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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA – OAKLAND DIVISION

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

Plaintiffs,

v.

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

Defendants.

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

PLAINTIFFS' REPLY TO FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' OPPOSITION TO FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

Date: **January 12, 2018**
Time: **9:00 a.m.**
Location: **Courtroom 5**

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

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I. INTRODUCTION

This Court should deny the Motion for Summary Judgment of Federal Defendants the Federal Highway Administration ("FHWA"), FHWA Acting Administrator Brandy Hendrickson, the United States Department of Transportation, and Secretary of Transportation Elaine Chao and grant summary judgment in favor of Plaintiffs. For purposes of these summary judgment motions, there are two key inquiries.

First, there is no question that Federal Defendants failed to properly engage in government-to-government consultation with Plaintiffs. As this Court is well aware, Federal Defendants have a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty, recognizing the government-to-government relationship between the Federal Government and Indian tribes. Under the National Historic Preservation Act, Plaintiffs as Indian tribes are entitled to special consideration in the course of an agency's fulfillment of its consultation obligations. As a result, before Federal Defendants approved the Willits Bypass Project, let alone commencement of construction, Plaintiffs were entitled to a reasonable opportunity to identify their concerns about historic properties in government-to-government consultation, advise Federal Defendants on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, and participate with Federal Defendants in the resolution of adverse effects. Federal Defendants should have commenced consultation early in the Bypass planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.

There is no evidence in their Motion that Federal Defendants took any of the foregoing steps before construction started on the Project in 2013. Therefore, summary judgment should be granted to the Tribes on the first key inquiry as Federal Defendants violated their express duties to Plaintiffs.

The second key inquiry is whether Federal Defendants reassumed their responsibilities for processing the Willits Bypass Project once Plaintiffs, based on complete failures of

government-to-government consultation, determined that important issues, such as those involving the Mitigation Project, "will not be satisfactorily resolved by Caltrans."

Among the express duties violated was the obligation under Section 3.2.3 of the Memorandum of Understanding ("MOU") between Federal Defendants and Caltrans, whereby Federal Defendants were required to "reassume all or part of the responsibilities for processing the project." There is no question that Plaintiffs determined that the issues and concerns they described would not be resolved by Caltrans in a satisfactory manner nor is there any question that Plaintiffs demanded Federal Defendants reassume responsibilities nor is there any question Federal Defendants failed to reassume all or part of the responsibilities for the Willits Bypass Project as required by Section 3.2.3 of the MOU. As a result, summary judgment should be granted in favor of Plaintiffs.

II. ARGUMENT

A. FEDERAL DEFENDANTS FAILED TO COMPLY WITH THEIR OBLIGATIONS UNDER THE NATIONAL HISTORIC PRESERVATION ACT

Based on their brief, Federal Defendants still do not understand that "[t]he consultation requirement is not an empty formality." *Quechan Tribe of the Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 755 F.Supp.2d 1104, 1108 (S.D.Cal. 2010). In support of their claim that they complied with their obligations under the National Historic Preservation Act ("NHPA"), the Federal Defendants assert they "repeatedly provided information to Plaintiffs and repeatedly asked Plaintiffs to provide input or raise concerns." Fed. Defs. Br. at 1:11-15. This position is a complete misreading of the Willits Bypass and Mitigation Projects On-Going Section 106 Consultation/Communication Log (1988 - Present), CT AR 002325-392, attached to the Supp. Declaration of E. Knight as **Exhibit 6**. The Consultation/Communication Log clearly demonstrates that information was not timely provided and there was no government-to-government consultation before April 29, 2014, almost a year *after* construction started.

The consultation process is governed by 36 C.F.R. § 800.2(c)(2), one of Section 106's implementing regulations. Consultation is defined as "the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them

regarding matters arising in the section 106 process. . . .” 36 CFR § 800.16[f]. The regulations also state that the agency “shall ensure that consultation in the section 106 process provides the Indian tribe . . . a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects.” 36 CFR § 800.2[c][2][ii][A]. Native American individuals and organizations are included in the Section 106 process as members of the public and as potential “additional” consulting parties. Additional consulting parties are defined, in part as individuals or organizations with a demonstrated interest due to concerns with the undertaking’s effects on historic properties. In this regard, the regulations state that the agency is to “seek information from individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues relating to the undertaking’s potential effects on historic properties” 36 CFR § 800.4[a][3]. The views of the public and additional consulting parties on the assessment of effects and the resolution of adverse effects also must be considered in the decision-making. 36 CFR § 800.5(a), 36 CFR § 800.6[a] [2]-[4].

Section 106 regulations (36 CFR 800.4[b] [1]) direct federal agencies to make a “reasonable and good faith effort” to identify historic properties. As part of the “reasonable and good faith effort,” the Project Archaeologist must seek, consider, and follow up on any information offered by the Tribes that may indicate the presence of such properties in the project vicinity. A “reasonable and good faith effort,” as it pertains to a decision to engage a monitor, requires that all relevant information be provided to the Tribes during consultation. It is the Project Archaeologist’s responsibility to ensure the Tribes are aware of the setting, context, project history, scope of work, and cultural resources in the project area and that the Community is given the opportunity to provide information. Import for purposes of this case, the Project Archaeologist must ensure that these efforts are documented. Consultation must be conducted in a manner that is culturally appropriate and sensitive to local customs. Finally, for true and open consultation to occur, it is important that the Tribes understand any potential to affect cultural resources.

