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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

HEREDITARY CHIEF WILBUR SLOCKISH, a resident of Washington, and an enrolled member of the Confederated Tribes and Bands of the Yakama Nation,	**Case No. 3:08-cv-1169-ST** **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT** **Request for Oral Argument**

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,

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

and

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

Defendants.

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INTRODUCTION

The colonial, state, and federal governments of this Nation have been destroying Native American sacred sites since before the Nation was born. Centuries of destruction and pillaging have taken a terrible toll on Native American religious exercise—a toll mitigated only slightly by the belated recognition of Native American civil rights in laws like the Religious Freedom Restoration Act (RFRA).

The question in this case is whether, under RFRA, the Government's destruction of a Native American sacred site imposes a "substantial burden" on religious exercise. To ask the question is to answer it. Of course the destruction of a Native American sacred site imposes a substantial burden, because it makes religious exercise at that site impossible.

But under the Government's bizarre construction of RFRA, the burden on Plaintiffs' religious exercise is *too great* to be substantial. According to the Government, if it had merely made Plaintiffs' religious exercise *more costly*—such as by fining Plaintiffs for trespassing at the site—then Plaintiffs would have had a RFRA claim. But because it has made Plaintiffs' religious exercise *impossible*—by destroying the site—RFRA does not apply. This gets the concept of *a fortiori* exactly backwards. As many courts have recognized, "[t]he greater restriction" (making a religious practice impossible) "includes the lesser one (substantially burdening the practice)." *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014).

Unable to escape this logic, the Government tries to pass the buck, arguing that it merely authorized the Oregon Department of Transportation (ODOT) to destroy the site, rather than wielding the chainsaws and bulldozers themselves. ECF 287 at

23-25. But several courts have held that RFRA applies to "a federal governmental decision about what to do with federal land." *Village of Bensenville v. FAA*, 457 F.3d 52, 67 (D.C. Cir. 2006). The sacred site here was on federal land and subject to federal control. So the destruction never could have taken place unless the Government had authorized it. And the Government did far more than that—it planned, guided, coordinated, funded, and profited from the destruction.

Finally, the Government repeats several jurisdictional arguments that this Court rejected long ago, ignoring the fact that those decisions are law of the case. These arguments have not gotten any better in the last six years; they have gotten worse.

The saddest thing about this case is that this destruction never had to happen. The Government had numerous alternatives for widening the highway without harming Plaintiffs' sacred site. But it ignored Plaintiffs' pleas for protection and chose the most destructive alternative. That choice has deprived Plaintiffs of almost a decade of religious exercise, and that is just what RFRA prohibits.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual Background

A. Plaintiffs' Tribes

The Plaintiffs are Wilbur Slockish, Johnny Jackson, Carol Logan, the Cascade Geographic Society (CGS), and the Mount Hood Sacred Lands Preservation Alliance (MHSLPA). The individual Plaintiffs are members of CGS and MHSLPA, which are organizations dedicated to preserving the cultural and religious resources of the Cascade Mountains. Ex.1 ¶3; Ex.3 ¶20; Ex.2 ¶3; Ex.4 14:9-17, 18:20-19:8.

Slockish and Jackson are also enrolled members of the Confederated Tribes and Bands of the Yakama Nation. Ex.1 ¶2, Ex.2 ¶2. The Yakama lived along the Columbia River since before recorded history, but were forced to sign a treaty in 1855 ceding 12 million acres of land to the Government and move to a reservation. Ex.5-5. The last Chief to sign the treaty, Chief Sla-kish, did so under protest, and is a direct ancestor of Slockish and Jackson. Ex.1 ¶4; Ex.2 ¶4.

Logan is an enrolled member of the Confederated Tribes of Grand Ronde. Ex.3 ¶2. The Grand Ronde lived in western Oregon, southern Washington, and northern California, but were forced onto a reservation in 1856 so the Government could "free [their] land for … pioneer settlement," "miners, and ranchers." Ex.5-6. Some of the land taken from Plaintiffs' tribes is at issue in this case. Ex.6 ¶3; Ex.7 ¶3.

B. Plaintiffs' Religious Beliefs and the Sacred Site

As Hereditary Chiefs (Slockish and Jackson) and Elder (Logan), Plaintiffs are responsible for maintaining the traditions of their tribes. Ex.1 ¶¶7-11, 13-15; Ex.2 ¶¶6-13, 55; Ex.3 ¶¶5, 7-9. Plaintiffs Slockish and Jackson practice *Washat*—the traditional religion of the Yakama, also known as the "Drummer-Dreamer faith" or the "Religion of the Seven Drums." Ex.1 ¶16; Ex.2 ¶12; *see also* Ex.5-7 (Michael McKenzie, *Washat Religion (Drummer-Dreamer Faith)*, *in* The Encyclopedia of Religion and Nature 1712, 1712 (Bron Taylor, ed., 2006)). Logan is a "Traditional Practitioner of the Clackamas Tribe" and a spiritual leader for other Native American religious practitioners. Ex.7 ¶4; Ex.8 56:6-15.

Plaintiffs worship and seek guidance from a Creator. Ex.1 ¶¶16, 28, 32; Ex.3 ¶16; Ex.2 ¶¶18, 23, 28; *see also* Ex.5-7 (McKenzie at 1713). The Creator, they believe,

"keep[s] all Life in continuance" through a delicate balance, Ex.3 ¶9, in which "all [created] spirits … are entwined." Ex.8 20:12-21; *see also* Ex.5-8 (Rex Buck, Jr. & Wilson Wewa, *"We Are Created from this Land": Washat Leaders Reflect on Place-Based Spiritual Beliefs*, Or. Hist. Soc'y Q. vol. 115, no. 3, at 309-11 (2014)).

Like other Native American religious practitioners, Plaintiffs believe that they are required to "give thanks"; to "acknowledge" the gifts of creation through prayer and song; and to show "appreciation and respect for [the] earth mother." Ex.3 ¶¶9-10; Ex.8 24:13-21; *see also* Ex.9 25:17-23; Ex.1 ¶28; Ex. 5-7 (McKenzie at 1713). These requirements come from the Creator, Ex.8 24:6-8; Ex.1 ¶16, who one day will return and make "whole again" the bodies of the dead, taking those who have faithfully observed His ways to "join [Him], along with the other people, in another world." Ex.2 ¶23; *see also* Ex.10 68:13-25; Ex.8 27:1-13; Ex.9 13:16-19; Ex.5-9 (Cassandra Tate, *Smohalla (1815?-1895)*, HISTORYLINK.ORG, http://www.historylink.org/File/9481) (describing 19th-century *Washat* teachings)).

Plaintiffs' belief in the restoration of the bodies of the dead gives rise to a religious duty: to safeguard the integrity of ancestral burial sites and let them "return" to a natural state undisturbed. Ex.5-8 (Buck, Jr., & Wewa at 320); *see also* Ex.10 30:12-21 (burial sites should "leave no evidence" and "be left alone" "until [the Creator] comes back"); Ex.9 78:12-79:7. "If the graves of the ancestors who are buried are disturbed," Plaintiffs believe, "it will be difficult"—if not "impossible"—"for them to become whole again." Ex.2 ¶¶24, 28; *see also* Ex.9 60:12-25; Ex.1 ¶33; Ex.3 ¶17; Ex.5-8

(Buck, Jr., & Wewa at 301) ("reverence for ... the body after a person has left us" is "just as important as the reverence that we show for life on this earth").

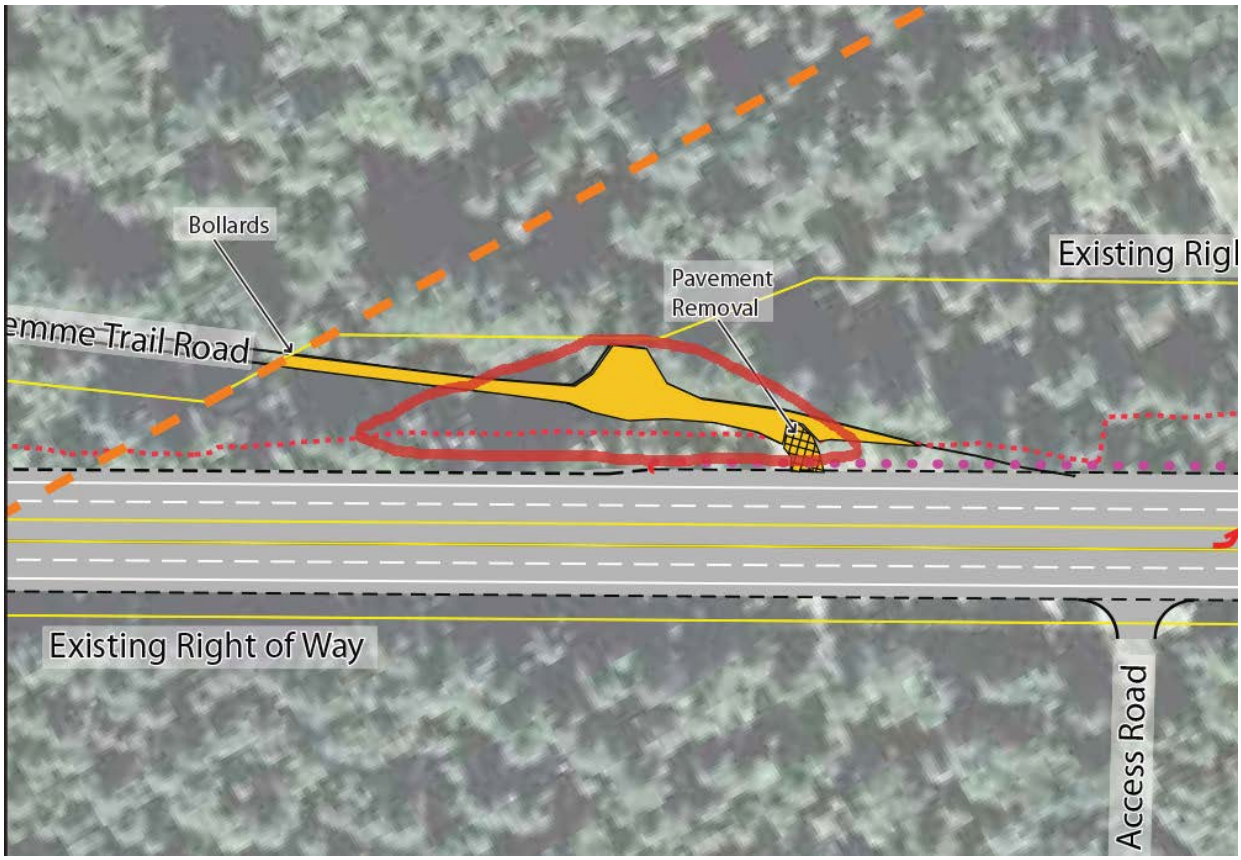
Although *Washat* and other Native American religions "revere the natural world in its entirety," certain sacred sites are "accorded special reverence." Ex.5-10 (Robert Charles Ward, *The Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sites on Federal Land*, 19 Ecology L.Q. 795, 800-01 (1992)); *see also* Ex.8 13:17-20; Ex.5-8 (Buck, Jr., & Wewa at 303). The visiting of these sacred sites "play[s] an important role in [Plaintiffs'] religious practice." Ex.8 43:15-18; *see also* Ex.9 26:8-10; Ex.1 ¶19.

