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 STATE FOREST SERVICE; UNITED STATES DEPARTMENT OF AGRICULTURE; and, in their Official and Individual Capacities, KENNETH SALAZAR and TOM VILSACK,

Defendants.

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

MEMORANDUM AND ORDER

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This matter is before the court on defendants' motion to dismiss plaintiffs' complaint pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). The Winnemem Wintu Tribe, Caleen Sisk Franco, and Mark Franco ("plaintiffs") oppose

defendants' motion. For the reasons set forth below,[1] defendants' motion is GRANTED in part and DENIED in part.

BACKGROUND

Plaintiffs instituted this action seeking tort damages as well as declaratory and injunctive relief for alleged harm to various areas that the Winnemem Wintu Tribe (the "Winnemem") use as cultural and religious sites. (Compl., filed Apr. 19, 2009, ¶¶ 100-04.) Plaintiffs allege that the Winnemem is a California Native Tribe recognized by the California Native American Heritage Commission and identify Caleen Sisk-Franco as the current tribal leader of the Winnemem. (Id. ¶¶ 19, 21.) Mark Franco is allegedly a member of the Winnemem. (Id. ¶ 1.) The complaint names as defendants the United States Department of the Interior ("DOI"); Bureau of Reclamation ("BOR"); Bureau of Indian Affairs ("BIA"); Bureau of Land Management ("BLM"); United States Forest Service ("USFS"); United States Department of Agriculture ("USDA"); the current Secretary of the Interior Kenneth Salazar; and the current Secretary of Agriculture Tom Vilsack.

The Winnemem is not a federally recognized Indian tribe. (Id. ¶ 19.) Plaintiffs allege that the U.S. government, through the BIA, made an error that resulted in the Winnemem's exclusion from the list of Indian tribes eligible to receive federal benefits. (Id.)

Plaintiffs identify several USFS activities in five areas as the bases for their action. First, in the Nosoni Creek area,

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[1] Because oral argument will not be of material assistance, the court orders this matter submitted on the briefs. E.D. Cal. L.R. 78-230(h).

plaintiffs allege that in 2001 the USFS damaged an area of cultural value to the Winnemem without regard to plaintiffs' protests and in violation of an alleged prior project agreement between the Winnemem and the USFS. (Id. ¶¶ 27-29.) Specifically, plaintiffs allege the USFS cut down three ancient "grandfather" grapevines that the Winnemem had used for medicinal purposes, dumped dirt on a "sacred site" without the guidance of any archeological monitoring or guidance, and rendered inaccessible an area for ceremonial storytelling by bulldozing and filling in a vegetated area. (Id.) Plaintiffs claim that these actions were in violation of Section 106 of the National Historic Preservation Act ("NHPA"), 16 U.S.C. § 470f. (Id.)

Second, in the Dekkas area, plaintiffs allege that in 2005 the USFS ignored an agreement with the Winnemem by cutting substantial quantities of old-growth manzanita trees that had been the only source of wood used for a centuries-old religious and cultural celebration. (Id. ¶ 32-33.) Plaintiffs allege that, in 2006, the USFS facilitated entry of other people to the area by removing a lock from a gate. (Id. ¶ 31.) Plaintiffs also allege that the USFS ordered the Winnemem to remove their items from the area in 2006. (Id. ¶ 34.) Defendants' activities at Dekkas, plaintiffs claim, interfered with plaintiffs' use and enjoyment of an area with religious significance to the Winnemem. (Id. ¶¶ 30-34.)

Third, plaintiffs allege that the USFS failed to respond to plaintiffs' request to protect the Coonrod area, a Winnemem cultural site. (Id. ¶ 35.) Fourth, plaintiffs allege that the USFS violated another agreement with the Winnemem by causing the

loss of culturally important medicinal plants in the Gilman Road area. (Id. ¶ 36.) Finally, in the Buck Saddle area, plaintiffs allege that the USFS breached a Memorandum of Understanding and failed to include the Winnemem when conducting activities that were "acts of deliberate desecration" in an area of religious significance to the Winnemem. (Id. ¶ 37.)

In addition to past activities, plaintiffs also complain of future and threatened harms. (Id. ¶ 39.) Plaintiffs allege that the USFS intends to build a parking lot over a village and burial site at the Rocky Ridge area. (Id.) Plaintiffs also allege that defendants will raise the level of Shasta Dam. (Id. ¶ 40.) Plaintiffs claim that the raised level will cause irreparable damage to a number of areas that are culturally and religiously significant to the Winnemem. (Id.) Defendants, however, challenge plaintiffs' assertions that the relevant agencies have already finalized these decisions. (Defs.' Reply Supp. Mot. Dismiss ("Defs.' Reply"), filed Aug. 14, 2009, at 8.) Defendants present evidence that the Shasta Dam project is still in the feasibility study phase and that there are currently no plans to build a parking lot in the Rocky Ridge area. (Defs.' Ex. C, ¶ 4; Defs.' Ex. E, ¶ 3.)

