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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION, Plaintiff, **CONFEDERATED TRIBES OF THE UMATILLA INDIAN RESERVATION,** Intervenor-Plaintiff, **vs.** **UNITED STATES FISH AND WILDLIFE SERVICE; et. al.**, Defendants.	**No. 14-CV-03052-TOR** **YAKAMA NATION'S REPLY RE: CROSS-MOTION FOR SUMMARY JUDGMENT AND RESPONSE TO USFWS' CROSS-MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, Local Rules 7.1(a) and 56.1, and the Court's Order Setting Briefing Schedule, Plaintiff Confederated Tribes and Bands of the Yakama Nation (hereinafter "Yakama

Nation" or "Tribe") hereby submits its reply brief for its cross-motion for summary judgment on all pending claims, as well as its response to the cross-motion by the United States for summary judgment on all pending claims. Plaintiff requests that the Court grant the Yakama Nation's cross-motion, deny the government's cross-motion, and issue an order under the APA holding unlawful, setting aside, and remanding the final agency actions in this case.

II. ARGUMENT

A. THERE IS NO EVIDENCE IN THE RECORD THAT FWS EVER ENGAGED IN DIRECT GOVERNMENT-TO-GOVERNMENT CONSULTATION WITH DESIGNATED YAKAMA NATION REPRESENTATIVES REGARDING THE WILDFLOWER TOURS AS REQUESTED BY THE PLAINTIFF.

In their motion for summary judgment, the federal defendants argue that the consultation requirements of the NHPA were met in this case because the Yakama Nation had "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties…articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." See ECF No. 52 at 10; 36 C.F.R. § 800.2(c)(2)(ii)(A); see also *Te-Moak Tribe of Western Shoshone of Nevada v. Department of the Interior*, 608 F.3d 592, 608-609 (9th Cir. 2010). However, such an "opportunity" is qualified by a requirement that proper consultation must "recognize the government-to-government relationship between the Federal Government and Indian tribes." 36 CFR § 800.2(c)(2)(ii)(C); see also *Quechan Tribe of the Fort Yuma Reservation v. U.S. Dept. of the Interior*, 755 F.Supp.2d 1104, 1109 (S.D. Cal. 2010). Especially critical to this

process is the need to consult "with representatives designated or identified by the tribal government." *Id.* Although the FWS provides numerous examples in the record of alleged "meetings and correspondence" with the tribe, none of the evidence presented shows that the agency actually conducted a one-on-one government-to-government consultation outside of a general "consortium" of staff members from four different tribes. More significantly, there is no evidence that the Plaintiff's request for consultation with designated and identified representatives at the Yakama Tribal Council was ever honored, even though it was requested. Therefore, the reasoning in *Te-Moak Tribe* is inapposite in this instance, and the claim by the defendants that "the Service met its obligations of consultation" fails.

1. The agency's meetings with staff members from numerous Indian tribes are not NHPA consultation, and the FWS failed to recognize the agency's "government-to-government relationship" with the Yakama Nation under the regulations.

Although the defendants allege that the record is "replete with references to meetings and correspondence between the Service and Plaintiffs," all of the evidence in the record involves meetings with a "Tribal Working Group" that included a number of Indian tribes, including the Yakama Nation. Although the FWS contends that it "consults with this consortium as a matter of practicality," it ignores the requirement in the NHPA regulations that the agency meet with the tribe on an individual governmental basis. ECF No. 52 at 4. The court in *Quechan Tribe* warned against these types of contacts, and concluded that it "doesn't substitute for the mandatory consultation" with a tribal government.

Quechan Tribe, 755 F.Supp.2d at 1112. The court went on to explain why they are inadequate:

> That BLM did a lot of consulting in general doesn't show that its consultation with the Tribe was adequate under the regulations. Indeed, Defendants' grouping tribes together (referring to consultation with "tribes") is unhelpful: Indian tribes aren't interchangeable, and consultation with one tribe doesn't relieve the BLM of its obligation to consult with any other tribe that may be a consulting party under NHPA.

Id. The Yakama Nation pointed this out in January 2013 when it refused to sign a memorandum of understanding (MOU) that would have formalized the consultation process between the FWS and all four tribes as a group. AR 2136; ECF No. 52 at 4. Internal correspondence among the defendants indicates just how much they wanted to group the tribes together rather than consult individually, and further efforts at establishing an exclusive MOU with the Plaintiff were never made. AR 2152.

