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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

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

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The Court should grant summary judgment in Federal Defendants' favor on the two remaining issues in this case involving the Federal Defendants. First, Plaintiffs are unable to demonstrate that Federal Defendants failed to comply with their consultation obligations, including those under the National Historic Preservation Act ("NHPA"), 54 U.S.C. § 306101–307108. The administrative record is clear that Plaintiffs were given the "reasonable opportunity" to participate in project planning required by the NHPA. See 36 C.F.R. § 800.2(c)(2)(ii)(A). Second, Plaintiffs' remaining claims all hinge on whether the Federal Highway Administration ("FHWA") was required by the 2007 Memorandum of Understanding to reassume responsibilities for the project that had been assigned to California Department of Transportation ("Caltrans"). That document, however, is not reviewable by a court under Section 706(1) of the Administrative Procedure Act ("APA") nor enforceable by Plaintiffs. Even if it were enforceable here, the 2007 Memorandum of Understanding, by its own terms, does not provide Plaintiffs with a right to force FHWA to reassume responsibilities.

I. Federal Defendants have Provided Plaintiffs a "Reasonable Opportunity" to Participate in the Project-Development Process, as Required by the National Historic Preservation Act

Plaintiffs have alleged violations of two requirements for Federal Defendants to share information with Plaintiffs: first, the specific obligations under the NHPA and its implementing regulations and, second, the general obligation of government-to-government consultation. Plaintiffs, however, have failed to identify any ways in which Federal Defendants have failed to fulfill either of those obligations.

First, Federal Defendants complied with all their obligations under the NHPA to consult with Plaintiffs. Starting as early as 1987, the Federal and State Defendants repeatedly provided Plaintiffs with information about the Project and repeatedly asked Plaintiffs to raise any concerns or provide any historical, cultural, or other input on the Project. *See* CT AR 011515–79 (hereinafter "Consultation Log"). A selection of Consultation Log entries demonstrates critical points prior to 2013 at which Defendants provided Plaintiffs with information about the project and asked for feedback:

Date	Consultation Log Entry for Contact with Plaintiffs' Representatives
12/7/87	"Invitation to a public meeting held in Willits to discuss the feasibility of constructing the Willits Bypass. The purpose of the meeting is to seek suggestions or comments on 'alignment alternatives, and significant social, economic, or environmental issues."

11/27/89	"Letter requesting each organization's participation in the [Technical Advisory Groups]"
12/15/89	"Notice of Preparation of the Environmental Impact Report/Statement and request for response no later than 45 days after receipt of the notice. The notice states that "surveys for archaeological and historic architectural resources will be undertaken."
11/28/90	"Summary of the September 11, 1990 Natural Resource Technical Advisory Group meeting. The letter also extends another invitation to 'meet with any groups to discuss any issues, concerns, or general questions about the process.'"
6/17/98	"CT letters informing each organization/individual in the NAHC list that Caltrans is resuming the environmental studies for the WBP and requesting input on prehistory, history, ethnographic land use, as well as contemporary NA values that may be associated with or near the project area."
3/6/00	"CT letters informing all individuals and organizations on the NAHC contact list that CT has completed its cultural resources studies for the WBP. The letter provides the details of the cultural resources surveys and the results (i.e., 25 archaeological sites identified). The letter requests information on any of these sites or expression of any concerns regarding the project and cultural resources. Caltrans states in the letter that if no response or inquiry is received within 30 days, Caltrans will assume that there are no concerns or information that is to be provided. The letter also states that all of the information gathered will be summarized in the Draft Environmental Impact Statement, which will be available to the public and a public hearing workshop will be help; and if they wish to receive a copy of the draft EIS, Caltrans asks that they contact Scott Williams (project archaeologist) to be placed on the distribution list."
6/5/02	"Submittal of Draft WBP [Environmental Impact Report/Statement] for review and comments."[1]
10/06	"In 10/06 the Final WBP [Environmental Impact Report/Statement] document was distributed and the [Sherwood Valley Rancheria Tribe] was on the distribution list as 'Local, County, and Tribal Government Agencies. The document was mailed to Sherwood Valley Rancheria, ATTN: Tribal Chairperson, 190 Sherwood Hill Drive, Willits, CA 95490." [2]
12/22/08	"Letter re-opening of the notification phase of the WBP to provide an opportunity for the [Native American] community in the region to ask questions, provide input or express concerns. The letter also informs the individuals/organizations on the NAHC contact list regarding changes to the project vis-à-vis the wetland and biological mitigation parcels. Caltrans ends the letter 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.'"
1/2/09	"Phone call following up on December 22, 2008 letter. Messages were left for all those that were contacted."

