IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
MISSOULA DIVISION

Freedom From Religion Foundation, Inc.,

Plaintiff,

v.

Chip Weber, Flathead National Forest Supervisor; and

United States Forest Service, an Agency of the United States Department of Agriculture,

Defendants,

and

William Glidden, Raymond Leopold, Norman DeForrest, Eugene Thomas, and the Knights of Columbus (Kalispell Council No. 1328),

Intervenor-Defendants.

Case No. 9:12-cv-19-DLC

REPLY IN SUPPORT OF INTERVENOR-DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

REGULATIONS

RULES

INTRODUCTION

FFRF has failed to identify any *genuine* dispute as to any *material* fact. FFRF lacks standing, and the war memorial on Big Mountain is not a government endorsement of religion. The motions for summary judgment should accordingly be granted.

ARGUMENT

I. FFRF LACKS STANDING.

FFRF claims associational standing based on three of its newest members. But their standing is defective, and FFRF lacks standing with or without its members.

A. The individual FFRF members lack standing.

1. William Cox lacks standing.

FFRF concedes Cox was not a member when this lawsuit was filed, but claims he creates jurisdiction anyway. Opp. at 16-17. But the two cases FFRF cites involved substitution of known proper parties under Rule 17, not joinder to cure a defect in associational standing. *Cf. Park B. Smith, Inc. v. CHF Indus. Inc.*, 811 F. Supp. 2d 766, 773 (S.D.N.Y. 2011) (allowing substitution, but stating that a plaintiff "may not cure a jurisdictional defect in standing by adding a party with standing").

FFRF's "file first, create jurisdiction later" approach contradicts Ninth Circuit precedent. *D'Lil v. Best W. Encina Lodge & Suites*, 538 F.3d 1031, 1036 (9th Cir. 2008) (standing evidence consists of "facts as they existed at the time" complaint was filed) (citation omitted); *EPIC v. Pac. Lumber Co.*, 469 F. Supp. 2d 803, 815-16 (N.D. Cal. 2007) ("no case law to support" notion that associational standing may be based on member who joined after suit was filed). That approach would condone what happened here: suing to stir up a controversy, and hopefully an individual plaintiff as well.[1]

2. Doug Bonham lacks standing.

FFRF concedes that Bonham has not been on Big Mountain for eight years and cannot ski because of his "aging knees." Bonham Decl. ¶ 2. "'Past exposure to illegal conduct does not in itself show a present case or controversy . . . if unaccompanied by any continuing, present adverse effects.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992) (citation omitted). Bonham cannot experience the "continuing, present adverse effects" of seeing the memorial, thus failing the "requirement

[1] Notably, FFRF ultimately found Cox, who identifies himself as "somewhere between a familiar acquaintance and a personal friend" of the court. SUF Ex. 10 at 2.

that threatened injury must be certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 2013 WL 673253, at *8 (Feb. 26, 2013); *see also Lujan* 504 U.S. at 564 ("'[S]ome day' intentions—without any description of concrete plans . . . do not support a finding of the 'actual or imminent' injury that our cases require.").[2]

3. Pamela Morris lacks standing.

Morris lacks standing because her allegations "constitute no more than the generalized grievances of one who observes government conduct with which she disagrees." *Caldwell v. Caldwell*, 545 F.3d 1126, 1130 (9th Cir. 2008).

In *Caldwell,* a parent with children in public school challenged a state education website that she said favored religious organizations that "have no conflict with the theory of evolution." *Id.* at 1129-30. The Ninth Circuit held she lacked standing, in significant part because "[a]ccessing and leaving a website is quick and easy, and the alleged offense from the content of one page out of 840 that one need not read or tarry over is fleeting at best." *Id.* at 1134.

[2] Bonham claims that his daughter skis on Big Mountain, Dkt. 75 ¶ 2, but FFRF cannot rely on her for standing because she is not a member of FFRF and has submitted no declaration.