Plaintiffs assert various tort claims for damages to the areas named in the complaint, claiming that defendants breached duties owed to plaintiffs under federal law and state law. (Compl. ¶¶ 2, 43-93.) Plaintiffs also assert a claim for mandamus and injunctive relief pursuant to 28 U.S.C. § 1361, requesting an order that defendants investigate and report to plaintiffs the extent that defendants' activities and planned

activities have damaged and will damage Winnemem cultural sites along the McCloud River. (Id. ¶¶ 97-98, 101.) Additionally, plaintiffs seek declaratory relief pursuant to 28 U.S.C. §§ 2201-02 that the defendants' actions constitute violations of federal, state, and common law. (Compl. ¶¶ 94-95.)

Defendants move to dismiss plaintiffs' claims on the grounds that: (1) plaintiffs lack Article III standing; (2) the court does not have subject matter jurisdiction to hear plaintiffs' complaint; and (3) plaintiffs fail to state a claim upon which relief can be granted. (Defs.' Mem. Supp. Mot. Dismiss ("Defs.' Mem."), filed June 29, 2009, at 1.)

STANDARDS

A. Lack Of Subject Matter Jurisdiction

The Eleventh Amendment limits the subject matter jurisdiction of the federal courts. See Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 53-54 (1996). Lack of subject matter jurisdiction may be asserted by either party or the court, *sua sponte*, at any time during the course of an action. Fed. R. Civ. P. 12(b)(1). Once challenged, the burden of establishing a federal court's jurisdiction rests on the party asserting the jurisdiction. See Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co., 907 F.2d 911, 912 (9th Cir. 1990).

There are two forms of 12(b)(1) attacks on subject matter jurisdiction: facial and factual attacks. See Thornhill Publ'g Co. v. General Tel. & Elecs. Corp., 594 F.2d 730, 733 (9th Cir. 1979). In a facial attack, a court construes jurisdictional allegations liberally and considers uncontroverted factual allegations to be true. See Robinson v. Overseas Military Sales

Corp., 21 F.3d 502, 507 (2d Cir. 1994); Oaxaca v. Roscoe, 641 F.2d 386, 391 (5th Cir. 1981). However, in an action such as this, when the defendant refers to matters outside the complaint to challenge plaintiff's assertion of subject matter jurisdiction, the 12(b)(1) motion is a factual attack. See Safe Air v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). In a factual attack, the district court may review affidavits or evidence relating to the jurisdictional issue and need not presume the truthfulness of the plaintiff's allegations. Id. The burden then falls upon the party opposing the motion to present affidavits or other evidence to establish subject matter jurisdiction. Id.

B. Failure To State A Claim

On a motion to dismiss, the allegations of the complaint must be accepted as true. Cruz v. Beto, 405 U.S. 319, 322 (1972). The court is bound to give the plaintiff the benefit of every reasonable inference to be drawn from the "well-pleaded" allegations of the complaint. Retail Clerks Int'l Ass'n v. Schermerhorn, 373 U.S. 746, 753 n.6 (1963). Thus, the plaintiff need not necessarily plead a particular fact if that fact is a reasonable inference from facts properly alleged. See id.

Nevertheless, it is inappropriate to assume that the plaintiff "can prove facts which it has not alleged or that the defendants have violated the . . . laws in ways that have not been alleged." Associated Gen. Contractors of Calif., Inc. v. Calif. State Council of Carpenters, 459 U.S. 519, 526 (1983). Moreover, the court "need not assume the truth of legal conclusions cast in the form of factual allegations." United

States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th Cir. 1986). Indeed, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009)(citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

In ruling upon a motion to dismiss, the court may consider only the complaint, any exhibits thereto, and matters which may be judicially noticed pursuant to Federal Rule of Evidence 201. See Mir v. Little Co. of Mary Hospital, 844 F.2d 646, 649 (9th Cir. 1988); Isuzu Motors Ltd. v. Consumers Union of United States, Inc., 12 F. Supp.2d 1035, 1042 (C.D. Cal. 1998).

Ultimately, the court may not dismiss a complaint in which the plaintiff alleged enough facts to "state a claim to relief that is plausible on its face." Iqbal, 129 S. Ct. at 1949 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Only where a plaintiff has failed to "nudge [his or her] claims across the line from conceivable to plausible," is the complaint properly dismissed. Id. at 1952. When there are well-pleaded factual allegations, "a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." Id. at 1950.

ANALYSIS

A. Article III Standing

Defendants argue that plaintiffs have no standing to bring this suit. Whether the plaintiff has standing to sue is a threshold jurisdictional question. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 102 (1998). The "irreducible constitutional minimum of standing" contains three requirements.

