JEFFREY H. WOOD
Acting Assistant Attorney General
Environment & Natural Resources Division
United States Department of Justice

RAGU-JARA GREGG (D.C. 495645)
Natural Resources Section
Environment & Natural Resources Division
United States Department of Justice
601 D Street NW, Suite 3816
Washington, DC 20004
TEL: (202) 514-3473
FAX: (202) 514-4231
e-mail: ragu-jara.gregg@usdoj.gov

Attorneys for Federal Defendants

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

THE COYOTE VALLEY BAND OF POMO INDIANS OF CALIFORNIA and THE ROUND VALLEY INDIAN TRIBES OF CALIFORNIA, Plaintiffs, v. UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*, Defendants.	No. 4:15-cv-04987-JSW FEDERAL DEFENDANTS' OPPOSITION AND CROSS-MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF CROSS-MOTION Date: January 12, 2018 Time: 9:00 a.m. Courtroom No. 5 Hon. Jeffrey S. White

Table of Contents

Table of Authorities

Cases

Satutes

Rules

Citations

Citations to the Administrative Record appear throughout Federal Defendant's Memorandum. Citations to the Administrative Record in the Memorandum are in the following format: CT AR 000111 (for citations to the Caltrans administrative record) and FHWA AR 000111 (for citations to the FHWA administrative record).

Acronyms

APA	Administrative Procedure Act
FAHA	Federal-Aid Highway Act
FHWA	Federal Highway Administration
MOU	Memorandum of Understanding
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
SHPO	State Historic Preservation Officer

NOTICE OF MOTION

Federal Defendants, the Federal Highway Administration ("FHWA"), FHWA Acting Administrator Brandye Hendrickson, the U.S. Department of Transportation, and Secretary of Transportation Elaine Chao (collectively "Federal Defendants"),[1] move this Court for an order of Summary Judgment pursuant to Federal Rules of Civil Procedure 56(a) against Plaintiffs Coyote Valley Band of Pomo Indians of California and the Round Valley Indian Tribes of California (collectively "Plaintiffs") and for an order striking the declarations of Pricilla Hunter, Eddie Knight, and Mike Knight declarations, ECF Nos. 134, 135, and 135. Their motion is scheduled for January 12, 2018, at 9:00 a.m., in Courtroom No. 5, U.S. Courthouse, Oakland, California, before the Honorable Jeffrey S. White.

The Court should grant summary judgment in Federal Defendants' favor on the two remaining issues in this case involving the Federal Defendants. First, Federal Defendants complied with their obligations under the National Historic Preservation Act ("NHPA"), 54 U.S.C. § 306101-306131, to consult with Plaintiffs. Defendants repeatedly provided information to Plaintiffs about the challenged project and repeatedly asked Plaintiffs to provide input or to raise concerns. Plaintiffs, therefore, were given the "reasonable opportunity" to participate in project planning required by the NHPA. *See* 36 C.F.R. § 800.2(c)(2)(ii)(A). Second, Plaintiffs' remaining claims are all based on the faulty premise that FHWA was required to reassume responsibilities for the project that had been assigned to California Department of Transportation ("Caltrans"). Plaintiffs fundamentally misread the document that they claim requires that reassumption of responsibility. Moreover, the provisions of the document that Plaintiffs are asking this Court to enforce are neither reviewable by a court under Section 706(1) of the Administrative Procedure Act ("APA") nor enforceable by Plaintiffs. Finally, Plaintiffs declarations should be stricken, as they are extra-record evidence that is inappropriate in an APA case.

I. Summary of Argument

Plaintiffs are two California Indian tribes that sued under the APA, alleging violations of NHPA,

[1] Acting Administrator Brandye Hendrickson and Secretary Elaine Chao are automatically substituted as defendants according to Federal Rule of Civil Procedure 25. *See* Fed. R. Civ. P. 25(d).

the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321–4370m-12, Section 4(f) of the Department of Transportation Act, *now codified at* 49 U.S.C. § 303(c), and Section 18(a) of the Federal-Aid Highway Act ("FAHA"), 23 U.S.C. § 138, in connection with the Willits Bypass Project ("Project"). The Project consists of a new, 5.8-mile-long segment of US 101 that bypasses the City of Willits in Mendocino County, California. CT AR 000015-16, 000038-39. Plaintiffs named the Caltrans and Caltrans Director Malcolm Dougherty, in addition to the Federal Defendants. The Federal Defendants have twice moved to dismiss Plaintiffs' initial Complaint, because, inter alia, responsibility for evaluating the Project and for defending any resulting litigation has been assigned to and assumed by Caltrans under 23 U.S.C. § 327, and because Caltrans is therefore the only proper defendant under that statute, *id*. § 327(d), (e). *See* ECF Nos. 31, 68. This Court granted those motions in part, but also granted Plaintiffs leave to amend with certain conditions. ECF Nos. 58, 94. Thus, the Court has strictly limited the scope of claims that might remain against the Federal Defendants.

Plaintiffs' remaining claims against Federal Defendants focus on two narrow issues. First, the Court has allowed Plaintiffs to proceed with their claim that Federal Defendants failed to satisfy the NHPA consultation requirement. Second, the Court has allowed Plaintiffs to proceed with their claims that Federal Defendants violated certain statutes (NEPA, Section 4(f), Section 18(a), and non-consultation portions of the NHPA) (hereinafter the "Remaining Non-Consultation Claims"), to the extent such claims arose after February 18, 2015. ECF No. 94 at 10. The viability of these Remaining Non-Consultation Claims hinges entirely on the theory that Federal Defendants were required to reassume responsibility for the Project after Plaintiffs requested that FHWA do so on February 18, 2015.

The Court should grant summary judgment in Federal Defendants' favor on both remaining issues in this case and likewise deny Plaintiffs' motion for summary judgment against the Federal Defendants. First, Federal Defendants complied with all their obligations under the NHPA to consult with Plaintiffs. In the decades before 2013, when Plaintiffs first raised concerns about the Project, Plaintiffs were repeatedly provided information about the Project and repeatedly asked to raise any concerns or provide any historical, cultural, or other input on the Project. *See* CT AR 011515-79 (hereinafter "Consultation Log"). It is therefore clear that Plaintiffs were given the "reasonable

opportunity" required by the NHPA to participate in the Project-development process and to identify any concerns. *See* 36 C.F.R. § 800.2(c)(2)(ii)(A). Having consistently failed to respond to these requests for input during the project planning phases, Plaintiffs cannot now complain that Federal Defendants denied them the opportunity to participate.

Second, Plaintiffs' Remaining Non-Consultation Claims are premised on the incorrect theory that Federal Defendants were required to reassume responsibility for the Project. First, Plaintiffs' theory is based on a flawed reading of the 2007 Memorandum of Understanding between FHWA and Caltrans that assigned responsibility for the Project to Caltrans. *See* Ex. A, Decl. David B. Glazer, ECF No. 32-1 (hereinafter, the "2007 MOU"). Plaintiffs' reading of the 2007 MOU ignores critical language in that document, and would give an Indian Tribe an unassailable right to force FHWA to reassume responsibilities for a project regardless of FHWA's views on the issue. The correct reading of the 2007 MOU is that FHWA may reassume responsibilities for a project only if FHWA makes its own discretionary determination to do so. In addition, even assuming Plaintiffs' interpretation of the 2007 MOU is correct, their motion for summary judgment on the Remaining Non-Consultation Claims should still be denied because the 2007 MOU's provisions do not fall within the limited type of actions that are reviewable by a court under Section 706(1) of the APA. Further, Plaintiffs have not proven that Federal Defendants unreasonably delayed reassuming Project responsibilities and they cannot do so under the relevant case law. Finally, Plaintiffs cannot enforce the terms of the MOU as they are not third-party beneficiaries.

