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

Attorneys for Defendants CALIFORNIA DEPARTMENT OF TRANSPORTATION; MALCOLM DOUGHERTY

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

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

Plaintiffs,

vs.

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

Defendants.

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

DEFENDANTS CALIFORNIA DEPARTMENT OF TRANSPORTATION AND MALCOLM DOUGHERTY'S REPLY BRIEF IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

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

Judge: Hon. Jeffrey S. White
Courtroom: 5

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

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

TABLE OF CONTENTS

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

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

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

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

I. INTRODUCTION

Plaintiffs have failed to cure the numerous infirmities in their opening brief, and have abandoned most of their arguments. They have failed to articulate any coherent claims against Caltrans, and have failed to support their contentions with citations to the record or applicable case law. This Court should enter summary judgment in Caltrans's favor on that basis alone.

At the same time, the record establishes that Caltrans has fully complied with its legal obligations under Section 106 of the National Historic Preservation Act with respect to the Willits Bypass Project, and all other applicable laws. After decades of careful and extensive public planning, the Project was completed in the fall of 2016, and the bypass on U.S. 101 has been operational ever since. This lawsuit has no merit, and this Court should enter judgment accordingly.

II. This Court should strike Plaintiffs' previous and newly proposed declarations.

In their opening brief, Plaintiffs improperly submitted extra-record declarations in this Administrative Procedure Act review case, without even attempting to explain or justify any exception to the rule limiting judicial review to the record, and in violation of numerous evidentiary rules and standards. (Dkt. 138 at 7:3-8:20.) Although they now pay lip service to such exceptions in their reply brief, this Court should disregard those arguments, because they were not made in Plaintiffs' opening brief, because the time to challenge the contents of the administrative record in this case expired long ago in July 2016, and because Plaintiffs have not sought to supplement the record by way of required motion. (Dkt. 53 at 2:12-13; *Alaska Center for Environment v. U.S. Forest Service*, 189 F.3d 851, 858 n.4 (9th Cir. 1999) (arguments made for first time in reply brief are waived).) Plaintiffs – again – do not even attempt to justify their failure to comply with this Court's Order regarding timely challenges to the contents of the record. (Dkt. 145:13-14.)

Moreover, Plaintiffs do not articulate an actual basis for any exception to apply here, but instead simply assert that, in general, exceptions sometimes do apply. (Dkt. 145 at 13-14.) Certainly they do, in general, but Plaintiffs have not even attempted to explain how any exception might apply here. (Id.) Plaintiffs state that extra-record evidence may be admissible "if necessary to fully explain the agency's decision," but do not explain how that exception should apply here. (Dkt. 145

at 13:11-17.) This Court should disregard Plaintiffs' unsupported and unarticulated assertions. (*Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988).)

Plaintiffs also contend 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." (Dkt. 145 at 13:25-14:2.) But, again, Plaintiffs do not explain what documents they are referring to, or why they would be necessary in this instance. In support, Plaintiffs cite a case that discussed extra-record evidence in the context of an Endangered Species Act claim, which employs a different standard for admitting extra-record evidence, and which said nothing whatsoever about sacred, cultural and historic issues. (*Western Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 497 (9th Cir. 2010).) Plaintiffs also cite a case where the court admitted certain post-decisional studies offered by the petitioners, because they could be "deemed a clarification or an explanation of the original information before the Agency." (Dkt. 145 at 14:2-6; *citing Ass'n. of Pacific Fisheries v. US EPA*, 615 F.2d 794, 811 (9th Cir. 1980).) But Plaintiffs are not offering anything resembling post-decisional studies here, nor have they even identified any information before the agency that could benefit from clarification. This Court should disregard these unsupported arguments as well. (*Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994).)

Plaintiffs argue that the declarations should be admitted because this case includes claims that the Federal Defendants "failed to act such that 'there is no administrative record for a federal court to review.'" (Dkt. 145 at 14:11-13.) But Plaintiffs cite no authority for the proposition that claims against one defendant support admission of extra-record evidence for use against a different defendant. Also, Plaintiffs ignore the fact that Caltrans's administrative record was not limited to designated final agency actions at any single point in time, but instead extended up to the point the record was lodged in July 2016, and included a supplemental record lodged in May 2017. (Dkt. 55, 106.) Plaintiffs have not even identified any documents that warrant inclusion; instead, they seek to admit declarations that consist largely of unsupported assertions of fact, assertions that are contradicted by the facts in the administrative record.

