UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**EDCV 15-00869 JGB (KKx)**	Date	April 22, 2022
Title	***Ronald Kammeyer et al v. United States Army Corps of Engineers et al.***		

Present: The Honorable	JESUS G. BERNAL, UNITED STATES DISTRICT JUDGE

TANISHA CARRILLO	Not Reported
Deputy Clerk	Court Reporter
Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings: **Order (1) GRANTING Federal Defendants' Renewed Motion for Summary Judgment (Dkt. No. 102); (2) DENYING AS MOOT Federal Defendants' Initial Motion for Summary Judgment (Dkt. No. 86); and (3) VACATING the April 25, 2022 hearing (IN CHAMBERS)**

Before the Court is the Renewed Motion for Summary Judgment of Federal Defendants. ("Motion," Dkt. No. 102.) The Court finds this matter appropriate for resolution without a hearing. See Fed. R. Civ. P. 78; L.R. 7-15. Upon consideration of the papers filed in support of and in opposition to the Motion, the Court **GRANTS** the Motion and **VACATES** the April 25, 2022 hearing.

I. BACKGROUND

Plaintiffs Ronald Kammeyer and Mural Conservancy of Los Angeles filed their initial Complaint on May 4, 2015. (Dkt. No. 1.) Plaintiffs filed a First Amended Complaint on June 2, 2015, against Defendants United States Army Corps of Engineers ("Corps") and Oneida Total Integrated Enterprises ("Oneida").[1] (Dkt. No. 14.) The Court granted Plaintiffs leave to file a Second Amended Complaint ("SAC") on July 9, 2015 (Dkt. No. 35), which Plaintiffs filed on July 17, 2015 (see SAC). The SAC added four individual defendants sued in their official

[1] The Corps retained Oneida to do work on the spillway related to the mural at issue in 2015. ("SAC," Dkt. No. 36 ¶ 48.) Oneida has never made an appearance in this action.

capacities as employees of the Corps.[2] On October 19, 2021, Plaintiffs filed a Third Amended Complaint (Dkt. No. 94), which the Court struck on April 12, 2022, due to its late filing and formatting deficiencies (Dkt. No. 108).

The SAC is therefore the operative pleading. The SAC alleges that Kammeyer is a landscape architect who co-designed the Bicentennial Freedom Mural in Corona, California (the "Mural"). (SAC ¶ 7.) Plaintiffs allege that Defendants plan to destroy the Mural, ostensibly due to concerns over graffiti and lead paint. (Id. ¶ 25.) Based on those allegations, Plaintiffs allege causes of action under (1) the Visual Artists Rights Act of 1990 ("VARA"), 17 U.S.C. § 1016A; (2) the California Art Preservation Act ("CAPA"), California Civil Code § 987, et seq.; (3) Violation of the National Historical Preservation Act ("NHPA"), 54 U.S.C. § 300101, et seq., and the Administrative Procedures Act ("APA"); and (4) California Business and Professions Code § 17200.

Plaintiffs previously moved this Court for a preliminary injunction, which the Court granted on August 24, 2015. (Dkt. No. 50.) The Court ordered the Corps not to take any action that could alter, desecrate, destroy, or modify the Mural. (Id. at 31.)

Federal Defendants moved to dismiss the SAC; and on October 9, 2015, this Court issued an order granting-in-part and denying-in-part Federal Defendants' motion to dismiss. ("MTD Order," Dkt. No. 59.) The Court ruled as follows:

(1) Plaintiffs' first claim, a VARA claim, was dismissed with leave to amend.
(2) Plaintiffs' second claim, a CAPA claim, was dismissed with prejudice.
(3) Defendants' motion to dismiss Plaintiffs' third claim alleging a violation of the NHPA was denied.

(Id. at 8.) Because Plaintiffs failed to file a Third Amended Complaint within the Court's deadline, Plaintiffs' VARA claim is dismissed with prejudice. Therefore, the sole claim remaining against Federal Defendants is the third claim for violation of the NHPA.

