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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

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

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

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

PLAINTIFFS' OBJECTIONS TO MAGISTRATE'S FINDINGS AND RECOMMENDATIONS (ECF 348)

Request for Oral Argument

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

CASCADE GEOGRAPHIC SOCIETY, an Oregon nonprofit corporation,

and

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

Plaintiffs,

v.

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

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

and

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

Defendants.

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GLOSSARY

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

INTRODUCTION

"[I]n the law, what is sauce for the goose is normally sauce for the gander." *Heffernan v. City of Paterson*, 136 S. Ct. 1412, 1418 (2016). Unfortunately, the Magistrate's recommendation fails to uphold that principle. The recommendation repeatedly bends procedural rules to accommodate the Government—reviving long-waived affirmative defenses, reversing law of the case, and overlooking the Government's disregard for summary-judgment procedure. By contrast, the recommendation stretches procedural hurdles beyond recognition in applying them against Plaintiffs—recommending dismissal of most of this twelve-year-old case on the long-waived, threshold defenses of laches and administrative waiver.

Although the recommendation apparently found the merits "analysis" to be "tangled," ECF 348 at 44, the analysis is not that difficult. The case centers on a less-than-one-acre Native American sacred site just north of U.S. 26. The site was part of a BLM-designated recreation area, was set aside by Congress and BLM because of its old-growth trees, and had been protected in a previous highway-widening project. Yet as part of another widening project in 2008, the Government cut down the old-growth trees, bulldozed the sacred site, and destroyed Plaintiffs' sacred altar. The Government doesn't dispute that it had feasible alternatives to avoid these results. Unsurprisingly, then, its actions violated several laws designed to prevent needless destruction of cultural, environmental, and religious sites.

In declining to reach the merits of most of Plaintiffs' claims, the Magistrate held they were barred first by the equitable doctrine of laches. But it's well-established that laches does not apply where, as here, plaintiffs file suit within a controlling statute of limitations. Moreover, Plaintiffs' supposed "delay"—filing suit just months after the agency's first actionable decision, only ten weeks into the year-long construction project, and four *years* before the six-year limitations period expired—is far from the sort of extraordinary circumstances where laches can apply in environmental

cases. The only extraordinary delay here was the *Government*'s ten-year delay in floating a laches defense.

Nor is this case barred by administrative waiver. The Government was well-aware of the concerns Plaintiffs raise in this litigation during the administrative process. In fact, the Government explicitly raised and addressed many of them, demonstrating its awareness. Whether it addressed those concerns *properly* is a merits question.

The Magistrate also erred in recommending summary judgment for the Government on Plaintiffs' NAGPRA and Free Exercise Clause claims. The Government violated NAGPRA by destroying Plaintiffs' sacred altar, which it had been told was a religious object. And the Government violated the Free Exercise Clause by altering the project to protect secular interests—such as nearby wetlands—while refusing to protect Plaintiffs' sacred site.

Worst of all, the destruction in this case was unnecessary. The Government had many alternatives for widening the highway without harming Plaintiffs' sacred site. But it ignored Plaintiffs' pleas and chose the most destructive alternative. The result was the destruction of a scenic area protected by Congress and the Government for over forty years, and the complete destruction of Plaintiffs' sacred site.

This case has now been pending for nearly twelve years. The plaintiffs are 75, 76, and 89 years old respectively. The head of Plaintiffs CGS and MHSLPA died while the current motion was pending before the Magistrate, fully briefed, for a year. Accordingly, regardless of how this Court views the merits of Plaintiffs claims, they respectfully request a decision that *addresses* the merits—rather than one that stretches procedural rules to dodge them. Otherwise, Plaintiffs face the very real prospect of two more years litigating procedural questions at the Ninth Circuit, only to return here after a reversal so this Court can address the merits for the first time. That would be a massive waste of judicial resources—and could well deprive Plaintiffs of any chance of relief in their lifetimes.

BACKGROUND

Plaintiffs incorporate by reference the detailed statements of fact in prior briefing. *See* ECF 331; ECF 302. Here, they summarize only the facts most pertinent to evaluating the Magistrate's recommendations.

I. Factual Background

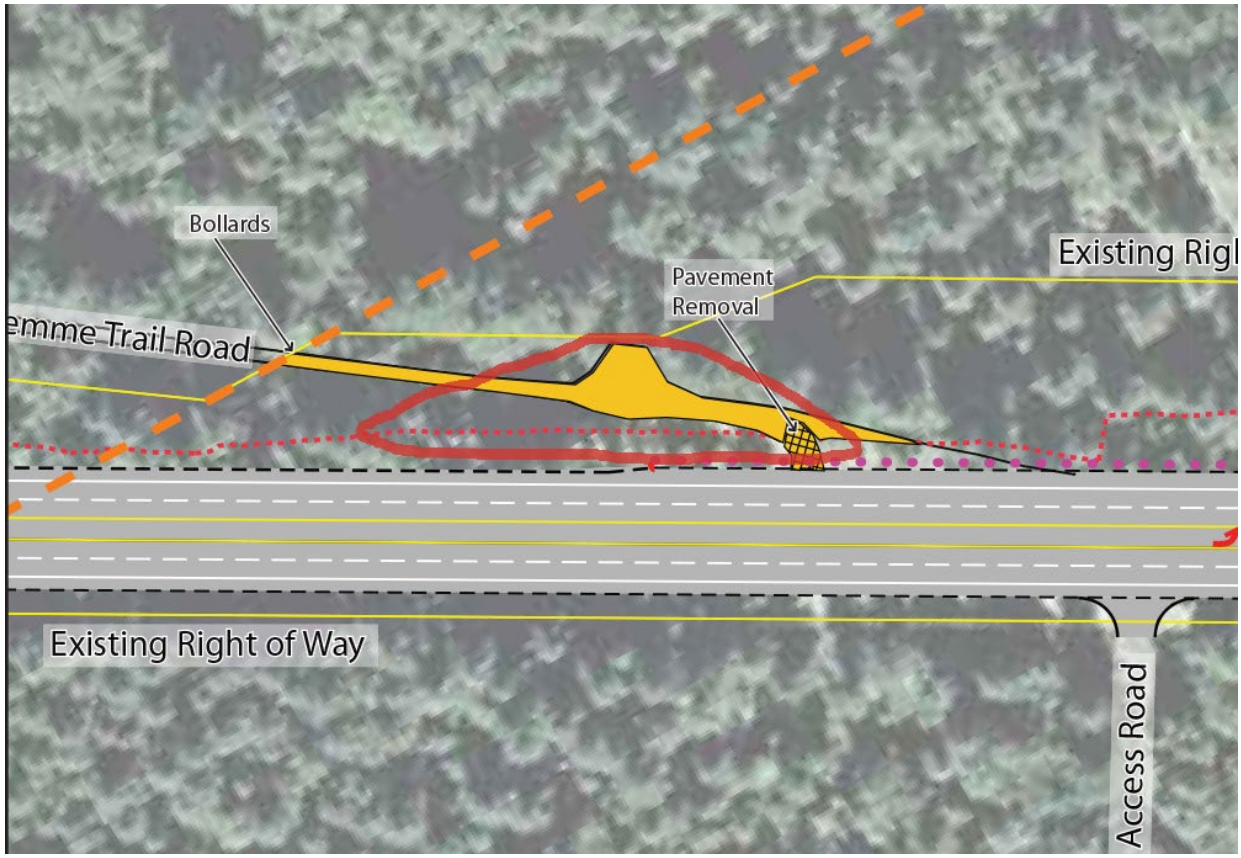
A. Plaintiffs and the sacred site

Plaintiffs are Wilbur Slockish, Johnny Jackson, Carol Logan, CGS, and MHSLPA. Slockish and Jackson are Hereditary Chiefs and enrolled members of the Confederated Tribes and Bands of the Yakama Nation; Logan is an Elder and enrolled member of the Confederated Tribes of Grand Ronde. ECF 292 at 3-4. The individual Plaintiffs are also members of CGS and MHSLPA, organizations formerly led by Michael Jones. *Id.* at 3, 11.

Slockish, Jackson, and Logan practice traditional Native American religions, including by venerating their ancestors, safeguarding ancestral burial sites, and visiting sacred sites. *Id.* at 4-6.

This case centers on one such site, known to Plaintiffs as *Ana Kwna Nchi nchi Patat* (the "Place of Big Big Trees"). The site occupied a small portion of the A.J. Dwyer Scenic Area, which is a roughly five-acre parcel just north of U.S. 26.

Ex.1FHWA_4472.[1] The site measured approximately 100 by 30 meters, or 0.74 acres, Ex.18BLM_17-18, and is circled in red in the map below. Ex.1FHWA_4356.



