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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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WINNEMEM WINTU TRIBE, in their
tribal and individual
capacities; CALEEN SISK
FRANCO; MARK FRANCO, et al.

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
THE INTERIOR; BUREAU OF
RECLAMATION; BUREAU OF INDIAN
AFFAIRS; BUREAU OF LAND
MANAGEMENT; UNITED STATES
FOREST SERVICE; UNITED STATES
DEPARTMENT OF AGRICULTURE;
and, in their Individual
Capacities, KRISTY COTTINI and
J. SHARON HEYWOOD,

Defendants.

NO. CIV. 2:09-cv-01072-FCD EFB

MEMORANDUM AND ORDER

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This matter is before the court on motions to dismiss
plaintiffs' first amended complaint by defendants the United
States Department of the Interior ("DOI"), Bureau of Reclamation
("BOR"), Bureau of Indian Affairs ("BIA"), Bureau of Land

1 Management ("BLM"), United States Forest Service ("USFS"), and
2 United States Department of Agriculture ("USDA") (collectively,
3 "the agency defendants") and District Ranger for the Shasta-
4 Trinity National Recreation Area, Kristy Cottini, and Forest
5 Supervisor for Shasta-Trinity National Forest, J. Sharon Heywood
6 (collectively, "the individual defendants"). Defendants move to
7 dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) and
8 12(b)(6). The Winnemem Wintu Tribe, Caleen Sisk Franco, and Mark
9 Franco ("plaintiffs") oppose defendants' motion. For the reasons
10 set forth below,¹ defendants' motion is GRANTED in part and
11 DENIED in part.

12 BACKGROUND

13 Plaintiffs filed their initial complaint on April 19, 2009,
14 asserting various tort claims under the Federal Tort Claims Act
15 ("FTCA") against the agency defendants and against Secretary of
16 the Interior Kenneth Salazar and Secretary of Agriculture Tom
17 Vilsack. (Compl. ¶¶ 2, 43-93.) Plaintiffs also
18 asserted a claim for mandamus and injunctive relief pursuant to
19 28 U.S.C. § 1361, requesting an order directing the defendants to
20 investigate and report on damage allegedly caused to sites of
21 cultural importance to the Winnemem Wintu Tribe (the "Winnemem")
22 along the McCloud River. (Id. ¶¶ 97-98, 101.) Finally,
23 plaintiffs sought a declaratory judgment pursuant to 28 U.S.C. §§
24 2201-02 that various actions by the defendants constituted
25 violations of federal, state, and common law. (Id. ¶¶ 94-95.)

26
27 ¹ Because oral argument will not be of material
28 assistance, the court orders this matter submitted on the briefs.
E.D. Cal. L.R. 230(g).

1 On June 29, 2009, the defendants filed a motion to dismiss
2 pursuant to Federal Rule of Civil Procedure 12(b)(1) and
3 12(b)(6). The court issued a Memorandum and Order on September
4 14, 2009, granting in part and denying in part the defendants'
5 motion (the "Order").

6 In an amended complaint, filed October 14, 2009, plaintiffs
7 reorganized their allegations to assert claims against the agency
8 defendants pursuant to the Administrative Procedures Act ("APA"),
9 5 U.S.C. § 551 *et seq.*, for alleged violations of various federal
10 statutes and the United States Constitution. (Amend. Compl. ¶¶
11 75-146.) Plaintiffs also bring a claim pursuant to Bivens v. Six
12 Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S.
13 388 (1971), against defendants Cottini and Heywood in their
14 individual capacities, seeking monetary damages for alleged
15 violations of plaintiffs' First Amendment and Fifth Amendment
16 rights. (Id. ¶¶ 147-53.)

17 Plaintiffs allege that the Winnemem are a California Native
18 Tribe recognized by the California Native American Heritage
19 Commission and identify Caleen Sisk-Franco as the current tribal
20 leader of the Winnemem. (Id. ¶¶ 43, 47.) However, the Winnemem
21 are not a federally recognized Indian tribe. (Id. ¶ 51.)
22 Plaintiffs allege that the U.S. government made an error in 1978
23 that resulted in the Winnemem's exclusion from the list of Indian
24 tribes eligible to receive federal benefits. (Id.) Plaintiffs
25 allege that the Federal Court of Claims had previously recognized
26 the Winnemem's federal status in 1928, 1954, and 1968. (Id. ¶
27 42, 45). Plaintiffs also point to federal permits allegedly
28 issued to Caleen Sisk-Franco and the Winnemem to possess eagle

1 feathers and parts as further evidence of previous federal tribal
2 recognition. (Id. ¶¶ 47-48.)

3 In their amended complaint, plaintiffs seek declaratory and
4 injunctive relief for alleged harm resulting from defendants'
5 failure to acknowledge the Winnemem as a federally recognized
6 Indian tribe and for alleged harm to various areas that the
7 Winnemem use as cultural and religious sites. (Amend. Compl. ¶¶
8 154-68.)

9 **A. Nosoni Creek**

10 Plaintiffs allege that the USFS engaged in various actions
11 causing damage to the Nosoni Creek area, a site of cultural
12 importance to the Winnemem, without regard to plaintiffs'
13 protests and in violation of a previous project agreement between
14 the Winnemem and the USFS. (Id. ¶¶ 53-55.) Specifically,
15 plaintiffs allege that in 2001, the USFS cut down three ancient
16 "grandfather" grapevines that the Winnemem had used for medicinal
17 purposes for more than 100 years. (Id. ¶ 53.) Plaintiffs
18 further allege that the USFS dumped dirt on a "sacred site"
19 without archeological monitoring or guidance and rendered
20 inaccessible an area for ceremonial storytelling by bulldozing
21 and filling in a vegetated area. (Id. ¶¶ 54-55.) In addition,
22 plaintiffs allege that the USFS allowed unmonitored construction
23 and industrial activities that "create biological hazards and
24 disturb natural ecosystems" at the site. (Id. ¶ 77.) Finally,
25 plaintiffs allege that the USFS blocked access to the site for
26 religious and ceremonial activities. (Id.)

27 Plaintiffs assert that these actions violate several federal
28 statutes: the Archaeological Resource Protection Act ("ARPA"), 16

1 U.S.C. §§ 470ee; the National Historic Preservation Act ("NHPA"),
2 16 U.S.C. § 470f; the American Indian Religious Freedom Act
3 ("AIRFA"), 42 U.S.C. § 1996; and the Religious Freedom and
4 Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1(b) (Id. ¶¶ 79,
5 131.)

6 **B. Dekkas Site**

7 In the Dekkas area, plaintiffs allege that in 2005 the USFS
8 ignored an agreement with the Winnemem and cut substantial
9 quantities of old-growth manzanita trees that for centuries had
10 been the only source of wood used for religious and cultural
11 celebrations. (Id. ¶ 61.) Plaintiffs allege that the cutting
12 took place in violation of an agreement that an archaeologist and
13 tribal representatives be present. (Id. ¶ 62.)

14 Plaintiffs further allege that in 2006, the USFS facilitated
15 entry by campers, hikers, and others into the Dekkas site by
16 removing a lock from a gate. (Id. ¶ 60.) Plaintiffs allege that
17 also in 2006, the USFS ordered the Winnemem to remove all their
18 items from the Dekkas site, including rocks of historical and
19 cultural significance to the Winnemem. (Id. ¶ 63.)

20 Finally, plaintiffs allege that in 2007, the USFS and/or
21 defendant Cottini forbade plaintiffs from using "Cultural
22 Property" at Dekkas, including "an ancient fire pit with rocks
23 that have been used by the Winnemem for hundreds of years," by
24 improperly revoking a special use permit and refusing to issue
25 new permits without cause (Id. ¶ 59.) Plaintiffs claim that
26 defendants' actions in connection with the Dekkas area interfered
27 with plaintiffs' use and enjoyment of a site that has religious
28 significance for the Winnemem. (Id. ¶¶ 59-63.)

1 Plaintiffs assert that defendants' actions in connection
2 with the Dekkas area violate the ARPA, NHPA, AIRFA, RFRA, and the
3 National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321.
4 (Id. ¶¶ 83, 131.)

5 **C. Coonrod Cultural Site**

6 Plaintiffs allege that the USFS allowed campers, hikers, and
7 hunters to intrude into the Coonrod Cultural Site, an area of
8 ceremonial importance to the Winnemem. (Id. ¶ 64.) Plaintiffs
9 further allege that the USFS failed to prevent cattle from
10 trampling over a fire pit of religious significance to the
11 Winnemem, despite a 2005 request by the Winnemem that the USFS
12 replace or rebuild a fence around the site. (Id.) In addition,
13 plaintiffs allege that defendants permitted recreational vehicles
14 to drive into the site. (Id. ¶ 89.) Plaintiffs also allege that
15 defendants refused to take steps to preserve cultural artifacts
16 and that defendants arbitrarily denied requests to expand the
17 boundaries of the Coonrod site to encompass newly discovered
18 cultural resources. (Id.)

19 Plaintiffs assert that these alleged actions and omissions
20 violate the ARPA, NHPA, AIRFA, and RFRA. (Id. ¶¶ 89, 131.)

21 **D. Gilman Road**

22 Plaintiffs allege that the USFS violated an agreement
23 regarding Gilman Road by causing medicinal plants to be cut and
24 sprayed with herbicides. (Id. ¶ 65.) Plaintiffs further allege
25 that the USFS failed to disclose to the Winnemem projects that
26 damaged cultural and religious sites or to take all possible
27 steps to mitigate the damage. (Id. ¶ 95.)

28 /////

1 Plaintiffs assert that these alleged actions and omissions
2 violate the ARPA, NHPA, and NEPA. (Id.)

3 **E. Buck Saddle Prayer Site**

4 Plaintiffs allege that the USFS built a recreational bike
5 trail through the Buck Saddle Prayer Site without disclosing the
6 project in advance or taking sufficient measures to protect the
7 site. (Id. ¶ 101.) Defendants further allege that the USFS
8 breached a Memorandum of Understanding by reorienting rocks, (Id.
9 ¶ 66), and that the USFS converted a prayer rock sacred to the
10 Winnemem into a ramp for dirt bikes. (Id. ¶ 101.) In addition,
11 plaintiffs assert that defendants have "enabl[ed] ongoing
12 degradation" of ecosystems, natural resources, and archaeological
13 sites, and permitted general access to the area without taking
14 sufficient measures to protect artifacts. (Id. ¶ 101.)

15 Plaintiffs assert that these alleged actions and omissions
16 violate the ARPA, NHPA, NEPA, AIRFA, and RFRA. (Id. ¶¶ 101,
17 131.)

18 **F. Panther Meadow**

19 Plaintiffs allege that the USFS allowed damage to Panther
20 Meadow to occur by permitting visitors to scatter human cremation
21 remains and to otherwise damage a site of religious and cultural
22 importance to the Winnemem and by failing to close Panther Meadow
23 or to regulate public access as necessary to prevent damage to
24 the site's resources. (Id. ¶ 67, 107.)

25 Plaintiffs assert that the these alleged actions and
26 omissions violate the ARPA, NHPA, and NEPA. (Id. ¶ 107.)

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1 **G. Shasta Reservoir Indian Cemetery**

2 Plaintiffs allege that defendants permitted damage to occur
3 to the Shasta Reservoir Indian Cemetery and interfered with
4 plaintiffs' use of the cemetery, including the right to use the
5 cemetery for burials. (Id. ¶ 113.) Plaintiffs further allege
6 that the DOI, BLM, and BOR have not responded to Freedom of
7 Information Act requests for the title and deed and trust
8 documents for the cemetery. (Id. ¶ 69.)

