

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES AND  
BANDS OF THE YAKAMA  
NATION,

Plaintiff,

v.

UNITED STATES FISH AND  
WILDLIFE SERVICE; ROBYN  
THORSON, Pacific Regional Director  
U.S. Fish and Wildlife Service;  
CHARLES STENVALL, Manager  
Mid-Columbia National Wildlife  
Refuge; LARRY KLIMEK, Manager  
Hanford Reach National Monument,

Defendants.

NO: 1:14-CV-3052-TOR

ORDER DENYING PLAINTIFF'S  
MOTION FOR A TEMPORARY  
RESTRAINING ORDER

BEFORE THE COURT is Plaintiff's Motion for a Temporary Restraining Order (ECF No. 6). This matter was heard with oral argument on May 5, 2014. Thomas A. Zeilman appeared on behalf of Plaintiff. Vanessa R. Waldref appeared on behalf of Defendants. The Court has reviewed the briefing and the record and

ORDER DENYING PLAINTIFF'S MOTION FOR A TEMPORARY  
RESTRAINING ORDER ~ 1

1 files herein, and is fully informed. This Order memorializes and supplements the  
2 Court's oral ruling.

### 3 BACKGROUND

4 This case concerns guided bus tours for members of the general public on  
5 Rattlesnake Mountain in the Hanford Reach National Monument conducted by  
6 Defendant United States Fish and Wildlife Services ("USFWS"). Plaintiff  
7 Confederated Tribes and Bands of the Yakama Nation ("the Yakama Nation")  
8 seeks judicial review of the USFWS's agency decision and actions that the guided  
9 tours will have no adverse effect on the site, which has been designated a  
10 Traditional Cultural Property ("TCP") under the National Historic Preservation Act  
11 ("NHPA"). In the motion now before the Court, Plaintiff seeks a temporary  
12 restraining order ("TRO") prohibiting the two remaining scheduled bus tours in  
13 2014. For the reasons explained below, the Court denies Plaintiff's motion.

### 14 FACTS<sup>1</sup>

15 The Yakima Nation is a federally recognized Indian Tribe. Defendant  
16 USFWS is responsible for administration and management of certain federally

---

17  
18 <sup>1</sup> Unless otherwise indicated, the following facts are primarily drawn from  
19 Plaintiff's complaint and documents appended to the instant motion, and are  
20 accepted as true for the purposes of this motion.

1 owned lands, including those lands comprising the National Wildlife Refuge  
2 system and Hanford Reach National Monument. Defendant Robyn Thorson is the  
3 Regional Director of the Pacific Region of the USFWS and is named in her official  
4 capacity. Defendant Charles Stenvall is the Manager of the USFWS Mid-Columbia  
5 National Wildlife Refuge Complex and is named in his official capacity.  
6 Defendant Larry Klimek is the USFWS Manager of the Hanford Reach National  
7 Monument and is named in his official capacity.

8 Rattlesnake Mountain, overlooking the Hanford Site in Benton County,  
9 Washington, is known to the Yakama Nation as *Laliik*, and means “standing above  
10 the water.” *Laliik* has cosmological, religious, and cultural significance for the  
11 Yakama Nation and other Indian tribes. The Yakama Nation ceded the land on  
12 which *Laliik* is situated to the United States under the Treaty of 1855. From 1943  
13 through 1987, the United States used the area as a buffer zone for the Hanford Site.  
14 In 1967, the Atomic Energy Commission formally designated the western sector of  
15 the Hanford Site, including *Laliik*, as the Arid Lands Ecology Reserve (“ALE”). In  
16 1977, the Department of Energy took control of the Hanford site, including ALE.  
17 In 1997, administration and management of the mountain was transferred to  
18 USFWS, and it was subsequently included in the Saddle Mountain National  
19 Wildlife Refuge. Ultimately, the area was included in the Hanford Reach National  
20 Monument, pursuant to the Antiquities Act of 1906. In 2007, *Laliik* was designated

1 as a Traditional Cultural Property (“TCP”) pursuant to §101(d)(6)(A) of the  
2 National Historic Preservation Act (“NHPA”). A TCP is a “property of traditional  
3 religious and cultural importance to an Indian tribe” and is thereby eligible for  
4 listing on the National Register of Historic Places.