In *Te-Moak Tribe of Western Shoshone of Nevada v. United States Department of the Interior*, 608 F. 3d 592 (9th Cir. 2010), the Ninth Circuit reviewed claims that the Bureau of Land Management ("BLM") violated, among other statutes, the NHPA, when it approved an amended exploration project in northeastern Nevada. The Court determined that, under the NHPA, an agency is required to consult federally recognized tribes, or their representatives, "early in the planning process," giving the Tribes a reasonable opportunity to identify "concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects," citing 36 C.F.R. § 800.2(c)(2)(ii)(A). *Id*. at 608. The Court stated the NHPA also mandates that consultation should recognize the government-to-government relationship between the Federal Government and Indian Tribes. *Id*. Such government-to-government consultation must "be conducted in a manner sensitive to the concerns and needs of the Indian tribe. . . ," citing 36 C.F.R. § 800.2(c)(2)(ii)(C). Finally, the Ninth Circuit cited to *Pit River Tribe v. U.S. Forest Serv*., 469 F.3d 768, 785-86 (9th Cir.2006), for the proposition that dilatory environmental review is insufficient to comply with the National Environmental Policy Act ("NEPA") because "inflexibility may occur if delay in preparing an EIS is allowed: After major investment of both time and money, it is likely that more environmental harm will be tolerated." (quoting *Save the Yaak Comm. v. Block*, 840 F.2d 714, 718 (9th Cir.1988) (internal quotation marks and citations omitted))).

As the Court found in *Quechan Tribe of the Fort Yuma Indian Reservation*, throughout the consultation process, "the regulations require the agency to consult extensively with Indian tribes that fall within the definition of 'consulting party,' including here the Quechan Tribe." 755 F.Supp.2d at 1109. "Section 800.4 alone requires at least seven issues about which the Tribe, as a consulting party, is entitled to be consulted before the project was approved. Under § 800.4(a)(3), BLM is required to consult with the Tribe identify issues relating to the project's potential effects on historic properties. Under § 800.4(a)(4), BLM is required to gather information from the Tribe to assist in identifying properties which may be of religious and

cultural significance to it. Under § 800.4(b), BLM is required to consult with the Tribe to take steps necessary to identify historic properties within the area of potential effects. Under § 800.4(b)(1), BLM's official is required to take into account any confidentiality concerns raised by tribes during the identification process. Under § 800.4(c)(1), BLM must consult with the Tribe to apply National Register criteria to properties within the identified area, if they have not yet been evaluated for eligibility for listing in the National Register of Historic Places. Under § 800.4(c)(2), if the Tribe doesn't agree with the BLM's determination regarding National Register eligibility, it is entitled to ask for a determination. And under § 800.4(d)(1) and (2), if BLM determines no historic properties will be affected, it must give the Tribe a report and invite the Tribe to provide its views. Sections 800.5 and 800.6 require further consultation and review to resolve adverse effects and to deal with failure to resolve adverse effects."

The Court in *Quechan Tribe of the Fort Yuma Indian Reservation* also noted that, "under § 800.2, consulting parties that are Indian tribes are entitled to *special consideration* in the course of an agency's fulfillment of its consultation obligations. This is spelled out in extensive detail in § 800.2(c)." 755 F.Supp.2d at 1110, citing 36 C.F.R. § 800.2(c)(2)(ii)(A)-(D).

> (A) The agency official shall ensure that consultation in the section 106 process provides the Indian tribe ... a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects.... Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.
> (B) The Federal Government has a unique legal relationship with Indian tribes set forth in the Constitution of the United States, treaties, statutes, and court decisions. Consultation with Indian tribes should be conducted in a sensitive manner respectful of tribal sovereignty....
> (C) Consultation with an Indian tribe must recognize the government-to-government relationship between the Federal Government and Indian tribes. The agency official shall consult with representatives designated or identified by the tribal government.... Consultation with Indian tribes ... should be conducted in a manner sensitive to the concerns and needs of the Indian tribe....
> (D) When Indian tribes ... attach religious and cultural significance to historic properties off tribal lands, section 101(d)(6)(B) of the act requires Federal agencies to consult with such Indian tribes ... in the section 106 process. Federal agencies should be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes ... and should consider that when complying with the procedures in this part.

There is no evidence Federal Defendants took ***any*** of the foregoing steps as to Plaintiffs before construction started on the Project in 2013. Federal Defendants not only failed to establish government-to-government consultation with Plaintiffs "early in the planning process"; they failed to establish any consultation occurred before backhoes were digging and sites were destroyed. To give this Court context, construction commenced on the Bypass Project in **2013**. Using 2001 as a starting point, the Consultation/Communication Log in the Administrative Record indicates it was not until 2008 that Plaintiffs (along with many other interested parties) were provided some information about the Project (CT AR 002336) and **it was not until June 25, 2013** that any Defendant provided either Plaintiff with information about the cultural or historical aspects of the Project. CT AR 002343. In fact, information was provided to the Coyote Valley Tribe only in response to a June 4, 2013 letter ***from*** the Coyote Valley Tribe: "Letter requesting government-to-government consultation regarding the WBP. In the letter, CVBP asks if Caltrans has carried out surveys of the Project area, requests all documents pertaining to the project, and inquired about project review and approval from the Mendocino County Archaeological Committee." CT AR 002343.