On May 24, 2021, Federal Defendants filed their initial motion for summary judgment. (Dkt. No. 86.) On July 15, 2021, this Court issued an order holding the motion in abeyance—without prejudice to its being modified or renewed after the close of discovery—formally lifting

[2] Defendant the Honorable John McHugh is named in his official capacity as Secretary of the Army. (SAC ¶ 11.) Defendant Lieutenant General Thomas P. Bostick is named in his official capacity as the Chief of Engineers and Commanding General of the Army Corps of Engineers. (Id. ¶ 12.) Defendant the Honorable Jo-Ellen Darcy is named in her official capacity as the Assistant Secretary of the Army for Civil Works. (Id. ¶ 13.) And Defendant Colonel Kimberly M. Colloton is named in her official capacity as the Los Angeles District Commander for the Army Corps. (Id. ¶ 14.) The Court will refer to these four individual Defendants and the Corps collectively as "Federal Defendants."

the stay of proceedings, and setting a new case schedule. (See "Abeyance Order," Dkt. No. 93.) On March 7, 2022, discovery closed in this matter. As such, Federal Defendants filed the instant Motion on March 18, 2022. Plaintiffs opposed on March 28, 2022 ("Opposition," Dkt. No. 103); and Federal Defendants replied on April 4, 2022 ("Reply," Dkt. No. 107).

II. LEGAL STANDARD

Summary judgment is appropriate when there is no genuine dispute as to any material fact. Fed. R. Civ. P. 56(a). The moving party has the initial burden of identifying the portions of the pleadings and record that it believes demonstrate the absence of an issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The moving party must show that "under the governing law, there can be but one reasonable conclusion as to the verdict." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). If the non-moving party bears the burden of proof at trial—as is the case here—then the moving party need not produce evidence negating or disproving every essential element of the non-moving party's case. Celotex, 477 U.S. at 325. Instead, the moving party "must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." Nissan Fire & Marine Ins. Co. v. Fritz Cos., Inc., 210 F.3d 1099, 1102 (9th Cir. 2000).

"If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial." Id. However, if the moving party has sustained its burden, the non-moving party must show that there is a genuine issue of material fact that must be resolved at trial. Celotex, 477 U.S. at 324. The non-moving party must make an affirmative showing on all matters placed at issue by the motion as to which it has the burden of proof at trial. Celotex, 477 U.S. at 322; Anderson, 477 U.S. at 252. A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." Anderson, 477 U.S. at 248. "The non-moving party must show more than the mere existence of a scintilla of evidence." In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010) (citing Anderson, 477 U.S. at 252).

When deciding a motion for summary judgment, the court construes the evidence in the light most favorable to the non-moving party. Barlow v. Ground, 943 F.2d 1132, 1135 (9th Cir. 1991). Summary judgment for the moving party is proper when a "rational trier of fact" would not be able to find for the non-moving party based on the record taken as a whole. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." Scott v. Harris, 550 U.S. 372, 380 (2007).

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III. FACTS

The following material facts are sufficiently supported by admissible evidence and are uncontroverted, except as noted. These material facts are "admitted to exist without controversy" for purposes of the Motion. See Fed. R. Civ. P. 56(e)(2); L.R. 56-3.

In July 2015, the Corps received a letter from the Advisory Council of Historic Preservation ("ACHP"), advising that it had received an inquiry from the public regarding the Corps' proposal to remove lead-based paint from the Prado Dam—specifically, paint connected to the Mural. ("SUF," Dkt. No. 102-2, ¶ 1.) The ACHP noted that it was unclear whether the Corps had concluded consultation for that undertaking. (Id. ¶ 2.)

In September 2015, the Corps sent a letter to the ACHP—copied to the California State Historic Preservation Officer ("SHPO")—providing background on the Corps' previous consultation efforts under Section 106 of the NHPA as to the proposed lead-paint removal. (Id. ¶ 3.) The proposed lead-paint removal is part of the larger Santa Ana River Mainstem ("SARM") undertaking. (Id. ¶ 4.) Section 106 consultation for the proposed removal of the Mural had been done pursuant to the 1993 SARM Programmatic Agreement, which was signed by the ACHP, the SHPO, and the Los Angeles District of the Corps. (Id.)