Plaintiffs have also failed to address the numerous evidentiary infirmities Caltrans

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

highlighted in its initial brief. (Dkt. 138 at 7-8.) That failure constitutes abandonment or concession of the contested issues. (*Jenkins v. County of Riverside*, 398 F.3d 1093, 1095, n.4 (9th Cir. 2005).)

Plaintiffs also claim the declarations should be admitted because Caltrans raised issues of standing and laches. (Dkt. 145 at 15:5.) But Caltrans did not make arguments regarding standing, other than in the limited context of interpreting and enforcing the MOU with FHWA, an argument that Plaintiffs have now abandoned anyway. (Dkt. 138 at 23:10.) Also, Plaintiffs submitted the initial declarations before Caltrans had made any standing or laches argument. (Dkt. 134-36, 138.) In any case, Plaintiffs do not demonstrate, in any way, how the declarations are necessary to supplement the administrative record on standing or laches, and the declarations themselves do not address or counter Caltrans's laches arguments. (Dkt. 134-36.) Finally, Plaintiffs cite no authority in support of their argument. (Dkt. 145 at 15:5-6.)

Plaintiffs now also seek to admit additional supplemental declarations on reply. (Dkt. 145-1, 145-14.) These declarations are improper for the same reasons as the initial declarations, as well as the additional reason that arguments not made in an opening brief are waived. (*Officers for Justice v. Civil Serv. Comm.*, 979 F.2d 721, 725-26 (9th Cir. 1992).)

III. LEGAL ARGUMENT

A. Plaintiffs have abandoned and conceded a number of issues by failing to respond.

Caltrans raised a number of arguments in its initial brief that Plaintiffs have failed to respond to; accordingly, Plaintiffs have conceded those arguments. (*Jenkins*, *supra*, 398 F.3d at 1095, n.4; *Stichting Pensioenfonds ABP v. Countrywide*, 802 F.Supp.2d 1125, 1132 (C.D. Cal. 2011) (failure to respond to an argument in a brief constitutes waiver or abandonment of the uncontested issue).)

Specifically, Plaintiffs have abandoned, and therefore no longer contest, the following arguments set forth in Caltrans's summary judgment brief (Dkt. 138):

- Plaintiffs have waived all of the arguments in their summary judgment motion by failing to support them with any citations to the record or applicable case law, so this Court should refuse to consider Plaintiffs' motion and dismiss the case. (Dkt. 138 at 8:21-11:2.)

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

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

- Many of Plaintiffs' arguments are barred by sovereign immunity and statute of limitations grounds, including: all challenges to compliance with Section 106 or any other laws "at the Final EIS/EIR stage," prior to the 2006 Project approval, "when Caltrans commenced ground-disturbing activities and commenced construction"; challenges to Caltrans's re-validation documents and MMPs; and any challenge to Caltrans's execution of the 2017 MOU. (Dkt. 138 at 11:3-22, 21:4-19, 24:2-25:12.)
- Plaintiffs fail to identify a final agency action, other than the 2006 Project approval, that is reviewable under the APA. (Dkt. 138 at 10:16, 11:15, 17:12-14, 18:12-17, 21:6-7.)
- No supplemental EIS was required. (Dkt. 138 at 19:2-21:3.)
- Challenges to Phase II of the Project are not ripe. (Dkt. 138 at 12:22-25.)
- Plaintiffs lack standing to enforce the 2012 MOU, any challenge to which is also moot because it expired of its own terms. (Dkt. 138 at 23:10-12, 23:18-24:1.)

