No. 21-35220

In the United States Court of Appeals for The Ninth Circuit

HEREDITARY CHIEF WILBUR SLOCKISH; CAROL LOGAN; CASCADE GEOGRAPHIC SOCIETY; MOUNT HOOD SACRED LANDS PRESERVATION ALLIANCE,
Plaintiffs-Appellants,

v.

UNITED STATES FEDERAL HIGHWAY ADMINISTRATION, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Oregon
No. 3:08-cv-1169
Hon. Marco A. Hernández

OPENING BRIEF OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Plaintiffs state that no nongovernmental corporation is a party to this appeal.

Dated: May 3, 2021

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GLOSSARY

BLM	Bureau of Land Management
C-FASH	Citizens for a Suitable Highway
CGS	Cascade Geographic Society
DTA	Department of Transportation Act
EA	Environmental Assessment
EIS	Environmental Impact Statement
FEIS	Final 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
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

INTRODUCTION

Our nation has a tragic history of callously destroying Native American sacred sites. The question in this case is whether federal law allows that history to repeat itself today.

Plaintiffs are members of federally-recognized tribes who long practiced their faith at a small sacred site called *Ana Kwna Nchi Nchi Patat,* or the "Place of Big Big Trees." The site measured approximately 100 by 30 meters—less than one acre—and consisted of a dense stand of old-growth trees encircling a historic campground, burial ground, and centuries-old stone altar. The site has been used by indigenous peoples since time immemorial, and by Plaintiffs personally since the 1940s for core religious ceremonies that cannot take place anywhere else.

In the 1980s, when the Government proposed widening a nearby highway, one of Plaintiffs' leaders informed the Government of the site's historic and religious significance, including the graves and stone altar. In response, the Government modified its project to protect the site. But in 2008, the Government widened the highway again to add a center turn lane. This time, it protected a nearby wetlands, but completely destroyed the sacred site—cutting down the old-growth trees, bulldozing the burial ground and stone altar, and covering the area under a massive earthen berm. It did this even though there were several feasible ways to add the turn lane without harming the sacred site.

This needless destruction of an ancient sacred site violated six federal laws. First, it violated the Religious Freedom Restoration Act ("RFRA"), which prohibits the Government from imposing a "substantial burden" on religious exercise unless it satisfies strict scrutiny. Here, the sacred site's destruction obviously imposes a "substantial burden" on Plaintiffs' religious practices because it makes those practices impossible. And given the many ways the Government could have added a turn lane without harming the sacred site, the Government hasn't even attempted to satisfy strict scrutiny.

Second, 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 nearby wetlands, it refused to make the same accommodation for Plaintiffs' sacred site.

Third, the Government violated the National Environmental Policy Act ("NEPA") by failing to take a "hard look" at the environmental consequences of its actions. The project could not have taken place unless Defendant Bureau of Land Management ("BLM"), which managed the A.J. Dwyer Scenic Area ("Dwyer") of which the sacred site was part, granted a tree-removal permit and right-of-way authorizing construction. Yet the Government performed no NEPA analysis for these actions at all. Defendant Federal Highway Administration ("FHWA") performed only a

truncated NEPA analysis for the project as a whole, improperly concluding it would have no significant impact on Dwyer even though it would destroy almost all of Dwyer's large, old-growth trees—the very characteristics that had prompted the site's federal protection in the 1960s. 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.

Fourth, the Government violated the National Historic Preservation Act ("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, tried to delegate to a state agency its NHPA duty to consult with tribes—which is expressly forbidden by statute. And even assuming FHWA's delegation were allowed, consultation with the Yakama took place only after tree-removal had already occurred—long after the time required by statute.

Fifth, the Government violated the Federal Land Policy and Management Act ("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.

Sixth, the Government violated §4(f) of the Department of Transportation Act ("DTA"), which forbids FHWA from approving highway pro-

jects 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.

In short, despite a host of federal laws designed to protect Plaintiffs' sacred site, Defendants ignored them, knowingly destroying centuries of Native American history, religion, and culture. More promises made and broken.

The saddest thing about this case is that the destruction of Plaintiffs' sacred site never had to happen. Defendants had numerous alternatives for adding a turn lane without harming Plaintiffs' sacred site. But they 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." 7-ER-1379. The result was the destruction of a scenic area protected by Congress and the Government for over forty years, and the destruction of a sacred site used by Native American for centuries—a site that "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." Justice demands more.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over this matter under 28 U.S.C. §§1331 and 1343. This Court has jurisdiction under 28 U.S.C. §1291 because this is an appeal from a final judgment issued March 19, 2021. The notice of appeal was timely filed on March 22, 2021.

STATEMENT OF ISSUES

1. Whether the government imposes a "substantial burden" on Native American religious exercise when it authorizes the destruction of their sacred site, rendering core Native American religious practices physically impossible.
2. Whether the government faces heightened scrutiny under the Free Exercise Clause when it adopts measures to protect secular interests during a highway project but refuses to adopt the same measures to protect religious interests.
3. Whether the government violates NEPA when it performs no NEPA analysis at all for the issuance of federal permits, issues only an EA instead of an EIS for actions significantly degrading the environment, and fails in its EA to consider reasonable alternatives.
4. Whether the government violates NHPA when it fails to perform any Section 106 process, fails to perform tribal consultation, and tries to delegate a belated consultation process to a state agency.
5. Whether the government violates FLPMA when it needlessly destroys a Native American sacred site and authorizes tree cutting where cutting is prohibited by statute and regulation.
6. Whether the government violates the DTA when it fails to prepare a §4(f) evaluation for a project that destroys a public recreation area.

STATEMENT OF THE CASE

A. Plaintiffs' Tribes

Plaintiffs are Wilbur Slockish, Johnny Jackson, Carol Logan, the Cascade Geographic Society ("CGS"), and the Mount Hood Sacred Lands Preservation Alliance ("MHSLPA").[1]

Slockish and Jackson are enrolled members of the Confederated Tribes and Bands of the Yakama Nation. 5-ER-912, 5-ER-939. The Yakama lived along the Columbia River since before recorded history but were forced to sign a treaty in 1855 ceding 12 million acres to the Government and move to a reservation. 1-ER-185-91. The last Chief to sign the treaty, Chief Sla-kish, did so under protest, and is a direct ancestor of Slockish and Jackson. 5-ER-912; 5-ER-939.

Logan is an enrolled member of the Confederated Tribes of Grand Ronde. 5-ER-927. The Grand Ronde lived in western Oregon, southern Washington, and northern California, but were forced onto a reservation in 1856 so the Government could "free [their] land for…pioneer settlement." 2-ER-193. Part of the land taken from Plaintiffs' tribes is at issue in this case. 5-ER-882; 5-ER-871.

The individual Plaintiffs are also members of CGS and MHSLPA, organizations dedicated to preserving the cultural and religious resources of the Cascade Mountains. 5-ER-912; 5-ER-929; 5-ER-939; 3-ER-325,

[1] Jackson passed away in 2020 at age 89, twelve years after filing this suit. Slockish is 76. Logan is 77.

329-30.

B. Plaintiffs' Religious Beliefs and the Sacred Site

As Hereditary Chiefs (Slockish and Jackson) and Elder (Logan), Plaintiffs are responsible for maintaining their tribes' traditions. 5-ER-913-15; 5-ER-940-41; 5-ER-928. Slockish and Jackson practice *Washat*—the traditional religion of the Yakama, also known as the "Drummer-Dreamer faith" or the "Religion of the Seven Drums." 5-ER-915; 5-ER-940; *see also* 2-ER-207 (Michael McKenzie, *Washat Religion (Drummer-Dreamer Faith)*, *in* Encyclopedia of Religion and Nature 1712, 1712 (Bron Taylor, ed., 2006)). Logan is a "Traditional Practitioner of the Clackamas Tribe" and spiritual leader for other Native Americans. 5-ER-871; 3-ER-502.

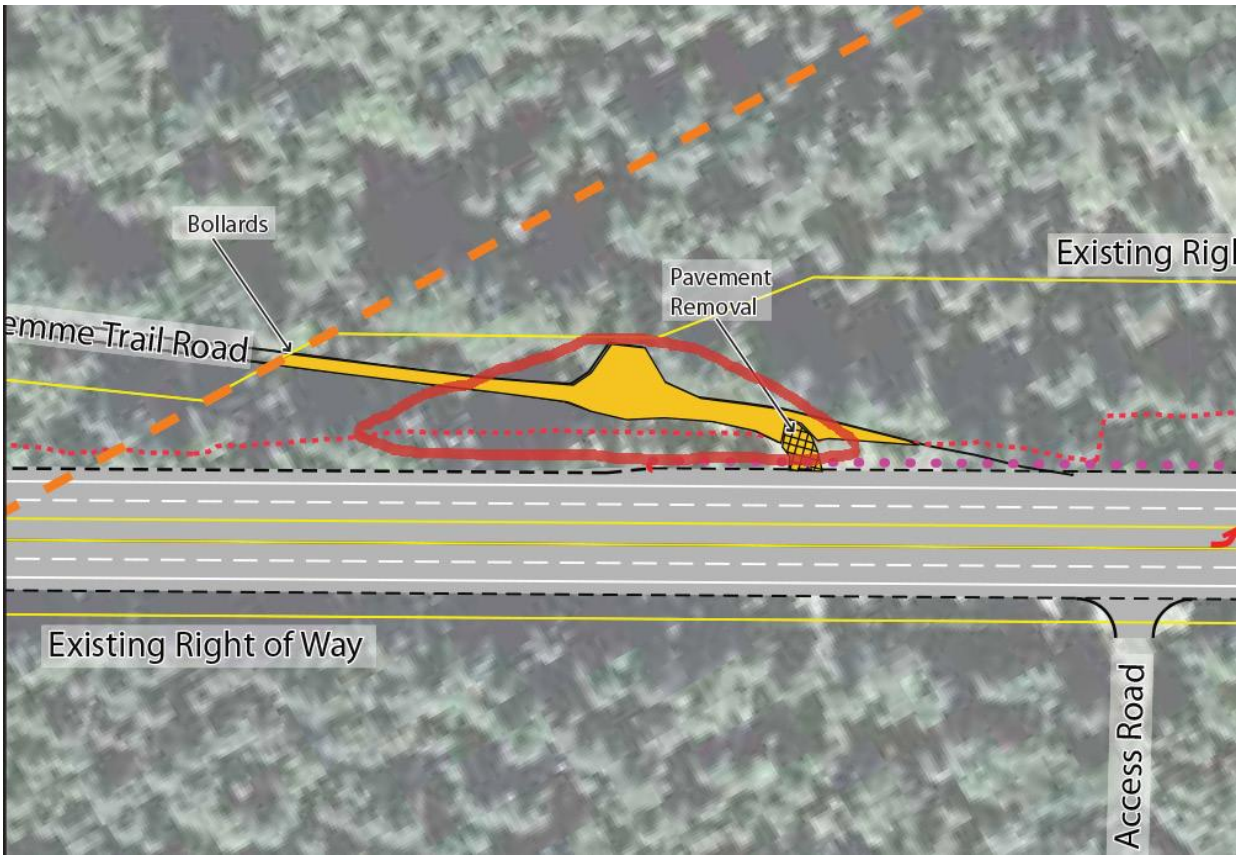
Plaintiffs worship and seek guidance from a Creator, 5-ER-915, 917-18; 5-ER-929; 5-ER-941-44; *see also* McKenzie at 1713, who "keep[s] all Life in continuance" through a delicate balance. 5-ER-928; 3-ER-466; *see also* 2-ER-222-24 (Rex Buck, Jr. & Wilson Wewa, *"We Are Created from this Land" Washat Leaders Reflect on Place-Based Spiritual Beliefs*, 115 Or. Hist. Q. 298, 309-11 (2014)). Although *Washat* and other Native American religions "revere the natural world in its entirety," certain sacred sites are "accorded special reverence." 2-ER-254-55 (Robert Charles Ward, *The Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sites on Federal Land*, 19 Ecology L.Q. 795, 800-01 (1992)); *see also* 3-ER-459; Buck at 303. The visiting of these sacred sites

"play[s] an important role in [Plaintiffs'] religious practice." 3-ER-489; *see also* 4-ER-678; 5-ER-916.

