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The Honorable Edward F. Shea
Motion Date: July 29, 2010
Time: To Be Determined

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, a federally-recognized Indian tribal government and as *parens patriae* on behalf of the Enrolled Members of the Confederated Tribes and Bands of the Yakama Nation; FRIENDS OF THE COLUMBIA GORGE, an Oregon non-profit corporation; NORTHWEST ENVIRONMENTAL DEFENSE CENTER, an Oregon non-profit corporation; COLUMBIA RIVERKEEPER, a Washington non-profit corporation; DAWN STOVER, a

NO. CV-10-3050-EFS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION'S MOTION FOR TEMPORARY RESTRAINING ORDER

Washington resident; DANIEL LICHTENWALD, a Washington resident;

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF AGRICULTURE; UNITED STATES DEPARTMENT OF AGRICULTURE ANIMAL AND PLANT HEALTH INSPECTION SERVICE; TOM VILSACK, Secretary of the United States Department of Agriculture; CINDY SMITH, Administrator of the United States Department of Agriculture Animal and Plant Health Inspection Service;

Defendants.

I. RELIEF REQUESTED

The Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation" or "Nation"), signatory to the 1855 Treaty With the Yakama, 12 Stat. 951 (the "Treaty of 1855"), pursuant to Federal Rule of Civil Procedure 65, respectfully requests a temporary restraining order enjoining Defendants United States Department of Agriculture ("USDA"), Secretary of Agriculture Tom

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Vilsack ("the Secretary"), the USDA Animal and Plant Health Inspection Service ("APHIS"), and APHIS Administrator Cindy Smith ("the Administrator"; collectively "Agriculture") from authorizing the dumping of Hawaiian garbage in the Roosevelt Regional Landfill in South Central Washington.

The Yakama Nation seeks this extraordinary remedy due to the grave threat of irreversible harm presented by Defendants and the lack of adequate remedy at law. For the first time in history, the Federal Government has authorized, through regulation change and federal permits, the exportation of Hawaiian garbage to the Mainland – **starting this Friday** – by a low-bid, self-regulated private contractor. Through a haphazard regulatory process that began during the last Presidential Administration, Agriculture has recently authorized profit-seeking Hawaiian Waste Systems, LLC ("HWS"), to immediately begin dumping municipal solid waste from Honolulu – along with invasive pest and plant species – in Washington, specifically within the Yakama's usual and accustomed lands per Article III of the Treaty of 1855.

Agriculture has: (1) violated the Yakama Treaty of 1855; (2) violated Section 106 of the National Historic Preservation Act ("NHPA") by failing to

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consult with the Washington State Historic Preservation Officer, her Yakama Nation counterpart, or the federal Advisory Council on Historic Preservation; (3) violated three Presidential Executive Orders, its common law trust responsibility to the Yakama Nation, NEPA and Council on Environmental Quality regulations and its own regulations, by not meaningfully consulting with Yakama or evaluating potential irreversible impacts to Treaty resources; and (4) violated NEPA by not preparing an Environmental Impact Statement regarding the potential irreparable harm caused by the Hawaiian garbage, plant pests, noxious weeds and pathogens to the Pacific Northwest environment. Agriculture must be enjoined.

Described herein as "the Violative Project," Agriculture is permitting HWS to transport tons of Hawaiian garbage through and onto lands that have been guaranteed in perpetuity to the Nation for its use. According to Agriculture's Under Secretary Edward Avalos and other sources described below, the waste will leave Honolulu on July 30, 2010, in 1.5- to 4-ton plastic-wrapped bales. When the plastic on the bales is ruptured – as it was on July 6, 2010 **and is**

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today, July 28, 2010[1] – invasive pest and plant species will invade the Columbia River Basin ecosystem, and the Nation's Treaty rights will be irrevocably and permanently violated. The remaining in-tact plastic sheets are likely to be torn as the containerized bales will be handled by heavy machinery no less than five times throughout their progress from Honolulu to Eastern Washington.

As vividly illustrated by recent and ongoing events in the Gulf Coast, the time to prevent such environmental catastrophe is now – before it occurs. Prevention should be accomplished through early meaningful consultation among concerned governments. But instead of deliberately consulting with the Yakama Nation, or with Washington State, Agriculture has foisted its plan on the Nation and traditional Yakama lands. Agriculture has failed to stop, look, listen and take a hard look at the potentially irreversible risks to Treaty resources, as is required by a myriad of federal laws. Agriculture's 11th hour visit to the Yakama Reservation last week, and *preceding* regulation change, and tiered Environmental Assessments, and Finding of No Significant Impact in lieu of an

[1] ***See* Declaration of Robert Harris, ¶ 5; Ex. A (13 photos of the bales taken today).**

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EIS, are wholly inadequate under federal law. In fact, Agriculture's actions are woefully inadequate under Agriculture's own regulations.

Agriculture must be enjoined.

II. FACTS

A. The Yakama Nation And Its Treaty With the United States of America

The Yakama Nation is a federally-recognized Indian tribal government, whose Reservation was established by the 1855 Treaty with the Yakama, 12 Stat. 951. The Nation currently occupies, regulates and self-governs over 1.2 million acres of lands within the Yakama Indian Reservation. In exchange for the rights guaranteed by the Yakama Treaty of 1855, the Yakama Nation ceded over 10 million acres of land to the United States. *U.S. v. Smiskin*, 487 F.3d 1260, 1265-66 (9th Cir. 2007). The United States also promised the Yakamas that they could rely on "all [the Treaty's] provisions being carried out strictly." *Id.* "The Yakama Nation thus understandably assigned a special significance to each part of the Treaty at the time of signing and continues to view the Treaty as a sacred document today." *Id.* at 1266.

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Through the Treaty of 1855, the Nation reserved, and the United States guaranteed the Yakama, "the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land." 12 Stat. 951, Art. III (emphasis added).

Yakama's Article III reserved fishing, hunting and gathering rights, and companion access, use and religious rights, extend throughout the 10 million acres of Yakama's ceded land, which includes all of Klickitat County in South Central Washington. *See* Declaration of Philip Rigdon ("Rigdon Decl."), Ex. 2, 3. The Roosevelt Regional Landfill is squarely situated in Klickitat County and Yakama Nation's ceded lands, and it lies amongst Yakama historic fishing, hunting and gathering areas and sacred sites. *Id.*, Ex. 1, 3.

The Violative Project threatens irreparable harm to an area that the Yakamas have used since time immemorial, and the Yakama continue to use this area today. *See* Declarations of Yakama Tribal Councilman Sam Jim, Sr. ("Jim Dec."); Johnson Meninick ("Meninick Dec."); and Rigdon Dec. Yakama Nation

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Tribal Councilman Sam Jim, born approximately a mile from the Landfill, has used the area surrounding the Landfill for over 70 years. Jim Dec. ¶¶4-12. Tribal members living near the Columbia River, and living on the Yakama Indian Reservation, use the area surrounding the Landfill to gather roots, foods, plants and medicines that are critical to both Yakama tradition and the Yakama way of life. *Id.* ¶¶ 10-12. Yakamas gather roots in the area along the road that leads to the Landfill. *Id.* ¶ 10; Meninick Dec. ¶ 11.

The area around the Landfill is close enough to timber habitat that if a tree-boring insect was introduced, it would have devastating effect on the Yakama Nation's timber management and harvesting activities. Rigdon Dec. ¶ 19. Similarly devastating effect would result from decimation of riparian trees like black cottonwoods and aspens, which provide cover for watersheds and fish habitat. *Id.* Any adverse effect on the habitat could harm the game, like deer and grouse, that Yakamas hunt, the salmon and steelhead that Yakamas fish, and the roots and herbs that Yakamas gather for food and medicine. *Id.*

Tribal leadership and the scientists employed by the Nation were not allowed to educate Agriculture regarding the effect of this Violative Project on

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the Nation's Treaty resources, because by the time something resembling consultation occurred, Agriculture had already issued a finding of no significant impact ("FONSI") – which Agriculture takes as a sign that no further meaningful analysis is required. Rigdon Dec. ¶¶20-21. Although the exact magnitude of such risk is unknown, harm caused to the natural or cultural resources of the Yakama Nation is a harm of the gravest type: not only are the threatened natural resources guaranteed to the Nation by the Treaty of 1855, but they are critical to the lives and ways of the Yakama People. *Id.,* 22.

B. Agriculture's Failure To Meaningfully Consult With the Yakama Nation or the State of Washington

Since 2005, Defendant APHIS has commissioned several environmental assessments ("EA") for the Violative Project: in September 2005, December 2006, April 2008 and December 2009, respectively. *See* Declaration of Julio V.A. Carranza ("Carranza Decl."), Ex. A.