5 USFWS has maintained the public access restriction to the area that began in  
6 1943 when the military and later the Department of Energy managed the area,  
7 using fences, locked gates, and policy to restrict access to authorized uses,  
8 according to the June 2012 report on wildflower tours. ECF No. 21-1 at 8.

9 On February 17, 2012, USFWS emailed the Yakama Nation with a request  
10 for a review of a proposed undertaking pursuant to § 106 of the NHPA. The  
11 undertaking consisted of two three-hour guided bus tours on one day on Laliik for  
12 the public to view the spring wildflowers. On March 13, 2012, the Yakama Nation  
13 responded that it did not concur under the NHPA. On April 26, 2012, USFWS  
14 issued a finding that the wildflower tours presented “no adverse effect” on the  
15 Laliik TCP. On April 30, 2012, State Historic Preservation Officer Allyson  
16 Brooks notified the USFWS that she did not concur with the finding of no adverse  
17 effect. On May 1, 2012, USFWS sent a cultural review of the wildflower tours to  
18 the State Historical Preservation Office and Yakama Nation for comment,  
19 documenting the finding of no adverse effect and stating that “as a potential threat  
20 to the integrity of Laliik’s feeling and association, the wildflower tour is fleeting.”

1 On June 7, 2012, USFWS notified the Yakama Nation that it was expanding  
2 the proposal for future wildflower tours at the Laliik TCP to six tour days per year  
3 (two tours per day) for the next five years. The § 106 review contained the same  
4 information regarding potential effects and the same finding of no adverse effect.  
5 USFWS informed the Tribe that it would have the Advisory Council on Historic  
6 Preservation review the new proposal because the Tribe and the State Historical  
7 Preservation Office had not concurred with the USFWS. On December 6, 2012,  
8 the Tribe told the ACHP that it did not concur with the new tours proposal. On  
9 December 28, 2012, the ACHP gave the USFWS detailed comments on a proposed  
10 elk hunt on Laliik, but did not comment on the wildflower tours. It did, however,  
11 specify the need to manage all projects on the TCP to mitigate adverse effects.

12 On January 17, 2013, Defendant Robyn Thorson met with the Yakama  
13 Tribal Council regarding a number of matters; consultation for the wildflower tours  
14 was scheduled for that meeting, but the discussion did not take place due to time  
15 constraints.

16 On February 13, 2013, USFWS told the Chairman of the Tribal Council that  
17 USFWS had met its NHPA § 106 consultation obligations and would proceed with  
18 the wildflower tours in May 2013, managed in a way that would produce “no  
19 adverse effect.”

1 On March 26, 2013, a representative from the Yakama Nation met with  
2 Charles Stenvall and Larry Klimek and expressed that the Tribe objected to the  
3 expanded wildflower tours. Defendants reiterated to him that USFWS had met all  
4 NHPA obligations and were proceeding with the wildflower tours. The Tribe  
5 again objected to the finding of no adverse effect in a letter to the Acting Assistant  
6 Interior Secretary for Fish and Wildlife and Parks. In response, Acting Assistant  
7 Secretary Jacobson stated that USFWS had met all NHPA § 106 obligations and  
8 that there would be no adverse effect if all work controls and project modifications  
9 were followed.

10 USFWS conducted four wildflower tours at the Laliik TCP over the course  
11 of two days, May 1 and May 4, 2013.

12 On May 16, 2013, the Tribe notified Jacobson that USFWS never conducted  
13 government-to-government consultation on the expanded tour.

14 On January 16, 2014, USFWS's website linked to articles and photos from  
15 the 2013 tours that the Tribe claims indicate that the USFWS had not followed the  
16 work controls. On February 3, 2014, Yakama Nation staff members met with  
17 ACHP members in Washington, D.C., regarding the adverse effects to Laliik. On  
18 April 9, 2014, the ACHP recommended to USFWS that it consult further with the  
19 Tribe prior to any further wildflower tours on the Laliik TCP, citing the allegedly  
20 unfollowed work controls and the Tribe's belief that there was an adverse effect.

