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IN THE UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

WINNEMEM WINTU TRIBE, in their tribal and individual capacities; CALEEN SISK, et al.,

Plaintiffs,

v.

UNITED STATES FOREST SERVICE,

Defendant.

Case No. 2:09-cv-01072 KJM KJN

UNITED STATES FOREST SERVICE'S RESPONSE TO PLAINTIFFS' BRIEF ON THE ISSUE OF THE APPROPRIATE REMEDY ON CLAIM THREE (COONROD FLAT)

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 1

A. All Of Plaintiffs' Remedies And Arguments Are Based On The Wrong APA Section. 1

B. The Court Cannot And Should Not Enjoin The Bartle Allotment Grazing Permit. 2

1. Plaintiffs Have Not Proven That Grazing Causes Irreparable Harm. 2

2. The Balance Of The Harms Weighs Strongly Against Enjoining The Permit. 6

C. The Court Cannot And Should Not Order A New Section 106 Analysis. 6

D. The Court Cannot And Should Not Order The Proposed "Additional Remedies". 6

1. The "Additional Remedies" Exceed The Scope Of The Order And Complaint 7

2. The Court Lacks Authority To Order The "Additional Remedies". 7

3. Policy And Other Considerations Warrant Denial Of The Requested Relief. 8

a) The Forest Service Cannot Exclude Anyone From Coonrod Flat. 8

b) Coonrod Flat Should Not Be Fenced. 9

c) The Forest Service Cannot Grant Plaintiffs Title To Coonrod Flat. 12

d) Coonrod Flat's Eligibility For the National Register Has Been Determined. 12

e) The Forest Service Already Allows Plaintiffs To Grow And Harvest Tobacco. 13

f) The Permittee Is Already Using Various Range Management Techniques To Manage Livestock Distribution At Coonrod Flat. 13

III. CONCLUSION 14

I.

INTRODUCTION

The United States Forest Service hereby responds to plaintiffs' remedies brief (ECF 149). For all of the reasons discussed below and in the Forest Service's opening brief (ECF 150), the Court cannot and should not order any of plaintiffs' proposed remedies.

II.

ARGUMENT

A. All Of Plaintiffs' Remedies And Arguments Are Based On The Wrong APA Section.

Plaintiffs' entire brief is premised on the incorrect assumption that the Court granted summary judgment on Claim Three, regarding Coonrod Flat, under Administrative Procedure Act section 706(2), which allows the Court to set aside agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2). But this Court did not rule that the Forest Service's decision to grant the 2010 grazing permit was arbitrary and capricious under section 706(2).

Instead, the Court held under APA section 706(1), that plaintiffs' claim that the Forest Service violated the National Historic Preservation Act ("NHPA") by not consulting with them about the 2010 grazing permit (raised for the first time on summary judgment) is a "'failure to act' claim in that [the Forest Service] 'failed to take a discrete action that it is required to take' . . . making injunctive relief available and appropriate." *Id.*, *see* 5 U.S.C. § 706(1) (court may "compel agency action unlawfully withheld or unreasonably delayed"); *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (court may only order action when an agency has "failed to take a *discrete* agency action that it is *required* to take") (emphases in original)).

Because plaintiffs' proposed remedies, arguments, and legal authorities[1] all are based on the incorrect assumption that the Court granted summary judgment under section 706(2), and they do not address the appropriate remedy under section 706(1), the Court should reject all of them as irrelevant.

[1] Plaintiffs have not cited a single case involving a failure to act claim under APA section 706(1), and their cited cases are distinguishable for other reasons as well. *See Nat. Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 1000 (9th Cir. 2000) (involving Clean Water Act citizen enforcement action, not APA review); *Tinoqui-Chalola Council of Kitanemuk & Yowlumne Tejon Indians v. U.S. Dep't of Energy*, 232 F.3d 1300, 1305 (9th Cir. 2000) (applying section 706(2)); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 804 (9th Cir. 1999) (applying 706(2) arbitrary and capricious standard

B. The Court Cannot And Should Not Enjoin The Bartle Allotment Grazing Permit.

Plaintiffs argue that the Court must enjoin the 2010 Bartle Allotment grazing permit and require the Forest Service to consult with them before allowing further cattle grazing. However, as the Forest Service showed in its opening remedies brief, the Court does not have the authority to set aside or enjoin the grazing permit under APA section 706(1).[2] *See* ECF 150 at 2-3 and n.1. Nor can the Court compel the Forest Service to consult with plaintiffs since they did not request, and were not granted, consulting party status for the Bartle Allotment grazing permit under 36 C.F.R. § 800.2(c)(5). The Forest Service's decision of whether to make plaintiffs a consulting party is discretionary, so the Court cannot compel the Forest Service to either grant that status or consult with plaintiffs under section 706(1). *See id.* at 4-6.