What is telling about Federal Defendants' brief is that they attempt to put the burden on Plaintiffs, accusing Plaintiffs of not providing "input" to them from 1989 to the "middle of 2013." Yet Federal Defendants fail to disclose to the Court that, while substantial information was being provided to the Sherwood Valley Tribe starting before 2008, no information was being provided to Plaintiffs. CT AR 002325-346. Further, Federal Defendants cite to only one opportunity that Plaintiffs had to provide input from 2001 to 2013, a 2008 letter sent generally to numerous Tribes in the area, where the letter ends by stating that "if we do not receive a response to this inquiry within 30 days, we will assume that you have no concerns or information regarding this project." CT AR 002336. Such a letter is not consultation as required under federal statutes, regulations, and Executive Orders.

The Consultation/Communication Log also indicates it was not until **April 29, 2014 (a year *after* construction commenced)**, that any Defendant engaged in government-to-government consultation with either Plaintiff about the Project. CT AR 002348. That meeting on

April 29 was the first time the Coyote Valley Tribe was presented with maps of the archeological site locales in the project area and the mitigation lands. On behalf of the Coyote Valley Tribe, Priscilla Hunter had been requesting maps with site locale identification since 1998-1999. CT AR 002330. No maps were provided with site locales within the project area until this initial government-to-government consultation in 2014.

It is also telling that the Federal Defendants' brief refers to, not government-to-government consultations, but to supposedly "good-faith discussions" with Plaintiffs, commencing in October 2013, after construction had started on the Bypass. Such "discussions" do not meet the consultation standard required by Section 106 or the *Te-Moak Tribe* decision. Also, in their brief, Federal Defendants refer to contact with the tribes, yet these supposed contacts stop at the phase known as "Resumption of Environmental Studies: Modified Alternatives" in 2006. CT AR 002326. Federal Defendants fail to cite to any government-to-government consultation occurring during the following project phases: Final EIR/EIS Approved (2006); Environmental Studies: Mitigation Parcels (2008–09); Supplemental EIR and Re-Validation Form Approved for Mitigation Parcels (2010); Buried Site Testing Program (2011–12); or Start of Project Construction (2013). CT AR 002326. There is no evidence that, during any of these phases, Plaintiffs had a reasonable opportunity to identify "concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects," as required by 36 C.F.R. § 800.2(c)(2)(ii)(A).

Further, the Consultation/Communication Log contains evidence of numerous instances where Plaintiffs were not consulted (and another Tribe, the Sherwood Valley Tribe, was) or the information provided was inadequate or inaccurate.

a. Beginning in June 2000, when the Historic Property Survey Report was done, only the Sherwood Valley Tribe received this report and only the Sherwood Valley Tribe was consulted in any way. CT AR 002332-333.

b. The Draft WBP EIR/EIS for the Project came out in 2002. Only the Sherwood Valley Tribe received a copy, not Plaintiffs. ("In May of 2002, the Draft WBP EIR/EIS was circulated and sent to the SVR Tribal Chairperson for review and comment.") CT AR 002334.

c. In 2006 the Final EIR was issued. Only the Sherwood Valley Tribe received a copy, not Plaintiffs. CT AR 002335.

d. On December 22, 2008, the Native American Heritage Commission ("NAHC") told Caltrans to contact other tribes regarding mitigation parcels. Rather than engage in government-to-government consultation with Plaintiffs, Caltrans then sent a letter stating: "we must hear from you in 30 days or we assume you have no concerns." There is no indication the letters included information other than mentioning there are two sites on the 1,650 acres of mitigation lands, similar to what was in the Record of Decision. "Two historic properties were identified within the Area of Potential Effects (APE)…." CT AR 001933. The Record of Decision, CT AR 001929-49, is attached to the Supp. Knight Dec. as **Exhibit 7**.

e. Also on December 22, 2008, deciding it was only going to consult with one Tribe, Caltrans wrote the Sherwood Valley Tribe as follows: "Ongoing Native American consultation w/SVR regarding continuing studies for WBP (Biological Mitigation Land Acquisition). Letter states that 'for over ten years, your tribal members have been our primary Native American consulting party and we fully intend to continue consultation with members of your tribe'. CA contact list included with letter." CT AR 002336.

f. It is not until late 2013 that Plaintiffs receive any studies, ***after*** project construction had commenced and tribal monitoring was required. CT AR 002345-46.

g. It is not until June 25, 2013, when the Coyote Valley Tribe received a disc of all the studies and the DEIR/EIR. CT AR 002345.

Since 2014, when it was contacted by Caltrans about Tribal issues concerning the Willits Bypass Project, the Coyote Valley Tribe and the Round Valley Tribe have expressed great concern about Caltrans' ongoing ground disturbing and past ground disturbing activities in and near archeological sites within the project area of the Willits Bypass Project. Yet, like the situation in *Pit River Tribe v. U.S. Forest Serv.*, Plaintiffs here were victims of dilatory government-to-government consultation, which is insufficient to comply with the NHPA because "inflexibility may occur if delay in [consultation] is allowed: After major investment of both time and money, it is likely that more [cultural and historic] harm will be tolerated." 469 F.3d at 785-86.