CT AR 011515–27. For a helpful narrative description of the history of consultation on the project, see CT AR 002298-312.

[1] This document was made available to the public. CT AR 000101-04; CT AR 002021-22.

[2] This document was made available to the public. CT AR 000101-04; CT AR 002021-22.

Plaintiffs claim that they were not provided information about the cultural or historical aspects of the Project until 2013. Pls.' Reply to Fed. Defs.' Op. to Pls.' Mot. for Summ. J. as to Fed. Defs. (ECF No. 144) ("Pls.' Reply re Fed. Defs.") at 6. This is incorrect. In March of 2000, Plaintiffs were notified about the completion of the cultural resources studies for the Project. CT AR 011521. In addition, detailed information about the cultural or historical aspects of the Project were included in the 2002 Draft Environmental Impact Statement and the 2006 the Final Environmental Impact Statement, including their underlying documents.[3] CT AR 001315–1882 (copy of Draft EIR); CT AR 000001–1928 (final EIR). It is unclear from the record whether printed or electronic copies of those multi-volume documents were directly provided to Plaintiffs,[4] but they were made available to the public, including on the Internet, and extensive public notice efforts were undertaken. CT AR 000101–04; CT AR 002021–22. Plaintiffs were also notified again by letter and phone message about the Project in late 2008/early 2009 and encouraged to ask questions, provide input or express concerns. CT AR 011526; CT AR 011614.

Even this selective overview of the record of contacts made to Plaintiffs demonstrates that Federal Defendants complied with their obligations under the NHPA. The Federal Defendants "provide[d the] tribe with 'a *reasonable opportunity* to identify its concerns about historic properties, advise on the identification and evaluation of historic properties . . . , articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects.'" *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 608 (9th Cir. 2010) (quoting 36 C.F.R. § 800.2(c)(2)(ii)(A)) (emphasis added) (footnote omitted); *see also Apache Survival Coalition v. United States*, 21 F.3d 895, 907 (9th Cir. 1994) (rejecting NHPA challenge because Tribe had failed

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[3] In particular the 2005 Historic Property Survey Report ("HPSR") and Finding of Effect ("FOE") document (CT AR 005672) is referenced in the Final Environmental Impact Statement, as are several other studies. CT AR 000072–73; CT AR 000681.

[4] Notably, the Consultation Log says that "In 10/06 the Final WBP [Environmental Impact Report/Statement] document was distributed and the [Sherwood Valley Rancheria Tribe] was on the distribution list as 'Local, County, and Tribal Government Agencies." CT AR 011525. Presumably, Plaintiffs would also have been on that distribution list, but that fact is not clear from the Consultation Log.

to participate in environmental review process); *Narragansett Indian Tribe v. Warwick Sewer Auth.*, 334 F.3d 161, 169 (1st Cir. 2003). Plaintiffs have failed to demonstrate any way in which they were deprived of that "reasonable opportunity" to participate.

Plaintiffs' main complaint about the period before 2013 seems to be that Defendants interacted more often over the course of the development of the project with another Tribe than with Plaintiffs. Pls.' Reply re Fed. Defs. 7–9. This simply reflects the fact that the other Tribe accepted the multiple invitations to provide input on the Project and then played an active role. *See* CT AR 011519–33 (including numerous instances of the other Tribe providing information and input on the Project). Plaintiffs, however, also received multiple invitations to engage in the project development process and decided not to participate until 2013.[5]

To the extent that Plaintiffs seek to rely on the more general obligation of government-to-government consultation, Plaintiffs have again failed to identify any particular failure by Federal Defendants. Plaintiffs do not – and cannot – point to any obligation that Federal Defendants failed to fulfill. To the contrary, Federal Defendants have met their obligations through both their compliance with all NHPA obligations and by being responsive to the Plaintiffs when the Plaintiffs eventually raised concerns. Federal Defendants have met with Plaintiffs repeatedly since Plaintiff Coyote Valley first expressed concern in 2013 about the Project and requested government-to-government consultation. FHWA AR 0007, Attachment at Page 1. Following the request, Federal Defendants have met in person with Plaintiffs at least a half dozen times between October 2013 and February 2015, and reached out to tribal officials outside those in-person government-to-government meetings. CT AR 011535–38, 011546; FHWA AR 0038, 0064.