The same principle applies here. There is no dispute that the memorial is visible only from a small portion of the resort. SUF ¶¶ 38-44. It is visible only to skiers who have purchased lift tickets to recreate at a privately owned and operated resort. In such circumstances, there is no reasonable expectation of not encountering disagreeable religious speech. And any alleged offense from the memorial would be "fleeting at best," *Caldwell*, at 1134, as skiers pass by it down the adjacent ski run. *De minimis* exposure cannot bestow standing on Morris or anyone else. *Id*. And none of FFRF's identified members can "establish standing simply by claiming that they experienced a 'chilling effect' that resulted from a governmental policy that does not regulate, constrain, or compel any action on their part." *Clapper*, 2013 WL 673253 at *13.

B. Amendment will not cure FFRF's standing defects.

FFRF again proposes amending the complaint to cure the defects in its members' standing. Opp. at 15-16. But an amendment this late in the litigation would be improper and ineffectual.

The deadline for amending has long since passed, and FFRF has not shown the requisite "good cause" for untimely amendment. Fed. R. Civ. P. 16(b); 11/27/2012 Order at 6, Dkt. 55.

Moreover, the members' declarations assert little more than a personal disagreement with, and psychological offense caused by, the Forest Service's decision to renew the permit. And even that minimal injury is suffered only after purchasing a lift ticket to enter a private resort and then skiing past the statue. This is not enough. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485 (1982) ("psychological consequence . . . produced by observation of conduct with which [plaintiff] disagrees" insufficient to warrant standing); *Caldwell*, 545 F.3d at 1134. No amendment would cure these defects. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) ("A State has not made religion relevant to standing in the political community simply because a particular viewer of a display might feel uncomfortable.").

C. FFRF lacks independent standing.

FFRF has not even alleged standing independent of its members. And since no members have standing, FFRF lacks associational standing.

Moreover, even if FFRF's members had standing, summary judgment would still be appropriate as against FFRF itself, because

offended observer standing is incompatible with associational standing. For offended observer standing, the Ninth Circuit requires plaintiffs at minimum to plead details such as "direct" exposure to the challenged display; "frequent regular contact"; membership in the community; and "spiritual harm." *See Vasquez v. Los Angeles Cnty.*, 487 F.3d 1246, 1251-52 (9th Cir 2007). These factors emphasize the highly individualized nature of the claim, which requires an individual plaintiff who personally experienced the contact and was personally injured. An injury of this nature is too individualized and personal to support associational standing on behalf of entire organizations. Thus, even if FFRF's members had standing, summary judgment would still be warranted against FFRF.

II. PERMITTING THE WAR MEMORIAL DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

FFRF offers insufficient facts to show that the Forest Service permit decision had the predominant purpose of promoting religion or the predominant effect of endorsing religion.

A. There is insufficient evidence that the original or renewed permits reflect a wrongful purpose.

FFRF has failed to show that the Forest Service granted or renewed the permit for the predominant purpose of promoting Christianity.

1. The original permit was not granted to promote religion.

As an initial matter, the purpose of the original permit is irrelevant, because it has been superseded by subsequent permit renewals.

Even so, FFRF's evidence does not create a dispute over whether the Forest Service issued the original permit with the purpose of promoting Christianity. FFRF says the *Knights'* purpose was to promote religion. Opp. at 19. But no matter what it may have been—and the record is equivocal—the Knights' *private* purpose cannot be attributed to the Forest Service. *Pinette*, 515 U.S. at 767-68 (rejecting "transferred endorsement" test). Indeed, even when a monument is *donated* to the government—not the case here—the donor's message does not become the government's. *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 474-76 (2009).

FRFF says the original permit is evidence of the Forest Service's intent. Opp. at 4. But it simply restates the Knights' purpose, and does not adopt it. SUF ¶ 3, Ex. 1, A-28 pg. 1. Nor can adoption blithely be

assumed. Courts must be "reluctan[t] to attribute unconstitutional motives to the [government], particularly when a plausible secular purpose . . . may be discerned." *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). FFRF has not shown that, in granting the original permit, the Forest Service did anything other than apply its permitting program in a neutral manner, granting the Knights' permit for use of the mountain, just as it had granted the resort's permit. No reasonable factfinder could conclude that the original permit was granted to promote religion solely because the Forest Service noted the Knight's purpose on the original permit.[3]

