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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

HEREDITARY CHIEF WILBUR SLOCKISH, a resident of Washington, and an enrolled member of the Confederated Tribes and Bands of the Yakama Nation, **HEREDITARY CHIEF JOHNNY JACKSON, a resident of Washington, and an enrolled member of the Confederated Tribes and Bands of the Yakama Nation,**	**Case No. 3:08-cv-1169-YY** **PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT** **Request for Oral Argument**

CAROL LOGAN, a resident of Oregon, and an enrolled member of the Confederated Tribes of Grande Ronde,

CASCADE GEOGRAPHIC SOCIETY, an Oregon nonprofit corporation,

and

MOUNT HOOD SACRED LANDS PRESERVATION ALLIANCE, an unincorporated nonprofit association,

Plaintiffs,

v.

UNITED STATES FEDERAL HIGHWAY ADMINISTRATION, an Agency of the Federal Government,

UNITED STATES BUREAU OF LAND MANAGEMENT, an Agency of the Federal Government,

and

ADVISORY COUNCIL ON HISTORIC PRESERVATION, an Agency of the Federal Government.

Defendants.

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GLOSSARY

ACHP	Advisory Council on Historic Preservation
APA	Administrative Procedure Act
C-FASH	Citizens for a Suitable Highway
CGS	Cascade Geographic Society
BLM	Bureau of Land Management
DTA	Department of Transportation Act
EA	Environmental Assessment
EIS	Environmental Impact Statement
FHWA	Federal Highway Administration
FLPMA	Federal Land Policy and Management Act
FONSI	Finding of No Significant Impact
MHSLPA	Mount Hood Sacred Lands Preservation Alliance
NAGPRA	Native American Graves and Protection Act
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
ODOT	Oregon Department of Transportation
ONRCF	*Oregon Natural Resources Council Fund*
ORCA	Oregon Resource Conservation Act
REA	Revised Environmental Assessment
RFRA	Religious Freedom Restoration Act
SDMP	Salem District Resource Management Plan
SHPO	State Historic Preservation Officer

INTRODUCTION

The Government doesn't dispute that Plaintiffs practiced their religion for decades at a less-than-one-acre sacred site just north of U.S. 26. It doesn't dispute that this site was set aside by Congress and BLM as a "Special Area" because of its environmental value. It doesn't dispute that the Government protected this site during a prior highway widening project. And it doesn't dispute that the Government *could* have protected the site during *this* highway widening project but chose not to do so. Given these undisputed facts, it is no surprise that the Government's actions violate several statutes designed to prevent destruction of cultural, environmental, and religious sites.

Rather than justifying its actions, the Government relies heavily on procedural arguments—claiming Plaintiffs' participation in the administrative process was too spotty, their lawsuit too late, their pleadings too vague, or the destruction of the site too complete to offer any remedy now. But these arguments are mere underbrush—easier to clear than a strip of old-growth trees. Plaintiffs' claims are not waived because, by the Government's own admission, "Plaintiffs' allegations did not in fact raise 'new' information," Cross-MSJ 21, and under the doctrine of administrative waiver, plaintiffs are not required to rehash what the Government already knows. Their claims are not barred by laches, because they were brought well within the six-year statute of limitations. Their pleadings are more than enough to put the Government on notice of the basis of their legal claims. And this Court has already

decided—twice—that Plaintiffs' have standing and that their injuries can be redressed by a variety of remedies short of re-routing the highway.

On the merits, the Government has little to say beyond "trust us." But the law requires more than blind deference to administrative agencies. It requires agencies to follow specific procedures and make specific showings before destroying cultural, environmental, and religious resources. Here, the Government failed to do so in multiple respects—it violated NEPA by failing to prepare an EIS, to consider alternatives, or in some cases to conduct any analysis at all; it violated NHPA by failing to perform the required analysis or consult with the relevant tribes; it violated FLPMA by destroying a sacred site and by authorizing tree cutting where tree cutting was prohibited; it violated the DTA by destroying part of a recreation area; it violated NAGPRA by failing to preserve Plaintiffs' sacred altar; and it violated the Free Exercise Clause by preferring the preservation of wetlands over the preservation of a sacred site. To be sure, agencies receive deference in their areas of expertise. But in some cases, agencies make mistakes and fail to justify their decisions. This is one of those cases: The Government failed to follow federal law and needlessly destroyed a long-protected sacred site.

ARGUMENT

I. The Government's procedural and evidentiary arguments are meritless.

A. Plaintiffs' claims are not waived.

The Government first claims Plaintiffs are barred from seeking judicial review because they did not raise their claims "during the administrative process." Cross-

MSJ 4-7. But this argument is both meritless and waived. It is waived because the Government failed to list waiver as an affirmative defense in its Answer as required under Rule 8(c). *See* ECF 238; *cf.* ECF 225 at 19. "[F]ailure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense and its exclusion from the case." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1278 at 644-45 (3d ed. 2004). So the Government cannot rely on waiver now. *Allmerica Fin. Life Ins. & Annuity Co. v. Llewellyn*, 943 F. Supp. 1258, 1262 (D. Or. 1996) (barring waiver defense at summary judgment).

The Government's waiver argument is also meritless because it is contrary to Ninth Circuit precedent. That court "has declined to adopt a broad rule which would require participation in agency proceedings as a condition precedent to seeking judicial review of an agency decision." *'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006) (internal quotation marks omitted). Rather, the court has repeatedly held that when an agency has "*independent knowledge* of the issues that concerned Plaintiffs," "there is no need for a [plaintiff] to point them out" during the administrative process. *Id.* at 1093 (quoting *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 765 (2004)) (emphasis added); *see also, e.g.*, *Friends of Clearwater v. Dombeck*, 222 F.3d 552, 558-59 (9th Cir. 2000).

This independent-knowledge rule flows from the purpose of the administrative-waiver doctrine: not to punish plaintiffs but merely to ensure the agency had an opportunity "to exercise its expertise over the subject matter." *Daly-Murphy v. Winston*, 820 F.2d 1470, 1476 (9th Cir. 1987). Ultimately, "the primary responsibility"

for compliance with the agency's procedural obligations "is with the agency." *'Ilio'ulaokalani,* 464 F.3d at 1092; *see also Friends of Clearwater*, 222 F.3d at 559. Thus, as long as the agency was "alert[ed]" to an issue "in general terms," there is no wavier. *Today's IV, Inc. v. Fed. Transit Admin.*, Nos. 13-378, 13-396, 13-453, 2014 WL 3827489, at *15 (C.D. Cal. May 29, 2014) (quoting *Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010)).

Here, Plaintiffs' legal claims all stem from the same concern: that the project would disturb sensitive environmental and cultural resources just north of U.S. 26 in Dwyer. Thus, if the Government had "independent knowledge" of this concern, it had the responsibility to address it during the administrative process—whether Plaintiffs participated or not. *'Ilio'ulaokalani*, 464 F.3d at 1093.

Here, the Government was well-aware of Plaintiffs' concerns. Indeed, the Government concedes just that, admitting that when "Logan and Jones told FHWA in February 2008 that the project could 'destroy[]' 'American Indian cultural and religious sites'…*Plaintiffs' allegations did not in fact raise 'new' information*." Cross-MSJ 21 (emphasis added). The reason is that this was the *second* time the Government considered widening U.S. 26 north into Dwyer—and the same concerns Plaintiffs raise now were explicitly raised in the earlier project. During the administrative process for the 1980s widening, Michael Jones, through C-FASH, submitted numerous comments (Ex.4 FHWA_000536-000602), testified at public hearings (*id.* FHWA_000514), gathered signatures on petitions (*id.* FHWA_000541), and talked extensively with agency officials, raising the following concerns:

- "Old growth trees [in Dwyer]…will be destroyed if the highway is widened as currently proposed," *id.* FHWA_000538; *see also id.* FHWA_000539, 000542-000543, 000549, 000571, 000593;

- The project would endanger the stone altar within Dwyer (which Jones thought at the time was a "grave"), *id.* FHWA_000539, 000549; 000567, 000577, 000590-000592; and

- A § 4(f) analysis was required because Dwyer was "within the boundaries of the Wildwood Recreation Site" and was used for recreation, *id.* FHWA_000549, 000566, 000577, 000584, 000587-000589.

These comments alerted the Government to Plaintiffs' concerns. Indeed, the Government *acted* on these concerns by changing the project to minimize the impact on Dwyer's trees, Ex.4 FHWA_000462-000464; arranging an archaeological excavation to investigate the altar, ECF 292-13; and responding in the FEIS to the § 4(f) issue, Ex.4 FHWA_000459. And these are the same concerns Plaintiffs raise now—meaning the Government has long had "independent knowledge of the very issue[s] that concern Plaintiffs in this case." *'Ilio'ulaokalani*, 464 F.3d at 1093.

