MICHAEL C. ORMSBY
United States Attorney
Vanessa R. Waldref
Assistant United States Attorney
P.O. Box 1494
Spokane, WA 99210-1494
Telephone: (509) 353-2767
FAX: (509) 835-6397

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA NATION,

Plaintiff,

CONFEDERATED TRIBES AND BANDS OF THE UMATILLA INDIAN RESERVATION,

Plaintiff-Intervenor,

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 Complex; LARRY KLIMEK, Manager, Hanford Reach National Monument,

Defendants.

Case No. CV-14-3052-TOR

UNITED STATES' JOINT REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

The United States of America, by and through Michael C. Ormsby, United States Attorney for the Eastern District of Washington, and the undersigned counsel, pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, Local Rules 7.1(a)

and 56.1, hereby submits this reply in support of its own motion for summary judgment. No material facts are in dispute and the United States Fish & Wildlife Service ("FWS" or "Service") and named Federal Defendants are entitled to judgment as a matter of law.

I. Introduction

Plaintiff Confederated Tribes and Bands of the Yakama Nation (hereinafter "Yakama Nation") and Plaintiff-Intervenor Confederated Tribes of the Umatilla Indian Reservation ("CTUIR") (collectively "Plaintiffs") allege that the Service violated the National Historic Preservation Act ("NHPA") and the Administrative Procedures Act ("APA") in the process of making its decision to conduct up to twelve guided wildflower tours a year at the Hanford Reach National Monument. The guided wildflower tours take place within the approximately 55,000 acres of an area known as *Laliik*, land that has been designated as a Traditional Cultural Property ("TCP") under § 101(d)(6)(A) of the NHPA. FWS complied with the consultation provisions of the NHPA and made a reasoned decision that the wildflower tours at issue will have "no adverse effect" on the *Laliik* TCP.

II. Legal Analysis

The FWS complied with the letter and spirit of the NHPA in its consultation and decision-making process for a wildflower tour undertaking on *Laliik.* FWS' consultation with Plaintiffs included formal correspondence from FWS to the Plaintiffs' Tribal leaders, numerous emails with the Plaintiffs, and Tribal Working Group meetings and engagements. Further, section 106 of the NHPA sets out the procedural requirements for federal agencies considering an undertaking that may

adversely affect culturally significant properties.[1] The Service complied with the procedural requirements of the NHPA and FWS' "no adverse effects" determination considered Tribal and SHPO input, took into account the characteristics making *Laliik* culturally significant, and was reasonable and rationally related to the relevant factors.

A. FWS complied with the NHPA Section 106 consultation requirements.

The NHPA implementing regulations require federal agencies, during the Section 106 process, "to consult with tribes that 'attach[ ] religious and cultural significance to historic properties that may be affected by an undertaking.'" *Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 608 F.3d 592,607 (9th Cir. 2010) (quoting 36 C.F.R. § 800.2(c)(2)(ii)). In doing so, the FWS recognized the government-to-government relationship between the affected Tribes and the United States, and provided the affected Tribes a reasonable opportunity identify their concerns with the putative undertaking. *See id.* at 608. Additionally, in light of the history and content of prior consultation regarding tours on *Laliik*, amendment of the undertaking from two to twelve wildflower tours a year did not require the Service reinitiate the entire consultation process.

[1] The *Laliik* TCP is eligible for inclusion in the National Register of Historic Places. NHPA requires a federal agency to "take into account the effect of [any] undertaking 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 NHPA regulations require "that agency decisionmakers 'stop, look, and listen,' but not that they reach particular outcomes." *Narragansett Indian Tribe v. Warwick Sewer Auth.*, 334 F.3d 161, 166 (1st Cir. 2003) (quoting *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999) (per curiam)). Although the Plaintiffs disagree with the ultimate decision of the FWS, Plaintiffs were consulted, and their concerns and objections were included and considered in FWS' reasoned decision. The FWS met its NHPA consultation obligations.

1. FWS properly recognized the government-to-government relationship when it consulted with plaintiffs regarding wildflower tours on the *Laliik* TCP.

Plaintiffs are wrong that FWS failed to engage in "government-to-government" consultation with the designated representatives of the Tribes as required by 36 C.F.R. § 800.2(c)(2)(ii)(C). *See* ECF No.54 at 5. The recognition of the government-to-government relationship under the NHPA involves the Tribes' entitlement "to be provided with adequate information and time, consistent with its status as a government that is entitled to be consulted." *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1119 (S.D. Cal. 2010) ("*Quechan I*"); *Quechan Tribe of Ft. Yuma Indian Reservation v. U.S. Dep't of the Interior*, 927 F. Supp. 2d 921, 927-28 (S.D. Cal. 2013) ("*Quechan II*"). A Tribe is entitled to "identify its concerns," to "advise," to "articulate," and to "participate." 36 C.F.R. § 800.2(c)(2)(ii)(A). Section 106 recognizes a respectful, practical approach to consultation; it does not mandate formal meetings between federal agencies and Tribal Council leaders in all situations. *See* ECF No. 54 at 3.