2. The permit was not renewed to promote religion.

FFRF also has not met its burden of showing that the permit was renewed for the predominant purpose of promoting Christianity. Its argument that a statue of Jesus is inherently religious, Opp. at 20-21, is irrelevant. *See Trunk v. City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011) (disregarding argument that "Latin cross is the 'preeminent

[3] FFRF's claim that the Knights' original authorization was "without cost," Opp. 20, is non-probative. There is no evidence the then-existing regulations required payment. Nor is there evidence that a fee waiver—if any—was made for an improper purpose. It is undisputed the Knights have paid for the renewed permit. SUF ¶¶ 9-10.

symbol' of Christianity" because that argument was "at bottom one regarding the . . . predominant effect" and irrelevant to purpose). Moreover, the Knights' purpose—even assuming it were to promote religion—is not attributable to the Forest Service.

FFRF instead argues that "the Forest Service's own purpose" is revealed by the alleged "sham tactics" it used to "justify reauthorization" after first denying renewal. Opp. at 21. But the initial denial itself rebuts any suggestion of improper purpose. The Forest Service expressly stated it was denying renewal out of fear (albeit unfounded) of violating the Establishment Clause. SUF ¶¶ 18-19. Thus, at least as of that time, the Forest Service indisputably lacked any intention of promoting Christianity.

The Forest Service's stated reason for its decision reversal was that the statue "has been a long-standing object in the community since 1953" and is "important to the community for its historical heritage." SUF ¶¶ 32-33. FFRF calls this a "sham" for several reasons, none of which are factually correct, and none of which—even if true—would preclude summary judgment.

First, FFRF suggests without authority that war memorials "are not appropriate for approval under government regulations." Opp. 21. Its assertion that "[t]he Government's own Brief" confirms this is incorrect. Governing law gives the Forest Service broad discretion in granting permits. 36 C.F.R. § 251.53 (listing statutes authorizing use); *Mountain States Tel. & Tel. Co. v. United States*, 499 F.2d 611, 613-14 (U.S. Ct. Cl. 1974) (giving Forest Service broad deference under authorizing statute 16 U.S.C. § 551).

The Forest Service's own regulations also leave sufficient discretion. SUF Ex. 1 at AR A-19 pg. 1 (observing that regulation FSM 2723.3 authorizes monuments that "have true historical interest to the general public"). FFRF refers—without authority—to a preference for limiting uses that could reasonably take place on private property. Opp. 8. But there is undisputed evidence that moving the statue would likely destroy it. SUF ¶ 16. And even assuming the permit violated some actual policy—an assertion FFRF has not established—there is no evidence the "violation" was religiously motivated.

FFRF also suggests that the Forest Service failed to conduct its own proper analysis, and even colluded with the Montana State Historic

Preservation Office (SHPO), to conclude that the memorial has historical significance. Opp. at 8. But FFRF provides no evidence, just unfounded conclusory statements, to support this innuendo. *Id.*[4] Similarly, there was no "'historical' about-face." Opp. at 8. Although the Forest Service's "initial thinking" was that the memorial would not qualify for recognition, SUF Ex. 1 at AR A-19 pg. 2, it was still "assessing the historical significance," SUF Ex. 1 at AR A-18 pg. 2. There is no evidence of impropriety in its ultimate determination.

Nor is there evidence of impropriety in its internal documents concerning media strategy. Opp. at 9. There was nothing improper about ensuring that the reason for reauthorization was properly conveyed to the public. Indeed, the Forest Service's extensive efforts to broadcast the history-based reasons for its decision underscore that its motives were proper.

---

[4] Accusations that the Forest Service tried to deny the memorial's religious and military significance to qualify for historical recognition, Opp. at 8, are false. The Forest Service merely noted there had to be a reason independent of the memorial's religious and military associations to qualify. SUF ¶ 22. The Forest Service and SHPO both independently confirmed the memorial's association with the development of the ski industry as a sufficient reason. SUF ¶¶ 22-23, 26-28.