Agriculture has never commissioned an environmental impact statement ("EIS") for the Violative Project. Carranza Decl., Ex. A. None of Agriculture's EAs, or associated assessments, meaningfully and specifically examine the risk of harm – or any effect – on Tribal or Treaty resources. *Id.*

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Even Agriculture's comment process curtailed the Nation's participation in evaluating the Violative Project. The Environmental Review Coordinator for the Confederated Tribes and Bands of the Yakama Nation Environmental Management Program learned of the opportunity to comment on the "Site Specific Environmental Assessment for Hawaiian Waste Systems LLC's Proposal to Transport Municipal Solid Waste from Hawaii to Roosevelt Regional Landfill" when a Yakama Nation staff member forwarded her a press release – not any official communication from Agriculture. *See* Declaration of Kristina Proszek ("Proszek Dec."), Ex. 1, ¶ 3. Typical to the process Agriculture undertook to maintain a pretense of compliance with federal regulations, the press release incorrectly noted that the deadline for comment was March 18, 2010. In fact, the actual deadline for comments was February 18, 2010. The Nation commented and petitioned for a government-to-government consultation on March 18, 2010. *Id.* ¶ 4.

Representatives from Agriculture assured the Nation that its comments would be timely, given Agriculture's failure to provide accurate information to the Nation – if it can be said that Agriculture provided information at all. *Id.*, ¶ 5.

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APHIS responded to the Nation's request for consultation with a letter to Councilwoman Ruth Jim signed by Rebecca Bech, drafted by Barbara Chambers and received by Yakama Nation Environmental Management Program, on April 8, 2010. *Id.* at ¶¶ 7-8, Ex. 3.

Ms. Bech, the Deputy Administrator for APHIS' Plant Protection and Quarantine Program (PPQ), stated: "APHIS believes it has met the responsibility of consultation, namely, informing and providing opportunity for input and dialogue on this issue in a timely fashion." *Id*. There had been no dialogue, no opportunity for input; in fact when the Nation requested consultation APHIS told the Nation that consultation had already occurred: "APHIS believes it has met the responsibility of consultation." *Id.* Of note, even before Agriculture claims to have consulted with the Nation, Agriculture issued the FONSI. *Id*. at ¶ 9.

The Nation's comments and request for consultation were never added to the Violative Project docket at www.regulations.gov and were never mentioned specifically in APHIS' response to public comments. *Id.*, ¶ 11. There is nothing in the record that suggests any of the Nation's timely voiced concerns have ever been taken into account by Agriculture.

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Even worse, APHIS never even bothered to initiate consultation with the Washington State Historic Preservation Office, or the Yakama Nation Tribal Historic Preservation Officer, and further, APHIS failed to seek approval from the Advisory Council on Historic Preservation, all of which is required by Section 106 of the NHPA. Section 106 requires that federal agencies "take into account the effect of the[ir] undertaking[s] on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470f. The Violative Project and its attendant processes - specifically, the Compliance Agreements with HWS - are federal undertakings. But as the State Historic Preservation Office reported:

> **We have not had any correspondence or Section 106 consultation from USDA regarding the above mentioned project," i.e, "Importation of Hawaiian Municipal Solid Waste."**

See Declaration of Gabriel S. Galanda, Ex. A (emphasis added). That fact alone requires that Defendants be enjoined from proceeding with the Violative Project.

That is because by failing to initiate Section 106-mandated state, tribal and federal consultation, APHIS has categorically failed to consider potential damage by the Violative Project to historical sites of cultural or religious significance to

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the Yakama People – or non-Native people for that matter – including areas near the Landfill and transportation route containing Native American human remains, designated cemeteries, cairns denoting ceremonial sites or burial sites, village ruins, petroglyphs, pictographs, fishing sites, and culturally modified trees used for ceremonial and hunting purposes. Valdez Dec., ¶ 6, 12-14.

C. The Violative Project & Federal Undertaking

On May 17, Defendant APHIS issued its FONSI for the Violative Project, in the face of 37 comment letters identifying very significant impacts that will be caused by Hawaiian garbage and expressing grave environmental concerns about the December 2009 EA once that EA was published in the Federal Register on January 19, 2010. *Id.* Again, before issuing its FONSI, Agriculture did not meaningfully consult with the Yakama Nation, as required by federal law, including United States Presidential Executive Order 13175, 3 C.F.R. § 304; NEPA regulations, 40 CFR § 1501.2 and Defendant APHIS' own Directive 1040.1. Rigdon Decl., ¶ 20. In particular, Defendant APHIS never met with the Yakama Nation Tribal Council with regard to the Violative Project before issuing the FONSI. *Id*. On or around June 10, 2010, Defendant APHIS and HWS

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entered into two Compliance Agreements, under which APHIS authorized the Violative Project – again without ever consulting the Nation regarding Treaty Resources, or even specifically examining such Treaty resources. Carranza Decl., Ex. B, C. The first Compliance Agreement permits HWS to handle and transport urban solid waste at/from an unnamed refuse facility in Honolulu, Hawaii, **indefinitely**. *Id.*, Ex. B. The Second Compliance Agreement permits HWS to transport urban solid waste to the Roosevelt Regional Landfill, **indefinitely**. *Id.*, Ex., C.

Pursuant to the Compliance Agreements, HWS will sort household and commercial garbage transported to a Honolulu refuse facility from throughout the Hawaiian Islands, at that facility. *Id*. Ex. B. HWS will inspect the inter-island urban solid waste and bale the waste in plastic film. *Id*. In turn, the plastic-wrapped bales of waste, which will weigh as much as four tons, will be staged by Defendant HWS in Honolulu for at least five days before being transloaded by a forklift or other heavy machinery, with grapplers, onto pallets or into containers. *Id.*, Ex. D, 3.

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Once "containerized," plastic-wrapped bales of waste will again be transloaded by a forklift or other heavy machinery onto a barge in Honolulu, which will carry the waste bales across the Pacific Ocean to the Port of Longview. *Id.*

At the Port of Longview, the plastic-wrapped waste bales will again be transloaded, under Defendant HWS's sole supervision, by a forklift or other heavy machinery off of the barge and onto a railcars or truck, which will then be transported either to an intermodal facility near the Columbia River, or directly to the Roosevelt Regional Landfill. *Id.*

At the intermodal facility, the plastic-wrapped waste bales would once again be loaded by a forklift or other heavy machinery onto trucks and driven to the Landfill, under Defendant HWS's sole supervision. *Id.*

At the Landfill, the plastic-wrapped waste bales will finally be moved, into the actual landfill and buried, also under Defendant HWS's sole supervision. *Id.*

All told, the plastic-wrapped waste bales will be transloaded by forklift or other heavy machinery with grapplers, between Honolulu and the Landfill, which Defendant APHIS acknowledges could cause punctures, ruptures or tears in the

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plastic film wrapped around the bales of household and commercial garbage. *Id*., 11. In fact just sitting on the dock has caused breaches to the plastic-wrapped bales, creating, in USDA's own words "**pest risk concerns**." *Id.*, Ex. E (emphasis added).

Today, the bales sitting on the dock, bound for Yakama lands, are not in tact. They are punctured, breached, and open to pest and plant infestation. Declaration of Robert Harris ("Harris Dec."), ¶¶ 3-6, Ex. A, p. 10, 11, 16, 18. The bales smell from approximately 300 meters away, contrary to the risk assessments relied on by Agriculture. *Id.* ¶ 4. In violation of compliance agreements, HWS appears to have used tape to attempt to repair breaches in the bales. *Id*. ¶ 5, Ex. A, p. 10, 13, 14. The Court can see for itself in the photos attached to the Declaration of Robert Harris, Director of the Hawai'i Chapter of the Sierra Club, that the plastic wrap on the bales is deteriorating; plainly visible tears are present in several bales. *Id*. ¶ 5. These photos were taken today. *Id.* ¶ 3. Yet somehow Agriculture has determined that these bales are ready for travel to Washington.

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While Agriculture itself has found "pest risk concerns" – grave enough to suspend operations of the project – it has never consulted with the Yakama Nation regarding what Treaty Resources might be affected by said "pest risk concerns." Indeed, it has never analyzed whether exposure to such "pest risks" would have a particular effect on Treaty resources through an EIS – or even the much less rigorous EA.

Although the Compliance Agreements mandate that Defendant HWS take no longer than 75 days from the date the urban solid waste is initially plastic-wrapped and baled to the date the plastic-wrapped waste bales are finally buried at the Landfill, Agriculture has allowed the solid waste to remain at the dock for much longer – so long in fact, that the Hawaii Department of Health has found such storage to be health violation subject to a $40,400.00-penalty. *Id.*, Ex. F. Agriculture has repeatedly defended HWS and appears to trust that HWS will police itself, and have the resources to be capable of correcting compliance issues. But HWS is not even capable of meeting its current financial obligations – let alone capable of addressing substantial systemic problems with its project. *See Id.*, Carranza Dec., Ex. G. A complaint filed earlier this month illustrates that

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HWS cannot sustain further expenses that may arise from monitoring and remediation of the Violative Project. *Id.*

D. Agriculture's Repeated Failures To Meaningfully Consult Regarding Imminent Risks To Treaty Resources

Pursuant to the Compliance Agreements, HWS proposes a massive undertaking that will affect the Nation, the Yakamas, and Yakama Treaty resources far into the future. HWS intends to import 150,000 tons of Hawaiian municipal solid waste into South Central Washington, into the Yakama Nation's historic fishing, hunting and gathering areas and sacred sites, each year – or 410 tons per day. Carranza Decl., Ex. D, 11.