The Government also showed that it had independent knowledge of Plaintiffs' concerns throughout *this* project. For instance, Plaintiffs claim the Government could have minimized damage by using a steeper slope or retaining wall within Dwyer. Mot. 26-28. Not only did the Government *actually employ* those measures to protect Dwyer in 1987, Ex.4 FHWA_00462, the scoping document for this project indicates that the original plan here was to protect Dwyer again. ECF 292-24 FHWA_001980. Similarly, Plaintiffs claim an EIS was required due to the destruction of Dwyer's old-growth trees. Mot. 24-26. FHWA officials anticipated this very concern in 2004, noting that the previous proposal to widen into Dwyer "was op-

posed by the public as a significant impact on the 'old growth' trees" and the current project "ha[d] the same issues as before." ECF 292-17 FHWA_002044. And underlying several of Plaintiffs' claims is the destruction of the stone altar used by Native Americans for their religious exercise. Mot. 35-36, 51-58. The Government obviously had independent knowledge of this concern because it sent an archaeologist to study the altar, and the archaeologist's notes acknowledge that Native Americans had been performing ceremonies at the site "for years." Ex.16 BLM_000008-000009. In short, the Government knew Plaintiffs (and others) were concerned about environmental and cultural impacts in Dwyer; Plaintiffs didn't have to rehash what the Government already knew.

None of the Government's cases undermines this analysis. *Vermont Yankee* was decided decades before the case on which the independent-knowledge rule is based, *Public Citizen*, *see 'Ilio'ulaokalani*, 464 F.3d at 1092-93; and neither it nor *La Cuna De Aztlan Sacred Sites Protection Circle Advisory Comm. v. W. Area Power Admin.*, No. 12-00005, 2012 WL 6743790 (C.D. Cal. Nov. 29, 2012), involved any independent-knowledge argument. The Government's other cases merely stand for the proposition that the doctrine of administrative waiver exists—true but irrelevant here, where the independent-knowledge rule applies.

By contrast, multiple cases have applied the independent-knowledge rule in analogous circumstances. In *Barnes v. U.S. Department of Transportation*, plaintiffs challenged an agency's decision to authorize construction of a new airport runway, claiming it would result in increased aviation demand. 655 F.3d 1124 (9th Cir.

2011). The Ninth Circuit held that regardless whether plaintiffs alerted the agency to their concerns about increased demand, three of the agencies' own "statements in the administrative record" showed that the agency "had independent knowledge" of the issue. *Id.* at 1132-35. So too here: regardless of Plaintiffs' participation in public meetings, the administrative record shows the Government knew about the impact on the stone altar and old-growth trees.

Likewise, in *Oregon Wild v. Bureau of Land Management*, No. 6:14-CV-0110-AA, 2015 WL 1190131 (D. Or. Mar. 14, 2015), BLM argued that plaintiffs waived their claim that an EA was defective for failing to consider a particular alternative, because plaintiffs failed to suggest that alternative during the comment period. But the court disagreed because "BLM was aware, well before the EA, of that alternative"—indeed, "it was BLM's original plan for the project." *Id.* at *6. So too here: the alternatives Plaintiffs say the Government should have considered are the ones it *used* in the 1980s to protect Dwyer, and the scoping document for this project shows the "original plan for the project" was to protect Dwyer again. *Id.*

Finally, finding waiver here would be particularly unjust given Plaintiffs' circumstances. The doctrine makes sense when applied to "large industry associations" with the resources to be "lawyered-up" at the comment stage and "faithful readers of the…*Federal Register*," *Koretoff v. Vilsack*, 707 F.3d 394, 401 (D.C. Cir. 2013) (Williams, J., concurring) (internal quotation marks omitted)—but that couldn't be further from a description of the elderly Plaintiffs, who live in remote areas, are "not…computer pe[ople]," and confess to "hav[ing] a hard time in the English lan-

guage." Ex.34 5:2-5, 6:12-17; Ex.35 4:13-19, 14:24-15:4, 55:4-7; ECF 292-10 7:2-10. Beyond that, the record shows that Plaintiffs were reluctant to speak out about the sacred site until absolutely necessary given the history of vandalism of the site. ECF 311 at 10-12 & n.3; Ex.17 ¶39. Both FHWA's Tribal Consultation Guidelines and E.O. 13007 recognize that this is a legitimate fear and that the Government is supposed to "respect[] tribal desires to withhold specific information about these types of sites," ECF 275-21 at 5; not penalize them for it. *See id.* at 5 ("Many tribes[']…beliefs require that the location and even the existence of traditional religious and cultural properties not be divulged"); 61 Fed. Reg. 26771 (May 29, 1996) (instructing agencies to "maintain the confidentiality of sacred sites" where appropriate).

B. Plaintiffs' claims are not barred by laches.

Next, the Government argues that "Plaintiffs' claims are barred by laches." Cross-MSJ 7. This argument fails for several reasons. First, it is waived, because the Government failed to plead laches as an affirmative defense. *See supra* Part I.A; ECF 238 (no mention of laches); *Foster Poultry Farms, Inc. v. SunTrust Bank*, 377 F. App'x 665, 670 (9th Cir. 2010) (barring laches defense); *Fleet Bus. Credit Corp. v. Nat'l City Leasing Corp.*, 191 F.R.D. 568, 569 (N.D. Ill. 1999) (same).

Second, "the doctrine of laches is inapplicable when Congress has provided a statute of limitations to govern the action." *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 586 (9th Cir. 1993); *see also SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 961 (2017). Here, Plaintiffs' APA claims are gov-

erned by the six-year statute of limitations in 28 U.S.C. § 2401(a). *Big Lagoon Rancheria v. California*, 789 F.3d 947, 954 (9th Cir. 2015). Plaintiffs' cause of action accrued, at the earliest, during the EA process in 2006. *See Citizens Ass'n of Georgetown v. Fed. Aviation Admin.*, 896 F.3d 425, 434 (D.C. Cir. 2018) (APA action "accrued during the EA process"). Plaintiffs filed suit less than two years later in 2008, ECF 1—well within the six-year limitations period. So laches cannot bar their claims.

Third, the Government's laches argument is premature. When plaintiffs satisfy the statute of limitations, laches is relevant, if at all, only "in determining appropriate injunctive relief" at "the remedial stage" of litigation—"[s]hould [Plaintiffs] ultimately prevail on the merits." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 686-87 (2014). Courts depart from this rule only in "extraordinary circumstances"—which the Government has not demonstrated here. *See, e.g.*, *Am. Trucking Ass'ns, Inc. v. New York State Thruway Auth.*, 199 F. Supp. 3d 855, 872 (S.D.N.Y. 2016), vacated, 238 F. Supp. 3d 527 (S.D.N.Y. 2017), aff'd, 886 F.3d 238 (2d Cir. 2018) (rejecting laches defense).

Finally, even assuming laches could apply, the Government has failed to demonstrate the necessary lack of diligence or prejudice here, particularly given that "[l]aches is strongly disfavored in environmental cases." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 862 (9th Cir. 2005). On diligence, the Government complains that Plaintiffs didn't participate in the "administrative process." Cross-MSJ 21-22. But Plaintiffs successfully fought to protect the site during the

1987 project. Ex.18 FHWA_005436. They continued to press their concerns throughout the 1990s. ECF 292 at 13. They repeatedly called, spoke with, and sent memos to federal officials before construction began. *Id.* at 11-15. And they filed suit just ten weeks after construction began. ECF 122 at 7-8. That is *more* diligence than in other cases in which the Ninth Circuit has refused to apply laches. *Cf. Preservation Coal., Inc. v. Pierce*, 667 F.2d 851, 854 (9th Cir. 1982).