9 Plaintiffs assert that these alleged actions and omissions
10 violate the ARPA, NHPA, and NEPA. (Id. ¶ 113.)

11 **H. Rocky Ridge Village Site**

12 Plaintiffs allege that defendants have permitted campers to
13 park recreational vehicles at the Rocky Ridge Village Site in
14 ceremonial areas that the Winnemem use for religious worship.
15 (Id. ¶ 119.) Plaintiffs further allege that the USFS intends to
16 permit the construction of a parking lot on a village and burial
17 site, despite objections by the Winnemem, (Id. ¶ 71.), and that
18 defendants have failed to engage in pre-project consultation in
19 connection with the planned parking lot. (Id. ¶¶ 119-20.)

20 Plaintiffs assert that these alleged actions and omissions
21 violate the NHPA, NEPA, and the Native American Grave Protection
22 and Repatriation Act ("NAGPRA"), 25 U.S.C. §§ 3002, 3013 (Id. ¶¶
23 119, 121.)

24 **I. Shasta Dam**

25 Finally, plaintiffs allege that defendants are evaluating
26 proposals to raise the level of Shasta Dam, and assert that this
27 project would cause the inundation and destruction of numerous
28 burial, cultural, and religious sites of the Winnemem. (Id. ¶¶

1 72, 125.) Plaintiffs allege that defendants have failed to
2 consult with the Winnemem or "to consider, assess and mitigate
3 potential project impacts." (Id. ¶¶ 125-26.)

4 Plaintiffs assert that these alleged actions and omissions
5 violate the NHPA, NEPA, and NAGPRA. (Id. ¶ 125.)

6 STANDARDS

7 A. Lack Of Subject Matter Jurisdiction

8 "Federal courts are courts of limited jurisdiction."
9 Kokkonen v. Guardian Life Ins. Co. of America, 511 U.S. 375, 377
10 (1994). Lack of subject matter jurisdiction may be asserted by
11 either party or by a court, *sua sponte*, at any time during the
12 course of an action. Fed. R. Civ. P. 12(h)(2)-(3). Once
13 challenged, the burden of establishing a federal court's
14 jurisdiction rests on the party asserting the jurisdiction. See
15 Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co., 907 F.2d
16 911, 912 (9th Cir. 1990).

17 There are two forms of 12(b)(1) attacks on subject matter
18 jurisdiction: facial and factual attacks. See Thornhill Publ'g
19 Co. v. General Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir.
20 1979). In a facial attack, a court construes jurisdictional
21 allegations liberally and considers uncontroverted factual
22 allegations to be true. See Robinson v. Overseas Military Sales
23 Corp., 21 F.3d 502, 507 (2d Cir. 1994); Oaxaca v. Roscoe, 641
24 F.2d 386, 391 (5th Cir. 1981). However, in an action such as
25 this, where the defendant refers to matters outside the complaint
26 to challenge the plaintiff's assertion of subject matter
27 jurisdiction, the 12(b)(1) motion is a factual attack. See Safe
28 Air v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). In a factual

1 attack, a district court may review affidavits or evidence
2 relating to the jurisdictional issue and need not presume the
3 truthfulness of the plaintiff's allegations. Id. The burden
4 then falls upon the party opposing the motion to present
5 affidavits or other evidence to establish subject matter
6 jurisdiction. Id.

7 **B. Failure To State A Claim**

8 Under Federal Rule of Civil Procedure 8(a), a pleading must
9 contain "a short and plain statement of the claim showing that
10 the pleader is entitled to relief." See Ashcroft v. Iqbal, 129
11 S. Ct. 1937, 1949 (2009). Under notice pleading in federal
12 court, the complaint must "give the defendant fair notice of what
13 the claim is and the grounds upon which it rests." Bell Atlantic
14 v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations
15 omitted). "This simplified notice pleading standard relies on
16 liberal discovery rules and summary judgment motions to define
17 disputed facts and issues and to dispose of unmeritorious
18 claims." Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002).

19 On a motion to dismiss, the factual allegations of the
20 complaint must be accepted as true. Cruz v. Beto, 405 U.S. 319,
21 322 (1972). The court is bound to give the plaintiff the benefit
22 of every reasonable inference to be drawn from the "well-pleaded"
23 allegations of the complaint. Retail Clerks Int'l Ass'n v.
24 Schermerhorn, 373 U.S. 746, 753 n.6 (1963). A plaintiff need not
25 allege "'specific facts' beyond those necessary to state his
26 claim and the grounds showing entitlement to relief." Twombly,
27 550 U.S. at 570. "A claim has facial plausibility when the
28 plaintiff pleads factual content that allows the court to draw

1 the reasonable inference that the defendant is liable for the
2 misconduct alleged." Iqbal, 129 S. Ct. at 1949.

3 Nevertheless, the court "need not assume the truth of legal
4 conclusions cast in the form of factual allegations." United
5 States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th
6 Cir. 1986). While Rule 8(a) does not require detailed factual
7 allegations, "it demands more than an unadorned, the defendant-
8 unlawfully-harmed-me accusation." Iqbal, 129 S. Ct. at 1949. A
9 pleading is insufficient if it offers mere "labels and

10 conclusions" or "a formulaic recitation of the elements of a
11 cause of action." Twombly, 550 U.S. at 555; Iqbal, 129 S. Ct. at
12 1950 ("Threadbare recitals of the elements of a cause of action,
13 supported by mere conclusory statements, do not suffice.").

14 Moreover, it is inappropriate to assume that the plaintiff "can
15 prove facts which it has not alleged or that the defendants have
16 violated the . . . laws in ways that have not been alleged."

17 Associated Gen. Contractors of Cal., Inc. v. Cal. State Council
18 of Carpenters, 459 U.S. 519, 526 (1983).

19 In ruling upon a motion to dismiss, the court may consider
20 only the complaint, any exhibits thereto, and matters which may
21 be judicially noticed pursuant to Federal Rule of Evidence 201.

22 See Mir v. Little Co. of Mary Hospital, 844 F.2d 646, 649 (9th
23 Cir. 1988); Isuzu Motors Ltd. v. Consumers Union of United
24 States, Inc., 12 F. Supp. 2d 1035, 1042 (C.D. Cal. 1998). Rule
25 201 permits a court to take judicial notice of an adjudicative
26 fact "not subject to reasonable dispute" because the fact is
27 either "(1) generally known within the territorial jurisdiction
28 of the trial court or (2) capable of accurate and ready

1 determination by resort to sources whose accuracy cannot
2 reasonably be questioned." Fed. R. Evid. 201(b). The court can
3 take judicial notice of matters of public record, such as
4 pleadings in another action and records and reports of
5 administrative bodies. See Emrich v. Touche Ross & Co., 846 F.2d
6 1190, 1198 (9th Cir. 1988).

7 Ultimately, the court may not dismiss a complaint in which
8 the plaintiff has alleged "enough facts to state a claim to
9 relief that is plausible on its face." Iqbal, 129 S. Ct. at 1949
10 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 570
11 (2007)). Only where a plaintiff has failed to "nudge [his or
12 her] claims across the line from conceivable to plausible," is
13 the complaint properly dismissed. Id. at 1952. While the
14 plausibility requirement is not akin to a probability
15 requirement, it demands more than "a sheer possibility that a
16 defendant has acted unlawfully." Id. at 1949. This plausibility
17 inquiry is "a context-specific task that requires the reviewing
18 court to draw on its judicial experience and common sense." Id.
19 at 1950.

20 **C. Leave to Amend**

21 Pursuant to Rule 15(a), "leave [to amend] is to be freely
22 given when justice so requires." "[L]eave to amend should be
23 granted unless amendment would cause prejudice to the opposing
24 party, is sought in bad faith, is futile, or creates undue
25 delay." Martinez v. Newport Beach, 125 F.3d 777, 785 (9th Cir.
26 1997).

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ANALYSIS

1
2 The agency defendants move to dismiss plaintiffs' first
3 through twelfth claims on the grounds that: (1) the court does
4 not have subject matter jurisdiction to hear plaintiffs'
5 complaint; (2) plaintiffs lack Article III standing; and (3)
6 plaintiffs fail to state a claim upon which relief can be
7 granted. (Defs.' Mem. Supp. Mot. Dismiss Amend. Compl. ("Agency
8 Defs.' Mem."), filed Dec. 11, 2009, at 1-2.) Defendants Cottini
9 and Heywood move to dismiss plaintiffs' thirteenth claim for
10 failure to state a claim upon which relief can be granted.
11 (Cottini and Heywood's Mem. Supp. Mot. Dismiss Amend. Compl.
12 ("Individual Defs.' Mem."), filed Mar. 26, 2010, at 1-2.)

A. Non-justiciable Political Question

13
14 Plaintiffs' eleventh and twelfth claims allege that
15 defendants violate the Due Process Clause of the Fifth Amendment
16 by refusing to acknowledge the Winnemem as a previously federally
17 recognized Indian tribe. (Amend. Compl. ¶¶ 135-46.) Plaintiffs
18 assert that the Winnemem were once a federally recognized tribe
19 but no longer receive such acknowledgment as a result of a
20 bureaucratic error. (Id. ¶¶ 42, 49-51.) Plaintiffs argue that
21 once "the government has treated the Winnemem as federally
22 recognized for some purposes, . . . that status must exist for
23 all purposes." (Id. ¶ 47.) Plaintiffs claim that defendants'
24 refusal to acknowledge the Winnemem as a previously-recognized
25 tribe deprives plaintiffs of substantive rights, protections, and
26 assistance that flow from federal recognition status, in
27 violation of the Due Process Clause of the Fifth Amendment. (Id.
28 ¶ 137.) In addition, plaintiffs allege that other, similarly-

1 situated Indian tribes received federal acknowledgment outside
2 the regular administrative recognition process, and that
3 defendants' refusal to provide such treatment for the Winnemem
4 denies plaintiffs equal protection of the laws, in violation of
5 the Due Process Clause of the Fifth Amendment. (Id. ¶ 141-44.)
6 In their prayer for relief, plaintiffs, *inter alia*, seek a
7 declaration that the Winnemem have been federally recognized as a
8 tribe and that Congress never terminated that status. (Id. ¶
9 161.)

10 Defendants argue that federal recognition of Indian tribe
11 status is a non-justiciable political question and thus, that the
12 court is precluded from adjudicating the issue of whether or not
13 the Winnemem are entitled to federal acknowledgment.² (Agency
14 Defs.' Mem. at 5-6.)

15 "Questions, in their nature political, or which are, by the
16 constitution and laws, submitted to the executive, can never be
17 made in this court." Marbury v. Madison, 5 U.S. (1 Cranch) 137,
18 170 (1803). The Supreme Court has articulated criteria for
19 determining when a case involves a non-justiciable political
20 question. Baker v. Carr, 369 U.S. 186 (1962). Specifically, the
21 Court has explained that "[p]rominent on the surface of any case
22 held to involve a political question" may be found "a textually
23 demonstrable constitutional commitment of the issue to a
24 coordinate political department." Id. at 217.

25
26 ² Defendants also argue that plaintiffs should be
27 judicially estopped from asserting that the Winnemem were
28 previously a federally recognized tribe. (Agency Defs.' Mem. at
4-5.) Because the court finds federal acknowledgment to be a
non-justiciable political question, the court need not reach
defendants' judicial estoppel argument.