Even if the Court determines that it has the power to enjoin the permit, as argued in detail in the Forest Service's brief, the Court should not order the extraordinary remedy of enjoining the 2010 grazing permit because plaintiffs have not proved that they have suffered irreparable harm from cattle grazing under the permit and the equitable balance of the hardships weighs strongly against enjoining the permit. *See id.* at 7-12.

1. Plaintiffs Have Not Proven That Grazing Causes Irreparable Harm.

The Forest Service has shown that plaintiffs' "evidence of cow usage" and old cow pies in 2010 fails to rise to the level of irreparable harm required for injunctive relief and, to the contrary, the Section 106 analysis for the 2010 grazing permit found very little to no grazing damage, including at Coonrod Flat. *See id.* at 7-8.

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in case involving federally recognized tribe); *Apache Survival Coalition v. United States*, 21 F.3d 895, 906 (9th Cir. 1994) (determining that NHPA claim was barred by laches and not addressing merits); *Kammeyer v. Oneida Total Integrated Enterprises*, 2015 WL 5031959, at *4 (C.D. Cal. Aug. 24, 2015) (stating that section 706(2)(A) appeared to apply to plaintiffs' claims); *Confederated Tribes & Bands of the Yakama Nation v. U.S. Fish & Wildlife Serv.*, No. 1:14-CV-3052-TOR, 2015 WL 1276811, at *5 (E.D. Wash. Mar. 20, 2015) (discussing section 706(2)(A) in case involving federally recognized tribe); *Karuk Tribe v. Kelley*, No. C 10-02039 WHA, 2011 WL 2444668, at *4 (N.D. Cal. June 13, 2011) (discussing section 706(2) in case involving federally recognized tribe).

[2] Even under section 706(2), affirmative injunctive relief is not an appropriate remedy. *Pinnacle Armor, Inc. v. United States*, 2012 WL 2994111, *10 n.3 (E.D. Cal. July 20, 2012) (citing 5 U.S.C. § 706(2); *Slockish v. U.S. Fed. Highway Admin.*, 682 F. Supp. 2d 1178, 1198 (D. Or. 2010)). Instead, remand is usually the appropriate remedy in section 706(2) cases. *See id.* (citing *Defenders of Wildlife v. United States Envt'l Protection Agency*, 420 F.3d 946, 978 (9th Cir. 2005), *rev'd on other grounds, Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644 (2007)).

Based solely on a declaration by tribe member Mark Miyoshi,[3] plaintiffs now argue that "cattle are allowed to wander freely throughout the site, defecating in an around the fire circle, and dislodging rocks in that circle." ECF 149 at 5; Miyoshi Decl. (ECF 149-1), ¶ 5.

Plaintiffs' only evidence of cattle wandering is a 2012 photograph of a bull near the fire circle at Coonrod Flat. Miyoshi Decl., ¶ 7. Miyoshi does not say when in 2012 he took the photograph, he does not identify the bull as belonging to Truax Cattle, he does not say how long the bull remained at the site or whether it was just passing through, and he does not say that he saw the bull defecating, dislodging rocks, or causing any other damage at the site in 2012. *See id.*, ¶ 7. The 2012 photo does not reveal any alleged damage; only that the bull was present when Miyoshi took the picture. *See id.* at 4.

Miyoshi wrongly asserts that, "[e]very year at any time, cattle trample and graze throughout the Traditional Cultural Property." *Id.*, ¶ 7. This assertion is plainly false because cattle do not graze on the Bartle Allotment year round. Under the 2010 grazing permit, Truax cattle are only permitted to graze annually from June through October. No grazing is permitted at any other time of the year, and the Forest Service has not issued any other grazing permits for the Bartle Allotment. *See* AR 962 (2010 grazing permit); Napper Decl., ¶ 6, Truax Decl., ¶¶ 12-13; Second Napper Decl., ¶ 43. Significantly, nowhere in his declaration does Miyoshi state that he has ever personally observed any cattle causing any damage to Coonrod Flat.