The Government also says that, "[n]ow that the project has been completed," the Government would suffer "significant prejudice" if it was "enjoined to remove or alter the highway." Cross-MSJ 10. But "prejudice must be judged as of the time the lawsuit was filed, thereby eliminating consideration of post-lawsuit expenditures and progress in constructing the [project]." *Save the Peaks Coal. v. U.S. Forest Serv.*, 669 F.3d 1025, 1033 (9th Cir. 2012). Here, Plaintiffs filed suit 10 weeks into a year-long project—and the Ninth Circuit has held that "even *substantial* completion [is] insufficient to bar suit." *Coal. for Canyon Pres. v. Bowers*, 632 F.2d 774, 779 (9th Cir. 1980) (emphasis added). More importantly, Plaintiffs seek a variety of relief far short of removing the highway—such as removing the earthen berm north of the highway, replanting trees, and reconstructing the stone altar. The Government has not even attempted to explain how these modest remedies would cause prejudice. Accordingly, laches does not apply. *See, e.g.*, *Grand Canyon Tr. v. Tucson Elec. Power Co.*, 391 F.3d 979, 988-89 (9th Cir. 2004) (rejecting laches even though utility company's $300 million emission-control units had been operational for eleven years); *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1381 (9th

Cir. 1998) (rejecting laches even though logging was 30% complete); *Coal. for Canyon Pres*, 632 F.2d at 780-81 (rejecting laches even though highway widening project had begun, "right-of-way acquisition is complete, utility lines have been relocated, and approximately 92 acres of timber have been cleared"); *see also Cabell v. Zorro Prods. Inc.*, No. 5:15-CV-00771-EJD, 2018 WL 2183236, at *16 (N.D. Cal. May 11, 2018) (laches "cannot apply to [a] declaratory judgment claim" that "is legal" in nature).[2]

C. Plaintiffs' claims were alleged in their complaint.

The Government argues that Plaintiffs waived some of their claims by failing to allege them in their complaint. Not so. The Federal Rules require "only" that a complaint consist of "a plausible 'short and plain' statement of the plaintiff's claim, not an exposition of his legal argument." *Skinner v. Switzer*, 562 U.S. 521, 530 (2011) (quoting Fed. R. Civ. P. 8(a)). Indeed, the "complaint need not identify the statutory or constitutional source of the" claim at all. *Alvarez v. Hill*, 518 F.3d 1152, 1157 (9th Cir. 2008). It need only plead the "facts underlying" the claims such that the defendant has "fair notice" of their substance. *McCalden v. Cal. Library Ass'n*, 955 F.2d 1214, 1223 (9th Cir. 1990); *see also Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("fair notice of what the claim is and the grounds upon which it rests")

[2] The Government (at 22) relies primarily on *Apache Survival Coal. v. United States*, 21 F.3d 895, 905 (9th Cir. 1994) and *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 3d 77 (D.D.C. 2017). *Apache Survival* was decided before the Supreme Court ruled that laches doesn't apply to claims filed within the statute of limitations, so it is no longer good law. And *Standing Rock* held that plaintiffs' claim could *not* be barred by laches, because it was filed within the statute of limitations, 239 F. Supp. 3d at 83-84—so *Standing Rock* supports Plaintiffs, not the Government. In any event, both cases are distinguishable because the plaintiffs there sought only the "extraordinary and drastic remedy" of stopping massive construction projects (*id.* at 87); here, Plaintiffs also request remediation that would have no effect on the highway.

(cleaned up). If the underlying facts were alleged, the plaintiff may "advance[e] legal arguments" at summary judgment even if the complaint identified a *different* legal basis for the claim. *Alvarez*, 518 F.3d at 1157-59.

Here, the facts underlying Plaintiffs' challenge to the SDMP were not alleged in the complaint, so that claim is waived. But the rest of their claims were more than adequately pled.

First, the Government says Plaintiffs' NEPA claims are waived because they "do not allege in their complaint that an Environmental Impact Statement (rather than an EA) was required [or] that a Supplemental EA was required." Cross-MSJ 12. But that is a quibble with the complaint's description of Plaintiffs' legal theories; the "facts underlying" those claims are adequately alleged. *McCalden*, 955 F.2d at 1223. Plaintiffs' legal theory is that an EIS was required because the project significantly affected the environment by destroying Dwyer's large, old trees. Mot. 24-26. To support that theory, the complaint alleges that the Government prepared only an EA, not an EIS. ECF 223 ¶¶ 34, 51. It details the significance of Dwyer's trees and the project's impact on them. *Id.* ¶¶ 23-24, 28-29, 37, 51. And it exceeds the pleading requirements by citing NEPA and asserting a claim for a "legally deficient Environmental Assessment." *Id.* ¶¶ 73-75.

The same goes for Plaintiffs' claim about NEPA supplementation. The legal theory is that an agency must supplement its NEPA analysis whenever it receives new information showing a project would have a significant environmental impact. *Marsh v. Or. Nat. Res. Def. Council*, 490 U.S. 360, 374 (1989). To support that theo-

ry, the complaint alleges that Plaintiffs renewed their efforts "to advise and alert the Defendants" of the site's significance beginning in early 2008, ECF 223 ¶¶ 40-50; that the Government's previous "EA reviews" were "deficien[t]" because they failed to consider the information provided in those communications, *id.* ¶ 40; and that despite these communications the Government wrongly concluded that "no further action was necessary." *Id.* ¶ 43. That is more than enough to preserve the claim.

Finally, the Government's says Plaintiffs' FLPMA claims for illegal sacred-site destruction and tree-cutting are waived because the complaint didn't cite "ORCA, the O&C Lands Act or its regulations, or Executive Order 13007." Cross-MSJ 13. But the Ninth Circuit "long ago rejected the argument that a specific statute must be named" for a complaint to allege a claim. *Sagana v. Tenorio*, 384 F.3d 731, 737 (9th Cir. 2004). And Plaintiffs *did* name a specific statute—they cited FLPMA, because these are FLPMA claims. Plaintiffs' also fully alleged the facts underlying these claims. They alleged that Dwyer included a "sacred site," ECF 224 ¶¶ 1, 3, 13-14, 21, 24, 25, 27; that the Government destroyed the site, *id.* ¶¶ 31, 37-38, 51; and that Plaintiffs were authoritative religious leaders who informed the Government of the site's existence, *id.* ¶¶ 4-6, 12, 16-20, 29, 40-47. Those are all the facts underlying the destruction-of-a-sacred-site claim under E.O. 13007. 61 Fed. Reg. 26771. Regarding tree-removal, and the claim that ORCA prohibits "[t]imber cutting" along the highway, Pub. L. No. 104-208, 110 Stat. 3009-536 (1996), the complaint alleges that the site was located just off the highway, ECF 224 ¶¶ 1, 23, 31, and that the

Government engaged in extensive tree removal, including of "old growth Douglas Fir within and adjacent to" Dwyer and the highway right-of-way, *id.* ¶ 37; *see also id.* ¶¶ 38-39, 51. So these claims are preserved.

Further, even if the Government *could* identify some inadequacy in the complaint regarding these claims, it does not (and cannot) say it is prejudiced by having to respond to them on summary judgment. The purpose of requiring claims to be adequately pled to be raised on summary judgment is to allow the defendant to engage in fully-informed discovery. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000) ("A complaint guides the parties' discovery, putting the defendant on notice of the evidence it needs to adduce in order to defend against the plaintiff's allegations."). Here, however, the only discovery either party took was on Plaintiffs' RFRA claim, *see* ECF 235 at 3 n.1; ECF 236, because the Government repeatedly argued that the APA claims should be decided solely on the administrative record. ECF 97, 110, 321, 339. The Government suffers no prejudice in responding to Plaintiffs' APA claims on their merits.

D. Plaintiffs have standing.

The Government argues Plaintiffs' claims are nonredressable because "the project ha[s] already been completed." Cross-MSJ 13. But this Court has already rejected this argument—twice. In 2010, the Court held that because some harm to Plaintiffs' "cultural resources" could still be "mitigate[d]," Plaintiffs' claims were justiciable. ECF 52 at 5-8. And in 2018, Judge Hernandez reiterated "that Plaintiffs' injury is redressable" because "some relief" could be "craft[ed]" that "would mitigate

Plaintiffs' injury." ECF 312 at 3-4. These holdings are law-of-the-case—and correct. The Ninth Circuit has repeatedly held that "completion of activity" renders a claim nonjusticiable only if "*no* effective relief for the alleged violation can be given." *Neighbors of Cuddy Mtn. v. Alexander*, 303 F.3d 1059, 1065-66 (9th Cir. 2002) (emphasis added); *see also, e.g., Cantrell v. City of Long Beach*, 241 F.3d 674, 678 (9th Cir. 2001); *Tyler v. Cuomo*, 236 F.3d 1124, 1133-34, 1136 (9th Cir. 2000); *Nw. Envtl. Ctr. v. Gordon*, 849 F.2d 1241, 1244-45 (9th Cir. 1988). Here there are numerous forms of mitigation that can still "help alleviate" the project's effect on Plaintiffs, *Tyler*, 236 F.3d at 1136—such as removing the earthen berm, replanting trees, and rebuilding the stone altar. ECF 292 at 41-42 (examples).

