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U.S. Court of Appeals

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILBUR SLOCKISH, Hereditary Chief of the Klickitat/Cascade Tribe; CAROL LOGAN, a resident of Oregon, and an enrolled member of the Confederated Tribes of the Grand Ronde; CASCADE GEOGRAPHIC SOCIETY, an Oregon nonprofit corporation; MOUNT HOOD SACRED LANDS PRESERVATION ALLIANCE, an unincorporated nonprofit association,

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF TRANSPORTATION; FEDERAL HIGHWAY

No. 21-35220

D.C. No. 3:08-cv-01169-YY

MEMORANDUM[*]

[*] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

ADMINISTRATION, an Agency of the Federal Government; U.S. DEPARTMENT OF THE INTERIOR; BUREAU OF LAND MANAGEMENT, an Agency of the Federal Government; ADVISORY COUNCIL ON HISTORIC PRESERVATION, an Agency of the Federal Government,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Oregon
Marco A. Hernandez, Chief District Judge, Presiding

Argued and Submitted November 16, 2021
San Francisco, California

Before: SCHROEDER, W. FLETCHER, and MILLER, Circuit Judges.

Plaintiffs Hereditary Chief Wilbur Slockish, Carol Logan, Cascade Geographic Society, and Mount Hood Sacred Lands Preservation Alliance appeal from the district court's grants of summary judgment to Defendants United States Department of Transportation, Federal Highway Administration ("FHWA"), United States Department of the Interior, Bureau of Land Management ("BLM"), and Advisory Council on Historic Preservation.

Plaintiffs allege that Defendants' actions with

respect to a 0.74-acre site located within a highway expansion project completed by the Oregon Department of Transportation ("ODOT") violated the Religious Freedom Restoration Act, the Free Exercise Clause of the First Amendment, the National Environmental Policy Act, the National Historic Preservation Act, the Federal Land Policy and Management Act, and Section 4(f) of the Department of Transportation Act. We conclude that this appeal is moot and that we therefore lack jurisdiction.

"The case or controversy requirement of Article III . . . deprives federal courts of jurisdiction to hear moot cases." *Native Vill. of Nuiqsut v. BLM*, 9 F.4th 1201, 1208 (9th Cir. 2021) (quoting *NAACP, W. Region v. City of Richmond*, 743 F.2d 1346, 1352 (9th Cir. 1984)). "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012) (citation and quotations omitted). A case is not moot if "there can be *any* effective relief." *Wild Wilderness v. Allen*, 871 F.3d 719, 724 (9th Cir. 2017) (emphasis in original) (quoting *Or. Nat. Res. Council v. BLM*, 470 F.3d 818, 820 (9th Cir. 2006)).

ODOT, which owns the right-of-way for the highway that encompasses the site, was dismissed from this case in 2012 based on Eleventh Amendment immunity. The remaining Defendants are federal agencies that cannot order the outright removal of the challenged highway expansion. The district court concluded that the court could nonetheless "craft some relief that would mitigate Plaintiffs' injury." Plaintiffs specifically identify the relief that they seek. That relief falls short of

removing the highway expansion, but it contemplates restoration of highway access to E. Wemme Trail Road, replacement of vegetation, reconstruction of the rock pile, removal of the sloped earthen embankment over the site, and removal of the guard rail. This relief would partially restore the site to the status quo ante, but this relief would make changes to aspects of the highway project that ODOT designed and implemented based on its judgment that those aspects improved highway safety. Because ODOT has been dismissed from this suit, none of the Defendants has authority to make the changes sought by Plaintiffs.

Pursuant to an easement previously granted by FHWA, ODOT owns a right-of-way easement over BLM land. The easement encompasses the entire site of the highway widening project. The easement reserves limited rights for BLM to use or authorize the use of the highway for non-highway purposes, but it expressly precludes BLM from doing so when it would "impair the full use and safety of the highway" or would otherwise be "inconsistent with the provisions of Title 23 of the United States Code."

The language of the easement, in combination with ODOT's dismissal, renders the case moot. All of the relief sought by Plaintiffs implicates highway safety. As ODOT and FHWA explain in the Environmental Assessment, the removal of highway access to E. Wemme Trail Road, the removal of vegetation and the rock pile, the addition of the earthen embankment, and the addition of the guard rail were all conducted for the purpose of improving the safety of the highway. As a result, BLM's limited reservation of rights to use or authorize the use of the

highway for non-highway purposes would not permit it to undo those actions.

Plaintiffs' claims for declaratory relief are also moot. Declaratory relief must correspond with a separate remedy that will redress Plaintiffs' injuries. *California v. Texas*, 141 S. Ct. 2104, 2115-16 (2021) (explaining that the Declaratory Judgment Act "alone does not provide a court with jurisdiction," and that courts must "look elsewhere to find a remedy that will redress plaintiffs' injuries"). "[A] declaratory judgment may not be used to secure judicial determination of moot questions." *Nome Eskimo Cmty. v. Babbitt*, 67 F.3d 813, 816 (9th Cir. 1995) (quotations omitted) (quoting *Native Vill. of Noatak*, 38 F.3d 1505, 1514 (9th Cir. 1994)). Plaintiffs' claims for declaratory relief that correspond to their claims for injunctive relief are therefore moot.

Plaintiffs' claim for damages is barred by federal sovereign immunity. *See Price v. United States*, 174 U.S. 373, 375-76 (1899).

Because we cannot order any effective relief, this appeal is moot. Although Defendants' "burden of demonstrating mootness is a heavy one," that burden is carried here. *Nw. Env't Defense Ctr. v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988) (citing *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)).

DISMISSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HEREDITARY CHIEF WILBUR SLOCKISH, a resident of Washington, and an enrolled member of the Confederated Tribes and Bands of Yakama Nation, et al., Plaintiffs, v. UNITED STATES FEDERAL HIGHWAY ADMINISTRATION, an Agency of the Federal Government, et al., Defendants.	Case No. 3:08-cv-01169-YY **ORDER**

HERNÁNDEZ, District Judge:

Magistrate Judge Youlee Yim You issued a Findings and Recommendation on April 1, 2020, in which she recommends that this Court grant Defendants' motion for relief from LR 56- 1(B) and to strike extra-record materials, grant Defendants' motion for summary judgment, and

deny Plaintiffs' motion for summary judgment. F&R 82, ECF 348. The matter is now before the Court pursuant to 28 U.S.C. § 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b).

Plaintiff filed timely objections to the Magistrate Judge's Findings & Recommendation. Pl. Obj., ECF 350. When any party objects to any portion of the Magistrate Judge's Findings & Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1); *Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009); *United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

Plaintiffs object to the Magistrate Judge's conclusion that the doctrine of laches bars Plaintiffs' claims under the National Environmental Policy Act ("NEPA"), the National Historic Preservation Act ("NHPA"), the Federal Land Policy and Management Act ("FLPMA"), and the Department of Transportation Act ("DTA"). First, Plaintiff argues that Defendants waived the defense of laches by failing to plead it in their answer. Pl. Obj. 11. The Court need not address this question because the doctrine of laches does not apply. The Supreme Court has held that the doctrine of laches does not bar a suit filed within an applicable federal statute of limitations. *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017) (reasoning that "applying laches within a limitations period specified by Congress would give judges a 'legislation-overriding' role that is beyond the Judiciary's power"). As a result, the Court declines to adopt Magistrate Judge You's finding that laches bars Plaintiffs' claims.

The Court has carefully considered Plaintiffs' other objections and concludes that there is no basis to modify the remainder of the Findings & Recommendation. The Court has also reviewed the pertinent portions of the record *de novo* and finds no error in the remainder of the Magistrate Judge's Findings & Recommendation.

CONCLUSION

The Court ADOPTS IN PART Magistrate Judge You's Findings and Recommendations [348]. The Court DECLINES TO ADOPT Magistrate Judge You's finding that Plaintiffs' NEPA, NHPA, FLPMA, and DTA claims are barred by the doctrine of laches. The Court ADOPTS the remainder of Judge You's Findings and Recommendations. Defendants' Motion to Strike Extra-Record Materials [339] is GRANTED. Plaintiffs' Motion for Summary Judgment [331] is DENIED. Defendants' Cross Motion for Summary Judgment [340] is GRANTED. Accordingly, this case is dismissed with prejudice.

IT IS SO ORDERED.

DATED: February 21, 2021.

/s/ Marco A. Hernández
MARCO A. HERNÁNDEZ
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

HEREDITARY CHIEF WILBUR SLOCKISH, et al., Plaintiffs, v. UNITED STATES FEDERAL HIGHWAY ADMINISTRATION, et al., Defendants.	Case No. 3:08-cv-01169-YY **FINDINGS AND RECOMMENDATIONS**

YOU, Magistrate Judge:

This action concerns a highway-widening project in Oregon along Mount Hood Highway No. 26 between the communities of Wildwood and Wemme, about 43 miles east of Portland.

Plaintiffs are Hereditary Chief Wilbur Slockish, Hereditary Chief Johnny Jackson, Carol Logan, the Cascade Geographic Society, and the Mount Hood Sacred Lands Preservation Alliance (collectively "plaintiffs"). Defendants are three federal agencies: the Federal Highway Administration, the Bureau of Land Management, and the Advisory Council on Historic

Preservation (collectively "defendants"). Other defendants, the Oregon Department of Transportation ("ODOT") and its Director, were dismissed from this action after invoking sovereign immunity in late 2011. Findings and Recommendations 20, ECF #122, *adopted by* Opinion and Order 13, ECF #131. However, the court imputes ODOT's actions to defendants because they maintain the obligation to "fulfill the requirements of section 106" regardless if a state government official "has been delegated legal responsibility for compliance." 36 C.F.R § 800.2.

Plaintiffs' Fourth Amended Complaint alleges twelve claims under the National Environmental Policy Act of 1970 ("NEPA"), 42 U.S.C. § 4321 *et seq.*, the National Historic Preservation Act of 1966 ("NHPA"), 54 U.S.C. § 300101 *et seq.*, the Federal Land Policy and Management Act of 1976 ("FLPMA"), 43 U.S.C. § 1701 *et seq.*, the Department of Transportation Act of 1966 ("DTA"), 49 U.S.C. § 303 *et seq.*, the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. § 3001 *et seq.*, the Archeological Resources Protection Act ("ARPA"), 16 U.S.C. § 470aa *et seq.*, the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, the Free Exercise Clause, U.S. CONST. amend. I, and the Due Process Clause, U.S. CONST. amend. V. Fourth Am. Complaint, ECF #223. The court dismissed the RFRA claim in 2018. Order 2, ECF #310.

Before the court are cross-motions for summary judgment (ECF ##331, 340) and defendants' motions for relief from Local Rule 56-1(B) and to strike extra-record materials (ECF #339). For the reasons set forth below, defendants' motions for relief from Local Rule 56-1(B) and to strike extra-record materials should be

granted, their motion for summary judgment should be granted, plaintiffs' motion for summary judgment should be denied, and this action should be dismissed with prejudice.

I. Statutory Framework

A. National Environmental Policy Act

NEPA "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a).[1] The statute's purpose is twofold: "(1) to ensure that agencies carefully consider information about significant environmental impacts and (2) to guarantee relevant information is available to the public." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1072 (9th Cir. 2011) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). To these ends, "NEPA imposes procedural requirements designed to force agencies to take a 'hard look' at environmental consequences." *Lands Council v. Powell*, 395 F.3d 1019, 1027 (9th Cir. 2005) (citation omitted). NEPA does not mandate "substantive outcomes." *Id.* at 1026.

Before taking "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C), agencies must either prepare an environmental assessment ("EA") or an environmental impact statement ("EIS"). 40 C.F.R. § 1501.3(a), 4(a)–

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[1] Federal regulations interpreting NEPA are "binding on federal agencies and are given substantial deference by courts." *Natl. Wildlife Fedn. v. Natl. Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 879 n.39 (D. Or. 2016) (citations omitted).

(c).[2] The EA must provide sufficient evidence and analysis for determining whether to prepare an EIS or a finding of no significant impact ("FONSI"). An EA must "include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. § 1508.9(b). An EIS must "[r]igorously explore and objectively evaluate all reasonable alternatives" to the government action. 40 C.F.R. § 1502.14(a). "The analysis of alternatives to the proposed action is the 'heart of the environmental impact statement.'" *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 642 (9th Cir. 2010) (quoting *Oregon Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 531 F.3d 1114, 1121 (9th Cir. 2008)).

B. National Historic Preservation Act

The overarching purpose of NHPA is to "foster conditions under which our modern society and our historic property can exist in productive harmony." 54 U.S.C. § 300101(1).[3] "Like NEPA, '[s]ection 106 of NHPA is a "stop, look, and listen" provision that requires each federal agency to consider the effects of its programs.'" *Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dept. of Int.*, 608 F.3d 592, 607 (9th Cir. 2010) (quoting *Muckleshoot Indian Tribe v. U.S. Forest*

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[2] *See also* 40 C.F.R. § 1502.1 (describing purpose of EIS), § 1508.9 (defining EA), § 1508.11 (defining EIS), § 1508.13 (defining FONSI).

[3] "The requirements of section 306108 of title 54 are commonly referred to as section 106 requirements (see section 106 of the National Historic Preservation Act of 1966 (Public Law 89- 665; 80 Stat. 917) as in effect before the repeal of that section)." 49 U.S.C. § 303(f)(2).

Serv., 177 F.3d 800, 805 (9th Cir. 1999)) (alteration in original); 36 C.F.R. § 800.8 (encouraging agencies to coordinate NEPA and NHPA compliance). The statute thus requires federal agencies to "make a reasonable and good faith effort" to identify historic properties "within the area of potential effects" of an undertaking by, in part, consulting with Indian tribes[4] and various preservation officers, 36 C.F.R. §§ 800.3(e), 4(b), 4(b)(1), and provide interested members of the public reasonable opportunity to comment. *Id.* §§ 800.1(a), 800.2(a)(4), (d)(1).

If historic properties may be affected by an undertaking, the agency must notify all consulting parties and invite their views. *Id.* § 800.4. If an adverse effect is found, the agency must continue to work with consulting parties to evaluate alternatives to "avoid, minimize, or mitigate"—and ultimately resolve—adverse effects on the historic property. *Id.* §§ 800.5(d)(2), 800.6(a), 800.7. The Advisory Council on Historic Preservation ("ACHP") may issue an advisory opinion for an individual undertaking "regarding the substance of any finding, determination or decision or regarding the adequacy of the agency official's compliance" with Council procedures. *Id.* § 800.9(a).

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[4] Tribal consultation duties were imposed by amendment in 1992. See National Historic Preservation Act Amendments of 1992, Pub. L. No. 102-575, 106 Stat. 4753 (1992). "'Indian tribe' means an Indian tribe, band, nation, or other organized group or community, including a Native village, Regional Corporation or Village Corporation (as those terms are defined in section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602)), that is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians." 54 U.S.C. § 300309.

C. Federal Land Policy and Management Act

With the passage of FLPMA in 1976, Congress established a policy in favor of retaining ownership of public lands, "unless as a result of the land use planning procedure provided for in this Act, it is determined that disposal of a particular parcel will serve the national interest." 43 U.S.C. § 1701(a)(1). The Bureau of Land Management ("BLM") must manage public lands "on the basis of multiple use and sustained yield." 43 U.S.C. § 1701(a)(7). "'Multiple use management' describes the enormously complicated task of striking a balance among the many competing uses to which land can be put, 'including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and [uses serving] natural scenic, scientific and historical values.'" *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 58 (2004) (quoting 43 U.S.C. § 1702(c)) (alteration in original). "'Sustained yield[]' requires BLM to control depleting uses over time, so as to ensure a high level of valuable uses in the future." *Id.* (citing 43 U.S.C. § 1702(h)). To these ends, FLPMA directs BLM to "develop, maintain, and, when appropriate, revise land use plans . . . for the use of the public lands." 43 U.S.C. § 1712(a); *see also id.* § 1712(c) (providing criteria for development and revision of land use plans).

D. Department of Transportation Act

Congress passed DTA in 1966 to effectuate its policy that "special effort should be made to preserve the natural beauty" of public lands. 49 U.S.C. § 303(a).

Section 4(f)[5] of the DTA thus "imposes a substantive mandate," *N. Idaho Community Action Network v. U.S. Dept. of Transp.*, 545 F.3d 1147, 1158 (9th Cir. 2008), that "[s]ubject to subsections (d) and (h), the Secretary [of Transportation] may approve a transportation program or project . . . only if (1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use." 49 U.S.C. § 303(c). Subsection (d) provides for an exception to this mandate for de minimis impacts, including de minimis impacts to historical sites. *See id.* §§ 303(d)(1)–(2).

E. Native American Graves Protection and Repatriation Act

NAGPRA provides for the inventory and repatriation of Native American cultural items—i.e., human remains, associated and unassociated funerary objects, sacred objects, and objects of cultural patrimony (25 U.S.C. §§ 3001(3))—from federally funded museums and institutions to lineal descendants or the Indian tribe or Native Hawaiian organization with the strongest cultural affiliations. *See generally* 25 U.S.C. §§ 3001–05; 43 C.F.R. §§ 10.1–.17. It also provides for the protection of American Cultural items during intentional excavation and inadvertent discovery after November 16, 1990. 25 U.S.C. §§ 3002(a), (c)–(d); *see also* 43 C.F.R. §§ 10.3–.4. NAGPRA requires persons

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[5] "The requirements of this section are commonly referred to as section 4(f) requirements (see section 4(f) of the Department of Transportation Act (Public Law 89-670; 80 Stat. 934) as in effect before the repeal of that section)." 49 U.S.C. § 303(f)(1).

who know, or have reason to know, that they have discovered Native American cultural items on federal land to "cease [construction] in the area of discovery, make a reasonable effort to protect the items discovered before resuming such activity," and notify the agency managing the land and the appropriate Indian tribe. 25 U.S.C. § 3002(d)(1).

II. Standard of Review

"In reviewing an administrative agency decision, summary judgment is an appropriate mechanism for deciding the legal question of whether the agency could reasonably have found the facts as it did." *City & County of San Francisco v. U.S.*, 130 F.3d 873, 877 (9th Cir. 1997). Judicial review of agency action is governed by the Administrative Procedure Act ("APA"). 5 U.S.C. § 706. Under the APA, the "reviewing court shall 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." 5 U.S.C. § 706(2)(A). "A decision is arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010) (citation omitted).

"This standard of review is 'highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.'" *Natl. Mining Assn. v. Zinke*, 877 F.3d 845, 866 (9th Cir. 2017) (quoting *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th

Cir. 2007)); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) ("the agency's decision is entitled to a presumption of regularity"). The court's role is simply to ensure that the agency made no "clear error of judgment" that would render its action arbitrary and capricious. *Friends of Santa Clara River v. U.S. Army Corps of Engineers*, 887 F.3d 906, 920–21 (9th Cir. 2018). The Ninth Circuit requires only a rational connection between the agency's factual findings and conclusions. *Id.* "[A] court is not to substitute its judgment for that of the agency, and should uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–14 (2009) (internal citations and quotation marks omitted). Nevertheless, a reviewing court must engage in a "substantial inquiry," i.e., a "thorough, probing, in-depth review" of the challenged action. *Locke*, 776 F.3d at 992.

III. Factual Background

This section includes relevant information regarding prior highway-widening projects in the late 1980s and '90s, the Wildwood to Wemme project at issue here, and plaintiffs, as they became involved in challenging the projects. The information is derived from the administrative record[6] and the limited parts of

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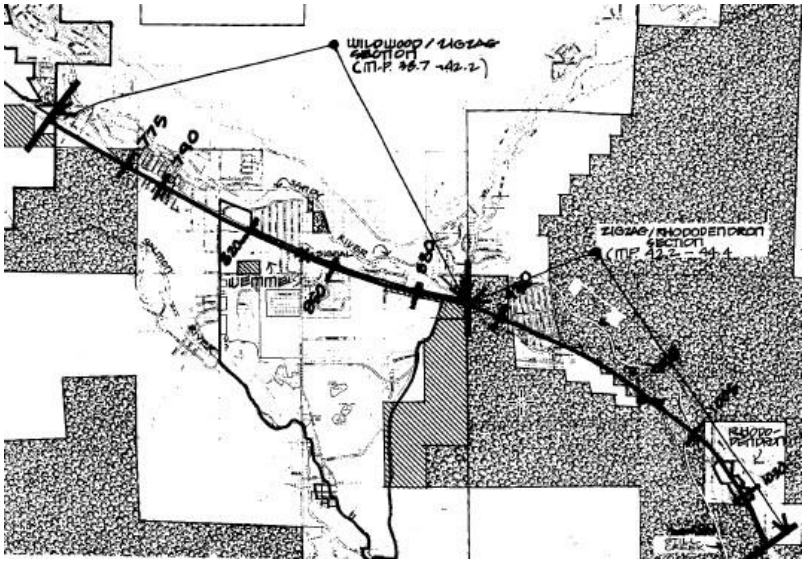
[6] The administrative record is comprised of 6,977 pages of documents (ECF #85) and 615 pages of sealed documents (ECF #86) from FHWA, 184 pages from ACHP, 141 pages from BLM (*see* ECF #85), and 124 pages of supplemental documents (ECF #90). This opinion omits the underscore and leading zeroes to bates stamps in the administrative record. For example, the citation FHWA 4957 represents bates stamp FHWA_004957, and ACHP 2 represents ACHP_000002.

plaintiffs' extra-record evidence entitled to consideration, as explained *infra* Section VI.B. The United States owns, and BLM manages, the land under Mount Hood Highway No. 26 ("US 26" or "the highway"). ODOT owns the right of way for the highway.

A. Wildwood to Rhododendron project

In 1984, ODOT began planning to expand US 26 from Wildwood to Rhododendron to increase traffic capacity during the ski season, weekends, and holidays. FHWA 60, 319; *see also* FHWA 273 (summarizing technical advisory meetings in Draft EIS).



FHWA 188 (map of project area in Draft EIS).

ODOT sought public input, including from a citizen advisory committee. FHWA 274–76 (summarizing notes from eight meetings with the committee from January to August 1984). ODOT also conducted archeological surveys and issued cultural resources reports.

ODOT sent Archeologist Richard M. Pettigrew ("Pettigrew") to conduct a field survey of the project area in April 1985. FHWA 159. His survey revealed no evidence of prehistoric sites, FHWA 162, but noted three historic features: a probable segment of the Barlow Road,[7] an artificial rock wall, and an artificial pillar near East Mountain Air Drive. FHWA 161. ODOT also had a cultural resources technician consult historic inventories to identify potential archeological and historic resources within the project's area of effect. FHWA 56–158. The resulting report found that five groups of aboriginal peoples, including the Cascade Tribe, lived in the area around Mt. Hood. FHWA 61–62. It did not identify any archeological sites "listed in, nominated to, or determined eligible in the National Register." FHWA 66; *see also* FHWA 66–71 (evaluating historical and archeological sites outside the project area for inclusion in the National Register). It also noted A.J. Dwyer donated a "40 acre stand of 1st and 2nd growth trees" to the public in 1937, but that it "would not qualify for the National Register." FHWA 72. The report ultimately concluded that the "project area contains no National Register prehistoric archaeological resources." *Id.*

ODOT and the Federal Highway Administration ("FHWA") issued a draft EIS in June 1985. FHWA 165–301. The Draft EIS proposed a no-build alternative, two build alternatives from Wildwood to Zigzag, and a build alternative from Zigzag to Rododendron. FHWA 176– 78, 186–94. The preferred alternative required expanding a six-mile stretch of highway from

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[7] "The Barlow Road was established in 1846 between The Dalles and Oregon City following trailblazing by Samual Barlow and others in 1845." ACHP 59.

two lanes to four lanes, adding a center turn lane, and adding a six-foot-wide bicycle path along the shoulders. FHWA 59, 317. The Draft EIS noted several areas of controversy, including the removal of large trees from the north side of the Dwyer Memorial Roadside Preservation area ("the Dwyer area"), damage to wetlands, and danger to pedestrians. FHWA 178–79. The Draft EIS indicated that the Dwyer area had "no official status," so BLM managed it "under the principals of multiple use and sustained yield." FHWA 199. The Draft EIS also reproduced the cultural resources report's findings, which state: "The project area contains no archeological sites listed in, nominated to, or determined eligible for the National Register of Historic Places." FHWA 216. The Draft EIS does not indicate that ODOT or FHWA formally consulted with any Indian tribes. *See* FHWA 277–78.

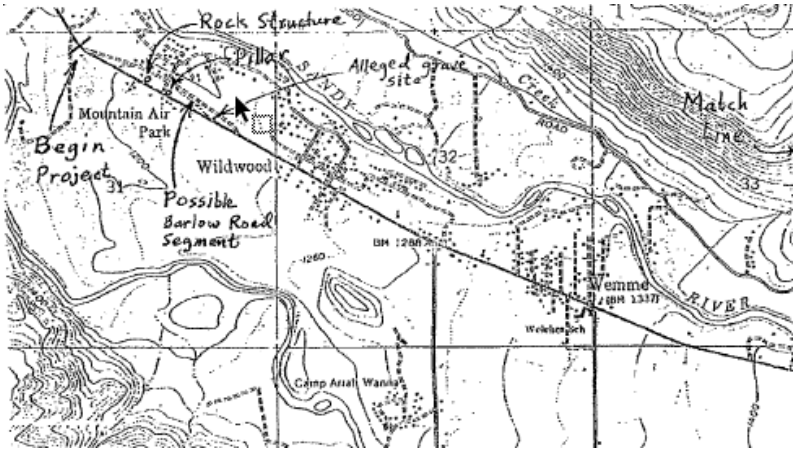
After publishing the Draft EIS, ODOT held additional public hearings and sought and received substantial public comment. FHWA 449–470; *see also* FHWA 513–687 (letters, reports, summary of public testimony). Someone commented that the Draft EIS did not mention "what appears to be a gravesite on the north side of the highway in the Dwyer area." FHWA 459. Other residents also "indicated that they wished further study of some sites and objects they felt were omitted by the Cultural Resources Report." FHWA 487. Many of these comments originated from Citizens for a Suitable Highway ("CFASH"), a local group led by Michael P. Jones ("Jones"). *E.g.*, FHWA 536, 541, 545, 548–55. Jones is a co-founder and curator of plaintiff Cascade Geographic Society ("CGS") and a member of plaintiff Mount Hood Sacred Lands Preservation Alliance ("the Alliance"). Declaration of Michael

P. Jones in Support of Standing of All Plaintiffs ¶¶ 1, 5–6, ECF #148 ("Jones Decl."). Jones does not represent that he is a member of an Indian tribe or that he practices any Native American religion. During a public hearing, Jones presented a slide show, including photos of "stone pillars at the entrance to Mountain Air Park, in Wildwood" and "the pioneer grave," as well as information about 50 other sites and features in the project area. FHWA 537–38.

FHWA 7169 (photo of "white stone pillars"). Another CFASH member wrote a letter indicating there was an unmarked "pioneer grave" in Dwyer area. FHWA 577. ODOT sent three archeologists to investigate. FHWA 302.

Pettigrew, Brian O'Neill, Ph.D., and another archeologist investigated the purported gravesite on March 4, 1986. FHWA 302 ("The rock feature in question . . . was reported to the Highway Division by local citizenry during the summer, 1985. The citizens who reported it suggested that the rocks might mark the location of a pioneer grave, and thus might be of historic cultural significance."). Pettigrew wrote that his team could "not determine with any confidence whether the

feature is aboriginal or Euro-American." FHWA 303 ("Pettigrew's 1986 Excavation Report"). They found "no subsurface disturbance accompany[ing] the placement of the rock pile on the surface. No skeletal material or other cultural objects were found." FHWA 305. Because the rocky deposit beneath the rock pile had not "been previously disturbed in any way," the archeologists wrote that they "were in complete agreement that there was no evidence of disturbance of any kind beneath the rock feature, and that the possibility of a burial beneath the stones has been shown to be extremely remote." *Id.* Pettigrew wrote, "Based upon our investigations described herein, I recommend no further investigation of the rock feature, which has no demonstrated archaeological significance and does not in my judgment appear worthy of either protection or mitigation." *Id.* BLM Archeologist Frances Philipek ("Philipek") received a copy of the report. *Id.*



FHWA 306 (map of survey area in Pettigrew's 1986 Excavation Report).

Another of CFASH's many concerns was that expanding the highway "would destroy most of the old-

growth in this area." FHWA 549. Many others took the same position. For example, then-retired Oregon Supreme Court Justice Thomas H. Tongue protested that A.J. Dwyer decided not to log the area at considerable expense during the Great Depression "in the hope that for future years this corridor of old-growth trees would remain to enhance the beautify of this highway and for future generations to see and appreciate old-growth Douglas fir trees." FHWA 674. One CFASH letter contested ODOT's conclusion in the Draft EIS that "[t]he Dwyer Area is not an active part of a park or a recreation area and there are no plans by the [BLM] to make it so." FHWA 459 (Draft EIS), 566 (CFASH letter).

The final cultural resources report indicated the only potential historic sites in the project area were a possible segment of the Barlow road that lacked "integrity and interpretive potential" and a three-foot-high rock wall, the possible remnants of a toll gate. FHWA 313, 324–25. On March 4, 1986, Pettigrew received a letter from CFASH threating a lawsuit "if the potential gravesite is further disturbed." FHWA 5079–80 ("1986 CFASH letter").

In early 1987, ODOT regional engineer Rick Kuehn ("Kuehn") worked with Jones to address CFASH's concerns. FHWA 5405 (describing "numerous conversations"). Kuehn wrote a document describing over 70 issues he discussed with Jones. FHWA 5405–33. Kuehn summarized the actions to be taken and cost implications for each issue. *See id.* In the Dwyer area, "the north pavement edge [would be] moved 15 feet to the south . . . by eliminating the left- turn refuge. These changes resulted in the count of large trees (2 feet in diameter and larger) to be removed dropping from 85 to 52." FHWA 5407. Keuhn also wrote that the "stone

pillars" would be relocated, and that there would be no impact to the "pile of stones." FHWA 5411. Jones wrote a document explaining his views of the issues and listed "conditions" that ODOT was to abide by. FHWA 5435–64. Kuehn and Jones referred to these combined documents as an "Agreement for Conditions and Remedies for Mitigating and Resolving 26 Highway Dispute." FHWA 5404 ("1987 Kuehn–Jones Agreement"). In a cover letter to the documents, Jones' indicated the selected alternative "eliminates congestion and moves traffic in a safe and effective manner, without sacrificing the area's natural scenic beauty, historic and cultural resources such as the Barlow Trail and Faubion Bridge, or eliminating the Dwyer Memorial Forest, the Bear Creek wetlands, fish and wildlife habitats, and the 17,000 plus trees which would have been removed under the first proposals." FHWA 5435. Jones also wrote that he was "able to feel at peace that the Native American or pioneer gravesite . . . will not be disturbed by the widening. . . ." FHWA 5436. He noted, however, that Kuehn referred to the site as a "piles of stones." FHWA 5442. In the early 1990's, other ODOT staff indicated the document was not a binding agreement in part because it was not signed. FHWA 5577.

Ultimately, FHWA chose to build "alternative two," with some modification, because it met "the project goals of reducing congestion and improving safety," and it was the alternative "most responsive to the testimony received during the hearing process." FHWA 440 (Final EIS). The modified "alternative two" design still included four travel lanes, bike lanes on each side of the highway, and a median turn lane in sections where there [were] frequently used driveways and lo-

cal streets." FHWA 440. However, the design eliminated the continuous turn lane bordering the Dwyer area and left the pavement edge alone instead of expanding it to the north. FHWA 441–44. The Record of Decision stated that, since the Dwyer area is "an environmental[*sic*] sensitive area, the roadway section through this parcel will be reduced to avoid 85 trees with 2 foot DBH [diameter at breast height]." FHWA 700. FHWA concluded, and the Oregon State Historic Preservation Office ("SHPO") concurred, that the project "would have no effect on historic properties or archaeological resources in the area." FHWA 511. The final EIS does not indicate that ODOT or FHWA formally consulted with any Indian tribes. However, "a series of survey and testing reports" generated to prepare the final EIS were sent to the Confederated Tribes of Warm Springs ("Warm Springs"), the Confederated Tribes of the Grand Ronde Community of Oregon ("Grand Ronde"), and the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation"). ACHP 216.

On January 24, 1991, ODOT met with Yakama Nation Tribal Council Chairman Wilferd Yallup and representatives of CFASH and CGS to discuss impacts of the project from Zigzag to Rhododendron. FHWA 5565. ODOT brought an archeologist, a cultural specialist, and an engineer Walter Bartel ("Bartel"), among others. *Id.* Yallup opened the meeting by indicating that FHWA had paved over a burial site between Goldendale and Toppenish in Washington State, and that he did not want that to happen again. FHWA 5566–67. When Bartel asked Yallup, "Are you saying that there is a burial ground on this project?,"

Yallup answered, "Yes," and Jones added, "Rhododendron to the bridge." FHWA 5567. But when Bartel responded, "Where exactly? Can you be a little more specific?," Jones interrupted, "[W]e're not going to get down to specifics. If you want like pinpoints, you know, we're not going to do [that]." FHWA 5568. Yallup indicated there were "two burials somewhere in the vicinity of Zigzag." FHWA 5574. Jones and Yallup later spoke of [redacted].

Someone with ODOT asked about "moving to the north side. Does that move us into another problem to your knowledge?" FHWA 5591. Jones responded, "No." *Id.* He indicated there might be a cultural site "further north" but it was "further away from the highway." FHWA 5592. After further discussion, CGS' attorney Michael Nixon summed it up: "[I]f you go to the north, you have total avoidance with no adverse impacts on those kinds of things [that] exist in the south. As [Jones] mentioned, there are things that may [have] been in the north at one time, but they've already been destroyed. . . ." FHWA 5595. Jones reiterated that "if you stay to the, if you stay to the north, there's no, there's no problem." *Id.* The word "Dwyer" does not appear anywhere in the meeting transcript.

Several days later, Yakima Nation General Council Secretary Leo Aleck sent a letter to ODOT on behalf of the Yakama Indian Nation requesting documents and indicating many tribal members "still utilize this general area for cultural purposes." FHWA 6303 ("1991 Yakama Letter). He also wrote that the area included

sacred grounds, natural foods and medicines, and traditional use areas. FHWA 6303. Records indicate Yallup and ODOT exchanged additional letters in late 1991 and sometime in 1992. ACHP 218–19. An ODOT archeologist met with Jones in March 1992 and reported:

> Two of the cultural features [Jones] expressed concerns about were clearly not historic resources: 1. A rock stack (described as a possible burial cairn) that exhibited no evidence of weathering in place (lichen or moss growth, partial collapse, etc., and located on an abandoned road track); it appeared to my eyes to have been a recent dumping episode, probably to block access on the older road.

ACHP 219.

[redacted].

In 1993, ACHP asked the Keeper of the National Register of Historic Places to determine if Enola Hill, a hill southeast of Rhododendron, should be listed in the National Register. FHWA 1918. The Keeper indicated there was not enough evidence to make the determination, and in 1994, the Forest Service asked the Keeper to suspend ACHP's request. FHWA 1919. Also, in 1993, CGS and others sued to stop a timber sale on Enola Hill. The court granted the Forest Service's motion for summary judgment stating, "Significant inventories conducted in 1983, 1988, 1990, and 1992 re-

vealed no physical evidence of sites of traditional cultural value." *Native Americans for Enola v. U.S. Forest Serv.*, 832 F. Supp. 297, 300 (D. Or. 1993). The Ninth Circuit dismissed plaintiffs' appeal as moot. *Native Americans for Enola v. U.S. Forest Serv.*, 60 F.3d 645, 646 (9th Cir. 1995). In 1996, CGS submitted additional ethnographic materials concerning potential properties in the "Enola Hill area" to the Keeper and the Forest Service. FHWA 1918. As of this writing, Enola Hill is not listed in the National Register. National Register Database and Research, National Register of Historic Places, https://www.nps.gov/subjects/nationalregister/database-research.htm (last visited March 16, 2020).

B. US 26 Rhododendron to OR 35 Junction project

Although the widening from US 26 Rhododendron to OR 35 Junction was east of the Wildwood to Wemme project area, its history provides additional context. Under an Oregon law establishing "a new vision for surface transportation," ODOT conducted a study of US 26, exploring alternatives to accommodate "future increases in travel demand." FHWA 1021. FHWA published a Draft EIS and sought public comment in the summer of 1995. The Draft EIS noted, "Because the highway traverses an environmentally sensitive and culturally rich portion of the Mount Hood National Forest, any significant highway improvements could have natural, visual, and cultural impacts." FHWA 1022. It also noted that future demand will exceed existing capacity and that the accident rate is twice as high as those in other primary rural, non- freeway highways. FHWA 1024. The Draft EIS included four alternatives varying in scope and impact: (1) a no-

build alternative, (2) adding a single lane from Rhododendron to Laurel Hill and four lanes from Laurel Hill to OR 35, (3) adding three lanes from Rhododendron to Laurel hill and four lanes from Laurel Hill to OR 35, or (4) adding four lanes from Rhododendron to OR 35. FHWA 1580. In addition,

> ODOT consulted with Indian tribal organizations through a series of letters to the Confederated Tribes of the Grand[] Ronde, Siletz, Warm Springs, and Umatilla Reservations, and to the Yakama Indian Nation, informing the tribes about the study, and asking them to respond with information on cultural resources. The Study team and ODOT Project staff met with the Tribes of the Grand Ronde and Warm Springs and invited them to participate on the Technical Advisory Committee. American Indians were invited to and attended some of the Citizen Advisory Committee meetings.

FHWA 1744 (1998 Mount Hood Corridor Final EIS); *see also* FHWA 1805 (listing same consulted Indian tribes). ODOT also sent the tribes copies of the Draft EIS and Draft Section 4(f) Evaluation in March 1997. FHWA 1757.

In April 1997, CGS opposed all measures to widen US 26 through extensive written comment. *See* FHWA 1825, 1857–66. CGS emphasized that Enola Hill is a sacred site to the Yakama Indian Nation. FHWA 1829–35. Jones wrote that he worked with various archeologists to study the area, and stated, "Although I provided [an ODOT archeologist] with no site specific information, she had some boundaries of sensitive areas that the Highway 26 project had to stay away from to prevent destroying important cultural, historical,

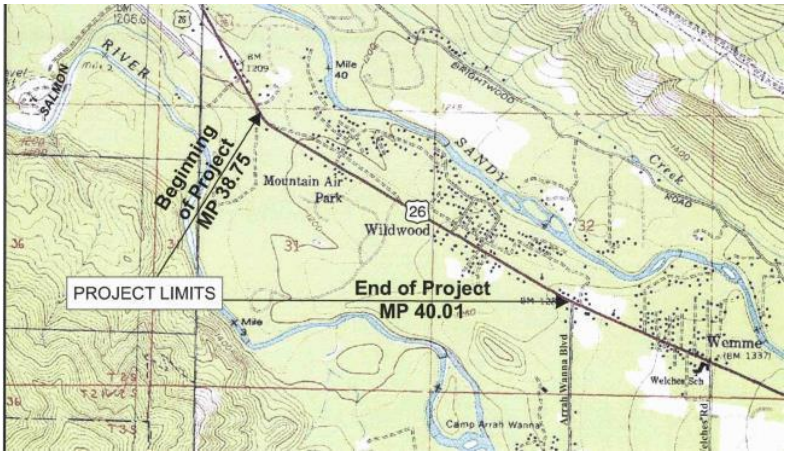
and natural resources." FHWA 1835. Jones repeatedly lamented ACHP's finding that Enola Hill was ineligible for the National Register. FHWA 1836; FHWA 1819–21 (emphasizing negative impacts to Enola Hill, Laurel Hill, Tollgate, and Yocum Falls areas during a public hearing). A 1997 archeological sampling of the Barlow Road toll station near Rhododendron revealed cultural materials in the form of a disposal site for Tollgate House occupants, early 20th-century recreational usage, and a 1930s guard station. FHWA 1516. However, the report indicated that the "data are easily recoverable should highway expansion occur." FHA 1516.

ODOT received many other comments taking opposing positions and raising many other concerns, including impacts on the environment, endangered species, and increased pollution from the build alternatives, and impacts on traffic, safety, and the economy from the no-build alternative. *See* FHWA 1839–1907. For example, one woman wrote that she was "fiercely opposed to any further laying of pavement anywhere in this state." FHWA 1868. Many comments focused on the preservation of the "Enola Hill/Tollgate Area." FHWA 1902. Various chambers of commerce wrote in support of expansion for Oregon's "future economic health," FHWA 1846, and members of Mt. Hood ski clubs advocated for "maximum highway widening." FHWA 1899. Ultimately, FHWA chose "a blend of Alternatives 3 and 4" because it met the "project objectives for improving safety, maintaining an acceptable highway [level of service], and increased capacity, while preserving the important environmental and historic resources." FHWA 1914.

C. Wildwood to Wemme project

1. Before Revised EA and FONSI

In December 1998, ODOT received a letter signed by just over 650 residents, recurrent visitors, and patrons of local business along US 26 expressing "great concern and fear for their personal safety due to the lack of a left turn [lane]" between Wildwood and Wemme. FHWA 2503–33, 1980, 4440; ACHP 180. They complained that the traffic situation was "extremely dangerous" and petitioned for the provision of a left-turn lane to "increase the safety of travel for all users." FHWA 4441. In response, ODOT and defendants began efforts to ameliorate these unsafe conditions. FHWA 1976 (January 2000 Scoping Packet).



FHWA 4959 (map of project area in Revised EA).

The project's stated purpose was to improve safety on this section of highway "to match the cross section (width of lanes, center turn lane and shoulders) to that of the roadway to the east and west of the proposed project area." FHWA 4957. The safety improvements were needed because about 40 driveways and streets access this section of highway, "creating a safety hazard for vehicles making left turns onto and from the

highway. FHWA 4957–60. Left-turning motorists were frequently required to stop in the fast lane to wait for a gap in oncoming traffic while those turning left onto the highway had no median refuge to enter.

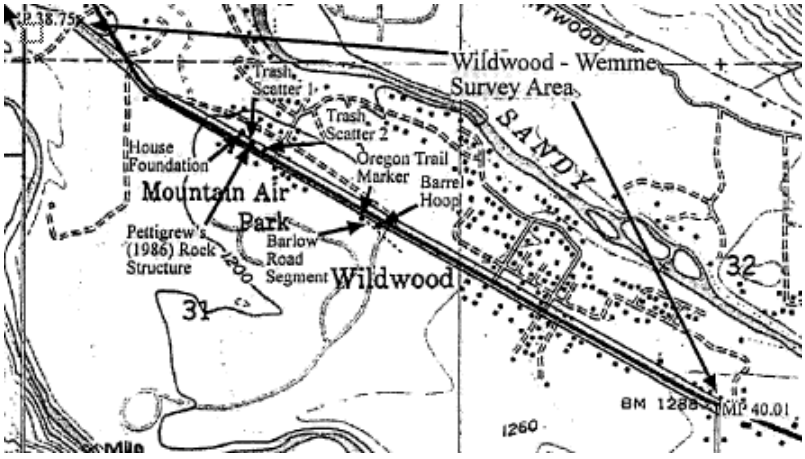
"Fourteen accidents, two fatal, were reported in this section between January 1997 and December 2002." FHWA 4793. Thirteen accidents were reported within the project limits in the five-year period from 2000 through 2004. FHWA 4960; *see also* FHWA 4787 (indicating "public concern for safety due to traffic accidents and fatalities in the project area was the primary motivator driving this project" in a January 2007 Public Involvement Tech Report).

The scoping packet indicated "widening to the north would require removal of many large diameter trees and extensive filling. ODOT expended considerable effort to protect these trees. The Dwyer Corridor traverses an old-growth timber grove that provides a scenic canopy over the highway." FHWA 1980.

In 2001, FHWA and ODOT executed a Programmatic Agreement ("PA"). FHWA 2020–30. The PA allows ODOT to undertake minor transportation projects without further review by ACHP, FHWA, or the SHPO, so long as ODOT complies with a proscribed internal review process. FHWA 2024–26. The PA also provides that "ODOT and FHWA will maintain ongoing consultation with Oregon's nine federally-recognized tribal governments . . . in accordance with each tribe's vision of effective consultation . . . and will be consistent with coordination required under 36 CFR 800." FHWA 2027.

In late 2003, ODOT held a public hearing. FHWA 2031–40. Internally, ODOT staff were sympathetic to

the safety issues, but an ODOT project manager recounted how the "community went nuts when this section of highway was proposed for five lanes in the 1980s. . . . Because of the public uproar, the highway was reduced to four lanes." FHWA 2042. In September 2004, ODOT issued a project prospectus indicating an environmental assessment would need to be prepared. FHWA 2047. Under a subsection titled "Estimated Archaeology and Historical Impacts," ODOT cited the 1985 Draft EIS from the Wildwood to Rhododendron project and stated, "Historic resources along the project corridor will need to be reassessed. Some of the structures that were ineligible for listing in 1985 may now be eligible for the National Register. Section 106 documentation will be necessary for any impacted historic resources." FHWA 2049. Led by staff archeologist Patrick O'Grady, ODOT conducted exploratory archaeological surveys in early 2005 and issued a report that June. FHWA 2410–54 ("O'Grady report").



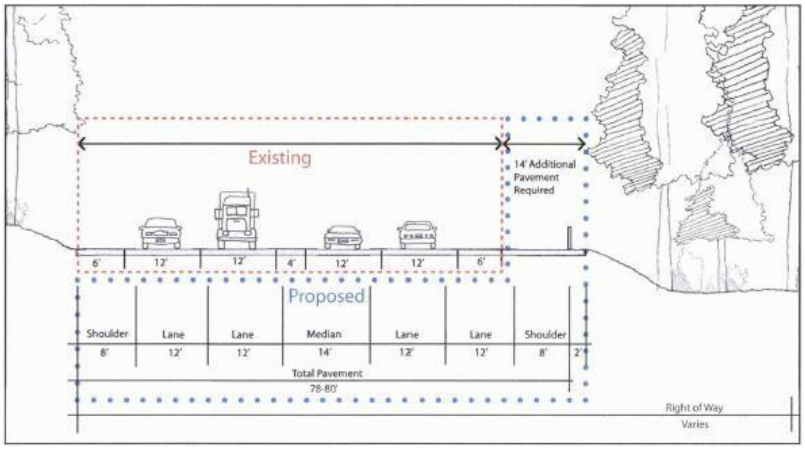
FHWA 2419 (map of pedestrian survey area in O'Grady report).

The archeological teams conducted 38 shovel probes and hundreds of shovel scrapes. FHWA 2411–14. The teams conducted pedestrian surveys along both sides of the highway, revealing two historic-era trash scatters, an isolated hand-forged barrel hoop, an Oregon Trail marker, and a house foundation. FHWA 2414. The report cites Pettigrew's 1986 Excavation Report and other resources used and generated during the prior projects. *See* FHWA 2417. The O'Grady report recounts and confirms Pettigrew's finding that "the rock cluster did not have archaeological significance and was not worthy of protection or mitigation." FHWA 2414. O'Grady sent his report to, among others, the Grand Ronde Cultural Resources Coordinator Khani Schultz ("Schultz"), the Cultural Resources Director Robert Kentta ("Kentta") of the Confederated Tribes of Siletz Indians ("Siletz"), and Warm Springs' Cultural Resources Manager Sally Bird ("Bird"). FHWA 2416.

In 2005 and 2006, ODOT mailed four newsletters and postcards advertising three public hearings to about 3,700 people located near the project area. FHWA 4786–87. On March 21, 2005, ODOT issued a news release and sent postcards announcing a March 31, 2005 open house to about 700 people located near the project area. FHWA 4791–92. Interested parties submitted public comments, and about 35 people attended the open house. FHWA 4794–4800. ODOT invited Jones to the open house. FHWA 2153.

ODOT compiled a project development team of "technical staff from traffic, engineering, planning and environmental fields" to explore and ultimately make a recommendation to ODOT management and FHWA. FHWA 4353. The team considered seven alternatives

in total: no build, widen to the north, widen to the north and realign, widen to the south, widen to the north and south, relocate BLM access to the Wildwood Recreation Site, and add a median barrier to prevent any left-hand turns. FHWA 4359–64. The widen-to-the-north alternative would move the northern edge of the pavement 14 feet to the north and require tree cutting. FHWA 4354.



FHWA 4962 (depicting widen-to-the-north alternative).

The widen-north-and-realign alternative would move the northern edge of the pavement 20 feet to the north and require even more tree cutting and would also impact wetlands. FHWA 4360. The widen-south alternative would move the southern edge of the pavement 14 feet south and would impact private properties, utilities, local businesses, wetlands, public park property, and the "pristine, high priority, historic Barlow Road trace," in addition to requiring tree cutting. FHWA 4361. The widen-north-and-south alternative "would not save trees," but would still impact private property and the Barlow Road trace. FHWA 4362. The

BLM-access-alternative would still require widening to the north and thus "would not save the large trees," in addition to impacting additional vegetation, wildlife habitat, traffic patterns, and private property. FHWA 4363. Finally, adding a median barrier to prevent left turns would necessitate cutting even more trees than the widen-to-the-north alternative because the barrier would require inside shoulders and "turnarounds or jug handles and traffic lights at each end of the median" to allow residents to access their homes. FHWA 4364. The team specifically considered the impacts of the widen-to- the-north alternative on the Dwyer area. FHWA 4379, 4406. ODOT also found that the "the Mountain Air Park pillars do not meet the criteria for listing in the National Register . . . [because they] lack distinction and, because they have been moved, they lack the 'location' aspect of integrity." FHWA 4496.

On September 1, 2005, ODOT issued another news release, sent postcards to about 550 local landowners, and mailed about 3,000 area residents, announcing a September 13, 2005 open house. FHWA 4786, 4805. ODOT specifically sought "participant feedback on the 'No Build' option and 4 proposed design alternatives." FHWA 4805. ODOT invited Jones. FHWA 2158. ODOT's summary of the meeting indicated that "'people's lives ahead of trees' was a common theme." FHWA 4805. "Alternative 1: Widen North" received the most favorable public response while the "No Build" alternative received the least favorable response. FHWA 4805–10. Thirty-one people attended, and many submitted written public comments. FHWA 4811– 4902. Several attendees submitted the same written comments, one of which asked ODOT to disre-

gard those submitted by people who were not "impacted by the current danger to life and property" by the lack of center turn lane. FHWA 2700–09. One person handwrote, "This means Michael P. Jones!" next to this comment. FHWA 2703 (emphasis in original).

In September 2005, an ODOT archaeologist Kurt Roedel ("Roedel") met with Warm Springs' tribal elders and provided them with "project information and a project area map." FHWA 5955 (ODOT's summary of tribal consultations); FHWA 2609 (map).

On January 30, 2006, Roedel contacted Schultz, Kentta, and Bird, provided them with a fieldwork notification and project area map, and explained the archeological resources identified during prior fieldwork. FHWA 5955. Roedel also emailed the Executive Director of the Oregon Commission on Indian Services asking whether he should consult the Yakama Nation about "any ODOT projects." FHWA 6084, 6086. The representative responded that Yakama Nation has "'usual & accustomed' interests in some areas . . . primarily along the Columbia River," and told him to "contact me for any specific project." FHWA 6084. Roedel responded with gratitude but did not ask whether the Yakama Nation should be consulted about the Wildwood to Wemme project. FHWA 6084. ODOT did not contact the Yakama Nation about the project again until April 2008, after Jones provided ODOT with documents from the Wildwood to Rhododendron project, including a transcript of the 1991 Yallup meeting and the 1991 Yakama letter. *See* FHWA 4979 (omitting Yakama Nation from ODOT's list of consulted parties in Revised EA).

On January 25, 2006, ODOT issued a third news release and sent a mailer and postcards soliciting public comment at a February 23, 2006 open house. FHWA 4904–08. ODOT again invited Jones. FHWA 2159. Thirty-three people attended, and about half of them submitted public comment. FHWA 4909. The "meeting participants were positive about the proposed alternative (Widen to the North) and expressed desires to see the project constructed as soon as possible. Comments provided at the meeting tended to focus on specific concerns such as water runoff, drainage, pedestrian connectivity (trails), and traffic enforcement (speeding)." FHWA 4909.

In March 2006, Roedel emailed a fieldwork notice to Bird and asked for comments, questions, and whether she "would like to accompany [the Oregon State Museum of Anthropology] during their fieldwork." FHWA 3062, 5955. At a quarterly meeting with Warm Springs tribal elders the same month, ODOT discussed over 30 ongoing and upcoming projects, including the Wildwood to Wemme project. FHWA 3178–80, 5955.

In April 2006, ODOT sent postcards and mailers indicating it was focusing on the "Widen to the North" alternative, advertising an upcoming open house and linking to an ODOT website with more information. FHWA 4924–27. The mailer included preliminary environmental findings. FHWA 4925. The postcard allowed people to request copies of the forthcoming Draft EA, and Jones requested a copy. FHWA 4102. Meeting notes from a May 18, 2006 project-development-team meeting indicate Jones also requested a mediation through Clackamas County but that the request "was being refused by ODOT because [Jones] had not

availed himself of the public process that has been created for the project and made available to the public for project involvement. [Jones] has not yet participated in any of the public meetings." BLM 63. ODOT held another quarterly meeting with the Grand Ronde in April 2006, and Schultz followed up, indicating Grand Ronde had "no immediate concerns" regarding the project. FHWA 5955. O'Grady also conducted another pedestrian survey in 2006, largely confirming his earlier findings. ACHP 57–62.

ODOT undertook many other significant efforts to explore the alternatives and prepare a Draft EA. *E.g.*, FHWA 3332 (April 2006 Historical Resources Technical Report); FHWA 3409 (May 1, 2006 Visual Resources Technical Report); FHWA 4028 (May 3, 2006 Geology Technical Report); FHWA 3494 (May 4, 2006 Biological Assessment); FHWA 3594 (May 9, 2006 Traffic Report); FHWA 4003 (July 2006 finding no effect on endangered or threatened species); FHWA 4517 (September 2006 finding no effect on Norther Spotted Owl). Of particular significance is a May 26, 2006 report titled "A.J. Dwyer Input for Wildwood-Wemme Highway Widening Project" prepared by a BLM botanist and a BLM outdoor recreation specialist. FHWA 4472. They reported that the "A.J. Dwyer Scenic Area is a five-acre parcel of land . . . north of and adjacent to U.S. Highway 26 and immediately across from the entrance of the Wildwood Recreation site." *Id.* BLM manages the scenic area, which "was designated a Special Area in the BLM's 1995 Salem District Resource Management Plan with scenic and botanical values as the identified unique features." *Id.* The area also is within the Mt. Hood Corridor, "a Congressionally designated scenic area which requires

that scenic values be protected on BLM lands that can be seen from U.S. Highway 26." *Id.* There were "several large older trees" adjacent to the highway, but the report emphasized that the "truly unique botanical values" in the area "include a diverse group of lichens and vascular plants." *Id.* The area is particularly unique because it hosts a "diverse botanical community," not seen elsewhere with similar environments. *See id.* Under the widen-to-the-north alternative, about "65 trees over 24 inches in diameter at breast height (dbh) would be removed, including an estimated 22 older and larger trees that are greater than 40 inches in diameter at breast height (dbh)." *Id.* However, the "diverse group of lichens and vascular plants in the northern portion of the A.J. Dwyer parcel would not be disturbed as a result of the proposed project." FHWA 4473. The report concludes that aside from "some visual disturbance," the general character of the area would generally remain unchanged and the project was "expected to be in compliance with management objectives associated with the AJ Dwyer Scenic Area and the Mt. Hood Corridor. *Id.*

ODOT emailed Schultz, Kentta, and Bird "Finding of No Historic Properties Affected" reports and results from O'Grady's second pedestrian survey in June 2006. FHWA 3820. On June 12, 2006, Oregon SHPO concurred with the Section 106 finding that no historic properties would be affected by the project. FHWA 3337, 3763.

In September 2006, ODOT issued another public newsletter and sent a copy to Jones. *See* FHWA 2160. ODOT also consulted with local organizations that expressed interest in the project, including the Barlow

Trail Association and the Mt. Hood Safety Corridor Citizens' Advisory Commission. FHWA 4428.

ODOT and FHWA issued the Draft EA in late August 2006. FHWA 4346–4438. The Draft EA noted that archeologists from the University of Oregon had conducted pedestrian surveys of the project area in April 2005 and March 2006, and recorded "an isolated barrel hoop, a house foundation, two trash scatters, and an Oregon Trailer marker. They re-examined a previously identified section of the Barlow Road. No prehistoric cultural materials were identified during the survey." FHWA 4389; ACHP 57. The Draft EA also indicated that after conducting field surveys and consulting resources, a historian identified 30 potential historic properties near the project area. FHWA 4390. Of those, ODOT identified five historic resources that were "potentially eligible for, or listed in, the National Register of Historic Places," but reported that the widen-to-the-north alternative would not affect them. FHWA 4390–94. The Draft EA quoted O'Grady's 2006 report:

> A rock cluster that was previously recorded Pettigrew (1986) was not relocated during this or the previous project. Tested as a possible burial site, the rock pile showed no evidence of subsurface disturbance. An on-site evaluation by Pettigrew and ODOT Archaeologist Leland Gilsen concluded that the rock cluster did not have archaeological significance and was not worthy of protection or mitigation.

ACHP 60.

On September 21, 2006, ODOT issued a fourth set of news releases and mailers soliciting public comment

and a public hearing. FHWA 4929. ODOT kept the comment period open until October 20, 2006. *Id.* Only 16 people attended this meeting, and only five made public comments. One comment requested that ODOT put up signage during Wildwood events indicating "heavy traffic ahead." FHWA 4935. Another comment simply stated: "To the folks at ODOT[,] a hearty thanks for all the hard work. Your determination will carry this project through." FHWA 4933 (capitalization altered).

ODOT issued the Revised EA and FONSI on January 25, 2007, selecting the widen-to- the-north alternative. FHWA4951, 4961. The Revised EA sets forth all of ODOT's considerations regarding of the project's effects on the geologic environment, water quality and hydrology, wetlands, wildlife and plant species, air quality, visual resources, and social and economic conditions, among others. FHWA 4966–71. In addition, ODOT reported that it could reduce the number of trees cut by using "a more gentler, more transversable[*sic*] slope where new small trees and other native vegetation can be re-planted to mitigate for visual impact." FHWA 4972. Jones called in with a single comment, which ODOT reproduced in the Revised EA: "Mr. Jones noted ODOT's intent to protect and relocate the white stone pillars on the north side of the highway. He stated that the Cascade Geologic Society owns the pillars." FHWA 4977.

2. After Revised EA and FONSI

ODOT sent a final project notice to the public on February 15, 2007. *See* FHWA 5001–15. Jones is listed as a recipient. FHWA 5006. By November 2007, ODOT planned to coordinate construction with two other nearby projects and proceeded to secure a right of way

and tree cutting permit. FHWA 5035, 5043. These three projects were collectively referred to as the "US 26: Salmon River Bridge to East Lola Pass Road" project.

ODOT discussed the project during a quarterly meeting with Warm Springs on November 26, 2007. FHWA 5049. For the first time, Warm Springs tribal elders raised concerns about potential cultural resources in the project area, which were apparently brought to them by plaintiff Carol Logan ("Logan"). *See* FHWA 5676. Logan is "an Elder" and "enrolled member" of Grand Ronde. Declaration of Carol Logan in Support of Standing ¶¶ 2, 5, ECF #147. She is "a lineal descendant of the Clackamas People, one of the signatory tribes of the 1855 Treaty with the Kalapuya." *Id.* ¶ 4. Roedel's notes of the November 26, 2017 meeting indicate the prior highway-widening projects and cultural-resource investigations, including Pettigrew's 1986 archeological excavation were discussed. FHWA 5049.

Roedel and ODOT archeologist Tobin Bottman ("Bottman") began exchanging emails with Eirik Thorsgard ("Thorsgard"), Grand Ronde's Cultural Protection Coordinator. FHWA 5467. ODOT sent Thorsgard Pettigrew's 1986 Test Excavation Report. FHWA 5050–59. Thorsgard responded that "this is the exact area that was brought to my attention" and accepted that the site was not a burial, but indicated that the report "does not answer several other questions about the orientation and use of this stone pile, such as a prayer area[, i.e.,] a rock cairn, or use as a trail marker for the Old Barlow Road." FHWA 5066, 5082.