In October 2015, the ACHP sent a letter to the Corps recommending that (1) the Corps separately assess the eligibility of the Mural for listing on the National Register of Historic Places ("National Register") in consultation with the SHPO and other consulting parties, and (2) if the Mural is eligible for listing on the National Register, to treat the Mural as a "post review discovery pursuant to 36 C.F.R. § 800.13." (Id. ¶ 5.) ACHP's recommendation was based on what it described as "new information, clear public support, and the 26 years since the [Corps' prior] survey of historic properties" in the area. (Id. ¶ 6.)

Consistent with the ACHP's recommendation, the Corps embarked on an effort to separately evaluate the Mural. (Id. ¶ 7.) As part of its efforts to identify historic property, the Corps invited interested parties to participate in the consultation process to evaluate the Mural. (Id. ¶ 8.) Before formally inviting consulting parties, the Corps informally worked with both the Friends of the Prado Dam Mural and the Bicentennial Freedom Mural Conservancy to identify parties that would likely want to participate. (Id. ¶ 9.)

In February 2016, the Corps invited as consulting parties the following individuals and entities: Plaintiffs Kammeyer and Mural Conservancy of Los Angeles, Friends of the Prado Dam Mural, The Bicentennial Freedom Mural Conservancy, City of Chino Hills, City of Norco, City of Corona, City of Chino, Orange County Public Works, Riverside County Flood Control and Water Conservation District, San Bernardino County, and Cathy Sciortino (a Norco resident). (Id. ¶ 10.) Those individuals and entities were invited to be consulting parties to provide

information relevant to the Corps' evaluation of the Mural. (Id. ¶ 11.)[3] All but one party declined to be a consulting party. (Id. ¶ 12.)

In April 2016, in accordance with the 1993 SARM Programmatic Agreement, the Corps sent a letter to the SHPO informing her of the Corps' evaluation plan for determining whether the Mural is eligible for listing on the National Register. (Id. ¶ 14.) The Corps noted that it would record the Mural on the appropriate forms, host a workshop with the consulting parties, and prepare a historic context to determine whether the Mural is of "exceptional importance" pursuant to 36 C.F.R. § 60.4. (Id. ¶ 15.)

Weeks later, the SHPO sent a letter to the Corps responding to the Corps' evaluation plan. (Id. ¶ 16.) In that letter, the SHPO requested that the Corps provide the "scope of work or research plan that will be used to guide this work." (Id. ¶ 17.) The Corps replied that it would provide the scope of work once the work was prepared. (Id. ¶ 18.)

In May 2016, the Corps held a workshop at Prado Dam with the consulting parties to solicit their concerns and views regarding the Mural and to gather additional information related to the potential eligibility of the Mural for listing on the National Register. (Id. ¶ 19.) The workshop included discussion of how the Mural could be repainted. ("SUF Response," Dkt. No. 105 ¶ 19.) Attendees included Plaintiffs Ron Kammeyer and the Mural Conservancy of Los Angeles, as well as representatives from local cities, counties, and the Corps. (SUF ¶ 20.) As part of the workshop, attendees visited the Mural in person and then met to discuss specific NHPA criteria under which the Mural may be eligible for listing. (Id. ¶ 21.)[4] Following the workshop, the Corps reviewed the information received and began the process of compiling a draft consultation package to be shared with the SHPO and the consulting parties. (Id. ¶ 22.) The Corps coordinated with its Technical Center of Expertise for the Preservation of Historic Buildings and Structures ("Technical Center") and requested that it assist in evaluating the Mural by preparing a historic context statement in Spring 2016. (Id. ¶ 23.)

In October 2016, the ACHP sent the Corps a request for a status update on its efforts to assess the Mural's eligibility for listing on the National Register. (Id. ¶ 24.) The Corps responded to the ACHP in an April 2017 letter. (Id. ¶ 25.) The letter summarized how the Corps—in accordance with the 1993 SARM Programmatic Agreement—had reinitiated

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[3] Plaintiffs argue that "that process was in the morning session" (see SUF Response ¶ 19)—but that does not dispute that that process occurred.

