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11
12 **UNITED STATES DISTRICT COURT**
13
14 **DISTRICT OF OREGON**
15

**HEREDITARY CHIEF WILBUR
SLOCKISH, a resident of Washington,
and an enrolled member of the
Confederated Tribes and Bands of the
Yakama Nation,**

**HEREDITARY CHIEF JOHNNY
JACKSON, a resident of Washington, and
an enrolled member of the Confederated
Tribes and Bands of the Yakama Nation,**

**CAROL LOGAN, a resident of Oregon,
and an enrolled member of the
Confederated Tribes of Grande Ronde,**

**CASCADE GEOGRAPHIC SOCIETY,
an Oregon nonprofit corporation,**

and

**MOUNT HOOD SACRED LANDS
PRESERVATION ALLIANCE, an
unincorporated nonprofit association,**

Plaintiffs,

v.

**UNITED STATES FEDERAL
HIGHWAY ADMINISTRATION, an
Agency of the Federal Government,**

Case No. 3:08-cv-1169-ST

**THIRD AMENDED
COMPLAINT**

**SUIT FOR
DECLARATORY, EQUITABLE
AND INJUNCTIVE RELIEF;
AND FOR DAMAGES**

**UNITED STATES BUREAU OF LAND
MANAGEMENT, an Agency of the
Federal Government,**

**ADVISORY COUNCIL ON HISTORIC
PRESERVATION, an Agency of the
Federal Government,**

and

**MATTHEW GARRET, in his official
capacity as Director of the OREGON
DEPARTMENT OF
TRANSPORTATION, an Agency of the
State of Oregon,**

Defendants.

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Plaintiffs allege:

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INTRODUCTION

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Plaintiffs seek to preserve, protect, and rehabilitate historical and archaeological

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resources, and Native American sacred and cultural sites, and in the area of Mount Hood,

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in Oregon. They have been damaged, and are at further risk of further damage, by the

11

U.S. 26: Wildwood-Wemme highway widening project. This project is also referred to as

12

the U.S. 26: Salmon River Bridge to East Lolo Pass Road Project. The project area at

13

issue lies within and adjacent to a bow-shaped right-of-way of U.S. 26 owned by the

14

State of Oregon Department of Transportation, adjacent to the Mountain Air Park

15

subdivision between the villages of Wildwood and Wemme, near the town of Welches, in

16

Clackamas County Oregon. It also includes the northeast corner of the Wildwood

17

National Recreation Area, north of U.S. 26, which is owned by the United States of

1 America and managed by Defendant Bureau of Land Management (hereinafter “BLM”).
2 Defendant BLM has designated this area in its Salem District Resource Management Plan
3 as the A.J. Dwyer Scenic Area. The damage has occurred and will occur as a result of the
4 failure of the Defendants to carry out the applicable laws and regulations for which they
5 are respectively responsible. The individual Native American Plaintiffs also seek redress
6 for denial of their First and Fourteenth Amendment right to exercise their religion; and
7 redress for for deprivation of life, liberty, and property without due process of law, under
8 the Fifth and Fourteenth Amendments to the U.S. Constitution.

9 Plaintiffs seek:

- 10 (1) declarations that Defendants have violated specific provisions of the U.S.
11 Constitution, and of federal laws and regulations;
- 12
13 (2) declarations that in violating the U.S. Constitution, and federal laws and
14 regulations, the Defendants have violated the civil and other rights of the
15 Plaintiffs.
- 16
17 (3) declarations that the Native American Plaintiffs have continuing rights to
18 use, enjoy, and worship at, the sacred historic and cultural resources and
19 sites that are the subject of this Complaint;
- 20
21 (4) an injunction to require Defendants to comply with applicable laws
22 and regulations; to remediate damage to the historic,
23 archaeological, sacred sites and other resources associated with
24 work on the U.S. 26: Wildwood-Wemme project; and to require
25 Defendants to permit the Native American Plaintiffs to use, enjoy,
26 and worship at, the sacred historic and cultural resources and sites
27 that are the subject of this Complaint;
- 28
29 (5) the assessment of reasonable costs, expenses, and attorney fees; and
30
31 (6) other equitable relief that the Court may deem appropriate.
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33

34 JURISDICTION

35 2.

1 Jurisdiction is invoked pursuant to 5 U.S.C. § 702; 25 U.S.C. § 3013; 28 U.S.C.
2 §§ 1331, 1343(3), and 1343(4); and 42 U.S.C. § 2000bb-1(c). This action is brought
3 pursuant to 5 U.S.C. §§701-706; 16 U.S.C. § 470(a) et. seq.; 16 U.S.C. § 470aa et seq.; 23
4 U.S.C. § 101 et seq.; 25 U.S.C. § 3001 et. seq.; 42 U.S.C. §§ 1983 and 1988 and the First,
5 Fifth and Fourteenth Amendments to the Constitution of the United States; 42 U.S.C. §
6 2000bb et. seq.; 42 U.S.C §§ 4321 et. seq.; 43 U.S.C. § 1701 et. seq.; 49 U.S.C § 303;
7 and federal common law.

8 **VENUE**

9 **3.**

10 Venue of this court is invoked pursuant to 28 U.S.C. § 1391(b). A substantial
11 portion of the events giving rise to the claims occurred within this Division of Oregon, as
12 alleged below. The segment of U.S. Highway 26 from the Salmon River Bridge to East
13 Lolo Pass Road, and the sacred sites and cultural, historic, and archaeological resources
14 impacted by the highway widening project, are all located within unincorporated
15 Clackamas County, Oregon. The Defendants made the decisions to approve the highway
16 widening project, for the most part, in Salem, Oregon, and the metropolitan area of
17 Portland, Oregon.

18 **PARTIES AND STANDING**

19 **4.**

20 Plaintiff Wilbur Slockish is a resident of the State of Washington. He is an
21 Hereditary Chief, and an enrolled member of the Confederated Tribes of the Yakama
22 Nation. His ancestry includes the Klickitat and Cascade peoples who have frequented and
23 made use of the territory that includes the site that is the subject of this Complaint, and

1 for whom the area of Mount Hood is sacred. He is a direct descendant of Sla-kish, a
2 signatory to the 1855 Treaty between the United States and the Confederated Tribes of
3 the Yakama Nation. Slockish uses and enjoys the affected area of the U.S. 26 Wildwood-
4 Wemme highway widening project, for religious, cultural, recreational, and aesthetic
5 purposes.