The cases relied upon by Plaintiffs serve only as studies in contrast to the actions that Federal Defendants have taken here to meet their NHPA obligations. Although Plaintiffs repeatedly invoke

[5] The Consultation Log shows no instances of the Plaintiffs providing any input on the Project or responding to any of the information provided to them by Defendants for the entire period from the beginning of the environmental studies work in 1989 to the middle of 2013. CT AR 011518–33.

Quechan Tribe of Fort Yuma Indian Reservation v. United States Department of Interior, 755 F. Supp. 2d 1104 (S.D. Cal. 2010), Pls.' Reply re Fed. Defs. at 2, 4, 5, 9, "[t]his is not a case like *Quechan Tribe*, where a tribe entitled to consultation actively sought to consult with an agency and was not afforded the opportunity." *Wilderness Soc'y. v. Bureau of Land Mgmt.*, 526 F. App'x 790, 793 (9th Cir. 2013) (citation omitted). In *Quechan Tribe*, the Tribe repeatedly attempted to participate in the process and gather additional information, but "the Tribe's government's requests for information and meetings were frequently rebuffed or responses were extremely delayed." *Quechan Tribe*, 755 F. Supp. 2d at 1119. By contrast, the Plaintiffs waited until 2013 to request government-to-government consultation with FHWA, despite repeated updates about the projects and invitations to provide input or ask questions. And when the Plaintiffs reached out in 2013, Federal Defendants responded. This case is also unlike *Pit River Tribe v. United States Forest Service, 469 F.3d 768 (9th Cir. 2006),* as that case dealt with a situation where "no consultation or consideration of historical sites occurred in connection with the [challenged actions]." *Id.* at 787. Here, by comparison, the consultation and consideration of historical sites was completed, submitted to the state historic preservation officer ("SHPO") in 2005, and the SHPO concurred in FHWA's determination. CT AR 000072–73, 000163–64. Federal Defendants have thereby satisfied the NHPA process. *See Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 581 (9th Cir. 1998).

Far from *Quechan Tribe* and *Pit River*, this situation has much more in common with *Apache Survival Coalition v. United States*, where the Ninth Circuit rejected a the Tribe's NHPA claims because the Tribe chose not to participate in the long administrative National Environmental Policy Act and NHPA process. 21 F.3d at 907. In that case, the Tribe was "solicited for input concerning [the project location] and its cultural resources," but provided only a limited response; "the Tribe failed to respond to the [agency's] request for comments on the [Draft Environmental Impact Statement]," and "the Tribe [] failed to provide comment or input" on the final Environmental Impact Statement. Given that background, the Ninth Circuit determined that the Tribe "ignored the *very process* that its members now contend was inadequate," and asserted its rights "with inexcusable tardiness." *Apache Survival Coal.*, 21 F.3d at 907. Given the similar facts in this case, this Court should reach the same conclusion.

II. While Plaintiffs' Remaining Non-Consultation Claims Are Not Reviewable by This Court, They Also Fail Because FHWA Was Not Required to Reassume Project Responsibility

This Court should grant summary judgment for Federal Defendants on Plaintiffs' Remaining Non-Consultation Claims[6] against Federal Defendants, as those claims are all based on Plaintiffs' request that this Court enforce the 2007 Memorandum of Understanding between FHWA and Caltrans. *See* Ex. A, Decl. David B. Glazer, ECF No. 32-1 (hereinafter, the "2007 MOU").[7] First, Plaintiffs have completely failed to address the fact that the 2007 MOU's provisions are not reviewable by this court under Section 706(1) of the APA. Second, even if this Court could review the 2007 MOU, Plaintiffs cannot demonstrate that they are third-party beneficiaries who can enforce the 2007 MOU. Finally, the provisions of that agreement make clear that the Tribe cannot unilaterally force the FHWA to reassume Project responsibilities.

Plaintiffs' Remaining Non-Consultation Claims are premised on an alleged violation of APA Section 706(1). This reflects that the Court only allowed the Remaining Non-Consultation Claims to proceed under the theory that Federal Defendants' conduct after February 18, 2015 may have amounted to action "unlawfully withheld or unreasonably delayed." ECF No. 94 at 11 (quoting 5 U.S.C. §§ 706(1)).[8]

Plaintiffs, however, have refused to address the problem that their claims are not judiciable under Section 706(1) of the APA, as explained at length in Federal Defendants' Memorandum in Support of Cross-Motion. ECF No. 139 (hereinafter "Fed. Defs.' MSJ") at 15–17. Plaintiffs have therefore waived any such arguments. *United States v. Romm*, 455 F.3d 990, 997 (9th Cir. 2006). As Federal Defendants

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[6] The Remaining Non-Consultation Claims are the claims that may have arisen after February 18, 2015 under the National Environmental Policy Act, Section 4(f), Section 18(a), and non-consultation portions of the NHPA. ECF No. 94 at 10.