On November 30, 2007, archeologist Brian O'Neill, who participated in Pettigrew's 1986 archeological investigation, sent a memo to Roedel with two attachments: the 1986 CFASH letter and a picture of the site. FHWA 5078–81. O'Neill wrote:

> As you can see from the attached photograph, we carefully avoided disturbing the integrity of the rock pile by excavating beside it and then tunneling beneath it from the profile to examine the potential for human remains. As I recall, there was no change in the soil texture and we certainly observed no skeletal (neither human nor non-human) material.

FHWA 5078. Bottman and Thorsgard exchanged additional emails about the site. On December 10, 2007, Thorsgard wrote, "I am not sure that I would call this rock feature cultural if I had found it, it most likely is a pile of rocks from ploughing," but indicated he would visit the site with tribal elders. FHWA 5088. Thorsgard sent ODOT pictures after they visited the site. FHWA 5134–46. Bottman then sent Thorsard additional reports from the prior projects. FHWA 5199–5339. He also sent two memoranda to Kentta, Bird, and Thorsgard on December 19, 2007, and exchanged phone calls and emails with Thorsgard and Bird about cultural resources in the project area. FHWA 5360, 5676. Thorsgard and Bottman agreed that "a tribal monitor must be present during ground disturbing construction" for the project. FHWA 5351. Bottman indicated he would contact Thorsgard at least a month before construction began to coordinate with the tribal monitor. *See* FHWA 5351, 7484.

In January 2008, a year after the Revised EA and FONSI were issued, Jones and Logan contacted

FHWA and ACHP. Jones called FHWA Operations Engineer Jeffrey Graham ("Graham") on January 25, 2008, and spoke at length about his involvement with the prior highway-widening projects and his interest in preserving the white stone pillars. FHWA 5392– 93, 5397. Jones sent Graham a copy of the 1987 Kuehn–Jones Agreement. FHWA 5404–64. They discussed the white stone pillars, and Jones identified two people to assist with their relocation. ACHP 27–28. ODOT sent Jones letters in January, February, and May 2008 proposing to relocate the white stone pillars. FHWA 6067; ACHP 167–68. Logan called Graham on January 31, 2008, to express her concern about usual and accustomed places. FHWA 7486. She called him again in early February and told him she did not think Warm Springs and Yakama Nation had been contacted. FHWA 7489.

On February 14, 2008, Jones and Logan faxed a letter to FHWA demanding a new Section 106 review of the project area to identify "all heritage resources." FHWA 5474–83; ACHP 25–26. They raised the Zigzag to Rhododendron EIS, Pettigrew's 1986 Test Excavation Report, the 1987 Kuehn–Jones Agreement, the 1991 Yallup meeting, the 1991 Yakima Letter, technical advisory reports from the prior projects, additional meetings with "Nez Perce and Umatilla spiritual leader" Rip Lone Wolf, meetings and communications with Jones, and other meetings and communications with "American Indians." FHWA 5475–76. They wrote that, upon further agency review, "American Indian sites in the 'Dwyer Memorial Forest' will constitute a 'district'" for the National Register. FHWA 5477. Additionally, they listed 33 other sites of interest along the US 26 including the Barlow Trail

and Enola Hill. FHWA 5478–79. They also called ACHP and demanded a New Section 106 Process" for the Wildwood to Wemme project. ACHP 36, 47.

Throughout February 2008, Bottman coordinated with Thorsgard to have a tribal monitor present during construction. FHWA 5646, 5666–69, 5726–28, 5973. Grand Ronde's Cultural Resources Division Manager David Lewis, Ph.D., wrote ODOT a letter explaining that only three members of the Cultural Protection staff officially represent the Tribe's interests in cultural resource management, including himself and Thorsgard. FHWA 6911.

> We are aware that at times members of the Tribe speak out in public meetings and seek to represent the Tribes and cultures in which their ancestry is derived. If Tribal members are not employed in an official capacity with the Tribe, . . . please be aware that they can only represent their *personal perspectives* regarding the issues at hand. We believe that they have this right to speak their opinions but that there are not supported by the Tribe unless a Tribal official speaks in support. Thank you for your attention to this issue.

FHWA 6910–11 (emphasis in original).

On February 15, 2008, following additional discussion with Logan, Bottman again spoke with Thorsgard, who stated, "Carol is not representing the Tribe, she is not advertising the Tribe's position, she is working as a private individual in concert with Michael Jones. The tribe's official position is that ODOT has done and followed the 106 and NEPA process. We have no fault with what they have done." FHWA 5652.

BLM issued ODOT a tree cutting permit in late February 2008. BLM 33–38.

Jones and Logan called and faxed letters and additional documents to ODOT, FHWA, and ACHP in early March 2008. They reproduced the 1991 Yakama Letter and indicated defendants should have contacted Yakama Nation about the project. ACHP 25-26, 44–49, *see also* FHWA 6139 (email from ACHP to FHWA). They demanded defendants conduct new Section 106 and Section 4(f) reviews.

In response, ODOT investigated Yakama Nation's ties to the project area. ODOT had retained a copy of the 1991 Yakama letter, and noted that it referred to the Zigzag-to- Rhododendron portion of the 1980s project, which was "outside of this project area." FHWA 6301. Bottman's notes indicate he spoke with Yakama Nation council member Kate Valdez ("Valdez") on March 10, 2008. FHWA 7495. Valdez requested project details, and Bottman complied by sending the EIS's and EA's of the three projects along US 26 and underlying archeological reports. FHWA 6425, 6430. Valdez confirmed receipt of this information and indicated ODOT should contact Yakama Nation's Cultural Resource Manager Johnson Meninick ("Meninick") to discuss any consultation issues. FHWA 6434, 7211.

On April 4, 2008, Bottman emailed Meninick that "a member of the public has recently been acting as a representative for a handful of Tribally affiliated folks, including members of the Yakama [He] has insinuated that ODOT failed to consult with the Yakama nation." FHWA 6544. Bottman then invited Meninick to discuss the project and any additional areas of con-

cern. FHWA 6544. Bottman forwarded his conversation notes to his colleagues. FHWA 7194, 7203. Bottman wrote that Meninick

> said that he didn't see a reason for further consultation based on the scope, especially in light of the negative results of the extensive archaeological investigations conducted. Mr. Meninick did say that further discussion about consultation boundaries for Oregon projects outside of the Gorge would be appreciated and could help insure that this kind of situation does not happen again.

FHWA 7194. ODOT then concluded it had satisfied its Section 106 consultation duties to Yakama Nation. FHWA 7199.

In April 2008, after ODOT cleared trees from the project area, a local newspaper ran an article featuring CGS members Jones, Jackson, and Logan who were accusing ODOT of "intruding on sacred burial sites" and of a "deliberate attempt to ignore the truth." FHWA 6513–14. Bottman scanned and emailed the article to Bird and a Warm Springs' archeologist stating, "there are some pretty erroneous statements in it" and invited further discussion. FHWA 6515, 6565–68. Bird emailed back that they had received a report "a grave was found and that the Grand Ronde was consulted and said to not worry about it. Though I don't think this could have happened[,] I need to follow up and stop some rumor before it gets to the public." FHWA 6518. Bird spoke with the Warm Springs' archeologist then again emailed Bottman to "please disregard the first email." FHWA 6520, 6523. The archeologist thanked Bottman for his attentiveness and responded that she did not "foresee any follow-up as being

needed." FHWA 6519. Bottman also forwarded the article to Thorsgard, who replied that "Carol is very adamant about stopping this project regardless of the damage it does to any agency or individual," and offered further assistance. FHWA 6527. FHWA published its Notice of Final Agency Actions on April 8, 2008. Notice of Final Federal Agency Actions on U.S. 26, Wildwood to Wemme: Clackamas County, OR, 73 Fed. Reg. 19134-02 (April 8, 2008).

In response to a request by Jones and Logan in early 2008 for ACHP to review FHWA's compliance with Section 106, ACHP sent FHWA a letter stating

> In accordance with the [programmatic agreement], ODOT consulted with the Oregon State Historic Preservation Officer and three federally recognized Indian Tribes. Neither the SHPO nor the tribes raised concerns about the project or its impacts on the AJ Dwyer Scenic Area. . . .
>
> This is clearly a place of importance to the parties that contacted the ACHP. To be eligible for inclusion in the National Register as a traditional cultural property, a place must generally be associated with cultural practices of a larger community (NPS National Register Bulletin 38). As project construction has already commenced, and no federally recognized Indian tribes have come forward or expressed any concerns about the project's effect on the AJ Dwyer Scenic Area, we do not recommend any further action at this time.

FHWA 6572–73.

On May 5, 2008, Jones sent ACHP memoranda from plaintiffs Wilbur Slockish ("Slockish") (ACHP 117–25), Johnny Jackson ("Jackson") (ACHP 127–35), and Logan (ACHP 137–43). Slockish is the hereditary chief of the Klickitat Tribe. Declaration of Hereditary Chief Wilbur Slockish in Support of Standing ¶ 6, ECF #146 ("Slockish Decl."). Jackson is a Chief of the Cascade Tribe. Declaration of Heredity Chief Johnny Jackson in Support of Standing ¶ 1, ECF #151 ("Jackson Decl."). These are bands, or subtribes, within Yakama Nation. Slockish Decl. ¶ 6, ECF #146; Jackson Decl. ¶¶ 4, 7, ECF #151. Both Slockish and Jackson are direct lineal descendants of signers of "the Confederated Tribes and Bands of The Yakama Nation Treaty of 1855." Slockish Decl., ¶ 4; Jackson Decl. ¶ 4. They are both members of the Alliance and CGS. Slockish Decl. ¶ 3; Jackson Decl. ¶ 3. Yakama Nation is a federally recognized Indian tribe, but the Klickitat and Cascade tribes are not. *See* Federal Register Vol 73, No. 66 April 4, 2008 at 18554.

Slockish's first memo indicates his people buried their dead in the "area known today as the 'Dwyer Memorial Forest.'" ACHP 118. The second memo indicates the Dwyer Memorial Forest is sacred, it contains natural medicines of great significance, and it is a place of great significance to his people. ACHP 123–24. Slockish also indicated he

> was never contacted either by [ODOT or FHWA,] or any of their contractors, about the Section 106 process for this highway project, even though [he] should have been. After [he] contacted representatives of [ODOT and FHWA,] and left messages as to who I was and

> why I was calling, they chose not to communicate with me.

ACHP 125.

Jackson's memos relate how his people gathered traditional foods near Mt. Hood, including near the highway project. He also wrote that his people passed through the Dwyer Memorial Forest, where a traditional camp was located. ACHP 129. He indicated there are sacred burial sites in the Dwyer Memorial Forest. *Id.* He also indicated that two of his uncles worked with Jones to oppose the previous highway expansion projects, including his Uncle Yallup. *Id.* at 132–34. He wrote that the Dwyer Memorial Forest, among many other locations, is a "Usual and Accustomed Place" on Mount Hood and that these places are of great significance to his people. ACHP 134. Jackson's final memo ends:

> Our traditional cultural properties on Mount Hood are not in the way of highway improvements. [ODOT and FHWA] just needs to do things differently, but only after allowing the Native People the chance to speak and give testimony in order to prove the significance of our sacred places on [Mt. Hood.] I am not asking you to do anything out-of-the ordinary. Stop the [ODOT and FHWA] from inflicting any further destruction on our sacred places and sites. Allow us the chance to have our elders speak and give testimony, which is something that should have happened.

ACHP 135.

Logan wrote that the project would destroy the Dwyer area and other usual and accustomed places,

including "burials, the medicine sites, the village site, the ancient American Indian Trial." ACHP 142. She related her opinion that the Dwyer area should be listed in the National Register, along with over 40 other sites along US 26. ACHP 142–43.

On May 13, 2008, Yakama Nation vice-chairwoman Lavina Washines sent a letter to ODOT. It begins, "This letter is being sent as a follow up to a letter sent in January 1991. " FHWA 6949. She indicates that Yakama Nation "should be consulted with on any activities occurring in the Mt. Hood Area, for these are areas very sacred to our people. Areas we do not wish to see any construction activities occurring." FHWA 6949.

BLM issued a deed for the right of way on May 15, 2008. BLM.

Bottman, Graham, and other ODOT and FHWA staff realized they were getting a different message from Washines than they were receiving from Meninick. FHWA 7205. Accordingly, they drafted a response to Washines' letter. FHWA 7202–39. In a June 2008 letter to Washines, they summarized their discussions with Valdez and Meninick, again recounted Meninick's opinion that "he saw no reason for further consultation on this project based on the scope, especially in light of the negative results of the comprehensive investigations that have been conducted." FHWA 7274–75. Washines did not respond to this letter. The same month, CGS' attorney sent defendants a letter demanding a new Section 106 review. ACHP 5.

On July 7, 2008, Jones spoke with archeologist Philipek and told her that the "site" had been vandalized. BLM 8. About three weeks later, Philipek visited

the project area "to relocate and assess the rock cluster." BLM 6. She found the rock cluster "in scattered and disturbed condition surrounded by disturbed soil." *Id.* However, she walked the project area and did not observe any "cultural features or objects that [were] clearly historic or prehistoric." *Id.* She wrote in her notes that "[t]he rock cluster area itself does not present any additional indication as to its functional or temporal nature and appears to still have no other associated objects or features such that it could be identified as a cultural resource." *Id.*

ODOT completed demolition within the next few days. It also retained the same contractor who previously rebuilt one of the pillars (after it was damaged in an auto accident) to be onsite during their relocation. FHWA 6068. The pillars were damaged during relocation, but the contractor repaired them. FHWA 5398; ACHP 171.

Plaintiffs filed this lawsuit on October 6, 2008, but did not serve defendants until February 3, 2009. Complaint, ECF #1; Summons, ECF #0. They also did not move for a preliminary injunction.

IV.Summary of Claims

In their motion for summary judgment, plaintiffs contend defendants violated:

- NEPA by (1) not performing a NEPA analysis for the tree cutting permit and the right-of-way, (2) not preparing an EIS, (3) not considering a 1:5:1 slope alternative in the Dwyer area, and (4) failing to prepare a supplemental EA following communications with CGS in early 2008;

- NHPA by (1) not performing a Section 106 analysis for the tree cutting permit and right-of-way, (2) delegating tribal consultation duties to ODOT and thus failing to perform any tribal consultations, (3) failing to timely consult Yakama Nation, and (4) failing to identify historic properties;
- FLPMA by (1) destroying plaintiffs' sacred site, (2) issuing a tree cutting permit allowing removal of old-growth trees, and (3) failing to develop the Salem District Resource Management Plan in accordance with legally required information-gathering procedures;
- DTA by not conducting any Section 4(f) analysis;
- NAGPRA by failing to (1) cease construction when Philipek discovered the altar in July 2008, and (2) notify and consult Indian tribes associated with the altar; and
- The Free Exercise Clause by destroying plaintiffs' sacred site.

Plaintiffs also bring claims under the Due Process Clause and ARPA; however, neither party discusses them. *See* Fourth Am. Compl ¶¶ 56, 92, ECF #223. The viability of the due process claim is contingent on the free exercise claim. If defendants did not violate the plaintiffs' right to freely exercise their religion, it necessarily follows that they could not have failed to provide the process that was due when not depriving them of that right. Moreover, under NAGPRA, intentional excavation of Native American cultural items from federal land requires an ARPA permit. 25 U.S.C. § 3002(c)(2). Thus, if plaintiffs do not invoke

NAGPRA's intentional-excavation provision, ARPA is inapplicable.

V. Article III Standing

"A plaintiff seeking relief in federal court must establish the three elements that constitute the irreducible constitutional minimum of Article III standing, namely, that the plaintiff has (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Friends of Santa Clara River v. U.S. Army Corps of Engineers*, 87 F.3d 906, 918 (9th Cir. 2018) (citations and quotation marks omitted). "A plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Id.* (quoting *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017)) (alterations omitted). Defendants argue, for the third time, that plaintiffs lack Article III standing because a favorable decision would not redress their procedural injuries. Defs.' Mot. Summ. J. 13–14, ECF #340.

"To establish . . . redressability, the plaintiff must show that 'the relief requested—that the agency follow the correct procedures—may influence the agency's ultimate decision.'" *Friends of Santa Clara River*, 887 F.3d at 918 (quoting *WildEarth Guardians v. U.S. Dept. of Agric.*, 795 F.3d 1148, 1156 (9th Cir. 2015)). "In the NEPA context, plaintiffs may demonstrate redressability with a showing that the agency's decision []'could be influenced by the environmental considerations that NEPA requires an agency to study.'" *Id.* (quoting *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1087 (9th Cir. 2003)). "A plaintiff does not need to show that the correction of the alleged procedural er-

ror would lead to a decision more favorable to plaintiffs' interests." *Id.* (citing *Laub*, 342 F.3d at 1087). "Rather, plaintiffs need only show a reasonable probability that the [defendant's] decision "could be influenced by the environmental considerations that NEPA requires an agency to study." *Id.* at 920 (citing *Laub*, 342 F.3d at 1087). Put another way, the question "is not whether a *favorable decision* is likely but whether a favorable decision *likely will redress* a plaintiff's injury." *Bonnichsen v. U.S.*, 367 F.3d 864, 873 (9th Cir. 2004) (citation omitted) (emphasis in original).

"While this is not a high bar to meet[,] the redressability requirement is not toothless in procedural injury cases." *Friends of Santa Clara River*, 887 F.3d at 918 (quoting *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1227 (9th Cir. 2008)) (original alterations and internal quotation marks omitted). "Procedural rights 'can loosen . . . the redressability prong,' not eliminate it." *Id.* (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 497 (2009)).

In January 2010, this court held that Logan and the Alliance have standing to challenge defendants' conduct and that it "need not determine whether the remaining plaintiffs have standing to maintain the action." Order 11–12, ECF #52 (citing *Clinton v. City of New York,* 524 U.S. 417, 431 n.19 (1998), and *Nat'l Ass'n of Optometrists & Opticians LensCrafters v. Brown*, 567 F.3d 521, 523 (9th Cir. 2009)). Noting "5 U.S.C. § 706(2) of the APA confers broad equitable authority on courts to remedy violations of public law by government agencies" when the public interest is involved, Order 5, ECF #52 (collecting cases), the court held that plaintiffs' claims were not moot because although the project was nearly complete, the expanded

highway continued to harm plaintiffs' "ongoing interests in [their] cultural and historical resources." *Id.* at 8. Further, in June 2018, the court held plaintiffs had Article III standing to bring a claim under RFRA. Order 3–4, ECF #312. The court stated, "Given Plaintiffs' broad request for various forms of equitable relief, it is likely that the Court could craft some relief that would mitigate Plaintiff's injury and improve their access to the site and ability to exercise their religion." *Id.* at 4 (citing *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1065–66 (9th Cir. 2002), and *Feldman v. Bomar*, 518 F.3d 637, 642–43 (9th Cir. 2008)).

Plaintiffs argue these prior rulings are law of the case and should not be disturbed. Pls.' Reply 15, ECF #345. Regardless, "[b]ecause 'the need to satisfy Article III standing requirements persists throughout the life of the lawsuit,' if circumstances change such that the plaintiffs . . . no longer possess standing, [the court] must dismiss the affected claims." *Friends of Santa Clara River*, 887 F.3d at 917 (quoting *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1736–37 (2016)) (original alterations omitted).

No circumstances have changed since the 2018 order, which was limited to the RFRA claim. Since the 2010 order, the court dismissed ODOT on sovereign-immunity grounds, and ODOT completed the project. However, neither of these changed circumstances prevent defendants from providing *some* effective relief. Even if ODOT's dismissal removed the ultimate mode of redress from the court's arsenal, and the court could not "order the removal of portions of a highway project under the APA," Order 9, ECF #52 (citing *West*, 206 F.3d at 925), the remaining defendants may still provide some other form of effective relief.

As the court put it in 2010, "If the Court determines additional study of cultural, historical, or ecological resources is required by law, Defendants may, for example, be required . . . to take additional mitigating actions to protect cultural, ecological, or historical resources in accordance with any new agency findings." Order 10, ECF #52; *see also Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001) (site demolition not enough to render NEPA case nonjusticiable). Again, even if defendants came to the same ultimate conclusions after additional review and plaintiffs' harms ultimately went unmitigated, "the possibility of effective relief is all that is required." *N.W. Envtl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1245 (9th Cir. 1988)). Defendants' additional arguments to the contrary are inapposite. Thus, plaintiffs' claims are redressable and plaintiffs have Article III standing, except for those claims in which plaintiffs challenge defendants' consultations with federally recognized Indian tribes, as explained *infra*, Section VI.A.

VI.Reconsideration of Prior Rulings

"All rulings of a trial court are 'subject to revision at any time before the entry of judgment.'" *U.S. v. Houser*, 804 F.2d 565, 567 (9th Cir. 1986) (quoting FED. R. CIV. P. 54(b)). A district court "may reconsider its prior rulings so long as it retains jurisdiction over the case." *U.S. v. Smith*, 389 F.3d 944, 948 (9th Cir. 2004); *see also E.E.O.C. v. Serrano's Mexican Restaurants, LLC*, 306 F. App'x 406, 407 (9th Cir. 2009) (cited pursuant to Ninth Circuit Rule 36-3) ("There is no strict prohibition against one district judge reconsidering and overturning the interlocutory order or ruling of a prior district judge in the same case before final judgment, though one judge should not overrule

another except for the most cogent reasons."). In fact, a district court may *sua sponte* reconsider and rescind a prior order without first requesting additional briefing from the parties. *City of Los Angeles, Harbor Div. v. Santa Monica Baykeeper*, 254 F.3d 882, 887 (9th Cir. 2001). "The 'law of the case" doctrine is "wholly inapposite to circumstances where a district court seeks to reconsider an order over which it has not been divested of jurisdiction . . . All rulings of a trial court are subject to revision at any time before the entry of judgment." *Guerra v. Paramo*, 251 F. App'x 424, 425 (9th Cir. 2007) (cited pursuant to Ninth Circuit Rule 36-3). Whether "the first decision was clearly erroneous" or "an intervening change in the law has occurred" are indisputably cogent reasons for revisiting prior rulings. *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir. 1993), *cert. denied* 508 U.S. 951 (1993).

After contemplating the many issues presented by the parties' motions, and viewing them with fresh eyes—only to find the analysis tangled—this court found it necessary to revisit prior rulings, including one ruling *sua sponte*. The court first addresses whether plaintiffs may challenge defendants' tribal consultations, and then whether it should consider plaintiffs' extra- record evidence.

A. Plaintiffs do not have Article III standing to challenge the adequacy of defendants' government-to-government consultations with Indian tribes.

The court previously held that because the Klickitat Tribe and Cascade Tribe are not federally recognized, Slockish and Jackson "have no right to consultation under Section 106." Findings and Recommendations 9 n.4, ECF #154 *adopted by* Order, ECF

#171. The court also found that plaintiffs were not "additional consulting parties" because they failed to follow the process under Section 106 to obtain this status, that is, they failed to request in writing to be additional consulting parties under 36 C.F.R. § 800.3(f)(3). *Id.* at 13–14. These conclusions are correct. The court also held, however, that because plaintiffs "are members of the public who claim an interest in the preservation of the historic sites at issue," they "fall within the zones of interests protected by the NHPA and have standing to challenge the adequacy of Federal Defendants' consultation with federally recognized tribes, including the Yakama Nation, Warm Springs, and Grande Ronde tribes." *Id.* at 12; *see also id.* at 14 ("plaintiffs have standing as interested members of the public . . . to allege a violation of the NHPA for failing to consult with an Indian tribe"); *id.* at 18 ("This issue boils down to what information must be conveyed by the Federal Defendants to the tribes to satisfy the duty to consult."). This ruling is both clearly erroneous and contrary to binding intervening authority.

1. Clearly Erroneous

It would debase a tribe's sovereignty for a tribal member, even someone within the zone of interest under NHPA, to override a tribe's government-to-government consultation authority in what would amount a veto of the tribe's official position. "Consultation with an Indian tribe must recognize the *government-to-government relationship* between the Federal Government and Indian tribes." 36 C.F.R. § 800.2(c)(2)(ii)(C) (emphasis added). The rationale underpinning this ruling is apparent from the record in this case.

The record establishes that all interested federally recognized Indian tribes approved of (or in Yakama Nation's case, belatedly acquiesced to) the Wildwood to Wemme project. *See* FHWA 3820, 5652, 5955, 6544, 6910–11, 7194. When planning the project, ODOT asked the Oregon SHPO which Indian tribes it should consult. SHPO indicated Warm Springs, Grand Ronde, and Siletz had interests in the area. ODOT met with, sent documents to, and communicated with these tribes continuously between 2005 and 2006 until the project's completion. The tribes were satisfied with ODOT's efforts in investigating all cultural and historic resources in the project area. After these consultations and a robust public comment period—including CGS' singular comment that it owned the white stone pillars—ODOT worked extensively with Grand Ronde's Cultural Protection staff to address additional concerns even though the Revised EA and FONSI had already been issued. *See* FHWA 5088, 5134–46, 5199, 5351, 5360, 7484.

ODOT and Grand Ronde specifically considered the purported gravesite excavated by Pettigrew's team in 1986. FHWA 5066, 5082. After much discussion, Grand Ronde requested that a tribal monitor be present during construction, and ODOT agreed. *See* FHWA 5351, 7484. When CGS began protesting the project in early 2008, Grand Ronde told ODOT that tribal members who are not employed in an official capacity with the tribe "can only represent their *personal perspectives*" and that their opinions "are not supported by the Tribe unless a Tribal official speaks in support." FHWA 6910–11 (emphasis in original). Logan is a tribal member of Grand Ronde, but she does not represent Grand Ronde in any official capacity. *See*

FHWA 5652. Logan and CGS' assertion of historical or cultural significance in the Dwyer area was contrary to Grand Ronde's official position, and the professional opinion of every archeologist who visited the site. Grand Ronde explicitly told ODOT that Logan was not representing Grand Ronde. FHWA 5652. Grand Ronde's official position was that ODOT and defendants had followed the Section 106 process and the tribe had "no fault with what they have done." *Id.* When a local newspaper ran an article alleging ODOT planned to intrude on sacred burial sites in the project area, ODOT proactively sent the article to Grand Ronde and Warm Springs to address any potential concerns. FHWA 6515, 6565–68. Both tribes were satisfied with ODOT's response and efforts, and with the project as envisioned in the Revised EA and FONSI. FHWA 6519, 6527. Given the modest scale and footprint of the project, it is difficult to imagine more meaningful government-to-government consultations.

Granted, ODOT did not contact Yakama Nation until after issuance of the Revised EA and FONSI. Still, Yakama Nation Cultural Resource Manager Meninick, the official representative of Yakama Nation, indicated he saw no reason for further consultation based on the negative results of the extensive archaeological investigations conducted. FHWA 7194. That ODOT should have consulted Yakama Nation from the outset is harmless error because Yakama Nation was ultimately consulted and approved of the project. The letter from Washines—who is not Yakama Nation's Cultural Resource Manager—invoked the 1991 Yakama Letter and generically opposed all construction in the "Mt. Hood Area," but said nothing of the Wildwood to Wemme project. FHWA 6949. The

1991 Yakama Letter also generically opposed all construction near Mt. Hood. *See* FHWA 6303. Washines had no comment after FHWA and ODOT responded with a letter carefully explaining the extensive archeological investigations in the project area. FHWA 7274–75. More importantly, like Logan, Slockish and Jackson are not official representatives of Yakama Nation and cannot stand in its shoes.

In sum, defendants owe consultation duties to federally recognized Indian tribes. 54 U.S.C. § 300309. These consultations are government to government, not government to tribal member, and especially not government to tribal member over the objections of the tribal government. *See* 36 C.F.R. § 800.2(c)(2)(ii)(C).

The court's error appears to have resulted from misreading a non-binding 2004 decision from the District of Montana, *Montana Wilderness Ass'n v. Fry*, 310 F. Supp. 2d 1127 (D. Mont. 2004). In *Fry*, BLM issued three oil-and-gas leases and a pipeline right-of-way without conducting any Section 106 process at all. *Id.* at 1133. BLM issued the leases without producing an EIS, and instead relied on a prior EIS that did not analyze oil-and-gas development. *Id.* at 1145 (characterizing the prior analysis as a 'no look' not a 'hard look' process). That EIS stemmed from an even earlier oil-and-gas EA, but the record was unclear whether it was subject to public comment or discussion. *Id.* at 1146. Regardless, BLM never issued a FONSI for the EA, so it was invalid. *Id.* at 1146.

The court also found that BLM failed "to provide any notice to the public of its intention to evaluate the environmental impacts of the pipeline right-of-way, or to solicit comments from the public regarding the potential impacts of that action." *Id.* at 1147. The *Fry*

court found that a tribal member, Youpee, had standing to bring an NHPA claim, that BLM violated NHPA, and remanded to BLM to "consult with all required entities, including nearby tribes." *Id.* at 1157. But Youpee had Article III standing under NHPA as a member of the public who was not given an opportunity to participate in that capacity. The court held:

> NHPA's regulations require federal agencies to provide interested members of the public reasonable opportunity to participate in the section [106] process. 36 C.F.R. §§ 800.1(a), 800.2(a)(4), (d)(1). Thus, any member of the public who can demonstrate sufficient interest in the preservation of the historical lands at issue falls within the zone of interests protected by the NHPA. Youpee has sufficiently alleged facts supporting his standing under Article III *as well as* the zone of interests protected by the NHPA.

Id. at 1151 (emphasis added).

Fry's instruction to BLM to prepare an EIS and conduct a Section 106 process, including the requisite tribal consultations, does not mean Youpee had Article III standing to challenge the tribal consultations themselves. Instead, Youpee had Article III standing to challenge the lack of public notice and comment as a member of the public, as no EIS had been prepared in the first instance. Likewise, here, if defendants had not issued an EA and FONSI, and had not conducted the years-long public notice and comment process that it did, the court could similarly remand to defendants with instructions to prepare an EA with all the obligations that entails, including consultations with interested Indian tribes. However, here, defendants *did*

conduct a years-long public notice and comment process.

2. Intervening Authority

More important is the Ninth Circuit's affirmation that a tribal monitor "does not have standing to bring a claim for inadequate tribal consultation on behalf of the Tribe. The regulations extend the right to government-to-government consultation to the Tribe, not its individual members." *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of Interior*, 642 F. App'x 690, 693 (9th Cir. 2016) (cited pursuant to Ninth Circuit Rule 36-3). This decision is in line with prior Ninth Circuit cases holding that NHPA consultation requirements extend only to federal recognized tribes or their designated representatives. *E.g.*, *Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 608 F.3d 592, 608 n.19 (9th Cir. 2010) (9th Cir. 2010) (holding two non-Indian-tribe plaintiffs did not have standing to challenge tribal consultation requirements because "neither group is a federally recognized tribe to which the NHPA's consultation requirements extend nor do Plaintiffs point to evidence in the record showing that either party was acting as 'representatives designated or identified by the tribal government'"); *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1216 (9th Cir. 2008) (9th Cir. 2008) (citing NHPA's definition of Indian tribe, 54 U.S.C. § 300309, and holding, "Because the Snoqualmie Indians were not federally recognized before the closure of the administrative record, we need not evaluate the sufficiency of FERC's government-to- government consultation efforts"); *see also La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. W. Area Power Admin.*, No. EDCV 12-00005 VAP, 2012 WL 6743790,

at *6 (C.D. Cal. Nov. 29, 2012) ("[I]t is the tribe, as principal, that holds the right, and the tribe who is injured by a statutory violation. Thus, only the tribe itself may bring a claim for failure to comply with the consultation provision.").

If ODOT's consultation with Yakama Nation was inadequate, Yakama Nation suffered an injury, not plaintiffs. "Nothing short of the tribe's intervention as a plaintiff would satisfy the standing requirements." *La Cuna*, 2012 WL 6743790, at *6. That plaintiffs otherwise fall within NHPA's zone of interests is inapposite.

B. Consideration of Extra-Record Evidence

Defendants filed the public portions of the administrative record in October 2010, and the sealed portions the following month. *See* ECF ##85, 86. They supplemented the public administrative record in March 2011. ECF #90.

Plaintiffs rely on ten deposition transcripts and declarations outside of the administrative record, which they prepared for the purpose of this litigation[8] to support their motion for summary judgment. Defendants move to strike all of plaintiffs' extra-record evidence or to limit its consideration to the purposes identified by the court when previously granting leave

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[8] Plaintiffs also submitted other documents in support of their motion for summary judgment that were not created for this litigation. *E.g.*, ECF #331-5 (BLM, Salem District Resource Management Plan (May 1995); ECF #331-20 (Oregon Resource Conservation Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-536); ECF #331-27 (FHWA Federal-Aid Project Agreements (Jan. 2005-June 2013); ECF #331-29 (Pub. Land Order 4537, 33 Fed. Reg. 17628 (1968)).

to supplement. Mot. Strike 1–2, ECF #339. But first, they seek relief from Local Rule 56-1(b).

1. Local Rule 56-1(b)

Local Rule 56-1(b) provides that "[r]ather than filing a motion to strike, a party must assert any evidentiary objections in its response or reply memorandum." Here, defendants filed a 14-page motion to strike in addition to their full-length combined motion for summary judgment and response to plaintiffs' motion for summary judgment. ECF #339. They argue that Local Rule 56-1(b) is not applicable because they are moving to strike plaintiffs' extra-record evidence under the APA, not the federal rules of evidence, and even if it is applicable, the court has discretion to allow the motion to strike. *Id.* Plaintiffs counter that defendants' separate motion to strike is improper under both Local Rule 56-1(b) and Federal Rule of Civil Procedure 56(c)(2), defendants are simply trying to skirt the page limit, and the court lacks discretion to allow the motion. Pls.' Opp. Mot. Strike 2–4, ECF #344.

Rule 56(c)(2) provides that "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56. "The plain meaning of [Rule 56(c)(2)'s language and its corresponding advisory committee notes] show that objecting to the admissibility of evidence supporting a summary judgment motion is now a part of summary judgment procedure, rather than a separate motion to be handled preliminarily." *Campbell v. Shinseki*, 546 F. App'x 874, 879 (11th Cir. 2013). Recent changes to Local Rule 56-1(b) bring it in line with Rule 56(c)(2). On January 1, 2019, the District of Oregon modified Local Rule 56-1(b), replacing a permissive "may" with the

mandatory "must." LR 56 Amendment History, https://ord.uscourts.gov/index.php/rules-orders-and-notices/local-rules/civil-procedure/1244-2014-lr-56-amendment-history (last accessed March 17, 2020). Local Rule 56-1(b) makes clear what Federal Rule of Civil Procedure 56(c)(2) implies: in the District of Oregon, a party must assert any evidentiary objections in its summary judgment response or reply brief instead of filing a separate motion to strike. Thus, defendants' motion is procedurally improper.

The district's local rules have the "force of law." *Hollingsworth v. Perry*, 558 U.S. 183, 191 (2010) (quoting *Weil v. Neary*, 278 U.S. 160, 169 (1929)); *In re Corrinet*, 645 F.3d 1141, 1146 (9th Cir. 2011) ("District judges must adhere to their court's local rules, which have the force of federal law."). However, "the district court has broad discretion to depart from the strict terms of the local rules where it makes sense to do so and substantial rights are not at stake." *Prof'l Programs Grp. v. Dep't of Commerce*, 29 F.3d 1349, 1353 (9th Cir. 1994). "A departure [from the local rules] is justified only if the effect is 'so slight and unimportant that the sensible treatment is to overlook it.'" *Id.* (quoting *Martel v. County of Los Angeles*, 21 F.3d 940, 947 n.4 (9th Cir. 1994)) (original alteration omitted) (subsequent history of *Martel* omitted).

When reviewing agency action under the APA, "the party seeking to admit extra-record evidence initially bears the burden of demonstrating that a relevant exception applies." *Locke.*, 776 F.3d at 992–93; *Animal Defense Council v. Hodel,* 840 F.2d 1432, 1437 (9th Cir. 1988). Plaintiffs must make this showing regardless of the adequacy of defendants' evidentiary objections. Otherwise stated, even if defendants' motion to strike

were denied, the question of whether the court can rely on plaintiffs' extra-record evidence would still need to be answered. Under these circumstances, whether Local Rule 56-1(b) is applied would not affect a substantial right and it makes sense to grant defendants relief from the rule. *See Prof'l Programs Grp.*, 29 F.3d at 1353. Accordingly, the court moves on to consider the merits of defendants' motion to strike.

2. Prior Orders and Plaintiffs' Documents

In March 2012, the court heard oral argument on plaintiffs' renewed motion to supplement the administrative record and compel discovery (ECF #107). Minutes of Proceedings, ECF #137. The court allowed plaintiffs to submit "affidavits to support standing under NAGPRA." *Id.*

In May 2012, plaintiffs submitted four declarations in response to the court's order: Declaration of Hereditary Chief Wilbur Slockish in Support of Standing (ECF #146), Declaration of Carol Logan in Support of Standing (ECF #147), Declaration of Michael Jones in Support of Standing (ECF #148), and Declaration of Hereditary Chief Johnny Jackson in Support of Standing (ECF #151).

In August 2012, the court granted in part and denied in part plaintiffs' renewed motion to supplement the record and compel discovery (ECF #107) as follows:

> (1) The Court GRANTS Plaintiffs' Renewed Motion to Supplement the Record as to Plaintiff[s'] Third Claim
>
> (a) under NHPA as to testimony by Jones and Nixon to clarify the area

Yallup designated in 1991 as containing Native American burial sites and

(b) under NAGPRA as to

(i) affidavits establishing Plaintiffs' standing as traditional religious leaders and identifying "sacred objects" within the Project area and

(ii) testimony by Jones describing the information he communicated to ODOT and the Federal Defendants that is not reflected in the Administrative Record and confirming Larry Dick's communication to the BLM in 1990.

(2) The Court DENIES the remainder of Plaintiffs' Motion.

Order 7, ECF #171. The parties then entered settlement negotiations, and the case was stayed until mid-2015.

About a year after litigation resumed, plaintiffs submitted two[9] supplemental declarations: Supplemental Decl. of Hereditary Chief Johnny Jackson in Support of Standing (ECF #242) and Supplemental Decl. of Hereditary Chief Wilbur Slockish in Support of Standing (ECF #243). The parties each moved for summary judgment on plaintiffs' RFRA claim, and plaintiffs submitted deposition transcripts in support:

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[9] Plaintiffs submitted several other declarations, but do not rely on that testimony here. *See* ECF ##244, 245, 246.

Transcript of Deposition of Wilbur Slockish (ECF #287-4), Transcript of Deposition of Carol Logan (ECF #287-3), and Transcript of Deposition of Michael Jones (ECF #287-7). The court considered these transcripts when ruling on plaintiffs' RFRA claim, which was ultimately dismissed. Findings and Recommendations 5 n.1, 13 n.5, ECF #300; Order, ECF #312. The court also denied plaintiffs' motion for discovery on plaintiffs' free exercise claim, foreclosing any additional attempt to supplement the record. *See* Opinion and Order, ECF #325. Finally, plaintiffs submitted the declaration of Tx'li-Wins (Larry Dick) in support of the present motion for summary judgment. Declaration of Tx'li-Wins (Larry Dick), ECF #331-42.

3. Standards

"In general, a court reviewing agency action under the APA must limit its review to the administrative record." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 992 (9th Cir. 2014) (citing *Camp v. Pitts,* 411 U.S. 138, 142 (1973)); 5 U.S.C. § 706. "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985) (quoting *Camp*, 411 U.S. at 142) (alteration in original). "This rule ensures that the reviewing court affords sufficient deference to the agency's action." *Locke*, 776 F.3d at 992. "Were the federal courts routinely or liberally to admit new evidence when reviewing agency decisions, it would be obvious that the federal courts would be proceeding, in effect, de novo rather than with the proper deference to agency processes, expertise, and decision-making." *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005).

> In the Ninth Circuit,
>
> a reviewing court may consider extra-record evidence where admission of that evidence (1) is necessary to determine whether the agency has considered all relevant factors and has explained its decision, (2) is necessary to determine whether the agency has relied on documents not in the record, (3) when supplementing the record is necessary to explain technical terms or complex subject matter, or (4) when plaintiffs make a showing of agency bad faith.

Locke, 776 F.3d at 992–93 (quoting *Land Council*, 395 F.3d at 1030) (internal quotation marks omitted). "These exceptions are to be narrowly construed, and the party seeking to admit extra- record evidence initially bears the burden of demonstrating that a relevant exception applies." *Id.*; *Pinnacle Armor, Inc. v. United States*, 923 F. Supp. 2d 1226, 1232 (E.D. Cal. 2013) ("The party seeking supplementation bears the burden of overcoming this presumption by 'clear evidence.'"). "Consideration of the evidence to determine the correctness or wisdom of the agency's decision is not permitted, even if the court has also examined the administrative record. If the court determines that the agency's course of inquiry was insufficient or inadequate, it should remand the matter to the agency for further consideration and not compensate for the agency's dereliction by undertaking its own inquiry into the merits." *Asarco, Inc. v. U.S. Envtl. Prot. Agency*, 616 F.2d 1153, 1160 (9th Cir. 1980).

4. Analysis

Plaintiffs argue that their submission of extra-record evidence complies with the court's prior orders,

which applied the first exception to the rule against extra-record evidence, i.e., when "necessary to determine if the agency has considered all factors and explained its decision." Pls.' Reply 17, ECF #345.[10] Plaintiffs flatly assert that defendants "fail to show the decision was wrong at all, much less a clear judgment of error," but do not explain why application of this exception was correct in the first instance. *Id.* All this is to say, plaintiffs do not make a case for the court's consideration of any extra-record evidence here on the cross-motions for summary judgment. In any event, with one exception,[11] the court's prior orders allowing plaintiffs to supplement the record were clearly erroneous because the record sufficiently explains defendants' decisions and supplementation would duplicate and recharacterize matters already in the record or otherwise result in an unlawful de novo review of the agency action.

The Ninth Circuit has recognized and even applied what this court previously termed the "NEPA exception":

> In the Ninth Circuit, when claims are brought under the NEPA, the first of these four circumstances allows expansion of the record to consider whether the agency "neglected to mention

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[10] Plaintiffs do not respond to the substance of defendants' motion to strike in their response, instead opting to address the arguments in their summary judgment reply brief. Pls.' Opp. Mot. Strike 4, ECF #344.

[11] The order allowing submission of affidavits "to establish plaintiffs' standing as traditional religious leaders under NAGPRA" is clearly proper. Minutes of Proceedings, ECF #137; Order ¶ 1(b)(i), ECF #171.

> a serious environmental consequence, failed adequately to discuss some reasonable alternative or otherwise swept stubborn problems or serious criticism . . . under the rug."

Findings and Recommendations 6, ECF #154, *adopted by* Order, ECF #171 (quoting *Animal Defense Council*, 840 F.2d at 1437). What the Ninth Circuit articulated in *Animal Defense Council* is merely the "all relevant factors" exception, which applies whether it is a NEPA case or a different statutory context. *See Animal Defense Council*, 840 F.2d at 1437.

In *National Audubon Society v. U.S. Forest Service*, the Ninth Circuit affirmed a district court's consideration of expert witness testimony under *Animal Defense Council*'s articulation of the "all relevant factors' exception where the plaintiff alleged "the Forest Service *completely ignored* the roadless nature of the timber sales when it prepared the environmental assessments." 46 F.3d 1437, 1448 (9th Cir. 1993) (emphasis added).

> Therefore, because the Audubon Society alleged the Forest Service "neglected to mention a serious environmental consequence" in preparing the environmental assessments on the four challenged timber sales, we hold the district court properly considered Dr. Noss's affidavit even though it is not contained within the administrative record.

Id. Similarly, in a case previously cited by this court,[12] *Inland Empire Public Lands Council v. U.S. Forest Service*, the Ninth Circuit applied the "all relevant factors" exception in a case that had "highly technical matters," which the agency neglected to mention. 88 F.3d 754, (9th Cir. 1996) (quoting *Asarco*, 616 F.2d at 1160).

By contrast, here, plaintiffs' extra-record evidence does not pertain to highly technical matters or address something defendants completely ignored or neglected to mention. Implicit in the court's prior orders was the idea that allowing supplementation might provide information about how defendants failed to communicate to Yakama Nation or the other Indian tribes. However, as discussed above, plaintiffs may not challenge defendants' tribal consultations; therefore, the primary justification for supplementation falls away.

The record also reveals that, in the 1980s and '90s, defendants repeatedly investigated CGS' claims regarding the archeological, historical, and cultural significance of the project areas—including the purported gravesite. The record contains the transcript of ODOT's 1991 meeting with Yallup during which he told ODOT there were burial sites [redacted] Later archeological surveys investigated these claims, and the results were reproduced in reports, which were incorporated and examined in the Wildwood to Rhododendron EIS, the US 26 Rhododendron to OR 35 Junction EIS, and the Wildwood to Wemme EA. The record contains hundreds of

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[12] *See* Findings and Recommendations 27, ECF #154, *adopted by* Order, ECF #171 (alteration in original) (quoting *Inland Empire*, 88 F.3d at 760).

pages of information provided by Jones through CFASH and CGS in opposition to all projects in the area. And, importantly, the record contains more than enough evidence to show ODOT and defendants investigated the presence of burial sites and cultural items in the project area, including via consultation with the Grand Ronde, Warm Springs, Siletz, and Yakama Nation.

Thus, supplementation of the record would not reveal whether defendants ignored the alleged archeological, historical, and cultural significance of these sites, but would instead directly challenge the agency's findings about that evidence. *Friends of the Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 997 (9th Cir. 1993) (upholding decision to exclude extra-record witness testimony where the "administrative record sufficiently explained the Corp's decision and showed that the agency considered the relevant factors"); *Rybachek v. EPA*, 904 F.2d 1276, 1296 n.25 (9th Cir. 1990) ("The original record here adequately explains the basis of the EPA's decision and demonstrates that the EPA considered the relevant factors."). However subtle, this distinction makes or breaks the application of the "all relevant factors" exception to the rule that "a court reviewing agency action under the APA must limit its review to the administrative record." *See Locke*, 776 F.3d at 992. To the extent the court's prior orders allowing supplementation impermissibly teed up the present motions for a de novo review of the propriety of defendants' decision, those orders are clearly erroneous and should be rescinded. *See Envtl. Def. Fund, Inc.*, 657 F.2d at 286 (holding that "a judicial venture outside the record"

can "never, under *Camp v. Pitts*, examine the propriety of the [agency's] decision itself"). Although the documents plaintiffs seek to include "'might have supplied a fuller record,' they do not 'address issues not already there.'"[13] *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1451 (9th Cir. 1996) (quoting *Friends of the Earth v. Hintz*, 800 F.2d 822, 829 (9th Cir. 1986)).

Moreover, plaintiffs' declarations go far beyond attempting to identify or explain a "relevant factor" that defendants' purportedly ignored, and instead attempt to undermine evidence of their own conduct in the record. For example, Logan, Jones, and Larry Dick ("Dick") all declare that Logan, Dick, and Rip Lone Wolf worked with Jones in the 1980s and '90s to identify traditional use areas and sacred sites along US 26, but claim they did not comment publicly for fear the government or people who supported widening the highway would deliberately destroy the sites, including the Dwyer area, [redacted]. Logan Decl. ¶¶ 37–42, ECF #147; Jones Decl. ¶¶ 27-31, ECF #148, Dick Decl. ¶¶ 257–294, ECF #331-42 ("Dick Decl."). The record contains extensive documentation of ODOT and defendants' interactions with Jones and archeological investigations of the very site at issue. If the court considered these statements, it would not unveil some factor that defendants ig-

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[13] Moreover, where the record does not reveal a rational basis for agency action, and the action is therefore arbitrary and capricious, the proper remedy is to remand with instruction for further explanation, not to conduct a de novo review with plaintiffs' post-decisional evidence. *See Asarco*, 616 F.2d at 1160.

nored but would instead imbue new meaning and recharacterize record evidence of ODOT and Jones' interactions.

Another example is Jones' declaration in which he states that during the 1991 meeting, [redacted].[14] The word Dwyer does not appear anywhere in the transcript. When Bartel pushed Yallup to "be a little more specific," Jones interrupted and said, "we're not going to get down to specifics. If you want like pinpoints, you know, we're not going to do [that]." FHWA 5568. Later during the meeting, Jones and CGS' attorney, Michael Nixon, both emphasized that construction north of the highway would not be problematic. FHWA 5591–95. Jones further declares that after the meeting, Yallup told him: "I gave the government workers enough information to allow them to do their job and keep the highway away from these sacred places. They can no longer claim they did not know what was there because, as a leader and Elder of the Yakama Nation, I have now told them." Jones Decl. ¶ 42, ECF #148. Admitting Jones' declaration would allow Jones to impermissibly recharacterize the transcript, which is already in the record.

A final example goes to the heart of plaintiff's allegations. In a declaration dated December 2018, Dick declares that he showed Jones "cultural and religious sites in the Mount Hood Area," [redacted] Dick Decl. ¶ 260, ECF #331-42.

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[14] CGS sent a copy of the transcript to FHWA in February 2008. FHWA 5562.

> Stone altars were the focal point of the burial sites [of] the area. If people didn't know what they were, they would move on. Only those who followed the Native way would use them for prayers and ceremony. Altars were used in conjunction with the burials in the area. There were stone markers but they did not exactly pinpoint where the burials were.

Id. ¶¶ 265–66. Dick further declares that he did not tell Jones that the stone mound was actually an altar "until after it was vandalized," which is why Jones "was still referring to it as a grave." *Id.* ¶¶ 283–84.

The record reveals that defendants investigated Jones' claim that this was a gravesite and found no humans remains: public comments about a gravesite, FHWA 487, Jones' inquiry about a "pioneer grave," FHWA 577, the 1986 CFASH letter threatening suit "if the potential gravesite is further disturbed," FHWA 5079, Jones' documentation that he was "able to feel at peace that the Native American or pioneer gravesite . . . will not be disturbed by the widening" in the 1987 Kuehn–Jones Agreement, FHWA 5436, the many archeological investigations of the site, including those resulting in Pettigrew's 1986 Excavation Report, FHWA 303–05, 487, the March 1992 note regarding how the "rock stack (described as a possible burial cairn)" was clearly not a historic resource, ACHP 219, O'Grady's pedestrian surveys confirming Pettigrew's findings, FHWA 2410; ACHP 57, and Roedel and Bottman's many communications with the official cultural resource managers of Grand Ronde (Schultz and Thorsgard), Warm Springs (Bird), Siletz (Kentta), and Yakama Nation (Meninick) confirming the tribes' official positions that the Dwyer area and rock feature

were not culturally significant. *See* FHWA 2416, 3820, 5066, 5088, 5351, 5465, 5646, 5652, 5666–69, 5676, 5726–28, 5973, 6515, 6527, 6544, 6565–68, 6911, 7194, 7274–75. Dick's recent testimony that the rock feature is actually a stone altar and that he misled Jones in the 1980s and '90s, thus qualifying and undermining all of Jones and ODOT's interactions, constitutes post-decision information that may not be advanced as "a new rationalization either for sustaining or attacking an agency's decision." *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) (citing *Association of Pac. Fisheries v. EPA,* 615 F.2d 794, 811–12 (9th Cir. 1980).

Not all of plaintiffs' extra-record evidence suffers from the same defects; however, it does not otherwise fit within the narrowly construed exceptions to the rule that agency action must be judged on the record. *Camp*, 411 U.S. at 142. And aside from flatly asserting the prior order was not clearly erroneous, plaintiffs do not even attempt to carry their burden on summary judgment. *See Locke*, 776 at 992; *Hodel*, 840 F.2d at 1437. Other than the small portions of the declarations that have been proffered to establish standing, plaintiffs' extra-record evidence cannot be considered by this court without running afoul of the APA and the required deference due to agency decision-making.

VII. Defendants' Affirmative Defenses: Laches and Waiver

The court addresses two preliminary questions, then laches and waiver.

A. Waiver of Affirmative Defenses

Defendants contend that (1) the doctrine of laches bars plaintiffs' claims and (2) plaintiffs waived their

claims because they did not raise them during the administrative process. Defs.' Mot. Summ. J. 4–7, ECF #340. Plaintiffs argue that defendants waived their right to assert the affirmative defenses of laches and waiver because they did not plead them in their answer. Pls.' Reply Supp. Mot. Summ. J. 6, ECF #346.

On January 21, 2016, defendants answered the Fourth Amended Complaint and alleged four defenses: lack of standing, lack of subject matter jurisdiction, failure to state a claim, and statute of limitations. Ans. Fourth Am. Compl., Affirmative Defenses, ECF #225. Plaintiffs then moved to strike. Mot. Strike 3–4, ECF #226. Instead of responding to the motion to strike, defendants amended their answer to omit all defenses, but stated that they "maintain the right to assert any non-waivable or jurisdictional defense to the claims asserted and do not relinquish the right to challenge in this Court or on appeal Plaintiffs' failure to state a claim as to any cause of action." Am. Answer 19, ECF #238. Order, ECF #239.

Rule 8 provides that "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including . . . laches . . . [and] waiver." Fed. R. Civ. P. 8(c)(1). Plaintiffs cite a leading treatise for the proposition that "failure 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." Pls.' Reply 3, ECF #345 (citing 5 FED. PRAC. & PROC. CIV. § 1278 (3d ed.). But the same treatise also acknowledges that "the waiver rule that has developed in the practice under Rule 8(c) is not applied automatically with regard to omitted affirmative defenses and as a practical matter there are numerous

exceptions to it based on the circumstances of particular cases." 5 FED. PRAC. & PROC. CIV. § 1278 (3d ed.). In the Ninth Circuit, "[a]s long as the plaintiff is not prejudiced, affirmative defenses that were not pleaded in an answer may be raised for the first time on summary judgment." *McGinest v. GTE Serv. Corp.*, 247 F. App'x. 72, 75 (9th Cir. 2007) (collecting cases and citing *Camarillo v. McCarthy*, 998 F.2d 638, 639 (9th Cir. 1993)) (cited pursuant to Ninth Circuit Rule 36-3); *Sharer v. Oregon*, 481 F. Supp. 2d 1156, 1164–65 (D. Or. 2007), *adhered to on reconsideration,* 04-CV-1690-BR, 2007 WL 9718957 (D. Or. Apr. 18, 2007) (quoting *Camarillo*, 998 F.2d at 639).

Plaintiffs are not prejudiced by defendants' failure to plead waiver and laches. Thus, defendants may raise these affirmative defenses for the first time on summary judgment.

B. Plaintiffs Are Single Entity

Another preliminary question is whether plaintiffs should be treated as a single entity for purposes of the laches doctrine. *Apache Survival Coalition v. U.S.*, 21 F.3d 895, 907 (9th Cir. 1994). In *Apache Survival Coalition*, the Ninth Circuit held that the San Carlos Apache Tribe and Apache Survival Coalition were the same entity, where the coalition was composed of members of the tribe and the coalition's stated purpose was to protect and preserve traditional Apache culture. *Id.*

Here, CGS and the Alliance are both named plaintiffs. Jones is not a named plaintiff, but the record shows that he was the one who personally interacted with ODOT and defendants in the 1980s and '90s and before issuance of the Wildwood to Wemme EA and

FONSI. Jones is the curator and co-founder of plaintiff CGS, of which Logan is a co-founder and all individual plaintiffs are members, and Jones' conduct is essential to plaintiffs' case. Logan Decl. ¶¶ 20, 37–38, ECF #147; Jones Decl. ¶ 5, ECF #148. Logan only began personally interacting with ODOT and defendants in late 2007, and Slockish and Jackson only entered the picture in May 2008 when Jones sent their memoranda to ACHP. ACHP 117–35. Moreover, Logan, Slockish, Jackson, and Jones are all members of the Alliance. Slockish Decl. ¶ 3, ECF #146; Logan Decl. ¶ 20, ECF #147; Jones Decl. ¶ 5, ECF #148; Jackson Decl. ¶ 3, ECF #151. Thus, plaintiffs are a single entity.

C. Analysis of Affirmative Defenses

Except for the NAGPRA and free exercise claims discussed *infra*, Parts VIII and IX, plaintiffs' claims are barred by laches and waiver.

1. Laches

The equitable defense of laches protects defendants against unreasonable and prejudicial delay in commencing suit. *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 137 S. Ct. 954, 959 (2017).

> Although the application of laches depends on the facts of the particular case and is consigned as an initial matter to the sound discretion of the district court judge, that discretion must be exercised within limits. To demonstrate laches, a party must establish (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.

Apache Survival Coalition, 21 F.3d at 905 (internal citations, quotation marks, and emphasis omitted). Laches is employed sparingly in suits brought to vindicate the public interest, such as cases involving NHPA and NEPA. *Id.*

Citing *SCA Hygiene Products Aktiebolag*, plaintiffs argue that because they sued within the APA's six-year statute of limitations, the laches defense is categorically unavailable to defendants. Pls.' Reply 8, ECF #345.[15] In an APA action, the six-year statute of limitations accrues when the "final agency action" issues. *See Hells Canyon Pres. Council v. United States Forest Serv.*, 593 F.3d 923, 931 (9th Cir. 2010); 5 U.S.C. § 704; 28 U.S.C. § 2401(a). To be "final," an agency action "must mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177–78, (1997).

Here, defendants' issuance of the Revised EA and FONSI on January 25, 2007, marked the consummation of their decision-making process. Plaintiffs sued less than two years later in October 2008, years before the statute of limitations had run. However, plaintiffs

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[15] *SCA Hygiene* concerned "the relationship between the equitable defense of laches and claims for damages that are brought within the time allowed by a statute of limitations." 137 S. Ct. at 959. The Supreme Court held laches cannot be invoked to bar legal relief sought within the period prescribed by a statute of limitations. *Id.* The defendants argued that the collapse of equitable courts and courts of law in 1938 likewise expanded the application of laches to all forms of relief, but the Supreme Court reversed the Federal Circuit to hold otherwise. Thus, implicit in *SCA Hygiene* is not that laches is categorially unavailable to claims for equitable relief brought within the statute of limitations; rather, just the opposite.

seek only equitable relief, not legal relief. "As to equitable relief, in extraordinary circumstances, laches may bar at the very threshold the particular relief requested by the plaintiff." *Petrella v. Metro- Goldwyn-Mayer, Inc.*, 572 U.S. 663, 667–68 (2014). Thus, the laches defense is available to defendants, notwithstanding the fact that plaintiffs filed suit within the statute of limitations.

a. Diligence

To determine whether a party lacked diligence in pursuing its claims, courts consider (1) whether the party attempted to communicate its position to the agency before filing suit, (2) the nature of the agency response, (3) the extent of actions, such as preparatory construction, that tend to motivate citizens to investigate legal bases for challenging an agency action, (4) the length of the delay, and (5) the circumstances surrounding the delay. *Save the Peaks Coalition v. U.S. Forest Serv.*, 669 F.3d 1025, 1031 (9th Cir. 2012).

Plaintiffs are correct that the record does not reveal defendants made the sort of consistent, repeated attempts to consult with them like those made by the agency defendants in *Apache Survival*, 21 F.3d at 905, and *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 239 F. Supp. 3d 77, 87 (D.D.C. 2017). However, the plaintiffs in those cases were federally recognized Indian tribes to whom the defendant agencies owed consultation duties. 54 U.S.C. § 300309; 36 C.F.R. § 800.4. Even if ODOT and defendants knew of CGS when they began planning the Wildwood to Wemme project, they were under no legal obligation to extend to CGS the same sort of solicitude that they had previously extended to Jones. *E.g.*, BLM 63

(ODOT declining Jones' request for mediation). During prior projects, ODOT repeatedly met with Jones outside the normal public-comment process to understand CFASH and CGS's concerns. *E.g.*, FHWA 5404–11 (negotiating the 1987 Kuehn–Jones Agreement). However, these interactions did not elevate Jones or CGS above any other member of the public for the purpose of subsequent projects. CGS could have requested in writing to be an additional consulting party in the Section 106 process under 36 C.F.R. § 800.3(f)(3), but it did not.