The Government's attempts to evade the law of the case fail. It first cites *Friends of Santa Clara River v. U.S. Army Corps of Eng'rs*, 887 F.3d 906, 919 (9th Cir. 2018), Cross-MSJ 13, but the Ninth Circuit there merely noted that completion of a project can *sometimes* render an injury nonredressable. It did nothing to undermine the many cases holding that an injury is still redressable when there is at least some relief that could still be provided—as is the case here.

Next, the Government notes that this Court's most recent rejection of its redressability argument related only to Plaintiffs' RFRA claim, not their APA claims. Cross-MSJ 15. But the Government fails to mention that the Court's *first* rejection of its redressability argument *did* involve Plaintiffs' APA claims. ECF 52. Moreover, all the Ninth Circuit decisions cited above were APA decisions. In fact, the APA makes the Government's redressability argument weaker, not stronger, because re-

dressability is "relaxed" for procedural claims: the plaintiff need only show there is some possibility additional procedures "*could* influence" the agency to revise its action. *WildEarth Guardians v. U.S. Dep't of Agriculture*, 795 F.3d 1148, 1156 (9th Cir. 2015). That standard is easily met here.

The Government also claims circumstances have changed because ODOT has been dismissed from the case, and "[a]ny relief would implicate" ODOT's rights. Cross-MSJ 16. But the Government already tried this argument and the Court rejected it. *Compare* ECF 287 at 39 ("[A]ny relief this Court could order against Federal Defendants would not prevent ODOT from continuing to cause the harm alleged by Plaintiffs.") *with* ECF 312 at 3-4 ("The Court finds that Plaintiffs' injury is redressable."). And the Court rejected it for good reason: the Government is simply wrong that any mitigation of the site would necessarily implicate ODOT. ODOT's right-of-way expressly reserves to *the Government* the right to use "any portion of the right-of-way" for any purpose, provided it does not "interfere with the free flow of traffic or…safety of the highway." Ex.18 BLM_000012. And BLM retains "any rights" not "expressly convey[ed]" in a right of way, including the right to "authorize use of the right-of-way for compatible uses." 43 C.F.R. § 2805.15. Here, Plaintiffs seek modest remediation that would *not* interfere with highway safety. Because that remediation is still available, Plaintiffs have standing.

E. Plaintiffs' evidence is admissible.

The Government objects to two kinds of evidence: (1) the declarations of Plaintiffs, Jones, and Tx'li-Wins (Larry Dick), and (2) the deposition transcript of Plain-

tiffs and Jones. But both kinds of evidence were submitted in accordance with this Court's orders. In 2012, this Court held that Plaintiffs could supplement the record with affidavits establishing that they are "traditional religious leaders" and testimony "confirming Larry Dick's communication to the BLM in 1990" regarding the sacred altar. ECF 154 at 27. These declarations, the Court reasoned, fit within an exception to the APA record rule for when "supplementation is necessary to determine if the agency has considered all factors and explained its decision." *Id.* at 6 (quoting *Fence Creek Cattle Co. v. United States Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010)). That is precisely how they are being used here: to show that the Government failed to consider the fact that Plaintiffs are "appropriately authoritative representatives" and "traditional religious leaders" under the relevant laws. *See* Mot. 38-39, 53. The depositions, too, were taken in accordance with this Court's orders—and at the Government's behest—and serve the same purpose.

Recognizing the Court has already decided this issue, the Government attacks the previous decision. Mot. to Strike 12-14. But the Government fails to show that the decision was wrong at all, much less "a clear error of judgment." *United States v. Hinkson*, 585 F.3d 1247, 1283 (9th Cir. 2009). First, the Government says the decision erred in applying a "NEPA exception" to a NAGPRA claim. Mot. to Strike 13. But the exception the Court applied—that extra-record evidence is appropriate when "necessary to determine if the agency has considered all factors and explained its decision" (ECF 154 at 6)—applies to *all* APA claims, NEPA and otherwise. *See San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th Cir. 2014)

(discussing four exceptions); *Fence Creek*, 602 F.3d at 1131 (same); *Lands Council v. Powell*, 395 F.3d 1019, 1029 (9th Cir. 2005) (same).

Next, the Government says that intervening precedent undermines the Court's decision. Mot. to Strike 13-14. But none of the Government's cases questions the familiar record-rule exception the Court applied here. The mere fact that several recent NAGPRA claims "have proceeded under the APA," *id.* 14, is fully consistent with the Court's application of a well-established exception here. So the motion to strike fails.

II. The Government violated NEPA.

The Government violated NEPA in four ways.

A. Failure to perform any NEPA analysis for major federal actions.

First, it is undisputed that BLM failed to prepare any NEPA analysis for two "major Federal actions"—granting a tree-cutting permit, and granting the right-of-way. *See Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996) ("issuance of [federal] permit…constitute[s] major federal action"). It is also undisputed that BLM never formally adopted an EA or EIS prepared by another agency. That is enough to resolve this claim: BLM's failure to "at least conduct" an EA violated NEPA. *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006).

In response, the Government says that "when one agency prepares the environmental review, there is no need for other agencies involved in the larger action or project to duplicate that work." Cross-MSJ 19-20. True enough. But if an agency thinks preparing an environmental review would be duplicative, NEPA imposes an-

other requirement: the agency must formally adopt another agency's NEPA document. 40 C.F.R. § 1506.3; *see also Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1215 (11th Cir. 2002) ("Cooperating agencies are permitted to adopt an EIS signed by the lead agency, provided they undertake 'an independent review of the statement' and determine that their 'comments and suggestions have been satisfied.'" (quoting § 1506.3)); BLM Handbook H-1790-1, National Environmental Policy Act § 5.4.2 (Jan. 2008), goo.gl/k3iu3m (setting out BLM-specific adoption process). "The problem here is that there is no evidence that [BLM] adopted [FHWA]'s environmental assessment." *Anacostia Watershed Soc'y v. Babbitt*, 871 F. Supp. 475, 485-86 (D.D.C. 1994). That violated NEPA.

Alternatively, the Government says NEPA allows "a lead agency to work with other…agencies to conduct environmental review," and courts "approve of agencies working together." Cross-MSJ 19-20. Of course agencies can "work together" on an environmental review. But when an agency undertakes a major federal action *of its own*, it must either perform its own environmental review or formally adopt another agency's. BLM did neither here.

B. Failure to prepare EIS.

The Government also violated NEPA by failing to prepare an EIS, not just an EA. NEPA requires an EIS whenever a project may "significantly affect[]" environmental quality. 42 U.S.C. § 4332(C); *see also* 40 C.F.R. § 1502.2. One way an effect can be "significant" is if it "sever[ely]" affects the area's "unique characteristics." 40 C.F.R. § 1508.27(b), (b)(3). Here, the project required "clear[ance]" of "most of" the

large trees from an area long protected for just that reason—its "larger, older trees." Ex.1 FHWA_004405; Ex.5 at 5, 18-19; Ex.4 FHWA_000462-000464. This was a "significant" effect, mandating an EIS.

In response, the Government points to the REA's statement that Dwyer's "truly unique botanical values" were its "lichens and vascular plants" located outside the project area. Ex.1 FHWA_004397, 004472. But that statement was an unsupported *ipse dixit* when the Government made it in the REA, and the Government offers nothing more to support it now. *Nothing* in the record predating this project suggests that Dwyer's importance derived from its "lichens and vascular plants."

Instead, the record uniformly indicates that Dwyer was protected for a half-century because of its "dense stand" of old-growth trees, Ex.1 FHWA_004379. In 1985, the Government proposed a widening that would have required the removal of "most of [Dwyer's] large **trees**." Ex.3 FHWA_00178. Due to public outcry over "the large **trees** in the Dwyer Corridor," the Government altered the project to "minimize the number of **trees** taken." *Id.* FHWA_000462, 000469. No public comment or Government document from this period ever mentioned lichens and vascular plants.

In 1995, BLM promulgated the SDMP, again focusing on Dwyer's trees. *See* Ex.5. Dwyer was classified as a "Special Area" with a prohibition on "timber harvest." *Id.* at 5, 18-19. Nowhere does the SDMP mention lichens or vascular plants.

In 1996, Congress enacted ORCA, which protected Dwyer's trees. ORCA categorized the parts of Dwyer visible from U.S. 26 as "Mt. Hood Corridor Lands" which BLM was required to manage "for purposes other than timber harvest, so as not to

impair [its] scenic qualities." Section 401(g), Pub. L. No. 104-208, 110 Stat. 3009-536 (1996). Congress made no mention of lichens or vascular plants.