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

1. Plaintiffs have abandoned most of their Section 106 claims.

As set forth in Caltrans' prior brief, Plaintiffs fail to state and support a justiciable claim for a violation of Section 106. (Dkt. 138 at 11:3-12:25, 14:24-15:17.) Plaintiffs do not address or attempt to remediate their deficient claims; indeed, they abandon most of their Section 106 arguments.[1]

2. Plaintiffs' new arguments regarding Caltrans's Standard Environmental Reference are baseless and should be disregarded.

Instead of attempting to remediate their deficient claims, Plaintiffs improperly seek to introduce an internal Caltrans guidance document, erroneously interpret that guidance, and then "ask only that this Court hold Caltrans to" Plaintiffs' interpretation of Caltrans's "policies and procedures as set forth in the Standard Environmental Reference (SER)." (Dkt. 145 at 7:12-14.) As explained above, this Court should not consider this extra-record evidence, but even if it does, Plaintiffs'

[1] Compare Dkt. 118-4 at 11:5-13:28 (arguing Caltrans violated Section 106 by not executing an agreement with Plaintiffs, not involving tribal monitors in the manner the Plaintiffs desire, not adequately consulting with Plaintiffs) with Dkt. 145 at 1:24-7:15 (arguing solely that Caltrans violated Section 106 by not adequately consulting with Plaintiffs).

unfounded and incorrect allegation that Caltrans did not comply with its policies does not state a valid claim, and any such claim would be barred by sovereign immunity. (*In re Jackson*, 184 F.3d 1046, 1048-49 (9th Cir. (1999); Cal. Sts. & Hwy Code § 820.1.)

Again, the relevant legal requirement for cultural resources discovered after project approval is found in Stipulation XV.B of the Statewide Section 106 Programmatic Agreements (Statewide PA). (See 36 CFR §800.14(b)(iii); CT AR 2138:17592-593.) Plaintiffs rely on several guidance documents and claim that "[t]hese documents provide a roadmap for this Court to determine whether Caltrans met its responsibilities under Section 106." (Dkt. 145 at 3:3-6.) There is simply no legal support for that argument, which contradicts the law establishing an approved programmatic agreement as the controlling authority. (36 CFR §800.14(b)(iii).)

Plaintiffs also ignore statements in these guidance documents that "[i]t is not intended that any standard of conduct or duty toward the public shall be created or imposed by this manual" (SER, Introduction, http://www.dot.ca.gov/ser/intro.htm [last visited Dec. 1, 2017]) and that "the Section 106 Programmatic Agreement . . . governs Caltrans cultural resources actions on federally-assisted state and local projects . . . ." (SER Vol. 2, Ch.1, pg. 1-1.)[2]

Additionally, the documents Plaintiffs cite are irrelevant. Chapter 3 and Exhibit 3.1 of Volume 2 of the SER provide guidance on consultation with Native American tribes during the identification, evaluation, and treatment of known historic properties prior to project approval, and is in relation to Stipulation V of the Statewide PA. Here, those procedures were completed by FHWA in 2005 and the project was approved in 2006. (CT AR 5:1929-49, 7:2021-22; Dkt. 133 at 2:20-24; Dkt. 99 at ¶ 17.) Any Section 106 issues that arise from discoveries after that stage fall under the post-review discovery provisions of Stipulation XV.B, with additional guidance related to post-review discoveries provided in sections 1.2.6.1, 2.4.4, 5.10.3, and Exhibit 5.12 of Volume 2 of the SER. (See also CT AR 1188:14890 [expressing ACHP's concurrence that Caltrans continue to follow Stipulation XV of the Statewide PA].) The documents Plaintiffs cite do not establish a legal

[2] Although Caltrans objects to the admission and consideration of the extra-record evidence presented by Plaintiffs, if the Court decides to consider it, then the Court should consider the entire SER, which is found online at http://www.dot.ca.gov/ser/ [last visited Dec. 4, 2017].)

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

duty beyond that found in Stipulation XV.B of the Statewide PA.

3. Caltrans fully complied with Section 106.

Plaintiffs claim Caltrans did not adequately consult regarding the Project, but they rely on gross misstatements of the record, conflate the distinction between Section 106 consultation and government-to-government consultation, and ignore the well-documented history of Caltrans's consultation and compliance with Section 106 and the Statewide PA. (Dkt. 145 at 5-7.) The record demonstrates Caltrans satisfied its Section 106 responsibilities, which were assumed from FHWA after project approval, by complying with the post-review discovery procedures in the Statewide PA.