The site included several features integral to Plaintiffs' religious exercise, including an altar made of river rocks. The altar both "mark[ed] surrounding graves" and served as a focal point for religious ceremonies. ECF 302 at 7-9.

Dwyer—which encompasses the sacred site—"is a corridor of large fir trees" donated to the Government in the 1930s. Ex.30FHWA_2049; Ex.4FHWA_674. In 1968, the Government "withdr[ew]" and "reserved" Dwyer as part of the Wildwood Recreation Site. 33 Fed. Reg. 17628, Ex.29. In 1995, in the resource-management plan adopted by BLM under FLPMA—the SDMP—BLM designated Dwyer a "Special

[1] Exhibit citations refer to those attached to Plaintiffs' summary-judgment motion, ECF 331.

Area," "unique" for "scenic and botanical values," including "large older trees." Ex.1FHWA4472; *see* Ex. 5. And in 1996, Congress designated the parts of Dwyer visible from the highway as "Mt. Hood Corridor Lands" protected for their "scenic qualities." ORCA, Pub. L. No. 104-208, 110 Stat. 3009-537, § 401(g), Ex.20.

B. The 1980s widening

In the 1980s, FHWA and ODOT proposed to expand U.S. 26 15-feet north into Dwyer, Ex.4FHWA_444, requiring removal of "most of [Dwyer's] large trees." Ex.3FHWA_178. This proposal prompted a large-scale campaign to save Dwyer, led by C-FASH, another organization formed by Michael Jones. ECF 302 at 11-12.

After C-FASH highlighted Dwyer's altar (which Jones called a "grave"), BLM archaeologists studied it. The study found no human remains, but concluded the altar "may be at least several hundred years (and possibly much more) old," and it was "not possible to determine with any confidence whether the feature is aboriginal or Euro-American." ECF 292-13 FHWA_303.

In 1986, FHWA and ODOT issued a Final EIS, changing the widening proposal. Under the Final EIS, a center turn lane would be added on either side of Dwyer, but the stretch of highway bordering Dwyer would not include a center turn lane and would use "guardrails and retaining walls" to "minimize the number of trees taken." Ex.4FHWA_462-464.

To memorialize discussions surrounding the project, C-FASH and ODOT signed an agreement in 1987, which identified sacred resources and Native American gravesites in Dwyer to be considered in managing U.S. 26. Ex.19FHWA_5436. In a public meeting soon after, a government official acknowledged that the stone altar was "the reason why we can't widen the highway." Ex.10 64:7-21. A few days later, the altar was vandalized. *Id.* Jones informed BLM archaeologist Philipek of the vandalization, who memorialized the call in notes dated March 12, 1990. Ex.16BLM_8-

9.[2] Jones told Philipek that Native Americans had gone to the Dwyer site "for years" because of "graves" there. *Id.* He also told her about ceremonies performed there, including to re-consecrate the altar after its vandalism. *Id.*

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

In January 2000, FHWA and ODOT prepared a scoping packet for a new widening along the stretch of U.S. 26 bordering Dwyer: the Wildwood–Wemme Project at the center of this case. Ex.6.

The agencies recognized that widening U.S. 26 through Dwyer "would require…extensive filling" and "removal of many large diameter trees"—the same trees they had "expended considerable effort to protect" in the 1980s. Ex.6FHWA_1980. They also anticipated that this "may again spark public controversy." Ex.30FHWA_2047-2052.

Nonetheless, FHWA and ODOT issued an EA in August 2006, proposing that U.S. 26 be widened to the north within Dwyer. Ex.1. An REA and FONSI were signed on January 25, 2007. Ex.2. The EA and REA did not consider whether to use a steeper slope or retaining wall solely within the area bordering Dwyer. The REA did, however, propose to use those mitigation techniques elsewhere to "avoid" "impact[ing] a…wetland located on the north side of the highway." *Id.* FHWA_4967-4968.

Although the REA "selected" the widen-to-the-north alternative, FHWA and ODOT hadn't yet obtained from BLM the tree-cutting permit and right-of-way necessary to pursue it. *See* ECF 292 at 17-18. Nor had the FONSI been published in the Federal Register. Ex.2FHWA_4953.

Toward "the end of 2007" Plaintiff Logan first learned of the project and "hurr[ied]" to raise her concerns. Ex.34 32:18-21, 33:5-16. Those concerns reached ODOT in November. *See* FHWA_5676.

[2] The Magistrate incorrectly said this call occurred in 2008. ECF 348 at 38. The notes are dated "3/12/90"; they are attached to Philipek's 2008 report.

Plaintiffs then went directly to the Government, explaining their religious use of Dwyer, and asserting the Government's process had been deficient for failing to consult with them and the Yakama. Logan called FHWA in January 2008 and spoke about religious use of the site. Ex.26ACHP_141. In February 2008, Logan and Jones gave the Government a copy of the 1987 agreement. That same month, Logan sent FHWA a memorandum discussing "American Indian cultural and religious sites" in Dwyer, and expressing belief that "an additional lane c[ould] be added…without destroying heritage resources." Ex.26ACHP_47-49. All this occurred before BLM issued the tree-cutting permit and right-of-way necessary for the project to begin; before tree-cutting or construction began; before the Yakama were consulted; and before publication of the FONSI in the Federal Register.

On February 28, BLM issued the tree-removal permit. Ex.21. Tree cutting began in late March. ECF 287 at 6. BLM granted the right-of-way on April 2. Ex.41.

On April 4, ODOT consulted the Yakama. Ex.13FHWA_6544. Four days later, FHWA published the FONSI in the Federal Register, identifying the date by which parties seeking review should file suit: "October 6, 2008." FHWA_6553.

Throughout April and May, Plaintiffs sent additional memoranda, detailing the Dwyer site's history and importance to Native American religious exercise. ECF 302 at 18-19. In May, an FHWA official, alerted by Plaintiffs' attorney to "Indian remains on the site," informed Philipek, who had participated in the 1986 investigation of the altar. Ex.38. Philipek returned to the site on July 24, 2008, and documented that the "rock cluster" had been scattered. Ex.16BLM_6. She drafted a report about the visit, attaching the notes from her 1990 call with Jones. Ex.16BLM_7-9.

Construction began just after Philipek's visit in late July and was completed a year later. ECF 223 ¶51; ECF 238 ¶51. The project destroyed all elements of the site used in Plaintiffs' religious exercise, including the altar. ECF 302 at 20-21.

II. Procedural History

Plaintiffs filed this suit on October 6, 2008—the date FHWA identified in the Federal Register as the deadline for claims. ECF 1; FHWA_6553.

On May 21, 2009, the Government filed a motion to dismiss raising several affirmative defenses, including mootness, lack of standing, sovereign immunity, and failure to state a claim. ECF 28. But it did not raise laches or waiver. *Id.* After that motion was denied, the Government subsequently filed four different answers in this case, none raising laches or waiver as a defense. ECF 72, 165, 225, 238.

In 2012, the case was stayed for nearly three years pending settlement negotiations. In 2016, Plaintiffs filed their currently operative complaint. ECF 223. In 2018, the Court granted the Government's motion for summary judgment on Plaintiffs' RFRA claim. ECF 312.

In December 2018, Plaintiffs moved for summary judgment on their remaining claims—under NEPA, NHPA, FLPMA, § 4(f) of the DTA, NAGPRA, and the First Amendment's Free Exercise Clause. ECF 331. The Government cross-moved, arguing that with the project now completed, Plaintiffs' claims aren't redressable; that Plaintiffs' claims are barred by laches and administrative waiver; and contesting the merits. ECF 340. In response, Plaintiffs noted that while the Court has authority to undo the project, Plaintiffs also seek other forms of relief far short of that, including removing the earthen berm, replanting trees, and reconstructing the stone altar. ECF 345 at 10; *see also* ECF 292 at 29-30 (commemorative signage, declaratory judgment).

Michael Jones died on March 29, 2020. On April 1, Magistrate Judge You issued findings and recommendations. The Magistrate recommended rejection of the Government's redressability argument because "*some* effective relief" remained available. ECF 348 at 42-43. But the Magistrate said Plaintiffs' claims under NEPA, NHPA, FLPMA, and § 4(f) were barred by laches and administrative waiver. *Id.* at 64-76.

Lastly, the Magistrate recommended judgment for the Government on the merits of Plaintiffs' NAGPRA and Free Exercise Clause claims. *Id.* at 64, 76-82.