In addition to the above, the Court should grant summary judgment in Federal Defendants' favor as to Plaintiffs' claims for the following additional reasons: 1) Plaintiffs have waived many of their arguments by failing to present them in their motion for summary judgment,[2] *see United States v. Romm*, 455 F.3d 990, 997 (9th Cir. 2006) ("[A]rguments not raised by a party in its opening brief are deemed waived." (quotation marks and citation omitted)); *Mountain States Legal Found. v. Espy*, 833 F.

[2] These failures are noted at various points in this motion where they are best put in context, rather than being listed in a single subsection of the motion.

Supp. 808, 813 n.5 (D. Idaho 1993) (deeming claims not raised in summary judgment motion abandoned and granting judgment for defendants); 2) Plaintiffs inappropriately attempt to base their motion for summary judgment on extra-record declarations that should be stricken; 3) Plaintiffs continue to raise claims that are barred by the statute of limitations; 4) Plaintiffs have failed to demonstrate that they have standing to bring these claims; and 5) part of Plaintiffs argument is based on the wrong Federal Register notice.

II. Legal Standard

In APA cases such as this, the Court serves a limited role and is not tasked with serving as trier of fact, as suggested by Plaintiffs.[3] Mem. of Points and Authorities in Supp. of Pls.' Mot. for Summ. J. as to Fed. Defs. ("Pls.' Br. re Fed. Defs.") 4-5. While the Ninth Circuit has endorsed the use of motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure when reviewing agency decisions, it does so 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. *See Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985) (In an APA action, "there are no disputed facts that the district court must resolve. Th[e] court is not required to resolve any facts in a review of an administrative proceeding. Certainly, there may be issues of fact before the administrative agency. However, the function of the district court is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did."). If the Court is unable to resolve Plaintiffs' claims on the administrative record before it, the

[3] Plaintiffs incorrectly suggest that the relevant standard by which these motions for summary judgment should be evaluated is the traditional standard under Rule 56. Pls.' Br. re Fed. Defs. 4-5. As noted above, however, the traditional standard simply does not apply to APA review. Thus the cases that Plaintiffs cite are not relevant. *Id.* (citing *Anderson v. Liberty Lobby, Inc.*, 477, U.S. 242, 247–48 (1986) (libel suit) and *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (products liability action).

appropriate remedy is remand, not trial de novo. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985), *superseded by regulation on other grounds as stated in Novak Birch, Inc. v. United States*, 132 Fed. Cl. 578 (2017); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir.2014), *cert. denied by Stewart & Jasper Orchards v. Jewell*, 135 S. Ct. 948 and *State Water Contractors v. Jewell*, 135 S. Ct. 950 (2015).

III. Statement of Relevant Facts

Plaintiffs were first informed about this Project as early as 1987, when they were invited to a public meeting to discuss the feasibility of constructing a bypass around the City of Willits and to provide suggestions or comments on the proposed Project. CT AR 011518. Over the following years and stages of planning the Project, Plaintiffs were repeatedly provided information about the Project and invited to provide input, as documented in the Consultation Log. *See* CT AR 011518-21. This included being sent the Notice of Preparation of the Environmental Impact Report/Statement in 1989 along with a request for a response. CT AR 011519. Tribal elder Priscilla Hunter was invited to participate in a technical advisory group meeting in 1990 and was provided a summary of the meeting.[4] CT AR 011519-20. In 1998, Plaintiffs were notified that the FHWA and Caltrans were resuming environmental studies for the Project and were requested to provide any input on "prehistory, history, ethnographic land use, as well as contemporary [Native American] values that may be associated with or near the project area." CT AR 011520. In 2000, Defendants shared the results of the cultural resources surveys and the archaeological sites that had been identified and Plaintiffs were asked to provide input on the sites or any concerns regarding the Project and cultural resources. CT AR 011521-22. In 2008, Plaintiffs were sent a letter informing them about re-opening the notification phase of the Project, providing information about certain changes to the Project, and asking them to provide input or express concerns. CT AR 011526.

From the beginning of the environmental studies work in 1989 until the middle of 2013, the

[4] In 1992-93, Ms. Hunter was listed as being on the technical advisory group on behalf of non-plaintiff Native American Heritage Commission. CT AR 043019.

Consultation Log shows no instances of the Plaintiffs providing any input on the Project or responding to any of the information with which they had been provided. CT AR 011518-33. In 2013, Plaintiff Coyote Valley finally reached out and expressed concern about the Project and requested government-to-government consultation in a June 4 letter to Caltrans District Director Charles Fielder. FHWA AR 0007, Attachment at Page 1. Following the request, FHWA, joined by Caltrans, engaged in good-faith discussions with Plaintiffs, traveling from Sacramento to Willits on at least six occasions between October 2013 and February 2015. CT AR 011535-38, 011546. FHWA staff also reached out to tribal officials outside those in-person government-to-government meetings. FHWA AR 0038, 0064.

From the earliest stages of the Project until the Record of Decision was issued in 2006, the environmental studies for the Project were done under the authority of the FHWA. For the last decade, however, the Project has been operating under an agreement assigning environmental responsibilities to Caltrans. In 2007, the FHWA and Caltrans entered into the 2007 MOU, under which Caltrans agreed to accept assignment of all such responsibilities for the Project, including those under NEPA, the NHPA, Section 4(f), and Section 18 of the FAHA, excepting government-to-government consultation and certain other responsibilities not subject to such assumption.[5] In 2016, the FHWA and Caltrans signed an updated version of the 2007 MOU (hereinafter "2016 MOU") after providing public notice and the opportunity for comment. 81 Fed. Reg. 80,708 (Nov. 16, 2016).

IV. Argument

A. Federal Defendants Complied with the National Historic Preservation Act, Having Given Plaintiffs a "Reasonable Opportunity" to Participate in the Project-Development Process

The core of Plaintiffs' NHPA consultation claims against the Federal Defendants is based upon their claim that "Federal Defendants concluded a Section 106 review and issued a finding of conditional No Adverse Effect to historic properties …without any government-to-government consultation with Plaintiffs." Pls.' Br. re Fed. Defs. 3. This claim is, however, demonstrably false.

[5] For instance, conformity determinations under Section 176 of the Clean Air Act, 42 U.S.C. § 7506, may not be assigned. 23 U.S.C. § 327(a)(2)(B)(iv)(II).

1. Legal Background

The NHPA provides that federal agencies "having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property." 54 U.S.C. § 306108. If a project "has the potential to cause effects on historic properties," the agency must consult with the state historic preservation officer ("SHPO") to "[d]etermine and document the area of potential effects[.]" 36 C.F.R. §§ 800.3(a), 800.4(a)(1); *see also id.* § 800.16(d) (defining "area of potential effects"). The agency, along with the SHPO, is then directed to "apply the National Register criteria" to arguably eligible sites within the area of potential effects surrounding the project. *Id.* § 800.4(c)(1). If the agency finds that historic sites may be affected, it must solicit the views of various parties. *Id.* § 800.4(d)(2). The agency then applies the regulatory criteria to determine if there is an adverse effect, *id.* § 800.5(a), and if so, engages in further consultation to resolve any such adverse effects, *id.* § 800.6.

