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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 DEFENDANTS CALIFORNIA DEPARTMENT OF TRANSPORTATION AND MALCOLM DOUGHERTY'S OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND PLAINTIFFS' OPPOSITION TO DEFENDANTS CALIFORNIA DEPARTMENT OF TRANSPORTATION AND MALCOLM DOUGHERTY'S 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

One of the fundamental points Caltrans continually raises in its Brief is that this case is moot because the Willits Bypass Project is allegedly "complete … with only minimal additional planting and weed abatement work remaining." (Caltrans Br. at 2:14-15.) The Project is not complete. As evidenced by the Declarations of Eddie Knight (original and supplemental) and Owen Knight, substantial construction, as well as wetland and riparian mitigation efforts, are ongoing. CALTRANS SUPP AR 001036-40. Based on Caltrans's own projections, the Project will not be completed until 2020. CALTRANS SUPP AR 001038. For example, there is substantial ongoing work at Ryan Creek. Dec. of O Knight, ¶¶ 26-29 and Ex. 2; CALTRANS SUPP AR 001038. There also is ground disturbing activity at Niesen 1. Dec. of O Knight, ¶¶ 30-37 and Ex. 3.

Caltrans also claims to have properly engaged in government-to-government consultation, yet its brief is silent on when these consultations allegedly commenced, what Tribes were invited to attend, who attended, and what were the results of these government-to-government consultations. Caltrans's describes its consultation obligation as follows: "Consultation means that one or more parties confer with other identified parties in accordance with an established process and, prior to taking action(s), considers the views of the other parties and periodically informs them about action(s) taken." *See* Ex. 11 to the Supp. Dec. of E. Knight, "Definitions of Consultation," Page E-3.1 – 5. Such consultation did not occur until after extensive ground disturbing activities had begun. Thus, Caltrans violated its duties under Section 106 of the National Historic Preservation Act ("NHPA") and summary judgment should be granted in favor of Plaintiffs.

II. ARGUMENT

A. Caltrans Failed To Comply with the National Historic Preservation Act

In its Brief, Caltrans appears to claim that all it had to do to comply with Section 106 of the NHPA was to enter into a programmatic agreement with FHWA and the Advisory Council. Caltrans asserts to this Court, for example, that it was not statutorily required "to engage in government-to-government consultation." (Caltrans Br. at 15:20-26.) In fact, Caltrans even goes

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so far as to assert: "Plaintiffs may not bring claims against Caltrans for legal duties it does not have." (Caltrans Br. at 17:15-16.) Thus, in order to determine whether Caltrans is correct, and whether Caltrans complied with the NHPA, this Court must first determine the scope of Caltrans' responsibilities under the NHPA. Under the MOU, FHWA assigned, and Caltrans assumed, all of the federal responsibilities for environmental review, consultation, or other such action under various statutes, including Section 106 of the NHPA. Caltrans also concedes, as it must, that "the primary focus of Section 106 compliance is prior to project approval: 'prior to approval of the expenditures of any Federal funds… or prior to the issuance of any license….' (54 U.S.C. § 306108." (Caltrans Br. at 13:12-14.)

Regulations implementing Section 106 of the NHPA define tribal consultation 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]. Non-federally recognized groups and 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 "[S]eek 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 assessment of effects and resolution of adverse effects are also considered in the decision-making. 36 CFR § 800.5(a), 36 CFR § 800.6[a] [2]- [4].

While Caltrans may claim it is not subject to these statutes and regulations, Caltrans has set forth its understanding of its responsibilities under NHPA in two documents: Caltrans's "Standard Environmental Reference" on "Native American Consultation" (Supp. Dec. of E. Knight, Ex. 10); and Caltrans's "Standard Environmental Reference" on "Definitions of Consultation" (Supp. Dec. of E. Knight, Ex. 11). These documents provide a roadmap for this Court to determine whether Caltrans met its responsibilities under Section 106. As Caltrans's "Standard Environmental Reference" on "Native American Consultation" emphasizes: "*Requirements for consultation with Native Americans under the Section 106 Programmatic Agreement (Section 106 PA) are the same as those required under the regulations implementing Section 106."* (Page 3:1.) (Emphasis in original.)