For instance, Caltrans notified the necessary parties when potentially eligible historic properties were discovered and identified, allowed a reasonable opportunity for Plaintiffs to comment, and took any comments received into consideration. (See e.g. CT AR 4483:30399-401 [notifying Plaintiffs of a find, describing steps Caltrans took to analyze the find, providing Plaintiffs with summary of its determination]; CT AR 4547:30560-65 [summarizing consultation regarding post-review discovery].) Plaintiffs fail to cite any evidence in the record demonstrating how Caltrans failed to comply with its responsibilities under Stipulation XV.B of the Statewide PA.

The evidence from the record that Plaintiffs cite – for the first time in their reply brief – is mostly irrelevant to Stipulation XV.B. Indeed, Plaintiffs do not identify what event or action related to the cited evidence would trigger Stipulation XV.B, or how the evidence demonstrates a violation. They instead appear to advance a general complaint about consultation without acknowledging that Section 106 consultation was completed by FHWA prior to Project approval. But even if the standard consultation provisions did apply after Project approval, the evidence Plaintiffs cite – and grossly mischaracterize – does not show a violation of Section 106.[3]

For instance, Plaintiffs claim information was only provided to the Coyote Valley Tribe in response to a June 4, 2013 letter, (Dkt. 145 at 5:9-11) but they ignore the extensive outreach by

[3] Plaintiffs also misrepresent Caltrans' arguments. For example, Plaintiffs state that "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." (Dkt. 145 at 1:25-26.) But in fact, Caltrans explained that it "satisfied Section 106 by executing and ***complying*** with the Statewide PA." (Dkt. 138 at 15:25 [emphasis added].)

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

Caltrans to Plaintiffs and others from even the earliest stages of Project development. (E.g., CT AR 29:2325-92; 250:11519-21; 2058:17344-48; 2062:17362-65; 5674:43019.) The record shows Caltrans made good-faith efforts to continue consultation with those parties that expressed interest in the project, checked-in with other potentially interested parties to provide them with the opportunity to express their interest (e.g., CT AR 277:11614), and quickly worked to include Plaintiffs once they expressed interest in the Project. (See e.g. CT AR 316:11694-95; 317:11696.)

Similarly, Plaintiffs claim the Coyote Valley Tribe had requested maps with identified archeological site locales since 1998-1999, but only received them in April 2014. (Dkt. 145 at 5:15-21.) The record, though, shows that representatives from Coyote Valley were aware of the Project and given information and opportunities to provide input or request additional information, but it does not indicate that Coyote Valley requested maps then, as Plaintiffs now suggest. Also, Caltrans provided copies of the cultural resource documents that were prepared for the Project between 1992 and 2013 in June 2013, nearly a year before that now alleged by Plaintiffs. (CT AR 317:11696.) The record demonstrates multiple efforts to consult with Plaintiffs dating back to 1987 and 1998 respectively. (CT AR 29:2325-92.)

Plaintiffs also reference letters sent by Caltrans to various tribes dated December 22, 2008. (Dkt. 145 at 6:6-18; see also e.g. CT AR 277:11614 [December 22, 2008 letter sent to Coyote Valley Tribe].) In fact, these letters demonstrate: a lengthy history of consultation with the tribes dating back to the beginning of the Project (CT AR 277:11614); periodic notification to provide information and allow the tribes to express interest or concerns and request more information; the fact that Sherwood Valley Tribe was not the exclusive Native American consulting party (CT AR 29:2328-92 [consultation with Plaintiffs dating back to 1987 and 1998]), CT AR 277:11614); and, regular opportunities for the tribes to request "additional information regarding the proposed project" or to express interest in the Project that could then facilitate additional discussions, if necessary (*Id.*). Contrary to Plaintiffs assertions, these letters plainly did not avoid consultation or indicate it would be exclusively conducted with the Sherwood Valley Tribe.