The site at issue here is traditionally known to Plaintiffs' tribes as *Ana Kwna Nchi Nchi Patat* (the "Place of Big Big Trees"). 5-ER-884; 5-ER-872; 5-ER-893. The site was located within a small portion of the A.J. Dwyer Scenic Area, which is a roughly 5-acre parcel of land north of U.S. Highway 26 within the Wildwood Recreation Site. The site measured approximately 100 by 30 meters, or 0.74 acres. 5-ER-962-63.

The site lay along a trading route used by Native Americans for centuries—which later became part of the Oregon Trail, and is now followed by U.S. 26. 5-ER-943; 4-ER-715; *see also* ECF 122 at 4 & n.3. The site was held sacred because of its traditional use as a campsite for native peoples traveling to trade at Celilo Falls or to pick camas, a traditional food, in the Willamette Valley, 5-ER-943-44; 4-ER-711; 5-ER-917, 919, 36; 5-ER-929, and as a burial ground for those who died along the way. 4-ER-584; 3-ER-460; 5-ER-919; 5-ER-943-44.

A map taken from the highway planning documents (6-ER-1215), with the key area circled in red, appears below:



The sacred site contained several features. First were the "historic campground and burial grounds." 5-ER-934; *see also* 4-ER-711; 5-ER-914. The historic campground was marked by a small clearing just north of U.S. 26, which could be accessed through a gap in the guardrail. 3-ER-345. The clearing is depicted on the map as a yellow bulge. The burial grounds were located next to the campground in the strip of trees between the campground and U.S. 26. 5-ER-876; 5-ER-887; 5-ER-896.

Second, the site contained an ancient stone altar. *See* 3-ER-484-85,

488; 5-ER-887; 5-ER-895.[2] The altar was located between the campground and the highway and was roughly 6 feet long, 3-4 feet wide, and 1.5 feet high. 11-ER-2295, 2299; 5-ER-887; 5-ER-825; 3-ER-494-95. It served both to "mark[] surrounding graves" and as a focal point for religious ceremonies. 5-ER-825; 3-ER-486; 4-ER-724-25; 5-ER-895; 5-ER-887. The altar is shown below during a 1986 BLM archaeological excavation, which concluded that the altar "may be at least several hundred years (and possibly much more) old" (11-ER-2295; 6-ER-1158; 5-ER-969; 5-ER-1022):

[2] The altar is sometimes called a "stone monument," "rock cluster," or "rock cairn." 5-ER-926; 5-ER-825; 4-ER-724-25.

Third, the site featured valuable, old-growth Douglas fir trees. 4-ER-663. These trees were directly incorporated into religious ceremonies and provided the separation from the outside world necessary for Plaintiffs' religious practices. 3-ER-469; 5-ER-922-23.

Finally, the site had "powerful medicine" plants used in a particular type of healing ceremony. 3-ER-459, 532; *see also* 5-ER-919-20. Due to the climate, elevation, and spiritual power of the site, there is no other site where those plants can be gathered. 3-ER-533-34.

C. Plaintiffs' Use of the Sacred Site

Indigenous peoples have used this site for religious purposes "since time immemorial." 5-ER-929. According to their religion, Plaintiffs were obligated to protect the site and engage in religious practices there, or else risk being "banished to" the "land of darkness" "forever." 4-ER-748; 3-ER-501. They protected and used the site for many years.

Logan learned about the site as "a young girl" in the late 1940s or early 1950s. 3-ER-550-51. As an adult, she continued visiting the site for "prayer and meditation," to gather sacred medicine plants, and to pay respects to her ancestors through memorial ceremonies. 5-ER-929; 3-ER-532. These ceremonies included a time of spiritual preparation (3-ER-501); commemoration of ancestors by prayer, meditation, and song (5-ER-929); and the burning of tobacco offerings in a small fire (3-ER-501).

These ceremonies gave Logan "higher knowledge" and connection with the "spirit that is there." 3-ER-465.

Jackson was taught about the site in his youth and returned there for religious practices for over forty years. 5-ER-916, 919-21; *see also* 4-ER-633-34; 5-ER-896-98. For Jackson, the site was "like a church"—one that "never had walls, never had a roof, and never had a floor," but "is still just as sacred as a white person's church." 5-ER-916.

Slockish, consistent with his *Washat* faith, has a religious obligation to visit sacred sites like this one. 5-ER-940-41. On his visits, Slockish engaged in "prayer, veneration of [his] ancestors, and giving of tobacco offerings." 5-ER-945. He began visiting thirty years ago and continued "at least twice a month or whenever [he] was driving through the Mount Hood Area" from his home. 5-ER-894.

In all, Logan used the site for her religious practices for 50 years, Jackson for 40, and Slockish for 15—until the Government destroyed it, making their religious practices "impossible." 5-ER-919, 923; 3-ER-550-52; 5-ER-934; 5-ER-945, 947; 5-ER-948; *see also* 5-ER-923; 5-ER-935.

D. Protection of the Sacred Site

Dwyer—where the site is located—is owned by the Government and managed by BLM. Dwyer "is a corridor of large fir trees" donated in the 1930s by a logging company to allow "future generations to see and appreciate old-growth Douglas fir trees." 7-ER-1454; 9-ER-2060. In 1968,

the Government "withdr[ew]" and "reserved" Dwyer "for protection of public recreation values" as part of the Wildwood Recreation Site. 10-ER-2223; *see also* 7-ER-1426. In 1995, as part of the Salem District Resource Management Plan ("SDMP"), BLM designated Dwyer a "Special Area," "unique" for "scenic and botanical values," including its "large older trees." 6-ER-1331; *see also* 8-ER-1549-723. 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"); *see* 7-ER-1545-47.

Dwyer borders U.S. 26, which is used for recreational travel between Portland and tourism destinations like Mount Hood. 10-ER-2099, 2105. Over the decades, there have been several efforts to expand the highway—including the stretch bordering Dwyer—to facilitate travel during "holiday weekends and on ski weekends." 10-ER-2105.

In 1985, FHWA, BLM, and the Oregon Department of Transportation ("ODOT") issued a draft environmental impact statement ("EIS"), proposing to expand U.S. 26 to include a center turn lane, including in the portion bordering Dwyer. *See* 10-ER-2097-100. This proposal would have extended the pavement 15 feet north into Dwyer, 9-ER-1830, resulting in the removal of "most of [Dwyer's] large trees." 10-ER-2099.

This proposal prompted a large-scale campaign to save Dwyer. 9-ER-1826. Or as one official put it, "The community went nuts." 7-ER-1460. The campaign was led by Citizens for a Suitable Highway ("C-FASH"), an organization led by Michael Jones, who was also the head of Plaintiffs CGS and MHSLPA in this case.[3] 8-ER-1790. C-FASH submitted letters, testified at public hearings, gathered signatures on petitions, and talked extensively with agency officials. 9-ER-1922-28, 1933-38, 1940-41, 1949-64, 2000, 2084-85; 7-ER-1460; 8-ER-1790-93. C-FASH emphasized Dwyer's "historical and cultural significance," noting that the area is "sacred" to Native Americans, that there was a "gravesite" and stone altar. 8-ER-1791; 9-ER-1935.

BLM then issued a permit allowing archaeologists to study the stone altar. 11-ER-2294. Although the archaeologists found no human remains directly beneath the altar, they concluded that 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." 11-ER-2295.

Responding to the public concerns, FHWA and ODOT in 1986 issued a final EIS ("FEIS"), changing the proposal to "to decrease the impact in the Dwyer [Area]." 9-ER-1826, 1848. They decided not to add a center

[3] Jones passed away in 2020 at age 68, twelve years after filing this suit.

turn lane through Dwyer and to use "guardrails and retaining walls" to "minimize the number of trees taken." 9-ER-1848-50, 1860-61.

To memorialize discussions surrounding the project, C-FASH and ODOT signed an "Agreement" in 1987. 8-ER-1759-819. The Agreement stated there were "sacred" resources and Native American gravesites in Dwyer, and ODOT "committed" itself to managing U.S. 26 "consistent with these statements." 8-ER-1791, 1760. Jones sent copies of this Agreement to BLM officials by 1990. 5-ER-867.

Jones and others continued to raise awareness of the site's religious significance throughout the 1990s. In one public meeting, a government official acknowledged that the stone altar was "the reason why we can't widen the highway." 3-ER-375. 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. 5-ER-966-67. Jones told Philipek that Native Americans had been going to the Dwyer site "for years" because of Native American "graves" there. *Id.* He also told her about ceremonies 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. 2-ER-117, 134, 139, 155-64.

Jones and a Yakama leader named Willferd Yallup later participated in a meeting with government officials, at which Yallup "identified the [Dwyer site as] having burials." 3-ER-424; 6-ER-1073-121; 5-ER-830-31. Jones also told FHWA and BLM officials that Dwyer "was a traditional cultural property used by Native Americans" and that "there were Native American cultural and religious sites, including burials, at…Dwyer." 3-ER-370-72 (FHWA); 3-ER-376-77 (BLM); *see also* 3-ER-372-75 (FHWA present), 3-ER-380 (Jones "told everyone who [he] came in contact with [from] BLM" at the site "that there were Native American cultural and religious sites" there). By March 2008, Jones's persistent efforts to raise awareness about Dwyer were reflected in handwritten notes of a federal official: "Michael Jones—A nightmare. Since 1979[.]" 5-ER-1023.

E. Destruction of the Sacred Site

Despite these efforts, in the late 1990s, the Government and ODOT again discussed adding a center turn lane within Dwyer. 7-ER-1472-514. Although the Government claims it was to address safety, ECF 340 at 1, the stretch of U.S. 26 bordering Dwyer was statistically safer than "similar rural principal arterials" in Oregon, with 24% fewer accidents than comparable roads. 6-ER-1211.

In a 2000 scoping packet, officials recognized that widening U.S. 26 to the north "would require…extensive filling" and "removal of many large

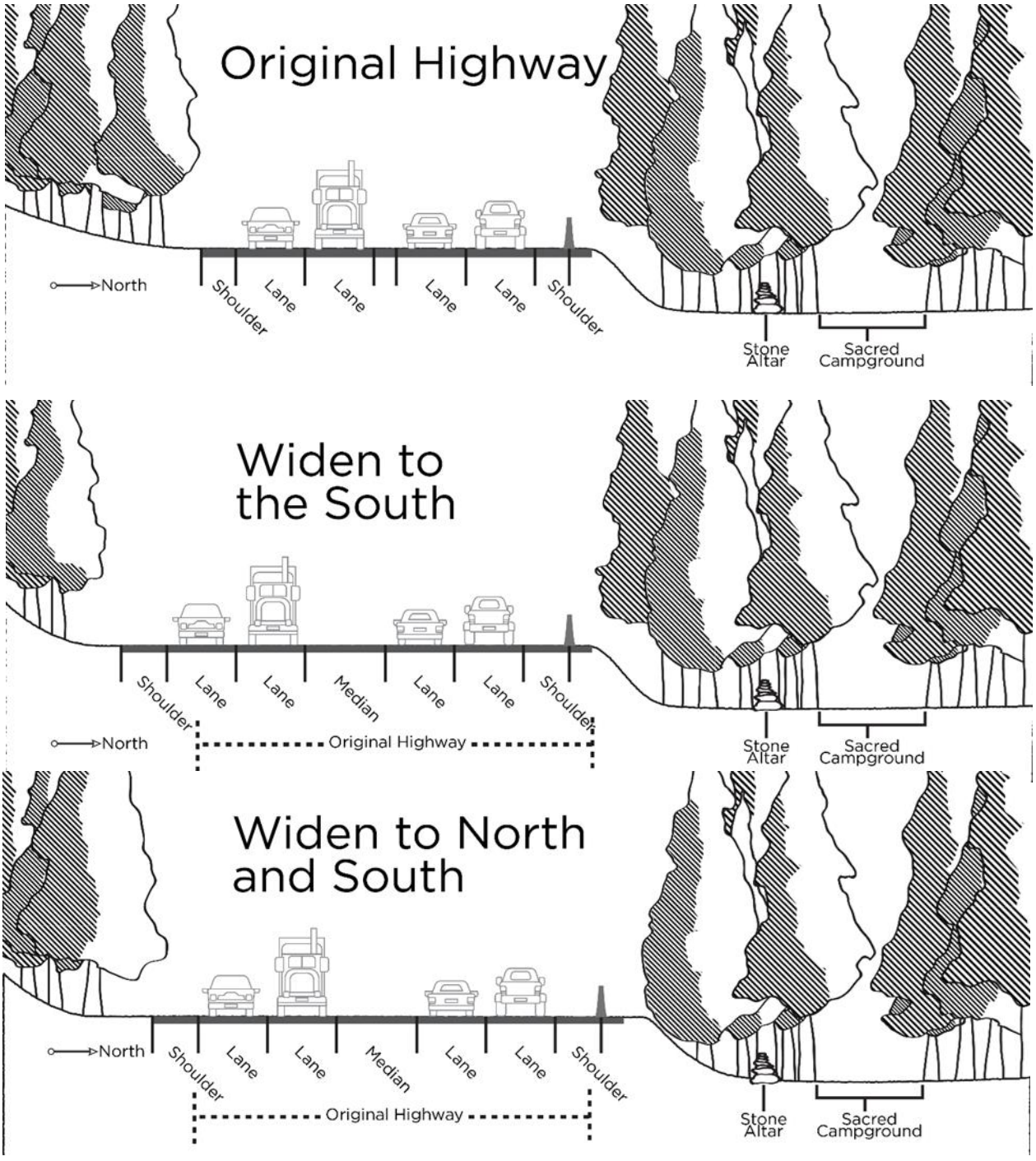
diameter trees"—the same trees the agencies had "expended considerable effort to protect" in the 1980s. 7-ER-1475; *see also* 7-ER-1458. And as discussions resumed in 2004, officials reiterated this "may again spark public controversy over the preservation of large trees" and "historic resources" within Dwyer. 7-ER-1452-57.

