UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

HEREDITARY CHIEF WILBUR SLOCKISH, et al.,

Plaintiffs,

v.

UNITED STATES FEDERAL HIGHWAY ADMINISTRATION, et al.,

Defendants.

Case No. 3:08-cv-01169-YY

FINDINGS AND RECOMMENDATIONS

YOU, Magistrate Judge:

This action concerns a highway-widening project in Oregon along Mount Hood Highway No. 26 between the communities of Wildwood and Wemme, about 43 miles east of Portland. Plaintiffs are Hereditary Chief Wilbur Slockish, Hereditary Chief Johnny Jackson, Carol Logan, the Cascade Geographic Society, and the Mount Hood Sacred Lands Preservation Alliance (collectively "plaintiffs"). Defendants are three federal agencies: the Federal Highway Administration, the Bureau of Land Management, and the Advisory Council on Historic Preservation (collectively "defendants"). Other defendants, the Oregon Department of Transportation ("ODOT") and its Director, were dismissed from this action after invoking sovereign immunity in late 2011. Findings and Recommendations 20, ECF #122, *adopted by*

Opinion and Order 13, ECF #131. However, the court imputes ODOT's actions to defendants because they maintain the obligation to "fulfill the requirements of section 106" regardless if a state government official "has been delegated legal responsibility for compliance." 36 C.F.R § 800.2.

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

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

## I. Statutory Framework

### A. National Environmental Policy Act

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

Before taking "major Federal actions significantly affecting the quality of the human environment," 42 U.S.C. § 4332(2)(C), agencies must either prepare an environmental assessment ("EA") or an environmental impact statement ("EIS"). 40 C.F.R. § 1501.3(a), 4(a)–(c).[2] The EA must provide sufficient evidence and analysis for determining whether to prepare an EIS or a finding of no significant impact ("FONSI"). An EA must "include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 C.F.R. § 1508.9(b). An EIS must "[r]igorously explore and objectively

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

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

evaluate all reasonable alternatives" to the government action. 40 C.F.R. § 1502.14(a). "The analysis of alternatives to the proposed action is the 'heart of the environmental impact statement.'" *Ctr. for Biological Diversity v. U.S. Dep't of Interior*, 623 F.3d 633, 642 (9th Cir. 2010) (quoting *Oregon Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 531 F.3d 1114, 1121 (9th Cir. 2008)).

**B. National Historic Preservation Act**

The overarching purpose of NHPA is to "foster conditions under which our modern society and our historic property can exist in productive harmony." 54 U.S.C. § 300101(1).[3] "Like NEPA, '[s]ection 106 of NHPA is a "stop, look, and listen" provision that requires each federal agency to consider the effects of its programs.'" *Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dept. of Int.*, 608 F.3d 592, 607 (9th Cir. 2010) (quoting *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999)) (alteration in original); 36 C.F.R. § 800.8 (encouraging agencies to coordinate NEPA and NHPA compliance). The statute thus requires federal agencies to "make a reasonable and good faith effort" to identify historic properties "within the area of potential effects" of an undertaking by, in part, consulting with Indian tribes[4] and various preservation officers, 36 C.F.R. §§ 800.3(e), 4(b), 4(b)(1), and provide

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

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

interested members of the public reasonable opportunity to comment. *Id.* §§ 800.1(a), 800.2(a)(4), (d)(1).

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

**C. Federal Land Policy and Management Act**

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

revise land use plans . . . for the use of the public lands." 43 U.S.C. § 1712(a); *see also id.* § 1712(c) (providing criteria for development and revision of land use plans).

**D. Department of Transportation Act**

Congress passed DTA in 1966 to effectuate its policy that "special effort should be made to preserve the natural beauty" of public lands. 49 U.S.C. § 303(a). Section 4(f)[5] of the DTA thus "imposes a substantive mandate," *N. Idaho Community Action Network v. U.S. Dept. of Transp.*, 545 F.3d 1147, 1158 (9th Cir. 2008), that "[s]ubject to subsections (d) and (h), the Secretary [of Transportation] may approve a transportation program or project . . . only if (1) there is no prudent and feasible alternative to using that land; and (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use." 49 U.S.C. § 303(c). Subsection (d) provides for an exception to this mandate for de minimis impacts, including de minimis impacts to historical sites. *See id.* §§ 303(d)(1)–(2).

**E. Native American Graves Protection and Repatriation Act**

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

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

C.F.R. §§ 10.3–.4. NAGPRA requires persons who know, or have reason to know, that they have discovered Native American cultural items on federal land to "cease [construction] in the area of discovery, make a reasonable effort to protect the items discovered before resuming such activity," and notify the agency managing the land and the appropriate Indian tribe. 25 U.S.C. § 3002(d)(1).

## II. Standard of Review

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

"This standard of review is 'highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.'" *Natl. Mining Assn. v. Zinke*, 877 F.3d 845, 866 (9th Cir. 2017) (quoting *Nw. Ecosystem Alliance v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007)); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014) ("the agency's decision is entitled to a presumption of

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

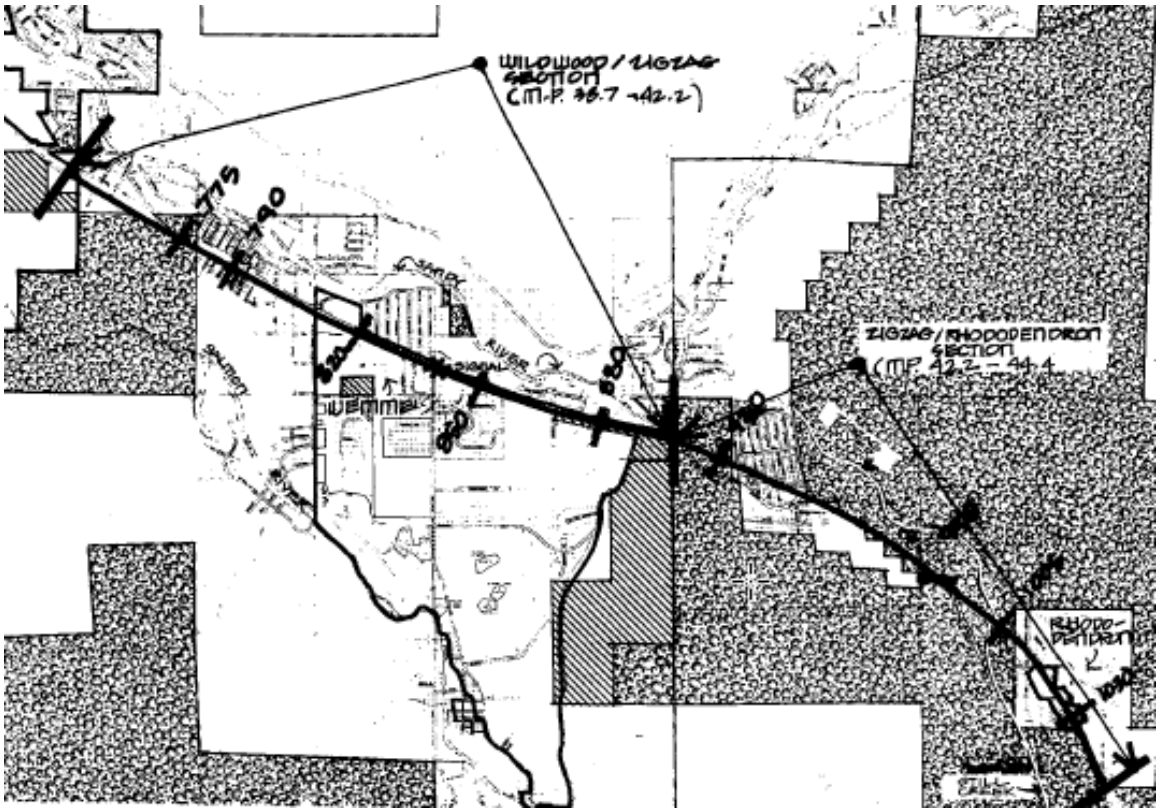
## III. Factual Background

This section includes relevant information regarding prior highway-widening projects in the late 1980s and '90s, the Wildwood to Wemme project at issue here, and plaintiffs, as they became involved in challenging the projects. The information is derived from the administrative record[6] and the limited parts of plaintiffs' extra-record evidence entitled to consideration, as explained *infra* Section VI.B. The United States owns, and BLM manages, the land under Mount Hood Highway No. 26 ("US 26" or "the highway"). ODOT owns the right of way for the highway.

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

### A. Wildwood to Rhododendron project

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




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

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

ODOT sent Archeologist Richard M. Pettigrew ("Pettigrew") to conduct a field survey of the project area in April 1985. FHWA 159. His survey revealed no evidence of prehistoric sites,

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

ODOT and the Federal Highway Administration ("FHWA") issued a draft EIS in June 1985. FHWA 165–301. The Draft EIS proposed a no-build alternative, two build alternatives from Wildwood to Zigzag, and a build alternative from Zigzag to Rododendron. FHWA 176–78, 186–94. The preferred alternative required expanding a six-mile stretch of highway from two lanes to four lanes, adding a center turn lane, and adding a six-foot-wide bicycle path along the shoulders. FHWA 59, 317. The Draft EIS noted several areas of controversy, including the removal of large trees from the north side of the Dwyer Memorial Roadside Preservation area ("the Dwyer area"), damage to wetlands, and danger to pedestrians. FHWA 178–79. The Draft EIS indicated that the Dwyer area had "no official status," so BLM managed it "under the

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

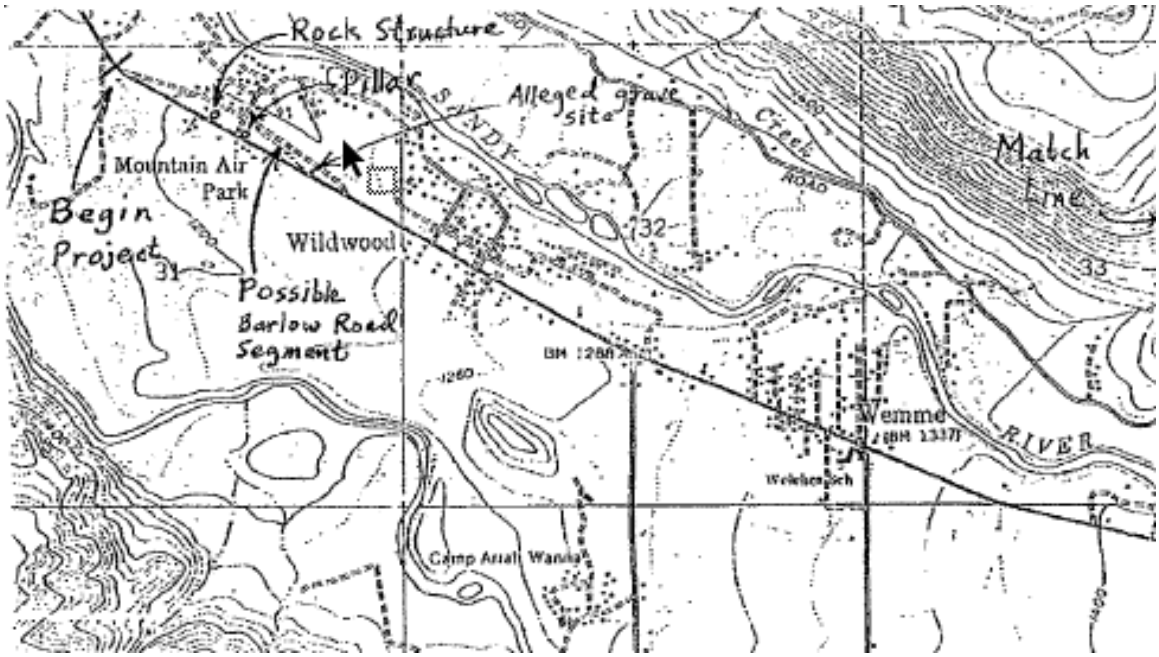
principals of multiple use and sustained yield." FHWA 199. The Draft EIS also reproduced the cultural resources report's findings, which state: "The project area contains no archeological sites listed in, nominated to, or determined eligible for the National Register of Historic Places." FHWA 216. The Draft EIS does not indicate that ODOT or FHWA formally consulted with any Indian tribes. *See* FHWA 277–78.