6 A. Slockish has been harmed by the damage to the historic, cultural, and
7 natural resources, in which he has an interest, located within and adjacent
8 to the A.J. Dwyer Scenic Area and within the U.S. 26 Wildwood-Wemme
9 highway widening project area.

10 B. Slockish has been harmed by the damage to the sacred sites, in which he
11 has an interest, located within and adjacent to the A.J. Dwyer Scenic Area
12 and within the U.S. 26 Wildwood-Wemme highway widening project
13 area, and by the project's interference with his ability to make use of the
14 sites for spiritual and religious purposes.

15 C. Slockish, individually as an interested party, and as an enrolled member of
16 the Confederated Tribes of the Yakama Nation, has been harmed by the
17 breach of his and his Tribe's respective entitlements to the procedural
18 protections, including consultation, provided by the various federal
19 statutes governing the U.S. 26 Wildwood-Wemme highway widening
20 project.

21 **5.**

22 Plaintiff Johnny Jackson is a resident of the State of Washington. He is an
23 Hereditary Chief, and an enrolled member of the Confederated Tribes of the Yakama

1 Nation. His ancestry includes the Cascade and Klickitat peoples who have frequented and
2 made use of the territory that includes the site that is the subject of this Complaint, and
3 for whom the area of Mount Hood is sacred. Jackson uses and enjoys the affected area of
4 the U.S. 26 Wildwood-Wemme highway widening project, for religious, cultural,
5 recreational, and aesthetic purposes.

6 A. Jackson has been harmed by the damage to the historic, cultural, and
7 natural resources, in which he has an interest, located within and adjacent
8 to the A.J. Dwyer Scenic Area and within the U.S. 26 Wildwood-Wemme
9 highway widening project area.

10 B. Jackson has been harmed by the damage to the sacred sites, in which he
11 has an interest, located within and adjacent to the A.J. Dwyer Scenic Area
12 and within the U.S. 26 Wildwood-Wemme highway widening project
13 area, and by the project's interference with his ability to make use of the
14 sites for spiritual and religious purposes.

15 C. Jackson, individually as an interested party, and as an enrolled member of
16 the Confederated Tribes of the Yakama Nation, has been harmed by the
17 breach of his and his Tribe's respective entitlements to the procedural
18 protections, including consultation, provided by the various federal
19 statutes governing the U.S. 26 Wildwood-Wemme highway widening
20 project.

21 **6.**

22 Plaintiff Carol Logan is a resident of Oregon, and is an enrolled member of the
23 Confederated Tribes of Grande Ronde. Her ancestry includes the Clackamas peoples who

1 have frequented and made use of the territory that includes the site that is the subject of
2 this Complaint, and for whom the area of Mount Hood is sacred. She is a member of the
3 Mount Hood Sacred Lands Preservation Alliance (hereinafter "MHSLPA"). Logan and
4 MHSLPA use the affected area of the U.S. 26 Wildwood-Wemme highway widening
5 project, for cultural, religious, recreational, and aesthetic purposes. She has since the
6 1980s engaged in advocacy to preserve and protect Native American sacred lands within
7 the Mount Hood area, including the project area at issue in this dispute.

8 A. Logan has been harmed by the damage to the historic, cultural, and natural
9 resources, in which she has an interest, located within and adjacent to the
10 A.J. Dwyer Scenic Area and within the U.S. 26 Wildwood-Wemme
11 highway widening project area.

12 B. Logan has been harmed by the damage to the sacred sites, in which she
13 has an interest, located within and adjacent to the A.J. Dwyer Scenic Area
14 and within the U.S. 26 Wildwood-Wemme highway widening project
15 area, and by the project's interference with her ability to make use of the
16 sites for spiritual and religious purposes.

17 C. Logan, as an interested party, has been harmed by the breach of her
18 entitlement to the procedural protections, including consultation, provided
19 by the various federal statutes governing the U.S. 26 Wildwood-Wemme
20 highway widening project.

21 7.

22 Plaintiff Cascade Geographic Society (hereinafter "CGS") is a nonprofit
23 corporation based in Rhododendron, Oregon. It is dedicated to preserving and promoting

1 cultural, historical, and natural resources of the Cascade Mountain Range and all the
2 lands and waters that it influences. Since the 1980s, CGS has undertaken research into the
3 Native American, Pioneer, and other history in the Mount Hood Area. It has coordinated
4 preservation efforts with Native Americans, descendants of Pioneers, the Dwyer Family,
5 and other interested parties, directed toward these resources. Members of CGS, including
6 Michael P. Jones, and Plaintiffs Wilbur Slockish, Johnny Jackson, and Carol Logan use
7 and enjoy the area affected by the U.S. 26 Wildwood-Wemme highway widening project,
8 for cultural, recreational, and aesthetic purposes.

9 A. CGS and its members have been harmed by the damage to the historic,
10 cultural, and natural resources, in which she has an interest, located within
11 and adjacent to the A.J. Dwyer Scenic Area and within the U.S. 26
12 Wildwood-Wemme highway widening project area.

13 B. CGS as an interested party, including its members, has been harmed by the
14 breach of its entitlement to the procedural protections, including
15 consultation, provided by the various federal statutes governing the U.S.
16 26 Wildwood-Wemme highway widening project.

17 **8.**

18 Defendant Federal Highway Administration (hereinafter "FHWA") is an agency
19 of the United States government, within the Department of Transportation, and
20 administers the Federal Aid Highway Program in Oregon authorized by 23 U.S.C. § 101
21 et. seq., including the U.S. 26: Wildwood-Wemme project. FHWA is the lead agency for
22 the U.S. 26: Wildwood-Wemme project.

23 **9.**

1 Defendant U.S. Bureau of Land Management (hereinafter "BLM"), is an agency
2 of the United States government, within the Department of the Interior. It manages the
3 Wildwood Recreation Area, which is owned by the United States of America. The A.J.
4 Dwyer Scenic Area is the northeast corner of the Wildwood Recreation area. Defendant
5 BLM has designated the A.J. Dwyer Scenic Area as a "Special Area" within its Salem
6 District Resource Management Plan. The A.J. Dwyer Scenic Area located north of U.S.
7 26 lies partially within the project area of the U.S. 26 Wildwood-Wemme highway
8 widening project.