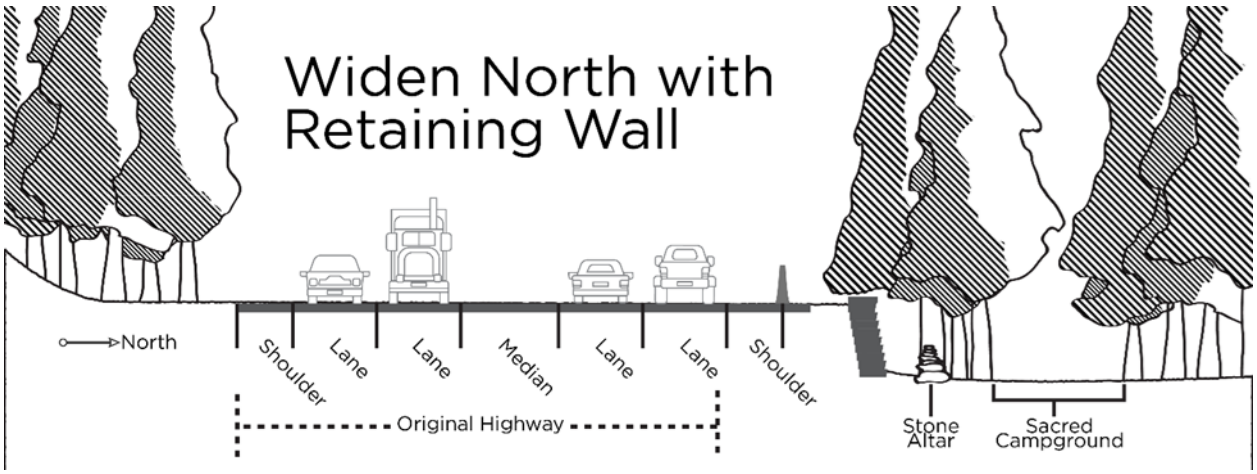
Nevertheless, FHWA and ODOT moved forward, issuing an Environmental Assessment ("EA") and Revised Environmental Assessment ("REA") and Finding of No Significant Impact ("FONSI"), in 2006 and 2007 respectively. In the EA, the Government identified various alternatives for "improv[ing] safety" on U.S. 26 without impacting Dwyer. 6-ER-1217. For instance, a center turn lane could be added by widening the road to the south, leaving the north side of the highway—including Dwyer and the sacred site—unaffected. 6-ER-1220. Likewise, the road could be expanded "equal[ly]…to the north and south," minimizing the impact to either side alone. 6-ER-1221. Or the speed limit could be lowered, resulting in no impact on the site at all.

The option most destructive to Dwyer would be to widen the road to the north only. But within that option, the Government still recognized ways to reduce the impact. For instance, rather than using a longer 3:1 slope on the north side of the highway—one that ran three feet for every foot of rise—the Government could use a steeper 1.5:1 slope or a retaining wall. *See* 7-ER-1396-97; *see also* 7-ER-1404-06. These options would have

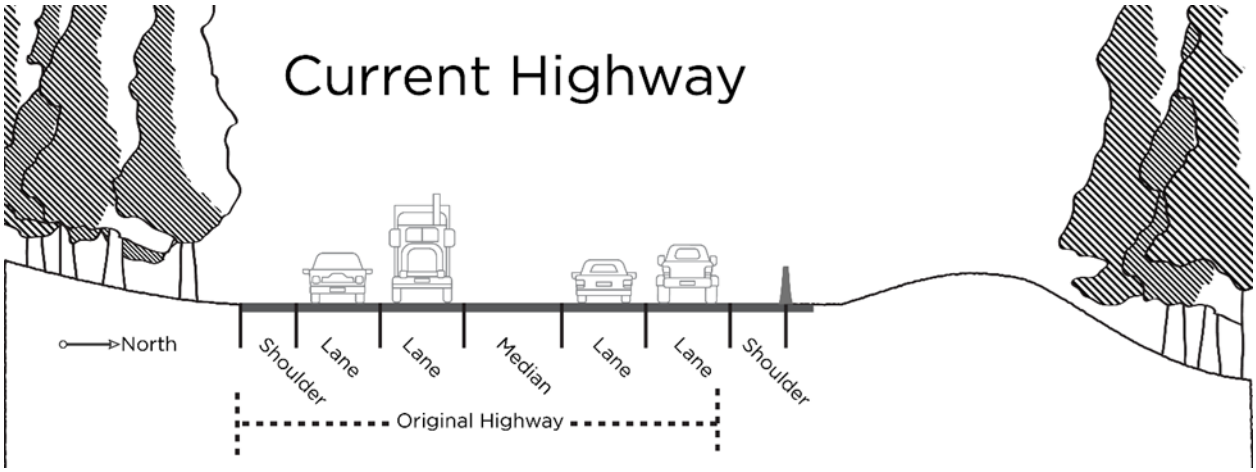
reduced the project's footprint in Dwyer by 39% or 61%, respectively. *See* 7-ER-1398-1403.

The following demonstratives (not to scale) illustrate these alternatives (ECF 292 at 16-17):





Despite these options, the Government chose the "Widen to the North" alternative, using a 3:1 slope—the option most destructive of the sacred site. 6-ER-1265-66; 6-ER-1178. This alternative would add 14 feet of paving on the north side of U.S. 26, requiring a 25–50-foot-wide strip of land in Dwyer to be "cleared of trees and vegetation," "includ[ing] most of the larger trees." 6-ER-1331.



ECF 292 at 17.

At the same time, the Government proposed to "steepen the slopes…and/or install guardrail" for another stretch of the widening, in order to "avoid" "impact[ing] a…wetland" also "located on the north side of the highway." 6-ER-1175-76.

Following the REA, BLM took the necessary steps to authorize construction: On February 28, 2008, it issued a tree-removal permit for cutting Dwyer's old-growth trees, 5-ER-1037; and on April 2, it granted a right of way authorizing construction within Dwyer. 5-ER-1025-34; 5-ER-1009-12. Following the permit and right of way, on April 8, FHWA published a notice in the Federal Register, stating that "[c]omments or questions concerning this proposed action and the FONSI should be directed to the FHWA." 73 Fed. Reg. 19,134, 19,134-35 (Apr. 8, 2008).

Meanwhile, Plaintiffs continued speaking out about their site—before issuance of the tree-removal permit or right of way, before the Federal Register notice, and before any tree-cutting or construction began. And they did so despite their well-founded fear that publicly disclosing their practices could lead to the same sort of vandalism that had occurred in the 1990s. 5-ER-929; 3-ER-474; 4-ER-669-70; 3-ER-330; *see also* 10-ER-2236 (FHWA guidelines recognizing that "[m]any tribes[']…beliefs require that the location and even the existence of traditional religious and cultural properties not be divulged").

In January 2008, Logan called FHWA and spoke about the religious use of the site. 5-ER-996. On February 14 and 15, Logan sent FHWA multiple memoranda discussing the "American Indian cultural and religious sites" in Dwyer, and expressing belief that "an additional lane c[ould] be added in the Wildwood to Wemme area without destroying heritage resources." 6-ER-1147-56; *see also* 6-ER-1067-69. In a February 15 memorandum, Logan and Jones gave the Government a copy of (*inter alia*) the 1987 Agreement, a transcript of the 1991 meeting with Wilferd Yallup, and a 1991 letter from a Yakama leader regarding use of the area—highlighting the burials, the altar, and the religious significance of the site. 6-ER-1070-1146. March 2008 notes from a federal official reflect communications from Slockish, Jackson, and Logan about the site, including that "these are [Native] sites" that have "graves," and that Plaintiffs were "not consulted about the project." 5-ER-1022-23.

After tree removal began—but before construction—Jackson, Logan, and Slockish sent additional memoranda in April and May, each of which detailed the Dwyer site's history and importance to Native American religious exercise. 5-ER-981-1007. In May, an FHWA official, alerted by Plaintiffs' attorney to "Indian remains on the site," informed Philipek. 5-ER-1022. Philipek said she had "addressed the issue with" Plaintiffs "in 1986" and decided it was not worth protecting. *Id.* Philipek returned to the site on July 24, 2008, and documented that the "rock cluster" had

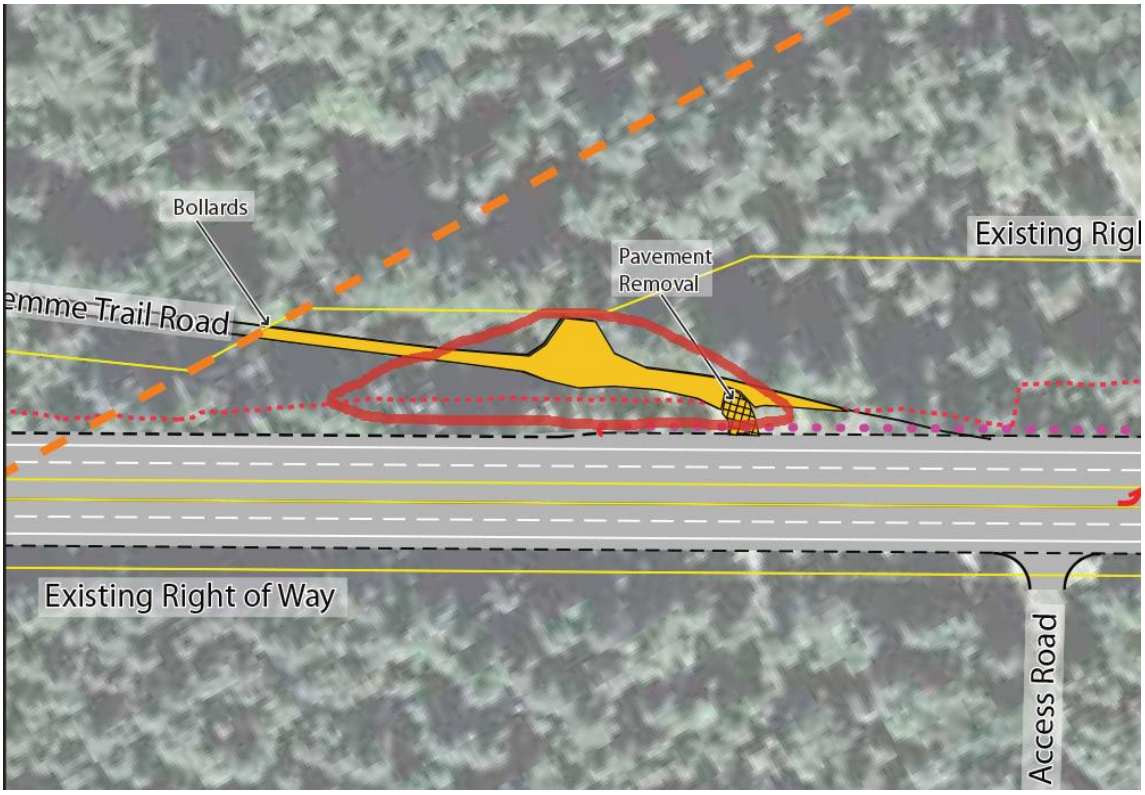
been scattered. 5-ER-969-73. She drafted a report about the visit, attaching the notes from her 1990 call with Jones highlighting the sacred nature of the site and its religious usage by Native Americans. 5-ER-964-67. All of Plaintiffs' outreach—in the 1980s, 1990s, and continuing through 2008—is included in the administrative record compiled for this project and submitted by Defendants in this case.