LEGAL STANDARD

The district court "must make a *de novo* determination" of any objected-to portion of the Magistrate's recommendation. *Barnes v. Chase Home Fin., LLC*, 825 F. Supp. 2d 1057, 1059 (D. Or. 2011); Fed. R. Civ. P. 72(b)(3). *De novo* review "means the district court must consider the matter anew, as if it had not been heard before and as if no decision previously had been rendered." *United States v. Boulware*, 350 F. Supp. 2d 837, 841 (D. Hawaii 2004) (citing *Ness v. Comm'r*, 954 F.2d 1495, 1497 (9th Cir. 1992)).

Summary judgment is proper if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

ARGUMENT

I. Plaintiffs are entitled to summary judgment on their NEPA, NHPA, FLPMA, and § 4(f) claims.

The Magistrate declined to reach the merits of Plaintiffs' claims under NEPA, NHPA, FLPMA, and § 4(f). To facilitate *de novo* review, Plaintiffs briefly summarize those claims here.

NEPA requires agencies to prepare an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4322(2)(C). It also requires agencies to "give full and meaningful consideration to all reasonable alternatives" to the proposed action. *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013) (citation omitted). Here, FHWA prepared only an EA, not an EIS, although the project would destroy Dwyer's large, old-growth trees—the very feature the Government had long recognized made Dwyer worth preserving. It also failed in the EA to consider alternatives that would have minimized the impact on

Dwyer—although in the 1980s it not only considered but *used* those alternatives to protect Dwyer; and although it used some of those same alternatives during *this* project to protect a nearby wetland. Moreover, the project could not have taken place without BLM's grant of the tree-removal permit and right-of-way—yet BLM performed no NEPA analysis for these actions at all. ECF 331 at 21-29.

Under NHPA, federal agencies must "take into account the effect of" their undertakings on certain sites, including "[p]roperties of traditional religious and cultural importance to an Indian tribe." 16 U.S.C. §§ 470(f), (d)(6)(A).[3] In discharging that duty, they must consult with tribes whose religious or cultural properties may be affected. *Id.* §§ 470(a)(d)(6)(B); 470h-2(a)(2)(D). Here, the Government violated NHPA by failing to consider the project's impact on Plaintiffs' sacred site. It also violated NHPA by failing to perform any government-to-government tribal consultation at all, instead outsourcing those duties to ODOT. And even ODOT didn't consult with one of the relevant tribes—the Yakama—until after the project began. Finally, BLM failed to perform any NHPA analysis for its two undertakings—the grant of the tree-cutting permit and right-of-way. ECF 331 at 29-36.

FLPMA makes BLM liable if it violates any other "Federal … laws related to environmental protection and protection of cultural resources." 43 C.F.R. § 3809.5; *see* 43 U.S.C. § 1732(b). It also requires BLM to adhere to the land-use plans it develops. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 69 (2004). Here, BLM violated FLPMA by violating two laws FLPMA incorporates—E.O. 13007, which requires federal agencies to "avoid adversely affecting the physical integrity of [Indian] sacred sites," 61 Fed. Reg. 26771; and ORCA, which prohibits "[t]imber cutting" within certain lands

[3] NHPA was recodified in 2014 at 54 U.S.C. § 300101 *et seq*. These citations are to the statute as codified at the time of the Government's actions.

including Dwyer, Ex.20. It also violated FLPMA by flouting the resource-management plan it developed—the SDMP—which designates Dwyer a "Special Area" where "timber harvest" is prohibited, Ex.5 at 48-49; *see* ECF 331 at 36-46.

Finally, § 4(f) of the DTA requires FHWA to use any "feasible" alternative to avoid using a "public park" or "recreation area" for highway project. 49 U.S.C. § 303(c). Dwyer is part of a park and recreation area—the Wildwood Recreation Site. Yet FHWA didn't perform any § 4(f) analysis in the EA. And it rejected feasible alternatives that would have minimized the damage in Dwyer. ECF 331 at 46-50.

The Magistrate addressed none of this, instead recommending disposal of these claims on laches and waiver. Both recommendations were error.

A. Plaintiffs' claims are not barred by laches.

The Magistrate's laches analysis fails on three grounds: (1) laches is waived because the Government never pled it as an affirmative defense; (2) laches is inapplicable because Plaintiffs filed suit within the statute of limitations; and (3) the government failed to demonstrate lack of diligence or prejudice. Indeed, the Magistrate's recommendation gets laches exactly backwards: It uses an equitable doctrine designed to prevent "delay" to punish Plaintiffs, who filed suit *four years before* the statute of limitations ran, while protecting the Government, which didn't raise laches until *a decade after* litigation commenced.

1. The Government waived laches by failing to plead it.

First, the Government waived any laches defense by failing to plead it. Rule 8(c) requires that certain defenses, including "laches," be "affirmatively state[d]" in the defendant's answer. Fed. R. Civ. P. 8(c)(1). "Failure to plead an affirmative defense…results in a waiver of that defense." *Crestwood Capital Corp. v. Andes Indus., Inc.*, 771 F. App'x 383 (9th Cir. 2019). The Government's answer never pled laches. ECF 238. So the Magistrate "erred in applying" it. *Foster Poultry Farms, Inc. v. SunTrust Bank*, 377 F. App'x 665, 669-70 (9th Cir. 2010).

The Magistrate didn't dispute any of this. ECF 348 at 62-63. Instead the Magistrate simply declined to apply Rule 8(c), saying that "as a practical matter" courts have found "exceptions…based on the circumstances of particular cases," and Plaintiffs here were not "prejudiced." *Id.* (quoting Wright & Miller, 5 *Fed. Prac. & Proc. Civ.* § 1278 (3d ed.)). But *ad hoc* judicial disregard of Rule 8(c) doesn't make the Rule any less binding. Rather, "Rule 8(c) means what it says: a party must first raise its affirmative defense in a responsive pleading before it can raise them in a dispositive motion." *Harris v. Sec'y, U.S. Dep't of Veterans Affairs*, 126 F.3d 339, 343-45 (D.C. Cir. 1997). "The Federal Rules are 'as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard [a Rule's] mandate than they do to disregard constitutional or statutory provisions.'" *Atchison, Topeka & S.F. Ry. Co. v. Hercules Inc.*, 146 F.3d 1071, 1074 (9th Cir. 1998) (quoting *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988)).

In any event, considering the "particular" "circumstances" of this case (ECF 348 at 63) only makes the Government's waiver *more* egregious. The Government filed *four* answers in this case, none raising laches. ECF 72, 165, 225, 238. The first three asserted various *other* affirmative defenses; the operative one asserted none. Nor did the Government raise laches in its motion to dismiss. ECF 28. Only after nearly a decade of litigation did the Government alight on laches as a possible escape hatch. But the Supreme Court has "disapprove[d] the notion that a party may wake up because a 'light finally dawned,' years after the first opportunity to raise a defense, and effectively raise it so long as the party was (through no fault of anyone else) in the dark until its late awakening." *Arizona v. California*, 530 U.S. 392, 410 (2000) (citing Rule 8(c)).

Even if "prejudice" to Plaintiffs is required to enforce Rule 8(c), it exists here. The elderly Plaintiffs have invested over a decade of time and resources into this litigation, hoping someday to recover a semblance of the sacred site so integral to their

worship. They also engaged in lengthy, good-faith settlement negotiations with the Government in search of a solution—negotiations that came close, but broke down without the Government ever putting Plaintiffs on notice that it might assert laches as a defense. Michael Jones, head of Plaintiffs CGS and MHSLPA, died days before the Magistrate's findings—so the years spent in this litigation proved his last. Just as laches protects defendants' interest in "clos[ing] chapter[s]" of their lives, *Latta v. Western Inv. Co.*, 173 F.2d 99, 107 (9th Cir. 1949), Rule 8(c) protects plaintiffs' interest in closing chapters of litigation by a resolution on the merits—or by settlement—rather than by the surprise assertion of stale affirmative defenses asserted at the eleventh-hour (or twelfth-year). *See Foster Poultry*, 377 F. App'x at 669-70 (laches waived where raised after trial); *Henson v. United States*, 27 Fed. Cl. 581, 592 (Ct. Fed. Cl. 1993) ("Defendant cannot avail itself of the laches defense by unreasonably delaying invoking it"). The Government waived its laches defense long ago.

2. Laches does not apply to claims timely filed under a federally prescribed statute of limitations.

Waiver aside, the Government's laches defense is per se inapplicable, because as the Supreme Court has twice reiterated, laches doesn't apply to suits filed "within a limitations period specified by Congress." *SCA Hygiene Prods. v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 677-80, 675-88 (2014). Laches and statutes of limitations both "provide[] a shield against untimely claims." *SCA Hygiene*, 137 S. Ct. at 960. Laches, however, is a judge-developed equitable doctrine developed to fill the gap absent a statutory timeliness rule—and "where there is a statute of limitations, there is no gap to fill." *Id.* at 961. Moreover, when *Congress* prescribes the limitations period, separation of powers precludes a court from "jettison[ing] Congress' judgment on the timeliness of suit" in favor its own. *Petrella*, 572 U.S. at 667. Put simply, after *SCA Hygiene* and *Petrella*,

to "appl[y] laches to bar in their entirety claims for discrete wrongs occurring within a federally prescribed limitations period" is reversible error. *Id.* at 680-81, 686.