Caltrans begins its "Standard Environmental Reference" on "Native American Consultation" by setting forth the purpose behind these policies and procedures:

> The consultation policies and procedures ensure that:
> • **Native Americans are involved in all aspects of identifying, evaluating and treating Native American historic properties or historical resources** and
> • **Native Americans' recommendations on the treatment of Native American** human remains, associated grave artifacts, and **sacred objects that may be unearthed by Caltrans activities are given maximum consideration.**
>
> Also presented are Caltrans policies and procedures (a) for identifying and treating resources that are not eligible for inclusion in the National Register of Historic Places (NRHP), but are culturally significant, and (b) **for providing Native American access to sacred sites and plant gathering areas located within Caltrans right of way.**

(Page 3:1.) (Emphasis added.)

Next in the "Standard Environmental Reference" on "Native American Consultation" is Caltrans's explanation of how consultation "typically focuses on the identification, evaluation, determination of effects, and treatment of archaeological resources. However, consultation also is necessary to identify areas important to Native Americans that may be unrecognized by people outside the culture. These include sacred sites, plant-gathering areas, and certain historic properties that are referred to as Traditional Cultural Properties." (Page 3:2.) Caltrans "echoes the need to respect tribal sovereignty and consulting with tribes on a government level." *Id*.

Initiation of consultation with tribes is an important point in the Reference. At one point, the Reference provides "[g]uidance on conducting consultation or on consultation in general, and specific references to consultation during the Section 106 review process's four steps (initiation, identification, assessment, and resolution)." (Page 3:16.) Earlier, the Reference also states that Caltrans is authorized "to initiate consultation": "Under the PA, although FHWA has authorized Caltrans to initiate consultation with Indian tribes, FHWA remains responsible for their government-to-government relationship with Indian tribes." (Page 3:3.) The admission by Caltrans that it should "initiate consultation" is significant for this case, because there is no evidence that Caltrans initiated government-to-government consultation with Plaintiffs. The "Standard Environmental Reference" on "Native American Consultation" goes on to provide that Plaintiffs are entitled to participate in consultations: "The SHPO, Indian tribes, local governments and applicants for federal assistance, permits, licenses, and other approvals are entitled to actively participate as consulting parties during Section 106 process." (Page 3:9.)

It is the policy of Caltrans to consult on any proposed project that has potential to affect tribes: "It is Caltrans policy to consult with Indian tribes and other Native American groups and individuals on any proposed Caltrans project that may potentially affect historic properties or 'cultural resources of interest to Native Americans.'" (Page 3:24.) The Reference then states that the "definitions of consultation" are set forth in Caltrans's "Standard Environmental Reference" on "Definitions of Consultation" (Supp. Dec. of E. Knight, Ex. 11). This page concludes with an important paragraph on the role and timing of consultation:

> **Consultation, meaning conferring, begins early in, and continues throughout, the life of the project**. Chapter 2 provides more detail on involving Indian tribes in the Section 106 PA process from the initial step of gathering information and developing the APE to consultation through the Resolution of Adverse Effects steps. Caltrans staff can consult with Indian tribes on developing and documenting an APE and should seek consistency with any pertinent guidance provided by tribes. Caltrans staff **must consult** with Indian tribes and other Native Americans **through the identification, evaluation, findings and assessment of effects, including establishment of ESAs for a finding of No Adverse Effects, and resolution of adverse effects on properties which they may attach religious and cultural significance**. Indian tribes and other Native Americans are also consulted during any review process for reevaluation, and during the reevaluation itself.

(Emphasis added.)