The NHPA's implementing regulations require "agencies to provide a tribe with 'a *reasonable opportunity* to identify its concerns about historic properties, advise on the identification and evaluation of historic properties . . . , articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects.'" *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 608 (9th Cir. 2010) (quoting 36 C.F.R. § 800.2(c)(2)(ii)(A)) (emphasis added) (footnote omitted). When addressing a program or the resolution of adverse effects from complex project situations or multiple undertakings, an agency may use a Programmatic Agreement to satisfy its NHPA obligations. 36 C.F.R. § 800.14(b). Caltrans, the FHWA, SHPO, and the ACHP have entered into a Statewide Programmatic Agreement that covers all FAHA projects in California, including this Project. *See* CT AR 014890.[6]

[6] It is therefore incorrect for Plaintiffs to suggest that Project activities are proceeding in the absence of an adequate Programmatic Agreement. Mem. of Points and Authorities in Supp. of Pls.' Mot. for Summ. J. as to California Department of Transportation ("Pls.' Br. re Caltrans") 4, 6, 11, ECF No. 133. Further, the NHPA regulations do not require that Plaintiffs sign the Programmatic Agreement. *See Quechan Indian Tribe of the Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 547 F. Supp. 2d 1033, 1049 (D. Ariz. 2008) (citing 36 C.F.R. § 800.6(c)(2)(ii), (iii)).

2. Plaintiffs Were Provided the "Reasonable Opportunity" Required by the NHPA

It is clear from the administrative record that Plaintiffs have been given a "reasonable opportunity" to participate in the Project-development process and to identify any concerns. 36 C.F.R. § 800.2(c)(2)(ii)(A). The Consultation Log demonstrates that, in the decades leading up to their 2013 decision to raise concerns about the Project, Plaintiffs were routinely provided information about the Project and repeatedly asked to raise any concerns or provide any input on the Project regarding issues such as prehistory, history, ethnographic land use, as well as contemporary Native American values that may be associated with or near the Project area. CT AR 011518-33. The Consultation Log shows multiple entries when Plaintiffs were contacted, provided detailed information about the Project, and invited to provide input during multiple Project-planning phases, including the Project Scoping phase, CT AR 011518, the Beginning of Environmental Studies: Six Alternatives phase, CT AR 011519-20, and the Resumption of Environmental Studies; Modified Alternatives phase, CT AR 011520-21.

This extensive record of consultation demonstrates that the State and Federal Defendants met their obligations under the NHPA. Notably, the period of repeated contacts with Plaintiffs covers both the period pre-2007, when FHWA had responsibility for environmental matters related to the Project, and the period from that point to now, when that responsibility has been assigned to Caltrans. FHWA fully satisfied its obligation to "make a reasonable and good faith effort" to identify historic properties within the undertaking's area of potential effects. 36 C.F.R. § 800.4(b)(1); *Quechan Indian Tribe v. U.S. Dept. Of Interior*, 547 F. Supp. 2d 1033,at 1046-47 (D. Ariz. 2008); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999) ("Under NHPA, a federal agency must make a reasonable and good faith effort to identify historic properties, 36 C.F.R. § 800.4(b)"). Further, "[a]n agency has satisfied the NHPA process if it shows that the project will have no adverse effect on historic resources, submits documentation of this finding to the SHPO for review, and the SHPO does not object within 15 days. 36 C.F.R. § 800.5(b)." *See Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 581 (9th Cir. 1998). FHWA made that submission to the SHPO in 2005; the SHPO concurred in the determination. CT AR 000072-73, 000163-164. The fact that the Plaintiffs may now be unsatisfied with a particular outcome or agency action does not provide the Plaintiffs veto power over the Project. *Te-*

Moak Tribe, 608 F.3d at 609-10 (reciting agency consultation efforts); *Muckleshoot Indian Tribe*, 177 F.3d at 806–07 ("Although the Forest Service could have been more sensitive to the needs of the Tribe, we are unable to conclude that the Forest Service failed to make a reasonable and good faith effort to identify historic properties." (footnote omitted)).

Further, Plaintiffs cannot now use their lack of involvement in the Section 106 process as a sword against the Project when they themselves declined to be involved in that process. There is no indication in the Consultation Log – from 1989 until 2013 – that Plaintiffs provided any input on any of the Project information that was repeatedly provided to and requested from them. The Consultation Log is clear that, while Plaintiffs were repeatedly sent information about the Project, Plaintiffs did not comment on the Project or provide the cultural or historical information that was requested from them.[7] CT AR 011519-33.[8]

Any criticism that Plaintiffs first raised about the Project after construction had already begun came too late to be actionable under the NHPA consultation provisions.[9] In *Apache Survival Coalition v. United States*, a tribe similarly chose not to participate in the long administrative NEPA and NHPA process, and then sued alleging that the construction of an observatory would harm its sacred sites. 21 F.3d 895, 898 (9th Cir. 1994). The Ninth Circuit found that the tribe's claims were barred by laches because the tribe "ignored the very process that its members now contend was inadequate," and asserted its rights "with inexcusable tardiness." *Id*. at 907 (emphasis omitted); *see also Narragansett Indian Tribe*

---

[7] By comparison, another tribe, Sherwood Valley Band of Pomo Indians, made the decision to provide input on the Project and played an active role. *See* CT AR 011519-33 (including numerous instances of the Tribe providing information and input on the Project). The Sherwood Valley Band did not join with Plaintiffs in bringing this case.

[8] Since Plaintiffs raised concerns in 2013, Federal Defendants have actively engaged in an ongoing dialogue with Plaintiffs and Caltrans, having met in-person on at least six occasions between the fall 2013 and winter 2015 and engaged with tribal officials outside those meetings. *See supra* Section III.

[9] Plaintiffs invoke Quechan Tribe of Fort Yuma Indian Reservation v. United States Department of Interior, 755 F. Supp. 2d 1104 (S.D. Cal. 2010). Pls.' Br. re Fed. Defs. 8. However, "[t]his is not a case like Quechan Tribe, where a tribe entitled to consultation actively sought to consult with an agency and was not afforded the opportunity." Wilderness Soc'y. v. Bureau of Land Mgmt., 526 F. App'x 790, 793 (9th Cir. 2013) (citation omitted). For the same reasons, this case is also unlike Oglala Sioux Tribe of Indians v. Andrus, 603 F.2d 707, 720 (8th Cir. 1979), also cited by Plaintiffs. Pls.' Br. re Fed. Defs. 8.

v. Warwick Sewer Auth., 334 F.3d 161, 169 (1st Cir. 2003) (agency complied with the NHPA where it "provided the Tribe with reports on [a private archaeological firm's] findings, engaged it in other contact about the Project, and solicited its comments"). As the Supreme Court has emphasized in the context of NEPA, a procedural statute similar to the NHPA, "[p]ersons challenging an agency's compliance … must 'structure their participation so that it alerts the agency to the [parties'] position and contentions,' in order to allow the agency to give the issue meaningful consideration." *Dep't of Tranp. v. Public Citizen*, 541 U.S. 752, 764 (2004) (*quoting Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 553 (1978); *cf. Quechen Indian Tribe*, 547 F.Supp.2d at 1040 ("The Court finds that Plaintiff waived its right to challenge BOR's choice of action alternatives when it failed to raise the third alternative during the NEPA process."). A plaintiff's obligations under NHPA are no different.

