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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

HEREDITARY CHIEF WILBUR SLOCKISH, a resident of Washington, and an enrolled member of the Confederated Tribes and Bands of the Yakama Nation,

HEREDITARY CHIEF JOHNNY JACKSON, a resident of Washington, and an enrolled member of the Confederated Tribes and Bands of the Yakama Nation,

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

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Request for Oral Argument

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

CASCADE GEOGRAPHIC SOCIETY, an Oregon nonprofit corporation,

and

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

Plaintiffs,

v.

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

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

and

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

Defendants.

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2	U.S. 26: Wildwood–Wemme Revised Environmental Assessment (Jan. 2007)	FHWA_004951-004993
3	Wildwood–Rhododendron, Mt. Hood Highway (U.S. 26): Draft Environmental Impact Statement (May 1985)	FHWA_000165-000301
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GLOSSARY

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

LOCAL RULE 7-1 CERTIFICATION

Under Local Rule 7-1(a), Plaintiffs Hereditary Chief Wilbur Slockish, Hereditary Chief Johnny Jackson, Carol Logan, Cascade Geographic Society ("CGS"), and Mount Hood Sacred Lands Preservation Alliance ("MHSLPA"), by and through undersigned counsel, contacted Defendants United States Federal Highway Administration ("FHWA"), United States Bureau of Land Management ("BLM"), and Advisory Council on Historic Preservation ("ACHP") (together, the "Government"), by and through their counsel, and made a good-faith effort to resolve the dispute over this motion, but were unable to do so.

MOTION

Under Federal Rule of Civil Procedure 56 and Local Rule 56, Plaintiffs respectfully move this Court for summary judgment on their claims under the National Environmental Policy Act ("NEPA"); the National Historic Preservation Act ("NHPA"); the Federal Land Policy and Management Act, ("FLPMA"); § 4(f) of the Department of Transportation Act ("DTA"); the Native American Graves Protection and Repatriation Act ("NAGPRA"); and the First Amendment to the U.S. Constitution.

MEMORANDUM

This case centers on a small Native American sacred site called *Ana Kwna Nchi nchi Patat,* or the "Place of Big Big Trees." The site measures approximately 100 by 30 meters—less than one acre—and is located north of U.S. Highway 26 within the

five-acre A.J. Dwyer Scenic Area. The Government first recognized Dwyer as a protected area in 1968 and designated it as a "Special Area" in 1995. In 1988, when it widened U.S. 26, the Government specifically altered the project to protect Dwyer.

But in 2008, the Government widened U.S. 26 again, this time authorizing extensive tree cutting and road construction within Dwyer—resulting in the complete destruction of the Native American sacred site. The question is whether the Government's actions fully complied with federal law.

They did not. In fact, the Government's actions violated six laws designed to prevent precisely this kind of needless destruction of cultural, environmental, and religious resources.

First, the Government violated NEPA by failing to take a "hard look" at the environmental consequences of its actions. The project could not have taken place unless BLM, which managed Dwyer, granted a tree-removal permit and right-of-way authorizing construction—yet the Government performed no NEPA analysis for these actions at all. FHWA performed only a truncated NEPA analysis for the project as a whole, improperly concluding that it would have no significant impact on Dwyer even though it would destroy almost all of Dwyer's large, old-growth trees—which were the very reason for protecting Dwyer in the first place. FHWA also ignored several alternatives that would have minimized the project's impact on Dwyer—even though it used the same alternatives to minimize impacts on nearby wetlands.

Second, the Government violated NHPA by failing to consider the project's impact on Plaintiffs' sacred site. BLM performed no NHPA analysis for its actions. And

FHWA, for its part, attempted to delegate its NHPA duty to consult with Native American tribes to a state agency—which is expressly forbidden by the text of the statute. And even assuming FHWA's delegation were allowed, consultation with the Yakama took place after tree-removal had already occurred—long after the time required by statute.

Third, the Government violated FLPMA by destroying the sacred site and performing extensive tree-cutting within Dwyer—both of which are prohibited by other provisions of federal law incorporated into FLPMA. The Government also failed to follow FLPMA's procedures in formulating the resource-management plan for administering Dwyer.

Fourth, the Government violated § 4(f) of DTA, which forbids FHWA from approving highway projects unless the project avoids or minimizes any impact on parks and recreation sites. Dwyer was officially designated as part of the Wildwood Recreation Site—an area all parties agree is protected by § 4(f). Yet FHWA performed no § 4(f) evaluation at all and made no effort to minimize the impact on Dwyer.

Fifth, the Government violated NAGPRA by failing to protect Plaintiffs' sacred altar. Just before construction, a BLM official who had been explicitly informed of the altar's religious significance discovered it—in scattered condition—on the site. At that point, NAGPRA required the official to pause the project and protect the altar. Instead, the official took pictures of the altar and attached them to a report allowing the project to proceed—which it did just days later, resulting in the altar's being "disposed of."

Sixth, the Government violated the Free Exercise Clause of the First Amendment by carving out secular—but not religious—exemptions from the negative consequences of its actions. Specifically, while the Government altered the project to accommodate wetlands, it refused to make a similar accommodation for Plaintiffs' sacred site.

The saddest thing about this case is that the destruction of Plaintiffs' sacred site never had to happen. The Government had numerous alternatives for widening the highway without harming Plaintiffs' sacred site. But it ignored Plaintiffs' pleas for protection and chose the most destructive alternative—with officials admitting in internal correspondence that they didn't think they needed to "blindly follow[] the rule book" given the low "likelihood of someone figuring out." Ex.23 BLM_0000083. The result was the complete destruction of Plaintiffs' sacred site—which "never had walls, never had a roof, and never had a floor," but for Plaintiffs was "just as sacred as a white person's church"—and the destruction of a scenic area that had been protected by Congress and the Government for over forty years. Plaintiffs are entitled to summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs' memorandum in support of their previous motion for summary judgment (ECF 292) included a detailed statement of the facts, which the Government did not dispute and which we incorporate by reference here. The following statement focuses on the facts most pertinent to the legal claims in this present Motion.

I. Factual Background

A. Plaintiffs and their tribal affiliations

Plaintiffs are Wilbur Slockish, Johnny Jackson, Carol Logan, CGS, and MHSLPA. Slockish and Jackson are Hereditary Chiefs and enrolled members of the Confederated Tribes and Bands of the Yakama Nation; Logan is an Elder and enrolled member of the Confederated Tribes of Grand Ronde. ECF 292 at 2-3. The individual Plaintiffs are also members of CGS and MHSLPA, which are organizations led by Michael Jones and dedicated to preserving the Cascade Mountains' cultural and religious resources. *Id.* at 3, 11.

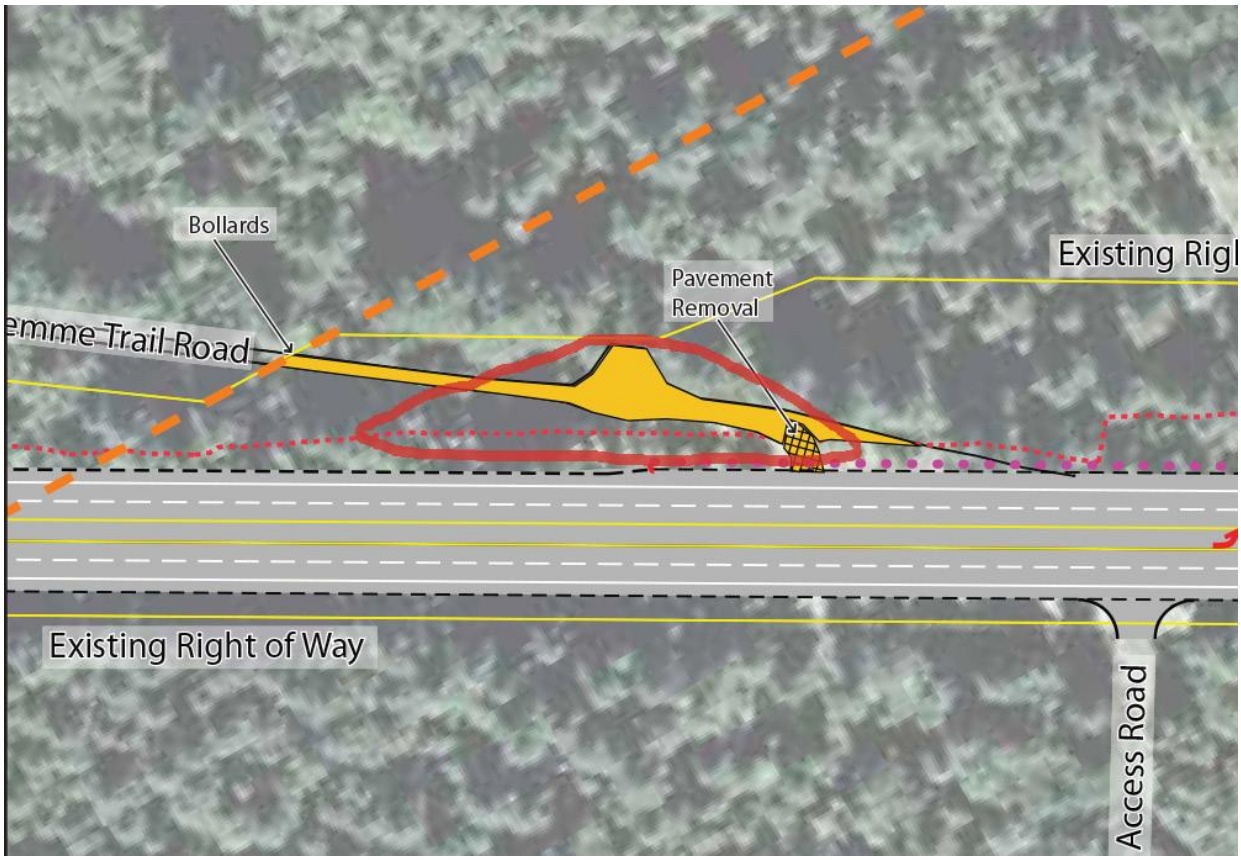
B. Plaintiffs' religious beliefs and the sacred site

Slockish, Jackson, and Logan practice traditional Native American religions. *Id.* at 3-5. Like many other traditional practitioners, Plaintiffs believe they must venerate their ancestors and safeguard ancestral burial sites. *Id.* Plaintiffs also practice their religion by visiting "sacred sites" where they become attuned to the "Creator." *Id.*

This case centers on one such site, known to Plaintiffs' tribes as *Ana Kwna Nchi nchi Patat* (the "Place of Big Big Trees"). The site was located within a small portion of the A.J. Dwyer Scenic Area, which is a roughly five-acre parcel of land on the north side of U.S. 26 between the villages of Wildwood and Wemme. Ex.1 FHWA_004472. The site measured approximately 100 by 30 meters, or 0.74 acres. Ex.18 BLM_000017-000018. It lay along a trading route used by Native Americans for centuries, and it was held sacred because of its use as a place where Native Americans

camped—and, when they died, were buried—while en route to trade or gather traditional foods. ECF 292 at 5-6.

A map taken from the highway planning documents (Ex.1 FHWA_004356) appears below, with the key area circled in red:



The site included several discrete features integral to Native American religious exercise: the campground and burial grounds themselves; an altar made of river rocks; old-growth trees; and medicinal plants. *Id.* at 6-8. The altar played a particularly key role in religious exercise, both "mark[ing the] surrounding graves" and serving as a focal point for religious ceremonies. *Id.* at 7. Below is a picture of the altar taken during a 1986 excavation, when BLM archaeologist Frances Philipek was on-site (ECF 292-14 FHWA_005083):

Indigenous people have used the site "since time immemorial." ECF 292 at 8. And Plaintiffs practiced their religion at the site for many decades—until the project at issue in this case. *Id.* at 8-10.