1 Article I of the U.S. Constitution provides that Congress
2 shall have the power "[t]o regulate Commerce . . . with the
3 Indian Tribes." U.S. Const., Art. I, § 8, cl. 3. The Supreme
4 Court has explained that "in respect of distinctly Indian
5 communities the questions whether, to what extent, and for what
6 time they shall be recognized and dealt with as dependent tribes
7 requiring the guardianship and protection of the United States
8 are to be determined by Congress, and not by the courts." United
9 States v. Sandoval, 231 U.S. 28, 46 (1913); see also United
10 States v. Holliday, 70 U.S. 407, 419 (1865) (stating that in
11 regard to the recognition of Indian tribes, "it is the rule of
12 this court to follow the action of the executive and other
13 political departments of the government, whose more special duty
14 it is to determine such affairs"). Consequently, "'the action of
15 the federal government in recognizing or failing to recognize a
16 tribe has traditionally been held to be a political one not
17 subject to judicial review.'" Miami Nation of Indians of Ind. v.
18 U.S. Dep't of Interior, 255 F.3d 342, 347 (7th Cir. 2001)(quoting
19 William C. Canby, Jr., American Indian Law in a Nutshell 5 (3d
20 ed. 1998)).

21 In this case, the gravamen of plaintiffs' due process and
22 equal protection claims is that defendants' failure to grant them
23 federal acknowledgment as a previously recognized tribe violates
24 the Constitution. However, the determination of whether the
25 Winnemem are entitled to such acknowledgment is a non-justiciable
26 political question and thus beyond the purview of the court.
27 While plaintiffs disingenuously contend that they do not seek
28 federal recognition through this litigation, (See Compl. ¶ 161),

1 their constitutional claims necessarily require the court to
2 inject itself in processes expressly left to the province of
3 Congress. Accordingly, defendants' motion to dismiss plaintiffs'
4 eleventh and twelfth claims is GRANTED without leave to amend.³

5 **B. Subject Matter Jurisdiction**

6 **1. Article III Standing**

7 Defendants assert that because the Winnemem are not a
8 federally-recognized Indian tribe, plaintiffs lack Article III
9 standing to assert claims for alleged injuries to tribal
10 interests. (Agency Defs.' Mem. at 1.) Thus, defendants argue
11 that the federal government can have no duty under the NHPA to
12 consult with the Winnemem in their tribal capacity. (Id. at 10.)

13 Whether the plaintiff has standing to sue is a threshold
14 jurisdictional question. Steel Co. v. Citizens for a Better
15 Env't, 523 U.S. 83, 102 (1998). The "irreducible constitutional
16 minimum of standing" contains three requirements. Id. at 102-03
17 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560
18 (1992)). First, the plaintiff must allege an injury-in-fact that
19 is concrete and particularized, and actual or imminent. Id. at
20 103. A particularized injury is one that "affect[s] the
21 plaintiff in a personal and individual way. Lujan, 504 U.S. at
22 561 n.1. Second, there must be a "fairly traceable connection
23 between the plaintiff's injury and the complained-of conduct of
24 the defendant." Steel Co., 523 U.S. at 103. And, third, "there
25 must be redressability - a likelihood that the requested relief

26
27 ³ Further, as set forth *infra*, to the extent plaintiffs
28 seek to press claims on behalf of a federally recognized Indian
tribe, plaintiffs lack standing, and such claims are DISMISSED
without leave to amend.

1 will redress the alleged injury." Id. The party invoking
2 federal jurisdiction bears the burden of establishing standing.
3 Lujan, 504 U.S. at 561. However, at the pleading stage, "general
4 factual allegations of injury resulting from the defendant's
5 conduct may suffice" to establish constitutional standing.
6 Bennett v. Spear, 520 U.S. 154, 168 (1997) (quoting Lujan, 504
7 U.S. at 561).

8 To the extent that claims may be brought for injuries to
9 tribal interests pursuant to the APA and the statutes under which
10 plaintiffs sue, plaintiffs lack Article III standing to assert
11 those claims because plaintiffs are not a federally recognized
12 tribe, and as set forth above, the court lacks authority to
13 adjudicate the issue of whether plaintiffs are entitled to
14 acknowledgment of previous federal recognition.⁴ However, as the
15 court held in its prior Order, tribal status is not plaintiffs'
16 only available basis for Article III standing. The Ninth Circuit
17 has held that having cultural and religious ties to an area
18 suffering an environmental impact can be a sufficient basis to
19 establish injury-in-fact for standing purposes. See Pit River
20 Tribe v. U.S. Forest Serv., 469 F.3d 768, 779 (9th Cir. 2006)

21
22 ⁴ Defendants also argue that regardless of whether or not
23 the Winnemem are federally recognized, plaintiffs cannot maintain
24 Article III standing because any tribal interests in the lands
25 encompassed by the Central Valley Project were extinguished by a
26 1941 Act of Congress, Pub. L. No. 77-198, 55 Stat. 612. (Agency
27 Defs.' Mem. at 2.) But because the Winnemem lack federal
28 recognition, and thus lack standing to bring claims based on
alleged injury to tribal interests, the argument that any tribal
interests in the Central Valley Project were extinguished by the
1941 Act is irrelevant. Moreover, as defendants acknowledge, the
Act does not preclude plaintiffs from stating claims as
individual Indians or as members of the public. (Id. at 8,
n.10.) Plaintiffs' complaint, liberally construed, may be read
to state such claims.

1 (holding that plaintiffs adequately pled injury-in-fact to allege
2 NEPA violations where the plaintiffs had used the affected area
3 for cultural and religious ceremonies for countless generations).
4 The Supreme Court has also held that environmental impacts that
5 diminish a plaintiff's aesthetic and recreational interests may
6 be sufficient to constitute an injury-in-fact. See Friends of
7 the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc., 528 U.S.
8 167, 183 (2000) (stating that "environmental plaintiffs
9 adequately allege injury in fact when they aver that they use the
10 affected area and are persons 'for whom the aesthetic and
11 recreational values of the area will be lessened' by the
12 challenged activity" (quoting Sierra Club v. Morton, 405 U.S.
13 727, 735 (1972))); see also Ocean Advocates v. United States Army
14 Corps of Eng'rs, 402 F.3d 846, 859 (9th Cir. 2005) (stating that
15 injury-in-fact is established by "showing a connection to the
16 area of concern sufficient to make credible the contention that
17 the person's future life will be less enjoyable").

18 Here, plaintiffs' first through tenth claims allege that
19 various actions and omissions by defendants have caused damage to
20 sites to which plaintiffs have long-standing cultural and
21 religious ties and have interfered with plaintiffs' use and
22 enjoyment of those sites. Thus, under Pit River Tribe, Laidlaw,
23 and Ocean Advocates, plaintiffs have sufficiently alleged injury-
24 in-fact to establish Article III standing over their NEPA claims.

25 Furthermore, plaintiffs' first through ninth claims allege
26 violations of the NHPA. These claims are likewise not dependent
27 upon acknowledgment of tribal status because, as the court held
28 in its previous Order, under Section 106 of the NHPA, any member

1 of the public has an interest in whether a federal agency takes
2 into account the effect of an undertaking on any site that
3 implicates historic preservation concerns. See 16 U.S.C. § 470f;
4 36 C.F.R. §§ 800.1; 800.2(d)(1)-(2). The Code of Federal
5 Regulations interpret Section 106 to require federal agencies to
6 "seek and consider the views of the public" and to "provide the
7 public with information about an undertaking and its effects on
8 historic properties and seek public comment and input." See 36
9 C.F.R. § 800.2(d)(1)-(2).

10 Plaintiffs allege that they have an interest under the NHPA
11 in preserving the historical quality of the areas named in the
12 first amended complaint. Plaintiffs also allege that the USFS
13 violated prior agreements by not seeking plaintiffs' comments and
14 by ignoring plaintiffs' input before undertaking the activities
15 that allegedly damaged the cultural value of the affected areas.
16 These general factual allegations, if sufficient to state a
17 claim, are sufficient to show injury-in-fact. See Bennett, 520
18 U.S. at 168 ("on a motion to dismiss, we presume that general
19 allegations embrace those specific facts that are necessary to
20 support the claim" (quoting Lujan, 504 U.S. at 561)); see also
21 Mont. Wilderness Ass'n v. Fry, 310 F. Supp. 2d 1127, 1151 (D.
22 Mont. 2004) (holding that the plaintiff had sufficiently alleged
23 injury-in-fact based on impact to sites that the plaintiff had
24 visited in the past and planned to revisit each year in the
25 future).

26 **2. Sovereign Immunity**

27 Defendants further assert that the court has no subject
28 matter jurisdiction because there is no waiver of sovereign

1 immunity for claims brought under the ARPA, NHPA, NEPA, AIRFA,
2 and NAGPRA. (Agency Defs.' Mem. at 11-12.) However, plaintiffs
3 bring their first through tenth claims pursuant to the APA, 5
4 U.S.C. §§ 704, 706 (Amend. Compl. ¶¶ 75-133.) The APA allows
5 plaintiffs to seek judicial review of federal agency actions and
6 to obtain non-monetary relief for legal wrongs resulting from a
7 final action undertaken by an agency or by an agency officer or
8 employee. 5 U.S.C. §§ 702, 704, 706. While the APA does not
9 create an independent basis for subject matter jurisdiction, it
10 provides a waiver of sovereign immunity in suits seeking judicial
11 review of a federal agency action. See Gallo Cattle Co. v. U.S.
12 Dep't of Agric., 159 F.3d 1194, 1198 (9th Cir. 1998). Where
13 plaintiffs seek judicial review under the APA of agency actions
14 that allegedly violate other federal statutes, a federal court
15 has subject jurisdiction pursuant to 28 U.S.C. § 1331 unless the
16 statute in question "expressly precludes review." Id.
17 Therefore, the court may exercise jurisdiction to the extent that
18 plaintiffs can sufficiently plead claims under the APA.

19 3. APA Prudential Standing

20 Finally, defendants assert that plaintiffs fail to allege
21 any discrete actions defendants were required to take. (Agency
22 Defs.' Mem. at 13.) Thus, defendants argue, plaintiffs cannot
23 satisfy the APA's prudential standing requirements. (Id.)

24 Under the APA, courts shall "compel agency action unlawfully
25 withheld or unreasonably delayed," 5 U.S.C. § 706(1), and shall
26 hold unlawful and set aside agency actions found to be
27 "arbitrary, capricious, an abuse of discretion, or otherwise not
28 in accordance with law." 5 U.S.C. § 706(2)(A). To bring suit

1 under the APA, plaintiffs must meet statutory requirements for
2 prudential standing. See Churchill County v. Babbitt, 150 F.3d
3 1072, 1078 (9th Cir. 1998). Specifically, plaintiffs must show
4 that (1) there has been final agency action which adversely
5 affected them, and (2) that as a result, their injury falls
6 within the "zone of interests" of the statutes they claim were
7 violated. 5 U.S.C. § 702; Churchill County, 150 F.3d at 1078.

8 "[T]wo conditions must be satisfied for agency action to be
9 final: First, the action must mark the consummation of the
10 agency's decisionmaking process—it must not be of a merely
11 tentative or interlocutory nature. And second, the action must
12 be one by which rights or obligations have been determined, or
13 from which legal consequences will flow." Fairbanks North Star
14 Borough v. U.S. Army Corps of Eng'rs, 543 F.3d 586, 591 (9th Cir.
15 2008), cert. denied, 129 S.Ct. 2825 (June 22, 2009) (quoting
16 Bennett, 520 U.S. at 177-78). Claims may also be brought under 5
17 U.S.C. § 706(1) based upon an agency's failure to act when the
18 agency fails to take a discrete action required by law. See
19 Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 64 (2004).