As discussed in detail in ¶¶ 12-18 and Ex. 6 of the Supp. Dec. of Eddie Knight, the Willits Bypass and Mitigation Projects On-Going Section 106 Consultation/Communication Log (1988 - Present), CT AR 002325-392, sets forth the history of the complete lack of government-to-government consultation between Caltrans and either Plaintiff prior to commencement of construction in 2013. The Consultation/Communication Log shows the lack of effort by Caltrans to attempt government-to-government consultation with either Plaintiff. The Consultation/Communication Log also shows there was no information provided to Plaintiffs between 2001-2008 and no attempts at government-to-government consultation during that time frame. ¶ 14 and Ex. 6 of the Supp. Dec. of Eddie Knight; CT AR 002343. Providing information to the Coyote Valley Tribe was done 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."

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. ¶ 15 and Ex. 6 of the Supp. Dec. of Eddie Knight; CT AR 002348. That April 29 meeting 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.

The Consultation/Communication Log contains numerous instances where Plaintiffs were not consulted (and another Tribe, the Sherwood Valley, was) or the information provided was inadequate or inaccurate. The following examples are from Ex. 6 of the Supp. Dec. of E. Knight:

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. ("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. 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, 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.

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 construction has commenced and monitoring is 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 they were 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's ongoing ground disturbing and past ground disturbing activities in and near archeological sites within the project area of the Willits Bypass Project. On June 27, 2017, Plaintiffs had their last government-to-government consultation with Defendants. Also in attendance were representatives of the Sherwood Valley Tribe. Among the topics discussed

were various failures of Caltrans in the Mitigation Project (discussed below) and a request by the Tribes to inspect how tribal artifacts are currently being stored. There has been no follow up to the consultation on mitigation. Also, Caltrans did not allow Plaintiffs to inspect how tribal artifacts are currently being stored.

Plaintiffs seek to hold Caltrans to Caltrans's own policies and procedures, which "*are the same as those required under the regulations implementing Section 106*." (Page 3:1.) The evidence is uncontested: prior to 2014, Caltrans did not engage in meaningful and timely government-to-government consultation with either Plaintiff, and certainly did not initiate such consultation through a "process of seeking, discussing, and considering carefully the views of others, in a manner that is cognizant of all parties' cultural values and, where feasible, seeking agreement." Caltrans did not consult with Plaintiffs on the identification of tribally significant resources, impacts, and applicable mitigation measures, or on project alternatives. Plaintiffs ask only that this Court hold Caltrans to its own policies and procedures as set forth in the Standard Environmental Reference. If this Court does so, summary judgment should be awarded in favor of Plaintiffs.

B. <u>Caltrans Has Failed to Comply With Its Tribal Monitoring Obligations</u>

As to the issue of Tribal Monitors, again Caltrans abdicates all responsibility. Once again, Plaintiffs only seek to hold Caltrans to its own policies and procedures.

During the course of the Willits Bypass Project, tribal monitoring in the Little Lake Valley has been one of the most important issues to the Tribes (Coyote Valley, Round Valley, and Sherwood Valley). ¶3 of the Dec. of Owen Knight. The Willits Bypass Project is being constructed through the Little Lake Valley. The Little Lake Valley contains numerous cultural and sacred resources which are archaeological resources and Traditional Cultural Properties for the Tribes. Plaintiffs view their cultural and sacred history within the Little Lake Valley as essential to the responsible stewardship of Tribal cultural and sacred resources. Id.

The role of tribal monitors is to be present to inspect and, if necessary, halt work at locations where ground disturbance will occur, either within the bypass alignment and the mitigation parcels. ¶4 of the Dec. of Owen Knight. In essence, if it is determined that prehistoric

(pre-contact) and historic (post-contact) artifacts may be present, it is the job of the tribal monitor to work with Caltrans to assess how to address discovery of the artifacts, as well as make sure artifacts are not damaged or destroyed during the construction or mitigation phases. *Id*.