C. Previous highway projects and protection of Dwyer

The A.J. Dwyer Scenic Area—which encompasses the sacred site—is owned by the United States and managed by BLM. Dwyer "is a corridor of large fir trees" donated to the Government in the 1930s by a logging company to "enhance the beauty of th[e] highway" and allow "future generations to see and appreciate old-growth Douglas fir trees." Ex.30 FHWA_002049; Ex.4 FHWA_000674. In 1968, the Government "withdr[ew]" and "reserved" Dwyer "for protection of public recreation values" as part

of the Wildwood Recreation Site. 33 Fed. Reg. 17628 (attached as Ex.29); *see also* Ex.22 FHWA_002874. In 1995, as part of the Salem District Resource Management Plan (SDMP) adopted by BLM under FLPMA, BLM designated Dwyer a "Special Area," "unique" for "scenic and botanical values," including its "large older trees." Ex.5 at 5, 18-19. And in 1996, Congress designated the parts of Dwyer visible from the highway as "Mt. Hood Corridor Lands" protected for their "scenic qualities." Oregon Resource Conservation Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-536, § 401(g) (1996) ("ORCA") (attached as Ex.20).

Because U.S. 26 has long been used for recreational travel to Mt. Hood, there have been several efforts to expand the highway to reduce traffic during "holiday weekends and on ski weekends." Ex.3 FHWA_000178, 000184. One previous project—the Wildwood–Rhododendron Project, constructed 1988–1990—involved the stretch bordering Dwyer, and is particularly important to this case. Two other projects—the Zigzag–Rhododendron Project, and the Rhododendron–OR 35 Project, both completed in the 1990s—also merit brief discussion for the light they shed on the Government's understanding of Native American resources near the highway.

1. The Wildwood–Rhododendron Project

FHWA, together with the Oregon Department of Transportation ("ODOT"), proposed the Wildwood-Rhododendron Project in a 1985 Draft Environmental Impact Statement ("EIS"). The project was designed to widen U.S. 26 from two to four lanes, plus a center turn lane, including in the portion bordering Dwyer. Ex.3 FHWA_000176-000178. This would have extended the pavement 15 feet north into

Dwyer, Ex.4 FHWA_000444, requiring the removal of "most of [Dwyer's] large trees." Ex.3 FHWA_00178.

This proposal prompted a large-scale campaign to save Dwyer, led by Citizens for a Suitable Highway ("C-FASH"), another organization formed by Michael Jones. C-FASH submitted letters, testified at public hearings, gathered signatures on petitions, and talked extensively with agency officials, emphasizing Dwyer's religious and cultural significance. ECF 292 at 11. Other commenters likewise advocated for saving Dwyer, explaining that damaging Dwyer "is a serious matter which requires justification." Ex.4 FHWA_000674 (comment from retired Oregon Supreme Court Justice concerned about the project); *see also, e.g.*, Ex.4 FHWA_000641.

After C-FASH highlighted the stone altar within Dwyer (which Jones at the time thought was a "grave"), BLM issued a permit allowing archaeologists to study it. The archaeologists found no human remains, but concluded the altar "may be at least several hundred years (and possibly much more) old," and it was "not possible to determine with any confidence whether the feature is aboriginal or Euro-American." ECF 292-13 FHWA_000303.

Responding to the public concerns, FHWA and ODOT issued a Final EIS in 1986, changing the proposal. Under the Final EIS, a center turn lane would be added on either side of Dwyer, but the stretch of highway bordering Dwyer would not include a center turn lane and would use "guardrails and retaining walls" to "minimize the number of trees taken." Ex.4 FHWA_000462-000464. The purpose of these changes

was "to decrease the impact in…Dwyer," which, the Government recognized, was a "valued feature[]." *Id.* FHWA_000440, FHWA_000462.

To memorialize discussions surrounding the project, C-FASH and ODOT signed an "Agreement" in 1987, which identified sacred resources and Native American gravesites in Dwyer to be considered in managing U.S. 26. Ex.19 FHWA_005436. In a public meeting soon after, a government official acknowledged that the stone altar was "the reason why we can't widen the highway." Ex.10 64:7-21. A few days later, the altar was vandalized. *Id.* Jones then informed BLM archaeologist Philipek, who memorialized the call in notes dated March 12, 1990. Ex.16 BLM_000008-000009. Jones told Philipek that Native Americans had gone to the Dwyer site "for years" because of "graves" there. *Id.* He also told her about ceremonies tribes performed at the site, including to reconsecrate the altar after its vandalism. *Id.* Jones's information came from Larry Dick, a "Medicine Person" of the Confederated Tribes of Warm Springs who, like "the Wascos and other tribes both in Oregon and Washington," used the Dwyer site and its "sacred altar" for his own religious practice. Ex.42 ¶¶4, 109, 141, 243-300.

2. The Zigzag–Rhododendron and Rhododendron–OR 35 Projects

The Zigzag–Rhododendron and Rhododendron–OR 35 Projects involved highway widening projects east of Dwyer. In the course of planning them, however, authorities became still more aware of the religious and cultural significance of the areas, like the Dwyer site, along U.S. 26 near Mt. Hood—particularly for the Yakama.

For example, in 1991, Leo Aleck, Secretary of the Yakima General Council, notified ODOT by letter that tribe members used the Mt. Hood area for cultural purposes. Ex.26 FHWA_005566. A few days later, ODOT invited Wilferd Yallup, Chairman of the Yakima Indian Nation, and Jones to an in-person meeting, at which Yallup "identified the [Dwyer site] as having burials." Ex.10 113:21-22; Ex.26 FHWA_005565-005613; Ex.12 ¶¶25, 30.

Given this information provided by the Yakama, FHWA formally consulted with the Yakama on the Rhododendron–OR 35 Project, recognizing that the Yakama "are known to have traditional uses and/or interest in the area." Ex.9 FHWA_001725, 001744, 001757, 001805. Likewise, the project's Record of Decision included two letters from the National Park Service that, citing information provided by Yallup, recommended further study on whether Enola Hill—a site just east of Dwyer—should be listed on the National Register of Historic Places as a traditional cultural property for the Yakama. Ex.39 FHWA_001918-001920.

D. The current project and the sacred site's destruction

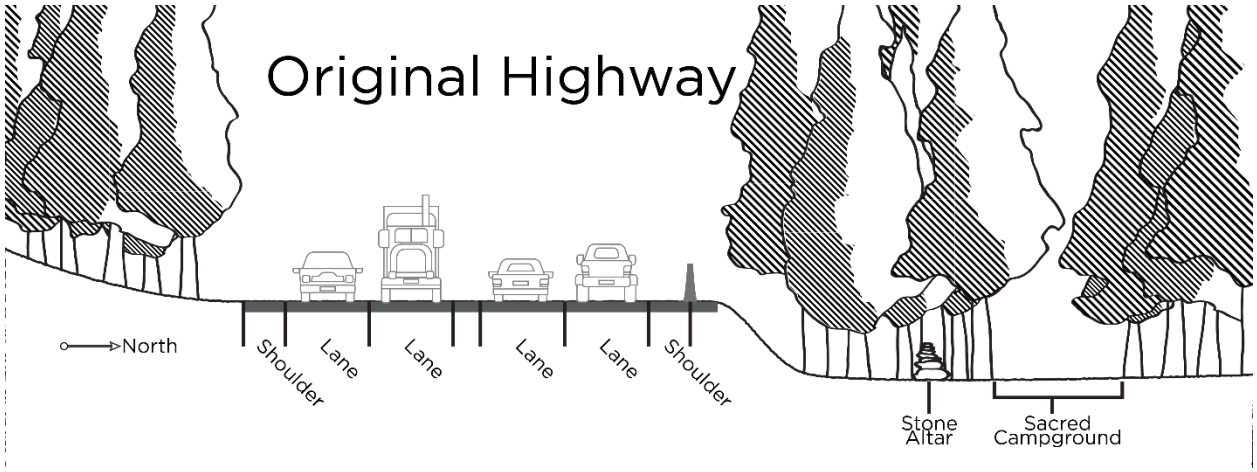
By the late 1990s, the Government and ODOT were again scoping a new widening project through Dwyer—the Wildwood–Wemme Project, which is the subject of this case.

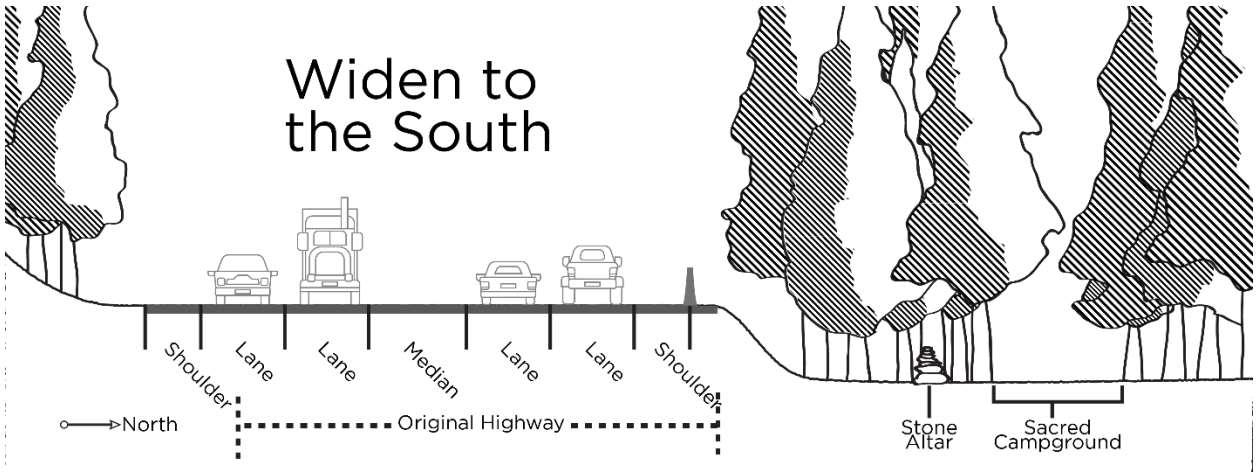
The agencies recognized that widening U.S. 26 through Dwyer "would require…extensive filling" and "removal of many large diameter trees"—the same trees they had "expended considerable effort to protect" in the 1980s. Ex.6 FHWA_001980.

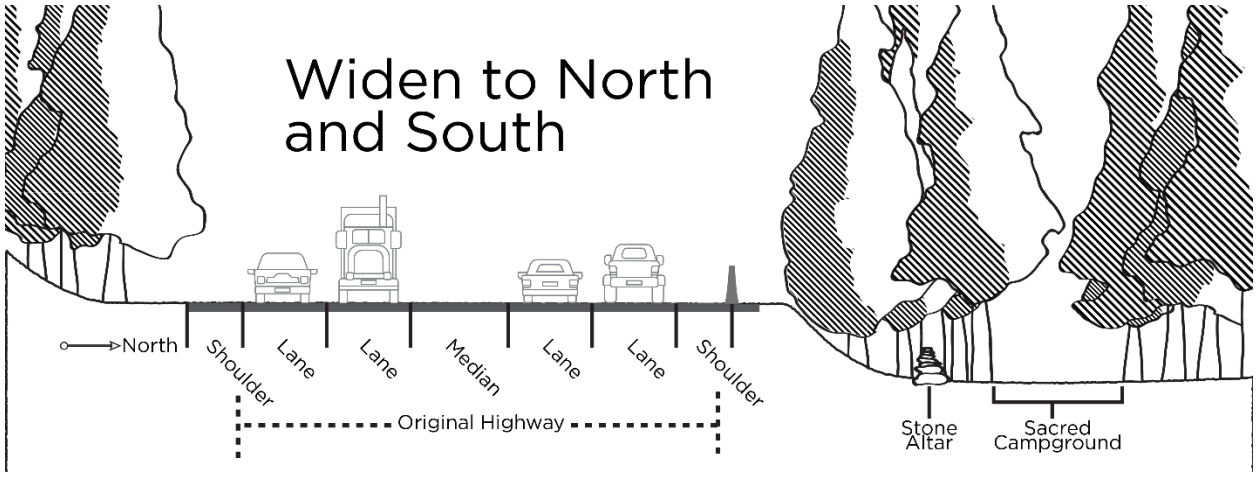
They also anticipated that this "may again spark public controversy over the preservation of large trees within Dwyer." Ex.30 FHWA_002047-002052. Nonetheless, they advanced the project—even though the stretch of U.S. 26 bordering Dwyer was statistically safer than comparable roads in Oregon. Ex.1 FHWA_004352 (24% fewer accidents).