9 **10.**

10 Defendant Advisory Council on Historic Preservation (hereinafter "ACHP") is an
11 agency of the United States government. It is charged with advising other federal
12 agencies as to the responsibilities and obligations of the latter under the National Historic
13 Preservation Act (hereinafter "NHPA")

14 **11.**

15 Defendant Matthew Garrett is the Director of the Oregon Department of
16 Transportation (hereinafter "ODOT"), which is the agent of Defendant FHWA for the
17 Federal Aid Highway Program pursuant to 23 U.S.C. § 315 and Oregon Revised Statutes
18 ORS 366.556 to 366.568. As Director of ODOT, Defendant Garrett supervises the
19 department. ORS 184.620. His duties include serving as the administrative head of the
20 department; hiring, assigning, and coordinating personnel of the department; and
21 administering the laws of the state concerning transportation. ORS 184.633(1)(a)-(c). He
22 shall prescribe regulations for the government of the department, the conduct of its
23 employees, and the assignment and performance of its business...in a manner consistent

1 with applicable law. ORS 184.633(2). He may delegate to any of the employees of the
2 department the exercise or discharge in the director's name of any power, duty or
3 function of whatever character, vested in or imposed by law upon the director. ORS
4 184.633(3). The official act of any such person so acting in the director's name and by
5 the authority of the director shall be considered to be an official act of the director. *Id.* He
6 is an "officer" having control over state highways, and has a duty to enter into such
7 contracts, appoint such officers, and do any other act or thing necessary to fully meet the
8 requirements of the federal government, of officers acting under applicable federal aid
9 highway statutes, and of other federal aid furnished. ORS 366.566. Defendant Garrett has
10 served as ODOT's Director since December 19, 2005. Plaintiffs assert claims against
11 Garrett in his official capacity under the *Ex Parte Young* doctrine for prospective
12 declaratory, equitable, and injunctive relief for ongoing violations the U.S. Constitution
13 and federal law.

14 GENERAL ALLEGATIONS

15 12.

16 Prior to European settlement, several Native American Indian groups, including
17 but not limited those belonging to Sahaptin and Chinookan language groups, used and
18 inhabited the area around Mount Hood in Oregon. The Klickitat (Sahaptin), Cascade and
19 Clackamas (Chinookan) peoples were among these groups. Plaintiffs Slockish, Jackson,
20 and Logan (hereinafter the "Native American Plaintiffs") identify their ancestors as
21 members of these groups. In the mid-19th Century, a series of treaties removed Native
22 Americans from these areas to the Yakama (Washington), Grande Ronde and Warm
23 Springs (Oregon), and other reservations. However, many of these Native Americans

1 resisted removal to the reservations and continued to live along the Columbia River and
2 surrounding areas, including the Cascade Mountains.

3 **13.**

4 The site that is the subject of this Complaint, the A.J. Dwyer Scenic Area and an
5 adjacent right-of-way of the Oregon Department of Transportation, is part of a complex
6 of sacred, interrelated and interconnected sites in the Mount Hood area. In addition to
7 Mount Hood itself, these other sites include, but are not limited to, Enola Hill, Owl
8 Mountain, Zig Zag Mountain, Hunchback Mountain, Huckleberry Mountain, Salmon
9 River Butte, North Mountain, Crutcher's Bench, Flag Mountain, Big Laurel Hill, Tom,
10 Buzzard's Butte, Wolfe Butte, Devil's Peak, Devil's Backbone, Bear Creek, and Indian
11 Meadow. The areas and sites have, since long before European settlement, been used for
12 religious and spiritual purposes such as vision quests, ancestral burials, food gathering,
13 hunting and fishing,

14 **14.**

15 Reflective of the sacred nature of the Mount Hood area, individual Native
16 Americans, including the Native American Plaintiffs in this case, and organized groups of
17 Native Americans, have over decades sought to defend these sacred areas of Mount Hood
18 from despoliation and desecration. These efforts have included both litigation and
19 advocacy.

20 **15.**

21 The Native Americans Plaintiffs in this case were each active in the efforts of the
22 group Native Americans for Enola, which in the 1990s sought to prevent the desecration
23 of Enola Hill by clear-cut logging authorized by the U.S. Forest Service. *Native*

1 *Americans for Enola, et al., v. U.S. Forest Service*, U.S. District Court of Oregon Nos.
2 90-826-PA; 92-1534-JE; 95-1306 MA.

3 **16.**

4 Elders of the Confederated Tribes of the Yakama Nation, including Wilferd
5 Yallup and Walter Speedis, both in their individual and official Tribal capacities, have
6 been particularly active in the defense of and advocacy on behalf of sacred and cultural
7 sites on Mount Hood. These efforts have included, but are not limited to:

8 A. A letter dated January 17, 1991 from Leo Aleck, General Secretary of the
9 Yakima Indian Nation General Council to ODOT expressing concern over
10 road construction proposals along Mount Hood that could impact sacred
11 grounds;

12 B. Recorded testimony by Yallup, as an official representative of the
13 Confederated Tribes of the Yakima Nation on January 24, 1991 during which
14 he identified to ODOT officials the site that is the subject of this Complaint as
15 a location of burial grounds;

16 C. A letter from Yallup in 1992 identifying Mount Hood as a “usual and
17 accustomed place” of the Yakima Indian Nation.

18 **17.**

19 Plaintiffs Slockish and Jackson are both nephews of, and received the learning
20 and wisdom of, Yallup and Speedis concerning the sacred and cultural resources of the
21 Mount Hood area. Since the passing of Yallup and Speedis, Plaintiffs Slockish and
22 Jackson have assumed the roles of Yakama tribal Elders.

23 **18.**

1 The Native American history of the Mount Hood area includes complex
2 migrations in search of food sources. A network of Indian Trails developed throughout
3 the area. Native Americans of the Pacific Northwest established villages, campsites, and
4 burial grounds along these trails. The site that is the subject of this Complaint includes
5 such trails.