But as Agriculture explained 2005:

> A threat to environmental quality in the continental United States associated with the transporting of municipal solid waste is the entry and establishment of harmful non-indigenous plant pests and noxious weeds that might accompany such waste. Harmful non-indigenous plant pests and noxious weeds that might accompany municipal solid waste may include noxious weed seeds, for example, that **could affect an ecological niche by overtaking an area previously populated by domestic plants**.
>
> Were harmful non-indigenous species to find their way into the continental United States and become established, actions to eradicate or control these pests or weeds would be required. **Such actions usually involve the use of pesticides, the potential effects**

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> **of which on the quality of the human environment represent indirect impacts**.
>
> * * *
>
> [T]he pest risk associated with moving municipal solid waste from Hawaii to the continental United States has been determined to be insignificant, but not zero[.]

Carranza, Ex. I, 7 (emphasis added). In addition to appreciating the grave risks to the environment in general a full five years ago, Agriculture has specifically conceded that it (1) did not properly consult the Yakama Nation as part of the evaluation process and (2) has not yet assessed specific Treaty resources. Even the suspension of HWS permission to ship the trash had nothing to do with Agriculture's obligations, according to Agriculture. Carranza Decl. ¶ 11.

On July 21, 2010, USDA Under Secretary Edward Avalos apologized to Yakama Tribal Council for Agriculture's failure to meaningfully consult up to that date. Carranza Decl. ¶ 12-166. Secretary Avalos stated that:

> [Agriculture] would like to extend an apology to the Yakama Nation regarding the consultation process; as I reviewed the communications between our two governments, I believe there was a breakdown and the breakdown in that both sides didn't understand proper government to government consultation.

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Id., ¶ 14. Under Secretary Avalos stated that he had come to the Tribal Council to fix the communication breakdown and follow "to the letter" applicable federal law regarding consultation with federally recognized Indian Tribes. Id., ¶ 15. On July 22, 2010, when asked whether Agriculture had taken the Nation's specific Treaty resources into account at any stage of the project assessment, Secretary Avalos stated:

> I don't know that I have a true answer for you, but one of the discussions we're going to have back in D.C. is we're going to ask whether a new risk assessment is going to be needed or not; we'll make a decision on that.

Carranza Dec., ¶ 16.

Since Agriculture has never meaningfully consulted with the Yakama Nation regarding the Violative Project's impacts on the Treaty, the Nation does yet know the extent of the potential adverse effects upon Yakama Treaty habitat and indigenous species, in the event of a breach in the bales' plastic-wrapping. Rigdon Dec., ¶ 22. While Agriculture has not taken the Nation's Treaty interests into account, it has based its decision on concerns over "frustrating commerce," – although those concerns do not appear to have been officially evaluated based on the administrative record of the Violative Project. *See* Carranza Dec., ¶ 17.

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On the afternoon of July 27, 2010, Under Secretary Avalos called Yakama Tribal Council Chairman Harry Smiskin to say that Agriculture would not prevent the dumping of Hawaiian garbage on Yakama land. Declaration of Yakama Tribal Council Chairman Harry Smiskin ("Smiskin Decl."), ¶¶ 4-5. This was in direct contradiction to Secretary Avalos' earlier representation to the Chairman and Tribal Council he desired to work cooperatively with the Yakama Nation and resolve the emergent and grave matter created by Agriculture's failure to properly consult the Yakama Nation before permitting thousands of tons of Hawaiian waste to be dumped on Yakama Nation land. *Id.*

For the first time on July 27, 2010, Secretary Avalos advised Chairman Smiskin that a barge filled with Hawaiian garbage was scheduled to depart Hawaii on Friday, July 30, 2010. *Id.* ¶ 6. According to Secretary Avalos, there was nothing he would or could do to prevent the departure of this garbage or the imminent threat of irreparable and immeasurable harm to Yakama Nation lands, Treaty resources, waterways, and religious, cultural and historically significant sites, as well as the way of life for the Yakama people. *Id.*

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III. AUTHORITY

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC*, 129 S.Ct. 365, 374, ___ U.S. ___ (2008). The Ninth Circuit uses a "sliding scale" under which "the required degree of irreparable harm increases as the probability of success decreases." *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005).

> If plaintiffs had demonstrated a strong likelihood of success on the merits, then plaintiffs would have needed only to make a minimal showing of harm to justify the preliminary injunction. *See Idaho Sporting Congress v. Alexander*, 222 F.3d 562, 565 (9th Cir. 2000) (the stronger the probability of success on the merits, the less burden is placed on the plaintiffs to demonstrate irreparable harm).

Kootenai Tribe v. Veneman, 313 F.3d 1094, 1124 (9th Cir. 2002). The less the likelihood of success on the merits, the more plaintiffs must show that "the balance of hardships tips decidedly in their favor." *Id.* Agriculture has *per se* violated at least one federal law, Section 106 of the NHPA, as discussed in Section III.B.2 below. Based on that violation alone, Yakama will succeed on

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the merits. Thus, the showing of harm immediately below is more than adequate to justify a TRO.

A. The Nation Will Suffer Irreparable Harm Without Injunctive Relief.

1. The Violative Project Will Threaten Historic Places.

Agriculture has never consulted with the Nation or the Washington State Historic Preservation Officer regarding this federal undertaking. Sites of cultural and historical significance literally encircle the Landfill. *See* Valdez Dec. ¶¶ 8-13. These sites are of critical importance to the Yakama Nation, its people, and the Yakama way of life. *Id.*

More than ninety archeological sites, designated and enumerated under the Smithsonian Trinomial System, may be adversely impacted, and in fact, irreparably damaged by the transportation and dumping of Hawaiian waste in Washington state. *Id.* ¶ 8. Dozens of these archeological sites are of traditional religious and cultural importance to the Yakama Nation. *Id.* ¶ 9. Many of these archeological sites are also subject to protection under NHPA. *Id.*, Ex. A. These sites include, but are not limited to, areas containing human remains, designated cemeteries, cairns denoting ceremonial sites or burial sites, Native American

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village ruins, petroglyphs, pictographs, fishing sites, and culturally modified trees used for ceremonial and hunting purposes. *Id*. ¶ 12.

At this time all such archaeological sites must be presumed eligible for the National Register of Historic Places until they are formally assessed. Id. ¶ 13. Non-assessed sites that are potentially eligible are afforded such protection until determined non-eligible. *Id*. In other words, federal government projects and assessments that bypass evaluating potentially eligible properties are required to treat the properties as eligible sites. *Id*.

All potentially eligible sites need to be assessed as to the direct and indirect effects that may occur as the result of Hawaiian waste transportation. *Id*. ¶ 14. For example federal assessments must consider the impact to all archaeological sites should exotic, invasive plants and animals be inadvertently released in close proximity to any of those archaeological or other types of sites. *Id*.

Finally, in addition to the no less than ninety archaeological sites requiring assessment and evaluation, at least three sites along the proposed route of Hawaiian waste transportation to Roosevelt, WA, or in the area near the Landfill,

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are included in the National Register of Historic Places and are, therefore, subject to protection under NHPA. *Id.* ¶ 15.

Further, because Agriculture has wholly botched the consultation process, the exact numbers of eligible or registered sites that may suffer irreparable harm from the importation of Hawaiian waste remain unknown. *Id.* ¶ 16. Because Agriculture has not consulted, and since it will allow shipment of the garbage on Friday, the Nation is prohibited from definitively determining how many eligible or registered sites may be harmed. *Id.*

2. As Approved, The Violative Project Will Adversely Affect The Yakama Nation's Treaty Resources.

Agriculture's approval of the Violative Project relies entirely on its hope that the plastic wrap on garbage bales will not break. According to Agriculture:

> Specific pests are not discussed here because the species of interest will depend upon the destination, and because the baling technology will be universally effective against all types of pests if bales remain airtight

Carranza Dec. Ex. H, 6-7 (emphasis added). What cannot be disputed is that the bales have broken and have not remained airtight. Again, according to Agriculture, as recently as July 6, 2010, "punctures and tears were observed in bales by Plant Protection and Quaranatine (PPQ) compliance inspectors during

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the unloading and monitoring procedures." Carranza Dec. Ex. E at 2. Today, there are breaches in the bales. Harris Decl., ¶ 5, Ex. A. Note the large hole in the bale – one of many – shown in the photograph below (*id.* p. 16), which was taken today, of the very bales bound for Yakama lands:

Agriculture's own findings of breaches in the bales – **and the actual breaches in the bales** – are proof that the entire presumption of in-tact bales is faulty.