1 HRNM management told the Yakama Nation that the USFWS had made a  
2 final agency decision to proceed with eight wildflower tours, scheduled for April  
3 25 and 27, and May 8 and 10, 2014. The Yakama Nation filed a complaint in this  
4 Court on April 22, 2014. On April 28, after the first two days of tours occurred, the  
5 Tribe moved the Court for a temporary restraining order prohibiting the tours  
6 scheduled for May 8 and 10, 2014.

### 7 DISCUSSION

8 The Yakama Nation maintains that USFWS did not adequately consult with  
9 it on a government-to-government basis before approving the wildflower tours and  
10 finding that they presented no adverse effect to the Laliik TCP, as required under  
11 NHPA § 106. They maintain that a temporary restraining order is justified,  
12 prohibiting the USFWS from conducting the two remaining scheduled wildflower  
13 tours on May 8 and 10, 2014, pending the USFWS's proper consultation with the  
14 Tribe.

15 Pursuant to Rule 65 of the Federal Rules of Civil Procedure, the Court may  
16 grant preliminary injunctive relief in order to prevent "immediate and irreparable  
17 injury." Fed.R.Civ.P. 65(b). The analysis for granting a temporary restraining order  
18 is "substantially identical" to that for a preliminary injunction. *Stuhlbarg Intern.*  
19 *Sales Co., Inc. v. John D. Brush and Co., Inc.*, 240 F.3d 832, 839 fn. 7 (9th Cir.  
20 2001). It "is an extraordinary remedy never awarded as of right." *Winter v.*

1 *Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). To obtain this relief, a  
2 plaintiff must establish that (1) he is “likely to succeed on the merits,” (2) he is  
3 “likely to suffer irreparable harm in the absence of preliminary relief,” (3) “the  
4 balance of equities tips in his favor,” and (4) “an injunction is in the public  
5 interest.” *Id.* at 20. “In each case, courts ‘must balance the competing claims of  
6 injury and must consider the effect on each party of the granting or withholding of  
7 the requested relief.’” *Id.* at 24 (citing *Amoco Production Co. v. Village of*  
8 *Gambell, Alaska*, 480 U.S. 531, 542 (1987)). The Ninth Circuit uses a “sliding  
9 scale” under which the temporary restraining order may be issued if there are  
10 serious questions going to the merits and the balance of hardships tips sharply in  
11 the plaintiff's favor, along with satisfaction of the two other *Winter* factors.  
12 *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011)  
13 (“For example, a stronger showing of irreparable harm to plaintiff might offset a  
14 lesser showing of likelihood of success on the merits.”).

#### 15 **A. Likelihood of Success on the Merits**

16 The Court's review of agency action under the NHPA is governed by the  
17 Administrative Procedure Act. Under 5 U.S.C. § 706 the Court is directed to  
18 compel agency action that has been unlawfully withheld, (§ 706(1)), and hold  
19 unlawful and set aside agency actions it finds to be “arbitrary, capricious, abuse of  
20 discretion, or otherwise not in accordance with law” (§ 706(2)(A)), or “without



1 observance of procedure required by law” (§ 706(2)(D)). The burden is on the  
2 Tribe to show any decision or action was arbitrary and capricious. *Kleppe v. Sierra*  
3 *Club*, 427 U.S. 390, 412 (1976). Agency action will be upheld if the agency “has  
4 considered the relevant factors and articulated a rational connection between the  
5 facts found and the choice made.” *Baltimore Gas & Elec. Co. v. Natural Res. Def.*  
6 *Council, Inc.*, 462 U.S. 87, 105 (1983). An agency’s decision can be upheld only  
7 on the basis of the reasoning in that decision. *Anaheim Memorial Hospital v.*  
8 *Shalala*, 390 F.3d 630, 638 (9th Cir. 2004). “The scope of review under the  
9 ‘arbitrary and capricious’ standard is narrow and a court is not to substitute its  
10 judgment for that of the agency,” but “the agency must examine the relevant data  
11 and articulate a satisfactory explanation for its action including a ‘rational  
12 connection between the facts found and the choice made.’” *Motor Vehicle Mfrs.*  
13 *Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)  
14 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). An  
15 agency decision may be reversed under the arbitrary and capricious standard if the  
16 agency “relied on factors that Congress did not intend it to consider, or offered an  
17 explanation for its decision that runs counter to the evidence or is so implausible  
18 that it could not be ascribed to a difference in view or the product of agency  
19 expertise.” *Snoqualmie Indian Tribe v. Federal Regulatory Commission*, 545 F.3d  
20