Id. at 102-03 (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). First, the plaintiff must allege an injury-in-fact that is concrete and particularized, and actual or imminent. Id. at 103. A particularized injury is one that "affect[s] the plaintiff in a personal and individual way. Lujan, 504 U.S. at 561 n.1. Second, there must be a "fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." Steel Co., 523 U.S. at 103. And, third, "there must be redressability – a likelihood that the requested relief will redress the alleged injury." Id. The party invoking federal jurisdiction bears the burden of establishing standing. Lujan, 504 U.S. at 561. However, at the pleading stage, "general factual allegations of injury resulting from the defendant's conduct may suffice" to establish constitutional standing. Bennett v. Spear, 520 U.S. 154, 168 (1997) (quoting Lujan, 504 U.S. at 561).

Defendants argue only that plaintiffs cannot meet Article III standing on the first standing requirement, that is, plaintiffs have not sufficiently alleged injury-in-fact.[2] (Defs.' Mem. at 6 & n.5.) Defendants characterize plaintiffs' injuries as injuries to tribal resources and properties. (Id. at

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[2] Although defendants do not challenge the second and third requirements to establish Article III standing, the court finds that plaintiffs' allegations are sufficient. Plaintiffs identify the USFS and not an unnamed third party as the agency actively carrying out the activities that caused injury to plaintiffs' interest. (Compl. ¶¶ 27-37.) Therefore, the harm that plaintiffs complain of is fairly traceable to one of the defendants' conduct. Interpreting their claims for declaratory and injunctive relief liberally, the court may also give effective relief by requiring that any future agency action complies with the relevant statutes.

6.) Defendants argue that, as the Winnemem is not a federally recognized Indian tribe, the Winnemem do not have legally recognized ownership interest in the properties at issue and therefore, cannot prove that plaintiffs have suffered an injury-in-fact. (Id.) As such, defendants' contention that there is no injury-in-fact is premised solely upon the existence of legal interests which, in this case, are contingent upon federal recognition of the Winnemem as an Indian tribe.

However, injury to a legal interest is not the only basis for alleging an injury-in-fact. In environmental cases, when a plaintiff alleges that the defendant's activity diminished plaintiff's aesthetic and recreational interests or destroyed a connection to the area that makes life more enjoyable, the plaintiff sufficiently pleads injury-in-fact. See, e.g., Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 183 (2000) (holding that environmental plaintiffs adequately allege injury-in-fact when they aver that they use the affected area and are persons "for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity); Ocean Advocates v. United States Army Corps of Eng'rs, 402 F.3d 846, 859 (9th Cir. 2005) (stating that injury-in-fact is established by "showing a connection to the area of concern sufficient to make credible the contention that the person's future life will be less enjoyable"). Alleging cultural and religious ties to an area that suffers an environmental impact due to a defendant's activity can be an adequate demonstration of injury-in-fact for standing purposes. See Pit River Tribe v. United States Forest Serv. 469 F.3d 768, 779 (9th Cir.

2006)(holding that plaintiffs adequately pled injury-in-fact to allege statutory violations under the National Environmental Policy Act because plaintiffs had used the affected areas for cultural and religious ceremonies for countless generations).

In this action, plaintiffs' allegations in the complaint present a sufficient showing of injury-in-fact at the pleading stage. See Bennett v. Spear, 520 U.S. at 168 ("general factual allegations of injury resulting from the defendant's conduct may suffice"). Plaintiffs allege that, as a result of USFS activities, plaintiffs can no longer enjoy particular uses of medicinal plants, other plant life, and areas where plaintiffs have had long-standing cultural and religious ties. (Compl. ¶¶ 27-37.) Plaintiffs have adequately alleged that defendants' activities adversely affected plaintiffs' interests.[3] The lack of federal recognition of tribal status, therefore, does not bar plaintiffs in this case from adequately alleging an injury-in-fact when plaintiffs generally allege that USFS activities diminished plaintiffs' enjoyment of areas where plaintiffs have had long-standing cultural and religious ties. See Golden Hill Paugussett Tribe of Indians v. Weicker, 39 F.3d 51, 58 (2d Cir. 1994)(holding that a non-federally recognized Indian tribe had standing to bring suit when it sufficiently pled the elements of Nonintercourse Act, which was the foundation of its claim).

Defendants' reliance on Western Shoshone Bus. Council v. Babbitt, 1 F.3d 1052 (10th Cir. 1993), and United States v. 43.47

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[3] The court need not reach the merits of plaintiffs' assertion that there is a lower threshold for alleging injury-in-fact in cases involving severe harm to land used for tribal ceremonies or practices.

Acres of Land More or Less, 855 F.Supp. 549 (D.Conn. 1994) is unpersuasive. In Western Shoshone, the plaintiffs' lack of standing to sue was premised on a different issue; they did not have prudential standing to sue because they were not within the zone of interests of 25 U.S.C. § 81, the statute that they had invoked. Western Shoshone Bus. Council, 1 F.3d at 1058. In 43.47 Acres of Land, the plaintiffs expressly invoked the Indian Nonintercourse Act, an act relating to the conveyance of Indian tribal lands. 43.47 Acres of Land More or Less, 855 F.Supp. at 551. There, the court denied the plaintiffs' standing to sue specifically under the Act. Id. Here, plaintiffs do not assert any claims under the Nonintercourse Act and, as set forth infra, they allege harms within the zone of interests of the relevant statutes. Accordingly, neither 43.47 Acres of Land nor Western Shoshone support defendants' proposition that federal recognition is a mandatory prerequisite before plaintiffs can allege an injury-in-fact based on cultural and religious interests.