As of March 2017, Caltrans's North Region (District 1, District 2, and District 3) has implemented Native American Monitoring Procedures. A copy of these Procedures is attached as Ex. 5 of the Supp. Dec. of Eddie Knight. There are numerous Native American Monitoring Procedures contained in this document which Caltrans and Federal Defendants did not follow and are not following in connection with the Willits Bypass Project. Examples include the following. (Citations to page numbers refer to the page in the Native American Monitoring Procedures):

a. "Caltrans (sic) policy is to consult with California Indian tribes, including both federally recognized and unrecognized, and individuals on any proposed Caltrans project that may potentially affect historic properties or 'cultural resources of interest to Native Americans.' The consideration of Native American concerns, ideas, beliefs and values in the development of Caltrans highway projects is an important part of the project development process (Standard Environmental Reference [SER] Vol 2, Ch 3). Native American consultation is an integral component in the Section 106 and CEQA processes and continues throughout the project. The need for Native American monitoring is determined during the consultation effort. Monitoring is not a substitute for consultation and adequate identification efforts; monitoring is one potential aspect of consultation. If consultation with the Native American Community has resulted in Caltrans' decision to include Native American monitoring, it is essential to define clearly the parties' roles and responsibilities prior to any field work (see Sections 2, 3, and 4). As a Community representative, the monitor is a liaison that transmits information between Caltrans and the Community, assisting with consultation during field activities. Caltrans consults with federally recognized tribes, California Indian traditional cultural leaders, federally unrecognized tribes, and California Indian individuals on cultural concerns and areas of cultural significance that a proposed project may affect. Consultation attempts to identify

areas important to Native Americans that may be unrecognized by people outside the culture, such as sacred sites, plant-gathering areas, traditional cultural properties, and tribal cultural resources (SER, Vol 2, Ch 3)." (Page 1.) (Emphasis added.) As set forth more fully below, Defendants did not consult with either of the Plaintiffs until after construction commenced on the Willits Bypass Project.

b. "Caltrans' policy and practice is to seek a monitor for archaeological excavations of sites of Native American origin and archaeological monitoring of construction activities (Winters 2003). It is Caltrans practice to pay Native American Monitors under the following circumstances: During archaeological excavations. During construction and construction related activities adjacent to known Native American archaeological or cultural sites, or Environmentally Sensitive Areas. During construction or related activities in areas where there is a high probability that there may be buried deposits based on the project's geomorphological studies." (Page 8.) The Court should note that the citation to Winters, 2003 refers to a November 4, 2003 Memorandum from Gary R. Winters, included as pages 12-14 of the Native American Monitoring Procedures.

The "Standard Environmental Reference" on "Native American Consultation" also addresses Tribal Monitors: "The Native American Monitor is a liaison between Caltrans and the local Native American community, with whom Caltrans may contract on a project-by-project basis. The Monitor participates and obtains firsthand knowledge of archaeological excavations and construction in areas (as agreed upon in consultation) that are known to have cultural sensitivity or have the potential for cultural sensitivity." (Page 3:10.) Later the "Standard Environmental Reference" sets forth Caltrans's policy on tribal monitors:

> As outlined in Division of Environmental Analysis Chief Gary R. Winters November 4, 2003 memo, it is Caltrans policy to have Native American monitoring in the following circumstances:
> • During all Caltrans archaeological excavations at prehistoric or historic Native American sites, including Extended Phase I, Phase II and Phase III studies
> • During construction or related activities at known site locations or in areas where there is a high probability that there may be a buried archaeological site based on the geomorphology of the area

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The general manner in which Caltrans has treated tribal monitors on the Willits Bypass Project is that Caltrans has not properly worked with the tribal monitors to avoid or minimize addressing any issues during construction or during the mitigation effort which involve protecting cultural and sacred resources which are archaeological resources and Traditional Cultural Properties so that Caltrans could construct the Project unfettered by such concerns. ¶5 of the Dec. of Owen Knight.