One of Plaintiffs' sacred sites is at issue here—a site traditionally known to Plaintiffs' tribes as *Ana Kwna Nchi nchi Patat* (the "Place of Big Big Trees"). Ex.6 ¶16; Ex.7 ¶8; Ex.12 ¶6. The site was located within a small portion of the A.J. Dwyer Scenic Area, which is a roughly 5-acre parcel of land on the north side of U.S. 26 between the villages of Wildwood and Wemme. Ex. 11 FHWA_004472.

The site lay along a trading route used by Native Americans for centuries—a route that later became the Barlow Road portion of the Oregon Trail, and is now followed by U.S. 26. Ex.2 ¶26; Ex.9 63:14-17; *see also* ECF 122 at 4; *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1238-1240 (E.D. Wash. 1997), aff'd sub nom. *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998) (discussing the historic religious significance of travel to the Yakama). The site was held sacred because of its traditional use as a place where native people camped while en route to trade at Celilo Falls or to pick camas, a traditional food, in Willamette Valley. Ex.2 ¶¶25-28; Ex.9 59:10-18; Ex.1 ¶¶25-27, 36;

Ex.3 ¶¶18-19. It also served as a burial ground for those who died along the way. Ex.10 15:16-23; Ex.8 14:6, 12; Ex.1 ¶36; Ex.2 ¶26, 28. The site is also important for its proximity to a complex of other sacred sites used by Plaintiffs and others for vision quests and sweat lodges. Ex.8 14:6-11, 105:11-16; Ex.6 ¶21; Ex.2 ¶20.

A map of the site taken from the highway planning documents (Ex.11 FHWA_004356), with the key area circled in red, appears below:



The sacred site consisted of several features. First were the "historic campground and burial grounds." Ex.3 ¶51; *see also* Ex.9 59:15-18; Ex.1 ¶11. The campground consisted of a small clearing just north of U.S. 26, which could be accessed by driving a car through a gap in the guardrail and parking in the campground itself. Ex.4 34:7-17, 15-17. The clearing is depicted on the map as a yellow bulge. The burial grounds

were located next to the campground in the strip of trees located between the campground and U.S. 26. Ex.7 ¶29; Ex.6 ¶30; Ex.12 ¶16.

Second, the site contained an altar made of river rocks. *See* Ex.8 38:22-39:6; 42:2-17; Ex.6 ¶28-29; Ex.12 ¶14. This altar is sometimes referred to in the record as a "stone monument," "rock cluster," or "rock cairn." *See, e.g.*, Ex.3 ¶51; Ex.21 ¶4; Ex.9 72:19-73:6. The altar was located between the campground and the highway. Ex.6 ¶28; Ex.21 ¶4. It served a dual function, both to "mark[] surrounding graves," and to serve as a focal point for religious ceremonies. Ex.21 ¶4; Ex.8 40:19-21; Ex.9 72:19–73:6; Ex.12 ¶14.; Ex.6 ¶28-29. Below is a picture of the altar taken during a 1986 excavation (Ex.14 FHWA_005083), when BLM archaeologist Frances Philipek was on-site (Ex.35 BLM_0000021; Ex.19 BLM_000019):

Third, the site featured valuable old-growth trees. Ex.9 11:20-24. These trees were directly incorporated into ceremonies at the Dwyer site, Ex.8 23:1-9, and they provided the shade, camouflage, and separation from the outside world needed for Plaintiffs' religious practices. Ex.1 ¶53.

Finally, the Dwyer site had "certain powerful medicine" plants used in a particular type of healing ceremony. Ex.8 13:15-17, 86:3-23; *see also* Ex.1 ¶¶36, 41-42. Due to the climate, elevation, and the spiritual power of the site itself, Plaintiffs were unaware of any other site where those plants could be gathered. Ex.8 87:7-88:13.

C. Plaintiffs' Use of the Sacred Site

Many indigenous people have used this site for religious purposes "since time immemorial." Ex.3 ¶19.[1] Plaintiffs believe that they were obligated to protect the site and engage in religious practices there, or else risk being "banished to" the "land of darkness" "forever." Ex.9 96:11-25; Ex.8 55:4-12. Thus, they protected and used the site for many years.

Plaintiff Logan learned about the site through visiting it with her family as "a young girl" in the late 1940s or early 1950s. Ex.8 104:23-105:10. As an adult, she continued to visit the site for "prayer and meditation," to gather sacred medicine plants, and to pay respects to her ancestors through memorial ceremonies. Ex.3 ¶15; Ex.8 86:3-8. These ceremonies involved a multi-step procedure: participants would

[1] The Government disputes the site's significance, citing surveys of the area that found "no prehistoric cultural materials." ECF 287 at 16. But these surveys failed even to locate the stone altar, which was excavated in 1986 with a BLM archaeologist on-site. Ex.35 BLM_0000021. In any event, the question under RFRA is how Plaintiffs exercised their religion at the site, not whether the Government finds Plaintiffs' beliefs "acceptable, logical, consistent, or comprehensible." *United States v. Zimmerman*, 514 F.3d 851, 853 (9th Cir. 2007).

first "get ready" and "prepare [themselves]," in recognition that they were "going into a very sacred place," Ex.8 55:18-21; they would then remember their ancestors by "saying prayers, meditating, … and singing songs," Ex.3 ¶15; finally, they would "solidify[]" the ceremony—"bring[it] into place"—by leaving tobacco offerings, consisting of burning a pinch of tobacco in a small campfire. Ex.8 55:13-17. In exercising her religion at the Dwyer site, Logan attained "higher knowledge" and connection with the "spirit that is there." Ex.8 19:9-20.

Like Logan, Jackson was taught about the Dwyer site in his youth, and he has returned there for religious exercises over the past forty years. Ex.1 ¶¶22, 37, 43; *see also* Ex.10 64:1-65:1; Ex.12 ¶20, 26. "[V]isit[ing] traditional spiritual places, like the A.J. Dwyer Scenic Area," is an important part of Jackson's *Washat* faith. Ex.1 ¶¶17-19; *see also* Ex.5-8 (Buck, Jr., & Wewa at 302). Sometimes Jackson would drive into the Dwyer site, "park [his] vehicle in the campground and just rest," in the same way his ancestors rested there as a stopover on their trading routes. Ex.1 ¶44. For Jackson, the Dwyer site was "like a church"—one that "never had walls, never had a roof, and never had a floor," but "is still just as sacred as a white person's church." *Id.* ¶19.

Slockish, too, consistent with his *Washat* faith, has a religious obligation to visit sacred sites like the Dwyer site. Ex.2 ¶¶12, 16. On his visits, Slockish would engage in "prayer, veneration of [his] ancestors, and giving of tobacco offerings." *Id.* ¶33, 35. Slockish's visits began "[i]n the early 1990s" and "took place at least twice a month or whenever [he] was driving through the Mount Hood Area" from his home a few hours' drive or less away. Ex.12 ¶9.

Plaintiffs accessed the site by driving through an opening in the guardrail on the north side of U.S. 26 directly to the campground itself. Ex.1 ¶¶44, 56; Ex.2 ¶51. Alternatively, it was sometimes possible to park at the end of East Wemme Trail and walk to the site. Ex.1 ¶56; *see also* Ex.3 ¶61; Ex.2 ¶51. But East Wemme Trail is "very, very narrow" and prone to flooding. Ex.4 37:9-10, 13-15. Thus, after significant rains, or if Plaintiffs planned to stay for anything more than "a very short time," the use of East Wemme Trail was unfeasible: either the car would end up "in a lake," or would cause "issues" by blocking traffic. Ex.4 37:9-16; *see also* Ex.8 92:12-18, 92:6-11.

In all, Plaintiffs used the Dwyer site for their religious practices for many decades—around 40 years for Jackson, 50 years for Logan, and 15 years for Slockish, Ex.1 ¶¶37, 54; Ex.8 104:23-105:10, 106:8-13; Ex.3 ¶¶29-30, 50; Ex.2 ¶¶33, 46. Their use continued until March 2008, when the Government destroyed the site, ultimately rendering Plaintiffs' continued religious exercise there "impossible." Ex.2 ¶53; *see also* Ex.1 ¶54; Ex.3 ¶61.

D. Previous Protection of the Sacred Site

The Dwyer Area is owned and managed by the Government through defendant BLM. Ex.11 FHWA_004472. BLM designated the Dwyer Area as a "Special Area," "unique" for "scenic and botanical values" including the diverse vegetation and the "large older trees" held sacred by Plaintiffs. *Id.*

The portion of U.S. 26 bordering Dwyer has long been used for recreational travel between population centers like Portland and tourism destinations like the Mount Hood ski resorts. Ex.15 FHWA_000178, 000184. Over the decades, there have been

many efforts to expand the highway—including the stretch bordering Dwyer—to "reduce existing peak use congestion" during "holiday weekends and on ski weekends." Ex.15 FHWA_000184.

In 1985, FHWA, BLM, and ODOT proposed expanding U.S. 26 to include a center turn lane, including in the portion bordering Dwyer. *See* Ex.15 FHWA_000176-000178. This proposal would have extended the pavement 15 feet north into Dwyer, Ex.16 FHWA_000444, resulting in the removal of "most of [Dwyer's] large trees." Ex.15 FHWA_00178.