Instead, Miyoshi cites to an April 16, 2016, photograph (which was not taken during grazing season) that he says shows "archaeological site violations" including a "deep cattle trail" and damage to house pits. Miyoshi Decl., ¶ 7. The photograph is not marked to identify where the "deep cattle trail" is located, no measurement showing the depth of the cattle trail is evident, and no cattle trail is easily discernible in the picture. *See* Second Napper Decl., ¶ 40.

[3] Plaintiffs explain that Miyoshi is their Tribal Historic Preservation Officer (THPO) with the disclaimer that their use of the term is not intended to imply federal recognition status. ECF 149 at 5 n.1. However, under the NHPA regulations, the term specifically refers to a THPO of a federally recognized Indian tribe, which plaintiffs are not. *See* 36 C.F.R. § 800.2(c)(2)(i). The Forest Service agrees with plaintiffs that the Court should not accord any particular deference or significance to Miyoshi's statements based on his status as their THPO.

As for alleged damage to archaeological house pits, Forest Service archaeological surveys of Coonrod Flat in 1981, 2000, and 2004 concluded that there are no archaeological resources at Coonrod Flat. ECF 131-2, Ex. E, ¶ 6 (Henn Declaration) ("[n]o prehistoric village site or house pits were found at Coonrod Flat" and the "fire pit and camping areas observed along Ash Creek are all believed to be modern"); *see* Order, ECF 147 at 6 ("Henn notes that there was some evidence of historic use by Native Americans at the Coonrod Flat site, but no evidence of archaeological resources" was found); *see also* Second Napper Decl., ¶ 40. Moreover, Miyoshi attributes damage to the house pits to both "cattle and campers" without identifying what damage was allegedly caused by cattle as opposed to campers, or any valid basis for making such a distinction. Miyoshi Decl., ¶ 7.

Miyoshi's third photograph, also taken on April 16, 2016, does not reveal any cattle grazing damage at all. *Id.* at 6. Instead, Miyoshi says that the photo "shows a dirt bike track in the Coonrod Flat meadow" and that "[d]irt bike and other OHV use is common in the meadow causing damage to the vegetation." *Id.*, ¶ 7. This photograph is therefore irrelevant to the issues before the Court.

Miyoshi states that the fourth photograph, taken on April 21, 2016 (not during cattle grazing season), shows cow patties in the fire circle and that plaintiffs must clean up the fire circle before every ceremony.[4] *Id.* at ¶ 7. Plaintiffs thus concede that the presence of cow patties at the fire circle does not cause irreparable harm that would warrant injunctive relief. Any alleged harm at that location due to the presence of cow patties can be addressed by removal of the cow patties by plaintiffs, the permittee, or Forest Service employees, and Forest Service employees have removed cow patties from the site in the past. *See* Second Napper Decl., ¶¶ 32, 41.

Miyoshi points to a fifth photograph, taken on April 16, 2016, that purports to show cattle tracks 5-8 inches deep at the fire ring. *Id.*, ¶ 7. However, nothing in the photograph definitively proves that the surface variations shown in the foreground of this picture are cattle tracks; they could have been caused by elk, deer, or even recreational users that frequent the area. Second Napper Decl., ¶ 42.

[4] Plaintiffs themselves do not routinely leave the Coonrod Flat TCP in a clean condition after they use it for their ceremonies. Second Napper Decl., ¶¶ 44-47. For example, in September 2015, the Forest Service received complaints from another branch of the Winnemem Wintu regarding trash, human excrement, and debris that plaintiffs left at Coonrod Flat after their August 2015 ceremonies. *Id.*