6 **22.**

7 European settlers took advantage of this existing network of trails. Pioneer
8 Samuel Barlow utilized such trails, one of which developed into the Barlow Road, the
9 westernmost segment of the Oregon Trail. A number of remnant segments of the Barlow
10 Road traverse the U.S. 26: Wildwood-Wemme project area. When first constructed, U.S.
11 26, furthermore, roughly paralleled the route of the Indian Trail / Barlow Road.

12 **23.**

13 In the 1930s, Robert Dwyer preserved a corridor of Douglas Fir trees along U.S.
14 26 as a timber buffer. The timber was part of a 1933 Timber Patent issued to Dwyer
15 Lumber Company. Dwyer, a member of the Oregon Transportation Commission, left the
16 buffer to honor his father, A.J. Dwyer. The Oregon Highway Department established a
17 memorial corridor in that name in 1948-49. In 1984, Robert Dwyer initiated the process
18 with Defendant BLM to establish the present A.J. Dwyer Scenic Area within its Salem
19 District Resource Management Plan.

20 **24.**

21 The sacred, historic, cultural, and natural resources that are the subject of this
22 Complaint result from this complex of natural, Native American, Pioneer, and logging
23 histories. They are as follows:

1 highway widening project, an opening in the continuous guardrail along U.S. 26 provided
2 access to the campsite.

3 **26.**

4 Defendant FHWA and its agent ODOT widened U.S. 26 from two to four lanes in
5 the 1980s. That project included an Environmental Impact Statement (hereinafter "EIS")
6 pursuant to the National Environmental Policy Act (hereinafter "NEPA"), 42 U.S.C. §
7 4321 et seq. During the development of the EIS, archaeologist Richard Pettygrew
8 identified an archaeological site as a potential Barlow Road stone toll booth. This artifact
9 was, and remains, located with the U.S. 26 right-of-way owned by ODOT. It is within the
10 project area for the current U.S. 26: Wildwood-Wemme project.

11 **27.**

12 During the 1980s highway widening project, a rock cluster was identified adjacent
13 to the project area. This rock cluster was located on land owned by Defendant BLM, in
14 the corner of the Wildwood Recreation Area property that is north of U.S. 26; or
15 alternatively, just within the U.S. 26 right-of-way owned by ODOT. This site is within
16 the current project area for the U.S. 16 Wildwood-Wemme project. Pettygrew examined
17 the rock cluster as a potential Pioneer or Native American gravesite, and found no human
18 remains. Pettygrew had no Native Americans on his archaeological team, and the
19 distribution list for his report included no Native Americans. Later, Yakama elder
20 Wilfred Yallup independently identified the rock cluster as a burial cairn identifying
21 surrounding graves.

22 **28.**

1 Defendant FHWA and its agent ODOT undertook planning for the U.S. 26
2 Wildwood-Wemme project, and in August of 2006 issued its draft Environmental
3 Assessment (hereinafter "draft EA") pursuant to NEPA. The project's Key Number is
4 12840. FHWA and ODOT selected as the "preferred alternative" the "widen to the north"
5 alternative. This alternative would add fourteen (14) feet of paving on the north side of
6 U.S. 26, in order to provide an equal amount of space for a center refuge turn lane in the
7 middle of the highway. This alternative would destroy the rock cluster that Yakama elder
8 Wilfred Yallup had identified as a burial cairn, because this resource was so close to the
9 pavement of U.S. 26 to begin with, after the highway widening that occurred in the
10 1980s. It would also involve substantial grading, earth moving, and tree removal,
11 including in the area of the campsite used for prayer and meditation, and the surrounding
12 burial grounds; although these were not identified in the EA. The project would also
13 involve landscape changes and substantial tree removal within and adjacent to the A.J.
14 Dwyer Scenic Area, damage to the Third Priority Barlow Road Segment designated by
15 Clackamas County, and possible damage to the potential stone toll booth identified by
16 Pettygrew. The EA either did not select or did not propose feasible alternatives that
17 would have provided for the protection of these resources.

18 **32.**

19 The draft EA included a June 10, 2005 archaeological report by archaeologist
20 Patrick O'Grady. This report was not disclosed to the public. The report makes no
21 reference to the potential Barlow Road stone toll booth previously identified by Richard
22 Pettygrew in 1985. O'Grady failed to locate the rock cluster that had been examined by
23 Pettygrew in 1986 and later identified by Yakama elder Wilfred Yallup as a burial cairn.

1 Neither O'Grady, FHWA, nor ODOT provided the report to the Confederated Tribes of
2 the Yakama Nation, Plaintiff Slockish, Plaintiff Jackson, or Plaintiff Logan; nor
3 consulted any of these parties for their input as to the significance of the rock cluster.

4 **33.**

5 The draft EA included a Historic Resources Technical Report, which analyzed the
6 project under the terms of a 2001 Programmatic Memorandum of Agreement for Minor
7 Transportation Projects. The EA did not include a separate Section 106 analysis under the
8 National Historic Preservation Act, 16 U.S.C. 470f, or a full memorandum of agreement
9 for the U.S. 26: Wildwood-Wemme highway widening project.

10 **34.**

11 As part of the EA process, neither Defendant FHWA or its agent ODOT consulted
12 with the Confederated Tribes of the Yakama Nation, or with any of the Plaintiffs in this
13 case, regarding the sacred, cultural, historic and natural resources, within the project area,
14 including their eligibility for the National Register of Historic Places. Neither the
15 Confederated Tribes of the Yakama Nation nor any of the Native American Plaintiffs in
16 this case were included in any notices associated with the EA.

17 **35.**

18 After public hearings and public comment, FHWA and ODOT issued a Revised
19 Environmental Assessment (hereinafter "REA") and Finding of No Significant Impact
20 (FONSI) for the project on February 8, 2007. The cover letter of this FONSI indicated
21 that "Claims for judicial review of this decision must be filed within 180 days from the
22 date the Revised Environmental Assessment and Finding of No Significant impact (sic)
23 are published in the Federal Register." The cover letter stated that the 180-day limitation

1 period is established by 23 U.S.C. 139(1). Neither the Confederated Tribes of the
2 Yakama Nation, nor any of the Native American Plaintiffs in this case were sent the
3 REA, FONSI, or cover letter.