While Plaintiffs repeatedly emphasize the harms that they allege may have happened to historical sites, that is not the benchmark for NHPA compliance. *See e.g.*, Pls.' Br. re Fed. Defs. 1, 12. The question regarding Federal Defendants' compliance with the NHPA is whether the agencies met the procedural requirements of the statute. The NHPA does not prohibit harm to historic properties, but creates obligations "that are chiefly procedural in nature[.]" *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1097 (9th Cir. 2005) (quotation and citations omitted). It has "the goal of generating information about the impact of federal actions on the environment; and . . .require[s] that the relevant federal agency carefully consider the information produced." *Id.*; *see Te-Moak Tribe*, 608 F.3d at 608. Moreover, "the Tribe has made no showing that it would have provided new information" that would have prevented such harm if consultation had somehow been different. *Id.* at 610.[10]

Despite the clear history of being invited to participate in the Project development process,

[10] To the extent that Caltrans made new discoveries as the work commenced, it was "proper for Caltrans to proceed with the project … by continuing to follow the unanticipated discovery provisions of … the Caltrans Statewide Programmatic Agreement." CT AR 014890. "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); *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1216 (9th Cir. 2008) (when the Advisory Council signs a programmatic agreement that "closes the record for purposes of NHPA § 106." (citation omitted)).

Plaintiffs make the bold – and incorrect – assertion that "[t]here is no question that, before commencement of construction of the Project, the FHWA did not notify Plaintiffs who were required to be involved in the developmental process of the Project." Pls.' Br. re Fed. Defs. 6. In order to make this erroneous claim, Plaintiffs' conflate the initiation of NHPA consultation with the point in 2013 at which Plaintiffs asked FHWA to sit down face-to-face with representatives of Plaintiffs, which FHWA promptly did. Pls.' Br. re Fed. Defs. 6-8.[11] This is simply wrong, as demonstrated by the administrative record discussed above. Plaintiffs were given many opportunities to consult on the project and did not do so; therefore, summary judgment on the NHPA consultation claims should be granted in Federal Defendants' favor.

B. Plaintiffs' NEPA, Section 4(f), Section 18(a), and Non-Consultation NHPA Claims Fail, as FHWA Was Not Obligated to Reassume Responsibilities for the Project

Plaintiffs' Remaining Non-Consultation Claims are all based on the faulty premise that FHWA was required to reassume Project responsibilities that had been assigned to Caltrans. Under this Court's prior rulings, Federal Defendants only face liability for these claims if FHWA unreasonably delayed reassumption of those responsibilities in violation of Section 706(1) of the APA. Plaintiffs' arguments that such reassumption was required ignore the plain text of the 2007 MOU, which merely grants FHWA the discretionary ability to reassume responsibilities. Moreover, the reassumption of responsibilities provisions of the 2007 MOU do not fall within the limited type of actions that are reviewable by a court under Section 706(1). Even if they were, FHWA did not unreasonably delay reassumption of responsibilities and Plaintiffs cannot seek enforcement of those provisions since they are not signatories of the 2007 MOU.

[11] It is possible that Plaintiffs are seeking to draw a distinction between the consultation that was done with them on the Project – pursuant to NHPA and dating back to the late 1990s – and some other government-to-government consultation obligation. To the extent that Plaintiffs are alleging violation of Federal Defendants' obligations to engage in government-to-government consultation pursuant to some authority other than NHPA, they fail to identify that authority in their motion for summary judgment. Further, they fail to explain how Federal Defendants violated that as-yet-unnamed authority. They have therefore waived such arguments. *Romm*, 455 F.3d at 997.

1. Legal Background

Since 2007, most of the responsibility for the Project has been assigned to Caltrans pursuant to the Surface Transportation Project Delivery Program, 23 U.S.C. § 327, which allows a state to accept assignment of sole responsibility and liability for environmental review of a highway project, subject to certain exceptions. That assignment of responsibility is reflected in the 2007 and 2016 MOUs, under which Caltrans agreed to accept assignment of all such responsibilities, including those under NEPA, the NHPA, Section 4(f), and Section 18 of the FAHA, excepting certain responsibilities such as government-to-government consultation. Since Caltrans has assumed such responsibility, it is solely liable as the proper defendant for challenges to assigned responsibilities and a reviewing court only has jurisdiction over the state in lieu of the federal government. 23 U.S.C. § 327(d), (e).

As this Court has held, in light of 23 U.S.C. § 327 and the 2007 MOU, Plaintiffs' potentially viable claims against the Federal Defendants are quite limited. This Court concluded that Plaintiffs may not bring claims against the Federal Defendants for alleged "violations of NEPA, Section 4(f), Section 18(a), and non-consultation related violations of the NHPA prior [to] February 18, 2015." ECF No. 94 at 10.[12] The Court allowed those claims to proceed for actions taken by Federal Defendants after February 18, 2015, under the theory that Federal Defendants' conduct after that date may have amounted to action "unlawfully withheld or unreasonably delayed" or action that is otherwise "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* at 11 (quoting 5 U.S.C. §§ 706(1), 706(2)(A)). Thus, Plaintiffs' Remaining Non-Consultation Claims must be premised on the theory that FHWA was required to reassume responsibility for the Project after having been asked to do so by Plaintiffs and that such reassumption was unlawfully withheld or unreasonably delayed.

2. Plaintiffs' Remaining Non-Consultation Claims Fail as FHWA Was Not Required to Reassume Project Responsibility and Did Not Unreasonably Delay Doing So

a) While the 2007 MOU Grants FHWA the Discretionary Ability to

[12] The Court identified February 18, 2015, as the earliest date that Plaintiffs claim to have asked the Federal Defendants to reassume environmental responsibilities for all or part of the Project. ECF No. 94 at 9. The Court stated that such a request triggered the provisions Section 3.2.3 of the 2007 MOU, which addresses the possibility that FHWA may reassume responsibilities for the Project. *Id.* at 9-10.

Reassume Responsibilities, It Does Not Require FHWA to Do So

The plain language of the 2007 MOU makes clear that FHWA has the discretion to reassume responsibilities for a project under certain circumstance and that it is not required to do so simply because an Indian tribe raises concerns. Plaintiffs' suggestions to the contrary fail to address key provisions of the 2007 MOU. In particular, Section 9 of the 2007 MOU has detailed provisions regarding the two ways in which responsibility for a project may be reassumed; either FHWA may initiate reassumption of responsibilities or Caltrans may do so. 2007 MOU 16 of 25 (Sec. 9 - Reassumptions of Responsibility). If FHWA initiates reassumption of responsibilities, it does so pursuant to Section 9.1 of the 2007 MOU. *Id.* at 16 of 25 to 17 of 25 (Sec. 9.1 –FHWA Initiated Reassumptions of Projects). Similarly, Caltrans may decide that it would like FHWA to reassume Project responsibilities, as laid out in Section 9.2. *Id.* at 16 of 25 to 17 of 25 (Sec. 9.1). Notably, Section 9 does not provide for tribal initiation of reassumption of responsibilities.