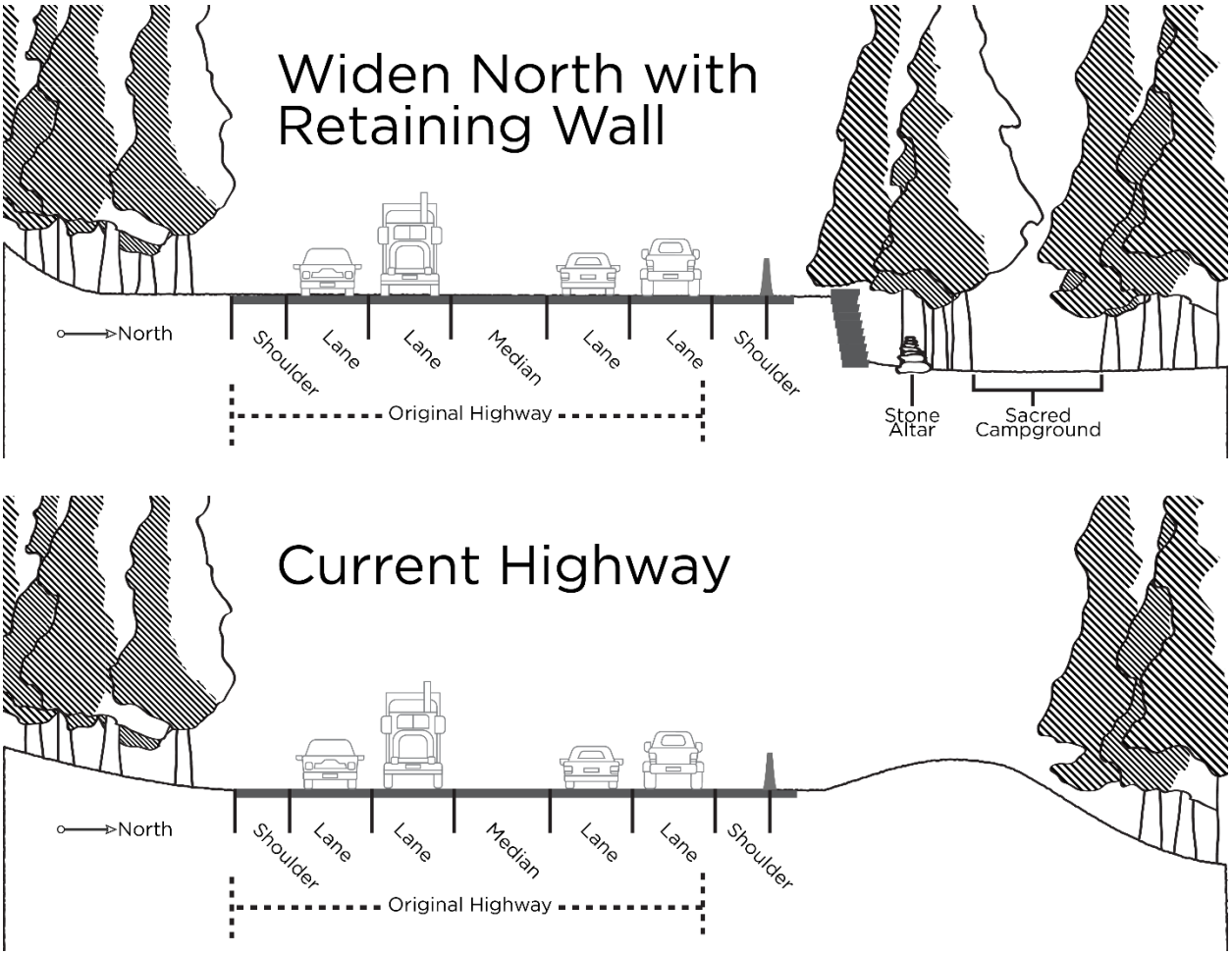
FHWA and ODOT issued an Environmental Assessment ("EA") and combined Revised Environmental Assessment ("REA") and Finding of No Significant Impact ("FONSI"), in 2006 and 2007, respectively, proposing that U.S. 26 be widened to the north within Dwyer. Ex.1; Ex.2. The EA and REA acknowledged that this project would require "clear[ing]" a 25-50-foot-wide strip of land in Dwyer and the removal of "most of" Dwyer's larger trees—transforming Dwyer from a "fairly dense stand" of "late-successional Douglas-fir forest" to a "more open" area with "younger and smaller trees." Ex.1 FHWA_004379, 004472-004473. Nonetheless, FHWA rejected several alternatives that would have had less impact on Dwyer—like widening to the south, or widening both north and south in smaller measure. Ex.1 FHWA_004361-004362. It also recommended widening to the north using a 3:1 slope, rather than a 1.5:1 slope or retaining wall, even though those options would have had a smaller "footprint" in Dwyer. Ex.1 FHWA_004406-4407; Ex.2 FHWA_004970.

The following demonstratives (not to scale) illustrate these alternatives:


Original Highway
North
Shoulder
Lane
Lane
Lane
Lane
Shoulder
Stone Altar
Sacred Campground


Widen to the South
Shoulder
Lane
Lane
Median
Lane
Lane
Shoulder
North
Original Highway
Stone Altar
Sacred Campground


Widen to North and South
North
Shoulder
Lane
Lane
Median
Lane
Lane
Shoulder
Original Highway
Stone Altar
Sacred Campground



The EA and REA did not consider whether to use a steeper slope or retaining wall solely within the area bordering Dwyer. The REA did, however, propose to use those mitigation techniques elsewhere to "avoid" "impact[ing] a…wetland located on the north side of the highway." Ex.2 FHWA_004967-4968.

In preparing the EA and REA, FHWA performed no tribal consultation of its own. Instead, FHWA purported to have ODOT consult with tribes on its "behalf." Ex.7 FHWA_005944. However, ODOT did not contact the Yakama during this stage of the project. Ex.2 FHWA_004979.

Following the REA and FONSI, in February 2008, BLM issued a tree-removal permit, authorizing the removal of Dwyer's large, old-growth trees. Ex.21. In April 2008, it granted ODOT a right of way, authorizing the construction within Dwyer. Ex.41.

Prior to any tree removal or construction, Plaintiffs explicitly informed the Government of their religious use of Dwyer, and asserted that the Government's process had been deficient for failing to consult with them and with the Yakama. Logan called FHWA in January 2008 and spoke about the religious use of the site. Ex.26 ACHP_000141. In February 2008, Logan and Jones gave the Government a copy of the 1987 Agreement, a transcript of the 1991 meeting with Wilferd Yallup, and the 1991 Leo Aleck letter. ECF 292 at 18. That same month, Logan sent FHWA a memorandum discussing the "American Indian cultural and religious sites" in Dwyer, and expressing belief that "an additional lane c[ould] be added…without destroying heritage resources." *Id.* All this occurred before tree-cutting beganin March.

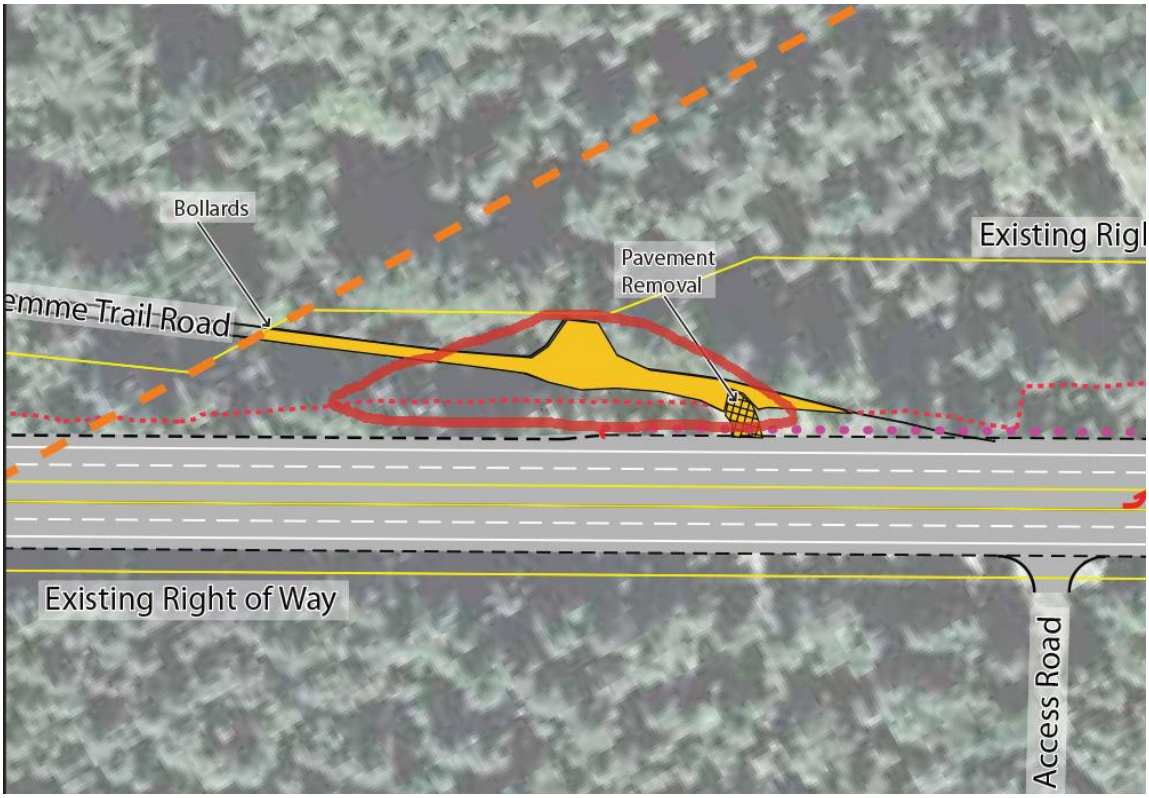
In April, ODOT finally contacted a Yakama representative. Ex.13 FHWA_006544. This belated communication triggered a letter from the Yakama Vice-Chairwoman, who reiterated that, as the Yakama had explained in 1991, the "Mt. Hood Area" is "very sacred to" the Yakama, and they "should be consulted with on any activities occurring" there. Ex.8 FHWA_007189. Also in April and May, Plaintiffs sent additional memoranda, detailing the Dwyer site's history and importance to Native American religious exercise. ECF 292 at 19.

In May, an FHWA official, alerted by Plaintiffs' attorney to "Indian remains on the site," informed BLM archaeologist Philipek. Ex.38. Philipek said she had "addressed the issue with" Plaintiffs "in 1986" and decided it was not worth protecting. Philipek returned to the site on July 24, 2008, and documented that the "rock cluster" had been scattered. Ex.16 BLM_000006. She drafted a report about the visit, attaching the notes from her 1990 call with Jones highlighting the sacred nature of the site. *Id.* at BLM_000007-9.

Construction began four days after Philipek's visit and was completed in 2009. ECF 122 at 7-8; ECF 287 at 6. The project destroyed all elements of the site used in Plaintiffs' religious exercise. Scores of trees were cut down and used to rehabilitate a fish habitat. Ex.1 FHWA_004472; Ex.23 BLM_000066. The traditional campground and burial grounds were bulldozed and buried beneath a massive earthen berm. The stone altar was "disposed of." The native vegetation formerly covering the campground, including the sacred medicine plants, was replaced with grass. And a new guardrail blocked Plaintiffs' former access to the site. ECF 292 at 19-20.