Finally, plaintiffs claim that cattle have "degraded Ash Creek and the riparian area around Ash Creek, which runs through the site." Miyoshi Decl. at 5. They allege that "the cattle have broken down the bank of the Creek and polluted the pristine glacial water with their bathing and feces." *Id.* These conclusory statements about Ash Creek are not supported by the record or any admissible evidence. Moreover, the Forest Service disagrees with plaintiffs' characterization of Ash Creek as containing "pristine glacial water" that is polluted by cattle. Second Napper Decl., ¶ 36. Although Ash Creek is glacial runoff, the creek contains a high degree of sediment, is an intermittent channel, and only flows for a portion of the year. *Id.*, ¶ 39. Ash Creek is rarely clear, and it is likely that the name of the creek is due to the ash deposits which it cuts through. *Id.* Because of the high sediment load in Ash Creek, the creek routinely deposits sediment in the Coonrod Flat area, which results in a tremendous amount of sediment deposits in some years followed by scour and down-cutting in other years, depending on the flow rate. *Id.* As a result of the active channel building processes inherent to Ash Creek, plaintiffs overstate the impact of cattle on banks and degraded water quality. *Id.*

In sum, nothing in the Miyoshi declaration proves that cattle grazing under the 2010 permit causes irreparable damage that would warrant enjoining the permit. Indeed, Miyoshi's declaration shows (consistent with the Section 106 analysis performed by the Forest Service in 2007 for the 2010 permit) that cattle grazing cannot be, and is not, the sole cause of the alleged damage that plaintiffs complain of at Coonrod Flat.

Miyoshi claims that damage to Coonrod Flat is caused by "campers, hikers, hunters, and off-road vehicles" and other "recreational users" and that "non-Winnemem tribal members" have picked over the wild native tobacco patch there. Miyoshi Decl., ¶ 6. The Section 106 analysis attributed the "very little to no" impact observed in the Bartle Allotment to "past road maintenance and dispersed recreation vehicle impacts," not to cattle grazing. AR 959. Under these circumstances, enjoining the 2010 Bartle Allotment grazing permit is not an appropriate remedy, and enjoining the permit would not do anything to address alleged damage to the Bartle Allotment plaintiffs attribute to recreational users.[5]

[5] It is clear from plaintiffs' brief and proposed "additional remedies" that plaintiffs want the Court to order relief that amounts to granting them sole rights to use Coonrod Flat, to the exclusion of all others, including other Indian tribes and recreational users. As discussed in section II.D below, the Court cannot and should not grant such relief.

2. The Balance Of The Harms Weighs Strongly Against Enjoining The Permit.

In addition to the fact that plaintiffs have not proven irreparable harm, as argued in the Forest Service's opening brief, enjoining the 2010 grazing permit would be inequitable and inappropriate because Coonrod Flat covers only a tiny fraction of the entire Bartle Allotment permit area, and an injunction also would severely and negatively impact the livelihood and lives of permittee Wesley Truax and his family. *See* ECF 150 at 9-12.

Moreover, while the Forest Service understands the importance of Coonrod Flat, the Forest Service notes that plaintiffs typically use Coonrod Flat for ceremonies only two weeks out of the year, but it is a popular area for recreators and experiences a lot of use year-round. Second Napper Decl., ¶¶ 4-6. Because of this extensive recreational use, the burden on the Forest Service to maintain Coonrod Flat in pristine condition for plaintiffs the entire year would be substantial. *Id.*, ¶ 6.

C. The Court Cannot And Should Not Order A New Section 106 Analysis.

For all of the reasons argued in the Forest Service's opening remedies brief, injunctive relief is not appropriate under section 706(1) because the Forest Service's Section 106 analysis for the 2010 grazing permit complied with the NHPA. ECF 150 at 4-6. The Forest Service was not required to consult with plaintiffs since plaintiffs did not request that the Forest Service grant them consulting party status, and the Forest Service did not grant such status in its discretion. *See id.; see also* 36 C.F.R. § 800.2(c)(5), § 800.3(f)(3). Therefore, the Court cannot order the Forest Service to conduct a new Section 106 analysis for the Bartle Allotment grazing permit in consultation with plaintiffs.

Moreover, other than consultation, there is no factual basis upon which the Court could base an order requiring the Forest Service to conduct a new Section 106 analysis for the 2010 grazing permit because the Court did not find any other procedural or substantive insufficiency with the Section 106 analysis. Thus, the existing NHPA analysis for the 2010 grazing permit is sufficient and should stand.

D. The Court Cannot And Should Not Order The Proposed "Additional Remedies".

In a blatant case of overreaching, rather than limiting their remedies proposal to addressing the NHPA violation that the Court actually found, plaintiffs instead urge the Court to order a panoply of additional remedies in a remedial plan that, if granted, would give plaintiffs the exclusive right to use Coonrod Flat, to the detriment of recreational users and other Indian tribes.