20 Plaintiffs' first through tenth claims are based upon
21 defendants' alleged failure to act in compliance with the
22 mandates of various federal statutes. To the extent that
23 plaintiffs plead sufficient facts to allege failure to undertake
24 discrete actions required under these statutes, plaintiffs may
25 establish prudential standing under the APA and the court may
26 exercise subject matter jurisdiction over the claims. Because
27 jurisdiction thus depends upon the specific requirements of the
28 various statutes at issue, in conjunction with the facts pled,

1 the court analyzes plaintiffs' APA allegations on a claim-by-
2 claim basis.

3 **C. Plaintiffs' First Claim for Relief: Nosoni Creek⁵**

4 Plaintiffs' first claim for relief is brought pursuant to 5
5 U.S.C. §§ 704 and 706 for alleged violations of the ARPA and NHPA
6 at the Nosoni Creek area. (Amend. Compl. ¶¶ 75-80.) Plaintiffs
7 allege that the USFS destroyed medicinal "grandfather"
8 grapevines, dumped dirt on a "sacred site," bulldozed and filled
9 a vegetated area in violation of a "project agreement,"⁶ allowed
10 unmonitored construction and industrial activity to occur
11 resulting in biological hazards and disruptions to ecosystems,
12 and blocked plaintiffs' access to the site. (Id. ¶¶ 53-55, 77.)

13 **1. ARPA**

14 The Archaeological Resources Protection Act was enacted in
15 part "to secure, for the present and future benefit of the
16

17 ⁵ The court notes at the outset that plaintiffs' claims
18 are replete with vague, conclusory allegations relating to the
19 alleged injuries and statutory violations occurring at numerous
20 enumerated sites. Plaintiffs' allegations are comprised
21 primarily of conduct or consequences they are aggrieved by, but,
22 as set forth, *infra*, generally fail to set forth how the numerous
23 statutes referenced have been violated or how defendants are
24 responsible for the conduct or consequences at issue. Due to the
25 expansive nature of the allegations and the litany of statutes
26 alleged to have been violated, defendants have not been put on
27 fair notice of the majority of the claims against them and the
28 grounds upon which they rest. However, for the same reasons, the
court cannot conclude that amendment would be futile as to many
of these claims. Plaintiffs are cautioned that where leave to
amend has been granted, further amendment to the complaint should
clearly set forth the factual basis for each claim of an alleged
statutory violation.

⁶ Defendants contend that no project agreement between
the Winnemem and the USFS in connection with the Nosoni Creek
site exists. (Agency Defs.' Mem. at 9.) However, the absence of
an agreement is not be dispositive, as agreements are not
required for the alleged ARPA and NHPA violations at issue.

1 American people, the protection of archaeological resources and
2 sites which are on public lands and Indian lands." 16 U.S.C.
3 470aa(b). The ARPA provides that "[n]o person may excavate,
4 remove, damage, or otherwise alter or deface" any archaeological
5 resource located on public or Indian lands unless pursuant to a
6 permit. 16 U.S.C. § 470ee(a). Under the federal regulations
7 pertaining to ARPA, "person" is defined to include "any officer,
8 employee, agent, department, or instrumentality of the United
9 States." 43 C.F.R. § 7.3(g).⁷ The regulations define
10 "archaeological resource" as "any material remains of human life
11 or activities which are at least 100 years of age, and which are
12 of archaeological interest." 43 C.F.R. § 7.3(a). A list of
13 illustrative examples of material remains includes
14 "horticultural/agricultural gardens or fields." 43 C.F.R. §
15 7.3(a)(3)(I).

16 In this case, plaintiffs have alleged that in 2001 the USFS
17 destroyed three ancient "grandfather" grapevines that the
18 Winnemem "had used medicinally for over 100 years." (Amend.
19 Compl. ¶ 53.) Construing plaintiffs' complaint liberally,
20 plaintiffs may be understood to allege that the "grandfather"
21 grapevines constitute an archaeological resource within the
22 meaning of the ARPA and that the USFS lacked a permit authorizing
23 its action. Thus, liberally construed, plaintiffs' amended
24

25 ⁷ Defendants argue that plaintiffs cannot state any claim
26 for ARPA violations because "they have no right to seek
27 enforcement of ARPA, only the government does." (Agency Defs.'
28 Reply Br. at 7.) However, defendants cite no authority in
support of this interpretation of the statute. Furthermore, the
applicable regulations define the "any person" to whom ARPA's
prohibitions apply to include federal officers and agencies. 43
C.F.R. § 7.3(g).

1 complaint alleges that the USFS destroyed three grandfather vines
2 at Nosoni Creek, that these items are archaeological resources
3 protected by the ARPA, and that defendants acted in violation of
4 the ARPA by destroying the vines without a permit.⁸ Because
5 plaintiffs allege that defendants failed to take a discrete
6 action required by statute, plaintiffs have alleged "agency
7 action unlawfully withheld," and thus plaintiffs have sufficient
8 stated a claim under the APA, 5 U.S.C. § 706(1), for a violation
9 of the ARPA, 16 U.S.C. § 470ee(a).

10 However, defendants argue that plaintiffs' claim is time-
11 barred by the six-year statute of limitations applicable to
12 claims brought under the APA. (Agency Defs.' Mem. at 15.) See
13 28 U.S.C. 2401(a); Gros Ventre Tribe v. United States, 469 F.3d
14 801, 814 n.12 (9th Cir. 2006). Plaintiffs allege that the
15 destruction of the vines occurred in 2001, (Amend. Compl. ¶ 53.),
16 but plaintiffs did not file their complaint until 2009. Thus, as
17
18
19
20

21 ⁸ Defendants argue that plaintiffs fail to state an ARPA
22 claim because "plaintiffs have not alleged any acts which involve
23 the intentional excavation and removal of cultural items."
24 (Agency Defs.' Mem. at 18.) Some district courts have held that
25 intentional conduct is required to constitute a violation of 16
26 U.S.C. § 470ee(a). See, e.g., Attakai v. United States, 746 F.
27 Supp. 1395, 1410 (D. Ariz. 1990) (stating that "the Act is
28 clearly intended to apply specifically to purposeful excavation
and removal of archaeological resources, not excavations which
may, or in fact inadvertently do, uncover such resources"); San
Carlos Apache Tribe v. United States, 272 F. Supp. 2d. 860, 888
(D. Ariz. 2003)(same, citing Attakai). However, because notice
pleading applies, and plaintiffs sufficiently allege that the
USFS destroyed items encompassed under ARPA, the court need not
reach the issue of whether intentional conduct is required at
this stage in the litigation.

1 pled, plaintiffs' ARPA claim for the destruction of the vines is
2 barred by the statute of limitations.⁹

3 To the extent that plaintiffs allege other ARPA violations
4 at the Nosoni site, plaintiffs' assertions are vague and
5 conclusory and do not state a plausible claim for relief.
6 Specifically, plaintiffs do not clearly make allegations against
7 any agency other than the USFS. (Agency Defs.' Mot. at 19.)
8 Plaintiffs maintain that "[t]he [d]efendants in this case . . .
9 should not be dismissed as to any claim." (Opp. Agency Defs.'
10 Mot. at 17.) But from the vague allegations in plaintiffs'
11 amended complaint, it is not apparent whether any agencies other
12 than the USFS are alleged to have violated the ARPA in connection
13 with Nosoni Creek, nor have plaintiffs sufficiently pled facts to
14 state claims for any other ARPA violations at Nosoni Creek.
15 Therefore, regarding the alleged ARPA violations in plaintiffs'
16 first claim for relief, defendants' Motion to Dismiss is GRANTED
17 with leave to amend.

18 **2. NHPA**

19 In enacting the National Historic Preservation Act, Congress
20 found that "historic properties significant to the Nation's
21 heritage are being lost or substantially altered, often
22 inadvertently, with increasing frequency." 16 U.S.C. § 470(b)(3).
23 To mitigate this problem and to promote "the preservation of this
24 irreplaceable heritage," 16 U.S.C. § 470(b)(4), Section 106 of
25 the NHPA requires federal agencies to consider the effect of any

26
27 ⁹ Furthermore, plaintiffs fail to allege any facts or to
28 advance any arguments with respect to the applicability of
equitable tolling or any other basis by which the six-year
statute of limitations would not apply.

1 undertaking on any site that is eligible for inclusion in the
2 National Register before expending federal funds or approving any
3 licenses in connection with the undertaking. 16 U.S.C. § 470f.

4 The NHPA's regulations require federal agencies to consult
5 and consider the views of interested members of the public in the
6 Section 470f process. 36 C.F.R. §§ 800.1(a), 800.2(a)(4),
7 800.2(d)(1), 800.2(d)(2), 800.3(e). "The goal of consultation is
8 to identify historic properties potentially affected by the
9 undertaking, assess its effects and seek ways to avoid, minimize
10 or mitigate any adverse effects on historic properties." 36
11 C.F.R. § 800.1. The NHPA contains additional provisions
12 requiring federal agencies to consult with Indian tribes that
13 attach religious or cultural significance to affected properties.
14 16 U.S.C. § 470a(d)(6)(B); 36 C.F.R. § 800.2(c)(2).

15 Defendants present a Rule 12(b)(1) factual challenge to
16 plaintiffs' assertion of subject-matter jurisdiction.¹⁰ Pursuant
17 to this challenge, defendants have attached various exhibits to
18 their Motion to Dismiss, including Exhibit H, Declaration of
19 Kristy Cottini. In her declaration, Cottini addresses
20 plaintiffs' allegations regarding the actions of the USFS at the
21 Nosoni Creek site. (Agency Defs.' Mem. Ex. H ¶ 4.) Cottini
22 states that the only project undertaken by the USFS near Nosoni
23 Creek was the Nosoni Bridge Replacement project and that a NEPA

24
25 ¹⁰ Defendants also argue that plaintiffs lack standing to
26 establish NHPA claims based upon failure to consult the Winnemem
27 because "NHPA regulations regarding consultation on historic
28 properties of religious and cultural significance to Indian
tribes only require consultation with federally-recognized Indian
tribes." (Agency Defs.' Mem. at 13.) However, plaintiffs may be
entitled to participate in the public consultation process
required under Section 106.

1 environmental analysis and NHPA Section 106 evaluation were
2 conducted in conjunction with the project in 2000. (Id.)
3 According to Cottini, "[t]he Section 106 evaluation concluded
4 that the bridge was not eligible for the National Historic
5 Register, and there were no other historic properties in the
6 project area." (Id.)

7 Where a party introduces evidence challenging a federal
8 court's subject matter jurisdiction, the burden falls upon the
9 opposing party to present evidence to establish jurisdiction.

10 See Safe Air v. Meyer, 373 F.3d at 1039. Here, defendants have
11 introduced evidence to show compliance with the NHPA's
12 requirements. Plaintiffs fail to allege with any clarity any
13 deficiency in the Section 106 process completed in 2000.

14 Furthermore, it is also unclear if plaintiffs allege that any
15 defendants violated NHPA through activities at Nosoni Creek
16 outside of the scope of the previously completed Section 106
17 process. Thus, even as interested members of the public,
18 plaintiffs have not clearly stated allegations giving rise to any
19 plausible injury-in-fact under the NHPA. Therefore, as to the
20 alleged NHPA violations in connection with Nosoni Creek,
21 defendants' Motion to Dismiss is GRANTED with leave to amend.