Regardless of whether it is FHWA or Caltrans who initiates reassumption of responsibilities, the discretionary decision regarding whether to reassume responsibilities rests with FHWA. If FHWA initiates the process, Section 9.1 governs, providing in relevant part:

> [t]he FHWA *may*, at any time, reassume all or part of the USDOT Secretary's responsibilities that have been assumed by Caltrans under part 3 of this MOU for any highway project or highway projects upon the *FHWA's determination* that:
> . . .
> C. Caltrans cannot satisfactorily resolve an issue or concern raised in a government-to-government consultation process, as provided in section 3.2.3.

Id. at 16 of 25 (emphasis added). Thus, Section 9.1 is clear that, if FHWA starts the process, the decision regarding whether to reassume responsibilities for a project is a discretionary decision that rests with FHWA. *Id.* ("FHWA *may*, at any time, reassume… responsibilities… *upon FHWA's determination*…." (emphasis added)). But even if it is Caltrans that first decides that they want FHWA to reassume responsibilities, FHWA is given clear discretion in determining whether it wants to reassume responsibilities (and can refuse to reassume responsibilities, despite Caltrans' request). *Id.* at 17 of 25 (Section 9.2.2) (giving FHWA discretion to "determine whether it will reassume the responsibilities

requested").[13]

By their arguments, Plaintiffs are asking the Court to grant Indian tribes, who are not a party to the 2007 MOU, a right that not even Caltrans has under the 2007 MOU – the right to unilaterally decide that FHWA must reassume Project responsibilities. Specifically, Plaintiffs claim that Federal Defendants acted illegally by "fail[ing] to reassume any part of their responsibilities for processing the Willits Bypass Project" after "*Plaintiffs determined* that the[ir] concerns would not be satisfactorily resolved by Caltrans" and requested that FHWA reassume responsibilities. Pls.' Br. re Caltrans 20 (emphasis added).[14] Under Plaintiffs' logic, once a tribe determines that its concerns will not be satisfactorily resolved by the State and requests that FHWA reassume responsibilities, FHWA acts illegally if it thereafter fails to reassume responsibilities.

Plaintiffs reach this result by cherry-picking language from another portion of the 2007 MOU and ignoring its cross-reference to Section 9. Pls.' Br. re Caltrans 20. Namely, Plaintiffs point to part of the language in Section 3.2.3, which provides:

> [i]f a project-related concern or issue is raised in a government-to-government consultation process with an Indian tribe . . . 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. *In this case, the provisions of section 9.1 concerning FHWA initiated reassumptions shall apply.*

2007 MOU 4 of 25 (Sec. 3.2.3) (emphasis added). Plaintiffs' argument relies on the statement that if "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." *Id.* Thus, they

---

[13] FHWA's discretion under the 2007 MOU is not absolute. Its decision-making is constrained by the criteria laid out in Sections 9.1 and 9.2, but the decision ultimately rests with FHWA.

[14] Plaintiffs make this argument in their motion for summary judgment against the State Defendants, but fail to do so in their motion against the Federal Defendants, therefore waiving such argument as against Federal Defendants. *Romm*, 455 F.3d at 997. In their motion against the Federal Defendants, Plaintiffs repeatedly fault Federal Defendants for the alleged failure to reassume responsibilities, but do not provide any explanation or argument. *See* Pls.' Br. re Fed. Defs. 1 (claiming that Federal Defendants "are liable … for refusing to reassume regulatory jurisdiction over the Project when requested by Plaintiffs"); *see also id.* at 2, 4, 12, 14, 17.

suggest that if a tribe makes a determination that its concern will not be satisfactorily resolved by Caltrans, then FHWA *must* reassume responsibilities.

Plaintiffs' argument, however, ignores the fact that Section 3.2.3 explicitly cross-references and is therefore subject to Section 9.1. *Id.* ("In this case, the provisions of section 9.1 concerning FHWA initiated reassumptions shall apply."). It is simply incorrect to read the language of 3.2.3 in isolation. *See e.g.*, Restatement (Second) of Contracts § 202(2) (1981) (requiring that a contract be interpreted as a whole). The court needs to look beyond the word "shall" in Section 3.2.3 to the whole 2007 MOU. *See e.g.*, *Gonzalez v. United States*, 814 F.3d 1022, 1029–31 (9th Cir. 2016) (language using "shall" still allowed for discretion); *Rincon Band of Mission Indians v. Escondido Mut. Water Co.*, 459 F.2d 1082, 1084–85 (9th Cir. 1972) (language using "shall" can be discretionary, rather than mandatory).

Reading the provisions of Section 3.2.3 and 9.1 in concert, the 2007 MOU sets out a process whereby a project-related concern may be raised in a government-to-government consultation process by an Indian tribe (or by FHWA). If a tribe determines that the issue or concern will not be satisfactorily resolved by Caltrans, then FHWA shall reassume responsibilities if – and only if – Section 9.1 is satisfied. As discussed above, Section 9.1 makes clear that the decision regarding whether to reassume responsibilities is a discretionary decision made by FHWA, not the State or Tribe. Thus, reassumption of responsibilities is not an outcome that can be forced upon FHWA by an Indian tribe. Federal Defendants should therefore be granted summary judgment on the Remaining Non-Consultation Claims as FHWA was not required to reassume Project responsibilities simply because the Tribe requested it.

b) MOU Requirements Are Not Reviewable Under APA Section 706(1)

Even if the 2007 MOU could be interpreted as Plaintiffs suggest, Plaintiffs' motion for summary judgment on the Remaining Non-Consultation Claims should be denied, as the 2007 MOU requirements that Plaintiffs point to are not reviewable under Section 706(1) of the APA.[15] Only a very limited set of

[15] Since Plaintiffs' theory relies on a claim that Federal Defendants failed to reassume responsibilities, the analysis above focuses on the claim of an "action unlawfully withheld or unreasonably delayed." 5 U.S.C. §706(1). The brief does not further address Section 706(2)(A) because Plaintiffs do not identify a final agency action by Federal Defendants addressing reassumption of responsibilities that could be considered "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 (Footnote continued)

"discrete" actions are enforceable under Section 706(1) of the APA. Section 706(1) grants a court the power to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). Under Section 706(1), a court's "ability to 'compel agency action' is carefully circumscribed to situations where an agency has ignored a specific legislative command." *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010). As the Ninth Circuit noted:

> [T]he Supreme Court explained the two primary constraints on our review under § 706(1). First, the Court held that judicial review of actions alleged to be unlawfully withheld or unreasonably delayed extends only to 'discrete' actions, such as rules, orders, licenses, sanctions, and relief. … Second, the Court held that the purportedly withheld action must not only be 'discrete,' but also 'legally required' – in the sense that the agency's legal obligation is so clearly set forth that it could traditionally have been enforced through a writ of mandamus. According to the Court, limiting judicial review to actions that are legally required 'rules out judicial direction of even discrete agency action that is not demanded by law.'

Id. (quoting *Norton v. S. Utah Wilderness All.* ("*SUWA*"), 542 U.S. 55, 62-63 (2004)).[16] As such, "a claim under § 706(1) can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required* to take." *SUWA*, 542 U.S. at 64. The mandamus remedy, in turn, "was normally limited to enforcement of a specific, unequivocal command" or "the ordering of a precise, definite act … about which [an official] had no discretion whatever." *Id.* at 63 (internal quotations and citations omitted).