Further, defendants' contention that plaintiffs' standing is wholly dependent on federal recognition of tribal status is flawed because, under Section 106 of the NHPA, any member of the public has an interest in whether a federal agency takes into account the effect of an undertaking on any site that implicates historic preservation concerns. See 16 U.S.C. § 470f; 36 C.F.R. §§ 800.1; 800.2(d)(1)-(2). The Code of Federal Regulations interpret Section 106 to require federal agencies to "seek and consider the views of the public" and "provide the public with information about an undertaking and its effects on historic properties and seek public comment and input." See 36 C.F.R. §

800.2(d)(1)-(2). Plaintiffs allege that they have an interest under the NHPA in preserving the historical quality of the areas named in the complaint. Plaintiffs also allege that the USFS violated prior agreements and the Memorandum of Understanding by not seeking plaintiffs' comments and ignoring plaintiffs' input before undertaking the activities that allegedly damaged the cultural value of the affected areas. These general factual allegations are sufficient to show injury-in-fact. See Bennett, 520 U.S. at 168 ("on a motion to dismiss, we presume that general allegations embrace those specific facts that are necessary to support the claim"); see also Mont. Wilderness Ass'n v. Fry, 310 F. Supp. 2d 1127, 1151 (D. Mont. 2004)(holding that plaintiff had sufficiently alleged facts supporting Article III standing under the NHPA because plaintiff averred that he had visited sites of traditional cultural significance and planned to do so each year in the future; these sites were impacted by the agency's failure to consult with the people of his people).[4]

Accordingly, the court finds that plaintiffs have sufficiently alleged Article III standing to proceed with their complaint.

B. Subject Matter Jurisdiction

Defendants argue that the court does not have jurisdiction to hear plaintiffs' claims because plaintiffs have not met the jurisdictional prerequisites to file an action through the

[4] As this interest granted by the NHPA includes individuals as members of the public, the Francos' allegations of the same injury-in-fact allow them to bring this action.

Administrative Procedures Act ("APA"), 5 U.S.C. § 702, or the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b).[5]

1. APA

Defendants challenge plaintiffs' right to seek judicial relief through the APA. While the APA does not provide an independent basis for subject matter jurisdiction, it provides a waiver of sovereign immunity in actions seeking judicial review of a federal agency action. Gallo Cattle Co. v. United States Dep't of Agric., 159 F.3d 1194, 1198 (9th Cir. 1998). For actions such as this, where plaintiffs appear to be seeking statutory enforcement of agency actions, the federal court has jurisdiction pursuant to 28 U.S.C. § 1331. Id.

To bring this suit under the APA, the plaintiffs must meet the APA's statutory requirements for prudential standing. See Churchill County v. Babbitt, 150 F.3d 1072, 1078 (9th Cir. 1998). The plaintiffs must show that (1) there has been final agency action which adversely affected them and, (2) as a result, their injury falls within the "zone of interests" of the statutes they claim were violated. 5 U.S.C. § 702; Churchill County, 150 F.3d at 1078. Defendants argue that plaintiffs fail on both fronts. (Defs.' Mem. at 18.)

Plaintiffs assert that they have alleged "multiple agency actions of a final nature" in which defendants have violated various federal statutes. (Pls.' Opp'n Mot. Dismiss ("Pls.'

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[5] Plaintiffs acknowledge that, of the bases for jurisdiction cited in the complaint, only the APA and the FTCA provide waivers of sovereign immunity to grant the court jurisdiction to hear this action. (Pls.' Opp'n Mot. Dismiss, filed Aug. 7, 2009, at 1.)

Opp'n"), filed Aug. 7, 2009, at 9.) However, liberally construing plaintiffs' allegations, plaintiffs only have sufficiently pled facts that constitute violations of Section 106 of the NHPA.[6] Therefore, the court looks only at the allegations relating to the NHPA to assess whether plaintiffs have jurisdiction to proceed under the APA.

a. Final Agency Action

"[F]inality is a jurisdictional requirement to obtaining judicial review under the APA." Fairbanks North Star Borough v. U.S. Army Corps of Eng'rs, 543 F.3d 586, 591 (9th Cir. 2008), cert. denied, 2009 U.S. LEXIS 4621 (June 22, 2009). "Two conditions must be satisfied for agency action to be final: First, the action must mark the consummation of the agency's decisionmaking process--it must not be of a merely tentative or interlocutory nature. And, second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." Id. (quoting Bennett, 520 U.S. at 177-78).