After publishing the Draft EIS, ODOT held additional public hearings and sought and received substantial public comment. FHWA 449–470; *see also* FHWA 513–687 (letters, reports, summary of public testimony). Someone commented that the Draft EIS did not mention "what appears to be a gravesite on the north side of the highway in the Dwyer area." FHWA 459. Other residents also "indicated that they wished further study of some sites and objects they felt were omitted by the Cultural Resources Report." FHWA 487. Many of these comments originated from Citizens for a Suitable Highway ("CFASH"), a local group led by Michael P. Jones ("Jones"). *E.g.*, FHWA 536, 541, 545, 548–55. Jones is a co-founder and curator of plaintiff Cascade Geographic Society ("CGS") and a member of plaintiff Mount Hood Sacred Lands Preservation Alliance ("the Alliance"). Declaration of Michael P. Jones in Support of Standing of All Plaintiffs ¶¶ 1, 5–6, ECF #148 ("Jones Decl."). Jones does not represent that he is a member of an Indian tribe or that he practices any Native American religion. During a public hearing, Jones presented a slide show, including photos of "stone pillars at the entrance to Mountain Air Park, in Wildwood" and "the pioneer grave," as well as information about 50 other sites and features in the project area. FHWA 537–38.

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

Pettigrew, Brian O'Neill, Ph.D., and another archeologist investigated the purported gravesite on March 4, 1986. FHWA 302 ("The rock feature in question . . . was reported to the Highway Division by local citizenry during the summer, 1985. The citizens who reported it suggested that the rocks might mark the location of a pioneer grave, and thus might be of historic cultural significance."). Pettigrew wrote that his team could "not determine with any confidence whether the feature is aboriginal or Euro-American." FHWA 303 ("Pettigrew's 1986 Excavation Report"). They found "no subsurface disturbance accompany[ing] the placement of the rock pile on the surface. No skeletal material or other cultural objects were found." FHWA 305. Because the rocky deposit beneath the rock pile had not "been previously disturbed in any way," the archeologists wrote that they "were in complete agreement that there was no evidence of disturbance of any kind beneath the rock feature, and that the possibility of a burial beneath the stones has been shown to be extremely remote." *Id.* Pettigrew wrote, "Based upon our

investigations described herein, I recommend no further investigation of the rock feature, which has no demonstrated archaeological significance and does not in my judgment appear worthy of either protection or mitigation." *Id.* BLM Archeologist Frances Philipek ("Philipek") received a copy of the report. *Id.*




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

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

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

In early 1987, ODOT regional engineer Rick Kuehn ("Kuehn") worked with Jones to address CFASH's concerns. FHWA 5405 (describing "numerous conversations"). Kuehn wrote a document describing over 70 issues he discussed with Jones. FHWA 5405–33. Kuehn summarized the actions to be taken and cost implications for each issue. *See id.* In the Dwyer area, "the north pavement edge [would be] moved 15 feet to the south . . . by eliminating the left-turn refuge. These changes resulted in the count of large trees (2 feet in diameter and larger) to be removed dropping from 85 to 52." FHWA 5407. Keuhn also wrote that the "stone pillars" would be relocated, and that there would be no impact to the "pile of stones." FHWA 5411. Jones wrote a document explaining his views of the issues and listed "conditions" that ODOT was to abide by. FHWA 5435–64. Kuehn and Jones referred to these combined documents as an "Agreement for Conditions and Remedies for Mitigating and Resolving 26 Highway Dispute." FHWA 5404 ("1987 Kuehn–Jones Agreement"). In a cover letter to the documents, Jones' indicated the selected alternative "eliminates congestion and moves traffic in a safe and effective manner, without sacrificing the area's natural scenic beauty, historic and cultural resources such as the Barlow Trail and Faubion Bridge, or eliminating the Dwyer Memorial Forest, the Bear Creek wetlands, fish and wildlife habitats, and the 17,000 plus trees which would have been removed under the first proposals." FHWA 5435. Jones also wrote that he was "able to feel at peace that the Native American or pioneer gravesite . . . will not be disturbed by

the widening. . . ." FHWA 5436. He noted, however, that Kuehn referred to the site as a "piles of stones." FHWA 5442. In the early 1990's, other ODOT staff indicated the document was not a binding agreement in part because it was not signed. FHWA 5577.

Ultimately, FHWA chose to build "alternative two," with some modification, because it met "the project goals of reducing congestion and improving safety," and it was the alternative "most responsive to the testimony received during the hearing process." FHWA 440 (Final EIS). The modified "alternative two" design still included four travel lanes, bike lanes on each side of the highway, and a median turn lane in sections where there [were] frequently used driveways and local streets." FHWA 440. However, the design eliminated the continuous turn lane bordering the Dwyer area and left the pavement edge alone instead of expanding it to the north. FHWA 441–44. The Record of Decision stated that, since the Dwyer area is "an environmental[*sic*] sensitive area, the roadway section through this parcel will be reduced to avoid 85 trees with 2 foot DBH [diameter at breast height]." FHWA 700. FHWA concluded, and the Oregon State Historic Preservation Office ("SHPO") concurred, that the project "would have no effect on historic properties or archaeological resources in the area." FHWA 511. The final EIS does not indicate that ODOT or FHWA formally consulted with any Indian tribes. However, "a series of survey and testing reports" generated to prepare the final EIS were sent to the Confederated Tribes of Warm Springs ("Warm Springs"), the Confederated Tribes of the Grand Ronde Community of Oregon ("Grand Ronde"), and the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation"). ACHP 216.

On January 24, 1991, ODOT met with Yakama Nation Tribal Council Chairman Wilferd Yallup and representatives of CFASH and CGS to discuss impacts of the project from Zigzag to Rhododendron. FHWA 5565. ODOT brought an archeologist, a cultural specialist, and an

engineer Walter Bartel ("Bartel"), among others. *Id.* Yallup opened the meeting by indicating that FHWA had paved over a burial site between Goldendale and Toppenish in Washington State, and that he did not want that to happen again. FHWA 5566–67. When Bartel asked Yallup, "Are you saying that there is a burial ground on this project?," Yallup answered, "Yes," and Jones added, "Rhododendron to the bridge." FHWA 5567. But when Bartel responded, "Where exactly? Can you be a little more specific?," Jones interrupted, "[W]e're not going to get down to specifics. If you want like pinpoints, you know, we're not going to do [that]." FHWA 5568. Yallup indicated there were "two burials somewhere in the vicinity of Zigzag." FHWA 5574. Jones and Yallup later spoke of [redacted]

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

Several days later, Yakima Nation General Council Secretary Leo Aleck sent a letter to ODOT on behalf of the Yakama Indian Nation requesting documents and indicating many tribal

members "still utilize this general area for cultural purposes." FHWA 6303 ("1991 Yakama Letter). He also wrote that the area included sacred grounds, natural foods and medicines, and traditional use areas. FHWA 6303. Records indicate Yallup and ODOT exchanged additional letters in late 1991 and sometime in 1992. ACHP 218–19. An ODOT archeologist met with Jones in March 1992 and reported:

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

ACHP 219.

[redacted]

In 1993, ACHP asked the Keeper of the National Register of Historic Places to determine if Enola Hill, a hill southeast of Rhododendron, should be listed in the National Register. FHWA 1918. The Keeper indicated there was not enough evidence to make the determination, and in 1994, the Forest Service asked the Keeper to suspend ACHP's request. FHWA 1919. Also, in 1993, CGS and others sued to stop a timber sale on Enola Hill. The court granted the Forest Service's motion for summary judgment stating, "Significant inventories conducted in 1983, 1988, 1990, and 1992 revealed no physical evidence of sites of traditional cultural value." *Native Americans for Enola v. U.S. Forest Serv.*, 832 F. Supp. 297, 300 (D. Or. 1993). The Ninth Circuit dismissed plaintiffs' appeal as moot. *Native Americans for Enola v. U.S. Forest Serv.*, 60 F.3d 645, 646 (9th Cir. 1995). In 1996, CGS submitted additional ethnographic materials concerning potential properties in the "Enola Hill area" to the Keeper and the Forest

Service. FHWA 1918. As of this writing, Enola Hill is not listed in the National Register. National Register Database and Research, National Register of Historic Places, https://www.nps.gov/subjects/nationalregister/database-research.htm (last visited March 16, 2020).

**B. US 26 Rhododendron to OR 35 Junction project**

Although the widening from US 26 Rhododendron to OR 35 Junction was east of the Wildwood to Wemme project area, its history provides additional context. Under an Oregon law establishing "a new vision for surface transportation," ODOT conducted a study of US 26, exploring alternatives to accommodate "future increases in travel demand." FHWA 1021. FHWA published a Draft EIS and sought public comment in the summer of 1995. The Draft EIS noted, "Because the highway traverses an environmentally sensitive and culturally rich portion of the Mount Hood National Forest, any significant highway improvements could have natural, visual, and cultural impacts." FHWA 1022. It also noted that future demand will exceed existing capacity and that the accident rate is twice as high as those in other primary rural, non-freeway highways. FHWA 1024. The Draft EIS included four alternatives varying in scope and impact: (1) a no-build alternative, (2) adding a single lane from Rhododendron to Laurel Hill and four lanes from Laurel Hill to OR 35, (3) adding three lanes from Rhododendron to Laurel hill and four lanes from Laurel Hill to OR 35, or (4) adding four lanes from Rhododendron to OR 35. FHWA 1580. In addition,

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

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

In April 1997, CGS opposed all measures to widen US 26 through extensive written comment. *See* FHWA 1825, 1857–66. CGS emphasized that Enola Hill is a sacred site to the Yakama Indian Nation. FHWA 1829–35. Jones wrote that he worked with various archeologists to study the area, and stated, "Although I provided [an ODOT archeologist] with no site specific information, she had some boundaries of sensitive areas that the Highway 26 project had to stay away from to prevent destroying important cultural, historical, and natural resources." FHWA 1835. Jones repeatedly lamented ACHP's finding that Enola Hill was ineligible for the National Register. FHWA 1836; FHWA 1819–21 (emphasizing negative impacts to Enola Hill, Laurel Hill, Tollgate, and Yocum Falls areas during a public hearing). A 1997 archeological sampling of the Barlow Road toll station near Rhododendron revealed cultural materials in the form of a disposal site for Tollgate House occupants, early 20th-century recreational usage, and a 1930s guard station. FHWA 1516. However, the report indicated that the "data are easily recoverable should highway expansion occur." FHA 1516.