Federal Defendants are not free "to glide over" requirements imposed by Congressionally-approved statues and duly adopted regulations. *Quechan Tribe*, 755 F.Supp.2d at 1119. "The required consultation must at least meet the standards set forth in 36 C.F.R. § 800.2(c)(2)(ii), and should begin early. The Tribe was entitled to be provided with adequate information and time, consistent with its status as a government that is entitled to be consulted. The Tribe's consulting rights should have been respected. It is clear that did not happen here." *Id*. Plaintiffs were not adequately consulted as required under the NHPA before the Willits Bypass Project was approved and construction commenced. Because Federal Defendants did not follow the "procedure required by law," Plaintiffs are entitled to prevail on summary judgment and have Federal Defendants' actions set aside under 5 U.S.C. § 706(2)(D).

B. BECAUSE "SHALL" MEANS "SHALL," FEDERAL DEFENDANTS WERE OBLIGATED TO REASSUME RESPONSIBILITIES FOR THE PROJECT

There is a Memorandum of Understanding between Caltrans and FHWA ("MOU"), effective July 1, 2007. As part of the MOU, 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 specifically 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*. The MOU was renewed in 2012. Dkt. 32-1 at 26-31. The MOU then expired of its own terms on December 31, 2016. CALTRANS 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 was to take effect on January 1, 2017. *Id*. However, because the California Legislature did not timely renew the State's waiver of sovereign immunity, Caltrans's assumption of responsibilities was suspended until March 30, 2017. CALTRANS SUPP AR 342:2929-30.

Whether Federal Defendants were required to reassume responsibilities under the MOU turns on two issues. The *first* issue relates to the impact of Section 3.2.3 of the MOU, which provides, in relevant part:

> [i]f a project-related concern or issue is raised in a government-to-government consultation process with an Indian tribe, as defined in 36 CFR 800.16(m), and is related to NEPA or another federal environmental law for which Caltrans has assumed responsibilities under this MOU, *and either* the Indian tribe or the FHWA determines that the issue or concern will not be satisfactorily resolved by Caltrans, then the FHWA *shall* reassume all or part of the responsibilities for processing the project. In this case, the provisions of section 9.1 concerning FHWA initiated reassumptions shall apply.

(Emphasis added.)[1]

The *second* issue relates to whether, Section 3.2.3 of the MOU, Plaintiffs were entitled to require Federal Defendants to "reassume all or part of the responsibilities for processing the project" based on events that occurred during and after a meeting on February 18, 2015. There is

[1] Under Sections 3.1.1 and 3.2.1 of the MOU, FHWA assigned, and Caltrans assumed, all of the federal responsibilities for environmental review, consultation, or other such action under various statutes, including, but not limited to, NEPA and Section 106 of the NHPA. Further, in Section 3.2.2, Caltrans assumed responsibility "for complying with the requirements of any applicable environmental law," whether or not it was listed in Sections 3.1.1 or 3.2.1. Thus, the language in Section 3.2.3 ("related to NEPA or another federal environmental law for which Caltrans has assumed responsibilities under this MOU") refers to the various provisions listed in Sections 3.1.1 and 3.2.1.

no question that Plaintiffs determined issues or concerns would not be satisfactorily resolved by Caltrans and, on March 17, 2015, requested Federal Defendants reassume all or part of the responsibilities for processing the Project. CT AR 017305-307: "The Tribe therefore requests that FHWA reassume federal responsibility for environmental review of this project." Federal Defendants *never* responded to this request and *never* took any action to reassume responsibilities.

As part of this second issue, this Court should find both that Coyote Valley determined that the issues and concerns they described would not be resolved by Caltrans in a satisfactory manner, particularly as to the Mitigation Plan, and that, once Coyote Valley communicated that determination to Federal Defendants, Federal Defendants failed to reassume all or part of the responsibilities for the Willits Bypass Project. There is no question that, in March 2015, Plaintiffs sent a letter that raised additional issues with Federal Defendants regarding the manner in which Native American cultural resources had been impacted. CT AR 017305-307. There also is no question that, in the March 2015 letter, they asked Federal Defendants to reassume responsibility for environmental review of the Willits Bypass Project, as well as issues relating to the protection of archeological sites and cultural resources and asked Federal Defendants to "reassume regulatory jurisdiction over the Willits Bypass Project." Finally, there is no question that Federal Defendants never responded to Coyote Valley's request and failed to reassume any part of their responsibilities for processing the Willits Bypass Project.

Federal Defendants attempt to avoid the clear language of Section 3.2.3 of the MOU by pointing to discretionary language in Section 9.1 of the MOU. However, such a construction of Section 3.2.3 of the MOU would change the word "shall" to "may." Under federal common law, this Court looks to "general principles for interpreting contracts." *Klamath Water Users Prot. Assoc. v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999). There is no evidence that such an interpretation was intended.

The proper, common sense interpretation of Section 9.1 is that, under Section 9.1.1, "FHWA may, at any time, reassume all or part" of the responsibilities, and this decision can be made independently of Section 3.2.3 of the MOU. It may be made based on the provisions of

Section 9.1.1 (A), (B), or (C). However, Section 9.1.2 is triggered once either FHWA independently makes the decision to reassume responsibilities under Section 9.1.1 (A), (B), or (C) or the Indian tribe determines that the issue or concern will not be satisfactorily resolved by Caltrans under Section 3.2.3.