The following map, satellite images, and photographs depict the site's destruction:

Construction Map (Ex.1 FHWA_004356)

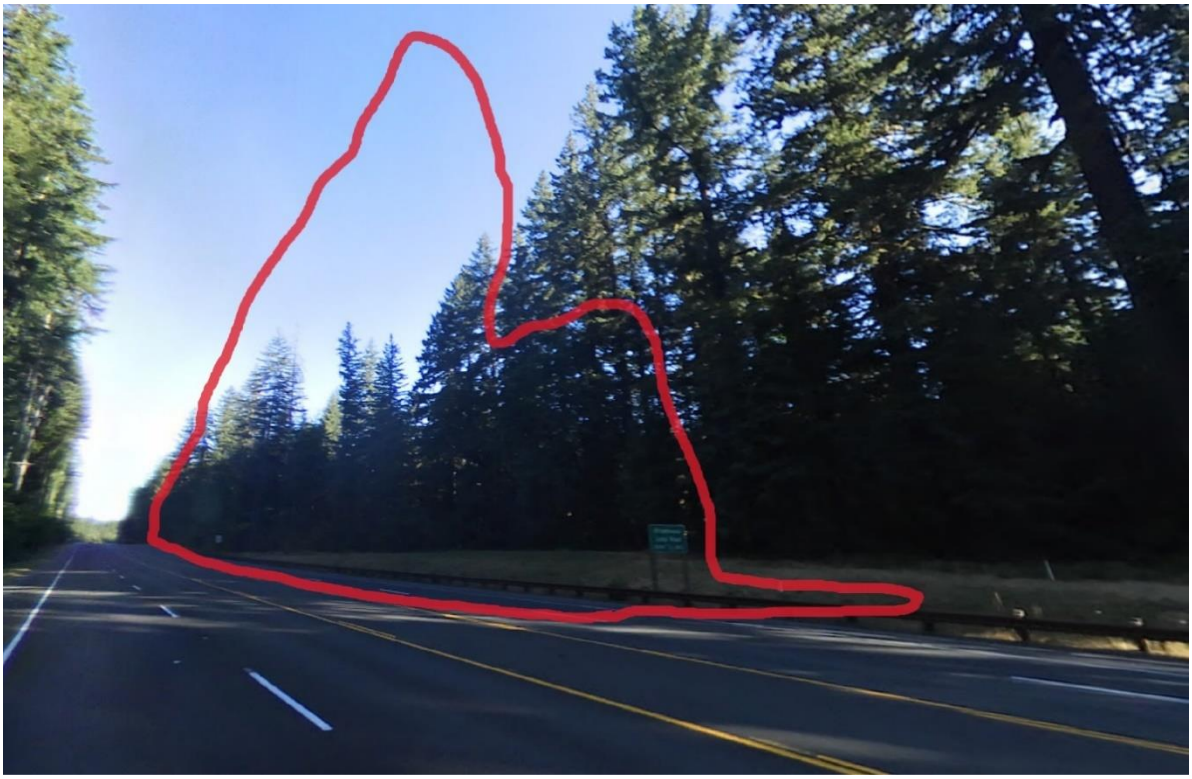


Before Widening – 2005 (ECF 292-5-3)

After Widening – 2016 (ECF 292-5-2)

Before Widening – 2008 (ECF 292-5-1)

After Widening – 2017 (ECF 292-5-4)



II. Procedural History

Plaintiffs sued in 2008. ECF 1. In 2009, the Government moved to dismiss, arguing that, because the project was completed, Plaintiffs' injuries were no longer redressable. ECF 28-2 at 17-19. This Court disagreed, explaining that it "should not reward defendants' efficiency in completing the project by shielding them from their" legal obligations. ECF 48 at 16-24 (Magistrate Judge Stewart); ECF 52 (Judge Brown, adopting ECF 48).

Beginning in 2012, the case was stayed for nearly three years pending settlement negotiations. In 2016, Plaintiffs filed their currently operative complaint, ECF 223, asserting the claims at issue in this motion, plus a claim under the Religious Freedom Restoration Act ("RFRA"). Earlier this year, the Court granted the Government's motion for summary judgment on the RFRA claim, holding that Plaintiffs had not established a "substantial burden" as that "term of art" is used in RFRA. ECF 300 at 4-16; ECF 312 (adopting ECF 300). This motion seeks summary judgment on Plaintiffs' other claims.

STANDARD OF REVIEW

Plaintiffs' claims are reviewed under the Administrative Procedure Act, under which this Court "should 'hold unlawful and set aside agency action…[that is] arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Nat. Res. Def. Council v. Nat'l Marine Fisheries Serv.*, 421 F.3d 872, 877 (9th Cir. 2005) (quoting 5 U.S.C. § 706(2)(A)). "This standard, while narrow, nonetheless re-

quires the court to engage in a substantial inquiry, a thorough, probing, in-depth review." *Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.*, 565 F.3d 545, 554 (9th Cir. 2009) (cleaned up).

ARGUMENT

I. NEPA

"NEPA declares a broad national commitment to protecting and promoting environmental quality." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989). The statute realizes these "sweeping policy goals" "through a set of 'action-forcing' procedures that require that agencies take a '"hard look" at environmental consequences'" before engaging in projects. *Id.* at 350 (quoting *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976)).

The primary NEPA requirement is that "for all 'major Federal actions significantly affecting the quality of the human environment,' the agency must prepare an EIS, which is a detailed study examining the environmental consequences of its decision." *Idaho Conservation League v. Bonneville Power Admin.*, 826 F.3d 1173, 1175 (9th Cir. 2016) (quoting 42 U.S.C. § 4322(2)(C)). To "determine whether an EIS is required, the federal agency" prepares an EA; if through the EA the agency concludes "that the action will not significantly affect the environment," it can issue a FONSI "in lieu of an EIS." *Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1225 (9th Cir. 1988). Whether it prepares an EA or EIS, however, the agency's NEPA document must "give full and meaningful consideration to all reasonable alternatives" to the proposed action. *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013).

Here, the Government violated NEPA in four ways. First, BLM failed to prepare any NEPA documentation at all for its two major federal actions—the tree-cutting permit and the right of way. Second, FHWA failed to prepare an EIS, even though the EA demonstrated that the project was a major federal action significantly affecting environmental quality. Third, the EA failed to consider reasonable alternatives that would have minimized impact within Dwyer while still allowing the Government to accomplish the widening. Fourth, FHWA failed to prepare supplemental NEPA documentation after being specifically informed of the project's effect on Plaintiffs' sacred site.

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

BLM violated NEPA by failing to perform any NEPA analysis at all for the two major federal actions that made the widening project possible—the tree-cutting permit and the right of way. The Ninth Circuit has held that "if a federal permit is a prerequisite for a project with adverse impact on the environment, *issuance of that permit*…constitute[s] major federal action and the federal agency involved must conduct an EA and possibly an EIS before granting it." *Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996) (emphasis added). But here, BLM failed to prepare an EA or EIS before granting the right of way or the tree-cutting permit—without which the tree-cutting and construction in Dwyer would have been illegal. *See* 43 C.F.R. § 5511.3-2(b)(1). This failure to "at least conduct" an EA for these actions violated NEPA. *Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006); *see also*

Kern v. Bureau of Land Mgmt., 284 F.3d 1062, 1067 (9th Cir. 2002) ("the agency must prepare an EA").

The record suggests the Government viewed NEPA compliance as unnecessary because "tree removal was considered" in the REA and FONSI prepared by FHWA. ECF 272-4 at 2. But an "agency may not justify, post hoc, its failure to comply with NEPA on the basis that some other agency prepared an environmental assessment in the past." *San-Luis & Delta-Mendota Water Auth. v. Salazar*, No. 1:09-CV-00407, 2009 WL 1575169, at *20 (E.D. Cal. May 29, 2009). Instead, NEPA requires the agency "to take its own hard look at the potential effects" of its actions. *Anacostia Watershed Soc'y v. Babbitt*, 871 F. Supp. 475, 484 (D.D.C. 1994).

Although NEPA allows "an agency in certain circumstances to adopt another agency's" NEPA document, such adoption is a formal process under the NEPA regulations, and BLM did not follow that process here. *Id.* at 485. According to BLM's own handbook, to rely on an EA prepared by another agency, BLM must "adopt" the document; "independently evaluate" it; "take full responsibility for its scope and content"; issue its own FONSI to document its formal adoption of the EA; and prepare its "own decision record following adoption of the EA and issuance of the FONSI." BLM Handbook H-1790-1, National Environmental Policy Act § 5.4.2 (Jan. 2008), goo.gl/k3iu3m. BLM "did none of these things"—which is a straightforward violation of NEPA. *Anacostia*, 871 F. Supp. at 486.

B. Failure to prepare EIS.

Second, FHWA should have performed an EIS, rather than just an EA, for the widening project.

The Government concedes that FHWA's approval of a federal-aid highway project like this one requires appropriate NEPA documentation. ECF 287 at 9 (citing 23 C.F.R. § 771.113). The question, then, is whether the EA raised "substantial questions" whether the project "*may* cause significant degradation of some human environmental factor"; if so, FHWA was required to prepare an EIS rather than a FONSI. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864 (9th Cir. 2005) (emphasis in original) (internal quotation marks omitted).

The regulations give the term "significantly" "two components: context and intensity." *Id.* at 865 (citing 40 C.F.R. § 1508.27). "Context refers to the setting in which the proposed action takes place," *id.*—as relevant here, Dwyer. "Intensity means 'the severity of the impact.'" *Id.* (quoting 40 C.F.R. § 1508.27(b)). Evaluating "intensity" requires consideration of the "unique characteristics of the geographic area." 40 C.F.R. § 1508.27(b)(3).

Applying these factors, the EA and REA indicated that the impact of the project on Dwyer would be "significant." The EA recognized that the proposed widening alternative would "clear" a "25 to 50" foot strip of land within Dwyer—a strip that "include[d] most of the larger trees." Ex.1 FHWA_004405. The project thus would convert Dwyer from a "fairly dense stand" of "late-successional Douglas-fir forest…established in 1855" to a "more open" area "with younger and smaller trees." Ex.1

FHWA_004379, 004473. Yet it was precisely Dwyer's status as a "dense stand" of older, larger trees that made it "[u]nique" and worth protecting in the first place. 40 C.F.R. § 1508.27(b)(3). Dwyer was first donated to the government to preserve those trees. Ex.3 FHWA_000217; Ex.4 FHWA_000674. When the Government altered the 1980s widening to minimize impacts on Dwyer, it did so specifically to "minimize the number of trees taken." Ex.4 FHWA_000462. And when in 1995 BLM classified Dwyer a "Special Area" in the SDMP, it prohibited "timber harvest" to protect Dwyer's "large older trees." Ex.5 at 5, 18-19. So removing these trees removed the very reason for Dwyer's existence as a protected area—which is necessarily a "significant" impact.

To avoid performing an EIS, the government must include in the EA a "'convincing statement of reasons'…why the project will impact the environment no more than insignificantly." *Ocean Advocates*, 402 F.3d at 864 (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998)). But all the Government offered here was misdirection, stating that "the truly unique botanical values at [Dwyer] include a diverse group of lichens and vascular plants," which were "north of the proposed project area." Ex.1 FHWA_004388, 004397, 004472. This is not only not "convincing," it is false. Nothing in the record supports the conclusion that Dwyer was "unique" because of its "lichens and vascular plants"; rather, it was donated in the 1930s, set aside in the 1960s, protected in the 1980s, and designated a "Special Area" in the 1990s to protect the large, old-growth trees that were destroyed by this project. Because the Government failed to take the required "hard look" by preparing

an EIS, it violated NEPA. *Blue Mountains*, 161 F.3d at 1212 (internal quotation marks omitted).

C. Failure to consider reasonable alternatives

Even setting aside the failure to prepare an EIS, the EA for the widening was deficient because the Government failed to consider reasonable alternatives—most obviously, using a steeper slope or retaining wall within Dwyer.

NEPA requires that reasonable alternatives to the proposed action "be given full and meaningful consideration." *Bob Marshall All.*, 852 F.2d at 1229. "Alternatives that do not advance the purpose of the [project]" are not "reasonable or appropriate" and need not be considered. *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246-47 (9th Cir. 2005). But where an "alternative[] could feasibly meet the project's goal," it "should be considered in detail"; failure to do so violates NEPA. *W. Watersheds*, 719 F.3d at 1052.

Here, the Government selected the alternative of widening the highway to the north using a 3:1 slope—which resulted in the destruction of "most of [Dwyer's] larger trees." Ex.1 FHWA_004472. But the EA failed to consider whether, even assuming widening to the north, the project could use a steeper slope or a retaining wall within Dwyer. As the EA recognized, there were at least three different "options" available for the project's "fill area"—a "retaining wall[]" option; a "1.5:1 slope" option; and a "3:1 slope" option. Ex.1 FHWA_004406-4407. The EA explained that the 3:1 slope option would have the maximal impact, extending the project's "footprint" further

into the north side of the highway and thus requiring the removal of more trees than the other options. Ex.1 _004407.