Even this project focused on Dwyer's trees. The initial scoping document recommended protecting the "old-growth" trees that agencies in the 1980s "expended considerable effort to protect." Ex.6 FHWA_001980. Similarly, FHWA officials said the project would require additional environmental analysis because the attempt to widen through Dwyer in the 1980s "was opposed by the public as a significant impact upon the 'old growth' trees," and the new project posed "the same issues as before." Ex.25 FHWA_002044. FHWA correspondence at this juncture showed no confusion regarding what feature of Dwyer was central to the calculus:

> Ummmm. Guess again. The community went nuts when this section of highway was proposed for five lanes in the 1980s. Hundreds of signatures were gathered to save 'old growth' trees…

Id. FHWA_002046.

Despite all this, in 2008, the REA said it would *not* be a "significant" impact on Dwyer to destroy *the very same trees* that had been protected for decades, because it turns out Dwyer's "truly unique botanical values" were its "lichens and vascular plants." The REA cited nothing to support this proposition other than an attached BLM report, which in turn cited no data or other analysis at all. *See* Ex.1 FHWA_004397, 004472.

Of course, agencies are free to change their views. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016). But when they do, they must "provide a reasoned explanation for the change." *Id.* (citing *Nat'l Cable & Telecomms. Ass'n v.*

Brand X Internet Servs., 545 U.S. 967, 981-82 (2005)); *see also Organized Vill. of Kake v. U.S. Dep't of Agric.*, 795 F.3d 956, 966-67 (9th Cir. 2015) (en banc). "[A]t a minimum," an agency wishing to depart from past practice must "acknowledge the change" and give a "reasoned analysis" for the departure. *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 923 (D.C. Cir. 2017) (internal quotation marks omitted). The Government failed to do so here—which "violates the APA." *Organized Vill. of Kake*, 795 F.3d at 966.

The Ninth Circuit has repeatedly applied this principle in cases like this one, involving "unexplained conflicting findings about the environmental impacts of a proposed agency action." *Id.* at 969 (citing *Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1045-46 (9th Cir. 2010)). In *Organized Village of Kake*, the agency decided that exempting a forest from a rule limiting road construction and timber harvesting would not undermine the forest's "roadless values," even though two years earlier the agency had found that an exemption would jeopardize the forest's "extraordinary ecological values." *Id.* at 968. Because the agency provided no "reasoned explanation for disregarding [its] previous factual findings," the Ninth Circuit vacated the decision. *Id.* at 966-969.

Similarly, in *American Wild Horse Preservation Campaign*, the agency had long treated a particular tract as falling within wild-horse territory. 873 F.3d at 920-21. But in 2013, the agency announced that the tract's inclusion had been an "administrative error," and—without preparing an EIS—changed the territory's boundaries to exclude it. *Id.* at 921-22. The D.C. Circuit found the EA and FONSI arbitrary and

capricious, because the agency "never came to grips with" "the *relevant* environmental concern"—the effect of the action on the wild horse population that, mistake or not, the agency had "actually managed…for two decades." *Id.* at 930-31 (quoting *Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1154 (D.C. Cir. 2011)).

So too here. Far from taking the required "hard look" at the project's consequences for Dwyer, the Government "averted its eyes altogether" from "the *relevant* environmental concern" as demonstrated by decades of agency documentation and practice. *Id*. That evidence demonstrates unequivocally that Dwyer's has always been managed to protect trees, not lichens or vascular plants.

Thus, the Government's request for "deference" on this score falls flat. *Cf. Encino Motorcars, LLC,* 136 S. Ct. at 2126 (no *Chevron* deference for unexplained policy reversals). Agency expertise warrants deference only when it is "reasoned." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 548 (2009). Here, the Government provided no reasoning for its policy change—it ducked the issue. Moreover, whatever their expertise, federal agencies can't overrule policy judgments made by Congress. Here, Congress mandated through ORCA that the overriding goal in managing Dwyer should be to protect its scenic trees.

C. The REA failed to consider all reasonable alternatives.

Ninth Circuit law is clear: "The existence of a viable but unexamined alternative renders an EA inadequate." *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013) (internal brackets omitted). The Government does not dispute that it failed to consider using a steeper slope or retaining wall within Dwyer. Nor does it

dispute that this alternative was viable—indeed, it would have allowed the Government to widen the highway just as much while also furthering the project's goal of minimizing visual impacts. Ex.1 FHWA_004353. Plaintiffs are entitled to judgment on their NEPA claim. *W. Watersheds*, 719 F.3d at 1050; *see also Or. Wild*, 2015 WL 1190131, at *4-5 (holding agency liable for failing to consider all reasonable alternatives in EA and collecting cases).

In response, the Government first notes that courts review "the range of alternatives considered by an agency" according to a "rule of reason." ECF 340 at 3232. But that just restates the rule: the only alternatives the agency must consider are "reasonable" ones. *See HonoluluTraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1231 (9th Cir. 2014). Again, there is no dispute that using a retaining wall or steeper slope within Dwyer was reasonable—i.e., "feasible" and "consistent with [the project's] basic policy objectives." *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813 (9th Cir. 1999). Nor could there be, since these are the measures the Government took in *this project* to preserve a wetland and took in the 1980s to preserve Dwyer. Ex.2 FHWA_004967-68; Ex.4 FHWA_000462.

Next, the Government notes the Ninth Circuit has previously "upheld EAs that considered only the agency's proposed action and a no-action alternative." Cross-MSJ 19. But we don't say the Government has to consider any particular *number* of alternatives; only that is has to consider "reasonable" ones, as required by the statute and controlling precedent. And again, the Government never even suggests that the alternative at issue here was unreasonable.

Finally, the Government defends the REA's discussion of the alternatives it *did* consider, noting that the REA included "maps, environmental impacts, and" other "information." *Id.* But Plaintiffs aren't challenging the extent to which the REA discussed the alternatives it discussed; they're challenging its failure to consider another reasonable alternative *at all*: a steeper slope or retaining wall within Dwyer. This was "a feasible alternative that could not be ignored," so the government violated NEPA. *Muckleshoot*, 177 F.3d at 814.

D. Failure to prepare supplemental NEPA document.

The Government also failed to supplement its NEPA analysis when Plaintiffs told FHWA in early 2008 that the project would "destroy[]" "American Indian cultural and religious sites." Ex.14 FHWA_005477; Ex.26 ACHP_000141. The Government's only response on this point is to argue that Plaintiffs "did not in fact raise 'new' information." Cross-MSJ 21. But that undermines much of the Government's brief. The Government says Plaintiffs' claims are waived because "they chose not to speak a word" to the relevant agency officials, *id.* 4-7; that their E.O. 13007 claim fails because the Government didn't know Dwyer included a sacred site, *id.* 31-32; and that their NAGPRA claim fails because the Government didn't know the altar was a sacred object, *id.* 36-37. Plaintiffs agree that the Government was well-aware of this information—which is why the Court should grant summary judgment to Plaintiffs on these claims.

But even though the Government was aware of this information, it violated NEPA by refusing to consider this information in the EA. Citing *Swanson v. United*

States Forest Service, the Government says there is a "high bar to the obligation to prepare a supplemental NEPA analysis." *Id.* 21. But no supplemental NEPA analysis was required in *Swanson* because "the agency's EIS already had taken a hard look at its action's impacts" respecting the additional information. *Id.* (citing 87 F.3d 339, 344 (9th Cir. 1996)). Here, the EA did not consider the site's religious significance at all.

III. The Government violated NHPA.

The Government violated NHPA in three ways.

A. Failure to perform any Section 106 process.

First, BLM failed to perform any Section 106 process for its two "undertaking[s]"—granting the tree-cutting permit and the right-of-way. 16 U.S.C. § 470f; *see Dugong v. Rumsfeld*, No. C 03-4350 MHP, 2005 WL 522106, at *13 (N.D. Cal. Mar. 2, 2005) ("'undertakings'" include "licensing" and "land grants") (collecting cases)).

As under NEPA, the Government argues that BLM did not need to comply with NHPA because FHWA did. Cross-MSJ 25. But again, "an agency may not avoid its [NHPA] obligations by simply relying on another agency's conclusions about" another undertaking. *Anacostia*, 871 F. Supp. at 485.

B. Failure to perform tribal consultation.

Second, the Government violated NHPA by failing to perform tribal consultation. NHPA is clear: "*Federal agenc[ies]*" must consult with Native American tribes. 16 U.S.C. § 470a(d)(6)(B); *see also id.* § 470h-2(a)(2)(D). The Government can't delegate that duty to ODOT.