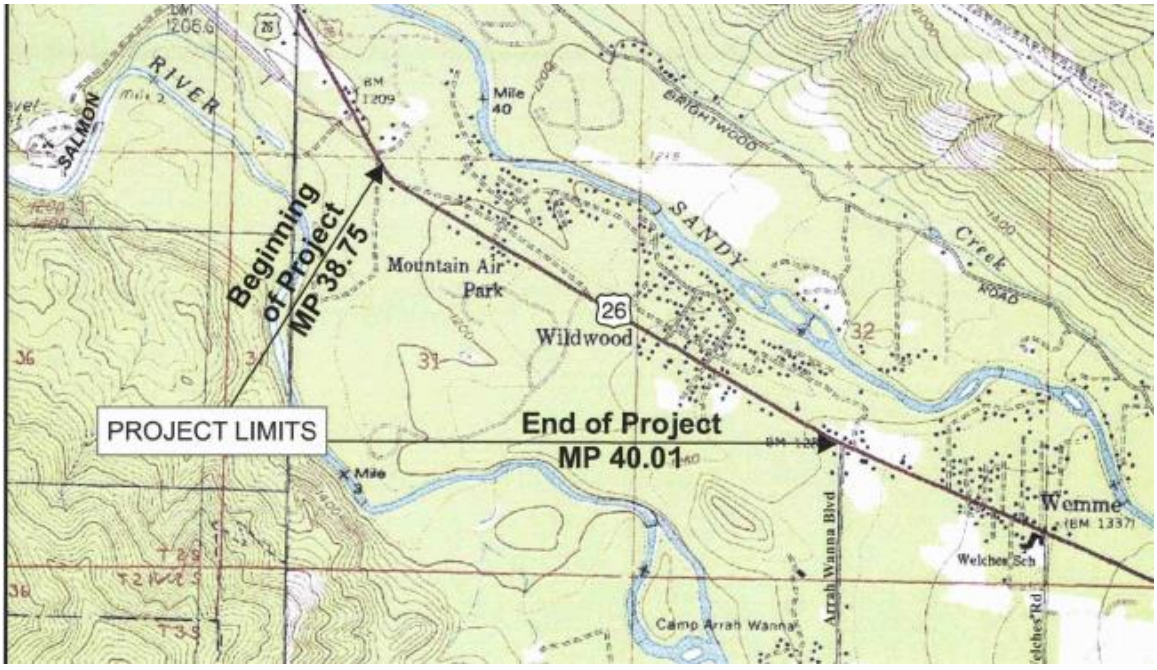
ODOT received many other comments taking opposing positions and raising many other concerns, including impacts on the environment, endangered species, and increased pollution from the build alternatives, and impacts on traffic, safety, and the economy from the no-build alternative. *See* FHWA 1839–1907. For example, one woman wrote that she was "fiercely opposed to any further laying of pavement anywhere in this state." FHWA 1868. Many comments focused on the preservation of the "Enola Hill/Tollgate Area." FHWA 1902. Various chambers of commerce wrote in support of expansion for Oregon's "future economic health,"

FHWA 1846, and members of Mt. Hood ski clubs advocated for "maximum highway widening." FHWA 1899. Ultimately, FHWA chose "a blend of Alternatives 3 and 4" because it met the "project objectives for improving safety, maintaining an acceptable highway [level of service], and increased capacity, while preserving the important environmental and historic resources." FHWA 1914.

### C. Wildwood to Wemme project

#### 1. Before Revised EA and FONSI

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



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

The project's stated purpose was to improve safety on this section of highway "to match the cross section (width of lanes, center turn lane and shoulders) to that of the roadway to the east and west of the proposed project area." FHWA 4957. The safety improvements were needed because about 40 driveways and streets access this section of highway, "creating a safety hazard for vehicles making left turns onto and from the highway. FHWA 4957–60. Left-turning motorists were frequently required to stop in the fast lane to wait for a gap in oncoming traffic while those turning left onto the highway had no median refuge to enter.

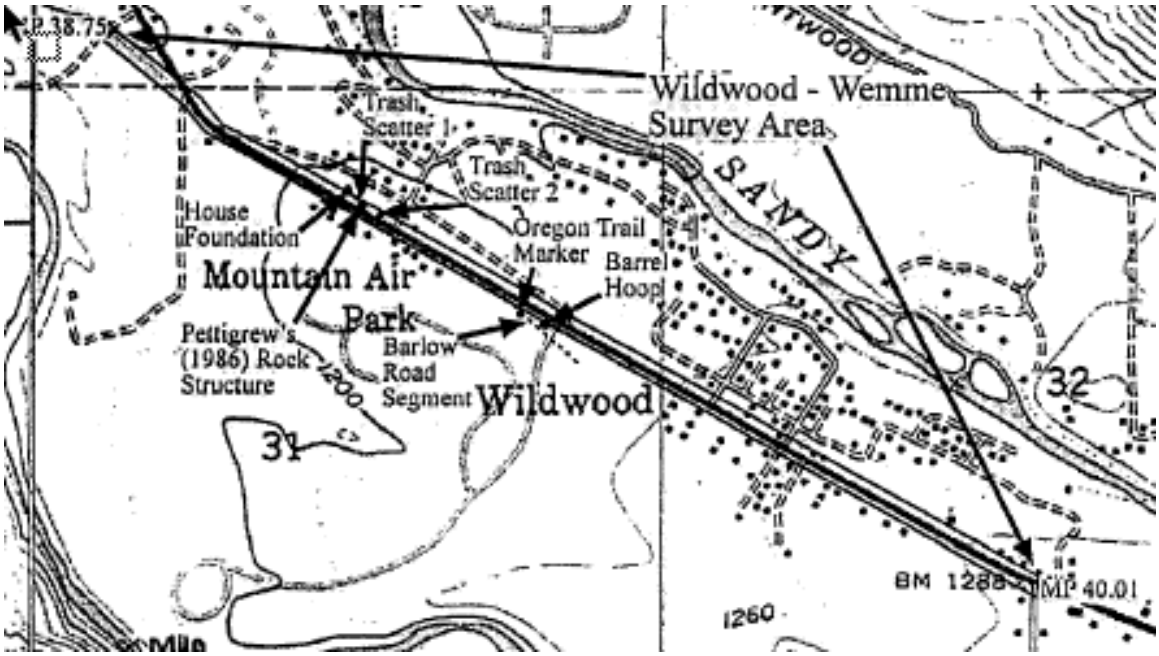
"Fourteen accidents, two fatal, were reported in this section between January 1997 and December 2002." FHWA 4793. Thirteen accidents were reported within the project limits in the five-year period from 2000 through 2004. FHWA 4960; *see also* FHWA 4787 (indicating "public concern for safety due to traffic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

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

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

accordance with each tribe's vision of effective consultation . . . and will be consistent with coordination required under 36 CFR 800." FHWA 2027.

In late 2003, ODOT held a public hearing. FHWA 2031–40. Internally, ODOT staff were sympathetic to the safety issues, but an ODOT project manager recounted how the "community went nuts when this section of highway was proposed for five lanes in the 1980s. . . . Because of the public uproar, the highway was reduced to four lanes." FHWA 2042. In September 2004, ODOT issued a project prospectus indicating an environmental assessment would need to be prepared. FHWA 2047. Under a subsection titled "Estimated Archaeology and Historical Impacts," ODOT cited the 1985 Draft EIS from the Wildwood to Rhododendron project and stated, "Historic resources along the project corridor will need to be reassessed. Some of the structures that were ineligible for listing in 1985 may now be eligible for the National Register. Section 106 documentation will be necessary for any impacted historic resources." FHWA 2049. Led by staff archeologist Patrick O'Grady, ODOT conducted exploratory archaeological surveys in early 2005 and issued a report that June. FHWA 2410–54 ("O'Grady report").



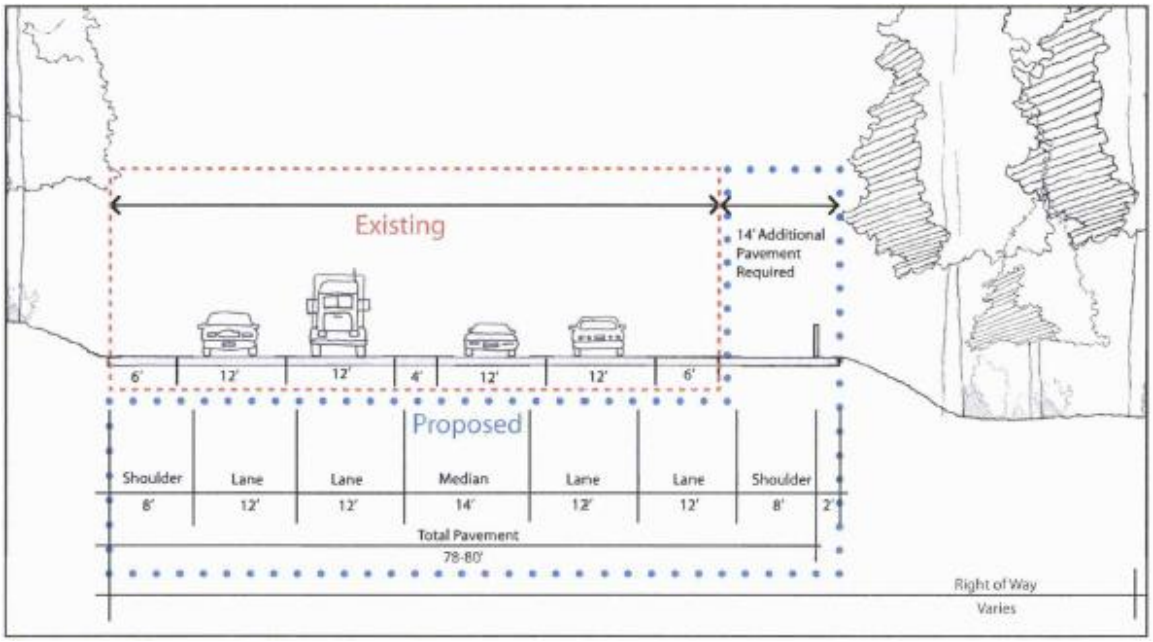

FHWA 2419 (map of pedestrian survey area in O'Grady report).

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

In 2005 and 2006, ODOT mailed four newsletters and postcards advertising three public hearings to about 3,700 people located near the project area. FHWA 4786–87. On March 21,

2005, ODOT issued a news release and sent postcards announcing a March 31, 2005 open house to about 700 people located near the project area. FHWA 4791–92. Interested parties submitted public comments, and about 35 people attended the open house. FHWA 4794–4800. ODOT invited Jones to the open house. FHWA 2153.

ODOT compiled a project development team of "technical staff from traffic, engineering, planning and environmental fields" to explore and ultimately make a recommendation to ODOT management and FHWA. FHWA 4353. The team considered seven alternatives in total: no build, widen to the north, widen to the north and realign, widen to the south, widen to the north and south, relocate BLM access to the Wildwood Recreation Site, and add a median barrier to prevent any left-hand turns. FHWA 4359–64. The widen-to-the-north alternative would move the northern edge of the pavement 14 feet to the north and require tree cutting. FHWA 4354.