This proposal prompted a large-scale campaign to save Dwyer. Ex.16 FHWA_000440, Ex.17 FHWA_002046 ("The community went nuts."). The campaign was led by Citizens for a Suitable Highway ("C-FASH"), an organization formed by Michael Jones—the head of Plaintiffs CGS and MHSLPA—"to fight the proposed widening project." Ex.18 FHWA_005435. C-FASH submitted letters to relevant agencies, testified at public hearings, gathered signatures on petitions, and talked extensively with agency officials. Ex.16 FHWA_000536-000542, 000547-000552, 000554-000555, 000563-000578, 000514, 000698-000699; Ex.17 FHWA_002046; Ex.18 FHWA_005435-005438. C-FASH emphasized Dwyer's "historical and cultural significance," noting that the area is "sacred" to Native Americans, that there was a "gravesite … not too very far off the highway," and that there was a stone altar. Ex.18 FHWA_005436; Ex.16 FHWA_000549.

BLM then issued a "Cultural Resource Use Permit" allowing archaeologists to study the stone altar with a BLM archaeologist on-site. Ex.13 FHWA_000302; Ex.35

BLM_0000021). Although they found no human remains, they concluded that the altar "may be at least several hundred years (and possibly much more) old," and it was "not possible to determine with any confidence whether the feature is aboriginal or Euro-American." Ex.13 FHWA_000303.

In response to C-FASH's concerns, FHWA and ODOT changed the proposal to "to decrease the impact in the Dwyer [Area]." Ex.16 FHWA_000440, FHWA_000462. Although a center turn lane was added on either side of Dwyer, they decided to treat Dwyer differently, adding no center turn lane and using "guardrails and retaining walls" to "minimize the number of trees taken." Ex.16 FHWA_000462-000464, 000474-000475. This modified proposal was adopted in 1986. *See* Ex.11 FHWA_004349.

To memorialize their discussions, C-FASH (through Jones) and ODOT signed an "Agreement for Conditions and Remedies for Mitigating and Resolving Highway 26 Widening Dispute." Ex.18 FHWA_005404-005464. This 1987 Agreement stated that there were "sacred" trees and a gravesite in Dwyer that needed to be considered in managing U.S. 26. Ex.18 FHWA_005436. ODOT also "committed" itself to managing U.S. 26 "in a manner which is consistent with these statements." Ex.18 FHWA_005405. Jones sent copies of this Agreement to BLM officials by 1990, Ex.21 ¶188, and FHWA received a copy no later than January 2008—before the construction at issue in this case began. Ex.18 FHWA_005404; *see also* Ex.4 74:11-15, 74:20-75:1.

Jones and others continued to raise awareness of the religious significance of the site throughout the 1990s. In one public meeting, a government official acknowledged that the stone altar was "the reason why we can't widen the highway." Ex.4 64:7-21. A few days later, the altar was vandalized. *Id.* Jones then informed BLM archaeologist Philipek and told her that "there were Native burials at Dwyer." Ex.21 ¶186. Philipek memorialized this call in notes dated March 12, 1990. Ex.20 BLM_000008-000009. Jones told Philipek that Native Americans had been going to the Dwyer site "for years" because of Native American "graves" at the site. *Id.* Jones also told her about ceremonies tribes performed at the site, including to repair the altar after it had been vandalized. *Id.*

Jones and Yakama leaders also met with government officials and "identified the [Dwyer site] as having burials." Ex.4 113:21-22; Ex.22 FHWA_005565-005613; Ex.21 ¶¶25, 30. Jones specifically told FHWA and BLM officials that Dwyer "was a traditional cultural property used by Native Americans" and that "there were Native American cultural and religious sites, including burials, at the Dwyer area." Ex.4 59:16-20, 60:18-61:8 (FHWA); 65:17-25, 66:16-19 (BLM); *see also* Ex.4 61:18-21, 63:5, 64:7-16 (FHWA present), 69:20-25 (Jones "told everyone who [he] came in contact with [from] BLM" at the site "that there were Native American cultural and religious sites" there). By March 2008, Jones's tireless efforts to raise awareness of the Dwyer site were reflected in the handwritten notes of a federal official: "Michael Jones—A nightmare. Since 1979[.]" Ex.23 ACHP_000053.

E. The Destruction of the Sacred Site

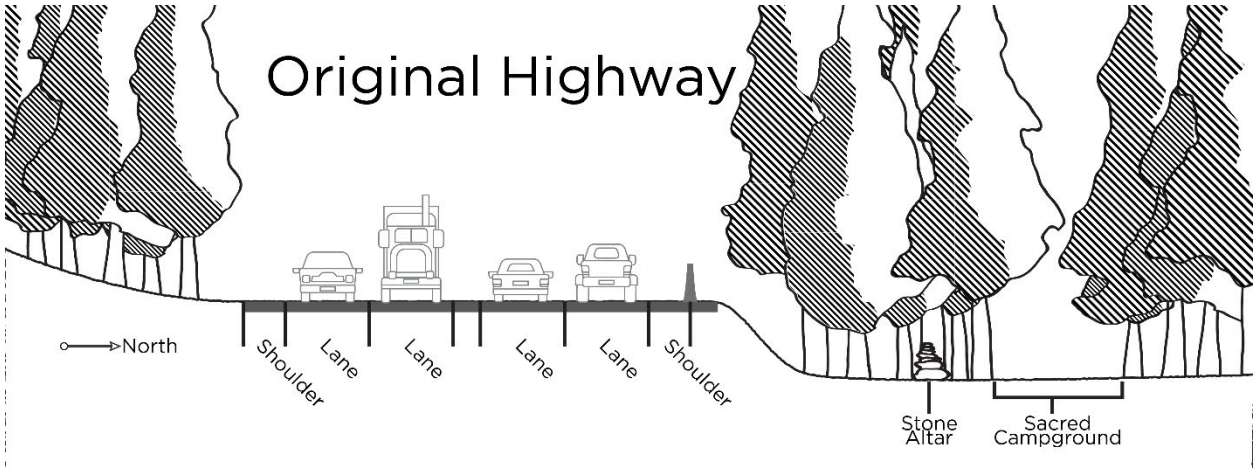
Despite these efforts, by the late 1990s, the Government and ODOT were again discussing widening U.S. 26 within Dwyer. Ex.24 FHWA_01977-002019. They recognized that widening U.S. 26 to the north "would require … extensive filling" and "removal of many large diameter trees"—the same trees that the agencies had "expended considerable effort to protect" in the 1980s. Ex.24 FHWA_001980. Nevertheless, BLM was "willing to allow widening," and even to "clos[e] access to the Dwyer [site] north of Highway 26," *id.*—despite the fact that the stretch of U.S. 26 bordering Dwyer was statistically safer than "similar rural principal arterials" in Oregon, with 24% fewer accidents than comparable roads. Ex.11 FHWA_004352 (0.47 vs. 0.62).

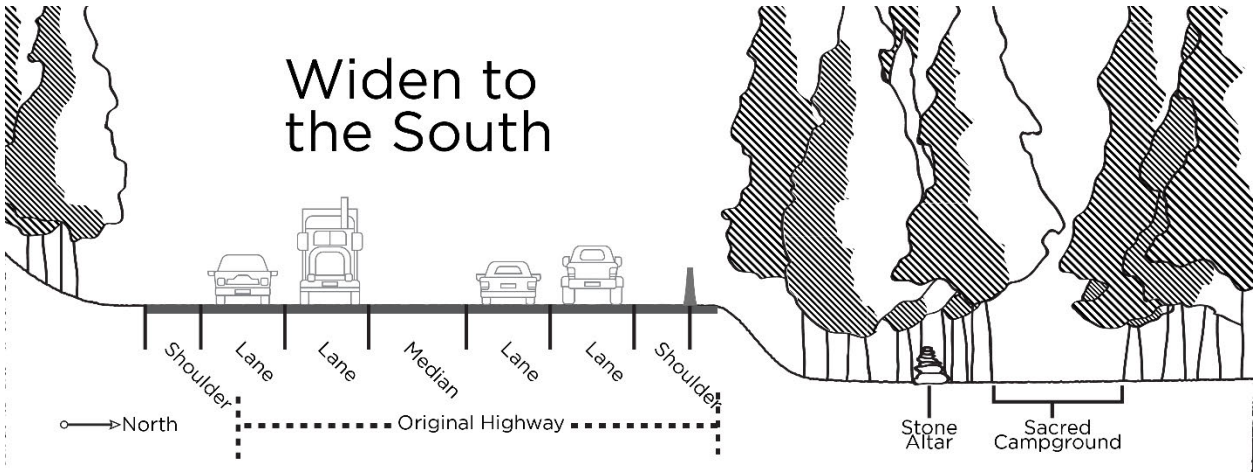
This new widening project—named the U.S. 26 Wildwood-Wemme Project—is the subject of this case. To initiate the project, in April 2004, FHWA suggested beginning with an Environmental Assessment (EA). Ex.17 FHWA_002044. In August, FHWA, BLM, and ODOT jointly prepared the EA. The EA identified a number of alternatives for "improv[ing] safety" on U.S. 26, several of which would involve no impact on Dwyer. Ex.11 FHWA_004361. For instance, a center turn lane could be added by widening the road to the south, leaving the north side of the highway—including the Dwyer site—unaffected. *Id.* Likewise, the road could be expanded "equal[ly] to the north and south," minimizing the impact to either side alone. Ex.11 FHWA_004362. Or the speed limit could be lowered, resulting in no impact on the site at all.