The Government argues its delegation was consistent with a Programmatic Agreement ("PA") between the Government and Oregon's SHPO. Cross-MSJ 23-25. But although the Government says "Section 106's implementing regulations" provide that compliance with a PA satisfies Section 106, it points to nothing in *the statute* permitting delegation of tribal-consultation duties to state agencies. Yet it is Congress's intent regarding delegation, not the agency's, that matters. *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 565-66 (D.C. Cir. 2004). A federal agency may not subdelegate its authority "to outside entities—private or sovereign—absent affirmative evidence of authority to do so." *Id.* at 566.

Here there is the opposite: affirmative evidence of congressional intent *not* to permit subdelegation. Sections 470a(d)(6)(B) and 470h-2(a)(2)(D) speak only of "federal" agencies. Another part of NHPA (§ 470a(b)(6)(A)-(B)) lists responsibilities the Government *can* delegate to the SHPO—a list that does *not* including tribal consultation. And the Federal-Aid Highway Act provides that states may "assume" from FHWA certain consultation duties "*other than* responsibilities relating to federally recognized Indian tribes." 23 U.S.C. § 325(a)(2) (emphasis added).

Even if the PA could override clear statutory text—and it can't—the Government' didn't comply with the PA here. The PA says "ODOT *and* FHWA will maintain…consultation" with the Indian tribes—not that ODOT will handle it alone. ECF 292-26 FHWA_002026-27 (emphasis added). Moreover, the PA includes a proviso: the tribal consultation it contemplates "will be consistent with coordination required under 36 CFR 800." *Id.* 36 C.F.R. § 800, in turn, reaffirms the statute's re-

quirement that consultation be performed by the federal government. *See, e.g.,* 36 C.F.R. § 800.2(c)(2)(ii)(B) (the "*Federal Government* has a unique legal relationship with Indian tribes" (emphasis added)); *id.* § 800.2(c)(2)(ii)(C) (consultation must "recognize the government-to-government relationship between the *Federal Government* and Indian tribes" (emphasis added)); *id.* § 800.2(c)(2)(ii)(D) ("*Federal agencies*" should take into account certain considerations when carrying out consultations (emphasis added)). The Government characterizes what occurred here as "working with ODOT to initiate tribal consultations." Cross-MSJ 24. But the *only* communications the Government identified as NHPA consultations here were between ODOT and the tribes; no federal agency was involved. Ex.7 FHWA_005944, 005955-57. That is delegation, and it violated NHPA.[3]

C. Untimely consultation.

NHPA requires not just consultation, but *timely* consultation. *See Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 787 (9th Cir. 2006) (quoting 36 C.F.R. § 800.1(c)). Here, the Yakama weren't consulted until after the administrative process was complete. Mot. 33-35. The Government concedes this violated NHPA; it claims only that the error was harmless. Cross-MSJ 25-26.

"[I]n the context of agency review," however, "the role of harmless error is constrained" "to avoid gutting the APA's procedural requirements." *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1091 (9th Cir. 2011). And "[t]he Ninth

[3] The Government also questions Plaintiffs' standing to raise this claim because they are not themselves the improperly-consulted tribes. Cross-MSJ 24. But this Court already decided in 2012 that Plaintiffs had "standing to challenge the adequacy of the Federal Defendants' consultation with federally recognized tribes." ECF 154 at 12.

Circuit has emphasized that the timing of required review processes can affect the outcome." *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1108 (S.D. Cal. 2010). Here, though the Yakama did not ultimately object to the project, their Vice Chairwoman reminded the government that the areas surrounding Mt. Hood "are very sacred" and insisted that the Yakama be consulted on projects going forward. Ex.8 FHWA_007189. And former Yakama Chairman Wilferd Yallup had in 1991 identified Dwyer as a burial site. Mot. 11-15. With earlier consultation here—before the "inflexibility" caused by untimely consultation, *Pit River*, 469 F.3d at 786—the result may have been different.

IV. The Government violated FLPMA.

BLM violated FLPA in two ways.

A. Destruction of sacred site.

First, it unnecessarily destroyed a sacred site. E.O. 13007 requires agencies, "to the extent practicable," to "avoid adversely affecting the physical integrity of [Indian] sacred sites." 61 Fed. Reg. 26771. Here, BLM destroyed a sacred site to make way for a highway widening, while ignoring numerous alternatives that would have minimized or avoided the impact on the site.

In response, the Government first argues that E.O. 13007 is "non-binding" and unenforceable. Cross-MSJ 31. But the Ninth Circuit has twice held otherwise: "Although E.O. 13007 has no force and effect *of its own*," "its requirements *are incorporated into FLPMA* by virtue of FLPMA's prohibition on unnecessary or undue degradation of the lands." *Te-Moak Tribe of W. Shoshone v. U.S. Dep't of Interior*, 565 F.

App'x 665, 667-68 (9th Cir. 2014) (emphasis added); *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 721-24 (9th Cir. 2009).

On the merits, the Government says "[n]o Tribe identified the Dwyer area as sacred," and a Grand Ronde representative told the Government that Logan "did not speak for the Tribe." Cross-MSJ 31-32. But the E.O. does not require a "*Tribe*" to identify a sacred site; a site can be identified by any "Indian individual determined to be an appropriately authoritative representative of *an Indian religion*." 61 Fed. Reg. 26771 (emphasis added). BLM has long recognized that "[i]n some cases, a person not identified by the tribal government as appropriately authoritative, may indeed be so." BLM, *Exec. Order 13007 "Key Questions & Answers"* (1997) *in* U.S. Dep't of Interior, *Implementation Report on Executive Order 13007*, App'x B (1997). Indeed, BLM has cautioned that because tribal governments and "religious leaders" sometimes "do not agree," BLM officials should not "shop around for answers that [they] prefer," *id.*—precisely what the Government did here.

Plaintiffs are authoritative representatives of their religions. Slockish and Jackson are Hereditary Chiefs charged with maintaining and passing on their tribes' religious traditions, protecting sacred sites, and "exercising a leadership role" with respect to "cultural, ceremonial, and religious practices," Ex.33 ¶¶4-13; Ex.32 ¶¶4-15; Ex.36 ¶¶5-7, 22-25; Ex.37 ¶¶2-5, 14-16—who both specifically identified themselves as such to the Government. Ex.26 ACHP_000119 (Slockish identifying himself as "Hereditary Chief[]" with "the right to address cultural and spiritual issues"), ACHP_000121 (Slockish: "[M]y words…must be accepted because I am a Hereditary

Chief[.]"), ACHP_000127 (Jackson identifying himself as "hereditary chief"). Logan is an Elder who "organize[s]…religious ceremonies for [her] people," Ex.17 ¶¶4-9; and who identified herself to FHWA as a "spiritual leader." Ex.14 FHWA_005475. In *South Fork Band v. U.S. Department of Interior*, the plaintiffs made "no showing that" the "individual tribe members" were "appropriately authoritative representative[s]," No. 3:08-CV-00616, 2010 WL 3419181, at *9 n.7 (D. Nev. Aug. 25, 2010); here, by contrast, Plaintiffs are chiefs and elders "educated in tribal history and customs" whose testimony "regarding relevant aspects of" tribal life has been "sanctioned" in the Ninth Circuit for decades. *Cree v. Flores*, 157 F.3d 762, 773 (9th Cir. 1998).

The Government also claims the site at issue here was not "specific, discrete, [or] narrowly delineated" enough to trigger E.O. 13007. Cross-MSJ 31-32 (citing *South Fork Band*, 2010 WL 3419181, at *9). But *South Fork Band* cuts in *Plaintiffs'* favor, not the Government's. Plaintiffs told the Government the sacred site was within Dwyer—which borders U.S. 26 only for "0.27 mile[s]," Ex. 1 FHWA_004472—and the site itself was less than an acre in size and comprised of a handful of specific, identifiable features. ECF 292 at 6. That identification of a small, discrete sacred site is a far cry from telling the Government "the entire mountain" was off-limits. 588 F.3d at 724. Indeed, Dwyer is analogous to the "particular sites on the mountain that [were] used for religious observance" that the Ninth Circuit in *South Fork Band* indicated *would* qualify as sacred sites under E.O. 13007. *See id.* ("more discrete sites for cultural and religious observance" included "the top of the mountain,

the White Cliffs immediately below the top of the mountain, [and] the Pediment area of piñon-juniper groves on the slope of the mountain").