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

The widen-north-and-realign alternative would move the northern edge of the pavement 20 feet to the north and require even more tree cutting and would also impact wetlands. FHWA 4360. The widen-south alternative would move the southern edge of the pavement 14 feet south

and would impact private properties, utilities, local businesses, wetlands, public park property, and the "pristine, high priority, historic Barlow Road trace," in addition to requiring tree cutting. FHWA 4361. The widen-north-and-south alternative "would not save trees," but would still impact private property and the Barlow Road trace. FHWA 4362. The BLM-access-alternative would still require widening to the north and thus "would not save the large trees," in addition to impacting additional vegetation, wildlife habitat, traffic patterns, and private property. FHWA 4363. Finally, adding a median barrier to prevent left turns would necessitate cutting even more trees than the widen-to-the-north alternative because the barrier would require inside shoulders and "turnarounds or jug handles and traffic lights at each end of the median" to allow residents to access their homes. FHWA 4364. The team specifically considered the impacts of the widen-to-the-north alternative on the Dwyer area. FHWA 4379, 4406. ODOT also found that the "the Mountain Air Park pillars do not meet the criteria for listing in the National Register . . . [because they] lack distinction and, because they have been moved, they lack the 'location' aspect of integrity." FHWA 4496.

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

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

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

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

On January 25, 2006, ODOT issued a third news release and sent a mailer and postcards soliciting public comment at a February 23, 2006 open house. FHWA 4904–08. ODOT again invited Jones. FHWA 2159. Thirty-three people attended, and about half of them submitted public comment. FHWA 4909. The "meeting participants were positive about the proposed alternative (Widen to the North) and expressed desires to see the project constructed as soon as

possible. Comments provided at the meeting tended to focus on specific concerns such as water runoff, drainage, pedestrian connectivity (trails), and traffic enforcement (speeding)." FHWA 4909.

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

In April 2006, ODOT sent postcards and mailers indicating it was focusing on the "Widen to the North" alternative, advertising an upcoming open house and linking to an ODOT website with more information. FHWA 4924–27. The mailer included preliminary environmental findings. FHWA 4925. The postcard allowed people to request copies of the forthcoming Draft EA, and Jones requested a copy. FHWA 4102. Meeting notes from a May 18, 2006 project-development-team meeting indicate Jones also requested a mediation through Clackamas County but that the request "was being refused by ODOT because [Jones] had not availed himself of the public process that has been created for the project and made available to the public for project involvement. . . . [Jones] has not yet participated in any of the public meetings." BLM 63. ODOT held another quarterly meeting with the Grand Ronde in April 2006, and Schultz followed up, indicating Grand Ronde had "no immediate concerns" regarding the project. FHWA 5955. O'Grady also conducted another pedestrian survey in 2006, largely confirming his earlier findings. ACHP 57–62.

ODOT undertook many other significant efforts to explore the alternatives and prepare a Draft EA. *E.g.*, FHWA 3332 (April 2006 Historical Resources Technical Report); FHWA 3409

(May 1, 2006 Visual Resources Technical Report); FHWA 4028 (May 3, 2006 Geology Technical Report); FHWA 3494 (May 4, 2006 Biological Assessment); FHWA 3594 (May 9, 2006 Traffic Report); FHWA 4003 (July 2006 finding no effect on endangered or threatened species); FHWA 4517 (September 2006 finding no effect on Norther Spotted Owl). Of particular significance is a May 26, 2006 report titled "A.J. Dwyer Input for Wildwood-Wemme Highway Widening Project" prepared by a BLM botanist and a BLM outdoor recreation specialist. FHWA 4472. They reported that the "A.J. Dwyer Scenic Area is a five-acre parcel of land . . . north of and adjacent to U.S. Highway 26 and immediately across from the entrance of the Wildwood Recreation site." *Id.* BLM manages the scenic area, which "was designated a Special Area in the BLM's 1995 Salem District Resource Management Plan with scenic and botanical values as the identified unique features." *Id.* The area also is within the Mt. Hood Corridor, "a Congressionally designated scenic area which requires that scenic values be protected on BLM lands that can be seen from U.S. Highway 26." *Id.* There were "several large older trees" adjacent to the highway, but the report emphasized that the "truly unique botanical values" in the area "include a diverse group of lichens and vascular plants." *Id.* The area is particularly unique because it hosts a "diverse botanical community," not seen elsewhere with similar environments. *See id.* Under the widen-to-the-north alternative, about "65 trees over 24 inches in diameter at breast height (dbh) would be removed, including an estimated 22 older and larger trees that are greater than 40 inches in diameter at breast height (dbh)." *Id.* However, the "diverse group of lichens and vascular plants in the northern portion of the A.J. Dwyer parcel would not be disturbed as a result of the proposed project." FHWA 4473. The report concludes that aside from "some visual disturbance," the general character of the area would generally

remain unchanged and the project was "expected to be in compliance with management objectives associated with the AJ Dwyer Scenic Area and the Mt. Hood Corridor. *Id.*

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

In September 2006, ODOT issued another public newsletter and sent a copy to Jones. *See* FHWA 2160. ODOT also consulted with local organizations that expressed interest in the project, including the Barlow Trail Association and the Mt. Hood Safety Corridor Citizens' Advisory Commission. FHWA 4428.

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

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

> did not have archaeological significance and was not worthy of protection or mitigation.

ACHP 60.

On September 21, 2006, ODOT issued a fourth set of news releases and mailers soliciting public comment and a public hearing. FHWA 4929. ODOT kept the comment period open until October 20, 2006. *Id.* Only 16 people attended this meeting, and only five made public comments. One comment requested that ODOT put up signage during Wildwood events indicating "heavy traffic ahead." FHWA 4935. Another comment simply stated: "To the folks at ODOT[,] a hearty thanks for all the hard work. Your determination will carry this project through." FHWA 4933 (capitalization altered).

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

**2. After Revised EA and FONSI**

ODOT sent a final project notice to the public on February 15, 2007. *See* FHWA 5001–15. Jones is listed as a recipient. FHWA 5006. By November 2007, ODOT planned to

coordinate construction with two other nearby projects and proceeded to secure a right of way and tree cutting permit. FHWA 5035, 5043. These three projects were collectively referred to as the "US 26: Salmon River Bridge to East Lola Pass Road" project.

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

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

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

> As you can see from the attached photograph, we carefully avoided disturbing the integrity of the rock pile by excavating beside it and then tunneling beneath it

> from the profile to examine the potential for human remains. As I recall, there was no change in the soil texture and we certainly observed no skeletal (neither human nor non-human) material.

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

In January 2008, a year after the Revised EA and FONSI were issued, Jones and Logan contacted FHWA and ACHP. Jones called FHWA Operations Engineer Jeffrey Graham ("Graham") on January 25, 2008, and spoke at length about his involvement with the prior highway-widening projects and his interest in preserving the white stone pillars. FHWA 5392–93, 5397. Jones sent Graham a copy of the 1987 Kuehn–Jones Agreement. FHWA 5404–64. They discussed the white stone pillars, and Jones identified two people to assist with their relocation. ACHP 27–28. ODOT sent Jones letters in January, February, and May 2008 proposing to relocate the white stone pillars. FHWA 6067; ACHP 167–68. Logan called Graham on January 31, 2008, to express her concern about usual and accustomed places. FHWA

7486. She called him again in early February and told him she did not think Warm Springs and Yakama Nation had been contacted. FHWA 7489.

On February 14, 2008, Jones and Logan faxed a letter to FHWA demanding a new Section 106 review of the project area to identify "all heritage resources." FHWA 5474–83; ACHP 25–26. They raised the Zigzag to Rhododendron EIS, Pettigrew's 1986 Test Excavation Report, the 1987 Kuehn–Jones Agreement, the 1991 Yallup meeting, the 1991 Yakima Letter, technical advisory reports from the prior projects, additional meetings with "Nez Perce and Umatilla spiritual leader" Rip Lone Wolf, meetings and communications with Jones, and other meetings and communications with "American Indians." FHWA 5475–76. They wrote that, upon further agency review, "American Indian sites in the 'Dwyer Memorial Forest' will constitute a 'district'" for the National Register. FHWA 5477. Additionally, they listed 33 other sites of interest along the US 26 including the Barlow Trail and Enola Hill. FHWA 5478–79. They also called ACHP and demanded a New Section 106 Process" for the Wildwood to Wemme project. ACHP 36, 47.

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

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

FHWA 6910–11 (emphasis in original).

On February 15, 2008, following additional discussion with Logan, Bottman again spoke with Thorsgard, who stated, "Carol is not representing the Tribe, she is not advertising the Tribe's position, she is working as a private individual in concert with Michael Jones. The tribe's official position is that ODOT has done and followed the 106 and NEPA process. We have no fault with what they have done." FHWA 5652. BLM issued ODOT a tree cutting permit in late February 2008. BLM 33–38.

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

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

On April 4, 2008, Bottman emailed Meninick that "a member of the public has recently been acting as a representative for a handful of Tribally affiliated folks, including members of

the Yakama . . . . [He] has insinuated that ODOT failed to consult with the Yakama nation." FHWA 6544. Bottman then invited Meninick to discuss the project and any additional areas of concern. FHWA 6544. Bottman forwarded his conversation notes to his colleagues. FHWA 7194, 7203. Bottman wrote that Meninick

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

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

In April 2008, after ODOT cleared trees from the project area, a local newspaper ran an article featuring CGS members Jones, Jackson, and Logan who were accusing ODOT of "intruding on sacred burial sites" and of a "deliberate attempt to ignore the truth." FHWA 6513–14. Bottman scanned and emailed the article to Bird and a Warm Springs' archeologist stating, "there are some pretty erroneous statements in it" and invited further discussion. FHWA 6515, 6565–68. Bird emailed back that they had received a report "a grave was found and that the Grand Ronde was consulted and said to not worry about it. Though I don't think this could have happened[,] I need to follow up and stop some rumor before it gets to the public." FHWA 6518. Bird spoke with the Warm Springs' archeologist then again emailed Bottman to "please disregard the first email." FHWA 6520, 6523. The archeologist thanked Bottman for his attentiveness and responded that she did not "foresee any follow-up as being needed." FHWA 6519. Bottman also forwarded the article to Thorsgard, who replied that "Carol is very adamant about stopping this project regardless of the damage it does to any agency or individual," and offered further assistance. FHWA 6527. FHWA published its Notice of Final Agency Actions

on April 8, 2008. Notice of Final Federal Agency Actions on U.S. 26, Wildwood to Wemme: Clackamas County, OR, 73 Fed. Reg. 19134-02 (April 8, 2008).

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

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

FHWA 6572–73.

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

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

> was never contacted either by [ODOT or FHWA,] or any of their contractors, about the Section 106 process for this highway project, even though [he] should have been. After [he] contacted representatives of [ODOT and FHWA,] and left messages as to who I was and why I was calling, they chose not to communicate with me.

ACHP 125.

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

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

ACHP 135.