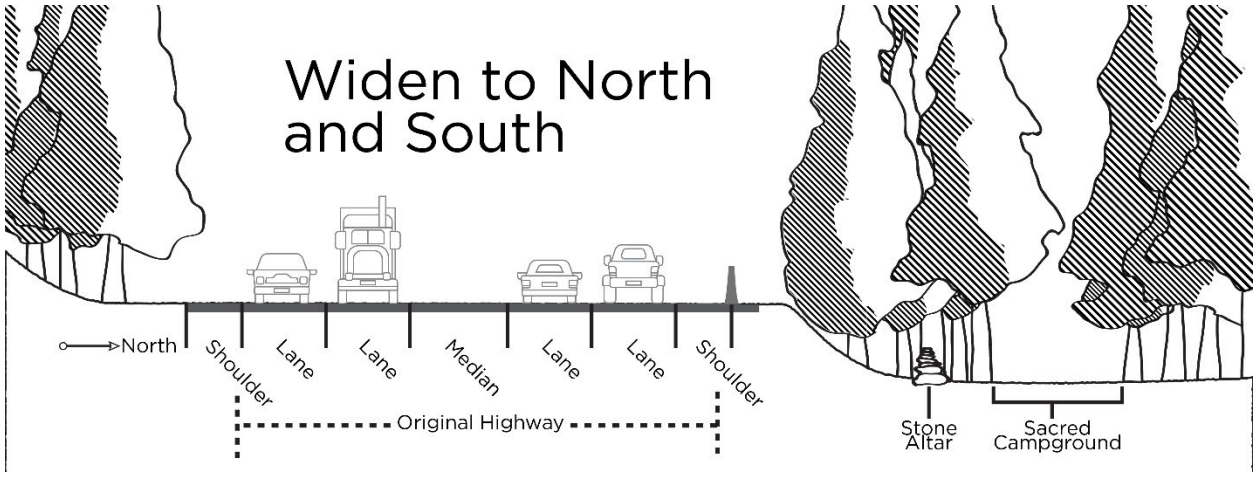
The option most destructive to Dwyer would be to widen the road to the north only. But within that option, the Government still recognized ways to reduce the im-

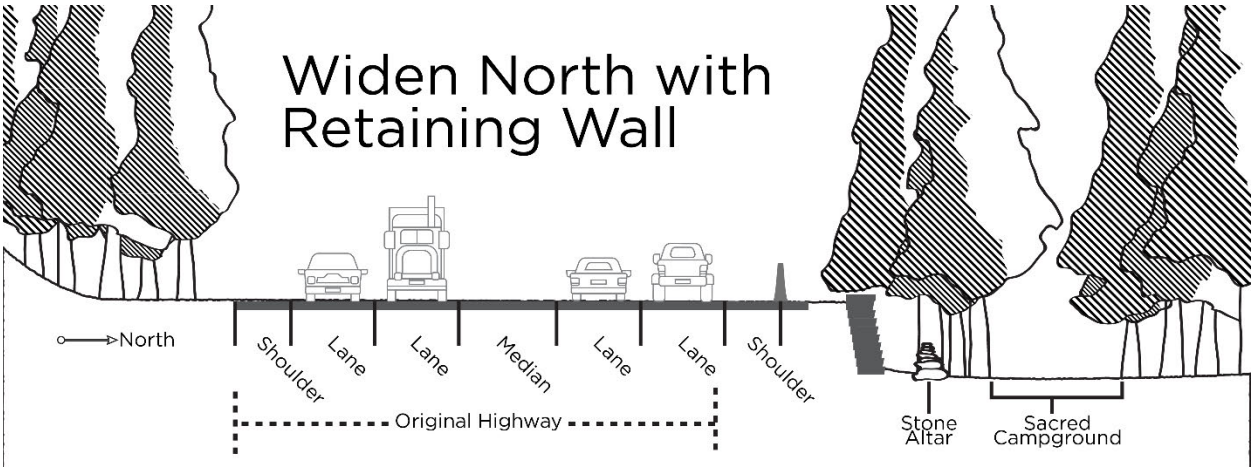
pact. For instance, rather than using a longer 3:1 slope on the north side of the highway—one that ran three feet for every foot of rise—the Government could use a steeper 1.5:1 slope or a retaining wall, as it did to protect wetlands in another part of the project. *See* Ex.25 FHWA_002976-002977; *see also* Ex.25 FHWA_003044-003046; Ex.42 FHWA_004967 (wetlands). These options would have reduced the project's footprint in Dwyer by 39% or 61%, respectively. *See* Ex.25 FHWA_002985-002990.

The following demonstratives (not to scale) illustrate these alternatives:

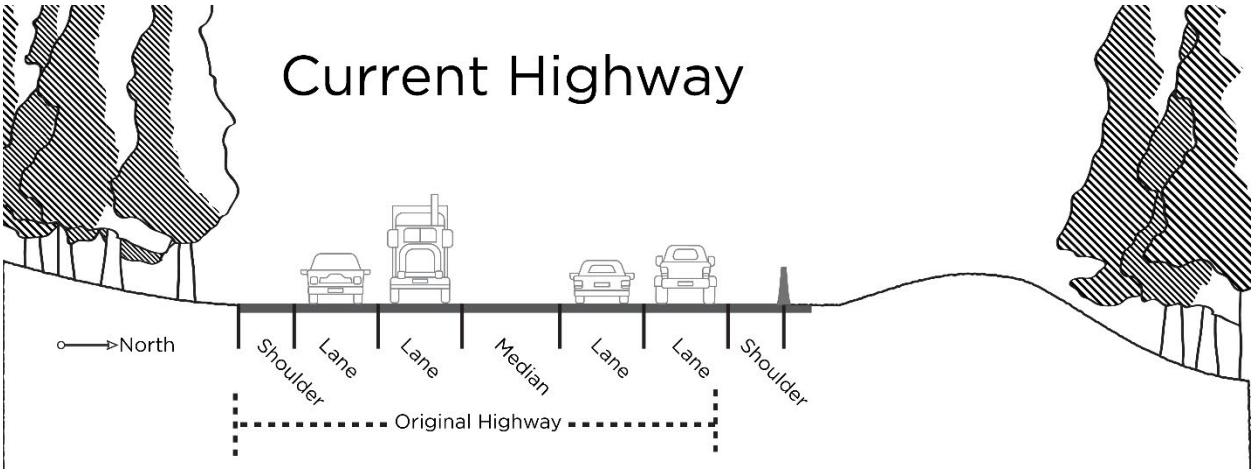

Original Highway
North
Shoulder
Lane
Lane
Lane
Lane
Shoulder
Stone Altar
Sacred Campground


Widen to the South
Shoulder
Lane
Lane
Median
Lane
Lane
Shoulder
North
Original Highway
Stone Altar
Sacred Campground


Widen to North and South
North
Shoulder
Lane
Lane
Median
Lane
Lane
Shoulder
Original Highway
Stone Altar
Sacred Campground



Despite these options, the Government and ODOT chose the "Widen to the North" alternative, using a 3:1 slope—the option most destructive of the Dwyer site. Ex.42 FHWA_004967. This alternative involved adding 14 feet of pavement on the north side of U.S. 26, requiring a 25-50-foot-wide strip of land in Dwyer to be "cleared of trees and vegetation," "includ[ing] most of the larger trees." Ex.11 FHWA_004472. This alternative is illustrated below:



BLM and FHWA then removed the remaining legal obstacles to construction. Because Dwyer was owned by the federal government, no trees could be removed without a BLM permit, 43 C.F.R. § 5511.3-2(b)(1); *see also United States v. Alcorn*, 12 F.

App'x 574, 574 (9th Cir. 2001); and no construction could take place unless BLM granted a right of way. *See* Ex.27 44-45. Thus, in February 2008, BLM granted a tree-removal permit. Ex.28 BLM_000035. And in April 2008, under an agreement with FHWA, BLM granted the right of way. Ex.29 BLM_000023-000032; Ex.30 FHWA_006590-006593. FHWA then executed a series of formal "Project Agreements" authorizing the use of more than $5 million in federal funds—over 90% of the total needed. Ex.31, pp.7-9.

Meanwhile, Plaintiffs explicitly informed the Government of their religious use of the Dwyer site—despite the Government's failure to consult with the Yakama Nation until after the project began, *see* Ex.32 FHWA_06544; Ex.23 ACHP_000053, and despite their fear that further highlighting the site would again lead to vandalism. Ex.3 ¶22; Ex.8 28:3-6; Ex.9 17:20-18:12; Ex.4 19:15-19. Jones urged FHWA to interview Jackson, Slockish, and Logan about Dwyer. Ex.4 88:10-89:3. Logan called FHWA in January 2008 and spoke about these issues. Ex.33 ACHP_000141. In February, the Government was given a copy of the 1987 Agreement, a transcript of the 1991 meeting with Wilferd Yallup, and a 1991 letter from a Yakama Nation official, Ex.33 FHWA_005562-63—all highlighting the importance of the area for Native American religious use. Ex.4 113:21-22; Ex.18 FHWA_005436; Ex.33 FHWA_005564. That same month, Logan sent FHWA a memorandum discussing the "American Indian cultural and religious sites" in Dwyer, and expressing belief that "an additional lane c[ould] be added in the Wildwood to Wemme area without destroying heritage resources." Ex.33 ACHP_000047-ACHP_000052; *see also* Ex.33 FHWA_005704-005707.

Notes from a federal official in March 2008 reflect these communications from Slockish, Jackson, and Logan, stating that "these are [Native] sites," that have "graves," and that Plaintiffs were "not consulted about the project." Ex.23 ACHP_000053. All of this occurred before tree removal began in March 2008.