Construction began the week of July 28, 2008. ECF 122 at 7-8. 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. 6-ER-1331; 7-ER-1377. During tree removal, around twelve "stone monuments" marking the "surrounding graves" of Plaintiffs' ancestors were uncovered from where they "had become camouflaged by the trees and vegetation." 5-ER-876-877; *see also* 4-ER-587; 3-ER-469-70; 5-ER-887; 5-ER-896. These markers were "scraped up" and removed. 5-ER-887-88. The traditional campground and burial grounds were bulldozed and buried beneath a massive earthen berm. 5-ER-935. Before tree removal, the stone altar had "a red flag over it," so Plaintiffs hoped it would be protected. 3-ER-468; *see also* 5-ER-887; 5-ER-875. But the altar was "scattered and disturbed" during tree removal, 5-ER-969, and ultimately "disposed of." ECF 287 at 28. The native vegetation formerly covering the campground, including the sacred medicine plants, was replaced with

grass. 3-ER-349. And a new guardrail blocked off the former access to the site. 5-ER-923; 5-ER-947-48.

The following map, satellite images, and photographs depict the destruction of the site:[4]

Construction Map (6-ER-1215)



[4] Interactive photos of the site before and after construction are available from Google (https://bit.ly/3380iM4) and 2-ER-173 (http://bit.ly/2usgvbo), respectively.

Before Widening – 2005 (2-ER-181)

After Widening – 2016 (2-ER-179)

Before Widening – 2008 (2-ER-177)

After Widening – 2017 (2-ER-183)

The destruction of the site has rendered Plaintiffs' religious practices impossible. 5-ER-948; 3-ER-496; 3-ER-531-32; 4-ER-674; 4-ER-675; 3-ER-353.

F. Proceedings Below

Plaintiffs filed suit on October 6, 2008. ECF 1. In May 2009, the Government moved to dismiss for lack of standing, claiming that because it had already destroyed the sacred site, Plaintiffs' injury was no longer redressable. ECF 28-2 at 5-8, 10-12. The magistrate and district judges rejected that argument. ECF 52. In June 2011, Defendants moved for judgment on the pleadings, arguing that destruction of Plaintiffs' site did not impose a "substantial burden" on their religious exercise under RFRA. ECF 104 at 8-13. The magistrate and district judges rejected this argument, too, reasoning that Defendants imposed a substantial burden by destroying religious artifacts and eliminating access to the site. ECF 131 at 9-10. The case was then stayed for almost three years to facilitate settlement negotiations. ECF 208. After those negotiations failed, the case was reassigned to new magistrate and district judges. ECF 234, 301.

After discovery, the parties in May 2017 cross-moved for summary judgment on Plaintiffs' claims under RFRA. ECF 287, 292. The new magistrate judge rejected the prior judges' rulings and recommended granting Defendants' motion, reasoning that the total destruction of Plaintiffs'

sacred site did *not* constitute a "substantial burden" on Plaintiffs' religious exercise, even though it made Plaintiffs' religious practices physically impossible. 1-ER-95-108. The district court adopted the magistrate's recommendation and dismissed Plaintiffs' RFRA claims. 1-ER-89-92.

The parties then filed cross-motions for summary judgment on Plaintiffs' claims under (*inter alia*) NEPA, NHPA, FLPMA, DTA, and the Free Exercise Clause. After those motions had been pending for a year (and Michael Jones, the head of Plaintiffs CGS and MHSLPA, had died), the magistrate on April 1, 2020, issued findings and recommendations. 1-ER-6-88. The magistrate did not reach the merits of most of Plaintiffs' claims—stating that the merits were "tangled." 1-ER-49. Instead, it recommended dismissing Plaintiffs' claims on the threshold grounds of laches and waiver (1-ER-69-81)—even though the Government had never asserted these affirmative defenses in any of its four answers and did not raise them until a decade after litigation began. ECF 350 at 12.

Plaintiffs timely objected to the magistrate judge's recommendation. ECF 350. Ten months later—after Plaintiff Jackson had died (ECF 352) and Plaintiffs had filed an unopposed motion to expedite (ECF 353)—the district court issued a five-paragraph order adopting the magistrate's recommendations in part and granting summary judgment to Defendants. 1-ER-3-5. Although the district court rejected the magistrate's ruling on

laches, it found "no basis to modify the remainder of the Findings & Recommendation"—thus granting summary judgment to the Government on Plaintiffs' remaining claims, most of them on grounds of administrative waiver. 1-ER-4. The five-paragraph order included no additional substantive reasoning.

The district court entered judgment a month later, on March 19, 2021. 1-ER-2. Plaintiffs noticed this appeal the next business day. ECF 359.

STANDARD OF REVIEW

This Court "review[s] de novo a district court's decision on cross-motions for summary judgment." *Comcast of Sacramento I, LLC v. Sacramento Metro. Cable Television Comm'n*, 923 F.3d 1163, 1168 (9th Cir. 2019). Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

SUMMARY OF ARGUMENT

The needless destruction of Plaintiffs' sacred site violated multiple federal laws, and the district court's contrary ruling should be reversed.

I. Under RFRA, the federal government may not impose a "substantial burden" on religious exercise unless imposing that burden is the least restrictive means of advancing a compelling governmental interest. Here, the Government has substantially burdened Plaintiffs' religious exercise by making it physically impossible for Plaintiffs to engage in essential,

longstanding religious practices. It is undisputed that for decades, Plaintiffs performed key religious exercises at the site that cannot be replicated elsewhere. But the Government's actions rendered these exercises impossible—by cutting down the trees, destroying the sacred altar, and burying the site under an earthen berm.

The Government therefore bears the burden of satisfying strict scrutiny. But it hasn't tried to carry this burden. And it can't meet this burden because its actions weren't the least restrictive means of furthering a compelling governmental interest.

II. Under the Free Exercise Clause, the Government must satisfy strict scrutiny unless the burden on religious exercise is "neutral and of general applicability." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 521 (1993). If the government "treat[s] *any* comparable secular activity more favorably than religious exercise," it fails this test. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). Here, the Government treated a nearby wetlands more favorably than Plaintiffs' sacred site. That triggers strict scrutiny, which the Government cannot satisfy.

III. Under NEPA, agencies must take a "hard look at environmental consequences" before acting. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (cleaned up). The Government violated NEPA in three ways. First, the project here could only take place if BLM

granted both a tree-removal permit and a right-of-way authorizing construction. But the Government performed no NEPA analysis for these actions at all. Second, FHWA performed only a narrow NEPA analysis for the project as a whole, and improperly focused on "lichens and vascular plants" instead of the large, old-growth trees which were the reason for federal protections of Dwyer in the first place. Third, FHWA also ignored several feasible alternatives that would have minimized the impact on Dwyer—an especially egregious error when the Government used those same alternatives to minimize impacts on nearby wetlands.

IV. NHPA requires federal agencies to consider the impact of any undertaking on properties of traditional religious and cultural importance to an Indian tribe. The Government violated NHPA by failing to do so here. BLM performed no NHPA analysis for its actions, and FHWA erred by attempting to delegate to a state agency its NHPA duty to consult with tribes—an action expressly forbidden by NHPA's text. And even assuming such a delegation were permissible, consultation with the Yakama occurred only after the tree-removal had already taken place—long after the time required by statute.

V. Under FLPMA, "BLM must take 'any action necessary to prevent unnecessary or undue degradation of'" federal lands. *Te-Moak Tribe of W. Shoshone Indians of Nev. v. DOI*, 565 F. App'x 665, 667 (9th Cir. 2014) (quoting 43 U.S.C. §1732(b)). Here, the Government violated FLPMA by

failing to prevent the undue degradation of both Plaintiffs' sacred site and Dwyer's old-growth trees.

VI. Section 4(f) of the DTA prohibits FHWA from approving highway projects unless there are "no prudent and feasible alternative[s]" and the project "includes all possible planning" to minimize any impact on parks and recreation sites. 49 U.S.C. §303(c). Dwyer was officially designated as part of the Wildwood Recreation Site—which all parties agree is protected by §4(f). FHWA nonetheless failed to perform a §4(f) evaluation and made no effort to use prudent and feasible alternatives to minimize the impact on Dwyer.

VII. The lower court's conclusion that Plaintiffs waived their NEPA, NHPA, FLPMA, and DTA claims was erroneous. The Government waived this affirmative defense by failing to plead it in its answer. And the defense is meritless, because the record shows that the Government had abundant, specific knowledge—both independently and directly from Plaintiffs—of the issues Plaintiffs raised in this lawsuit.

ARGUMENT

I. The Government violated RFRA.

Congress enacted RFRA "to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014). Under RFRA, "Government shall not substantially burden a person's exercise of religion" unless it satisfies strict scrutiny. 42 U.S.C. §2000bb-1(a)-(b).

RFRA claims proceed in two steps. First, the plaintiff must show his "exercise of religion" has been "substantially burdened." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006). Second, "the burden is placed squarely on the Government" to prove that substantially burdening the plaintiff is "the least restrictive means" of furthering a "compelling governmental interest." *Id.* at 418, 429. Here, the Government has imposed a substantial burden by destroying Plaintiffs' sacred site. And it has waived any strict scrutiny defense.

A. The destruction of Plaintiffs' sacred site imposes a substantial burden on Plaintiffs' religious exercise.

According to its ordinary meaning, a substantial burden is "a significantly great restriction or onus" on any exercise of religion. *Warsoldier v. Woodford*, 418 F.3d 989, 995 (9th Cir. 2005) (quotation marks omitted). It is "more than an inconvenience." *Guru Nanak Sikh Soc'y of Yuba City v. Cnty. of Sutter,* 456 F.3d 978, 988 (9th Cir. 2006). As this definition suggests, a burden need not be "complete, total, or insuperable" to count. *Thai Meditation Ass'n of Ala. v. City of Mobile*, 980 F.3d 821, 830 (11th Cir. 2020). But "government conduct" that *does* "'completely prevent[]'" the plaintiff's religious exercise "clearly satisfies" it. *Id.*; *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008) ("We have little difficulty in concluding that an outright ban on a particular religious exercise is a substantial burden on that religious exercise.").

The Supreme Court's cases illustrate the point. In *Sherbert v. Verner*,

374 U.S. 398 (1963), a state denied unemployment compensation to a Seventh-day Adventist who declined to work on her Sabbath. *Id.* at 399-401. This imposed a substantial burden because it forced her "to choose" between either "abandoning one of the precepts of her religion" or "forfeiting benefits." *Id.* at 404; *see also Holt v. Hobbs*, 574 U.S. 352, 361 (2015) (putting Muslim prisoner to "choice" of shaving his beard or facing discipline "easily satisfied" substantial-burden test).