[4] Under the "incorporation by reference" doctrine, the Court, on its own motion, takes judicial notice of the Corps' Certified Administrative Record (see "CAR," Dkt. No. 96) because its authenticity is not in dispute and because the Corps necessarily relies on it. See Kannan v. Apple Inc., 2020 WL 6135994, at *2 n.1 (N.D. Cal. Oct. 19, 2020). The CAR contains the public comments of the May 11, 2016 meeting held in Corona, CA, regarding the Mural, which unequivocally establish that attendees met to discuss NHPA criteria under which the Mural may be eligible for listing. (See CAR, Exhibit 1, Dkt. No. 96-1, at 17.)

consultation on the Mural and described the steps taken to date: coordinating an evaluation plan with the SHPO, inviting consulting parties, holding the consulting party workshop, and retaining the assistance of the Technical Center. (Id. ¶ 26.) The letter also laid out the Corps' plan to provide a draft determination to all the consulting parties for their review and comment before making a final determination of the Mural's eligibility for listing. (Id. ¶ 27.)

In April 2017, the Corps received the Technical Center's draft historic context statement—titled "The Prado Dam Mural: Evaluation of the National Register Eligibility"—opining that the Mural was not eligible for the National Register. (Id. ¶ 28.) The following month, the Corps finished a draft of its report on the Mural, titled "The Recordation and Evaluation of the Prado Dam Bicentennial Mural, Corona, California." (Id. ¶ 29.) The Corps' draft report summarized the National Register eligibility recommendations of the Technical Center and noted that the Corps had made a preliminary determination that the Mural did not meet any criteria for listing on the National Register. (Id. ¶ 30.) The report also found that the Mural lacks exceptional significance under the National Register's 50-year age guideline, and that—beyond its commemoration of an event—the Mural lacks significant historical associations. (Id. ¶ 31.) In addition, the report found that the Mural does not qualify on exceptional grounds as an art piece or as the work of a significant artist, and that the property does not have the potential to yield information important to understanding the Bicentennial era's history, America's founding, or mural design. (Id. ¶ 32.)

In June 2017, the Corps sent a letter to the SHPO summarizing its steps to evaluate the Mural; and the Corps provided its draft determination, the draft historic context statement, the scope of work for the evaluation, and all other supporting documentation for the SHPO's review and comment. (Id. ¶ 33.) The following month, the SHPO responded to the Corps with a letter recommending that the Corps expand its historic context statement to include information about any local Bicentennial celebrations or other associated activities, in addition to the already provided state and national context. (Id. ¶ 34.)

In July 2017, the comment period closed for the Corps' draft determination of eligibility of the Mural for listing on the National Register. (Id. ¶ 35.) The Corps received and reviewed 219 comments. (Id. ¶ 36.)

To address comments raised by the public, by the SHPO, and by other consulting parties on the draft determination of the Mural's eligibility, the Corps arranged for Lauren McCroskey—the program manager and senior architectural historian from the Technical Center—to conduct a site visit to carry out additional research. (Id. ¶ 39.) McCroskey visited the Los Angeles area and Mural site in January 2018 to obtain more information related to the local bicentennial celebration. (Id. ¶ 40.) During her research trip, McCroskey interviewed Perry Schaefer and Plaintiff Kammeyer; and she visited the Riverside Library, Corona Historical Society, and other local repositories. (Id. ¶ 41.) McCroskey expanded and updated her historic context to include the additional information. (Id. ¶ 42.) Then, in May 2018, the Corps received the final historic context statement, titled "Prado Dam Mural: Historic Context and Evaluation of National Register Eligibility." (Id. ¶ 43.)

In May 2018, the Corps (1) provided the SHPO and the other consulting parties the Corps' final determination that the Mural was not eligible for listing on the National Register, and (2) requested SHPO concurrence on that determination. (Id. ¶ 44.) Two months later, the SHPO—without opining on the Corps' determination—suggested that the Corps engage the Keeper of the National Register of Historic Places ("Keeper") at the National Park Service to seek a determination of eligibility from the Secretary of the Interior. (Id. ¶ 45.)