The 2007 MOU's discretionary reassumption of responsibility provisions in Sections 9.1 and 3.2.3 do not fall within the limited type of actions that are enforceable under Section 706(1) of the APA. First, the 2007 MOU is a government contract between two sovereigns that does not provide a private right of enforcement to Plaintiffs. As such, it is neither a "specific legislative command," nor is it a "discrete" action, such as a rule, order, license, sanction, or relief. *Hells Canyon Pres. Council*, 593 F.3d at 932. Second, the discretionary reassumption of responsibility Plaintiffs seek is not "'legally required,'" such as an action that "traditionally could have been enforced through a writ of mandamus." *Id.* Finally, Plaintiffs have utterly failed to argue why the provisions should be reviewable under Section

---

U.S.C. §706(2)(A).

[16] These principles apply equally to claims seeking to compel agency action "unlawfully withheld" or "unreasonably delayed." *SUWA*, 542 U.S. at 63 & n.1.

706(1) and have therefore waived such arguments. *Romm*, 455 F.3d at 997.

Indeed, permitting suits to compel the reassumption of responsibilities would usurp Congress's intent in the Surface Transportation Project Delivery Program, 23 U.S.C. § 327, to allow Federal agencies and states to mutually determine how best to order priorities and structure assignment of Project responsibilities, thereby improperly requiring the courts, "rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management." *SUWA*, 542 U.S. at 66-67. This "prospect of pervasive oversight by federal courts over the manner and pace of agency compliance with . . . congressional directives is not contemplated by the APA." *Id.* at 67. Accordingly, Plaintiff cannot state a cognizable APA claim against Federal Defendants for failure to reassume responsibilities. *See, e.g., Ctr. for Biological Diversity v. Veneman*, 394 F.3d 1108, 1113 (9th Cir. 2005) (affirming dismissal where a plaintiff fails to allege a claim under Section 706(1)).

c) Federal Defendants Have Not Engaged in Unreasonably Delay

Assuming *arguendo* that Plaintiffs were permitted to enforce the 2007 MOU's discretionary reassumption of responsibility provisions under Section 706(1) of the APA, analysis of the applicable factors shows that Federal Defendants did not unreasonably delay their actions.[17] Courts are instructed to apply the six so-called "TRAC factors" when determining whether an agency's delay is reasonable. *See Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 507 n.7 (9th Cir. 1997) (listing factors and quoting *Telecomm Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984)). Plaintiffs make no mention of the *TRAC* factors. Applying these factors to the facts of this case shows that there was no unreasonable delay.

By allowing dialogue among FHWA, Plaintiffs, and Caltrans to continue, rather than preemptively reassuming responsibilities, FHWA did not unreasonably delay action. As discussed above, since Plaintiffs first requested that FHWA reassume responsibilities for the Project in 2013, Federal Defendants have actively engaged in an ongoing dialogue with Plaintiffs and Caltrans, having

[17] Plaintiffs have made no attempt to demonstrate that Federal Defendants unlawfully withheld or unreasonably delayed reassumption of responsibilities, thereby waiving such arguments. *Romm*, 455 F.3d at 997.

met in-person on at least six occasions between the fall of 2013 and the winter of 2015, and engaged with tribal officials outside those formal meetings. *See supra* Section III. This dialogue was focused on facilitating resolution by Caltrans of Plaintiffs' concerns. Briefly analyzing the TRAC factors: a "rule of reason" would allow this discussion among FHWA, Plaintiffs, and Caltrans to continue (factor 1); it is not a discussion that has a congressionally established deadline (factor 2); this is not a situation where human health and welfare are at stake (factor 3); the current assignment of authorities reflects FHWA's and Caltrans' currently-preferred arrangement, based on the array of priorities faced by both agencies and the Court should not second-guess management of those priorities (factor 4); Plaintiffs' interests are not prejudiced by the delay, as they continue to be able to raise concerns to Caltrans and FHWA and there is no basis to suggest that FHWA would manage the Project differently if it were to reassume responsibilities (factor 5); and there certainly is no impropriety in FHWA's continuing work to facilitate dialogue among FHWA, Plaintiffs, and Caltrans to attempt to address Plaintiffs' concerns (factor 6). *See Indep. Mining Co.*, 105 F.3d at 507 n.7. Thus, there is no basis for this Court to conclude that Federal Defendants unreasonably delayed action.

d) Plaintiffs Cannot Bring Suit to Enforce the 2007 MOU as They Are Not Third-Party Beneficiaries of the 2007 MOU

In addition to the arguments above, Plaintiffs' motion for summary judgment should be denied because they have no right to seek enforcement of the MOU.[18] Because the 2007 MOU is an agreement with the federal government, federal common law applies to its interpretation. *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 2000), *opinion amended on denial of reh'g*, 203 F.3d 1175 (9th Cir. 2000). Under federal common law, a non-signatory to a federal agreement is not deemed to be a third-party beneficiary and cannot overcome that presumption "absent a clear intent" to grant such third party "enforceable rights." *Orff v. United States*, 358 F.3d 1137, 1145 (9th Cir. 2004) (emphasis, quotation, and citations omitted), *aff'd*, 545 U.S. 596 (2005). The Restatement of Contracts

[18] While the Court considered this argument previously and determined that it was inappropriate "at the pleading stage," ECF No. 94 at 11, Federal Defendants raise this argument again at the summary judgment stage, since the issue is now ripe.

describes an intended beneficiary under common law as one for whom a right to performance effectuates the intent of the parties, and the circumstances indicate that the promisee intended to give the beneficiary the benefit of the promised performance. RESTATEMENT (SECOND) OF CONTRACTS § 302 (AM. LAW INST. June 2016 Update), *available at* www.westlawnext.com. However, when one of the contracting parties is a governmental entity, a "more stringent test applies." *Minshew v. Donley*, 911 F. Supp. 2d 1043, 1060 (D. Nev. 2012) (quotation and citation omitted). Third-party beneficiaries to a government contract are presumptively incidental beneficiaries who may not enforce the contract "absent a clear intent to the contrary." *Orff*, 358 F.3d at 1145 (emphasis, quotation, and citation omitted). The contract must establish both an intent to confer a benefit on the third party and an intent to grant the third party "enforceable rights." *Id.* (quotation and citation omitted). "Government contracts often benefit the public, but individual members of the public are treated as incidental beneficiaries unless a different intention is manifested." *Patterson*, 204 F.3d at 1211 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 313, Comment (a) (1981)).

In *Orff*, the Ninth Circuit held that individual irrigators could not enforce, as third-party beneficiaries, a water-delivery contract between the United States and the water district that serviced the irrigators, 358 F.3d at 1145-47, notwithstanding that the contract mentioned the individual irrigators as a class. It was not enough that the contract operated to the irrigators' benefit and was entered into with them "in mind." *Id.* at 1147 (quoting *Patterson*, 204 F.3d at 1212 (contract provision relied on by Plaintiffs merely allowed enforcement rights to government)). Indeed, as here, the relevant contract provisions may underscore that a third party is *not* intended to be able to enforce the contract. *Patterson*, 204 F.3d at 1211–12. Section 9.1 of the 2007 MOU expressly provides that the FHWA, at its discretion, *may* determine that it should reassume all or part of Project responsibilities under the 2007 MOU. But nothing in Section 9 provides any enforcement rights to non-signatories. Under governing Ninth Circuit law, Plaintiffs are not able to demand that the FHWA take Project responsibilities away from Caltrans.