Federal Defendants' citation to *Gonzalez v. United States*, 814 F.3d 1022, 1029 (9th Cir. 2016), is misplaced. In *Gonzalez*, the Ninth Circuit analyzed the discretionary function exception and applied the *Berkowitz* two-prong test - the "Discretionary Act" and the "Policy Judgment" - in holding that the FBI's decision on whether to disclose information to local law enforcement was discretionary and therefore shielded the government from liability under the FTCA. As part of its analysis, the Ninth Circuit broadened the discretionary function exception to include negligence claims for the FBI's failure to inform local law enforcement, even though such actions violated the Attorney General Guidelines; and further held that the two-prong standard in *Berkowitz* was satisfied when the FBI made the decision of whether or not to disclose information to law enforcement, and the government was therefore immune from the plaintiff's tort claim.

The *Gonzalez* decision did not involve a contract which required action based on a determination of a third party. The obvious point here is that, under Federal Defendants' interpretation, the reference to "the Indian tribe" in Section 3.2.3 ("and either the Indian tribe or the FHWA determines that the issue or concern will not be satisfactorily resolved by Caltrans") would be meaningless if the Indian tribe did not have the right to obtain a court order to enforce the requirement that "FHWA shall reassume all or part of the responsibilities for processing the project."

Plaintiffs recognize that only a party to a contract or an intended third-party beneficiary may sue to enforce the terms of that contract or obtain an appropriate remedy for breach. *Far West Fed. Bank, S.B. v. Office of Thrift Supervision-Dir.*, 119 F.3d 1358, 1363 (9th Cir. 1997). The parties must have intended to benefit the third party. *Klamath Water*, 204 F.3d at 1211. To prove intended beneficiary status, Plaintiffs need only show "the contract reflects the express or implied intention of the parties to the contract to benefit the third party." *Id*. at 1211. To do that,

this Court should examine the terms of the contract as a whole, giving the terms their ordinary meaning. *Id*. at 1210. The contract need not name a beneficiary specifically or individually in the contract; instead, it can specify a "class clearly intended by the parties to benefit from the contract." *Id*. at 1211.

The MOU, especially in Section 3.2.3 prior to the language at issue, goes to great lengths to show that Federal Defendants remain responsible ***to these Tribes*** and that Caltrans may not assume those responsibilities. There are important reasons why Federal Defendants had to remain responsible for "all government-to-government consultation" to these Tribes and why these Tribes were clearly the intended beneficiaries of Section 3.2.3.

The United States has a unique legal relationship with Native Americans tracing to the Constitution itself. These provisions in the Constitution grant the federal government the power to make treaties and engage in commerce with tribes as foreign governments, recognizing the pre-existing sovereignty of the tribes and creating a trust responsibility toward tribes. The trust responsibility is the foundation of federal Indian law and the wellspring of all other laws benefitting tribes. Uniquely applicable to tribes, the trust responsibility derives from three foundational cases that established the foundation for the trust responsibility and the government-to-government relationship: *Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia,* 30 U.S. 1 (1831); and *Worcester v. Georgia*, 31 U.S. 515 (1832). Today, the United States government still deals with tribes as sovereigns through a government-to-government relationship including government-to-government consultation

The Ninth Circuit has emphasized that federal agencies, as their trustee, owe a fiduciary duty to all Indian tribes, and that at a minimum this means agencies must comply with general regulations and statutes. *Pit River Tribe*, 469 F.3d at 788. *See also* 36 C.F.R. § 800.2(c)(2)(ii)(B) (mentioning the "unique legal relationship" between federal government and Indian tribes). At a minimum, this fiduciary obligation "requires the government to demonstrate compliance with general obligations and statutes not specifically aimed at protecting Indian tribes." 469 F.3d 788. Hence, violation of NEPA's requirements constitutes a failure of the federal government to meet its minimum fiduciary obligations to Indian tribes and gives those Tribes a right of action. *Id*.

Violation of this fiduciary duty to comply with the NHPA and the NEPA requirements during the process of reviewing and approving projects vitiates the validity of that approval and may require that it be set aside. *Id*. As their trustee, the federal government owes a fiduciary obligation to these Tribes, and that responsibility makes these Tribes intended beneficiaries of Section 3.2.3.

As characterized by one insightful article, the trust responsibility imposes at least three general duties on the federal government: (1) to provide federal services to tribal members, such as health care and education; (2) to protect tribal resources, including cultural and natural resources; and (3) to protect tribal sovereignty, the oldest duty and the root of the federal government's relationship to tribes. Colette Routel & Jeffrey K. Holth, *Toward Genuine Tribal Consultation in the 21st Century*, 46 U. Mich. J. of L. Reform 417, 430-35 (2013). Government-to-government consultation is essential to the fulfillment of the federal trust responsibilities.