This rule applies here. Plaintiffs' claims are governed by a federally prescribed statute of limitations—the six-year limitations period for "civil action[s]…against the United States" under 28 U.S.C. § 2401(a). *Big Lagoon Rancheria v. California*, 789 F.3d 947, 954 (9th Cir. 2015). Meanwhile, Plaintiffs' cause of action accrued, at the earliest, when the REA and FONSI were signed in January 2007. ECF 348 at 65. Plaintiffs filed suit in October 2008—over four years before the limitations period expired. So the Magistrate "erred in treating laches as a complete bar to [Plaintiffs'] suit." *Petrella*, 572 U.S. at 686; *see RB Jai Alai, LLC v. Sec'y of Fla. Dep't of Transp.*, 112 F. Supp. 3d 1301, 1315-16 (M.D. Fla. 2015) (applying *Petrella* to NEPA claim).

In recommending the contrary, the Magistrate distinguished between *legal* relief (like damages) and *equitable* relief (like injunctions), conceding that *SCA Hygiene* and *Petrella* apply when plaintiffs seek legal relief, but concluding that laches remains fully "available" when plaintiffs "seek only" equitable relief. ECF 348 at 64-65 & n.15. Not so; indeed, in *Petrella* itself, the plaintiff sought both legal and equitable relief—yet the Court held that the lower courts had erred in applying laches to bar *both*. *Petrella*, 572 U.S. at 686-88; *see American Trucking Ass'ns, Inc. v. N.Y. State Thruway Auth.*, 199 F. Supp. 3d 855, 870 (S.D.N.Y. 2016) ("*Petrella* expressly applied to equitable as well as legal remedies….").

Rather, the distinction between legal and equitable relief under *SCA Hygiene* and *Petrella* goes to the particular equitable *remedy* the plaintiff can obtain if he prevails. That is, although a court may never apply laches to bar outright a claim filed within a limitations period, it may, "in determining appropriate [equitable] relief," conclude that delay tilts the equities away from granting a particular form of equitable relief to remedy the injury. *Petrella*, 572 U.S. at 667-68. Ordinarily, the judge would perform this analysis "at the remedial stage"; in "extraordinary circumstances, laches

may bar at the very threshold the particular *relief* requested by the plaintiff." *Id.* (emphasis added). Either way, however, the court cannot invoke laches to "summarily dispose[]" of the case and "prevent[] adjudication of any…claims on the merits." *Id.* at 685.

The Magistrate's recommendation violates this rule. The Magistrate didn't conclude that Plaintiffs' purported "delay" was "of sufficient magnitude" to render *every* "form of relief" Plaintiffs seek "unjust." *Id.* at 685-86 (internal quotation marks omitted). Nor would that be plausible, since Plaintiffs seek a range of remedies short of removing the highway—remedies the Magistrate herself recognized could still be "effective," ECF 348 at 42, and some of which the Government *offered* in settlement negotiations, ECF 296 at 10. Instead, the Magistrate recommended dismissal of Plaintiffs' claims "in their entirety." *Petrella*, 572 U.S. at 680-81. That "c[an] not stand." *Id.* at 686.

3. Even if laches could apply, the Magistrate erred in concluding that it applies here.

Even assuming laches could bar entire claims filed within a limitations period—which it can't—the Magistrate erred in applying it here. Laches requires defendants to "demonstrate '(1) that the [plaintiff] lacked diligence in pursuing its claim; and (2) that prejudice resulted from that lack of diligence.'" *Save the Peaks Coal. v. U.S. Forest Serv.*, 669 F.3d 1025, 1031 (9th Cir. 2012) (quoting *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1381 (9th Cir. 1998)). But "[l]aches is not a favored defense in environmental cases." *Coal. for Canyon Pres. v. Bowers*, 632 F.2d 774, 779 (9th Cir. 1980) (Kennedy, J). And the Government hasn't shown that this is the sort of exceptional case that overrides the Ninth Circuit's "repeated[] caution against application of the equitable doctrine of laches" in the environmental context. *Portland Audubon Soc'y v. Lujan*, 884 F.2d 1233, 1241 (9th Cir. 1989).

Diligence. First, the Government hasn't shown lack of diligence. Under this factor, courts consider "the length of the delay" and "the circumstances surrounding" it. *In re Beaty*, 306 F.3d 914, 927 (9th Cir. 2002). They also look to "(1) whether the party attempted to communicate its position to the agency before filing suit, (2) the nature of the agency response, and (3) the extent of actions, such as preparatory construction, that tend to motivate citizens to investigate legal bases for challenging an agency action." *Pres. Coal., Inc. v. Pierce*, 667 F.2d 851, 854 (9th Cir. 1982).

Length of delay cuts sharply against laches here. First, even when a limitations period doesn't entirely foreclose laches, there is a "strong presumption" that when a claim is filed within the limitations period, "laches is inapplicable." *Jarrow Formulas, Inc. v. Nutrition Now, Inc.*, 304 F.3d 829, 835-36 (9th Cir. 2002). It is "extremely rare" for this presumption to be overcome. *Shouse v. Pierce County*, 559 F.2d 1142, 1147 (9th Cir. 1977).

Further, Plaintiffs' purported "delay"—filing suit less than two years after the earliest date the cause of action could have accrued, and just ten weeks into a year-long construction project—pales in comparison to other cases in which the Ninth Circuit has refused laches. *E.g., Grand Canyon Tr. v. Tucson Elec. Power Co.*, 391 F.3d 979, 988-89 (9th Cir. 2004) (project operational for eleven years). And whatever "delay" occurred was attributable in part to the fact that Plaintiffs first sought to vindicate their rights in another forum, *see* ECF 223 ¶ 52—a well-recognized laches "excuse[]." *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1033 (Fed. Cir. 1992).

Moreover, Plaintiffs didn't just file suit four years before the statute of limitations ran, and shortly after construction began—they also filed within the period the Government itself identified as time for seeking "judicial review." Ex.2FHWA_4953. In the Federal Register, FHWA stated that "claim[s] seeking judicial review of" the project could be "filed on or before October 6, 2008." FHWA_6553. Plaintiffs sued that

same day—October 6, 2008. Thus, Plaintiffs' "delay" can't possibly have been "long enough to be unreasonable" when they filed within the time the Government itself identified as permissible. *Herb Reed Enters., LLC v. Fla. Entm't Mgmt., Inc.*, 736 F.3d 1239, 1246-47 (9th Cir. 2013).

Other diligence considerations also weigh against laches. Plaintiffs "attempted to communicate" their concerns before suing, *Pres. Coal.*, 667 F.2d at 854—indeed, they did so for decades, dating back to the 1980s. ECF 331 at 8-10. Most importantly, after the Government issued the REA and FONSI here, Plaintiffs launched a vigorous outreach campaign, calling federal officials, sending detailed memoranda outlining their concerns, and formally requesting supplemental review. Ex.26ACHP_141; Ex.38; ECF 292 at 18-19. This outreach began before any tree removal or construction; before Federal Register publication and Yakama consultation; and before some of the actions Plaintiffs challenge—like BLM's tree-removal-permit and right-of-way grants—had even occurred. *Cf. Save the Peaks Coal.*, 669 F.3d at 1031 (plaintiffs "ceased communications" for four years before filing suit).

The Magistrate ignored these points, staking the lack-of-diligence finding solely on Plaintiffs' purported failure to participate in the administrative process. ECF 348 at 65-67. But this confuses laches with the Government's administrative-waiver defense, which is also meritless. *See infra* Part I.B. It also isn't supported by the Magistrate's sole Ninth Circuit case, *Apache Survival Coal. v. United States*, 21 F.3d 895 (9th Cir. 1994), *see* ECF 348 at 66. What made *Apache Survival* an exceptional case justifying laches even in the environmental context wasn't that the plaintiffs didn't participate in the administrative process—it was that they ignored consistent, repeated attempts by the agency specifically to involve them, and then, after finally voicing concerns, refused to give follow-up information when the agency proved "willing[] to listen." 21 F.3d at 900 ("the San Carlos Apache asked to be removed from the mailing list"); *id.* (Government "requested information concerning specific sites that

were of interest to the Tribe. No response was forthcoming."); *id.* ("Tribe failed to respond" to meeting request); *see also Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 3d 77, 84-85 (D.D.C. 2017) (similar).