Logan wrote that the project would destroy the Dwyer area and other usual and accustomed places, including "burials, the medicine sites, the village site, the ancient American

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

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

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

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

On July 7, 2008, Jones spoke with archeologist Philipek and told her that the "site" had been vandalized. BLM 8. About three weeks later, Philipek visited the project area "to relocate and assess the rock cluster." BLM 6. She found the rock cluster "in scattered and disturbed condition surrounded by disturbed soil." *Id.* However, she walked the project area and did not observe any "cultural features or objects that [were] clearly historic or prehistoric." *Id.* She wrote in her notes that "[t]he rock cluster area itself does not present any additional indication as

to its functional or temporal nature and appears to still have no other associated objects or features such that it could be identified as a cultural resource." *Id.*

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

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

## IV. Summary of Claims

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

- NEPA by (1) not performing a NEPA analysis for the tree cutting permit and the right-of-way, (2) not preparing an EIS, (3) not considering a 1:5:1 slope alternative in the Dwyer area, and (4) failing to prepare a supplemental EA following communications with CGS in early 2008;
- NHPA by (1) not performing a Section 106 analysis for the tree cutting permit and right-of-way, (2) delegating tribal consultation duties to ODOT and thus failing to perform any tribal consultations, (3) failing to timely consult Yakama Nation, and (4) failing to identify historic properties;
- FLPMA by (1) destroying plaintiffs' sacred site, (2) issuing a tree cutting permit allowing removal of old-growth trees, and (3) failing to develop the Salem District Resource Management Plan in accordance with legally required information-gathering procedures;
- DTA by not conducting any Section 4(f) analysis;

- NAGPRA by failing to (1) cease construction when Philipek discovered the altar in July 2008, and (2) notify and consult Indian tribes associated with the altar; and
- The Free Exercise Clause by destroying plaintiffs' sacred site.

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

## V. Article III Standing

"A plaintiff seeking relief in federal court must establish the three elements that constitute the irreducible constitutional minimum of Article III standing, namely, that the plaintiff has (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Friends of Santa Clara River v. U.S. Army Corps of Engineers*, 887 F.3d 906, 918 (9th Cir. 2018) (citations and quotation marks omitted). "A plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Id.* (quoting *Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017)) (alterations omitted). Defendants argue, for the third time, that plaintiffs lack Article III standing because a favorable decision would not redress their procedural injuries. Defs.' Mot. Summ. J. 13–14, ECF #340.

"To establish . . . redressability, the plaintiff must show that 'the relief requested—that the agency follow the correct procedures—may influence the agency's ultimate decision.'" *Friends of Santa Clara River*, 887 F.3d at 918 (quoting *WildEarth Guardians v. U.S. Dept. of Agric.*, 795 F.3d 1148, 1156 (9th Cir. 2015)). "In the NEPA context, plaintiffs may demonstrate redressability with a showing that the agency's decision []'could be influenced by the environmental considerations that NEPA requires an agency to study.'" *Id.* (quoting *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1087 (9th Cir. 2003)). "A plaintiff does not need to show that the correction of the alleged procedural error would lead to a decision more favorable to plaintiffs' interests." *Id.* (citing *Laub*, 342 F.3d at 1087). "Rather, plaintiffs need only show a reasonable probability that the [defendant's] decision "could be influenced by the environmental considerations that NEPA requires an agency to study." *Id.* at 920 (citing *Laub*, 342 F.3d at 1087). Put another way, the question "is not whether a *favorable decision* is likely but whether a favorable decision *likely will redress* a plaintiff's injury." *Bonnichsen v. U.S.*, 367 F.3d 864, 873 (9th Cir. 2004) (citation omitted) (emphasis in original).

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

In January 2010, this court held that Logan and the Alliance have standing to challenge defendants' conduct and that it "need not determine whether the remaining plaintiffs have standing to maintain the action." Order 11–12, ECF #52 (citing *Clinton v. City of New York*, 524

U.S. 417, 431 n.19 (1998), and *Nat'l Ass'n of Optometrists & Opticians LensCrafters v. Brown*, 567 F.3d 521, 523 (9th Cir. 2009)). Noting "5 U.S.C. § 706(2) of the APA confers broad equitable authority on courts to remedy violations of public law by government agencies" when the public interest is involved, Order 5, ECF #52 (collecting cases), the court held that plaintiffs' claims were not moot because although the project was nearly complete, the expanded highway continued to harm plaintiffs' "ongoing interests in [their] cultural and historical resources." *Id.* at 8. Further, in June 2018, the court held plaintiffs had Article III standing to bring a claim under RFRA. Order 3–4, ECF #312. The court stated, "Given Plaintiffs' broad request for various forms of equitable relief, it is likely that the Court could craft some relief that would mitigate Plaintiff's injury and improve their access to the site and ability to exercise their religion." *Id.* at 4 (citing *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1065–66 (9th Cir. 2002), and *Feldman v. Bomar*, 518 F.3d 637, 642–43 (9th Cir. 2008)).

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

No circumstances have changed since the 2018 order, which was limited to the RFRA claim. Since the 2010 order, the court dismissed ODOT on sovereign-immunity grounds, and ODOT completed the project. However, neither of these changed circumstances prevent defendants from providing *some* effective relief. Even if ODOT's dismissal removed the ultimate mode of redress from the court's arsenal, and the court could not "order the removal of

portions of a highway project under the APA," Order 9, ECF #52 (citing *West*, 206 F.3d at 925), the remaining defendants may still provide some other form of effective relief.

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

## VI. Reconsideration of Prior Rulings

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

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

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

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

The court previously held that because the Klickitat Tribe and Cascade Tribe are not federally recognized, Slockish and Jackson "have no right to consultation under Section 106." Findings and Recommendations 9 n.4, ECF #154 *adopted by* Order, ECF #171. The court also found that plaintiffs were not "additional consulting parties" because they failed to follow the process under Section 106 to obtain this status, that is, they failed to request in writing to be additional consulting parties under 36 C.F.R. § 800.3(f)(3). *Id.* at 13–14. These conclusions are correct. The court also held, however, that because plaintiffs "are members of the public who claim an interest in the preservation of the historic sites at issue," they "fall within the zones of

interests protected by the NHPA and have standing to challenge the adequacy of Federal Defendants' consultation with federally recognized tribes, including the Yakama Nation, Warm Springs, and Grande Ronde tribes." *Id.* at 12; *see also id.* at 14 ("plaintiffs have standing as interested members of the public . . . to allege a violation of the NHPA for failing to consult with an Indian tribe"); *id.* at 18 ("This issue boils down to what information must be conveyed by the Federal Defendants to the tribes to satisfy the duty to consult."). This ruling is both clearly erroneous and contrary to binding intervening authority.

**1. Clearly Erroneous**

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

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

extensively with Grand Ronde's Cultural Protection staff to address additional concerns even though the Revised EA and FONSI had already been issued. *See* FHWA 5088, 5134–46, 5199, 5351, 5360, 7484.

ODOT and Grand Ronde specifically considered the purported gravesite excavated by Pettigrew's team in 1986. FHWA 5066, 5082. After much discussion, Grand Ronde requested that a tribal monitor be present during construction, and ODOT agreed. *See* FHWA 5351, 7484. When CGS began protesting the project in early 2008, Grand Ronde told ODOT that tribal members who are not employed in an official capacity with the tribe "can only represent their *personal perspectives*" and that their opinions "are not supported by the Tribe unless a Tribal official speaks in support." FHWA 6910–11 (emphasis in original). Logan is a tribal member of Grand Ronde, but she does not represent Grand Ronde in any official capacity. *See* FHWA 5652. Logan and CGS' assertion of historical or cultural significance in the Dwyer area was contrary to Grand Ronde's official position, and the professional opinion of every archeologist who visited the site. Grand Ronde explicitly told ODOT that Logan was not representing Grand Ronde. FHWA 5652. Grand Ronde's official position was that ODOT and defendants had followed the Section 106 process and the tribe had "no fault with what they have done." *Id.* When a local newspaper ran an article alleging ODOT planned to intrude on sacred burial sites in the project area, ODOT proactively sent the article to Grand Ronde and Warm Springs to address any potential concerns. FHWA 6515, 6565–68. Both tribes were satisfied with ODOT's response and efforts, and with the project as envisioned in the Revised EA and FONSI. FHWA 6519, 6527. Given the modest scale and footprint of the project, it is difficult to imagine more meaningful government-to-government consultations.

Granted, ODOT did not contact Yakama Nation until after issuance of the Revised EA and FONSI. Still, Yakama Nation Cultural Resource Manager Meninick, the official representative of Yakama Nation, indicated he saw no reason for further consultation based on the negative results of the extensive archaeological investigations conducted. FHWA 7194. That ODOT should have consulted Yakama Nation from the outset is harmless error because Yakama Nation was ultimately consulted and approved of the project. The letter from Washines—who is not Yakama Nation's Cultural Resource Manager—invoked the 1991 Yakama Letter and generically opposed all construction in the "Mt. Hood Area," but said nothing of the Wildwood to Wemme project. FHWA 6949. The 1991 Yakama Letter also generically opposed all construction near Mt. Hood. *See* FHWA 6303. Washines had no comment after FHWA and ODOT responded with a letter carefully explaining the extensive archeological investigations in the project area. FHWA 7274–75. More importantly, like Logan, Slockish and Jackson are not official representatives of Yakama Nation and cannot stand in its shoes.

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

The court's error appears to have resulted from misreading a non-binding 2004 decision from the District of Montana, *Montana Wilderness Ass'n v. Fry*, 310 F. Supp. 2d 1127 (D. Mont. 2004). In *Fry*, BLM issued three oil-and-gas leases and a pipeline right-of-way without conducting any Section 106 process at all. *Id.* at 1133. BLM issued the leases without producing an EIS, and instead relied on a prior EIS that did not analyze oil-and-gas development.

*Id.* at 1145 (characterizing the prior analysis as a 'no look' not a 'hard look' process). That EIS stemmed from an even earlier oil-and-gas EA, but the record was unclear whether it was subject to public comment or discussion. *Id.* at 1146. Regardless, BLM never issued a FONSI for the EA, so it was invalid. *Id.* at 1146.

The court also found that BLM failed "to provide any notice to the public of its intention to evaluate the environmental impacts of the pipeline right-of-way, or to solicit comments from the public regarding the potential impacts of that action." *Id.* at 1147. The *Fry* court found that a tribal member, Youpee, had standing to bring an NHPA claim, that BLM violated NHPA, and remanded to BLM to "consult with all required entities, including nearby tribes." *Id.* at 1157. But Youpee had Article III standing under NHPA as a member of the public who was not given an opportunity to participate in that capacity. The court held:

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

*Id.* at 1151 (emphasis added).

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

consultations with interested Indian tribes. However, here, defendants *did* conduct a years-long public notice and comment process.

**2. Intervening Authority**

More important is the Ninth Circuit's affirmation that a tribal monitor "does not have standing to bring a claim for inadequate tribal consultation on behalf of the Tribe. The regulations extend the right to government-to-government consultation to the Tribe, not its individual members." *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of Interior*, 642 F. App'x 690, 693 (9th Cir. 2016) (cited pursuant to Ninth Circuit Rule 36-3). This decision is in line with prior Ninth Circuit cases holding that NHPA consultation requirements extend only to federal recognized tribes or their designated representatives. *E.g.*, *Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 608 F.3d 592, 608 n.19 (9th Cir. 2010) (9th Cir. 2010) (holding two non-Indian-tribe plaintiffs did not have standing to challenge tribal consultation requirements because "neither group is a federally recognized tribe to which the NHPA's consultation requirements extend nor do Plaintiffs point to evidence in the record showing that either party was acting as 'representatives designated or identified by the tribal government'"); *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1216 (9th Cir. 2008) (9th Cir. 2008) (citing NHPA's definition of Indian tribe, 54 U.S.C. § 300309, and holding, "Because the Snoqualmie Indians were not federally recognized before the closure of the administrative record, we need not evaluate the sufficiency of FERC's government-to-government consultation efforts"); *see also La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. W. Area Power Admin.*, No. EDCV 12-00005 VAP, 2012 WL 6743790, at *6 (C.D. Cal. Nov. 29, 2012) ("[I]t is the tribe, as principal, that holds the right, and the tribe who is

injured by a statutory violation. Thus, only the tribe itself may bring a claim for failure to comply with the consultation provision.").