Although the federal defendants cite a number of documents that claim to prove that extensive meetings were conducted over a span of years and including a number of similar past projects, virtually all of these records are either email notices and/or Tribal Working Group meeting agendas and (cursory) notes. See, e.g., AR 1989; AR 2043. However, there is no proof that any Yakama Nation tribal staff members even showed up to these meetings, other than a single attendance sheet from May 10, 2012 (which was shortly after the initial adverse effect determination as made). Moreover, none of the notes seem to indicate that there was any extensive discussion of the wildflower tours as an agenda item, or even that they were mentioned at all. See, e.g., AR 2029; AR 2043. In other words, these alleged meeting documents are not probative of anything other than

"professions of good intent," and do not support a finding that the agency complied with the regulations. *Quechan Tribe,* 755 F.Supp.2d at 1118 (documentation that actual government-to-government consultation occurred is "painfully thin").

As a result, the reliance by the defendants on Tribal Working Group meeting notices and other documents to show that the "tribes" were somehow "consulted" does not provide any evidence in the record that the procedures in 36 C.F.R. § 800.2(c)(2)(ii) were complied with. Again, *Quechan Tribe* is instructive on this point: "While informational public meetings, consultations with individual tribal members, meetings with government staff or contracted investigators, and written updates are obviously a helpful and necessary part of the process, they don't amount to the type of 'government-to-government' consultation contemplated by the regulations." *Id.* at 1119. Given this scant record, any argument by the defendants that the FWS provided the tribe with the full "opportunity…to articulate its views" as required in the NHPA regulations has no merit. 36 C.F.R. § 800.2(c)(2)(ii)(A).

2. The FWS never discussed the wildflower tour proposals with the Yakama Tribal Council despite requests for such consultation.

Although the FWS seems to be arguing that the fact of the Plaintiff's stated opposition to the proposed wildflower tours over a period of time assumes that true consultation has been met, this does not mean that the tribe has had a full opportunity to "participate in the resolution of adverse effects." ECF No. 52 at 12 ("Plaintiffs participated in the process by repeatedly stating that they were opposed"). However, the agency never actually engaged the Yakama Tribal

Council in any such discussion, and therefore any measures that were proposed to "avoid, minimize, or mitigate any adverse effects on historic properties" were not developed in consultation with "representatives designated or identified by the tribal government." 36 C.F.R. § 800.2(c)(2)(ii)(C). Therefore the federal defendants did not comply with NHPA procedures.

The record shows that the Tribal Council invited defendant Robyn Thorson to meet with the Yakama Tribal Council in January 2013 to discuss, among other agenda topics, the wildflower tours as part of government-to-government consultation. However, the consultation never took place because of time constraints. AR 2213; AR 2323. Additional meetings with the Tribal Council were never scheduled by the FWS. In a letter to Rachel Jacobson, Acting Assistant Interior Secretary for Fish and Wildlife and Parks, dated March 22, 2013, Tribal Council Chairman Harry Smiskin requested the following: "Government to Government consultation to discuss: preservation, protection, and perpetuation of the Laliik TCP. Yakama Nation also requests the Wildflower Tour be postponed until such time as the Government-to-Government consultation has taken place." AR 2246. However, instead of honoring that request, Ms. Jacobson replied that FWS had met all NHPA § 106 obligations. AR 2518-2519. The tribe then responded by reminding Ms. Jacobson that FWS had failed to meet with the Tribal Council in January 2013:

> During the meeting YN Tribal Council clearly defined Government to Government consultation, and the important role this level of consultation plays in working through issues, therefore, it is unclear why USFWS made no attempt to schedule another Government to Government consultation to discuss the pending Wildflower Tour project.

AR 2322-2323.

In its contacts with the federal defendants, the Yakama Nation clearly indicated to the FWS that the members of the Tribal Council are the appropriate "representatives designated or identified by the tribal government" for purposes of consultation under 36 C.F.R. § 800.2(c)(2)(ii)(C). Nevertheless, there is no evidence in the record that those representatives were ever involved in consultation regarding the wildflower tours, at any stage dating back to the first proposals in the fall of 2010. Although the FWS argues that "Tribes cannot ignore invitations to consult," the record shows that the opposite is true. Consultation should be with the Tribal Council if the Chairman requests it, as explained by the court in *Quechan Tribe*:

> Although BLM invited the Tribe to attend public informational meetings about the project, the invitations do not appear to meet the requirements set forth in 36 C.F.R. § 800.2(c)(2)(ii). This is particularly true because the Tribe first requested a more private, closed meeting between BLM and its tribal council. In later communications, the Tribe continued to request that BLM meet with the tribal council on the Tribe's reservation.