1 1207, 1212 (9th Cir. 2008) (citing *Sierra Club v. EPA*, 346 F.3d 955, 961 (9th Cir.  
2 2003)).

3 1. *Consultation*

4 Under NHPA Section 106 (16 U.S.C. § 470f) and its implementing  
5 regulations, USFWS is required to consult with the Tribe before spending money  
6 on or approving any federally-assisted undertaking such as the project at issue  
7 here. The consultation process is governed by 36 C.F.R. § 800.2(c)(2), one of  
8 § 106's implementing regulations. In the consultation,

9 [t]he agency official shall ensure that consultation in the section 106 process  
10 provides the Indian tribe or Native Hawaiian organization a reasonable  
11 opportunity to identify its concerns about historic properties, advise on the  
12 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.

13 36 C.F.R. § 800.2(c)(2)(ii)(A). Furthermore, the consultation “must recognize the  
14 government-to-government relationship between the Federal Government and  
15 Indian tribes” and is to be “conducted in a manner sensitive to the concerns and  
16 needs of the Indian tribe.” § 800.2(c)(2)(ii)(C). However, “[i]f within the 30 day  
17 review period the SHPO/THPO or any consulting party notifies the agency official  
18 in writing that it disagrees with the finding and specifies the reasons for the  
19 disagreement in the notification, the agency official shall either consult with the  
20 party to resolve the disagreement, or request the Council to review the finding

1 pursuant to paragraphs (c)(3)(i) and (c)(3)(ii) of this section.” 36 C.F.R.

2 § 800.5(c)(2)(i). The code further provides:

3 When a finding is submitted to the Council pursuant to paragraph (c)(2)(i) of  
4 this section, the Council shall review the finding and provide the agency  
5 official and, if the Council determines the issue warrants it, the head of the  
6 agency with its opinion as to whether the adverse effect criteria have been  
7 correctly applied. A Council decision to provide its opinion to the head of an  
8 agency shall be guided by the criteria in appendix A to this part. The Council  
9 will provide its opinion within 15 days of receiving the documented finding  
10 from the agency official. The Council at its discretion may extend that time  
11 period for 15 days, in which case it shall notify the agency of such extension  
12 prior to the end of the initial 15 day period. *If the Council does not respond*  
13 *within the applicable time period, the agency official's responsibilities under*  
14 *section 106 are fulfilled.*

10 36 C.F.R. § 800.5(c)(3) (emphasis added).

11 Despite the Tribe’s contention that USFWS did not consult as required under  
12 applicable law, the complaint and documentation submitted evidences a back-and-  
13 forth exchange between USFWS and Tribal representatives. The June 2012 Section  
14 106 report states,

15 The FWS has consulted with the cultural resource staff and the leaders of the  
16 Yakama Nation, Confederated Tribes of the Umatilla Indian Reservation  
17 (CTUIR), the Nez Perce Tribe, and the Wanapum (collectively referred to as  
18 the “Tribes” in this report) on the undertaking, APE, and potential effects of  
19 the wildflower tour on historic properties. The consultation included a  
20 meeting at the FWS office in Burbank, Washington, on February 2, 2012  
and a written/email correspondence from the FWS to the Times on February  
17, 2012....The FWS has modified the original tour concept in response to  
concerns raised by the Tribes. Modifications included limiting group size,  
limiting the area traversed at the stops, and keeping the group together and  
under the immediate control of the FWS tour leader.