4 **36.**

5 At some point unknown to Plaintiffs, FHWA and ODOT determined after issuing
6 the REA that they would have to secure additional right-of-way from Defendant BLM on
7 the north side of U.S. 26. Defendant BLM issued a Letter of Consent to grant the right-
8 of-way to Defendant FHWA on April 2, 2008. At some point in time unknown to
9 Plaintiffs, BLM granted the right-of-way.

10 **37.**

11 On February 28, 2008, Defendant BLM, pursuant to 43 U.S.C. § 1732, issued a
12 permit for tree removal to ODOT in the project area of the U.S. 26: Wildwood to
13 Wemme project. In late March of 2008, contractors for Defendant FHWA and ODOT
14 began cutting trees, including old growth Douglas Fir within and adjacent to the A.J.
15 Dwyer Scenic Area and the ODOT right-of-way. The trees were removed with heavy
16 equipment, including track-propelled backhoes and tractors. The contractors left tree
17 stumps in place. This operation was substantially complete by the end of that month.

18 **38.**

19 The tree removal operations caused substantial ground disturbance, and damaged
20 the Native American trail, the Barlow Road segment, and the burial grounds. The
21 operations destroyed the remaining traces of the rock cairn, and removed the tree canopy
22 over and surrounding the historic campsite used for prayer and meditation.

23 **39.**

1 damage to the Wildwood Stone Pillars, and the inadequacy of the project Section 106
2 review as it pertain to these pillars.

3 **43.**

4 Also in February of 2008, Plaintiffs Logan and CGS requested that Defendant
5 ACHP advise Defendant FHWA that an adequate Section 106 review was necessary for
6 the U.S. 26: Wildwood-Wemme project. On April 14, 2008, Defendant ACHP advised
7 Defendant FHWA that because project construction had already commenced, and
8 because no “federally recognized” Indian tribes had come forward to express concerns,
9 no further action was necessary. On April 25, 2008, Plaintiff Logan responded to
10 Defendant ACHP’s letter, and noted the religious use of the site.

11 **44.**

12 On March 6, 2008, Plaintiff CGS sent Defendant ACHP a detailed 8-page memo
13 particularizing the applicability of Section 4(f) of the Department of Transportation Act
14 of 1966, 23 U.S.C. 138, and 49 U.S.C. 303, to the U.S. 26: Wildwood-Wemme highway
15 widening project.

16 **45.**

17 On April 23, 2008, Plaintiff Slockish sent a memo to ODOT, Defendant FHWA,
18 and Defendant ACHP regarding the status of the A.J. Dwyer Scenic Area as a location of
19 traditional sites and burials, and specifically noted that the site contained burial grounds.
20 On April 25, 2008, Plaintiff Jackson sent out a similar memo to the same Parties, and also
21 specifically noted the site as the location of burial grounds.

22 **46.**

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Construction on the U.S. 26: Wildwood-Wemme project commenced on or about the week of July 28, 2008, and continued to approximately July, 2009. During construction, heavy machinery uprooted the stumps of the previously-cut Douglas Fir trees, severely damaging and impacting the sacred burial grounds, and the Native American trail / Barlow Road. The expansion of pavement covered and damaged the Native American trail/ Barlow Road. The Wildwood Pillars were physically moved to a location not consistent with their historic purpose, and suffered physical damage and integrity loss during the move. Earth moving and grading further harmed the burial grounds, and buried the traditional campsite. The newly-constructed guardrails did not include the previous opening / break in the railing that had previously allowed access to the historic campsite, and access to the area from U.S. 26 is now blocked.

51.

In addition to the instant case, the Plaintiffs between them filed three appeals with the Oregon Land Use Board of Appeals. On June 20, 2008, Plaintiff CGS filed a Notice of Intent to Appeal in the Oregon Land Use Board of Appeals (hereinafter, "LUBA"), case no. 2008-091. Plaintiff CGS appealed the denial by Clackamas County of CGS's code enforcement request against ODOT for the latter's failure to seek review of the U.S. 26: Wildwood-Wemme project by the Clackamas County Historic Review Board for the project's impacts on the Barlow Trail. LUBA denied Plaintiff CGS motion for a stay. LUBA dismissed the appeal on August 20, 2008.

52.

1 On June 20, 2008, Plaintiff CGS filed a Notice of Intent to Appeal with LUBA,
2 case no. 2008-092. Plaintiff CGS appealed the failure of the Oregon Department of
3 Environmental Quality to comply with Oregon's land use statute in permitting ODOT to
4 undertake clearance, grading, and construction activities pursuant to an NPDES 1200-CA
5 erosion and sediment control permit. This permit covers the U.S. 26: Wildwood-Wemme
6 project. LUBA denied Plaintiff CGS's motion for a stay. LUBA dismissed this appeal on
7 August 20, 2008. The Court of Appeals affirmed without opinion LUBA's final opinion
8 and order on November 26, 2008.

9 **53.**

10 On July 7, 2008, Plaintiffs Slockish, Jackson and Logan filed a Notice of Intent to
11 Appeal with LUBA, case no. 2008-101. These Plaintiffs appealed ODOT's U.S. 26:
12 Wildwood-Wemme project due to ODOT's failure to comply with Oregon's land use
13 statutes. LUBA dismissed this appeal on December 29, 2008.

14

15 **FIRST CLAIM FOR RELIEF: FAILURE TO INVENTORY**

16 **54.**

17 Plaintiffs reallege ¶¶ 1-53.

18 **55.**

19 Defendants FHWA, BLM, and Garrett failed to conduct adequate historic and
20 cultural inventories for the U.S. 26: Wildwood-Wemme highway widening project, in
21 violation of the National Historic Preservation Act, 16 U.S.C. § 470a et seq., the
22 Archeological Resources Protection Act, 16 U.S.C. § 470aa et seq., and the Native
23 American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 et seq.

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56.

Defendants FHWA, BLM, and Garrett failed to conduct adequate historic and cultural inventories for the U.S. 26: Wildwood-Wemme highway widening project, despite the fact that for approximately three decades the Plaintiffs in this case, and others, have assiduously and responsibly alerted and informed FHWA, BLM, and ODOT, the agency supervised by Garrett, of the resources and activities occurring within the sites at issue in this Complaint.

SECOND CLAIM FOR RELIEF: FAILURE TO NOMINATE

57.

Plaintiffs reallege ¶¶ 1-56.

58.