Quechan Tribe, 755 F.Supp.2d at 1118. It is clear from the record that the federal defendants had little interest in meeting with the Yakama Tribal Council, employing "consultation" procedures of their own choosing instead.

Citing the *Te-Moak Tribe* case, the FWS contends that the Plaintiff has not identified "anything missing in the record regarding information they would have provided in response to the additional tours." ECF No. 52 at 12. However, without proper government-to-government consultation it is difficult to know what other information would have been provided by the Council or tribal spiritual leaders in a fully confidential setting. Certainly the tour measures that allegedly "mitigate" any adverse effects were proposed and implemented without

any input by the tribe's designated representatives. Even if the agency could prove in the record that Yakama Nation staff members attended every Tribal Working Group meeting regarding the project all the way back five years, this does not substitute for proper consultation with official tribal decision makers. Although the government's position that the NHPA is a purely procedural statute is not debatable, it is clear that the correct procedures, with the proper participants, were not utilized in this endeavor. The defendants therefore violated the NHPA's requirements under 36 C.F.R. § 800.2(c)(2)(ii).

B. THE FWS DETERMINATION OF "NO ADVERSE EFFECTS" SHOULD RECEIVE NO DEFERENCE, AND WAS ARBITRARY AND CAPRICIOUS BECAUSE NO DETAILED INFORMATION WAS PROVIDED REGARDING CUMULATIVE EFFECTS.

Federal defendants contend that the FWS is entitled to "deference in its determination of no adverse effect." ECF No. 52 at 19. However, for that conclusion the agency cites not a single case that directly evaluates a "no adverse effects" determination under the NHPA. Case law does suggest, however, that the only agency with any claim to a "high standard of deference" is the Advisory Council on Historic Preservation (ACHP).

The FWS also argues that it "considered long-term and cumulative impact of the tour by proposing the tour precautions and limits (two stops, of less than 100 meters each, restricted, guided access) and only allowing up to 12 tours a year until 2017." ECF No. 52 at 18. Yet nowhere in its decision does the agency actually provide any information that would show what those impacts currently are or would be in the future with increased numbers of tours (or how they would be mitigated). For this reason alone, the analysis is inadequate and violates the

NHPA. However, now that Congress has opened up the TCP to further possible public access for many purposes, the agency must take an even "harder" look.

1. Federal court decisions do not support a "high standard of deference" for the defendants' NHPA Section 106 decision.

For its conclusion that FWS should receive substantial deference, the only case cited by the federal defendants that involves historic properties is a decision that the Federal Highway Administration (FHWA) had complied with Section 4(f) of the Department of Transportation Act (DTA), which includes a requirement for NHPA 106 consultation. *Valley Community Preservation Comm'n v. Mineta,* 373 F.3d 1078 (10th Cir. 2004) ("*VCPC*"). It is important to note that in order for the FHWA to find that there is no adverse effect on historic properties, the DTA absolutely requires written concurrence from the State Historic Preservation Officer (SHPO) and/or the Advisory Council on Historic Preservation. 49 U.S.C. § 303(d)(2)(B). In the DTA provision Congress recognizes that these consulting parties have the necessary technical expertise for a "reasonable" determination of effects. The court in *VCPC* also recognized the deference that should be owed these agencies in their concurrence with an agency's final decision in the Section 106 process. *VCPC*, 373 F.3d at 1089-1091. In a case involving the Federal Communications Commission (FCC) and the definition of historic properties "eligible for inclusion" in the Section 106 process, the court explains this point regarding the deference owed the Advisory Council in its interpretation of NHPA regulations:

> Congress has entrusted one agency with interpreting and administering section 106 of the NHPA: the Council. *See* 16 U.S.C. § 470s (authorizing the Council "to promulgate such rules and regulations as it deems

> necessary to govern the implementation of [section 106 of the Act] *in its entirety"*) (emphasis added). Although the term "eligible for inclusion" may appear in other provisions, Congress has authorized the Council to administer the provision at issue here: section 106.

CTIA-The Wireless Ass'n v. FCC, 466 F.3d 105, 116 (D.C. Cir. 2006) ("*CTIA*"). The court went on to conclude that it must defer to the ACHP's reasonable interpretation of the meaning of Section 106, and "we cannot see how it was arbitrary and capricious…for the FCC to choose to do so as well." *Id.* at 117.