1 ECF No. 21-1 at 4. Emails indicate that the USFWS communicated with the tribe,  
2 including Harry Smiskin, Chairman of the Yakama Nation Tribal Council, offering  
3 the Tribe a “reasonable opportunity” to respond. A March 13, 2012, email from  
4 Rose Ferri states that the Yakama Nation “cannot concur” with the undertaking,  
5 “as it would constitute [an] adverse effect to the Laliik TCP.” ECF No. 7 at 11. An  
6 April 26, 2012, letter to Chairman Smiskin requests review of the USFWS report  
7 on the wildflower tours. ECF No. 7 at 14. As USFWS Historical Preservation  
8 Officer Anan Raymond stated in a letter November 16, 2012, regarding the  
9 approval for the more extensive tours over the course of five years, the consulting  
10 parties indicated that the additions to the original 2012 tour proposal did not  
11 change their objections to the tour. Thus, USFWS appears to have consulted the  
12 Tribe regarding the second round of tours.

13 The Tribe argues that the consultation was inadequate, citing the request of  
14 Harry Smiskin, Chairman of the Yakama Nation Tribal Council, for a government  
15 to government consultation with the USFWS in a letter dated March 22, 2013. ECF  
16 No. 7-1 at 9. Smiskin had previously stated that government-to-government  
17 consultation had not taken place in the past because no staff member was  
18 authorized to make decisions for the Tribal Council. ECF No. 7-1 at 6. Principal  
19 Deputy Assistant Secretary of the Interior Rachel Jacobson replied to Smiskin’s  
20 March 22 letter by stating that the USFWS had met its regulatory requirements to

1 consult consistent with § 106, pointing to the modifications to the tour, including  
2 limiting group size, limiting the area traversed at stops, and keeping the group  
3 together and supervised. ECF NO. 7-1 at 11. The Government argues that USFWS  
4 consults with the Hanford Area Tribes (including the Yakama Nation,  
5 Confederated Tribes of the Umatilla Reservation, Nez Perce Tribe and the  
6 Wanapum Band) regularly in the manner it did for the wildflower tours. ECF No.  
7 23 at 3. In practice, USFWS transmits information and findings concerning  
8 undertakings separately to each tribe by letter, email and personal exchange—a  
9 practice established by the Department of Energy two decades ago, according to  
10 the Government. *Id.* USFWS acknowledges that this process is not codified by a  
11 charter or agreement document. *Id.*

12         Given the lack of formal consultation procedure between the USFWS and  
13 the Tribe, and the fact that there was significant communication between the  
14 USFWS and the Tribe regarding the tours, the Court does not find that, for the  
15 purposes of the motion now before the Court, the Tribe is likely to succeed on the  
16 merits of its claim that it was inadequately consulted about the tours.

17         Furthermore, the evidence indicates that USFWS followed the correct  
18 procedure for occasions when there is disagreement about a proposed course of  
19 action. As Anan Raymond's declaration indicates, the USFWS's November 2012  
20 transmittal and report requested that the Advisory Council on Historic Preservation

1 review the Service's determination of no adverse effect. ECF No. 21 at 5; ECF No.  
2 7 at 18 (November 16, 2012 letter from USFWS to the Advisory Council on  
3 Historic Preservation explaining the Tribe's dispute with the finding of no adverse  
4 effect and their inability to come to a resolution). Raymond's declaration states that  
5 the Council did not respond to USFWS within the time prescribed by 36 C.F.R.  
6 800.5, and when contacted, the Council representative stated that the Council had  
7 no plans to respond. *Id.* An April 9, 2014, letter from the Advisory Council  
8 indicates that it did not respond to USFWS's request for resolution of the dispute.  
9 ECF No. 7-1 at 5. While it does reference a letter dated December 28, 2012,  
10 regarding an advisory opinion that the "historic qualities exhibited by Laliik and its  
11 integrity of setting, feeling, and association for the tribes may be compromised by  
12 the proposed elk hunts," The council acknowledges that "[a]t the time it did not  
13 opine on whether the wildflower tours would constitute an Adverse Effect." *Id.*  
14 Additionally, the April 9, 2014, letter from the Council indicates that its letter  
15 about the elk hunts was dated after the responsive time period had elapsed. *Id.*  
16 Thus, there are numerous indications—from the Tribe's evidence and the  
17 Government's—that the USFWS followed the consultation procedure outlined in  
18 the C.F.R.s.