Here, the Magistrate *conceded* that "the record does not reveal" that the Government made any "consistent, repeated attempts to consult with" Plaintiffs, as the agency did in *Apache Survival*. ECF 348 at 66. And while the *Apache Survival* agency sought to learn about the plaintiffs' concerns once raised, the Government's response to Plaintiffs' communications here was to send a letter flatly denying review. Ex.7. Thus, *Apache Survival* is inapplicable—and the Magistrate's lack-of-diligence finding was incorrect.

Prejudice. Laches is also inapplicable because the Government failed to show "prejudice resulting from the alleged delay." *Neighbors of Cuddy Mountain*, 137 F.3d at 1381. The Ninth Circuit has "recognized two chief forms of prejudice in the laches context—evidentiary and expectations-based." *Grand Canyon Tr.*, 391 F.3d at 988 (internal quotation marks omitted). "Evidentiary prejudice" includes "lost, stale, or degraded evidence, or witnesses whose memories have faded or who have died." *Id.* Expectations-based prejudice exists when the defendant "took actions or suffered consequences that it would not have, had the plaintiff brought suit promptly." *Id.*

The Government has shown neither here. Instead, the Government says it would suffer "significant prejudice" if it were "enjoined to remove or alter the highway" now that the project is complete. ECF 340 at 10. But the project wasn't complete when Plaintiffs sued—and as the Magistrate recognized, "prejudice must be judged as of the time the lawsuit was filed, thereby eliminating consideration of post-lawsuit expenditures and progress in constructing" it. *Save the Peaks Coal.*, 669 F.3d at 1033; *see* ECF 348 at 67-68.

In any event, "[a]lthough courts have on occasion considered the amount of money spent and how far a project has progressed in determining whether a defendant has been prejudiced, such consideration has been in the context of evaluating whether the relief sought is still practicable." *Sierra Club v. U.S. Dep't of Transp.*, 245 F. Supp. 2d 1109, 1117 (D. Nev. 2003). The relief Plaintiffs seek here—mostly modest remediation falling far short of altering the highway—remains practicable, as both the Magistrate (at 42-43) and the Government (in settlement negotiations, *see supra*) have recognized. So the Government's prejudice argument fails. *Bowers*, 632 F.2d at 781 (no prejudice where the government could still "mitigate[e] unnecessary damage").

Recognizing as much, the Magistrate tried to offer a new prejudice argument of her own: the Government would be prejudiced because "[r]emanding for the agency to consider concerns that could have been raised but were not would result in undue cost." ECF 348 at 68. But the Ninth Circuit has squarely rejected the notion that an agency suffers prejudice in being "ask[ed] only [to] conduct the type of analysis that it is required to conduct by law" and "should have done in the first instance." *Neighbors of Cuddy Mountain*, 137 F.3d at 1382. And for good reason—forced reconsideration isn't a special harm attributable to delay but is the remedy for nearly every successful APA claim, promptly filed or not. "Difficulties caused by the pendency of a lawsuit, and not by delay in bringing the suit[,] do not constitute prejudice within the meaning of the laches doctrine." *Shouse*, 559 F.2d at 1147.

B. Plaintiffs' claims are not waived.

The Magistrate also erred in recommending dismissal of Plaintiffs' claims based on administrative waiver. ECF 348 at 69-76.

1. The Government waived any administrative-waiver defense by failing to plead it in its answer.

First, the Government's waiver argument was itself waived. Waiver, like laches, must be "affirmatively state[d]" in the defendant's answer to be preserved. Fed. R.

Civ. P. 8(c)(1). Here, the Government's operative answer did not raise waiver as an affirmative defense. ECF 238. Nor did any of its previous three answers. ECF 72, 165, 225. The defense is therefore waived, and the Magistrate's failure to apply Rule 8 was erroneous. Part I.A.1, *supra*.

2. The waiver defense fails because the Government had independent knowledge of the issues Plaintiffs raise in this lawsuit.

Overlooking the Government's failure to raise *its* arguments at the proper time, the Magistrate claimed that Plaintiffs failed to raise *theirs*, recommending dismissal on the ground that Plaintiffs failed to raise their "specific concerns and criticisms during the administrative process." ECF 348 at 69-76. But unlike the clear rule that affirmative defenses not pled are waived, there is no "broad rule which would require participation in agency proceedings as a condition precedent to seeking judicial review of an agency decision." *'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006).

Rather, the law requires only that the agency have had an opportunity "to exercise its expertise over the subject matter" of the plaintiff's claim during the administrative process. *Daly-Murphy v. Winston*, 820 F.2d 1470, 1476 (9th Cir. 1987) (internal quotation marks omitted). This requirement is met if the Government had "independent knowledge of the very issue[s] that concern[] Plaintiffs in this case." *'Ilio'ulaokalani*, 464 F.3d at 1093.

Here the Government had independent knowledge of the issues that concerned Plaintiffs—both before and during its decision-making process. During the earlier widening project, Michael Jones repeatedly raised the same concerns Plaintiffs raise in this lawsuit—that widening U.S. 26 through Dwyer would result in removal of Dwyer's old-growth trees, destroy a Native American sacred site, and harm a recreation area. ECF 331 at 7-8. More importantly, the record shows that those same con-

cerns were specifically re-aired during the Government's preparations for *this* project—yet the Government proceeded with the project anyway. *Id.* at 8-9. Because the independent-knowledge rule applies, the Magistrate's recommendation that plaintiffs are "barred from" challenging the Government's decision "because they [did] not submit[] comments to the [agency] during the [administrative] process" is error. *'Ilio'ulaokalani*, 464 F.3d at 1091.

The Magistrate offered two reasons for rejecting Plaintiffs' independent-knowledge argument, neither persuasive. First, the Magistrate said that while the government may have been aware of Plaintiffs' "general concern," the independent-knowledge rule requires "[m]uch more specificity." ECF 348 at 72-73. Second, the Magistrate reasoned that because the Government "in fact addressed [Plaintiffs'] general concerns" by investigating the altar and discussing old-growth trees in its NEPA documents, Plaintiffs' claims are waived. *Id.* at 74. But these arguments fail at multiple levels.

First, by claiming that Plaintiffs' needed to make the Government aware of their concerns with "[m]uch more specificity," rather than in "general" terms, *id.* at 72-73, the Magistrate misstated the controlling standard. Indeed, the Ninth Circuit has said just the opposite: that waiver is inapplicable if the agency was aware of a plaintiff's concern "in general terms." *Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010); *see also, e.g., Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1133 (9th Cir. 2011) ("petitioners need not 'incant certain magic words in order to leave the courtroom door open to a challenge'" (citation omitted)). This standard ensures that "[c]ompliance with" procedural obligations remains primarily the agency's "duty," not a responsibility dependent "on the vigilance and limited resources of environmental plaintiffs." *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 559 (9th Cir. 2000).

Second, even under the Magistrate's incorrect standard, the record shows that the Government was aware of Plaintiffs' specific concerns. Michael Jones explicitly raised

these precise concerns the first time the Government considered widening through Dwyer. During that administrative process, Jones, through C-FASH, submitted numerous comments (Ex.4FHWA_536-602), testified at public hearings (Ex.4FHWA_514), gathered signatures on petitions (Ex.4FHWA_541), and talked extensively with agency officials, raising the following concerns:

- "Old growth trees [in Dwyer]…will be destroyed if the highway is widened as currently proposed," Ex.4FHWA_538; *see also* Ex.4FHWA_539, 542-43, 549, 571, 593;
- The project would endanger the stone altar within Dwyer (which Jones thought at the time was a "grave"), Ex.4FHWA_538, 549, 567, 577, 590-92; and
- A § 4(f) analysis was required because Dwyer was "within the boundaries of the Wildwood Recreation Site" and was used for recreation, Ex.4FHWA_549, 565, 577, 584, 587-89.

These comments alerted the Government to Plaintiffs' concerns; indeed, the Government *acted* on them by changing the project to minimize the impact on Dwyer, Ex.4FHWA_462-464; arranging an archaeological excavation to investigate the altar, ECF 292-13; and responding in the FEIS to the § 4(f) issue, Ex.4FHWA_459.

More importantly, the Government was well-aware of these same concerns in preparing for the *current* widening project through Dwyer. Indeed, the Government itself included all the materials cited above in the administrative record for this project—thus certifying them as "documents and materials" it "directly or indirectly considered." *Thompson v. U.S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989) (emphasis omitted).