Defendants argue that plaintiffs have not been aggrieved by final agency actions because the relevant agencies have not made any decisions regarding the proposals to build a parking lot at

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[6] Plaintiffs allege that the USFS revoked a special use permit that interfered with their use of the Dekkas area but do not allege any other fact that can explain why it is a legal violation. (Compl. ¶ 30.)

Further, plaintiffs' other allegations only make conclusory assertions that defendants violated various federal and state statutes without any clarity regarding the bases of their claims. Because, as set forth *infra*, the court finds that plaintiffs sufficiently alleged an APA claim arising under the NHPA, the court will allow plaintiffs to amend their complaint to clarify their other bases for relief.

the Rocky Ridge village site or raise the level of Shasta Dam. (Defs.' Mem. at 18.) Defendants also assert that these issues are not ripe for review. (Id.)

However, defendants' arguments do not address plaintiffs' allegations regarding the USFS activities. The allegations describing how the USFS violated agreements or failed to consult with the Winnemem before it carried out activities in the named areas are not allegations of agency decisions that are "merely tentative or interlocutory." As a result of defendants' activities, plaintiffs allegedly lost the traditional uses of certain cultural sites, were deprived of the opportunity to give public comment or input, and had their rights under the agreements and Memorandum of Understanding violated. Not only do these alleged activities describe the "consummation of a decisionmaking process," they also denied plaintiffs the right to participate as persons interested in the historical preservation of the named areas. Cf. Dugong v. Gates, 543 F. Supp. 2d 1082, 1091-93 (N.D. Cal. 2008) (holding that an obligation under NHPA to take into account the effect of a construction project on an animal species before pursuing that undertaking is a discrete agency action and the failure to do so while approving design and construction plans was a "final agency action"). Construing plaintiffs' allegations liberally, the court finds that plaintiffs meet the first requirement of prudential standing under the APA. Because plaintiffs allegedly already have been aggrieved by these agency actions, the issues that relate to the NHPA are also ripe for review.

b. Zone Of Interests

The second prudential standing requirement to assert a claim under the APA is meeting the "zone of interests" test. See Ashley Creek Phosphate Co. v. Norton, 420 F.3d 934, 940 (9th Cir. 2005). The "zone of interests" test is "not meant to be particularly demanding" and is used simply to determine whether the plaintiffs' interests have more than a marginal relationship to the purpose implicit in the statute at issue. See Ashley Creek Phosphate Co., 420 F.3d at 940; Cent. Ariz. Water Conservation Dist. v. United States EPA, 990 F.2d 1531, 1538-39 (9th Cir. 1993); Nat'l Wildlife Fed'n v. Burford, 871 F.2d 849, 852 (9th Cir. 1989). A plaintiff's interest falls outside the "zone of interests" protected by a statute when the plaintiff's interest is inconsistent with the purposes of the statute and that interest is so inconsistent that it would be unreasonable to assume that Congress intended to permit the suit. Cf. Presidio Golf Club v. Nat'l Park Serv., 155 F.3d 1153, 1158 (9th Cir. 1998)(describing what would constitute failure to come within the zone of interests of the National Environmental Protection Act). Defendants contend that plaintiffs do not meet this second requirement because plaintiffs are not a federally recognized Indian tribe. (Defs.' Mem. at 18.)

Here, plaintiffs allege that defendants' agency actions violate section 106 of the NHPA. (Compl. ¶¶ 28-29.) Congress enacted NHPA in part because "the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people." 16 U.S.C. § 470(b)(2). In

order to carry out NHPA's objectives, Section 106 of the NHPA places a responsibility on federal agencies to consider the effect of an undertaking on any site that is eligible for inclusion in the National Register. 16 U.S.C. § 470f. The relevant agencies should make this consideration prior to the approval of the expenditure of any Federal funds on the undertaking or before issuing any licenses. Id. When an undertaking may affect properties of historic value to an Indian tribe on non-Indian lands, the regulations interpreting NHPA require that the Indian tribe be afforded the opportunity to participate as interested persons. 36 C.F.R. § 800.1(c)(2)(iii); see Muckleshoot Indian Tribe v. United States Forest Serv., 177 F.3d 800, 806 (9th Cir. 1999). NHPA's regulations also require federal agencies to provide interested members of the public reasonable opportunity to participate in the section 470f process. 36 C.F.R. §§ 800.1(a), 800.2(a)(4), (d)(1).

Plaintiffs assert that the Winnemem have used the affected areas as cultural and religious sites for generations and that the USFS activities are interfering with the historical preservation and continued cultural use of these sites. (Compl. ¶¶ 27-37). Plaintiffs also claim that the USFS conducted these activities without consulting plaintiffs and in direct violation of agreements they had made with plaintiffs. (Id.) Given that the NHPA's purpose is to preserve the historical and cultural foundations of this Nation and to do so with public input, the court cannot find at this point in the litigation that the plaintiffs' interests are so inconsistent with the NHPA that it would be unreasonable to assume that Congress would permit this

suit.[7] Cf. Presidio Golf Club, 155 F.3d at 1158 (holding that maintaining a historic golfhouse and the surrounding environment in a fashion suitable for golf was arguably within the zone of interests protected by the APA).

