2312.) Like the prior re-validations, that decision was supported by studies from 2008 to 2016, and Plaintiffs' failure to address any of these documents renders hollow, and is fatal to, their allegations that Caltrans acted arbitrarily and capriciously.

[7] The site names, and Caltrans's findings with respect to each site, are set forth in a chart attached to the State's June 30, 2016, re-validation document. (CT AR 27:2313-16 (filed under seal).)

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111 Grand Avenue, Suite 11-100, Oakland, California 94612
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Lastly, Plaintiffs' claim that Caltrans must have prepared an SEIS is barred by laches and is moot. The duty to supplement is not applicable unless "there remains major federal action." (*Norton v. Southern Utah*, 542 U.S. at 73.) As discussed above, Phase I Project construction is complete.

E. Plaintiffs fail to state a claim regarding the MMPs, which they may not challenge.

Plaintiffs purportedly challenge the Mitigation and Monitoring Plans for the Project, but do not identify the legal basis for their challenge or any final agency action. This absence of supported legal argument is fatal to any claim they attempt to make. Moreover, to the extent Plaintiffs take issue with the 2010 and 2011 re-validations, which evaluated planned mitigation and found no substantial change in cultural resource impacts, any claim became time-barred 180 days after the Federal Register notice was posted on July 23, 2012. (CT AR 13:2088, 15:2129, 16:2205-06.)

And as the record demonstrates, Caltrans made a "reasonable and good faith effort" to identify historic properties under Section 106. Caltrans conducted archaeological surveys of the mitigation parcels from 2008 to 2009 (CT AR 66:5695-67:6174), Extended Phase I archaeological studies of the mitigation parcels in 2014 (CT AR 45:3315-3651), and consultation with the State Historic Preservation Officer regarding the parcels (*e.g.*, CT AR 1003:14417-14418, 1111:14712-14723). This case is nothing like *Pueblo of Sandia v. U.S.*, 50 F.3d 856 (10th Cir. 1995), where the agency did not conduct its own archaeological investigation of cultural resources despite numerous claims regarding their existence. Any claim regarding the mitigation plans therefore is meritless.

F. Plaintiffs again fail to state a claim regarding tribal monitors, which are not required by law, but which Caltrans utilizes nonetheless.

In section IV(B)(5) of their motion for summary judgment, Plaintiffs largely copy and paste various allegations from their Complaint, but fail to articulate any coherent claims or support them with citations to the record or the law. (Dkt. 133 at 17:11-21:3.) The claims – to the extent anyone can discern what they are – should be summarily denied.

Plaintiffs first allege that Caltrans does not involve Tribal monitors, and then that the monitors Caltrans does use are not provided with unfettered access to the construction site, with

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adequate information or equipment, or with authority over the Project. (Dkt. 133 at 18:16-17, 18:25-19:3, 19:5-8-11.) This mirrors aspects of Plaintiffs Section 106 allegations and similarly does not cite any legal authority; accordingly, the claims fail for the same reasons discussed above. There is simply no legal authority requiring Caltrans to use Tribal monitors.

As a factual matter, the record that demonstrates that Caltrans has extensively used tribal monitors (CT AR 3831:25655-3864:27266), has consistently provided them with updated construction information (CT AR 3040:23797 [providing tribal monitor with schedule of work], 3046:23806, 3054:23823 [same]; CT Supp. AR 82:2148 [expressing appreciation for Caltrans' timely and consistent communications with Tribal monitors]), and offered to provide additional access to the Project site (CT AR 263:11533 [referencing a site visit with Tribal representatives in June 2013], 263:11538 [May 2014 site visit with Coyote Valley], 263:11541 [Nov. 2014 site visit with Tribal representatives], 397:12142 [planning a site visit with Tribal representatives in March 2014], 743:13590 [discussing site visit with Tribal representatives in May 2015]; CT Supp. AR 108:2265 [declining to authorize additional paid time for monitoring that is not justified, but allowing monitor to observe additional activities on his own time]). Plaintiffs fail to state a claim regarding tribal monitoring.