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

**B. Consideration of Extra-Record Evidence**

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

Plaintiffs rely on ten deposition transcripts and declarations outside of the administrative record, which they prepared for the purpose of this litigation[8] to support their motion for summary judgment. Defendants move to strike all of plaintiffs' extra-record evidence or to limit its consideration to the purposes identified by the court when previously granting leave to supplement. Mot. Strike 1–2, ECF #339. But first, they seek relief from Local Rule 56-1(b).

**1. Local Rule 56-1(b)**

Local Rule 56-1(b) provides that "[r]ather than filing a motion to strike, a party must assert any evidentiary objections in its response or reply memorandum." Here, defendants filed a 14-page motion to strike in addition to their full-length combined motion for summary judgment and response to plaintiffs' motion for summary judgment. ECF #339. They argue that Local

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

Rule 56-1(b) is not applicable because they are moving to strike plaintiffs' extra-record evidence under the APA, not the federal rules of evidence, and even if it is applicable, the court has discretion to allow the motion to strike. *Id.* Plaintiffs counter that defendants' separate motion to strike is improper under both Local Rule 56-1(b) and Federal Rule of Civil Procedure 56(c)(2), defendants are simply trying to skirt the page limit, and the court lacks discretion to allow the motion. Pls.' Opp. Mot. Strike 2–4, ECF #344.

Rule 56(c)(2) provides that "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence." Fed. R. Civ. P. 56. "The plain meaning of [Rule 56(c)(2)'s language and its corresponding advisory committee notes] show that objecting to the admissibility of evidence supporting a summary judgment motion is now a part of summary judgment procedure, rather than a separate motion to be handled preliminarily." *Campbell v. Shinseki*, 546 F. App'x 874, 879 (11th Cir. 2013). Recent changes to Local Rule 56-1(b) bring it in line with Rule 56(c)(2). On January 1, 2019, the District of Oregon modified Local Rule 56-1(b), replacing a permissive "may" with the mandatory "must." LR 56 Amendment History, https://ord.uscourts.gov/index.php/rules-orders-and-notices/local-rules/civil-procedure/1244-2014-lr-56-amendment-history (last accessed March 17, 2020). Local Rule 56-1(b) makes clear what Federal Rule of Civil Procedure 56(c)(2) implies: in the District of Oregon, a party must assert any evidentiary objections in its summary judgment response or reply brief instead of filing a separate motion to strike. Thus, defendants' motion is procedurally improper.

The district's local rules have the "force of law." *Hollingsworth v. Perry*, 558 U.S. 183, 191 (2010) (quoting *Weil v. Neary*, 278 U.S. 160, 169 (1929)); *In re Corrinet*, 645 F.3d 1141, 1146 (9th Cir. 2011) ("District judges must adhere to their court's local rules, which have the

force of federal law."). However, "the district court has broad discretion to depart from the strict terms of the local rules where it makes sense to do so and substantial rights are not at stake." *Prof'l Programs Grp. v. Dep't of Commerce*, 29 F.3d 1349, 1353 (9th Cir. 1994). "A departure [from the local rules] is justified only if the effect is 'so slight and unimportant that the sensible treatment is to overlook it.'" *Id.* (quoting *Martel v. County of Los Angeles*, 21 F.3d 940, 947 n.4 (9th Cir. 1994)) (original alteration omitted) (subsequent history of *Martel* omitted).

When reviewing agency action under the APA, "the party seeking to admit extra-record evidence initially bears the burden of demonstrating that a relevant exception applies." *Locke.*, 776 F.3d at 992–93; *Animal Defense Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir. 1988). Plaintiffs must make this showing regardless of the adequacy of defendants' evidentiary objections. Otherwise stated, even if defendants' motion to strike were denied, the question of whether the court can rely on plaintiffs' extra-record evidence would still need to be answered. Under these circumstances, whether Local Rule 56-1(b) is applied would not affect a substantial right and it makes sense to grant defendants relief from the rule. *See Prof'l Programs Grp.*, 29 F.3d at 1353. Accordingly, the court moves on to consider the merits of defendants' motion to strike.

**2. Prior Orders and Plaintiffs' Documents**

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

In May 2012, plaintiffs submitted four declarations in response to the court's order: Declaration of Hereditary Chief Wilbur Slockish in Support of Standing (ECF #146),

Declaration of Carol Logan in Support of Standing (ECF #147), Declaration of Michael Jones in Support of Standing (ECF #148), and Declaration of Hereditary Chief Johnny Jackson in Support of Standing (ECF #151).

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

> (1) The Court GRANTS Plaintiffs' Renewed Motion to Supplement the Record as to Plaintiff[s'] Third Claim
>
> (a) under NHPA as to testimony by Jones and Nixon to clarify the area Yallup designated in 1991 as containing Native American burial sites and
>
> (b) under NAGPRA as to
>
> (i) affidavits establishing Plaintiffs' standing as traditional religious leaders and identifying "sacred objects" within the Project area and
>
> (ii) testimony by Jones describing the information he communicated to ODOT and the Federal Defendants that is not reflected in the Administrative Record and confirming Larry Dick's communication to the BLM in 1990.
>
> (2) The Court DENIES the remainder of Plaintiffs' Motion.

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

About a year after litigation resumed, plaintiffs submitted two[9] supplemental declarations: Supplemental Decl. of Hereditary Chief Johnny Jackson in Support of Standing (ECF #242) and Supplemental Decl. of Hereditary Chief Wilbur Slockish in Support of Standing (ECF #243). The parties each moved for summary judgment on plaintiffs' RFRA claim, and plaintiffs submitted deposition transcripts in support: Transcript of Deposition of Wilbur Slockish (ECF #287-4), Transcript of Deposition of Carol Logan (ECF #287-3), and Transcript of Deposition of Michael Jones (ECF #287-7). The court considered these transcripts when

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

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

**3. Standards**

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

In the Ninth Circuit,

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

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

**4. Analysis**

Plaintiffs argue that their submission of extra-record evidence complies with the court's prior orders, which applied the first exception to the rule against extra-record evidence, i.e., when "necessary to determine if the agency has considered all factors and explained its decision." Pls.' Reply 17, ECF #345.[10] Plaintiffs flatly assert that defendants "fail to show the decision was wrong at all, much less a clear judgment of error," but do not explain why application of this exception was correct in the first instance. *Id.* All this is to say, plaintiffs do not make a case for the court's consideration of any extra-record evidence here on the cross-

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

motions for summary judgment. In any event, with one exception,[11] the court's prior orders allowing plaintiffs to supplement the record were clearly erroneous because the record sufficiently explains defendants' decisions and supplementation would duplicate and recharacterize matters already in the record or otherwise result in an unlawful de novo review of the agency action.

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

> In the Ninth Circuit, when claims are brought under the NEPA, the first of these four circumstances allows expansion of the record to consider whether the agency "neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative or otherwise swept stubborn problems or serious criticism . . . under the rug."

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

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

> Therefore, because the Audubon Society alleged the Forest Service "neglected to mention a serious environmental consequence" in preparing the environmental assessments on the four challenged timber sales, we hold the district court

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

> properly considered Dr. Noss's affidavit even though it is not contained within the administrative record.

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

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

The record also reveals that, in the 1980s and '90s, defendants repeatedly investigated CGS' claims regarding the archeological, historical, and cultural significance of the project areas—including the purported gravesite. The record contains the transcript of ODOT's 1991 meeting with Yallup during which he told ODOT there were burial sites in [redacted] Later archeological surveys investigated these claims, and the results were reproduced in reports, which were incorporated and examined in the Wildwood to Rhododendron EIS, the US 26 Rhododendron to OR 35 Junction EIS, and the Wildwood to Wemme EA. The record contains hundreds of pages of information provided by Jones through CFASH and CGS in opposition to all projects in the area. And, importantly, the record contains more than enough evidence to show ODOT and defendants investigated the presence of burial

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

sites and cultural items in the project area, including via consultation with the Grand Ronde, Warm Springs, Siletz, and Yakama Nation.

Thus, supplementation of the record would not reveal whether defendants ignored the alleged archeological, historical, and cultural significance of these sites, but would instead directly challenge the agency's findings about that evidence. *Friends of the Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 997 (9th Cir. 1993) (upholding decision to exclude extra-record witness testimony where the "administrative record sufficiently explained the Corp's decision and showed that the agency considered the relevant factors"); *Rybachek v. EPA*, 904 F.2d 1276, 1296 n.25 (9th Cir. 1990) ("The original record here adequately explains the basis of the EPA's decision and demonstrates that the EPA considered the relevant factors."). However subtle, this distinction makes or breaks the application of the "all relevant factors" exception to the rule that "a court reviewing agency action under the APA must limit its review to the administrative record." *See Locke*, 776 F.3d at 992. To the extent the court's prior orders allowing supplementation impermissibly teed up the present motions for a de novo review of the propriety of defendants' decision, those orders are clearly erroneous and should be rescinded. *See Envtl. Def. Fund, Inc.*, 657 F.2d at 286 (holding that "a judicial venture outside the record" can "never, under *Camp v. Pitts*, examine the propriety of the [agency's] decision itself"). Although the documents plaintiffs seek to include "'might have supplied a fuller record,' they do not 'address issues not already there.'"[13] *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*,

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

100 F.3d 1443, 1451 (9th Cir. 1996) (quoting *Friends of the Earth v. Hintz*, 800 F.2d 822, 829 (9th Cir. 1986)).

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

Another example is Jones' declaration in which he states that during the 1991 meeting, [redacted][14] The word Dwyer does not appear anywhere in the transcript. When Bartel pushed Yallup to "be a little more specific," Jones interrupted and said, "we're not going to get down to specifics. If you

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

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

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

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

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

The record reveals that defendants investigated Jones' claim that this was a gravesite and found no humans remains: public comments about a gravesite, FHWA 487, Jones' inquiry about a "pioneer grave," FHWA 577, the 1986 CFASH letter threatening suit "if the potential gravesite is further disturbed," FHWA 5079, Jones' documentation that he was "able to feel at peace that the Native American or pioneer gravesite . . . will not be disturbed by the widening" in the 1987

Kuehn–Jones Agreement, FHWA 5436, the many archeological investigations of the site, including those resulting in Pettigrew's 1986 Excavation Report, FHWA 303–05, 487, the March 1992 note regarding how the "rock stack (described as a possible burial cairn)" was clearly not a historic resource, ACHP 219, O'Grady's pedestrian surveys confirming Pettigrew's findings, FHWA 2410; ACHP 57, and Roedel and Bottman's many communications with the official cultural resource managers of Grand Ronde (Schultz and Thorsgard), Warm Springs (Bird), Siletz (Kentta), and Yakama Nation (Meninick) confirming the tribes' official positions that the Dwyer area and rock feature were not culturally significant. *See* FHWA 2416, 3820, 5066, 5088, 5351, 5465, 5646, 5652, 5666–69, 5676, 5726–28, 5973, 6515, 6527, 6544, 6565–68, 6911, 7194, 7274–75. Dick's recent testimony that the rock feature is actually a stone altar and that he misled Jones in the 1980s and '90s, thus qualifying and undermining all of Jones and ODOT's interactions, constitutes post-decision information that may not be advanced as "a new rationalization either for sustaining or attacking an agency's decision." *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) (citing *Association of Pac. Fisheries v. EPA*, 615 F.2d 794, 811–12 (9th Cir. 1980).