22 **D. Plaintiffs' Second Claim: the Dekkas Site**

23 Plaintiffs' second claim for relief is brought pursuant to 5
24 U.S.C. §§ 704 and 706 for alleged violations of the ARPA, NHPA,
25 and NEPA at the Dekkas area. Plaintiffs allege that defendants
26 improperly revoked a special use permit and refused to issue new
27 permits without cause; cut old-growth manzanita trees in
28 violation of an agreement with the Winnemem; cut a lock from a

1 gate and facilitated entry of campers and hikers into the site;
2 and ordered plaintiffs to remove from the site various items
3 including rocks of historical and cultural significance to the
4 Winnemem. (Amend. Compl. ¶¶ 59-63.)

5 **1. NEPA**

6 The National Environmental Policy Act ("NEPA"), 42 U.S.C. §
7 4321, establishes a national policy of environmental stewardship
8 in order to promote various purposes, including to "fulfill the
9 responsibilities of each generation as trustee of the environment
10 for succeeding generations," 42 U.S.C. § 4331(b)(1), and to
11 "preserve important historic, cultural, and natural aspects of
12 our national heritage." 42 U.S.C. § 4331(b)(4). The NEPA
13 requires federal agencies to prepare a detailed Environmental
14 Impact Statement ("EIS") for all "major Federal actions
15 significantly affecting the quality of the human environment."
16 42 U.S.C. § 4332(c). In order to determine whether or not a
17 proposed action requires the preparation of an EIS, an agency may
18 prepare an Environmental Assessment ("EA"). See Te-Moak Tribe of
19 W. Shoshone of Nev. v. U.S. Dep't of the Interior, 2010 WL
20 2431001, at *4 (9th Cir. 2010); 40 C.F.R. §§ 1501.4(b),
21 1501.4(c). An EA is "a concise public document" that serves to
22 "[b]riefly provide sufficient evidence and analysis for
23 determining whether to prepare an environmental impact statement
24 or a finding of no significant impact." 40 C.F.R. § 1508.9. An
25 agency may also comply with NEPA's requirements by determining
26 that a proposed action falls within an established categorical
27 exclusion, a category of actions that have been previously
28 determined under agency regulations not to have a significant

1 effect on the human environment. 40 C.F.R. §§ 1501.4(a), 1508.4.
2 Moreover, to bring a claim under the APA for a violation of the
3 NEPA, plaintiffs must show that they have exhausted available
4 administrative remedies prior to bringing an action in federal
5 court. See Idaho Sporting Congress, Inc. v. Rittenhouse, 305
6 F.3d 957, 965 (9th Cir. 2002).

7 Here, defendants argue that plaintiffs fail "to allege any
8 facts that establish how NEPA has been violated" or to identify
9 "any final agency action or decision that could be the subject of
10 a NEPA challenge." (Agency Defs.' Mem. at 18.)

11 Plaintiffs' allegations as to defendants' alleged NEPA
12 violations at the Dekkas site are insufficient to state a
13 plausible claim for relief. Plaintiffs do not specify any final
14 agency action or failure to take a discrete action required by
15 statute as the basis of an alleged NEPA violation. Even assuming
16 that cutting old-growth manzanita trees might qualify as a major
17 federal action, plaintiffs fail to specify how the USFS allegedly
18 violated NEPA with this action. Plaintiffs do not allege that
19 the USFS failed to prepare an EIS or EA and do not allege that
20 the cutting was not encompassed within a categorical exclusion.
21 Further, plaintiffs do not plead any facts establishing that they
22 have exhausted any available administrative remedies. Plaintiffs
23 thus fail to plead sufficient facts to give rise to a plausible
24 claim for relief. Therefore, as to the NEPA violations alleged
25 in plaintiffs' second claim for relief, defendants' Motion to
26 Dismiss is GRANTED with leave to amend.

27 /////

28 /////

1 **2. ARPA**

2 The ARPA violations alleged in plaintiffs' second claim for
3 relief are vague and conclusory. Plaintiffs do not specifically
4 identify any archaeological resources or the manner in which the
5 ARPA was allegedly violated. While plaintiffs do make reference
6 to "an ancient fire pit with rocks that have been used by the
7 Winnemem for hundreds of years," (Amend. Compl. ¶ 59), it is not
8 clear whether plaintiffs are asserting that any damage occurred
9 to the fire pit, or simply objecting to defendants' alleged
10 failure to issue a permit in connection with the property.
11 Although plaintiffs also assert that the USFS destroyed "sacred
12 trees" at the site, (Id. ¶ 83), plaintiffs do not allege that the
13 USFS acted without a permit or that the trees constitute
14 archaeological resources. Furthermore, it is not clear that the
15 trees meet the definition of an archaeological resource under the
16 applicable regulations. See 43 C.F.R. § 7.3(a).

17 Because plaintiffs fail to plead sufficient facts to state a
18 plausible claim for any ARPA violation at the Dekkas site,
19 defendants' Motion to Dismiss is GRANTED with leave to amend as
20 to the ARPA violations alleged in plaintiffs' second claim for
21 relief.

22 **3. NHPA**

23 Plaintiffs' allegations of NHPA violations at the Dekkas
24 area are likewise insufficient. Plaintiffs allege that the USFS
25 cut down old-growth Manzanita trees without notice to the
26 Winnemem. (Amend. Compl. ¶¶ 61-62.) However, plaintiffs do not
27 allege that any portion of the Dekkas Site is eligible for
28 inclusion in the National Register or that the USFS failed to

1 engage in required public consultation prior to acting.¹¹ To the
2 extent that plaintiffs might assert NHPA violations for failure
3 to consult the public, plaintiffs thus fail to state a plausible
4 claim for relief. Therefore, as to the alleged NHPA violations
5 in plaintiffs' second claim for relief, defendants' Motion to
6 Dismiss is GRANTED with leave to amend.

7 **4. Failure to Issue Permits**

8 In response to plaintiffs' allegations regarding use permits
9 for the Dekkas area, defendants again point to the Cottini
10 Declaration. (Agency Defs.' Mem. at 10.) According to Cottini,
11 the USFS previously issued a nontransferrable individual use
12 permit for the Dekkas Rock area to Florence Jones, a Winnemem
13 Wintu, in 1979. (Agency Defs.' Mem. Ex. H ¶ 6.) Cottini states
14 that the permit expired in 1989 and that another nontransferrable
15 permit was issued to Jones in 1995. (Id.) According to Cottini,
16 the second permit terminated by operation of law upon Jones's
17 death in 2003. (Id.) Cottini further states that the Winnemem
18 Wintu, Mark Franco, and Caleen Sisk Franco have never applied to
19 the USFS for a special use permit for the Dekkas Rock Area.
20 (Id.)

21 Unless plaintiffs can establish that a permit was required
22 for the Dekkas Rock area, that they applied for a permit, and
23 that the USFS denied their application, plaintiffs cannot show
24 final agency action denying them a permit, and thus cannot show
25

26 ¹¹ While the NHPA does require federal agencies to consult
27 with Indian tribes that attach religious or cultural significance
28 to affected properties, see 16 U.S.C. § 470a(d)(6)(B), 36 C.F.R.
§ 800.2(c)(2), as set forth *supra*, plaintiffs lack standing to
bring claims for alleged violations of these requirements because
the Winnemem are not a federally recognized Indian tribe.

1 injury-in-fact.¹² Because defendants have introduced evidence
2 challenging the assertion of subject matter jurisdiction, the
3 burden shifts to plaintiffs to show that they meet the final
4 agency action requirement for prudential standing under the APA,
5 5 U.S.C. § 704, as well as injury-in-fact to establish Article
6 III standing. Plaintiffs have failed to meet this burden, and
7 therefore, as to the permit allegations in plaintiffs' second
8 claim for relief, defendants' Motion to Dismiss is GRANTED with
9 leave to amend.

10 **E. Plaintiffs' Third Claim: the Coonrod Cultural Site**

11 Plaintiffs' third claim for relief is brought pursuant to 5
12 U.S.C. §§ 704 and 706 for alleged violations of the ARPA and NHPA
13 at the Coonrod Cultural Site. Plaintiffs allege that the USFS
14 allowed campers, hikers, and hunters to gain access to the
15 Coonrod site; that the USFS failed to prevent cattle from
16 trampling and destroying a "sacred fire pit"; and that the USFS
17 refused to take adequate measures to preserve cultural artifacts
18 at the site. (Amend. Compl. ¶¶ 64, 89.)

19 **1. ARPA**

20 Plaintiffs' allegations of ARPA violations at the Coonrod
21 site are vague and conclusory. Plaintiffs do not allege any
22 action taken without a required permit. In addition, plaintiffs
23 fail to identify any archaeological resources encompassed by
24 ARPA, nor do they plead facts with sufficient clarity to give
25 rise to a plausible inference that defendants destroyed any
26

27 ¹² Importantly, Cottini states that the Dekkas Rock area
28 is on lands open to the public, and that *plaintiffs do not need a permit to use the site.* (Agency Defs.' Mem. Ex. H ¶ 6.)

1 archaeological resources. Furthermore, despite plaintiffs'
2 assertion that the agency defendants other than the USFS should
3 not be dismissed as to any claim, plaintiffs do not allege any
4 activities by any defendants other than the USFS in connection
5 with the Coonrod site. Thus, plaintiffs fail to allege
6 sufficient facts to give rise to a plausible ARPA claim against
7 any defendant. Therefore, regarding the alleged ARPA violations
8 in plaintiffs' third claim for relief, defendants' Motion to
9 Dismiss is GRANTED with leave to amend.

10 **2. NHPA**

11 Plaintiffs likewise fail to plausibly allege any NHPA
12 violations in their third claim for relief. Plaintiffs do not
13 sufficiently allege any final agency action in violation of the
14 NHPA or failure to perform a discrete action required by the
15 NHPA. Plaintiffs appear to object to the USFS's alleged failure
16 to exclude campers, hikers, hunters, and cattle from the Coonrod
17 site and the USFS's alleged failure to take measures to protect
18 artifacts. However, plaintiffs do not specify any USFS
19 undertaking among these alleged omissions that would trigger the
20 Section 106 process, nor do the facts alleged, even liberally
21 construed, give rise by inference to any discernible NHPA
22 violation. Plaintiffs also fail to identify any action by any
23 other agency that could constitute an NHPA violation at the
24 Coonrod site. Consequently, as to the alleged NHPA violations in
25 plaintiffs' third claim for relief, defendants' Motion to Dismiss
26 is GRANTED with leave to amend.

27 /////

28 /////

1 **F. Plaintiffs' Fourth Claim: Gilman Road**

2 Plaintiffs' fourth claim for relief is brought pursuant to 5
3 U.S.C. §§ 704 and 706 for alleged violations of the ARPA, NHPA,
4 and NEPA in connection with Gilman Road. Plaintiffs allege that
5 the USFS violated the ARPA and NHPA by cutting and spraying with
6 herbicides certain "culturally important medicinal plants" in
7 violation of an agreement with the Winnemem. (Amend. Compl. ¶¶
8 65, 95.) Plaintiffs allege that the USFS violated the NEPA by
9 "failing to disclose projects that damaged Cultural and Religious
10 Sites and by failing to take all possible steps to mitigate the
11 damage." (Amend. Compl. ¶ 95.)

12 **1. ARPA**

13 Plaintiffs fail to allege any facts that could constitute a
14 plausible claim for a violation of the ARPA. Plaintiffs do not
15 identify any archaeological resources nor do they plead any facts
16 giving rise to a plausible inference that the USFS removed or
17 damaged any archaeological resources, with or without a permit.
18 Plaintiffs also fail to make any allegations pertaining to any
19 other defendant. Therefore, as to the alleged ARPA violations in
20 plaintiffs' fourth claim for relief, defendants' Motion to
21 Dismiss is GRANTED with leave to amend.