Accordingly, to the extent that plaintiffs' claims are related to Section 106 of the NHPA, defendants' motion to dismiss plaintiffs' claims on the ground of lack of subject matter jurisdiction is DENIED.

2. FTCA

Defendants also argue that this court lacks jurisdiction to hear plaintiffs' tort claims under the FTCA. Defendants argue that plaintiffs' claims are barred because they failed to exhaust their administrative remedies and that the tort-claims are time-barred.[8] (Defs.' Mem. at 9-11.)

The FTCA contains a limited waiver of sovereign immunity that authorizes certain civil tort suits for money damages

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[7] The court notes that the Ninth Circuit cases that apply the NHPA have not yet addressed what constitutes an "Indian tribe" for purposes of the Act; all relevant cases involve plaintiff tribes that had federal recognition. See e.g. Navajo Nation v. United States Forest Serv., 479 F.3d 1024 (9th Cir. 2007); San Carlos Apache Tribe v. United States, 417 F.3d 1091 (9th Cir. 2005); Muckleshoot Indian Tribe, 177 F.3d 800. However, plaintiffs have alleged that, at the very least, they are interested members of the public who have a right to participate in any undertaking relating to these affected sites. "[A]ny member of the public who can demonstrate sufficient interest in the preservation of the historical lands at issue falls within the zone of interests protected by the NHPA." Mont. Wilderness Ass'n, 310 F. Supp. 2d at 1151. Accordingly, the court need not reach this issue.

[8] Defendants also contend that federal agencies are not proper parties to FTCA claims. Because, as set forth *infra*, the court grants defendants' motion based upon plaintiffs' failure to exhaust administrative remedies and to meet the statute of limitations, the court does not reach the merits of this argument.

against the U.S. government. See Vacek v. United States Postal Serv., 447 F.3d 1248, 1250 (9th Cir. 2006). Specifically, the FTCA grants federal courts jurisdiction to hear claims for damages for injury or loss of property that is caused by the negligent or wrongful act or omission of any federal employee while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant according to the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b).

However, the FCTA imposes jurisdictional prerequisites that limits the court's power to hear these civil suits. The plaintiff must comply with 28 U.S.C. § 2675 by presenting an administrative claim to the appropriate agency and having the claim finally denied in writing before filing in federal court. Blair v. IRS, 304 F.3d 861, 864-65 (9th Cir. 2002); Brady v. United States, 211 F.3d 499, 502-03 (9th Cir. 2000). For the purposes of Section 2675, the claimant must give written notice of the injury and the harm suffered and request money damages in a sum certain. See Warren v. United States Dep't of Interior Bureau of Land Mgmt., 724 F.2d 776, 780 (9th Cir. 1984)(en banc); Blair, 304 F.3d at 865. While the notice requirement is minimal, it should put the agency on notice of every essential feature of the claimant's case to allow the agency to investigate and, if possible, settle the claim before the matter goes to court. See Goodman v. United States, 298 F.3d 1048, 1055 (9th Cir. 2002); Brady, 211 F.3d at 503.

District courts do not have the discretionary power to waive compliance with the claim requirement, including the requirement

that the claim state a sum certain. See Vacek, 447 F.3d at 1250 (explaining that the exhaustion requirement was jurisdictional and must be interpreted strictly such that the court was "not allowed to proceed in the absence of fulfillment of the conditions merely because dismissal would visit a harsh result upon the plaintiff"); Blair, 304 F.3d at 865 ("[T]here is a jurisdictional requirement of a "sum certain" that comes from 28 U.S.C. § 2675."); Brady, 211 F.3d at 502-03 (holding that a previously-dismissed judicial complaint, even though giving notice to the relevant agency of the injury and the damages sought, was insufficient to grant subject matter jurisdiction for the court to hear a second judicial complaint because the plaintiff did not first file an administrative claim with the agency). Even the futility of filing an administrative claim does not excuse a plaintiff from meeting this jurisdictional prerequisite because it is a limitation that is imposed by Congress. See Nero v. Cherokee Nation of Okla., 892 F.2d 1457, 1463 (10th Cir. 1989). "Where such a claim is not first presented to the appropriate agency, the district court, pursuant to Federal Rule of Civil Procedure 12(b)(1), must dismiss the action for lack of subject matter jurisdiction." Goodman, 298 F.3d at 1054-55.