In November 2018, the Corps requested from the Keeper a determination of eligibility for the Mural. (Id. ¶ 46.) Copies of that letter were provided to the SHPO; ACHP; and the twelve consulting parties, including Plaintiffs. (Id. ¶ 47.)

In February 2019, the Keeper issued a Determination of Eligibility Notification that found that the Mural was not eligible for listing on the National Register: "National Register evaluations require that we consider the property in its current condition, not as it could be restored or recreated"; the Mural's current vandalized condition, the Keeper noted, "significantly obscur[es] not only the physical artwork but also the intended historic message." (Id. ¶ 48.)

In March 2019, the Corps notified the SHPO's office and the twelve consulting parties of the Keeper's determination. (Id. ¶ 49.) The Corps reminded the consulting parties that the Keeper is the final authority on a property's eligibly for listing on the National Register. (Id.)

IV. OBJECTIONS

Plaintiffs make several evidentiary objections. Plaintiffs' evidentiary objections to the above-summarized facts are **DENIED**.[5] Because the Court does not consider any other objected-to evidence in its decision, all other evidentiary objections are **DENIED** as moot.

V. DISCUSSION

Federal Defendants move for summary judgment on the grounds that the Corps completed the Section 106 process required under the National Historic Preservation Act. (Motion at v.) Federal Defendants argue that they are therefore entitled to summary judgment on the only remaining claim against them: the third cause of action for violation of the NHPA.

[5] The Court, for example, has denied some of Plaintiffs' objections as largely "boilerplate recitations of evidentiary principles or blanket objections without analysis applied to specific items of evidence." Doe v. Starbucks, Inc., 2009 WL 5183773, at *1 (C.D. Cal. Dec. 18, 2009); Amaretto Ranch Breedables v. Ozimals Inc., 907 F. Supp. 2d 1080, 1081 (N.D. Cal. 2012) ("This Court need not address boilerplate evidentiary objections that the parties themselves deem unworthy of development"); Communities Actively Living Indep. & Free v. City of Los Angeles, 2011 WL 4595993, at *8 (C.D. Cal. Feb. 10, 2011) (summarily overruling boilerplate evidentiary objections when the grounds for the objections were unduly vague and overbroad).

(Id.) Plaintiffs bring that claim under the Administrative Procedures Act. (See Dkt. No. 50 at 21.)

Section 106 of the NHPA is a "stop, look, and listen provision" that requires each federal agency to consider the effects of its programs. WildEarth Guardians v. Provencio, 923 F.3d 655, 676 (9th Cir. 2019). Specifically, Section 106 of the NHPA requires federal agencies to "make a reasonable and good faith effort to identify historic properties; determine whether identified properties are eligible for listing on the National Register"; and "assess the effects of the undertaking on any eligible historic properties found." Id. (citations and quotations omitted). Section 106 also requires federal agencies to "engage in consultation with the State Historic Preservation Officer (SHPO) to determine and document the area of potential effects, gather information, and develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties." Id. (citations, quotations, and brackets omitted).

An "undertaking" includes a "project, activity, or program" that is "carried out by or on behalf of [a] Federal agency." 54 U.S.C. § 300320. A "historic property" is any "prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register of Historic Places, including artifacts, records, and material remains relating to the district, site, building, structure, or object." 54 U.S.C. § 300308 (emphasis added).

NHPA regulations are promulgated by the Advisory Council of Historic Preservation, and federal agencies "must" comply with those regulations in implementing the Section 106 consultation process. Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep't of Interior, 608 F.3d 592, 607 (9th Cir. 2010) ("The NHPA explicitly delegates authority to the [ACHP] to promulgate such rules and regulations as it deems necessary to govern the implementation of section 106. We have previously determined that federal agencies must comply with these regulations." (citations and quotations omitted)).

The regulations identify the following parties as having consultative roles in the Section 106 process: (1) SHPO; (2) "Indian" tribes; (3) representatives of local governments; (4) applicants for federal assistance, permits, licenses, and other approvals; and (5) additional consulting parties with "a demonstrated interest in the undertaking," who may participate as consulting parties. 36 C.F.R. § 800.2(c)(1)-(c)(5). In addition, the public's views must be sought and considered in a manner that "reflects the nature and complexity of the undertaking and its effects on historic properties . . . ." 36 C.F.R. § 800.2(d) (emphasis added).