Tribal monitors have been trained through Caltrans. Both during training and in the field, tribal monitors have been taught by Caltrans that, for tribal monitors to be effective, they must be consistently physically present to inspect at locations where ground disturbance will occur, either within the bypass alignment and the mitigation parcels. ¶6 of the Dec. of Owen Knight. Monitoring must commence immediately prior to and consistently, without interruption, for the duration of any ground disturbing activity.

Tribal monitors serve to help ensure that previously undocumented cultural and sacred resources located in undisturbed soils are identified in a timely manner and protected until more thorough and proper in-field investigations can be undertaken. ¶7 of the Dec. of Owen Knight. Tribal monitors seek to determine the presence of prehistoric (pre-contact) and historic (post-contact) isolated artifacts, densities or concentrations of artifacts or archaeological sites. Examples of prehistoric archaeological sites include temporary campsites (for hunting, fishing, gathering, tool-making, food processing), dwellings, ceremonial structures, and villages. We are looking for objects, ruins, or other physical remnants of human activities that are over 50 years old. Examples of historic archaeological sites are the remains associated with former human occupation of homes, homesteads, farms, ranches, towns, subsistence-based activities (hunting, fishing) and mining. *Id*.

Traditional Cultural Properties ("TCPs") can be physical locations or materials that are important to the Tribes due to their religious, spiritual, or traditional value. Examples of TCPs include traditional hunting, fishing, or gathering areas, sacred locations (burial sites, caves and/or rockshelters, rock art sites, springs, and mountain peaks), or specific types of native plants, minerals or rock art sites.

The primary concern in this case is that tribal monitors from the Coyote Valley Band, Round Valley Indian Tribes, or Sherwood Valley are not present at all ground-disturbing activities and all archaeological investigations. ¶7 of the Dec. of Owen Knight. In fact, tribal monitors are not even told about the various ground disturbing activities so that they can be present to monitor. Nor have the proper number of tribal monitors been consistently used if the number of ground disturbing activities on the Project exceeded the number of tribal monitors available to monitor all ground-disturbing activities and all manner and type of archaeological investigation. Given the extensive geographic size of the Willits Bypass, at least one monitor from the Tribes should be present on site for each ground disturbing machine to effectively and thoroughly observe all ground disturbing activities. ¶7 of the Dec. of Owen Knight. More than one tribal monitor is required if activities are occurring simultaneously in different areas of the Project. ¶7 of the Dec. of Owen Knight. All tribal monitors must be provided free and full access to all work sites for monitoring.

To provide a perspective of the scope of the current situation, right now only three tribal monitors are used by Caltrans during current construction and mitigation activities on 2,000 acres of land on which multiple construction and earth moving mitigation activities are occurring. ¶7 of the Dec. of Owen Knight. Frequently, Caltrans engaged in construction of the Project during the evening for several months. During these nighttime construction activities, no tribal monitors are allowed to observe ground disturbing activities at all due to alleged safety concerns on the part of Caltrans. This position was unreasonable because the tribal monitors have received the same safety training as employees of Caltrans. ¶7 of the Dec. of Owen Knight.

Given the failure of Caltrans to assign a sufficient amount of tribal monitors to the Project, it is difficult for Plaintiffs to know the extent of damage to various cultural and sacred sites in the absence of tribal monitors. ¶7 of the Dec. of Owen Knight. To the extent any artifacts or features of special concern or interest are uncovered, tribal monitors should have the right to consult with their respective Tribal leaders as to how to address both the artifacts and the site where the artifacts are found. Also, in consultation with their respective Tribal leaders, tribal monitors must be permitted to freely check the totality of the APE and mitigation lands to

ascertain if contractors are undertaking unreported ground disturbances without tribal monitors present.