In sum, Plaintiffs still make no effort to demonstrate how Caltrans failed to satisfy the

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

procedures of Stipulation XV.B, which Caltrans uses to satisfy its Section 106 responsibilities. Instead of articulating and supporting a valid claim, Plaintiffs merely renew their dissatisfaction with Caltrans's actions. Accordingly, summary judgment should be granted for Caltrans.

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

Plaintiffs continue to allege, without any support, that Caltrans has a legal obligation to employ tribal monitors. (Dkt. 145 at 7:16-15:8.) As explained in Caltrans' previous brief, there is no such legal obligation; moreover, the record demonstrates that Caltrans has used tribal monitors extensively nonetheless, and has offered to provide the tribes with additional access to Project sites. (Dkt. 138 at 21:22-24, 22:3-16.)

In their reply brief, Plaintiffs repeat the same arguments, but again fail to cite to the administrative record, or any applicable legal authority, in support of their claim. (*United States v. Graf*, 610 F.3d 1148, 1166 (9th Cir. 2010) [arguments not supported by citations to the record or to case authority are generally deemed waived]; *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994) [rejecting assertions unsupported by legal authority].) Instead, they present another general airing of grievances, untethered to any law and contrary to the record.

Rather than cite any legal authority, Plaintiffs claim they "only seek to hold Caltrans to its own policies and procedures."[4] (Dkt. 145 at 7:17-18.) Yet, while Caltrans has followed its policies and procedures for tribal monitors, it does not have any enforceable legal obligation to use tribal monitors in the first place.[5] Plaintiffs' claim should be rejected and summary judgment granted in favor of Caltrans. (*Greenwood*, *supra*, 28 F.3d at 977.)

Additionally, the State's sovereign immunity bars any attempt to enforce Caltrans's own policies and procedures. The State has provided a limited waiver of sovereign immunity "in regard to the compliance, discharge, or enforcement of the responsibilities assumed by [Caltrans] pursuant

[4] Plaintiffs again improperly seek to admit extra-record evidence through declarations and exhibits, without any justification. (Dkt. 145 at 7:17-18.) This Court should strike the proffered evidence and declarations.

[5] Even the guidance Plaintiffs cite preserves Caltrans's discretionary authority to determine when, where, and how tribal monitors will be used. (Dkt. 145 at 8:18-23 [need for monitoring determined by Caltrans during consultation], 9:19-21 [monitor participates in manner agreed upon by Caltrans].)

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

to Section 326 of, and subsection (a) of Section 327 of, Title 23 of the United States Code." (Cal. Sts. & Hwy Code § 820.1; *In re Jackson*, *supra,* 184 F.3d at 1048-49.) Because Plaintiffs cannot establish a legal requirement that federal agencies use tribal monitors, it cannot be a responsibility that Caltrans assumed pursuant to 23 U.S.C. section 327, and the limited waiver of the State's sovereign immunity cannot apply.

Moreover, the enforcement of Caltrans's policies and procedures does not present a federal question under 28 U.S.C. § 1331, because it does not arise under the constitution or laws of the United States, and it would clearly fall under the agency discretion exception to the Administrative Procedures Act (APA). (5 U.S.C. § 702(a)(2) [precluding judicial review of agency decisions committed to agency discretion].) Therefore, this Court does not have subject matter jurisdiction over this purported claim either.

Even if Plaintiffs could overcome these numerous hurdles, the cited guidance itself does not even support their claims, and Plaintiffs' arguments rest on empty assertions and mischaracterizations of the record. For instance, Plaintiffs complain that monitors "are not present at all ground-disturbing activities and all archeological investigations," (Dkt. 145 at 11:1-2), but that is not the policy. Instead, Caltrans's policy is that "[t]he 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." (SER Vol. 2, Ch. 3, p. 3:10, 3:25; Dkt. 145 at 9:23-28.) Plaintiffs do not cite to the record or provide any admissible evidence that identifies any archeological excavations or construction in areas, as agreed upon, where Caltrans did not use tribal monitoring in accordance with its policy.