But in some cases, the Government is even more coercive. Instead of offering a "choice," it makes the religious exercise impossible. And when the Government "*prevents* the plaintiff from participating in a[][religious] activity," giving the plaintiff no "degree of choice in the matter," it "easily" imposes a substantial burden. *Yellowbear v. Lampert*, 741 F.3d 48, 55-56 (10th Cir. 2014) (Gorsuch, J.) (emphasis added); *accord Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014) ("greater restriction…includes the lesser one").

Thus, as the Supreme Court recently recognized, government prevention of religious exercise through physical acts—such as "*destruction of religious property*"—can constitute a "RFRA violation[]." *Tanzin v. Tanvir*, 141 S. Ct. 486, 492 (2020) (emphasis added); *cf. United States v. Antoine*, 318 F.3d 919, 924 (9th Cir. 2003) (assuming "raz[ing]" a "house of worship" would be a substantial burden). And this Court's precedents

have repeatedly acknowledged that government action giving the plaintiff no choice in the matter—but instead simply taking action to violate religious beliefs or make religious exercise impossible—constitutes a substantial burden.[5]

That is what occurred here. The Government offered Plaintiffs no "choice"—such as allowing them to use the sacred site subject to penalties. Instead, the Government physically destroyed the site—making Plaintiffs' religious practices impossible. Thus, this is an *a fortiori* case. Or as Judge Bumatay explained: "the complete destruction" of a sacred site is "an obvious substantial burden." Order at 4, *Apache Stronghold v. United States*, No. 21-15295 (9th Cir. Mar. 5, 2021) (Bumatay, J., dissenting); *see id.* 1-2 (no disagreement on merits); *see also Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1069 (9th Cir. 2011)

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[5] *See, e.g.*:

- *Greene*, 513 F.3d at 988 ("little difficulty" finding that prison's "outright" refusal to allow inmate to attend worship services was a "substantial burden");
- *Warsoldier*, 418 F.3d at 996 (government conceded that "physically forc[ing an inmate] to cut his hair" would constitute a substantial burden);
- *Mockaitis v. Harcleroad*, 104 F.3d 1522, 1525, 1530 (9th Cir. 1997) ("no question" of substantial burden where officials secretly recorded priest giving confession), *overruled on other grounds by City of Boerne v. Flores*, 521 U.S. 507 (1997);
- *Nance v. Miser*, 700 F. App'x 629, 631-32 (9th Cir. 2017) (prison's denial of religious oils constituted substantial burden).

("a place of worship…is at the very core of the free exercise of religion"); *Comanche Nation v. United States*, No.CIV-08-849-D, 2008 WL 4426621, at *17 (W.D. Okla. Sept. 23, 2008) (physical interference with worship at sacred site "amply demonstrate[d]" a "substantial burden").

The magistrate failed to grapple with this straightforward analysis. Instead, it found no substantial burden based on several arguments, each meritless.

First, it attempted to distinguish some of Plaintiffs' cases by saying they involved RLUIPA, not RFRA. 1-ER-106-07. But *Tanzin* and *Comanche Nation* are RFRA cases. More importantly, the Supreme Court has said that RLUIPA "mirrors RFRA" and imposes "the same standard as set forth in RFRA," *Holt*, 574 U.S. at 357-58—which makes sense, given that the operative text of both statutes is identical. *Accord Nance*, 700 F. App'x at 630.

Second, the magistrate said that under *Lyng* and *Navajo Nation*, Plaintiffs suffer no substantial burden even when they experience "actual destruction of their religious site." 1-ER-102-03. But neither case involved physical destruction of a sacred site; rather, both acknowledged the outcome would have been different otherwise.

In *Navajo Nation v. U.S. Forest Service*, plaintiffs challenged the use of treated wastewater to make artificial snow for a ski area on a sacred

mountain. 535 F.3d 1058, 1062-63 (2008) (en banc). In finding no substantial burden, this Court emphasized that the snow would have *no physical impact* on the area, much less destroy it: "no plants, springs, natural resources, shrines with religious significance, or religious ceremonies…would be physically affected[;] [n]o plants would be destroyed or stunted; no springs polluted; no places of worship made inaccessible, or liturgy modified." *Id.* at 1063. No religious practices were made physically impossible; "the sole effect [was] on the Plaintiffs' *subjective spiritual experience*." *Id.* (emphasis added).

Here, by contrast, "plants *w[ere]* destroyed"; "shrines with religious significance [and] religious ceremonies…*w[ere]* physically affected"; and a place of worship [*was*] made" not just "inaccessible" but destroyed. The claim isn't just about "subjective spiritual experience"; it's about the physical destruction of Plaintiffs' sacred site. Thus, *Navajo Nation* is inapposite.

So, too, is *Lyng v. Northwest Indian Cemetery Protective Association*, which involved completion of a road near sacred sites. There, the Court emphasized that the Government "could [not] have been more solicitous" toward religious practices. 485 U.S. 439, 454 (1988). It chose a route that was "farthest removed from contemporary spiritual sites," and "provided for one-half mile protective zones around all the religious sites." *Id.* at

454, 443. This ensured that "*[n]o sites where specific rituals take place [would] be disturbed*." *Id.* at 454 (emphasis added).

The magistrate cited the *Lyng* plaintiffs' claim that the road would "*virtually destroy*" their "ability to practice their religion." 1-ER-103. But that claim was not based on physical destruction of their sacred site; it was based solely on the road's effect on their subjective "spiritual development." *Lyng*, 485 U.S. at 451. Accordingly, the Court held that the existence of a substantial burden "cannot depend on measuring the effects of a governmental action on *a religious objector's spiritual development*." *Id.* (emphasis added). But the Court acknowledged that "prohibiting the Indian [plaintiffs] from *visiting* [their sacred sites] would raise a different set of constitutional questions." *Id.* at 453 (emphasis added).

Here, Plaintiffs' sacred site has not just been "disturbed," *id.* at 454, but destroyed. They have not just been prevented from "visiting" their site, *id.* at 453, it has been interred under a massive berm. And far from being maximally "solicitous" of Plaintiffs' religious practices, *id.* at 454, the Government was maximally destructive.[6]

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[6] The same distinction of *Navajo Nation* and *Lyng* applies to the other cases the magistrate cited. 1-ER-99-101. These cases only involved claims regarding a subjective impact on spiritual development. None involved physical destruction of a sacred site:

- *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1215 (9th Cir. 2008) (plaintiffs could access sacred falls; claims concerned "the *quality* of [their] religious experience");

Third, citing *Navajo Nation*, the magistrate held that Plaintiffs can establish a "substantial burden" only if they demonstrate one of two "critical elements": (1) "that they are being coerced to act contrary to their religious beliefs under the threat of sanctions," or (2) "that a governmental benefit is being conditioned upon conduct that would violate their religious beliefs." 1-ER-102. In other words, had the Government merely fenced off Plaintiffs' site and threatened "sanctions" for trespassing, Plaintiffs would face a "substantial burden"; but now that the Government obliterated the site—rendering Plaintiffs' religious practices impossible—they do not.

That is absurd. *Navajo Nation* says "[a]ny burden imposed on the exercise of religion *short of*" losing a government benefit or suffering a criminal or civil sanction is not a "'substantial burden' within the meaning of RFRA." 535 F.3d at 1069-70 (emphasis added). In other words, loss of

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- *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. DOI*, No. 11-cv-00395, 2012 WL 2884992, at *7 (C.D. Cal. July 13, 2012) (Government guaranteed "access to sites" and "use and possession of sacred objects");
- *S. Fork Band v. DOI*, 643 F. Supp. 2d 1192, 1208 (D. Nev. 2009) ("Plaintiffs will continue to have access to the areas identified as religiously significant"), *aff'd in part, rev'd in part on other grounds*, 588 F.3d 718 (9th Cir. 2009);
- *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-1534, 2017 WL 908538, at *9 (D.D.C. March 15, 2017) (no claim that the Government destroyed a sacred site—only that it rendered lake "ritually [im]pure" by allowing a pipeline to be built underneath it).

benefits or threat of sanctions is the *minimum* needed to establish a substantial burden; it is not the *universe* of substantial-burden claims. If government action is *worse*, as here, courts have "little difficulty" finding a substantial burden. *Greene*, 513 F.3d at 988.

The magistrate's contrary reading of *Navajo Nation* produces grotesque results. In *Wisconsin v. Yoder*, for example, the Court held that imposing a $5 criminal fine on Amish families for violating compulsory schooling laws was a substantial burden. 406 U.S. 205 (1972). But under the magistrate's reasoning, forcibly rounding up Amish children and sending them to a public boarding school—as the Government did to Native American children in the 1800s—would not be. *See* Stephanie Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1332 (2021); *id.* at 1327, 1332 & nn.205-208 (collecting other examples of "brute force" substantial burdens). That cannot be what RFRA means.

Fourth, the magistrate held that Plaintiffs have not suffered a substantial burden because they can still "freely access" their site—by standing on the earthen berm where the historic campsite, graves, altar, and trees once stood. 1-ER-111. But this is, frankly, insulting—like claiming that because parishioners can stand on a pile of rubble where their bulldozed church once stood, they can "freely access" their church. A sacred

site, like a church, is more than a set of GPS coordinates. Plaintiffs cannot "freely access" a sacred site that has been destroyed.

Alternatively, the magistrate concluded that "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…is accomplished." 1-ER-112. But that squarely contradicts *Lyng*, which noted that "prohibiting the Indian respondents from *visiting* [a sacred site] would raise a different set of constitutional questions." 485 U.S. at 453 (emphasis added). It also contradicts the Government's own concession in *Navajo Nation*—that it *would* be a substantial burden to eliminate access to a religious site on federal land. *See* Oral Arg. at 41:50-43:26, 535 F.3d 1058 (2008) (No. 06-15371) (en banc), https://perma.cc/4X8U-SZZR. And it is contrary to the record, which shows that the destruction of Plaintiffs' site has coercively stopped their religious practices by making those practices impossible.

Fifth, the magistrate said Plaintiffs have not shown a substantial burden because they supposedly have "substitute" sites "capable of serving the exact same religious function." 1-ER-102-03, 112-13 (quoting *Oklevueha Native Am. Church of Haw., Inc. v. Lynch*, 828 F.3d 1012, 1017 (9th Cir. 2016)). But this wrong both factually and legally. Factually, there is no site with the "exact same religious function"—there is no other altar like this one, 3-ER-484-85, 488; 5-ER-887; 5-ER-895; no other place

to gather the sacred medicine plants, 3-ER-459, 532; and the spirits of Plaintiffs' ancestors are not fungible, 2-ER-211-36; 5-ER-878; 5-ER-886; 5-ER-943-44. *Cf. Oklevueha*, 828 F.3d at 1017 (plaintiff *admitted* that cannabis was "simply a substitute for peyote").

And legally, the Supreme Court has rejected the notion that there is no substantial burden on one aspect of a plaintiff's religious exercise just because the plaintiff can engage in another. The "inquiry asks whether the Government has substantially burdened religious exercise…, not whether the…claimant is able to engage in other forms of religious exercise." *Holt*, 574 U.S. at 361-62.

Finally, even accepting the magistrate's misreading of *Navajo Nation*, Dwyer's destruction *does* deny Plaintiffs a "governmental benefit": the use and enjoyment of "government" land for religious exercise.

B. The Government cannot satisfy strict scrutiny.

Given the substantial burden, the Government must satisfy strict scrutiny. But it has not even tried. Because it "bears the burden of proof" on this issue, its failure to carry that burden below means Plaintiffs prevail. *O Centro*, 546 U.S. at 426-30.

Even if it tried, the Government could not satisfy strict scrutiny. Strict scrutiny "is the most demanding test known to constitutional law." *Boerne*, 521 U.S. at 534. The Government must prove destroying Plaintiffs' sacred site was "the least restrictive means" of furthering a "compelling governmental interest." *O Centro*, 546 U.S. at 418, 429. It cannot.

***Compelling governmental interest*:** "[I]n this highly sensitive…area, only the gravest abuses, endangering paramount interest[s]," allow the government to limit free exercise. *Sherbert*, 374 U.S. at 406 (cleaned up). Here, it would not be a "grave abuse" to protect Dwyer—as the Government did for almost 40 years. Rather, the opposite is true. The Government has a "compelling interest" in "preserving Native American culture and religion." *United States v. Hardman*, 297 F.3d 1116, 1128-29 (10th Cir. 2002) (en banc) (collecting cases). Meanwhile, the stretch of U.S. 26 bordering Dwyer was statistically safer than comparable roads in Oregon. 6-ER-1211.