On a regular basis, Caltrans is not providing tribal monitors with a current, accurate APE map depicting the locations of all ESAs (i.e., known archaeological sites) and a copy of the most up-to-date ESA Action Plan. On a regular basis, Caltrans is not providing all archaeological and tribal monitors with the most current and accurate construction plans for the Project, including plans related to all aspects of the construction of the Bypass proper, any fisheries/riparian area/rehabilitation/restoration/construction, and the creation of the wetlands mitigation lands (including, but not limited to, plans for grading, drainage, plantings, fencing, stream crossings, irrigation, etc.). Caltrans is not regularly updating this information to ensure tribal monitors always have the most up-to-date construction plans for the Project.

As set forth in ¶7 of the Dec. of Owen Knight, Caltrans is currently placing improper constraints on tribal monitors, including:

a. Providing second hand reports regarding ground disturbing activities, rather than have tribal monitors attend construction- and mitigation-based meetings;

b. Not providing tribal monitors with updated maps or construction plans;

c. Removing tribal monitors from any installations, checks, and/or maintenance;

d. Refusing to permit tribal monitors to freely check ground disturbance in native soils; and

e. Requiring tribal monitors to seek permission from Caltrans or its contractors to even be on the job site and then to seek permission to even observe an activity.

In his Supp. Declaration, Eddie Knight reviews the tribal monitoring issues at the following sites: Niesen 1, a prehistoric archaeological site just on the west side of the Northern Interchange of the Willits Bypass (¶¶ 3-7); and Ryan Creek, an engineered streambed that provides fish passage, also replacing metal and concrete culverts (¶¶ 8-10).

There is no question that tribal monitors serve as the eyes and ears of the tribes during construction and other ground disturbing activity. However, as can be seen by the Declarations of Owen Knight and the Supp. Declaration of Eddie Knight, absent an order of this Court,

Plaintiffs are not allowed to have effective tribal monitors during construction or related activities at known site locations or in areas where there is a high probability that there may be a buried archaeological site. Based on Caltrans' own policies and procedures, summary judgment on the tribal monitor issue should be granted in favor of Plaintiffs.

C. This Court Should Deny the Motion to Strike the Declarations

This Court should consider the evidence offered in 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. 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,

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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 issues of standing and laches raised by Defendants. 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. Plaintiffs' Claims Are Not Barred By Laches

Caltrans's attempt to shield from judicial review its various failures to consult and its improper handling of the approval process fails because Plaintiffs timely filed this litigation, and Caltrans has not demonstrated any prejudice. In asserting Plaintiffs' claims are barred by laches (Caltrans Br. at 11:23-25), Caltrans primarily relies on *Apache Survival Coalition v. United States*, 21 F. 3d 895 (9th Cir. 1994). In that decision, the Ninth Circuit first decided what standard to apply. It noted that, in NEPA cases, courts generally apply a more lenient standard when determining whether laches should bar a claim. The Court found the lenient standard should also prevail in NHPA cases where, like NEPA, suits are brought in the public interest and to ensure Federal agency compliance. 21 F.3d at 906. In applying this more lenient standard of laches, the court examined whether the plaintiffs unduly delayed their suit and whether the defendant would be unduly prejudiced if the suit were allowed to go forward. The court identified plaintiffs as representing the interests of the San Carlos Apache Tribe. Any notice to the Tribe, therefore, constituted notice to plaintiffs. The Forest Service had solicited the Apache Tribe's views regarding cultural resources six years before the lawsuit was initiated, but the Tribe did not express concerns over the resources at that time. The Tribe failed to comment on the draft EIS and several years later asked to be taken off the mailing list for the final EIS. Notwithstanding that request, the Forest Service sent the Tribe a final EIS. The Tribe did not comment. The Ninth Circuit determined these consistent failures to act

To establish the doctrine of laches as an affirmative defense, Caltrans must show: (1) the opposing party lacked diligence in pursuing its claim; and (2) prejudice resulted from that lack of diligence. *Apache Survival Coalition*, 21 F.3d at 905. ("To establish the defense of laches, a party must show prejudice caused by the opposing party's lack of diligence in pursuing its claim."). The doctrine is to be invoked sparingly in litigation such as the instant case because the plaintiff is not the only party to suffer harm by alleged environmental damage. *See Portland Audubon Soc'y v. Lujan*, 884 F.2d 1233, 1241 (9th Cir.1989) (citing *Preservation Coalition, Inc. v. Pierce*, 667 F.2d 851, 854 (9th Cir.1982)). "We have repeatedly cautioned against application of the equitable doctrine of laches to public interest environmental litigation.... This approach has found unanimous support in the other circuits." *Id*. (citations omitted).