C. Several Additional Failures in Plaintiffs' Claims Support Granting Summary Judgment to Federal Defendants

The Court should grant summary judgment in favor of Federal Defendants for the reasons

discussed above. However, several additional failures in Plaintiffs' claims also support Federal Defendants' motion.

1. Plaintiffs' Motion for Summary Judgment Is Not Based Upon the Administrative Record; Rather Plaintiffs Rely on Inappropriate, Extra-Record Declarations

First, Plaintiffs' motion for summary judgment should be denied because it is not based upon information included in the administrative record, as is required in an APA case. Plaintiffs' motion is devoid of even a single citation to the administrative record. Instead, Plaintiffs rely on extra-record declarations to support the assertions in their motion, noting in a footnote that "[u]nless otherwise indicated, all facts [in the motion] are taken from the Declaration of Priscilla Hunter." ECF No. 134, Pls.' Br. re Fed. Defs. 2 n. 1.[19] While the Hunter declaration does itself include information from the administrative record, it is replete with pages of inappropriate argument and extra-record factual allegations.[20] ECF No. 134. The Pricilla Hunter, Eddie Knight, and Mike Knight declarations, ECF Nos. 134, 135, and 135, should be stricken in their entirety.

The extra-record personal views, experiences, and arguments repeatedly put forward by Plaintiffs' declarants are prohibited in an APA case. In an APA case, the Court's review of the merits is limited to the administrative record that was before the agency at the time it made its decision. 5 U.S.C. § 706; *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419-20 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *Fla. Power & Light Co.*, 470 U.S. at 743-44 ("The task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency presents to the reviewing court." (citation omitted)). Both the Supreme Court and the Ninth Circuit have emphasized that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the

[19] Plaintiffs' motion further fails to bolster this casual reliance on the Hunter declaration with any specific citations to that declaration at any point in Plaintiffs' motion.

[20] The extent to which the Hunter declaration includes extra-record information is perhaps best demonstrated by the fact that, in the last fifteen pages of the Hunter declaration, she cites to underlying documents only five times. *See* Hunter Decl. Similarly, the eight page Eddie Knight declaration cites the administrative record only once. ECF No. 135.

reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973); *see also Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996). A court may consider extra-record materials only in those rare cases where a plaintiff has demonstrated that the record is so inadequate as to frustrate effective judicial review. *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996); *Pac. Shores Subdiv., Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 6 (D.D.C. 2006) (plaintiff must prove that an exception applies for court to consider extra-record evidence); *see also Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010) (consideration of extra-record evidence "is the exception, not the rule"). Moreover, even where an exception applies – which Plaintiffs have not alleged – consideration of extra-record materials in order to determine the correctness or wisdom of the challenged decision is prohibited. *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981) (quoting *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980)). Finally, Plaintiffs missed the deadline established by this Court for requesting that extra-record material be considered. ECF Nos. 53, 97, 116.

Further, the lengthy declarations represent an improper end-run around the page limits and content restrictions imposed by this Court's local rules. The Hunter declaration alone effectively adds thirty pages to Plaintiffs' motion, which is limited by rule to twenty-five pages. Civil L.R. 7-2(b). It is impermissible to supplement a brief beyond the page limits by using the declaration to advance arguments and factual contentions and the Court should not allow Plaintiffs to flaunt the rules. *See Long v. Nationwide Legal File & Serve, Inc.*, No. 12-cv-3578-LHK, 2014 WL 3809401, at *9 n.6 (N.D. Cal. July 23, 2014) (noting that "including argument in an accompanying declaration is an impermissible violation of the page limits on the opposition brief"); *Rinky Dink, Inc. v. Elec. Merchant Sys., Inc.*, No. C13–1347–JCC, 2014 WL 5880170, at *4, n.1 (W.D. Wash. Sept. 30, 2014) (declining to consider material in a declaration that included legal argument in "an apparent attempt to circumvent the page limit for reply briefs"); *Duplessis v. Golden State Foods*, No. C06-563 1 RJB, 2007 WL 1127744, at *2 (W.D. Wash. Apr. 16, 2007); *Goodworth Holdings v. Suh*, 239 F. Supp. 2d 947, 949 n.1 (N.D. Cal. 2002), *aff'd*, 99 F. App'x 806 (9th Cir. 2004).

Even assuming the declarations were proper in an APA case, despite the requirement that

"declarations may contain only facts," Civil 5(b), Hunter repeatedly includes arguments and draws unwarranted conclusions from the allegedly factual statements in her declarations. *See e.g.*, Decl. of Pricilla Hunter ("Hunter Decl.") ¶ 10 (arguing that "[t]here … was an intentional effort to keep our Tribe from the negotiating table") and ¶¶ 113-23 (arguing the appropriateness of the renewal of the 2007 MOU), ECF No. 134. Declarations in support of a brief may only include "facts as would be admissible in evidence,"[21] and "should not be used to make an end-run around the page limitations . . . by including legal arguments outside of the briefs." *King Cnty v. Rasmussen*, 299 F.3d 1077, 1082 (9th Cir. 2002) (quoting Fed. R. Civ. P. 56(e)) (affirming decision to strike affidavits); *Special Devices, Inc. v. OEA, Inc.*, 131 F. Supp. 2d 1171, 1175 (C.D. Cal. 2001) ("This Court considers arguments set forth in the memorandum of points and authorities only, and it looks to the declarations as cited in the memorandum to adequately support the facts therein.").

These declarations must be stricken, as they are prohibited in a record review case and in violation of this Court's local rules regarding content and page limits. Since Plaintiffs' motion for summary judgment relies almost exclusively on the Hunter declaration, to the exclusion of the administrative record, Plaintiffs' motion for summary judgment should also be denied and stricken. *See Nat. Res. Def. Council, Inc. v. EPA*, 683 F.2d 752, 753 n.2 (3d Cir. 1982) (where extra-record materials are referenced in or attached to a brief, those materials and argument based upon them should be stricken); *Oceana v. Locke*, 674 F. Supp. 2d 39, 49 (D.D.C. 2009) (in APA case, striking plaintiffs' summary judgment brief and requiring them to re-file version that did not cite extra-record evidence).

[21] The declarations attempt to put forward evidence that is barred by the Federal Rules of Evidence as hearsay, lacking foundation, prejudicial, opinion, speculative, and irrelevant and should therefore be stricken. Fed. R. Civ. P. Rule 56(e) requires that affidavits in support of summary judgment be "made on personal knowledge, shall set forth such facts that would be admissible in evidence, and shall show that the affiant is competent to testify on the matters stated. . ." *Deem v. Koch Agric. Inc.*, No. 98-35343, 1999 WL 635521 at *1 (9th Cir. Aug. 17, 1999). In a record review case, those facts would be limited to the questions of standing. Declarations that contain conclusory statement and legal arguments must be excluded. "It is an abuse of discretion for a court to consider declarations that do not comply with Rule 56(e)(1)'s requirements." *Tele Atlas N.V. v. NAVTAQ Corp.*, No. C-05-01673-RMW, 2008 WL 480441, at *4 (N.D. Cal. Oct. 28, 2008); *Beyene v. Coleman Sec. Servs., Inc.* 854 F.2d 1179, 1181 (9th Cir. 1988).

