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10 **UNITED STATES DISTRICT COURT**
11 **EASTERN DISTRICT OF WASHINGTON**

12 **CONFEDERATED TRIBES AND**
13 **BANDS OF THE YAKAMA NATION,**

14 Plaintiff,

15 vs.

16 **UNITED STATES FISH AND**
17 **WILDLIFE SERVICE; ROBYN**
18 **THORSON**, Pacific Regional Director,
19 U.S. Fish and Wildlife Service;
20 **CHARLES STENVALL**, Manager,
21 Mid-Columbia National Wildlife Refuge
22 Complex; **LARRY KLIMEK**, Manager,
23 Hanford Reach National Monument,

24 Defendants.

No. 14-CV-03052

**COMPLAINT UNDER
THE ADMINISTRATIVE
PROCEDURE ACT**

25 COMES NOW the plaintiff, and alleges as follows:

I. NATURE OF THE ACTION

1. Plaintiff, by this Complaint, seeks judicial review pursuant to the
Administrative Procedure Act (APA), 5 U.S.C. § 701 *et. seq.*, of final agency

COMPLAINT UNDER THE
ADMINISTRATIVE PROCEDURE ACT - 1

1
2 actions taken by the defendants subject to the requirements of the National
3 Historic Preservation Act (NHPA), 16 U.S.C. § 470 *et. seq.* Plaintiff seeks a
4 judgment, holding unlawful, setting aside and remanding these agency actions as
5 well as a temporary and preliminary injunction under 5 U.S.C. § 705.

6 2. This action relates to agency decisions and actions by the U.S. Fish
7 and Wildlife Service and named officials thereof to conduct guided bus tours for
8 members of the general public on Rattlesnake Mountain within the Hanford
9 Reach National Monument (HRNM). The mountain is considered by the plaintiff
10 to be of great religious and cultural importance, and for that reason the site has
11 been federally designated as a Traditional Cultural Property (TCP) under the
12 NHPA. The defendants concluded in April 2012 that the guided wildflower tours
13 will have no adverse effect on the TCP, and plaintiff seeks judicial review of this
14 finding. In addition, the defendants are seeking judicial review of a final agency
15 action proceeding with scheduled public wildflower tours in 2014 despite a lack
16 of concurrence by both the plaintiff and the State Historic Preservation Officer
17 (SHPO), and subsequent violations of consultation procedures required by the
18 NHPA.

19 20 **II. JURISDICTION AND VENUE**

21 3. This action involves claims arising under federal laws including the
22 Administrative Procedure Act (APA), 5 U.S.C. § 701 *et. seq.*, and the National
23 Historic Preservation Act, 16 U.S.C. § 470 *et. seq.* This Court has subject matter
24 jurisdiction over all claims asserted in this action under 5 U.S.C. § 702, 28 U.S.C.
25 § 1331, and 28 U.S.C. § 1362, as this is an action brought by an Indian tribe with

1 a governing body duly recognized by the Secretary of the Interior and arising
2 under the Constitution, laws, or treaties of the United States.

3 4. Venue is proper in the Eastern District of Washington pursuant to 28
4 U.S.C. § 1391(b).

6 **III. PARTIES**

7 5. Plaintiff Confederated Tribes and Bands of the Yakama Nation
8 (Yakama Nation or Tribe) is a federally recognized Indian tribe. The Yakama
9 Nation signed a treaty with the United States on June 9, 1855, which was ratified
10 by Congress on March 8, 1859. Under the National Historic Preservation Act,
11 plaintiff is an “Indian Tribe that attaches religious and cultural significance to
12 historic properties that may be affected by [the] undertaking” that is the final
13 agency action being challenged, and has been “adversely affected or aggrieved”
14 by such agency action within the meaning of the relevant statute as provided in
15 the APA, 5 U.S.C. § 702.

16 6. Defendants are the United States Fish and Wildlife Service; Robyn
17 Thorson, USFWS Pacific Regional Director; Charles Stenvall, Manager, Mid-
18 Columbia National Wildlife Refuge Complex; and Larry Klimek, Manager,
19 Hanford Reach National Monument.

20 7. Defendant USFWS is responsible for administration and
21 management of certain federally owned lands, including those lands comprising
22 the National Wildlife Refuge System and Hanford Reach National Monument.

23 8. Defendant Robyn Thorson the Regional Director of the Pacific
24 Region of the USFWS and is named herein in an official capacity.