Plaintiffs also claim that Caltrans does not have a cultural resource policy in place to address effects to cultural resources. (Dkt. 133 at 18:17-19.) This again mirrors Plaintiffs' Section 106 claim and fails for the same reasons discussed above. Plaintiffs cite no authority for its position that such plans or guidelines are required by law. And, as a factual matter, Caltrans staff are qualified professionals who utilize available guidance on the treatment of historic properties. (CT AR 2138:17581 (requiring professionally qualified staff), 2138:17584 (referencing Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation [48 Fed. Reg. 44,716 (Sept. 29, 1983)], 2138:17587 (referencing Standards for the Treatment of Historic Properties), 2138:17592 (referencing Standards for Archaeological Documentation and the California Guidelines for the Curation of Archaeological Collections), 532:12948 (Caltrans' Cultural Handbook available at http://www.dot.ca.gov/ser/vol2/ch3.pdf [last visited Aug. 14, 2017]). Plaintiffs have failed to state

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111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

a claim and meet their burden of proving a violation of law, and this claim should be denied.

Plaintiffs also allege that Caltrans did not have all the information it was required to consider under NEPA at the time Caltrans approved the Project. (Dkt. 133 at 19:24-26.) This claim is untimely (23 U.S.C. 139(l)(1) [barring any claim not filed within 180 days of published notice]; CT AR 7:2021-2022 [notice published on Jan. 5, 2007]), and is barred by sovereign immunity under the Eleventh Amendment. (CT AR 5:1929-49; 2017 MOU [referencing assignment of NEPA responsibilities, effective July 1, 2007 MOU, after Project approval).)

Finally, Plaintiffs allege that FHWA failed to reassume responsibilities under the 2012 MOU that assigned responsibilities to Caltrans under 23 U.S.C. § 327(a). (Dkt. 133 at 20:21-22.) This allegation is defective for several reasons. First, Plaintiffs lack standing to enforce provisions of the MOU because they are not a party to the agreement and there are no third party beneficiaries to the MOU. (CT Supp. AR 342:2908; *see, e.g.*, *Maniere v. U.S.*, 31 Fed.Cl. 410, 417 (1994).) Second, Plaintiffs have failed to state a claim against Caltrans, because they allege only that FHWA failed to reassume responsibilities, and make no argument that Caltrans has violated the law or the MOU in any way. (Dkt. 133 at 20:21-22.) Third, the allegation is not in regard to the compliance, discharge, or enforcement of responsibilities assumed by Caltrans and would be outside the scope of the State's waiver of sovereign immunity. (Cal. Sts. & Hwy Code § 820.1.)

Lastly, the claim is now moot because the 2012 MOU that Plaintiffs challenge expired by its own terms on December 31, 2016. (CT Supp. AR 341:2903); Dkt. 133 at 3:11, 20:9-14.) A case is generally considered moot when the issues presented are no longer live or when the Court cannot grant any effective relief. (*Ruiz v. City of Santa Maria*, 160 F.3d 543, 549 (9th Cir. 1998).) Additionally, the terms from the 2012 MOU that form the basis of Plaintiffs' claim, that "FHWA shall reassume . . . responsibilities," were amended in the superseding 2017 MOU to clarify that "FHWA may withdraw the assignment." (CT Supp. AR 342:2911-12.) Because the 2012 MOU has expired and the language Plaintiffs rely upon was clarified, the controversy is no longer live and the Court could not provide any effective relief. This claim should be dismissed as moot.[8] See *Ruiz v.*

[8] Plaintiffs also fail to demonstrate how re-assumption by FHWA would result in any substantive changes. Indeed, many of the actions addressed in Plaintiffs' allegations were performed or expressly

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111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

City of Santa Maria, 160 F.3d 543, 549 (9th Cir. 1998).