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

- Plaintiffs claim the Government violated NEPA by failing to use an EIS despite the project's destruction of Dwyer's old-growth trees. ECF 331 at 24-26. In a

2004 email, FHWA officials raised this precise concern, noting that the previous proposal to widen into Dwyer "was opposed by the public *as a significant impact upon the 'old growth' trees*" and the current project "ha[d] the same issues as before." ECF 292-17 FHWA_2044 (emphasis added).

- Plaintiffs claim the Government violated NEPA by failing to consider in the EA the alternative of using a steeper slope or retaining wall where the project passed through Dwyer. ECF 331 at 26-28. These are the precise measures the Government *actually employed* to protect Dwyer in 1987. Ex.4FHWA_462. And the scoping document prepared by the Government for this project indicates that the Government originally planned to protect Dwyer again. ECF 292-24 FHWA_1980.

- Plaintiffs also claim the Government violated FLPMA by destroying a Native American sacred site. ECF 331 at 29-32. In 1990, Jones told BLM archaeologist Philipek that Dwyer included a "Nat[ive] Amer[ican] sacred site" that Native Americans have been visiting "for years," and identified particular practitioners and ceremonies. Ex.16BLM_8-9. Philipek's notes on this are part of the administrative record for this project—meaning, again, the Government has certified that they were before it in making its decision. *Thompson*, 885 F.2d at 555. Philipek also attached these notes to the report she produced after visiting the "scattered," but not yet destroyed, altar in 2008. Ex.16.

- Plaintiffs claim the Government violated FLPMA by permitting tree-cutting within Dwyer in violation of a federal statute—ORCA—that prohibits tree-cutting within "Mt. Hood Corridor Lands," including Dwyer. ECF 331 at 40-44. In the EA, the Government explicitly discussed this concern, acknowledging that "[t]he A.J. Dwyer parcel is … within the Mt. Hood Corridor, a Congressionally designated scenic area," but nonetheless concluding that the project was "in compliance with" the statute. Ex.1FHWA_4472-73.

- Plaintiffs likewise claim the Government violated FLPMA by permitting tree-cutting within Dwyer when the applicable BLM resource-management plan—the SDMP—designated Dwyer a "Special Area" where "timber harvest" was prohibited. ECF 331 at 40-44. The EA explicitly discussed this concern, acknowledging that "[t]he A.J. Dwyer parcel was designated a Special Area in the BLM's 1995 Salem District Resource Management Plan," but still concluded that the Government could remove its "large older trees." Ex.1FHWA_4472-73.

These claims can't be waived. Each of these concerns was explicitly raised in the administrative record; several of them the Government explicitly addressed. Accordingly, the "independent knowledge" rule is satisfied. *'Ilio'ulaokalani*, 464 F.3d at 1093.

All of which leads back to the Magistrate's second argument—that Plaintiffs waived their claims because the Government "in fact addressed" them. ECF 348 at 74. But this reasoning is backward. The fact that an agency "considered and rejected" a concern necessarily means that the agency *was aware of it. Delaware Riverkeeper Network v. U.S. Army Corps of Eng'rs*, 869 F.3d 148, 155 & n.5 (3d Cir. 2017). So if the Government "considered and rejected" Plaintiffs' concerns, the claims aren't waived; they are "fair game for litigation" under the independent-knowledge rule. *Id.* (citing *'Ilio'ulaokalani*, 464 F.3d at 1093; *Barnes*, 655 F.3d at 1132).

None of the Magistrate's cases (at 76) undermine this logic. These cases stand for the proposition that when the plaintiff's "argument is one of degree," *League of Wilderness Defs.-Blue Mountain Biodiversity Project v. Bosworth*, 383 F. Supp. 2d 1285, 1296-97 (D. Or. 2005)—*i.e.*, when her "complaint is that [some] alternative should have been evaluated in more detail," *Moapa Band of Paiutes v. BLM*, No. 2:10-CV-02021, 2011 WL 4738120, at *12 (D. Nev. Oct. 6, 2011)—she must say during the administrative process what details are missing. *Id.* But this has no application here, where Plaintiffs aren't claiming that the Government should have addressed their concerns in more detail, but that it (1) failed to address them *at all* in its NEPA documents; or (2) *did* address them, but did so contrary to law.

The controlling analysis is instead supplied by several on-point waiver cases that Plaintiffs briefed extensively, but the Magistrate ignored. *See* ECF 345 at 6-7 (citing *Barnes*, 655 F.3d at 1132-35 ("statements in the administrative record" showed "independent knowledge" of factor allegedly requiring EIS); *Oregon Wild v. BLM*, No. 6:14-CV-0110-AA, 2015 WL 1190131, at *6 (D. Or. Mar. 14, 2015) (independent

knowledge where scoping document showed alternative not discussed in EA was "original plan for the project")).

Finally, the Magistrate erred by declining to consider *why* Plaintiffs were hesitant to speak out about the sacred site until absolutely necessary—their concern to protect its confidentiality. *See* ECF 302 at 18; Ex.10 19:15-19 (Jones: "The belief was don't talk about things because, if you talk about them, they're going to be destroyed. And so, you do everything behind closed doors."). FHWA's own Tribal Consultation Guidelines recognize that "[m]any tribes[']…beliefs require that the location and even the existence of traditional religious and cultural properties not be divulged," and that it is "vital" for the agency to "respect[] tribal desires to withhold specific information about these types of sites." ECF 275-21 at 5. Plaintiffs' concerns here were eminently justified, given that the altar was, in fact, vandalized just days after a government official stated that the altar was "the reason why we can't widen the highway." Ex.10 64:7-21; Ex.16BLM_8-9. Plaintiffs should not be penalized for communicating about their site circumspectly—particularly when the Government's own guidelines say it is "vital" to respect their prerogative to do so.

C. Plaintiffs have standing to raise their failure-to-consult claims under NHPA.

The Magistrate recommended that Plaintiffs lack standing to challenge the Government's failure to consult with Native American tribes under NHPA because Plaintiffs aren't tribes themselves. ECF 348 at 44-50. But this Court already held the opposite, concluding that Plaintiffs have standing because they "claim an interest in the preservation of the historic sites at issue," and thus "fall within the zone of interests protected by the NHPA." ECF 154 at 12, *adopted at* ECF 171. That decision is "law of the case" that the Court must follow unless it is "clearly erroneous" or superseded by "intervening controlling authority." *Barnes-Wallace v. City of San Diego*, 704 F.3d 1067, 1076 (9th Cir. 2012).

The Magistrate concluded that this Court's decision was "clearly erroneous" because "[i]t would debase a tribe's sovereignty for a tribal member, *even someone within the zone of interest* under NHPA," to challenge an agency's failure to consult with tribes. ECF 348 at 45 (emphasis added). But whether Plaintiffs have standing is precisely a question of whether they are within the zone of interests protected by NHPA. *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 (2014). As this Court previously explained, where, as here, a plaintiff's cause of action derives from the APA, the plaintiff has statutory standing if he is "'arguably within the zone of interests to be protected or regulated by the statute' that he says was violated." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224 (2012); *see* ECF 154 at 8-9.

That test is met here. NHPA is "designed to encourage preservation of sites and structures of historic, architectural, or cultural significance." *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1093-94 (9th Cir. 2005) (internal quotation marks and citation omitted). Plaintiffs are within NHPA's zone of interest because they are members of tribes the Government failed to consult, and they use those sites for their religious exercise—thus "claim[ing] an interest in the preservation of" the threatened historic and cultural sites. ECF 154 at 12; *see Wishtoyo Found. v. U.S. Fish & Wildlife Serv.*, No. CV 19-03322-CJC, 2019 WL 8226080, at *7 (C.D. Cal. Dec. 18, 2019) ("[A]ny 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." (citation omitted)); *see also id.* at *5 ("Courts have consistently found that non-tribal plaintiffs asserting similar claims challenging the adequacy of an agency's section 106 efforts have standing under the NHPA." (citing the Court's previous decision in this case)).

The Magistrate's "intervening authority" argument fares no better. The only intervening case the Magistrate identifies is an unpublished panel decision. ECF 348

at 49 (citing *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)). But to overcome law of the case, the intervening authority has to be "*controlling*," *Barnes-Wallace*, 704 F.3d at 1076—and non-precedential opinions are explicitly not that. 9th Cir. R. 36-3(a). Besides, the only NHPA claims at issue in *La Cuna* were failure-to-consult claims, while, here, as in *Wishtoyo*—a post-*La Cuna* decision relying on this Court's previous NHPA standing decisions in this case—Plaintiffs' "allegations are…broadly based." 2019 WL 8226080, at *5.