Furthermore, whatever interests supported the decision to destroy Plaintiffs' sacred site also extended to the nearby wetland. Yet the Government adjusted the project to "avoid" "impact[ing]" the wetland. 6-ER-1175-76. That alone undermines any compelling-interest showing. *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)).

***Least restrictive means*:** Even assuming the Government's actions furthered a compelling interest, the Government still fails strict scrutiny because it had "other means of achieving its desired goal" while burdening Plaintiffs less. *Hobby Lobby*, 573 U.S. at 728. Specifically, it could have reduced the speed limit or widened to the south, with no impact on

Plaintiffs' site. "[M]ost straightforward[ly]," the Government could have used the same alternatives it adopted to protect the nearby wetland, such as a steeper slope or retaining wall. *Id.* In fact, Plaintiffs pleaded with the Government that "an additional lane c[ould] be added" to the highway "without destroying heritage resources." 6-ER-1147-56; 6-ER-1067-69; *see Holt*, 574 U.S. at 365 ("If a less restrictive means is available for the Government to achieve its goals, the Government must use it." (cleaned up)). Yet the Government ignored them. Thus, it fails strict scrutiny.

II. The Government violated the Free Exercise Clause.

The Government's needless destruction of Plaintiffs' sacred site also violated the Free Exercise Clause. Under that Clause, government action burdening religion is subject to strict scrutiny if it "is not neutral or not of general application." *Lukumi*, 508 U.S. at 521.

Government actions fail neutrality and general applicability "whenever they treat *any* comparable secular activity more favorably than religious exercise." *Tandon*, 141 S. Ct. at 1296. For instance, in *Lukumi*, the Court considered a municipal ordinance prescribing punishments for "whoever…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. *Id.* at 537-38.

The same analysis applies here. The Government steepened the slope to avoid impacting a wetland. 6-ER-1175-76. But the Government declined to do the same for Plaintiffs' site. 6-ER-1147-56; 6-ER-1067-68. That "value judgment" triggers strict scrutiny. *Fraternal Ord. of Police v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (Alito, J.).

The magistrate didn't address this point, instead rejecting Plaintiffs' free-exercise claim on the theory that a free-exercise plaintiff must (as under RFRA) show a "substantial burden." 1-ER-86. But "there is no substantial burden requirement" under the Free Exercise Clause. *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 170 (3d Cir. 2002). Rather, when a law is not neutral or generally applicable, the Free Exercise Clause applies "[r]egardless of the magnitude of the burden imposed," *Fazaga v. FBI*, 965 F.3d 1015, 1058 (9th Cir. 2020), provided (as here) the plaintiff has alleged "specific religious conduct that was affected by the Defendants' actions." *Cal. Parents for the Equalization of Educ. Materials v. Torlakson*, 973 F.3d 1010, 1017 (9th Cir. 2020); *see also, e.g.*, *Tandon*, 141 S. Ct. 1294 (no substantial-burden analysis); *Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020) (same). So even if the district court's substantial-burden analysis were correct—and it isn't—that still wouldn't shield the Government from strict scrutiny, which it can't satisfy. *See supra*, Part I.B.

III. The Government violated NEPA.

NEPA imposes "a set of 'action-forcing' procedures that require that agencies take a "'hard look' at 'environmental consequences'" before engaging in projects. *Robertson*, 490 U.S. at 350. NEPA requires that "for all 'major Federal actions significantly affecting the quality of the human environment,' the agency must prepare an EIS." *Idaho Conservation League v. Bonneville Power Admin.*, 826 F.3d 1173, 1175 (9th Cir. 2016) (quoting 42 U.S.C. §4322(C)). To determine significant impact, the agency prepares an EA. *Bob Marshall All. v. Hodel*, 852 F.2d 1223, 1225 (9th Cir. 1988). Regardless, the agency must "give full and meaningful consideration to all reasonable alternatives." *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013).

The Government here violated NEPA in multiple ways.

A. Failure to perform NEPA analysis

First, BLM violated NEPA by failing to perform *any* NEPA analysis for its two major federal actions—the grant of a tree-cutting permit and right of way. "[I]f a federal permit is a prerequisite for a project with adverse impact on the environment, *issuance of that permit*…constitute[s] major federal action." *Ramsey v. Kantor*, 96 F.3d 434, 444 (9th Cir. 1996) (emphasis added). Yet BLM failed to prepare an EA or EIS before granting the right of way or the tree-cutting permit—though both were prerequisites for the widening. *See* 43 C.F.R. §5511.3-2(b)(1) (prohibiting tree

removal from BLM land without a permit); 6-ER-1180 ("right-of-way from BLM" "needed").

This failure violated NEPA. *Ramsey*, 96 F.3d at 444 ("clear" violation to issue permit without NEPA analysis).

B. Failure to prepare EIS

Second, FHWA violated NEPA by preparing only an EA, not an EIS. An EIS is required if the EA raises "substantial questions" whether the project "*may* cause significant degradation of some human environmental factor." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864 (9th Cir. 2005) (cleaned up).

One way a project can be "significant" is if it "severe[ly]" impacts an area's "unique characteristics." *Id.* at 865, 868; *see also Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1086 (D.C. Cir. 2019). Applying that criterion here, the EA showed the project would significantly impact Dwyer. The EA recognized the widening would "clear" a "25 to 50"-foot strip of land—"includ[ing] most of [Dwyer's] larger trees." 6-ER-1264. It thus would convert Dwyer from a "fairly dense stand" of "late-successional Douglas-fir forest" to a "more open" area "with younger and smaller trees." 6-ER-1238, 1332.

Yet it was precisely Dwyer's status as a "dense stand" of older, larger trees that made it unique and prompted its federal protection in the first place. *See Anglers of the Au Sable v. USFS*, 565 F. Supp. 2d 812, 826-27

(E.D. Mich. 2008) (old-growth trees are "unique characteristic of the project area"); *Bair v. Cal. State Dep't of Transp.*, No. 17-6419, 2019 WL 2644074, at *2 (N.D. Cal. June 27, 2019), *rev'd on other grounds*, 982 F.3d 569 (9th Cir. 2020) (similar). Dwyer was donated to the Government to preserve its trees. 10-ER-2138; 9-ER-2060. The Government altered the 1980s widening to "minimize the number of trees taken." 9-ER-1848. The SDMP prohibited "timber harvest" in Dwyer to protect its "large older trees." 6-ER-1331. And in ORCA, Congress required BLM to manage the relevant parts of Dwyer "for purposes other than timber harvest"—thus protecting its trees. 7-ER-1545-47.

Even *this* project initially focused on Dwyer's trees. The scoping document recommended protecting the "old-growth" trees that the Government had in the 1980s "expended considerable effort to protect." 7-ER-1475. And FHWA officials acknowledged the 1980s widening "was opposed…as a significant impact upon" Dwyer's "'old growth' trees," and this project posed "the same issues as before." 7-ER-1458.

Yet in the EA, the Government pivoted, stating "the truly unique botanical values at [Dwyer] include a diverse group of lichens and vascular plants," which would be unaffected. 6-ER-1247, 1256, 1331. But *nothing* in the record predating this project suggests Dwyer's importance derived from "lichens and vascular plants," rather than trees. And while an agency can change views, it must provide a "reasoned explanation for

disregarding previous" findings, *Organized Vill. of Kake v. USDA*, 795 F.3d 956, 966-67, 969 (9th Cir. 2015) (en banc). It cannot simply "avert[] its eyes," as it did here. *Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914, 930-31 (D.C. Cir. 2017). Because the destruction of Dwyer's trees was "significant," this project required an EIS.

C. Failure to consider reasonable alternatives

Third, the Government violated NEPA because the EA failed to consider reasonable alternatives: a steeper slope or retaining wall within Dwyer.

The Government selected the alternative of widening to the north using a 3:1 slope—destroying "most of [Dwyer's] larger trees." 6-ER-1331. But the EA failed to consider whether, even assuming widening to the north, the project could use a steeper slope or 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[]"; a "1.5:1 slope"; and a "3:1 slope." 6-ER-1265-66. The 3:1 slope would have the maximally destructive impact, extending the project's "footprint" and thus requiring removal of more trees. 6-ER-1266.

Nonetheless, the Government chose that option (6-ER-1178), never considering a steeper slope or retaining wall *within Dwyer*. Those options were reasonable and consistent with the project's purposes, enabling the Government to build the same road with less impact. In fact, the Government used just such a more protective slope to preserve nearby wetlands.

6-ER-1175-76. And it had already used such measures in the 1980s to protect Dwyer itself. 9-ER-1848.

"The existence of a viable but unexamined alternative renders an EA inadequate," violating NEPA. *W. Watersheds*, 719 F.3d at 1050 (internal quotation marks omitted). That's especially so where, as here, the unexamined alternatives are "*more* consistent with" the project's objectives than the one actually chosen. *Muckleshoot Indian Tribe v. USFS*, 177 F.3d 800, 813-814 (9th Cir. 1999) (emphasis added).

IV. The Government violated NHPA.

NHPA requires federal agencies to "take into account the effect of any undertaking on" historic properties. *Pit River Tribe v. USFS*, 469 F.3d 768, 787 (9th Cir. 2006) (internal quotation marks omitted). To comply, agencies must complete a "section 106 process." *Te-Moak Tribe of W. Shoshone of Nev. v. DOI*, 608 F.3d 592, 607 (9th Cir. 2010). Under that process, the agency must, *inter alia*, "consult" with any tribe that "attaches religious and cultural significance" to properties potentially affected. 54 U.S.C. §302706(b); *see also* 36 C.F.R. 800.2(c)(2)(ii).[7]

Here, the Government violated NHPA in three ways.

A. Failure to perform any Section 106 process

First, BLM violated NHPA by failing to perform *any* Section 106 process. Section 106 applies to all federal "undertaking[s]." 54 U.S.C.

[7] NHPA was recodified in 2014 from its prior position in title 16. This brief references the current codification.

§306108. "Because of the operational similarity between the two statutes, courts generally treat 'major federal actions' under the NEPA as closely analogous to 'federal undertakings' under the NHPA." *Sac and Fox Nation of Mo. v. Norton*, 240 F.3d 1250, 1263 (10th Cir. 2001). So just as they constituted "major federal actions," BLM's tree-cutting permit and right-of-way grants also were "undertakings." *See, e.g.*, *Dugong v. Rumsfeld*, No. C 03-4350 MHP, 2005 WL 522106, at *12-13 (N.D. Cal. Mar. 2, 2005) ("undertakings" include "licensing" and "land grants" (collecting cases)); *Mont. Wilderness Ass'n v. Fry*, 310 F. Supp. 2d 1127, 1151-52 (D. Mont. 2004) ("right-of-way grant" was "undertaking"); *see also* 54 U.S.C. §300320 ("'undertaking' means a project, activity, or program under the direct or indirect jurisdiction of a Federal agency"). Yet BLM engaged in no Section 106 process for either action, violating NHPA.

B. Failure to perform tribal consultation

Second, the Government violated NHPA by failing to consult with Indian tribes. Indeed, *no* federal agency consulted with *any* tribe regarding this project. Instead, the Government claims ODOT consulted "on behalf of FHWA." 5-ER-1042. But "[w]hen 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. FCC*, 359 F.3d 554, 565-66 (D.C.

Cir. 2004). Here, Congress not only hasn't affirmatively authorized delegation—it expressly foreclosed it.

NHPA requires "*Federal agenc*[*ies*]" to consult with Native American tribes. 54 U.S.C. §302706(b). It grants no authority to delegate this responsibility to states. This "statutory 'silence'" leaves the presumptive rule—no delegation—"untouched." *U.S. Telecom*, 359 F.3d at 566.