22 **2. NHPA and NEPA**

23 Defendants have introduced evidence to show compliance with
24 the NHPA and NEPA in connection with Gilman Road. In Exhibit H
25 to defendants' Memorandum in support of their Motion to Dismiss,
26 the Declaration of Kristy Cottini, defendant Cottini states that
27 the USFS completed an NHPA Section 106 evaluation and a NEPA
28 environmental assessment for the Gilman Road Shaded Fuelbreak

1 Project.¹³ (Agency Defs.' Mem. Ex. H ¶ 5.) Cottini further
2 states that Caleen Sisk Franco and Mark Franco participated in
3 the NEPA process, which was completed in June 2003. (Id.)

4 Plaintiffs do not identify any deficiency in the USFS's
5 previous Section 106 evaluation, nor do plaintiffs allege with
6 any clarity any NHPA violation at Gilman Road outside the scope
7 of the previous evaluation. Similarly, as to their NEPA
8 allegations, plaintiffs fail to identify any deficiency in the EA
9 that the USFS prepared in June 2003, or to allege any USFS action
10 outside the scope of the previous EA and in violation of the
11 NEPA. Further, plaintiffs fail to plead any facts establishing
12 exhaustion of NEPA administrative remedies or to plead any facts
13 giving rise to any plausible NHPA or NEPA claim against any other
14 defendant. Therefore, as to the alleged NHPA and NEPA violations
15 in plaintiffs' fourth claim for relief, defendants' Motion to
16 Dismiss is GRANTED with leave to amend.

17 **G. Plaintiffs' Fifth Claim: Buck Saddle Prayer Site**

18 Plaintiffs' fifth claim for relief is brought pursuant to 5
19 U.S.C. §§ 704 and 706 for alleged violations of the ARPA, NHPA,
20 and NEPA in connection with the Buck Saddle Prayer Site.
21 Plaintiffs allege that the USFS created a recreational bike trail
22 through "one of the Winnemem's sacred prayer sites" without
23 disclosing the activity; converted a "sacred prayer rock" into a
24 ramp for dirt bikes; allowed common access to the site without
25 protecting "sacred artifacts"; and "enable[d] ongoing
26 degradation" of "ecosystems," "natural resources," and "known

27
28 ¹³ The court may take judicial notice of agency reports pursuant to Fed. R. Evid. 201(b).

1 archaeological sites." (Amend. Compl. ¶¶ 66, 101.) Plaintiffs
2 further allege that "[t]he USFS, Ms. Cottini and Ms. Heywood also
3 failed to include the Winnemem in the planning of these acts of
4 deliberate desecration." (Id. ¶ 66.)

5 **1. ARPA**

6 Plaintiffs' allegations regarding "known archaeological
7 sites" in the Buck Saddle area are vague and conclusory.
8 Plaintiffs do not identify specific archaeological resources
9 protected by the ARPA, nor do they identify any action by the
10 USFS, such as the removal or destruction of archaeological
11 resources without a permit, that could constitute an ARPA
12 violation. Consequently, plaintiffs have not pled sufficient
13 facts to state a plausible claim for an ARPA violation by the
14 USFS. Plaintiffs do not make any allegations regarding the other
15 agency defendants, and the alleged failure of defendants Cottini
16 and Heywood to consult the Winnemem does not give rise to any
17 plausible claim for an ARPA violation. Therefore, as to the
18 alleged ARPA violations in plaintiffs' fifth claim for relief,
19 defendants' Motion to Dismiss is GRANTED with leave to amend.

20 **2. NHPA**

21 Construing the amended complaint liberally, plaintiffs
22 allege that the Buck Saddle Prayer Site is eligible for inclusion
23 in the National Register and that activities by the USFS at the
24 site constitute an "undertaking" requiring evaluation under 16
25 U.S.C. § 470f. While plaintiffs have framed their claim for
26 relief based on the USFS's alleged failure to consult the
27
28

1 Winnemem as a tribe,¹⁴ a liberal construction of the amended
2 complaint permits the inference that plaintiffs allege the USFS
3 failed to consult and consider the views of interested members of
4 the public, and that such consultation was required under 36
5 C.F.R. §§ 800.1(a), 800.2(a)(4), 800.2(d)(1), 800.2(d)(2),
6 800.3(e). Therefore, regarding the alleged NHPA violations at
7 the Buck Saddle site, to the extent that plaintiffs allege the
8 USFS failed to comply with the requirements of 16 U.S.C. § 470f
9 in conjunction with the construction of the bike trail and dirt
10 bike ramp, defendants' Motion to Dismiss plaintiffs' fifth claim
11 for relief is DENIED.

12 **3. NEPA**

13 However, plaintiffs' allegations of NEPA violations at the
14 Buck Saddle site are insufficient to state a plausible claim for
15 relief. Even if plaintiffs' complaint is construed liberally to
16 allege that the construction of the bike trail and bike ramp
17 constituted "major Federal actions significantly affecting the
18 quality of the human environment" within the meaning of 42 U.S.C.
19 § 4332(c), plaintiffs fail to allege any facts that would give
20 rise to the inference that the USFS violated the NEPA in
21 connection with these actions. Plaintiffs do not allege that the
22 USFS failed to prepare an EIS or EA and do not allege that the
23 construction was not encompassed within a categorical exclusion
24 from NEPA requirements. Nor do plaintiffs plead any facts to
25 establish exhaustion of administrative remedies. Therefore, as
26

27 ¹⁴ As set forth *supra*, plaintiffs do not have standing to
28 bring such allegations because the Winnemem lack federal
recognition.

1 to the alleged NEPA violations in plaintiffs' fifth claim for
2 relief, defendants' Motion to Dismiss is GRANTED with leave to
3 amend.

4 **H. Plaintiffs' Sixth Claim: Panther Meadow**

5 Plaintiffs' sixth claim for relief is brought pursuant to
6 the APA, 5 U.S.C. §§ 704 and 706, for alleged violations of the
7 ARPA, NHPA, and NEPA in connection with Panther Meadow.

8 Plaintiffs allege that the USFS permitted visitors to scatter
9 human cremation remains and to inflict unspecified damage on the
10 site, failed to close Panther Meadow, and failed to regulate
11 public access sufficiently to prevent damage to the site.

12 (Amend. Compl. ¶¶ 67, 107.)

13 Plaintiffs' allegations are vague and conclusory.
14 Plaintiffs fail to allege the presence of any archaeological
15 resources protected by the ARPA or any removal or destruction of
16 such resources that could constitute an ARPA violation.
17 Plaintiffs also fail to allege any USFS undertaking at the site
18 that could require a Section 106 process under the NHPA, nor do
19 they allege the failure to engage in such a process. Finally,
20 plaintiffs fail to identify any major federal action that might
21 require an EIS or EA pursuant to the NEPA, or to plead facts
22 demonstrating exhaustion of administrative remedies.
23 Consequently, defendants' Motion to Dismiss plaintiffs' sixth
24 claim for relief is GRANTED with leave to amend.

25 **I. Plaintiffs' Seventh Claim: Shasta Reservoir Indian Cemetery**

26 Plaintiffs' seventh claim for relief is brought pursuant to
27 the APA, 5 U.S.C. §§ 704 and 706, for alleged violations of the
28 ARPA, NHPA, and NEPA in connection with the Shasta Reservoir

1 Indian Cemetery. Plaintiffs allege that the BLM denied the
2 Winnemem access to the cemetery for burials. (Amend. Compl. ¶
3 68.) Plaintiffs also allege that defendants allowed unspecified
4 damage to the cemetery and "fail[ed] to fulfill their trust
5 responsibilities for the Cemetery." (Id. ¶ 113).

6 Plaintiffs' allegations are vague and conclusory and do not
7 plausibly give rise to any violations of the statutes at issue.
8 Plaintiffs do not identify any archaeological resources or any
9 actions by any defendant that could conceivably constitute a
10 violation of the ARPA. Plaintiffs do not identify any agency
11 undertaking that might require a Section 106 process under the
12 NHPA or the failure to engage in such a process. Finally,
13 plaintiffs do not identify any major agency action or failure to
14 perform an EIS or EA pursuant to the NEPA and do not demonstrate
15 exhaustion of administrative remedies. Therefore, defendants'
16 Motion to Dismiss plaintiffs' seventh claim for relief is GRANTED
17 with leave to amend.

18 **J. Plaintiffs' Eighth Claim: the Rocky Ridge Village Site**

19 Plaintiffs' eighth claim for relief is brought pursuant to
20 the APA, 5 U.S.C. §§ 704 and 706, for alleged violations of the
21 NHPA, NEPA, and NAGPRA in connection with the construction of a
22 parking lot and the parking of recreational vehicles at the Rocky
23 Ridge Village site.

24 **1. Construction of a Parking Lot**

25 Plaintiffs allege that the USFS intends to permit the
26 construction of a parking lot on a village and burial site, and
27 that the USFS has failed to engage in pre-project consultation
28

1 with the Winnemem in connection with the planned construction.
2 (Id. ¶ 71.)

3 Defendants assert that plaintiffs lack standing to bring
4 their claims in connection with the Rocky Ridge Village site
5 because according to defendants, there is no USFS project to
6 construct a parking lot, and thus, plaintiffs cannot show injury-
7 in-fact to establish Article III standing or final agency action
8 sufficient for APA prudential standing. (Agency Defs.' Mem. at
9 11.) Defendants point to Exhibit H of their Memorandum, a
10 declaration in which defendant Cottini asserts that "[t]here is
11 no past or current Forest Service project to construct a parking
12 lot at the Rocky Ridge Village site.¹⁵ (¶ 7.)

13 Based on the Cottini declaration, the USFS has not
14 undertaken any project to construct a parking lot, and thus,
15 there is no final agency action and no injury-in-fact to
16 plaintiffs. Thus, plaintiffs lack standing to bring claims
17 regarding future construction.

18 **2. Permitting Recreational Vehicles to Park**

19 Plaintiffs also allege that the USFS permits campers to park
20 recreational vehicles in a make-shift parking area located on
21 ceremonial sites that the Winnemem use for religious worship.
22 (Amend. Compl. ¶ 71, 119.)

23 **a. NAGPRA**

24 The Native American Grave Protection and Repatriation Act
25 imposes restrictions on the intentional excavation and removal of

26
27 ¹⁵ The court may review evidence outside the complaint
28 when considering a Rule 12(b)(1) factual attack on plaintiffs'
assertion of subject matter jurisdiction. See Safe Air v. Meyer,
373 F.3d at 1039.

1 Native American human remains and objects. 25 U.S.C. § 3002(c).
2 Under the NAGPRA, the "intentional removal from or excavation of
3 Native American cultural items from Federal or tribal lands" may
4 only be conducted pursuant to a permit under the ARPA, 16 U.S.C.
5 § 470cc, and after consultation with or consent by the
6 appropriate Indian tribe. 25 U.S.C. § 3002(c). In the event of
7 the inadvertent discovery of Native American remains or objects
8 on federal lands, NAGPRA requires notification of the head of the
9 agency with primary management authority over the site. 25
10 U.S.C. § 3002(d)(1). If an inadvertent discovery occurs in
11 connection with an activity, the person finding the items must
12 "cease the activity in the area of the discovery, make a
13 reasonable effort to protect the items discovered before resuming
14 such activity, and provide notice" of the discovery. Id.

15 Defendants argue that plaintiffs fail to state a claim for
16 any NAGPRA violations because plaintiffs do not allege any
17 intentional excavation and removal of cultural items by the USFS.
18 (Agency Defs.' Mem. at 19.) Defendants also point out that
19 plaintiffs do not make allegations concerning any defendant other
20 than the USFS in connection with the Rocky Ridge site. (Id.)