Finally, the Government offers no response to Plaintiffs' argument that there were practicable ways to minimize impacts on the site. Unlike in *South Fork Band*, in which BLM "devoted over seventy pages" of the EIS to plaintiffs' religious practices and reduced the project's scope to accommodate them, the Government here ignored Plaintiffs' religious practices and destroyed the site. That violated FLPMA.

B. Granting of tree-cutting permit.

BLM also violated FLPMA by granting a tree-cutting permit for land on which tree-cutting was prohibited by federal statute (ORCA) and by BLM's own resource management plan (the SDMP).

ORCA requires BLM to manage Mt. Hood Corridor Lands, including Dwyer, for protection of their "scenic qualities." Section 401(g), 110 Stat. at 3009-537. ORCA forbids managing Dwyer for "timber harvest," but says "[t]imber cutting may be conducted…following a resource-damaging catastrophic event." *Id.* at § 401(h). Here, BLM "cleared" Dwyer of "trees and vegetation," Ex.1 FHWA_004472, even though there was no catastrophic event. So it violated ORCA.

In response, the Government says "ORCA does not categorically prohibit timber cutting"; it simply places restrictions on timber cutting after a "catastrophic event." Cross-MSJ 29. But this reading is both counter-textual and implausible. It is counter-textual because it ignores § 401(g), which requires the Government to manage Dwyer for "scenic qualities" and prohibits "timber harvest." Read in context of a

prohibition on "timber harvest," § 401(h) functions as an *exception* for when there has been a "catastrophic event." The Government's reading is also implausible because it assumes the Government would have *less* authority to harvest timber after a catastrophic event than it has normally. And it assumes that needlessly clearing Dwyer's trees is consistent with managing Dwyer for its "scenic qualities."

The government (at 29-30) also points to two snippets of unrelated laws bundled with ORCA in an appropriations act, Pub. L. No. 104-208—both of which "prohibit the cutting" of trees in protected areas. *See id.* at §§ 105(f)(1), 604(b)(1). In both provisions, however, the very next subsection authorizes the agency to "allow the cutting of trees" under certain conditions. *See id.* at §§ 105(f)(2), 604(b)(2). That is just what ORCA does: One subsection prohibits "timber harvest"; the next subsection makes an exception for "catastrophic events." So these statutes simply confirm that the Government violated ORCA.

The tree-cutting in Dwyer likewise violated the SDMP. BLM "must comply [with the SDMP] under FLPMA." *Or. Nat. Res. Council Fund v. Brong*, 492 F.3d 1120, 1125 (9th Cir. 2007) ("*ONRCF*"). Here, the SDMP mandated "No" "Timber Harvest" within Dwyer:

Table 2 Management of Special Areas

Name	Acres	Off-Highway Vehicle Designation	Leasable Mineral Entry	Locatable/Salable Mineral Entry	Timber Harvest
A.J. Dwyer Scenic Area	5	Limited	Open - NSO	Closed	No

Ex.5 at 48. Despite this, BLM issued a permit allowing "most of" Dwyer's large trees to be harvested and used for a fish habitat. Ex.1 FHWA_004405.

In response, the Government claims the SDMP's requirement of "No" "Timber Harvest" actually means no "*commercial*" timber harvest—and because the Government didn't *sell* the removed trees, it didn't violate the SDMP. Cross-MSJ 27-29 (emphasis added). But that argument can't be squared with the SDMP's text, read "as a whole." *ONRCF*, 492 F.3d at 1125. Indeed, the same table of the SDMP that mandates "***No***" "Timber Harvest" in Dwyer mandates "No ***Commercial*** Timber" harvest in other areas:

Table 2 Management of Special Areas

Name	Acres	Off-Highway Vehicle Designation	Leasable Mineral Entry	Locatable/Salable Mineral Entry	Timber Harvest
		…			
Willamette River Parcels	76	Closed	Open - NSO	Closed	No Commercial Timber
Williams Lake ACEC	98	Limited	Open - NSO	Closed	No
Yampo ACEC	13	Limited	Open - NSO	Closed	No
Yaquina Head ACEC / ONA	106	Limited	Open - NSO	Closed	No Commercial Timber

Ex.5 at 49. "***No***" timber harvest and "No ***Commercial*** Timber" harvest obviously don't mean the same thing—and the Government's argument to the contrary renders some of the SDMP's language "superfluous." *Boise Cascade Corp. v. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991); *see also AT&T Commc'ns of Cal., Inc. v. Pac-West*

Telecomm, Inc., 651 F.3d 980, 992 & n.17 (9th Cir. 2011) (applying the canon against superfluity to agency document).

The Government also claims that other provisions of the SDMP use "timber harvest" in discussing commercial activities. Cross-MSJ 27-28. But of course "timber harvest" *includes* commercial timber harvest; the problem for the Government is that it includes noncommercial timber harvest, too. Moreover, other SDMP provisions refer to the "harvest[ing]" of trees in *non*commercial contexts—for example, the SDMP prohibits the "harvest" of "timber" in proposed recreation sites, but makes an "exception" for "hazard trees" or "dead and dying trees" following "a natural catastrophe." Ex.5 at 57-58. No "exception" would be needed if "timber harvest" meant only commercial harvest.

The Government also says Plaintiffs' argument would lead to "absurd results," like the Government being unable to "remove hazard trees." Cross-MSJ 28. But the SDMP *itself* recognizes this consequence could follow from prohibiting "timber" "harvest" absent an exception. In any event, the SDMP lets the Government make "interim management adjustments" in the case of unusual events like "a wildfire or windstorm." Ex.5 at 69. What the SDMP doesn't do is let the Government "clear" a strip of trees in a protected area just because it wants a wider highway. Ex.1 FHWA_004405.

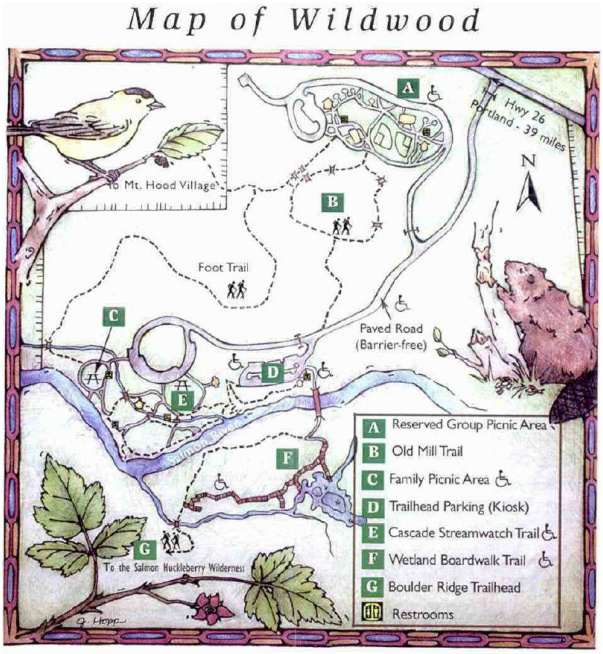
V. The Government violated § 4(f) of DTA.

Section 4(f) of DTA allows FHWA to "use" a "park" or "recreation area" for a transportation project only if "there is no prudent and feasible alternative to" doing

so and harm to the site is "minimize[d]." 49 U.S.C. § 303(c). Here, the project destroyed a "25 to 50 foot" strip of the Wildwood Recreation Site, Ex.1 FHWA_004405, and the Government does not dispute that there were "prudent and feasible alternative[s]" that would have reduced the harm. The project therefore violated § 4(f).

The Government's only counterargument is to dispute whether the specific portion of the Wildwood Recreation Site harmed here—Dwyer—was a "park" or "recreation area." The Government relies on BLM's determination (conveyed in a letter to FHWA during the 1980s widening, Ex.22 FHWA_002874) that the area was "not managed as a recreation site" (*id.*) and says FHWA "acted reasonably" in accepting this determination and that the Court should "defer[]" to it. Cross-MSJ 32-34.

But Plaintiffs are not asking the Court to second-guess the agencies' designation of the site—we're asking the Court to hold them to it. The land including Dwyer was withdrawn in 1968 and officially designated as the "Wildwood ***Recreation Site***." Ex.29, 33 Fed. Reg. 17628 (emphasis added). Never in the intervening 50 years has the Government changed the site's official designation. Rather, throughout the record, the Government repeatedly acknowledges that Dwyer is "part of" the Wildwood Recreation Site. Ex.30 FHWA_002049; *see also* Ex.3 FHWA_000217; FHWA_000199. And BLM's own materials advertised Dwyer as part of the Wildwood Recreation Site:



Ex. 31 FHWA_000026 (Dwyer is triangular area in upper-right, north of U.S. 26). The Government cites no authority allowing BLM to carve out part of an area designated in the Federal Register as a "Recreation Site" and declare it not really a recreation site.