Agriculture's Regulation Revision EA, (Carranza Decl. Ex. I), now over five years old, evaluates a proposal from waste haulers to compress Hawaiian MSW into bales and wrap it in plastic. That EA concludes that such measures

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would, by depriving the baled MSW of oxygen, kill most insect and animal pests. But even Agriculture acknowledges in that EA that many invasive weed seeds and many types of pathogens would not be killed by the baling and wrapping process and could be released if the plastic-wrapped bales were breached prior to burial in a landfill:

> Thus, endangered or threatened species and critical habitat could be potentially affected by plant pest species, if at all, in the event of a breach in the wrapping. Should that happen, the potential exists for weed seeds and plant pathogens to escape into the environment and adversely affect protected species and critical habitats, were any located in the area.

Revised Reg. EA, App. A, at 9. This admission is crucial for two very important reasons: First, every subsequent EA or other analysis has "tiered from" – relied upon – this initial EA without any subsequent meaningful analysis. Second, Agriculture's representations to the contrary, the risk of breaches to bales is substantial (as proven by the fact that the bales are in fact breached), and Agriculture's enforcement protocols apparently rely on county inspectors, with whom contracts have not yet been executed, and whose involvement has never been evaluated under any EA. *See* Carranza Dec., ¶ 18.

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Again, crucially, Agriculture determined that the risk of breach of the bales is "low" but not insignificant. And even this "low" rating hinges entirely on Agriculture's trusting HWS to ensure that every plastic bale is in tact 100% of the time. One breach in a single bale destroys Agriculture's entire premise for safe transport of Hawaiian waste.

In fact, to ensure strict compliance with the mitigation requirements, Agriculture's own risk assessment required that waste handlers' compliance with required mitigation be monitored by federal agency personnel. Carranza Dec., Ex. I, 8. Without any kind of analysis, or even disclosure prior to the FONSI, Agriculture "plan[s] to" enter into agreements with County employees, who may or may not know about such agreements, agree to such arrangement, or have the expertise or resources needed to ensure compliance. *See* Carranza Dec., ¶ 18.

But the Compliance Agreements, incredibly, direct HWS to be responsible for monitoring its own compliance with the agreements:

> Upon arrival in Washington the barges with containers of Garbage and Regulated (domestic) Garbage will be routed directly to the Port of Longview, WA and containers will be inspected by a Hawaiian Waste Systems supervisor to verify that the exterior of the containers are free of pests and mollusks. [Carranza Dec., Ex. C, 6].

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> A HWS supervisor will be present during all transloading and ensure proper handling equipment is used. [*Id.*].
>
> The protocol must include at least one point in the process where the wrapping around the bale is completely and thoroughly inspected from every angle for punctures or tears. . . . HWS will have a supervisor present at the transloading point to safely conduct this inspection. A record on the bale manifest will show by initials or some other accountable way that a thorough inspection was performed and that no punctures, ruptures or tears were found. [*Id.* at 7].

(Emphasis added). Therefore, according to is own Compliance Agreements, Agriculture intends to allow HWS itself to monitor HWS.

As the Hawaiian Department of Health has already found, HWS "operated an illegal solid waste management system by storing containerized waste bales upon an un-permitted site" and "continues (at least through April 8, 2010) the noncompliance solid waste management activity of exceeding the permitted time limited for storage upon the site." Carranza Dec., Ex. F at 4, 3. HWS cannot meet its financial obligations; it is unlikely that if further resources are demanded because of bale breaches or spills, HWS will have any ability to do even what is required under the compliance agreements. *See* Carranza Dec., Ex. G. Unfortunately for the Yakama Nation and Washington's natural resources, only HWS will be present to monitor such lapses in its own behavior.

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Agriculture has analyzed and determined that real and present risks to the environment exist if a bale is breached. Bales have been breached. And the only entity required to monitor this project under the Compliance Agreements is HWS itself. Agriculture's recent mention of delegation to county officers is so whimsical as to provide any solace. Even if unsuspecting county officers elect to participate in the monitoring of HWS, there is no evidence anywhere that they will provide the kind of oversight necessary to make this project safe. Under the eyes of Agriculture itself, the bales are in tatters from merely sitting on a dock.

B. The Nation Is Likely To Prevail On The Merits.

The Nation will likely prevail on any one of the following claims.

1. Agriculture Has Breached Its Trust Responsibility.

The Supreme Court has recognized "the undisputed existence of a general trust relationship between the United States and the Indian people." *United States v. Mitchell,* 463 U.S. 206, 225 (1983). "This obligation has been interpreted to impose a fiduciary duty owed in conducting 'any Federal government action' which relates to Indian Tribes." *Northwest Sea Farms, Inc. v. U.S. Army Corps of Engineers*, 931 F.Supp. 1515 (W.D. Wash. 1996) (citing

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Nance v. Environmental Protection Agency, 645 F.2d 701, 711 (9th Cir. 1981)). In carrying out its fiduciary duty, it is the United States', and subsequently Agriculture's, "responsibility to ensure that Indian treaty rights are given full effect." *Id.* at 1520 (citing *Seminole Nation v. United States,* 316 U.S. 286, 296-97 (1942)). This proposition has been repeatedly confirmed by the courts. *See e.g. Kittitas Reclamation Dist. v. Sunnyside Valley Irrig. Dist.*, 763 F.2d 1032 (9th Cir.), *cert. denied,* 474 U.S. 1032 (1985); *No Oilport! v. Carter*, 520 F.Supp. 334 (W.D. Wash. 1981); *Confederated Tribes of the Umatilla Indian Reservation v. Alexander,* 440 F.Supp. 553 (D.Or. 1977).

It cannot be disputed that Agriculture, a federal agency, "owes a fiduciary duty to ensure" that the Yakama's "treaty rights are not abrogated or impinged upon . . . ." *Northwest Sea Farms, Inc*, 931 F.Supp. at 1520. It is this fiduciary duty that mandates that Agriculture take the Yakama's Treaty rights into consideration. Agriculture has failed to do so.

Pursuant to the United States' trust obligation to the Yakama Nation, Agriculture was required, at minimum, to consult the tribe prior to bestowing federal permission on the Violative Project. *Klamath Tribes v. U.S.*, 1996 WL

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924509, at *8 (D. Or. 1996) ("In practical terms, a procedural duty has arisen from the trust relationship such that the federal government must consult with an Indian Tribe in the decision-making process to avoid adverse effects on treaty resources."). Rather than taking them into consideration, Agriculture ignored the Nation's treaty rights altogether in approving the Violative Project, thus acting in direct violation of their fiduciary duty to ensure that permitting the importation of Hawaiian garbage would not abrogate or infringe those rights.

Not only did Agriculture fail to consult with the Nation prior to issuing a FONSI, but when the Nation demanded consultation, Agriculture responded by saying that consultation had already occurred. Proszek Dec., ¶¶ 7-8, Ex. 3. Later, on the eve of shipment of the trash, Agriculture came to the Yakama Nation. But rather than agreeing to halt shipment of trash based on incomplete analysis, Agriculture refused to take a hard look at Treaty resources.

On July 21, 2010, USDA Under Secretary Edward Avalos conceded that Agriculture had not even consulted with the Yakama Nation "in the decision-making process to avoid adverse effects on treaty resources." *Klamath*, 1996 WL 924509 at *8. Secretary Avalos did so by recognizing a "breakdown" in the

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consultation process and stated that he had come to the Tribal Council "to fix" the communication breakdown and follow "to the letter" applicable federal law regarding consultation with federally recognized Indian Tribes. *Id.*, ¶ 14, 15. When asked directly whether Agriculture had taken the Nation's specific Treaty resources into account at any stage of the Violative Project assessment, Secretary Avalos could not say that it had. *Id.*, ¶ 16. Even when the principal asked the fiduciary for an answer – has Agriculture taken Treaty resources into account at any point during the analysis of the Violative Project? – the fiduciary has repeatedly refused to answer.

This behavior falls far below the standard of behavior required of a fiduciary. And it begins to resemble bad faith when taken with the procedural hoops Agriculture has forced its fellow government, the Yakama Nation, to jump through in order to voice concerns over an un-vetted project. Agriculture has never come close to meeting its fiduciary obligations to the Yakama Nation; it will likely be enjoined from further violating them. The Nation is likely to prevail on its breach of trust claim.

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2. Agriculture Has *Per Se* Violated NHPA

The National Historic Preservation Act (NHPA), 16 U.S.C. § 470 *et seq.* establishes the National Register of Historic Places (Register). 1992 amendments to NHPA provide that properties "of traditional religious and cultural importance" to a Tribe may be eligible for inclusion on the Register. *Id.* at § 470(a). Section 106 of NHPA requires a consultation process for any "undertakings" by a federal agency, or assisted or licensed by a federal agency, that may have an effect on "any district, site, building, structure, or object" that is on, or is eligible to be included in, the Register. *Id.* at § 470(w). Under NHPA regulations, "[c]onsultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them." 36 C.F.R. § 800.16(f). NHPA § 470h-2(d) explicitly states that NHPA is applicable to any project where "any Federal license, permit, or other approval is required . . . ." The NHPA consultation process generally includes two inquiries. *See generally Muckleshoot Indian Tribe v. U.S. Forest Serv.,* 177 F.3d 800, 805 (9th Cir. 1999).