As part of the U.S. 26: Wildwood-Wemme highway widening project, Defendants FHWA, BLM, and Garrett failed to evaluate adequately the eligibility of the sites and resources described in ¶ 24, *supra*, for inclusion in the National Register of Historic Places – for example as a Traditional Cultural Property as defined and described in National Register Bulletin 38 – and failed to nominate these properties to the Register, in violation of the National Historic Preservation Act, 16 U.S.C. § 470a *et seq.*

THIRD CLAIM FOR RELIEF: FAILURE TO CONSULT

National Historic Preservation Act

59.

Plaintiffs reallege ¶¶ 1-58.

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60.

2 As part of the U.S. 26: Wildwood-Wemme highway widening project, Defendants
3 FHWA, BLM, and Garrett failed to engage in adequate formal consultation with the
4 Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of
5 Grande Ronde, and the Confederated Tribes of Warm Springs, each a federally-
6 recognized Indian Tribe, in violation of the National Historic Preservation Act, 16 U.S.C.
7 § 470a et seq.

8

61.

9 Defendants FHWA, BLM, and Garrett failed to engage in adequate formal
10 consultation with the Plaintiffs in this case as interested “other consulting parties,” in
11 violation of the National Historic Preservation Act, 16 U.S.C. § 470a et seq.

12

62.

13 The failure to engage in adequate formal consultation pertains to all aspects of the
14 U.S. 26: Wildwood-Wemme highway widening project, including but not limited to
15 inventory, determination of eligibility for and inclusion in the National Register of
16 Historic Places, taking into account the effects of the undertaking, and mitigation
17 strategies.

18

Native American Graves Protection and Repatriation Act

19

63.

20 Plaintiffs reallege ¶¶ 1-62.

21

64.

22 As part of the U.S. 26: Wildwood-Wemme highway widening project, Defendants
23 FHWA, BLM, and Garrett failed to engage in adequate formal consultation with the

1 Confederated Tribes and Bands of the Yakama Nation, the Confederated Tribes of
2 Grande Ronde, and the Confederated Tribes of Warm Springs, each a federally-
3 recognized Indian Tribe, in violation of the Native American Graves Protection and
4 Repatriation Act, 25 U.S.C. § 3001 et. seq.;

5 **65.**

6 Defendants FHWA, BLM, and Garrett failed to engage in adequate formal
7 consultation with Plaintiffs Slockish and Jackson as “traditional religious leaders,” in
8 violation of the Native American Graves Protection and Repatriation Act, 25 U.S.C. §
9 3001 et. seq.;

10
11 **FOURTH CLAIM FOR RELIEF: FAILURE TO ENSURE STANDARDS OF**
12 **PROFESSIONAL ARCHAEOLOGY**

13
14 **66.**

15 Plaintiffs reallege ¶¶ 1-65.

16 **67.**

17 Defendants FHWA and Garrett failed to ensure that their agent, archaeologist
18 Patrick O’Grady, met professional standards, in violation of the National Historic
19 Preservation Act, 16 U.S.C. § 470a et. seq. As part of his archaeological report for the
20 project’s Environmental Assessment O’Grady failed to locate the burial cairn within the
21 project area. Because of this failure, he further failed to consult with the Native American
22 Plaintiffs in this case to properly identify the resource. This failure, in turn, resulted in the
23 failure of Defendant’s FHWA and Garrett to properly protect the resource, and it was
24 subsequently destroyed by vandalism.

25 **68.**

1 Defendants FHWA and Garrett failed to undertake a sufficiently intensive-level
2 archaeological investigation of the potential stone toll booth first identified by Richard
3 Pettygrew in 1985, in violation of the National Historic Preservation Act, 16 U.S.C. §
4 470a et. seq.. Defendants FHWA and Garrett therefore failed to determine whether or not
5 this structure was in fact an historic toll booth associated with the adjacent Barlow Road,
6 and whether the resource is eligible for the National Register of Historic Places.

7

8 **FIFTH CLAIM FOR RELIEF: LEGALLY DEFICIENT SECTION 106 REVIEW**

9 **69.**

10 Plaintiffs reallege ¶¶ 1-68.

11 **70.**

12 Defendants FHWA and Garrett failed to take into account the effects of the U.S.
13 26: Wildwood-Wemme highway widening project on properties included in or eligible
14 for the National Register of Historic Places, in violation of the National Historic
15 Preservation Act, 16 U.S.C. § 470a et. seq. The Section 106 analysis in the EA did not
16 mitigate impacts by adopting a design alternative that would have allowed construction of
17 the center refuge lane while not impacting the resources described in ¶ 24, *supra*, despite
18 the opinion of staff that this was possible and feasible. Nor did Defendants consider other
19 mitigation strategies.

20 **71.**

21 The EA for the project indicates that Defendants analyzed the project impacts
22 pursuant to the terms of a 2001 Programmatic Agreement Regarding the Implementation
23 of Minor Transportation Projects (hereinafter "PMOA") between the Oregon State

1 Historic Preservation Officer, and Defendants ACHP and FHWA, and ODOT. This
2 PMOA provides a streamlined process for the parties to address their obligations under
3 Section 106. However, because Defendants FHWA and Garrett determined that
4 additional right-of-way would have to be acquired from Defendant BLM, the U.S. 26:
5 Wildwood-Wemme project no longer met the definition of a “minor transportation
6 project” within the PMOA. Instead, a full Section 106 review was required, with a
7 separate legally-sufficient memorandum of agreement (MOA) specific to the project,
8 detailing inventory, consultation, evaluation of alternatives, and mitigation of adverse
9 effects. Such an MOA was never drafted, signed, and implemented, in violation of the
10 National Historic Preservation Act, 16 U.S.C. § 470a et. seq.

11
12 **SIXTH CLAIM FOR RELIEF: LEGALLY DEFICIENT ENVIRONMENTAL**
13 **ASSESSMENT**

14
15 **72.**
16
17 Plaintiffs reallege ¶¶ 1-71.

18 **73.**
19 The U.S. 26 Wildwood -Wemme project is a major federal action under the
20 National Environmental Policy Act (NEPA), 42 U.S.C §§ 4321 et. seq. A federal agency
21 meets its obligations under the National Historic Preservation Act as part of the NEPA
22 process. Because Defendants FHWA and Garrett violated the NHPA, as detailed in the
23 First through Fifth Claims for Relief, ¶¶ 1-68, they also violated NEPA.