1 9. Defendant Charles Stenvall is the Manager of the USFWS Mid-
2 Columbia National Wildlife Refuge Complex and is named herein in an official
3 capacity.

4 10. Larry Klimek is the USFWS Manager of the Hanford Reach
5 National Monument and is named herein in an official capacity.

7 IV. FACTUAL ALLEGATIONS

8 11. Rattlesnake Mountain in Benton County, Washington, is a 3,527 ft
9 (1,060 m) windswept treeless sub-alpine ridge overlooking the Hanford Site.
10 Parts of the western slope are privately owned ranchland, while the eastern slope
11 is currently owned by the U.S. Department of Energy (DOE).

12 12. In their language the Yakama people call the area of Rattlesnake
13 Mountain "*Laliik*," which means "standing above the water." *Laliik* is associated
14 with the cosmological, religious, and cultural practices and beliefs of the
15 Washani community of the Yakama Nation and other Indian tribes. Oral
16 tradition indicates that *Laliik* offered refuge for people during the cataclysmic
17 floods of 13,000 years ago. *Laliik* is also sacred because the Yakama people
18 believe that spirits ascend to the sky from the summit after death. The mountain
19 is also associated with the Indian prophet Smohalla and the *Washat* religion. It
20 has served and continues to serve as an important place for vision and spirit
21 questing, resource gathering, and other cultural activities by enrolled members of
22 the plaintiff Yakama Nation.

23 13. *Laliik* is part of the aboriginal lands of the Yakama people and was
24 ceded by the Yakama Nation to the United States of America under the Treaty of
25 1855.

1 14. In 1943, the United States seized *Laliik* by eminent domain and used
2 the area as a buffer for plutonium production at the Hanford Site until 1987.

3 15. In 1967, the Atomic Energy Commission formally designated the
4 western sector of the Hanford Site, including *Laliik*, as the Arid Lands Ecology
5 Reserve (ALE). 1977 DOE took control of the Hanford Site, including ALE and
6 *Laliik*.

7 16. Administration and management of *Laliik* was transferred from DOE
8 to USFWS through a memorandum of agreement in 1997, and it was
9 subsequently included in the Saddle Mountain National Wildlife Refuge.

10 17. In 2000, *Laliik* was included in the Hanford Reach National
11 Monument by Presidential Proclamation 7319 pursuant to the Antiquities Act of
12 1906.

13 18. In 2007, DOE designated *Laliik* as a Traditional Cultural Property
14 pursuant to §101(d)(6)(A) of the NHPA. A TCP is a “property of traditional
15 religious and cultural importance to an Indian tribe” and is thereby eligible for
16 listing on the National Register of Historic Places.

17 19. On February 17, 2012, the defendants (hereinafter “USFWS”)
18 transmitted to the Tribe by email a Request for Review of Proposed Undertaking
19 pursuant to § 106 of the NHPA. The undertaking was a proposal to conduct 3-
20 hour guided bus tours at the Laliik TCP for fifty members of the public to view
21 spring wildflowers (hereinafter “Wildflower Tours”). Two 25-person tours were
22 to be conducted by USFWS on a single day. The Request for Review included a
23 map of the Area of Potential Effect.

24 20. On March 13, 2012, the Yakama Nation transmitted comments on
25 the Wildflower Tours proposal, stating that it did not concur under the NHPA.

1 Its comments stated that “the nature of [*Laliik*’s] cultural significance is not
2 conducive to tourism and recreation and will adversely affect the TCP.” The
3 Tribe requested that “USFWS acknowledge and respect the nature of *Laliik* as a
4 TCP, warranting full protection under the Antiquities Act, NHPA, Proclamation
5 7319, and Executive Order 13007.” The Tribe also noted in its comments that
6 “there are other locations the public can be taken to enjoy the splendor of the
7 wildflowers on the Monument,” pointing out that USFWS had conducted such
8 tours elsewhere at HRNM with great success.

9 21. Despite the Tribe’s comments indicating that *Laliik* would be
10 adversely affected, on April 26, 2012, USFWS issued a finding of “no adverse
11 effect” of the Wildflower Tours on the *Laliik* TCP.

12 22. In a letter dated April 30, 2012, the State Historic Preservation
13 Officer (SHPO), Allyson Brooks, notified USFWS that she did not concur with
14 the USFWS finding of “no adverse effect” of the Wildflower Tours on the TCP.