ODOT conducted a robust public outreach effort, even though the project had a relatively modest footprint. ODOT invited CGS to three public meetings before issuing the Daft EA. FHWA 2153 (March 2005 open house), 2158 (September 2005 open house), 2159 (February 2006 open house). Jones knew of the Draft EA and requested a copy. FHWA 4102 (April 2006). ODOT sent CGS another newsletter and a final project notice before the Revised EA and FONSI were issued. FHWA 2160 (September 2006), 5006 (February 2007). CGS clearly knew of the project and could have expressed its concerns during the public comment period like it did during the Wildwood to Rhododendron project and US 26 Rhododendron to OR 35 Junction project. In fact, CGS did comment—on the protection and relocation of the white stone pillars— and defendants addressed those concerns. FHWA 4977.

Moreover, CGS is not an unsophisticated entity. Jones commented extensively during prior projects, revealing an advanced knowledge of the environmental and archeological consequence of the projects and of ODOT's legal obligations. Congress coordinated

NEPA and NHPA compliance and designed the administrative process to give federal agencies and their agency officials the chance to make informed decisions, with information from all interested parties. Defendants could have addressed and accommodated plaintiffs' concerns as they did with Jones and CFASH during the prior projects, but plaintiffs did not avail themselves of the many opportunities to comment publicly. In fact, ODOT did accommodate CGS by relocating and repairing the white stone pillars even though it determined they lacked distinction and integrity and were not eligible for the National Register. FHWA 4496.

Finally, ODOT archeologist Philipek visited the site at the end of July 2008 and found the rock feature 'in scattered and disturbed condition." BLM 6. ODOT finished demolition less than a week later, yet plaintiffs did not file suit until after construction was long underway in October 2008 and did not even serve defendants until February 2009, two years after issuance of the Revised EA and FONSI. And they did not move for a preliminary injunction to halt construction.

For all of these reasons, plaintiffs lacked diligence in pursuing their claims.

b. Prejudice

Defendants argue they would suffer undue prejudice "because the turn lane has been constructed for more than a decade." Defs.' Mot. Summ. J. 10, ECF #340. However, "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.*, 669 F.3d at 1033.

Regardless, the "primary concern is whether the harm that Congress sought to prevent through the relevant statutory scheme is now irreversible, or is reversible only at undue cost to the relevant project." *Apache Survival Coal.*, 21 F.3d at 912 (citations omitted). Here, Section 106's public notice and comment requirements were designed so that all interested parties could raise their concerns at one time, before the agency brought its expertise to bear and made an informed decision. This requires the agency to engage in a delicate balance, as interested parties take opposing positions. Remanding for the agency to consider concerns that could have been raised but were not would result in undue cost and undercut the purpose of Section 106's notice and comment requirements. *See Standing Rock*, 239 F. Supp. 3d at 87 (finding prejudice when construction was nearly complete, and plaintiff Indian tribes had remained silent during Section 106 process after Army Corps invited their views).

Moreover, in their response to defendants' motion for summary judgment, plaintiffs submit that they "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." Pls.' Reply 10, ECF #345. But plaintiffs clearly sought a return to the status quo when they filed suit. Findings and Recommendations 22, ECF #48 (contemplating ordering removal of the offending portion of the highway). In any event, the court has already found the project does not burden plaintiffs' practice of religion. Order, ECF #312. And ODOT specifically chose the "gentler, more transversable[*sic*] slope" with the express purpose of replanting "new small trees and other native vegetation . . . to mitigate

for visual impact." FHWA 4972. The costs of altering the project or undertaking a new administrative process far outweigh whatever benefits might accrue to plaintiffs resulting from that process. Thus, laches bars plaintiffs' claims.

2. Administrative Waiver and Exhaustion

Plaintiffs' claims are described in detail *supra* in Section IV. Because plaintiffs failed to raise these specific concerns and criticisms during the administrative process, and because these were not obvious flaws about which defendants had independent knowledge, plaintiffs' claims are waived.[16]

"A party waives arguments that are not raised during the administrative process." N. Plains Res. Council, Inc. v. Surface Transp. Bd., 668 F.3d 1067, 1081 (9th Cir. 2011); Vermont Yankee Nuclear Power Corp.

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[16] Additionally, defendants assert that plaintiffs' "claims" raised for the first time on summary judgment are waived. Defs.' Mot. Summ. J. 12–13, ECF #340. Plaintiffs counter that with few exceptions, they raise only new legal theories, and that they sufficiently pleaded the underlying factual allegations. While "summary judgment is not a procedural second chance to flesh out inadequate pleadings[, i.e., factual allegations]," *Wasco Prods., Inc. v. Southwall Techs., Inc.*, 435 F.3d 989, 992 (9th Cir. 2006), "a complaint need not identify the statutory or constitutional source of the claim raised in order to survive a motion to dismiss." *Alvarez v. Hill*, 518 F.3d 1152, 1157 (9th Cir. 2008); *Pickern v. Pier 1 Imports (U.S.), Inc.*, 457 F.3d 963, 968 (9th Cir. 2006) (barring assertion of "new factual allegations" on summary judgment). Suffice it to say, plaintiffs only settled on some of their specific concerns after they filed suit—including up until the moment they filed their motion for summary judgment. However, the court need not reach this issue because plaintiffs otherwise waived their claims by failing to raise them during the administrative process.

v. Natural Resources Defense Council, Inc., 435 U.S. 519, 553 (1978) ("it is still incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions."). The Ninth Circuit has "defined [this] exhaustion requirement broadly: 'The plaintiffs have exhausted their administrative appeals if the appeal, taken as a whole, provided sufficient notice to the agency to afford it the opportunity to rectify the violations that the plaintiffs alleged.'" *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 965 (9th Cir. 2006) (quoting *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 899 (9th Cir. 2002)). This includes identifying issues with enough specificity to separate them from "more general issues" otherwise raised during the administrative process. *Oregon Nat. Desert Assn. v. Jewell*, 840 F.3d 562, 571 (9th Cir. 2016); *Dept. of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004) ("Persons challenging an agency's compliance with NEPA must 'structure their participation so that it alerts the agency to the parties' position and contentions,' in order to allow the agency to give the issue meaningful consideration.") (quoting *Vermont Yankee*, 435 U.S. at 553).

Here, CGS only commented on the white stone pillars during the administrative process. Defendants relocated and repaired the pillars even though they lacked distinction and integrity and were not eligible for the National Register. FHWA 4496. Because plaintiffs did not otherwise make their other positions known during the administrative process, they did not "afford [defendants] the opportunity to rectify the violations that the plaintiffs alleged.'" *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 965 (9th Cir. 2006).

And plaintiffs' comments in 2007 and 2008, made after defendants issued the Revised EA and FONSI, "may not form a basis for reversal of an agency decision." *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991) (citing *Vermont Yankee*, 435 U.S. at 553–54).

Therefore, plaintiffs' only plausible means of escaping the exhaustion requirement is to somehow excuse their lack of participation in the administrative process. *See Havasupai Tribe*, 943 F.2d at 34 ("Absent exceptional circumstances, such belatedly raised issues may not form a basis for reversal of an agency decision."). For example, if defendants had owed plaintiffs consultation duties under NHPA but failed to perform them, defendants might be to blame for plaintiffs' failure to timely raise their concerns. However, as discussed *supra*, Section VI.A, plaintiffs are not federally recognized Indian tribes and defendants owed them no consultation duties apart from allowing them to comment publicly, which defendants did. Plaintiffs therefore have no tenable excuse for their lack of participation in the administrative process. Plaintiffs' claims are waived.

Plaintiffs' invocation of the independent knowledge exception does not save them from this exhaustion requirement. Consistent with the Supreme Court's application of *Vermont Yankee*, the Ninth Circuit "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 Coalition v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006) (citing *Kunaknana v. Clark*, 742 F.2d 1145, 1148 (9th Cir. 1984)). The Ninth Circuit "has drawn a distinction between situations in

which NEPA plaintiffs submitted comments that did not alert the agency to their concerns or failed to participate when the agency looked into their concerns and situations in which plaintiffs allege procedural violations of NEPA." *Id.* (quoting *Kunaknana*, 742 F.2d at 1148). Because "the agency bears the primary responsibility to ensure that it complies with NEPA, . . . an EA's or an EIS' flaws might be *so obvious* that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action." *Dept. of Transp. v. Pub. Citizen*, 541 U.S. 752, 765 (2004) (emphasis added).

The Ninth Circuit's decision in *'Ilio'ulaokalani Coalition* is instructive. During a project transforming the 2nd Brigade in Hawaii into a Stryker Brigade Combat Team, the Army divided its NEPA compliance into two tiers. *See* 464 F.3d at 1088–91. In the first tier, the Army decided to transform the 2nd Brigade in place without considering any alternative locations. But the EIS had "no supporting analysis," and the "Army's experts recognized this as a potential deficiency": "The PEIS leaves us short on alternatives. The only alternatives we have are no action versus action." *Id.* at 1090 (quoting record). This decision constrained future decision- making in the second tier. "In response to public questions as to why alternatives outside of Hawaii were not considered," the Army pointed to its earlier unsubstantiated decision. *Id.* at 1091.

On appeal, the Ninth Circuit held that the plaintiffs did not waive "their opportunity to challenge the range of alternatives considered in the PEIS" because the "Army had independent knowledge of the very issue that concerns Plaintiffs in this case such that 'there is no need for a commentator to point them out

specifically in order to preserve its ability to challenge a proposed action.'" *Id.* at 1092–93 (quoting *Pub. Citizen*, 541 U.S. at 765). The court found that "[t]he record in this case is replete with evidence that the Army recognized the specific shortfall of the PEIS raised by Plaintiffs here: the failure to support the determination to transform the 2nd Brigade in place." *Id.* at 1092.

Here, by contrast, the record does not reflect that defendants had independent knowledge of the very issues that concern plaintiffs in this case. Plaintiffs contend that their "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," and "[t]hus, 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." Pls.' Reply 4, ECF #345. But this is about as general of a concern as one can imagine. Much more specificity is required. *See Jewell*, 840 F.3d at 571 (finding an argument to be waived when the plaintiff did not use a specific term in its comments on a draft EIS or make specific arguments about the issue, separately from more general issues).

Plaintiffs seize on a paragraph from defendants' motion for summary judgment where defendants argue there was "no need for a supplemental" NEPA analysis when Logan and Jones told FHWA that "the project could destroy American Indian cultural and religious sites" because this allegation "did not in fact raise 'new' information." Pls.' Reply 1, 4, 25, ECF #345 (citing Defs.' Mot. Summ. J. 21, ECF #340) (quotation

marks omitted). Plaintiffs take this to mean "the Government was well aware of Plaintiffs' concerns," and argue that the independent knowledge doctrine therefore captures all their claims. *Id.* at 4. But what defendants argue is simply another way of saying that plaintiffs did not raise their specific concerns until they filed suit (or even moved for summary judgment); whether "the project could destroy American Indian cultural and religious sites" is a general concern that defendants had already addressed. If plaintiffs took issue with how defendants addressed this broad concern, they should have said so during the public comment period.

Plaintiffs also contend that comments Jones made during the comment periods of the two prior highway-widening projects regarding a gravesite in the Dwyer area, old-growth trees, and the Dwyer area's status as a recreational area should have alerted defendants to the concerns they raise here. Pls.' Reply 5, ECF #345.

For instance, plaintiffs now contend that the rock feature in the Dwyer area, which was previously alleged to be a grave site, is actually a sacred campsite and altar. However, as defendants aptly note, there is no evidence that they had any knowledge of this specific claim. Defs.' Reply Mot. Summ, J. 8, ECF #346. Instead, based on reports that it was a grave site, defendants conducted an investigation into *that* claim. Pettigrew and two other archeologists excavated the site, and Pettigrew reported that the site "has no demonstrated archaeological significance and does not in my judgment appear worthy of either protection or mitigation." FHWA 305. They found no evidence of human remains. In 1991, Yallup raised specific concerns about burials in [redacted],

but not in the Dwyer area or the north side of the highway. *See* FHWA 5567–90. Another archeologist told Jones in March 1992 that the "rock stack" was clearly not a historic resource. ACHP 219. O'Grady investigated the site again nearly twenty years later and agreed with Pettigrew's finding that the rock cluster was not worthy of protection or mitigation. FHWA 2414, ACHP 57–62. Had defendants received information from plaintiffs that this was in fact a sacred campsite and altar, they could have further investigated those specific claims, but they received no such information. Moreover, the record reveals that through 2007, defendants consulted with Grand Ronde, Warm Springs, Siletz, and Yakama Nation and confirmed the rock feature was not culturally or historically significant. In December 2007, Grand Ronde's Cultural Protection Coordinator told ODOT, "I am not sure that I would call this rock feature cultural if I had found it[.] [I]t most likely is a pile of rocks from ploughing." FHWA 5088.

Plaintiffs also now challenge the project's effects on old-growth trees and the Dwyer area's status as recreation area. Defendants in fact addressed these general concerns. When there was public outcry over cutting trees in the Dwyer area during the planning of the Wildwood to Rhododendron project in 1986 and '87, ODOT selected a modified alternative that eliminated the turn lane and spared old growth. FHWA 441–44. Later, during the planning of the Wildwood to Wemme project, there was public outcry over the lack of safety on the highway because people were dying in traffic accidents—not over the loss of old-growth trees. In response, ODOT reassessed environmental, archeological, and historic resources in 2005 and 2006. FHWA

2410–54, 4966–71. A botanical survey revealed a diverse community of lichens and vascular plants in the Dwyer area and acknowledged 65 large trees would need to be cut but found that the general character of the area would not be changed. FHWA 4473. ODOT considered seven different alternatives with varying impacts on the Dwyer area, including impacts on the nearby Wildwood Recreation Site. FHWA 4359–64. ODOT even considered and rejected a "widen north and realign" alternative that would have moved the northern edge of the pavement six feet further north and required cutting even more trees in the Dwyer area than the selected "widen to the north" alternative. FHWA 4360. ODOT also prioritized preserving the historic Barlow Road trace and reducing impact to wildlife habitat, private property, utilities, and businesses just south of the highway. FHWA 4361–62. Defendants published this analysis and sought CGS' feedback.

If plaintiffs took issue with this analysis or had additional concerns, they should have participated in the administrative process.[17] Before the public-comment

[17] Even when Jones and Logan began calling and faxing documents to defendants in early 2008, long after the close of the public comment period and issuance of the Revised EA and FONSI, they sought to recognize "all heritage resources" along the highway, including outside the project area. FHWA 5474–83. Logan insisted that over 40 sites, including the Dwyer area, should be listed in the National Register. ACHP 142–43. When Slockish and Jackson finally sent memoranda in May 2008, they wrote that the entire forest is sacred, of traditional medicines and foods, and of sacred burials. ACHP 123–41. Plaintiffs concerns about sites and resources outside the Wildwood to Wemme project area are simply irrelevant, and plaintiffs forfeited their opportunity to

period closed, CGS only raised concern about the white stone pillars, which defendants accommodated. *See 'Ilio'ulaokalani Coalition*, 464 F.3d at 1092 ("plaintiffs submitted comments that did not alert the agency to their concerns"). Like with the white stone pillars, if provided the opportunity, defendants could have rectified any alleged deficiencies or otherwise given them meaningful consideration.

In sum, no one raised the specific, nuanced concerns or critiques of defendants' analysis that plaintiffs raise now. "When the argument is one of degree, rather than an outright failure to address, the plaintiff must raise that argument during the comment period or be precluded from litigating it at a later date." *League of Wilderness Defenders–Blue Mountain Biodiversity Project v. Bosworth*, 383 F. Supp. 2d 1285, 1296–97 (D. Or. 2005); *see also Honolulutraffic.com v. Fed. Transit Admin.*, CIV. 11-00307 AWT, 2012 WL 180, at *8 (D. Haw. May 17, 2012) ("It would be unreasonable to hold that Defendants' attempts to address the comment letters concerning the Merchant Street District were 'obviously' flawed, when Plaintiffs made no effort to point out those flaws themselves"); *Moapa Band of Paiutes v. U.S. Bureau of Land Mgt.*, 2:10-CV-02021- KJD, 2011 WL 4738120, at *12 (D. Nev. Oct. 6, 2011) ("Plaintiffs did not raise the issue of the degree to which the BLM addressed the no-action alternative in the comments to the EA or in the scoping period, despite ample opportunity to do so."), *aff'd sub nom. Moapa Band of Paiutes v. Bureau of Land Mgt.*, 546 F.

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allege deficiencies with defendants' analysis of archeological, historical, and cultural resources in the project area because defendants conducted that analysis and plaintiffs did not timely identify flaws in that analysis.

App'x. 655 (9th Cir. 2013) (cited pursuant to Ninth Circuit Rule 36- 3). Because plaintiffs failed to raise these specific concerns at the administrative level, their claims are waived.

VIII. NAGPRA

By its nature, a NAGPRA claim based on inadvertent discovery of Native American cultural items is not subject to administrative waiver. *See* 25 U.S.C. § 3002(d)(1); *see also* 43 C.F.R. §10.4(d)(1)(ii); *Bonnichsen v. United States*, 367 F.3d 864, 873 (9th Cir. 2004) ("[NAGPRA] Section 3013 by its terms broadly confers jurisdiction on the courts to hear '*any action'* brought by '*any person alleging a violation*.") (quoting 25 U.S.C. § 3013)) (emphasis in *Bonnichsen*).

NAGRPA "culminates decades of struggle by Native American tribal governments and people to protect against grave desecration, to repatriate thousands of dead relatives or ancestors, and to retrieve stolen or improperly acquired religious and cultural property back to Native owners." Jack F. Trope Walter R., *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 36 (1992). The law has three substantive components. First, it imposes criminal liability on anyone who "knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American without the right of possession to those remains." 18 U.S.C. § 1170. Second, it provides for the inventory, identification, and repatriation of Native American human remains, associated and unassociated funerary objects, sacred objects, and objects of cultural patrimony from federally funded museums and agencies to lineal descendants or the Indian tribe or Native Hawaiian organization with the strongest

cultural affiliations. *See generally* 25 U.S.C. §§ 3001–05; 43 C.F.R. §§ 10.1–.17. The museums and agencies were given five years from November 16, 1990 (with the possible extensions of time if compliance efforts were made in good faith),[18] to inventory and identify human remains and cultural items in their possession and control. 25 U.S.C. §§ 3003(a), (b)(1)(B), (c). Third, NAGPRA provides protections for human remains, associated and unassociated funerary objects, sacred objects, and objects of cultural patrimony during intentional excavation or from inadvertent discovery *after* November 16, 1990. 25 U.S.C. §§ 3002(a), (c)–(d); *see also* 43 C.F.R. §§ 10.3–.4.

NAGPRA mandates a two-part analysis. *Bonnichsen*, 367 F.3d at 875. The first inquiry is whether the items are Native American within the statute's meaning. If the objects are not Native American, then NAGPRA does not apply. If the objects are Native American, then NAGPRA applies, triggering the second inquiry of determining which persons or tribes are most closely affiliated with the remains. *Id.*

Plaintiffs argue that BLM violated NAGPRA when it failed to notify and consult Indian tribes when excavating or removing the altar, and, that ODOT archeologist Philipek violated the inadvertent discovery provision when she visited the site in 2008 and discovered the stone altar was scattered but did not follow the requisite notification and cessation requirements. Pls.'

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[18] These efforts are ongoing, as tens of millions of human remains and funerary objects were stolen or improperly acquired before the law was enacted. *See* U.S. Government Accountability Office, Native American Graves Protection and Repatriation Act: After almost 20 years, Key Federal Agencies Still Have Not Fully Complied with the Act at 4–8 (July 2010) (GAO-10-768).

Mot. Summ. J. 51–55, ECF #331. However, even if BLM, as the primary management authority over the land in the project area, was required to notify and consult with Indian tribes associated with the rock feature and secure an APRA permit before proceeding, *see* 43 C.F.R. § 10.4(d), as already explained, plaintiffs are not federally recognized Indian tribes and do not have article III standing to challenge duties owed to Indian tribes. Moreover, plaintiffs' inadvertent discovery argument fails because any sacred objects were discovered before November 16, 1990.

During construction, persons who know, or have reason to know, that they have discovered Native American cultural items on "Federal or tribal lands after November 16, 1990, shall . . . cease [construction] in the area of discovery, make a reasonable effort to protect the items discovered before resuming such activity," and notify the agency managing the land and the appropriate Indian tribe. 25 U.S.C. § 3002(d)(1); *see also* 43 C.F.R. §10.4(d)(1)(ii).

As an initial matter, defendants' (and Philipek's) position that the objects were not Native American cultural items was based on substantial evidence. ODOT consulted with the official cultural resources personnel of the four federally recognized Indian tribes with cultural ties to the area. All agreed the stones were not worthy of protection. Every archeologist to visit the site found the stones to be of no cultural or archeological significance. Grand Ronde provided a tribal monitor during construction to stop construction if human remains or cultural items were discovered. Defendants' determination that the stones and campsite in the Dwyer area were not Native

American cultural items was based on this substantial evidence.

Even assuming, however, the stones and campsite were Native American cultural items,[19] defendants did not inadvertently discover them after November 16, 1990, because they were discovered by Pettigrew and his team in 1986 at the latest. *See Geronimo v. Obama*, 725 F. Supp. 2d 182, 186 (D.D.C. 2010) (holding complaint failed to state a NAGPRA claim "because it alleges no discoveries after November 16, 1990, the only discoveries to which § 3002 applies," as the "only alleged discovery or wrongful removal described by the complaint occurred in or around 1918").

Plaintiffs cite *Yankton Sioux Tribe* for the proposition that a later "re-observation" constitutes an inadvertent discovery. Pls.' Mot. Summ. J. 52, ECF #331; Pls.' Reply 39–40, ECF #345. It certainly may be, but that is not what happened here. In *Yankton Sioux Tribe*, the U.S. Army Corps of Engineers disinterred, removed, and reinterred hundreds of bodies from a cemetery and adjacent Indian burial site dating back to the 1800s because they would be covered by water part of the year after the construction of a dam. *Id.* at 1049. The Corps varied the water level depending on flood control, irrigation, power supply, and recreation needs, and by 1966, it was clear some of the human

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[19] Slockish, Jackson, and Logan declare they are traditional religious leaders and that the stones and campsite in the Dwyer area necessary for their religious practice. Slockish Decl. ¶¶ 11, 14, 16, ECF #146; Jackson Decl. ¶¶ 16–43, ECF #151; Logan Decl. ¶¶ 9–15, ECF #147.

remains had not been relocated. *Id.* 1050. Human remains and casket parts were observed in and near the cemetery and along the shoreline in 1966, 1990, 1991, and again in 1999. The Corps argued NAGPRA was inapplicable under Section 3002(c) and 43 C.F.R. § 10.2(g)(4) because "it knew that remains were already present at the site, and either knew or should have known that the lake's wave action was eroding the shoreline." *Id.* at 1056. The court rejected that argument, finding that it did not appear the Corps "anticipated any additional remains to be uncovered at the site" and the "Corps discovered at least some of the remains at the site after November 16, 1990." *Id.* at 1056.

Here, by contrast, no additional material of any kind was discovered after November 16, 1990, including in 2008 during construction. Lastly, plaintiffs' contention that "discover" means "to expose to view" is untenable because it would read the temporal restriction out of Section 3002(d). Defendants did not violate NAGPRA.

IX. Free Exercise Clause

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend I. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Empl. Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990). "The Free Exercise Clause affords an individual protection from certain forms of government compulsion; it does not afford an individual a right to dictate the conduct of

the Government's internal procedures." *Bowen v. Roy*, 476 U.S. 693, 699–700 (1986).

In *Smith*, the Supreme Court "held that neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause of the First Amendment." *Holt v. Hobbs*, 574 U.S. 352 (2015) (citing *Smith*, 494 U.S. at 878–82); 42 U.S.C. § 2000bb(a)(4) (stating *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion"). In response to *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, "to provide *greater protection* for religious exercise than is available under the First Amendment." *Holt v. Hobbs*, 574 U.S. 352 (2015) (citing *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694–95 (2014)) (emphasis added). Thus, a "person asserting a free exercise claim must show that the government action in question substantially burdens the person's practice of her religion." *Jones v. Williams*, 791 F.3d 1023, 1031 (9th Cir. 2015).

Here, this court dismissed plaintiffs' RFRA claim, holding plaintiff "have not established that they are being coerced to act contrary to their religious beliefs under the threat of sanctions or that a governmental benefit is being conditioned upon conduct that would violate their religious beliefs." Order 2, ECF #310 (citing Findings and Recommendations 10, ECF #300). "Without these critical elements, [P]laintiffs cannot establish a substantial burden under the RFRA." *Id.* (citing Findings and Recommendations 10, ECF #300) (alteration in original). As the Ninth Circuit has stated, plaintiffs' "failure to demonstrate a substantial burden under RFRA necessarily means that they have

failed to establish a violation of the Free Exercise Clause, as RFRA's prohibition on statutes that burden religion is stricter than that contained in the Free Exercise Clause." *Fernandez v. Mukasey*, 520 F.3d 965, 966 n.1 (9th Cir. 2008) (per curiam) (citing *Smith*, 494 U.S. at 878–80).

Plaintiffs argue that post-*Smith*, a plaintiff need not show that the law or government action substantially burdens its practice of religion. Pls.' Reply 41–42, ECF #345. Instead, they dive into the neutral-and-general-applicability element of the free-exercise inquiry without addressing substantial burden. *See id.* However, it is only after finding that a law burdens religious practice that the court next asks whether it is neutral and generally applicable. *Am. Fam. Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1124 (9th Cir. 2002). Plaintiffs' free exercise claim therefore fails. To the extent plaintiffs also bring a related due process claim, that claim similarly fails.

Having found all plaintiffs' claims either fail as a matter of law or are barred by laches and waiver, the court need not reach the remaining arguments.

RECOMMENDATIONS

Defendants' motions for relief from LR 56-1(B) and to strike extra-record materials (ECF #339) should be GRANTED, defendants' motion for summary judgment (ECF #340) should be GRANTED, plaintiffs' motion for summary judgment (ECF #331) should be DENIED, and this action should be dismissed with prejudice.

SCHEDULING ORDER

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due Wednesday, April 22, 2020. If no objections are filed, then the Findings and Recommendations will go under advisement on that date.

If objections are filed, then a response is due within 21 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will go under advisement.

NOTICE

These Findings and Recommendations are not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of judgment.

DATED this 1st day of April, 2020.

/s/ Youlee Yim You
Youlee Yim You
United States Magistrate Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HEREDITARY CHIEF WILBUR SLOCKISH, et al., Plaintiffs, v. UNITED STATES FEDERAL HIGHWAY ADMINISTRATION, et al., Defendants.	Case No. 3:08-cv-01169-YY **ORDER**

HERNÁNDEZ, District Judge:

Magistrate Judge You issued a Findings and Recommendation [300] on March 2, 2018, in which she recommends that this Court grant Defendants' Motion for Partial Summary Judgment [287], deny Plaintiffs' Motion for Partial Summary Judgment [294], and dismiss Plaintiffs' Thirteenth Claim for Relief. The matter is now before the Court pursuant to 28 U.S.C.§ 636(b)(1)(B) and Federal Rule of Civil Procedure 72(b). Plaintiffs filed timely objections to the Magistrate Judge's Findings & Recommendation. Pls. Obj. ECF 302. When any party objects to any portion of the Magistrate Judge's Findings & Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1); *Dawson v. Marshall*, 561 F.3d 930, 932 (9th Cir. 2009); *United*

States v. Reyna-Tapia, 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc).

Plaintiffs raise two objections to the F&R: (1) Plaintiffs have established a substantial burden under the Religious Freedom Restoration Act ("RFRA") and (2) Plaintiffs have standing. With regard to Plaintiffs' first objection, the Court agrees with Judge You. The Ninth Circuit has taken a narrow approach to defining what constitutes a "substantial burden" under RFRA. *See e.g. Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1213(2008) (noting that in *Navajo Nation* the Ninth Circuit adopted "a narrower definition" of what constitutes a substantial burden than it had in prior decisions). Per the dictates of *Navajo Nation v. U.S. Forest Service*:

> a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*). Any burden imposed on the exercise of religion short of that described by *Sherbert* and *Yoder* is not a 'substantial burden' within the meaning of RFRA, and does not require the application of the compelling interest test as set forth in those two cases.

535 F.3d 1058, 1070 (2008). Here, as discussed by Judge You, Plaintiffs "have not established that they are being coerced to act contrary to their religious

beliefs under the threat of sanctions or that a governmental benefit is being conditioned upon conduct that would violate their religious beliefs." F&R 10. "Without these critical elements, [P]laintiffs cannot establish a substantial burden under the RFRA." *Id.*

With regard to Plaintiffs second objection, Plaintiffs contend that Judge You "conflated the merits of the RFRA claim with the question of standing." Pls. Obj. F&R 30. The Court agrees. Judge You found that "by failing to establish a *prima facie* case under the RFRA, plaintiffs have failed to establish that they have suffered an injury in fact" and "lack standing on the RFRA claim." F&R 17. But whether Plaintiffs have an injury in fact for standing purposes is a separate inquiry from whether Plaintiffs can succeed on the merits of their case. *See Kirola v. City and Cty of San Franciso*¸ 860 F.3d 1164, 1175 (9th Cir. 2017) (finding "[t]he district court seems to have improperly conflated [the plaintiff's] standing with whether she would prevail on the merits"); *Claybrook v. Slater*, 111 F.3d 904, 907 (9th Cir. 1997) ("Whether a plaintiff has a legally protected interest (and thus standing) does not depend on whether he can demonstrate that he will succeed on the merits. Otherwise, every unsuccessful plaintiff will have lacked standing in the first place.").

In this case, Plaintiffs have standing. First, Plaintiffs suffered an ongoing concrete and particularized injury that the RFRA was designed to protect: Plaintiffs contend they are limited in their ability to access the site and exercise their religion as they had previously done on a regular basis and

would continue to use the site for religious purposes if the damage was remediated. Pl. Obj. F&R 28-29; Pl. Resp. Def. Mot. Summ J. 27-28, ECF 292; *see also Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181-83 (2000) (finding allegations that members of the plaintiff-organization would use a specific site for recreational purposes as they had previously but for their concerns of the defendant's pollution sufficient for standing purposes). Second, Defendants do not appear to contest that the injury suffered by Plaintiffs is fairly traceable to Defendants' conduct. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) ("[T]here must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of an independent action of some third party not before the court."). Third, the Court finds that Plaintiffs' injury is redressable *Id.* ("[I]t must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.). Given Plaintiffs' broad request for various forms of equitable relief, it is likely that the Court could craft some relief that would mitigate Plaintiff's injury and improve their access to the site and ability to exercise their religion. *See e.g. Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1065-66 (9th Cir. 2002) (In the context of mootness, the Ninth Circuit has held that an injury is remediable where "the court below might order other measures to help mitigate the damage" even if it can't be entirely undone.); *see also Feldman v. Bomar*, 518 F.3d 637, 642-43 (9th Cir. 2008) (listing cases in which the court "could . . . remedy the alleged harm" even though "the contested

government projects were complete"). However, as Plaintiffs have not succeeded in establishing a *prima facie* case under RFRA, this determination does not alter the outcome of this decision.

The Court has reviewed the pertinent portions of the record *de novo* and finds no other errors in the Magistrate Judge's Findings & Recommendation.

CONCLUSION

The Court ADOPTS in part Magistrate Judge You's Findings and Recommendation [300]. Defendant's Motion for Partial Summary Judgment [287] is GRANTED in part, and Plaintiff's Thirteenth Claim for Relief under RFRA is dismissed. Plaintiff's Motion for Partial Summary Judgment [294] is DENIED.

IT IS SO ORDERED.

DATED this 11th day of June, 2018.

/s/ Marco A. Hernández
MARCO A. HERNÁNDEZ
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

HEREDITARY CHIEF WILBUR SLOCKISH, et al., Plaintiffs, v. UNITED STATES FEDERAL HIGHWAY ADMINISTRATION, et al., Defendants.	Case No. 3:08-cv-01169-YY **FINDINGS AND RECOMMENDATIONS**

YOU, Magistrate Judge:

Before the court are cross motions for summary judgment (ECF ##287, 294) regarding the Thirteenth Claim in the Fourth Amended Complaint, in which plaintiffs allege that the

Federal Highway Administration ("FHWA"), Bureau of Land Management ("BLM"), and Advisory Council on Historic Preservation (collectively the "Federal Defendants") have interfered with their free exercise of religion in violation of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C.A. §§ 2000bb–2000bb-4. For the reasons discussed below, federal defendants' motion for summary judgment against the Thirteenth Claim (ECF #287) should be GRANTED, plaintiff's motion for summary judgment

(ECF #294) should be DENIED, and plaintiff's Thirteenth Claim should be DISMISSED.

LEGAL STANDARD

Under FRCP 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The party moving for summary judgment bears the initial responsibility of informing the court of the basis for the motion and identifying portions of the pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Once the moving party does so, the nonmoving party must "go beyond the pleadings" and "designate 'specific facts showing that there is a genuine issue for trial.'" *Id.* at 324 (citing FRCP 56(e)).

In determining what facts are material, the court considers the underlying substantive law regarding the claims. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). Otherwise stated, only disputes over facts that might affect the outcome of the suit preclude the entry of summary judgment. *Id.* A dispute about a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. *Id.* at 248-49. A "scintilla of evidence" or "evidence that is merely colorable or not significantly probative" is insufficient to create a genuine issue of material fact. *Addisu v. Fred Meyer, Inc.*, 198 F.3d 1130, 1134 (9th Cir. 2000). The court "does not weigh the evidence or determine the truth of the matter, but only determines whether there is a genuine issue for trial." *Balint v. Carson City, Nev.*,

180 F.3d 1047, 1054 (9th Cir. 1999). "Reasonable doubts as to the existence of material factual issue are resolved against the moving parties and inferences are drawn in the light most favorable to the non-moving party." *Addisu,* 198 F.3d at 1134.

FINDINGS

Federal defendants assert that plaintiffs' Thirteenth Claim must be dismissed because they have failed to establish a *prima facie* case under the RFRA that their right to exercise religion has been substantially burdened. They further contend that plaintiffs lack standing and that this claim is barred by laches. Plaintiffs counter that this court has already ruled in its favor and that its rulings are law of the case. They otherwise contend that they have established a *prima facie* case that their right to exercise religion has been substantially burdened. For the reasons discussed below, this court should find that plaintiffs have failed to establish a *prima facie* case and decline to exercise its discretion in applying the doctrine of law of the case to its prior rulings.

I. Plaintiffs have failed to establish a *prima facie* case under the RFRA.

A. The RFRA

The RFRA provides in relevant part:

(a) In general

> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
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> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.
>
> 42 U.S.C.A. § 2000bb–1.

To establish a *prima facie* case under the RFRA, "a plaintiff must present evidence sufficient to allow a trier of fact rationally to find" (1) the activities the plaintiff claims are burdened are an "exercise of religion," and (2) the government action "substantially burdens" the plaintiff's exercise of religion. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008). If the plaintiff establishes a *prima facie* case, the burden shifts to the government to prove that the challenged government action is in furtherance of a "compelling governmental interest" and is implemented by "the least restrictive means." *Id.*

The RFRA was enacted by Congress in response to the Supreme Court's holding in *Emp't Div. v. Smith*, 494 U.S. 872 (1990). The RFRA notes that "in [*Smith*] the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C.A. § 2000bb(a)(4). The RFRA recognizes, however, that "the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious

liberty and competing prior governmental interests." 42 U.S.C.A. § 2000bb(a)(5). Thus, the purposes of the RFRA, as expressly stated in the statute, are:

> (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
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> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.
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> 42 U.S.C.A. § 2000bb(b).

B. Analysis

In their RFRA claim, plaintiffs assert that federal defendants have substantially burdened and interfered with their right to exercise religion by "damaging and destroying a historic campground and burial grounds through tree cutting and removal, grading, and ultimately burying the campground and burial grounds," and "by blocking off access to these by installation of a new guardrail." Fourth Am. Compl. ¶ 95, ECF #223. This sacred site is traditionally known to plaintiffs' tribes as Ana Kwna Nchi nchi Patat (the "Place of Big Big Trees"),[1] and is located within the

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[1] This site is sacred and holds spiritual importance to plaintiffs for numerous reasons, including that it is a burial ground along an ancient trading route. *See* Pl. Resp. 5-6, ECF #292. The site contained an altar of rocks that marked surrounding graves and was a focal point for religious ceremonies. *Id.* at 7. As plaintiff Chief Johnny Jackson described it, "[T]hat trail was . . . where our people passed on that could not make it home. And they were

A.J. Dwyer Memorial Scenic Area, an approximately eight-acre parcel managed by the BLM and located on the north side of U.S. 26 between the villages of Wildwood and Wemme. Def. Mot. Partial Summ. J. 3, ECF #287; Pl. Resp. 5, ECF #292. These actions were taken as part of the widening of U.S. 26 in response to community outcry over vehicular accidents, including at least one fatality, caused by the lack of a left-turn lane.[2] However, as discussed in detail below, plaintiffs' claim fails because they cannot show that their right to exercise religion has been "substantially burdened."[3]

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put away there because they had no way to bring them back to where they came from." Dep. Chief Johnny Jackson ("Jackson Dep.") 15:20-23, ECF #287-2, at 5. The rocks, which had been used for trade, came from different parts of the state, and "when they put these people in the ground," the rocks were left "as a marker for them." *Id.* 53:5-15, ECF #287-2, at 14. During highway construction, Chief Jackson and others watched the "highway department" remove the rocks and "throw[] them in a truck." *Id.* at 45:19-21, ECF #287-2, at 12.

[2] In 1999, 600 petitioners asked the Oregon Department of Transportation to address safety issues along this section of U.S. 26 due to a high number of accidents, including fatalities. ECF #292-42, at 24. Fourteen accidents occurred between 2000 and 2004, including one fatality. ECF #292-36, at 119. Numerous driveways and streets access U.S. 26 in this section. *Id.* "Motorists making left turns from the highway [were] frequently required to stop in the fast lane to wait for a gap in oncoming traffic while those turning left onto the highway [had] no median refuge to enter." *Id.*

[3] Federal defendants do not appear to contest that the activities plaintiffs claim are burdened are an "exercise of religion" under the first prong of the RFRA analysis. Thus, these Findings and Recommendations focus on the question of whether plaintiffs' exercise of religion has been "substantially burdened."

Plaintiffs' claim is foreclosed by the Ninth Circuit's decision in *Navajo Nation*. In *Navajo Nation*, the site at issue was the Skibowl recreational area located on federally owned public land in Northern Arizona. The plaintiffs objected to the application of artificial snow, made from recycled wastewater containing trace amounts of human waste, on mountain peaks they believe are a living entity and sacred to their religion. They claimed that the artificial snow desecrated the entire mountain and deprecated their religious ceremonies, thereby imposing a substantial burden on their free exercise of religion under the RFRA. 535 F.3d at 1063.

The Ninth Circuit, sitting en banc, rejected this argument. The court first recognized that the RFRA's "stated purpose" is to "restore the compelling interest test as set forth in *Sherbert* . . . and . . . *Yoder*" as "a workable test for striking sensible balances between religious liberty and competing prior governmental interests." *Id.* at 1068-69. In *Sherbert*, the plaintiff, a Seventhday Adventist, was fired by her South Carolina employer because she refused to work on Saturdays, as it was a day of rest according to her faith. The Supreme Court held that the plaintiff was unconstitutionally forced "to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand." 374 U.S. at 404; *see also Ruiz-Diaz v. United States*, 703 F.3d 483, 486 (9th Cir. 2012) (describing the situation in *Sherbert* "as an example of a forced choice that Congress intended to prevent by passing RFRA"). In *Yoder*, the defendants, who were Amish, were convicted of violating a state law that required their children to attend school until they turned

sixteen. The Supreme Court reversed their convictions, holding the Wisconsin law "affirmatively compel[led the defendants], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." 406 U.S. at 218.

The Ninth Circuit went on to hold that "a government action that decreases the spirituality, the fervor, or the satisfaction with which a believer practices his religion is not what Congress has labeled a 'substantial burden'—a term of art chosen by Congress to be defined by reference to Supreme Court precedent—on the free exercise of religion." *Navajo Nation*, 535 F.3d at 1063. "Where . . . there is no showing the government has coerced the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, or conditioned a governmental benefit upon conduct that would violate the Plaintiffs' religious beliefs, there is no 'substantial burden' on the exercise of their religion." *Id.* "The presence of recycled wastewater on the Peaks does not coerce the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, nor does it condition a governmental benefit upon conduct that would violate their religious beliefs, as required to establish a 'substantial burden' on religious exercise under RFRA." *Id.* at 1067.

The Ninth Circuit further explained why no other result is feasible:

> Were it otherwise, any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citizens. ***Each citizen would***

hold an individual veto to prohibit the government action solely because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires. Further, giving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone.

"[W]e are a cosmopolitan nation made up of people of almost every conceivable religious preference." *Braunfeld v. Brown*, 366 U.S. 599, 606, 81 S. Ct. 1144, 6 L.Ed.2d 563 (1961). Our nation recognizes and protects the expression of a great range of religious beliefs. Nevertheless, respecting religious credos is one thing; requiring the government to change its conduct to avoid any perceived slight to them is quite another. No matter how much we might wish the government to conform its conduct to our religious preferences, act in ways that do not offend our religious sensibilities, and take no action that decreases our spiritual fulfillment, no government—let alone a government that presides over a nation with as many religions as the United States of America—could function were it required to do so. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 452, 108 S. Ct. 1319, 99 L.Ed.2d 534 (1988).

Id. at 1063-64 (emphasis added).

The Ninth Circuit reaffirmed its ruling in *Snoqualmie Indian Tribe v. Fed. Energy Regulatory Comm'n*, 545 F.3d 1207 (9th Cir. 2008). There, the plaintiff objected to the relicensing of a hydroelectric power plant at Snoqualmie Falls near Seattle on grounds that it was a sacred site, specifically a place "to gather to pray, to meditate, to worship, and to renew their contact with their ancestors and their spiritual powers." *Id.* at 1211. Applying *Navajo Nation*, the court held that, after a searching review of the voluminous record, it found no "evidence demonstrating that Snoqualmie Tribe members will lose a government benefit or face criminal or civil sanctions for practicing their religion." *Id.* at 1214. "The Tribe's arguments that the dam interferes with the ability of tribal members to practice religion are irrelevant to whether the hydroelectric project either forces them to choose between practicing their religion and receiving a government benefit or coerces them into a Catch–22 situation: exercise of their religion under fear of civil or criminal sanction. " *Id.* Therefore, the relicensing did not "impose a substantial burden under RFRA on the tribal members' ability to exercise their religion." *Id.* at 1214-15.

Other cases from the Ninth Circuit have followed suit. In *La Cuna de Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of the Interior ("La Cuna II")*, No. CV 11-00400 DMG, 2013 WL 4500572 (C.D. Cal. Aug. 16, 2013), the plaintiffs objected that they were unable to access certain portions of the Salt Song Trails, located on government land in Nevada, because

of an eight-foot barbed wire fence that surrounded a site under construction for a solar power plant. They claimed that the Salt Song Trails have significant historical, cultural, and religious value to several Indian Tribes and that they would be subjected to criminal trespass violations if they entered the property. The court rejected that argument, holding that denial of access to land alone is insufficient to establish a RFRA claim:

> Under *Navajo Nation*, . . . ***denial of access to land, without a showing of coercion to act contrary to religious belief, does not give rise to a RFRA claim, regardless of how that denial of access is accomplished***. . . . Though Native Americans may have some rights to use sacred sites, "those rights do not divest the Government of its right to use what is, after all, its land." . . . ***Thus, sad as it may be that access to some parts of the Salt Song Trails will be impaired, Plaintiffs face no civil or criminal sanction for practicing their religion—the choice to use those parts of the Salt Song Trails is simply not available to them***.

Id. at *9 (quoting *Lyng*, 485 U.S. at 453) (emphasis added).

Similarly, in *S. Fork Band v. U.S. Dep't of Interior*, 643 F. Supp. 2d 1192 (D. Nev.), *aff'd in part, rev'd in part sub nom. S. Fork Band Council of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718 (9th Cir. 2009), tribes brought a RFRA claim challenging BLM's decision to approve a mining project on public land,

including Mt. Tenabo, which they claimed was a sacred site. After noting that "demonstrating a substantial burden on the exercise of their religion is high," the court found that the plaintiffs had failed to establish a *prima facie* case because there was no evidence that BLM's approval of the project (1) forced them to choose between following their religion and receiving a government benefit or (2) coerced them into violating their religious beliefs by threat of civil or criminal sanctions. *Id.* at 1208.

At least one other court in the country has reached the same result. In *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs.*, 239 F.Supp.3d 77 (D.C.C. 2017), the plaintiffs sought to block construction of an oil pipeline under the waters of Lake Oahe on grounds that the "mere existence" of the pipeline would "desecrate those waters and render them unsuitable for use in their religious sacraments." *Id.* at 82. The court denied injunctive relief, finding the government's actions did not create a "substantial burden" because it did not "impose a sanction on the Tribe's members for exercising their religious beliefs, [or] . . . pressure them to choose between religious exercise and the receipt of government benefits." *Id.* at 91. The court rejected the plaintiffs' claim that their inability to perform required religious sacraments at the lake constituted a "substantial burden." *Id.* The court observed that such an argument was "directly at odds with Supreme Court precedent," specifically *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). *Id.*

In *Lyng*, the plaintiffs challenged the U.S. Forest Service's decision to build a six-mile paved road and permit timber foresting on government-owned land

that was considered sacred to several tribes. 485 U.S. at 442. The plaintiffs claimed that the proposed road would "***physically destro[y]*** the environmental conditions and the privacy without which the [religious] practices cannot be conducted." *Id.* at 449 (emphasis added). The Supreme Court acknowledged that the government's actions "would interfere significantly with private persons' ability to pursue spiritual fulfillment according to their own religious beliefs" and "could have devastating effects on traditional Indian religious practices." *Id.* at 449, 451. Nevertheless, the court found no First Amendment violation because the affected individuals would not be "coerced by the Government's action into violating their religious beliefs" or "penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 449.

Applying these cases, in particular *Lyng* and *Navajo Nation*, which are controlling Supreme Court and Ninth Circuit precedent, this court must similarly conclude that plaintiffs have failed to establish a *prima facie* case that their right to exercise religion has been substantially burdened. As in *Lyng* and *Navajo Nation*, plaintiffs contend that the sacred site at issue, which is located on federal land, has been desecrated and destroyed. Yet, as in those cases, plaintiffs have not established that they are being coerced to act contrary to their religious beliefs under the threat of sanctions or that a governmental benefit is being conditioned upon conduct that would violate their religious beliefs. Without these critical elements, plaintiffs cannot establish a substantial burden under the RFRA.

Plaintiffs contend that their case is distinguishable because it involves the actual destruction of their religious site. Plaintiffs argue that while *Sherbert* and *Yoder* involved "indirect" burdens on religious exercise, their case involves a "direct" burden on their religious beliefs because the site has been destroyed and thus they have been effectively "barred" from entering it. Pl. Resp. 33-34, ECF #292.

This argument is foreclosed by *Lyng*. There the Supreme Court held that even assuming that the government's actions would "***virtually destroy***" the Native Americans' "ability to practice their religion . . . the Constitution simply does not provide a principle that could justify upholding [their] legal claims." 485 U.S. at 451-52 (emphasis added).

> "Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs, ***the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development***,' even where the effect on religious practice is '***extremely grave***."

Standing Rock, 239 F.Supp.3d at 92 (quoting *Lyng*, 485 U.S. at 451) (emphasis added). "Though Native Americans may have some rights to use sacred sites, 'those rights do not divest the Government of its right to use what is, after all, its land.'" *La Cuna II*, 2013 WL 4500572, at *10 (quoting *Lyng*, 485 U.S. at 453).

Contrary to plaintiffs' claims, the Supreme Court's decision in *Lyng* still controls. As the Ninth Circuit

observed in *Navajo Nation*, "[t]hat *Lyng* was a Free Exercise Clause, not RFRA, challenge is of no material consequence." 535 F.3d at 1071 n.13. "Congress expressly instructed the courts to look to pre-*Smith* Free Exercise Clause cases, which include *Lyng*, to interpret RFRA." *Id.*; *see also Oklevueha Native Am. Church of Hawaii, Inc. v. Lynch*, 828 F.3d 1012, 1016 (9th Cir. 2016) (reiterating that the meaning of the term "substantial burden" under the RFRA is defined by pre-*Smith* Supreme-Court case law). Legislative history further confirms that by enacting the RFRA, Congress did not intend to diminish the Supreme Court's holding in *Lyng*.[4]

Moreover, as the Ninth Circuit recently explained, a substantial burden does not exist where there is a "substitute" that is "capable of serving the exact same religious function." *Oklevueha*, 828 F.3d at 1017. In *Oklevueha*, the plaintiffs practiced "peyotism" but considered cannabis, "in addition to peyote, to be sacred or most holy," and consumed it as a substitute for peyote. *Id.* at 1014, 1016. They sought declaratory

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[4] As Senator Orin Hatch explained, the RFRA

> does not effect [sic] *Lyng* . . . , a case concerning the use and management of government resources, because, like *Bowen v. Roy*, the incidental impact on a religious practice does not "burden" anyone's free exercise of religion. In *Lyng*, the court ruled that the way in which government manages its affairs and uses its own property does not impose a burden on religious exercise. Unless a burden is demonstrated, there can be no free exercise violation.

139 Cong. Rec. S14461, at S14470 (daily ed. Oct. 27, 1993) (statement of Sen. Hatch); *see also id.* (statement of Sen. Daniel Inouye) (RFRA will not address "the circumstance in which Government action on public and Indian lands directly infringes upon the free exercise of a native American religion.").

and injunctive relief under the RFRA to prevent the government from prosecuting them under the Controlled Substances Act, 21 U.S.C. §§ 801–971. In rejecting their claim, the Ninth Circuit noted that "nothing in the record demonstrates that a prohibition on cannabis forces [the plaintiffs] to choose between obedience to their religion and criminal sanction, such that they are being 'coerced to act contrary to their religious beliefs.'" *Id.* at 1016 (quoting *Navajo Nation*, 535 F.3d at 1070). The plaintiffs made "no claim that peyote is unavailable or that cannabis serves a unique religious function." *Id.* at 1016. Their "failure to demonstrate that the prohibition on cannabis puts them to such a choice is fatal to their claim." *Id.*

Here, as federal defendants contend, "the A.J. Dwyer Scenic Area is not the only area in which [plaintiffs] can practice their religion. Indeed, the entire Willamette Valley, as well as all of Mount Hood, is sacred to Plaintiffs, and they practice their religion at dozens of other sites." Def. Mot. Partial Summ. J. 19 n.7, ECF #287. But most importantly, as explained above, there is no evidence that plaintiffs have been "coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Navajo Nation*, 535 F.3d at 1070. They face no "forced choice" or "Catch–22." They are still able to access the site,[5] and there is no evidence that

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[5] In their complaint, plaintiffs admit that the site is accessible through East Wemme Trail Road. Fourth Am. Compl. ¶ 25, ECF #223. East Wemme Trail Road is a graveled one-lane road that is 8-12 feet wide and runs in an east-west direction, forming a crescent shape in relation to U.S. 26. ECF #292-11, at 148-49; *see also* Reply 15, ECF #295 (depicting aerial photo of East Wemme

they will be cited for trespass or suffer any government-imposed penalty for doing so.[6] Thus, while plaintiffs may raise important questions whether the decisions regarding the site were culturally sensitive or the least destructive choice among various options, those factors do not establish a substantial burden under the RFRA.

Plaintiffs' reliance on *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2015), is also misplaced. The Supreme Court's decision in *Hobby Lobby* does not change the analysis here. The central issue presented in *Hobby Lobby* was whether a corporation was a "person" under the RFRA and whether a for-profit corporation could practice religion. *Id.* at 2768-69. After holding federal

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Trail Road). It served as a motor road for early automobilists who traveled to Mt. Hood for recreation opportunities. *Id.* at 149.

In his deposition, plaintiff Chief Wilbur Slockish testified that he visited the site when a promotional video was filmed. Dep. Chief Wilbur Slockish 54:21-25, 55:1-12, ECF #287-4; *see also* Def. Mot. Partial Summ. J. 18 n.6, ECF #287 (containing link to video). Federal defendants' reply contains a still photograph from that video, depicting plaintiff Chief Johnny Jackson at the site. Reply 15, ECF #295.

Michael Jones testified at his deposition that he accessed the site in 2015 and 2016 by driving down East Wemme Trail Road. Dep. Michael Jones 92:2-21, ECF #287-7, at 24. There is a barricade at the end of East Wemme Trail Road where it dead-ends. Jones testified that, although it is "difficult," "you go around that." *Id.* 120:5-7, ECF #287-7, at 31. In sum, it is clear from the deposition testimony and other evidence that the site can be accessed.

[6] In fact, it is the official policy of BLM to "accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners" on public lands. *See* 61 Fed. Reg. 26771 (May 24, 1996).

restrictions on "activities of a for-profit closely held corporation must comply with RFRA," the Supreme Court applied the same analysis used in *Navajo Nation*. *Id.* at 2775. Because the contraceptive mandate at issue in that case "force[d]" the corporation to pay as much as $475 million per year in penalties if it failed to comply, it imposed a substantial burden on the corporation's beliefs. *Id.* at 2779.

Plaintiffs contend that, in *Hobby Lobby*, the Supreme Court faulted the government for making the same "absurd" argument that federal defendants make here—"namely, that 'RFRA merely restored this Court's pre-*Smith* decisions' and therefore 'did not allow a plaintiff to raise a RFRA claim' unless it was the same sort of claim 'that this Court entertained in the years before *Smith*.'" Pl. Resp. 37-38, ECF #292 (quoting *Hobby Lobby*, 134 S. Ct. at 2773). Plaintiffs, however, take the language of the opinion out of context. The Supreme Court used this language in deciding whether a for-profit corporation fell within the category of "persons" protected by the RFRA. 134 S. Ct. at 2773. As federal defendants accurately contend, there is nothing in the *Hobby Lobby* opinion that eviscerated the RFRA's requirement of government coercion or compulsion.

Plaintiffs cite other cases, but they likewise do not support their claim that some test other than the coercion/compulsion standard should apply. Most of the cases plaintiffs cite involve claims made under the Religious Land Use and Institutionalized Persons Act

("RLUIPA"), 42 U.S.C. §§ 2000cc–2000cc-5., not the RFRA.[7] Because this is not a prisoner case, the RLUIPA does not apply and those cases are therefore inapplicable.[8] The holdings in those cases nevertheless do not change the outcome in this case.

Under the RLUIPA, "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution[.]" 42 U.S.C. § 2000cc–1(a). The "RLUIPA . . . protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter v. Wilkinson*, 544 U.S. 709, 721 (2005).

In *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005), the Ninth Circuit explained that a substantial burden exists for purposes of the RLUIPA where a prison policy "intentionally puts significant pressure on inmates . . . to abandon their religious beliefs" or "denies [an important benefit] because of conduct mandated by religious belief." *Id.* at 995-96 (citation omitted) (brackets in original). The court found that the plaintiff established a substantial burden where he was subjected to multiple "punishments"—including being confined to his cell, forced to work more hours, and expelled from classes—for refusing to

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[7] *See, e.g.*, *Greene v. Solano Cty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008); *Yellowbear v. Lampert*, 741 F.3d 48, 51-52 (10th Cir. 2014); *Haight v. Thompson*, 763 F.3d 554 (6th Cir. 2014). Pl. Resp. 34-35, ECF #292.

[8] In *Navajo Nation*, the plaintiffs also cited cases decided under the RLUIPA, which the Ninth Circuit likewise found were inapplicable. 535 F.3d at 1077.

comply with the prison's hair grooming policy due to his religious beliefs. *Id.* at 995-96.

Recently, in *Holt v. Hobbs*, 135 S. Ct. 853 (2015), the Supreme Court clarified that the RLUIPA allows prisoners "to seek religious accommodations pursuant to the same standard as set forth in RFRA." *Id.* at 860. The Court concluded that a corrections department's grooming policy requiring the petitioner to shave his beard against his religious beliefs or "face serious disciplinary action" constituted a substantial burden. *Id.* at 862.

As discussed at length above, plaintiffs have failed to establish the type of coercion illustrated in *Holt* or *Warsoldier*. Thus, even if the analysis in these RLUIPA cases applied, the outcome would be the same.

Moreover, prisoner cases under the RLUIPA are otherwise distinguishable from the type at hand for the reasons wisely articulated by the court in *Standing Rock*:

> The RLUIPA cases on which the Tribe relies, furthermore, offer little succor. Not only have inmates suffered a total loss of liberty, whereas the Tribe's members have not, but the cases cited involved either a specific prohibition on a particular form of religious exercise or the imposition of a sanction or other collateral, nonreligious harm in response to religious exercise. . . . Here, although the Tribe's members may feel unable to use the water from Lake Oahe in their religious ceremonies once the pipeline is

> operational, there is no specific ban on their religious exercise, nor does performance of their sacraments trigger a sanction, loss of a government benefit, or other collateral harm. If a Jewish prisoner is denied kosher meals and adheres to his belief that he cannot consume non-kosher food, he will starve. If a Muslim prisoner forbidden from growing a beard nonetheless grows one, he will be punished. But if the Tribe persists in its belief that DAPL will render the waters of Lake Oahe spiritually impure, it suffers no collateral consequence. In so stating, the Court does not diminish the significance of such a loss; indeed, inability to engage in religious conduct may cause deep personal and communal harm. The point is simply that the prisoner cases to which Cheyenne River draws a comparison involve an additional harm beyond the spiritual that is not present here.

239 F.Supp.3d at 95-96. Therefore, this court should not look to the RLUIPA cases cited by plaintiffs in deciding this question, but instead to *Lyng* and *Navajo Nation*. Applying the holding in those cases, plaintiffs have failed to establish a *prima facie* showing that they were substantially burdened. Accordingly, federal defendants' motion for summary judgment against plaintiffs' Thirteenth Claim under the RFRA should be granted.

II. Standing

Federal defendants assert that, because plaintiffs have failed to establish that their right to exercise religion under the RFRA has been "substantially burdened," they lack standing. Def. Mot. Partial Summ. J. 26, ECF #287.

Federal courts are courts of limited jurisdiction. "Article III of the Constitution confines the judicial power of federal courts to deciding actual 'Cases' or 'Controversies.'" *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (quoting U.S. Const. art. III, § 2). An "essential element" of the limitations on this court's jurisdiction is that "any person invoking the power of a federal court must demonstrate standing to do so." *Hollingsworth*, 133 S. Ct. at 2661 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The "irreducible constitutional minimum of standing" requires the party invoking federal jurisdiction to establish three elements:

> First, the plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Lujan, 504 U.S. at 560-61 (1992) (internal citations, ellipses, and quotation marks omitted). These are "not mere pleading requirements but rather an indispensable part of the plaintiff's case [and] each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561 (citations omitted).

Here, by failing to establish a *prima facie* case under the RFRA, plaintiffs have failed to establish that they have suffered an injury in fact. Thus, they lack standing on the RFRA claim, and it should be dismissed.

III. Law of the Case

Plaintiffs contend that federal defendant's motion for summary judgment is foreclosed because of this court's prior rulings, which they contend are law of the case. That contention should be rejected for the reasons discussed below.

A. Doctrine of Law of the Case

"The law of the case doctrine is a judicial invention designed to aid in the efficient operation of court affairs." *Milgard Tempering, Inc. v. Selas Corp. of Am.*, 902 F.2d 703, 715 (9th Cir. 1990) (*citing Lockert v. U.S. Dept. of Labor*, 867 F.2d 513, 518 (9th Cir. 1989). "Under the doctrine, a court is generally precluded from reconsidering an issue previously decided by the same court[.]" *Id.* The doctrine "concerns courts' general practice of refusing to reopen questions previously decided in the same case." *Rent-*

A-Ctr., Inc. v. Canyon Television & Appliance Rental, Inc., 944 F.2d 597, 601 (9th Cir. 1991). For the doctrine to apply, the issue in question must have been "decided explicitly or by necessary implication in [the] previous disposition." *Milgard*, 902 F.2d at 715.

However, the doctrine "is not a limitation on [the courts'] power." *Rent-A-Ctr.*, 944 F.2d at 602. It is an "equitable doctrine that should not be applied if it would be unfair." *Id.* Application of the doctrine is discretionary. *Milgard*, 902 F.2d at 715. A court properly exercises its discretion where (1) the first decision was clearly erroneous and would result in manifest injustice; (2) an intervening change in the law has occurred; or (3) the evidence on remand was substantially different. *Milgard*, 902 F.2d at 715 (citing *Eichman*, 880 F.2d at 157).