24 **74.**

25 In addition, the tree removal undertaken by Defendants FHWA and Garrett on
26 land owned by Defendant BLM was in contravention to the tree cover and protection

1 provisions for the A.J. Dwyer Scenic Area in Defendant BLM’s Salem District Resource
2 Management Plan. The tree removal violated the Federal Land Policy Management Act,
3 43 U.S.C. § 1701 et. seq.

4 **SEVENTH CLAIM FOR RELIEF: FAILURE TO IDENTIFY "SECTION 4(F)"**
5 **RESOURCES AND ADDRESSING THE PROJECT IMPACTS ON THESE**
6 **RESOURCES.**

7
8 **75.**

9 Plaintiffs reallege ¶¶ 1-74.

10 **76.**

11 The U.S. 26 Wildwood -Wemme project is governed by and 23 U.S.C. § 138 and
12 49 U.S.C. § 303. The project is in contravention of these statutes because Defendants
13 FHWA and Garrett failed to evaluate all prudent and feasible alternatives, and did not
14 undertake all possible planning to minimize harm to sites and resources described in ¶ 24,
15 *supra*, which are “Section 4(f) resources”.

16 **77.**

17 Defendants FHWA and Garrett did not mitigate impacts by adopting a design
18 alternative that would have allowed construction of the center refuge lane while not
19 impacting the resources described in ¶ 24, *supra*, despite the opinion of staff that this was
20 possible and feasible. Nor did Defendants consider other mitigation strategies.

21
22 **EIGHTH CLAIM FOR RELIEF: FAILURE TO ADVISE**

23
24 **78.**

25
26 Plaintiffs reallege ¶¶ 1-77.

27
28 **79.**

29

1 Defendant ACHP has a duty to advise Federal and State agencies on matters
2 relating to historic preservation. 16 U.S.C. § 470a et. seq. Defendant ACHP failed to
3 properly advise Defendants FHWA and Garrett on the necessity to determine whether the
4 resources described in ¶ 24, *supra*, were eligible for inclusion in the National Register of
5 Historic Places.

6 **80.**

7 Defendant ACHP erred in asserting that formal consultation under Section 106
8 was not required because no federally-recognized tribes had expressed concerns about the
9 project; the federally recognized tribes are entitled to formal consultation by statute. It
10 failed to advise Defendants FHWA that the Plaintiffs in this case who had written to it
11 with concerns about the U.S. 26: Wildwood-Wemme highway widening projects were
12 entitled to formal consultation because of their status as interested parties.

13 **81.**

14 Defendant ACHP failed to inform itself adequately of the project's details. It
15 failed to advise Defendants FHWA and Garrett that the necessity to seek additional right-
16 of-way from Defendant BLM meant that the project is not a "minor transportation
17 project" covered by the 2001 PMOA, and that instead a full Section 106 review, with a
18 separate, project-specific Memorandum of Agreement was required for the project.

19
20 **NINTH CLAIM FOR RELIEF: LEGALLY-DEFICIENT TREE-CUTTING**
21 **PERMIT**

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23 **82.**

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25 Plaintiffs reallege ¶¶ 1-81

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27 **83.**

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The tree cutting permit issued by Defendant BLM is a federal undertaking pursuant to the National Historic Preservation Act, 16 U.S.C. § 470a et. seq. Defendant BLM was required to undertake Section 106 review for this undertaking. It failed to do so. It did none of the required inventory, evaluation of eligibility, nomination, Section 106 review, or mitigation of adverse effects required under law.

84.

The tree-cutting permit also constituted a major federal action under the National Environmental Policy Act, 42 U.S.C §§ 4321 et. seq. An environmental assessment (EA) was required for this project, but Defendant BLM failed to undertake any EA.

TENTH CLAIM FOR RELIEF: LEGALLY-DEFICIENT APPROVAL OF A GRANT OF RIGHT-OF-WAY

85.

Plaintiffs reallege ¶¶ 1-84.

86.

Defendant BLM's approval of a grant of a right-of-way is a federal undertaking pursuant to the National Historic Preservation Act, 16 U.S.C. § 470a et. seq. Defendant BLM was required to undertake Section 106 review for this undertaking. It failed to do so. It did none of the required inventory, evaluation of eligibility, nomination, Section 106 review, or mitigation of adverse effects required under law.

87.

The approval of a grant of a right-of-way also constituted a major federal action under the National Environmental Policy Act, 42 U.S.C §§ 4321 et. seq. An

1 environmental assessment (EA) was required for this project, but Defendant BLM failed
2 to undertake any EA.

3

4 **ELEVENTH CLAIM FOR RELIEF: VIOLATION OF ADMINISTRATIVE**
5 **PROCEDURES ACT.**

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88.

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Plaintiffs reallege ¶¶ 1-87.

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89.

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13

In failing to comply with the statutes referenced in the First through Eleventh
Claims for Relief, ¶¶ 1-84. the Defendants in this case acted in a manner that was

14

arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law;

15

contrary to constitutional right, power, privilege, or immunity; and without observance of

16

procedure required by law. The Defendants; actions therefore violated the Administrative

17

Procedures Act. 5 U.S.C. §§ 701-706.

18

19

TWELFTH CLAIM FOR RELIEF: DUE PROCESS VIOLATION

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Plaintiffs reallege ¶¶ 1-89.

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91.

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In violating the statutes referenced in the First through Eleventh Claims for

28

Relief, ¶¶ 1-86, and causing the resulting damage to the resources described in ¶ 24,

29

supra, the federal Defendants have deprived Plaintiffs Slockish, Jackson, and Logan of a

1 liberty interest without due process of law guaranteed by the Fifth Amendment to the U.S
2 Constitution: namely the right to freely exercise their religion..

3 **92.**

4 In violating the statutes referenced in the First through Eleventh Claims for
5 Relief, ¶¶ 1-84, and causing the resulting damage to the resources described in ¶ 24,
6 *supra*, the Defendant Garrett has deprived Plaintiffs Slockish, Jackson, and Logan of a
7 liberty interest without due process of law guaranteed by the Fifth and Fourteenth
8 Amendments to the U.S Constitution: namely, the right to freely exercise their religion.
9 In depriving Slockish, Jackson, and Logan of their rights, Defendant Garrett acted under
10 color of Oregon law.