15 23. On May 1, 2012, USFWS sent a cultural review of the Wildflower
16 Tours under § 106 of the NHPA to the SHPO and Yakama Nation for comment.
17 This review documented the finding of no adverse effect. In concluding that the
18 tours would not “diminish the integrity of setting, feeling, or association” of the
19 TCP, the review states that “as a potential threat to the integrity of *Laliik*’s
20 feeling and association, the wildflower tour is fleeting.”

21 24. On May 5, 2012, USFWS conducted the two guided public
22 Wildflower Tours at locations in the HRNM outside the TCP area. Contrary to
23 NHPA regulations, USFWS failed to conduct any § 106 review or consultation
24 with the Tribe or SHPO before these tours were conducted. The Tribe learned of
25 the tours only afterward through third parties.

1 25. On June 7, 2012, USFWS notified the Tribe that it was expanding
2 the proposal for future Wildflower Tours at the *Laliik* TCP and also amended the
3 § 106 review. The new proposal was for six tour days per year (two tours per
4 day) for the next five years. USFWS informed the Tribe that it was planning to
5 invite the Advisory Council on Historic Preservation (ACHP) to review the new
6 proposal, as neither the Tribe nor the SHPO had concurred with the Wildflower
7 Tours.

8 26. On November 16, 2012, USFWS send the expanded Wildflower
9 Tours proposal to the ACHP for review and comment.

10 27. In November and December 2012 the Tribe informed the ACHP that
11 it had additional information for its consideration in reviewing the expanded
12 proposal, including how the Wildflower Tours constitute an adverse effect to the
13 *Laliik* TCP. In a letter dated December 6, 2012, the Tribe communicated to the
14 ACHP that it did not concur with the new tours proposal.

15 28. In a letter dated December 28, 2012, the ACHP sent detailed
16 comments on a proposed elk hunt at the *Laliik* TCP. Included in its comments
17 was the recommendation that a management plan should be developed by
18 USFWS for any further activities on the *Laliik* TCP. While the comments did not
19 specify the Wildflower Tours, it did specify the need to manage all projects on
20 the TCP to mitigate adverse effects.

21 29. In January 2013, the Tribe inquired from ACHP regarding its
22 decision regarding the USFWS finding of no adverse effect. The ACHP did not
23 respond to this inquiry.

24 30. In a letter dated February 13, 2013, USFWS told the Chairman of
25 the Tribal Council that USFWS had met all NHPA § 106 obligations, would

1 proceed with the Wildflower Tours in May 2103, and that it would manage the
2 Wildflower Tours in a way that will maintain “no adverse effect.”

3 31. On February 22, 2013, USFWS emailed the SHPO, stating that the
4 ACHP had recommended in its comments that a programmatic agreement and/or
5 management plan should be developed by USFWS for the *Laliik* TCP to cover all
6 activities. USFWS also indicated that it was still discussing the April 2012
7 finding of no adverse effect with the ACHP as of January 3, 2013.

8 32. On March 26, 2013, Phil Rigdon, the Deputy Director of the
9 Yakama Nation Department of Natural Resources, met with defendants Charles
10 Stenvall and Larry Klimick. Mr. Rigdon again expressed to the defendants that
11 the Tribe objected to and did not concur with the expanded Wildflower Tours at
12 the *Laliik* TCP. The defendants reiterated to him that USFWS had met all NHPA
13 obligations, and were going ahead with the new Wildflower Tours despite the
14 Tribe’s and the SHPO’s conclusion that there would be adverse effects on *Laliik*.

15 33. In a letter to Rachel Jacobson, Acting Assistant Interior Secretary for
16 Fish and Wildlife and Parks, dated April 3, 2013, the Tribe again objected to the
17 finding of no adverse effect and requested further USFWS review of potential
18 adverse effects of the expanded Wildflower Tours.

19 34. In April 2013, the Tribe requested that USFWS provide a list of
20 plants to be seen only on *Laliik* and not available for view anywhere else on the
21 Hanford Reach National Monument. Three weeks later, USFWS provided a list
22 of some of the plants they expected to view at *Laliik*, but all are commonly seen
23 in areas outside of the TCP.

24 35. In a letter dated April 26, 2013, Acting Interior Secretary Jacobson
25 replied to the Tribe’s April 3 letter, concluding that USFWS had met all NHPA

1 Section 106 obligations, and that there would be no adverse effect if all work
2 controls/project modifications were followed.