B. The Court's Prior Rulings and Analysis

In a February 7, 2012 order denying federal defendants' Motion for Judgment on the Pleadings (ECF #104), the court ruled as follows:

> The Magistrate Judge distinguishes *Lyng* by pointing out that construction of the guardrail on Highway 26 prevents Plaintiffs from having any access to their religious site, and, in addition, religious artifacts at the site were destroyed. The Magistrate Judge concludes disputed fact exist as to whether Plaintiffs "may be forced to act contrary to their religious beliefs . . .[w]ithout the artifacts and free access to the site."
>
> After reviewing the record de novo, the Court agrees with the Magistrate Judge and

> concludes there are disputes of fact that preclude the entry of summary judgment as to Plaintiffs' 13th Claim based on Plaintiffs' free exercise of religion under the First Amendment.

Opinion and Order (February 7, 2012), ECF #131, at 9-10.

The court's prior order pertained to a motion for judgment on the pleadings, where no evidence was presented and the court was permitted to consider only the allegations in the complaint. *Lyon v. Chase Bank USA, N.A.*, 656 F.3d 877, 883 (9th Cir. 2011) ("A judgment on the pleadings is properly granted when, taking all the allegations in the pleadings as true, [a] party is entitled to judgment as a matter of law.") By contrast, the present motion before the court is one for summary judgment, and the proffered facts are "substantially different" from when the court issued its prior order in 2012. *Milgard*, 902 F.2d at 715. There is now evidence that plaintiffs have access to the site and do not suffer the threat of trespass[9] they

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[9] In her Findings and Recommendations, Judge Stewart noted that plaintiffs claimed they would be subject to a trespass action if they attempted to access the site:

> Here, in contrast, plaintiffs allege that they cannot freely access the site because of a newly constructed guardrail and destruction of the artifacts themselves. [Second Am. Compl.], ¶ 50. In addition, plaintiffs also argue (but do not allege) that they would suffer criminal trespass should they attempt to access the site. Based solely on plaintiffs' allegations which are assumed to be true, this court cannot conclude as a matter of law that the Project has not substantially burdened plaintiffs' free exercise of religion. Without the artifacts and free access

argued existed when the court's previous order was issued. There are no longer those "disputes of fact" that the court was concerned with in 2012—the uncontroverted evidence is that BLM allows plaintiffs access to the site and that some of the plaintiffs have in fact visited the site.

Additionally, to the extent the court previously held that denial of access to land constitutes a substantial burden under the RFRA, that ruling is clearly erroneous. "Under *Navajo Nation*, . . . denial of access to land, without a showing of coercion to act contrary to religious belief, does not give rise to a RFRA claim, regardless of how that denial of access is accomplished. . . ." *La Cuna II*, 2013 WL 4500572, at *9 (finding no substantial burden where eight-foot-high fence prevented tribe from accessing sacred site). "Whatever rights the [Native Americans] may have to the use of the area, . . . those rights do not divest the Government of its right to use what is, after all, *its* land." *Lyng*, 485 U.S. at 454 (emphasis in original). With the trespass and access issues resolved, the only remaining basis for the court's prior ruling is the destruction of artifacts. However, as discussed above,

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> to the site, plaintiffs may be forced to act contrary to their religious beliefs. In addition, this court cannot ascertain whether the Federal Defendants took the least restrictive means for implementing the Project and whether they followed all appropriate procedures. As previously noted, fact issues also exist as to whether plaintiffs received procedural due process. Due to these fact issues that must be resolved in order to determine if the burden on plaintiffs' exercise of their religion is substantial, the Federal Defendants' motion to dismiss the Thirteenth Claim should be denied.

Findings and Recommendations (Sept. 21, 2011) 17, ECF #122.

destruction of a sacred site is not enough to constitute a "substantial burden." Even where the government's actions would "virtually destroy" a group's "ability to practice their religion . . . the Constitution simply does not provide a principle that could justify upholding [their] legal claims." *Lyng*, 485 U.S. at 451-52; *see also Navajo Nation*, 535 F.3d at 1070 (holding desecration of spiritual mountain with sewage effluent containing fecal coliform bacteria did not impose a substantial burden). "[T]he diminishment of spiritual fulfillment—serious though it may be—is not a 'substantial burden' on the free exercise of religion." *Id.* at 1070. A recent case decided by the Ninth Circuit in 2013—after the court issued its previous order—cements this conclusion. In *Oklevueha*, the court made clear that a substantial burden does not exist where there is a "substitute" that is "capable of serving the exact same religious function." 828 F.3d at 1017. Here, plaintiffs concede that the site at issue "is part of a complex of sacred, interrelated and interconnected sites in the Mount Hood area."[10] Fourth Am. Compl. ¶ 13, ECF #223.

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[10] Plaintiffs' complaint alleges:

> In addition to Mount Hood itself, these other sites include, but are not limited to, Enola Hill, Owl Mountain, Zig Zag Mountain, Hunchback Mountain, Huckleberry Mountain, Salmon River Butte, North Mountain, Crutcher's Bench, Flag Mountain, Big Laurel Hill, Buzzard's Butte, Wolfe Butte, Devil's Peak, Devil's Backbone, Bear Creek, Indian Meadow, Cedar Ridge, Alderwood, the Meadows (Rhododendron Meadow and the Big Island), the Big Deadening, Devils Half Acre, Barlow Pass, Summit Prairie, Red Top Meadow, Salmon River Canyon, Alder Mountain, McIntire Mountain, Sandy River Canyon, Veda Butte, Plaza Butte, Bull Run,

The court in *La Cuna II* considered a similar scenario and concluded there was no substantial burden: "[S]ad as it may be that access to some parts of the Salt Song Trails will be impaired, Plaintiffs face no civil or criminal sanction for practicing their religion—the choice to use those parts of the Salt Song trails is simply not available to them." The same result is compelled in this case.

For these reasons, the court should decline to apply the law of the case doctrine and find, as discussed above, the plaintiffs have failed to establish a *prima face* case under the RFRA.

IV.Laches

Federal defendants argue that plaintiffs are alternatively barred from asserting this claim under the doctrine of laches. It is unnecessary to reach this issue because plaintiffs' claim is foreclosed by their failure to establish a *prima facie* case under the RFRA, as discussed above.

RECOMMENDATIONS

For the reasons set forth above, federal defendants' motion for summary judgment against Claim 13 (ECF #287) should be GRANTED, plaintiff's cross-motion for summary judgment (ECF #294) should be DENIED, and plaintiff's Thirteenth Claim should be dismissed.

SCHEDULING ORDER

These Findings and Recommendations will be referred to a district judge. Objections, if any, are due

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the Wind Mountains, and Tom, Dick, and Harry Mountain.

Fourth Am. Compl. ¶ 13, ECF #223.

Friday, March 16, 2018. If no objections are filed, then the Findings and Recommendations will go under advisement on that date.

If objections are filed, then a response is due within 14 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendations will go under advisement.

NOTICE

These Findings and Recommendations are not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any Notice of Appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate Procedure, should not be filed until entry of a judgment.

DATED this 2nd day of March, 2018.

/s/ Youlee Yim You
Youlee Yim You
United States Magistrate Judge

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HEREDITARY CHIEF WILBUR SLOCKISH, a resident of Washington, individually and as Hereditary Chief of the Klickitat/Cascade Tribe; THE KLICKITAT/CASCADE TRIBE, a confederated tribe of the Yakama Indian Nation; CHIEF JOHNNY JACKSON, a resident of Washington, individually and as Chief of the Cascade Tribe; THE CASCADE TRIBE, a confederated tribe of the Yakama Indian Nation; CAROL LOGAN, a resident of Oregon; CASCADE GEOGRAPHIC SOCIETY, an Oregon nonprofit corporation; and MOUNT HOOD SACRED LANDS PRESERVATION ALLIANCE, an unincorporated nonprofit association,

Plaintiffs,

v.

08-CV-1169-ST

ORDER

Portland Division

UNITED STATES FEDERAL HIGHWAY ADMINISTRATION, an Agency of the Federal Government; UNITED STATES BUREAU OF LAND MANAGEMENT, an Agency of the Federal Government; ADVISORY COUNCIL ON HISTORIC PRESERVATION, an Agency of the Federal Government; and MATTHEW GARRETT, Director of the Oregon Department of Transportation, an Agency of the State of Oregon,

Defendants.

BROWN, Judge.

Magistrate Judge Janice M. Stewart issued Findings and Recommendation (#48) on October 27, 2009, in which she recommended the Court grant Defendants' Motion (#28) to Dismiss without prejudice Plaintiffs' Tenth, Eleventh, and Twelfth Claims. The Magistrate Judge also recommended the Court grant Defendants' Motion (#28) to Dismiss as to Plaintiffs Wilbur Slockish, Johnny Jackson, the Klickitat Tribe, and the Cascade Tribe for lack of standing.

Defendants filed timely Objections to the Findings and Recommendation. The matter is now before this

Court pursuant to 28 U.S.C. § 636(b)(1) and Federal Rule of Civil Procedure 72(b).

When any party objects to any portion of the Magistrate Judge's Findings and Recommendation, the district court must make a *de novo* determination of that portion of the Magistrate Judge's report. 28 U.S.C. § 636(b)(1). *See also United* States *v. Reyna-Tapia,* 328 F.3d 1114, 1121 (9th Cir. 2003) *(en banc); United States v. Bernhardt,* 840 F.2d 1441, 1444 (9th Cir. 1988).

BACKGROUND

Plaintiffs allege Defendants violated federal statutes under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321, et *seq*. (1970); the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470, et *seq*. (1994); and the Department of Transportation Act (DTA), 49 U.S.C. § 303 (1994), when they planned, approved, and constructed a highway-widening project (the Project) on Highway 26 in Oregon between the villages of Wildwood and Wemme near the town of Welches, Oregon. Plaintiffs allege in part that Defendants violated various statutory notice and process provisions when they prepared and undertook the Project without proper consideration of the impact on federally protected cultural, historical, and ecological resources. In their First Amended Complaint, Plaintiffs seek declaratory and injunctive relief, including "all other and further relief to which Plaintiffs may be entitled and which the Court may deem just and equitable."

DISCUSSION

Neither party raises any objection to the Magistrate Judge's recommendation that this Court dismiss

Plaintiffs' Tenth, Eleventh, and Twelfth Claims or that the Court dismiss Plaintiffs Slockish, Jackson, the Cascade Tribe, and the Klickitat Tribe for lack of standing. Defendants, however, object to other aspects of the Magistrate Judge's Findings and Recommendation on two grounds: (1) the Court should dismiss this matter as moot and (2) Plaintiff Cascade Geographic Society (CGS) lacks standing to challenge Defendants' actions in this matter.

I. Mootness.

Defendants object to the Findings and Recommendation and assert that Plaintiffs' claims are moot on two bases: (1) the fact that the Project is nearly complete, and, therefore, this Court arguably cannot provide any effective relief to Plaintiffs and (2) the Court cannot order the completed highway widening project to be "undone." Although Plaintiffs contend Defendants' Objections are "new," they are, in fact, essentially the same as the arguments they made in the Memorandum in Support of their Motion and their Reply but with additional authorities cited to support them.

The Magistrate Judge addressed Defendants' mootness arguments at length in the Findings and Recommendation and concluded Defendants "failed to meet their burden to show that this case is moot." Although the Magistrate Judge did not explicitly include in her Recommendation that this Court deny Defendant's Motion to Dismiss all of Plaintiffs' claims as moot, the Court construes the Magistrate Judge's discussion of this issue and conclusion as part of the Recommendation and, accordingly, reviews it *de novo*.

A. Court's Authority under the Administrative Procedures Act (APA) to Remedy Violations of Public Law by Government Agencies.

The Magistrate Judge found the Administrative Procedures Act (APA), 5 U.S.C. §§ 701-706 (2006), governs the Court's review of Plaintiffs' claims under NEPA, NHPS, and DTA. The APA permits the Court to "hold unlawful and set aside agency action, findings and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). *See, e.g., N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.,* 545 F.3d 1147, 1152 (9th Cir. 2008) (APA governs the court's review under NEPA and the DTA § 303); *San Carlos Apache Tribe v. United States,* 417 F.3d 1091, 1098-99 (9th Cir. 2005) (APA governs the court's review under§ 106 of the NHPA). The Magistrate Judge also concluded§ 706(2) of the APA confers broad equitable authority on courts to remedy violations of public law by governmental agencies. *See, e.g., Northwest Envtl. Def. Ctr. v. Bonneville Power Admin.,* 477 F.3d 668, 689-71 (9th Cir. 2007) (When "the public interest is involved, 'equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.'") (citing *United States v. Alisal Water Corp.,* 431 F.3d 643, 654 (9th Cir.2005)); *Tinoqui Chalola Council of Kitanemuk and Yowlumne Tejon Indians v. U.S. Dep't of Energy,* 232 F.3d 1300, 1305 (9th Cir. 2000) (the court retains "broad discretion to fashion equitable remedies" under APA§ 706(2)). This Court agrees.

B. Plaintiff's Claims Are Not Moot Because the Court Can Provide P1aintiffs with an Effective Remedy.

As the Magistrate Judge stated, the bar for establishing mootness in the Ninth Circuit is high. *See, e.g., Cantrell v. City of Long Beach,* 241 F.3d 674, 678 (9th Cir. 2001) ("[D]efendants in NEPA cases face a particularly heavy burden in establishing mootness."). Thus, a claim is not moot if "any effective relief" may be provided. *See Tinoqui Chalola Council,* 232 F.3d at 1305. *See also Northwest Envtl. Def. Ctr. v. Gordon,* 849 F.2d 1241, 1244-45 (9th Cir. 1988) ("[T]he question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be *any* effective relief.") (quoting *Garcia v. Lawn,* 805 F.2d 1400, 1403 (9th Cir. 1986) (emphasis in original)).

The Magistrate Judge pointed out the Ninth Circuit has held the fact that a challenged project is completed during litigation does not necessarily moot a plaintiff's challenge to the process an agency undertook to approve a project, particularly when there is an ongoing harm to the plaintiff's interests. *See, e.g., Cantrell,* 241 F.3d at 678 (destruction of the building the plaintiffs sought to enjoin did not moot the plaintiffs' case because additional study by the defendants could have led to remedial actions to mitigate alleged harm to birds); *Gordon,* 849 F.2d at 1244-45 (end of 1986 fishing season did not moot challenge to fishing regulations because additional study might dictate defendants should take mitigating actions in subsequent fishing seasons).

The Magistrate Judge also found ongoing harm to Plaintiffs' interests in cultural and historical assets

that may remain in the Project area. The Magistrate Judge also set out several potential avenues of relief this Court might order to remedy any violation of the law by Defendants such as an order for "defendants to carry out additional review of the alleged cultural and historical resources in the project area in compliance with the NHPA, NEPA, and [DTA]." Moreover, the Magistrate Judge concluded the Court could enjoin future work on the Project, order removal of offending portions of the Project, or order mitigation of the harm to cultural resources such as monuments or markers. The Magistrate Judge, therefore, concluded the Court could provide some form of effective relief to Plaintiffs if the Court determines Defendants violated the law.

Defendants, nonetheless, maintain there is not any ongoing harm to Plaintiffs' interests that could be remedied by this Court. In particular, Defendants contend the Project is nearly complete and all of the damage that could have been done has been done. Defendants rely on cases in which a completed mining or culling project was sufficient to moot challenges to those projects. *See, e.g., Feldman v. Boman,* 518 F.3d 637 (9th Cir. 2008) (completed culling of feral pigs mooted humane group's challenge to the plan); *Sierra Club v. Penfold,* 857 F.2d 1307 (9th Cir. 1988) (completed mining project mooted challenge to stop mining because the court could not order the mine to be "unmined."). Plaintiffs, however, point out that here cultural and historical artifacts such as burial grounds, historic buildings, and trails may have been disturbed or paved over, and, as the Magistrate Judge noted, interests in these artifacts are distinguishable from interests in living

things or resources that have been removed or killed and cannot be restored. In any event, the record before the Magistrate Judge was not sufficient to establish conclusively that such resources have been entirely destroyed and are unrecoverable. Thus, Plaintiffs' ongoing interests in the cultural and historical resources that underlie their First through Seventh Claims render this matter a "live" controversy. *See H.C. ex rel. Gordon v. Koppel,* 203 F.3d 610, 612 (9th Cir. 2000).

C. The Court Has Equitable Power to Order the Project Removed.

Defendants contend the Court cannot order Defendants to remove offending sections of the now-widened Highway 26, a potential avenue of relief suggested by the Magistrate Judge, because such relief is beyond the Court's equitable authority. Defendants contend even though the federal Defendants approved the Project, agents of the state of Oregon carried out the project's construction and the Court cannot order the State to dismantle the Project.

As noted, the Court's equitable authority in this case is substantial and may take a number of forms to remedy violations of federal law. The Court points out that Defendant Matthew Garrett, Director of the Oregon Department of Transportation, is a party to this matter, which gives rise to a potential for equitable relief such as an order directing him to remove offending portions of Highway 26. *See, e.g., Fund* for *Animals, Inc. v. Lujan,* 962 F.2d 1391, 1397-98 (9th Cir. 1992) (concluding a court could enjoin state actors pursuant to NEPA under a number of circumstances where a project involves federal-state

cooperation). Moreover, as the Magistrate Judge noted, the Ninth Circuit has held in the context of a NEPA claim that the removal of portions of a highway project is within the remedial powers of the court under the APA. *West v. Sec'y of Dep't of Transp.,* 206 F.3d 920, 925 (9th Cir. 2000) ("[O]ur remedial powers would include remanding for additional environmental review and, conceivably, ordering the interchange closed or taken down.").

Plaintiffs contend Defendants did not notify parties who were required to be involved in the developmental process of the Project and Defendants did not adequately study the impact of the Project on historical, cultural, and ecological resources. The Court concludes it would be poor practice to dismiss claims as moot in instances where governmental agencies move swiftly and without appropriate consideration to complete a project before lawsuits challenging such projects may be brought. *See Cantrell,* 241 F.3d at 678 ("[W]e have repeatedly emphasized that if the completion of the action challenged under NEPA is sufficient to render the case nonjusticiable, entities 'could merely ignore the requirements of NEPA, build its structures before a case gets to court, and then hide behind the mootness doctrine. Such a result is not acceptable.'") (citing *West v. Sec'y of Dep't of Transp.,* 206 F.3d 920, 925 (9th Cir. 2000).

If the Court determines additional study of cultural, historical, or ecological resources is required by law, Defendants may, for example, be required to modify or to remove portions of the Project or to take additional mitigating actions to protect cultural, ecological, or historical resources in accordance with any new agency

findings. It *is* premature, in any event, at this stage of the case to set the precise parameters of the Court's equitable authority. Such a determination will best be made in any remedial phase of this litigation after the facts have been established and the legal issues have been decided. Thus, the Court concludes the Magistrate Judge did not err in making the limited finding at this stage of the proceedings that some effective relief remains available to Plaintiffs in this litigation. In short, the Court concludes this matter is not moot.

II. Standing.

In its Motion to Dismiss, Defendants asserted Plaintiffs Slockish, Jackson, Cascade Tribe, and Klickitat Tribe do not have standing to challenge Defendants' actions. In the Findings and Recommendation, the Magistrate Judge agreed with Defendants and recommends this Court grant Defendants' Motion to Dismiss as to each of those Plaintiffs for lack of standing. The Magistrate Judge also specifically found Plaintiffs Carol Logan and Mount Hood Sacred Lands Preservation Alliance (MHSLPA) have standing to challenge Defendants' actions. Neither Plaintiffs nor Defendants object to these portions of the Findings and Recommendation.

Defendants, however, assert for the first time in their Objections that Plaintiff CGS also does not have standing to challenge Defendants' actions. Because Defendants raise this argument for the first time in their Objections to the Findings and Recommendation, the Court has discretion whether to consider the issue. *See Brown v. Roe,* 279 F.3d 742, 744-45 (9th Cir. 2002). *See also United States v. Howell,* 231 F.3d 615, 621 (9th Cir. 2000) (concurs with the First Circuit that "an unsuccessful party is

not entitled as of right to *de novo* review by the judge of an argument never seasonably raised before the magistrate.") (citation omitted).

Defendants point out that the Magistrate Judge noted the record did not contain sufficient allegations by CGS to support its standing as an organization. The Magistrate Judge, however, merely observed CGS "makes no such allegation[s]." Moreover, the Court notes because Defendants did not raise this standing argument in its original Motion to Dismiss, CGS did not have an opportunity to assert any bases for standing. In any event, the Magistrate Judge correctly pointed out that when a court has established a single plaintiff (like Logan and MHSLPA in this case) has standing, the court need not determine whether the remaining plaintiffs have standing to maintain the action. *See Clinton v. City of New York,* 524 U.S. 417, 431 n.19 (1998). *See also Nat'l Ass'n of Optometrists & Opticians LensCrafters v. Brown,* 567 F.3d 521, 523 (9th Cir. 2009) ("As a general rule, in an injunctive case this court need not address standing of each plaintiff if it concludes that one plaintiff has standing.").

For these reasons, the Court; in the exercise of its discretion, does not reach the issue of CGS's standing on this record.

III. Factual Error.

Plaintiffs assert in footnote one of their Response to Defendants' Objections that the Magistrate Judge erred when she found Defendants destroyed an historic stone toll booth during work on the Project. Plaintiffs assert this stone toll booth still exists within the Project area.

Initially, the Court notes Plaintiffs' objection is untimely. Plaintiffs filed their Response to Defendant's Objections on November 30, 2009, two weeks past the Magistrate Judge's deadline to file objections. In addition, the record is unclear as to whether the stone toll booth exists and as to the impact Defendants' actions may have had, in part, because, as Plaintiffs allege, Defendants did not properly assess the cultural and historical resources in the Project area. Thus, the Court cannot evaluate this issue on the existing record. In any event, the Magistrate Judge's finding as to the stone toll booth was not essential to the Magistrate Judge's determination of Defendants' Motion to Dismiss.

In summary, the Court has carefully considered Defendants' Objections and concludes they do not provide a basis to modify the Findings and Recommendation. The Court also has reviewed the pertinent portions of the record *de novo* and does not find any error in the Magistrate Judge's Findings and Recommendation.

CONCLUSION

For these reasons, the Court **ADOPTS** Magistrate Judge Stewart's Findings and Recommendation (#48) and specifically **ADOPTS** the Magistrate Judge's conclusion that Defendants did not meet their burden to prove Plaintiffs' claims are moot. The Court, therefore, **GRANTS** Defendants' Motion to Dismiss Plaintiffs' Tenth, Eleventh, and Twelfth Claims **without prejudice; GRANTS** Defendant's Motion to Dismiss as to Plaintiffs Slockish, Jackson, Cascade Tribe, and Klickitat Tribe for lack of standing; and **DENIES** Defendants' Motion to Dismiss this matter as **moot.**

IT IS SO ORDERED.

DATED this 27th day of January, 2010.

/s/ Anna J. Brown
Anna J. Brown
United States District Judge

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

HEREDITARY CHIEF WILBUR SLOCKISH, a resident of Washington, individually and as Hereditary Chief of the Klickitat/Cascade Tribe; THE KLICKITAT/ CASCADE TRIBE, a confederated tribe of the Yakama Indian Nation; CHIEF JOHNNY JACKSON, a resident of Washington, individually and as Chief of the Cascade Tribe; THE CASCADE TRIBE, a confederated tribe of the Yakama Indian Nation; CAROL LOGAN, a resident of Oregon; CASCADE GEOGRAPHIC SOCIETY, an Oregon nonprofit corporation; and MOUNT HOODSACRED LANDS PRESERVATIONALLI ANCE, an unincorporated nonprofit association,

Plaintiffs,

v.

Case No. CV-08-1169-ST

FINDINGS AND RECOMMENDATION

UNITED STATES FEDERAL HIGHWAY ADMINISTRATION, an Agency of the Federal Government; UNITED STATES BUREAU OF LAND MANAGEMENT, an Agency of the Federal Government; ADVISORY COUNCIL ON HISTORIC PRESERVATION, an Agency of the Federal Government; and MATTHEW GARRETT, Director of the Oregon Department of Transportation, an Agency of the State of Oregon,

Defendants.

STEWART, Magistrate Judge:

INTRODUCTION

This case involves the U.S. Highway 26 Wildwood-Wemme highway widening project ("Wildwood-Wemme project" or "the project") near Mt. Hood, Oregon, which was substantially completed in 2008. Plaintiffs consist of individuals and organizations who seek to preserve, protect, and rehabilitate Native American sacred and cultural sites and historical and archaeological resources in the lands surrounding Mount Hood. They allege that defendants United

States Federal Highway Administration ("FHWA"), United States Bureau of Land Management ("BLM"), Advisory Council on Historic Preservation ("ACHP"), and Matthew Garrett, the Director of the Oregon Department of Transportation ("ODOT"), violated the National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470-470x-6, National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4347, § 4(f) of the Department of Transportation Act ("DTA"), 49 U.S.C. § 303, the public trust doctrine, and the due process clause, and also committed a breach of fiduciary duty.

The federal defendants have filed a motion to dismiss (docket #28) asserting that this court lacks subject-matter jurisdiction because the case is moot and some of the plaintiffs lack standing. Alternatively, the federal defendants assert that several of plaintiffs' claims in the First Amended Complaint ("FAC") fail to state a claim upon which relief can be granted.

Plaintiffs concede that their public trust doctrine, due process, and breach of fiduciary duty claims (Tenth, Eleventh and Twelfth Claims) are deficient and seek leave to amend them. Otherwise, plaintiffs assert this court has subject matter jurisdiction over their remaining claims.

For the reasons that follow, defendants' motion should be GRANTED as to the Tenth, Eleventh, and Twelfth Claims and as to plaintiffs Slockish, Jackson, the Klickitat Tribe, and the and Cascade Tribe.

STANDARDS

Motions to dismiss under FRCP 12(b)(1) for lack of subject-matter jurisdiction generally take two forms. First, a defendant may facially attack the allegations

in the complaint as insufficient to establish subject-matter jurisdiction. *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir 1979). "In reviewing a facial attack on the complaint, a district court must accept the allegations in the complaint as true." *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir 1995).

Second, a party may go beyond the allegations in the complaint and attack the factual basis for subject matter jurisdiction. *Thornhill*, 594 F.2d at 733. If a party factually attacks subject matter jurisdiction, then no presumptive truthfulness attaches to the factual allegations in the complaint. *Id.* In that instance, a court has wide discretion to allow additional evidence in order to resolve disputed jurisdictional facts under FRCP 12(b)(1). *Biotics Research Corp. v. Heckler,* 710 F.2d 1375, 1379 (9th Cir 1983). Furthermore, a court's reference to evidence outside the pleadings does not convert the motion to a FRCP 56 summary judgment motion. *Id.* However, a court is required to convert a FRCP 12(b)(1) motion to dismiss into a FRCP 12(b)(6) or FRCP 56 summary judgment motion when resolution of the jurisdictional question is intertwined with the merits of the case. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983).

Motions to dismiss for failure to state a claim pursuant to FRCP 12(b)(6) are governed by the standards recently enunciated in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (May 18, 2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Iqbal*, 129 S. Ct. at 1949, quoting *Twombly*, 550 U.S. at 555.

In order to survive a motion to dismiss for failure to state a claim pursuant to FRCP 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id*, quoting *Twombly*, 550 U.S. at 570. Thus,

> [i]n keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Id. at 1950 (the "*Twombly* two-step").

FACTUAL ALLEGATIONS

I. Plaintiffs

Wilbur Slockish is a resident of the State of Washington and the hereditary Chief of the Klickitat Tribe, which is a confederated tribe within the Yakama Indian Nation. FAC, ¶ 4. He is a direct descendent of Sla-kish, a signatory to the 1855 Treaty between the United States and the confederated tribes of the Yakama Indian Nation. *Id.* Johnny Jackson is a resident of the State of Washington and the hereditary Chief of the Cascade Tribe. *Id*, ¶ 6. Together they claim harm, both as individuals and representatives of their tribes, from the damage to the cultural and historical resources located within the

right-of-way of the Wildwood-Wemme project in which they and their tribes have an interest. *Id*, ¶¶ 4(A), 6(A). They also claim injury, both individually and as representative of their tribes, from various procedural violations committed by defendants in the course of approving and carrying out the Wildwood-Wemme project, including the defendants' failure to consult with them as representatives of their respective tribes throughout the course of the project. *Id*, ¶¶ 4(B), 6(B).

The Klickitat and Cascade Tribes are confederated Tribes of the Yakama Indian Nation.[1]

They both consider the Mount Hood area, including the region located within the project, to be a "traditional cultural property."[2] *Id*, ¶¶ 5, 7. They

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[1] The FAC only identifies the Klickitat tribe as a confederated tribe within the Yakama Indian Nation and also refersto it as the Klickitat/Cascade Tribe. Plaintiffs, however, have clarified in their briefing that there are actually two tribes involved in this case, the Klickitat and Cascade Tribes, both of which are confederated tribes within the Yakama Indian Nation.

[2] A "traditional cultural property" is one "'associate[ed] with cultural practices or beliefs of a living community that (a) are rooted in that community's history, and (b) are important in maintaining the continuing cultural identity of the community.'" *Navajo Nation v. U.S. Forest Serv.*, 479 F.3d 1024, 1029 (9th Cir 2007) (brackets in original), *panel decision reversed in part on reh'g en banc*, 535 F.3d 1058 (9th Cir 2008), *cert denied*, 129 S. Ct. 2763 (2009), quoting National Register Bulletin 38: *Guidelines for Evaluating and Documenting Traditional Cultural Properties* (rev. ed. 1998), *available at* http://www.nps.gov/nr/publications/bulletins/pdfs/nrb38.pdf. Traditional cultural properties are eligible for inclusion on the National Register. *Id*.

claim injuries identical to those suffered by their respective leaders. *Id*.

Carol Logan is a resident of Oregon and is of Native American ancestry. *Id*, ¶ 8. She is a member of the Mount Hood Sacred Land Preservation Alliance ("MHSLPA"). *Id*. Logan and the MHSLPA use the affected area of the Wildwood-Wemme project for cultural, religious, recreational, and aesthetic purposes. *Id*. Logan has engaged in advocacy to preserve and protect Native American sacred lands within the Mount Hood area since the 1980s. *Id*. She claims injury from the damage to the cultural and historical resources located in the project area. *Id*.

The Cascade Geographic Society ("CGS") is a nonprofit corporation based in Oregon. *Id*, ¶ 9. It is dedicated to preserving and promoting the cultural, historical, and natural resources of the Cascade Mountain Range and its rivers. *Id*. It coordinates preservation efforts with Native Americans, descendants of pioneers, and other interested parties within this region. *Id*. It also uses the area affected by the Wildwood-Wemme highway project for cultural, recreational, and aesthetic purposes. *Id*. The CGS also claims injury due to the damage to cultural, historical, and natural resources located within the project area. *Id*, ¶ 9(A).

II. Wildwood-Wemme Project

The FHWA and ODOT widened U.S. Highway 26 from two to four lanes in the 1980s. *Id*, ¶ 17. That project included an environmental impact statement ("EIS") pursuant to NEPA. *Id*. Included in that project was the stretch of highway at issue here: a bow-shaped right-of-way adjacent to the Mountain Air

Park subdivision and the Wildwood Recreation Area between the villages of Wildwood and Wemme near the town of Welches. *Id*, ¶¶ 1, 16-19. This stretch also includes within its right-of-way a section of the A. J. Dwyer Scenic Area, located in the northeast corner of the Wildwood Recreation Area which is owned by the BLM. *Id*, ¶ 11. Defendant ODOT owns the right-of-way for U.S. Highway 26. *Id*, ¶ 13.

During the development of the EIS for the 1980s project, an archaeologist identified an archaeological site located within the U.S. Highway 26 right-of-way as a potential stone tollbooth for the historic Barlow Road. *Id*, ¶¶ 16-17. This road served as a final leg of the Oregon Trail, bringing pioneers over the Cascades into the Willamette Valley.[3] *Id*. The archaeologist also discovered a rock cluster adjacent to the project area in a corner of the Wildwood Recreation Area. *Id*, ¶ 18. He examined this site as a potential pioneer or Native American gravesite but found no human remains. *Id*. The site was later examined by a Native American who identified the rock cluster as a burial cairn identifying surrounding graves, though without a grave beneath it. *Id*. During the 1980s project, ODOT negotiated an agreement with the now curator of CGS (who was then with a different organization) for the protection of certain historic, cultural, and

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[3] The Barlow Road was built by Samuel Barlow in 1845 as an alternative to the treacherous raft trip down the Columbia river. To recoup the costs of building the road, Barlow charged a toll, though the road never became profitable. *See* Kate Brown, Sec'y of State, OREGON BLUE BOOK 345-46 (2009); additional information available at *Notable Oregonians*: *Sam Barlow - Pioneer, Roadbuilder*, http://bluebook.state.or.us/notable/notbarlow.htm (last accessed, October 12, 2009).

natural resources, including the Barlow Road and potential toll booth, the rock cluster later identified as a burial cairn, the A. J. Dwyer Scenic Area, and stone pillars marking the beginning of Mountain Air Drive. *Id*, ¶ 19. All of these resources were preserved during that project and are within the area affected by the Wildwood-Wemme project. *Id*.

In 1998, citizens petitioned ODOT to widen U.S. Highway 26 east of Sandy, Oregon. *Id*, ¶ 21. They expressed concerns for safety because this stretch of highway did not include a center refuge lane for turns. *Id*. This ultimately led to the Wildwood-Wemme project. In August 2006, the FHWA and ODOT released a draft environmental assessment ("EA") regarding the project. *Id*, ¶ 23. The FHWA and ODOT selected as the "preferred alternative" the "widen to the north" alternative which would destroy the rock cluster/burial cairn, possibly damage the Barlow Road stone toll-booth, and impact a "third priority" segment of Barlow Road. *Id*. It also required significant tree removal and other harmful landscape changes to areas within and adjacent to the A. J. Dwyer Scenic Area that the CGS believes contain other segments of the Barlow Road and that the Native American plaintiffs identify as traditional cultural property. *Id*.

The draft EA also included an archaeological report which was not disclosed to the public. *Id*, ¶ 24. This report made no reference to the possible toll-booth and failed to locate the rock cluster discovered during the 1980s project. *Id*. None of the individual or tribal Native American plaintiffs were included in any notices associated with the EA, and none of the defendants ever consulted with any of the Native American plaintiffs concerning the significance of the

rock cluster or other potential cultural resources located within the project area. *Id*, ¶¶ 24, 25. It also did not address any of the resources in the project area as § 4(f) resources under the DTA, 49 U.S.C. § 303. *Id*, ¶ 27.

On February 8, 2007, after public hearings and public comment, the FHWA and ODOT circulated a revised environmental assessment ("REA") and finding of no significant impact ("FONSI") for the project. *Id*, ¶ 28. None of the Native American plaintiffs were sent a copy of the REA, FONSI, or the cover letter to these documents which indicated the time line for challenging the REA. *Id*.

On February 15, 2008, Logan and CGS requested a new review of the Project under § 106 of the NHPA. *Id*, ¶ 29. Logan also notified the FHWA that the rock cluster had recently been vandalized. *Id*. FHWA responded on February 26, 2008, that the § 106 review prepared with the EA was satisfactory. *Id.* Also in February 2008, Logan and CGS requested that the ACHP advise FHWA that an adequate § 106 review was necessary for the project. *Id*, ¶ 31. In April 2008, the ACHP advised FHWA that no further action was necessary because project construction had already commenced and no "federally recognized" Indian tribes had come forward to express concerns. *Id*.

On February 28, 2008, the BLM issued a permit for tree removal to ODOT without conducting any analysis under NEPA or the NHPA. *Id*, ¶ 32. In late March of 2008, contractors began cutting trees including old-growth Douglas Fir within and adjacent to the A. J. Dwyer Scenic Area, within the project area. *Id.* This operation was substantially complete by the end of March 2008. *Id.*

On April 8, 2008, the FHWA published its Notice of Final Agency Actions regarding the project. *Id*, ¶ 34. That same month, Slockish and Jackson each sent a memo to ODOT, the FHWA, and the ACHP discussing the status of the A. J. Dwyer Scenic Area as a traditional cultural property to them and their people and the existence of burial grounds within the project area. *Id*, ¶ 36.

On June 20, 2008, CGS filed two Notices of Intent to Appeal in the Oregon Land Use Board of Appeals ("LUBA"). One appeal was based upon ODOT's failure to seek review of the Project related to impacts on the Barlow Road. *Id*, ¶ 38. The other appeal was based on the failure of the Oregon Department of Environmental Quality to comply with Oregon's land use statute in permitting ODOT to undertake clearance, grading, and construction activities pursuant to an NPDES 1200-CA erosion and sediment control permit. *Id*, ¶ 39. LUBA dismissed both appeals on August 20, 2008. *Id*, ¶¶ 38-39. The Court of Appeals affirmed LUBA's final opinion and order on November 26, 2008. *Id*, ¶ 39.

On July 7, 2008, Slockish, Jackson, and Logan filed a Notice of Intent to Appeal with LUBA based upon a claim that ODOT failed to comply with Oregon's land use statutes. *Id*, ¶ 40. LUBA dismissed this appeal on December 29, 2008. *Id.*

Plaintiffs commenced this action on October 6, 2008.

III. Claims

A. NHPA Claims

The First through Third and Sixth through Eighth Claims allege violations of the NHPA. The NHPA contains "a series of measures designed to encourage preservation of sites and structures of historic, architectural, or cultural significance." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 107 n1 (1978). It establishes a National Register of Historic Places ("National Register") and procedures for placing sites and structures on the listing. 16 U.S.C. § 470a. Section 106, codified at 16 U.S.C. § 470f, requires federal agencies to "take into account the effect of any undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register" prior to expending federal funds on or issuing any federal license for the project. The § 106 review process consists of (1) identifying the resource that is eligible for listing on the National Register that would be affected by the federal undertaking; (2) determining if the effect could be adverse; and (3) if so, consulting with the State Historic Preservation Officer ("SHPO")[4] and other appropriate parties to develop alternatives to mitigate any adverse effects on the historic properties. *Tyler v. Cuomo*, 236 F.3d 1124, 1128-29 (9th Cir 2000), citing 36 C.F.R. §§ 800.4(b) & (c) & 800.5(e); *see also* 36 C.F.R. §§ 800.2 (parties to the § 106 process) & 800.3 (initiation of the § 106

[4] The SHPO is a state official designated to assist federal agencies with their duties under the NHPA on projects in that state, and is involved in the § 106 consultation process. 16 U.S.C. 470a(b) & (c).

process).[5] A federal agency must ensure that the employees or contractors conducting this review meet professional standards established by regulation. 16 U.S.C. § 470h-4; 36 C.F.R. § 800.2(a)(1).

The NHPA affords specific protection to the properties of "Indian tribes" and requires the Secretary of the Interior to "establish a program and promulgate regulations to assist Indian tribes in preserving their particular historic properties." 16 U.S.C. § 470a(d)(1)(A). Once identified, these properties may be eligible for inclusion on the National Register and fall within the protection of § 106. 16 U.S.C. § 470a(d)(6)(A)-(B). The NHPA's implementing regulations require federal agencies to consult with Indian tribes about the effects of federal undertakings on historic properties of religious or cultural significance to those tribes. *See* 36 C.F.R. §§ 800.2(c)(2) & 800.4(c)(1). Consultation with Indian tribes must occur even if the proposed project will take place on non-Indian lands. 16 U.S.C. § 470a(d)(6); 36 C.F.R. § 800.2(c)(2)(ii); *see Muckleshoot Indian Tribe v. United States Forest Serv.*, 177 F.3d 800, 806 (9th Cir 1999) (*per curiam*). The federal agency proposing a project subject to the NHPA must "make a reasonable and good faith effort to identify Indian tribes" to be consulted, 36 C.F.R. § 800.2(c)(2)(ii)(A), and consultation must be "initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking." 36 C.F.R. §

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[5] All citations are to the regulations in effect at the time the FHWA issued its Notice of Final Agency Action.

800.1(c).

The NHPA established the ACHP to advise federal, state, and local agencies in carrying out their various duties under the act. 16 U.S.C. §§ 470i-j. Some of its duties include advising the President and Congress on matters relating to historic preservation, advising State and local governments as to guidelines for drafting legislation relating to historic preservation, and reviewing the policies and programs of federal agencies and recommending to those agencies methods to bring those policies and programs into greater alignment with the policies and programs created by the NHPA. 16 U.S.C. § 470j(1), (4) & (6). A federal agency undertaking an action implicating the NHPA must give the ACHP an opportunity to comment on the action. 16 U.S.C. § 470f; 36 C.F.R. § 800.9. The ACHP also plays a role in resolving disputes that may arise during the § 106 review process. *See* 36 C.F.R. §§ 800.4(d)(1) & 800.5(c).

The First Claim alleges that the FHWA and Garrett violated § 106 of the NHPA by failing to consult with the Klickitat and Cascade Tribes to identify traditional cultural properties located in the project area and by failing to take into account the effects of the project on these properties. The Second and Third Claims allege that the FHWA and Garrett violated § 106 of the NHPA by failing to ensure that the archaeologist who examined the project area met relevant professional standards. As a result, defendants failed to identify resources eligible for inclusion on the National Register, including the burial cairn and potential Barlow Road stone toll-booth, and failed to properly consult with plaintiffs. The Sixth Claim alleges that the ACHP also violated

§ 106 of the NHPA by failing in its duty to advise FHWA and Garrett on the necessity of consultation with the Native American plaintiffs as to whether the project area would affect traditional cultural resources. Finally, the Seventh and Eighth Claims allege that the BLM violated § 106 of the NHPA by issuing the FHWA and ODOT a permit to cut trees located on BLM-owned land and by approving a grant of right-of-way without engaging in the required consultation and impact analysis.

B. NEPA Claims

NEPA and its implementing regulations require federal agencies to file an EIS before undertaking "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C); *see* 40 C.F.R. §§ 1500.1-1508.25. An agency that believes its action is not a "major Federal action," and therefore does not require the preparation of a full EIS, may prepare a more limited environmental review, or EA, to determine whether the full EIS is necessary. 40 C.F.R. § 1501.4(b) & (c). If the proposed action "will not have a significant effect on the human environment," the agency may issue a FONSI and need not complete an EIS. 40 C.F.R. § 1508.13. NEPA is purely a procedural statute: "[it] does not mandate particular results but simply provides the necessary process to ensure that federal agencies take a hard look at the environmental consequences of their actions." *Muckleshoot Indian Tribe*, 177 F.3d at 814, quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (internal quotation marks omitted).

The Fourth Claim alleges that the FHWA and Garrett violated NEPA in numerous ways, including

failing to prepare a full EIS, consult with the Native American plaintiffs, or identify property protected by the NHPA. In addition, the Seventh and Eighth Claims allege that the BLM violated NEPA by granting the right-of-way and tree-removal permits without preparing an EIS.

C. DTA Claim

Pursuant to § 4(f) of the DTA, "[i]t is the policy of the United States Government that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands . . . and historic sites." 49 U.S.C. § 303(a). Whereas the NHPA and NEPA impose only procedural requirements on federal projects, § 4(f) imposes a "substantive mandate." *N. Idaho Cmty. Action Network v. United States Dep't of Transp.*, 545 F.3d 1147, 1158 (9th Cir 2008) ("*North Idaho*"). Section 4(f) dictates that a federal transportation project "requiring the use of publicly owned land of . . . an historic site of national, State, or local significance" may be approved only if: "(1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the . . . historic site resulting from the use." 49 U.S.C. § 303(c); *see North Idaho*, 545 F.3d at 1158.

The Fifth Claim alleges that the FHWA and Garrett violated § 4(f) by failing to identify § 4(f) resources and by failing to minimize the project's impact on these resources.

D. APA Claim

The Administrative Procedures Act ("APA") permits this court to "hold unlawful and set aside

agency action, findings, and conclusions" which are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The court's review under the APA is limited to "final agency actions." 5 U.S.C. §§ 702, 704.

The Ninth Claim alleges that the agencies' final actions of adopting the EA, REA, and FONSI in violation of the provisions of law discussed above must be set aside. Although couched as a separate claim, the APA actually serves as the basis for this court's jurisdiction and delimits the scope of this court's review of the challenged actions. See *North Idaho*, 545 F.3d at 1152 (noting that "the [APA] provides authority for the court's review of decisions under NEPA and Section 4(f) of the [DTA]"); *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 109899 (9th Cir 2005) (holding that § 106 of the NHPA does not create a private right of action and, therefore, review is available only under the APA); *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1065 (9th Cir 2002) ("*Cuddy Mountain*") (review of court decisions under NEPA is governed by the APA).

IV. Relief Sought

Plaintiffs seek damages and the following declaratory and injunctive relief:

(1) a declaration that defendants have violated the NHPA, NEPA, and § 4(f) in carryingout the project; and

(2) a preliminary and permanent injunction voiding the Wildwood-Wemme project EA,

REA, and FONSI, and ordering these be redone in compliance with the law; and

(3) a permanent injunction requiring defendants to:

(a) consult with plaintiffs concerning the traditional cultural properties located inthe project area;

(b) comply with the NHPA including entering into Memorandum of Agreement ("MOA") with plaintiffs;

(c) undertake appropriate remedial measures to address the damage to thetraditional cultural property located within the project area; and

(d) undertake an archaeological survey to properly identify the possible stone tollbooth;

FAC, pp. 27-29.

Plaintiffs also seek to recover their costs, attorney fees and any other just and equitable relief.

FINDINGS

I. Subject-Matter Jurisdiction

A. Mootness

1. Legal Standards

A federal court lacks jurisdiction "to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992) (citations omitted). A moot case is one which has "lost its character as a present, live controversy of the kind that must exist if [the court is] to avoid advisory opinions on abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48 (1969); *see also H.C. ex rel. Gordon v. Koppel*, 203 F.3d 610, 612 (9th Cir 2000)

("A case is moot where the issues before the court no longer present a live controversy or the parties lack a cognizable interest in the outcome of the suit."), citing *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). "Mootness can be characterized as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'" *Cook Inlet Treaty Tribes v. Shalala*, 166 F.3d 986, 989 (9th Cir 1999), quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980).

When a case is challenged as moot, "'the question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be *any* effective relief.'" *Nw. Envt'l. Def. Ctr. v. Gordon* ("*NEDF*"), 849 F.2d 1241, 1244-45 (9th Cir 1988), quoting *Garcia v. Lawn*, 805 F.2d 1400, 1403 (9th Cir 1986) (emphasis in *NEDF*); *see also Sierra Club v. United States Forest Serv.*, 93 F.3d 610, 614 (9th Cir 1996) ("An action is moot if the court cannot grant any effective relief.") (quotation marks, citation omitted). The Ninth Circuit has emphasized that "courts of equity have broad discretion in shaping remedies." *Garcia*, 805 F.2d at 1403. Accordingly, the burden of demonstrating mootness is a "heavy one" and is born by the party claiming the case is moot. *NEDF*, 849 F.2d at 1244.

2. Analysis

Defendants assert that this case is moot because the Wildwood-Wemme project is substantially complete, and all of the remaining tasks are limited to areas already impacted by the project. According to the ODOT manager responsible for oversight of the

design, development, and construction of the Wildwood-Wemme project, "only a small amount of work remains to be completed on the Project and all work that could have impacted any of the alleged cultural resources mentioned in [the FAC] was completed by early November 2008." Watanabe Decl. (docket #28-3), ¶ 3. The remaining tasks were to be completed by the end of July 2009 and would occur only within the already disturbed right-of-way of the project with no further impact any of the cultural resources identified in the FAC. *Id*, ¶¶ 4-8. Despite the project's completion, plaintiffs assert that this case still retains its character as a present, live controversy because the court is empowered to provide additional forms of relief.

The Ninth Circuit has addressed the issue of mootness due to completion of a project numerous times. In *Columbia Basin Land Protection Assoc. v. Schlesinger*, 643 F.2d 585 (9th Cir 1981), the plaintiffs sued to enjoin the construction of a 500-kilovolt power transmission line across their lands, raising both substantive and procedural challenges to the project. By the time of the appeal, all 191 towers required for the line had been built and the line was operational. Nevertheless, the court concluded that the case was not moot because it could still grant effective relief to plaintiffs. "The building of the towers has not made the case hypothetical or abstract – the towers still cross the fields of the Landowners, continually obstructing their irrigation systems – and this Court has the power to decide if they may stay or if they may have to be removed." *Id.* at 591 n1 (citations omitted). The court further observed that if a project's completion was sufficient to make the case moot, a federal agency "could merely ignore the requirements

of NEPA, build its structures before a case gets to court, and then hide behind the mootness doctrine." *Id*. The court found that possibility "unacceptable." *Id*.

Many decisions by the Ninth Circuit since *Columbia Basin* also have held that the completion of a project was insufficient to moot a challenge to that project. *See Cuddy Mountain*, 303 F.3d at 1065-66; *Cantrell v. City of Long Beach*, 241 F.3d 674, 678-79 (9th Cir 2001); *Tyler*, 236 F.3d at 1137; *West v. Sec'y of the Dep't of Transp.*, 206 F.3d 920, 925 (9th Cir 2000); *NEDF*, 849 F.2d at 1245. *NEDF, Cantrell*, and *West* are particularly instructive.

In *NEDF*, environmentalists sued several federal agencies over management procedures for the 1986 salmon fishing season. The district court dismissed the case as moot because the 1986 season had concluded. The Ninth Circuit reversed because possible remedies remained. Specifically, the court could order the 1989 management plan to allow more spawning because the salmon allegedly over-fished in 1986 would return to spawn in 1989. Allowing more spawning in 1989 would assure the preservation genetic characteristics of the salmon that spawned in 1986. "In a case such as this, where the violation complained of may have caused *continuing harm* and where the court can still act to remedy such harm by limiting its future adverse effects, the parties clearly retain a legally cognizable interest in the outcome." *NEDF*, 849 F.2d at 1245 (emphasis added). It did not matter that the plaintiffs had not specifically asked for injunctive relief as to the 1989 season because their request for "such other equitable relief as [the court] deemed necessary 'to repair any damages

incurred'" was broad enough to include such a remedy. *Id*.

Cantrell concerned a joint reuse plan by the Navy and State of California to lease a former naval base to a company for conversion into a marine container terminal. The navy base contained buildings listed on the National Register and habitat for several protected species of birds. The plaintiffs challenged the reuse plan as violating state law and NEPA. The district court found the plaintiffs lacked standing, After the plaintiffs appealed, the historic buildings and bird habitats were destroyed. Defendants argued the case was therefore moot. The Ninth Circuit disagreed, concluding that the destruction of the specific buildings and habitat did not leave the plaintiffs without a remedy. Instead, if the defendants were ordered to "undertake additional environmental review," it was possible that "defendants could consider alternatives to the current reuse plan, and develop ways to mitigate the damage to the birds' habitat . . . ." *Cantrell*, 241 F.3d at 678-79. Because effective relief was possibly available, the destruction of the station and habitat was "insufficient to render the case moot." *Id.* at 679.

In *West*, the plaintiffs challenged a two-stage highway interchange construction project, claiming that the FHWA violated NEPA by determining that the project satisfied a categorical exclusion from NEPA. They sought a declaration that the project was not excluded and an injunction against further work on the project until a valid EIS was completed. During the pendency of the litigation, Stage 1 of the project was completed and the interchange was opened to traffic. As a result, the defendants argued that the

case was moot. The Ninth Circuit rejected that argument, both because Stage 2 was not yet completed and because the court had "remedial powers" to remand the case for additional environmental review and even to order the interchange closed or taken down. *West*, 206 F.3d at 925.

"The common thread in these cases" is the existence of a "continuing harm" after the completion of the project where "the court can still act to remedy such harm by limiting its future adverse effects." *Feldman v. Bowmar*, 518 F.3d 637, 643 (9th Cir 2008), quoting *NEDC*, 849 F.2d at 1245. The converse is demonstrated in *Feldman* where the lack of continuing harm rendered a legal challenge moot. In *Feldman*, animal rights activists challenged a plan implemented by the National Park Service ("NPS") to eradicate a non-native feral pig population that was damaging the ecological and archaeological resources on Santa Cruz Island. Under the plan, the agency chose to hire professional hunters to kill the pigs. The activists wanted NPS to choose non-lethal methods of removal. They activists lost on the merits at the district court. Before the appeal could be heard, the NPS eliminated the entire pig population. The Ninth Circuit held that the case was moot because the court could give the activists no remedy now that all the pigs were dead. Unlike the other cases, there was no secondary, continuing injury that the court could alleviate. The only injury occurred when the pigs were shot; that injury was fully in the past, and plaintiffs could not demonstrate "a remediable harm that effects [*sic*] their 'existing interests.'" *Id.* at 644.

Similarly, in *Sierra Club v. Penfold*, 857 F.2d 1307, 1318 (9th Cir 1988), the court held a challenge

to certain mining actions was moot where the mining had been completed. Citing *Columbia Basin*, the court found that "unlike a power transmission line, a completed mining operation cannot be moved." *Id*. The impacts of the mines were "not remediable" because the court could not order the mines be "unmined." *Id*.

In view of these cases, the simple fact that the Wildwood-Wemme project is complete does not render this case moot. Instead, the issue is whether that completed project causes continuing harm to plaintiffs' existing interest that can be redressed through equitable relief available under the APA.

According to defendants, the damage to plaintiffs' interests in the burial cairn, possible stone toll-booth, trees, and any other cultural or historical resources cannot be undone. Even if this court were to set aside the entire project and order defendants to restore U.S. Highway 26 to its pre-project dimensions, the damage to those resources would remain unabated.

Plaintiffs disagree. First, they argue that a legally sufficient NEPA and NHPA review, including consultations with plaintiffs, would document the precise character of the project as Native American traditional cultural property. They maintain that U.S. Highway 26 in the area of the project crosses portion of the Oregon Trail which followed trails used by Native Americans. Similarly, appropriate consultation with plaintiffs would reveal the precise character of the Barlow Road segments crossed by U.S. Highway 26 in the project area. Plaintiffs propose that remediation for these harms could include a revised landscaping plan that uses

landscaping and interpretive markers to delineate these historic trails within the right-of-way owned by ODOT.

In addition, plaintiffs argue that appropriate consultation under the NHPA could reveal that the rock pile was in fact a burial cairn signifying that other unmarked Native American graves are in the area. Even though it is now destroyed, defendants could agree to place a commemorative monument or other structure in its place. Similarly, adequate consultation could demonstrate plaintiffs are correct about the stone toll-booth from the Barlow Road which defendants could choose to restore or, alternatively, could provide interpretive signage discussing the road.

Finally, as in *Schlessinger* and *Gordon*, plaintiffs point out that they broadly seek any other relief that this court deems necessary and appropriate, allowing this court's "broad discretion" to shape an equitable remedy.

The analysis must begin by assuming, as alleged in the FAC, that defendants have violated the NHPA, NEPA, and § 4(f) by failing to consult with plaintiffs on the project, by failing to identify the cultural and historical resources or attempt to mitigate the impact the project had on them, and by completing an inadequate environmental review. This court also must assume that the cultural and historical resources identified by plaintiffs exist and that the project has had an adverse impact upon them. *See Nulankeyutmonen Nkihtaqmikon v. Impson*, 503 F.3d 18, 26 (1st Cir 2007) (beginning jurisdictional analysis with assumption that agency's actions violated federal obligations). Based on these assumptions, this court

has the power to grant plaintiffs some remedy. That remedy includes enjoining further work on the project, as well as ordering removal of the offending portions of U.S. Highway 26. The court also could order defendants to complete a new NEPA § 106 review and include consultation with at least some defendants. After this additional review, defendants may not reach the same conclusion or may be able to alleviate some of plaintiffs' injuries, for instance, by creating markers or monuments to designate and honor the now lost cultural and historical resources and those that still remain.

Contrary to defendants' assertions, plaintiffs do allege a continuing harm. The expanded portions of U.S. Highway 26 still cross alleged cultural and historical property, possibly including an Native American burial site and portions of the historic Barlow Road. Ground that was once undisturbed has been paved over. While the specific markers plaintiffs allege were located in the project area may have been destroyed, the cultural and historical assets they demarcated may still remain. This case is unlike *Feldman* where the only interest the animal rights activities possessed was in the method used to kill the feral pigs. That interest was extinguished at the same time the pigs were exterminated. Here, as in *Gordon, Cantrell*, and *West*, something of interest to plaintiffs remains despite defendants' destruction of the cairn and toll-booth, such that this court retains the power to provide some remedy.

Defendants also argue that much of plaintiffs' suggested relief is beyond the scope of this court's authority under § 706(2)(A) of the APA to "hold unlawful and set aside agency actions." Much of the

affirmative injunctive relief suggested by plaintiffs would only be available under § 706(1) of the APA which allows the court to "compel agency action unlawfully withheld or unreasonably delayed." But in order to proceed under this provision, plaintiffs must establish that one of the defendant agencies "failed to take a discrete agency action that it [was] required to take." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004). Plaintiffs have not pointed to any provision in the NHPA, NEPA, or § 4(f) that would require the defendants to take such action as remedial landscaping or erection of interpretive signage or monuments.

This argument is well-taken but ultimately irrelevant. The court does have the power to order defendants to carry out additional review of the alleged cultural and historical resources in the project area in compliance with the NHPA, NEPA, and § 4(f). While defendants may ultimately come to the same decision, it is also possible that they could agree to some of plaintiffs' demands. That possibility of effective relief is all that is required to establish that this claim is not moot. *NEDF*, 849 F.2d at 1245.

The NHPA, NEPA, and § 4(f) are powerful legal mechanisms intended to assure that federal agencies analyze the impacts of their projects on the cultural, historical, and environmental resources of our nation. *See San Carlos Apache Tribe*, 417 F.3d at 1097 (observing that "what § 106 of NHPA does for sites of historical import, NEPA does for our natural environment"); *Apache Survival Coalition v. United States*, 21 F.3d 895, 906 (9th Cir 1994) (finding the NHPA and NEPA "closely related" as "[b]oth are 'stop, look, and listen' provisions . . . that are design[ed] to

ensure that Federal agencies take into account the effect of Federal or Federally-assisted programs") (internal and external citations omitted, brackets in original). These statutes allow interested and affected members of the public to provide input to assure that the agency has all the information needed to make an informed decision about a project's impacts prior to undertaking the project. These are key requirements in any federal project or undertaking which cannot casually be set aside. By failing to include key stakeholders in this process, defendants may have acted without information necessary for them to comply with their obligations under these provision. This court should not reward defendants' efficiency in completing the project by shielding them from their obligations under these provisions. Thus, defendants have failed to meet their burden to show that this case is moot.

B. Standing

1. Legal Standards

Even if this case presents a live, present controversy, someone must have standing to bring it. Federal courts have developed a number of rules to determine whether a plaintiff has a sufficient stake in a litigation to satisfy both constitutional and prudential limits on standing. "[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III" of the U.S. Constitution. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

To satisfy Article III standing requirements, a plaintiff must show that:

> (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc., 528 U.S. 167, 180-81 (2000).

"'To satisfy the injury in fact requirement, a plaintiff asserting a procedural injury must show that the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing.'" *Beeman v. TDI Managed Care Servs., Inc.*, 449 F.3d 1035, 1038 (9th Cir 2006), quoting *Citizens for Better Forestry v. USDA*, 341 F.3d 961, 969 (9th Cir 2003). "[E]nvironmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons 'for whom the aesthetic and recreational value of the area will be lessened' by the challenged activity." *Friends of the Earth*, 528 U.S. at 183, quoting *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). In alleging procedural harm, a sufficient "concrete interest" is established by alleging a "'geographic nexus' between the individual asserting the claim and the location suffering an environmental impact.'" *Ashley Creek Phosphate Co. v. Norton,* 420 F.3d 934, 938 (9th Cir 2005), quoting *Cantrell*, 241 F.3d at 679, *cert denied*, 548 U.S. 903 (2006). This nexus may be established by allegations and affidavits

showing that the plaintiff uses the area threatened by a proposed action. *Id.* at 939.