Similarly, evidence that the Forest Service denied permits for new "monuments, grave markers, [and] crosses," Opp. at 7, 21-22, is consistent with the Forest Service's regulations and its stated reason for making an exception for the memorial because of its historic significance. SUF Ex. 1 at AR A-19 pg. 1 (citing regulation FSM 2723.1). FFRF's insinuation that these uses were denied only to "non-Christian groups," Opp. at 22, is unsupported by the record and contradicted by the denial of permits for "crosses." PSDF ¶ 45. There is no other evidence to suggest the exception for the memorial was for religious, rather than historic, reasons.

FFRF's only evidence of religious motivation is that some individuals submitted comments with religious reasons for supporting the memorial. *See* Opp. 8-9. But public comments cannot be ascribed to the Forest Service. *Trunk*, 629 F.3d at 1109 ("[E]vidence of the role of Christian advocacy organizations . . . is not probative of Congress's objective."). Rather, the Forest Service is entitled to a presumption that it acted for the stated historical reasons. *Salazar v. Buono*, 130 S. Ct. 1803, 1817 (2010) ("It is reasonable to interpret the congressional

designation as giving recognition to the historical meaning that the cross had attained.") (plurality opinion).

FFRF's own brief implicitly concedes that—at worst—it was not promotion of religion, but "avoid[ing] 'notoriety,'" "avoid[ing] controversy," and "popular opinion" that led the Forest Service to grant the permit. Opp. at 6, 9. And there is nothing wrong with that, even assuming it is true. It is government's "prerogative to balance opposing interests" and its "competence to do so provide[s] one of the principal reasons for deference to its policy determinations." *Salazar*, 130 S. Ct. at 1817; *see also id.* at 1817-18 (government's judgment to accommodate religious symbol "should not have been dismissed as an evasion").

It is FFRF's burden to show that the Forest Service's predominant reason for permitting the memorial was to promote religion. *Cal. Parents for Equalization of Educ. Materials v. Noonan*, 600 F. Supp. 2d 1088, 1118 (E.D. Cal. 2009). Factually unfounded aspersions are insufficient.

B. There is insufficient evidence that the memorial's predominant effect is to endorse religion.

To show endorsement, FFRF relies mainly on trying to analogize the memorial in this case to the Mt. Soledad cross at issue in *Trunk*. Opp. at 23-26. But the memorial is distinguishable in history, setting, and appearance.

1. The memorial's history disproves endorsement.

The reasonable observer would know that the memorial is privately-owned private speech, by a private organization, and that the only *state* action was the Forest Service's decision to permit it. *Pinette*, 515 U.S. at 780. Those facts alone negate FFRF's claim of endorsement. *See id.* at 770, 775 (concluding that private speech on public property was not government endorsement of religion). Knowledge of the initial decision not to renew the permit further negates endorsement. Even knowledge that new permits were denied for other "monuments" and "grave markers"—*including Christian "crosses,"* PSDF ¶ 45—dispels any perception that permitting the memorial endorses Christianity.

The memorial's public association with the 10th Mountain Division and typically irreverent treatment by skiers shows that, in fact,

permitting the memorial is not seen as an endorsement of religion. FFRF complains there is "no contemporaneous historical evidence" that the statue was intended as a war memorial, Opp. at 4, but what matters is how the public has historically seen it. SUF ¶¶ 47-64.

FFRF notes that some local residents say the memorial has a "religious meaning" for them and that it has been "used periodically for religious services." Opp. at 5-6. But this ignores the expert witness's conclusion that "secular uses surrounding the statue have outweighed the religious ones," SUF ¶ 64, confirming that the memorial's predominant effect is not endorsement.[5]

Finally, there can be no endorsement where the memorial has stood for nearly sixty years without controversy. *Van Orden v. Perry*, 545 U.S. 677, 702 (2005) (Breyer, J., concurring) (forty-year uncontroversial existence meant that "few individuals . . . are likely to have understood the monument as amounting, in any significantly detrimental way" to endorsement).[6]

---

[5] FFRF's cursory attacks on the expert and unsubstantiated "denials" of the overwhelming evidence that secular perceptions predominate cannot create a genuine issue of material fact.