21 Plaintiffs' allegations of NAGPRA violations are vague and
22 conclusory. Plaintiffs fail to allege that any defendant
23 excavated or removed, either intentionally or inadvertently, any
24 specific Indian remains or objects at the Rocky Ridge site.
25 Thus, plaintiffs fail to state a plausible claim for a violation
26 of NAGPRA by any defendant. Therefore, as to plaintiffs'
27 allegations of NAGPRA violations at the Rocky Ridge site,
28 defendants' Motion to Dismiss is GRANTED with leave to amend.

1 **b. NHPA and NEPA**

2 Plaintiffs' allegations are likewise insufficient to state a
3 claim for any NHPA or NEPA violations based on the USFS allowing
4 vehicles to park at the Rocky Ridge Village site. Even liberally
5 construing the amended complaint to allege that the site is
6 eligible for inclusion in the National Register, plaintiffs do
7 not identify any undertaking by the USFS that could trigger the
8 Section 106 process under the NHPA, nor do they allege failure to
9 engage in this process. Similarly, plaintiffs fail to allege any
10 major federal action in the absence of an EIS or EA under the
11 NEPA, and do not demonstrate exhaustion of administrative
12 remedies. Thus, as to the alleged NHPA and NEPA violations at
13 Rocky Ridge Village, defendants' Motion to Dismiss plaintiffs'
14 eighth claim for relief is GRANTED with leave to amend.

15 **K. Plaintiffs' Ninth Claim: Shasta Dam**

16 Plaintiffs' ninth claim for relief is brought pursuant to
17 the APA, 5 U.S.C. §§ 704 and 706, for alleged violations of the
18 NHPA, NEPA, and NAGPRA in connection with Shasta Dam. Plaintiffs
19 allege that defendants are evaluating proposals to raise Shasta
20 Dam and that this proposed action would cause the inundation and
21 destruction of burial, ceremonial, and religious sites important
22 to the Winnemem. (Amend. Compl. ¶ 125.) Plaintiffs further
23 allege that defendants have refused to assess or to mitigate the
24 impact of this alleged project or to engage in consultation with
25 the Winnemem regarding the project. (Id. ¶ 126.)

26 Defendants argue that plaintiffs lack standing to bring
27 claims regarding raising Shasta Dam because no final decision has
28 been made to raise the dam. (Agency Defs.' Mem. at 11.)

1 Pursuant to their challenge to plaintiffs' assertion of subject
2 matter jurisdiction, defendants present evidence that the Shasta
3 Dam project is currently the subject of a feasibility study that
4 will not be completed until at least 2011. (Agency Defs.' Ex. I,
5 ¶ 4.) According to a declaration by Deputy Regional Director for
6 the Bureau of Reclamation Pablo Arroyave, "Reclamation is not
7 congressionally authorized to move beyond the feasibility study
8 phase and actually increase Shasta Reservoir storage by raising
9 Shasta Dam." (Id.)

10 Plaintiffs' amended complaint alleges only that defendants
11 are "evaluating" proposals to raise Shasta Dam. (Amend. Compl. ¶
12 125.) Plaintiffs do not allege final agency action, or failure
13 to take a discrete action required by statute, by any defendant,
14 in connection with Shasta Dam. Thus, plaintiffs fail to plead
15 the requirements of APA prudential standing. Plaintiffs also
16 fail to show injury-in-fact, and thus have not established
17 Article III standing. Consequently, defendants' Motion to
18 Dismiss plaintiffs' ninth claim for relief is GRANTED without
19 leave to amend.

20 **L. Plaintiffs' Tenth Claim: AIRFA and RFRA**

21 Plaintiffs' tenth claim for relief is brought pursuant to
22 the APA, 5 U.S.C. §§ 704 and 706, for alleged violations of the
23 AIRFA and RFRA in connection with alleged activities at various
24 sites, including Nosoni Creek, the Dekkas site, the Coonrod site,
25 the Buck Saddle Prayer Site, and "numerous other" unspecified
26 sites on the McCloud River. (Amend. Compl. ¶ 131.) Plaintiffs
27 allege that defendants violated the AIRFA and RFRA by interfering
28

1 with plaintiffs' access to and use of these sites for religious
2 activities. (Id.)

3 **1. AIRFA**

4 The American Indian Religious Freedom Act provides that "it
5 shall be the policy of the United States to protect and preserve
6 for American Indians their inherent right of freedom to believe,
7 express, and exercise the traditional religions of the American
8 Indian, Eskimo, Aleut, and Native Hawaiians, including but not
9 limited to access to sites, use and possession of sacred objects,
10 and the freedom to worship through ceremonials and traditional
11 rites." 42 U.S.C. § 1996. The Supreme Court has held that AIRFA
12 does not "create a cause of action or any judicially enforceable
13 individual rights." Lyng v. Nw. Indian Cemetery Protective
14 Ass'n, 485 U.S. 439, 455 (1988); see also Henderson v. Terhune,
15 379 F.3d 709, 715 (9th Cir. 2004) (stating that "AIRFA is simply
16 a policy statement that is judicially unenforceable").

17 Defendants argue that because AIRFA does not create
18 judicially enforceable rights, plaintiffs' AIRFA claim fails to
19 state a claim for which relief can be granted. (Agency Defs.'
20 Mem. at 20.)

21 Because AIRFA is simply a policy statement, AIRFA does not
22 mandate any discrete agency action that defendants must
23 undertake, nor can plaintiffs establish a final agency action by
24 any defendant in violation of AIRFA. Consequently, plaintiffs
25 fail to state a claim pursuant to the APA for any violation of
26 AIRFA. Therefore, regarding the alleged AIRFA violations in
27 plaintiffs' tenth claim for relief, defendants' Motion to Dismiss
28 is GRANTED without leave to amend.

1 **2. RFRA**

2 The Religious Freedom and Restoration Act provides that
3 "[g]overnment shall not substantially burden a person's exercise
4 of religion even if the burden results from a rule of general
5 applicability" except where the government demonstrates that the
6 burden "(1) is in furtherance of a compelling governmental
7 interest; and (2) is the least restrictive means of furthering
8 that compelling governmental interest." 42 U.S.C. §§ 2000bb-
9 1(a), 2000bb-1(b). The Ninth Circuit has held that a
10 "substantial burden" under the RFRA "is imposed only when
11 individuals are forced to choose between following the tenets of
12 their religion and receiving a governmental benefit or coerced to
13 act contrary to their religious beliefs by the threat of civil or
14 criminal sanctions." Navajo Nation v. U.S. Forest Serv., 535
15 F.3d 1058, 1070 (9th Cir. 2008)(internal references omitted).

16 Defendants argue that plaintiffs fail to state a claim for
17 any RFRA violations because plaintiffs do not allege any instance
18 of being forced to choose between following their religious
19 tenets and receiving a governmental benefit or of being coerced
20 to act contrary to their religious beliefs by the threat of civil
21 or criminal sanctions. (Agency Defs.' Mem. at 20.)

22 Plaintiffs answer this objection by merely repeating their
23 vague and conclusory assertions that defendants violated the RFRA
24 by failing to preserve and grant plaintiffs access to various
25 sites. (Opp. Agency Defs.' Mot. Dismiss at 18.) Because
26 plaintiffs do not plead any facts to establish a "substantial
27 burden" to their exercise of religion, plaintiffs thus fail to
28 state a claim for any violation of RFRA. Therefore, regarding

1 the alleged RFRA violations in plaintiffs' tenth claim for
2 relief, defendants' Motion to Dismiss is GRANTED with leave to
3 amend.

4 **M. Bivens Claim**

5 Plaintiffs bring their thirteenth claim for relief under
6 Bivens v. Six Unknown Named Agents of Federal Bureau of
7 Narcotics, 403 U.S. 388 (1971), against defendants Cottini and
8 Heywood in their individual capacities. Plaintiffs argue that
9 Cottini and Heywood went beyond their official duties as USFS
10 employees and violated plaintiffs' constitutional rights.
11 (Amend. Compl. ¶ 150-52.) Specifically, plaintiffs allege that
12 Cottini and Heywood violated plaintiffs' First and Fifth
13 Amendment rights by (1) engaging in "[d]isparate treatment of
14 Plaintiffs' tribal interests and preferential treatment of
15 recreational activities along the McCloud River"; (2) failing to
16 consult with the Winnemem concerning a plan to replace the
17 McCloud River Bridge; (3) damaging Winnemem cultural sites in
18 connection with a campground expansion at Hirz Bay; (4) failing
19 to consult with the Winnemem concerning the Hirz Bay campground
20 expansion; (5) revoking a special use permit for the Dekkas site;
21 (6) damaging and allowing others to damage the Buck Saddle site;
22 (7) failing to take sufficient measures, in consultation with the
23 Winnemem, to protect the Buck Saddle site; and (8) advising other
24 federal agencies that the USFS could not meet with plaintiffs
25 regarding replanting activity at sites not addressed in this
26 action. (Amend. Compl. ¶¶ 57-58, 150-151.) Plaintiffs further
27 allege that defendant Heywood violated the First and Fifth
28 Amendments by refusing to discipline or to provide "cultural

1 sensitivity training" to defendant Cottini and by cancelling "MOU
2 meetings" with plaintiffs concerning Panther Meadows. (Id. ¶¶
3 150-151.)

4 "In Bivens, the Supreme Court 'recognized for the first time
5 an implied right of action for damages against federal officers
6 alleged to have violated a citizen's constitutional rights.'" W.
7 Radio Servs. Co. v. U.S. Forest Serv., 578 F.3d 1116, 1119 (9th
8 Cir. 2009)(quoting Ashcroft v. Iqbal, 129 S.Ct. 1937, 1947
9 (2009)). The Bivens Court held that a plaintiff was entitled to
10 bring a federal court action against individual federal agents
11 for damages resulting from the violation of his Fourth Amendment
12 rights. 403 U.S. at 397. The Supreme Court has extended Bivens
13 liability to other contexts. In Davis v. Passman, the Court
14 recognized an implied cause of action for damages for a violation
15 of the Due Process Clause of the Fifth Amendment, 442 U.S. 228,
16 248-49 (1979), and in Carlson v. Green, the Court held that a
17 Bivens remedy was available for a violation of the Eighth
18 Amendment's prohibition against cruel and unusual punishment.
19 446 U.S. 14, 20-21 (1980). However, "[b]ecause implied causes of
20 action are disfavored, the Court has been reluctant to extend
21 Bivens liability 'to any new context or new category of
22 defendants.'" Iqbal, 129 S. Ct. at 1948 (quoting Corr. Servs.
23 Corp. v. Malesko, 534 U.S. 61, 68 (2001)); see also W. Radio
24 Servs. Co., 578 F.3d at 1119 (citing decisions "across a variety
25 of factual and legal contexts" in which the Supreme Court refused
26 to extend Bivens liability).

27 To determine whether a Bivens remedy is consistent with
28 Congressional intent, the Supreme Court has developed a two-step

1 analysis. W. Radio Servs. Co., 578 F.3d at 1120. First, a court
2 must determine whether there is “‘any alternative existing
3 process for protecting’ the plaintiff’s interest.” Id. (quoting
4 Wilkie v. Robbins, 551 U.S. 537, 550 (2007)). The existence of a
5 remedial process “raise[s] the inference that Congress ‘expected
6 the Judiciary to stay its Bivens hand’ and ‘refrain from
7 providing a new freestanding remedy in damages.’” Id. (quoting
8 Wilkie, 551 U.S. at 550, 554). If the court “cannot infer that
9 Congress intended a statutory remedial scheme to take the place
10 of a judge-made remedy,” the court must move on to the second
11 step and evaluate whether there are “‘factors counseling
12 hesitation’ before devising such an implied right of action.” Id.
13 (quoting Wilkie, 551 U.S. at 550).