The Ninth Circuit supports a generous interpretation of what constitutes written notice to the agency. However, the grounds for relief pled in the judicial complaint must, at least, arise out of the same body of facts alleged in the administrative claim. See, e.g., Goodman, 298 F.3d at 1056-57 (holding that plaintiff reasonably included sufficient facts to give notice of

an informed consent claim when he alleged in his administrative claim that his wife died because of the agency's mistakes during a medical procedure); Rooney v. United States, 634 F.2d 1238, 1243 (9th Cir. 1980)(holding that allegations in administrative claim that injuries were caused by a fall and the subsequent medical care broadly put the government on notice for the judicial claim that the government's negligence caused the fall).

In response to defendants' factual attack on subject matter jurisdiction, plaintiffs proffer only the letter from Assembly Member Jared Huffman to the Department of the Interior as evidence that they have complied with FTCA's claim requirement. (Letter from Jared Huffman, Assembly Member of California's Sixth District, to Dick Kempthorne, Secretary of the Interior (May 15, 2007) (Pls.' Exhibit A).) Mr. Huffman's letter to the Department of Interior does not meet the claim presentment requirements. The thrust of the letter is that the department's "series of clerical errors" led to the Winnemem's exclusion from the list of recognized tribes, resulting in a loss of federal benefits. However, plaintiffs' complaint, even under a broad reading, does not ask the court to redress the loss of federal benefits. Further, the letter does not refer to any damages caused to the areas identified in the complaint, much less put a monetary value on the damages.

Plaintiffs urge the court for a more forgiving interpretation of FTCA's jurisdictional limitation. They argue that Congress did not intend Section 2675(a) to pose procedural hurdles or a barrier of technicalities to potential litigants; Section 2675(a)'s purpose is simply to facilitate early

disposition of claims. (Pls.' Supplemental Mot. Dismiss ("Pls.' Supplemental"), filed Aug. 26, 2009, at 1.) Plaintiffs emphasize that the presentment requirements imposed by Section 2675(a) are "minimal." (Id. at 2.)

The cases that the plaintiffs cite do not support their proposition that the barest minimum of information suffices to meet Section 2675. In Burchfield v. United States, 168 F.3d 1252 (11th Cir. 1999), the plaintiff's judicial claim was closely related to the facts alleged in his administrative claim. In his administrative claim, the plaintiff alleged that government doctors negligently prescribed a particular drug that caused osteoporosis as a side-effect. Id. at 1254. In his judicial claim, he alleged that, during the same time period mentioned in the administrative claim, the doctors failed to diagnose and treat osteoporosis properly. Id. Similarly, in Adams v. United States, 615 F.2d 284, 285-86 (5th Cir. 1980), both the administrative claim and the judicial complaint sought damages stemming from the same incident, that is, negligent prenatal and delivery care. Furthermore, in Brown v. United States, 838 F.2d 1157, 1161 (11th Cir. 1988), the court allowed the plaintiff's counsel to add a new cause of action that accrued after the administrative claims had been denied because the government's liability was based on the same facts presented in the administrative claim. The plaintiff in Brown had sought damages arising from the negligent failure to diagnose tongue and throat cancer but died before his judicial claim reached trial, prompting his counsel to add a wrongful death cause of action to the judicial claim. Id. at 1158-59. In all these cases, the

plaintiffs' judicial claims arose from the same body of facts that were alleged in their administrative claims.

Unlike Goodman, Rooney, Burchfield, and Adams, the injury here arising from the allegations in Mr. Huffman's letter is not the same injury for which plaintiffs seek judicial redress. Unlike Brown, defendants' liability here is premised on a different body of facts from the facts alleged in Mr. Huffman's letter. Defendants, upon receiving Mr. Huffman's letter, could not have been put on notice of the tort claims arising from USFS activity or the sum certain that plaintiffs now seek.[9] Without the essential features of plaintiffs' tort claims that are asserted in the complaint, defendants could not have investigated and settled the claims before plaintiffs instituted this action. See Brady, 211 F.3d at 503. Therefore, as plaintiffs do not meet the notice and sum certain requirements of Section 2675, the court does not have subject matter jurisdiction to hear plaintiffs' tort claims.

However, even if the court were to find that Mr. Huffman's letter suffices for purposes of Section 2675, plaintiffs also fail to meet the statute of limitations for filing a FTCA claim. "A district court does not have jurisdiction to hear a tort claim against the United States unless the claimant files a complaint in federal court within six months after the final agency

[9] The court does not address whether Mr. Huffman's letter could have met the claim presentment requirements, including the sum certain requirement, for an action seeking damages for the loss of benefits due to the alleged series of clerical errors because plaintiffs do not assert a cause of action based on that agency action. Moreover, as set forth *infra*, such a claim would likely be barred by the statute of limitations.

decision." Goodman, 298 F.3d at 1053; 28 U.S.C. § 2401(b). Ninth Circuit precedent holds that the six-month statute of limitations in Section 2401(b) is jurisdictional and not subject to doctrines of equitable estoppel or equitable tolling. See Marley v. United States, 567 F.3d 1030, 1038 (9th Cir. 2009).