The facts of this case are distinguishable from either *VCPC* or *CTIA*, raising the question of how much deference an agency gets when the consulting parties *don't* agree with its decision. Here the Washington SHPO did not concur with the FWS finding of "no adverse effect" of the wildflower tours on the *Laliik* TCP. AR 2004. In addition, in April 2014 the ACHP sent a letter to the FWS with the following input:

> We wish to reaffirm our advice that all such activities proposed for Rattlesnake Mountain be considered as having the potential to cause an Adverse Effect and be treated under a PA developed in consultation with the interested tribes, State Historic Preservation Officer of Washington State (SHPO), and other appropriate consulting parties. Therefore, before proceeding with additional tours, the FWS should re-engage in consultation with the interested tribes regarding the wildflower tours and their potential to cause effects to the Laliik TCP and to identify if possible specific parameters for the activity that will ensure adverse effects will not occur. We also request that you clarify for us the status of a Cultural Resources Management Plan that we understood was under development for the HRNM. Such a management plan, developed in consultation with interested tribes should serve as the basis for addressing the potential for adverse effects to historic properties.

AR 2440. Nevertheless, the federal defendants ignored the Council's opinion and proceeded with the tours on the basis of its "no adverse effects" decision. If

the ACHP must receive deference in its interpretation of the Section 106 process in that letter, then any action taken by the FWS that is contrary to that interpretation should not receive any such similar deference.[1]

2. The agency failed to include quantified or detailed information regarding cumulative impacts to the *Laliik* TCP, and any future actions anticipated under the recent public access legislation needs to be included in the effects analysis also.

As the Plaintiff explained in its initial briefing, the Section 106 regulations require agencies to examine "reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative." 36 C.F.R. § 800.5(a)(1). In a cumulative impacts analysis, an agency must take a "hard look" at all actions, "giving a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment." *Te-Moak Tribe*, 608 F.3d at 603 (quoting *Lands Council v. Powell*, 395 F.3d 1019, (9th Cir. 2005)). Concerning cumulative impacts under NEPA, the *Te-Moak* court explained:

> General statements about "possible effects" and "some risk" do not constitute a "hard look" absent a justification regarding why more definitive information could not be provided. Some quantified or detailed information is required. Without such information, neither the courts nor the public…can be assured that the [agency] provided the hard look that it is required to provide.

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1 In its briefing the FWS repeatedly refers to the *Laliik* TCP as being either "included" or "listed" on the National Register of Historic Places" [NRHP]. ECF No. 52 at 3,15. This is incorrect – the TCP is "eligible" for listing but is not actually listed on the NRHP. Again, this is another error that points out the federal defendants' lack of expertise in historic preservation.

Id. (quoting *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1379-80 (9th Cir. 1998)). In other words, conclusory analysis is not adequate.

Yet that is exactly what the June 2012 Section 106 report provided: nothing in the way of detailed information about cumulative effects, and virtually no analysis other than a conclusory statement about "transitory events" and "minimum impact activities." AR 2076-2077. There is no "quantified or detailed information" at all. *Te-Moak* makes it clear, particularly with regard to cultural resources and Native American religious concerns, that simply saying that "all cumulative impacts will be avoided or mitigated" is simply not enough to pass muster. *Te-Moak Tribe*, 608 F.3d at 604. The agency's "no adverse effects" determination was therefore arbitrary and capricious under the APA.

Moreover, as the federal defendants point out in their briefing, Congress recently passed a provision in the 2014 National Defense Authorization Act which authorizes the FWS to allow public access to *Laliik* for a variety of purposes, including motorized vehicle access. See ECF No. 52 at Exhibit A. Although the agency appears to conclude that this somehow assists its argument that its "no adverse effects" decision was correct, it really doesn't. Now the defendants must weigh an even heavier future potential for impacts to the TCP as part of an even broader cumulative impacts analysis. In addition, it is arguable that in order for the FWS to continue its wildflower tours into 2017 (and for any other planned activity at *Laliik* involving public access that was not previously authorized), the agency will need to conduct further NHPA Section 106 consultation, and prepare another Environmental Impact Statement and Comprehensive Conservation Plan (CCP) pursuant to NEPA, the Antiquities Act, and Wildlife Refuge System Administration Act of 1966.

III. CONCLUSION

Based on the foregoing legal authorities and the administrative record in this case, the Court should grant the Plaintiff Yakama Nation's Cross-Motion for Summary Judgment on the Record, and deny the cross-motion for summary judgment filed by the United States on January 30, 2015. Plaintiff requests that the Court issue 1) a judgment under the APA that the defendants' final agency actions were and are arbitrary, capricious, an abuse of discretion, and not in accordance with law, as well as not in observance of procedures required by law, and 2) an order under the APA holding unlawful, setting aside, and remanding the final agency actions in this case.

RESPECTFULLY SUBMITTED this 19th day of February, 2015.

s/ Thomas Zeilman
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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of February, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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