Nonetheless, the Government chose the 3:1 slope option for the project as a whole (Ex.2 FHWA_004970), never considering whether to use a steeper slope or retaining wall solely within Dwyer. Doing so would have been reasonable and consistent with the purposes of the project, enabling the Government to build precisely the same road with less impact on Dwyer. In fact, the Government chose to do *exactly that* to preserve nearby wetlands. Ex.2 FHWA_004967-68 (agencies would "steepen the slopes between the highway and the wetland and/or install guardrail"—rather than using "3:1 slopes"—to "avoid" "impact[ing] a…wetland located on the north side of the highway"). These are also some of the same measures the Government used in the 1980s to minimize impacts in Dwyer. Ex.4 FHWA_000462.

FHWA's failure to consider these alternatives is especially "troubl[ing]" because the alternatives are "*more* consistent with" the objectives of the project than the alternatives that were considered in the EA. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 813-814 (9th Cir. 1999) (emphasis added). In addition to "improving safety" by adding a turn lane, the Government's objectives included "[m]inimiz[ing] and mitigat[ing] visual impacts." Ex.1 FHWA_004353. And the EA recognized that Dwyer's "visual environment" consisted of its "forested setting" of rare, late-successional firs. Ex.1 FHWA_004396, 4405. Yet the EA did not consider whether using a steeper slope or retaining wall would allow FHWA to have *both* advanced its preferred alternative of widening to the north *and* minimized impacts on Dwyer's old-

growth trees. Because "[t]he existence of a viable but unexamined alternative renders an EA inadequate," *W. Watersheds*, 719 F.3d at 1050 (internal quotation marks omitted), the EA violated NEPA.

D. Failure to prepare supplemental NEPA document.

Finally, FHWA violated NEPA by failing to prepare a supplemental EA or EIS following its correspondence with Logan and Jones in February 2008.

"An agency that has prepared an EIS" or EA "cannot simply rest on the original document." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000). Instead, it "must be alert to new information…even after a proposal has received initial approval." *Id.* (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 374 (1989). "When new information comes to light the agency must consider it, evaluate it, and make a reasoned determination whether it" requires new NEPA analysis. *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017, 1024 (9th Cir. 1980). If new information shows the environmental impact would be significant, new NEPA analysis is required. *Marsh*, 490 U.S. at 371.

Here, new NEPA analysis was required after Logan and Jones told FHWA in February 2008 how the project would "destroy[]" "American Indian cultural and religious sites" in Dwyer, Ex.14 FHWA_005477; Ex.26 ACHP_000141. This information raised "substantial questions" whether the project "*may* cause significant degradation of some human environmental factor." *Ocean Advocates*, 402 F.3d at 864; 40 C.F.R. § 1508.27(b)(8). But rather than conducting a supplemental EA or EIS, FHWA dismissed the information with an *ipse dixit*, stating that "the project will not affect

traditional cultural properties." Ex.7 FHWA_005945. That assertion was wrong; and the failure to consider the information from Logan and Jones violated NEPA.

II. NHPA

"NHPA involves a series of measures designed to encourage preservation of sites and structures of historic, architectural, or cultural significance." *San Carlos Apache Tribe v. United States,* 417 F.3d 1091, 1093-94 (9th Cir. 2005) (internal quotation marks omitted). Its core requirement is Section 106, which 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." *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 787 (9th Cir. 2006) (quoting 16 U.S.C. § 470(f).[1] This includes "[p]roperties of traditional religious and cultural importance to an Indian tribe." 16 U.S.C. § 470a(d)(6)(A).

To comply with Section 106, agencies must complete a "[S]ection 106 process." *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 607 (9th Cir. 2010). Under that process, as specified in ACHP regulations, the agency must "identify historic properties potentially affected by the undertaking," including by engaging in "consultation" with any Native American tribe that "attaches religious and cultural significance" to historic properties that may be affected. 16 U.S.C. § 470a(d)(6)(B); *see also* 36 C.F.R. § 800.2(c)(2)(ii). The agency must also "[r]eview existing information on historic properties within the area of potential effects"; "seek information from individuals and organizations likely to have knowledge of historic

[1] NEPA was recodified in 2014 at 54 U.S.C. § 300101 *et seq*. This brief refers to the statute as codified at the time of the Government's actions here.

properties in the area"; and "[g]ather information from any Indian tribe to assist in identifying properties…which may be of religious and cultural significance to them," *id.* § 800.4(a)(2)-(4)—completing each step with a "reasonable and good faith effort," *id.* § 800.4(b)(1).

Here, FHWA and BLM violated NHPA in four ways. First, BLM failed to perform *any* Section 106 review for its two "undertaking[s]"—the grant of the tree-cutting permit and right of way. Second, no federal agency ever consulted with any Native American tribes; instead, the Government attempted to delegate its consultation duty to ODOT, which is statutorily prohibited. Third, the consultation that ODOT eventually performed with the Yakama was untimely. Finally, the Government failed to identify historic properties and make a reasonable and good-faith effort to carry out appropriate identification efforts under 36 C.F.R. § 800.4.

A. Failure to perform any Section 106 process.

NHPA's requirements, including Section 106 review, apply to all federal "undertaking[s]." 16 U.S.C. § 470f. As relevant here, "'undertaking' means a project, activity, or program…requiring a Federal permit, license, or approval." *Id.* § 470w(7)(C). Under this definition, BLM's tree-cutting permit and right-of-way grants were clearly "undertaking[s]": They were federal "permit[s]" and "approv[als]" for activities that could not otherwise have occurred. *See* 43 C.F.R. § 5511.3-2(b)(1) (prohibiting tree removal from BLM land without a permit); Ex.2 FHWA_004972 ("right-of-way from BLM" "needed"). Yet BLM engaged in no Section 106 process for either action.

Instead, as with NEPA, the record suggests BLM thought the Section 106 analysis performed by FHWA and ODOT in the EA for the highway widening as a whole sufficed for the tree-cutting permit and right-of-way grant, too. ECF 272-4 at 2. But again, every agency must "take *its own* hard look at the potential effects" of each undertaking. *Anacostia Watershed Soc'y*, 871 F. Supp. 475, 482-86 (emphasis added); *see also Pit River*, 469 F.3d at 787 ("NHPA is similar to NEPA except that it requires consideration of historic sites, rather than the environment." (internal quotation marks omitted)). BLM did not.

B. Failure to perform tribal consultation.

The Government also violated NHPA with respect to the widening itself by failing to consult with Native American tribes. Indeed, *no* federal agency consulted with *any* Native American tribe regarding this project. Instead, the Government claims ODOT consulted several tribes "on behalf of FHWA." Ex.7 FHWA_005944. But NHPA does not allow the Government to delegate tribal consultation to state agencies. "When a statute delegates authority to a federal officer or agency," the officer or agency "may not subdelegate to outside entities—private or sovereign—absent affirmative evidence of authority to do so." *U.S. Telecom Ass'n v. F.C.C.*, 359 F.3d 554, 565-66 (D.C. Cir. 2004). Here, Congress not only hasn't affirmatively authorized delegation of consultation duties—it has foreclosed it.

First, the text of NHPA requires "*Federal agenc[ies]*" to consult with Native American tribes. 16 U.S.C. § 470a(d)(6)(B); *see also id.* § 470h-2(a)(2)(D). Section 470a(d)(6)(B) grants no authority to federal agencies to delegate this responsibility to

state agencies. Nor does it grant such authority directly to states. This "statutory 'silence'" leaves the presumptive rule—that agencies may not delegate—"untouched." *U.S. Telecom*, 359 F.3d at 566. Other NHPA sections only strengthen this presumption, demonstrating that when Congress wanted to authorize federal agencies to delegate NHPA responsibilities to state agencies, or empower state agencies to discharge NHPA obligations directly, it knew how to do so. *See, e.g.*, 16 U.S.C. §§ 470a(b)(3) (listing "responsibilit[ies] of the State Historic Preservation Officer" ("SHPO") under NHPA), 470a(b)(6)(A)-(B) (permitting the Government to delegate certain responsibilities to the SHPO, not including tribal consultation).

The Federal-Aid Highway Act, too, confirms that FHWA may not delegate tribal-consultation responsibilities to states. In 2005, Congress amended that Act to allow states to "assume" from FHWA, for certain highway projects, responsibility for environmental reviews, consultation, or decisionmaking "*other than* responsibilities relating to federally recognized Indian tribes." 23 U.S.C. § 325(a)(2) (emphasis added). In other words, the responsibility to consult with Indian tribes cannot be delegated to states.

ACHP's NHPA implementing regulations also forbid delegation. The regulations recognize that the "*Federal Government* has a unique legal relationship with Indian tribes." 36 C.F.R. § 800.2(c)(2)(ii)(B) (emphasis added). They require consultation to "recognize the government-to-government relationship between the *Federal Government* and Indian tribes." *Id.* § 800.2(c)(2)(ii)(C) (emphasis added). "*Federal agencies*"

are instructed to "be aware that frequently historic properties of religious and cultural significance are located on ancestral, aboriginal, or ceded lands of Indian tribes" and to "consider that when" carrying out consultation. *Id.* § 800.2(c)(2)(ii)(D). And they allow tribes to enter agreements "with an *agency official*" specifying how "*they* will carry out" consultation responsibilities, *id.* § 800.2(c)(2)(ii)(E) (emphasis added)—with the term "agency" defined to mean an "authority *of the Government of the United States*." *Id.* § 800.16(b) (cross-referencing the APA's definition, 5 U.S.C. § 551(1)) (emphasis added).

Finally, BLM's own tribal-consultation guidelines interpreting NHPA expressly forbid delegation, stating (in bold): "**The BLM's responsibility to notify and consult with Native Americans cannot be assigned or delegated to any other party.**" BLM Manual Handbook H-8120-1, Guidelines for Conducting Tribal Consultation (Dec. 3, 2004), goo.gl/Y9K5nc, at V-4.

The Government's failure to consult was a failure to "observ[e] [the] procedure required by law"—which invalidates its actions under the APA. *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1110, 1119-20 (S.D. Cal. 2010) (citing *Pit River*, 469 F.3d at 788).

C. Untimely consultation.

Even if the Government could delegate tribal-consultation duties—and it can't—ODOT's consultation was inadequate because it didn't contact the Yakama until *after* the final step in the planning process was complete and Dwyer had already been cleared of trees. FHWA is liable for this NHPA violation, because NHPA's regulations

make federal agencies responsible for NHPA compliance when they delegate duties to state officials. *See* 36 C.F.R. § 800.2(a), (a)(3).

NHPA requires tribal consultation to "be 'initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process.'" *Pit River*, 469 F.3d at 787 (quoting 36 C.F.R. § 800.1(c)). In *Quechan Tribe*, the tribe "was consulted late in the planning process"—"communication[s]…began in earnest" over a year after planning had begun and months before issuance of the EIS. 755 F. Supp. 2d at 1111, 1113. Explaining that the "consultation requirement is not an empty formality" and its "timing…can affect the outcome," the court held that BLM had likely violated NHPA, and entered an injunction. *Id.* at 1108-09, 1119-20.

Here, the Government's failure is far more egregious. Despite knowing that the Yakama "have traditional uses and/or interest" in the Mt. Hood Corridor generally, Ex.9 FHWA_001725, 001744, 001757, 001805, and Dwyer specifically, Ex.10 113:21-22; Ex.15 FHWA_005565-005613; Ex.12 ¶¶25, 30, ODOT didn't contact the Yakama until April 2008. Ex.13 FHWA_006544. That is two years after ODOT contacted other tribes and issued the EA (Ex.1 FHWA_004501), and one year after the REA and FONSI were issued—which was the *final* step in the planning process. Further, by the time ODOT contacted the Yakama, tree-cutting and the destruction of the sacred altar was already complete. Such belated consultation is a clear violation of NHPA. *See, e.g., Pit River*, 469 F.3d at 782 ("analysis…serve[s] no purpose" if done after project approval (internal quotation marks omitted)); *Lower Brule Sioux Tribe v. Deer*,

911 F. Supp. 395, 401 (D.S.D. 1995) ("Meaningful consultation means tribal consultation *in advance* with the decision maker…." (emphasis added)); 36 C.F.R. § 800.1(c) (tribes must be consulted "early in the [project's] planning").