19 ///

20 ///

1           2. *Finding of adverse effects*

2           The Tribe contends that the finding of no adverse effects was arbitrary and  
3 capricious for several reasons. First, the Tribe argues that the USFWS expanded  
4 the number of tours into an annual activity that will occur for five years. ECF No.  
5 19 at 15. As such, the Tribe argues, the once “fleeting intrusion” reflected in the  
6 report may have a more invasive and destructive potential than first anticipated. *Id.*  
7 The Tribe argues that under the APA, this is a relevant factor that the USFWS  
8 “utterly failed to consider” in its reasoning behind the “no adverse effect” finding.  
9 *Id.* at 16. The Tribe contends that “the April 2012 and the June 2012 Section 106  
10 Review have no rational connection with each other,” but even if the Court finds  
11 that they do, the decision is arbitrary and capricious because the proposal has  
12 changed significantly. *Id.* Second, Plaintiff argues that evidence from the USFWS  
13 website indicates that adverse effects occurred on the May 2013 wildflower tours.  
14 *Id.* Third, the Tribe argues that USFWS never looked at alternatives to the location  
15 of the wildflower tours in areas of the HRNM that were not as culturally sensitive.  
16 *Id.* at 17. The Tribe contends that this is a “relevant factor” which the USFWS  
17 failed to consider in the Section 106 review. *Id.*

18           Under 36 C.F.R. § 800.5, the “agency official must apply the criteria of  
19 adverse effect to historic properties within the area of potential effects.” “An  
20 adverse effect is found when an undertaking may alter, directly or indirectly, any

1 of the characteristics of a historic property that qualify the property for inclusion in  
2 the National Register in a manner that would diminish the integrity of the  
3 property's location, design, setting, materials, workmanship, feeling, or  
4 association." 36 C.F.R. § 800.5(a)(1). Examples of adverse effects include:

5 (i) Physical destruction of the property; (ii) Alteration of a property...; (iii)  
6 Removal of the property from its historic location; (iv) change of the  
7 character of the property's use or physical features within the property's  
8 setting that contribute to its historic significance; (v) introduction of visual,  
atmospheric or audible elements that diminish the integrity of the property's  
significant historic features; (vi) Neglect of a property which causes its  
deterioration...; (vii) Transfer, lease or sale of property....

9 36 C.F.R. §800.5(a)(2).

10 First, given the record before the Court, the only significant change between  
11 the Section 106 report from April 2012 and the Section 106 report from June 2012  
12 is the number of people. It is reasonable to conclude that the precautions and  
13 reasoning that the USFWS determined would be sufficient for two tours in 2012  
14 (ECF No. 6-1 at 3) would also be sufficient for up to 12 tours a year for five years  
15 (ECF No. 21-1 at 3. Though larger in number, the overall effect is similar in that  
16 the tours are short (three hours), do not involve any permanent structure, and  
17 would both be subject to the same controls, including keeping the bus on the roads,  
18 limiting the walking range to 100 meters, and supervising the tourists. *See* ECF  
19 No. 21-1 at 3-4. Thus, the transfer of reasoning from two tours to twelve tours has  
20 not been shown to be arbitrary and capricious on this record.



1 Nor has it been shown on this record that the 2013 tours had an adverse  
2 effect. For its argument, the Tribe cites a photograph from the USFWS website on  
3 the tours of a rock cairn described as sacred and culturally significant. But  
4 evidence submitted by the Government indicates somewhat persuasively that the  
5 rock cairn's provenance was very recent and does not represent a prehistoric or  
6 historic archaeological site. And the Tribe has not shown, at least in the context of  
7 this motion, how the temporary presence of other people or photography  
8 "alters...the characteristics of [the]historic property that qualify the property for  
9 inclusion in the National Register in a manner that would diminish the integrity of  
10 the property's location, design, setting materials, workmanship, feeling or  
11 association." *See* 36 C.F.R. § 800.5(a)(1).