Plaintiffs' exclusive reliance on *Quechan I* does not support their contention that FWS failed to engage in government-to-government consultation here. In

Quechan I, the Bureau of Land Management ("BLM") approved a massive, time-sensitive, solar-energy undertaking, utilizing 6,500 acres of land from the Quechan Tribe, to install 30,000 individual sun-catchers, "[s]upport buildings, roads, a pipeline, and a power line to support and service the network of collectors . . . ." *Quechan I,* 755 F. Supp. 2d at 1107. In light of the high risk of irreparable harm and the substantial undertaking, the *Quechan I* court granted the Tribe's motion for *preliminary injunction* on the Tribes showing that the BLM failed to survey the project area for historical and cultural sites and the BLM only invited the tribe to attend "public informational meetings about the project." *Id.* at 1118, 1122. The court reasoned that the BLM failed to provide the Quechan Tribe with sufficient information and time for meaningful consultation. *Id.* at 1119.

In contrast, in *Quechan II,* a merits ruling in which the court determined that that BLM satisfied its Section 106 consultation requirements, the court emphasized that letters from the BLM to Tribal leaders constituted initiation of government-to-government consultation, and that letters requesting the Tribes' involvement in surveys and identification of archeological sites were sufficient to update the Tribe on the status of the undertaking. *Quechan II*, 927 F. Supp. 2d at 929, 933.

Unlike *Quechan I,* with permanent structural impacts on the Tribe's culturally significant lands, the wildflower tours in the present case are limited in duration, number, and long-term impact on *Laliik*. Here, after communications began with Tribal leaders and cultural resource staff in 2010 regarding potential tours, including visits and surveys and initiation of formal undertakings, *see e.g.,* AR001906-11; SAR00001-01; AR Nos. 402, 404; AR001912-13; AR1925, Nos. 307-08, the FWS formally notified in writing each Tribe individually of this undertaking in February

and April of 2012. *See* AR 2089-97; AR001968-69; AR001992; AR001995. These communications discussed in detail the proposed undertaking and solicited input from Plaintiffs, consistent with the requirements of Section 106. *See id.* On November 16, 2012, the FWS submitted the June 2012 Updated Report to the ACHP, and once more to the Plaintiffs individually. AR002056-2113. In conjunction with monthly working group meetings, Tribes individually were provided information repeatedly regarding the project, invited to identify their concerns, and to advise the FWS on the undertaking.

Contrary to the regulations and case law, Plaintiff Yakama Nation contends that government-to-government consultation cannot occur unless the FWS meets with the Yakama Tribal Council, and then, only if the Tribal Council has time to address the FWS undertaking at the meeting. ECF No. 54, at 6. Of course, federal agencies must comply with the NHPA consultation requirements and provide adequate information and time for consultation; however, these Section 106 requirements are established by 36 C.F.R. § 800 *et seq.*, not defined and controlled by the consulting parties. Here, FWS complied with the Section 106 consultation requirements.

2. FWS engaged in consultation with plaintiffs regarding the tour undertaking, and FWS was not required to re-initiate consultation upon amendment of the undertaking.

Plaintiffs also contend that FWS failed to consult with them regarding the amendment of the wildflower tour schedule from two to twelve tours. ECF No. 55 at 2-5. The Ninth Circuit spoke specifically to this point in *Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 608 F.3d 592 (9th Cir. 2010). In *Te-Moak*, as here, the plaintiff-tribe argued that that BLM failed to adequately consult

with the tribe on an amendment to the undertaking after years of meetings and discussion regarding the project. *Id.* at 609.

The *Te-Moak* Court explained that "in light of the BLM's previous consultation with the Tribe for the original [undertaking] and other projects in the area, the BLM provided the Tribe with a sufficient 'opportunity to identify its concerns about historic properties' as provided by 36 C.F.R. § 800.2(c)(2)(ii)(A)." *Id.* Ruling that BLM appropriately consulted with the tribe regarding the amendment, the court relied on the fact that the tribe did "not identify any new information regarding how the additional exploration would adversely affect the identified [cultural properties] . . . ." *Id.* On this issue, the *Te-Moak* court explained that the point of the consultation is "to ensure that all types of historic properties and all public interests in such properties are given *due consideration*," which the BLM had already provided. *Id.* (quoting 16 U.S.C. § 470a(d)(1)(A)) (internal quotations omitted) (emphasis added).