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The first requirement of the Section 106 consultation process mandates that permitting agencies "make a reasonable and good faith effort to identify historic properties; determine whether identified properties are eligible for listing on the National Register . . . ; assess the effects of the undertaking on any eligible historic properties found; determine whether the effect will be adverse; and avoid or mitigate any adverse effects." *Muckleshoot Indian Tribe,* 177 F.3d at 805. In making this determination, the agency must "confer with the State Historic Preservation Officer ('SHPO') and seek the approval of the Advisory Council on Historic Preservation ('Council')." *Id.*

Specifically, 36 C.F.R. § 800.4(a) mandates that the agency "request the SHPO's views on ways to identify historic properties, and seek information from interested parties likely to have knowledge about historic properties in the area." *Pueblo of Sandia v. U.S.*, 50 F.3d 856, 859 (10th Cir. 1995). This request "must be 'initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.'" *Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 787 (9th Cir. 2006) (quoting 36 C.F.R. § 800.1(c)). Agriculture never initiated consultation with

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Washington's SHPO, or via the SHPO, sought approval from the Advisory Council on Historic Preservation. *See* Declaration of Gabriel S. Galanda, Ex. A.

If a tribe chooses to undertake its own management of historic properties, the tribe may assume all or part of the functions of the SHPO with regard to tribal lands if, *inter alia,* the tribe designates a tribal preservation official to administer the program. 16 U.S.C. § 470a(d)(2)(B). The Court in *San Juan Citizens Alliance v. Norton*, 586 F.Supp.2d 1270, 1280-81 (D. N.M. 2008), explained:

> In such cases, the Tribal Historic Preservation Officer ("THPO") is the official representative for purposes of Section 106 consultation. 36 C.F.R. §§ 800.2(c)(2)(i)(A); 800.3(c)(1). Consultation with an Indian tribe must recognize the government-to-government relationship between the federal government and the tribe, and the consultation should be conducted in a manner "sensitive to the concerns and needs of the Indian tribe . . . ." 36 C.F.R. § 800.2(c)(2)(ii). Consultation should provide the tribe with "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." *Id.* Tribal consultation should be conducted concurrently with NEPA analyses, as historic and cultural resources are expressly included among the factors to be considered in an EIS. 36 C.F.R. § 800.8.

Id. When a Tribe has a THPO, as Yakama does, 36 C.F.R. § 800.2(c)(2)(ii)(A) requires that "[t]he agency official shall consult with the THPO in lieu of the

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SHPO regarding undertakings occurring on or affecting historic properties on tribal lands." Agriculture, however, never initiated consultation with the Yakama THPO, Kate Valdez, either. Valdez Dec. ¶ 6.

The second requirement of Section 106 consultation process demands that, if historic properties are "[p]roperties of traditional religious and cultural importance to an Indian tribe," the federal agency consult with that tribe. 16 U.S.C. § 470a(d)(6)(A). Specifically, the NHPA implementing regulations require federal agencies,

> at all stages of the section 106 process, to consult with tribes that "attach[ ] religious and cultural significance to historic properties that may be affected by an undertaking." 36 C.F.R. § 800.2(c)(2)(ii). "The goal of consultation is to identify historic properties potentially affected by the undertaking . . . ." *Id.* § 800.1.

Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dept. of Interior, 608 F.3d 592, 607 (9th Cir. 2010).[2]

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[2] *See also* 36 C.F.R. §§ 800.2(c)(2) (designating tribes as consulting party), 800.4 (regarding identification of historic properties), 800.5(a), (c)(2)(iii) (regarding assessment of adverse effects), 800.6 (regarding resolution of adverse effects), 800.14(f) (regarding generation of programmatic agreement); § 800.8 (regarding coordination with NEPA, which requires consultation with Tribes)

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The Ninth Circuit Court of Appeals has determined, on multiple occasions, that federal agencies must comply with these regulations. *See id.* (citing *Pit River Tribe v. U.S. Forest Serv.,* 469 F.3d 768, 787 (9th Cir. 2006); *Muckleshoot Indian Tribe,* 177 F.3d at 805); *see also Attakai v. United States*, 746 F. Supp. 1395, 1408 (D. Ariz. 1990) (noting that NHPA "clearly require[s] that an Indian Tribe participate as a consulting party," even when the undertaking involves "properties beyond their own reservations").[3] Moreover, courts have ruled that compliance is particularly indispensable when a trust responsibility is involved. *See Pit River Tribe,* 177 F.3d at 788.

The Ninth Circuit has consistently analogized NHPA's consultation process to that of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-70. *See San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1097 (9th Cir. 2005) ("What § 106 of NHPA does for sites of historical import, NEPA

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[3] Erick B. Bluemel, *Accommodating Native American Cultural Activities on Federal Public Lands*, 41 IDAHO L. REV. 475, n.307 (2005) ("Although some land managers and others consider the consultation requirement to undermine agency efficiency and unnecessary, irrespective of one's views of the requirement, it nevertheless exists and must be followed.")

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does for our natural environment."); *Muckleshoot Indian* Tribe, 177 F.3d at 805 (9th Cir. 1999) ("Section 106 of NHPA is a 'stop, look, and listen' provision that requires each federal agency to consider the effects of its programs."). Though similar, the NEPA and NHPA processes remain distinct. *United States v. 0.95 Acres of Land,* 994 F.2d 696, 698 (9th Cir. 1993) ("NHPA is similar to NEPA except that it requires consideration of historic sites, rather than the environment.").

Although Section 106 contains "no provisions which Native Americans can use to stop the imminent destruction of their land and sacred sites, or to force the abandonment of a project which threatens significant historic property,"[4] NHPA is a valuable tool to guide inimical agency action in the protection of historic sites, **and requires strict procedural compliance**. *See Calvert Cliffs' Coordinating Committee, Inc. v. U. S. Atomic Energy Commission*, 449 F.2d 1109 (10th Cir. 1971) (discussing the force of NHPA and the strict compliance it requires). Noncompliance with NHPA regulations in the fulfillment of an

[4] David S. Johnston, Note, *The Native American Plight: Protection and Preservation of Sacred Sites*, 8 WIDENER L. SYMP. J. 443, 456 (2002)

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agency action constitutes an "arbitrary and capricious" action under the APA, 5 U.S.C. § 706(2)(A). *See e.g. Pit River Tribe*, 469 F.3d 768; *see also Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 573 (9th Cir. 1998) ("Decisions regarding NHPA [are] reviewed under the arbitrary and capricious standard.").

Here, Agriculture's rule issuance of Compliance Agreements to move Hawaiian waste is a federal undertaking. *See Pit River Tribe,* 177 F.3d at 787 (holding "that the extension of the leases was a federal undertaking requiring review"); *Kalorama Historical Ass'n v. Christopher*, 49 F.3d 750, 754 (D.C. Cir. 1995) (stating that "federal authority to . . . license a project" renders a project an undertaking).

Agriculture has wholly failed to consider NHPA in the procedures leading up to the issuance of the Compliance Agreements with HWS. In blatant violation of NHPA, APHIS made no attempt to identify historic properties, take into account the effects that the Violative Project would have on those properties, or consult with SHPO and/or the Yakama Nation THPO regarding potential historic properties. *See* Galanda Decl., Ex. A; Valdez Decl., ¶ 6. Further, it seems that Agriculture's disregard for NHPA compliance is systemic. Executive Order

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11,593, 36 Fed. Reg. 8921 (1971), requires federal agencies to institute procedures, in consultation with the Advisory Council on Historic Preservation, to assure that federal agencies carry out their responsibilities of historic preservation under NHPA. *See generally Stop H-3 Ass'n v. Coleman*, 533 F.2d 434 (9th Cir. 1976) (discussing Executive Order 11,593). In feigned compliance with the Order, USDA Defendants have promulgated an Environmental Protection Program Manual, the only APHIS regulation even mentioning NHPA, requiring that APHIS:

> identify, preserve, and protect historical, cultural, and archeological sites, districts, and objects on property owned or operated by the Agency. The Agency will consult with the State Historical Preservation Officer, Advisory Council, and other technical experts on historical preservation. The Agency will actively work to prevent or minimize damage to any historical, cultural, or archaeological site, district, or object resulting from construction or other activities or operations on Agency property

APHIS, ENVIRONMENTAL PROTECTION PROGRAM (ENVIRONMENTAL MANAGEMENT SYSTEM), MANUAL 1060, (Jul. 17, 2003).[5] Of course, NHPA

[5] *Accessed July 28, 2010 at* http://www.aphis.usda.gov/mrpbs/publications/safety_security/downloads/environmental_protection_program.pdf.