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

## VII. Defendants' Affirmative Defenses: Laches and Waiver

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

### A. Waiver of Affirmative Defenses

Defendants contend that (1) the doctrine of laches bars plaintiffs' claims and (2) plaintiffs waived their claims because they did not raise them during the administrative process. Defs.' Mot. Summ. J. 4–7, ECF #340. Plaintiffs argue that defendants waived their right to assert the affirmative defenses of laches and waiver because they did not plead them in their answer. Pls.' Reply Supp. Mot. Summ. J. 6, ECF #346.

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

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

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

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

**B. Plaintiffs Are Single Entity**

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

Here, CGS and the Alliance are both named plaintiffs. Jones is not a named plaintiff, but the record shows that he was the one who personally interacted with ODOT and defendants in the 1980s and '90s and before issuance of the Wildwood to Wemme EA and FONSI. Jones is the curator and co-founder of plaintiff CGS, of which Logan is a co-founder and all individual plaintiffs are members, and Jones' conduct is essential to plaintiffs' case. Logan Decl. ¶¶ 20, 37–38, ECF #147; Jones Decl. ¶ 5, ECF #148. Logan only began personally interacting with

ODOT and defendants in late 2007, and Slockish and Jackson only entered the picture in May 2008 when Jones sent their memoranda to ACHP. ACHP 117–35. Moreover, Logan, Slockish, Jackson, and Jones are all members of the Alliance. Slockish Decl. ¶ 3, ECF #146; Logan Decl. ¶ 20, ECF #147; Jones Decl. ¶ 5, ECF #148; Jackson Decl. ¶ 3, ECF #151. Thus, plaintiffs are a single entity.

### C. Analysis of Affirmative Defenses

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

#### 1. Laches

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

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

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

Citing *SCA Hygiene Products Aktiebolag*, plaintiffs argue that because they sued within the APA's six-year statute of limitations, the laches defense is categorically unavailable to defendants. Pls.' Reply 8, ECF #345.[15] In an APA action, the six-year statute of limitations

[15] *SCA Hygiene* concerned "the relationship between the equitable defense of laches and claims for damages that are brought within the time allowed by a statute of limitations." 137 S. Ct. at

accrues when the "final agency action" issues. *See Hells Canyon Pres. Council v. United States Forest Serv.*, 593 F.3d 923, 931 (9th Cir. 2010); 5 U.S.C. § 704; 28 U.S.C. § 2401(a). To be "final," an agency action "must mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature." *Bennett v. Spear*, 520 U.S. 154, 177–78, (1997).

Here, defendants' issuance of the Revised EA and FONSI on January 25, 2007, marked the consummation of their decision-making process. Plaintiffs sued less than two years later in October 2008, years before the statute of limitations had run. However, plaintiffs seek only equitable relief, not legal relief. "As to equitable relief, in extraordinary circumstances, laches may bar at the very threshold the particular relief requested by the plaintiff." *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 667–68 (2014). Thus, the laches defense is available to defendants, notwithstanding the fact that plaintiffs filed suit within the statute of limitations.

**a. Diligence**

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

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959. The Supreme Court held laches cannot be invoked to bar legal relief sought within the period prescribed by a statute of limitations. *Id.* The defendants argued that the collapse of equitable courts and courts of law in 1938 likewise expanded the application of laches to all forms of relief, but the Supreme Court reversed the Federal Circuit to hold otherwise. Thus, implicit in *SCA Hygiene* is not that laches is categorially unavailable to claims for equitable relief brought within the statute of limitations; rather, just the opposite.

Plaintiffs are correct that the record does not reveal defendants made the sort of consistent, repeated attempts to consult with them like those made by the agency defendants in *Apache Survival*, 21 F.3d at 905, and *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 239 F. Supp. 3d 77, 87 (D.D.C. 2017). However, the plaintiffs in those cases were federally recognized Indian tribes to whom the defendant agencies owed consultation duties. 54 U.S.C. § 300309; 36 C.F.R. § 800.4. Even if ODOT and defendants knew of CGS when they began planning the Wildwood to Wemme project, they were under no legal obligation to extend to CGS the same sort of solicitude that they had previously extended to Jones. *E.g.*, BLM 63 (ODOT declining Jones' request for mediation). During prior projects, ODOT repeatedly met with Jones outside the normal public-comment process to understand CFASH and CGS's concerns. *E.g.*, FHWA 5404–11 (negotiating the 1987 Kuehn–Jones Agreement). However, these interactions did not elevate Jones or CGS above any other member of the public for the purpose of subsequent projects. CGS could have requested in writing to be an additional consulting party in the Section 106 process under 36 C.F.R. § 800.3(f)(3), but it did not.

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

project. In fact, CGS did comment—on the protection and relocation of the white stone pillars—and defendants addressed those concerns. FHWA 4977.

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

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

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

**b. Prejudice**

Defendants argue they would suffer undue prejudice "because the turn lane has been constructed for more than a decade." Defs.' Mot. Summ. J. 10, ECF #340. However, "prejudice must be judged as of the time the lawsuit was filed, thereby eliminating consideration of post-

lawsuit expenditures and progress in constructing the [project]." *Save the Peaks Coal.*, 669 F.3d at 1033.

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

Moreover, in their response to defendants' motion for summary judgment, plaintiffs submit that they "seek a variety of relief far short of removing the highway—such as removing the earthen berm north of the highway, replanting trees, and reconstructing the stone altar." Pls.' Reply 10, ECF #345. But plaintiffs clearly sought a return to the status quo when they filed suit. Findings and Recommendations 22, ECF #48 (contemplating ordering removal of the offending portion of the highway). In any event, the court has already found the project does not burden plaintiffs' practice of religion. Order, ECF #312. And ODOT specifically chose the "gentler, more transversable[*sic*] slope" with the express purpose of replanting "new small trees and other native vegetation . . . to mitigate for visual impact." FHWA 4972. The costs of altering the

project or undertaking a new administrative process far outweigh whatever benefits might accrue to plaintiffs resulting from that process. Thus, laches bars plaintiffs' claims.

**2. Administrative Waiver and Exhaustion**

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

"A party waives arguments that are not raised during the administrative process." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1081 (9th Cir. 2011); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 553 (1978) ("it is still incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions."). The Ninth Circuit has "defined [this] exhaustion requirement broadly: 'The plaintiffs have exhausted their administrative appeals if the appeal, taken as a whole, provided sufficient notice to the agency to afford it the opportunity to rectify the violations that the plaintiffs alleged.'" *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 965 (9th Cir. 2006)

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

(quoting *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 899 (9th Cir. 2002)). This includes identifying issues with enough specificity to separate them from "more general issues" otherwise raised during the administrative process. *Oregon Nat. Desert Assn. v. Jewell*, 840 F.3d 562, 571 (9th Cir. 2016); *Dept. of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004) ("Persons challenging an agency's compliance with NEPA must 'structure their participation so that it alerts the agency to the parties' position and contentions,' in order to allow the agency to give the issue meaningful consideration.") (quoting *Vermont Yankee*, 435 U.S. at 553).

Here, CGS only commented on the white stone pillars during the administrative process. Defendants relocated and repaired the pillars even though they lacked distinction and integrity and were not eligible for the National Register. FHWA 4496. Because plaintiffs did not otherwise make their other positions known during the administrative process, they did not "afford [defendants] the opportunity to rectify the violations that the plaintiffs alleged.'" *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 965 (9th Cir. 2006). And plaintiffs' comments in 2007 and 2008, made after defendants issued the Revised EA and FONSI, "may not form a basis for reversal of an agency decision." *Havasupai Tribe v. Robertson*, 943 F.2d 32, 34 (9th Cir. 1991) (citing *Vermont Yankee*, 435 U.S. at 553–54).

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

duties apart from allowing them to comment publicly, which defendants did. Plaintiffs therefore have no tenable excuse for their lack of participation in the administrative process. Plaintiffs' claims are waived.

Plaintiffs' invocation of the independent knowledge exception does not save them from this exhaustion requirement. Consistent with the Supreme Court's application of *Vermont Yankee*, the Ninth Circuit "has declined to adopt 'a broad rule which would require participation in agency proceedings as a condition precedent to seeking judicial review of an agency decision.'" *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006) (citing *Kunaknana v. Clark*, 742 F.2d 1145, 1148 (9th Cir. 1984)). The Ninth Circuit "has drawn a distinction between situations in which NEPA plaintiffs submitted comments that did not alert the agency to their concerns or failed to participate when the agency looked into their concerns and situations in which plaintiffs allege procedural violations of NEPA." *Id.* (quoting *Kunaknana*, 742 F.2d at 1148). Because "the agency bears the primary responsibility to ensure that it complies with NEPA, . . . an EA's or an EIS' flaws might be *so obvious* that there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action." *Dept. of Transp. v. Pub. Citizen*, 541 U.S. 752, 765 (2004) (emphasis added).

The Ninth Circuit's decision in *'Ilio'ulaokalani Coalition* is instructive. During a project transforming the 2nd Brigade in Hawaii into a Stryker Brigade Combat Team, the Army divided its NEPA compliance into two tiers. *See* 464 F.3d at 1088–91. In the first tier, the Army decided to transform the 2nd Brigade in place without considering any alternative locations. But the EIS had "no supporting analysis," and the "Army's experts recognized this as a potential deficiency": "The PEIS leaves us short on alternatives. The only alternatives we have are no

action versus action." *Id.* at 1090 (quoting record). This decision constrained future decision-making in the second tier. "In response to public questions as to why alternatives outside of Hawaii were not considered," the Army pointed to its earlier unsubstantiated decision. *Id.* at 1091.

On appeal, the Ninth Circuit held that the plaintiffs did not waive "their opportunity to challenge the range of alternatives considered in the PEIS" because the "Army had independent knowledge of the very issue that concerns Plaintiffs in this case such that 'there is no need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action.'" *Id.* at 1092–93 (quoting *Pub. Citizen*, 541 U.S. at 765). The court found that "[t]he record in this case is replete with evidence that the Army recognized the specific shortfall of the PEIS raised by Plaintiffs here: the failure to support the determination to transform the 2nd Brigade in place." *Id.* at 1092.

Here, by contrast, the record does not reflect that defendants had independent knowledge of the very issues that concern plaintiffs in this case. Plaintiffs contend that their "legal claims all stem from the same concern: that the project would disturb sensitive environmental and cultural resources just north of U.S. 26 in Dwyer," and "[t]hus, if the Government had 'independent knowledge' of this concern, it had the responsibility to address it during the administrative process—whether Plaintiffs participated or not." Pls.' Reply 4, ECF #345. But this is about as general of a concern as one can imagine. Much more specificity is required. *See Jewell*, 840 F.3d at 571 (finding an argument to be waived when the plaintiff did not use a specific term in its comments on a draft EIS or make specific arguments about the issue, separately from more general issues).