Because plaintiffs' alleged injuries are procedural in nature, the third prong of the standing test, redressability, is relaxed such that plaintiffs need not demonstrate that defendants would have reached a different decision upon additional review. Plaintiffs "need not demonstrate that the ultimate outcome following proper procedures will benefit them." *Cantrell*, 241 F.3d at 682. Instead, "[p]laintiffs alleging procedural injury . . . need to show only that the relief requested – that the agency follow the correct procedures – may influence the agency's ultimate decision of whether to take or refrain from taking a certain action." *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1226-27 (9th Cir 2008). However, as recently cautioned by the Supreme Court, "[o]nly a 'person who has been accorded a procedural right to protect *his concrete interests* can assert that right without meeting all the normal standards for redressability and immediacy.'" *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1151 (May 19, 2009), quoting *Lujan*, 504 U.S. at 572 n7 (emphasis in *Summers*).

Plaintiffs challenging an agency action under the APA must also meet the additional, prudential standing requirement of showing that their injury falls within the "zone of interest" the law in question was designed to protect. *Cantrell*, 241 F.3d at 679. Defendants do not dispute that plaintiffs have satisfied this prudential standing requirement.

An organization may have standing to assert claims on behalf of its members. To do so, it must show: "(a) its members would otherwise have standing

to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *see also Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir 2000). Thus, in order for the organization to be able to sue, at least some of its members must have suffered an injury as a result of the challenged conduct.

2. Analysis

Defendants challenge the standing of Slockish, Jackson, the Klickitat Tribe, and the Cascade Tribe to bring claims under the NHPA, NEPA, or §4(f) for failure to allege a sufficient concrete interest, or geographic nexus, to the project area. The court agrees. None of these plaintiffs assert that they, or any other members of the tribe, have visited, used, or ever plan on visiting or using the traditional cultural resources that allegedly have been impacted by the project. *See Ashley Creek*, 420 F.3d at 938 ("Plaintiffs who use the area threatened by a proposed action or who own land near the site of the proposed action have little difficulty establishing a concrete interests."); *Nulankeyutmonen Nkihtaqmikon*, 503 F.3d at 27-28 (finding that Native Americans who lived near and used the affected site for a variety of ceremonial and community purposes had established standing to challenge an action under NEPA and the NHPA).

Plaintiffs respond that the special nature of this property excuses them from the geographic nexus typically required in procedural injury claims. Because the property at issue is a "traditional cultural

property" of the tribes, they argue that any damage to the cultural resources on that property necessarily injures the individual members of that culture. This "cultural injury," they argue, is sufficient to establish constitutional standing. Plaintiffs cite no legal support for this astoundingly broad assertion of standing. If plaintiffs are correct, then any Native American plaintiff can establish standing to challenge a project governed by any of these statutes by simply asserting that the property involved constitutes a "traditional cultural property" they believe their ancestors have used in the past, irrespective of whether that Native American plaintiff ever plans on visiting or using the resource in question. This court is not aware of any case which countenances this expansive view of Native American standing.

Summers and other cases stand firmly against it. *See Lujan*, 504 U.S. at 564 (denying standing to plaintiffs who could show only speculative "'some day' intentions" to visit endangered species halfway around the world); *Sierra Club*, 405 U.S. at 735 (holding that an organization lacked standing where it failed to assert in its pleadings or affidavits that its members used the proposed project area "for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents"). As these cases demonstrate, Slockish, Jackson, and their tribes, cannot assert a concrete interest in a cultural resource they believe to exist but have never attempted to visit or view and have no immediate plans to visit in the near future.

Nevertheless, the court must still assess whether any party asserting the claims which would otherwise be defeated by these findings, has standing.

Defendants have not challenged the standing of Logan, the MHSLPA, or CGS. If any of these parties have standing to bring any of the claims that can be fairly read to assert a legal right they possess, that claim must survive even though the remaining plaintiffs lack standing. *Clinton v. City of New York*, 524 U.S. 417, 431 n19 (1998) (because some plaintiffs had standing it was unnecessary to consider whether the other plaintiffs also had standing), citing *Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *Village of Arlington Heights v. Metro. Housing Develop. Corp.*, 429 U.S. 252, 264 n9 (1977) (holding that where one plaintiff has standing "we need not consider whether the other individual and corporate plaintiffs have standing to maintain the suit"); *see also Nat'l Ass'n of Optometrist & Opticians LensCrafters, Inc. v. Brown*, 567 F.3d 521, 523 (9th Cir 2009) ("As a general rule, in an injunctive case this court need not address standing of each plaintiff if it concludes that one plaintiff has standing."), citing *Preminger v. Peake*, 552 F.3d 757, 764 (9th Cir 2008).

All three of these parties claim they use the Wildwood-Wemme project area for cultural, recreational, and aesthetic purposes. They also claim they have suffered injury by the damage done to the cultural, historical, and – in the case of CGS – natural resources located within the project area. These allegations are sufficient to establish standing by an individual. *See*, *e.g.*, *Montana Wilderness Ass'n v. Frye*, 310 F Supp2d 1127, 1150-51 (D Mont 2004) (finding that Native American who averred that he had personally visited sites of traditional cultural significance in the project area and would do so in the future had standing to sue under both constitutional and prudential requirements).

However, more is required for the MHSLPA and the CGS to establish standing. To assert standing, an organization must allege the factors identified by *Hunt*, including that one of its members has standing. Because Logan is a member of MHSLPA and is a party to this lawsuit, MHSLPA has standing under the organizational standing criteria. However, Logan is not a member of the CGS.

Alternatively, the CGS could assert standing on the basis that the organization itself has been injured. This would require the CGS to allege that defendants' actions caused a concrete injury to its activities and a consequent drain on its resources apart from this lawsuit. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982); *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (DC Cir 1990), *cert denied*, 498 U.S. 980 (1990), *and cert denied*, 498 U.S. 1046 (1991). The CGS makes no such allegation. Without proper allegations of organizational standing or injury to the organization itself, the CGS lacks standing to challenge the Wildwood-Wemme project.

Thus, only Logan and the MHSLPA allege sufficient facts to establish constitutional standing which also bring them within the prudential zone-of-interest requirement. *See Montana Wilderness Ass'n*, 310 F Supp2d at 1150-51. Because these plaintiffs have standing, this court has jurisdiction.

Although defendants have not challenged Logan's standing, in the context of challenging the other Native American plaintiffs' standing, they assert that none of the interests identified in the FAC (*e.g.*, burial cairn) are sufficiently concrete to serve as a sufficient interest to establish standing. This court disagrees. The fact that the precise natures of the burial cairn

and other alleged historical or cultural resources eligible for protection are uncertain, does not defeat plaintiffs' claims. The NHPA and its implementing regulations are intended not only to protect previously identified resources, but also to aid in the discovery of previously unknown or uncertain resources which are eligible for protection. *See* 36 C.F.R. § 800.4(b)(1) ("the agency official *shall* take the steps necessary to identify historic properties within the area of potential effects" including "make[ing] a reasonable good faith effort to carry out appropriate identification efforts.") (emphasis added). Indeed, one of the concerns motivating passage of the NHPA was that "historic properties significant to the Nation's heritage [were] being lost or substantially altered, often inadvertently . . . ." 16 U.S.C. § 470(3). A party who believes the agency's analysis was incomplete, resulting in the failure to identify and assess a historical or cultural resource in which she personally has a concrete interest, has standing to challenge that agency action even if the cultural resource at stake has not been clearly identified.

II. Legal Sufficiency of Claims

Even if this court has jurisdiction, defendants challenge the NHPA claims as failing to state a claim on which relief can be granted. In particular, they attack the First Claim alleging that the NHPA analysis was flawed because the FHWA and Garrett failed to consult with the tribes or Native American plaintiffs.[6] Defendants argue that they were under no

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[6] This challenge is necessarily limited to the First Claim brought against the FHWA and Garrett. The Second and Third

obligation to consult with the Klickitat or Cascade Tribes because they are not federally recognized tribes entitled to consultation under the NHPA. *See* 16 U.S.C. § 470w(4) (defining "Indian Tribe" or "tribe" as used in the NHPA as "an Indian Tribe, band, nation, or other organized group or community . . . which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians"); 36 C.F.R. § 800.16(m) (same); *Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs*, 53 Fed Reg, No. 250, p. 52829 (Dec. 19, 1988) (notice) (listing eligible tribes).

The Klickitat and Cascade Tribes do not sufficiently allege that they are federally recognized tribes. However, the First Claim incorporates all the proceeding paragraphs which include allegations pertaining to the other cultural resources and parties involved in this lawsuit. FAC, ¶ 41. Although not a model of clarity, the First Claim can be read as a claim brought not only by the tribes, but also by all plaintiffs, including Logan, who complain that the FHWA erred in leaving the Klickitat and Columbia Tribes out of the § 106 process.

Such a claim by a non-tribal member is not unprecedented. In *Montana Wilderness Ass'n*, a

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Claims allege that the FHWA and Garrett failed to employ a qualified archaeologist resulting in a failure to identify the cultural and historical resources in the project area. The Seventh, Eighth, and Ninth Claims allege that the ACHP and the BLM failed entirely in their duties under the NHPA. These other claims do not rest on any allegation of violating the NHPA by failing to consult with the tribes.

plaintiff alleged that the BLM's failure to consult several Indian tribes of which he was not a member violated the NHPA. The court held that the plaintiff had standing to assert that claim because he averred that his own Indian tribe had used the land and that he personally had visited sites of cultural significance in the area, and because the NHPA protects the right of "any member of the public who can demonstrate sufficient interest in the preservation of the historical lands at issue." *Id*, 310 F Supp2d at 1150-51.

Moreover, reading the FAC as a whole, the central grievance presented by the NHPA claims is defendants' inadequate § 106 analysis, resulting in their failure to identify the extant cultural and historical resources located within the project area. Although the FAC contains inartfully pled claims, and may even allege that defendants should have taken steps that they are not legally required to take (*i.e.*, consulting with the Klickitat and Cascade tribes), Logan has properly pled a claim under the NHPA.

The fact that the tribes and their respective chiefs lack standing is not fatal to these claims. Logan has sufficient standing to assert the various claims at issue, given the broad class of individuals protected by the NHPA's procedural requirements and the requirement that pleadings be construed broadly in favor of plaintiffs on motion to dismiss. *Thomas v. Mundell*, 572 F.3d 756, 760 (9th Cir 2009). At the pleading stage, the allegations by Logan are sufficient to survive a FRCP 12(b)(6) motion to dismiss, although additional amendment may be necessary to clarify the precise nature of the claim.

RECOMMENDATION

Defendants' motion to dismiss (docket #28) should be GRANTED in part without prejudice as to the Tenth, Eleventh, and Twelfth Claims and as to plaintiffs Slockish, Jackson, the Klickitat Tribe, and the Cascade Tribe.

SCHEDULING ORDER

The Findings and Recommendation will be referred to a district judge. Objections, if any, are due November 16, 2009. If no objections are filed, then the Findings and

Recommendation will go under advisement on that date. If objections are filed, then a response is due within 10 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will go under advisement.

DATED this 27th day of October, 2009.

/s/ Janice M. Stewart
Janice M. Stewart
United States Magistrate Judge

Filed May 6, 2022
Molly C. Dwyer, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILBUR SLOCKISH, Hereditary Chief of the Klickitat/Cascade Tribe; CAROL LOGAN, a resident of Oregon, and an enrolled member of the Confederated Tribes of the Grand Ronde; CASCADE GEOGRAPHIC SOCIETY, an Oregon nonprofit corporation; MOUNT HOOD SACRED LANDS PRESERVATION ALLIANCE, an unincorporated nonprofit association,

Plaintiffs-Appellants,

v.

U.S. DEPARTMENT OF TRANSPORTATION; FEDERAL HIGHWAY ADMINISTRATION, an Agency of the Federal Government; U.S. DEPARTMENT OF THE

No. 21-35220

D.C. No. 3:08-cv-01169-YY
District of Oregon, Portland

ORDER

INTERIOR; BUREAU OF LAND MANAGEMENT, an Agency of the Federal Government; ADVISORY COUNCIL ON HISTORIC PRESERVATION, an Agency of the Federal Government,

Defendants-Appellees.

Before: SCHROEDER, W. FLETCHER, and MILLER, Circuit Judges.

Appellants' motion for leave to supplement the record on appeal (Dkt. No. 74), filed on February 9, 2022, is DENIED.

Appellants' motion for leave to file a reply in support of petition for rehearing and rehearing en banc (Dkt. No. 93), filed on April 18, 2022, is GRANTED. The Clerk is directed to file the reply.

Appellees' conditional cross-motion for leave to file a second brief in opposition to petition for rehearing (Dkt. No. 94), filed on April 29, 2022, is DENIED as moot.

Appellants filed a petition for panel rehearing and rehearing en banc (Dkt. No. 75) on February 9, 2022. The panel voted to deny the petition for panel rehearing. Judge Miller

voted to deny the petition for rehearing en banc, and Judges Schroeder and W. Fletcher so recommended.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter an banc. Fed. R. App. P. 35(b).

The petition for panel rehearing and rehearing en banc is DENIED.

42 U.S.C. 2000bb provides:

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. 2000bb-1 provides:

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C. 2000bb-2 provides:

§ 2000bb-2. Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

42 U.S.C. 2000bb-3 provides:

§ 2000bb-3. Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

42 U.S.C. 2000bb-4 provides:

§ 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

ODOT
File 7349002
Clackamas County Official Records
Sherry Hall, County Clerk
08/04/2008

HIGHWAY EASEMENT DEED

THIS DEED, made this 28th day of July, 2008, by and between the **UNITED STATES OF AMERICA**, acting by and through the **DEPARTMENT OF TRANSPORTATION**, Federal Highway Administration, hereinafter referred to as "Department", and the **STATE OF OREGON**, by and through its **DEPARTMENT OF TRANSPORTATION**, hereinafter referred to as "Grantee":

WITNESSETH:

WHEREAS, the Grantee has tiled application under the provisions of the Act of Congress of August 27, 1958, as amended (23 U.S.C. Section 317), for the right-of-way of a highway over certain Federal land under the jurisdiction of the Department of the Interior - Bureau of Land Management, in the State of Oregon, which land has been appropriated by the Department; and,

WHEREAS, the Federal Highway Administrator, pursuant to delegation of authority from the Secretary of Transportation, has determined that an easement over the land covered by the application is reasonably necessary for a right-of-way for the Mt. Hood Highway; and,

WHEREAS, the Department of the Interior, acting by and through the Bureau of Land Management, in

its consent to the appropriation of the Federal land, has agreed to the transfer by the Department of an easement over the land to Grantee.

NOW THEREFORE, the Department, as authorized by law, and in compliance with all requirements imposed by or pursuant to Title 49 CFR, Department of Transportation, Subtitle A, Office of Secretary, Part 21, nondiscrimination in federally-assisted programs of the Department of Transportation (49 CFR 21.2 - 21.23) pertaining to and effectuating the provisions of Title VI of the Civil Rights Act of 1964 (78 Stat. 252; 42 U.S.C. 2000d to 2000d-4), does hereby grant to the Grantee an easement for a right-of-way, for the construction, operation and maintenance of a highway and use of the space above and below the established grade line of the highway pavement for highway purposes on, over, across, in, and upon the following described Federal land within the County of Clackamas, State of Oregon as shown on three (3) sheets of right-of-way plats, dated October 18, 2007, marked Exhibit A, attached hereto and made a part hereof, subject, however, to the following terms and conditions:

1) This easement is subject to outstanding valid claims, if any, existing on the date of the execution of this deed by the Department, and the Grantee shall obtain such permission as may be necessary on account of any such claims.

2) Construction of the highway facility is to be undertaken by the Grantee in compliance with the Act entitled "An Act for the Preservation of American antiquities" approved June 8, 1906 (34 Stat. 225, 16 U.S.C. 432-433), and State laws where applicable.

3) This easement granted herein shall terminate ten (10) years from the date of the execution of this deed by the Department in the event construction of a highway on the right of way is not started during such ten (10) year period.

4) The easement herein granted is limited to use of the described right-of-way and the space above and below the established grade line of the highway pavement for the purpose of construction, operation, and maintenance of a highway, and does not include the grant of any rights for non-highway purposes or facilities: Provided, that the right of the Bureau of Land Management to use or authorize the use of any portion of the right-of-way for non-highway purposes shall not be exercised when such use would be inconsistent with the provisions of Title 23 of the United States Code and of the Federal Highway Administration regulations issued pursuant thereto or would interfere with the free flow of traffic or impair the full use and safety of the highway, and, in any case, the Grantee and the Federal Highway Administration shall be consulted prior to the exercise of such rights; and Provided further, that nothing herein shall preclude the Bureau of Land Management from locating Department of the Interior information signs on the portions of the right-of-way outside of construction clearing limits.

5) The design and reconstruction of the highway project situated on this right-of-way will be in accord with the provisions of Title 23, United States Code – Highways, and amendments; the

provisions of the Federal-Aid Highway Program Manual issued by the Federal Highway Administration; the construction specifications of the State highway department as approved by the Federal Highway Administration for use on Federal-aid project.

6) Consistent with highway safety standards, the Grantee shall:

   a) Protect and preserve soil and vegetative cover and scenic aesthetic values on the right-of-way outside of construction limits.

   b) Provide for the prevention and control of soil erosion within the right-of-way and adjacent lands that might be affected by the constructions, operation, or maintenance of the highway, and shall vegetate and keep vegetated with suitable species, all earth cut or fill slopes feasible for revegetation or other areas on which ground cover is destroyed. The Grantee shall maintain all terracing, water bars, lead-off ditches, or other preventive works that may be required to accomplish this objective. This provision shall also apply to slopes that are reshaped following slides which occur during or after construction.

   c) Identify and mitigate dangers to workers from danger trees to be left standing within the right-of-way and occupied areas outside the right-of-way in accord with provisions of the Field Guide for Danger Tree Identification and Response, issued by U.S. Department of Agriculture – Forest Service

and the U.S. Department of the Interior – Bureau of Land Management.

7) The Grantee shall establish no borrow, sand, or gravel pits, stone quarry, or permanent storage areas, sites for highway operation and maintenance facilities, camps, supply depot or disposal areas within the right-of-way unless shown on approved construction plans without first obtaining approval.

8) The Grantee shall maintain the right-of-way and highway facilities to acceptable standards of repair, orderliness, neatness, sanitation, and safety.

9) The Grantee shall maintain the right-of-way clearing by means of chemicals only after written and/or verbal approval has been given by the Department after consultation with the Bureau of Land Management. Application for such approval may be in writing and specify the time, methods, chemicals, and the exact portion of the right-of-way to be chemically treated.

10) When the need for the easement herein granted shall no longer exist and the area has been reasonably rehabilitated to protect the public and environment, the Grantee shall give notice of that fact to the Secretary of Transportation and the rights herein granted shall terminate and land shall immediately revert to the full control of the Secretary of the Department of the Interior or assigns.

11) In the event of a reversion, the Grantee shall be responsible for the protection and maintenance of the easement of right of way until such time as the Grantee executes and records a quitclaim deed documenting the termination of the easement and the revesting of title in the United States of America

12) The Grantee, in consideration of the grant of this easement, does hereby covenant and agree as a covenant running with the land for itself, its successors and assigns that

(a) No person shall, on the grounds of race, color, sex, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination with regard to any facility located wholly or in part on, over, or under such lands hereby conveyed.

(b) The GRANTEE shall use said easement and right-of-way so conveyed, in compliance with all requirements imposed by or pursuant to Title 49, Code of Federal Regulations, Department of Transportation, Subtitle A, Office of the Secretary, Part 21. Nondiscrimination in Federally- assisted programs of the Department of Transportation, effectuation of Title VI of the Civil Rights Act of 1964, and as said Regulations may be amended.

In the event of breach of any of the above-mentioned nondiscrimination conditions, the Department shall have the right to re-enter said right of way and any facilities thereon and the above-described land and facilities shall thereupon revert to and vest in and become the absolute property of the Department of Transportation and its successors and assigns, as such interest existed prior to this instrument.

IN WITNESS WHEREOF, I, Phillip A. Ditzler, Division Administrator, pursuant to delegations of authority from the Secretary of Transportation and the Federal Highway Administrator, by virtue of authority in me vested by law, have hereunto subscribed my name as of the day and year first above written.

UNITED STATES OF AMERICA DEPARTMENT OF TRANSPORTATION FEDERAL HIGHWAY ADMINISTRATION

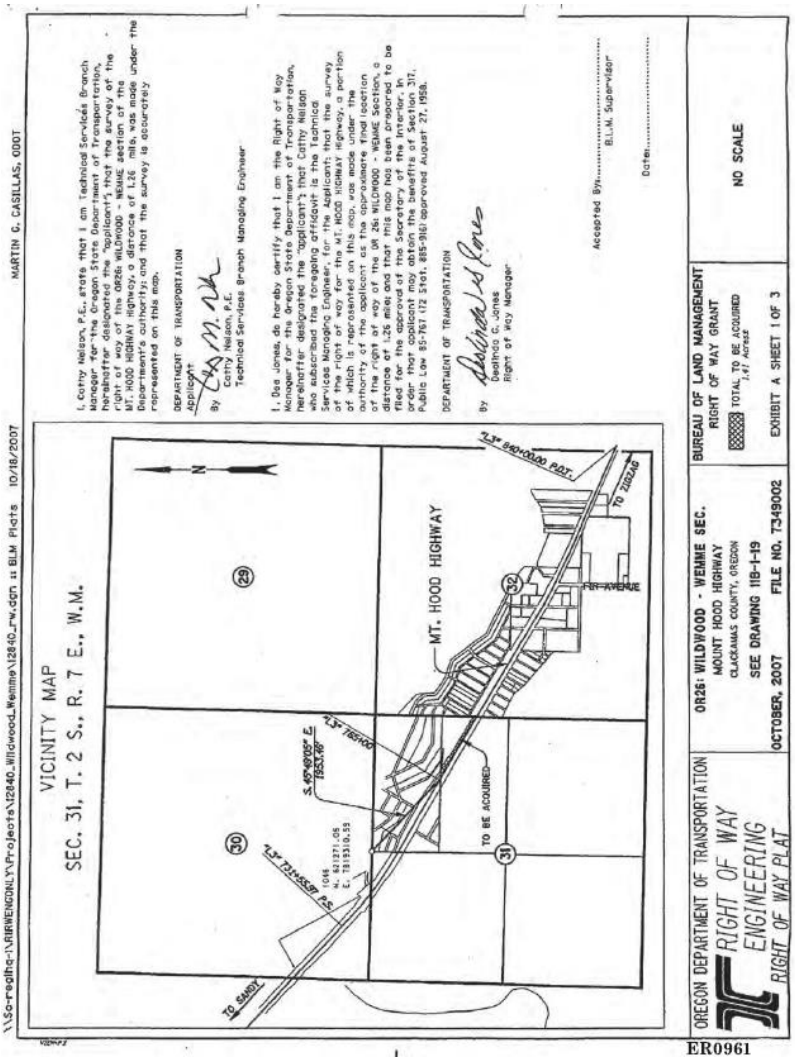
By: /s/ Phillip A. Ditzler
Phillip A. Ditzler, Division Administrator

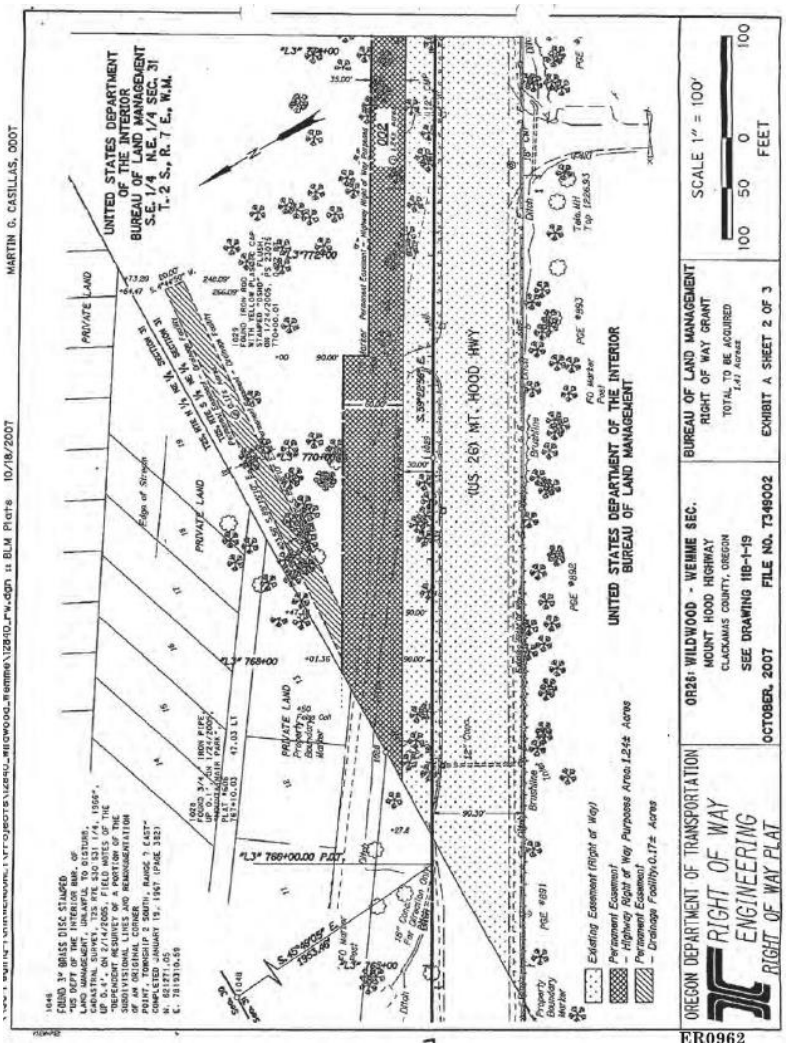
* * *

In compliance with the conditions set forth in the foregoing deed, the Grantee certifies, and by the acceptance of this deed, accepts the right-of-way over certain land herein described and agrees for itself, its successors and assigns, forever to abide by the conditions set forth in said deed.

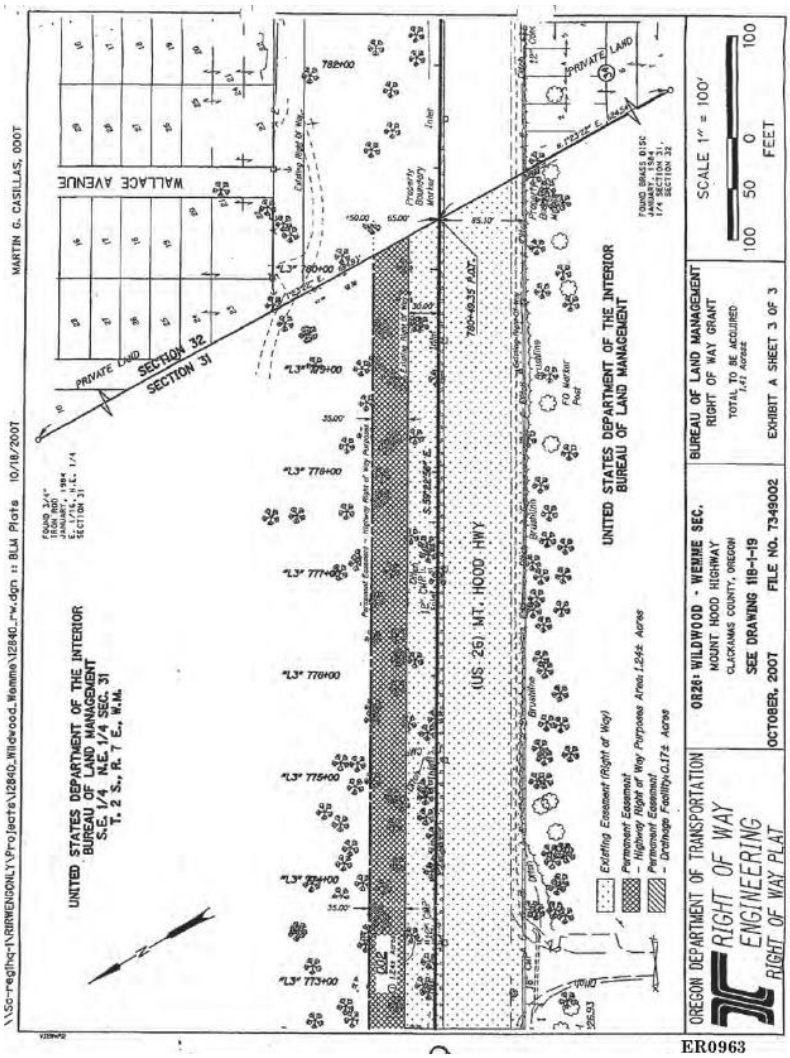
By: /s/ Deolinda G. Jones
Deolinda G. Jones,
State Right of Way Manager

* * *




UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
S.E. 1/4 N.E. 1/4 SEC. 31
T. 2 S., R. 7 E., W.M.
US 26 MT. HOOD HWY
PRIVATE LAND
Edge of Stream
Existing Easement (Right of Way)
Permanent Easement
- Highway Right of Way Purposes Area 1.24± Acres
Permanent Easement
- Drainage Facility 0.17± Acres
UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
OREGON DEPARTMENT OF TRANSPORTATION
RIGHT OF WAY
ENGINEERING
RIGHT OF WAY PLAT
OR26: WILDWOOD - WEMME SEC.
MOUNT HOOD HIGHWAY
CLACKAMAS COUNTY, OREGON
SEE DRAWING 11B-1-19
OCTOBER, 2007
FILE NO. 7349002
BUREAU OF LAND MANAGEMENT
RIGHT OF WAY GRANT
TOTAL TO BE ACQUIRED
1.41 Acres
EXHIBIT A SHEET 2 OF 3
SCALE 1" = 100'
100 50 0 100
FEET

ER0962


OREGON DEPARTMENT OF TRANSPORTATION
RIGHT OF WAY
ENGINEERING
RIGHT OF WAY PLAT
OR26: WILDWOOD - WEMME SEC.
MOUNT HOOD HIGHWAY
CLACKAMAS COUNTY, OREGON
SEE DRAWING 118-1-19
OCTOBER, 2001 FILE NO. 7349002
BUREAU OF LAND MANAGEMENT
RIGHT OF WAY GRANT
TOTAL TO BE ACQUIRED
1.43 Acres
EXHIBIT A SHEET 3 OF 3
SCALE 1" = 100'
100 50 0 100
FEET
UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT
S.E. 1/4 N.E. 1/4 SEC. 31
T. 2 S., R. 7 E., W.M.
US 26: MT. HOOD HWY
WALLACE AVENUE
SECTION 32
SECTION 31
PRIVATE LAND
Existing Easement (Right of Way)
Permanent Easement - Highway Right of Way Purposes Area 1.24± Acres
Permanent Easement - Drainage Facility 0.17± Acres
MARTIN G. CASILLAS, ODOT
10/18/2001

ER0963

U.S. Department of Justice
Amanda Marshall
United States Attorney
District of Oregon
405 E. 8th Ave., Ste. 2400
Eugene, OR 97401
(541) 465-6771
Fax (541) 465-6917

July 23, 2014

James J Nicita
McCarthy Holthus LLP
920 SW 3rd Ave 1st Fl
Portland OR 97204

Re: Slockish, et al v. U.S. Federal Highway Administration, et al. U.S. District Court Civil No. 3:08-cv-1169-ST Response to Settlement Proposal

Dear Mr. Nicita:

The purpose of this letter is to follow-up regarding our recent site visit and conversation regarding resolution of the above entitled matter. This letter is being sent pursuant to Federal Rules of Evidence 408 regarding the inadmissibility of offers of compromise. Please keep in mind that final settlement authority for the United States rests with the Attorney General or his designee, and that any provisional settlement discussions are ultimately subject to managerial approval within the United States Department of Justice and the defendant agencies.

Based upon our recent site visit and conversation, the United States wanted to provide a formal response

to the latest settlement parameters proposed by the Plaintiffs. Based upon the most recent discussion with the federal agencies named as defendants, the United States would be willing to work towards a resolution that consists of the parameters identified below.

(1) The United States agrees to place a tree or plant barrier on the triangular shaped parcel of Wildwood National Recreation land north of U.S. 26, referred to the parties as the "Dwyer Triangle" and depicted in the attached **Exhibit 1.** The Dwyer Triangle is further identified as a parcel of land located in section 31, township 2 south, range 7 east, Willamette Meridian, Clackamas County, Oregon, containing 8 acres, more or less, and more particularly described as follows: "That portion of the south 1/2 of the northeast 1/4 lying north of the northerly right-of-way of U. S. Highway No. 26." The United States will work with the Oregon Department of Transportation ("ODOT") to identify any potential easement or right of way limitations related to the parcel of land and/or placement of material. The United States will provide the Plaintiffs with a map indicating the exact location of the tree/plant barrier and a list of trees/plants which will be placed at the location.

(2) The United States agrees to identify the ownership rights related to Wemme Road and determine if repair of the portion of Wemme Road accessing the "Dwyer Triangle" (identified in paragraph 1) is possible. The United States will work with the ownership entity to provide a one-time application of gravel and the filling of pot holes presently existing on the identified portion of Wemme Road.

(3) The United States agrees to contact ODOT to determine if ODOT employees or contractors possess alleged material associated with the rock cluster/ rock cairn or other artifacts previously located at the site. If the United States is able to recover material associated with the rock cluster/rock cairn, this material will be provided to the Plaintiffs for re-construction of the rock cluster/rock cairn. The Plaintiffs' re-construction must take place at a location agreed upon and approved by all parties. If material is recovered which was not previously identified and considered through the Section 106 process of the National Historic Preservation Act (NHPA) for the project, then United States will consult with Federally-recognized Tribes and consulting parties regarding the appropriate disposition of those materials. If no material is recovered and Plaintiffs still want to reconstruct the rock cluster/rock cairn, the United States agrees to work with Plaintiffs to identify and approve of a location for the Plaintiffs to re-construct the rock cluster/rock cairn.

(4) The United State agrees to issue a land use permit to Plaintiffs for 5 years allowing the Plaintiffs access to and the use of the Owl Mountain/ Miller Quarry area. The permit will contain the condition that Plaintiffs may not build or erect any structures on the public lands.

(5) The United States agrees to develop and install one informational/interpretative sign within the Wildwood recreation area reflecting the importance of the area to Native Americans. The United States will work with the Plaintiffs to develop language to be included on the sign. The final language provided for the sign must be approved by the United States. The

Plaintiffs understand that the United States is required to consult with the federally recognized tribal governments connected to the area regarding the proposed sign language.

(6) The United States agrees to provide future notice of FHWA projects (and ODOT projects in which FHWA is a partner) within the following area: From Government Camp to Rhododendron on Highway U.S. 26. As part of this provision, the United States will designate points of contact for the Plaintiffs within each defendant agency, and will ensure that those contacts have reviewed National Register Bulletin 38.

(7) Due to funding limitations and lack of Congressional authority to acquire parcels of land, the United States is unable to agree to acquire specific parcels of land in the area impacted by the highway construction project which is the subject of the underlying litigation. However, the United States supports the Plaintiffs' desire to acquire and protect additional parcels in the area.

(8) The United States agrees to take necessary action to avoid future development in the "Dwyer Triangle" (identified in paragraph 1). The United States agrees to take no future action to develop or open this specific parcel to additional public use. The Plaintiffs and other tribal leaders will continue to have access to this area to continue their traditional use of the area.

(9) This Agreement would not be intended nor would it be construed as an admission of liability or fault on the part of the United States, United States Federal Highway Administration, United States Bureau of Land Management, the Advisory Council of

Historic Preservation, or the agents, servants, or employees of the named federal agencies.

(10) Upon the signing of a formal settlement agreement, the Plaintiffs will move to dismiss the pending litigation with prejudice indicating that each party will bear its own fees, costs, attorney's fees and expenses.

If the above parameters are agreeable, the parties would need to execute a formal Settlement Agreement which would settle and compromise all claims arising from the events, incidents, or circumstances giving rise to this litigation. If the Plaintiffs are unable to agree to a resolution consisting of the general parameters identified above, the United States would suggest that the parties discuss a briefing schedule to propose to the Court.

Sincerely,

/s/ Tim Simmons
Tim Simmons
Assistant United States Attorney

Ty Bair
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
Attorneys for Defendants

Exhibit prepared at the request of the Salem District office- Slokish Settlement

All that portion of the S 1/2 of the NE 1/4 of Section 31, T. 2 S., R. 7 E. lying north of the northerly right-of-way of U.S. Highway No. 26

N
W
E
S
100 0 100 200 300 400 500
Feet

No warranty is made by the Bureau of Land Management as to the accuracy, reliability, or completeness of these data for individual or aggregate use with other data. Original data were compiled from various sources. This information may not meet National Map Accuracy Standards. This product was developed through digital means and may be updated without notification. M14-05-07

Excerpts from Transcript of Deposition of Michael P. Jones

Slockish v. U.S. Federal Highway Admin.
No. 3:08-cv-1169-ST

[BY MR. BAIR]

Q. Why do those present impediments to visiting the site?

[BY MR. JONES]

A. The way Dwyer was allowed anyone to get access. It was right off the highway. You drove right in. The three grandmothers, who all had major problems, physical problems, they could drive in with their vehicle, get out. One was in a wheelchair. They had a lift that she could get out of her vehicle; she could go there.

It was -- the way it was, anybody had access to it for their physical abilities.

* * *

Q. Okay. So, how did the turn lane project impact that campground?

A. It blocked the access on both the far east and the far west, the access to that road; it filled in the campground.

Q. And when you say "filled in," what do you mean?

A. They put in a berm, a grass berm. Well, eventually, it turned out to be grass. It was treed; they died, and the scotch broom came up. They got rid of that, then they planted grass.

* * *

[BY MR. BAIR]

Do you have any other reason to believe that Federal Highways or BLM was aware of the presence of Native American cultural and religious sites at the Dwyer area as of 2000?

A. There was somebody present -- there was a meeting held at Welch's School, and Tom Rutherford, who was an engineer for the Oregon Department of Transportation, did a stupid thing. On an overhead projector, he showed the Dwyer area and where -- that rock cluster that Pedigrew had studied, Richard Pedigrew, the archeologist; and pointed it out on a map in front of everybody. And he said, this is the reason why we can't widen the highway, is because this pile of stones here. And there was -- somebody from Federal Highways was there at that meeting.

And a couple days later, the rock mound was impacted. Somebody went and vandalized it and took a Bible, tore it up and stuffed it between what was left of the rocks.

Q. When was that meeting?

A. In the '90s. I don't have that. We can go back and find the date. But, yeah, it was in the '90s.

Excerpts from Transcript of Deposition of Carol Logan

Slockish v. U.S. Federal Highway Admin.
No. 3:08-cv-1169-ST

BY MR. SCHIFMAN: So, you mentioned that A. J. Dwyer Forest,

THE WITNESS: A. J. Dwyer Scenic Area.

Q. I just want to make sure that we're both on the same page with where that is. So, I'll just ask you if you could describe where that is and what it is.

A. Well, the A. J. Dwyer Forest is a part -- I mean, some of it is a part of that Wildwood Park. It's a part of our Indian Trail. It's south of Mount Hood. It's north of Owl Mountain. It's up above where we had our sweat lodge down below. It's up above where our people fished. It's a ceremonial place, a burial place.

* * *

Q. So, the end of the paragraph says, In 2008, the Oregon Department of Transportation bulldozed a burial site. Is that your understanding of what happened?

A. Yes. We were notified that there was going to be a logging that took place -- that was going to take place there. So, we went through these steps to try to stop that. Before the logging happened, went there and noticed that there was these trees that had yellow -- or different colored markings on them, and then went to where the area where the one altar had already been -- I guess, been located a long time or been known about for a long time. It had a red flag over it. So, I thought -- at that time, I thought, wow, they're going to -- they singled this out. So, I am thinking that while -- they're

going to look at this and they're going to protect that, protect that altar. So, it was about, oh, I don't even know if it was a month, went -- it was before they logged; went back there and that altar was gone. So, I thought, well, maybe -- I got concerned because I didn't know if the altar was being protected or what was going on. So, then, in March 2008, they started logging. And we -- to see those trees fallen over and landing on our sacred sites and the limbs, it was very devastating because those trees themselves have been a part of ceremonies that we had done there. It was like taking that spirit there and just ignoring everything that had taken place for us when we do ceremonies. It's very devastating when we see that no one else has the same kind of understanding.

But, anyway, after all of the logging and everything being torn up and bulldozers and things running over the ground, it was very devastating. So, in May, we went back and did a ceremony there apologizing; not understanding why the trees had been cut, because it wasn't going to be an actual part of the highway. Their guardrail was down there; the road is over here (ind); A. J. Dwyer Forest here (ind); Wildwood Park's on the other side. And so, the distance between Mountain Air Park and the other road up above, it was like I'm -- I couldn't try to fathom of why. Maybe the road would come way over here into A. J. Dwyer Forest and go down in a dip and back up. I was trying to understand why something like this would take place. It didn't make any sense.

Q. BY MR. SCHIFMAN: So, you mentioned, a few minutes ago, an altar. Can you tell me what you mean by altar? Describe what you mean by that.

A. At this particular place, or -- and others, our people use things already that's there, that's already a part of the earth. Our earth is an altar itself. So, what we do is, we use the different things that come from our earth. It's like sometimes we use tree limbs. But that altar there is something that -- with these stones and things, it's like you -- the internal event of the earth.

Say, you have a volcano and there is the lava that comes. And then, out of this volcano and the lava, will be these little stones. After a while, they start forming. They become a little round. And, anyway, from the power of the earth and the fire and that volcano, that almighty volcano, that part of the earth releasing her -- we call it maybe she's releasing her anger; she's doing what she needs to do to function. So, we utilize these stones because of that power there and place them over there. They have been here forever. They have more significance than anything else because they're older than all of us. They have much more wisdom than we have. And they have been revered a lot, and they understand this process.

So, anyway, we do this altar because of that powerful significance that it has, part of the earth. We're just visitors.

Q. So, you talked about how the altar is made up of volcanic rocks; is that right? Or could you tell me what they look like, what these rocks looked like?

A. They're round. They have little indents in them. Usually, they get that way because, when the volcano erupts and the lava comes down, many of these rocks will end up in the rivers, and they'll come rolling down; they'll become smoothed out; they will become soft, or,

you know, smooth; and then, sometimes they're just the river rock.

But, a lot of times, it's those that we use in our altars, our ceremonies.

Q. So, in this lawsuit, sometimes there's been described something called a rock cairn. Do you know what that term means?

A. I don't understand where the word cairn came from; although, I know it's part of the English language. I don't know why that term was used. I believe it came from the archeologist and part of their identification of what this was, because they didn't know exactly what it was.

So, they never talked with our people to see what it is, how to identify things. So, I'm -- I don't understand why, you know, it would be called a rock cairn. We wouldn't call it that.

Q. Okay. I understand. So, it sounds like the -- what's been called the rock cairn and what you're calling the altar, as far as you know, is that the same stone monument, or is it different?

MR. TALBOT: Object to the form of the question.

So, there may be occasion where I say something like object to the form of the question, but you still answer if you're able, okay?

THE WITNESS: Well, I'm not quite sure I understand.

MR. SCHIFMAN: Let me try to rephrase.

Q. BY MR. SCHIFMAN: So, we talked about a cairn and talked about an altar. And, if you know, do you think those are the same things or different?

A. Well, my understanding is, I believe they are looked at in a different context when it comes from the non-native to the native people. It's -- although it's the same place and the same stones or the rocks that are there, it's how that area is identified. I believe that a rock cairn, in my understanding, doesn't have any ceremonies or songs or anything tied to that; prayers or where our altar is, where we do our ceremonies, our songs, and different things that we need to take place.

So, that's just kind of how I've been told how to understand that.

Q. Sure. I mean, I'll tell you, I didn't necessarily know what a cairn -- what that word was before I became involved in this suit. But I think, if we both looked at the rocks at this site, maybe I might call it a cairn and you might call it an altar. But is it correct that we'd be looking at the same thing, or would -- are there maybe two or more?

MR. TALBOT: Object to the form of the question.

THE WITNESS: Well, I'm not understanding -- again, I'm not understanding quite, but I'll try to -- this particular altar that I'm talking about -- and there is other monuments and other altars there at that site. This one here was specifically talked about, looked at, photographs and different kind of things of this one here. So, I'm not sure if our thought processes are the same in regards to this area because I'm not sure what your teachings are or your understanding of how these things work. So, I'm not understanding. When you say it's a rock cairn, if that's what you're told, if you would understand -- what the significance or your understanding of what you would know about this area.

My understanding of this rock altar is from the teachings and what we do in that area. So, I believe our thought process or whether it is there is probably different in looking at the belongings or the rocks and things that are there.

MR. SCHIFMAN: Okay.

Q. BY MR. SCHIFMAN: So, this rock altar, were the rocks piled or stacked up? Did they rise up from the ground, or were they flat on the ground?

A. This altar, there was stacked -- rocks piled on top of each other.

Q. About how high would you say the stack was?

A. Well, over time and the way things shift and move -- I'm trying to think, you know, feet-wise.

Q. Sure.

A. I'm not very good at that on distances or heights. At that point in time -- and which it -- part of the altar was in the earth, but there was probably maybe a foot and a half or, you know, round that was -- could have been a little higher, but there was in the ground, too.

So, I'm -- the whole thing, I'm not sure how, because it had been there, you know, for a while. I'm not sure.

* * *

Q. BY MR. SCHIFMAN: So, I'll turn to a different -- slightly different topic now and talk about sacred sites and your religious practice more generally.

So, I understand, from the discussion we had earlier, that sacred sites play an important role in your religious practice; is that right?

A. Right.

* * *

Q. Okay. And, in a general way -- you don't need to give me any details that you're not comfortable with -- what type of ceremony, or what did you do?

A. Well, once again, this one here would be like when people have Memorial Day, say, to honor their people or how they recognize their people after they have passed on and be -- and were laid to rest. I went there and -- to honor our peoples that have been laid to rest there, acknowledging them from the time they were on the earth to their whole journey that they had had, and for the relatives there, and reconnecting with that wisdom and letting them know that we haven't forgotten about them, that we're still thinking about them and caring about them.

And a part of that Indian Trail was there because our people left their footprints in that trail. It's like when you walk on the earth and you have you footprints that lay in the earth, as we all do. We leave those there forever as a part of recognition of who we are. And, at some point in our life, it's like with us in that time, in all of the remembrance. It's like when you make that journey, and it's like when the rains come, they come and they wash the tracks away but, yet, there is still the memory and the history there. It's a part of that journey that they're on so they can complete that journey without interference.

So, when those people are laid to rest there, it's always trying to make sure, when they do a ceremony and sing the songs, that there is not things coming in interfering with their time of rest. It's a part of a responsibility that each and every one of us have.

That's who we are. The creator put that down as our burial should never be disturbed, our people. That's a time when they rest; that's theirs; and that we need to go back from time to time to go back and do our offerings, leave our offerings there to help that process at that ceremony that takes place, to give that thanks for everything.

And one of the offerings that we could possibly leave there -- and I'll share this -- is, we leave tobacco. That's solidifying the ceremony. That's making sure that we're doing the ceremony. That's bringing that ceremony into place. And that's just one of the many things that we do when we go and we do a ceremony. There is a procedure that we do. We get ready. We prepare ourselves for when we go there, because we're going into a very sacred place. We're going around a holy place. So, we want to go there. We don't want to have our mind contaminated. We don't want to have all of the areas around there affecting or polluting or disturbing that ceremony. So, there is other things that we do, too.

So, we go there in the best possible way that we can when we go there because this is a very serious thing that we do. Our journeys here should never be to where they're disrespected because -- our peoples, because everyone will have a hard time, and we all do the best we can. We all try to help one another. And times that I went there, people would say, well, can you take a prayer, I can't make it. They were either ill or something going on in their life. So, I would go there and I would bring that, too, from different peoples to go there to acknowledge the old ones. And it works that way, too. So, when I do that and I'm carrying that prayer, I try to do it in the best way that I can; that I

don't do something that would be out of place to offend the people that wanted that done.

We really care about our relatives. We care about our life. We care about all life. It's very, very sacred. So, when we go there to do this, this is a very, very powerful, powerful thing to be able to go and to do that and to honor everything that's there, our people, our families, everything attached; the spirit, the trees, the stones, because everything -- all the things we bring. We don't bring negativity with us there. It's like we don't bring guns there because it's not the attitude of, well, gee, we're just going over there to create a ruckus or a riot or whatever. We go there with the best intentions and the best frame of mind in doing this.

And this is a very powerful, powerful thing to do. It takes preparation in going there to do that.

* * *

Q. Did you ever collect plants for your religious or spiritual practices in the A. J. Dwyer area before this project occurred?

A. Yes, I did.

Q. And what did you collect?

A. A medicine plant.

Q. Okay. Is this the same medicine plant that you referenced a few questions ago or a different one?

A. No. Because they all have different kinds of things that they do. Like, the comfrey, we use that for our body, soreness, achiness. If we add another plant to that, then it can get down there and heal the bones along with the outside tissues and things. And, of

course, comfrey can be, you know, used to help soothe you.

This one up there was to help in a ceremony that was a little bit more in-depth of a different kind of a type of a healing. As our plants, many of them have these significant kinds -- and some of them have many -- they can do many different kinds of things. This one here was more specific to a more intense kind of a healing.

Q. Okay. So, this healing --

A. And --

Q. Go ahead.

A. So, in order to protect that plant so it's not out there, because we're facing these things -- or the name of what it is -- I won't say what it is, but I can talk about it.

Q. That's just fine. So, the healing plant that you collected at the A. J. Dwyer site, where else could you collect that plant, if there are other places?

A. Well, this is an area where I seen it the most. It's -- we can take, like, camas. Camas was really vast in the Willamette Valley, and many people could go there. There's like the Willamette Falls. If you wanted to go and gather eels, they come in big plentiful. If you go in other areas, there may not that be many. So, it just depends on where these certain places are. It's even like the bear grass. I know where it really grows a lot over up in the Willamette National Forest. I come more over here, I don't see that. So, we have these different areas that we go. And some of it has to do with elevation. It has to do with the temperature for

some of these plants in order for them to grow. They have certain areas.

So, when we travel from the -- say, the coast and we go to that mountain, it's like going to these higher elevations, but then there is certain things that don't grow down below that grow up here. It's like even when you get around the lava rocks, there is certain plants that grow in there that don't grow anywhere else. So, if you go to the lava beds -- so, I mean, it's like that area there and all of -- everything, the power that's there is the reason that that plant is there.

Q. Have you ever collected that medicinal plant that you collected at the A. J. Dwyer site at any other place?

A. No.

Q. Are you aware of that plant being in any other place, if you were to go look for it?

A. No.

Excerpts from Transcript of Deposition of Hereditary Johnny Jackson
Slockish v. U.S. Federal Highway Admin.
No. 3:08-cv-1169-ST

[BY MR. JACKSON]

A. Our people always had a lot of respect for that area because, in the early days, many of my people died in that area. You take people that walk for miles that would venture from maybe the Tygh Valley area, which is another Indian area, the Warm Springs area, the Columbia River, that traveled down there, they traveled by foot because they didn't have horses. They didn't have nothing. But they traveled down there to the Willamette. Many of them never made it back. They came back and, for some reason, they passed on. They were put away in that area. That's why it's so sensitive to us.

We look at that highway, and, a lot of times, I look at it and I say that highway is on some of our people, or maybe some of our people are scattered out of there from -- for them to make that highway there. Because that trail was there where our people passed on that could not make it home. And they were put away there because they had no way to bring them back to where they came from.

Excerpts from Transcript of Deposition of Hereditary Chief Wilber Slockish
Slockish v. U.S. Federal Highway Admin.
No. 3:08-cv-1169-ST

[BY MR. BAIR]

Q. Are sacred sites an important part of the Washaat religion?

[BY MR. SLOCKISH]

A. Yes.

Q. Tell me about that.

A. When the burial happens, we have a ceremony. The person is laid to rest there. We use the salmon, the deer, the water, the roots, and the berries for the last meal we share with the person. The last meal is served around midnight, and the next morning, we take him to the ground and place him there, return him.

And there is a lot more to it, but, to me, it's -- this language is hard. It's -- I don't go to the Catholic church and ask them, you know, what do you -- how do you make this wine, how do you do all of these things. So, we do ours. And when we put him back in the ground, we expect him to be there undisturbed until he rises again for his judgment, whether it's a male or female or child.

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Of Attorney for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

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,

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

CASCADE GEOGRAPHIC SOCIETY, an Oregon nonprofit corporation,

Case No. 3:08-cv-1169-YO

SUPPLEMENTAL DECLARATION OF CAROL LOGAN IN SUPPORT OF STANDING

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.

I, Carol Logan, do hereby declare, under the penalty of perjury and the laws of the United States of America:

1. My name is Carol Logan. I am 72 years old. I reside at 696 North River Bend Road, in Otis, Oregon. I have personal knowledge of all of the contents of this declaration.

2. I am an enrolled member of the Confederated Tribes of Grande Ronde.

3. The ceded lands of the Confederated Tribes of Grande Ronde, as described in the 1855 Treaty With the Kalapuya, include the Mount Hood area, and therefore include the area now known as the A. J. Dwyer Scenic Area.

4. I am a Traditional Practitioner of the Clackamas Tribe. I am a direct descendant of Chief Gray Wolf whose ancestral home included the lands and waters that made up the natural landscapes of the Clackamas River, the Willamette River, the Columbia River, Mount Hood, and elsewhere. Chief Gray Wolf and other ancestors of mine spoke Sahaptin and several other Native languages.

5. In the ways of my people, I am a cultural-religious person and live my life as a Traditional Practitioner, which means I return to our usual and accustomed places for ceremonies. It is important for me to return to the places my ancestors had used and continue my people's traditions.

6. As a woman, I am a life-giver. I strive to preserve the culture and religion of my ancestors, and have learned from my elders how to follow these spiritual ways. Today, if I am asked, I will instruct others on how to best follow these traditions that the Creator has given us.

7. My way of life also includes preserving the natural landscapes that have always been considered sacred. These are places where my people traditionally practiced their culture and religion. These usual and accustomed places are not defined by neat boundaries on printed maps, but are defined by the actual use of the site and are passed on to future generations through oral tradition.

8. Some of these traditional cultural landscapes of my people included those areas on Wy'East, that peak in the Cascade Mountain Range that the whites renamed Mount Hood. The sacred places on this mountain included such usual and accustomed places such as Enola Hill, Indian Meadow, Bear Creek, Owl Mountain, Cedar Ridge, and other culturally significant areas, including the A.J. Dwyer Scenic Area (in Sahaptin, "Ana Kwna Nchi nchi Patat," the Place of Big Big Trees).

9. I lived at the Grand Ronde Reservation with my family, and eventually became a Traditional Cultural Practitioner based on the teachings of my Elders. The Grand Ronde had its funding taken away and was no longer recognized as of 1954. We were reinstated in 1984 as the Confederated Tribes of the Grand Ronde.

10. During those 30-plus years of termination, I never stopped learning from my Elders. When it was my time, I was able to step forward and participate in and conduct ceremonies, which helps preserve my people's culture. This also helps to preserve those places of sacredness which are the usual and accustomed places of my ancestors, where cultural and religious activities traditionally took place.

11. Now I am considered an Elder in my tribe. I have shared my elder wisdom in many ways, including having served on the Cultural Committee of the Confederated Tribes of Grande Ronde. I was serving on the Cultural Committee at the time of the highway widening project at issue in this case, in 2007 and 2008.

12. As a Traditional Cultural Practitioner, in the course of the life I live, I not only return to those natural areas that are our usual and accustomed places, which my people had utilized for cultural and religious activities, but also to those where my people were buried. These final resting places were sometimes located far away from our ancestral villages, such as those on Mount Hood. These included Indian Meadow, Bear Creek, and "Ana Kwna Nchi nchi Patat."

13. My life as a Traditional Practitioner goes beyond just participating in my people's traditional cultural and religious activities as sacred places. It also involves protecting these natural landscapes which are our usual and accustomed places. This includes "Ana Kwna Nchi nchi Patat."

14. I first got involved with the "Ana Kwna Nchi nchi Patat" in the early 1980s. A friend and coworker of mine, another Traditional Practitioner, Rip Lone Wolf (Umatilla and Nez Perce), contacted Michael P. Jones, the Curator of the Cascade Geographic Society, who was also acting as the Spokesperson for Citizens For A Suitable Highway, trying to get the Oregon Department of Transportation and the Federal Highway Administration to preserve sacred places along the Mount Hood Highway that they intended to

widen. At risk were Indian Meadow, Bear Creek, and Dwyer. These were our usual and accustomed places.

15. We had attempted to communicate with the Oregon Department of Transportation and the Federal Highway Administration about the effects the widening of the Mount Hood Highway would have on our sacred places. They wouldn't listen to us.

16. Rip Lone Wolf and myself began working with Jones to preserve these sacred places, believing that they might listen to him since they ignored us. Our role was to act as behind-the-scenes consultants, and only with him, in order to protect the site-specific knowledge of the cultural and religious activities that took place at Dwyer Memorial "Ana Kwna Nchi nchi Patat," Indian Meadow, and Bear Creek.

17. Through negotiations with the Oregon Department of Transportation and the Federal Highway Administration, "Ana Kwna Nchi nchi Patat," Indian Meadow, and Bear Creek were protected. It was at this time that we began working even closer with Jones. Eventually, besides working with Wilferd Yallup and Walter Speedis of the Yakama Indian Nation, we began working with Chief Johnny Jackson (Cascade Tribe) and Wilbur Slockish (Klickitat/Cascade Tribe) who was not yet a Chief at that time.

18. Several years later, together with Jones, Chief Johnny Jackson, Wilbur Slockish, and myself, we formed the Mount Hood Sacred Lands Preservation Alliance. The goal was to preserve the usual and accustomed places, which are natural landscapes where cultural and religious activities took place and where people could also be buried.

19. Throughout my life, my journey has followed a sacred path, thanks to my Creator. He has guided me to become a Traditional Practitioner, to learn from my elders about our traditional cultural and religious practices, to preserve our burial grounds, and to protect our usual and accustomed places that were located on our natural landscapes.

20. In 2008, when the Mount Hood Highway was widened through "Ana Kwna Nchi nchi Patat" there were sacred and ceremonial objects located there that were either destroyed or damaged. These were related to the burials at this location.

21. A stone monument, which served as an altar for individuals and families visiting nearby burials, and which was located near the Mount Hood Highway, was taken apart in pieces and hauled away. The Federal Highway Administration knew the exact location of this sacred site made of stones that had been gathered together so that ceremonies could take place at through "Ana Kwna Nchi nchi Patat."

22. The location of this stone altar was obviously known by the Federal Defendants, because of the examination of the altar that Professor Pettigrew had done in the 1980s. At that time, this sacred site had been flagged for the Federal Highway Administration by the Oregon Department of Transportation, and then probed and dug into, and studied by their archaeological contractors. Its location was even identified on an overhead projector in a public meeting. After this publicity, unknown people had vandalized the stone altar.

23. The Federal Defendants did not seem to understand the role and significance that this altar

had to those who were laid to rest in the burial grounds at the "Ana Kwna Nchi nchi Patat." They did not protect it.

24. Prior to the 2008 widening of the Mount Hood Highway through the Dwyer Memorial Forest, the stone altar was reflagged once again. And, just before they started cutting down the trees, the entire altar was removed from "Ana Kwna Nchi nchi Patat" and taken away to some unknown location.

25. Myself, Chief Wilbur Slockish and Chief Johnny Jackson asked Michael P. Jones to try and locate this stone altar so it could be returned to its rightful place. Unfortunately, he could not locate it.

26. There were other sacred and ceremonial objects located at "Ana Kwna Nchi nchi Patat," besides the stone altar, prior to the 2008 widening of the Mount Hood Highway. Located at Dwyer were a number of stone burial mounds. These had been placed long ago to identify the locations where people were buried and, over the years, had become camouflaged by the trees and vegetation.

27. While I was serving on the Cultural Committee of the Confederated Tribes of Grande Ronde in 2007 and 2008, the Oregon Department of Transportation was aware of the existence of these stone burial mounds because of the efforts of the Cultural Committee. This fact is shown in the administrative record of this case, at FHWA 005086 and FHWA 005090 to 005091.