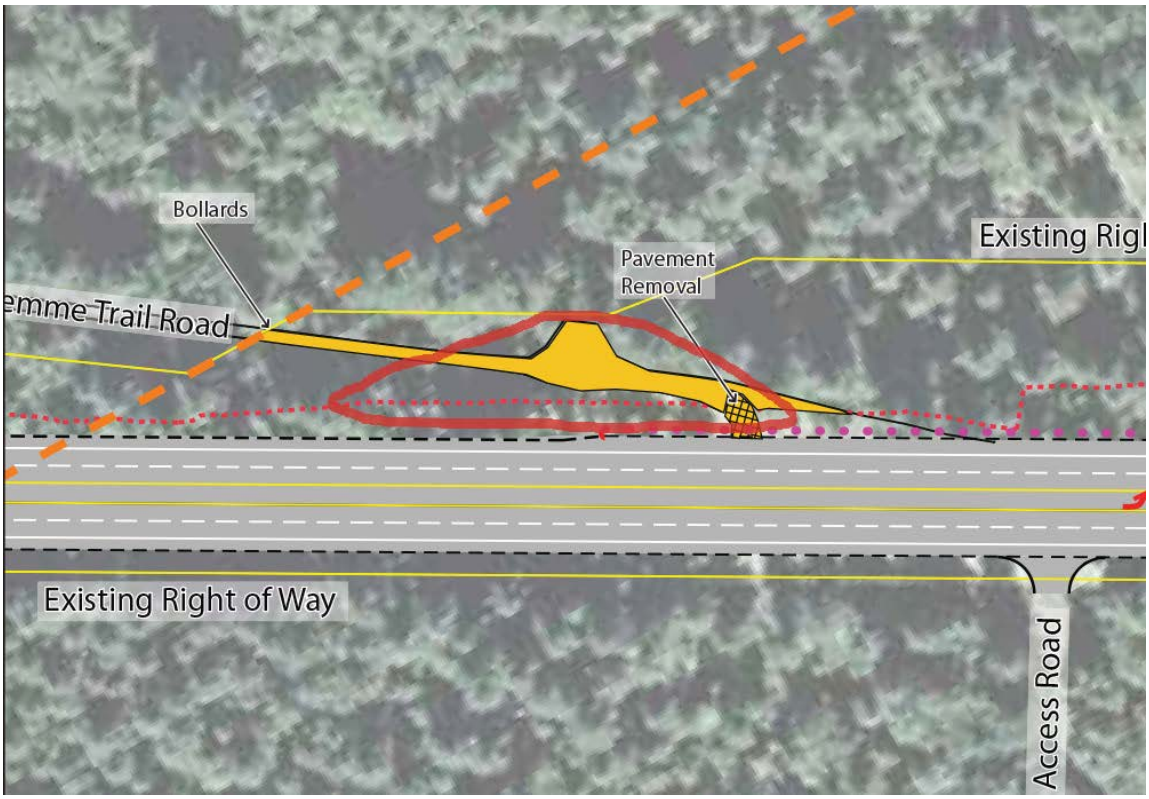
After tree removal but before construction, Jackson, Logan, and Slockish sent additional memoranda in April and May 2008, each detailing the Dwyer site's history and importance to Native American religious exercise. Ex.33 ACHP_000117-ACHP_000143. A FHWA call log from May 2008 shows that an FHWA official was alerted by Plaintiffs' attorney to "Indian remains on the site." Ex.19 BLM_000019. The FHWA official spoke with BLM's archaeologist, who said she had "addressed the issue with" Plaintiffs "in 1986" and decided it was not worth protecting. *Id.* The archaeologist also visited the site again on July 24, 2008, documenting that the "rock cluster" had been scattered. Ex.35 BLM 0000021-BLM0000025. Her report on the visit included notes from her previous call with Michael Jones highlighting the sacred nature of the site. Ex.20 BLM_000006-BLM000009.

Construction began four days after this visit and was completed the following year. ECF 122 at 7-8; ECF 287 at 6. The construction destroyed all elements of the site used in Plaintiffs' religious exercise. Scores of large-diameter trees were cut down and used by the Government to rehabilitate a fish habitat. Ex.11 FHWA_004472; Ex.34 BLM_0000066. During tree removal, around twelve "stone monuments" marking the burial grounds were uncovered from where they had been "camouflaged by the trees and vegetation." Ex.7 ¶¶26, 28-29; *see also* Ex.10 18:11-13; Ex.8 23:25-24:2;

Ex.6 ¶30; Ex.12 ¶16. These markers were then "scraped up" and removed. Ex.6 ¶31. The traditional campground and burial grounds were bulldozed and buried beneath a massive earthen berm. Ex.3 ¶55. Before tree removal, the stone altar had been marked with a flag so it could be easily located. Ex.8 22:11-23; *see also* Ex.6 ¶28 (the altar was "tagged … so that it could be easily located"); Ex.7 ¶24. But BLM's archaeologist acknowledged that the altar was "scattered and disturbed" during tree removal, Ex.35 BLM_0000021, and it was ultimately "disposed of." ECF 287 at 28. The native vegetation formerly covering the campground, including the sacred medicine plants, was replaced with grass. Ex.4 38:20-24. And a new guardrail blocked off the former access to the site. Ex.1 ¶56; Ex.2 ¶51.

The following map, satellite images, and photos depict the destruction of the site:

Construction Map (Ex.11 FHWA_004356)



Before Widening – 2005 (Ex.5-3)

After Widening – 2016 (Ex.5-2)

Before Widening – 2008 (Ex.5-1)

After Widening – 2017 (Ex.5-4)

An interactive, 360-degree photograph of the site is available before construction from Google here (https://goo.gl/maps/2LUfMQLaMGU2) and after construction from Ex.40-1 here (http://bit.ly/2usgvbo).

The destruction of the sacred site has made it impossible for Plaintiffs to "enter" the site in any meaningful sense, because "everything [sacred] that was there" has now been buried, removed, or obliterated. Ex.8 50:14-22; *see also* Ex.9 22:8-9, 23:16-20 (after construction, "[t]he site, the – where the burial was, where the rock piles were" was "gone"); Ex.4 42:17-19 ("[Plaintiffs] can't go to the campground. The campground isn't there. It's buried."). It has also made it impossible for Plaintiffs to engage in their religious practices there. Ex.2 ¶53. Before the widening, Plaintiffs used the campground and burial site to venerate and pay respects to their ancestors—but with those sites now buried under a berm, Plaintiffs "c[an] no longer" even "locate their [ancestors'] final resting places." Ex.1 ¶55. Plaintiffs' altar formerly served as a focal point for worship services and a marker that the site contained burials—but the altar has been "disposed of." ECF 287 at 28. The "trees themselves ha[d] been a part of ceremonies" Plaintiffs performed at the site, and they also relied on them to keep their religious exercises private—but now the trees are gone. Ex.8 23:4-5; Ex.1 ¶54; *see also* Ex.9 27:23-28:1; *cf.* Ex.9 98:23-99:10. And Plaintiffs formerly gathered sacred medicine plants at the site—but "[t]here is nothing" anymore at the Dwyer site "that [Plaintiffs] could use." Ex.8 85:22-86:2.

II. Relevant Procedural Background

Plaintiffs filed suit on October 6, 2008, challenging the destruction of their "sacred and cultural sites." ECF 1 at 3. On May 21, 2009, the Government moved to dismiss

for lack of jurisdiction, arguing that Plaintiffs had suffered no concrete injury and that, due to completion of the project, any injury was no longer redressable. ECF 28-2 at 12-15, 17-19. This Court rejected those arguments, concluding that Plaintiffs had demonstrated an injury and that relief was available. ECF 48 at 16-24, 28-29 (Magistrate Judge Stewart); ECF 52 (Judge Brown).

On June 3, 2011, the Government moved for judgment on the pleadings, arguing that Plaintiffs had not suffered a "substantial burden" on their religious exercise, and that RFRA does not apply to government actions on its own land. ECF 104 at 10-15. This Court rejected that argument, concluding that Plaintiffs had adequately alleged a substantial burden, because they "allege[d] that they cannot freely access the site because of a newly constructed guardrail and destruction of the artifacts themselves." ECF 122 at 14-17 (Magistrate Judge Stewart); ECF 131 (Judge Brown).

On March 13, 2017, this Court set a deadline for the Government "to file [a] dispositive motion on jurisdictional grounds." ECF 285, 286. On May 16, 2017, the Government filed the present motion, reasserting several of the jurisdictional arguments that have already been rejected. ECF 287 at 25-31. It also reasserts the argument that Plaintiffs have failed to show a "substantial burden" on their religious exercise. *Id.* at 14-23.

LEGAL STANDARD

Summary judgment is proper if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute of material fact exists if "reasonable jurors, drawing all inferences in favor of the nonmoving party, could return a verdict

in the nonmoving party's favor." *Diaz v. Eagle Produce Ltd. P'ship*, 521 F.3d 1201, 1207 (9th Cir. 2008).

ARGUMENT

I. Plaintiffs have standing.

The Government argues that Plaintiffs lack standing. ECF 287 at 25. To establish standing, Plaintiffs must demonstrate (1) an "injury in fact"; (2) that is "fairly traceable" to defendants; and (3) that is redressable by a favorable court ruling. *NRDC v. Jewell*, 749 F.3d 776, 782 (9th Cir. 2014) (en banc). Here, the Court has already held that Plaintiffs "allege[d] sufficient facts to establish constitutional standing." ECF 48 at 30. That ruling is law of the case and, in any event, Plaintiffs satisfy the requirements of Article III.

A. This Court's prior ruling on standing is law of the case.

Under law of the case doctrine, "a court is generally precluded from reconsidering an issue previously decided by the same court." *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452-53 (9th Cir. 2000). This doctrine applies when "the issue in question [was] decided explicitly or by necessary implication in [the] previous disposition." *Id.* at 452. This includes the issue of standing. *See, e.g.*, *Nordstrom v. Ryan*, 856 F.3d 1265, 1270 (9th Cir. 2017) ("prior determination that [plaintiff] had standing" was "law of the case"); *Hilao v. Estate of Marcos*, 103 F.3d 767, 772 (9th Cir. 1996) (prior Article III ruling was law of the case).

Here, the Government challenged standing in a prior motion to dismiss, arguing that Plaintiffs suffered no injury because they failed to allege "any intent to visit the [sacred] site in the future." ECF 28 at 11. The Government repeats that argument

here, claiming that Plaintiffs have suffered no injury because "none of the named Plaintiffs have identified concrete plans to visit the [sacred site]." ECF 287 at 26. But this Court has already rejected this argument, concluding that Plaintiffs "use[d] the [sacred site] for cultural, recreational, and aesthetic purposes" in the past and "would do so in the future"—but for the Government's destructive actions. ECF 48 at 27-29 (magistrate's report and recommendation); ECF 52 (adopting ECF 45). Since that ruling, Plaintiffs have offered even more facts detailing their past and planned use of the sacred site. *See* Ex.1 ¶¶17-19, 22, 37, 43-44; Ex.3 ¶¶15, 18, 50, 61-63; Ex.2 ¶¶12, 16, 33, 35. The Government offers no argument that any of the exceptions to the law of the case doctrine apply—*i.e.*, that this Court's prior decision was erroneous, that the evidence is weaker now than it was before, or that there has been an intervening change in the law. *See Lummi Indian Tribe*, 235 F.3d at 452-53. Thus, those arguments are waived, and the prior ruling is law of the case.

The Government's earlier motion also argued that, even if Plaintiffs had been injured, their injury is no longer "redressable," because the damage to the sacred site "has been completed," and any relief granted to Plaintiffs would be "outside the control of the Federal Defendants." ECF 28 at 8-9. The Government repeats that argument here, claiming that "no redress is possible," because the "destruction of a religious site … cannot be und[one]," and "only ODOT can" restore the site. ECF 287 at 28. But this Court has already rejected this argument, too, holding that the Court could still "order mitigation of the harm to cultural resources." ECF 52 at 5-8. That ruling is also the law of the case.