Alternatively, the Government says Dwyer was not "used" (Cross-MSJ 33-34) as a park or recreation area. But that is contrary to the only pertinent record evidence—the comments submitted in the 1980s detailing the "recreational uses within" Dwyer (Ex.4 FHWA_000584, 000587-89), and BLM's 2005 acknowledgment of plans to use Dwyer for a recreational trail (Ex.22 FHWA_002864). This rationale therefore "runs counter to the evidence before the agency," and is arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Government cannot just say a site is not a § 4(f) park or recreation area and make it so. *See SPARC v. Slater*, 352 F.3d 545, 554 (2d Cir.

2003) (according no "deference" to and reversing FHWA's determination that site was not park or recreation area under § 4(f)).

VI. The Government violated NAGPRA.

NAGPRA protects Native American cultural items by imposing duties on officials who "know[] or ha[ve] reason to know" they have discovered such items on federal land. 25 U.S.C. § 3002(d)(1). Here, in July 2008, a BLM archaeologist observed on federal land a rock feature she had reason to know was a Native American cultural item—because she had been told just that, as she recorded in her own handwritten notes. Yet rather than protecting it, the Government "disposed of" it. ECF 287 at 28. That is a NAGPRA violation.

In response, the Government makes no attempt to claim that it complied with its NAGPRA duties; instead, it offers several arguments why NAGRPA is "not implicated here" at all. Cross-MSJ 34. Each is unavailing.

First, the Government says "only three discrete groups can bring a NAGPRA claim," and Plaintiffs don't fall within those groups. Cross-MSJ 35. But NAGPRA provides district courts with "jurisdiction over any action brought by *any person* alleging a violation of this chapter." 25 U.S.C. § 3013 (emphasis added). "This broadly worded 'enforcement' section" "includes no textual limitation on federal court jurisdiction" and contains none of "the more restrictive formulations Congress sometimes uses to limit standing." *Bonnichsen v. United States*, 367 F.3d 864, 874 (9th Cir. 2004). In other words, "'[a]ny person' means exactly that": NAGPRA "confers jurisdiction on the courts to hear '*any action*' brought by '*any person alleging a vio-*

lation" who satisfies Article III. *Id.* at 873-74 (citation omitted); *see also e.g., Robinson v. Salazar*, 838 F. Supp. 2d 1006, 1035 (E.D. Cal. 2012) (rejecting standing argument under *Bonnichsen*); *Kawaiisu Tribe of Tejon v. Salazar*, No. 09-1977, 2011 WL 489561, at *7 n.3 (E.D. Cal. Feb. 7, 2011) (same).

Second, the Government argues NAGPRA doesn't apply because a BLM official first observed the altar in 1986—before NAGPRA's November 16, 1990, effective date. Cross-MSJ 36. But this argument is contrary to the only caselaw on the subject, which held a federal official's "re-observation" of remains in 1999 constituted a "discovery" under NAGPRA, even though the government had observed the remains several times before, beginning in the 1960s. *Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs*, 83 F. Supp. 2d 1047, 1050-53, 1056 (D.S.D. 2000). The argument is also inconsistent with the statutory text. Although "discover" sometimes means "to obtain sight or knowledge of…for the first time," it also means "to expose to view"—which can occur more than once. 4 Oxford English Dictionary 752-53 (2d ed. 1989). Given "two possible constructions" of an Indian-law statute, a court's "choice between them must be dictated by a principle deeply rooted in…Indian jurisprudence: Statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992) (internal quotation marks omitted)); *see also Yankton*, 83 F. Supp. 2d at 1056 (applying canon to NAGPRA).

Third, the Government claims that when Philipek viewed the altar in 2008, she had no reason to know the altar was a sacred object. Cross-MSJ 36-37. But Philipek

had reason to know because she was explicitly told so. As her handwritten call notes demonstrate, Philipek was told by Jones in 1990 that Native Americans "know about [the altar]," "visit it," and have been "going there for years"; that it had been vandalized; that a "Wasco tribe" "medicine man" would hold a "ceremony to put the site back together"; that another Native American had come from a "spiritual camp on [the] other side of Mt. Hood" to observe the vandalism; and that it was a "Nat[ive] Amer[ican] sacred site." Ex.16 BLM_000006-9 Philipek made a copy of these notes in May 2008 and included them in the report of her 2008 visit. *Id.* Yet rather than complying with NAGPRA by protecting the altar, Philipek green-lighted the project.

Fourth, the Government claims that the "Tribes who were consulted had no objections to the project." Cross-MSJ 37. But NAGPRA isn't tied to the views of tribes; it defines "[s]acred objects" as objects needed by "traditional Native American religious leaders for the practice of traditional Native American religions by their present day adherents," 25 U.S.C. § 3001(3)(C)—which is just what Plaintiffs are.

Finally, the Government says that its archaeological excavations found no human remains at the site. Cross-MSJ 37. But NAGPRA protects "sacred objects" as well as human remains, and neither excavation drew any conclusions about whether the altar was a "sacred object." Instead, the 1986 excavation—which involved Philipek—found that the altar was "not recently…created," could be of "aboriginal" origin, and "may be at least several hundred years (and possibly much more) old." ECF 292-13 FHWA_000302-03. Those findings comport with the information

Philipek later learned from Jones—that the altar was a ceremonial object used in Native American religious exercise.

VII. The Government violated the Free Exercise Clause

Under the Free Exercise Clause, government action that is not neutral and generally applicable with respect to religion is subject to strict scrutiny. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). Here, the Government's action was not neutral and generally applicable because the Government spared a wetland on the north side of U.S. 26 by using a steeper slope, but refused to extend the same treatment to Plaintiffs' nearby sacred site.

The Government makes no argument that its actions would survive strict scrutiny. Instead, it argues that in addition to showing that government action was not neutral and generally applicable, a Free Exercise plaintiff must *also* show a "substantial burden," and the Court already ruled against Plaintiffs on this issue in dismissing their RFRA claim. Cross-MSJ 38. But "there is no substantial burden requirement" under the Free Exercise Clause. *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 170 (3d Cir. 2002); *see also Hartmann v. Stone*, 68 F.3d 973, 979 n.4 (6th Cir. 1995) (rejecting substantial-burden requirement); *Rader v. Johnston*, 924 F. Supp. 1540, 1543 n.2 (D. Neb. 1996) (same). The Government's argument overlooks *Employment Division v. Smith*, 494 U.S. 872 (1990), where the Supreme Court "largely repudiated" its earlier Free Exercise jurisprudence, which *had* turned on the "substantial burden" requirement. *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015). Before *Smith*, a "substantial burden" was the strict-scrutiny trigger; after

Smith, it is lack of "neutral[ity]" or "general[] applicab[ility]." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1075-76 (9th Cir. 2015).

The cases the Government cites (Cross-MSJ 38) all involve prisoners, and because *Smith* didn't overrule earlier Supreme Court precedents on Free Exercise claims by prisoners, the Ninth Circuit, like other circuits, has held that "claims of prisoners" under the Free Exercise Clause are still governed by pre-*Smith* caselaw (including the "substantial burden" requirement). *Ward v. Walsh*, 1 F.3d 873, 876-77 (9th Cir. 1993); *see also Levitan v. Ashcroft*, 281 F.3d 1313, 1317-19 (D.C. Cir. 2002) ("Most Courts of Appeals have…simply continu[ed] to apply" pre-*Smith* law in the "prison context").

Alternatively, the Government says its actions were neutral and generally applicable because there is no evidence they were motivated by religious "animus." Cross-MSJ 38-39. But while "[p]roof of hostility or discriminatory motivation" is "*sufficient*" to trigger strict scrutiny "the Free Exercise Clause is not confined to actions based on animus." *Shrum v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006) (emphasis added). Instead, one way to demonstrate that government action is not neutral or generally applicable is to show that it includes secular exemptions from its negative consequences, but not religious exemptions. *See Lukumi*, 508 U.S. at 537; *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.). That is what Plaintiffs have shown here: the Government made an exception from the otherwise-applicable 3:1 slope to save wet-

lands, but not a sacred site, demonstrating that its actions were not neutral and generally applicable.

CONCLUSION

The Court should grant Plaintiffs' motion for summary judgment.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This memorandum complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 10,829 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

March 27, 2019

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CERTIFICATE OF SERVICE

I certify that on March 27, 2019, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

March 27, 2019

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