28. These stone burial mounds were used in religious and cultural ceremonies at Dwyer Memorial Forest (Ana Kwna Nchi Pat at). They marked surrounding graves, so that the Creator could know in

the future, upon the Creator's return, where our people were so they could be retrieved.

29. Over the years, as the trees and vegetation at "Ana Kwna Nchi Patat" grew, the stone burial mounds became camouflaged and were difficult to see. However, when the trees were cut down prior to the widening, they became more visible. The majority of these markers, perhaps twelve or more, were situated between the campground and the Mount Hood Highway. It was a sad site to see because they were not being protected by the Federal Highway Administration and the Oregon Department of Transportation.

30. Later, when the Federal Highway Administration and the Oregon Department of Transportation came in and removed the trees, the mounds were damaged. Then, when heavy equipment was brought in to dig out stumps and start leveling the ground, they disappeared. They were unfortunately removed to an unknown location.

31. Chief Wilbur Slockish, Chief Johnny Jackson, and myself, asked Michael P. Jones to try and locate the missing stone monuments and get them returned. Sadly, like the stone altar, they were never located. The agencies pleaded ignorance.

32. There were personal and cultural objects located in the burial sites at Ana Kwna Nchi nchi Patat - the Dwyer Memorial Forest. This is known because this is a cultural practice of my people. What is not known are the specific items because myself or anyone else alive were not there; only the artifacts as placed so long ago.

33. The items that may have been buried with them would have varied from one person to the next. Most likely these objects would have reflected what they did in life, such as a hunter, fisherman, basket-maker, tule mat maker, etc. This would have helped define them in their social-cultural position in their tribe.

32. In 2008, when the Federal Highway Administration and the Oregon Department of Transportation brought in heavy equipment and began digging out the trees, the stumps, and the earth, these burial objects were swept up and hauled away. As far as we know they have never been "officially" located.

33. It is my understanding that during the actual construction when the widening of the Mount Hood Highway actually took place, some of the construction workers found historical objects. These could have been from the burials at Ana Kwna Nchi nchi Patat.

34. I am a cultural-spiritual person who has always lived the way the Creator has instructed me to do. I am a Traditional Cultural Practitioner who practices the ways of my people, and part of my work involves protecting our usual and accustomed places so we can return to these sacred landscapes.

35. The Creator has instructed me how to live my life and how to undertake this spiritual journey that I have been on my entire adult life. And, one day when I stand in judgment before him, I will be evaluated for what I have or have not done. In respect to trying to protect our usual and accustomed places and our sacred lands, I will be acknowledged for my work.

36. The number one law that the Creator has given us is not to dig up the burials. They must never be disturbed. These final resting places must be respected. This land where we are buried belongs to them and only them, and no one else.

37. Until the Creator calls them home (the ones who are resting here in peace), they must be left alone. A special ceremony had already taken place to allow them to be placed here. This is the way of our people. The Creator knows the names of those who are resting in peace, and where they are buried. They must be left alone.

38. When the Creator calls to them, they will rise up and face him in the east. But, if they have been dug up, and/or their belongings removed, this will disrupt their journey.

39. Those who are responsible and have violated the graves or stole their belongings, will account for their actions before the Creator. These final resting places must be left alone, the dead must never disturbed, and should never be robbed.

40. I am a Traditional Cultural Practitioner of the Clackamas Tribe and a direct descendant of Chief Gray Wolf. I believe in returning to my people's usual and accustomed places and practicing our culture and religion, and being able to pay my respects to those who are buried there.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 6th Day of August, 2016.

Respectfully Submitted,

/s/ Carol Logan
Carol Logan

CERTIFICATE OF SERVICE

I certify that on August 7th, 2016, I filed electronically the foregoing *Supplemental Declaration of Carol Logan in Support of Standing*, and served the same electronically upon the counsel of record via the Court's electronic case filing system:

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DATED August 7th, 2016

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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

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,

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

CASCADE GEOGRAPHIC SOCIETY, an Oregon

Case No. 3:08-cv-1169-YO

SUPPLEMENTAL DECLARATION OF HEREDITARY CHIEF JOHNNY JACKSON IN SUPPORT OF STANDING

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.

I, Johnny Jackson, do hereby declare, under the penalty of perjury and the laws of the United States of America:

1. My name is Johnny Jackson. I am 85 years old. I reside at the in-lieu Fishing Village site at the mouth of the White Salmon River in Underwood, Washington. I have personal knowledge of all of the contents of this declaration.

2. I am an enrolled member of the Confederated Tribes of the Yakama Indian Nation. I have served, and currently serve, as a Commissioner on the Columbia InterTribal Fish Commission.

3. The ceded lands of the Confederated Tribes of the Yakama Indian Nation, as described in the 1855 Treaty With the United States, include the Mount Hood area, and therefore include the area now known as the A. J. Dwyer Scenic Area, or Dwyer Memorial Forest.

4. I am the Chief of the Cascade Tribe. Like those leaders of the people before me, I am working to preserve our usual and accustomed places, including those where we practice our culture and religion, and where we have buried our dead.

5. Since time immemorial, the Columbia River has been the ancestral home of my people. Before the whites came to this land and changed the name of this great waterway that had served so many generations of Native people, it was called Nch'i Wana in our traditional Sahaptin language; this translates to mean "the Big River."

6. This is our ancestral homeland. We have never left, but have always been here since time

immemorial. We have always utilized and will always utilize these landscapes.

7. I live at Underwood, Washington, along the Columbia River, at the mouth of the Little White Salmon River. My family and people have always lived at this particular place and I have never abandoned it.

8. Like all my ancestors have done for many thousands of years, I am a fisherman. I am also a spiritual person and a traditional practitioner of our culture. I have been honored to serve as the Chief of my Cascade Tribe since the early 1980s.

9. The ancestral leaders of my people have always fought for our right to return and utilize our usual and accustomed places wherever they are. This is also in the instructions given to us by the Creator.

10. Our usual and accustomed places are not just fishing sites along the Columbia River, the Willamette River, the Clackamas River, and the streams on Mount Hood, not to mention elsewhere in this land that now comprises what has become the states of Washington and Oregon. They are also cultural and ceremonial sites that are part of the natural landscapes. These comprise some of our sacred lands.

11. Returning to and utilizing our usual and accustomed places, goes beyond just fishing, hunting, gathering roots or berries at our traditional sites. Our rights that we have been given through the instructions of the Creator, insure that we can go back to those places that had been used for cultural purposes, and make use of them like we always have done. These include the landscapes that comprise all the waters and springs of the Cascade Mountain Range.

12. We can, like we always have done, return to where my ancestors had fished, hunted, gathered plants for medicines, conduct ceremonies, etc. This means that we can always return to where my ancestors had purified themselves, and we can utilize our sweat lodges at those locations. We can return to where my ancestors went pray, and we can undergo the vision quest ceremonies where we have always done so.

13. Some of these places of my ancestors were also burial grounds. The Creator has given us the instructions that we must follow, which gives us the opportunity to return to these places to pray, reflect, and pay our respects to those of my people who were laid to rest there.

14. At 85 years old, I am the eldest of all the Chiefs along the Columbia River in our ancestral homeland. The knowledge shared with me by my elders is what guides me in my work.

15. As a Chief, one of my jobs is to protect the cultural traditions of my people, and make sure our usual and accustomed places can continue to be utilized today and for future unborn generations who will follow us. The spiritual guidance that provides us these opportunities, is through the instructions given to us by our Creator, which allows us, through spiritual right, to be able to continue to practice our cultural traditions at the places we have always done so.

16. "Ana Kwna Nchi nchi Patat," the Place of Big Big Trees, what we call today the A.J. Dwyer Scenic Area, is one of our usual and accustomed places. As a

Chief and traditional practitioner, this place is and will always be important to me.

17. "Ana Kwna Nchi nchi Patat," was well known and utilized by my Uncles, Wilferd Yallup and Walter Speedis. They had been working with Michael P. Jones, the Curator of the Cascade Geographic Society who was also the Spokesperson for Citizens for A Suitable Highway. As they got up in age and started to have poor health, they took me to the campground that was located inside Ana Kwna Nchi nchi Patat, and discussed with me the potential future threats to this usual and accustomed place. This is a sacred place of my people, where ceremonies had taken place since time immemorial. This was where plants were gathered for medicines, such as in the case of my Uncle Walter Speedis.

18. This was also where some of my ancestors were buried.

19. My uncles asked me to step forward and get involved with preserving this particular place of sacredness and the other sacred landscapes in the Mount Hood Area. These sacred places had to be preserved for the generations of the future.

20. I knew "Ana Kwna Nchi nchi Patat," well, as a usual and accustomed place of my people. In the past I had come here before to pay my respects to those who were buried here, and to pray. Stepping forward to help preserve "Ana Kwna Nchi nchi Patat" was critical for it was important to my people.

21. I had become acquainted with Michael P. Jones, the Curator of the Cascade Geographic Society, in the later part of the 1980s. We worked together to save Enola Hill, a place where the vision quest takes

place along with other ceremonies. "Ana Kwna Nchi nchi Patat," was directly tied to vision quests, for it was one of the campgrounds where people prepared themselves before journeying up to Enola. I agreed to get actively involved.

22. I asked Wilbur Slockish to assist us, who was not yet the Chief of the Klickitat/Cascade Tribe at the time, but was a traditional practitioner and fisherman. Carol Logan (Clackamas Tribe), who had been involved with Jones since the mid-1980s in saving it from the first highway widening, continued to play a major role. Together we formed the Mount Hood Sacred Lands Preservation Alliance with the goal of preserving sacred places, such as those usual and accustomed places where, for example, traditional cultural practices had taken place, where medicines were gathered, and where people were laid to rest - all of which took place at "Ana Kwna Nchi nchi Patat."

23. "Ana Kwna Nchi nchi Patat," needed to be preserved, for it was an important usual and accustomed place for not just me, but for my people. As my ancestors traveled to and

24. from the Columbia River into the Willamette Valley to harvest the camas bulb for food, to fish and gather eels, they would travel over an ancient Indian trail that crossed over Wy'East - Mount Hood. "Ana Kwna Nchi nchi Patat" was an important campground that they utilized.

25. My ancestors, being located so far from their villages, would camp at the "Ana Kwna Nchi nchi Patat." Some of these early day travelers passed away at or near this location. They were laid to rest here, for it was a traditional place to gather together, which

made the burials easy to find so family members could return and pay their respects.

26. I was one of those Native speakers who would return to "Ana Kwna Nchi nchi Patat." Some of my ancestors were buried here, so I could visit their final resting place, and pray. I let them know that they were not alone, for me and others would always return. But, the widening of the Mount Hood Highway in 2008 changed all of this for they not only logged but brought in their heavy equipment and dug into the earth, destroying the burials, the camp ground, and the other cultural sites associated with it.

27. Our usual and accustomed places must be preserved. Today we should be able utilize these places, as well as tomorrow. The generations of the future have the opportunity to continue to utilize their people's sacred places. What happened to the "Ana Kwna Nchi nchi Patat" should not have taken place, for its use was a Creator-given-right.

28. There were sacred objects that were visible at the "Ana Kwna Nchi nchi Patat." The most obvious one was a stone monument altar that was located near the guardrail along the Mount Hood Highway. The Federal Highway Administration and the Oregon Department of Transportation tagged it so that it could be easily located.

29. Just before the Mount Hood Highway was widened through this location, the trees were cut and the stone altar vanished. All that was left was its location, but all the river rocks that had comprised it were completely gone. The stone altar helped to identify the burial grounds. It was placed here as a monument and altar, which individuals like me, and

families, could utilize to pray and pay their respects to those who had been laid to rest there.

30. After the trees were cut at the Dwyer Memorial Forest in 2008, other sacred stone burial monuments were revealed. With the vegetation disturbed, these additional stone monuments could be easily seen. These were at least twelve stone burial mounds located on the south side of the campground towards the Mount Hood Highway. But, there were obviously more here that were still hidden by the vegetation.

31. These stone burial mounds, unfortunately, disappeared. Everything at this site was scraped up and put in dump trucks. This material was hauled away to an unknown location and disposed of.

32. My ancestors utilized their usual and accustomed places, such as journeying great distances to harvest food. When they passed on, they were laid to rest away from the trail.

33. These burials went from the crest of Mount Hood all the way to the Willamette River, to the Sandy River area. Without modern-day transportation like we have today, they could not be taken back to the villages but had to remain here.

34. At "Ana Kwna Nchi nchi Patat," there were objects that were destroyed when they brought in the bulldozers and hauled things away. These were the personal items that were buried with those who were laid to rest here.

35. I personally, do not know what these items were, because I obviously was not present when they were buried. However, traditionally, when my people were laid to rest, both back then and today, objects

representing the tools of their trade, were and are placed in the grave. They could be elaborate or simple items, which identified what they did in life, such as a fisherman, hunter, trader, medicine gatherer, basket maker, etc.

36. I live my life as a cultural-spiritual person who follows the traditional ways of my people, as much as I can in this Twenty-First Century. I am also the Chief of the Cascade Tribe whose duties include protecting our usual and accustomed places, which includes the Dwyer Memorial Forest.

37. In my life I have worked very hard to protect my people's usual and accustomed places. I tried to educate the others through public forums about our cultural sites. This is what I must do, for when my days come to an end, I will stand before my Creator and be judged for what I did in my life.

38. The Creator will ask me what I did to preserve these sacred places and the gifts of natural resources he gave to my people. I want to respond that I did the best to my ability and did not give up trying to preserve what I could for the generations who will follow us.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 4th Day of August, 2016.

Respectfully Submitted,

/s/ Johnny Jackson
Johnny Jackson

CERTIFICATE OF SERVICE

I certify that on August 5th, 2016, I filed electronically the foregoing *Supplemental Declaration of Johnny Jackson in Support of Standing*, and served the same electronically upon the counsel of record via the Court's electronic case filing system:

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DATED August 5th, 2016

/s/ James J. Nicita
James J. Nicita

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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

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, CAROL LOGAN, a resident of Oregon, and an enrolled member of the Confederated Tribes of Grande Ronde, CASCADE GEOGRAPHIC SOCIETY, an Oregon	Case No. CV '08-1169-YO **SUPPLEMENTAL DECLARATION OF HEREDITARY CHIEF WILBUR SLOCKISH IN SUPPORT OF STANDING**

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.

1. Wilbur Slockish, do hereby declare, under the penalty of perjury and the laws of the United States of America:

2. My name is Wilbur Slockish. I am 71 years old. I reside at 89 Main Street, Wishram, Washington 98673 or 7400 Schoolie Flat Road, Warm Springs, Oregon 97761. I have personal knowledge of all of the contents of this affidavit.

3. I am an enrolled member of the Confederated Tribes and Bands of the Yakama Nation. I have served, and currently serve, as a Commissioner on the Columbia InterTribal Fish Commission.

4. I am the hereditary Chief of the Klickitat/Cascade Tribe. As a leader of my people, I am walking in the footsteps of my Grandfather Chiefs before me, which is a great responsibility with many duties.

5. Our ancestral home is along the Columbia River, a name given to this waterway when the whites started coming to this country in which we lived. Up to this time, we had always known this great waterway as "Nch'i Wana" (as it is known in Sahaptin), which translates to mean "the Big River."

6. I am the descendant of Chief Sla-kish (Slockish) who was present at Walla Walla for the Klicktat/Cascade Tribes. This Treaty was signed in 1855 with Governor Isaac Ingalls Stevens, the representative for the government of the United States of America, in what was then known as Washington Territory. As a Chief along the Columbia River and a leader of his people, he did this by placing his thumbprint on this document that the Americans had provided.

7. I have been a fisherman all my life, as well as a Traditional Practitioner of my tribe. I have served as Chief approximately since 1999, and like the Chiefs before me, I am a ceremonial-spiritual person. I live my life with the understanding that the Creator has given me certain instructions that I must follow on this spiritual journey. These include participating in ceremonies at our usual and accustomed places, such as "Ana Kwna Nchi nchi Patat" as it is known in Sahaptin, and which would translate to "Place of Big Big Trees." It is known also known in English as the A.J. Dwyer Scenic Area. Other significant usual and accustomed places include Indian Meadow, Bear Creek, Enola Hill, and many other places on Mount Hood, those along the Columbia River, in the Willamette Valley, and elsewhere. These are and always will be sacred to my people to be used in the ways they have been since time immemorial.

8. Before I became a Chief, in the early 1990s, my uncle, Wilferd Yallup, who was an important Cultural Practitioner with the Yakama Indian Nation, encouraged me to learn to speak about our sacred places and be prepared to defend them. He warned me about the threat to one of our sacred places on Mount Hood that had burials, medicine plants, and a traditional campground. This was "Ana Kwna Nchi nchi Patat." and he instructed me to work with Michael P. Jones, the Curator of the Cascade Geographic Society, who was trying to preserve my people's sacred sites on both Mount Hood and elsewhere.

9. Prior to this time, I was familiar with "Ana Kwna Nchi nchi Patat." I was aware that this was a place where some of my ancestors had been laid to

rest, had medicine-gatherings, and had utilized the camp ground on the way to and from the Willamette Valley, where they harvested the camas, fished for salmon, and gathered eels. They would dry the harvested eels for their importance to my people, but not just for food. The tails were utilized as teething rings for babies, and the oils would soothe the gums and help their teeth to break through.

10. In the early 1990s I began I began visiting our campground and burial ground in "Ana Kwna Nchi nchi Patat" for the purpose of prayer and veneration of our ancestors. These visits took place at least twice a month or whenever I was driving through the Mount Hood Area.

11. "Ana Kwna Nchi nchi Patat" was a usual and accustomed place of my people. But, the widening of the Mount Hood Highway took this away from us.

12. I began working with Michael P. Jones, along with Chief Johnny Jackson (Cascade Tribe), and Traditional Cultural Practitioner Carol Logan (Clackamas Tribe). Together, we formed the Mount Hood Sacred Lands Preservation Alliance to preserve the cultural and religious sites that are part of the natural landscape that makes up this peak in the Cascade Mountain Range. This is in keeping with my duty as a Chief and as a Cultural Practitioner.

13. My people's sacred places must always be available for our use not just for today, but for tomorrow and in the future. Such places include those that are used for religious worship (including the vision quest), areas where they can gather medicines, places where purification practices take place (including the sweat lodge), and where you can go by

yourself to pray and reflect on your life. It also includes our burial grounds where we have laid our people to rest. "Ana Kwna Nchi nchi Patat" is such a sacred place.

14. What happened to "Ana Kwna Nchi nchi Patat" should never have taken place. This relationship between natural areas and cultural and religious sites is not that difficult to understand. A government agency established National Register Bulletin 38 to provide guidelines for federal agencies to follow. In 2016, Bulletin 38 was revised to provide even more clarification of the location of places where ceremonies have traditionally taken place in natural areas.

15. There were numerous sacred and ceremonial objects at the "Ana Kwna Nchi nchi Patat" prior the 2008 widening of the Mount Hood Highway. One was a stone monument that archaeologist Richard Pettigrew examined in 1986. He had no Native Americans on the team that analyzed this stone monument. The stone monument had the function of an altar, and individuals like myself, as well as families, would use this altar in prayer and ceremony when "Ana Kwna Nchi nchi Patat" to pray and pay respects to ancestors buried nearby. In addition to its function as an altar, the stone monument marked the area as being a location of nearby burial grounds.

16. After the stone altar had been vandalized and removed as part of the 2008 U.S. 26 highway widening project, Chief Johnny Jackson, Traditional Practitioner Carol Logan, and I sought the assistance of Michael P. Jones, Curator of the Cascade Geographic Society, to locate the sacred stones and have them returned "Ana Kwna Nchi nchi Patat." Unfortunately, they could not be located.

17. In addition to this stone altar, there were stone burial mounds that were strategically placed at this location to identify where people were buried. These stone burial mounds were difficult to see, but after the trees had been cut at "Ana Kwna Nchi nchi Patat," they became more visible. They numbered at least twelve, and were located outside the camp ground towards the Mount Hood Highway. Unfortunately, when the Federal Highway Administration and the Oregon Department of Transportation came in and removed the trees, they were damaged. And, when they brought heavy equipment in and began digging out stumps and leveling the ground, they were removed to an unknown location.

18. Once more, myself, Chief Johnny Jackson, and Traditional Practitioner Carol Logan requested that Michael P. Jones try and locate the stones that made up these burial mounds. We wanted them returned. But, like the stone altar, he could not locate them.

19. My ancestors are buried at "Ana Kwna Nchi nchi Patat." The stone burial mounds identified where they were laid, and were part of this sacred place for me, where I would come here and pay my respects and pray.

20. In 2008, when they widened the Mount Hood Highway through the A.J. Dwyer Scenic Area, they destroyed the personal, ceremonial, and religious objects. These sacred items were buried with those who were laid to rest.

21. I cannot specifically tell you what these sacred objects were, because they varied from individual to individual who were laid to rest. Traditionally, it would be personal adornments, and items that related

to what they did in life. It could be things that were related to a fisherman, a hunter, a medicine person, a basket maker, a matmaker, a weaver, a hide tanner, a tool-maker, a carver or canoe-maker, etc.

22. My people individually did different things in their life that contributed to the overall well-being of the tribe. What was buried with them at "Ana Kwna Nchi nchi Patat." reflected who they were. And all of these things were lost when they brought in the bulldozers and scraped up everything on the landscape so it could be paved over to become an expansion of the Mount Hood Highway.

23. I am the Chief of the Klickitat/Cascade Tribe and I am a cultural-spiritual person who follows the traditions and ways of my people in these modern times. I utilized the "Ana Kwna Nchi nchi Patat" and other sacred sites on Mount Hood as my ancestors did.

24. I will continue to work the rest of my life to protect our usual and accustomed places. My people have to be able to return to these sacred places that are inter-related with these natural areas like the "Ana Kwna Nchi nchi Patat" and other areas where some of my ancestors were laid to rest.

25. When the end comes for me, I will stand before the Creator and be judged on what I did or did not do in my life, which is based on the instructions that he has given me and my people. This is why my life has been lived undergoing these great struggles to preserve our cultural and religious sites, such as "Ana Kwna Nchi nchi Patat". I do this not just because these are the usual and accustomed places of my people, but for my people today and in those future generations,

who have and always will have the right to return and practice their religion and culture.

26. It is my duty as a Chief, and my obligation as a traditional cultural-spiritual person, to not only utilize these sacred places but also to preserve them and all of the gifts from the Creator, that are now called resources. These include such things as medicines, foods, tools, wildlife, fish, trees, plants, water, and rocks for use in the sweat lodges. All these things are inter-connected and needed for our survival.

27. There are objects at the "Ana Kwna Nchi nchi Patat" that are considered sacred. These are part of Nature's resources and are gifts from the Creator. These sacred objects are used in both ceremonies and in our daily life. These include but are not limited to trees, plants, and rocks. They are all considered important and sacred because of their location on this earth - "Ana Kwna Nchi nchi Patat" and the other sacred places where our traditional cultural-spiritual activities take place.

28. These are the instructions the Creator has given to my people. When I stand before him in judgment, and when he asks me what I did to preserve the gifts he gave my people, I want to respond truthfully. I want to say that I did my best to preserve these sacred places and these gifts.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the 4 foregoing is true and correct.

Executed this 4th Day of August, 2016.

Respectfully Submitted,

/s/ Wilbur Slockish
Wilbur Slockish

CERTIFICATE OF SERVICE

I certify that on August 5th, 2016, I filed electronically the foregoing *Supplemental Declaration of Hereditary Chief Wilbur Slockish in Support of Standing*, and served the same electronically upon the counsel of record via the Court's electronic case filing system:

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DATED August 5th, 2016

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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

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,

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

CASCADE GEOGRAPHIC SOCIETY, an Oregon

Case No. 3:08-cv-1169-ST

DECLARATION OF HEREDITARY CHIEF JOHNNY JACKSON IN SUPPORT OF STANDING

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,

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

and

MATTHEW GARRET, in his official capacity as

Director of the OREGON DEPARTMENT OF TRANSPORTATION, an Agency of the State of Oregon,

Defendants.

I, Johnny Jackson, do hereby declare, under the penalty of perjury and the laws of the United States of America:

1. My name is Johnny Jackson. I am 81 years old. I reside at the in-lieu Fishing Village site at the mouth of the White Salmon River in Underwood, Washington 98651. I have personal knowledge of all of the contents of this affidavit.

2. I am an enrolled member of the Confederated Tribes and Bands of the Yakama Nation.

3. I am also a member of the Mount Hood Sacred Lands Preservation Alliance and Cascade Geographic Society.

4. I am a direct lineal descendant of a signer of the Treaty of 1855 for the Confederated Tribes and Bands of The Yakama Nation. This was Chief Slockish who signed for the River People — those who lived along the Columbia River. He was the last one to sign, and did so under protest. He wanted to make sure the sacred sites and burials of his people were protected.

5. I am a relative of the late Wilferd Yallup, who served as the Chair of the Confederated Tribes and Bands of the Yakama Nation. He also served for many years on the Columbia River Inter-Tribal Fish

Commission, and on the Cultural Committee for the Yakama Nation.

6. I am also the descendant of the late Walter Speedis, an important cultural practitioner of the Yakama People for his knowledge of our traditional ceremonies, and his knowledge of our natural medicines that he gathered from many areas along the Columbia River, Mount Adams, Mount Jefferson, and Mount Hood.

7. I am a Chief of the Cascade Tribe, one of the Tribes that make up the Confederated Tribes and Bands of the Yakama Nation. I have served in this important position for over thirty years.

8. The Cascade and Klickitat peoples have close familial ties. The Cascade have traditionally been settled along the Columbia River in villages. The Klickitat have traditionally been traders who journeyed far and wide, but had villages also along the Columbia. My status of Chief preserves the right to address cultural and spiritual issues as my ancestors did. It also insures me the right to fight to protect for our usual and accustomed places, whether it is for hunting, fishing, the gathering of foods or medicines, or for cultural and religious practices like the vision quest and other ceremonies.

9. The role of a Chief is above all to look out for the welfare of my people. Protection of our usual and accustomed places allows them to return and practice their culture and religion whenever they want or need to.

10. As a Chief, I have fulfilled my role in numerous ways, in particular by defending the rights of my people to fish in our usual and accustomed places

under the 1855 Yakama Nation Treaty; protecting our in-lieu sites which defended right of my people to live along the Columbia River; assisted to get housing at Celilo Village; and actively worked to protect the cultural and religious sites on Enola Hill and other places on Mount Hood.

11. A major responsibility in my position as a Chief, is to defend our sacred cultural and historical sites from the Columbia River to Mount Adams, Mount Hood, and in the Willamette. On Mount Hood, some of these places include but are not limited to Enola Hill, Zig Zag Mountain, Huckleberry Mountain, North Mountain, Hunchback Mountain, Indian Meadow, Bear Creek, and the burial grounds and campground at the site commonly known as the Dwyer Memorial Forest — the A. J. Dwyer Scenic Area.

12. The Dwyer Memorial Forest — the A.J. Dwyer Scenic Area — had different names for the various families and individuals who utilized the area. My Uncles, Wilferd Yallup and Walter Speedis, told me that it was called it Ana Kwna Wana Pakiyawaxa ["Where the Rivers Meet") by some of those who used it, and Ana Kwna Nchi nchi Patat ["Place of Big Trees"] by others. These are just two names for this usual and accustomed place that I know of, but there were others that would have been used by families or individuals.

13. As a Chief, I am also an educator for our young people on the history and traditions of our people, including our religious practices. I am also the individual who helps to reaffirm our cultural practices and traditional ways so that they can be passed on to future generations.

14. I also educate our young about previous court decisions on land rights, fishing rights, and food-gathering rights. Previous court decisions state must be loosely interpreted and construed in our favor, since the language is not ours but is that of the learned ones.

15. I am recognized by members of the Confederated Tribes of the Yakama Indian Nation, including members of the Klicktat and Cascade Tribes, as being responsible for performing cultural duties relating to the ceremonial or religious traditions of these Tribes; and as exercising a leadership role in these Tribes based on their cultural, ceremonial, and religious practices.

16. My religion is the Washat Religion, or the Religion of the Seven Drums. The people who lived along the Columbia River received the songs, the prayers, and the ceremonies, directly from the Creator so we recognize how to know him, understand him, and worship him. It did not come from a person, but directly from the Creator.

17. Once a week, on Sunday, those who follow the Washut religion, will come together in a Longhouse. Seven drums will accompany the singing of sacred songs.

18. Through our Washut Religion, people will also gather together in our Longhouses for other ceremonies. These include weddings, funerals and memorials, and name givings. Other ceremonies that we practice is when a boy catches his first salmon and kills his first deer; in addition, there are those ceremonies for a girl picking her first berries and gathering her first roots. The same Washut songs,

similar to those utilized at our Sunday services, are also utilized in these ceremonies.

19. When you practice the Washut religion, you will visit those traditional spiritual places, like the A. J. Dwyer Scenic Area. It is part of the natural environment of Mount Hood, in the woods, but it is like a church that never had walls, never had a roof, and never had a floor. But, it is still just as sacred as a white person's church that is all enclosed and separated from Nature.

20. Places like the Dwyer Forest is usual and accustomed, meaning my people have practiced their religion and culture at these sacred sites in the past. They are important traditional cultural and religious sites that are very important to the Native People on both sides of the Columbia River, for their use and for the use of future generations. These are the same places that our ancestors used, and must always be there for our future use.

21. When there are burials, like at Dwyer Forest, it is even more important to us, and we must protect this place to make sure that those who are resting here are not bothered. They cannot speak for themselves or stand up for their rights, so we must do this for them.

22. In my youth, as I was growing up, we were taught about my people's history and traditions, about our religion, and about those places on Mount Hood that are sacred, like Enola Hill and Dwyer Forest. These educators were my Elders who always told me that I must learn because I would be going to these places one day and would utilize the sites.

23. When they told us stories about these places, we young people had to listen and learn from what

they were saying. What they were teaching us were things that we would use in the future and be able to pass on to others.

24. My uncles, Wilferd Yallup and Walter Speedis, provided much information about the usual and accustomed places on Mount Hood Area. These were very sacred to my people and still are, and we had to learn about them so when we went to these places we would know why they were so important, Then, when we performed our ceremonies and recited our prayers, we would be doing these things for both our ancestors and those generations who would one day follow us.

25. Some of our sacred places on Mount Hood, like Enola Hill, the Dwyer Forest, Bear Creek, and Indian Meadow, and other sites like The Meadows (in Rhododendron), are located along an Indian Trail that went from the Columbia River, over Mount Hood, and into the Willamette Valley. We used this since time immemorial, before we even had horses. It was used to get to our cultural sites; to get to places where we hunted and fished; to get to places where we gathered natural medicines; to get to places where we traded; and to get to places where we practiced our religion and even the vision quest.

26. We used this ancient trail over Mount Hood to get to our camas fields in the Willamette Valley, so we had a traditional food source and something to trade at places like Celilo Falls. Our village was so far away, so we would camp along the way, and the Dwyer Forest was one of these places.

27. People would not always make it back to their villages, but would die along the way. They would bury their dead near to where they camped. This way they

could always come back and find the burials of those who had passed on. Dwyer Forest was one such place.

28. As a Washut practitioner, I am guided by the traditions of my religion. Each day I must give thanks to the Creator for all the gifts he has given us — the land, water, roots, berries, elk, deer, salmon, and other foods. We also pray for the protection of our burial grounds that they will not be disturbed and will be left alone to remain sacred.

29. It is our belief, through our Washut religion, that when we bury our dead, the ground, the land, becomes sacred. All of Dwyer is sacred and that is how we have always treated it.

30. Our traditional burials, like those in Dwyer Forest, are not like those of the whites. Stones are not placed on top of the burials, but are used as monuments.

31. The rocks that used as monuments at Dwyer Forest, were river rock and were gathered from that area. These were important markers that enabled those who visited this site to find the burials so they could pray and pay their respects. This was how I knew where to locate the graves were at Dwyer, until the logging and heavy equipment destroyed them.

32. It is our belief that when our Creator returns, we will stand before him and be judged to see if what the Creator has been given to us, has been taken care of. If we have followed the ways of our Washut religion, then our bodies will become whole again. At this time we will join the Creator, along with the other people, on the other side — heaven.

33. If of our ancestors' graves are disturbed, it will be difficult for them to become whole again. If their bones are desecrated and scattered, or their final resting place is paved over, it will be very hard for them to join the others and be with the Creator. Mount Hood, which we called Wy'Easf', has always been veiy important to the Cascade People, even though we lived along the Columbia River, which we called "Nchi-Wana" (the "Big River"). It was a major pass through the Cascade Mountains that we utilized almost year around and lead us to many of our usual and accustomed places that we needed to return to, and were also the sites where those after us would be returning to.

34. What the white people called the Oregon Trail or the Barlow Trail was a Native Trail in the very beginning. These strangers couldn't get their wagons past the Cascade Falls on the Columbia River, so they used the ancient Indian Trail over Mount Hood that lead down to the camas fields in the Willamette Valley. And, they even used the same camp grounds that the Natives used, and one was located in the Dwyer Forest. This was told to me by my Uncles Walter Speedis and Wilferd Yallup in their stories. This was oral tradition, meaning that they were passed on from generation to generation and they were not made up.

35. Other Native People from Oregon and Washington also utilized this Trail over Mount Hood. It was not just the Cascade People or the Klickitat People.

36. The oral tradition of my people identified the Dwyer Forest as an ancestral campground where there was water and game nearby; a place that they could always stop at when traveling over Mount Hood.

It was a place to gather plants that were used for medicines, like my uncle, Walter Speedis, would do. This is where a burial ground was established for those who could not make it home.

37. It was through the oral traditions of my people that I learned that I must always return here and visit the burials. This was where I would pray and pay my respects. I would return again and again. And, I always did, for forty years except for the widening activities of Highway 26, Until then, generally nothing was ever distured there.

38. I was 40 years old when I started hearing people talk about Dwyer Forest. It was never the young people, but the old people. They told the stories.

39. The Elders talked about the sweat lodge that was located in Dwyer Forest over a hill to the north. It was by a small stream, whose waters bubbled-up from under a rock, and had a good flow. This is where the old people said that there were sweat lodges.

40. There were two sweat lodges by this stream; one for men and one for women. This was to purify people who were doing ceremonies. It was an important place to us because it purified both the mind and the spirit.

41. There were different medicines that were used for different purposes that came from the natural landscape. Different medicines are used for cuts and bruises, fevers and colds, and other ailments. They used roots and herbs.

42. Those who used what the Creator gave them, like the natural medicines, protected that land. These medicines didn't just grow everywhere, and they didn't

all grow in one place. That is one reason why the Native People always had respect for Mount Hood. And, Dwyer Forest was one place where certain medicines grew.

43. My Elders' stories about Dwyer Forest drew me to this sacred place. My religious activities on these visits to Dwyer Forest included prayer, meditation, paying our respects to those who were buried there, as well as giving of tobacco offerings; all of these activities were consistent with the Washat Religion, or the Religion of the Seven Drums. These are just some of the spiritual things that we do at these places where our ancestors are buried.

44. Sometimes I would go to Dwyer Forest and park my vehicle in the campground and just rest. This was what our ancestors did when they were traveling through.

45. Before the logging and road building, when I traveled over Mount Hood, I would stop at Dwyer Forest. I would pray and make sure the burials had not been disturbed.

46. Years ago, when I was traveling over Mount Hood with my Uncle Walter or my Uncle Wilferd, we would stop at Dwyer Forest. We would drive into the campground and I would listen to their stories.

47. In the later part of the 1980's I became involved in the protection of Enola Hill from logging. It was at that time that I got to know Michael P. Jones, even though I had met him several times prior to this period.

48. Both my uncles, Wilferd Yallup and Walter Speedis, drove me into the Dwyer Forest and stopped

in the campground. They told me that I must work with Michael P. Jones to protect this site and the other sacred sites on Mount Hood, and that it was my duty. So, I did. I have now been working with him for the past twenty-four years.

49. I helped to create the Mount Hood Sacred Lands Preservation Alliance over a decade ago. Chief Wilbur Slockish is a member, along with Carol Logan and Michael P. Jones. This group attempts to preserve what has been and always will be our usual and accustomed places. We do this through education and by trying to work with the general public, government agencies, and private land owners, trying to make them understand the sacredness of our land. People do not know that there are burials in that part of that ground. They have no idea how we Native People traveled and that sometimes we could not return to our village, but passed on.

50. I became a member of Citizens for a Suitable Highway in 1987.1 became a member of the Cascade Geographic Society beginning in the early 1990s. I consulted and advised both these groups on matters primarily concerning Native American cultural and religious issues that pertain to Mount Hood, and these included the A. J. Dwyer Forest and other sacred places that are along Highway 26.

51. Over a twenty-four year period, I have developed both a working relationship as well as one of trust with the Curator of the Cascade Geographic Society, Michael P. Jones. I have verbally authorized him to speak on my behalf to agencies, which he has done for many years. He has always attempted to build bridges of communication with government agencies, which he has done if they chose to listen. Those who

were involved in making the decisions on this Highway 26 project chose to ignore us.

52. The sacred sites along Highway 26 were of great importance to me and my people. Mr. Jones, since I was a member of the Mount Hood Sacred Lands Preservation Alliance and the Cascade Geographic Society, as well as a consultant with Citizens For A Suitable Highway, expressed my interest in and concerns over the U.S. 26: Wildwood-Wemme Highway Widening Project.

53. When they logged the Dwyer Forest, I went there to assess the damage and destruction to this sacred place. I prayed for those who were buried there, but witnessed that the stone monuments that identified the area as having burials, were now exposed, and there were at least four of these that were identified by flagging. Some of these became vandalized, while some of the stones were actually earned away.

54. My religious and cultural activities at the Dwyer Forest had continued until around March of 2008. That is when Dwyer was logged by the contractors employed by the Federal Highway Administration and the Oregon Department of Transportation. The Bureau of Land Management, who is said to manage the land for the public, did nothing. My plea to the Advisory Council on Historic Preservation made no difference.

55. After the logging, when the agencies brought in the bulldozers and began stump removal, this destroyed the remaining stone burial markers and began to disturb the soil beneath them, and things became even worse. Everything was scattered or

hauled away. Where our ancestors were buried was now offended in every way. I could no longer locate their final resting places.

56. The construction of the new guardrail as part of the highway widening project did not include an opening from U.S. 26 into our historic campground and burial ground in the A. J. Dwyer Scenic Area. The government agencies also buried our campground with a large mound of dirt that grows nothing but non-native Scotchbroom. They have even blocked the alternate access point, East Wemme Trail Road, with a metal barricade. You cannot drive in or walk in, and you cannot even stop alongside the guardrail to view where the campground and burials were.

57. What happened at Dwyer Forest, a sacred place for me and my people, has caused me great spiritual pain and intense emotional distress, of which there are no words to describe such feelings. What does one do when this happens? Exactly what we are doing; attempting to get justice for ourselves and those who would have used this place not only today, but in the future.

58. Those who are buried here, also need justice. Because they can no longer speak or can no longer move about, we are speaking for them. They, too, need justice through our courts.

59. This important Court of the United States of America should require that Federal Highway Administration and the Bureau of Land Management restore my access and my people's access to the Dwyer Forest. Remove the dirt that has buried our campground and covered over our burials. Reopen the access from the highway by removing the guardrail

and reopen the trail that enters from the west by removing the barricade. Replant the trees. Replant the vegetation. I will then attempt to return and carry on the same cultural and religious activities that I did before the logging started in March of 2008.

60. Desecration of the Dwyer Forest was something I never believed would happen, because it was a usual and accustomed place of my people. Cultural and religious practices took place here. This was the final resting place of those who could not make it back to their homes. All the agencies would have to do was listen to us, but they refused.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 7th Day of May, 2012.

Respectfully Submitted,

/s/ Johnny Jackson
Johnny Jackson

CERTIFICATE OF SERVICE

I certify that on May 7th, 2012, I filed electronically the foregoing *Declaration of Hereditary Chief Johnny Jackson in Support of Standing*, and served the same electronically upon the counsel of record via the Court's electronic case filing system:

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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

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,

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

CASCADE GEOGRAPHIC SOCIETY, an Oregon

Case No. 3:08-cv-1169-ST

DECLARATION OF CAROL LOGAN IN SUPPORT OF STANDING

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,

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

and

MATTHEW GARRET, in his official capacity as

Director of the OREGON DEPARTMENT OF TRANSPORTATION, an Agency of the State of Oregon,

Defendants.

I, Carol Logan, do hereby declare, under the penalty of perjury and the laws of the United States of America:

1. My name is Carol Logan. I am 68 years old. I reside at 696 North River Bend Road, in Otis, Oregon. I have personal knowledge of all of the contents of this declaration.

2. I am an enrolled member of the Confederated Tribes of Grande Ronde.

3. The ceded lands of the Confederated Tribes of Grande Ronde, as described in the 1855 Treaty With the Kalapuya, include the Mount Hood area, and therefore include the area now known as the A.J. Dwyer Scenic Area.

4. I am a lineal descendant of the Clackamas People, one of the signatory Tribes of the 1855 Treaty With the Kalapuya. Our Clackamas People inhabited and traveled through the areas of Mount Hood, included the region that includes the area now known as the A.J. Dwyer Scenic Area.

5. I am an Elder within the Confederated Tribes of Grande Ronde. My indigenous grandmothers and grandfathers were forced marched to Fort Yamhill, a

military reserve, which was then and is now on the Grande Ronde Reservation.

6. They were given numbers to keep track of them. We are still assigned numbers to keep track of who we are and where we are.

7. My father and mother and mother have walked on, and due to my age, I am now considered an Elder.

8. This means to teach and help keep our traditional ways alive and passing them on to future generations.

9. I organize and participate in religious ceremonies for my people, including water ceremonies. As visitors here on Earth, we have responsibilities to fulfdl. We go to the water and give thanks for keeping all Life in continuance.

10. Without water, we all would die. We apologize for all of the disrespect that is occurring to all of the waters. We acknowledge the water, as we never want it to leave.

11. These ceremonies are part of my religion. As a spritual practitioner, I use the sweat lodge for my teachings, and to keep my mind, body, and spirit in balance.

12. Mount Hood is sacred to Native peoples. Our water is sacred. It comes from the pure clean snow, and as it travels down the mountain, it keeps all Life healthy and well.

13. We do not go on the sacred Mountain and play in the snow and pollute it. The trees, plants, animals, birds, fish, and other leaving beings have a right to clean water.

14. Our People use many of these in our ceremonies. We do not want them contaminated.

15. I used the area of the A.J. Dwyer Scenic Area for prayer and meditation. I followed the traditional practice of my people regarding memorial ceremonies and services for people who have passed, in order to keep the memories of them ongoing for future generations. This would involve would saying prayers, meditating, leaving offerings, and singing songs.

16. The Creator will come one day and call upon those who are resting in peace, and they will rise and go to another place.

17. It is going to be very difficult for those ancestors to rise and go with the Creator when their resting place has been violated.

18. The campground at what is now called, the A.J. Dwyer Scenic Area was sent there for prayer and gathering and connection to sacred Mount Hood, Enola Hood, Indian Meadows, Bear Creek, the ancient Indian Trail for travel, Celilo Falls, camas fields, as well as a big trading area at what is now Rhododendron.

19. I am talking about millions of indigenous people who have used this place in Dwyer Forest throughout History. People have used this place since time immemorial.

20. I am also a member of the Mount Hood Sacred Lands Preservation Alliance and Cascade Geographic Society.

21. I worked with Cascade Geographic Society and Citizens for a Suitable Highway beginning in 1987 in

order to preserve and protect sacred sites along Highway 26 from Brightwood to Rhododendron.

22. These sacred sites are a very sensitive issue, and giving out their exact location would probably cause them to be destroyed.

23. I worked with Michael P. Jones, telling how important these sites are to our People, and about their historical value.

24. These sacred places are our usual and accustomed places, and it has been difficult to get government agencies to listen to tribal people or to let us exercise our rights of passage for gathering, ceremonies, hunting, fishing, and other traditional practices in these areas.

25. I asked Michael P. Jones if he would be my interpreter, about my inherent rights and interests: protecting burial grounds, campgrounds, plants and trees at Dwyer Forest; and The Stone Pillars west of Dwyer Forest, as we put prayer offerings on the top of them; large rocks at Wildwood; fishing grounds at Zigzag; not disturbing Indian Meadow, Bear Creek, and sacred sites at Rhododendron.

26. I was looking for ways to help preserve and protect these sacred sites.

27. At the same time, in the early 1990s, I became active in the organizing efforts to protect the Native American cultural resources and site in the area of Mount Hood, which my people consider to be sacred.

28. I participated in the organizing and legal effort to prevent logging on Enola Hill, a sacred site near not far from the A. J. Dwyer Scenic Area, and the site of vision quests.

29. I joined the Mount Hood Sacred Lands Preservation Alliance, the group that emerged out of the Enola Hill organizing efforts. Enola Hill is a vision quest site, and was desecrated by cutting down the trees there and destroying sacred elements surrounding the area. Two sweat lodges were also destroyed.

30. A few of us tribal people gathered at Enola Hill and offered the Forest Service a sacred pipe to smoke with us in peace, to help them to understand the importance of this sacred place. They refused.

31. I worked with Rip Lone Wolf, and Umatilla and Nez Perce descendant. Rip was a descendant of Chief Joseph. His wisdom about our Native rights and preserving and protecting our sacred places, is highly honored my many, including myself. He has since passed.

32. I am very honored to have worked along side him. I helped him looking for laws that pertain to protecting burials and sacred sites.

33. For some reason, the Forest Service, courts, and others involved said these laws did not apply to this sacred place.

34. Elders came to testify, but no one would give them a chance to testify.

35. We in MHSLPA have educated many through television, video, radio, colleges, newspapers, telephones, and internet, about respecting, preserving, and protecting our sacred places, as we are still doing this through MHSLPA.

36. We are trying to preserve and protect our sacred places through the legal channels. My trust in

legal laws have been damaged morally and ethically. I pray one day that it can be peaceably repaired.

37. I have developed a relationship of trust with the Curator and Historian with the Cascade Geographic Society, Michael P. Jones. I have authorized him orally to speak on my behalf.

38. Through Mr. Jones, I expressed my interest in and concerns over the U.S. 26: Wildwood-Wemme Highway Widening Project directly to the Oregon Department of Transportation and the Federal Highway Administration, prior to the finalization of the Environmental Assessment for this project.

39. I was reluctant to speak publicly about the Native American cultural resources along U.S. 26, including within the A.J. Dwyer Scenic Area, for fear that public knowledge of these resources would lead to their vandalism and desecration.

40. Instead, I demonstrated by interest and concern for the potential impacts of the widening of U.S. 26 on these Native American cultural resources discreetly and directly with the Oregon Department of Transportation.

41. As a result of the interest I demonstrated through the years, both in the 1980s when the initial widening took place, and in the 2000s when the U.S. 26: Wildwood Wemme Highway Widening Project was being planned, I expected to be invited to participate as an interested party or "other consulting party," for the Section 106 review for this project.

42. I never received an invitation to participate in the Section 106 review for this project. Therefore, after the Environmental Assessment came out in 2007,1

began to contact directly the Oregon Department of Transportation and the Federal Highway Administration regarding my concerns.

43. My concerns went unaddressed in the Section 106 process undertaken by ODOT and FHWA. At some point, I decided that I needed to contact these agencies directly to express my concerns about the impact of the U.S. 26: Wildwood-Wemme Highway Widening Project on the Native American cultural resources within the A.J. Dwyer Scenic Area.

44. On about February 5, 2008,1 placed a call to Mr. Wayne Statler, Project Manager for Region 1 within the Portland office ODOT to express my concerns. I identified myself as what I am: a direct lineal descendant of the Clackamas People.

45. On February 14, 2008,1 spoke with Mr. Tobin Bottman of ODOT. During this conversation we discussed the possibility of a meeting in the field with him, and I asked if Michael P. Jones of Cascade Geographic Society could accompany us. Ultimately, Mr. Bottman did not agree to the meeting in the field he initially proposed.

46. There are references to these calls in the administrative record of this case. FHWA 5466, 5469-5470.

47. Also, on February 14, 2008, Mr. Jones and I prepared a written request to Mr. Jeffrey Graham of FHWA for a new and adequate Section 106 review for the U.S. 26: Wildwood-Wemme Highway Widening Project. In this letter, I described my direct written and oral communications with ODOT and FHWA regarding my concerns about the potential impacts of widening U.S. 26 on the Native American cultural

resources both in the Mount Hood Area and specifically in the A.J. Dwyer Scenic Area, going back 25 years, into the mid to late 1980s. This letter is in the administrative record of this case, FHWA 5474 to 5483.

48. On or about February 15, 2008, Mr. Jones and I prepared a supplemental faxed memo to Mr. Graham. This memo reported recent vandalism to Native American cultural resources in the A. J. Dwyer Scenic Area. The fax memo included the deposition from January 24, 1991 of Yakama Tribal Chairman Wilferd Yallup regarding burials along U.S. 26. It also included a February 8th, 1991 Cultural Resources report prepared by Cascade Geographic Society. This memo and the attachments are included in the administrative record of this case at FHWA 5559-5638.

49. Towards the end of February or the beginning of March 2008,1 received a letter from Mr. Graham dated February 26, 2008. He declined our request for an adequate Section 106 review. This letter and its attachments are in the administrative record of this case, FHWA 5943-5967.

50. My religious activities continued up through the tree removal that the Oregon Department of Transportation's contractors started in March of 2008 as part of the U.S. 26: Wildwood-Wemme Highway Widening Project.

51. This tree removal project desecrated the historic campground and burial grounds of my people. It destroyed a stone monument to surrounding burials. The heavy machinery and backhoes with steel

tracks disturbed the ground over the campgrounds and burial grounds.

52. After the tree removal was completed in 2008,1 attended a ceremony to mark the desecration of the Native American cultural resources within the A. J. Dwyer Scenic Area. Looking at the large-scale destruction was heartbreaking. We put drumming and singing and prayers there, along with three small limbs erected to mark this place as sacred.

53. We did this Ceremony so that the Creator would not overlook these burials when it was time to call their bodies home. We wanted our ancestors to know that we have not forgotten them, and how important such ceremonies are to us.

54. Shortly after that, I went to the site with Michael Jones, Hereditary Chief Johnny Jackson, and Hereditary Chief Wilbur Slockish to mourn the descration of the site and to record on video the meaning of the cultural resources on the site.

55. The desecration continued with the tree stump removal and burial of the campground and burial grounds underneath a berm constructed beyond a new guardrail for the U.S. 26: Wildwood-Wemme Highway Widening Project.

56. This desecration caused me intense spiritual pain and emotional distress. I am a lineal descendant of the ancient people of this country. The stories, ceremonies, and living practices come from time immemorial. Keeping me out of the A. J. Dwyer Scenic Area is like saying to me, "forget your people, culture, song, prayers, gatherings, and stop respecting the last resting place of those who have walked on."

57. Resting places are never to be disturbed.

58. I am very devastated over the destruction of my race of peoples' identity. The destruction of the burial grounds in the A. J. Dwyer Scenic Area are just the latest part of this historical process.

59. What a slap in the face. How do we explain this to our children, relatives, and other interested people. How do we remain peaceful with such mental anguish.

60. The construction of the new guardrail as part of the highway widening project did not include an opening from U.S. 26 into the historic campground and burial grounds in the A.J. Dwyer Scenic Area.

61. The construction of the new guard rail, the blocking off of Wemme Trail, and the burial of the historic campground and burial grounds under an earthen berm has prevented me from undertaken the religious activities I undertook prior to March of 2008.

62. I am concerned that if I try to enter the area that has been blocked off and buried I will be arrested.

63. If the Court orders the Federal Highway Administration and the Bureau of Land Management to restore my access to the site and unearth the historic campground and burial grounds, I will return to my prior religious activities.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 7th Day of May, 2012.

Respectfully Submitted,

/s/ Carol Logan
CAROL LOGAN

CERTIFICATE OF SERVICE

I certify that on May 7, 2012, I filed electronically the foregoing *Declaration of Carol Logan in Support of Standing*, and served the same electronically upon the counsel of record via the Court's electronic case filing system:

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DATED May 7, 2012

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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

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,

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

CASCADE GEOGRAPHIC SOCIETY, an Oregon

Case No. 3:08-cv-1169-ST

DECLARATION OF HEREDITARY CHIEF WILBUR SLOCKISH IN SUPPORT OF STANDING

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,

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

and

MATTHEW GARRET, in his official capacity as

Director of the OREGON DEPARTMENT OF TRANSPORTATION, an Agency of the State of Oregon,

Defendants.

I, Wilbur Slockish, do hereby declare, under the penalty of perjury and the laws of the United States of America:

1. My name is Wilbur Slockish. I am sixty-seven years old. I reside at 89 Main Street, Wishram, Washington 98673 or 7400 Schoolie Flat Road, Wann Springs, Oregon 97761.1 have personal knowledge of all of the contents of this declaration.

2. I am an enrolled member of the Confederated Tribes and Bands of the Yakama Nation.

3. I am also a member of the Mount Hood Sacred Lands Preservation Alliance and Cascade Geographic Society.

4. I am a direct lineal descendant of a signer of a federal document known as the Confederated Tribes and Bands of The Yakama Nation Treaty of 1855. His thumbprint and mark are alongside the name Slakish, which is my family name that is now spelled "Slockish".

5. I am a relative of the late Wilferd Yallup, who served as the Chair of the Cnfederated Tribes and Bands of the Yakama Nation.

6. I am a hereditary chief of the Klickitat / Cascade Tribe, one of the Tribes that make up the Confederated

Tribes and Bands of the Yakama Nation.

7. The Klickitat and Cascade peoples have close ties of kinship. The Klickitat have traditionally been migratory. The Cascade have traditionally been settled along the Columbia River.

8. This status of hereditary chief reserves to me the right to address cultural and spiritual issues as my ancestor Sla-kish did.

9. The role of a hereditary chief is to above all to look out for the welfare of my people.

10. I have fulfilled this role in numerous ways, in particular by defending the rights of my people to fish in our usual and accustomed places under the 1855 Yakama Nation Treaty.

11. As a hereditary chief, I also have the responsibility to oversee and defend our sacred cultural and historical sites, including but not limited to the burial grounds and campgrounds at the site commonly known as the A.J. Dwyer Scenic Area.

12. As a hereditary chief, I also serve as an educator for our young people on the history and traditions of our people, including our religion, which is known to some as the Washut religion, or the Religion of the Seven Drums.

13. I am recognized by members of the Confederated Tribes of the Yakama Indian Nation, including members of the Klicktat and Cascade Tribes, as being responsible for performing cultural duties relating to the ceremonial or religious traditions of these Tribes; and as exercising a leadership role in these Tribes based on their cultural, ceremonial, and religious practices.

14. In our Washut religion, once a week, on Sunday, people come together to worship. This is done in a Longhouse where sacred songs are sung that accompany seven drums.

15. As needed, people will gather in the Longhouses for such things as memorials and name givings, and even funerals. These ceremonies will also take place for a boy's first deer and salmon, and a girl's first berries and roots. The same Washut songs are utilized at Sunday services are utilized in these ceremonies.

16. Those who practice the Washut religion will visit those spiritual places, like the A.J. Dwyer Scenic Area. Usual and accustomed sites like this one, is a traditional cultural landscape, that are very important us. All such places are utilized for praying because of the ancestors of my people who were here before us. This is especially true when there are burials.

17. Growing up, I learned about the history and traditions of my people from my parents, my aunts and uncles, and close relatives like Wilferd Yallup and Walter Speedis. The Mount Hood Area was very important because of the sacred places that were located there like Enola Hill and the other sites that were located along our ancient Native Trail that passed through this peak in the Cascade Mountain Range that became known as the Barlow Trail and the Oregon Trail. This area not only provided us with spiritual and cultural areas, but also foods like berries, elk, deer, roots, fish. It also provided us with medicinal plants, in addition to drinking water.

18. Through the Washut religion, I learned that

each day I must give thanks to the Creator for all the gifts he had given us. This included the land, water, roots, berries, and other traditional food like animals, whether they run, fly, swim, or live in the water. We also prayed for the protection of our burial grounds.

19. As a practitioner of the Washut religion I will visit places like the A. J. Dwyer Scenic Area where my people had traditionally traveled to and utilized, and I would have to give thanks here. And, those places that had the burials of my people, like Dwyer, we would pray that those who rest here will be watched over undisturbed. There are numerous places that my people have utilized in this manner.

20. The traditional usual and accustomed places in the Cascade Mountain Range, were also important for vision quests and numerous ceremonial practices. Individuals, male or female, would go to high-elevation places like Enola Hill when they were entering various stages of their life. Places like Dwyer were resting places that were utilized before and after this experience.

21. These sacred places must be protected so that future generations can follow in our footsteps and then they can practice our religion and culture the way our ancestors practiced. It is a tradition that must continue on until the time arrives that, together, will meet our Creator.

22. In our Washut religion, we believe that as soon as a person is laid to rest in the ground, the land becomes sacred. Stone monuments made from the rocks gathered from area allows the Native People to return to these burial grounds, like the A. J. Dwyer Scenic Area, and find these final resting places so they

can pay their respects. In precontact times, these rocks served a similar purpose as the headstones in cemeteries today.

23. When our Creator returns, we will stand before him and be judged. If we have followed the ways of our Washut religion, then our bodies will become whole again and we will join the Creator, along with the other people, in another world.

24. If the graves of the ancestors who are buried are disturbed, it will be difficult for them to become whole again. If their dust is scattered or their final resting place is paved over it will be even harder for them to join the others with the Creator.

25. Our oral traditions include our ancient habitation of the lands along the "nchi-wana" or "Big River", as our people called it, and the "Columbia River" as it is commonly known today. It also includes the migration routes of our people from the areas along the river, over Mount Hood and into the Willamette Valley to trade and fish at Willamette Falls, and to collect camas which is a traditional food.

26. We have Burial sites all along the migration route, which American emigrants in turn followed as the Barlow Trail, and which, in turn, various parts were paved over to create Highway 26. These are the final resting places of those who could not make it back to their village so they were laid to rest, often adjacent or near the campsites, like the one in A. J. Dwyer Scenic Area, or along Bear Creek, in Indian Meadow, in The Meadows at Rhododendron, and in the meadow at the base of Owl Mountain, to name just a few places.

27. One of the areas that so important to my people is known today as the "A. J. Dwyer Scenic Area." My

Uncles, Wilferd Yallup and Walter Speedis, said the Native name for the area around what is now known as Dwyer is "Ana Kwna Wana Pakiyawaxa," or "Place Where Rivers Meet." The name for the specific place that includes Dwyer is "Ana Kwna Nchi nchi Patat," or "Place of Big Trees". Usual and accustomed places, like Dwyer, had different names depending upon the tribe, band, family, or even the individuals who utilized the site and would always return here.

28. According to our oral traditions, our ancestors used this site as a campground and burial ground along the migration route, for people who passed on due to accidents or any other reason. Our people buried our dead with respect and honor, to not bother their resting place until Our Creator, or God as is known in so-called civilized people's churches, comes. No one should bother them or disturb their burial sites until He returns on Judgment Day to see where our actions lead us — to the Good Land or to the other place. But, if the graves are disturbed, it would be harder for them to join the others along with the Creator. But, if it's destroyed, it's impossible. That is the Law given to us by Him , so we follow our Ancient Laws, which are unwritten and orally handed down.

29. In the 1960s and 1970s, my Dad, Wilbur Slockish, Sr., Uncles, Wilferd Yallup and Walter Speedis, began sharing with me the oral traditions about the cultural and religious sites on Mount Hood. They also told me that one day I would be an Elder and would have to protect these places where we practice our spiritual traditions. We go to these sacred places and pray. If there are burials, we go there and we pay our respects. My people's oral history followed these practices and I continue to follow this tradition.

30. The A. J. Dwyer Scenic Area was one of these sacred places. Here, we had a traditional camp site, gathered natural medicines, and prayed. This was also where some of my people were laid to rest and members of my tribe and family would return to this place and pay their respects.

31. In the early 1980s my training as a cultural leader began. As a direct result, I renewed the Salmon Ceremony for the Klickitat Tribe that had not been held since 1945, after my Grandfather, who was the Chief of the Klickitats, Frank Slockish, died.

32. In the early 1990s, I became active in the organizing efforts to protect Native American cultural resources and sites on Mount Hood. This included Enola Hill, which my people consider to be sacred. It was a place where Native People conducted vision quests and other ceremonies not far from the A. J. Dwyer Scenic Area.