The APA governs a court's review of agency action pursuant to the NHPA. See Ctr. for Biological Diversity v. Esper, 958 F.3d 895, 903 (9th Cir. 2020). Under the APA, "a reviewing court must hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id. at 910 (citation and quotations omitted). "The arbitrary or capricious standard is a deferential standard of review under which the agency's action carries a presumption of regularity." Id. (quoting San Luis & Delta-Mendota Water Auth. v. Locke, 776 F.3d 971, 994 (9th Cir. 2014)). "'Where the

agency has relied on relevant evidence such that a reasonable mind might accept as adequate to support a conclusion, its decision is supported by substantial evidence,' and this court must affirm the agency's finding." Id. (quoting San Luis & Delta-Mendota Water Auth. v. Jewell, 747 F.3d 581, 601 (9th Cir. 2014)). "Even if the evidence is susceptible of more than one rational interpretation, the court must uphold the agency's findings." Id. (citation, quotations, and brackets omitted).

Here, Federal Defendants contend that they fulfilled their NHPA obligations and that they are therefore entitled to summary judgment on the NHPA claim. The Court agrees. The undisputed material facts establish that the Corps—as required by the NHPA—made a reasonable and good faith effort to identify whether the Mural is a historic property and to determine whether the Mural is eligible for listing on the National Register. Ultimately, the Mural was determined not eligible for listing and thus not a historic property. (See SUF ¶ 49.) Plaintiffs primarily respond that Federal Defendants' "recitation of facts focuses on the Section 106 process but ignores the longstanding dialogue" between Kammeyer and the Corps relating to the Mural. (See Opposition at 3.) That "longstanding dialogue," however, is irrelevant to the legal issue before the Court: whether the Corps has complied with its Section 106 obligations under the NHPA.

The Corps did, indeed, complete the Section 106 process required under the NHPA. In October 2015, the ACHP sent the Corps a letter, recommending that the Corps assess the eligibility of the Mural for listing on the National Register in consultation with the SHPO and any other consulting parties. (SUF ¶ 5.) The Corps then embarked on an effort to do so. (SUF ¶ 7.) It involved interested parties in the consultation process to evaluate the Mural, including Plaintiffs and representatives of local governments. (SUF ¶¶ 8-11, 13.) In May 2016, the Corps held a workshop at Prado Dam with the consulting parties to solicit their concerns and views regarding the Mural and to gather additional information related to the potential eligibility of the Mural for listing on the National Register. (Id. ¶ 19.) Plaintiffs contend that that meeting "was to talk about repainting the Mural" (see SUF Response ¶ 19), but allegations concerning discussions of repainting or otherwise restoring the Mural have no bearing on the NHPA's requirements, including the requirement that federal agencies consider the effects of their undertaking on historic properties and afford the ACHP a reasonable opportunity to do so. See 54 U.S.C. § 306108; (see also Reply at 3.).

After the meeting, the Corps reviewed the information received and began to compile a draft consultation package to be shared with the SHPO and the consulting parties. (SUF ¶ 22.) The Corps also coordinated with its Technical Center of Expertise to obtain its assistance in evaluating through Mural through the preparation of a historic context statement. (Id. ¶ 23.)

In its efforts to identify whether the Mural is a history property and eligible for listing on the National Register, the Corps received the draft historic statement from the Technical Center of Expertise, which recommend that the Mural was not eligible for the National Register. (Id. ¶ 28.) In May 2017, the Corps then completed its draft report on the Mural, which summarized the Technical Center's recommendations on the National Register eligibility and which noted

that the Corps had preliminarily determined that the Mural did not meet any criteria for listing on the National Register. (Id. ¶¶ 29-30.) The report found that the Mural lacks exceptional significance and that it does not have significant historical associations beyond its commemoration of an event. (Id. ¶ 31.) The report also found that the Mural does not qualify on exceptional grounds as an art piece or as the work of a significant artists, and that the property does not have the potential to yield information important to understanding the history of the Bicentennial era, the founding of America, or mural design. (Id. ¶ 32.) Plaintiffs do not dispute that the report concluded as such; instead, Plaintiffs dispute that those findings are correct. (SUF Response at 31.) The role of the Court here, however, is not to evaluate the Corps' findings but to evaluate whether the Corps has met the NHPA's obligations.