B. Plaintiffs have suffered concrete injury.

Even if the Court were to reconsider standing, Plaintiffs have satisfied the requirements of Article III. In cases involving use of land, a plaintiff establishes an injury in fact by showing "a connection to the area of concern sufficient to make credible the contention that the person's future life will be less enjoyable" if the area is adversely impacted. *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1149 (9th Cir. 2000) (citing *Friends of the Earth, Inc. v. Laidlaw Env'l Servs. (TOC), Inc.*, 528 U.S. 167, 180-84 (2000)). Here, Plaintiffs repeatedly visited the site to exercise their religion for many years, and would continue doing so, but cannot, because the site has been destroyed. *E.g.*, Ex.4 42:17-19; Ex.8 50:14-22, 85:22-86:2; Ex.1 ¶¶54-55; Ex.2 ¶¶33, 53. That demonstrates an injury in fact.

Ignoring this precedent, the Government cites *Lujan* and *Summers* (at 26), which held that a plaintiff who asserts only vague, "'some day' intentions" to visit an area has suffered no cognizable injury. *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 563-64 (1992). But Plaintiffs have not made "concrete plans to visit the [site]" in the future (ECF No. 287 at 26) for an obvious reason: The Government has destroyed the site, making it impossible for them to practice their religion there absent remediation. In other words, this case involves an "actual," ongoing injury—not, as the Government claims, a "future injury." *Id.*

Laidlaw is instructive. There, the plaintiff challenged the defendant's pollution of a river. 528 U.S. at 175-78. To establish injury, the plaintiffs testified that although they previously used the river, they no longer did so (nor had any concrete, future

intention to do so), because of the pollution—although they "would like" to return to their activities in the future. *Id.* at 181-83. The Court held that "[t]hese sworn statements … adequately documented injury in fact." *Id.* at 183.

Here, Plaintiffs testified that they formerly used the sacred site for religious purposes, but have been "prevented" from doing so by the Government's destruction of the site. Ex.3 ¶¶15, 50, 61; *see also* Ex.1 ¶¶36-37, 43-46, 54-56; Ex.2 ¶¶33-36, 46, 52-53. They further testified that "[i]f the Court orders" mitigation of the destruction, they "will return to … prior religious activities." Ex.3 ¶63; *see also* Ex.1 ¶59; Ex.2 ¶57. These statements are even stronger than the allegations that sufficed to establish an injury in *Laidlaw*. *See* 528 U.S. at 181-83.

C. Plaintiffs' injury is fairly traceable to the Government.

The Government also argues that the traceability requirement is not met because it was "ODOT, rather than the Federal Defendants," that "cut down trees and clear[ed] ground to construct the turn lane." ECF 287 at 27, 23.

But to satisfy traceability, it is enough to show that the defendant's conduct was a "but-for" cause of the plaintiff's injury. *See Maya v. Centex Corp.*, 658 F.3d 1060, 1070 (9th Cir. 2011). For example, in *Idaho Conservation League v. Mumma*, plaintiffs sued the U.S. Forest Service for recommending against designating certain areas as wilderness—thus allowing "possible subsequent development" by third parties. 956 F.2d 1508, 1518 (9th Cir. 1992). The Ninth Circuit held that harm caused by third parties was traceable to the government because "[t]he third parties could not undertake their future actions *but for* the challenged decision." *Id.*

So too here. The Government, through BLM, owns the land where Plaintiffs' sacred site was located. So unless BLM granted a right-of-way and a tree-removal permit, the highway could not have been expanded to the north, and the destruction of the sacred site could not have occurred. *See* Ex.30 FHWA_006590; Ex.27 44-45; 43 C.F.R. § 5511.3-2(b)(1). Thus, the Government was the but-for cause of Plaintiffs' injury. The Government also did far more than that—funding, planning, guiding, coordinating, and profiting from the destruction. *See* Part IV.G, *infra*. But nothing more is needed for traceability.

D. Plaintiffs' injury can be redressed.

Next, the Government claims that Plaintiffs' injury is no longer redressable because the "destruction of a religious site … cannot be und[one]," and, in any event, "even if it were possible to remediate the site, … only ODOT can do that." ECF 287 at 27-29.

But each Plaintiff testified that if the Government remediated the site, they would be able to resume at least some of their religious practices. *See* Ex.1 ¶59; Ex.3 ¶63; Ex.2 ¶57; Ex.10 65:2-66:6; Ex.8 59:4-67:20; Ex.9 98:1-99:18. Plaintiffs identified a number of different types of remediation: The Government could remove all or part of the earthen berm covering the campsite and burial ground, *e.g.*, Ex.3 ¶63; Ex.4 103:2-10; return the stone altar or allow Plaintiffs to create a replica at the site, Ex.8 29:3-4, 59:7-10; Ex.4 99:17-100:6; replant trees and vegetation, *e.g.*, Ex.2 ¶57; remove the portion of the guardrail blocking access to the site, *e.g.*, Ex.1 ¶59; or erect a marker identifying the area as a sacred site, *e.g.*, Ex.3 59:4-13; 60:16-21; *see also* Ex.4 95:24-96:24. All of this relief (except perhaps altering the guardrail) could be done on

the Government's own land. And if the Court ordered any of this relief, Plaintiffs' injury would be at least partially redressed—which is all that is required under Article III. *Neighbors of Cuddy Mtn. v. Alexander*, 303 F.3d 1059, 1065-66 & n.5 (9th Cir. 2002).

Finally, even if injunctive relief were unavailable, Plaintiffs have requested a declaratory judgment that the Government violated RFRA. ECF 223 at 37. Such relief is particularly appropriate here, where Plaintiffs use other sacred sites near Mount Hood, and the Government claims authority to destroy those sites without ever being subject to RFRA review. ECF 287 at 19-23. Thus, even absent injunctive relief, this Court has "a duty to decide the merits of [Plaintiffs'] declaratory judgment claim." *Biodiversity Legal Found. v. Bagley*, 309 F.3d 1166, 1173-75 (9th Cir. 2002).

II. The Government's laches argument is meritless.

The Government next argues that Plaintiffs' RFRA claim is barred by laches, because they allegedly "remain[ed] silent about their concerns … during the long administrative process" and filed suit only "after construction began." ECF 287 at 30. But this argument fails for multiple reasons.

First, "laches is inapplicable when Congress has provided a statute of limitations to govern the action." *Miller v. Maxwell's Int'l*, 991 F.2d 583, 586 (9th Cir. 1993). Here, Plaintiffs' RFRA claim is governed by "a four-year statute of limitations." *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-1534, 2017 WL 908538, at *5 (D.D.C. March 15, 2017); *see* 28 U.S.C. § 1658(a). Plaintiffs filed suit well within that time—immediately after construction began. Thus, laches is inapplicable.

Ignoring this, the Government cites *Apache Survival Coalition v. United States*, 21 F.3d 895 (9th Cir. 1994). ECF 287 at 30. But *Apache Survival* involved a claim under the National Historic Preservation Act, which has no statute of limitations—so it is irrelevant here. 21 F.3d at 905-14. The Government also cites *Standing Rock*, but *Standing Rock* held that the RFRA claim could *not* be barred by laches, because it was brought within the four-year statute of limitations. 2017 WL 908538, at *4-5. Thus, *Standing Rock* supports Plaintiffs, not the Government.

Second, even if there were no statute of limitations, "laches typically does not bar prospective injunctive relief," because "almost by definition, [a] plaintiff's past dilatoriness is unrelated to a defendant's ongoing behavior that threatens future harm." *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 959-60 (9th Cir. 2001). Here, Plaintiffs seek prospective injunctive relief: remediation of the sacred site. Thus, laches cannot apply.

Finally, even if laches could apply, the Government has failed to demonstrate that Plaintiffs "lacked diligence in pursuing [their] claim" or that the Government suffered "prejudice." *Save the Peaks Coal. v. U.S. Forest Serv.*, 669 F.3d 1025, 1031 (9th Cir. 2012). Plaintiffs successfully fought to protect the site in the 1980s. They obtained a written agreement expressly noting the "sacred" nature of the site and the presence of a "Native American . . . gravesite" and burial cairn "located not too very far off the highway." Ex.18 FHWA_005436. They continued to press their concerns throughout

the 1990s, and repeatedly called, spoke with, and sent memos to federal officials before construction began. *See* pp.11-13, *supra*. Far from a lack of diligence, this is the Government running roughshod over longstanding and well-recognized concerns.

III. Plaintiffs have established a substantial burden.

Lacking any serious jurisdictional arguments, the Government turns to the merits, arguing that Plaintiffs have failed to establish a "substantial burden" under RFRA. ECF No. 287 at 14-25. But the Government's arguments are inconsistent with the law of the case, ignore contrary authority, and misinterpret *Navajo Nation* and *Lyng*. In fact, Plaintiffs have established a substantial burden as a matter of law and are therefore entitled to partial summary judgment in their favor.

A. Plaintiffs have established a substantial burden as a matter of law.

RFRA provides that the "[g]overnment shall not substantially burden a person's exercise of religion" unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b).

RFRA claims proceed in two parts. First, the plaintiffs must show that their "exercise of religion" has been "substantially burdened." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008) (en banc). Second, "the burden of persuasion shifts to the government" to satisfy strict scrutiny—*i.e.*, to prove that burdening the plaintiffs' religious exercise is "the least restrictive means" of furthering a "compelling governmental interest." *Id.* The purpose of this framework is to provide "very

broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014).

The Supreme Court has long held that both "indirect" penalties and "outright prohibitions" can be a substantial burden. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2022 (2017) (quoting *Lyng v. N.W. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)). An example of an "indirect" burden is *Sherbert v. Verner*, in which a state denied unemployment compensation to a Seventh-day Adventist who declined to accept work on her Sabbath. 374 U.S. 398, 399-401 (1963). The Supreme Court held that this imposed a substantial burden on her religious exercise because it forced her "to choose" between either "abandoning one of the precepts of her religion" or else "forfeiting benefits." *Id.* at 403-04.