2. Plaintiffs Continue to Raise Claims That Fall Outside the Statute of Limitations

Second, the Court should grant Federal Defendants' summary judgment motion on all of Plaintiffs' claims regarding actions predating October 20, 2009, based on statute of limitations grounds. As this Court noted in its earlier decision, Federal Defendants raised this argument in their motion to dismiss and Plaintiffs failed to respond. ECF No. 94 at 12, 13 n.8. While still failing to explain why the claims are not barred on statute of limitations grounds, Plaintiffs continue to make arguments to that effect in their motion for summary judgment. *See e.g.*, Pls.' Br. re Fed. Defs. 15-17 (raising multiple claims regarding what should have been done "[p]rior to EIS approval" in 2006), 3 (challenging the 2005 finding of conditional No Adverse Effect to historic properties). Thus, at the invitation of the Court, ECF No. 94 at 12-13 n. 8, the Federal Defendants renew their statute of limitations arguments.

Claims based on such untimely allegations are not actionable, as the Court has held in the related case, *Center for Biological Diversity v. Federal Highway Administration*, No. C 12-02172 JSW, 2012 U.S. Dist. LEXIS 129294, at *8–9 (N.D. Cal. Sept. 11, 2012).[22] Any claims for actions or inactions that occurred before July 5, 2007 (which would include any claimed deficiencies in the process leading to or content of the Environmental Impact Statement that was completed in 2006) would be barred by the 180-day limitations period of 23 U.S.C. § 139(*l*) (2012).[23] In 2007, that limitations provision required that a suit challenging an approval be brought within 180 days after publication in the Federal Register of a notice announcing such approval. In this case, the FHWA published a "Notice of Final Federal Agency Actions on Proposed Highway in California" in the Federal Register, 72 Fed. Reg. 607 (Jan. 5, 2007), which required that suit be brought by July 5, 2007. 72 Fed. Reg. at 607–08. Finally, even if not barred by 23 U.S.C. § 139(*l*), any claims against the Federal Defendants for actions or omissions predating October 20, 2009 (two years after Caltrans took over Project responsibilities under the 2007 MOU) would *at a minimum* be barred by the six-year statute of limitations provided in 28 U.S.C. §

[22] Although the Court's earlier opinion is designated "not for publication," it is cited because it is a related case and "relevant under the doctrines of law of the case, res judicata or collateral estoppel." *See* Civil 4(e). The decision was not designated "not for citation." *See id.*; Civil 14.

[23] 23 U.S.C. § 139(l) was amended by § 1308 of the Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141, 126 Stat. 405, 539 (2012), reducing the limitation period from 180 days to 150.

2401(a). That limitations period applies generally to claims against the United States (subject to exceptions not relevant here), including claims brought under the APA. *See City of Oakland v. Lynch*, 798 F.3d 1159, 1166 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1486 (2016); *Hells Canyon Pres. Council*, 593 F.3d at 930.

3. Plaintiffs Have Failed to Demonstrate Standing

Third, the Court should grant summary judgment for Federal Defendants because Plaintiffs have failed to demonstrate that they have standing to bring these claims. "Standing under Article III of the Constitution requires that an injury be concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010) (citation omitted); *accord Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). The burden is on the plaintiff to make the necessary showing, *Lujan*, 504 U.S. at 561.

First, as Plaintiffs admit, the Project is essentially complete, Pls.' Br. re Fed. Defs. 2, rendering Plaintiffs' claims moot. Second, Plaintiffs have not even attempted to explain to this Court – much less proven – that the Project would have been, or will be, handled any differently if FHWA reassumed Project responsibilities. Plaintiffs have therefore failed to demonstrate how they have been harmed by FHWA's purported failure to reassume Project responsibilities or how the relief that they are seeking against Federal Defendants will redress their alleged injuries. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998) ("Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement."); *Townley v. Miller*, 722 F.3d 1128, 1134 (9th Cir. 2013) ("The proposition that plaintiffs must seek relief that actually improves their position is a well-established principle."); *Gonzales v. Gorsuch*, 688 F.2d 1263, 1263 (9th Cir. 1982) (relief sought from court must be capable of redressing injury alleged). Thus, Plaintiffs have failed to carry their burden of proving standing.

4. Plaintiffs' Claims that Federal Defendants Improperly Updated the 2007 MOU Are Based on Their Analysis of the Wrong Federal Register Notice

Finally, this Court should grant summary judgment in favor of Federal Defendants regarding Plaintiffs' allegations about the renewal of the 2007 MOU, as the 2016 MOU was properly updated and signed after appropriate notice and comment. *See* Pls.' Br. re Caltrans 21-22.[24] FHWA published a notice regarding the renewal of the MOU at issue in this litigation on November 16, 2016, and accepted comment through December 16, 2016. 81 Fed. Reg. 80,708. The notice described the draft 2016 MOU and provided several different ways that commenters could obtain the draft 2016 MOU for review. *Id.* at 80710. FHWA accepted comments on the draft 2016 MOU and signed a final copy of the 2016 MOU after the comment period closed. FHWA AR 0374 (2016 MOU signed on December 23, 2016).

Plaintiffs' allegations regarding any failure to properly renew the 2007 MOU appear to be based on their having analyzed the wrong Federal Register notice. Plaintiffs incorrectly claim that the 2007 MOU was renewed pursuant to a notice published at 81 Fed. Reg. 86,376 by FHWA on November 30, 2016. ECF No. 99 at 69. Pls.' Br. re Caltrans 21. That notice dealt with a wholly separate MOU assigning responsibility to Caltrans for certain NEPA categorical exclusions, provided for under a different statute (23 U.S.C. §326). Further, Plaintiffs' complaint regarding "new discretionary language" in the updated MOU does not reflect a substantive change to the 2007 MOU. Pls.' Br. re Caltrans 21-22. As discussed above, reassumption of the responsibilities was a discretionary decision under the prior 2007 MOU. Thus, the change from "shall" to "may" in Section 3.2.3 is consistent with the correct reading of the 2007 MOU, in which Section 3.2.3 is subject to the language in Section 9.1.

V. Conclusion

For the reasons set forth above, Federal Defendants respectfully request that the Court grant their summary judgment motion, strike the declarations filed in support of Plaintiffs' summary judgment motion, and deny Plaintiffs' summary judgment motion against the Federal Defendants.

[24] As with their arguments concerning reassumption by FHWA, Plaintiffs do not address this issue in their motion for summary judgment against the Federal Defendants, but do so only in their motion (Footnote continued)

Respectfully submitted,

DATED: September 11, 2017

JEFFREY H. WOOD
Acting Assistant Attorney General
Environment & Natural Resources Division

/s/*Ragu-Jara Gregg*
RAGU-JARA GREGG
Natural Resources Section
Environment & Natural Resources Division
United States Department of Justice
601 D Street NW, Suite 3816
Washington, DC 20004
TEL: (202) 514-3473
FAX: (202) 514-4231
e-mail: ragu-jara.gregg@usdoj.gov

Attorneys for Federal Defendants

OF COUNSEL

BRETT J. GAINER
Senior Attorney
Federal Highway Administration

against State Defendants.

CERTIFICATE OF SERVICE

I, Ragu-Jara Gregg, hereby certify that, on September 11, 2017, I caused the foregoing to be served upon counsel of record through the Court's electronic service.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 11, 2017

/s/*Ragu-Jara Gregg*
Ragu-Jara Gregg