11

12 **THIRTEENTH CLAIM FOR RELIEF: INTERFERENCE WITH FREE**
13 **EXERCISE OF RELIGION**

14

15 **93.**

16 Plaintiffs reallege ¶¶ 1-92.

17 **94.**

18 In undertaking prayer, meditation, veneration of ancestors, and other spiritual
19 activities in the historic campground and burial grounds within the A.J. Dwyer Scenic
20 Area, Plaintiffs Slockish, Jackson, and Logan were exercising their religion and engaging
21 in religious activities.

22 **95.**

23 By violating the statutes referenced in the First through Eleventh Claims for
24 Relief, ¶¶ 1-86, and thereby damaging and destroying the historic campground and burial
25 grounds through tree cutting and removal, grading, and ultimately burying the

1 campground and burial grounds; and by blocking off access to these by installation of a
2 new guardrail, the federal Defendants have substantially burdened and interfered with
3 Plaintiffs Slockish, Jackson and Logan's exercise of religion.

4 **96.**

5 In acquiring additional right-of-way that extends the legal boundaries of U.S. 26
6 further into the historic campground and burial grounds; by burying the campground and
7 burial grounds, and by blocking off access to these by installation of a new guardrail, the
8 federal Defendants have created a risk of trespass and other legal violations, with the
9 resulting possibility of fines and/or other penalties; and physical danger to themselves,
10 for Plaintiffs Slockish, Jackson, and Logan if they attempt to access the campground and
11 burial grounds. The imposition of these burdens and risks constitutes coercive pressure
12 on Plaintiffs Slockish, Jackson, and Logan not to practice, to change, and/or to violate
13 their religious beliefs.

14 **97.**

15 The actions of the federal Defendants have chilled the religious exercise of
16 Plaintiffs Slockish, Jackson, and Logan.

17 **98.**

18 The actions of the federal Defendants have served no compelling governmental
19 interest.

20 **99.**

21 The actions of the federal Defendants were not narrowly tailored to any
22 compelling governmental interest.

23 **100.**

1 The actions of the federal Defendants were not the least restrictive means of
2 furthering the federal Defendants' stated interests.

3 **101.**

4 The federal Defendants have thereby interfered with Plaintiffs Slockish, Jackson
5 and Logan's free exercise of religion, as guaranteed by the First Amendment to the U.S.
6 Constitution and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*

7 .
8 **102.**

9 Defendant Garrett has thereby interfered with Plaintiffs Slockish, Jackson and
10 Logan's free exercise of religion, as guaranteed by the First and Fourteenth Amendments
11 to the U.S. Constitution, and RFRA. In depriving Slockish, Jackson, and Logan of their
12 rights, Defendant Garrett acted under color of Oregon law.

13 **103.**

14 Absent injunctive and declaratory relief against the Defendants, and the
15 assessment of monetary damages, Plaintiffs Slockish, Jackson, and Logan have been
16 harmed and will continue to be harmed.

17
18 WHEREFORE, Plaintiffs pray for the following relief:

- 19 (1) An order declaring that the Defendants have:
20 a) violated the statutes referenced in this Complaint;
21 b) deprived Plaintiffs Slockish, Jackson, and Logan life, liberty and
22 property without due process of law;
23 c) interfered with Plaintiffs Slockish, Jackson, and Logan's right to
24 the free exercise of their religion; and
25 d) violated the public trust.
26
27 (2) An order for an injunction voiding the U.S. 26: Wildwood-Wemme
28 highway widening project EA, REA, and FONSI, and ordering these

1 be undertaken again in compliance with the statutes referenced in this
2 Complaint.

3
4 (3) An order an injunction voiding Defendant BLM's granting a tree
5 removal permit and granting a right-of-way to ODOT and Defendants
6 FHWA -- if this has not yet occurred -- or voiding the grant if it has
7 occurred until the former comply with their obligations under the
8 statutes referenced in this Complaint.

9
10 (4) An order for an injunction for the following relief:

- 11
- 12 a. The requirement that Defendants undertake adequate
13 consultation with the Confederated Tribes and Bands of the
14 Yakama Nation and with the Plaintiffs regarding the sacred,
15 historic, cultural, and natural resources within the U.S. 26:
16 Wildwood-Wemme project area.
 - 17
 - 18 b. The requirement that Defendants comply with Section 106 of
19 the National Historic Preservation Act in regards to the U.S.
20 26: Wildwood-Wemme project, and memorialize this
21 compliance with a Memorandum Agreement among
22 themselves and with Plaintiffs.
 - 23
 - 24 c. The requirement that the Defendants undertake appropriate
25 remedial measures, including but not limited to landscaping
26 and interpretive marking and signage, to address the damage to
27 the the sacred, historic, cultural, and natural resources located
28 within the U.S. 26: Wildwood-Wemme project area.
 - 29
 - 30 d. The requirement that the Defendants FHWA and Garrett
31 undertake an archaeological survey on the resource identified
32 by Pettygrew in 1985 to determine if in fact it is a toll booth
33 associated with the Barlow Road.
 - 34
 - 35 e. The requirement that the Defendants uncover the historic
36 campground, restore it through appropriate plantings and
37 landscaping, and return it to use for the religious purposes of
38 Plaintiffs Slockish, Logan, and Jackson, and others similarly
39 situated.

40
41 (5) The assessment of appropriate monetary damages;

42
43 (6) An order awarding Plaintiffs their reasonable costs, fees and expense
44 in this action, including reasonable attorney fees, pursuant to 16
45 U.S.C. § 470w-4 and 42 U.S.C. § 1988.

46

1 (7) An order imposing all other and further relief as to which Plaintiffs
2 may be entitled and which the Court may deem just and equitable.
3

4
5 DATED: July 3, 2012
6

7 Respectfully Submitted,
8

9 /s/ James J. Nicita

10 James J. Nicita

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18 Of Attorney for Plaintiffs
19

CERTIFICATE OF SERVICE

I certify that on July 3, 2012, I filed electronically the foregoing *Plaintiffs' Third Amended Complaint*, and served the same electronically upon the counsel of record via the Court's electronic case filing system:

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