12 Third, evidence submitted by USFWS indicates that the Rattlesnake  
13 Mountain site "provides an ecological setting that allows for unique expression of  
14 plant communities" due to climate, soil, and elevation not represented elsewhere  
15 on the reserve. Declaration of Larry Klimek, ECF No. 22 at 3-5. The 2012  
16 wildflower tours were conducted outside of the Laliik TCP on Yakima Ridge, and,  
17 according to the Declaration of Larry Klimek, "were not of the same quality" as  
18 the 2013 wildflower tours, indicating that the USFWS had considered alternatives  
19 at the time it issued the June 2012 report.

1 Thus, the evidence before the Court does not support a finding that the  
2 agency's decision was arbitrary and capricious.

3 **B. Irreparable Harm**

4 Having concluded above that the USFWS finding of no adverse effect was  
5 likely not arbitrary or capricious or unlawful, the Court likewise concludes that the  
6 finding of no adverse effect indicates that there is little likelihood of irreparable  
7 harm.

8 The Tribe's briefing and oral argument simply failed to establish a basis for  
9 finding that irreparable harm would likely occur by allowing the final two days of  
10 tours in 2014 to continue as scheduled. First, Plaintiff's counsel stated during oral  
11 argument that the large number of tourists would inevitably harm the environment  
12 and artifacts on the mountain, estimating the number over the course of five years  
13 at 1,500 people. But the TRO motion requests an order preventing *two* days of  
14 scheduled tours in 2014, which, by the Court's calculation, would involve  
15 approximately 100 people. Other than numbers, Plaintiff does not articulate how  
16 the presence of people on the mountain would irreparably harm its value to the  
17 Tribe or its character as a TCP.

18 Furthermore, Plaintiff did not identify and articulate any specific harms that  
19 arose out of the tours that took place in 2013, citing again the general negative  
20 effects on the environment and spiritual experience of the Tribe. The Tribe cites

1 the photographs from the USFWS website as evidence that USFWS was not  
2 following the work controls, but the photographs indicate a news media member  
3 photographing or filming a flower, and a photo of a rock cairn without other people  
4 visible in the photo. USFWS submitted a declaration stating that an archaeologist  
5 determined that the rock cairn pictured on the site was of recent origin, and not a  
6 historic or prehistoric archaeological site. ECF No. 21 at 6. Plaintiff contends that  
7 damage to environmental resources is usually considered irreparable, but as all  
8 driving will take place on already established roads, and the tourist themselves will  
9 be supervised and kept in a contained area around the bus, the Court fails to see  
10 how their presence will irrevocably damage the environment. As the 2012 report  
11 indicates, the area will not be opened to unfettered public access. The USFWS  
12 Cultural Resource Compliance report on the wildflower tours, updated June 2012,  
13 emphasized the transitory nature of the tours. ECF No. 21-1 at 12. The tours are  
14 designed to be temporary and controlled, and to leave no physical trace. USFWS  
15 has stated that it took measures to prevent harm to the specific artifacts of spiritual  
16 and cultural significance. *See* ECF No. 21-1 at 8-10. Without more, Plaintiff has  
17 not adequately supported its claim that the mere physical presence of other people  
18 on the TCP will do irreparable harm.

19 The Court is sensitive to the Tribe's argument that the presence of tourists  
20 negatively impacts the spiritual tenor of the place and may conflict with the Tribe's

1 First Flood ceremonies. But, as it stated in the 2012 report, the USFWS has  
2 indicated that it is willing to conduct the tour on days that do not coincide with  
3 Tribal cultural activities.

#### 4 **C. Balance of the Equities and the Public Interest**

5 Nor does the Court find that the last two *Winters* factors militate for issuance  
6 of a TRO. First, the balance of the equities does not tip strongly in favor of  
7 issuance of a TRO. Though the Tribe certainly has a strong interest in preservation  
8 of its culture and spiritual interest, the public also has an interest in being allowed  
9 to see and experience the land, as long as precautions are taken to preserve the  
10 nature of the place. Without a clearer articulation about how the tours harm that  
11 experience—limited as they are in time and scope—the Court perceives no strong  
12 tip of the balance of equities such that a TRO/preliminary injunction is warranted.  
13 Similarly, prohibiting the final two wildflower tours appears to weigh against  
14 public interest, as the wildflower tours represent a rare chance for the public to  
15 have access—in a limited way—to this area.