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requires APHIS to take into account much more then effects of APHIS actions "on properties owned or operated by the Agency." Rather, it is quite settled that NHPA requires agencies to "stop, look, and listen" before commencing actions which could impact any historic or culturally significant properties – not just properties "owned or operated by the Agency." *See Apache Survival Coalition v. U.S.*, 21 F.3d 895, 906 (9th Cir. 1994).

Further, here, like in *Pit River Tribe*, Agriculture's behavior implicates its trust responsibility. 177 F.3d at 788. Specifically, the Yakama Nation reserved and retains access, use and religious rights over the land underneath, around and adjacent to the Landfill, and the route from Longview thereto, pursuant to various federal laws – most importantly the Yakama Treaty of 1855, which requires that the federal government shield from harm the historic fishing, hunting, and gathering areas; ceremonial sacred sites; and the religiously and culturally significant historic properties of the Yakama People. Defendants have an obligation to take into account these trust resources, and NHPA is one of the

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procedural directives that Congress instituted in order to guarantee that these responsibilities are fulfilled.[6]

In *Pit River Tribe*, the Ninth Circuit Court of Appeals, in finding for the tribe, stated,

> the agencies violated their fiduciary duty to the Pit River Tribe by failing to protect the Tribe's interests during the development process. The district court held that the agencies fully satisfied their fiduciary duty because they "did not violate any statutes during the approval process for Fourmile Hill." *Pit River Tribe,* 306 F.Supp.2d at 950. . . . We have held that agencies must at least show "compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Morongo Band,* 161 F.3d at 574. Because we conclude that the agencies violated . . . NHPA during the leasing and approval process, it follows that the agencies violated their minimum fiduciary duty to the Pit River Tribe when they violated the statutes.

Because a parallel situation is involved here, this Court should find similarly.

When all is considered, Agriculture has categorically acted in violation of NHPA. As noted above, NHPA requires federal agencies to "stop, look, and

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[6] *See generally* Marvin Keller, *Archaeological Protection, Historic Preservation and Trust Responsibility on Indian Reservations in the Northwest Plains*, 36 LANDSCAPE & URBAN PLANNING 103 (1996).

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listen" before commencing a federal undertaking, including the licensing of a project. Analogous to NEPA, NHPA's requirements do not require that an agency make a decision to protect the historical property in question, only that they make the procedural "good faith" attempt to consider how particular projects might affect the public interest. *Apache Survival Coalition*, 21 F.3d at 906. In other words, Section 106 sets the bottom line.

Other courts have found injunctive relief proper even where federal agencies have attempted to fulfill NHPA's consultation process, but failed to fully consider the warnings of adverse impact. In *Comanche Nation v. U.S.*, F.Supp.2d, 2008 WL 4426621, *19 (W.D. Okla. 2008), for instance, the Court found that because "Defendants merely paused, glanced, and turned a deaf ear to warnings of adverse impact," their "efforts fell short of the reasonable and good faith efforts required by the law. Where a plaintiff shows that an agency failed to comply with the NHPA requirements, injunctive relief may issue." *Id.* (citing *Pueblo of Sandia v. U.S.*, 50 F.3d 856, 860 (10th Cir. 1995)). Here, Agriculture did not even attempt to comply with NHPA. If there ever were a case where an agency acted in an "arbitrary and capricious" manner, it is the one at bar. *See*

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Apache Survival Coalition, 21 F.3d at 906. ("[C]ourts have found that the same lenient standard for granting a preliminary injunction that is applied to NEPA claims should also be applied to challenges brought under NHPA . . . .").

For the reasons set forth above, USDA Defendants violated NHPA regulations by in entering into Compliance Agreements with HWS, and therefore acted in an "arbitrary and capricious" manor, in violation of APA § 706(2)(A). Further, in doing so, USDA Defendants violated their minimum fiduciary duty to the Yakama Nation. The Nation is therefore likely to prevail on its NHPA claim.

3. Agriculture Has Violated The Treaty of 1855.

The Treaty of 1855 guaranteed to the Yakama Nation,

> the right of taking fish at all usual and accustomed places, in common with the citizens of the Territory, and of erecting temporary buildings for curing them: together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

12 Stat. 951, Art. III. Agriculture haphazardly granted federal permission to a project that has the very real potential to harm the usufructary rights for which the Yakama ceded over 10 million acres of land.

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The Nation's Treaty is "among the treaties that were signed and negotiated by Governor Stevens in the 1850s in a hasty effort to clear land occupied by Indians for development by settlers." *United States v. Oregon,* 29 F.3d 481, 484 (9th Cir. 1994) (discussing Treaty with the Yakamas, 12 Stat. 951 (June 9, 1855, ratified March 8, 1859, proclaimed April 29, 1859)). In measuring the treaty rights retained by the tribes that signed treaties with Governor Stevens, courts are guided by various well-established principles. To begin with, the signing of a treaty only acts as a limitation on, not a taking of, rights previously held by the tribe. *United States v. Winans,* 198 U.S. 371, 381 (1905).

As such, the act of signing the Treaty is appropriately viewed as a reservation of rights by the Indians, rather than a grant of rights from the United States. *Id.* In interpreting these rights, the courts must construe treaty language in the manner in which the Indians understood it. *Id.* Accordingly, the determination of whether the Yakama presently exercises their hunting, fishing, or gathering rights in the proposed site must be guided by an interpretation of the Indians' understanding of the rights reserved by the treaty. The words "usual and accustomed," as contemplated by the Stevens treaties signatories, have been

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defined as "closely synonymous words" which "indicate the exclusion of unfamiliar locations and those used infrequently or at long intervals and extraordinary occasions." *Washington,* 384 F.Supp. at 322. As such, these areas include every location that members of a tribe customarily use "from time to time." *Id.* In other words, "the site in question need not be the primary or most productive one" for hunting, fishing, or gathering. *Northwest Sea Farms, Inc*, 931 F.Supp. at 1521. Thus, the determination of whether the areas surrounding the Landfill should be afforded treaty protection "depends upon whether the record supports the conclusion that the site is [used] by members of the [tribe] on more than an extraordinary basis." *Id.*

Factually, members of the Yakama Nation use all of the land surrounding the Landfill and have since time immemorial:

- Members hunt and fish throughout the hills surrounding the Landfill. Jim Decl. ¶ 5.
- To the immediate west of the landfill is a drainage called Wood Gulch, which is an important cultural site, food gathering area, and Treaty fishing stream with Steelhead Trout. *Id.*, ¶ 8.

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- Yakama Tribal Councilman Sam Jim, Sr. and his family, and Yakama Tribal Members use the area immediately surrounding the Landfill to gather roots, foods, and medicines. *Id.*, ¶ 9.

- Although Yakama members do not discuss particular things that are gathered, there are roots where the landfill is now that are very scarce, and very hard to gather. There are places where people gather food surrounding the landfill. *Id.*, ¶ 10.

- The area around the Landfill has been occupied and used by Indian people, and specifically ancestors of the Confederated Tribes and Bands of the Yakama Nation, for thousands of years to gather traditional foods and roots. Rigdon Decl., ¶ 16.

- Yakama tribal member families live near the Landfill and subsist on resources gathered in this area today. Id., ¶ 17. The Nation uses Treaty fishing access sites immediately adjacent to the Landfill, which is located squarely within ceded lands. *Id.*

- The Nation's Department of Natural Resources has invested millions of dollars in the nearby Klickitat drainage for habitat restoration for spring and winter Chinook, Coho, and steelhead and has spent substantial resources restoring the steelhead fishery in nearby Rock Creek. Rigdon Dec., ¶ 18.

- The area around the Roosevelt Regional Landfill is close enough to timber habitat that if a tree-boring insect was introduced, it would have devastating effect on the Yakama Nation's timber management and harvesting activities. Similarly devastating effect would result from decimation of riparian trees like black cottonwoods and aspens, which provide cover for watersheds and fish habitat. Any adverse effect on the habitat could harm the game, like deer and grouse, that Yakamas hunt, the salmon and steelhead that Yakamas fish, and the roots and herbs that Yakamas gather for food and medicine. *Id.*, ¶ 19.

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The Yakama "maintain a strong relationship with the river that includes, but goes well beyond, its economic capability. In addition to providing the Nation with salmon to harvest and water for agricultural production on reservation lands, the river is also a source of great spiritual power. . . . " Sidney P. Ottem, *The General Adjudication of the Yakama River: Tributaries for the Twenty-First Century and a Changing Climate*, 23 J. ENVTL. L. & LITIG. 275, 282 (2008). The Yakama have continued to exercise their right to hunt, fish, and gather throughout their ceded areas in the Columbia River basin, including the area that the landfill is located. *See U.S. v. Washington*, 384 F.Supp. 312, 379-82 (D.C. Wash. 1974) (providing historical background as to the location of the Yakama Tribe's usual and accustomed fishing areas); Rigdon Dec., Exs. 1-3.