More fundamentally, Caltrans bears the burden of proof on its affirmative defense. *See Couveau v. Am. Airlines*, 218 F.3d 1078, 1083 (9th Cir. 2000) ("To establish laches a defendant must prove both an unreasonable delay by the plaintiff and prejudice to itself."). Moreover, there is a "strong presumption" that laches is inapplicable when a plaintiff files suit within the appropriate statute of limitations period. *Jarrow Formulas, Inc. v. Nutrition Now, Inc*., 304 F.3d 829, 836-37 (9th Cir. 2002), citing *Shouse v. Pierce County*, 559 F.2d 1142, 1147 (9th Cir. 1977) ("It is extremely rare for laches to be effectively invoked when a plaintiff has filed his action before limitation in an analogous action at law has run.").

This is not one of the rare cases in which it is appropriate to invoke the doctrine of laches. As detailed by ¶¶ 14-17 of the Supp. Dec. of E. Knight, the Consultation/Communication Log indicates it was not until 2008 that Plaintiffs (along with many other interested parties) were provided information about the Project (CT AR 002336) and it was not until June 25, 2013, that either Defendant provided either Plaintiff with any information about the cultural or historical aspects of the Project. CT AR 002343. Providing information to Coyote Valley "was done 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.'" ¶ 14 of the Supp. Dec. of E. Knight.

The Consultation/Communication Log also indicates it was not until April 29, 2014 (a year after construction commenced), that either 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. ¶ 15 of the Supp. Dec. of E. Knight. 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. ¶ 15 of the Supp. Dec. of E. Knight.

The Consultation/Communication Log contains numerous instances where Plaintiffs were not consulted (and another Tribe, the Sherwood Valley Tribe, was) or the information provided was inadequate or inaccurate. The following examples are from Exhibit 6 to the Supp. Dec. of E. Knight.:

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. ("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. 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, Caltrans then sent a letter stating "we must hear from you in 30 days or we assume you have no concerns." CT AR 002336.

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 was not until late 2013 that Plaintiffs receive any studies, after construction has commenced and monitoring is required. CT AR 002345-46.

g. It was 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 they were 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. ¶ 17 of the Supp. Dec. of E. Knight.

Upon meeting with Caltrans and Federal Defendants on February 18, 2015, Plaintiffs determined that 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."

Whether or not Plaintiffs exercised diligence in pursuing this action, Caltrans has not produced cognizable evidence of prejudice resulting from the alleged delay. Thus, this action is not barred by the doctrine of laches.

III. CONCLUSION

Summary judgment should be granted in favor of Plaintiffs. Plaintiffs' position on the appropriate remedy is clearly set forth in their Opposition Brief to the Federal Defendants' Motion and is incorporated herein by reference. Plaintiffs believe that, absent an order of this Court, their tribal cultural, historic, and sacred resources will be destroyed. Only an order will

avoid or minimize potential impacts to Plaintiffs' cultural resources. Based on the history of this Project, the Tribes request a favorable court order to ensure the avoidance and protection of historic properties during the Mitigation Project and after, as well as to protect the artifacts.

If this Court determines that it needs more detailed information to fashion an appropriate remedy going forward, Plaintiffs will provide details of protective measures that should be employed at the remaining stages of the Project (including after mitigation) and identify the parties we believe should be responsible for the implementation of such measures.

Dated: November 3, 2017

COTCHETT, PITRE & McCARTHY, LLP

By: /s/ Philip L. Gregory
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