Plaintiffs point to the letter dated May 23, 2007 from the Department of Interior to Mr. Huffman as evidence of final agency action. (Pls.' Supplemental at 3; Letter from Director, Office of Federal Acknowledgment, Department of the Interior, to Jared Huffman, Assembly Member of California's Sixth District (May 23, 2007) (Pls.' Ex. A).) However, plaintiffs filed the complaint on April 19, 2009, almost two years after the Department of Interior's reply. Assuming the Department of Interior's letter constituted sufficient evidence of final agency action, plaintiffs still fail to satisfy the six-month statute of limitation that Section 2401(b) requires.

Plaintiffs seek the court's leave to amend if there are deficiencies in the complaint. However, when opposing a factual attack on subject matter jurisdiction, plaintiffs bear the burden to present evidence or affidavits establishing subject matter jurisdiction. See Safe Air Meyer, 376 F.3d at 1039. Other than Mr. Huffman's letter to the Secretary of Interior, plaintiffs have not put forward evidence of an administrative claim relating to tort claims asserted in the complaint, thus failing to meet their burden with respect to both the exhaustion requirement and the statute of limitations. As plaintiffs' tort claims were not first presented to the appropriate agency, the court's jurisdiction is limited. Leave to amend will not cure this

deficiency. Therefore, the court must dismiss the action for lack of subject matter jurisdiction. See Goodman, 298 F.3d at 1054-55.

Accordingly, defendants' motion to dismiss the tort claims for lack of subject matter jurisdiction is GRANTED without leave to amend.[10]

C. Failure to State a Claim Upon Which Relief Can Be Granted

Defendants argue that plaintiffs' claims for equitable relief fail to state plausible claims that give defendants fair notice of the grounds upon which plaintiffs' claims are based. Defendants also argue that plaintiffs fail to state cognizable claims against Mr. Salazar and Mr. Vilsack.

1. Equitable Relief Claims

Plaintiffs seek a declaratory judgment that defendants' actions constitute violations of federal, state, and common law. (Compl. ¶ 95.) Plaintiffs also seek injunctive relief through a judicial order that will direct defendants to investigate and report the extent their activities and planned activities have damaged and will damage sites along the McCloud River that have cultural significance to the Winnemem. (Id. ¶ 101.)

Defendants argue that plaintiffs cannot seek injunctive relief because plaintiffs do not specify which "activities and planned activities" are the subject of their request for relief, thus not giving defendants fair notice of the grounds on which the claims are based. (Defs.' Mem. at 19.) However, a court may

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[10] As plaintiffs do not meet the claim presentment requirements or the statute of limitations to bring FTCA claims, the court need not address the plaintiffs' failure to name the United States as the proper party.

not dismiss a complaint in which the plaintiff alleged enough facts to "state a claim that is plausible on its face." Iqbal, 129 S. Ct. At 1949. At this stage in the pleadings, the court must assume the truth of plaintiffs' allegations, that is, the USFS violated agreements and ignored plaintiffs' input before affecting areas of cultural significance to the Winnemem. See Cruz, 405 U.S. at 322 ("the allegations of the complaint must be accepted as true"). As set forth, *supra*, these factual allegations give rise to plausible claims of NHPA violations. Accordingly, defendants' motion to dismiss plaintiffs' NHPA based claims for equitable relief is DENIED.

However, plaintiffs also make conclusory assertions that defendants violated other federal and state statutes through agency actions. As to these other statutes, the court cannot reasonably infer from plaintiffs' allegations whether or how defendants have violated such statutes. If plaintiffs seek alternative grounds for relief for such agency actions, the court grants plaintiffs leave to amend.

2. Individual Claims

Plaintiffs also bring claims against Mr. Salazar and Mr. Vilsack in their official and individual capacities under 42 U.S.C. § 1983 and purportedly under Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971). Plaintiffs only allege that Mr. Salazar and Mr. Vilsack violated plaintiffs' constitutional rights by actively continuing policies of the prior federal administration. (Compl. ¶¶ 11, 12.) The allegations against Mr. Salazar and Mr. Vilsack are insufficient and do not give defendants fair notice of the grounds upon which

plaintiffs' claims are based. Accordingly, defendants' motion to dismiss the claims against Mr. Salazar and Mr. Vilsack is GRANTED with leave to amend.

CONCLUSION

For the foregoing reasons, defendants' motion to dismiss is GRANTED in part and DENIED in part.

(1) Defendants' motion to dismiss plaintiffs' equitable relief claims under the APA is DENIED.

(2) Defendants' motion to dismiss plaintiffs' tort claims under the FTCA for lack of subject matter jurisdiction is GRANTED without leave to amend.

(3) Defendants' motion to dismiss plaintiffs' individual claims against Mr. Vilsack and Mr. Salazar for failure to state a cognizable claim is GRANTED with leave to amend.

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

IT IS SO ORDERED.

DATED: September 14, 2009

FRANK C. DAMRELL, JR.
UNITED STATES DISTRICT JUDGE