Similarly, in *Holt v. Hobbs*, a prison required a Muslim prisoner to either shave the beard he grew for religious reasons or else face disciplinary action. 135 S. Ct. 853, 862 (2015). The Supreme Court unanimously held that "put[ting] [the prisoner] to this choice" "easily satisfied" the substantial burden test. *Id.* at 862-63.[2] In these and other cases, the Court has had "little trouble" finding a substantial burden, even though the plaintiffs still had a "choice," *Hobby Lobby*, 134 S. Ct. at 2775-77, and the burden on their religious exercise was only "indirect."

Here, however, the burden on Plaintiffs' religious exercise is *direct*. The Government has not given Plaintiffs a "choice"—such as by telling them that they can use

[2] *Holt* involved a claim under RLUIPA, which is RFRA's "sister statute" and applies "the same [substantial burden] standard" in the prison and land-use contexts. *Holt*, 135 S. Ct. at 859-60.

the sacred site but may be fined for trespassing if they do. Instead, the Government has *barred* Plaintiffs from engaging in their religious practices altogether by destroying the site. Thus, under *Sherbert*, *Hobby Lobby*, and *Holt*, this is an *a fortiori* case.

Numerous cases confirm this principle. For example, in *Greene v. Solano County Jail*, 513 F.3d 982, 988 (9th Cir. 2008), a prison refused to allow an inmate to attend worship services with other prisoners. The Ninth Circuit noted that the prison was not merely giving the inmate a "false choice" between forgoing his religious practice or suffering prison discipline. *Id.* Instead, it was stopping his religious practice entirely. *Id.* The court had "little difficulty" concluding that "an outright ban on a particular religious exercise is a substantial burden." *Id.*; *see also Warsoldier v. Woodford*, 418 F.3d 989, 996 (9th Cir. 2005) ("physically forc[ing an inmate] to cut his hair" would constitute a substantial burden).

Likewise, in *International Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1066-70 (9th Cir. 2011), the government refused to let plaintiffs build a church at the only site in the city that would accommodate their religious practices. The Ninth Circuit recognized that the right to "a place of worship … consistent with … theological requirements" is "at the very core of the free exercise of religion." *Id.* (citation omitted). It therefore held that preventing plaintiff from building a place of worship could constitute a substantial burden. *Id.* at 1061, 70.

In *Yellowbear v. Lampert*, 741 F.3d 48, 51-52 (10th Cir. 2014), the plaintiff sought to use his prison's sweat lodge, but the prison refused. In an opinion by then-Judge Gorsuch, the court held that "it d[idn]'t take much work to see that" the plaintiff's

religious exercise had been substantially burdened, because it hadn't given the plaintiff any "degree of choice in the matter." *Id.* at 56. It had "prevent[ed] [him] from participating" in the religious exercise entirely, which "easily" constituted a substantial burden. *Id.* at 55.

Finally, in *Haight*, a prison denied the plaintiffs' request to receive "traditional foods [for] their annual powwow." 763 F.3d at 560 (6th Cir. 2014). The court held that the prison had not merely "burden[ed]" the prisoners' religious exercise; "the prison *barred* access to the foods altogether." *Id.* at 564-65. And, of course, "[t]he greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice)." *Id.* at 565; *see also Shaw v. Norman*, No. 6:07cv443, 2008 WL 4500317, at *13 (E.D. Tex. Oct. 1, 2008) ("confiscation of [religious] items" is a substantial burden because it "t[akes] away the very items [plaintiff] need[s] to practice his religion").

All of these cases involve the same type of burden: The government did not merely burden plaintiffs' religious exercise "indirectly," by giving them a choice between forgoing their religious exercise or suffering a penalty; it burdened their religious exercise "directly," by rendering it impossible. The same is true here.

B. The Government's substantial-burden argument is foreclosed by law of the case.

Against this straightforward analysis, the Government argues, in effect, that the burden on Plaintiffs' religious exercise is *too great* to qualify as a "substantial burden." *See* ECF 287 at 14-23. The Government says that a "substantial burden" is a

"term of art" that encompasses only "two limited circumstances"—namely, when individuals are (1) "forced to choose between following the tenets of their religion and receiving a governmental benefit," or (2) "threat[ened] [with] civil or criminal sanctions." *Id.* at 14-15 (quoting *Navajo Nation*, 535 F.3d at 1070). Thus, under this view, if the Government had fined Plaintiffs for trespassing at the site (thus making their religious practices more *costly*), Plaintiffs would have suffered a "substantial burden." *Id.* at 17-19. But because the Government destroyed the site (making their religious practices *impossible*), Plaintiffs have suffered no "substantial burden."

Aside from being absurd, this argument is foreclosed by law of the case. In 2011, citing *Navajo Nation* and *Lyng*, the Government argued that there is no substantial burden, because the Government did not "[1] force the plaintiffs to choose between following their religion and receiving a governmental benefit" or "[2] coerce plaintiffs into violating their religious beliefs by threat of civil or criminal sanctions." ECF 104 at 12. But this Court rejected that argument, concluding that *Navajo Nation* and *Lyng* are "distinguish[able]" where, as here, the Government has "prevent[ed] Plaintiffs from having any access to their religious site, and, in addition, [destroyed] religious artifacts at the site." ECF 131 at 9-10. Recognizing this problem, the Government now claims that Plaintiffs "have failed to establish a record" of destruction of "any artifacts at the site," and "have always had access to the Dwyer site." ECF 287 at 22. But the evidence abundantly shows that the campground, burial ground, stone altar, and trees have been destroyed, and there is no more sacred site to "access." Thus, the Court's prior ruling remains law of the case.

C. Neither *Lyng* nor *Navajo Nation* involved the destruction of a sacred site.

Even if the prior ruling were not law of the case, the Government's interpretation of RFRA is incorrect. Citing *Navajo Nation*, the Government argues that it can impose a substantial burden *only* by (1) denying a government benefit or (2) imposing a penalty on a religious practice. ECF 287 at 14-23. But this is a misinterpretation of *Navajo Nation*.

Navajo Nation derived those two categories from *Sherbert* and *Yoder*, two Supreme Court cases involving "indirect" burdens on religious exercise. After discussing those cases, *Navajo Nation* held that "[a]ny burden imposed on the exercise of religion *short of* that described by *Sherbert* and *Yoder* is not a 'substantial burden' within the meaning of RFRA." 535 F.3d at 1069-70.

The Government interprets this to mean that unless a burden on religious exercise takes the *same form* as the indirect burdens in *Sherbert* and *Yoder*, the plaintiff has not suffered a substantial burden. But *Navajo Nation* held that *Sherbert* and *Yoder* constitute the *floor* of substantial-burden claims, not the *universe*. That means that if a burden on religious exercise is not "short of" but *greater than* the burdens in *Sherbert* and *Yoder*, it is "substantial" under RFRA. *Id.*

Indeed, if *Navajo Nation had* purported to limit the concept of "substantial burden" to only those burdens that were already deemed substantial in "pre-*Smith* cases" (as the Government claims at 13-15), it would be flatly inconsistent with later Supreme Court precedent. Specifically, in *Hobby Lobby*, the Government made the same basic argument it makes here—namely, that "RFRA merely restored this Court's pre-

Smith decisions" and therefore "did not allow a plaintiff to raise a RFRA claim" unless it was the same sort of claim "that this Court entertained in the years before *Smith*." 134 S. Ct. at 2773. But the Supreme Court rejected that argument as "absurd." *Id.* Reading *Navajo Nation* to reach the same result is equally absurd.

Lyng and *Navajo Nation* are also distinguishable from this case—as this Court has already recognized. ECF 131 at 9-10. Neither case involved the destruction of a sacred site; rather, both involved claims that the government had merely "'diminish[ed] the sacredness'" of a site. *Navajo Nation*, 535 F.3d at 1071 (quoting *Lyng*, 485 U.S. at 448).

In *Lyng*, the plaintiffs alleged that a road would impinge on the "purity" of religious practices in an area encompassing "more than 17,000 acres." 485 U.S. at 453. The Government, however, chose a route that was "the farthest removed from contemporary spiritual sites" so that "[n]o sites where specific rituals take place [would] be disturbed." 485 U.S. at 453-454. Thus, the plaintiffs in *Lyng* did not allege that any sacred site was destroyed; they alleged that the project made their religious practices less spiritually satisfying. *Id.* at 448-53. Indeed, the Court in *Lyng* said that if the plaintiffs had been "prohibit[ed] . . . from visiting" the area, that "would raise a different set of constitutional questions." *Id.* at 453.

Here, by contrast, Plaintiffs are not saying that the Government has interfered with the purity of their religious practices. They are saying that the Government has prevented them from engaging in those practices at all—by obliterating the objects used for those practices and destroying the site. Further, in *Lyng*, the Government

"could [not] have been more solicitous" toward Native American religious practices while building the road. *Lyng*, 485 U.S. at 453-54. Here, the Government did not even consider Plaintiffs' religious practices and chose the most destructive alternative.

Navajo Nation is equally inapposite. There, plaintiffs challenged the use of recycled wastewater to make artificial snow on 777 acres of a 74,000-acre sacred mountain range. 535 F.3d at 1062-63. The Ninth Circuit held that there was no substantial burden, because the snow would have no physical impact on the area: "no plants, springs, natural resources, shrines with religious significance, or religious ceremonies … would be physically affected[; n]o plants would be destroyed or stunted; no springs polluted; no places of worship made inaccessible, or liturgy modified." *Id.* at 1063. Instead, "the sole effect of the artificial snow [was] on the Plaintiffs' subjective experience." *Id.*

But this case is not about a diminishment of Plaintiffs' "subjective experience" in using the site; it is about their inability to use the site at all. Here, unlike *Navajo Nation*, "plants [*were*] destroyed"; "shrines with religious significance [*were*] physically affected"; and a "place[] of worship [*was*] made inaccessible" by being bulldozed and buried under an earthen berm. Thus, the holding in *Navajo Nation*, which addressed an injury to "religious sensibilities" divorced from any physical impact to the site, is inapplicable here. 535 F.3d at 1064. Indeed, the Government recognized as much in oral argument in *Navajo Nation*, conceding that if in that case, rather than

approving the use of artificial snow, the Government had instead fenced off the mountain and prohibited access to it, the substantial-burden element would have been satisfied. Oral Argument at 41:50, 43:21, *Navajo Nation*, 535 F.3d 1058 (No. 06-15371).