The Executive Branch has recognized this special relationship. President Clinton issued Executive Order 13175, stating there was an across-the-board agency acknowledgment that it was the "unique legal relationship with Native American tribal governments"—the trust responsibility—that mandated consultation. President Bush reaffirmed this policy. Memorandum on Government-to-Government Relationship with Tribal Governments, 2 Pub. Papers 2177 (Sept. 23, 2004). President Obama issued a similar memorandum in 2009, citing the "special relationship." Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 57,881 (Nov. 9, 2009).

As Tribes, Plaintiffs are not like the farmers in *Orff v. United States*, 358 F.3d 1137, 1145 (9th Cir. 2004), or the parties in *Klamath Water*, seeking implied beneficiary status under government contracts. In *Klamath Water*, local irrigators sought to enforce terms of a contract between the United States and a power company engaged to build and operate a dam within the Klamath River Basin. 204 F.3d at 1209. The Ninth Circuit held that, although the contract "operates to the Irrigators benefit" and "was undoubtedly entered into with the Irrigators in mind," the irrigators could not be third-party beneficiaries because such a finding would be inconsistent with the objectives of the contract and "would open the door to all users receiving a

benefit from the Project achieving similar status, a result not intended by the Contract." *Id*. at 1212.

Such is clearly not the situation in the instant case. Not only are Plaintiffs among the limited class of Tribes specially named in the MOU, but Federal Defendants have various duties, including fiduciary responsibilities, to these Tribes, particularly to protect tribal resources, including cultural and natural resources. Thus, the Tribes are entitled to enforce the provisions of Section 3.2.3 when Federal Defendants refuse to act. As the Court determined in *Pit River Tribe*, violations of these duties to comply with NHPA and NEPA requirements during the process of reviewing and approving projects vitiates the validity of that approval and allows Tribes to bring claims under those statutes to set aside such approvals. 469 F.3d 788. Under the Administrative Procedures Act, 5 U.S.C. § 706, this Court should compel agency action that has been unlawfully withheld, (§ 706(1)), and hold unlawful and aside agency actions it finds to be "arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law" (§ 706(2)(A)), or "without observance of procedure required by law." § 706(2)(D).[2]

C. THIS COURT SHOULD DENY THE MOTION TO STRIKE THE DECLARATIONS

This Court should consider the declarations of Priscilla Hunter, Eddie Knight, and Mike Knight because the administrative record is lacking sufficient or adequate information necessary to facilitate effective judicial review. As the Supreme Court explained in *Camp v. Pitts*, there may be instances where there is "such failure to explain administrative action as to frustrate judicial review." 411 U.S. 138, 142-43 (1973). In such cases, the court may turn to extrarecord information. This second exception to the record rule, which would allow extrarecord information if necessary to fully explain the agency's decision, has been recognized by many circuits. *Friends of the Payette v. Horseshoe Bend Hydroelectric Co*., 988 F.2d 989, 997 (9th Cir.

[2] It should be noted that Federal Defendants' administrative record fails to contain any documents relating to the negotiation of the MOU. Such information would go to the issue of whether Plaintiffs are intended beneficiaries. Either Federal Defendants should be ordered to supplement the administrative record on this point or be precluded from arguing the third party beneficiary issue. As Federal Defendants note in their brief, one of the issues is proving "'clear intent' to grant such third party 'enforceable rights.'" Fed. Defs. Br. at 18:20-23. Evidence of such intent is clearly germane to this issue.

1993); *Sierra Club v. Marsh*, 976 F.2d 763, 772-73 (1st Cir. 1992); *Armstead v. U.S. Dep't of Hous. & Urban Dev.*, 815 F.2d 278, 281 (3d Cir. 1987); *Arkla Exploration Co. v. Tex. Oil & Gas Corp.*, 734 F.2d 347, 357 (8th Cir. 1984); *Envtl. Def. Fund, Inc. v. Costle*, 657 F.2d 275, 285 (D.C. Cir. 1981).

The Ninth Circuit recognized this difficulty in *Asarco v. United States Environmental Protection Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980), where it explained that a district court engaged in review of an agency action may properly allow outside testimony in limited circumstances:

> It will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not. The court cannot adequately discharge its duty to engage in a "substantial inquiry" if it is required to take the agency's word that it considered all relevant matters.

Another reason to consider these Declarations is that these documents are necessary for the Court to understand the sacred, cultural, and historic issues raised in the litigation from the unique perspective of the Tribes. *See Western Watersheds Project v. Kayenbrink*, 632 F.3d 472, 497 (9th Cir. 2010) (discussing courts' ability to consider evidence outside the administrative record while applying the APA standard of review to the evidence before it). For instance, in *Ass'n of Pacific Fisheries v. United States Environmental Protection Agency*, 615 F.2d 794, 811 (9th Cir. 1980), the Ninth Circuit considered several postdecisional studies offered by the petitioners in reviewing an informal agency rulemaking, considering them to be "a clarification or an explanation of the original information before the Agency." *See, e.g., City of Las Vegas, Nev. v. F.A.A.*, 570 F.3d 1109, 1116 (9th Cir. 2009) (consideration of "extra-record materials" appropriate when, inter alia, "necessary to determine whether the agency has considered all relevant factors"); *Friends of Payette v. Horseshoe Bend Hydroelectric Co*., 988 F.2d 989, 997 (9th Cir. 1993).