D. Failure to identify historic properties.

Finally, the Government violated NHPA by failing to identify historic properties. NHPA regulations require FHWA and BLM to "[r]eview existing information on historic properties within the area of potential effects, including any data concerning possible historic properties not yet identified." 36 C.F.R. § 800.4(a)(2). Here, FHWA had in its files documentation from three prior projects demonstrating FHWA was required to consult with the Yakama, and that the Yakama had specific information pertinent to the Mt. Hood Corridor, including Dwyer. In the 1987 Final EIS, Jones, through C-FASH, submitted copious documentation demonstrating Dwyer's status as a NHPA-protected traditional cultural property, including information concerning contemporary use of the Native American campsite and the existence of a potential Native American grave. Ex.4 FHWA_000590-000591. He also submitted extensive documentation supporting Dwyer's inclusion on the National Register, even independent of the traditional cultural property. Ex.4 FHWA_000596-000601. Likewise, BLM's files included Philipek's 1990 notes from her call with Jones, highlighting Native American use of Dwyer's rock altar and Warm Springs Medicine Person Larry Dick's determination that the altar was of religious significance. Ex.16 BLM_000006-000009; Ex.42 ¶¶272-300. Yet nothing in the record suggests the Government took any of this information into account during the Section 106 process.

Consequently, the Government failed to seek information from Jones, Dick, or Plaintiffs here, as individuals with information pertinent to the identification of Dwyer as a traditional cultural property. 36 C.F.R. § 800.4(a)(2). Had they done so, they would have obtained information like that provided FHWA by Logan and Jones in February 2008—that there were significant "American Indian cultural and religious sites" in Dwyer, Ex.14 FHWA_005477-005479—and that provided by Larry Dick—that the Dwyer site "was a very sacred place" used by "tribes both in Oregon and Washington." Ex.42 ¶¶256, 291. Likewise, the Government failed to seek information from the Yakama; again, no agency made any contact with the Yakama before any of the undertakings associated with this project. 36 C.F.R. § 800.4(a)(4).

These failures constituted a lack of a reasonable and good-faith effort to identify historic properties. *Id.* § 800.4(b)(1). And because of them, the Government failed to complete the remainder of the Section 106 process, including evaluating historic significance (*id.* § 800.4(c)), assessing adverse effects (*id.* § 800.5) and resolving those effects (*id.* § 800.6).

III. FLPMA

FLPMA gives BLM "authority and direction…concerning the use and management" of federal lands. *Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1220 (9th Cir. 2011). Under FLPMA, "BLM must take 'any action necessary to prevent unnecessary or undue degradation of" those lands. *Te-Moak Tribe of W. Shoshone Indians of Nev. v. U.S. Dep't of Interior*, 565 F. App'x 665, 667 (9th Cir. 2014) (quoting

43 U.S.C. § 1732(b)). BLM must also "develop, maintain, and, when appropriate, revise" resource management plans in accordance with certain procedures, 43 U.S.C. § 1712(a), then manage its lands consistently with the adopted plan. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 69 (2004).

Here, BLM violated FLPMA in three ways. First, it allowed unnecessary or undue degradation of Dwyer by destroying a Native American sacred site. Second, in granting the tree-cutting permit for the project, BLM both allowed unnecessary or undue degradation of Dwyer and failed to manage Dwyer in accordance with the relevant resource management plan, the SDMP. Third, the SDMP itself lacks the factual basis required under FLPMA.

A. Destruction of a sacred site.

FLPMA prohibits "unnecessary or undue degradation of the [public] lands" 43 U.S.C. § 1732(b). This prohibition is defined by regulation to include any action violating "a state or federal law relating to environmental or cultural resource protection." 43 C.F.R. § 3809.5; *see S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 723-24 (9th Cir. 2009). Here, in destroying Plaintiffs' sacred site, BLM's actions violated one such "law"—Executive Order 13007—which the Ninth Circuit has recognized is incorporated into FLPMA, and which requires BLM "to avoid physical damage" to Tribal "sacred sites." *Id.* (citing 61 Fed. Reg. 26771 (May 24, 1996)).

E.O. 13007 provides that "[i]n managing Federal lands," federal agencies "shall, to the extent practicable," "avoid adversely affecting the physical integrity of [Indian]

sacred sites." 61 Fed. Reg. 26771. It defines "sacred site" as "any [1] 'specific, discrete, narrowly delineated location' of [2] 'established religious significance' or 'ceremonial use,'" *Te-Moak Tribe of W. Shoshone*, 565 F. App'x at 667-68, provided that [3] an "appropriately authoritative representative of an Indian religion has informed the agency of the existence of such a site." 61 Fed. Reg. 26771. The Ninth Circuit has twice recognized that these "requirements are incorporated into FLPMA." *Te-Moak Tribe of W. Shoshone*, 565 F. App'x at 667; *see also S. Fork Band Council*, 588 F.3d at 724 (BLM "was required to comply with" E.O. 13007).

Here, BLM violated E.O. 13007 by destroying *Ana Kwna Nchi nchi Patat*. First, the site is a "specific, discrete, [and] narrowly delineated location." It measured 100 by 30 meters—less than one acre within Dwyer, Ex.18 BLM_000017-000018, Ex.1 FHWA_004472—and it comprised a handful of specific, discrete features: a campground, an altar, old-growth trees, and medicinal plants. ECF 292 at 6-8. Thus, while the *South Fork Band* plaintiffs argued that "the entire mountain" was off-limits to BLM under E.O. 13007, Plaintiffs have identified only a "particular site[]" actually "used for religious observance." *See* 588 F.3d at 724.

Second, it is undisputed that the site was a place of "ceremonial use" by an Indian religion. Indigenous people have used the site for religious purposes "since time immemorial," Ex.17 ¶19; and Plaintiffs elaborated in detail on their own religious use of the site as traditional religious leaders of their tribes. ECF 292 at 8-10.

Third, Plaintiffs are "appropriately authoritative representative[s]" of their religion, 61 Fed. Reg. 26771, because they are Hereditary Chiefs (Slockish and Jackson)

and an Elder (Logan) who are "responsible for maintaining the traditions of their tribes." ECF 292 at 3. And the Government was fully "informed…of the existence of [the] site." 61 Fed. Reg. 26771. As early as 1985, the Government was informed that Dwyer is "sacred" to Native Americans, that there was a "gravesite" near the highway, and that there was a stone altar inside Dwyer. Ex.19 FHWA_005436; Ex.4 FHWA_000549. In 1990, Jones told BLM archaeologist Philipek that Native Americans had been going to the Dwyer site "for years," identifying particular practitioners who used the site (like Larry Dick) and ceremonies performed there. Ex.16 BLM_000008-000009. In the 1990s, Jones "told everyone who [he] came in contact with [from] BLM" "that there were Native American cultural and religious sites" within Dwyer. Ex.10 69:20-25. And in 2008, Jackson, Slockish, and Logan confirmed these accounts, sending the Government numerous memoranda identifying "American Indian cultural and religious sites" in Dwyer and explaining that destroying the site would infringe on their right "to practice their religion." Ex.14 FHWA_005477-005479.

Under E.O. 13007, then, BLM was required, if "practicable," to "accommodate access to and ceremonial use of" the site, and "avoid adversely affecting [its] physical integrity." 61 Fed. Reg. 26771. It did not do so. Instead, it approved and facilitated a project that buried the campground and burial site under a berm; "disposed of" Plaintiffs' sacred altar; cut down the trees; replaced the native vegetation with grass; and added a guardrail to block Plaintiffs' former access point. ECF 292 at 19-20. Unlike in *Te-Moak*, BLM did not "consider[] the impacts on [Plaintiffs'] religious practices"

or "reduce[] the original scope of the Project in response to [Plaintiffs'] concerns," 565 F. App'x at 667; to the contrary, it entirely ignored Plaintiffs' religious exercise. Nor is there any doubt that it would have been "practicable" for BLM to minimize impacts on the sacred site—it could have, among other things, widened to the south (Ex.1 FHWA_004361), or used a steeper slope or retaining wall alongside Dwyer (as it did to minimize impacts on nearby wetlands, Ex.2 FHWA_004967-004968). Or it could simply have declined to add a turn lane at all for the few hundred feet of road bordering the sacred site—an eminently "practicable" measure given that there are no turnoffs on that short stretch of highway. *See* Ex.18 BLM_000017-000018. Failure to take actions like these to preserve a Native American sacred site on federal land is precisely what FLPMA—through incorporation of E.O. 13007—forbids.

B. Granting of tree-cutting permit.

Second, BLM violated FLPMA by issuing a tree-cutting permit allowing the removal of "most of" (Ex.1 FHWA_004405) Dwyer's significant trees. This action both (1) constituted "unnecessary and undue degradation of the lands" because it violated a "federal law….relating to environmental or cultural resource protection"—the Oregon Resource Conservation Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009-536 (1996) ("ORCA") (attached as Ex.20)—and (2) violated BLM's FLPMA duty to maintain federal lands in accordance with the relevant resource management plan—the SDMP. *See Or. Nat. Res. Council Fund v. Brong*, 492 F.3d 1120, 1125-28, 1135 (9th Cir. 2007) ("*ONRCF*") ("Once a land use plan is developed," BLM action inconsistent with the plan "violate[s] FLPMA").

ONRCF demonstrates that one way BLM can violate FLPMA is by authorizing tree-cutting in an area where that activity is prohibited by another environmental law or the applicable resource management plan. There, BLM proposed to permit logging in hundreds of acres of federal land and salvage the resulting timber. Some of the land was designated "Late-Successional Reserve" in the applicable resource management plan—a category within which the plan generally made certain "activities, such as logging, impermissible." 492 F.3d at 1126-27. Given this prohibition, and noting that the plan did "*not* in any way relax its…management goals for salvage operations," the Ninth Circuit held that BLM's proposal was "inconsistent with the [plan's] clear direction," and violated FLPMA. *Id.* at 1127; *see also id.* at 1128-32.

Here, tree-cutting within Dwyer was prohibited both by ORCA and by the SDMP. Congress passed ORCA in 1996, to protect "the scenic qualities of" the "Mt. Hood Corridor Lands"—a term defined to include BLM-managed areas near Mt. Hood in an area including Dwyer "which can be seen from the right-of-way of" U.S. 26. § 401(g), 110 Stat. at 3009-537. The law prohibits "[t]imber cutting" on such lands, except "following a resource-damaging catastrophic event," like a "forest fire." *Id.* § 401(h). And even then, tree-cutting is sharply limited: it "may only be conducted to achieve" one of four limited "resource management objectives," like "control[ling] the continued spread of forest fire" or "remov[ing] hazard trees along…roadways." *Id.* In ORCA, then, Congress forbade BLM from authorizing tree-cutting within those areas of Dwyer visible from U.S. 26 merely to expand the highway.

Tree-cutting within Dwyer was also categorically prohibited by the relevant resource management plan, the SDMP. The SDMP categorizes BLM-administered land "scattered in twelve counties of northwest Oregon" into various "land use allocations," with corresponding "objectives and management actions/direction" for each category. Ex.5 at 5, 18-19. Dwyer is categorized as a "Special Area." *Id.* at 48. The SDMP imposes restrictions on "timber harvest" in all "Special Areas"—in some, timber harvest is permitted only in certain "zone[s]"; in some, only non-"commercial" timber harvest is permitted; and in some "timber harvest" is categorically prohibited. *Id.* at 48-49. Dwyer is one in which "timber harvest" is categorically prohibited:

Table 2 Management of Special Areas

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

Id. at 48.