D. Plaintiffs' "extra-record evidence" is admissible.

In 2012, this Court held that Plaintiffs could supplement the record with (1) affidavits establishing that they are "traditional religious leaders" and (2) testimony "confirming Larry Dick's communication to the BLM in 1990" regarding the altar. ECF 154 at 27, *adopted by* ECF 171. The Magistrate concluded that this holding, too, was "clearly erroneous" and now recommends that Plaintiffs' "extra-record evidence" be excluded. ECF 348 at 50-61. This Court should decline this recommendation and adhere to the law of the case.

First, the Magistrate erred in even entertaining the Government's evidentiary arguments. Those arguments were presented in a 14-page motion to strike filed on top of the Government's already-overlength summary-judgment response. ECF 339. But as Plaintiffs explained, ECF 344, the Government's motion was improper: Under Rule 56, a party with "evidentiary objections" to material in a summary-judgment motion "*must* assert [them] in its response or reply memorandum," *not* in a "motion to strike." LR 56-1(b) (emphasis added); *see Campbell v. Shinseki*, 546 F. App'x 874, 879 (11th Cir. 2013) (same under Fed. R. Civ. P. 56(c)). The Magistrate excused the Government's disregard of summary-judgment procedure on the ground that it would have to consider the admissibility of Plaintiffs' evidence anyway. ECF 348 at 52. That was mistaken; the whole point of the law-of-the-case doctrine is to "protect[] against the

agitation of settled issues," *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988), so "the burden lies with the party opposed to" a previous decision to show it should be reconsidered, *In re Rosenblum*, 609 B.R. 854, 862 (Bankr. D. Nev. 2019).

Invalid motion to strike aside, the Magistrate's recommendation is incorrect. First, it is overbroad, as the Magistrate recommended exclusion not just of testimony this Court previously approved of, but of material the Government didn't even object to, including: (1) BLM's resource-management plan for the area, the SDMP; (2) the text of a federal statute, ORCA; and (3) a Federal Register entry reflecting BLM's withdrawal of Dwyer for recreational purposes. ECF 348 at 50 n.8; *compare* ECF 339 at iv. These materials aren't "evidence" but *law*, attached solely for the Court's convenience. *See, e.g., Barber v. Vance*, No. 3:16-CV-2105-AC, 2018 WL 7078668, at *2 n.3 (D. Or. Oct. 10, 2018) ("The court will necessarily consider relevant federal statutes…."); *Rohnert Park Citizens to Enforce CEQA v. U.S. Dep't of Transp.*, No. C 07-4607 TEH, 2009 WL 595384, at *3 (N.D. Cal. Mar. 5, 2009) ("Although the Federal Register entries are not part of the administrative record, the Court must take judicial notice of them."). Further, they should have been included in the record to begin with, because the Government considered them in making its decision. Ex.1FHWA_4472-73 (ORCA and SDMP); Ex.22FHWA_2864-78 (SDMP and Federal Register entry).

Nor was this Court "clearly erroneous" in allowing Plaintiffs to submit testimony. Rather, the Court was correct. The Court applied a well-settled exception to the administrative-record rule allowing supplementation when "necessary to determine if the agency has considered all factors and explained its decision." ECF 154 at 6 (quoting *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010)). As the Court explained, this evidence was necessary to show whether the Government failed to consider whether Plaintiffs were "traditional religious leaders" able to identify Dwyer as a sacred site. *Id.* at 27.

The Magistrate said this was clearly erroneous because the record shows that the Government investigated the "purported gravesite," and ODOT consulted with area tribes. ECF 348 at 57-61. But this is a *non sequitur*. Protection of Dwyer under the laws Plaintiffs invoke doesn't depend on whether it is a gravesite (though it is) or on whether the particular tribal representatives ODOT contacted acknowledge it, but on whether "appropriately authoritative representative[s] of an Indian religion" have identified its religious significance or ceremonial use. ECF 331 at 37-38 (quoting E.O. 13007); *see id.* at 52-53 (NAGPRA's definition of "sacred objects": objects "needed by traditional Native American religious leaders for the practice of traditional Native American religions"). There is no way to determine whether the Government followed this standard without considering evidence regarding Plaintiffs' status as Native American religious leaders.

II. Plaintiffs are entitled to summary judgment on their NAGPRA claims.

Aside from their APA claims, Plaintiffs are also entitled to summary judgment under NAGPRA. NAGPRA requires government officials to "protect" items discovered on federal land that the officials "know[] or ha[ve] reason to know" are Native American cultural items. 43 C.F.R. § 10.4(b), (d)(1)(ii); *see also* 25 U.S.C. § 3002(d)(1). Such officials must first "cease the activity"—"including…construction"—that led them to discover the items, and try "to protect the items discovered." 25 U.S.C. § 3002(d)(1). Then they must "notify" the head of the federal agency that manages the land, which in turn must notify, consult with, and turn over control of the items to the "Indian tribe" affiliated with them. *Id.*; 43 C.F.R. §§ 10.4(d)(1), 10.6(a)(2).

Here, in July 2008, in preparation for widening, BLM[4] archaeologist Philipek observed Plaintiffs' stone altar. Ex.16 BLM_6. She had reason to know it was a Native American cultural item because, *inter alia*, she had been told so by Plaintiffs, as she

[4] The Magistrate referred to Philipek as an "ODOT archeologist." ECF 348 at 67, 78. That is incorrect; she worked for BLM. Ex.1FHWA4500.

recorded in her own notes. *Id.* BLM_8-9. Yet rather than protecting it and notifying BLM to pause construction, she took pictures of it, noted its "scattered" condition, and greenlighted the Government's continued destruction of the site. Ex.16. The altar was then "disposed of." ECF 287 at 28. That is a NAGPRA violation.

In recommending the contrary, the Magistrate first said Plaintiffs lack standing to sue under NAGPRA because they cannot "challenge duties owed to Indian tribes." ECF 348 at 78. But the Ninth Circuit has explicitly rejected this argument: "We hold that [NAPGRA] does not limit jurisdiction to suits brought by…Indian tribes." *Bonnichsen v. United States*, 367 F.3d 864, 874 (9th Cir. 2004) (finding standing for claim brought by non-Indian scientists). Ignoring *Bonnichsen*, the Magistrate cross-referenced her (also incorrect) theory that Plaintiffs lack standing to raise their failure-to-consult claims under NHPA. ECF 348 at 78. But NAGPRA doesn't just require consultation—it requires *protection* of discovered items. Even if Plaintiffs couldn't challenge failure to consult regarding their items, they surely can challenge destruction of those items.

Second, the Magistrate argued that NAGPRA wasn't implicated because the Government's "position" that the altar and other "objects were not Native American cultural items was based on substantial evidence." ECF 348 at 78-79. For support, the Magistrate noted that (1) "ODOT consulted with the official cultural resources personnel of the four federally recognized Indian tribes with cultural ties to the area," who did not object; and (2) archaeological excavations "found the stones to be of no cultural or archeological significance." *Id.*

But this argument overlooks NAGPRA's plain language. First, NAGPRA defines "cultural items" as including, among other things, "sacred objects"—*i.e.*, "specific ceremonial objects which are needed by traditional Native American religious leaders for the practice of traditional Native American religions by their present day adher-

ents." 25 U.S.C. § 3001(3), (3)(C). This definition doesn't turn on whether archaeologists or "official cultural resources personnel" identify an item, *cf.* ECF 348 at 78; it turns on whether "traditional Native American religious leaders" like Plaintiffs use it for their religious exercise—as Plaintiffs did, *see* ECF 331 at 53.

Nor does NAGPRA require government officials to know that an item is used for religious practices with certainty; it requires only that they have "reason to know" it. 25 U.S.C. § 3002(d)(1). That standard is satisfied here. Philipek's own notes show that she spoke with Jones about the altar in 1990, who told her that Native Americans "know about it," "visit it," and have been "going there for years"; that a "Wasco tribe" "medicine man" held a "ceremony" at the site; and that it was a "Nat[ive] Amer[ican] sacred site." Ex.16BLM_8-9; *see also* Ex.42 ¶¶272-300. She visited it in July 2008 because she was told there were "Indian remains on" the site, Ex.38BLM_19, and her report on that visit includes her notes from the 1990 Jones call. Ex.16. Moreover, she had participated in the 1986 excavation, which found that the altar was "not recently…created," could be of "aboriginal" origin, and "may be at least several hundred years (and possibly much more) old." ECF 292-13 at FHWA_303. Philipek at minimum had "reason to know" the altar was used for Native American religious ceremonies—triggering NAGPRA's requirement to protect it.