[7] The 2007 MOU was renewed in 2012 without changing the language discussed above, and updated in 2016. 81 Fed. Reg. 80,708, 80,709 (Nov. 16, 2016). Plaintiffs appear to have dropped their challenge to the 2016 MOU, as they do not address it in their Reply. If not, Federal Defendants stand by their prior arguments. *See* Fed. Defs.' MSJ at 25.

[8] While the Court also identified 5 U.S.C. § 706(2)(A), ECF No. 94 at 11, Plaintiffs have failed to identify a final agency action by Federal Defendants addressing reassumption of responsibilities that could be considered "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). Thus, Federal Defendants focus their analysis on 5 U.S.C. § 706(1).

explained, only a very limited set of "discrete" actions are enforceable under Section 706(1) of the APA. Under Section 706(1), a court's "ability to 'compel agency action' is carefully circumscribed to situations where an agency has ignored a specific legislative command." *Hells Canyon Pres. Council v. U.S. Forest Serv.*, 593 F.3d 923, 932 (9th Cir. 2010). The 2007 MOU's discretionary reassumption of responsibility provisions in Sections 9 and 3.2.3 do not fall within the limited type of actions that are enforceable under Section 706(1) of the APA. *Hells Canyon Pres. Council*, 593 F.3d at 932 (neither a "specific legislative command," nor a "discrete" action, nor "legally required"). Because the 2007 MOU's provisions do not fall within the limited types of actions that are reviewable by a court under Section 706(1) of the APA, this Court should grant Summary Judgment for Federal Defendants on the Remaining Non-Consultation Claims.

Even assuming the Court could enforce the 2007 MOU under Section 706(1), the Plaintiffs are not parties that can bring such a suit. As Federal Defendants explained, Fed. Defs.' MSJ at 18–19, a non-signatory to a federal agreement is not deemed to be a third-party beneficiary and cannot overcome that presumption "absent a clear intent" to grant such third party "enforceable rights." *Orff v. United States*, 358 F.3d 1137, 1145 (9th Cir. 2004) (emphasis, quotation, and citations omitted), *aff'd*, 545 U.S. 596 (2005). In the face of the "more stringent test" for government contracts, this Court should not conclude that a collective reference in the 2007 MOU to all of the Tribes in California confers third-party beneficiary rights on Plaintiffs. *Minshew v. Donley*, 911 F. Supp. 2d 1043, 1060 (D. Nev. 2012) (citation omitted). This is particularly true as there are no indications in the text of the 2007 MOU that it was designed to give "enforceable rights" to any Tribes.

Plaintiffs' generalized arguments that there is a unique legal relationship between Tribes and the United States do nothing to change the nature of the 2007 MOU or Plaintiffs' ability to enforce its terms. *See* Pls.' Reply re Fed. Defs. at 13–15. Despite this Federal-Tribal relationship, the contract still does not provide "enforceable rights" to the Tribes. Plaintiffs' argument overreaches, as they claim that since the federal government has certain fiduciary responsibilities to Tribes, the Plaintiffs should be granted the right to go to court to enforce the 2007 MOU. *Id.* First, Plaintiffs have cited no authority to support a proposition that Tribes are to be granted third-party beneficiary status for government contracts where

other entities (*e.g.*, farmers and irrigators) would not. Second, there seems to be no limiting principle to Plaintiffs' argument. If this Court adopted such a rule, it would open the door to Tribes being able to bring suit as third-party beneficiaries for any federal government contract that mentions Tribes or might impact Tribal interests.