As in *ONRCF*, then, BLM violated FLPMA by permitting tree-cutting in an area in which that activity was specifically prohibited by federal environmental law and the resource management plan. BLM issued a permit allowing ODOT to "remov[e] timber" from Dwyer, Ex.21 BLM_000033, 000037, including in areas visible from the highway. Ex.1 FHWA_004405. This permitting of tree-cutting within Dwyer absent a "resource-damaging catastrophic event" contradicts both ORCA and the SDMP, and thus violates FLPMA.

BLM acted arbitrarily and capriciously in concluding otherwise. In the EA, BLM said the project would "compl[y] with" ORCA because "a forested setting would be maintained" within Dwyer and "the parcel is in view while traveling" U.S. 26 for only a "short amount of time." Ex.1 FHWA_004472-004473. But this simply fails to grapple with the text of the law. The law protects *all* "Mt. Hood Corridor Lands"—there is no *de minimis* exception for projects affecting only a short stretch of them. And the law does not just tell BLM to maintain "a forested setting" on Mt. Hood Corridor Lands; it tells it *how to do so*—by allowing "[t]imber cutting" only when made necessary by "a resource-damaging catastrophic event." "To have not acted in an arbitrary and capricious manner, the agency must present a 'rational connection' between the facts found and the conclusions made." *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005) (internal quotation marks omitted). Here, BLM presented no rationale reconciling the fact that this project required extensive tree-cutting in an area (Dwyer) where ORCA expressly prohibited it absent a "catastrophic event."

As for the SDMP, BLM purported to read it to prohibit only "*commercial* timber harvest" within Dwyer. Ex.22 FHWA_002864-002878. But this is "plainly inconsistent" with the SDMP's language. *ONRCF*, 492 F.3d at 1125. Although the SDMP prohibited only "commercial" timber harvest within *other* "Special Areas," Ex.5 at 48-49, Dwyer is one of several for which there is no modifier: the prohibition is on "timber harvest" *simpliciter*. To read that prohibition to extend only to "commercial" timber

harvest would be to make surplusage of the other prohibitions that expressly prohibit "*commercial* timber harvest."

Nor is it relevant that BLM ultimately used the salvaged timber to rehabilitate a fish habitat. Ex.1 FHWA_004472; Ex.23 BLM_0000066. The SDMP does "*not* in any way relax its" prohibition on "timber harvest" within Dwyer "for salvage operations." *ONRCF*, 492 F.3d at 1126-27. Indeed, the arrangement here—in which BLM didn't require ODOT to pay for the trees it cut down in exchange for BLM's retaining the timber for another use—violated yet another federal law, under which all "applicant[s]" for tree-removal permits on BLM-managed lands in an area of Oregon including Dwyer are "required to pay to [BLM], in advance of the issuance of the permit, the full stumpage value" of the timber. 43 C.F.R. § 2812.5-1.[2] The salvage plan's illegality was specifically raised in internal communications. Ex.23 BLM_000097-000098 (BLM official explaining that, regardless whether the logs were to be used "for fish projects," "43 CFR 2812.5-1 is clear" that "[r]ight-of-way timber on O&C lands must be paid for in advance…; there is no other option"). But BLM dismissed these concerns, taking the view that it didn't need to "blindly follow[] the rule book" because the "likelihood of someone figuring out that we've violated the O&C Act and lodging a complaint would be fairly low." Ex.23 BLM_0000083.

[2] The full-stumpage-value requirement applies to "O. and C. lands." 43 C.F.R. § 2812.5-1. O. and C. lands include lands administered by BLM in Oregon west of Range 8 E., Willamette Meridian. 43 C.F.R. § 2812.0-5(e). The BLM-administered lands involved in the project here, including Dwyer, are located immediately west of Range 8, at T2S R6E, and T2S R7E. Ex.24 BLM_000133.

C. Lack of a factual basis.

Finally, BLM violated FLPMA by failing to develop the SDMP in accordance with legally required information-gathering procedures.

"To ensure that the BLM has adequate information" to manage federal lands in accordance with FLPMA, the statute requires BLM to "'prepare and maintain on a continuing basis an inventory of all public lands.'" *Or. Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1096-97 (9th Cir. 2010) (quoting 43 U.S.C. § 1711(a)); *see also* 43 C.F.R. § 1610.4-3. This inventory must "be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values." 43 U.S.C. § 1711(a). And the inventory must guide BLM's formulation of the management plan. *Id.* § 1712(c)(4).

BLM's land use plans must also be formulated based on "[a]n extensive public comment process." *Or. Nat. Desert Ass'n*, 625 F.3d at 1097 (citing 43 C.F.R. § 1610.2). Most importantly here, BLM is required to "coordinat[e]" with "federally recognized Indian tribes" in developing its resource management plans, including by inviting them "to participate as cooperating agencies." 43 C.F.R. § 1610.3-1.

If BLM doesn't follow these information-gathering procedures, its decisions can be invalidated as arbitrary and capricious. In *Center for Biological Diversity v. Bureau of Land Management*, for instance, plaintiffs "contend[ed] that the BLM relied on incomplete and insufficient inventory data regarding" an area's resources. 422 F. Supp. 2d 1115, 1167 (N.D. Cal. 2006). BLM did "not dispute that [it] failed to maintain a current inventory of the" area, and there was "extensive evidence in the record

indicating the existence of numerous" un-inventoried resources. *Id.* at 1167-68. The court held that BLM violated FLPMA in approving a resource management plan "with such obviously outdated and inadequate inventories." *Id.* at 1168.

Here, too, it is undisputed that BLM "failed to maintain a current inventory of" Dwyer, *id.* at 1167-68—indeed, earlier in this case, BLM "concede[d] that [it] did not perform the inventory" required under FLPMA. ECF 122 at 28. BLM also violated 43 C.F.R. § 1610.3-1 by failing to coordinate with an interested, federally-recognized Indian tribe—the Yakama—in developing the SDMP. *See* Ex.5 at 82 (listing consulted tribes).

IV. Section 4(f) of DTA

"All federally funded highway projects must comply with" § 4(f) of DTA. *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1158 (9th Cir. 2008). Section 4(f) prohibits FHWA from approving a transportation project "requiring the use of publicly owned land of a public park, recreation area, or…an historic site of national, State, or local significance" unless "(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,…or historic site resulting from the use.'" 49 U.S.C. § 303(c).

These requirements "are stringent." *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1447 (9th Cir. 1984). An alternative is "feasible" for § 4(f) purposes if it could "be built as a matter of sound engineering." *Id.* at 1449 n.11. And an alternative is "prudent" pro-

vided it does not "compromise[] the project to a degree that it is unreasonable to proceed with the project in light of its stated purpose and need," *HonoluluTraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1232 (9th Cir. 2014) (quoting 23 C.F.R. § 774.17); or impose "cost[s] or community disruption" that reaches "extraordinary magnitudes." *Stop H-3 Ass'n*, 740 F.2d at 1449 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 413, 416 (1971)).

For FHWA to approve a project despite its use of § 4(f)-protected property, it must "determin[e]" that § 4(f) is satisfied, 23 C.F.R. § 774.3, producing "sufficient supporting documentation to demonstrate why there is no feasible and prudent alternative," and "summariz[ing] the results of all possible planning to minimize harm to the Section 4(f) property," *id.* § 774.7(a). This § 4(f) documentation "should be included in" the project's NEPA document. *Id.* § 774.7(f).

The project at issue here was federally funded (Ex.27), and the Government concedes no § 4(f) evaluation was prepared. Ex.28 FHWA_007271-7273. The question, then, is whether Dwyer is a "public park" or "recreation area" protected by § 4(f); if so, FHWA's failure to make a § 4(f) determination violated DTA.

It is. After Dwyer was donated to the Government in the 1930s, BLM officially "withdr[ew]" and "reserved" the land including Dwyer in 1968 "for protection of public recreation values," designating it as the "Wildwood Recreation Site." 33 Fed. Reg. 17628; *see also* Ex.22 FHWA_002874. It is therefore undisputed that Dwyer is "part of…Wildwood," Ex.30 FHWA_002049—and the Government admitted in the EA that projects that "use property from the Wildwood Recreation [S]ite" "require a Section

4(f) evaluation." Ex.1 FHWA_004361; *see also* Ex.3 FHWA_000217 (Dwyer within "the Wildwood Recreation Area"), FHWA_000199 ("the Wildwood Recreation Area/Dwyer Memorial Roadside Preservation Area"); Ex.31 FHWA_000026 ("Map of Wildwood" in BLM brochure including Dwyer in upper-right-hand corner). So under the plain language of § 303(c), this project—which required the grant of a right-of-way, tree cutting, and a 25-50-foot strip of the Dwyer portion of the Wildwood Recreation Site to be cleared and covered with a berm—was a project "requiring the use of a" "public park" or "recreation area" subject to § 4(f).

During the 1980s expansion, FHWA attempted to avoid § 4(f) by asserting that Dwyer is not an "*active* part" of the Wildwood Recreation Site. Ex.4 FHWA_000459 (emphasis added); *see also* Ex.4 FHWA_000479; Ex.22 FHWA_002874. That assertion was controversial at the time, *see* Ex.4 FHWA_000587-90 (disputing Draft EIS's § 4(f) determination), FHWA_000673 (same), and it is both legally and factually incorrect. Legally, FHWA has no authority to arbitrarily divide parks into "active" and "inactive" areas and freely approve highways on the latter. Indeed, FHWA's own policy on this subject states, "[p]ublicly owned land is considered to be a park [or] recreation area…when the land has been officially designated as such *or* when the Federal…officials having jurisdiction over the land determine that one of its major purposes or functions is for park, recreation, or refuge purposes." *SPARC v. Slater*, 352 F.3d 545, 555-56 (2d Cir. 2003) (quoting FHWA, Section 4(f) Policy Paper (revised June 7, 1989)) (some emphasis omitted). This policy is disjunctive: Even if the Government has "determine[d] that" recreation or park use isn't "one of [Dwyer's] major purposes,"

it is still a park or a recreation area if it has been "officially designated as such." And Dwyer has been officially designated as a recreation site since 1968.

The Government's assertion that Dwyer is not used for recreation is also belied by the record. Responding to the 1985 Draft EIS, commentators detailed at length the "recreational uses within" Dwyer, including "hiking, picnic[king], huckleberry picking, mushroom hunting, bird watching, [and] wildlife observation." Ex.4 FHWA_000584, 000587-589. The Government also recognizes that Dwyer is "valued" for its "scen[ery]." Ex.4 FHWA_000440, FHWA_000462. And it is, as the Government has emphasized in this litigation, open to the public for all kinds of use, including religious use. ECF 295 at 2. Moreover, in reviewing the use of Dwyer for this project, BLM acknowledged that there were plans to use Dwyer for "development of a trail"—which it conceded was a "recreation[al]" use. Ex.22 FHWA_002864.

Because Dwyer is a "park" and "recreation area" protected by § 4(f), FHWA was required to determine in the EA that there was "no feasible and prudent" alternative to using it and that the project "include[d] all possible planning…to minimize harm to [it] resulting from such use." 23 C.F.R. § 774.3(a). FHWA's failure to do so violated DTA. *See, e.g., Stop H-3 Ass'n v. Coleman*, 533 F.2d 434, 445 (9th Cir. 1976) (finding § 4(f) violation after rejecting FHWA's position "that the statute was…inapplicable").

Nor *could* FHWA have made such a determination. Again, of the various ways FHWA could have added an additional lane to the highway, FHWA chose to widen to

the north only—the alternative most destructive of Dwyer. And then, *within* that alternative, FHWA chose to separate the highway from the tree-line using a berm with a gradual, 3:1 slope, rather than one with a steeper, 1.5:1 slope, or a retaining wall.

This choice violated § 4(f), because the steeper slope and retaining wall were "prudent and feasible alternatives" that would have minimized the highway's incursion into Dwyer while allowing FHWA to build precisely the same turn lane. Indeed, the EA admits as much, explaining that a 1.5:1 slope "would reduce the footprint of the project" and a retaining wall would reduce it even more, making the "[l]evel of change" only "Low–Moderate." Ex.1 FHWA_004406-004408. No evidence suggests that the steeper-slope or retaining-wall options could not "be built as a matter of sound engineering" or would impose the "cost[s] or community disruption" of "extraordinary magnitude[]" that would render them imprudent for § 4(f) purposes. *Stop H-3 Ass'n*, 740 F.2d at 1449 & n.11; *see also id.* at 1452 ("increased cost of $42 million…is not a cost of extraordinary magnitude"). To the contrary, the REA indicates just the opposite—that a steeper slope or retaining wall *were* feasible and prudent alternatives—because the project used precisely these alternatives to protect wetlands. Ex.2 FHWA_004967-004968.