14 Defendants Cottini and Heywood move to dismiss plaintiffs’
15 Bivens claim on multiple grounds, asserting, *inter alia*, (1) that
16 the availability of a remedy under the APA precludes plaintiffs
17 from bringing a Bivens claim, and (2) that the claim is barred by
18 the court’s prior Order dismissing the FTCA claims in plaintiffs’
19 initial complaint. (Individual Defs.’ Mot. Dismiss First Amend.
20 Compl. at 1-2.)

21 **1. Availability of the APA**

22 The Ninth Circuit has held that where a remedy is available
23 under the APA, a plaintiff is precluded from bringing a Bivens
24 claim. W. Radio Servs. Co., 578 F.3d at 1122-23. In Western
25 Radio, the plaintiff brought claims against the USFS and some of
26 its officers under both the APA and Bivens, alleging violations
27 of the First and Fifth Amendments and the APA. 578 F.3d at 1118.
28 Noting that “[t]he APA expressly declares itself to be a

1 comprehensive remedial scheme" and that the "APA's procedures are
2 available where no other adequate alternative remedy exists," the
3 court concluded that "the APA leaves no room for Bivens claims
4 based on agency action or inaction." Id. at 1122-23.

5 The instant case is controlled by Western Radio. Here,
6 plaintiffs have brought a Bivens claim against defendants Cottini
7 and Heywood based on essentially the same allegations upon which
8 they bring their APA claims against the agency defendants. Thus,
9 plaintiffs' other claims for relief demonstrate the potential
10 availability of an alternative remedy.

11 Plaintiffs argue that the APA does not preclude their Bivens
12 claim because the alleged actions by Cottini and Heywood at issue
13 were "extra procedural" acts outside of the individual
14 defendants' official duties, and thus not within the scope of
15 administrative agency action subject to APA review. (Opp.
16 Cottini and Heywood's Mot. Dismiss at 6.) However, this
17 assertion is belied by plaintiffs' amended complaint, in which
18 the same allegations are pled both under the APA and under
19 Bivens. Plaintiffs fail to allege facts demonstrating any
20 instance where Cottini or Heywood acted outside of an official
21 capacity, but simply fall back on the conclusory assertion that
22 Cottini and Heywood "were acting outside the scope of their
23 authority and employment functions as federal employees."
24 (Amend. Compl. ¶ 152.) Under Western Radio, plaintiffs' Bivens
25 claim thus fails as a matter of law because the availability of
26 the APA provides plaintiffs with an adequate remedial scheme.

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1 **2. The FTCA Judgment Bar**

2 Although plaintiffs may amend their complaint to plead
3 allegations for which relief under the APA is unavailable,
4 defendants maintain that plaintiffs' Bivens claim is precluded by
5 the judgment bar of the Federal Tort Claims Act, 28 U.S.C. §
6 2676. (Individual Defs.' Mem. at 4-6.)

7 The FTCA contains a limited waiver of sovereign immunity
8 authorizing civil tort suits for money damages against the United
9 States government. See Vacek v. U.S. Postal Serv., 447 F.3d
10 1248, 1250 (9th Cir. 2006). The FTCA grants federal courts
11 jurisdiction to hear claims for damages for injury or loss of
12 property caused by the negligent or wrongful act or omission of
13 any federal employee acting within the scope of his office or
14 employment under circumstances where the United States, if a
15 private person, would be liable to the claimant. 28 U.S.C. §
16 1346(b)(1). Under the FTCA, a judgment in an action brought
17 pursuant to 28 U.S.C. § 1346(b) "shall constitute a complete bar
18 to any action by the claimant, by reason of the same subject
19 matter, against the employee of the government whose act or
20 omission gave rise to the claim." 28 U.S.C. § 2676.

21 In their initial complaint, plaintiffs brought FTCA claims
22 for money damages pursuant to 28 U.S.C. § 1346(b)(1). (Compl. ¶
23 2). In its prior Order, the court dismissed plaintiffs' FTCA
24 claims without leave to amend for lack of subject matter
25 jurisdiction based upon plaintiffs' failure to exhaust
26 administrative remedies and to meet the statute of limitations.
27 (Order at 23-24.)

28

1 Defendants maintain that plaintiffs' Bivens claim is "by
2 reason of the same subject matter" as their FTCA claims, and thus
3 barred under 28 U.S.C. § 2676. (Individual Defs.' Mem. at 4.)
4 Plaintiffs do not dispute that their Bivens claim arises out of
5 the same subject matter as their dismissed FTCA claims, but argue
6 (1) that the FTCA's judgment bar does not apply to alternative
7 claims raised in the same action and (2) that dismissals on
8 jurisdictional grounds are not judgments under § 2676. (Opp.
9 Individual Defs.' Mot. Dismiss at 4-5).

10 **a. Claims Raised in the Same Action**

11 Plaintiffs argue that § 2676 only applies to subsequent
12 actions based on allegations made in a previously dismissed
13 action and not to alternative claims raised in the same action.
14 (Opp. Individual Defs.' Mot. Dismiss at 4-5.) However, the Ninth
15 Circuit has applied § 2676 to hold that a judgment on an FTCA
16 claim bars recovery on a Bivens claim in the same action.
17 Arevalo v. Woods, 811 F.2d 487, 490 (9th Cir. 1987). In Arevalo,
18 a district court entered judgment in favor of the plaintiff on
19 two claims arising out of the same event: an FTCA claim against
20 the United States and a Bivens claim against an Immigration and
21 Naturalization Service investigator. 811 F.2d at 488. The Ninth
22 Circuit held that the FTCA judgment barred recovery under Bivens
23 and reversed the Bivens judgment against the investigator. Id.
24 Applying Arevalo to the facts of this case, the FTCA's judgment
25 bar precludes plaintiffs' Bivens claim even though both claims
26 were raised in the same action.

27 /////

28 /////

1 **b. Dismissals on Jurisdictional Grounds**

2 Plaintiffs also maintain that the FTCA's judgment bar does
3 not apply where "FTCA claims are not dismissed on the merits, but
4 rather on jurisdictional grounds," relying on Pesnell v.
5 Arsenault, 543 F.3d 1038 (9th Cir. 2008) (Opp. Individual Defs.'
6 Mot. Dismiss at 5).

7 However, the Ninth Circuit has interpreted the FTCA's
8 judgment bar to preclude Bivens claims where a dismissal of a
9 previous FTCA claim was upheld based on lack of subject matter
10 jurisdiction. Gasho v. United States, 39 F.3d 1420, 1436-38 (9th
11 Cir. 1994). The Gasho court applied § 2676 in affirming the
12 dismissal of Bivens claims against Customs Service agents after a
13 related FTCA claim against the government had been dismissed.
14 Id. Although the district court had dismissed the Gasho
15 plaintiffs' FTCA abuse of process claim under Rule 12(b)(6), the
16 Ninth Circuit upheld the dismissal on the alternative grounds
17 that the claim was barred under an exception to the FTCA's waiver
18 of sovereign immunity. Id. at 1436. Although lack of subject
19 matter jurisdiction was the basis on which the FTCA judgment was
20 upheld, the Ninth Circuit nevertheless found related Bivens
21 claims to be precluded. Id. at 1437. The court held that "any
22 FTCA judgment, regardless of its outcome, bars a subsequent
23 Bivens action on the same conduct that was at issue in the prior
24 judgment." Id. (emphasis in original).

25 Where Bivens claims are not based on the same allegations
26 that formed the basis of a dismissed FTCA claim, by contrast,
27 such Bivens claims are not barred. In Pesnell, the plaintiff had
28 previously brought an action against the United States and

1 various federal agencies pursuant to the FTCA. 543 F.3d at 1040-
2 41. The FTCA claims were dismissed for lack of subject matter
3 jurisdiction. Id. at 1041. In a subsequent action, the
4 plaintiff then brought related Bivens claims and federal and
5 state civil Racketeer Influenced and Corrupt Organizations Act
6 ("RICO") claims against four federal employees. Id. The Pesnell
7 court held that § 2676 barred the plaintiff from proceeding on
8 the same factual allegations made in the dismissed FTCA claims.
9 Id. at 1041-42. However, to the extent that the Bivens and RICO
10 claims arose out of allegations not raised in the previous
11 action, the plaintiff could proceed because Bivens and RICO
12 claims are not encompassed within the subject matter jurisdiction
13 authorized by § 1346(b), and thus the claims were "not foreclosed
14 by the statutory bar of § 2676," which applies only to claims
15 brought under § 1346(b). Id. at 1041.

16 Under § 2676 as interpreted in Pesnell, a Bivens action
17 related to a previously dismissed FTCA claim may proceed only to
18 the extent that it arises out of factual allegations different
19 than those raised in the FTCA claim. Consequently, in order to
20 proceed with their Bivens claim, plaintiffs must not only allege
21 action by defendants Cottini and Heywood for which relief is
22 unavailable pursuant to the APA, they must also plead only
23 factual allegations not previously raised by their FTCA claims.

24 Because the allegations in plaintiffs' Bivens claim are the
25 same allegations raised in their previously dismissed FTCA
26 claims, as well as in their current APA claims, defendants'
27 Motion to Dismiss plaintiffs' thirteenth claim for relief is
28 GRANTED with leave to amend.

CONCLUSION

For the foregoing reasons, defendants' motions to dismiss are GRANTED in part and DENIED in part.

(1) Defendants' motion to dismiss plaintiffs' first claim for relief is GRANTED with leave to amend.

(2) Defendants' motion to dismiss plaintiffs' second claim for relief is GRANTED with leave to amend.

(3) Defendants' motion to dismiss plaintiffs' third claim for relief is GRANTED with leave to amend.

(4) Defendants' motion to dismiss plaintiffs' fourth claim for relief is GRANTED with leave to amend.

(5) Defendants' motion to dismiss plaintiffs' fifth claim for relief is DENIED as to the allegation that the USFS violated the NHPA by constructing a bike trail and dirt bike ramp without engaging in required public consultation, and GRANTED with leave to amend as to all other allegations.

(6) Defendants' motion to dismiss plaintiffs' sixth claim for relief is GRANTED with leave to amend.

(7) Defendants' motion to dismiss plaintiffs' seventh claim for relief is GRANTED with leave to amend.

(8) Defendants' motion to dismiss plaintiffs' eighth claim for relief is GRANTED with leave to amend.

(9) Defendants' motion to dismiss plaintiffs' ninth claim for relief is GRANTED without leave to amend.

(10) Defendants' motion to dismiss plaintiffs' tenth claim for relief is GRANTED without leave to amend as

1 plaintiffs' AIRFA claim and with leave to amend as to
2 plaintiffs' RFRA claim.

3 (11) Defendants' motion to dismiss plaintiffs' eleventh
4 claim for relief is GRANTED without leave to amend.

5 (12) Defendants' motion to dismiss plaintiffs' twelfth claim
6 for relief is GRANTED without leave to amend.

7 (13) Defendants' motion to dismiss plaintiffs' thirteenth
8 claim for relief is GRANTED with leave to amend.

9 Plaintiffs are granted fifteen (15) days from the date of
10 this order to file an amended complaint in accordance with this
11 order. Defendants are granted thirty (30) days from the date of
12 service of plaintiffs' amended complaint to file a response
13 thereto.

14 IT IS SO ORDERED.

15 DATED: July 16, 2010



16
17 FRANK C. DAMRELL, JR.
18 UNITED STATES DISTRICT JUDGE
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