Moreover, Plaintiffs' claim that they have "enforceable rights" is based on a mistaken interpretation of the 2007 MOU. Plaintiffs' interpretation of the 2007 MOU would grant Indian Tribes an unassailable right that not even Caltrans has under the document – the right to unilaterally force the FHWA to reassume Project responsibilities regardless of FHWA's views on the issue. Pls.' Reply re Fed. Defs. at 9–12. They suggest that the Court need not look past the word "shall" in Section 3.2.3, but this argument fails to recognize that the 2007 MOU must be read as a whole. *See e.g.*, Restatement (Second) of Contracts § 202(2) (1981). In particular, the language relied upon by Plaintiffs – Section 3.2.3 – explicitly cross-references, and is therefore subject to, the provisions in Section 9.1. 2007 MOU 4 of 25 (Sec. 3.2.3). Those detailed Section 9.1 provisions explain the process for reassumption of responsibilities, making clear that such reassumption is a discretionary decision to be made by FHWA.[9]

The 2007 MOU thus does not set out the unavoidable mandate for FHWA to reassume responsibilities that Plaintiffs claim. Instead, it sets out a process whereby a Tribe can trigger the FHWA's consideration of reassumption of responsibilities if the Tribe makes the determinations provided for in Section 3.2.3. However, the FHWA shall reassume responsibilities if – and only if – Section 9.1 is satisfied. And Section 9 makes clear that reassumption of responsibilities is not an outcome that can be forced upon FHWA. The text is clear that California cannot force FHWA to reassume responsibilities and this Court should not read the 2007 MOU in a way that allows a Tribe to be able to force FHWA to do so.

[9] Under the 2007 MOU, regardless of whether it is FHWA or Caltrans who initiates reassumption of responsibilities, the discretionary decision regarding whether to reassume responsibilities rests with FHWA in all cases. 2007 MOU 16 of 25, 17 of 25 (if FHWA initiates, "FHWA *may*… reassume … responsibilities … upon the *FHWA's determination"* (emphasis added); if Caltrans initiates, FHWA has discretion under Section 9.2 to "determine whether it will reassume the responsibilities requested").

Finally, Plaintiffs lack standing to raise these claims. Looking backward, Plaintiffs have failed to demonstrate redressability. They have failed to explain how they have been harmed by FHWA's purported failure to reassume Project responsibilities or how an order stating that Federal Defendants should have reassumed responsibilities will redress their alleged injuries. *See* Fed. Defs.' MSJ at 24 (citing supporting cases). Looking forward, any claim that FHWA must now reassume responsibilities is moot. The 2007 MOU was updated in 2016 and the language of the 2016 MOU is even clearer that Tribes cannot force FHWA to reassume project responsibilities, as Plaintiffs acknowledge. ECF No. 133 at 22 (Under the 2016 MOU, "the issue of whether FHWA re-assumes jurisdiction is left solely to the discretion of FHWA.")

Since FHWA was not required to reassume Project responsibilities under the 2007 MOU and since Plaintiffs have failed to even argue – much less prove – that FHWA has unreasonably delayed reassumption of responsibilities,[10] this Court must grant summary judgment for Federal Defendants on Plaintiffs' Remaining Non-Consultation Claims.

III. This Court Should Reject Plaintiffs' Request for a Free-Ranging Remedy Phase

Although Federal Defendants do not believe that any remedy is warranted in this case, they submit that a remand to the agency would be the only appropriate remedy if Plaintiffs were to succeed on the merits of one of their claims. Plaintiffs have instead requested that this Court engage in a free-ranging remedy phase and encourage the Court to essentially step into the role of manager for the Project going forward. Pls.' Reply re Fed. Defs. at 17–21. Neither suggestion is appropriate in this APA case.

Should the Court determine that an action by Federal Defendants has violated one of the laws invoked by Plaintiffs, the remedy is for this Court to remand that action to the agency. Under the APA, the Court is tasked with determining whether the facts found by the agency and the agency's decision as

[10] Plaintiffs have made no attempt to demonstrate that Federal Defendants unlawfully withheld or unreasonably delayed reassumption of responsibilities, thereby waiving such arguments. *Romm*, 455 F.3d at 997. For an analysis of the applicable factors that shows that Federal Defendants did not unreasonably delay actions, see Fed. Defs.' MSJ at 17-18.

a whole are supported by the administrative record. *See Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985). "If the record before the agency does not support the agency action, if the agency has not considered all relevant factors…the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985), *superseded by regulation on other grounds as stated in Novak Birch, Inc. v. United States*, 132 Fed. Cl. 578 (2017); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014), *cert. denied by Stewart & Jasper Orchards v. Jewell*, 135 S. Ct. 948 (2015) and *State Water Contractors v. Jewell*, 135 S. Ct. 950 (2015); *see also Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) (guiding principle is that the "function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration.").