Specifically, plaintiffs want the Court to order a new Section 106 analysis, in consultation with plaintiffs (which, as discussed above, the Court lacks authority to do), that will result in a memorandum of agreement or remedial plan that includes "additional remedies" including the following:

- Enlarging the Coonrod Flat boundaries;
- Installing and maintaining a fence around the enlarged Coonrod Flat boundaries;
- Creating a "protection plan" for the enlarged Coonrod Flat;
- Excluding Coonrod Flat from the Bartle Allotment grazing permit;
- Enjoining recreational use and other activities at Coonrod Flat; and
- Granting plaintiffs legal title to Coonrod Flat.

ECF 149 at 5, 10-11. The Court has already acknowledged that it "does not have the authority to circumvent federal tribal recognition processes and allow for federal recognition of the WWT in any grant of relief." ECF 147 at 28. The Court should decline to do so here, and should reject all of plaintiffs' "additional remedies" that would result in their being granted exclusive use of Coonrod Flat.

1. The "Additional Remedies" Exceed The Scope Of The Order And Complaint.

As an initial matter, plaintiffs' requests exceed the scope of the Court's summary judgment order to the extent that plaintiffs seek to enjoin activities and recreational uses other than those permitted by the Bartle Allotment grazing permit. The Court's order was limited to findings regarding the grazing permit, and it made no findings about any other activity at Coonrod Flat.

Additionally, most of the relief plaintiffs request is being raised for the first time in their remedies brief, and was not raised in the operative complaint, or on summary judgment (which would have been inappropriate in any event), so is not addressed by or encompassed in the Court's order. For example, plaintiffs have never mentioned anything about growing and harvesting ceremonial tobacco in any of their multiple complaints or briefing to date, and there is no claim related to tobacco in this case.

Because these issues are being raised for the first time now, and/or have nothing to do with the Bartle Allotment grazing permit and the actual claims adjudicated by the Court, the Court should reject all of plaintiffs' "additional remedies" in their entirety.

2. The Court Lacks Authority To Order The "Additional Remedies".

The Court lacks the authority to require the Forest Service to enter into a memorandum of agreement or a remedial plan with plaintiffs because that is not a discrete act that the Forest Service is

legally required to take. Nor is the Forest Service legally required to enlarge Coonrod Flat boundaries, fence Coonrod Flat, create a protection plan for Coonrod Flat,[6] exclude Coonrod Flat from the Bartle Allotment, or allow plaintiffs to grow and harvest tobacco at Coonrod Flat. Nor can the Court order the Forest Service to grant title to Coonrod Flat to plaintiffs or to grant plaintiffs exclusive use of the site while excluding recreational users and other Indian tribes. Since none of the "additional remedies" are actions that the Forest Service is legally required to do, the Court cannot compel them.

3. Policy And Other Considerations Warrant Denial Of The Requested Relief.

a) The Forest Service Cannot Exclude Anyone From Coonrod Flat.

Plaintiffs' requests for "additional remedies," if granted, would amount to awarding plaintiffs the exclusive right to use Coonrod Flat. Not only does the Court lack the authority to grant such relief, but such relief would be contrary to the Multiple-Use Sustained-Yield Act of 1960 ("MUSYA"), 16 U.S.C. §§ 528-31, and other policies that govern the use of National Forest System lands that require the Forest Service to balance competing uses and address conflicting needs of different segments of the community. *See* Second Napper Decl., ¶¶ 31-35.

The MUSYA states that "[i]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." *Id.* § 528. Similarly, the National Forest Management Act of 1976, 16 U.S.C. §§ 1600-14, requires that the national forests be managed to "provide for multiple use and sustained yield of the products and services obtained therefrom . . . and [must] include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness[.]" *Id.* § 1604(e)(1). "Congress has consistently acknowledged that the Forest Service must balance competing demands in managing National Forest System lands [and], since Congress' early regulation of the national forests, it has never been the case that 'the national forests were . . . to be "set aside for non-use."'" *The Lands Council v. McNair*, 537 F.3d 981, 990 (9th Cir. 2008) (*en banc*) (quoting *United States v. New Mexico*, 438 U.S. 696, 716 n.23 (1978) (citing 30 Cong. Rec. 966 (1897) (statement of Rep. McRae)).