As *Te-Moak* clarified, an amendment to an undertaking does not require a formal re-initiation of the consultation process. 608 F.3d at 609-10. Plaintiffs still cannot identify any new information they would have shared with the Service. Here, the Section 106 consultation requirements were met, FWS considered the Tribes objections, and FWS's amendment from two to twelve tours is rationally support by the same reasoning in the June 2012 amended Section 106 Report.

3. NHPA Section 106 requires consultation not control.

The NHPA consultation requirements do not grant consulting parties *control* over a federal agency's proposed project. *Narragansett Indian Tribe v. Warwick Sewer Auth.*, 334 F.3d 161, 168 (1st Cir. 2003) (emphasis added); *see also Save Our*

Heritage, Inc. v. F.A.A., 269 F.3d 49, 62 (1st Cir. 2001) ("[T]he choice whether to approve the undertaking ultimately remains with the agency."). Plaintiffs have made their opinion clear that any intrusion onto *Laliik* would adversely affect the property. Yet, the Plaintiffs' disagreement with the "effects" determination, although relevant, is not dispositive to the ultimate agency decision. The ultimate decision with whether to approve the undertaking remains with the FWS, and the NHPA consultation process does not relinquish control of that decision to the Plaintiffs. *See Save Our Heritage*, 269 F.3d at 62. That being so, the FWS made a reasoned decision regarding the tours following Section 106 consultation requirements.

Plaintiff Yakama Nation also asserts that FWS argued that the recently enacted National Defense Authorization Act, which directed the Secretary of the Interior to provide public access to the summit of Rattlesnake Mountain (*Laliik*), supports its "no adverse effects" decision. ECF No. 54 at 12. To the contrary, FWS noted the recent legislation in its brief to illustrate the conflicting mandates that guide the FWS management of the Hanford Reach National Monument. The *Laliik* TCP encompasses over 55,000 acres of land managed by the FWS at Hanford, and the Plaintiffs' view that any activity on the TCP is prohibited by NHPA – unless approved by Plaintiffs - is unfounded.

B. Plaintiffs cannot meet their burden of showing the FWS's decision that the wildflower tours would have "no adverse effect" is "arbitrary and capricious" under the APA.

Plaintiffs' arguments that the FWS decision is entitled to "no deference" confuse the burden of proof, standard of review, and degree of deference involved in this case. ECF No. 55 at 5; ECF No. 54 at 9. The burden of proof is clear: in a challenge brought under the APA, the burden remains on the Plaintiff to show that

the agency's decision was "arbitrary and capricious." *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976). As described in greater detail below, the standard of review under the APA is always "highly deferential, presuming the agency action to be valid" and requires "affirming the agency action if a reasonable basis exists for its decision." *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir.2006) (citing *Indep. Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir.2000)).

Furthermore, courts afford a higher degree of deference to an agency expert considering technical matters, even when conflicting views are presented. *Lands Council v. McNair*, 537 F.3d 981, 993 (9th Cir. 2008). *American Trucking Ass'ns Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir.2009); *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989). The FWS should receive this heightened deference, but the Court need not reach that decision because the FWS easily prevails under the well-established APA standard: the FWS decision that the wildflower tours would have "no adverse effects" is reasonable and must be affirmed.

1. The arbitrary and capricious standard of review under the APA affords the FWS high deference.

Plaintiffs do not and cannot cite to any authority that an agency's decision pursuant to the NHPA regulations, challenged under the APA, is not entitled to the deferential "arbitrary and capricious" standard of review. *See* ECF No. 54 at 8; ECF No. 55at 6. Indeed, all NHPA cases utilize the deferential APA standard of review. *Te-Moak*, 608 F.3d at 610 (rejecting plaintiff's challenge to BLM's "no effect" determination and noting "we do not agree that approval of a phased project in its entirety always results in a violation of the NHPA"); *see also Quechan Tribe of Ft.*

Yuma Indian Reservation v. U.S. Dep't of the Interior, 927 F. Supp. 2d 921, 927-28 (S.D. Cal. 2013); *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 885 n.16 (D. Ariz. 2003), *aff'd*, 417 F.3d 1091 (9th Cir. 2005); *Montana Wilderness Ass'n v. Connell*, 725 F.3d 988, 994 (9th Cir. 2013).