G. Plaintiffs fail to state a claim regarding renewal of the MOU, which they may not challenge anyway.

Plaintiffs allege a "failure to properly renew the MOU," but this claim also fails for multiple reasons. (Dkt. 133 at 21:4-22:15.) First, Plaintiffs again fail to identify any legal duty that has even allegedly been violated, or to support their allegations with any facts or law. (Dkt. 133 at 21-22.) Instead, they merely set forth generalized complaints about the scope of the 2017 MOU and the process that led to its execution. (Id.) While Plaintiffs object to the language in section 3.2.3 of the 2017 MOU, they identify no legal violation, nor cite to any law of any kind. And, as a factual matter, the change in language in section 3.2.3 from the 2012 MOU did not substantively alter the agreement as Plaintiffs suggest. Read together, sections 3.2.3 and 9.1 in the 2012 MOU demonstrate that FHWA always retained the discretion to reassume responsibilities. (*See, e.g., Shakey's, Inc. v. Covalt*, 704 F.2d 426, 434 (9th Cir. 1983) (written contract must be read as a whole); Dkt. 32-1.)

Second, any such claim would be barred by sovereign immunity, because the waiver contained in Streets and Highways Code section 820.1 applies only to specified acts taken after execution of the MOU, but not to the execution itself, which does not relate to the compliance, discharge, or enforcement of the responsibilities assumed by Caltrans in that MOU, and is outside the scope of the State's waiver of sovereign immunity.[9] (*In re Jackson, supra*, 184 F.3d at 1048-49.)

Third, to the extent Plaintiffs seek to invalidate the 2017 MOU because it was approved without responding to Plaintiffs' comments, or because they object to the language in section 3.2.3 that reserves to FHWA the discretion to decide whether to reassume responsibilities, Plaintiffs have their facts wrong and have no support in the law.

There is no legal requirement that Caltrans or FHWA provide responses to comments prior to

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ratified by FHWA (e.g., Dkt. 133 at 11:6-14 (alleging violations of Section 106 at the time FHWA approved the Project).) Thus, re-assumption would not provide any effective relief.

[9] Caltrans would also be a necessary and indispensable party under Rule 19 to any challenge to the 2017 MOU, because Plaintiffs seek to take away Caltrans's authority to perform federal environmental responsibilities, which would prejudice Caltrans. (*Confederated Tribes v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991).)

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111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167

executing the MOU. The implementing regulations for 23 U.S.C. § 327 require that FHWA, not Caltrans, consider comments received when approving the renewal of NEPA Assignment. (23 C.F.R. § 773.115(f) and (g).) Moreover, Plaintiffs acknowledge that FHWA did consider their comments, as they informed the Tribes in an email on November 16, 2016, that "FHWA and Caltrans has had several very good discussions about what [they] heard at the consultation meeting [the August 30th session], and the comments [they] received." (Dkt. 99 at ¶ 219.) Plaintiffs also conflate two separate Federal Register notices for two separate MOUs. (Dkt. 133 at 21:5-20.) In claiming that comments were to be received by December 30, 2016, Plaintiffs cite to the Federal Register Notice for the section 326 MOU relating to categorical exemptions under NEPA. (FHWA AR 187-189.) But comments on the section 327 MOU that Plaintiffs object to here were due by December 16, 2016, as reflected in the Federal Register notice published on November 16, 2016. (CT Supp. AR 341:2902.)

VI. CONCLUSION

Plaintiffs have failed to support their arguments with any citations to the record or applicable law, and they should be disregarded as a result. At the same time, Plaintiffs largely fail to state coherent claims, and this Court should not do Plaintiffs the favor of construing them charitably. As it is, even when construed favorably, most of Plaintiffs' claims are barred by the statute of limitations, sovereign immunity, laches, mootness, or ripeness. In any case, Plaintiffs have no claims on the merits, as the administrative record in this action shows that Caltrans fully complied with NEPA and the NHPA. This Court should deny Plaintiffs' motion for summary judgment, grant Caltrans' cross-motion for summary judgment, and enter Judgment in Caltrans's favor on all grounds.

DATED: September 11, 2017

SCHERER, HARRINGTON, BACA, VAN HOFTEN, LAU & WALKER

By */s/ Derek S. van Hoften*
Attorneys for Defendants
CALIFORNIA DEPARTMENT OF TRANSP. and MALCOLM DOUGHERTY

CALIFORNIA DEPARTMENT OF TRANSPORTATION - LEGAL DIVISION
111 Grand Avenue, Suite 11-100, Oakland, California 94612
Telephone: (510) 433-9100, Facsimile: (510) 433-9167