Other provisions confirm this presumption. NHPA permits the Government to delegate certain *other* "responsibilities" to state officials—not including tribal consultation. 54 U.S.C. §302304(b)(1)(A); *see also id.* §302303 (direct responsibilities, no mention of tribal consultation). Likewise, the Federal-Aid Highway Act allows states to "assume" from FHWA certain consultation responsibilities—"*other than* responsibilities relating to federally recognized Indian tribes." 23 U.S.C. §325(a)(2) (emphasis added).

NHPA's implementing regulations agree. They acknowledge the "*Federal Government* has a unique legal relationship with Indian tribes"; require consultation to "recognize the government-to-government relationship between the *Federal Government* and Indian tribes"; instruct "*Federal agencies*" to consider certain factors when consulting with tribes; and allow tribes to enter agreements "with an *agency official*" specifying how "*they* will carry out" consultation—with "agency" defined to mean an "authority *of the Government of the United States*." 36 C.F.R.

§§800.2(c)(2)(ii)(B)-(E) (emphases added); *see id.* §800.16(b) (cross-referencing APA definition, 5 U.S.C. §551(1)).

Finally, BLM's NHPA guidelines expressly forbid delegation, stating: "**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), https://perma.cc/4BLE-DYWG, at V-4.

The Government's failure to perform any government-to-government consultation therefore violated NHPA.

C. Untimely consultation

Even assuming delegation was proper, ODOT's consultation was inadequate because ODOT didn't contact the Yakama until *after* the planning process was complete.

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)). Here, however, ODOT didn't contact the Yakama until April 2008, 5-ER-1008—two years after the EA, one year after the REA and FONSI, and even after tree-cutting and the destruction of Plaintiffs' altar were already complete. This violates NHPA. *Pit River*, 469 F.3d at 782 ("analysis…serve[s] no purpose" if done after project approval (internal quotation marks omitted)).

D. Plaintiffs have standing for their NHPA claims.

The district court initially concluded Plaintiffs had standing to raise these NHPA claims, because Plaintiffs "claim an interest in the preservation of the historic sites at issue," and thus "fall within the zone of interests protected by the NHPA." ECF 154 at 12; ECF 171. Later, however, the new magistrate reversed course, saying that "[i]t would debase a tribe's sovereignty for" tribe members to challenge the adequacy of consultation with tribes. 1-ER-49-55.

But this new theory contradicts precedent. The Supreme Court has repeatedly permitted individual Indian tribe members to assert claims based on tribal rights. *See, e.g., McGirt v. Oklahoma*, 140 S. Ct. 2452, 2460-63 (2020) (individual's challenge to prosecution based on "promises [made] to the Tribe"); *Herrera v. Wyoming*, 139 S. Ct. 1686, 1693 (2019) (same, treaty memorializing "the Tribe's right to hunt off-reservation"). Accordingly, "[c]ourts have consistently found that non-tribal plaintiffs asserting similar claims challenging the adequacy of an agency's section 106 efforts have standing under the NHPA." *Wishtoyo Found. v. USFWS*, No. CV 19-03322-CJC(ASx), 2019 WL 8226080, at *5 (C.D. Cal. Dec. 18, 2019) (collecting cases); *see Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1229-30 (9th Cir. 2008) (standing for *environmental group* to challenge adequacy of defendant's consultation with *agency*).

The district court's cases are inapposite. The issue in *Te-Moak* wasn't whether non-tribe plaintiffs could challenge the adequacy of consultation with a tribe; it was whether they could assert tribal-consultation requirements to challenge the adequacy of consultation *with them*. 608 F.3d at 608 n.19; *cf.* 1-ER-54. *La Cuna*, meanwhile, is nonprecedential, predates *Herrera* and *McGirt*, and has been distinguished where—as here—plaintiffs don't *just* challenge tribal consultation but assert "allegations [that] are…broadly based." *Wishtoyo*, 2019 WL 8226080, at *5; *cf.* 1-ER-54 (citing *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. DOI*, 642 F. App'x 690, 693 (9th Cir. 2016)). Accordingly, Plaintiffs have standing.

V. The Government violated FLPMA.

Under FLPMA, "BLM must take 'any action necessary to prevent unnecessary or undue degradation of [federal] lands.'" *Te-Moak,* 565 F. App'x at 667 (quoting 43 U.S.C. §1732(b)). BLM must also develop resource management plans, 43 U.S.C. §1712(a), then manage consistently with them, *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 69 (2004).

Here, BLM violated FLPMA in two ways. First, it degraded Dwyer by destroying a Native American sacred site. Second, in granting the tree-cutting permit, BLM both degraded Dwyer and failed to manage it consistently with the SDMP.

A. Destruction of sacred site

FLPMA's prohibition on unnecessary or undue degradation includes any action violating "a state or federal law relating to environmental or cultural resource protection." 43 C.F.R. §3809.5; *S. Fork Band Council of W. Shoshone of Nev. v. DOI*, 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, 61 Fed. Reg. 26,771 (May 24, 1996).

E.O. 13007 provides that "[i]n managing Federal lands," agencies "shall, to the extent practicable," "avoid adversely affecting the physical integrity of [Indian] sacred sites." *Id*. It defines "sacred site" as "any [1] 'specific, discrete, narrowly delineated location' of [2] 'established religious significance' or 'ceremonial use,'" *Te-Moak*, 565 F. App'x at 667-68, provided [3] an "appropriately authoritative representative of an Indian religion has informed the agency of" its existence. 61 Fed. Reg. 26,771. These "requirements are incorporated into FLPMA." *Te-Moak*, 565 F. App'x at 667; *see S. Fork*, 588 F.3d at 724.

BLM violated E.O. 13007 here. First, Plaintiffs' site is a "specific, discrete, [and] narrowly delineated location." It measured 100 by 30 meters—less than one acre within Dwyer, 5-ER-962-63; 6-ER-1331—and comprised specific, discrete features: a historic campground, altar, burial ground, old-growth trees, and medicinal plants. *Supra* pp. 10-12.

Second, the site was of "ceremonial use." Indigenous people have used it for religious purposes "since time immemorial," 5-ER-929; and Plaintiffs elaborated in detail on their own use as traditional religious leaders of their tribes. *Supra* pp. 12-13.

Third, Plaintiffs are "appropriately authoritative representative[s]" of their religion, 61 Fed. Reg. 26,771, because they are Hereditary Chiefs and an Elder who are responsible for maintaining the traditions of their tribes. *Supra* pp. 8-9. And the Government was "informed…of the" site's "existence," 61 Fed. Reg. 26,771—repeatedly, and over the course of decades. *See, e.g.*, 8-ER-1791; 9-ER-1935; 5-ER-966-67; 4-ER-637; 6-ER-1150-52.

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. 26,771. Instead, it destroyed the site entirely, despite numerous "practicable" measures that would have avoided it.

B. Grant of tree-cutting permit

Second, BLM violated FLPMA by issuing the tree-cutting permit. 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"—ORCA—and (2) violated BLM's FLPMA duty to maintain federal lands in accordance with the relevant resource

management plan—the SDMP. *See ONRCF v. Brong*, 492 F.3d 1120, 1125-28, 1135 (9th Cir. 2007).

Tree-cutting within Dwyer was prohibited both by ORCA and by the SDMP. Congress passed ORCA to protect "the scenic qualities of" the "Mt. Hood Corridor Lands"—a term defined to include the portion of Dwyer at issue here. §401(g), 110 Stat. at 3009-537. It therefore prohibits "[t]imber cutting" on such lands, except "following a resource-damaging catastrophic event," like a "forest fire." *Id.* §401(h).

Tree-cutting within Dwyer was also prohibited by the SDMP. The SDMP categorizes Dwyer as a "Special Area." 8-ER-1609. And it imposes restrictions on "timber harvest" in all "Special Areas"—in some, it is permitted only in certain "zone[s]"; in some, only non-"commercial" timber harvest is permitted; and in some, "timber harvest" is categorically prohibited. 8-ER-1609-10. In Dwyer, "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

8-ER-1609.

Nonetheless, BLM issued a permit allowing ODOT to "remov[e] timber" from Dwyer, 5-ER-1035, 1039, including in areas visible from the

highway. 6-ER-1264. This violated both ORCA and the SDMP—and thus FLPMA.

BLM's conclusion to the contrary was arbitrary and capricious. BLM said the project would "compl[y] with" ORCA because "a forested setting would be maintained" and "the parcel is in view while traveling" U.S. 26 for only a "short amount of time." 6-ER-1331-32. But this contradicts statutory text. ORCA protects *all* "Mt. Hood Corridor Lands"—there is no *de minimis* exception for projects affecting only a short stretch of them. And ORCA does not just tell BLM to maintain "a forested setting"; it tells it *how to do so*—by allowing "[t]imber cutting" only when made necessary by "a resource-damaging catastrophic event."

As for the SDMP, BLM purported to read it to prohibit only "*commercial* timber harvest" within Dwyer. ECF 340 at 27-29. 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," 8-ER-1609-10, Dwyer is one of several for which there is no modifier: the prohibition is on "timber harvest" *simpliciter*. BLM's grant of the tree-cutting permit thus violated FLPMA.

VI. The Government violated DTA.

Section 4(f) of DTA prohibits FHWA from approving a 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" doing so; and (2) the "project includes all possible planning to minimize harm." 49 U.S.C. §303(c). To approve a project using §4(f)-protected property, FHWA must "determin[e]" §4(f) is satisfied via "sufficient supporting documentation." 23 C.F.R. §774.3, 774.7(a), (f).

Here, no §4(f) evaluation was prepared, 5-ER-978-80, so the only question is whether Dwyer is a "public park" or "recreation area" protected by §4(f). The answer is yes: Dwyer has been designated a recreation site since 1968. *See SPARC v. Slater*, 352 F.3d 545, 555-56 (2d Cir. 2003) ("publicly owned land is considered to be a park [or] recreation area…when the land has been officially designated as such" (internal quotation marks omitted)). That year, BLM "withdr[ew]" and "reserved" the land including Dwyer "for protection of public recreation values," designating it the "Wildwood Recreation Site." 10-ER-2223-24; *see also* 7-ER-1426.[8] So the project here was subject to §4(f)—making the lack of §4(f) analysis unlawful. *See, e.g., N. Idaho Cmty. Action Network v. DOT*, 545 F.3d 1147, 1158-59 (9th Cir. 2008); *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434, 445 (9th Cir. 1976).

[8] *See also, e.g.*, 7-ER-1454 (Dwyer "is managed as part of the Wildwood Recreation Area"); 10-ER-2138 (Dwyer "is a corridor of large fir trees on either side of the highway through the Wildwood Recreation Area"); 10-ER-2229 (map of Wildwood in recreational brochure, Dwyer included).

Nor *could* FHWA have approved the project under §4(f). Of the various ways FHWA could have added a turn lane, FHWA chose to widen to the north only—the alternative most destructive of Dwyer. And then, *within* that alternative, FHWA chose a 3:1 slope, rather than a 1.5:1 slope or retaining wall. That is the opposite of "minimiz[ing] harm." §303(c); *see Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1447 (9th Cir. 1984) (requirements "are stringent").

VII. Plaintiffs' NEPA, NHPA, FLPMA, and DTA claims were not waived.

The district court never considered the merits of Plaintiffs' NEPA, NHPA, FLPMA, or DTA claims. Instead, after sitting on Plaintiffs' summary-judgment motion for 11 months, the court essentially threw up its hands—concluding that the merits were "tangled," and dismissing the claims as waived, even though the Government never pled waiver. That was error.

A. The Government waived waiver.

First, Defendants' waiver argument was itself waived. "[W]aiver must be "affirmatively state[d]" in the defendant's answer to be preserved. Fed. R. Civ. P. 8(c)(1). Yet none of the Government's four answers, over a decade of litigation, ever raised waiver as an affirmative defense. 5-ER-900-10; 5-ER-951-53. The Supreme Court has "disapprove[d] the notion that a party may wake up because a 'light finally dawned,' years after the first opportunity to raise a defense, and effectively raise it so long as the party

was (through no fault of anyone else) in the dark until its late awakening." *Arizona v. California*, 530 U.S. 392, 410 (2000). The defense was therefore waived.