Furthermore, courts have consistently rejected plaintiffs' attempts to carve out situations from the general applicability of the APA's deferential standard of review. *See Ninilchik Traditional Council v. United States*, 227 F.3d 1186, 1193 (9th Cir. 2000) ("[W]e hold that a reviewing court must apply the deferential APA standard in the absence of a stated exception when reviewing federal agency decisions."); *Douglas v. Independent Living Centers of S. California, Inc.*, 132 S.Ct. 1204, 1210 (2012) ("[O]rdinarily review of agency action requires courts to apply certain standards of deference to agency decisionmaking."); *Hells Canyon Alliance v. U.S. Forest Service*, 227 F.3d 1170, 1177 (9th Cir. 2000). Thus, the FWS is entitled to the highly deferential standard of review under the APA that presumes agency action to be valid and , here, requires the FWS's reasonable "no adverse effects" decision to be affirmed.

2. FWS' "no adverse effects" decision was reasonable, considered the appropriate NHPA factors, and the ACHP did not opine otherwise.

Plaintiffs further maintain that FWS "ignored" the ACHP's opinion and the SHPO's and Tribes' technical recommendations regarding the "no adverse effects" decision, and therefore is not entitled to the high level of deference normally afforded by courts when considering agency decisions based on technical expertise. ECF No. 55 at 6; ECF No. 54 at 10. This argument is factually inaccurate and confuses the APA standard of review.

First, the FWS considered the Tribes and the SHPO's opinions, which were also included specifically in the Section 106 Compliance Report and submitted to the ACHP. AR002058-2108.

Second, the ACHP had the opportunity to opine on the FWS's decision and decided not to provide its opinion as to whether the adverse effect criteria had been correctly applied. *See* C.F.R. § 800.5(c)(3)(i). This meant that the Service's responsibilities under section 106 were fulfilled. *Id.* Moreover, the ACHP letter excerpted by Plaintiffs to support the proposition of the ACHP's "disagreement" with the FWS was written almost two years after the Section 106 period for 36 C.F.R. § 800.5 ended, and does not bear on the FWS's 2012 "effects" determination. *See* AR002440.

Third, under the APA, when an issue requires "a high level of technical expertise, [this Court] must defer to the informed discretion of the responsible federal agenc[y]." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 377, (1989) (citing *Kleppe*, 427 U.S. at 412); *see also Baltimore Gas & Elec. Co.*, 462 U.S. at 103, 103 S.Ct. 2246) ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."); *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 576 (9th Cir. 1998). Plaintiff's cited cases that discuss deference to the ACHP are not to the contrary. Here, the FWS determination, made by its technical expert weighing the appropriate factors – and not timely disputed by the ACHP – is also entitled to highest deference under the APA.

/ / /

3. Plaintiffs Incorrectly Attempt to Import the NEPA "Cumulative Impact" Analysis into the NHPA Requirements

Finally, Plaintiffs maintain that the FWS failed to consider the cumulative impact of expanded the number of wildflower tours on the *Laliik* TCP. ECF No. 54 at 11. Plaintiffs inappropriately attempt to import the National Environmental Policy Act ("NEPA") "cumulative impact" analysis into the NHPA. NEPA's technical, environment-focused, cumulative impact analysis has never been – and should not be – imported into NHPA. *See, e.g.*, *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 809 (9th Cir. 1999) (evaluating both NHPA and NEPA claims, but only assessing cumulative impact under NEPA); *Te-Moak Tribe*, 608 F.3d at 602 (9th Cir. 2010) (same); *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 580 (9th Cir. 1998) (same).

The FWS appropriately analyzed its "no adverse effects" decision utilizing the applicable regulation here, 36 C.F.R. § 800.5(a)(1): "Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative."

In rendering the "no adverse effects" determination, the FWS limited the wildflower tours in number, time, duration, location, and years. *See* AR002067. In evaluating two tours or twelve tours, the undertaking takes place on pre-existing roads, at a limited number of stops, with a limited number of visitors, and is closely monitored and guided by FWS personnel. *Id.* Given all of the safeguards put in place by the FWS to limit potential effects to the *Laliik* TCP, the "foreseeable" cumulative effects of twelve tours a year were considered and addressed by the FWS. Plaintiffs' "cumulative impact" argument is misplaced and FWS's determination should be upheld.

IV. Conclusion

For the reasons set forth above, the United States respectfully requests that this Court rule that Federal Defendants are entitled to judgment as a matter of law.

Respectfully submitted this 6th day of March, 2015.

MICHAEL C. ORMSBY
United States Attorney

s/Vanessa R. Waldref
Vanessa R. Waldref
Attorney for United States Fish and Wildlife Service
USAWAE.VWaldrefECF@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 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:

Thomas Zeilman: tzeilman@qwestoffice.net

Melena Pinkham: malenapinkham@ctuir.org

Joseph Pitt: joepitt@ctuir.org

and/or I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participant(s): N/A

/s Vanessa R. Waldref
VANESSA R. WALDREF
Assistant United States Attorney