[6] *See* ECF 131-2, Ex. E (Henn Decl.) (stating that NHPA section 110 does not require Forest Service create to protection plans on a site-by-site basis and the Shasta-Trinity Forest Plan contains guidelines and standards regarding preservation of historic properties consistent with section 110).

Additionally, under the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701-87, Congress has required that "goals and objectives be established by law as guidelines for public land use planning, and that management be on the basis of multiple use and sustained yield unless otherwise specified by law." *Id.*, § 1701(a)(7). The term "multiple use" means "the management of the public lands and their various resource values so that they are utilized in the combination that will best meet the present and future needs of the American people . . . including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values." *Id.*, § 1702(c).

Consistent with these requirements, the Shasta-Trinity National Forest's Plan "establishes the framework for multiple-use management through an ecosystem approach. The Forest Plan provides for an integration of resource values including old-growth forest habitat, high quality water and fisheries, riparian habitat, forage, wood products outputs, recreation, minerals, visual quality, wild and scenic rivers, and wilderness for the benefit of the American people." Second Napper Decl., ¶ 34. Under these policies, the Forest Service administers timber sourcing, rangeland, water usage, recreational use, and wildlife on the national forests, and no one use is superior to any other. *Id.*, ¶ 33.

Given these governing policies, the Forest Service cannot exclude potential users of Coonrod Flat, including hikers, campers, foragers, mountain bikers, cross-country skiers, and other recreators. *Id.*, ¶ 35. Additionally, other tribes, including the federally recognized Pit River Tribe and other branches of the non-federally recognized Winnemem Wintu Tribe, all have an interest in, and use, the Coonrod Flat area for their ceremonies, and cannot be excluded. *Id.*, ¶ 36. Therefore, the Court should not order additional remedies that would result in plaintiffs having exclusive use of Coonrod Flat.

b) Coonrod Flat Should Not Be Fenced.

Plaintiffs argue that the Forest Service violated the terms of the Programmatic Agreement (PA) by not demarcating or excluding Coonrod Flat from the Bartle Allotment and monitoring the site. But they already made this argument in summary judgment briefing, and the Court did not rule in their favor. The Forest Service argued that this was a new argument raised for the first time on summary judgment, but the Court ruled that it would consider plaintiffs' assertions under "the PA in the context of the Coonrod Claim." ECF 147 at 4. Ultimately, the Court did not rule that the Forest Service violated

the NHPA by not demarcating, excluding, or monitoring Coonrod Flat; the only violation it found was that the Forest Service should have, but did not, consult with plaintiffs under 36 C.F.R. § 800.2.[7] Accordingly, the Court should not order fencing of Coonrod Flat because the Court did not rule that the Forest Service violated the NHPA by not demarcating, excluding, and monitoring the site.[8]

Additionally fencing is not an appropriate remedy because fencing would be impractical, time-consuming, costly, and controversial with locals in the community, other Indian tribes, and recreational users who frequent the site.

Plaintiffs correctly note that, almost 15 years ago, the Forest Service and plaintiffs had informal discussions regarding the construction of a fence at Coonrod Flat. *See, e.g.*, AR 190, 197-200, 210, 216-21, 903, 906, 921-22, 926-29. However, there was never a formal agreement with plaintiffs regarding the construction or maintenance of a fence at Coonrod Flat. Second Napper Decl., ¶ 9. All discussions with plaintiffs at that time made clear that any fence would be a "let-down" fence that plaintiffs would be responsible for erecting, maintaining, and taking down seasonally every year before and after their ceremonies, and that the fence could not restrict public access to the site. *See* AR 921-22, 929, 209, 218. Back in 2005, the Forest Service provided fencing materials for plaintiffs to use to erect a fence, but they never did. *See* AR 929; Second Napper Decl., ¶ 11-13.