The Court should not step into the decision-making role for the agency.[11] The manner in which the agency satisfies its legal requirements on remand should be left to the agency's discretion. *See Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1178–80 (9th Cir. 2008) (finding that court should defer to Agency's decision on remand); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 937 (9th Cir. 2008) (remand order cannot "direct the substance of the agencies' actions on remand"); *Alaska Ctr. for the Env't v. Browner*, 20 F.3d 981, 986–87 (9th Cir. 1994) (district court on remand properly left "substance and manner" of achieving compliance with statutory directive up to agency).

IV. Plaintiffs' Belated Arguments Do Not Justify Supplementing the Administrative Record with Plaintiffs' Inappropriate, Extra-Record Declarations

The Court should reject Plaintiffs' belated arguments that the administrative record is lacking sufficient information and that it should be supplemented by several declarations. Plaintiffs make these arguments for the first time in their Reply brief, and long after missing the deadline to do so imposed by this Court. Plaintiffs long ago passed on the window offered by the Court to request that extra-record

[11] Moreover, many, if not all, of Plaintiffs' suggested remedies bear no relation to the claims against Federal Defendants and should, therefore, be summarily rejected. *See e.g.*, Pls.' Reply re Fed. Defs. at 17–21 (suggesting that the Court order that the Tribes to have co-management of the mitigation lands).

material be considered. ECF Nos. 53, 97, 116 (setting a process for disputes over the record to be completed before summary judgment briefing). Moreover, having missed that deadline, Plaintiffs failed to offer any justification in their Motion for Summary Judgment for their reliance on the extra-record information, thereby waiving such arguments. *Romm*, 455 F.3d at 997. For those reasons alone, the Court should reject Plaintiffs' arguments and strike the declarations.

Plaintiffs do address the issue in their Reply brief, but are unable to offer sufficient justification to overcome the strong presumption that extra-record evidence is not allowed in APA cases. The rule is that a court may consider extra-record materials only in those rare cases where a plaintiff has demonstrated that the record is so inadequate as to frustrate effective judicial review. *James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996); *Pac. Shores Subdiv. Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 6 (D.D.C. 2006) (plaintiff must prove that an exception applies for court to consider extra-record evidence); *see also Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 514 (D.C. Cir. 2010) (consideration of extra-record evidence "is the exception, not the rule"). Although they identify several exceptions to the rule excluding extra-record evidence, Plaintiffs fail to explain why the material included in the declarations fits within any of those exceptions. Pls.' Reply re Fed. Defs. at 15–17. Plaintiffs can point to no instances where there are "failure[s] to explain administrative action," much less ones that are so egregious as to "frustrate judicial review." Pls.' Reply re Fed. Defs. at 15 (citing *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973)). They have provided no justification that "additional information if necessary to fully explain the agency's decision." *Id.* The Court has the information it needs in the administrative record for this case and the declarations do not provide any appropriate or necessary augmentation to the record. Instead, as discussed at length in Federal Defendants' Cross-Motion for Summary Judgment, Fed. Defs.' MSJ at 20–22, the declarations are replete with pages of inappropriate legal argument and extra-record opinions that constitute nothing more than an improper end-run around the page limits and content restrictions imposed by this Court's local rules.

V. Many of Plaintiffs' Claims Are Time-Barred by the Statute of Limitations

Finally, many of Plaintiffs' claims are time-barred. Although this Court specifically pointed out

that Plaintiffs failed to address the statute of limitations during briefing on the motion to dismiss, ECF No. 94 at 12–13 n.8, Plaintiffs have done the same thing again during this round of briefing. Plaintiffs continue to take issue with actions that took place long before the October 30, 2009 statute of limitations date and yet fail to address the statute of limitations bar. *See e.g.*, Pls.' Reply re Fed. Defs. at 6–8 (making allegations about actions in 2000, 2001, 2002, 2006 and 2008). As Federal Defendants previously argued, Fed. Defs.' MSJ at 23–24, and Plaintiffs failed to address, the Court should grant Federal Defendants' summary judgment motion on all of Plaintiffs' claims regarding actions predating October 20, 2009. *See* 28 U.S.C. § 2401(a) (six-year statute of limitations). This specifically includes the issuance of the Final Environmental Impact Statement and Record of Decision in 2006.[12]

VI. Conclusion

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

Respectfully submitted,

DATED: December 8, 2017

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[12] A challenge to those documents would have needed to have been brought by July 5, 2007. *See* Fed. Defs.' MSJ at 23.

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CERTIFICATE OF SERVICE

I, Ragu-Jara Gregg, hereby certify that, on December 8, 2017, I caused the foregoing to be served upon counsel of record through the Court's electronic service.

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

Dated: December 8, 2017

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