16 The Court notes that relevant case law supports the denial of a TRO under  
17 these circumstances. A fairly recent Ninth Circuit case, for example, rejected an  
18 argument that use of artificial snow consisting of recycled wastewater on a  
19 mountain sacred to certain Indian tribes violated the Religious Freedom Act, the  
20 National Environmental Policy Act, or the National Historical Preservation Act.

1 *Navajo Nation v. United States Forest Service*, 535 F.3d 1058 (9th Cir. 2008) (en  
2 banc). The court noted that:

3 the sole effect of the artificial snow is on the Plaintiffs' subjective spiritual  
4 experience. That is, the presence of the artificial snow on the Peaks is  
5 offensive to the Plaintiffs' feelings about their religion and will decrease the  
6 spiritual fulfillment Plaintiffs get from practicing their religion on the  
7 mountain. Nevertheless, a government action that decreases the spirituality,  
8 the fervor, or the satisfaction with which a believer practices his religion is  
9 not what Congress has labeled a "substantial burden"—a term of art chosen  
by Congress to be defined by reference to Supreme Court precedent—on the  
free exercise of religion. Where, as here, there is no showing the government  
has coerced the Plaintiffs to act contrary to their religious beliefs under the  
threat of sanctions, or conditioned a governmental benefit upon conduct that  
would violate the Plaintiffs' religious beliefs, there is no "substantial  
burden" on the exercise of their religion.

10 Were it otherwise, any action the federal government were to take, including  
11 action on its own land, would be subject to the personalized oversight of  
12 millions of citizens. Each citizen would hold an individual veto to prohibit  
13 the government action solely because it offends his religious beliefs,  
sensibilities, or tastes, or fails to satisfy his religious desires. *Further, giving  
one religious sect a veto over the use of public park land would deprive  
others of the right to use what is, by definition, land that belongs to  
everyone.*

14 "[W]e are a cosmopolitan nation made up of people of almost every  
15 conceivable religious preference." *Braunfeld v. Brown*, 366 U.S. 599, 606,  
81 S.Ct. 1144, 6 L.Ed.2d 563 (1961). Our nation recognizes and protects the  
16 expression of a great range of religious beliefs. Nevertheless, respecting  
17 religious credos is one thing; requiring the government to change its conduct  
to avoid any perceived slight to them is quite another. No matter how much  
we might wish the government to conform its conduct to our religious  
18 preferences, act in ways that do not offend our religious sensibilities, and  
take no action that decreases our spiritual fulfillment, no government—let  
19 alone a government that presides over a nation with as many religions as the  
United States of America—could function were it required to do so.

1 *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d at 1063-64 (some internal citations  
2 omitted) (emphasis added). Thus, while the Tribe's interest in preserving Laliik for  
3 cultural and spiritual experiences is very important, the Court cannot, without  
4 more, foreclose others who want to experience the mountain's uniqueness from  
5 sharing that space.

6 The Court reiterates that this is not a decision on the merits; simply a finding  
7 that the record before the Court does not support the issuance of such a "drastic  
8 remedy" as a TRO provides.

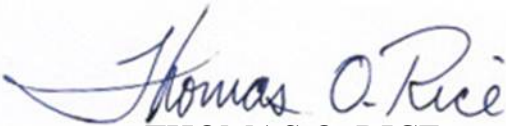
9 **ACCORDINGLY, IT IS HEREBY ORDERED:**

10 Plaintiff's Motion for a Temporary Restraining Order (ECF No. 6) is  
11 **DENIED.**

12 The District Court Executive is hereby directed to enter this Order and  
13 provide copies to counsel.

14 **DATED** May 5, 2014.



  
THOMAS O. RICE  
United States District Judge