After the Corps informed the SHPO of its steps to evaluate the Mural, the SHPO recommended that the Corps expand its historical context statement. (SUF ¶¶ 33-34.) In addition, the Corps received and reviewed 219 public comments on the Corps' draft determination. (Id. ¶¶ 35-36.) Thus, to address comments raised by the public, the SHPO, and other consulting parties on the draft determination of the Mural's eligibility, the Corps arranged and conducted additional research on the local bicentennial celebration. (Id. ¶¶ 39-42.) That research was included in the Technical Center's final historic context statement. (Id. ¶¶ 42-43.)

After considering those comments, the Corps in May 2018 provided the SHPO and the other consulting parties the Corps' final determination that the Mural was not eligible for listing in the National Registry, and the Corps requested the SHPO's concurrence on the determination. (SUF ¶ 44.) The SHPO, without taking a position the Corps' determination, suggested that the Corps engage the Keeper to seek determination of the Mural's eligibility from the Secretary of the Interior. (Id. ¶ 45.) The Corps did so (id. ¶ 46.), pursuant to both 36 C.F.R § 800.4(c)(2) and 36 C.F.R. Part 63. In the end, the Keeper—i.e., the final authority on a property's eligibility for listing on the National Register—determined that the Mural was not eligible for listing. (Id. ¶¶ 48-49.) Accordingly, the Court concludes that the Corps has complied with Section 106 of the NHPA because it conducted a reasonable and good faith effort to identify whether the Mural is a historic property and to determine whether the Mural is eligible for listing on the National Register.

Ultimately, Plaintiffs have failed to create a genuine issue of material fact regarding whether the Corps' actions were arbitrary or capricious. Plaintiffs argue that the Corps' facts detailing the Corps' efforts to satisfy the NHPA's procedural requirements are "only half the story" because the parties had also discussed an alternative: preserving or repainting the Mural. (Opposition at 2.) Unfortunately for Plaintiffs, those discussions are not relevant to determining whether the Corps' efforts to satisfy the NHPA were arbitrary or capricious. Similarly, Plaintiffs' argument that the Keeper's assessment was arbitrary or capricious (see Opposition at 6-7) is not relevant because the Keeper's reasoning is not a subject of this litigation. Plaintiffs thus provide no evidence or persuasive argument as to why the Corps' determination that the Mural is not a historic property under the NHPA was arbitrary or capricious. Accordingly, finding sufficient evidence that the Corps' actions were neither arbitrary nor capricious, the Court must uphold the Corps' determination.

V. CONCLUSION

For the foregoing reasons, the Court **ORDERS** as follows:

1. The Court **GRANTS** Federal Defendants' Renewed Motion for Summary Judgment (Dkt. No. 102).

2. The April 25, 2022 hearing is **VACATED**.

3. The Court **DENIES AS MOOT** Federal Defendants' Initial Motion for Summary Judgment (Dkt. No. 86).

4. The Court **DISSOLVES** the Preliminary Injunction that was entered on August 24, 2015 (Dkt. No. 50) and modified on December 2, 2020 (Dkt. No. 84).

5. The Court **DISMISSES** Federal Defendants from this action because no claims remain against them.

6. The Court **DISMISSES** Defendant Oneida Total Integrated Enterprises ("Oneida") from this action ("Oneida"). A proof of service was never filed with respect to Oneida, and Oneida has never made an appearance in this action.

7. Because Oneida is dismissed, the Court **DISMISSES with prejudice** Plaintiffs' fourth claim against Oneida for violation of California Business and Professions Code § 17200.

8. The Clerk of the Court is **DIRECTED** to close this case.

9. Judgment shall issue accordingly.

IT IS SO ORDERED.