Nor has the Government cited any other case involving destruction of a sacred site. ECF 287 at 17, 22 (citing cases). In *Snoqualmie Indian Tribe v. F.E.R.C.*, plaintiffs challenged the relicensing of a hydroelectric plant, because it reduced the flow of water over a sacred waterfall. 545 F.3d 1207, 1210-11 (9th Cir. 2008). But the plant had already been operating for 106 years, and relicensing actually *increased* water flows up to ten times what was previously permitted. *Id.* at 1211-12 (100 vs. 1,000 cfs). The plaintiffs also remained able to access the falls, possess religious objects, and perform ceremonies there; they complained instead about "the *quality* of [their] religious experience." *Id.* at 1215 & n.3. Thus, the court applied *Navajo Nation*.

Similarly, in *La Cuna*, the government specifically guaranteed "access to sites" and "use and possession of sacred objects," and the plaintiffs "d[id] not demonstrate that they ha[d] in fact been barred from the Project site." *La Cuna De Aztlan Sacred Sites Protection Circle Advisory Committee v. U.S. Department of the Interior*, No. 11-cv-00395, 2012 WL 2884992, at *8 (C.D. Cal. July 13, 2012). In the final Ninth Circuit ruling on the case—which the Government fails to cite—the court noted that the plaintiffs offered "little more than conclusory statements" and failed to show that their sacred sites were located within the project area at all. 603 F. App'x 651, 652 (9th Cir. 2015).

Finally, in *Standing Rock*, there was no claim that the government destroyed a sacred site—only that it rendered a lake "ritually [im]pure" by allowing a pipeline to be built underneath it. 2017 WL 908538, at *9. Given that "the pipeline itself never enters the lake's waters," and that the only alleged harm was "spiritual," the court applied *Lyng*. *Id.* at *9, 11-14.[3]

In short, the Government fails to cite a single case involving destruction of a sacred site. ECF 131 at 9-10.[4]

D. The burden here was imposed by the Government.

In a final attempt to avoid liability, the Government argues that it cannot be held responsible under RFRA, because federal officials did not personally "cut down trees and clear ground to construct the turn lane." ECF 287 at 23-25. But this argument fails for the same reason that the Government's traceability argument fails: The destruction of the sacred site could not have occurred *but for* the Government's *own* actions on its *own* land. And even if the Government's own actions on its own land

[3] The Government's other cases are equally far afield. *See Guam v. Guerrero*, 290 F.3d 1210, 1223 (9th Cir. 2002) (failure to show that importation of marijuana was a religious exercise); *Ruiz-Diaz v. United States*, 703 F.3d 483, 486 (9th Cir. 2012) (failure to show that application for lawful-permanent-resident status was a religious exercise); *Holly v. Jewell*, 196 F. Supp. 3d 1079, 1085-91 (N.D. Cal. 2016) (Title VII, not RFRA, was the remedy for religious employment discrimination).

[4] Recognizing that destruction is different, the Government offers a fallback argument: Plaintiffs have suffered no substantial burden because they can practice their religion "at dozens of other sites." ECF 287 at 19 n.7. But sacred sites are not fungible. And the Supreme Court has already rejected this argument, stating that the "'substantial burden' inquiry asks whether the government has substantially burdened [a particular] religious exercise…, not whether the [plaintiff] is able to engage in other forms of religious exercise." *Holt*, 135 S. Ct. at 862.

were not enough, the Government is still responsible under the "joint action" doctrine. *See Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 834-36 (9th Cir. 1999).[5]

1. The Government's actions on its own land.

RFRA applies to any substantial burden imposed by the "Government," which includes any "agency … of the United States." 42 U.S.C. §§ 2000b-1(a); 2000bb-2(1). Thus, the question is whether BLM, FHWA, or ACHP took actions that resulted in a substantial burden on Plaintiffs' religious exercise. The answer is yes.

Plaintiffs' sacred site was located on BLM land and was therefore subject to BLM control. BLM issued the permit allowing the trees to be cut down. Ex.28 BLM_000033-000038. BLM granted the easement allowing the site to be bulldozed. Ex.30 FHWA_006590-006602. BLM coordinated with FHWA, which provided over 90% of the funding. Without these actions, the site never would have been destroyed.

This is more than enough to invoke RFRA. Indeed, the Supreme Court, the Ninth Circuit, and other courts have all decided RFRA and free exercise claims based on the federal government's authorization of third-party actions on federal land. *See, e.g., Lyng*, 485 U.S. at 453 ("commercial timber harvesting"); *Navajo Nation*, 535 F.3d at 1064-66 (private ski resort); *Snoqualmie*, 545 F.3d at 1210-12 (private hydroelectric plant); *Wilson v. Block*, 708 F.2d 735, 737-39 (D.C. Cir. 1983) (private ski resort). In each case, the final act affecting religious exercise was taken by a non-Government

[5] Plaintiffs believe there is no fact issue regarding the Government's responsibility. However, should the Court agree with the Government's position, Plaintiffs request an opportunity to submit a Rule 56(d) declaration, because discovery is not yet complete and some government witnesses have yet to be deposed on this "necessarily fact-bound inquiry." *Bensenville*, 457 F.3d at 63.

entity. Yet in every case, the court resolved the claim without even questioning that the Government was the proper defendant.

2. The Government's joint action with ODOT.

Unable to cite any cases involving federal actions with respect to federal land, the Government relies on *Bensenville*, which involved federal approval of an airport-expansion project undertaken by the City of Chicago. 457 F.3d at 57. There, no federal land was involved, and no federal approval was required. *Id.* at 58. Rather, the City requested federal approval only so that it could obtain federal funding. *Id.* at 64-65. And even that was not *needed*, as the City was "prepared to proceed without federal funds if necessary." *Id.* at 57, 65.

On these facts, the court held that the government's "[m]ere approval" of funding did not make the City's action on the City's land "fairly attributable" to the government. *Id.* at 64 (internal quotation marks omitted). But the court expressly distinguished cases involving federal land—noting that "a third party's use of the *third party's land*" is different from "a federal governmental decision about what to do with *federal land*." *Id.* at 67 (emphasis added). Here, Plaintiffs challenge "a federal governmental decision about what to do with federal land." *Id.* Thus, *Bensenville* is not controlling.

Even assuming *Bensenville* supplied the proper test, the Government's actions satisfy that test here. Under *Bensenville*, "[m]ere approval of or acquiescence in" the challenged action is not enough; rather, there must be a "sufficiently close nexus" between the challenged action and the federal government. *Bensenville*, 457 F.3d at

62, 64 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)). To establish this "nexus," it is enough to show that the Government was a "willful participant in joint action" with a non-Government actor. *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012) (internal quotation marks omitted); *see also Collins v. Womancare*, 878 F.2d 1145, 1154 (9th Cir. 1989) ("a substantial degree of cooperative action").

For example, in *Rimac v. Duncan*, 319 F. App'x 535 (9th Cir. 2009), the plaintiff sued his neighbor and the town fire chief when the neighbor "cut down [the plaintiff's] trees after a meeting with" the fire chief. *Id.* at 536. The Ninth Circuit held that the plaintiff had sufficiently alleged state action because he alleged that "there was an agreement or plan between [the defendants] to cut down the trees"—regardless of who physically performed the cutting. *Id.* at 537; *see also Howerton v. Gabica*, 708 F.2d 380, 384 (9th Cir. 1983) (joint action where police assisted in eviction).

Here, even before discovery has closed, the record demonstrates far more joint action than in *Rimac*. First, the government owned, controlled, surveyed, and gave approval for the use of its own land, despite clear knowledge of the Native American use of the land. Ex.19 BLM_000019; Ex.18 BLM_000006-BLM000009. Second, the Government suggested the need for an Environmental Assessment (EA), because otherwise it would be "very difficult to get the new [right of way] from the BLM." Ex.17 FHWA_002044. Third, the Government helped draft the EA, which analyzed various construction alternatives. *See* Ex.11 FHWA_004428-004429 (listing FHWA and BLM "preparers and reviewers"); Ex.11 FHWA_004471-004479; Ex.36 FHWA_003873-003977 (FHWA revisions); Ex.36 FHWA_004192-004285 (BLM revisions). Fourth,

BLM indicated a preference for widening to the north rather than the south to avoid impacting "recreation." Ex.24 FHWA_001980. Fifth, the Government helped ODOT avoid a survey of trees that it admitted was "technically" required by BLM protocol. Ex.37 FHWA_003477-003478. Sixth, BLM worked closely with ODOT on tree removal so that BLM could use the felled trees to rehabilitate a federal fish habitat. Ex.34 FHWA_003235, 003241, BLM_000100; Ex.28 BLM_000033.

These examples also show that BLM was willing to stretch the rules to push the project forward, and in fact received benefits for doing so. Indeed, before BLM issued the tree-removal permit, a BLM representative reprimanded BLM project managers for allowing third parties to cut down BLM-owned trees in exchange for BLM "us[ing] the[] logs for [other] projects"—noting that this was prohibited under federal law. Ex.34 BLM_000097-000098. But BLM proceeded anyway. When the Government "knowingly accepts the benefits derived from" an action in this way, it is a "maxim" that the action is attributable to the Government. *Tsao*, 698 F.3d at 1140.

Finally, even the language used by ODOT shows that this was a joint action with the Government. The Government gave its "cooperation." Ex.39 BLM_000010. It joined numerous "coordination meeting[s]." Ex.38 BLM_000040; Ex.34 BLM_000099-000102. It was part of the "team." Ex.38 BLM_000059, 000061. It was the "decision-maker … for fed[eral] land." Ex.38 FHWA_002124. It was a "stakeholder[]." Ex.38 FHWA_000999. ODOT even referred to itself as the Government's "agent." ECF 266-10 at 3. Thus, the Government did not "mere[ly] approv[e]" the project, *Bensenville*,

457 F.3d at 64, but was a "willful participant in joint action," *Tsao*, 698 F.3d at 1140. That is more than enough to invoke RFRA.

CONCLUSION

Plaintiffs' motion for partial summary judgment should be granted and the Government's motion for partial summary judgment should be denied.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 10,800 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, signature block, exhibits, and any certificates of counsel.

August 7, 2017

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CERTIFICATE OF SERVICE

I certify that on August 7, 2017, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

August 7, 2017

/s/ Luke W. Goodrich
Luke W. Goodrich
Attorney for Plaintiffs