Plaintiffs allege that they were not told about ground-disturbing activities (Dkt. 145 11:3-5), but they do not cite to the record or provide any admissible evidence that identifies what activities they were never told about. And, even if Plaintiffs identified a specific instance where Caltrans moved forward with some activity without notifying tribal monitors, if it was not an archeological excavation or construction in a potentially sensitive area, then the policy would not apply.

Although Plaintiffs acknowledge that Caltrans is utilizing three tribal monitors (Dkt. 145 at

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

11:14), they argue that a proper number of monitors have not been used. (*Id*. at 11:5-10.) The guidance, however, does not mandate a specific number of monitors; instead, it recognizes that the decision of who and how many monitors is a complex issue that "can only be resolved through consultation and professional judgment by the Project Archaeologist. Although addressing every circumstance that could arise is not feasible, Caltrans' policy is that the number of monitors employed on a project should be no more than necessary to gain a firsthand understanding of the site or of construction in the area of the site."

Plaintiffs assert that "tribal monitors must be provided free and full access to all work sites" (Dkt. 145 at 11:12-13), and must be permitted to freely check the totality of the Area of Potential Impact and mitigation lands (*Id*. at 11:27-12:2), but there is nothing in the guidance suggesting monitors are to have free and full access to the Project site. Instead, the guidance gives the Project archeologist discretion to determine when and where monitoring is needed. Therefore, even if Plaintiffs could establish that Caltrans restricted access to the Project, that would not be inconsistent with the guidance. In any case, Caltrans has been willing to arrange for additional tribal visits or unpaid monitoring, when monitoring is not justified. (CT AR 263:11533, 263:11538, 397:12142, 743:13590; CT Supp. AR 108:2265 [declining to authorize additional paid time for monitoring that is not justified, but allowing monitor to observe additional activities on his own time]).

Lastly, Plaintiffs allege that Caltrans has not provided monitors with current and accurate maps, action plans, and construction plans and has prevented monitors from attending construction meetings. (Dkt. 145 at 12:3-16.) Again, they provide no evidence of this and their argument should be considered waived. (*United States v. Graf, supra*, 610 F.3d at 1166.) Additionally, the administrative record contradicts their allegations. (CT AR 3040:23797 [providing tribal monitor with schedule of work], 3046:23806, 3054:23823 [same]; CT Supp. AR 82:2148 [expressing appreciation for Caltrans' timely and consistent communications with Tribal monitors].)

This Court does not have jurisdiction over Plaintiffs claim against Caltrans related to the use of tribal monitors, the claim is unsupported by fact or law, is waived, and is barred by the State's sovereign immunity. This Court should deny the claim and grant summary judgment for Caltrans.

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

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

D. Plaintiffs' arguments regarding laches and mootness are contradicted by the record.

In claiming that laches should not apply to bar their claims, Plaintiffs grossly misstate or ignore the facts and record. (Dkt. 145 at 16:19-18:23.) Plaintiffs make the remarkable assertion that "it was not until 2008 that Plaintiffs… were provided information about the Project." (Dkt. 145 at 16:21-22.) The record, in fact, shows precisely the opposite. For example:

- Priscilla Hunter, a member of the Coyote Valley Band of Pomo (Dkt. 118-6 ¶ 1), was provided information about the Project as early as 1987, personally attended public information meetings as early as 1988, and was part of a Technical Advisory Group as far back as 1992. (CT AR 2058:17344-48; 2062:17362-65; 5674:43019.)
- In 1989, Caltrans sent Coyote Valley and other tribes a notice of preparation of the EIS. (CT AR 250:11519.)
- Meetings were held with tribal representatives, including Plaintiff tribes, in 1990 as part of the Natural Resource Technical Advisory Group. (CT AR 250:11519-20.)
- When environmental studies resumed in 1998, Caltrans provided letters informing Plaintiffs, and others, that Caltrans was "resuming the environmental studies for the Project 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." (CT AR 250:11520.)
- In 2000, Caltrans sent letters to Plaintiffs, and others, "providing details of cultural resource surveys and the results (i.e., 25 archaeological sites identified)," and "requesting information on any of these sites or expression of any concerns regarding the project and cultural resources." (CT AR 250:11521.)