Finally, the Magistrate argued that NAGPRA doesn't apply because it covers only items "discovered" after its effective date of "November 16, 1990," 25 U.S.C. § 3002(a), and here, officials observed the altar in 1986. ECF 348 at 79-80. But NAGPRA's effective-date language doesn't authorize the Government to destroy items it encounters today just because it may also have encountered them before 1990. Rather, it is a nonretroactivity provision—it protects the Government from being held liable for acts that would violate NAGPRA today but were taken before NAGPRA's enactment. So here, if the Government had destroyed the altar the first time it discovered it during the 1980s widening, Plaintiffs couldn't sue under NAGPRA. But where, as here,

the Government rediscovered the altar, then destroyed it, *after* NAGPRA's effective date, the nonretroactivity provision poses no obstacle to Plaintiffs' claims.

This interpretation accords not only with § 3002(a)'s obvious purpose, but also with the "deeply rooted" canon that given "two possible constructions" of an Indian-law statute, the statute must "be construed liberally in favor of the Indians." *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992). Although the statutory term "discover" sometimes means "to obtain sight or knowledge of…for the first time," it also means "to expose to view," 4 Oxford English Dictionary—and both the function of the effective-date language and this canon require the latter reading.

Plaintiffs' reading is also supported by the only on-point caselaw, *Yankton Sioux Tribe v. U.S. Army Corps of Eng'rs*, 83 F. Supp. 2d 1047 (D.S.D. 2000). There the court held that a NAGPRA "discovery" includes "re-observation" of protected items, *id.* at 1050-53, 1056—and it applied that holding even to particular items government officials may have first observed before NAGPRA's effective date. *Compare* ECF 348 at 79-80 *with Yankton*, 83 F. Supp. 2d at 1056-57 & n.13.

The Magistrate argues that Plaintiffs' understanding of "discover[ed]…would read the temporal restriction out of Section 3002(d)." ECF 348 at 80 (internal quotation marks omitted). This is incorrect; it does the work of foreclosing NAGPRA claims where the alleged acts violating NAGPRA occurred before the statute's effective date. Plaintiffs are entitled to judgment on their NAGPRA claim.

III. Plaintiffs are entitled to summary judgment on their free-exercise claims.

The Government's needless destruction of Plaintiffs' sacred site also violated the federal Free Exercise Clause. Under that Clause, government action that "is not neutral" with respect to religion "or not of general application" "must undergo the most rigorous of scrutiny." *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1130 (9th Cir. 2009)

(quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 521 (1993)). Here, the Government's action was not neutral or generally applicable because the Government spared a wetland on the north side of U.S. 26 by using a steeper slope, Ex.2FHWA_4967-68, but refused to similarly protect the nearby sacred site, despite Plaintiffs' pleading that it do so, Ex.26ACHP_47-52; FHWA_5704-07. And the Government cannot satisfy strict scrutiny because, among other reasons, it cannot show that it had an interest of "the highest order" in using a 3:1 slope rather than a 1.5:1 slope or retaining wall through the small slice of the project bordering Dwyer. *Lukumi*, 508 U.S. at 547.

The Magistrate didn't address any of this. Instead the Magistrate rejected Plaintiffs' free-exercise claim on the theory that a free-exercise plaintiff must show a "substantial burden," and the Court already ruled against Plaintiffs on this issue in dismissing their RFRA claim. ECF 348 at 81. But "there is no substantial burden requirement" under the Free Exercise Clause. *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 170 (3d Cir. 2002); *see also Hartmann v. Stone*, 68 F.3d 973, 979 n.4 (6th Cir. 1995) (same); *Rader v. Johnston*, 924 F. Supp. 1540, 1543 n.2 (D. Neb. 1996) (same).

This is because of *Employment Division v. Smith*, 494 U.S. 872 (1990). Before *Smith*, the Court interpreted the Free Exercise Clause to require strict scrutiny when the government "substantially burdened" religious exercise. *Holt v. Hobbs*, 574 U.S. 352, 357 (2015). In *Smith*, however, the Court "largely repudiated th[is] analysis," *id.*, holding instead that a free-exercise plaintiff must demonstrate that a law is not "neutral" or "generally applicable." *Stormans*, 794 F.3d at 1076. After *Smith*, then, Plaintiffs aren't required to demonstrate a "substantial burden" under the Free Exercise Clause. In fact, in all three cases where the Court has ruled for free-exercise plaintiffs since *Smith*, the Court rested its analysis on the fact that the law was not

"neutral" or "generally applicable"—without ever considering whether the government had imposed a substantial burden. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); *Lukumi*, 508 U.S. 520 (1993).

None of the Magistrate's cases requires otherwise. *Jones v. Williams*, 791 F.3d 1023 (2015), was a prisoner case, and because *Smith* didn't overrule earlier Supreme Court precedents on free-exercise claims by prisoners, the Ninth Circuit, like other circuits, has held that "claims of prisoners" under the Free Exercise Clause are still governed by pre-*Smith* caselaw (including the "substantial burden" requirement). *Ward v. Walsh*, 1 F.3d 873 876 (9th Cir. 1993); *see also Levitan v. Ashcroft*, 281 F.3d 1313, 1317-19 (D.C. Cir. 2002). The non-prisoner cases the Magistrate cites were decided before the Supreme Court's decisions in *Masterpiece* and *Trinity Lutheran* and can't be reconciled with them. *See* ECF 348 at 81. Moreover, post-*Masterpiece* and *Trinity Lutheran*, the Ninth Circuit has recognized that when a law "is not neutral," the Free Exercise Clause (unlike RFRA) requires strict scrutiny "[r]egardless of the magnitude of the burden imposed." *Fagaza v. FBI*, 916 F.3d 1202, 1244 (9th Cir. 2019) (quoting *Lukumi*, 508 U.S. at 533).

The Government's decision to destroy the sacred site, while preserving a nearby wetlands, was not neutral or generally applicable, and the Government's actions here cannot survive the "demanding" strict-scrutiny test. *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997); *see* ECF 331 at 57-58.

IV. Regardless of how the Court rules on laches and waiver, the Court should address the merits of Plaintiffs' claims.

Regardless of how this Court ultimately rules on the questions of laches and waiver, Plaintiffs respectfully request that the Court address the merits of all their claims. This case has now been pending for nearly 12 years. Although the Magistrate

deliberated over Plaintiffs' summary-judgment motion for nearly a year, she ultimately concluded that "many issues" were "tangled," ECF 348 at 44, and strained to dismiss most claims on procedural grounds. As shown above, that recommendation is wrong. At minimum, it is vulnerable to reversal on appeal. Thus, if this Court adopts the Magistrate's recommendation in full, the parties face the likelihood of returning to this Court a year or two from now after appeal, only to brief the merits again, and only for this Court (and the Magistrate) to have to familiarize itself with the administrative record again. That could prolong this litigation by another 3-4 years.

The individual Plaintiffs are 75, 76, and 89 years old respectively. Michael Jones died while the current motion was pending. The case is not about damages. It is about rectifying an injustice and enabling Plaintiffs to resume their religious practices at a sacred site they used for decades, as their ancestors did before them. Plaintiffs hope to do this again during their lifetimes.

Accordingly, Plaintiffs respectfully request that this Court address the merits of their NEPA, NHPA, FLPMA, and § 4(f) claims, regardless of how the Court rules on laches and waiver. This Court has wide discretion in reviewing a magistrate's recommendation. Fed. R. Civ. P. 72(b)(3). When, as here, a magistrate erroneously recommends disposing of a motion on a threshold issue, without reaching the merits, district courts routinely exercise their discretion to address the merits themselves in the first instance, "in the interests of judicial economy." *Binns v. Va., Dep't of Corr.*, No. 1:13CV00086, 2015 WL 1477910, at *8 (W.D. Va. Mar. 30, 2015); *Person v. United States*, 27 F. Supp. 2d 317, 320 (D.R.I. 1998). Likewise, even if the Court adopts the Magistrate's recommendation on laches and waiver, it has discretion to address the merits in the alternative "to facilitate appellate review." *Cf. Kayser v. Ocwen Loan Servicing, LLC*, No. CV 13-5999 (KM), 2017 WL 3578696, at *8 (D.N.J. Aug. 18, 2017). Plaintiffs' claims have been exhaustively briefed, and both judicial economy and the

interests of justice counsel in favor of allowing the parties to take the entire case, including the merits of the NEPA, NHPA, FLPMA, and § 4(f) claims, on appeal.

CONCLUSION

The Court should reject the Magistrate's recommendation and grant Plaintiffs' motion for summary judgment on all claims.

Dated: April 22, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This memorandum complies with the applicable word-count limitation under LR 7-2(b) because it contains 10,951 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

April 22, 2020

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CERTIFICATE OF SERVICE

I certify that on April 22, 2020, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

April 22, 2020

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