Plaintiffs seize on a paragraph from defendants' motion for summary judgment where defendants argue there was "no need for a supplemental" NEPA analysis when Logan and Jones told FHWA that "the project could destroy American Indian cultural and religious sites" because this allegation "did not in fact raise 'new' information." Pls.' Reply 1, 4, 25, ECF #345 (citing Defs.' Mot. Summ. J. 21, ECF #340) (quotation marks omitted). Plaintiffs take this to mean "the Government was well aware of Plaintiffs' concerns," and argue that the independent knowledge doctrine therefore captures all their claims. *Id.* at 4. But what defendants argue is simply another way of saying that plaintiffs did not raise their specific concerns until they filed suit (or even moved for summary judgment); whether "the project could destroy American Indian cultural and religious sites" is a general concern that defendants had already addressed. If plaintiffs took issue with how defendants addressed this broad concern, they should have said so during the public comment period.

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

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

FHWA 305. They found no evidence of human remains. In 1991, Yallup raised specific concerns about burials in [redacted], but not in the Dwyer area or the north side of the highway. *See* FHWA 5567–90. Another archeologist told Jones in March 1992 that the "rock stack" was clearly not a historic resource. ACHP 219. O'Grady investigated the site again nearly twenty years later and agreed with Pettigrew's finding that the rock cluster was not worthy of protection or mitigation. FHWA 2414, ACHP 57–62. Had defendants received information from plaintiffs that this was in fact a sacred campsite and altar, they could have further investigated those specific claims, but they received no such information. Moreover, the record reveals that through 2007, defendants consulted with Grand Ronde, Warm Springs, Siletz, and Yakama Nation and confirmed the rock feature was not culturally or historically significant. In December 2007, Grand Ronde's Cultural Protection Coordinator told ODOT, "I am not sure that I would call this rock feature cultural if I had found it[.] [I]t most likely is a pile of rocks from ploughing." FHWA 5088.

Plaintiffs also now challenge the project's effects on old-growth trees and the Dwyer area's status as recreation area. Defendants in fact addressed these general concerns. When there was public outcry over cutting trees in the Dwyer area during the planning of the Wildwood to Rhododendron project in 1986 and '87, ODOT selected a modified alternative that eliminated the turn lane and spared old growth. FHWA 441–44. Later, during the planning of the Wildwood to Wemme project, there was public outcry over the lack of safety on the highway because people were dying in traffic accidents—not over the loss of old-growth trees. In response, ODOT reassessed environmental, archeological, and historic resources in 2005 and 2006. FHWA 2410–54, 4966–71. A botanical survey revealed a diverse community of lichens and vascular plants in the Dwyer area and acknowledged 65 large trees would need to be cut but

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

If plaintiffs took issue with this analysis or had additional concerns, they should have participated in the administrative process.[17] Before the public-comment period closed, CGS only raised concern about the white stone pillars, which defendants accommodated. *See 'Ilio'ulaokalani Coalition*, 464 F.3d at 1092 ("plaintiffs submitted comments that did not alert the agency to their concerns"). Like with the white stone pillars, if provided the opportunity, defendants could have rectified any alleged deficiencies or otherwise given them meaningful consideration.

[17] Even when Jones and Logan began calling and faxing documents to defendants in early 2008, long after the close of the public comment period and issuance of the Revised EA and FONSI, they sought to recognize "all heritage resources" along the highway, including outside the project area. FHWA 5474–83. Logan insisted that over 40 sites, including the Dwyer area, should be listed in the National Register. ACHP 142–43. When Slockish and Jackson finally sent memoranda in May 2008, they wrote that the entire forest is sacred, of traditional medicines and foods, and of sacred burials. ACHP 123–41. Plaintiffs concerns about sites and resources outside the Wildwood to Wemme project area are simply irrelevant, and plaintiffs forfeited their opportunity to allege deficiencies with defendants' analysis of archeological, historical, and cultural resources in the project area because defendants conducted that analysis and plaintiffs did not timely identify flaws in that analysis.

In sum, no one raised the specific, nuanced concerns or critiques of defendants' analysis that plaintiffs raise now. "When the argument is one of degree, rather than an outright failure to address, the plaintiff must raise that argument during the comment period or be precluded from litigating it at a later date." *League of Wilderness Defenders–Blue Mountain Biodiversity Project v. Bosworth*, 383 F. Supp. 2d 1285, 1296–97 (D. Or. 2005); *see also Honolulutraffic.com v. Fed. Transit Admin.*, CIV. 11-00307 AWT, 2012 WL 180, at *8 (D. Haw. May 17, 2012) ("It would be unreasonable to hold that Defendants' attempts to address the comment letters concerning the Merchant Street District were 'obviously' flawed, when Plaintiffs made no effort to point out those flaws themselves"); *Moapa Band of Paiutes v. U.S. Bureau of Land Mgt.*, 2:10-CV-02021-KJD, 2011 WL 4738120, at *12 (D. Nev. Oct. 6, 2011) ("Plaintiffs did not raise the issue of the degree to which the BLM addressed the no-action alternative in the comments to the EA or in the scoping period, despite ample opportunity to do so."), *aff'd sub nom. Moapa Band of Paiutes v. Bureau of Land Mgt.*, 546 F. App'x. 655 (9th Cir. 2013) (cited pursuant to Ninth Circuit Rule 36-3). Because plaintiffs failed to raise these specific concerns at the administrative level, their claims are waived.

## VIII. NAGPRA

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

NAGRPA "culminates decades of struggle by Native American tribal governments and people to protect against grave desecration, to repatriate thousands of dead relatives or ancestors, and to retrieve stolen or improperly acquired religious and cultural property back to Native owners." Jack F. Trope Walter R., *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 36 (1992). The law has three substantive components. First, it imposes criminal liability on anyone who "knowingly sells, purchases, uses for profit, or transports for sale or profit, the human remains of a Native American without the right of possession to those remains." 18 U.S.C. § 1170. Second, it provides for the inventory, identification, and repatriation of Native American human remains, associated and unassociated funerary objects, sacred objects, and objects of cultural patrimony from federally funded museums and agencies to lineal descendants or the Indian tribe or Native Hawaiian organization with the strongest cultural affiliations. *See generally* 25 U.S.C. §§ 3001–05; 43 C.F.R. §§ 10.1–.17. The museums and agencies were given five years from November 16, 1990 (with the possible extensions of time if compliance efforts were made in good faith),[18] to inventory and identify human remains and cultural items in their possession and control. 25 U.S.C. §§ 3003(a), (b)(1)(B), (c). Third, NAGPRA provides protections for human remains, associated and unassociated funerary objects, sacred objects, and objects of cultural patrimony during intentional excavation or from inadvertent discovery *after* November 16, 1990. 25 U.S.C. §§ 3002(a), (c)–(d); *see also* 43 C.F.R. §§ 10.3–.4.

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

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

Plaintiffs argue that BLM violated NAGPRA when it failed to notify and consult Indian tribes when excavating or removing the altar, and, that ODOT archeologist Philipek violated the inadvertent discovery provision when she visited the site in 2008 and discovered the stone altar was scattered but did not follow the requisite notification and cessation requirements. Pls.' Mot. Summ. J. 51–55, ECF #331. However, even if BLM, as the primary management authority over the land in the project area, was required to notify and consult with Indian tribes associated with the rock feature and secure an APRA permit before proceeding, *see* 43 C.F.R. § 10.4(d), as already explained, plaintiffs are not federally recognized Indian tribes and do not have article III standing to challenge duties owed to Indian tribes. Moreover, plaintiffs' inadvertent discovery argument fails because any sacred objects were discovered before November 16, 1990.

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

As an initial matter, defendants' (and Philipek's) position that the objects were not Native American cultural items was based on substantial evidence. ODOT consulted with the official cultural resources personnel of the four federally recognized Indian tribes with cultural ties to the

area. All agreed the stones were not worthy of protection. Every archeologist to visit the site found the stones to be of no cultural or archeological significance. Grand Ronde provided a tribal monitor during construction to stop construction if human remains or cultural items were discovered. Defendants' determination that the stones and campsite in the Dwyer area were not Native American cultural items was based on this substantial evidence.

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

Plaintiffs cite *Yankton Sioux Tribe* for the proposition that a later "re-observation" constitutes an inadvertent discovery. Pls.' Mot. Summ. J. 52, ECF #331; Pls.' Reply 39–40, ECF #345. It certainly may be, but that is not what happened here. In *Yankton Sioux Tribe*, the U.S. Army Corps of Engineers disinterred, removed, and reinterred hundreds of bodies from a cemetery and adjacent Indian burial site dating back to the 1800s because they would be covered by water part of the year after the construction of a dam. *Id.* at 1049. The Corps varied the water level depending on flood control, irrigation, power supply, and recreation needs, and by 1966, it was clear some of the human remains had not been relocated. *Id.* 1050. Human remains and casket parts were observed in and near the cemetery and along the shoreline in 1966, 1990, 1991,

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

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

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

**IX. Free Exercise Clause**

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend I. "The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Empl. Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 877 (1990). "The Free Exercise Clause affords an individual protection from certain forms of government compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Bowen v. Roy*, 476 U.S. 693, 699–700 (1986).

In *Smith*, the Supreme Court "held that neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause of the First Amendment." *Holt v. Hobbs*, 574 U.S. 352 (2015) (citing *Smith*, 494 U.S. at 878–82); 42 U.S.C. § 2000bb(a)(4) (stating *Smith* "virtually eliminated the requirement that the government justify

burdens on religious exercise imposed by laws neutral toward religion"). In response to *Smith*, Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, "to provide *greater protection* for religious exercise than is available under the First Amendment." *Holt v. Hobbs*, 574 U.S. 352 (2015) (citing *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 694–95 (2014)) (emphasis added). Thus, a "person asserting a free exercise claim must show that the government action in question substantially burdens the person's practice of her religion." *Jones v. Williams*, 791 F.3d 1023, 1031 (9th Cir. 2015).

Here, this court dismissed plaintiffs' RFRA claim, holding plaintiff "have not established that they are being coerced to act contrary to their religious beliefs under the threat of sanctions or that a governmental benefit is being conditioned upon conduct that would violate their religious beliefs." Order 2, ECF #310 (citing Findings and Recommendations 10, ECF #300). "Without these critical elements, [P]laintiffs cannot establish a substantial burden under the RFRA." *Id.* (citing Findings and Recommendations 10, ECF #300) (alteration in original). As the Ninth Circuit has stated, plaintiffs' "failure to demonstrate a substantial burden under RFRA necessarily means that they have failed to establish a violation of the Free Exercise Clause, as RFRA's prohibition on statutes that burden religion is stricter than that contained in the Free Exercise Clause." *Fernandez v. Mukasey*, 520 F.3d 965, 966 n.1 (9th Cir. 2008) (per curiam) (citing *Smith*, 494 U.S. at 878–80).

Plaintiffs argue that post-*Smith*, a plaintiff need not show that the law or government action substantially burdens its practice of religion. Pls.' Reply 41–42, ECF #345. Instead, they dive into the neutral-and-general-applicability element of the free-exercise inquiry without addressing substantial burden. *See id.* However, it is only after finding that a law burdens religious practice that the court next asks whether it is neutral and generally applicable. *Am.*

*Fam. Ass'n, Inc. v. City and County of San Francisco*, 277 F.3d 1114, 1124 (9th Cir. 2002). Plaintiffs' free exercise claim therefore fails. To the extent plaintiffs also bring a related due process claim, that claim similarly fails.

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

## RECOMMENDATIONS

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

## SCHEDULING ORDER

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

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

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**NOTICE**

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

DATED this 1st day of April, 2020.

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