The area around the Landfill, including the Columbia River and its tributaries, and the rights-of-way thereto, are used "on more than an extraordinary basis" by the tribe. As a result, the areas surrounding the Landfill must be afforded treaty protection. Agriculture not only ignored this protection, but it is facilitating the very breach of Yakama Treaty rights. Because Agriculture has so

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clearly violated the Treaty of 1855, the Nation is likely to prevail on its Treaty claim.

4. Agriculture Also Violated The Administrative Procedures Act.

Agriculture's final action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706(2)(A); *see also Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dept. of Interior*, 2010 WL 2431001, 3-4 (9th Cir. 2010).

Federal agency action taken without fully complying with a tribal consultation policy adopted by the agency to implement Executive Order 13175 is subject to judicial review under the APA. *Yankton Sioux Tribe v. Kempthorne*, 442 F.Supp.2d 774, 785 (D.S.D. 2006) ("Agency action taken without statutory authorization, or which frustrates the congressional policy which underlies a statute, is invalid.") (citing *Oglala Sioux Tribe of Indians v. Andrus,* 603 F.2d 707, 715 (8th Cir.1979)). An agency must comply with its own internal policies even if those are more rigorous than procedures required by the APA. *Oglala,* 603 F.2d at 713 (citing *Morton v. Ruiz,* 415 U.S. 199, 235 (1974)) . Where a federal agency has established "a policy requiring prior consultation with a tribe,

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and therefore created a justified expectation that the tribe will receive a meaningful opportunity to express its views before policy is made, that opportunity must be given." *Lower Brule Sioux Tribe v. Deer,* 911 F.Supp. 395, 399 (D.S.D 1995) (citing *Oglala Sioux,* 603 F.2d at 721). Where a federal agency acts in such a manner as to deny a tribe its right to consultation, an injunction will be granted. *See Yankton Sioux*, 442 F.Supp.2d 774 (issuing an injunction against BIA action where the tribe was not consulted in compliance with BIA's internal regulations).

First, CEQ regulation 1501, 40 CFR § 1501.2 (2010), requires federal agencies to "consult[] early with . . . Indian tribes . . . when [the agency's] involvement is reasonably foreseeable." (emphasis added). Second, in response to Executive Order No. 13,175, 3 C.F.R. 304 (2000) (instructing APHIS to receive "meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications," particularly where those policies touch upon "tribal treaty and other rights"), APHIS issued Directive 1040.1, requiring APHIS to "[c]onsult with the tribal leaders of federally recognized tribal governments before taking actions that affect them; . . .

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Consider the impact of APHIS projects, programs, and activities on tribal trust resources and establish communication systems with tribal leaders to ensure that tribal government rights and concerns are considered during their development; [and] Consider the impact of APHIS projects, programs, and activities on tribal trust resources and establish communication systems with tribal leaders to ensure that tribal government rights and concerns are considered during their development . . . ."

A useful definition of "meaningful consultation" is found in *Lower Brule Sioux*, 911 F. Supp. at 401, which explains what potentially takes place during the formal process of consultations between federal agencies and tribal government officials. The typical consultation described in *Lower Brule Sioux* would have comprised a meeting, during which meeting the federal agency notifies the tribe of the proposed action and justifies his reasoning. *Id.* (citing *Hoopa Valley Tribe v. Christie*, 812 F.2d 1097 (9th Cir. 1987)). The tribe may then issue a motion of support for the decision, or reject the decision. "Meaningful consultation means tribal consultation in advance with the decision maker or with intermediaries with clear authority to present tribal views" to the agency decision maker. *Id.*

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Here, Agriculture did not consult meaningfully, as required by the agency's own regulations. In compliance with CEQ regulation 1501, consultation should have occurred in early application and during the development of the EA. However, the Yakama are not even listed as being consulted in all but one of the EAs. Further, the Yakama Nation was not formally notified of the opportunity to review and provide comment on the EA. Rather, a Yakama Nation staff member was forwarded a link to the press release, which included an error as to the comment deadline. This clearly flies in the face of the agency's own regulations, specifically Directive 1040.1. By the time Agriculture began to realize it had wholly failed to consult with the Yakama Nation, a FONSI had been issued, and Agriculture would go on to refuse to suspend the Violative Project to take the hard look that the Nation sought.

The arbitrary and capricious standard also "'requires [the court] to ensure that an agency has taken the requisite hard look at the environmental consequences of its proposed action, carefully reviewing the record to ascertain whether the agency decision is founded on a reasoned evaluation of the relevant factors.'" *Te-Moak Tribe of Western Shoshone of Nevada*, 2010 WL 2431001, at

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*4 (quoting *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992)). Where federal activities affect trust resources, tribes should be entitled to greater involvement than the due process rights afforded non-Indians. *See Northwest Seafarms*, 931 F. Supp. at 1520 (noting that although agency's regulations do not specifically require consideration of treaty rights as part of "public interest" review mandated by statute, trust and treaty obligations provide it with the authority to do so). This is particularly important when tribal interests may be affected by the agency action. *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152 (9th Cir. 1988) (holding that, because the agency did not have input from the tribe, the NEPA "process was spoiled.").

Here, the final action in question is Agriculture's decision to allow Hawaiian garbage into Eastern Washington and Yakama lands without taking a "hard look" (or any look, in this case) at the consequences of this action regarding Yakama's treaty rights. Although it could be argued that EA took into account the effect that the Violative Project would have upon the immediate surroundings, including the fish and wildlife within part of the Yakama's ceded

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areas, at this point one cannot be sure because Agriculture failed to consult with the Nation regarding those ceded areas – as required by APHIS' own regulations.

Agriculture was required to "[c]onsult with the tribal leaders of federally recognized tribal governments **before** taking actions that affect them;" and to "[c]onsider the impact of APHIS projects, programs, and activities on **tribal trust resources**." 40 CFR § 1501.2 (emphasis added). When asked whether Agriculture had done so, Secretary Avalos stated that, "I don't know that I have a true answer for you." Carranza Dec., ¶ 16. When a hard look was required, Agriculture gave – at most – a general perusal. When Agriculture required of itself a hard look at specific Treaty resources, Agriculture itself made a general survey of all resources, and now refuses to contemplate particular Treaty resources. When Agriculture was required to assess impacts on Treaty resources ***before*** making a decision, it did not. Agriculture did not take a "hard look" – or any look at all – at the consequences of its decision to issue a FONSI as to the tribe's usufructary rights guaranteed under the Treaty of 1855. The Nation will prevail on its APA claims regarding Agriculture's failure to consult.

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5. Agriculture Has Also Violated NEPA.

An agency's decision not to prepare an EIS will be overturned if it was unreasonable. *Save the Yaak Comm. v. Block,* 840 F.2d 714, 717 (9th Cir. 1988). In reviewing an agency decision not to prepare an EIS pursuant to NEPA, the inquiry is whether the "responsible agency has 'reasonably concluded' that the project will have no significant adverse environmental consequences." *San Francisco v. United States,* 615 F.2d 498, 500 (9th Cir. 1980) (citation omitted). If substantial questions are raised regarding whether the proposed action *may* have a significant effect upon the human environment, a decision not to prepare an EIS is unreasonable. *Foundation for North American Wild Sheep v. United States Department of Agriculture,* 681 F.2d 1172, 1178 (9th Cir. 1982). Additionally, an agency's decision not to prepare an EIS will be considered unreasonable if the agency fails to "supply a convincing statement of reasons why potential effects are insignificant." *The Steamboaters v. FERC,* 759 F.2d 1382, 1393 (9th Cir. 1985). Indeed, "the statement of reasons is crucial" to determining whether the agency took a "hard look" at the potential environmental impact of a project. *Id.; Kleppe v. Sierra Club,* 427 U.S. 390, 410 n. 21 (1976).

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Further, in providing the "convincing statement of reasons," of why the agency did not prepare an EIS, and instead prepared an EA, it must be "obvious" that no "effect on the environment is possible. *Sierra Club v. Bosworth*, 352 F.Supp.2d 909, 923 (D. Minn. 2005) (quoting *Natural Res. Def. Council v. Duvall*, 777 F.Supp. 1533, 1538 (E.D. Cal. 1991)). Thus, the Court should defer to an agency's decision only when it is "fully informed and well-considered." *Jones v. Gordon,* 792 F.2d 821, 828 (9th Cir.1986).

Here, the Nation has gone beyond raising "substantial questions" whether the project "may have a significant effect" on the environment. Agriculture admits, even without ever consulting the Nation, that the Violative Project may have a significant impact. For instance, because the introduction of any non-native species is currently unknown, substantial questions arise as to the cumulative impacts that such a species could have on the Yakama's Treaty rights – questions that are not addressed in the EA. Moreover, the EA/FONSI created by APHIS did not contain a convincing statement of why an EIS was not warranted as to the effects on secondary or cumulative effects on species habitat.