33. In the early 1990s, I began visiting our campground and burial ground in the A. J. Dwyer Scenic Area for the purpose of prayer and veneration of our ancestors. These visits took place at least twice a month or whenever I was driving through the Mount Hood Area.

34. My visits were conducted regularly because I also wanted to make sure that the burials were not being disturbed and the area wasn't being bothered by artifact hunters. My own family's cemetery, Wahkiacus, which is located above Lyle, Washington, had been disturbed and vandalized.

35. My religious activities on these visits to the A.J. Dwyer Scenic Area included prayer, veneration of my ancestors, and giving of tobacco offerings,

consistent with the Washat Religion, or the Religion of the Seven Drams. These are just some of the spiritual things that we do at these places where our ancestors are buried.

36. On these visits I would park my vehicle along Highway 26 outside the A. J. Dwyer Scenic Area, in a gap in the guard rail, which allowed me access to the campground. I would walk in and pay my respects to my ancestors.

37. When I participated in the efforts to protect Enola Hill from logging, I was threatened with arrest for trespass for going to a traditional usual and accustomed place. It was at that time that I became reluctant to be even seen walking into the A. J. Dwyer Scenic Area, fearing arrest.

38. If I believed that I was being followed or observed, I would stop alongside Highway 26 near the east entrance to Dwyer, and pretend to check my engine, my tires, etc., and then say a prayer. I was reluctant to enter the campground for fear of being harassed or arrested.

39. My fear of being harassed or arrested at Dwyer is due to the historical suppression of our religion, language, and culture, as well as being forced into Christianity. We were even punished for speaking our language in school. So, my fear is very real.

40. When the Enola Hill logging issue quieted down after 1993,1 could more easily access Dwyer. However, I still would not drive into the campground, fearing that I would be blocked in and arrested and my vehicle seized, so I would just walk into this traditional place.

41. I joined the Mount Hood Sacred Lands Preservation Alliance, the group that emerged out of the Enola Hill organizing efforts. The purpose is to protect our usual and accustomed places and to educate the public as to why we need to preserve our sacred sites.

42. I became a consultant to Citizens for a Suitable Highway and Cascade Geographic Society beginning in the early 1990s, and advised these organizations on the religious and cultural significance of the Mount Hood Area, including the A. J. Dwyer Scenic Area.

43. I have developed a relationship of trust with the Curator of the Cascade.

44. Geographic Society, Michael P. Jones. I have orally authorized him to speak on my behalf.

45. Through Mr. Jones, I expressed my interest in and concerns over the U.S. 26: Wildwood-Wemme Highway Widening Project.

46. My religious activities continued up through the tree removal that the Oregon Department of Transportation's contractors started in March of 2008 as part of the U.S. 26: Wildwood-Wemme Highway Widening Project.

47. This tree removal project desecrated the historic campground and burial grounds of my people. It destroyed a stone monument to surrounding burials. The heavy machinery and backhoes with steel tracks disturbed the ground below which our ancestors were and are buried.

48. The desecration continued with the tree stump removal and burial of the

49. campground and burial grounds underneath a

berm constructed beyond a new guardrail for the U.S. 26: Wildwood-Wemme Highway Widening Project.

50. This desecration caused me intense spiritual pain and emotional distress. Those who lay buried here on this sacred ground, have had their dust scattered and have been paved over. In spite of my attempts to work with the government agencies, they refused to listen. They had numerous chances to learn the truth about the Native Peoples' use of the A.J. Dwyer Scenic Area, but repeatedly refused.

51. The construction of the new guardrail as part of the highway widening project did not include an opening from U.S. 26 into our historic campground and burial ground in the A.J. Dwyer Scenic Area. The government agencies also buried our campground with a large mound of dirt that grows nothing but non-native Scotchbroom. They have even blocked the alternate access point, East Wemme Trail Road, with a metal barricade. You cannot drive in or walk in, and you cannot even stop alongside the guardrail to view where the campground and burials were.

52. The government agencies construction of the new guard rail and the burial of our historic campground and burial grounds under an earthen berm, in addition to the blocking of East Wemme Trail Road, has prevented me from practicing the religious activities I undertook prior to March of 2008.

53. I can no longer utilize the A. J. Dwyer Scenic Area. The loss of the big trees and the removal of the vegetation that served as the camouflage that allowed me to undertake my religious and ceremonial practices at this location, plus the placement of the large mound of dirt over the site, has made it impossible.

54. I am concerned that if I try to enter the A. J. Dwyer Scenic Area I will be arrested. Since the logging took place, whenever I would go to the site, the Oregon State Police would stop along side the highway and observe me. I have even seen people in plain clothes in unmarked cars photograph me. It is impossible for me to practice my religion.

55. I am the Chief of the Klickitat-Cascade People. One of my duties is to protect and preserve the burial sites and our usual and accustomed places. By doing so, these sacred sites become available to people today and for future generations, like they were to our ancestors.

56. It is our ceremonial duty that we have to preserve and protect our burials, our sacred objects, and our sacred sites, so that our generations will do the same.

57. If the Court orders the Federal Highway Administration and the Bureau of Land Management to restore both of the accesses to the A. J. Dwyer Scenic Area, and remove the mound that covers the historic campground and burial grounds, as well as replanting the trees and vegetation to restore the needed camouflage, I should be able to visit this sacred place. I would then be able to resume my prior religious activities at this site.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct.

Executed this 7th Day of May, 2012.

Respectfully Submitted,

/s/ Wilber Jackson
WILBUR SLOCKISH

CERTIFICATE OF SERVICE

I certify that on May 7th, 2012, I filed electronically the foregoing *Declaration of Hereditary Chief Wilbur Slockish in Support of Standing*, and served the same electronically upon the counsel of record via the Court's electronic case filing system:

Tim Simmons
Assistant U.S. Attorney
United States Attorney's Office
District of Oregon
405 E. 8 Ave., Suite 2400
Eugene, OR 97401

Ty Bair
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DATED May 7th, 2012

/s/ James J. Nicita
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Of Attorney for Plaintiffs

Notes on Wildwood-Wemme rock cluster location

On July 24, 2008, Thursday, I went out to the Wildwood-Wemme Hwy. 26 project area to relocate and assess the rock cluster that was tested by Rick Pettigrew in 1986.1 found what I believe was the original rock cluster now in scattered and disturbed condition surrounded by disturbed soil. The timber has been cut and surrounding vegetation has been disturbed all along the north side of Highway 26 in this area to prepare for the planned highway modifications which were proceeding actively slightly further to the east with some activity occurring on the highway immediately adjacent south of the rock cluster location. I was on-site during the 1986 test excavations and recall the area I visited this time as the same as from that previous visit.

On this July 24, 2008 visit, I took a series of photos of the scattered rocks and disturbed soil of this rock cluster area. In addition to inspecting the rock cluster location, 1 walked over much of the disturbed right-of-way that is being prepared for the modifications as well as the undisturbed dirt road that runs to the north across BLM land to private land.

No cultural features or objects that are clearly historic or prehistoric were observed in the area disturbed for the current highway modification project, in the existing, undisturbed dirt roadway, nor in the strip of land between the dirt road and the area cleared for the highway modifications. Soil visibility is good over the entire area of the highway modification clearing and in the existing dirt road bed on the BLM

parcel. There is little soil visibility in the densely vegetated strip between those locations. The rock cluster area itself does not present any additional indication as to its functional or temporal nature and appears to still have no other associated objects or features such that it could be identified as a cultural resource.

Frances M. Philipek
Salem District Archeologist
July 25,2008

Photos DSCN0946.jpg through DSCN0955.jpg in this file are the photos taken of the rock cluster location on this 7/24/2008 visit.

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July 25,2008

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CASCADE GEOGRAPHIC SOCIETY
P.O. Box 398
Rhododendron, Oregon 97049
(503) 622-4798
(cell) 503-318-9752

To: Charlene Dwin Vaughn, Assistant Director, Advisory Council on Historic Preservation
(Fax: 202-606-8647)

From: Michael P. Jones

Subject: Memos from Hereditary Chief Johnny Jackson Concerning the "Dwyer Memorial Forest", the "Oregon Trail", & Other American Indian "Usual & Accustomed Places" on Oregon's Mount Hood that will be Adversely Impacted by Projects Along East U.S. Highway 26 by the Oregon Department of Transportation & the Federal Highway Administration

Date: May 5th, 2008

I have been requested to fax these very important memos to you from Chief Johnny Jackson of the Cascade Tribe. If you do not receive all of the pages please do not hesitate to let me know. Thank you.

[Please See the Attached 9 Pages]

Chief Johnny Jackson, Cascade Tribe
Post Office Box 190
Underwood, Washington 98651
541-993-0252

To: All Parties Making Decision on Dwyer Memorial Forest

From: Chief Johnny Jackson, Cascade Tribe

Subject: My Right to Speak Concerning Traditional Cultural Sites & Burials at Dwyer Memorial Forest on Mount Hood

Date: April 25, 2008

I am a hereditary chief of the Cascade/Klickitat Tribe of the Columbia River Bands. I want to speak on what is known as the Old Oregon Trail south of Mount Hood in the Enola Hill area.

The history of that area is that my People have always used that area. And, the Warm Springs Tribe have always picked huckleberries, and gathered foods and medicines there.

The Old Oregon Trail, which passes through the Mount Hood Area, was at one time an Indian Trail. This was the main trail which passes onto the Willamette Valley, before the time of automobiles or even horses.

The Willamette Valley used to be known for its camas, that the native people harvested for good. The camas patches were in abundance all along the Willamette Valley, and people traveled from Eastern

Oregon and Washington to father this important traditional food.

Native people had to go over Mount Hood, through that pass because the passage through the Gorge was impassable because of Cascade Falls. Highway 26, today, runs over portions of the Old Oregon Trail [the Indian Trail] or alongside it. This pass through the Cascade Mountain Range has been known by natives for hundreds of years.

When people from different areas to the East, and even over into the Warm Springs area, could not make it back over the mountain on this Indian Trail [now the Old Oregon Trail], people were buried along this trail. This is how it was done, because their people were unable to take them back to the village from which they came.

Many people were buried along the Indian Trail [the Old Oregon Trail]. In that way, the Trail was made sacred to the native people.

When the native people camped during the summer months below the Enola Hill, like in the "Dwyer Memorial Forest", they came to gather foods and berries. They also journeyed west to the Willamette Valley for the camas. It was an important food for these people, which they could dry and use as food all year round.

Not only that, but they also got fish from the Willamette River and dried it. This was another food supply that they brought back over the mountain.

These were just some of the foods that were very important to the native people. And, they used the Indian Trail [the Old Oregon Trail] in order to get

these foods, which made it a very important travel route.

The native people used the Indian Trail that was later called the Oregon Trail, which crossed over Mount Hood. It passed through the "Dwyer Memorial Forest", where a traditional camp was located. This was the route they used to go to and from the Willamette Valley, and to get back to their homes.

To the native people, a burial resting site is very sacred and very important, not to be bothered or ever disturbed. It was known to be one of the unwritten laws of the native people. It still exists today, and people still live by these unwritten laws.

The native people have respect for these places — for not only their own burial sites, but also for other nationalities with their burial sites. It is well known and understood that the sacredness of these burial sites is the law, and no one should disturb them. This law still exists today.

Therefore, we hope that other people will respect the sacredness and the burial sites along that Indian Trail and in the "Dwyer Memorial Forest". We hope that the Highway Department and whoever wants to develop anything there, should consult with the native people first.

We are the River Chiefs and we would appreciate if people would respect our history as well as they respect their own.

Also, there are many foods and medicines that the native people use, that they do not talk about or expose, because nowadays our foods and medicine sources are getting scarce. These can be found in that

mountainous area along and around the Indian Trail in the "Dwyer Memorial Forest".

There are other cultural issues in the Mount Hood Area, like along the creeks where there were sweat lodges and ceremonial sites — places that natives would go to have ceremonies and sweats. And, there were also vision sites on Enola Hill.

Therefore, I would appreciate any respect you could give the natives and ourselves.

Your truly,

Johnny Jackson

Chief, Cascade Tribe

Chief Johnny Jackson, Cascade Tribe
Post Office Box 190
Underwood, Washington 98651
541-993-0252

Memo

To: Charlese Dwin Vaughn, Assistant Director,
Advisory Council on Historic Preservation
[FAX: 202 606-8647]

From: Chief Johnny Jackson, Cascade Tribe

Subject: Responses to Your April 14th Letter Concerning the "Dwyer Memorial Forest", the "Oregon Trail", and Other "Usual and Accustomed Places" on Mount Hood

Date: April 26, 2008

I am the Chief of the Cascade Tribe of the Columbia River. My People are members of the Yakama Indian Nation and have been since the Treaty of 1855. We have used and continue to use the Mount Hood Area. Since time immemorial we have come here for food-gathering (such as berries and roots), for the gathering of medicines, for spiritual and religious uses, for trading, for hunting and fishing, for burials, for camping, and other uses.

I am writing respond to your letter, that is dated April 14th, concerning the recent construction activities on Mount Hood, along East U.S. Highway 26. The Oregon Department of Transportation and the Federal Highway Administration have been destroying areas and places on Mount Hood that has

and always will be of great concern to the Cascade Tribe. The "Dwyer Memorial Forest", the "Old Oregon Trail", and "Usual and Accustomed Places" that are located adjacent to that modern road, are sacred. That means that they are significant to my People and need to be left alone so that future generations can utilize them.

Many years ago, I became involved in what was happening along the highway of Mount Hood. The highway had just been widened the first time and the roadway was getting closer and closer to our sacred sites, which included burials.

My uncle, Walter Speedis from the Yakama Indian Nation, knew much about the natural medicines on Mount Hood and elsewhere — something which he had learned all of his life from the elders. He took me into the "Dwyer Memorial Forest" and, standing in the middle of my People's old camp site, he pointed out the Indian Trail (the Old Oregon Trail), and reaffirmed to me the important of this place that he would gather medicines from, and how it was related to Mount Hood.

My Uncle Walter also pointed out the burials of our People, and how they came to be here at this place. He explained their connection to what was later called by the whites the Old Oregon Trail.

My Uncle explained how the widening of the highway over Mount Hood could destroy areas that were used by our People, like the "Dwyer Memorial Forest", the Old Oregon Trail, and other sacred sites and places. That is why he told me that he was going to be working with Michael P. Jones (of the Cascade

Geographical Society), and that I, too, would need to get involved. And, I did.

Another Uncle, Wilferd Yallup, also from the Yakama Indian Nation, met several times with the Oregon Department of Transportation and explained to them why the "Dwyer Memorial Forest", the Indian Trail (the Old Oregon Trail), Bear Creek, Indian Meadow (also called Pioneer Meadow) needed to be protected and respected. But, he and his words were obviously ignored.

I have never, nor have my People ever hidden the important of "Dwyer Memorial Forest", the Old Oregon Trail, Bear Creek, Indian Meadow, and other traditional places that are sacred to us. We have been ignored and disrespected in all of the Section 106 reports, not just on this latest one, but on all of the documents that have been done by the Oregon Department of Transportation and the Federal Highway Administration. This is wrong! We may say things that these agencies do not want to hear, but they are the truth.

Today, we are speaking out once more, even though the agencies who are widening the highway do not want us to speak about our sacred places that they are destroying. The Oregon Department of Transportation and the Federal Highway Administration believe that if they ignore us, we will accept their designation that the "Dwyer Memorial Forest", which had always been utilized by the People traveling over Mount Hood. Of course, this will never be accepted because there are burials at this place. We should know: these are the final resting places of our People.

My People are not afraid to talk about our "Usual and Accustomed Places" on Mount Hood, whether it is about Enola Hill or the "Dwyer Memorial Forest", and any of the other areas that have been and continue to be used today. They, obviously, cannot be replaced. That is why not allowing us the chance to speak is wrong. That is why saying that there is no new information is even more wrong.

Our "Usual and Accustomed Places" on Mount Hood are of great significance to my People. They are traditional places that traditional practitioners still utilize. They must be saved for future use by ourselves today and others tomorrow.

I am requesting that the construction activities of the current highway project stop immediately. Give us the time to put together the documentation about the "Dwyer Memorial Forest", the "Oregon Trail", and our other "Usual and Accustomed Places" of my People, as they are currently at risk. If the Oregon Department of Transportation and the Federal Highway Administration cannot do their job, then we must do this for them. The guidelines, as outlined in "National Register Bulletin 38", would be followed.

Our traditional cultural properties on Mount Hood are not in the way of highway improvements. The Oregon Department of Transportation or the Federal Highway Administration just needs to do things differently, but only after allowing the Native People the chance to speak and give testimony in order to prove the significance of our sacred places on Mount Hood.

I am not asking you to do anything out-of-the-ordinary. Stop the Oregon Department of

Transportation and the Federal Highway Administration from inflicting any further destruction on our sacred places and sites. Allow us the chance to have our elders speak and give testimony, which is something that should have happened.

I anxiously await your response.

Johnny Jackson

Chief, Cascade Tribe

CASCADE GEOGRAPHIC SOCIETY
P.O. Box 398
Rhododendron, Oregon 97049
(503) 622-4798
(cell) 503-318-9752

To: Charlene Dwin Vaugh, Assistant Director,
Advisory Council on Historic Preservation
[FAX: 202-606-8647]

From: Michael P. Jones

Subject: Memos From Carol Logan, Descendant of Many Northwest Indian Nations Tribes, Concerning the "Dwyer Memorial Forest", the "Oregon Trail", & Other American Indian "Usual & Accustomed Places" on Oregon's Mount Hood that will be Adversely impacted by Projects Along East U.S. Highway 26 by the Oregon Department of Transportation & the Federal Highway Administration.

Date: May 5th, 2008

I have been requested to fax these very important memos to you from Hereditary Chief Wilbur Slockish, from the Klickitat/Cascade Tribes. If you do not receive all of the pages please let me know. Thank you.

[Please see the Attached 7 Pages]

Carol Logan
Descendant of Many Indian Nations
696 North River Bend Road
Otis, Oregon 97368
541-921-0388

Memo

To: Whom It May Concern

From: Carol Logan, Descendant of Many Indian Nations

Subject: My Response to Speak for My Sacred Grounds on Mount Hood

Date: April 25th, 2008

I am writing this Memo regarding the desecration of our sacred grounds along Highway 26 in the Mount Hood Area.

First I will introduce myself. I am known as Carol Logan; my Indian name is "Kwiskwis". I am a Grand Ronde tribal member, which means I am a descendant from the treaty tribes. Our reservation and the Grand Ronde tribe was terminated in 1954; it was restored in 1984.

My tribal connections come form my descendancy:

- From Gray Wolf — Clackamas Nation;
- From Cobaway — Clatsop Nation;
- Nancy Twinishe — Wasco Nation;
- Agnes Enick — Sauk-Suiattle Nation [Marble Mount Area];

- Camaphema (Chief Halo) — Kalapooya Nation [who refused to leave Splasta-alla, because his father and other family members were buried there].

There are oral histories told by elders and others about the ancient Indian Trails that went to and from Mount Hood, the Cascade Mountain Range, the Willamette Valley, the Coast, and the Columbia River. They told stories about the villages, the warm springs, the mineral springs, the medicine gathering places, the trading places, the travel routes, the burial grounds, etc.

I have been involved in protecting sites in these areas since the 1980s. I was there when the elders from the Yakama Indian Nation and the Three Grandmothers from Warm Springs came to testify about Enola Hill at the Courthouse in Portland and Oregon City, and, sadly, were not allowed to speak because they would have spoken the truth.

The issue at hand is about the Oregon Department of Transportation desecrating sacred places along Highway 26, falling trees and dragging bush, and driving heay equipment over the Indian Trail (i.e., "Oregon Trail"), destroying medicine plants, a village site, and burials. They also removed the sacred stone markers that identified the final resting places of our ancestors.

We have told the Oregon Department of Transportation for years about these sites. But, they say that there is nothing there. If they do find something, they say that it is "not significant". And, when we tell them about these sites, they say that they are "not significant".

The place for our sacred grounds being determined to be "not significant", is not just the fault of the highway engineers, although they hold a major portion of the responsibility. The blame also lies in the hands of the archaeologists who attempt to act like "experts" in deciding what is sacred and what is not sacred to my People. Knowing how to dig holes in the dirt does not make them experts about the significance of our "Usual and Accustomed Places".

My People have always considered our sacred grounds on Mount Hood, or anywhere else, to be important. Our "Usual and Accustomed Places" have always been significant to us, even during these modern times. And, these cultural and religious sites must be protected so that future generations of my People can continue to practice their traditional ways, as always have been done since time immemorial by our ancestors.

When the treaties were signed, this allowed our "Usual and Accustomed Places", like those on Mount Hood, to be "officially" (according to this legal document) protected. This allowed what remained of our People to continue carrying out our traditional responsibilities at these places of traditional use.

My People understand that life if the greatest gift from the Creator. To be able to follow the natural law of the land — as given to us by our Creator — we must have these traditional sacred grounds for our use. And, to be able to practice our traditional ways of life, we need these "Usual and Accustomed Places" to be protected.

The spirit of our People, along with their flesh, heart, and soul, remains there embedded in the Earth

forever. Since I was a little girl, I learned about how sacred Wy'East (Mount Hood) was, and about the power that is all around her.

I shall close for now and await your response.

Konaway nika tillicum

Carol Logan ("Kwiskwis")

Carol Logan
Descendant of Many Indian Nations
696 North River Bend Road
Otis, Oregon 97368
541-921-0388

Memo

To: Charlene Dwin Vaugh, Assistant Director,
Advisory Council on Historic Preservation
[FAX: 202-606-8647]

From: Carol Logan, Descendant of Many Indian Nations

Subject: Response to Your April 14th Letter Concerning the "Dwyer Memorial Forest", the "Oregon Trail", and "Usual and Accustomed Places"

Date: April 25th, 2008

I am a Grand Ronde tribal member, whose Indian name is "Kwiskwis". I am the descendant of many Indian Nations, including the Clackamas Nation, the Clatsop/Chinook Nation, the Wasco Nation, and the Sauk-Suiattle Nation.

I have been involved in protecting my People's "Usual and Accustomed Places" since the 1980s, many of which my family have and still use. That is when I first got involved with the many issues associated with the widening of Highway 26. At that time, all of the sites of concern were protected by the Highway 26 Widening Agreement that was made in 1987 between the Oregon Department of Transportation and

Citizens for Suitable Highway, of which I was and still am a member.

Today, the widening of the highway by the Oregon Department of Transportation and the Federal Highway Administration will destroy what was not only saved back in 1987, but will include even more areas of concern to my People on Mount Hood. These include, but are not limited to the following:

- the grove of trees "Dwyer Memorial Forest";
- the American Indian Trail (now known as the "Oregon Trail");
- and other "Usual and Accustomed Places".

Within these areas, which are the "Usual and Accustomed Places" of great concern to myself, my family, and others of my People, are traditional use sites. These include burials, cultural and religious use sites, that are located within this current project area.

The Oregon Department of Transportation has been aware of my existence and my concerns since the early 1990s. That is why I was very surprised when their highway agency did not include me in their Section 106 process, as the law specifies. This deliberate attempt to stifle information concerning the use and the significance of our "Usual and Accustomed Places" has resulted in this current project along East U.S. Highway 26, adversely impacting and/or destroying our sacred places, which cannot be replaced.

This last January, I did contact the Federal Highway Administration and expressed my concerns about the project and what it would do to you "Usual and Accustomed Places" to Jeff Graham. He said that

he "didn't know anything about it", and said he would have a couple of other people call me.

I then called Tobin Botman, the archaeologist that was working on the project with the Oregon Department of Transportation. After I told him my concerns, he said that he was going to call me back and set up a time that he and a highway engineer could walk the Highway 26 project area with me. He never bothered to call me back.

After the passage of approximately three weeks, I became very concerned. So, I again called Botman wondering when we were going to get together with this highway engineer. I was shocked when he said that we were not. He said that we didn't need to since there was "no new evidence."

Botman did not secure any information from me concerning our "Usual and Accustomed Places" in this project area, not apparently, did he want to. The question is why?

Also, Botman said that there was "no new evidence". If this is true, then he would have already known about the burials, the medicine sites, the village site, the ancient American Indian Trail (now known as the "Oregon Trail"), and other "Usual and Accustomed Places" of my People that were located in the project area for the highway widening. I thought that maybe he dug through the files of the Oregon Department of Transportation and located the testimonies of Wilferd Yallup, Walter Speedis, Bill Yallup, and others of the Yakama Indian Nation, Rip Lone Wolf from the Umatilla Indian Reservation, the Three Grandmothers from Warm Springs Indian

Reservation, and other American Indians who had provided testimonies concerning our sacred places.

Obviously, if I could not add anything "new" to the information about our "Usual and Accustomed Places" within this current Highway 26 project area, why are these sites not protected and included in the Section 106 report? And, if the Oregon Department of Transportation and the Federal Highway Administration had actually done their job, why have they not placed these sacred places on the National Register of Historic Places?

The "Dwyer Memorial Forest", the "Oregon Trail", and the other "Usual and Accustomed Places" within the Highway 26 project area, are related to others on Mount Hood, which gives these threated sites even more significance. These include: Enola Hill, Zig Zag Mountain, Wolf Camp, Hunchback Mountain, Wind Mountain, Big Laurel Hill, Indian Meadow, Bear Creek, the Zig Zag Campground, the Salmon River, Sandy River, White River, Still Creek, Henry Creek, Little Henry Creek, Meadow Creek, Spirit Horse Creek, Spirit Horse Falls, Little Zig Zag River, Little Zig Zag Falls, Salmon River Meadow, Blue Box Pass, Enid Lake, Toll Gate, the Big Deadening, Huckleberry Mountain, Veda Lake, Summit Prairie, Frog lake, Gate Creek, Lolo Pass, Mud Creek, Old Main Flatts, Ramona Falls, Little Crater Lake, Badger Creek, Barlow Pass, North Mountain, Wildcat Mountain, the Creighton Trail, Bald Mountain, and other areas of traditional use by my People.

The sites along Highway 26 — including the "Dwyer Memorial Forest", the "Oregon Trail", and other "Usual and Accustomed Places" — are eligible for inclusion in the National Register of Historic

Places. They should be reviewed under the established guidelines of the National Register Bulletin 38 to prove that they are significant. On this project, as well as others that already adversely impacted Indian Meadow and Bear Creek, it was archaeologists who determined the important of our sites by only "digging". This, obviously, is unacceptable since we are talking about traditional sites that are used by traditional practitioners.

It is very sad that the places along U.S. Highway 26, which traditional practitioners still use, are being destroyed by the Oregon Department of Transportation and the Federal Highway Administration. Our "Usual and Accustomed Places" must be saved. Highway construction must immediately stop and the evidence evaluated under the guidelines of the National Registers Bulletin 38. This is the only fair thing to do.

Konaway nika tillicum

Carol Logan ("Kwiskwis")

CASCADE GEOGRAPHIC SOCIETY
P.O. Box 398
Rhododendron, Oregon 97049
(503) 622-4798
(cell) 503-318-9752

To: Charlene Dwin Vaugh, Assistant Director,
Advisory Council on Historic Preservation
[FAX: 202-606-8647]

From: Michael P. Jones

Subject: Memos From Hereditary Chief Wilbur Slockish From the Klickitat/Cascade Tribes, Concerning the "Dwyer Memorial Forest", the "Oregon Trail", and Other American Indian "Usual & Accustomed Places" on Oregon's Mount Hood that will be Adversely impacted by Projects Along East U.S. Highway 26 by the Oregon Department of Transportation & the Federal Highway Administration.

Date: May 5th, 2008

I have been requested to fax these very important memos to you from Chief Johnny Jackson of the Cascade Tribe. If you do not receive all of the pages please do not hesitate to let me know. Thank you.

[Please see the Attached 8 Pages]

Chief Wilbur Slockish
Klickitat/Cascade Tribes
Post Office Box 184
The Dalles, Oregon 97058
541-993-4779

Memo

To: All Parties Making Decisions on Dwyer Memorial Forest

From: Chief Wilbur Slockish, Klickitat/Cascade Tribes

Subject: My Right to Speak Concerning Traditional Cultural Sites & Burials at Dwyer Memorial Forest

Date: April 23rd, 2008

I am a direct descendant of a signer of a federal document known as the Confederated Tribes and Bands of the Yakama Nation Treaty of 1855. His thumbprint and mark are alongside Sla-kish, which is my family name that is now being spelled as "Slockish".

This has reserved me the right to address cultural and spiritual issues as my Great Grandfather did; in our Klickitat/Cascade People roles of leadership we are Hereditary Chiefs that assume the role of our forefathers. This identity was not given by any government official to our people as we always had this custom since long before any government official, settler, homesteader, and trapper ever came to our Usual and Accustomed areas, which were used as

trails for food gathering, trading, or, as is what is now known as interstate commerce.

To get to and from our Usual and Accustomed areas, our people used this important trail that crossed over Mount Hood. This trail is now beneath and/or alongside of where the highway, known today as Highway 26, is located. This trail was used as a major route for our Klickitat/Cascade People for trading goods — materials from the Coast, down South, East for other goods … and from the other tribal nations in those directions.

I also need to remind you that history did not start with Captain Gray and his ship coming into the "nchi-wana" or "Big River", as our people called it. We have a history much older than your books, and this history we pass on orally. This is why we know the importance of the trail and our Usual and Accustomed areas, which has been passed on from one generation to the next.

We have Burial sites all along this area known today as "Dwyer Memorial Forest", as we had to seek no one's permission to bury our people who passed on while on this journey due to accident, or any other reason. Our people buried our dead with respect and honor, to not bother their resting place until Our Creator, or God as is known in so-called civilized people's churches, comes. No one should bother them or disturb their burial sites until He returns and comes back on judgment Day to see where our actions lead us — to the Good Land or to the other place. That is the Law given to us by Him, so we follow our Unwritten Laws.

This is a good time to learn from our Oral History about our Ways of Life, trade routes, and other usages of land, water, ceremonial, and other uses our People practiced here, from the People who still live it, practice it, and follow these ways, not from someone who learned from a college that has a degree. There is a difference in these ways of learning of these practices by actually doing them, or studying them in class. That is why those who are now sadly making decisions about the "Dwyer Memorial Forest" cannot understand the importance of this area and the others on Mount Hood.

With that, I will close for now and await your response.

Wilbur Slockish, Jr.

Hereditary Chief Klickitat/Cascade Tribes

Hereditary Chief Wilbur Slockish
Klickitat/Cascade Tribes
Post Office Box 184
The Dalles, Oregon 97058
541-993-4779
email: wsjr@netcnct.net

Memo

To: Charlene Dwin Vaugh, Assistant Director, Advisory Council on Historic Preservation [FAX: 202-606-8647]

From: Hereditary Chief Wilbur Slockish, Klickitat/Cascade Tribes

Subject: Response to Your April 14th Letter Concerning the "Dwyer Memorial Forest", the "Oregon Trail", and "Usual and Accustomed Places"

Date: April 24th, 2008

As the Hereditary Chief of the Klickitat/Cascade Tribes, who are members of the Yakama Indian Nation (through the Treaty of 1855), I am responding to your letter, dated February 14th, concerning the recent construction along East U.S. Highway 26 which has been destroying areas and places of great concern to the Klickitat/Cascade Tribes. This includes the "Dwyer Memorial Forest", the "Oregon Trail", and "Usual and Accustomed Places" — all which are on Mount Hood.

My Great Grandfather, Sla-Kish, signed the Treaty of 1855. That was good enough for the United States of America to take our land. Since I am a direct

descendant of this signer of what is a recognized federal document, I have the right to not only speak about the "Dwyer Memorial Forest", the "Oregon Trail", and "Usual and Accustomed Places", my words also must be accepted because I am a Hereditary Chief of the Klickitat/Cascade Tribes.

In January I called the Federal Highway Administration (in Salem) and the Oregon Department of Transportation (in Portland), and left a message with both agencies, clearly telling them who I was and why I was calling. For some reason, no one called me back. So, what I am going to tell you in this Memo is the same information that would have been relayed then at that time, if they would have called me back.

My words and others from my People should have been part of the documentation being collected during the Section 106 process. We, unfortunately, learned, was done, for some reason, without our input. It was as if there was nothing of concern to my People that would have been destroyed because of this highway project. Clearly, this is not the case and many members of the Yakama Indian Nation have always made this clear to the Oregon Department of Transportation and Federal Highway Administration.

First, let me explain why the areas and places listed above — the "Oregon Trail", and "Usual and Accustomed Places" — are of concern to the Klickitat/Cascade Tribes:

The area that has become known, over the years, as the "Dwyer Memorial Forest", has cultural sites as well as burials of my people. Wilferd Yallup, Bill Yallup and others from the Yakama Indian Nation,

including my Uncle, Walter Speedis, provided information to the Oregon Department of Transportation in the 1990s, which was at that time and still is the agent for the Federal Highway Administration. So, what I am going to tell you in this Memo should not be a surprise over 17-years later since the first time my People spoke about this great forest's significance.

The trail that is known today as the Oregon Trail", has always been of significance to my people, since it was not built by the white emigrants. This was and still is an American Indian heritage trail that has great importance to my people. It leads us to and from our "Usual and Accustomed Places", which includes both cultural and religious sites. The best known place is Enola Hill, but there are others in the Mount Hood Area that are also of concern, and must be protected.

This trail, the "Oregon Trail", extends from the white church in Wemme west through the "Dwyer Memorial Forest", where one of our traditional camp sites is located. And, until the recent logging and heavy equipment work, you could see the evidence of the covered wagons that came many thousands of years after my people first used this ancient path.

Our camp site in the "Dwyer Memorial Forest" was a stopping place for Camas gatherers coming from the Willamette Valley. It was also a camp for those fishing along the Salmon River and at its "mouth". Also, it was an important place along the trail that people heading east towards Enola Hill could rest before going to that sacred mountain for religious and cultural purposes. Later on, during the days the emigrants starting using our ancient path (the "Oregon Trail") to head West, these newcomers also camped here.

This camping area that is located in the "Dwyer Memorial Forest" is still being used today by my people traveling over Mount Hood, as it was in the past. When we stay there today, we can pay our respects to those of our people who died along this ancient path and were buried here many, many miles away from their villages.

The "Dwyer Memorial Forest" also contains natural medicines of great significance to my People. My Uncle, Walter Speedis, was recognizes far and wide for his knowledge of these medicines that come from these significant places, and would not only gather from this special forest, but would also bring others there and share his knowledge. Even when he was up in years, because he could drive off the highway — via the "Oregon Trail" — and into our camp site, he still could access this area.

My People still have "Usual and Accustomed Places" located on Mount Hood and in this area where the current highway project is. Many of these are still being used today and they cannot be replaced.

Our "Usual and Accustomed Places" are of great importance to my People. When someone who has been utilizing these site passes on, it does not mean that these areas become less important, for other generations from my People will take their place. Please remember, these are traditional places that are used only by traditional People.

Leo Aleck, who was then the Secretary of the General Council of the Yakama Indian Nation, made it very clear to the Oregon Highway Department/Oregon Department of Transportation, in a letter dated January 17th, 1991. To emphasize the

significance of traditional places being used by traditional People, he wrote the following that made it very clear about the importance of our "Usual and Accustomed Places" and how construction along Highway 26 in the Mount Hood Area could impact them:

> "We have received information about your road plans. Many of our tribal members still utilize this general area for cultural purposes. This makes me concerned about your plans, knowing such construction does much damage known to be sacred grounds. In these grounds are many natural foods and medicines. There may very well be some traditional use areas, too."

After the Yakama Indian Nation wrote this letter in 1991 to the Oregon Highway Department/Oregon Department of Transportation, who was and still are the agents for the Federal Highway Administration, why was the importance of our "Usual and Accustomed Places" not taken seriously? This is an important question that needs to be answered.

After the Oregon Highway Department/Oregon Department of Transportation and the Federal Highway Administration received the 1991 letter from the Yakama Indian Nation, why was no consideration given to our "Usual and Accustomed Places" at "Indian Meadow" (north of the bridge over the Zig Zag River), in Rhododendron, when Highway 26 was widened through there? Again, another important question that needs to be answered. Wilferd Yallup, Walter Speedis, Dave Bloggett, Bill Yallup, and others spoke many times about the burials and cultural sites at this

area of significance to my People, and its relationship to Enola Hill, but their words obviously must have fallen on deaf ears.

Why was no consideration given to our "Usual and Accustomed Places" along "Bear Creek", in Faubion, when this stream was moved and the highway widened here? Once more, another important question that needs to be answered. And, once again, after this 1991 letter was written, Wilferd Yallup, Walter Speedis, Bill Yallup, and others spoke many times to the Oregon Department of Transportation and the Federal Highway Administration about the burials and cultural sites along the waterway that held significance to my People, and its relationship to Enola Hill, but it made no difference when it came to planning highway projects.

My People's "Usual and Accustomed Places" at "Indian Meadow" and along "Bear Creek" have always been considered sacred (i.e., significant). However, despite the fact that there are laws and procedures to protect these areas, a great deal was destroyed by the Highway 26 projects. Sadly, all this could have been avoided and the highway widened if they would have taken the testimonies of my People, which is required.

As for this most recent highway project, the "Dwyer Memorial Forest", the "Oregon Trail", and other "Usual and Accustomed Places" of my People, they are now at risk. Some of these significant sites have already been destroyed. Any further action by the Oregon Department of Transportation and the federal Highway Administration will continue this destruction. THEY MUST STOP WHAT THEY ARE DOING NOW! You could make this happen!

Let me be very clear as to what this current highway project will do:

1. The "Dwyer Memorial Forest" and the other areas along East U.S. Highway 26 are and have been of great significance to traditional practitioners of my People, and will be adversely impacted and/or destroyed.
2. These areas are still being utilized by my People.
3. These are traditional cultural properties are "Usual and Accustomed Places" are related to other "Usual and Accustomed Places" of great concern to my People, which includes Enola Hill, the Zig Zag Campground, and other areas on Mount Hood, as well as "Indian Meadow" and "Bear Creek".
4. These "Usual and Accustomed Places" are traditional cultural properties, as defined by laws, and should have been reviewed under the guidelines of "National Registers Bulletin 38", which would have made them eligible for the National Historic Register of Historic Places.
5. I was never contacted by either the Oregon Department of Transportation or the Federal Highway Administration, or any of their contractors, about the Section 106 process for this highway project, even though I should have been.
6. After I contacted representatives of the Oregon Department of Transportation and the Federal Highway Administration, and left messages as

to who I was and why I was calling, they chose not to communicate with me.

We are willing to put documentation together concerning our sacred sites on Mount Hood that the Highway 26 project is destroying. Had the Oregon Department of Transportation and the Federal Highway Administration followed the requirements of Section 106, this would have already been done. And, although I do not like doing the job of government agencies, since they have the funding to do this form of documentation, we will do it and do it right. We do not want them to misinterpret the significance of our "Usual and Accustomed Places", like they have repeatedly done.

To summarize: We have been wronged! Our "Usual and Accustomed Places" are being destroyed because the Oregon Department of Transportation and the Federal Highway Administration chose not to do their job. They chose not to contact us, and Leo Aleck's letter of January 17th, 1991, makes it very clear that we needed to be contacted. It is as simple as that.

I await your response.

Hereditary Chief Wilbur Slockish,

Klickitat/Cascade Tribes

PERMIT

Permission is hereby granted to: Oregon Department of Transportation

Of: Oregon State

To use the following described lands:

TOWNSHIP: 2S	RANGE: 7E
SECTION: 31	SUBDIVISION: SE ¼ of the NE ¼
MERIDIAN: 33	STATE: OREGON
COUNTY: Clackamas	ACRES *(number)*: 1

For the purpose of: Removing timber in preparation of HWY 26 widening project.

And subject to the following conditions:

1. This permit is issued for the period specified below. It is revocable at the discretion of the BLM, at any time upon notice. This permit is subject to valid adverse claims heretofore or hereafter acquired.
2. This permit is subject to all applicable provisions of the regulations (43 CFR 2920) which are made a part hereof.
3. This permit may not be assigned without prior approval of BLM.
4. Permittee must not enclose roads or trails commonly in public use.
5. Authorized representatives of the Department of the Interior, other Federal agencies, and State and local law officials will at all times

have the right to enter the premises on official business.

6. Permittee must pay the United States for any damage to its property resulting from the use.
7. Permittee must notify the BLM of address change immediately.
8. Permittee must observe all Federal, State, and local laws and regulations applicable to the premises and to erection or maintenance of signs or advertising displays including the regulations for the protection of game birds and game animals, and must keep the premises in a neat, orderly, and sanitary condition.
9. Permittee must pay the BLM, in advance, the lump sum of $N/A for the period of use authorized by this permit or $N/A, annually, as rental or such other sum as may be required if a rental adjustment is made.
10. Use or occupancy of land under this permit will commence within N/A months from date hereof and must be exercised at least N/A days each year.
11. Permittee must take all reasonable precautions to prevent and suppress forest, brush, and grass fires and prevent pollution of waters on or in the vicinity of the lands.
12. Permittee must not cut any timber on the lands or remove other resources from the land without prior written permission from the BLM. Such permission may be conditioned by a requirement to pay fair market value for the timber or other resources.

13. Permittee agrees to have the serial number of this permit marked or painted on each advertising display or other facility erected or maintained under the authority of such permit.

14. This permit is subject to the provisions of Executive Order No. 11246 of September 24, 1965, as amended, which sets forth the Equal Opportunity clauses. A copy of this order may be obtained from the BLM.

15. Permittee acknowledges, by signing below, that he/she knows, understands and accepts the terms and conditions under which this permit is issued.

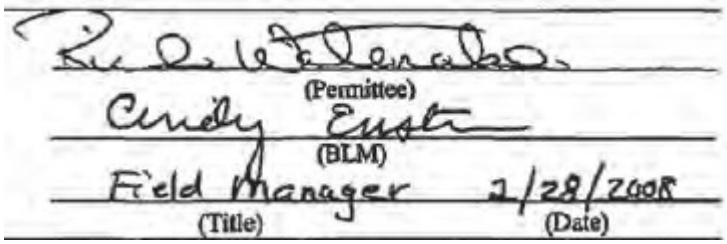
16. Special conditions (*attach additional sheets, if necessary*):

    1) 2 trees with dbh in the range of 30-40 must be felled into the surrounding stand and left for salamander habitat.

Permit issued for period

From: 2/29/2008

To: 4/15/2008



INSTRUCTIONS

1. Submit, in duplicate, to any local office of the Bureau of Land Management having jurisdiction of the lands.
2. Applications for Land Use Permits will not be accepted unless a notification of the availability of the land for non-BLM (Notice of Realty Action) has been published in the Federal Register and for 3 weeks thereafter in a newspaper of general circulation. This provision does not apply in those situations where the publication of a (Notice of Realty Action) has been waived by the BLM.
3. If the annual rental exceeds $250 dollars per year, costs of processing the application must be paid by the applicant in advance.
4. The BLM may require additional information to process an application. Processing will be deferred until the required information is furnished by the applicant.

NOTICES

The Privacy Act of 1974 and the regulation in 43 CFR 2.48(d) provide that you be furnished the following information in connection with information required by this application for a Land Use Permit.

AUTHORITY: 43 U.S.C. 1201; 43 CFR Part 2920

PRINCIPAL PURPOSE: The information is to be used to process your application.

ROUTINE USES: (1) The adjudication of the

applicant's request for a Land Use Permit. (2) Documentation for public information. (3) Transfer to appropriate Federal agencies when concurrence is required prior to granting a right in public lands or resources. (4)(5) Information from the record and/or the record will be transferred to appropriate Federal, State, local or foreign agencies, when relevant to civil, criminal or regulatory investigations or prosecutions.

EFFECT OF NOT PROVIDING INFORMATION: Disclosure of the information is voluntary. If all the information is not provided, the application may be rejected.

The Paperwork Reduction Act of 1995 requires us to inform you that:

Information is needed to process application for land use authorizations, pursuant to 43 CFR Section 2920.

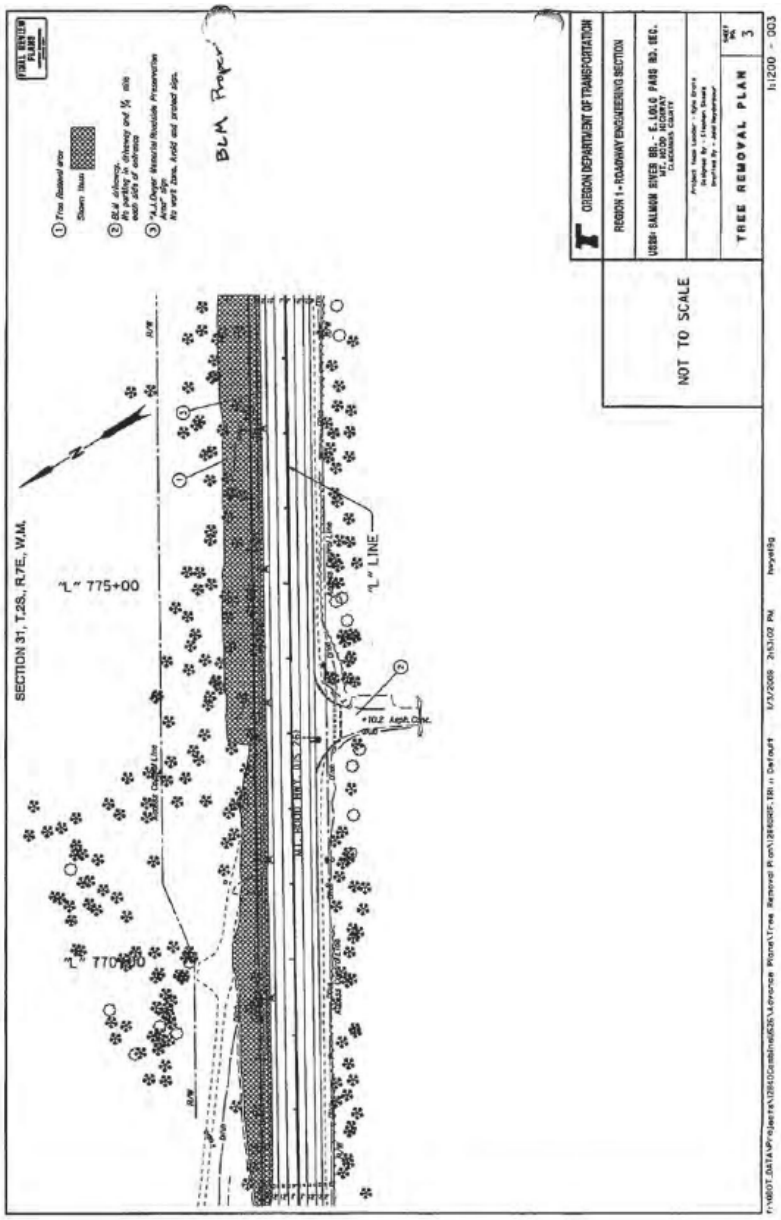
Information shows if the applicant and proposed use meet the requirements of 43 CFR Section 2920.1.

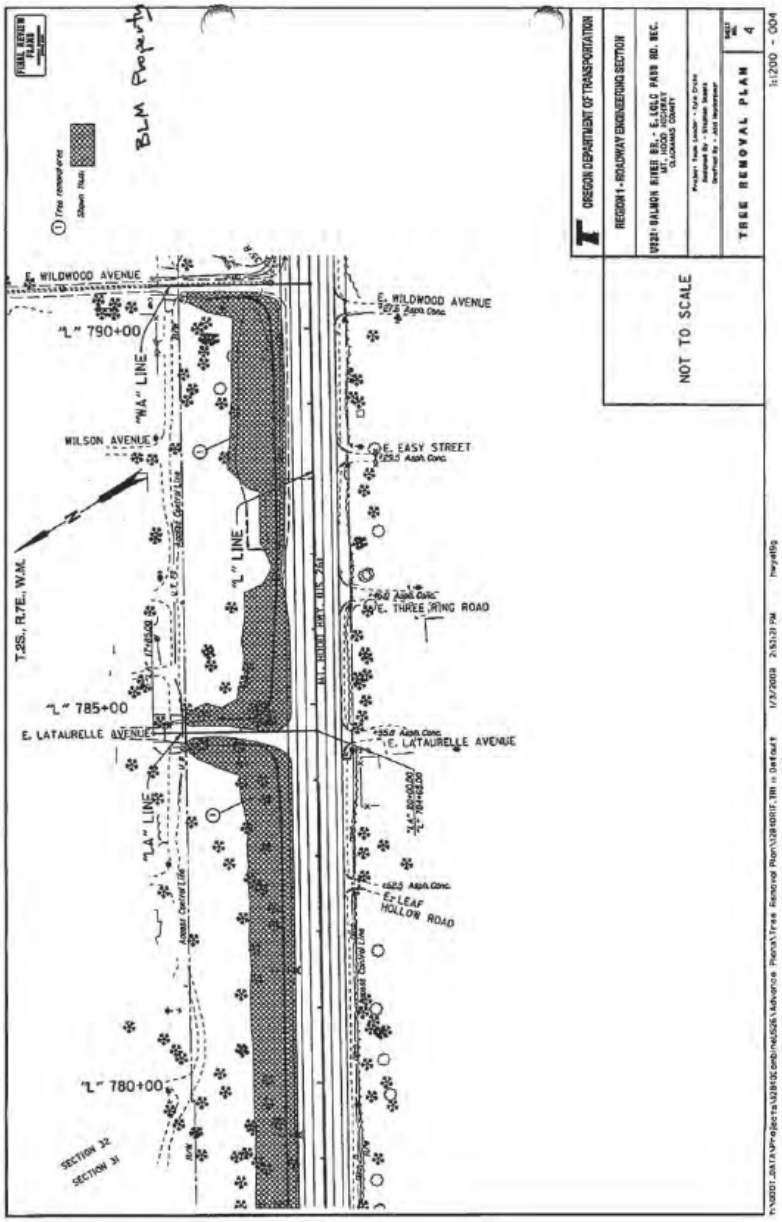
Applicant must respond before he/she can be granted an authorization to use public lands.

BLM would like you to know that you do not have to respond to this or any other Federal agency-sponsored information collection unless it displays a currently valid OMB control number.

BURDEN HOURS STATEMENT: Public reporting burden for this form is estimated to average 1 hour per response, including the time for reviewing instructions, gathering and maintaining data, and completing and reviewing the form. Direct comments

regarding the burden estimate or any other aspect of this form to U.S. Department of the Interior, Bureau of Land Management (1004-0009), Bureau Information Collection Clearance Officer, (WO-630), 1849 C Street, N.W., Mail Stop 401 LS, Washington, D.C. 20240.


OREGON DEPARTMENT OF TRANSPORTATION
REGION 1 - ROADWAY ENGINEERING SECTION
US26: SALMON RIVER NO. - E.ABLE PASS NO. SEC.
NOT TO SCALE
TREE REMOVAL PLAN
SHEET NO. 3
1:200 - 003
SECTION 31, T.2S., R.7E., W.M.
"L" 775+00
"L" 770+00
"L" LINE
BLM Property
Tree Removal Area
Stump Stub
RIGHT OF WAY PLAN


OREGON DEPARTMENT OF TRANSPORTATION
REGION 1 - ROADWAY ENGINEERING SECTION
TREE REMOVAL PLAN
NOT TO SCALE
BLM Property
E. WILDWOOD AVENUE
WILSON AVENUE
E. EASY STREET
E. THREE MILE ROAD
E. LATAURELLE AVENUE
E. LEAF HOLLOW ROAD
"L" 790+00
"L" 785+00
"L" 780+00
"WA" LINE
"L" LINE
"LA" LINE
T.2S., R.1E., W.M.
SECTION 32
SECTION 31

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CAROL LOGAN --- CLACKAMAS NATION
696 N. River Bend Road
Otis, Oregon 97368

MEMO

To: Mr. Jeff Graham
Federal Highway Administration
530 Center Street NE, Suite 100
Salem, Oregon 97301

From: Michael P. Jones & Carol Logan

Subject: Protection of Heritage Resources in the "US 26: Salmon River Bridge to East Lolo Pass Road" Project Area While a Determination for A New Section 106 Review can be Done

Date: February 15, 2008

We are very worried that the heritage resources in the project area that makes up the "US 26: Salmon River Bridge to East Lolo Pass Road", will be destroyed prior to a determination for a new Section 106 Review can take place. In the past, the Oregon Department of Transportation (ODOT) has pointed out sites on maps in public meetings. This, obviously, has caused importage resources to be adversely impacted and even destroyed. What is the plan for protecting resources of concern.

Recently, an individual who utilizes the Mount Hood Area for religious and cultural purposes, and who has this right through Treaty as a usual and accustomed place, sadly discovered some recent vandalism. Stones that made up a monument associated with American Indian graves had been carried off. This site is located on ODOT right-of-way and is within the "US 26: Salmon River Bridge to East Lolo Pass Road" project area.

What is the plan to protect heritage resources? Sadly, there is a mistaken belief that if sites of concern were eliminated, there would be no problem for this highway project and it can be put on the "fast track".

All heritage resources are of concern, including the very visible "Wildwood Stone Pillars". What can be done to insure their protection?

Thank you.

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CAROL LOGAN --- CLACKAMAS NATION
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MEMO

To: Mr. Jeff Graham
Federal Highway Administration
530 Center Street NE, Suite 100
Salem, Oregon 97301

From: Michael P. Jones & Carol Logan

Subject: Concerns About the Logging of Heritage Resources Before a Determination for A New Section 106 Review can be Done for the "U.S. 26: Salmon River Bridge to East Lolo Pass Road" Project Area

Date: February 15, 2008

The Oregon Department of Transportation is planning to begin logging the project area making up the "U.S. 26: Salmon River Bridge to East Lolo Pass Road" Project. This, obviously, would adversely impact or destroy heritage resources. How can your office delay this while ourselves and others undertake the time and efforts to work through the established system? Please get in touch with us concerning this matter as soon as possible.

Thank you.

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MEMO

To: Mr. Jeff Graham
Federal Highway Administration
530 Center Street NE, Suite 100
Salem, Oregon 97301

From: Michael P. Jones & Carol Logan

Subject: Additional Documentation Justifying A New Section 106 Process for the "US 26: Salmon River Bridge to East Lolo Pass Road" Project

Date: February 15, 2008

We are submitting the following documents from our archives:

- Transcript of a meeting between Citizens for A Suitable Highway, Wilfered Yallup (Yakama Indian Nation), Rip Lone Wolf (Native Americans for Enola), and others, who met with representatives from the Oregon Department of Transportation – January 24, 1991.
- Letter from Leo Aleck, Secretary of the Yakama General Council to the

Environmental Section of the Oregon Highway Department, dated January 17, 1991.

- "Draft Cultural Resource Report: Pioneer Meadow Site (Rhododendron, Oregon – Mt. Hood Area – Clackamas County)" – February 8th, 1991.
- "Draft Cultural Resource Report: Bear Creek Site (Faubion, Oregon – Mt. Hood Area – Clackamas County)" – February 8th, 1991.

We are still reviewing our archives for additional documents that may be of assistance. I am hoping to come across a report by Richard Pettigrew very soon.

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MEMO

To: Mr. Jeff Graham
Federal Highway Administration
530 Center Street NE, Suite 100
Salem, Oregon 97301

From: Michael P. Jones & Carol Logan

Subject: New Section 106 Process for the "Wildwood to Wemme Project" (now known as "US 26: Salmon River Bridge to East Lolo Pass Road")

Date: February 14, 2008

We are jointly requesting that a complete and accurate Section 106 process of the National Historic Preservation Act needs to take place on the "Wildwood to Wemme Project", just recently renamed by the Oregon Department of Transportation the "US 26: Salmon River Bridge to East Lolo Pass Road" highway widening project. This request is being made to insure that all heritage resources, whether they be historical, cultural or natural, be protected prior to, during, and after any and all highway planning, construction, and on-going maintenance.

We believe an additional lane can be added in the Wildwood to Wemme area without destroying heritage resources – critical historical, cultural, and natural resources. Several times in the past, when ODOT representatives walked East U.S. Highway 26 with Michael P. Jones, they claimed that such work could be accomplished and the sites could be preserved. We also strongly believe this to be the case, but the agency must incorporate this goal into the design of any highway improvements.

As of this point in time, any Section 106 work that has been done does not completely or accurately reflect the historical, cultural, and natural resources of concern that were addressed repeatedly during, but not limited to, such processes as follows: the Citizens Advisory Committee and Technical Advisory Committee meetings of the 1980; the 1987 Environmental Impact Statement for the widening of U.S. Highway 26 (covering the geographic areas from the Salmon River Bridge through the villages of Wildwood to Rhododendron); the 1980s Richard Pettigrew archaeological reports of the 1980s; during meetings and communications between Rip Lone Wolf (a Nez Perce and Umatilla spiritual leader) and ODOT representatives during the 1990s; the 1987 Highway 26 Widening Agreement made between Citizens for A Suitable Highway and ODOT (as the document was negotiated and placed in writing between Rick Kuehn, who was then-Region I Engineer, the ODOT representative, and Michael P. Jones – as had been requested by the Oregon Department of Transportation Commissioners); during meetings and communications between Wilferd Yallup of the Yakama Indian Nation and ODOT representatives during the 1990s; during meetings and

communications between Rip Lone Wolf (a Nez Perce and Umatilla spiritual leader) and ODOT representatives during the 1990s: during meetings and communications between Carol Logan (a Clackamas-Kalapooya-Chinook spiritual leader) and ODOT representatives during the 1990s; during meetings and communications between other American Indians and ODOT representatives during the 1990s; during meetings between Michael P. Jones and ODOT representatives during the 1990s; during the attempted dispute resolution process through ODOT in the 1990s; information provided by Michael P. Jones to ODOT representatives during the 1990s as they walked the current project area to determine how turn lanes could be incorporated without destroying heritage resources: the Citizens Advisory Committee and Technical Advisory Committee meetings of the 1990s (covering the geographic areas from the Village of Rhododendron to the junction of Oregon Highway 35); dispute resolution process through ODOT in the 1990s; information provided by Michael P. Jones to ODOT representatives beginning in the year 2000 as they walked the current project area to determine how turn lanes could be incorporated without destroying heritage resources; during meetings and communications between Carol Logan (a Clackamas-Kalapooya-Chinook spiritual leader) and ODOT representatives starting in the year 2000; during meetings and communications between Michael P. Jones and ODOT representatives starting in the year 2000; during meetings and open houses for the widening of the highway from the Villages of Zig Zag to Rhododendron that adversely impacted Bear Creek and Indian Meadow/Pioneer Meadow; and during the attempted dispute resolution process through

Clackamas County Dispute Resolution Center beginning in the year 2000.

We have serious issues on how the Section 106 process has taken place on the current "US 26: Salmon River Bridge to East Lolo Pass Road" project. The lack of preservation of eligible heritage resources in other highway widening projects in the Mount Hood Area clearly justifies our concerns.

Not only have the heritage resources of concern not been adequately and completely addressed in respect to the Section 106 reports concerning the highway widening projects along East U.S. Highway 26 in the Mount Hood Area, but also "concerned people" have not been contacted to participate. This has caused not only a lack of public participation in this process, but has lead to serious "voids" in the information that has been needed to be considered. As a direct result, the appropriate course of action concerning preservation and/or mitigation for critical historical cultural and natural resources of concern has not been planned for nor has this taken place.

We cannot allow this lack of participation of concerned parties to continue in respect to the current "US 26: Salmon River Bridge to East Lolo Pass Road" project. The "Dwyer Memorial Forest", for example, a strip of old-growth trees that borders the highway on both the south and north side of the road, which is technically part of the Bureau of Land Management-operated Wildwood Park, will be adversely impacted or destroyed by the current plans for the highway. This area has too many heritage resources of concern that need to be addressed before any construction should take place.

The heritage resources of concern in the "Dwyer Memorial Forest" have long been known by ODOT due to the public involvement process. Needed to be addressed in this particular area located on public land, for just a few examples, are the following:

- American Indian cultural and religious sites;
- American Indian heritage trails;
- American Indian usual and accustomed places;
- Etc.