Further, there can be no administrative record when an agency has not acted. This case includes claims that Federal Defendants failed to act such that "there is no 'administrative record' for a federal court to review." *Nat'l Law Ctr. on Homelessness & Poverty v. U.S. Dep't of Veterans Affairs*, 842 F. Supp. 2d 127, 130 (D.D.C. 2012); *see also Watersheds Project v.*

Pool, 942 F. Supp. 2d 93, 100 (D.D.C. 2013) ("Because this case is about agency inaction in response to the 2006 Determinations, rather than agency action, this case may not be resolved solely based on the administrative record."); *Wildearth Guardians v. U.S. Fed. Emergency Mgmt. Agency*, No. CV 10-863-PHX-MHM, 2011 WL 905656, at *2 (D. Ariz. Mar. 15, 2011) (explaining that a NEPA claim to "compel agency action unlawfully withheld or unreasonably delayed" is not limited to an administrative record because there is not a final agency action." (quoting 5 U.S.C. § 706(1)); *Sierra Club v. U.S. Dep't of Transp*., 245 F. Supp. 2d 1109, 1118–19 (D. Nev. 2003) (noting a NEPA failure-to-act claim is not limited to the administrative record and permitting discovery on that claim). As the Ninth Circuit explained, "In such cases, review is not limited to the record as it existed at any single point in time, because there is no final agency action to demarcate the limits of the record." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000).

"To survive summary judgment, a party does not necessarily have to produce evidence in a form that would be admissible at trial, as long as the party satisfies the requirements of Federal Rules of Civil Procedure 56." *Fraser v. Goodale*, 342 F.3d 1032, 1036-37 (9th Cir.2003) (citing *Block v. City of L.A*., 253 F.3d 410, 418-19 (9th Cir.2001)). If evidence is allegedly not presented in an admissible form in the context of a motion for summary judgment, but it may be presented in an admissible form at trial, a court may still consider that evidence. *Id*. at 1037.

Finally, these Declarations should be admitted as they go to the issue of standing. Where, as here, the issue of standing is raised in a motion for summary judgment filed by the defendant, the plaintiff may offer evidence to establish its standing. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

D. THIS COURT SHOULD ENTERTAIN ADDITIONAL BRIEFING ON THE APPROPRIATE REMEDY

Plaintiffs believe this Court will find that Federal Defendants violated the APA, the NEPA, the NHPA, and the MOU. This Court must then fashion the appropriate remedy under the circumstances of this case. Initially, Plaintiffs have requested declaratory relief that such violations have occurred and Plaintiffs believe declaratory relief is a proper remedy for Federal

Defendants' violations. Plaintiffs also requested an order requiring Federal Defendants comply with Section 106 of the NHPA and negotiate, execute, and implement a "Memorandum of Understanding or Programmatic Agreement with Plaintiffs addressing the adverse actions of Federal Defendants on the Willits Bypass Project, especially the Mitigation Project, and an order requiring Federal Defendants to supplement the Environmental Impact Statement for the Project.

While Federal Defendants make a brief assertion of lack of standing, Plaintiffs clearly have standing. First, construction on the Bypass Project and work in the Mitigation Project are not complete, even Federal Defendants concede this point. Plaintiffs' claims are not moot. See *Summers v. Earth Island Institute*, 555 U.S. 488, 497 (2009) (holding plaintiff who asserted cognizable interest in area affected by agency action had standing to challenge failure to provide notice of agency action that could adversely affect his interest "despite the possibility" that plaintiff's "right to comment would not be successful in persuading [the agency] to avoid impairment of [plaintiff's] concrete interests.") Second, for standing purposes, Plaintiffs do not need to show, as Federal Defendants claim, the Project would have been "handled any differently" to prove standing. This Court retains broad authority "to fashion practical remedies when faced with complex and intractable" violations. *Brown v. Plata*, 563 U.S. 493, 526 (2011). "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. Of Educ.*, 402 U.S. 1, 15 (1971).

However, neither this Court nor Plaintiffs have a complete understand of the state of the Willits Bypass Project. As the Project is now going into the winter shutdown, it is appropriate to require an update to the administrative record to determine what relief can be fashioned for construction and mitigation in 2018 and beyond. By way of guidance, Caltrans filed its administrative record on May 12, 2017, and the most recent document in that record is dated April 21, 2017. Federal Defendants filed their administrative record on June 16, 2017 and the most recent document in that record is dated February 10, 2017. This Court needs updated information about what is currently going on both with the Bypass construction Project and the Mitigation Project.

As addressed in paragraphs 19-23 of the Supp. Dec. of Eddie Knight, the Project includes an ongoing Wetland & Riparian Mitigation ("Mitigation") Project. The Mitigation Project is described at CALTRANS SUPP AR 001037-40, attached to the Supp. Knight Dec. as **Exhibit 8**. The Mitigation Project is located at the north end of the Little Lake Valley, just north of Willits. CALTRANS SUPP AR 001037. The Mitigation Project came about because construction of the Willits Bypass Project resulted in impacts to biological resources such as wetlands (64 acres) and other waters of the United States (5 acres) located in and adjacent to the Bypass Project's right of way. *Id*. As a result, Caltrans was required to provide concurrent compensatory off-site mitigation as required by the Army Corps of Engineers ("USACE") 404 Permit, the North Coast Regional Water Quality Control Board ("NCRWQCB") 401 Certification, and the California Department of Fish and Wildlife ("DFW") 1602 and 2081 Permits. *Id*.