In the face of that well-documented history of outreach and involvement, it is extraordinary for Plaintiffs to represent to this Court, in both pleadings and signed declarations, that they were not provided information about the Project until 2008.

Similarly, Plaintiffs assert that it was not until June 2013 that Plaintiffs were provided with

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

"any information about the cultural or historical aspects of the Project." (Dkt. 145 at 16:21-23.) As documented above, the record belies that. Plaintiffs were provided with such information from the earliest stage of the Project and through the course of Project development, and simply chose – for whatever reason, and unlike other tribes – to ignore this process that they now contend was inadequate. (*Apache Survival Coalition v. U.S.*, 21 F.3d 895, 911-14 (9th Cir. 1994).)

Plaintiffs also claim that no maps were provided until 2014 (Dkt. 145 at 17:9-11), yet Caltrans provided them with such maps and other cultural resources documents related to the Project in 2013, immediately after they had been requested, to say nothing of the wealth of maps and cultural resource materials provided and made publicly available long before that. (CT AR 317:11696, 318:11698, 312:11681.)

Lastly, Plaintiffs claim it was not until 2014 that Caltrans engaged in "government-to-government consultation." (Dkt. 145 at 17:3-5.) Plaintiffs again ignore the distinction between Section 106 consultation, a duty that Caltrans has pursuant to its MOU with FHWA, and government-to-government consultation, a duty that Caltrans does not have because FHWA retains those obligations. (Dkt. 138 at 17:8-18:17.)

With respect to mootness, Plaintiffs make similarly inaccurate statements about the status of the Project. They claim that "substantial construction," "substantial ongoing work at Ryan Creek," and "ground disturbing activity at Niesen 1" remain. (Dkt. 145 at 1:5-11.) On the contrary, the record reflects that construction at Ryan Creek – which is a separate mitigation project mandated as a condition of permits issued for the Willits Bypass Project – was slated to be completed at the end of 2017 (CT Supp. AR 10:1038-39), and is now in fact complete. In addition, the remaining wetland and riparian mitigation work consists solely of planting and weed abatement. (Id.; CT Supp. AR 66:1954-56, 28:1219 – 78:2067.)

E. Plaintiffs' newly added requests for relief exceed the Court's jurisdiction and have no support in fact or law.

Plaintiffs now propose, for the first time, an array of new remedies, such as installing Plaintiffs as co-managers of the 2,000-acre mitigation parcels for the next 10 years and imposing substantive tribal monitoring requirements. (Dkt. 145 at 18:25-27 [improperly incorporating by

reference arguments in Dkt. 144].) These remedies have no basis in the law. If a court finds a statutory violation, the remedy is to vindicate what Congress has directed by securing compliance with the statute; appropriate relief "does not require courts to engage in operational decision-making beyond their competence." (*Center for Biological Diversity v. Mattis*, 868 F.3d 803, 828 (9th Cir. 2017) [citation omitted].) Making Plaintiffs co-managers of the mitigation parcels would go far beyond the procedural requirements of Section 106 and California's limited waiver of sovereign immunity, to say nothing of undermining decades of planning and coordination on permits and approvals from numerous regulatory agencies. Plaintiffs have cited no legal support for this far-reaching remedy.

Moreover, Plaintiffs' request for an additional record and briefing is unfounded, because if the court cannot resolve Plaintiffs' claims on the record before it, the appropriate remedy is remand, not trial de novo. (See, e.g., *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014).)

In any case, this Court does not need to consider Plaintiffs' proposed remedies, because summary judgment should be granted in favor of Caltrans.

IV. CONCLUSION

The record in this case demonstrates that Caltrans has fully complied with Section 106 and all other applicable laws in connection with the Willits Bypass Project, construction of which ended over a year ago. Plaintiffs have failed to present any coherent claims to the contrary. This Court should enter judgment in Caltrans's favor on all grounds.

DATED: December 8, 2017

JEANNE SCHERER
G. MICHAEL HARRINGTON
LUCILLE Y. BACA
DEREK S. VAN HOFTEN
STACY J. LAU
BRANDON WALKER

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

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