[6] FFRF's attacks on Flathead Valley as a close-minded "Christian-fundamentalist area," Opp. at 9, 14, are specious at best. There is no

2. The memorial's setting disproves endorsement.

The memorial's situs on a privately-operated ski resort destroys any predominant perception of government endorsement. A reasonable observer would associate the statue with the resort, not the government. Indeed, the adjacent sign explains the memorial's association with World War II, attributes its installation and maintenance to the Knights, and invites resort guests to "enjoy and respect it," all over the signature of the "Whitefish Mountain Resort." SUF ¶ 51. *Pinette*, 515 U.S. at 776 ("presence of a sign disclaiming government sponsorship . . . make[s] the State's role clear to the community").

Similarly, FFRF's mantra that the statue is "omnipresen[t]" and "literally and figuratively looms over the Valley," Opp. at 10, 11, 14, does not make it so. The evidence shows the memorial is visible only from one ski run. SUF ¶¶ 38-46. This is not Corcovado.

---

admissible evidence that sixty years of non-controversy were "due to a climate of intimidation." *Van Orden*, 545 U.S. at 702.

Our national and state parks accommodate all kinds of statues, memorials, and other displays, including totem poles,[7] statues of Bigfoot,[8] statues of religious and historical figures,[9] chapels[10] and shrines,[11] among undoubtedly countless others. *See, e.g., Summum*, 555 U.S. at 474-76 (listing examples). Even where the government *owns* the monument, it "frequently is not possible to identify a single 'message' that is conveyed[.]" *Id.* at 476. And the government clearly is not endorsing every message that could be conveyed.

Here, FFRF has not met its "burden of proving" that the Forest Service's permitting private speech has "the principal or primary effect of advancing . . . religion." *California Parents*, 600 F. Supp. 2d at 1118. No reasonable factfinder could conclude that the Forest Service's

---

[7] *See* http://www.nps.gov/sitk/historyculture/totem-poles.htm (last visited Mar. 8, 2013).

[8] *See* http://www.fs.usda.gov/main/klamath/about-forest/districts (last visited Mar. 8, 2013).

[9] *See* http://www.nycgovparks.org/parks/forestpark/monuments/1766 (last visited Mar. 8, 2013).

[10] *See* http://www.nps.gov/yose/historyculture/chapel.htm (last visited Mar. 7, 2013) (Yosemite Chapel); http://www.nps.gov/goga/planyourvisit/upload/sb-chapel-v5.pdf (last visited Mar. 8, 2013) (Fort Mason Chapel).

[11] *See* http://www.nps.gov/grca/planyourvisit/shrine-of-the-ages.htm (last visited Mar. 8, 2013) (Shrine of the Ages).

decision to permit this private memorial had the predominant effect of endorsing religion. Indeed, finding otherwise would "tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Van Orden*, 545 U.S. at 699.

CONCLUSION

For the foregoing reasons, Intervenors' motion for summary judgment should be granted.

Dated: March 8, 2013

Respectfully submitted,

/s/ *Eric S. Baxter*
Eric C. Rassbach (*pro hac vice*)
Eric S. Baxter (*pro hac vice*)
The Becket Fund for Religious Liberty
3000 K St. NW, Suite 220
Washington, DC 20007
Telephone: (202) 955-0095
Facsimile: (202) 955-0090

Charles A. Harball
(Montana Bar No. 2841)
Kalispell, MT 59901
Telephone: (406) 758-7709
Facsimile: (406) 758-7758

Counsel for Defendant-Intervenors

CERTIFICATE OF COMPLIANCE WITH CIVIL LOCAL RULE 7.1(d)(2)

I hereby certify that the foregoing *Reply in Support of Intervenor-Defendants' Motion for Summary Judgment* contains 3246 words, excluding caption, certificates of service and compliance, table of contents and authorities, and signature block, as computed by Microsoft Word's word-count function.

/s/ *Eric S. Baxter*
Eric S. Baxter

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2013, I caused the foregoing *Reply in Support of Intervenor-Defendants' Motion for Summary Judgment* to be served via this Court's electronic filing system on the following counsel of record:

David B. Glazer
david.glazer@usdoj.gov

Mark Steger Smith
mark.smith3@usdoj.gov

Martin S. King
mking@wordenthane.com

Reid Perkins
rperkins@wordenthane.com

Richard L. Bolton
rbolton@boardmanclark.com

/s/ *Lee Marsh*
Lee Marsh