B. The waiver defense fails.

Defendants' waiver argument is also meritless. The magistrate concluded Plaintiffs didn't give the Government "sufficient notice" of their concerns for it to have had the "opportunity to rectify" them. 1-ER-74-75. But Plaintiffs vigorously raised their concerns during the 1980s and 1990s; the Government itself re-raised many of them in the leadup to the current project; and Plaintiffs raised them again in repeated outreach to the Government in early 2008. All this is reflected in the administrative record compiled and submitted in this case by Defendants themselves—meaning it was by definition before the "agency decision-makers" at the time of decision. *Thompson v. DOL*, 885 F.2d 551, 555 (9th Cir. 1989). Thus, the magistrate's waiver ruling is mistaken, on numerous levels.

At the outset, the magistrate was wrong to impose an issue-exhaustion requirement in the first place. There is no "broad rule which would require participation in agency proceedings as a condition precedent to seeking judicial review of an agency decision." *'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006) (internal quotation marks omitted). Rather, where, as here, administrative proceedings are non-"adversarial," courts are reluctant "to impose a judicially created issue-exhaustion requirement" at all. *Carr v. Saul*, 141 S. Ct. 1352, 1358 (2021)

(citing *Sims v. Apfel*, 530 U.S. 103 (2000)); *accord Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1080 (9th Cir. 2013). Thus, the magistrate was wrong to impose an issue-exhaustion requirement here.

In any event, any waiver or issue-exhaustion requirement is met. For one thing, the magistrate held Plaintiffs' claims were waived because they didn't raise their concerns "during the administrative process"—which the magistrate took to mean before issuance of the REA and FONSI. 1-ER-75. But this is the wrong definition of "the administrative process." For highway projects like this one, Congress itself has defined the "environmental review process": it means not only "the process for preparing an" EA, but *also* "the process for and completion of any" required "environmental permit [or] approval." 23 U.S.C. §139(a)(3); *see* 73 Fed. Reg. at 19,134 (citing 23 U.S.C. §139(*l*)(1)). And there's no question Plaintiffs *did* raise their concerns (again) in January and February 2008—*before* BLM issued the tree-cutting permit or granted the right-of-way necessary for the project to occur. That is presumably why Plaintiffs' 2008 comments appear in the Government-compiled administrative record. *E.g.*, 6-ER-1067-1156; 5-ER-981-1007; 5-ER-1022-24. And that is why the magistrate's waiver analysis strayed from the start—by picking the wrong date.

Even assuming the magistrate's (rather than Congress's) cutoff date, Plaintiffs' claims still wouldn't be waived, because the Government had

"independent knowledge of the very issue[s] that concern[] Plaintiffs in this case." *'Ilio'ulaokalani*, 464 F.3d at 1093. During the earlier widening project, Jones repeatedly raised the same concerns he and the other Plaintiffs raise in this lawsuit. And the record shows those same concerns were specifically re-aired during the Government's preparations for *this* project—yet the Government proceeded with the project anyway. Accordingly, the notion that Plaintiffs are "barred from" challenging the Government's decision "because they [did] not submit[] comments" before the REA is error. *'Ilio'ulaokalani*, 464 F.3d at 1091.

The magistrate rejected this argument on the ground that, while the government may have been aware of Plaintiffs' "general concern," the independent-knowledge rule requires "[m]uch more specificity." 1-ER-77-78. But this argument fails for several reasons.

First, the "much more specificity" argument misstates the controlling standard. This Court has squarely held that "alerting the agency in *general terms* will be enough" to satisfy an issue-exhaustion requirement. *Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010) (emphasis added). That is because even where issue exhaustion may be judicially imposed, the agency still "bears the primary responsibility to ensure that it complies with NEPA." *Barnes v. DOT*, 655 F.3d 1124, 1132 (9th Cir. 2011). Accordingly, "petitioners need not 'incant [certain] magic words…in order to leave the courtroom door open to a challenge.'" *Id.*

"Compliance with" procedural obligations remains primarily the agency's "duty," not a responsibility dependent "on the vigilance and limited resources of environmental plaintiffs." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 559 (9th Cir. 2000).

Moreover, even under the magistrate's incorrect standard, the record shows the Government was well-aware of Plaintiffs' concerns specifically. Jones explicitly raised these precise concerns the first time the Government considered widening through Dwyer. During that administrative process, Jones, through C-FASH, submitted numerous comments (9-ER-1922-88), testified at public hearings (9-ER-1900), gathered signatures on petitions (9-ER-1927), and talked extensively with agency officials, raising the following concerns:

- "Old growth trees [in Dwyer]…will be destroyed if the highway is widened as currently proposed," 9-ER-1924; *see also* 9-ER-1925, 9-ER-1928-29, 9-ER-1935, 9-ER-1957, 9-ER-1979;
- The project would endanger the stone altar within Dwyer (which Jones thought at the time was a "grave"), 9-ER-1924, 9-ER-1935, 9-ER-1953, 9-ER-1963, 9-ER-1976-78; and
- A §4(f) analysis was required because Dwyer was "within the boundaries of the Wildwood Recreation Site" and was used for recreation, 9-ER-1935, 9-ER-1951, 9-ER-1963, 9-ER-1970, 9-ER-1973-75.

These comments alerted the Government to Plaintiffs' concerns; indeed, the Government *acted* on them by changing the project to minimize

the impact on Dwyer, 9-ER-1848-50, arranging an archaeological excavation to investigate the altar, 11-ER-2294-2304, and responding in the FEIS to the §4(f) issue, 9-ER-1845.

More importantly, the Government was well-aware of these same concerns in preparing for the *current* widening project through Dwyer. Again, the Government itself included all the materials cited above in the administrative record for this project—thus certifying them as "documents and materials" it "directly or indirectly considered." *Thompson*, 885 F.2d at 555 (emphasis omitted).

Beyond that, the record shows that those concerns were specifically *re-aired* during the Government's preparations for the current project, in a way that maps precisely onto Plaintiffs' claims. In particular:

- Plaintiffs claim the Government violated NEPA by failing to use an EIS despite the project's destruction of Dwyer's old-growth trees. In 2004, FHWA officials raised this precise concern, noting that the previous proposal to widen into Dwyer "was opposed by the public *as a significant impact upon the 'old growth' trees*" and the current project "ha[d] the same issues as before." 9-ER-1458 (emphasis added).

- Plaintiffs claim the Government violated NEPA by failing to consider in the EA the alternative of using a steeper slope or retaining wall where the project passed through Dwyer. These are some of the precise measures the Government *actually employed* to protect Dwyer in 1987. 9-ER-1848. And the scoping document prepared for this project indicates that the Government originally planned to protect Dwyer in similar ways again. 7-ER-1474 ("section along the Dwyer Corridor…is NOT proposed for any widening").

- Plaintiffs also claim the Government violated FLPMA by destroying a Native American sacred site. In 1990, Jones told BLM archaeologist Philipek that Dwyer included a "Nat[ive] Amer[ican] sacred site" that Native Americans have been visiting "for years," and identified particular practitioners and ceremonies. 5-ER-966-67. Philipek's notes on this are part of the administrative record for this project—meaning, again, the Government has certified that they were before it in making its decision. Philipek also attached these notes to the report she produced after visiting the "scattered," but not yet destroyed, altar in 2008. 5-ER-964.

- Plaintiffs claim the Government violated FLPMA by permitting tree-cutting within Dwyer in violation of a federal statute—ORCA—that prohibits tree-cutting within "Mt. Hood Corridor Lands," including Dwyer. In the EA, the Government explicitly discussed this concern, acknowledging that "[t]he A.J. Dwyer parcel is…within the Mt. Hood Corridor, a Congressionally designated scenic area." 6-ER-1256, 6-ER-1331-32; *see also*, *e.g.*, 6-ER-1433-36 ("congressionally mandated…scenic corridor").

- Plaintiffs likewise claim the Government violated FLPMA by permitting tree-cutting within Dwyer when the SDMP designated Dwyer a "Special Area" where "timber harvest" was prohibited. The EA explicitly discussed this concern, acknowledging that "[t]he A.J. Dwyer parcel was designated a Special Area in the BLM's 1995 Salem District Resource Management Plan." 6-ER-1331-32; *see also, e.g.*, 7-ER-1416.

These claims can't be waived. Each of these concerns was explicitly raised in the administrative record; several of them the Government explicitly addressed. Accordingly, the "independent knowledge" rule is satisfied, '*Ilio'ulaokalani*, 464 F.3d at 1093, even apart from Plaintiffs' early-2008 efforts—which again raised all of these concerns in detail.

Alternatively, the magistrate reasoned that Plaintiffs waived their claims because the Government "in fact addressed" them. 1-ER-79. But this reasoning is backward. The fact that an agency "considered and rejected" a concern necessarily means that the agency *was aware of it*. *Delaware Riverkeeper Network v. U.S. Army Corps of Eng'rs*, 869 F.3d 148, 155 & n.5 (3d Cir. 2017). So if the Government "considered and rejected" Plaintiffs' concerns, the claims aren't waived; they are "fair game for litigation" under the independent-knowledge rule. *Id.* (citing *'Ilio'ulaokalani*, 464 F.3d at 1093; *Barnes*, 655 F.3d at 1132).[9]

Finally, the magistrate erred by declining to consider *why* Plaintiffs were hesitant to participate in public meetings, and instead communicated their concerns to Government officials directly—namely, their concern about vandalism. *See Carr*, 141 S. Ct. at 1360 (considering "the specific context of petitioners'" claims). When Plaintiffs spoke out about the site before, and an official stated during a public meeting in the 1990s that the sacred site "was the reason why we can't widen the highway," the sacred altar was vandalized just days later. 3-ER-375; 5-ER-966-67. The lesson Plaintiffs drew from this is unsurprising: "if you talk about

[9] Even if—counterfactually—the Government lacked independent knowledge of Plaintiffs' concerns before their early-2008 comments, that wouldn't mean the Government was entitled to ignore those comments and "simply rest on the original" analysis. *Friends of the Clearwater*, 222 F.3d at 557. Rather, that would mean the Government was required to perform a supplemental NEPA analysis to account for the new information, *id.*—which it did not do. ECF 331 at 28-29; ECF 345 at 25-26.

[sacred things], they're going to be destroyed," so "you do everything behind closed doors." 3-ER-330. Indeed, FHWA's own Tribal Consultation Guidelines recognize that "[m]any tribes['] beliefs require that the location and even the existence of traditional religious and cultural properties not be divulged," and it is "vital" for the agency to "respect[] tribal desires to withhold specific information about these types of sites." 10-ER-2236. Plaintiffs should not be penalized for communicating about their site circumspectly—particularly when Defendants' own guidelines say it is "vital" to respect their prerogative to do so.

CONCLUSION

Some cases present an irreconcilable conflict between the protection of a sacred site and the accomplishment of the Government's goals. Not this one. Plaintiffs sought to protect a tiny, 0.74-acre site where they worshiped for a half-century, and where their ancestors worshiped for centuries before them.

The Government knew about the site, sending an archaeologist to examine it. The Government protected the site, changing prior projects to preserve it. But then the Government knowingly destroyed it, rendering Plaintiffs' religious practices impossible. That the Government deemed the site insignificant, or wanted to finish its project more quickly, does not justify its actions. It only shows why we have laws like these in the first place—so our nation's tragic history of destroying sacred sites does not senselessly repeat itself.

The Court should reverse and remand for entry of judgment for Plaintiffs.

Respectfully submitted,

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STATEMENT OF RELATED CASES

This appeal is related to *Apache Stronghold v. United States*, No. 21-15295 (9th Cir.), as both cases involve similar religious-freedom claims; the parties are represented by the same counsel; and the district courts rejected the religious-freedom claims on nearly identical grounds. *See* 9th Cir. R. 28-2.6 (cases are related if they "raise the same or closely related issues"). In granting Appellants' motion to expedite briefing in part, this Court noted that this appeal and *Apache Stronghold* may be calendared together for oral argument. Dkt. 11.

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CERTIFICATE OF COMPLIANCE PURSUANT TO 9TH CIRCUIT RULE 32-1 FOR CASE NUMBER 21-35220

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 13,804 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on May 3, 2021. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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