The American Indian sites in the "Dwyer Memorial Forest" will constitute a "district" for the National Register of Historic Places. A Section 106 process for the "US 26: Salmon River Bridge to East Lolo Pass Road" project area must also identify how this particular section of land and its sites are related to other indigenous cultural and religious areas on Mount Hood. This would include, but is not limited to, the following (going from west to east along the highway):

- American Indian Trails in the Mount Hood Area;
- Oregon Trail/Barlow Trail in the Mount Hood Area;
- Salmon River;
- Sandy River;
- Pork Creek;
- Wildwood Park south of East U.S. Highway 26;
- Wemme Corridor;
- Huckleberry Mountain;

- Welches Bottom;
- Welches Wetland;
- Bear Creek;
- Lolo Pass;
- Hunchback Mountain;
- Indian Meadow/Pioneer Meadow;
- Meadow Creek;
- Henry Creek;
- Little Henry Creek;
- Zig Zag Campground;
- Whiskey Jack Creek;
- Enola Hill;
- Zig Zag Mountain;
- Spirit Horse Creek;
- Toll Gate;
- Camp Creek;
- Little Zig Zag Creek;
- Big Laurel Hill;
- Summit Prairie;
- Wolf Camp;
- Barlow Pass;
- Devil's Half Acre;
- Big Deadening;
- White River;

- Salmon River Meadows;
- Etc.

The understanding of and the protection of the American Indian heritage sites on Mount Hood is critical. The United States Government has an obligation under the treaties to allow indigenous people to continue to utilize their usual and accustomed Places, as well as to practice their religion as guaranteed by the Constitution.

In respect to the Oregon Trail, this also involves the "Dwyer Memorial Forest" as well as sites located elsewhere in the "US 26: Salmon River Bridge to East Lolo Pass Road" protect area. These also have to be carefully considered in the Section 106 process.

The "Wildwood Stone Pillars" are the property of the Cascade Geographic Society, and we were the ones that ODOT had to deal with when moving the pillars in 1987 during the widening of East U.S. Highway 26. In addition, we have maintained and, when necessary, repaired these landmarks. And, even though the agency actually stopped the work we were doing several years ago on the damaged west pillar required us to get a permit, for some reason they failed to include our input in their recent assessment.

Several years ago when the west pilar was struck by a drunk driver turning onto East Mountain Air Drive, the historical integrity of both Pillars were of great concern to Cascade Geographic Society. This is why, prior to doing anything, we consulted with a historical architect and an archaeologist. Next, we located a professional licensed and bonded stone mason, who could match the historical techniques and design of the "Wildwood Stone Pillars" and repair the

damage. As a result, if you did not know that one of the landmarks had actually been damaged and repaired, you wouldn't know it.

ODOT's assessment of the "Wildwood Stone Pillars", for some reason, claims that because one of the Pillars was damaged and repaired, this has marred its status as a landmark. This is a very biased analysis since historical sites are always being repaired and this is, obviously, part of the historical preservation process and the agency should be aware of this.

As for the historical integrity of the "Wildwood Stone Pilars", ODOT claims that because they were moved during the widening of East U.S. Highway 26 in 1987, this has, for some odd reason, made them ineligible for any landmark status. This conclusion is completely without any justification. They move historical sites regularly for preservation purposes, and included are such things as houses, buildings, bridges, lighthouses, etc., and they did not lose their status. Again, the agency should be aware of this and know that such positive efforts are part of the historical preservation process.

If, in fact, the "Wildwood Stone Pillars" had lost any such status, why did the highway agency not file something at that particular time? In addition, why did ODOT agree to move and protect the landmarks in the 1987 Highway 26 Widening Agreement if they were not important?

On several occasions, while walking the project area with ODOT personnel in order to gain some on-the-ground knowledge on how turn lanes could actually be installed without adversely impacting the

"Wildwood Stone Pillars" and other sites of concern, this was repeatedly reinforced. The pilars' importance as landmarks was obviously not diminished at that time just because they had been moved and preserved by the highway agency back in in 1987.

The "Wildwood Stone Pillars" are Clackamas County Landmarks and are situated just west of and on the edge of the "Dwyer Memorial Forest". They have long Proven to be very important to travelers going to and from Mount Hood. They, too, need to be accurately assessed through the Section 106 process.

ODOT's assessment of the "Wildwood Stone Pilars", thus far, has failed to address the landmark's relationship to not only Mount Hood's heritage, but to the area's transportation history, including the Oregon Trail and the Mount Hood Loop Highway. In fact, it was Herb Forbes, Sr. who constructed the pillars prior to taking a job with the Oregon Highway Division. [NOTE: The son, Herb Forbes, Jr., was a member of the Citizens Advisory Committee in the 1980s for the widening of East U.S. Highway 26 from the Villages of Wildwood to Rhododendron. The agency has had this information but did not interview him during their recent assessment of these important roadside attractions in the project area.]

In addition, the "Dwyer Memorial Forest" by itself, must be considered for preservation through the Section 106 process. Located in the Village of Wildwood, this area was saved in the 1930s during the "Great Depression" by the Dwyer Lumber Company. This company had the rights to log this area but, instead, saved a stretch of old-growth trees along the Mount Hood Loop Highway and gave them back to the public. They felt the history associated with these

trees, the related historical sites, and their scenic qualities that would have positive impacts on the tourism and recreation on Mount Hood, had to be preserved for future generations.

In the 1970s, Lady Bird Johnson, who was then First Lady, visited the "Dwyer Memorial Forest" along with Robert Dwyer, Sr., who, incidentally, would later become a Commissioner with ODOT. Lady Bird had been working hard on her highway beautification and wanted to see, for herself, what a private timber company did for preservation during the Great Depression. She had never heard of loggers giving up the money that they could make off of cutting-down trees, especially during hard economic times, and be, instead, thinking more about the traveling public of the future.

Back in the 1980s during the first highway widening through this area, we had requested that the Section 106 process be initiated so that at least a potential determination for the "Dwyer Memorial Forest" inclusion on the National Register of Historical Places could take place. However, ODOT did not desire such an undertaking, nor did they want to spend the money, since the 1987 Highway 26 Widening Agreement that was made between Citizens for A Suitable Highway and the agency protected this area and its related sites.

The Preservation of the "Dwyer Memorial Forest" became critical in the establishment of a federal day-use park. Since this "preserve" was established on federal land, this became the "springboard" for the Bureau of Land Management to establish Wildwood Park in the early-1970s. In fact, because the Dwyer Lumber Company had saved trees on both the north

and south sides of the highway, the official Park boundaries included the area on the north side even though all of the recreation they envisioned was to take place on the opposite side of the road.

To sum up, we are jointly requesting that a complete and accurate Section 106 process of the National Historic Preservation Act take place in what is now being called the "US 26: Salmon River Bridge to East Lolo Pass Road" project. Any analysis must be done on the integrity and importance and meaning of the various historical sites and districts, and not be hamstrung by political motivation (i.e., anti-preservation efforts). In addition, interested parties must be notified and involved in this most important process that should have taken place back in the 1980s in spite of the 1987 negotiated, written settlement between the highway agency and Citizens for A Suitable Highway, known as the Highway 26 Widening Agreement document.

ODOT saved a lot of work and money by negotiating the 1987 Highway 26 Widening Agreement, but, in spite of this document, a Section 106 process should have taken place to protect the heritage resources that had been preserved from this first widening project along East U.S. Highway 26.

We seriously believe that an additional lane can be added in the Wildwood to Wemme area without destroying critical historical, cultural, and natural resources of concern. ODOT representatives, such as Mark H. Wigg (then Senior Project Manager in the Environmental Section) and Charlie P. Sciscione, (then District Manager of District 2c) have claimed several times in the past, after walking East U.S. Highway 26 with Michael P. Jones, this could indeed

be done. However, their plans today do not allow for this, and fault can be attributed to an improper Section 106 process that reportedly has already been initiated for this project.

Issues that we have concerning the current "US 26: Salmon River Bridge to East Lolo Pass Road" project should be able to be resolved by initiating a new Section 106 process of the National Historic Preservation Act. We believe that if the analysis is done accurately and completely, and if interested parties are involved, then heritage resources will be preserved and ODOT should be able to modify their design and install any needed turn lanes.

BOTTMAN Tobin C

From: BOTTMAN Tobin C
Sent: Wednesday, February 06, 2008 4:37 PM
To: Eirik Thorsgard
Subject: US 26: Wildwood-Wemme project

Hi Eirik,

Starting in November, we discussed a trio of projects occurring on US 26. Two of the projects were very benign and I cleared them with the PA Memo for minor projects. The middle section is an EA that is nearing completion. Someone in the Portland office just got a call from a Carol Logan who says she represents the Clackamas people. Was she one of the elders that you met with to address concerns?

I thought that we had worked out that the project will not likely impact cultural resources, but a monitor would be on hand during work in certain areas.

I just wanted to check in about this. I was not sure if the Grand Ronde represented the interests of the Clackamas peoples and I want to ensure that her concerns are addressed.

Many thanks,

Tobin

Tobin C. Bottman, M.S., R.P.A.
ODOT Interim Archaeology Program Coordinator
Archaeologist Regions 1E, 3, 4
355 Capitol St. NE, Rm. 301
Salem, OR 97301
(503) 986-3783 (office)

(503) 931-5047 (mobile)

BOTTMAN Tobin C

From: BOTTMAN Tobin C

Sent: Friday, February 15, 2008 3:09 PM

To: NORMAN James B; BRINDLE Frances * Frannie

Subject: FW: Wildwood-Wemme Tribal Consultation, 12840

Attachments: US 26 Wildwood-Wemme Section 106 Consultation Doc.doc; 12840 Tribal Consultation.doc

Attached are the Section 106 documentation and tribal consultation histories from Kurt and I. We have handled different parts of the project. Thanks, let Kurt or I know if you have any further questions.

Tobin

Tobin C. Bottman, M.S., R.P.A.

ODOT Interim Archaeology Program Coordinator

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tobin.c.bottman@odot.state.or.us

* * *

US 26: Salmon River Bridge-East Lolo Pass Road

Section 106 Documentation and Tribal Consultation

Email:

Date:	To:	RE:
11/26/07	Eirik Thorsgard	Previous research regarding project area
12/4/07	Eirik Thorsgard	Additional research conducted
12/10/07	Eirik Thorsgard	Concern of cultural feature near project area
12/10/07	Eirik Thorsgard	Additional info on cultural feature
12/17/07	Eirik Thorsgard	Sent multiple documents pertaining to project
12/17/07	Eirik Thorsgard	Salmon River Bridge-East Lolo Pass project notification
12/18/07	Robert Kentta	Salmon River Bridge-East Lolo Pass project notification
12/18/07	Sally Bird	Salmon River Bridge-East Lolo Pass project notification
2/6/08	Eirik Thorsgard	Carol Logan complaints
2/15/08	Eirik Thorsgard	Monitoring notification for Wildwood-Wemme

Phone:

Date:	To:	RE:
11/26/08	Eirik Thorsgard	Request for previous research in project area for concerns expressed by Carol Logan
12/18/07	Eirik Thorsgard	Request for tribal monitor to be present during construction for Wildwood-Wemme at MP 38.9 and 39.3
2/14/08	Carol Logan	Discussed cultural resource concerns and Section 106 process
2/15/08	Eirik Thorsgard	Section 106 procedure dispute by Carol Logan

Documents:

12/19/07	Sally Bird	Salmon River Bridge-Wildwood PA Memo distributed
12/19/07	Robert Kentta	Salmon River Bridge-Wildwood PA Memo distributed
12/19/07	Eirik Thorsgard	Salmon River Bridge-Wildwood PA Memo distributed
12/19/07	Sally Bird	Wemme-East Lolo Pass Road PA Memo distributed
12/19/07	Robert Kentta	Wemme-East Lolo Pass Road PA Memo distributed
12/19/07	Eirik Thorsgard	Wemme-East Lolo Pass Road PA Memo distributed

BOTTMAN Tobin C

From: BOTTMAN Tobin C
Sent: Tuesday, December 04, 2007 8:34 AM
To: 'Eirik Thorsgard'
Subject: RE: Research so far
Attachments: Rock Feature Photo.pdf

Hi Eirik,
I was hoping you could provide me with some guidance to help guide my research into the US 26 matter. Attached is a photograph taken during the 1986 excavation under the rock pile. Is this the feature that the tribe is concerned about?

Thanks,

Tobin

Tobin C. Bottman, M.S., R.P.A
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Salem, OR 97301
(503) 986-3783 (office)
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tobin.c.bottman@odot.state.or.us

From: Eirik Thorsgard
[mailto:Eirik.Thorsgard@grandronde.org]
Sent: Monday, November 26, 2007 4:56 PM
To: BOTTMAN Tobin C
Subject: RE: Research so far

Hello Tobin,
This is the exact area that was brought to my attention, so far the work seems to indicate that a

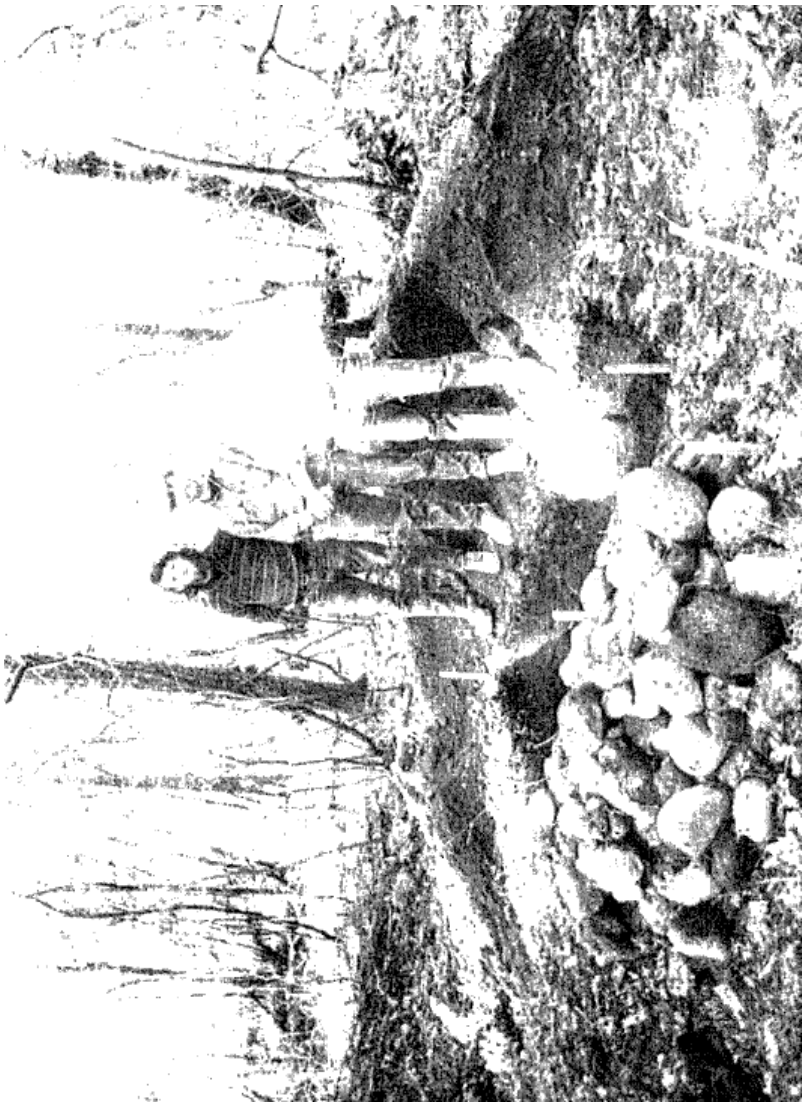
burial was not located their, but does not answer several other questions about the orientation and use of this stone pile, such as a prayer area ie a rock cairn, or use as a trail marker for the Old Barlow Road. I look forward to seeing what else you can dig up on this.

Eirik Thorsgard MAIS
Cultural Protection Specialist
Acting Cultural Protection Coordinator
Confederated Tribes of the Grand Ronde Community of Oregon

From: BOTTMAN Tobin C [mailto:Tobin.C.BOTTMAN@odot.state.or.us]
Sent: Monday, November 26, 2007 3:51 PM
To: Eirik Thorsgard
Subject: Research so far

Hi Eirik,
I wanted to send you some items I have uncovered so far to see if I am on the right path or not. The Hal letter to the Grand Ronde is a good summary of the issues surrounding this project. I think the 1986 Pettigrew report is the one that you were referencing; let me know if it is not. Thanks Eirik, I will continue digging.

Tobin



Excerpts from US 26: Wildwood – Wemme
Revised Environmental Assessment

January 2007

* * *

1.4 ***What is the Purpose and Need for this Project?***

The purpose of the proposed project is to improve safety on US 26 between milepost 38.75 and milepost 40.01 and to match the cross section (width of lanes, center turn lane and shoulders) to that of the roadway to the east and west of the proposed project area.

Safety improvements are needed because approximately 40 driveways and streets access US 26 in this 1.26-mile section, creating a safety hazard for vehicles making left turns onto and from the highway. Motorists making left turns from the highway are frequently required to stop in the fast lane to wait for a gap in oncoming traffic while those turning left onto the highway have no median refuge to enter. Thirteen accidents were reported within the project limits in the 5-year period from 2000 through 2004.

* * *

3.3 ***What will be done to mitigate impacts to wetlands?***

Existing wetlands would be avoided: The proposed widening of the highway to the north would use 3:1 slopes, which would impact a portion of the wetland located on the north side of the highway. To avoid this, ODOT proposes to steepen the slopes between the highway and the wetland and/or install guardrail at the edge of the highway along the length of the wetland. No fill is proposed on the southern side

of the highway, thus the wetland located there would not be impacted.

* * *

3.7 ***What will be done to mitigate impacts to the visual resources?***

* * *

Mitigation for tree and vegetation removal. The Widen to the North Alternative would change the visual environment by removing approximately 100 mature trees, many of which are visually prominent. Because many of the prominent trees are immediately adjacent to the highway, adding a new center turn lane would require removing these trees. The project could avoid removing as many trees as possible, reduce impacts to trees where possible, and plant new trees to mitigate these impacts.

ODOT staff investigated mitigation measures that could minimize the removal of some of the mature trees and other elements of the natural environment. The following describes the design solution chosen to reduce the number of trees impacted by the project.

Mitigation Option C. While a 3:1 slope design would require removal of many trees, new small trees and other native vegetation can be re-planted in the area. The design of the Widen to the North Alternative 3:1 slope area would include plantings of trees and vegetation that would re-grow over time.

* * *

Excerpts from US 26: Wildwood – Wemme Environmental Assessment

August 2006

* * *

1.4 Need

Why is the project needed?

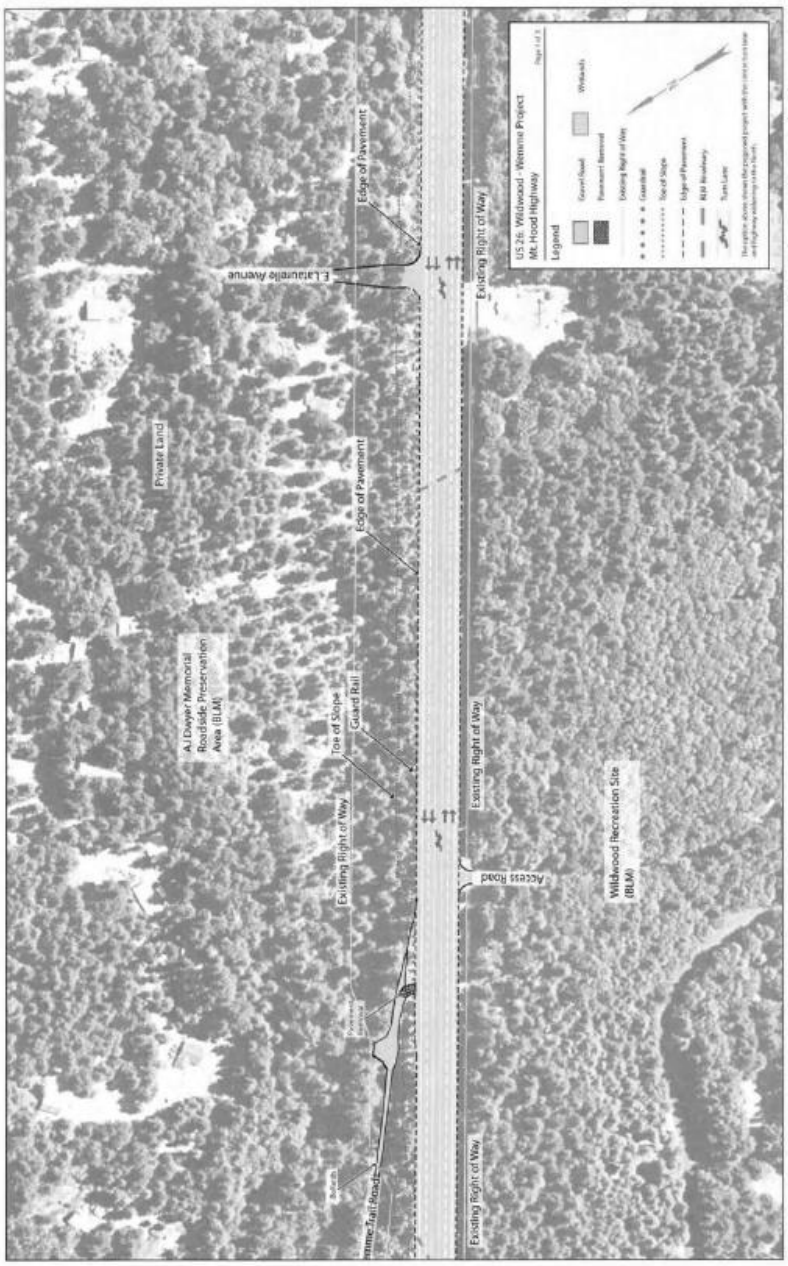
Safety improvements are needed because approximately 40 driveways and streets access US 26 in this 1.26-mile section, creating a safety hazard for vehicles making left turns onto and from the highway. Motorists making left turns from the highway are frequently required to stop in the fast lane to wait for a gap in oncoming traffic while those turning left onto the highway have no median refuge to enter. The posted speed in the project area is 45 miles per hour, however the average speed through the area is closer to 55 miles per hour.

The current average daily traffic (ADT) measured in 2004 within the project limits is 12,100. In 2030 the ADT is projected to increase to 21,000.

Thirteen accidents were reported within the project limits in the 5-year period from 2000 through 2004 shown in Table 1-1.

The computed accident rate for the project section over the five-year study period is 0.47 accidents per million vehicle miles traveled. This accident rate is lower than the 2004 statewide average accident rate of 0.62 accident per million vehicle miles traveled on similar rural principal arterials.

* * *


US 26: Wildwood - Wemme Project
Mt. Hood Highway
Legend
Gravel Road
Pavement Removal
Wetlands
Existing Right of Way
Guardrail
Toe of Slope
Edge of Pavement
BLM Roadway
Turn Lane
E Larkspur Avenue
Edge of Pavement
Existing Right of Way
Private Land
AJ Dwyer Memorial Roadside Preservation Area (BLM)
Toe of Slope
Guard Rail
Existing Right of Way
Edge of Pavement
Existing Right of Way
Access Road
Wildwood Recreation Site (BLM)
Existing Right of Way

* * *

2.3 Other Alternatives Considered

What other alternatives and design options were considered but not advanced?

Three alternatives were considered but not carried forward in the 1985 EIS; they were not reconsidered for the currently proposed project. They were as follows:

- Split the highway through the Dwyer Area with the westbound lanes far enough to the north to go behind the stand of trees near the road. This alternative was not advanced because there was not enough existing right-of-way to split the lanes and merge them at either end of the corridor without removing as many trees as the non-split alternatives. This remains the case today.
- Add one lane in the westbound direction, the lane that is most used. This alternative was not advanced because a three-lane roadway was considered unsafe. Motorists tend to consider the center lane as a passing lane and head-on accidents are more likely to occur. Also, although the eastbound lane was mostly uncongested at the time, traffic in that direction was projected to exceed the present capacity by the early 1990s.

The project was built with two lanes in each direction and no center turn lane through the Dwyer Area.

- Reduce peak hour traffic such as increasing transit usage or staggering the hours of operation at the ski areas. This was considered beyond the scope of the project. Transit for

skiers is available currently. Transit and staggering ski operations would not solve the safety problems during the non-ski seasons.

The current project team considered five additional alternatives besides the Widen to the North Alternative. After defining these other alternatives and evaluating them the team presented the results to citizens at the second open house held September 13, 2005. After receiving citizen's comments, the team decided not to carry the following alternatives into the environmental assessment for further study. The alternatives are described on the next pages along with the reasons for not continuing to study them further.

A. Widen and Realign to the North Alternative

This alternative would realign and shift the highway centerline to the north in order to provide for a standard clear zone on the south side of the highway, and widen for the 14-foot center turn lane median (see Figure 2-4). This alternative would bring this highway segment into compliance with highway standards, including clear zones, on both sides of the highway.

This alternative was not advanced for further study for the following reasons:

- It would remove more trees next to the highway than the Widen to the North Alternative.
- It would impact wetlands on the north side of the highway.

B. Widen South Alternative

This alternative would widen the segment of the highway to the south only. The existing edge of pavement on the north side of the highway would stay

where it is currently (see Figure 2-5). The alternative was identified to allow a comparison to the other widening alternatives.

The Widen South Alternative was not advanced for further study for the following reasons:

- It would impact private properties and utilities on the south side of the highway. It could require removing or relocating three businesses (motel, tavern and tattoo parlor), a private pump house and utilities on the south side of the highway. It would require acquisition of property from most property owners on the south side of the highway.
- It would use property from the Wildwood Recreation Site. This would require a Section 4(f) evaluation because it is a public park property.
- It would require additional Section 4(f) evaluation of the pristine, high priority, historic Barlow Road trace that has been identified on the south side within the Wildwood Recreation Site.
- It would impact wetlands.
- It would require removal of trees on the south side of the highway.

C. Widen to the North and South Alternative

This alternative would include equal widening to the north and south. The centerline of the highway would remain in the same location as it is currently (See Figure 2-6). This alternative was identified to investigate minimizing impacts to trees and properties in comparison to the other alternatives

This alternative was not advanced for further study for the following reasons:

- It would not save trees. The total number of trees removed would be nearly the same as for other alternatives because trees would be removed from both sides of the highway.
- It would require acquisition of private property from property owners on the south side of the highway and displacement of three businesses and a private pump house.
- It would require the use of property from the Wildwood Recreation site. This would require evaluation as a Section 4(f) resource because it is a park property.
- It would require additional Section 4(f) evaluation of the pristine, high priority, historic Barlow Road trace that has been identified on the south side within the Wildwood Recreation Site.

D. Relocate BLM Access Alternative

This alternative would provide a continuous left turn median for driveway and street accesses up to the BLM corridor and then transition back to the 4-foot median. The alternative was proposed with the thought that the elimination of BLM's access to the Wildwood Recreation Site could eliminate the need for the left turn median in this section. See Figure 2-3 b for BLM boundaries and entrance into the Wildwood Recreation Site. Figure 2-7 shows the various access options that were identified and evaluated.

This alternative was not advanced for further study for the following reasons:

- It would not save the large trees because it would not eliminate the need to widen the highway. There would still be a need for a 14-foot wide left turn lane for turns to and from the other access points outside the BLM corridor. The length of roadway needed to taper from five lanes to four lanes would require widening and the consequent removal of large trees.
- It would remove trees within the Wildwood Recreation Site and/or acquired property for the construction of a new roadway from Cascade Drive or Maple Street into the Site. It would have greater impacts to vegetation and wildlife habitat than the other alternatives due to construction of a new access road.
- It would alter the traffic flow in the Wildwood Recreation Site, which is not desired by BLM.
- It would move Wildwood Recreation Site traffic to Camino Rio Drive/Cascade Drive or Maple Street where it would pass through private property and by recreational vehicle and camp sites or residences.
- It would require the acquisition of private property or easements for the new access road.

E. Median Barrier Alternative

This alternative would place a barrier in the median that would prohibit cars from making left turns onto or off of the Highway through the section that currently contains the 4-foot median. The median barrier would necessitate opportunities for drivers to turn around at each end of the median. This alternative was proposed with the thought that it

might reduce the impact to the trees and still achieve the desired result of reducing accidents through this section.

This alternative was not advanced for further study for the following reasons:

- It would impact more trees than the Widen to the North Alternative, due to the required widening.
- It would not decrease the need for widening the highway because there would be a need to provide inside shoulders next to the median barrier. Normal median width for 4 lanes plus barrier is 18 feet, 4 feet wider than for a center turn lane. This would be the widest alternative.
- It would require turnarounds or jug handles and traffic lights at each end of the median. The turnarounds must be large enough to accommodate tractor-trailer trucks. Acquisition of property would be required for the turnarounds.
- It would impact wetlands (west end) due to land needed for turnarounds.
- It would impact forested areas, particularly on the east end where the access would intersect E. Arrah Wanna Boulevard south of the highway.
- It would cause new safety problems. Long deceleration lanes would be required for the turnarounds, conflicting with existing driveways and street accesses. Drivers may make illegal U-turns out of center lanes, rather than taking jug handle turnarounds.

Potentially, it could simply move accident locations to turnaround locations.

- It may increase response times for emergency vehicles.
- It would present an obstacle to animals and pedestrians attempting to cross the highway.
- It would create out of direction travel for some non-local motorists and for most local motorists.
- It would present maintenance concerns such as: increased maintenance costs for barriers and impact attenuators; obstacle to snow plowing and sanding operations; obstacle to drainage, causing standing water.

What about other types of alternatives?

Other types of solutions to specific transportation problem could, in some circumstances, solve the identified problems in an area. These types of solutions were considered and not evaluated further as described below.

A. Travel Demand Management

Travel demand management techniques are generally accepted as methods to reduce automobile travel on a congested roadway. Examples of travel demand management include carpooling, park and ride lots, flex time and telecommuting. According to the U.S. Department of Transportation, these techniques become more productive as traffic congestion increases in volume to capacity ratios. However, these techniques are more appropriate to commuting traffic in an urban setting than vacation or tourist traffic in a rural setting. Travel demand management by itself

would not solve the purpose of the project to improve the safety problem caused by left turns to and from US 26.

B. Pedestrian and Bicycle Travel

Consideration for pedestrian and bicycle travel is included in the Widen to the North Alternative by incorporating 8-ft shoulders on each side of the highway. This would be an improvement over the present narrow shoulders. In addition, the design of the widening would not preclude the future development of a walking and biking trail parallel to the highway. An informal foot trail exists now on a portion of the north side of US 26 and this may be developed in the future. Adding pedestrian and bicycle improvements, by itself, would not address the purpose of the project to improve the safety problem caused by left turns to and from US 26. See Figure 2-3 (c) for the location of the informal walking trail between E. Wildwood Avenue and Hoodland Church.

C. Public Transit

The Mountain Express, a public transportation service, serves customers along US 26 between Sandy and Rhododendron, Monday through Friday. One Greyhound bus per day travels between Portland to Bend on US 26. Improving public transportation, by itself, would not address the purpose of the project to improve the safety problem caused by left turns to and from US 26.

D. Rail

No freight or passenger rail transportation currently exists in the Mt. Hood corridor along US 26 and none is proposed.

* * *

What is the mitigation for long-term impacts of Widen to the North Alternative?

Mitigation for tree and vegetation removal: The Widen to the North Alternative would change the visual environment by removing approximately 100 mature trees, many of which are visually prominent (See page 50). Because many of the prominent trees are immediately adjacent to the highway, adding a new center turn lane would require removing these trees. The project would avoid removing as many trees as possible, reduce impacts to trees where possible, and plant new trees to mitigate these impacts.

Mitigation measures that would minimize the removal of some of the mature trees and other elements of the natural environment would include the investigation of the following design solutions to reduce the number of trees impacted by the project. This mitigation includes three options for the fill area in Landscape Unit 2. See Table 3-8.

Mitigation Option A: Design fill sections with a 1.5:1 slope (instead of 3:1), with a 10- foot clear area at the toe of the slope. This would reduce the footprint of the project and require removal of fewer trees. The most prominent trees, which are adjacent to the existing guardrail, would still be removed.

Table 3-8 Visual Impacts of the Build Alternative in Visual Assessment Unit 2 With Various Potential Mitigation Options			
	Character (Level of change)	Total Trees Lost[1]	Prominent Trees Lost
Build Alternative (with 3:1 slope)	Moderate	72	22
Mitigation Design (with 1.5:1 slope)	Moderate	56	22
Mitigation Design (with Gabion walls)	Low - Moderate	39	21
' Includes only trees greater than 24" diameter, which appear on the project survey.			

Mitigation Option B: Install gabion-style retaining walls, with a 15-foot clear area at the base of the wall. This would further reduce the footprint of the project (beyond Option A above) and would require removal of fewer trees. All but one of the most prominent trees, which are adjacent to the existing guardrail, would still be removed.

Mitigation Option C: While a 3:1 slope design would require removal of many trees, new small trees and other native vegetation can be re-planted in the area. The design of the 3:1 slope area would include plantings of trees and vegetation that would grow over time.

* * *

Appendix B
Bureau of Land Management Correspondence

A.J. Dwyer Area
Red Tree Vole
Visual Contrast Rating

A.J. Dwyer Input for Wildwood-Wemme Highway Widening Project

Prepared by:

Laura Dowlan, BLM Outdoor Recreation Planner and Terry Fennell, BLM Botanist
May 26, 2006

Affected Environment: The A. J. Dwyer Scenic Area is a five-acre parcel of land located in Township 2 South, Range 7 East, Section 31 and managed by the Bureau of Land Management (BLM). The parcel is to the north of and adjacent to U.S. Highway 26 and immediately across from the entrance of the Wildwood Recreation site. The area north of Hwy 26 is surrounded on all sides by private ownership. The A.J. Dwyer parcel was designated a Special Area in the BLM's 1995 Salem District Resource Management Plan with scenic and botanical values as the identified unique features. This parcel is managed under a Class 1 Visual Resource Management (VRM) category which calls for the preservation of the character of the landscape. The A.J. Dwyer parcel is also within the Mt. Hood Corridor, a Congressionally designated scenic area which requires that scenic values be protected on BLM lands that can be seen from U.S. Highway 26. Though designated as a scenic area, the A.J. Dwyer parcel is relatively small in size with approximately 0.27 mile of the parcel adjacent to U.S. Highway 26.

There are several large older trees on the parcel, most of which are located along or near the highway. Apart from the older forest adjacent to the highway, the truly unique botanical values at the A. J. Dwyer Scenic Area include a diverse group of lichens and vascular plants north of the proposed project area. Although the area is host to vascular plant and moss species that are typically found in dryer upland environments, it is also host to a variety of lichens

that are typically found in high humidity environments associated with riparian areas. With its dry, well drained volcanic soils that were not seen elsewhere in this parcel, and its diverse botanical community, this area stands out as unique.

The general habitat around the A.J. Dwyer parcel is characterized by a forested setting intermixed with houses and roads, with utilities along Hwy 26. No houses are directly adjacent to the part of the A.J. Dwyer parcel that would be disturbed and Wildwood Park is opposite the area and directly across Hwy 26. The proposed project area is most visible from the Hwy 26 with little visibility from houses in the general area due to the screening provided by the trees and brush in the northern end of the A. J. Dwyer parcel. Whether traveling east or west on Hwy 26, the proposed project area is only visible in the peripheral view for a few seconds. Except while exiting their driveways, the proposed project area would not be visible to residents living along the south side of Hwy 26.

Environmental Effects: A strip approximately 0.27-mile in length adjacent to U.S. Highway 26 would be cleared of trees and vegetation, which includes most of the larger trees in the A.J. Dwyer parcel. The width of the strip would vary from 25 to 50 feet. Approximately 65 trees over 24 inches in diameter at breast height (dbh) would be removed, including an estimated 22 older and larger trees that are greater than 40 inches in diameter at breast height (dbh).

The diverse group of lichens and vascular plants in the northern portion of the A. J. Dwyer parcel would not be disturbed as a result of the proposed project.

There would be some visual disturbance over several months during the construction period. Following the completion of the project, the general character of the parcel would continue to be dominated by a forested setting, however, the area would appear more open with younger and smaller trees. Given that a forested setting would be maintained and the short amount of time the parcel is in view while traveling U.S. Highway 26, the proposed project is expected to be in compliance with management objectives associated with the AJ Dwyer Scenic Area and the Mt. Hood Corridor.

Cumulative Effects: There are no other projects expected that would affect the A.J. Dwyer Scenic Area. Cumulative effects associated with the proposed action as a whole will be addressed by the Oregon Department of Transportation in their Environmental Assessment for the project.

Citizens for A Suitable Highway
P.O. Box 294
Rhododendron, Oregon 97049
(503) 622-4798

January 16, 1987

Rick Kuehn
Regional Engineer
Region 1
Oregon State Highway Division
9002 S.E. McLoughlin Blvd.
Milwaukie, Oregon 97222

Dear Mr. Kuehn:

I wish to thank you for your professionalism and integrity during the many months you have represented the Oregon State Highway Division in negotiating the disputes pertaining to the widening of U.S. Highway 26, between the Villages of Wildwood and Rhododendron in the Mt. Hood Corridor. Although these negotiations took far longer than I would have ever imagined, all the issues were addressed, and the end result is that not only the people of this area, but also throughout the State of Oregon, will benefit from the compromise reached between Citizens For A Suitable Highway and your agency.

As you are well aware, Citizens For A Suitable Highway has invested the last few years in devising a "suitable" plan for this highway that eliminates congestion and moves traffic in a safe and effective manner, without sacrificing the area's natural scenic beauty, historic and cultural resources such as the Barlow Trail and Faubion Bridge, or eliminating the

Dwyer Memorial Forest, the Bear Creek wetlands, fish and wildlife habitats, and the 17,000 plus trees which would have been removed under the first proposals. Our negotiated agreement achieves this goal. This time around, the integrity of the Mountain has been saved, with the State still being able to achieve the goals they desired for widening the highway through this area.

It is well understood that not everyone will be entirely pleased with this compromise agreement, specifically concerning the Highway Division widening the highway to four-lanes. However, when one weighs the major changes in the project's design and understands what we have achieved in saving the public's resources which they can continue to enjoy and appreciate in the coming years, this dissatisfaction should be - if not completely eliminated - surely lessened to the point of being able to tolerate a four-lane highway.

After first sitting on the Highway Division's Citizens Advisory Committee for this project, and then forming Citizens For A Suitable Highway to fight the proposed widening project, I can see a difference of "night and day" in today's final plan, as compared to all of the others that had been proposed up to the beginning of our negotiations this past summer. Knowing that the sections of the Barlow Trail, which interweave themselves throughout the project area, will continue to exert their historic presence in the Mt. Hood Corridor is an important achievement that people will appreciate long after the dust of this fight has settled and our memories surrounding the many, many issues regarding this project begin to "fog."

To be able to feel at peace that the Native American or pioneer gravesite, located not too very far off the highway, will not be disturbed by the widening is a major achievement in itself. The saving of this ate from destruction sends a very positive message concerning the Highway Division. It is the same, knowing that the Faubion Bridge, Native American fishing sites, pioneer campgrounds and related historical sites have also not been dealt what was once perceived as having a future that was nothing short of a certain fate of "doom."

By the Highway Division agreeing to install the SWAREFLEX "wildlife warning system," within certain areas within the project area that have been plagued with an increasing number of Deer kills, as well as agreeing to cooperate in monitoring "road kills" from Sandy to Mt. Hood Meadows, I feel that the entire State will benefit. With the Mt. Hood Corridor essentially serving as a "test area," the thousands of Deer and Elk that are killed on highways statewide may be drastically reduced because what we learn on the Mountain can and, hopefully, will be utilized elsewhere.

Your agency's agreeing to replant five trees to every tree cut, not to mention the re-planting of vegetation native to the Mt. Hood Corridor, is one of the most positive steps in the agreement to re-create those special qualities that this scenic highway has always possessed. The elimination of the proposed "dear zones," coupled with the Highway Division not utilizing herbicides in this area, will aid what could have been a very slow process in the Mountain's ability to heal itself as a result of the widening efforts. As a result of the conditions in this document, vegetation

and trees reclaiming their rightful place along Highway 26 should occur far more quickly than most could ever conceive.

The "Rhododendron Scenic Gardens" that we have proposed to create along various sections of Highway 26 will also add a special touch that will help to enhance the Mt. Hood Corridor. While at one time such gardens were historically part of the attraction of this area, contemporary times destroyed them. Now, however, they win be brought back for the enjoyment of the people.

As for the Dwyer Memorial Forest, technically known as the "A.J. Dwyer Memorial Roadside Preservation Area" in Wildwood, your agency has indeed made an honest attempt to preserve these "sacred" trees by spending $100,000 pins for a special stone wall along the north side of the highway. Yet, I wish that even those few trees that will have to be cut could have been spared due to their effect of creating a "natural gateway" to the Mt. Hood Corridor. However, by the Highway Division agreeing to construct another "gateway," although made by human hands, people traveling Highway 26 will still be able to recognize that they are entering a very special section in the Mountains.

In respects to the Highway Division agreeing to not "urbanize" the look of the area, but to work within the context of maintaining that rustic-Alpine flavor, this effort will also be a reward for the future. People have traditionally come to Mt. Hood looking for the Mountain and expect - inspite the fact that there is existing development - to find the Mountain. Urbanization has never fit the character of the Mt. Hood Corridor, nor has it served to benefit the tourism

trade that the businesses scattered within the various Villages rely upon for their survival. Perhaps by incorporating stone curbings and the flat-looking "mountable curbing," not to mention barriers with exposed aggregate surfacing, the historic feeling that this area has always seemed to portray, to visitors and residents alike, will survive the coining changes. Perhaps this effort will also spark additional design changes and the owners of businesses, as well as homeowners, will attempt to make their "place" truly fit within this very beautiful and historic setting, and maybe even give birth to a Village Mainstreet Program which would fit within the character of this Mountain very well.

The most important ingredient to this agreement, however, is what takes place after the highway widening is completed. Everyday highway maintenance operations can very quickly undo everything that we have attempted to achieve. However, this too, I feel, has been adequately covered with the inclusion of this statement:

> During the regular highway maintenance operations, the Highway Division will not do anything in the Wildwood-Rhododendron highway widening project area that will be contrary to the intentions of the re-design and mitigation efforts put forth in this project.

The "key" to our agreement is "trust." The people must trust the Highway Division to not only honor their portion of this agreement while the highway is under construction, but also trust that they will not destroy the public's resources in the future. To many individuals such a trust is risky, but this is the only

way that the compromise on this widening project can work.

Although the Highway Division is in charge of the bulldozers, so to speak, your agency is in a similar situation of having to rely upon trust. Specifically, you must place your trust in Citizens For A Suitable Highway to continue to accept the terms outlined in this agreement.

For this highway widening project to proceed smoothly, Citizens For A Suitable Highway must work closely with not only yourself, but also the Project Manager. This will insure that the lines of communication will always remain open and that the correct information is always presented to the people as the project progresses. When construction begins and trees begin to topple, and when crews begin creeping toward "sensitive sites" that your office has agreed to preserve for future generations, mas-leading and inaccurate rumors will almost assuredly run "rampart." However, these can be kept to a minimum by working together and educating the public as to what is and what is not happening, and insuring them on a continual basis that the terms in our agreement are being honored.

The future will judge the importance of what we have agreed upon in this document. I lay odds that this beautiful Mountain that we know as Mt. Hood, not forgetting the citizens of Oregon, will be rewarded continually because we were able to sit down, listen, share ideas, frustrations and concerns, and then successfully work out these extremely critical problems that were associated with the widening of Highway 26 from Wildwood to Rhododendron. How many times a government agency and citizens have

been able to adequately work out their differences, I couldn't tell you, but it surely hasn't been very many.

Again, I thank you for taking the time you did, and for not treating common, everyday citizens as not having anything worthwhile to share, or no reasonable solutions because they are not engineers. If you had, then today there would not be any compromise agreement in the widening of Highway 26 through the Mt. Hood Corridor.

Before us now is the tremendous task of insuring that the terms and conditions of this compromise agreement are met. If they are met, then we have achieved this very serious goal of creating a "Suitable Highway" for the Mt. Hood Corridor that people on both sides of this controversial issue should be able to "live with."

Sincerely,

Michael P. Jones
Spokesperson

Citizens for A Suitable Highway
P.O Box 565
Welches, Oregon 97067

SOME ISSUES PERTAINING TO THE
PROPOSED WIDENING
OF U.S. HIGHWAY 25
THROUGH THE MT. HOOD CORRIDOR

1) The construction of a proposed 134-144 foot highway through the "A. J. Dwyer Memorial Forest," which is located in the Wildwood area of the Mt. Hood Corridor, would destroy most of the old-growth in this area. The area would have major adverse impacts on scenic, cultural and historic resources. In addition, this widening would have equally as adverse economic and environmental impacts.

The trees which make-up the Dwyer Memorial Forest were given to the public back in 1934 by the Dwyer Family, due to their scenic values in relationship to the Mt. Hood Highway. The "key" individual who was instrumental in saving these trees was Robert Dwyer, Sr., who is currently a Transportation Commissioner for the Oregon Department of Transportation. (NOTE: He will not go against his friends in the Highway Department and fight to spare the trees. He has said if the road has to be widened "for the purpose of commerce," and if the trees are in the way, then the trees must be sacrificed.")

The Dwyer Memorial Forest lies within the Wildwood Recreation Site, a day-use park that is administered by the U.S. Bureau of Land Management. The park was developed in the 1960's

and the Dwyer Forest was included within its boundaries.

The Dwyer Memorial Forest is triangular-shaped and is situated on both sides of U.S. 26. Roughly 11.6 acres of the forest lies on the northside of the highway, of which an estimated 3.8 acres lies in the widening path and would be adversely affected with alternative 1, and 2.8 acres from alternative 2. Alternative 1 would topple 119 trees, 24 inch in diameter or larger (or 2,671 trees of all sizes), with Alternative 2 affecting 98 trees 24 inches in diameter or larger (or 1,726 total trees of all sizes).

2) A still-used section of the Barlow Trail cuts through this northern portion of the Dwyer Memorial Forest and stretches to the west where it eventually connects to the current highway. This has been confirmed by Hallard Bailey who came over on the Barlow Trail, by horse and wagon, when he was 11 years old. In addition to having travelled over the Barlow Trail, Hallard also was later hired to do maintenance on many sections of this historic wagon road, as well as many other roads in the Mt. Hood Corridor, (see related maps - Mountain Air Park plot map of July 1934, USGS January 8 and November 29, 1884 maps, USGS July 28, 1899 map, USGS February 1929 map, 1984 the Oregon State Highway Division's mid-1970 map and Clackamas County's 1979 map)

However, inspite of the supporting documentation and other physical evidence along the project area, the BLM and the Highway Division, in addition to the "unofficial" opinion of head of the Oregon Trails Advisory Group, deny that this was a primary route of the Barlow Trail. Our research, naturally, does not agree with these so-called "experts," and 86- year-old

Hallard Bailey, agrees with us. Ironically, 40 feet to the south, there is a historical marker designating this section of the Oregon Trail on the National Register. Our research shows that this designated section was either a spur road to a former stage stop and rest area, or was part of an alternative route used when trees were blocking the other trail or the mud was too deep to permit wagons to pass. Note that this section of the Barlow Trail was not included in Ute EIS or in the Cultural Resources Inventory.

3) The Dwyer Memorial Forest contains other historical sites related to the Barlow Trail which have significant historical and cultural significance which are worthy of preserving. A six by four foot pile of moss-covered rocks has been discovered (and not by Highway Division staff) which could be a Native American grave site or the unmarked grave of a Barlow Trail pioneer. In addition, the Highway Division has located some "wagon ruts," estimated to be around 6 feet in length between the Barlow Trail (whose name was changed by Clackamas County in 1980 to East Wemme Trail Road) and Highway 26. At this time, we have not located these ruts but will be conducting a thorough search of the area in the near future. Neither sites were included in their EIS or Cultural Resources Inventory.

4) To the north of the Dwyer Memorial Forest is an unnamed creek, which we appropriately call "Dwyer Creek," which meanders on and off this undeveloped section of Wildwood Park. Dwyer Creek is fed by underground springs, has accompanying wetlands and contains anadromous fish. The cutting of trees in the Wildwood area (which are located on a high bluff above the stream's watershed) would cause problems. The

trees within the Dwyer Forest or within what has been termed the "Dwyer Corridor" (i.e., 1/2 mile above and 1/2 mile below the boundaries of the Dwyer Forest) would have an adverse impact on this stream.

5) At a distance estimated to be 1/4 mile or less to the east of the Dwyer Memorial Forest is another section of the Barlow Trail. This section also is located to the north of Highway 26 and is still driveable and is still being used. I estimate this to be over 1/4 of a mile in length. This was not identified in either the Highway Division's EIS or Cultural Resources Inventory. There is a mention of this road, however, in the EIS but as (ironically) a "footpath." I have verified this with Hallard Bailey, the Barlow Trail pioneer, who conducted a site survey with me recently. He traced the trail from this point to the west, along the bluff which borders Highway 26 all the way to the section in the Dwyer Memorial Forest. According to him, the current shoulder of the highway use to the old Barlow Trail. Prior to the current highway being put in, the Old Mt. Hood Loop Highway (which was actually an improved version of the Barlow Road) utilized it as part of its roadway and by-passed the section through the Dwyer Forest, since it was curvy and not straight.

6) Alternative 1 proposed by the Highway Division would eliminate 13,790 trees (which is a conservative count). Alternative 2 would eliminate 11,270 trees (which is also a conservative count). This effects the scenic qualities of the highway, as well as wildlife habitat, as a buffer from development, noise, air pollution, etc. Both of the proposed alternatives are obviously unacceptable.

7) The alternatives proposed by the Highway Division would adversely affect small businesses in the project

area (which essentially represent the primary business and residential areas of the Mt. Hood Corridor). A "Village Mainstreet Program." which would be uniquely designed to incorporate historic landmarks, scenery, a "suitable" highway design and special promotions for the area, has been seriously talked about. Both the Oregon Downtown Development Association (who are specialists in Mainstreet Programs for the state) and Clackamas County's Economic Development Office have been dealing with us on this proposal. However the highway widening issue must be resolved first. Either proposal of the Highway Division would not be adequate for a "Village Mainstreet Program."

8) Either proposal of the Highway Division would not only mean more urbanization, but also more "urban-looking" structures and an encouragement of strip development along this now high-speed highway. This, obviously, would adversely effect this scenic highway. (NOTE: The Highway Division does not recognize the Mt. Hood Highway as a scenic highway, but it does recognize it as a scenic area. In addition, the Clackamas County plan and the Mt. Hood Community Plan recognizes the highway as being scenic.

9) The Faubion Bridge, according to the Highway Division, was constructed in 1935. However, Lou Jones, a property owner, said that in 1934 when he came to the Faubion area, the bridge was already there. Herb Forbes, President of the Mt. Hood Independent Steelheaders who was born on the Mountain, said he and some other members of his organization found a brass plate on the bridge (which has now been removed by some unknown person or persons), that set the construction date sometime

around 1924-28, meaning that the bridge was probably constructed sometime during the building of the Mt. Hood Loop Highway. Whether this bridge was built in 1924, 1928 or 1935 makes no difference. It is still eligible for the National Register.

10) The two proposed widening options would pose major safety hazards to the area. Widening would mean increased speeds through the project area which represents the Mt. Hood Corridor's primary business and residential areas. All attempts to lower the speed limits from 45 and 55 miles per hour down to a safe 35 miles per hour have failed thus far. (NOTE: Even those who want the highway widened want the speed limit both lowered and the traffic laws enforced. However, the Highway Division has told us that if the speed limit were lowered there would be no reason to construct a four to five lane highway. We believe that lowering the speed limit, including additional turn lanes and widening the Rhododendron Bridge would drastically improve the existing highway.)

11) Alternatives to the Highway Division's two proposals have not been adequately explored. The Highway Division refused, during the Citizen Advisory Council meetings, to look at other options, including a shuttle system for skiers (below the snow zone), a three lane highway, turn lanes, etc.

12) The Highway Division is currently proposing to construct two five-acre rest stops just west of Wildwood, along the existing four lane highway. These rest stops would be in wetlands of the Cedar Ridge area. First, this would be the worst place to place rest stops. Second, during the CAC meetings the Highway Division wanted to place their rest stops in an area where skiers would "chain-up" during the winter. No

one chains up in this area since there is usually no problems with snow. However, a rest stop would be adequate for the Rhododendron area since above this area, during the winter, is where motorists begin to experience problems. And, it is Rhododendron where the State Police require motorists to put on chains. It makes sense to move the rest stop to Rhododendron which has vacant land which businesses formerly occupied. However, these are not ten acre parcels, rather an overly adequate amount of space. After all, the next closest rest area is up in Government Camp, a mere 10 miles to the east.

The Highway Division has refused to discuss the proposed rest stop, stating that it has nothing to do with the widening of the highway. They may be correct in respect to funding for the project, but not in the overall planning for transportation in the Mt, Hood Corridor. Both have to planned together in order to do a more comprehensive approach to solving the problems with the highway and meet both the state, the residents and the highway user's needs.

An important thing to remember is that even though they want to widen the highway through Rhododendron, the traffic will always "bottleneck" at this point because the road narrows to two lanes. As for widening beyond this point, the following was taken from a joint study between the Highway Division, the U.S. Forest Service and the Federal Highway Administration in May of 1981:

> "Increasing the capacity of the roadway by extending the four-lane section from Wildwood to Government Camp is estimated to cost at least $18 million, not including assumed environmental

> impacts which are not quantifiable without further study. It is unlikely that funding would even be available from state or federal sources."

In May of 1981 they put a price tag of $18 million of improving the highway all the way to Government Camp. At this time, over five years later, the price tag for Alternative 1, from Wildwood through Zig Zag is estimated at $4.2 million, and $3.9 million for widening the highway from Zig Zag through Rhododendron. The cost of Alternative 2, from Wildwood through Zig Zag is estimated $3.4 million, and $3.9 million for continuing the project through Rhododendron. However, for both Alternatives 1 and 2, there is presently not enough money for taking the project all the way through Rhododendron. I can safely assume that the $18 million estimated in 1981 has better than doubled and that no such project would ever extend beyond the Rhododendron area. Besides, when the snow fails, it doesn't matter if you have ten lanes. Mother Nature dumps more snow in this area than the state plows can handle with only two lanes.

13) The proposed widening alternatives will affect wetlands and fisheries associated with Bear Creek, an anadromous fish stream.

When the highway was widened from Zig Zag through Rhododendron in the 1960's (some 21 years ago). Bear Creek suffered major damage due to this highway improvement due to the lack of adequate environmental protection ordinances and land use laws. As a result, a large portion of this stream lying within the project area, which, prior to this, was considered a major stream for Steelhead, Coho and Trout, was reduced to a straight channel of siltation.

Wetlands and thick vegetation situated alongside of the stream, as well as underground springs and feeder streams (which maintained the necessary flows), were also destroyed. The net result - the fisheries of Bear Creek was destroyed.

It has taken over 20 years for the fisheries in Bear Creek to begin to make a come back, due to this highway widening. Initially, based on information provided by the Highway Division, it was believed that only the stream's channel from behind the Zig Zag Mountain Store east to where it crosses under the highway, had been affected by the widening. However, until a stream survey was just recently conducted on Bear Creek, it has been learned that this was not the case. The Highway Division also affected the upper end of the stream, beginning an estimated one-half mile above the Faubion Bridge.

The following is a brief summary of the highway widening by the Highway Division in the upper portion of Bear Creek during the mid-1960's:

a) The stream was both filled (apparently to reduce its overbearing presence alongside of the highway) and channelized.

b) Accompanying wetlands and riparian vegetation along both sides of the stream were destroyed.

c) Feeder streams and springs (both surface and underground) springs were either destroyed or diverted.

d) The stream's natural channel was either partially filled and narrowed, or completely

destroyed with the placement of a man-made berm alongside the highway.

e) At least two culverts were installed in the upper reaches of the stream which has been diverting groundwater and natural runoff from the slopes of the hills to the south during periods of highwater. One culvert diverts water onto a Portland General Electric service road, and the other into the woods.

f) The widening eliminated (through filling and diverting) a fork of the stream, located in the upper reaches of Bear Creek near Homestead, a camp facility owned by the Girls Scouts of America.

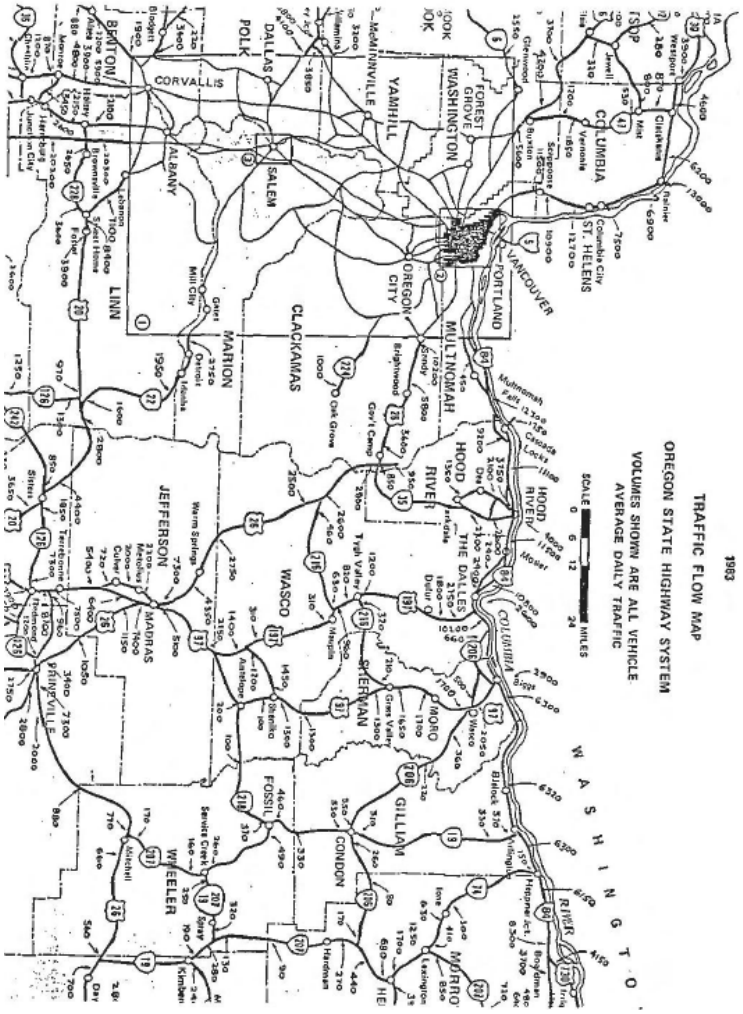
g) Another stream, a year around flowing stream according to the U.S. Geological Survey maps, which joins the main channel of Bear Creek near mile post 43, has also been impacted. Due to this unusually dry year, however, this cannot be confirmed until the fall rainy season begins.

h) The Highway Division's proposal to relocate this still undisturbed portion of Bear Creek and meander it in a new channel, based both on the information on this waterway known before and after the stream survey, is unacceptable if we are to maintain this waterway as a spawning and habitat stream for anadromous fish.

14) The widening of the Rhododendron Bridge from a two-lane to a four-lane, which is a must due to safety hazards, would have an impact on the Zig Zag River. This widening would affect wetlands located on the south side of the bridge, as well as excellent fishing holes heavily used by recreationalists.

* * * * *

These are only some of the issues related to the widening of Highway 26 through the Mt. Hood Corridor. For additional information contact Michael P. Jones at: Citizens For A Suitable Highway, P.O. Box 294, Rhododendron, Oregon 97049 (622-4798).


1983
TRAFFIC FLOW MAP
OREGON STATE HIGHWAY SYSTEM
VOLUMES SHOWN ARE ALL VEHICLE
AVERAGE DAILY TRAFFIC
SCALE 0 6 12 24 MILES
WASHINGTON
COLUMBIA
ST. HELENS
VANCOUVER
PORTLAND
MULTNOMAH
CLACKAMAS
OREGON CITY
WASHINGTON
FOREST GROVE
YAMHILL
McMINNVILLE
CLATSKANIE
CORVALLIS
ALBANY
SALEM
DALLAS
POLK
MARION
LINN
BENTON
HOOD RIVER
THE DALLES
WASCO
JEFFERSON
MADRAS
PRINEVILLE
SHERMAN
GILLIAM
CONDON
FOSSIL
WHEELER
MORROW
HEPPNER