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[7] Although the Court already has found this violation, plaintiffs now argue that they were entitled to be consulted as "Native Americans" under the terms of the PA. It is unclear why they raise this now, since the Court has already ruled in their favor on consultation. To the extent that plaintiffs refer to "Native Americans" in the PA as opposed to "Indian tribes" in the NHPA regulations in an attempt to argue that they have some sort of elevated status under the PA, the Court should reject this argument. The same page of the PA that plaintiffs refer to in their brief makes clear that "Native American concerns are addressed in Section 101(d)(6) of the NHPA [which is 16 U.S.C. § 470(a)(d)(6)], and in 36 C.F.R. 800." AR 103. Those statutes and regulations deal specifically with federally recognized Indian tribes, not "Native Americans." *See* 16 U.S.C. § 470(d)(6)(A) and 36 C.F.R. § 800.1, *et seq*. Moreover, the Court recognized in its order that "[u]nder the terms of the PA, defendants were required to comply with 36 C.F.R. § 800 for undertakings that may adversely affect historic properties . . ." ECF 147 at 22. Thus, the use of the term "Native Americans" in the PA does not accord plaintiffs a higher status than they are entitled to under the NHPA statutes and regulations. The plain language of the PA indicates that it is not meant to expand rights/obligations but, rather, to expedite the compliance process. *See* AR 71 ("The purpose of this PA is to expedite compliance with that portion of the AHCP's regulations (36 CFR 800) implementing Section 106 of the NHPA . . .").

[8] The Forest Service regularly monitors the site, including between approximately 6-10 times each summer, and also before Winnemem Wintu ceremonies, taking photographs and removing garbage and cow patties from the ceremonial area as needed. Second Napper Decl., ¶ 32.

The decision to construction a fence at Coonrod Flat would be a federal undertaking requiring lengthy and expensive analysis under both the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA). *Id.*, ¶ 14.[9] The Forest Service estimates that NEPA and NHPA analysis would likely take approximately up to 12 months and would cost the Forest Service approximately $75,000-150,000 to complete. *Id.*, ¶ 15. The NEPA and NHPA analysis would require that the Forest Service consult several groups regarding matters such as the proper boundary for the fence, and the location of multiple access points for the fence. *Id.*, ¶¶ 15-17. Different groups use the Coonrod Flat area differently, and the Forest Service anticipates that it would be difficult to get these groups to agree on these and other issues, which will require substantial time and effort to resolve. *Id.*

Fencing at Coonrod would also be difficult and expensive to maintain because heavy snowfall, animals, and downed trees typically damage fences in the area. *Id.*, ¶ 21. This is true of both permanent fences and temporary fences that might be built in the area. *Id.* As a result, permanent fences have a life span of about 2 to 3 years, and "let-down" fences last around 10 years if they are properly maintained. Second Napper Decl., ¶ 22-23. The Forest Service estimates that the cost to actually build a "let-down" fence at Coonrod Flat, assuming that the fence covers approximately 25-27 acres, would be about $17,500. *Id.*, ¶ 24. This figure excludes annual maintenance, the cost of erecting and removing the fence annually, and routine monitoring to ensure no damage and that cows do not enter the area, which would cost a few thousand dollars per year, at a minimum. *Id.* Additionally, if the fenced area needed to be larger to address access and visual concerns of other interested groups, the Forest Service estimates that the cost of a fence would be an additional $17,500 per mile of fence. *Id.*

Additionally, fencing of Coonrod Flat would not guarantee the absence of all cattle at the site, and there may be occasional trespass in the area, for example, if someone leaves an access point in the fence open. *Id.*, ¶ 19. A fence would exclude wildlife from Coonrod Flat if they are unable to pass through, over, or under the fence. *Id.*, ¶ 29. And, since any fence built at Coonrod Flat would likely

[9] Although the Forest Service's prior discussions with plaintiffs about a fence at Coonrod Flat ten to fifteen years ago did not include any discussion about NEPA and NHPA analysis, the Forest Service has concluded that NEPA and NHPA analysis likely would have been required back then, and NEPA and NHPA analysis would be required now before the Forest Service could build a fence at Coonrod Flat. Second Napper Decl., ¶ 20.

include a barbed-wire strand at the top of the fence, there would be an inherent risk of harm to cattle, wildlife, recreational users, and logging equipment that pass through or frequent the area. *Id.*, ¶ 30.