3 36. Despite the Tribe's objection, USFWS conducted four Wildflower
4 Tours at the *Laliik* TCP on May 1 and May 4, 2013 (two on each day).

5 37. In a letter dated May 16, 2013, the Tribe notified Acting Interior
6 Secretary Jacobson that USFWS had never conducted government-to-
7 government consultation with the Tribe regarding the expanded Wildflower
8 Tours as required in 36 CFR Part 800.

9 38. On or about January 16, 2014, USFWS provided a link to article on
10 the four May 2013 Wildflower Tours on its HRNM website. Photos of tourists
11 standing next to a rock cairn at *Laliik* were included in the article, as well as
12 discussion of the sacredness of the TCP. The photos made it clear that USFWS
13 had not followed the work controls in the Section 106 Review and had adversely
14 affected the *Laliik* TCP.

15 39. On February 3, 2014, Yakama Nation staff members met with
16 ACHP members in Washington, D.C. regarding the adverse effects to *Laliik* and
17 gave them a copy of the article from the USFWS website.

18 40. In March 2014, USFWS posted information on its website indicating
19 that it would again conduct Wildflower Tours in April and May 2014.

20 41. On March 24, 2014, Reid Nelson from the ACHP and SHPO
21 Allyson Brooks meet with the Yakama Tribal Council and discussed the
22 Wildflower Tours. Mr. Nelson stated that the ACHP would send a letter
23 reviewing the proposal and again requesting that USFWS develop an agreement
24 to manage projects on the TCP. He agreed that what happened during the
25 Wildflower Tours in May 2013 was an adverse effect to the *Laliik* TCP.

1 42. In a letter dated April 9, 2014, the ACHP recommended to USFWS
2 that further NHPA consultation with the Tribe be conducted prior to any further
3 Wildflower Tours on the *Laliik* TCP. The ACHP determined that work controls
4 in the Section 106 Review were not followed, and noted that the Tribe believes
5 there has been an adverse effect on the TCP.

6 43. On April 17, HRNM management communicated to Yakama Nation
7 staff that USFWS had made a final agency decision to proceed with eight
8 Wildflower Tours, scheduled for April 25 and 27, 2014, and May 8 and 10, 2014
9 (two tours on each date).

10 11 12 **V. CLAIM FOR RELIEF UNDER THE APA**

13 44. Plaintiff re-alleges the facts set out in paragraphs 1 through 43 as if
14 fully set out herein.

15 45. The finding by the defendants in April 2012, pursuant to the
16 National Historic Preservation Act, that the Wildflower Tours will have no
17 adverse effect on the *Laliik* Traditional Cultural Property is unsupported by the
18 facts in the record, and is arbitrary, capricious, an abuse of discretion, and
19 unlawful under the APA, 5 U.S.C. § 706(2)(A).

20 46. The decision by the defendants to proceed with the Wildflower
21 Tours in May 2013, and to proceed with further Wildflower Tours in April and
22 May of 2014, is in violation of consultation procedures promulgated under the
23 National Historic Preservation Act in its regulations at 36 CFR Part 800, and is
24 therefore without observance of procedure required by law under the APA, 5
25 U.S.C. § 706(2)(D).

1 47. The plaintiff has no plain, speedy, and adequate remedy in the
2 course of law and absent immediate judicial intervention, the Tribe will suffer
3 irreparable injury.
4

5 **VI. PRAYER FOR RELIEF**

6 WHEREFORE, plaintiff prays that the court grant relief as follows:

7 1. A temporary and preliminary injunction under the APA prohibiting
8 the defendants from proceeding with Wildflower Tours in April and May of 2014
9 without mitigating adverse effects to the *Laliik* TCP or complying with required
10 NHPA procedures;

11 2. A judgment under the APA that the defendants' final agency actions
12 were and are arbitrary, capricious, an abuse of discretion, and not in accordance
13 with law, as well as not in observance of procedures required by law;

14 3. An order under the APA holding unlawful, setting aside, and
15 remanding the final agency action by the defendants finding that the Wildflower
16 Tours will have no adverse effect under the NHPA;

17 4. An order under the APA holding unlawful, setting aside, and
18 remanding the final agency action by the defendants to proceed with Wildflower
19 Tours in April and May of 2014 without complying with NHPA procedures;

20 5. An order awarding plaintiff its costs and reasonable attorney fees;

21 6. Such further and other relief as this Court seems just and equitable.

22 DATED this 22nd day of April, 2014.
23

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