There are two Mitigation and Monitoring Proposals ("MMP") which describe the mitigation strategies and requirements. The federal MMP is for the USACE, and the state MMP is for DFW and NCRWQCB. CALTRANS SUPP AR 001037. The federal MMP includes wetland establishment (creation), re-establishment (restoration), and rehabilitation (enhancement) of wetlands and waters of the U.S. Per this MMP, livestock grazing will be eliminated on all of the wetland mitigation properties required for the USACE permit. Conservation Easements and an endowment are required to protect and fund the perpetual management of all mitigation lands. CALTRANS SUPP AR 001037. The state MMP includes protection and enhancement of wetlands, as well as habitat management for the state listed North Coast semaphore grass and Baker's meadowfoam; wetlands on the state mitigation lands will be enhanced by using prescriptive grazing as a mitigation tool; riparian corridors will be rehabilitated and fenced to exclude cattle from all streams, resulting in improvements to water quality and fish habitat; valley oaks will be planted, and oak woodlands preserved on the hills above the valley. CALTRANS SUPP AR 001037.

As discussed more fully by Eddie Knight in paragraphs 24-33 of his Supplemental Declaration, Plaintiffs have repeatedly been frustrated in their efforts to receive adequate government-to-government consultation and input with respect to this Project, particularly with

respect to assessing the effects of the Project on cultural and historic resources. For example, there has been no follow-up by either Defendant to the June 27, 2017 government-to-government consultation regarding mitigation or curation of artifacts.

In terms of an appropriate remedy, Plaintiffs recognize common sense dictates this Court cannot undo the highway construction to date. As a result, Plaintiffs request that this Court exercise its equitable powers and order that, once the Mitigation Project is concluded, Plaintiffs be allowed to co-manage the mitigation parcels to make sure that their tribal concerns regarding the future of their sacred lands are addressed.

This Court can order that the Tribes have co-management of the mitigation lands once the Mitigation Project is concluded. Caltrans has entered into a Cooperative Agreement with the Mendocino County Resource Conservation District ("MCRCD") for management of the Mitigation lands upon conclusion of the Mitigation Project. CT AR 007333-350 and **Exhibit 12** of the Supp. Dec. of Eddie Knight. No one from Plaintiffs had any role or input into this Cooperative Agreement. Plaintiffs' concern is that MCRCD will be managing the Mitigation lands for 10 years into the future with no accountability to the Tribes, even though these are tribal sacred lands.

This Court also could order imposition of a fair tribal monitoring agreement for the balance of the Project, such that the Tribes have monitors both properly present during ground disturbing activities and properly compensated. This Court also could order that the Tribes will take over responsibility for curation of the artifacts uncovered during the Project.

The MMP finalized in 2014 deals with impacts to non-jurisdictional waters, water quality, CWA Section 401 requirements, and impacts to other biological resources under the purview of NMFS, US Fish and Wildlife and CDFW. CT AR 9284-9831. There have been repeated opportunities during the many years of developing these MMP's for Federal Defendants to follow the law, engage the Tribes, and respond appropriately to the ever-mounting potential impacts to archaeological resources. Yet Federal Defendants continue to fail their fiduciary duties to the Tribes, during the Construction Project, during the Mitigation Project, in the protection of archeological sites, and for purposes of curation of artifacts. For example, Caltrans

has not even allowed Plaintiffs to inspect how tribal artifacts are currently being stored and Caltrans will not do so unless this Court orders it.

Under Executive Order 13007, FHWA has a role to preserve Plaintiffs' Sacred Lands: "In managing Federal lands, each executive branch agency with statutory or administrative responsibility for the management of Federal lands shall, to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions, (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites." Ordering that the Tribes have co-management of the mitigation lands once the Mitigation Project is concluded would achieve both purposes of Executive Order 13007, as it would permit accommodation of access to and ceremonial use of Indian sacred sites by Indian religious practitioners and would assist in avoiding adversely affecting the physical integrity of such sacred sites. The federal MMP referenced above includes wetland establishment (creation), re-establishment (restoration), and rehabilitation (enhancement) of the wetland mitigation properties. There is a conservation easements and an endowment to protect and fund the perpetual management of all mitigation lands. CALTRANS SUPP AR 001037.

III. CONCLUSION

The loss of cultural and historic resources is significant and unavoidable because they are sacred and irreplaceable. Federal Defendants and Caltrans failed in their obligations to Plaintiffs both to engage in timely, thorough government-to-government consultation and to ensure the avoidance and protection of cultural and historic resources during the construction phase of the Willits Bypass Project. It was not until Plaintiffs had no alternative that the Tribes turned to this Court for an order that would avoid or minimize potential impacts to tribal cultural resources. Based on the history of this Project, the Tribes need a court order to ensure the avoidance and protection of historic properties during the Mitigation Project and after, as well as to protect the artifacts.

Finally, if this Court determines that it needs more detailed information to fashion an appropriate remedy going forward, Plaintiffs are prepared to provide details of protective

measures that should be employed at the remaining stages of the Project (including after mitigation) and identify the parties that Plaintiffs believe should be responsible for the implementation of such measures.

Dated: November 3, 2017

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