Moreover, any fence constructed at Coonrod Flat could not exclude Indian tribes or recreational users from visiting and using the site. *Id.*, ¶ 19. Indeed, the Forest Service expects that a fence likely would be met with resistance, opposition, and possible vandalism by local residents and others who frequent the area, resulting in additional costs to the Forest Service for repair or replacement of the fence. *See id.*, ¶¶ 27-28. Coonrod Flat is located in Siskiyou County, which is an open-range county. *Id.*, ¶ 27. The idea of fencing off land in Siskiyou County is contrary to the long-standing tradition of openness on both public and private lands there and is likely to be met with resistance. *Id.* Finally, erecting a fence at Coonrod Flat may set a precedent prompting other groups to demand that the Forest Service erect fencing to serve their own individual interests, which would be unworkable. *Id.*, ¶ 26.

c) The Forest Service Cannot Grant Plaintiffs Title To Coonrod Flat.

Ignoring the many legal and policy reasons why the Forest Service cannot simply grant plaintiffs title to Coonrod Flat, which themselves would require a lengthy brief to explain, the Forest Service cannot give plaintiffs Coonrod Flat for the basic reason that they are not the only Indian tribe with interests in Coonrod Flat. Second Napper Decl., ¶ 49; *see* AR 232 ("The Forest has concluded that Coonrod Flat is eligible for inclusion in the NRHP as a TCP for its association with events of a spiritual or ceremonial nature and as a place of mythological importance to the Winnemem Wintu Tribe other members of the large Wintu community and the Pit River Tribe. It is important as a ceremonial area and a doctoring place"). The view of the features of Mt. Shasta from Coonrod Flat is important to both the Winnemem Wintu and the Pit River Tribe. *See* AR 232. Giving Coonrod Flat to any one group would be an affront to the other groups and individuals who have ties to and interests in Coonrod Flat.

d) Coonrod Flat's Eligibility For the National Register Has Been Determined.

There is no need for the Court to order the Forest Service to obtain a determination that Coonrod Flat is eligible to be listed on the National Register of Historic Places; that has already occurred. *See* AR 232; Second Napper Decl., ¶ 48. As for plaintiffs' demand that the Forest Service enlarge the Coonrod Flat boundaries and submit the new boundaries for an eligibility determination, the primary basis for that request appears to be to include archaeological resources in the area, but Forest Service

surveys have not found any archaeological resources in the Coonrod Flat area. *See id.*, ¶¶ 40, 50; ECF 131-2, Ex. E, ¶ 6 (Henn Declaration). Therefore, it is unclear how enlarging the boundaries would be beneficial, and doing so would require substantial time and effort by the Forest Service. Second Napper Decl., ¶ 50. Finally, enlarging the boundaries for any reason would be a lengthy and time-consuming process that would require input from other Indian tribes and individuals. *Id.*

e) The Forest Service Already Allows Plaintiffs To Grow And Harvest Tobacco.

The Forest Service does not prevent tobacco from growing and being harvested at Coonrod Flat, although the Forest Service cannot monitor and enforce who picks the tobacco. *Id.*, ¶ 51. In fact, a Forest Service archaeologist has helped plaintiffs obtain tobacco seeds and use Forest Service burn piles for planting the tobacco. *Id.* Additionally, the Forest Service has agreed to protect tobacco from other project activities that might destroy it, and there has been at least one Forest Service project that excluded the use of burn piles that contained tobacco at plaintiffs' request, even though the Forest ordinarily would reuse burn piles. *Id.*

f) The Permittee Is Already Using Various Range Management Techniques To Manage Livestock Distribution At Coonrod Flat.

Finally, the Court need not order "additional remedies" because, among other reasons, the grazing permittee, Truax Cattle, is already using range management techniques to manage livestock distribution at Coonrod Flat (including herding cattle on horseback, using trained herding dogs, and locating water stations, salting sites, and mineral supplements in locations to draw cattle away from Coonrod Flat), and is willing to increase its use of these approaches, and to help clean up the ceremonial area, around the time of plaintiffs' ceremonies. *See* Second Napper Decl., ¶¶ 29-31.

The Forest Service's discussion of range management techniques here and in the Second Napper Decl. does not waive the Forest Service's position that the Court cannot order the Forest Service to implement any of these measures under APA section 106, and is in no way binding on or enforceable against the Forest Service by plaintiffs. The Forest Service is providing this information strictly for informational purposes and as another reason why the Court should not order the "additional remedies" plaintiffs seeks.

III.

CONCLUSION

For all of the foregoing reasons, and as argued in its opening brief, the Forest Service respectfully requests that the Court deny plaintiffs' request for injunctive relief in its entirety.

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