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Further, as is apparent from the current state of the bales, there is a real and serious likelihood that bales will be breached, and Agriculture's entire assumption for low risk will be turned upside down. Bales were torn sitting on the dock in Hawaii. But when they begin to be moved – as they are arranged in the staging area after baling, as they remain in the staging area and new bales are placed in the staging area, as the bales are loaded onto the barge in Hawaii, as the bales are unloaded in the Port of Longview, as the bales are transported to rail or truck and transported up the Columbia Gorge, and as the bales are unloaded at the landfill – they will be breached.

The March 2006 Risk Assessment states that "baled waste is unlikely to be attractive to vectors because of its composition, appearance, and the lack of odorous biodegradation." Carranza Dec., Ex. H, 9. But the bales currently smell. Harris Decl., so this premise, like so many of Agriculture's, is faulty.

The EA and documents relied upon do not contain an informed discussion of Yakama Treaty fishing, hunting, or gathering rights; usufructary rights; the presence of cultural resources; or of secondary or cumulative effects on Yakama's ceded lands.

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"The purpose of NEPA is to require disclosure of relevant environmental considerations that were given a 'hard look' by the agency, and thereby to permit informed public comment on proposed action and any choices or alternatives that might be pursued with less environmental harm." *Lands Council v. Powell,* 395 F.3d 1019, 1027 (9th Cir.2005); *see* 42 U.S.C. § 4332(E) (requiring agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources"). "Agencies are required to consider alternatives in EAs and must give full and meaningful consideration to all reasonable alternatives." *Te-Moak Tribe of Western Shoshone of Nevada*, 2010 WL 2431001, at 6 (citing *Native Ecosystems Council v. U.S. Forest Serv.,* 428 F.3d 1233, 1245 (9th Cir. 2005)). In deciding what is "reasonable" the 9th Circuit looks to the agency's "basic policy objectives" for concurrence. *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1249 (9th Cir. 2005). "The existence of a viable but unexamined alternative renders an environmental impact statement inadequate." *Idaho Conservation League v. Mumma,* 956 F.2d 1508, 1519 (9th Cir. 1992) (quoting *Citizens for a Better Henderson v. Hodel,*

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768 F.2d 1051, 1057 (9th Cir. 1985)); *see also Muckleshoot*, 177 F.3d at 812 (9th Cir. 1999) (Forest Service's EIS was inadequate because it did not include a significant analysis of reasonable alternatives). Thus, when conducting an EA, all reasonable alternatives must be considered, and if a question is left unanswered an EIS must be done. *See National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722 (9th Cir. 2002) (holding that if an EA reveals "unknown" consequences an EIS must be completed).

Here, because they were not consulted, the Nation had no opportunity to offer reasonable alternatives to be considered. Thus, the EA included only two alternatives: no action, and approval of the Violative Project – neither of which posed an unanswered question. However, if the Nation had been consulted, as required by the agency's own regulations, an unanswered question would have been posed: What affect would the Violative Project have upon Yakama's treaty rights? At this point, the Nation and APHIS could have worked together to come up with an answer. Instead, Agriculture patently violated NEPA by failing to have any reasonable alternatives at all. Because Agriculture did not consult with

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the Nation, as required by its own internal policies, the alternatives offered were not "reasonable." *See Native Ecosystems Council*, 428 F.3d at 1249-51.

C. The Balance Of Hardships And The Public Interest Favor The Nation.

1. The Public Interest Requires Preliminary Injunction.

The public interest weighs heavily in favor of preventing irreparable environmental and cultural harm until the federal court has fully reviewed the merits. As the Ninth Circuit has stated in the mining context:

> The public interest strongly favors preventing environmental harm. Although the public has an economic interest in the mine, there is no reason to believe that the delay in construction activities caused by the court's injunction will reduce significantly any future economic benefit that may result from the mine's operation.

Southeast Alaska Conservation Council v. United States Army Corps of Eng'rs, 472 F.3d 1097, 1101 (9th Cir. 2006). The public interest in favor of a preliminary injunction is especially acute when faced with violations of environmental laws. *See Bob Marshall Alliance v. Hodel*, 852 F.2d 1223 (9th Cir. 1988); *National Parks Conservation Assoc. v. Babbitt*, 241 F.3d 722 (9th Cir. 2001); *Northern Alaska Envtl. Ctr. v. Hodel*, 803 F.2d 466 (9th Cir. 1986).

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Agriculture's interests in not preserving the status quo are negligible and are not sufficient to outweigh the interests of the Nation and the public in preventing irreparable environmental harm. *See American Motorcyclist Ass'n v. Watt*, 714 F.2d 962, 966 (9th Cir. 1983) (district court had "properly determined that the harm to Inyo [County]'s planning processes was not comparable to the harm enjoining the Plan would cause to the [environment] and the public interest"). Any harm to HWS' financial position is also not considered irreparable. "(T)he temporary loss of income, ultimately to be recovered, does not usually constitute irreparable injury . . . Mere injuries, however substantial, in terms of money, time and energy necessarily expended . . . are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Los Angeles Memorial Coliseum Commission v. NFL*, 634 F.2d 1197, 1202 (9th Cir. 1980) (citations quotations omitted).

Where, as here, there is a threat of irreparable environmental harm, "more than pecuniary harm must be demonstrated" in order to avoid a preliminary injunction, even where a party, rather than a non-party, may face "real financial

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hardship." *National Parks*, 241 F.3d at 738 ("loss of anticipated revenues ... does not outweigh the potential irreparable damage to the environment").

This Violative Project has been under review for over five years. Additional delay while the Court reviews the merits will be far shorter than HWS has taken to provide information regarding its plans to Agriculture.

The interests of a handful of persons affected by a temporary pause in the Violative Project pale in comparison to the interests of the Tribal members and others whose lives and resources will be irretrievably altered by the potential environmental catastrophe Agriculture has loosed on Eastern Washington.

2. <u>The Interests Of Agriculture Counsel For Injunction.</u>

Agriculture's interests counsel for Injunction. It is not a "hardship" for an agency to follow its own internal regulations. Not only was Agriculture required to act, as outlined above, but it had the discretion to honor its obligations under its trust obligation to the Yakama Nation. Although Secretary Avalos included a reluctance to frustrate trade as a reason for failing to take a hard look at the project, Agriculture's fiduciary obligation requires it to prevent damage to the Nation's trust – not please political and business special interests. Nowhere do

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Agriculture's internal regulations require or even allow it to place the commercial interests of a few over the Treaty interests of many. "[T]he . . . trust [is for] the benefit of the people, and not . . . for the benefit of private individuals as distinguished from the public good." *Geer v. Connecticut*, 161 U.S. 519, 529 (1896). Agriculture had the authority to do what was necessary to exercise its trust responsibility to the Nation; it chose not to.

Although Agriculture will likely argue that it is stuck between two stakeholders, Courts regularly approve of federal agencies exercising discretion to impose a higher standard of protection for Treaty resources. *HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10th Cir. 2000) (holding that EPA "bears a special trust obligation to protect the interests of Indian tribes, including protecting tribal property and jurisdiction"); *Parravano v. Babbitt*, 70 F.3d 539 (9th Cir. 1995) (upholding regulation under Magnuson Act to protect tribal fisheries); *Northwest Sea Farms*, 931 F. Supp. 1515 (upholding the Corps' refusal of a permit for a fish farm because it could interfere with treaty fisheries). In *HRI*, the Tenth Circuit upheld EPA's jurisdiction over a uranium mining company that sought to locate on lands in disputed Navajo territory, holding that: "[T]he federal executive is to

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consider its strict fiduciary obligation when interpreting regulations that directly affect . . . Indian lands." 198 F.3d at 1246.

Agriculture's interests in protecting Treaty resources, as it has espoused through internal regulations, are best served by the injunction sought at bar.

D. No Bond Should Be Required Of The Nation.

The Nation should not be required to post a bond to obtain a TRO. Because requiring a bond has a chilling effect on public interest litigants seeking to protect the environment, the bond requirement in FRCP 65 should be waived, or only a nominal bond should be required. *People ex rel. Van de Kamp v. Tahoe Regional Plan*, 766 F.2d 1319 (9th Cir. 1985) (no bond). "The court has discretion to dispense with the security requirement, or to request mere nominal security, where requiring security would effectively deny access to judicial review." *Id*. at 1325. Here, the Nation is attempting to protect its Treaty assets and the environment for which it has served as steward since time immemorial. Any bond would come directly from the Tribal resources needed to continue to provide governmental services – including stewardship over Treaty resources. No bond should be required.

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IV. CONCLUSION

The Nation requests that relief set forth in the proposed order filed with its Motion for Temporary Restraining Order.

DATED this 28th day of July, 2010.

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CERTIFICATE OF SERVICE

I, Gabriel S. Galanda, say:

1. I am now, and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of 18 years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

2. On July 28, 2010, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, and sent out via e-mail to:

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DATED this 28th day of July, 2010.

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