The Government simply chose not to take any "[a]dditional mitigation measure[]" within Dwyer. FHWA_004406. That choice was foreclosed by § 4(f).

V. NAGPRA

NAGPRA requires government officials to, among other things, "take immediate steps" to "protect" Native American cultural items discovered in the course of a construction project. 43 C.F.R. § 10.4(d)(1)(ii); *see also* 25 U.S.C. § 3002(d)(1). Because the Government here did not protect Plaintiffs' sacred campground, ritual altar, and burial site, but instead intentionally destroyed them, it violated NAGPRA.

NAGPRA "represents the culmination of 'decades of struggle by Native American tribal governments and people to protect against grave desecration, to [effect the repatriation of] thousands of dead relatives or ancestors, and to retrieve stolen or improperly acquired cultural property.'" *Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs*, 83 F. Supp. 2d 1047, 1054 (D.S.D. 2000) ("*Yankton I*") (quoting Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 Ariz. St. L.J. 35, 36 (1992)). It does so in part by imposing certain duties on those who "know[], or ha[ve] reason to know, that [they] ha[ve] discovered Native American cultural items on Federal" land. 25 U.S.C. § 3002(d)(1). Such persons must first "cease the activity"—"including (but not limited to) construction, mining, logging, [or] agriculture"—that led them to discover the cultural items, and "make a reasonable effort to protect the items discovered." *Id.* They then must "notify" the head of the federal agency "having primary management authority" over the land. *Id.*

That federal agency, in turn, must "take immediate steps, if necessary, to further protect the cultural items." 43 C.F.R. § 10.4(d)(1)(ii). Having protected the items, the

agency must notify and consult with the "Indian tribes which might be entitled to ownership or control of" them under the Act. *Yankton I*, 83 F. Supp. 2d at 1055 (citing 43 C.F.R. §§ 10.4(d)(1)). If the items "must be excavated or removed," that can be done "only if" the agency is issued a permit. 43 C.F.R. §§ 10.4(d)(1)(v), 10.3(b). In any event, "ownership or control" of the items must be passed to the relevant tribes, 43 C.F.R. §§ 10.4(d)(1)(iv), 10.6(a).

Yankton Sioux Tribe v. U.S. Army Corps of Engineers, 209 F. Supp. 2d 1008 (D.S.D. 2002) ("*Yankton II*"), is illustrative. There, the plaintiff tribe sued after a government official removed artifacts and human remains discovered in the course of a construction project. *Id.* at 1011-13. The court held that because the official had previous "knowledge of the Tribe's claims that their ancestors [we]re buried in the…area," the official was required to comply with NAGPRA by taking steps to protect the artifacts and remains, and remove them only after obtaining a permit and engaging in "meaningful and…good faith" consultation with the relevant tribes. *Id.* at 1021, 1023. The official had not complied with NAGPRA in removing the artifacts, so the court entered an injunction. *Id.* at 1020, 1026-27.

Here, too, the Government plainly violated NAGPRA. First, the record is clear that the Government's NAGPRA duties were triggered—that is, there was a discovery of items that the Government "kn[ew], or ha[d] reason to know," were "Native American cultural items on Federal" land. 25 U.S.C. § 3002(d)(1). The Act defines "cultural items" as including, among other things, "human remains" and "sacred objects"—"specific ceremonial objects which are needed by traditional Native American

religious leaders for the practice of traditional Native American religions by their present day adherents." 25 U.S.C. § 3001(3), (3)(C). Plaintiffs have repeatedly informed the Government that Dwyer was a burial site that included Native remains. *E.g.,* Ex.12 ¶¶25, 30, 186; Ex.16 BLM_000008-000009; Ex.10 59:16-20, 60:18-61:8, 61:18-21, 63:5, 64:7-16, 66:16-19, 113:21-22; Ex.15 FHWA_005565-005613.

It is also indisputable that the altar constitutes a "sacred object" under NAGPRA, because it is a "specific ceremonial object[] needed by traditional Native American religious leaders for the practice of traditional Native American religions." 25 U.S.C. § 3001(3)(C). Plaintiffs Slockish, Jackson, and Logan are traditional religious leaders of their tribes. Ex.32 ¶¶7-11, 13-15; Ex.33 ¶¶6-13, 55; Ex.17 ¶¶5, 7-9. They have testified without contradiction that the altar played a key role in their own religious exercise and in that of other traditional practitioners—it "enabled those who visited the site" to recognize it as a place where they should "pray and pay their respects," and it served as a focal point for ceremonies conducted within Dwyer. Ex.12 ¶4; Ex.32 ¶31; Ex.34 40:19-21; Ex.35 72:19-73:6; Ex.36 ¶14; Ex.37 ¶¶28-29.

Further, the altar's discoverer knew or had reason to know it was a sacred object. The altar was discovered at least when BLM archaeologist Frances Philipek observed and photographed it in July 2008, as workers were preparing to begin constructing the highway within Dwyer. Ex.16 BLM_000006; *see also Yankton I*, 83 F. Supp. 2d at 1056 ("re-observation…constitute[d] an inadvertent discovery" under NAGPRA). At the time of this visit, Philipek had ample reason to know the altar was a sacred object:

- She participated in the 1986 excavation, which found that the altar was "not recently…created," could be of "aboriginal" origin, and "may be at least several

hundred years (and possibly much more) old." ECF 292-13 at FHWA_000302-000303.

- Her own notes show that she spoke with Jones about the altar in 1990, who told her that Native Americans "know about it," "visit it," and have been "going there for years"; that it had been vandalized; that a "Wasco tribe" "medicine man" would hold a "ceremony to put the site back together"; that another Native American had come from a "spiritual camp on [the] other side of Mt. Hood" to observe the vandalism; and that it was a "Nat[ive] Amer[ican] sacred site." Ex.16 BLM_000008-000009; *see also* Ex.42 ¶¶272-300 (declaration of the Wasco Medicine Person referenced in the notes, confirming altar's religious significance).

- Finally, the impetus for her July 2008 visit to the site was a call from Plaintiffs' attorney regarding "Indian remains on" the site, Ex.38 BLM_000019, and her report on that visit includes her notes from the 1990 Jones call. Ex.16.

Thus, at the time of the 2008 visit, Philipek had been repeatedly informed that the altar was an object used by traditional Native American religious practitioners for their religious exercise, and the only archaeological conclusions she had drawn about it—including that it was manmade, potentially centuries-old, and its function wasn't obvious just from observing it—did nothing to undermine this testimony. *See Yankton II*, 209 F. Supp. 2d at 1019-20 (official's knowledge of tribe's "oral history" sufficient to trigger NAGPRA). Her NAGPRA duties, then, were triggered.

Philipek did not comply with these duties. After confirming the altar's presence, Philipek was required to "make a reasonable effort to protect" it, and to "cease the" project to permit NAGPRA compliance. 25 U.S.C. § 3002(d)(1). She did neither. Instead, she took pictures of the "scattered" altar, then authored a report giving the go-ahead for the Government to continue with its destruction of the site—which it did, just four days later. ECF 122 at 7-8.

BLM also violated NAGPRA in its role as the "primary management authority" over the land on which the items were discovered. *See Yankton I*, 83 F. Supp. 2d at 1057 (agency had "separate roles as the discoverer of the remains and as the federal agency with primary authority over the site"). In this capacity, BLM was required to notify and consult with the tribes associated with the altar, to pass ownership and control over the altar to those tribes, and to "excavate[] or remove[]" the altar only after receiving a permit to do so. *See* 43 C.F.R. § 10.4(d). BLM did none of these things. To the contrary, BLM simply continued with the project, resulting in the altar's being "disposed of." ECF 287 at 28.

VI. Free Exercise Clause

The Government's needless destruction of Plaintiffs' sacred site also violated the Free Exercise Clause of the First Amendment.

Under the Free Exercise Clause, government action that "is not neutral" with respect to religion "or not of general application" "must undergo the most rigorous of scrutiny." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1130 (9th Cir. 2009) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993)). One way to demonstrate that government action is not neutral or generally applicable is to show that it includes secular exemptions from its negative consequences, but not religious exemptions. For instance, in *Lukumi*, the Court considered a municipal ordinance prescribing punishments for "[w]hoever…unnecessarily…kills any animal." 508 U.S. at 537. The ordinance, however, was not applied to secular killings, but only certain types of religious sacrifices. The Supreme Court held that the exemptions for

secular killings rendered the ordinance not neutral and generally applicable, triggering strict scrutiny. When a law makes exceptions for secular behavior, but not analogous religious behavior, the Court explained, that "devalues religious reasons for [acting,] judging them to be of lesser import than nonreligious reasons." *Lukumi*, 508 U.S. at 537-38.

The Court applied a similar analysis in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018). There, a state agency found a baker liable under state-nondiscrimination law for declining to bake a wedding cake based on his religious opposition to same-sex marriage, but it had previously found that bakers acted lawfully in refusing to create cakes "with images that conveyed *disapproval* of same-sex marriage," based on the baker's secular objections to the message. *Id.* at 1730 (emphasis added). This "difference in treatment," the Court said, indicated "hostility" toward the baker's religious beliefs, requiring that the agency's order "be set aside." *Id.* at 1730-32.

Here, too, the Government made secular exemptions from the destruction wrought by the project, but not an exemption for Plaintiffs' sacred site. In the REA, the Government explained that the project would generally use a 3:1 slope from the highway's edge to the tree-line. But to "avoid" "impact[ing] a…wetland located on the north side of the highway," the Government made an exception: it would "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." Ex.2 FHWA_004967-004968. The Government did not extend similar treatment to the sacred site also located on the north side of

the highway—despite being repeatedly informed of the site's existence and importance to tribal religious practices, and despite Plaintiffs' pleading that "an additional lane c[ould] be added" to the highway "without destroying heritage resources." Ex.26 ACHP_000047-000052; FHWA_005704-005707. That refusal reflects "a value judgment that secular" resources (like the wetland) "are important enough to overcome [the Government's] general interest in uniformity but that religious" resources (like the sacred site) "are not." *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.). It therefore triggers strict scrutiny. *Id.*; *see also Lukumi*, 508 U.S. at 546.

The Government's refusal to accommodate the sacred site cannot satisfy strict scrutiny. To satisfy this test, the Government would have to show that its decision to use a 3:1 slope through the area bordering the sacred site "advance[d] interests of the highest order" and was "narrowly tailored in pursuit of those interests." *Id.* (citation and internal quotation marks omitted). The Government cannot even pass the first step. Nothing in the record suggests that the Government had a compelling interest in using a 3:1 slope rather than a 1.5:1 slope or retaining wall through the 0.27 miles of the project that bordered Dwyer. Ex.1 FHWA_004397. And indeed, the fact that the Government made an exception for wetlands itself suggests that there is no compelling interest in a uniform 3:1 slope for the project. *See Lukumi*, 508 U.S. at 547 ("[A] law cannot be regarded as protecting an interest 'of the highest order' when it leaves appreciable damage to that supposedly vital interest unprohibited." (cleaned

up)). The Government's refusal to accommodate Plaintiffs' sacred site therefore violated the Free Exercise Clause.

CONCLUSION

Plaintiffs' motion for summary judgment should be granted, and the Court should conclude that the Government violated the APA in carrying out the project inconsistently with the above statutes and constitutional provisions. The "APA confers broad equitable authority on courts to remedy violations of public law by governmental agencies." ECF 52 at 5 (collecting cases). Plaintiffs therefore request additional briefing on how the Court should exercise its remedial discretion once it finds the Government to have violated the law.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This memorandum complies with the applicable word-count limitation under this Court's order in ECF 330 and LR 7-2(b) because it contains 12,925 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

December 14, 2018

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CERTIFICATE OF SERVICE

I certify that on December 14, 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

December 14, 2018

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