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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

FREEDOM FROM RELIGION FOUNDATION, INC., Plaintiff, v. CHIP WEBER and UNITED STATES FOREST SERVICE, Defendants.	No. 9:12-CV-00019 DLC FEDERAL DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT Date: N/A Time: N/A Hon. Dana L. Christensen

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Federal Defendants submit this reply brief in support of their motion for summary judgment, ECF No. 60, and in response to Plaintiff's opposition brief, ECF No. 86 ("Pl. Opp.").[1]

I. OVERVIEW

Contrary to Plaintiff's characterizations, Pl. Opp. at 1–2, Federal Defendants do not maintain that the Big Mountain Jesus statue passes constitutional muster because its presence at the Whitefish Mountain Resort ("Resort") is supported by a majority of the community, or merely because it has been there for decades without reported complaint, or simply because it has historic value. Rather, as argued in Federal Defendants' opening brief, ECF No. 61 ("Fed. Br."), under both the three-prong test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and the contextual analysis suggested in *Van Orden v. Perry*, 545 U.S. 677 (2005), the statue does not reflect a government endorsement of any religious sect or a governmental preference for religion over non-religion.

Nor have the Federal Defendants confused their analysis under the Establishment Clause with doctrines governing cases arising under the Free Exercise Clause. *See* Pl. Opp. at 32–33. In *Pleasant Grove City, Utah v.*

[1] By Order of February 19, 2013, ECF No. 85, the Court granted Plaintiff's unopposed motion for leave to file corrected papers. This brief cites to those corrected documents, rather than to the original papers filed on February 13.

Summum, 555 U.S. 460 (2009), a religious organization sued because the City refused an organization's request that the City display the organization's proposed monument in a City park. The organization alleged that in rejecting its monument, but not others, the City violated the organization's rights of religious expression guaranteed by the Free Exercise Clause. The Court held that the permanent display of government-owned monuments in a public park represented *govern-ment*, not private, speech and, therefore, the Free Exercise Clause did not apply. *Id*. at 464–81. As the Court noted, "[p]ublic parks are often closely identified in the public mind with the government unit that owns the land." *Id.* at 472.

In *Summum*, both the land and the monuments displayed on it were owned and maintained by the City government. 555 U.S. at 472–73. Given the City's ownership and exclusive control over the park and its contents, the Court found that such monuments are "meant to convey and have the effect of conveying a government message, and they thus constitute government speech." *Id*. at 472. Here, unlike in *Summum*, the government neither owns the statue nor exercises exclusive control over the property on which it is located. Rather than being displayed in a conspicuously public city park, as in *Summum*, the Big Mountain statue stands to the side of a ski run on land leased to a private resort operator. Fed. Statement of Undisputed Facts ("SUF"), ECF No. 62, ¶¶ 1, 3, 5. The plaque placed in front of the statue makes it clear to the public that the statue is privately

owned and maintained. SUF ¶¶ 2, 21. The statue thus plainly constitutes *private* speech reflecting the personal views of its private owners and therefore cannot be seen by the reasonable observer, *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 773, 780 (1995) (O'Connor, J. concurring), as reflecting government promotion of religion, *see Barnes-Wallace v. City of San Diego*, 704 F.3d 1067, 1072–73, 1082–84 (9th Cir. 2012) (city does not violate Establishment Clause when leasing land to Boy Scouts, an admittedly religious organization); *Hawley v. City of Cleveland*, 24 F.3d 814, 822 (6th Cir. 1994) (city does not violate Establishment Clause when leasing airport space to church for maintenance of a private chapel).

The decision in *American Atheists, Inc. v. Duncan*, 637 F.3d 1095 (10th Cir. 2010), similarly underscores the absence of government endorsement in this case.[2] In *Duncan*, the plaintiff challenged a series of 12-ft. high memorial crosses located along Utah public highways and, in one instance, on the lawn of a government building (the state highway patrol offices). *Id*. at 1111–12. Significantly, the court

[2] The court, citing 10th Circuit precedent, applied *Lemon* exclusively, rather than *Van Orden*. 637 F.3d at 1117. But the Ninth Circuit has applied *Van Orden* to passive displays challenged under the Establishment Clause. *See, e.g., Trunk v. City of San Diego*, 629 F.3d 1099, 1107 (9th Cir. 2011) (applying both tests); *Card v. City of Everett*, 520 F.3d 1009, 1016–17 (9th Cir. 2008) (*Van Orden* applies "to determine the constitutionality of some longstanding plainly religious displays that convey a historical or secular message in a non-religious context").

did not find that the "purpose" prong of the *Lemon* test had been violated, finding a "plausible secular purpose" in memorializing slain state troopers and promoting highway safety. *Id*. at 1118–19. Rather, the court found that the monuments violated the "effect" prong of *Lemon*. *Id*. at 1119–24, citing the effect that the displays would have on the "reasonable observer," including someone visiting the state highway patrol office (and especially someone taken there against his or her will), as well as someone who notices that the insignia on the state's highway patrol vehicles is the same as that on the crosses. *Id*. at 1121 & n.13. These effects, the court concluded, might cause one naturally to conclude that the police were connected with a particular religion and that an individual's affiliation (or not) with that religion might affect how the individual might be treated. *Id*. In the case before this Court, there can be no such confusion. The Big Mountain Jesus statue simply does not convey any message that individuals visiting the Whitefish Mountain Resort might be treated more favorably or less favorably depending upon their religious affiliation.

In short, the Big Mountain Jesus display does not convey to the reasonable observer the message that the government, as opposed to private parties, endorses any particular religious faith over any other faith or over the absence of faith.

II. ARGUMENT

A. Summary Judgment is Appropriate in this Case

Summary judgment is appropriate unless there is a dispute over one or more *material* facts relevant to resolution of the case under the governing substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). Moreover, any such dispute must be *genuine*. *Id*. at 248. To establish a genuine dispute of fact, the party opposing a motion for summary judgment cannot simply gainsay the moving party's facts; rather, it must come forward with its own, contrary evidence. Fed. R. Civ. P. 56(c)(1)(A); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp*., 475 U.S. 574, 585–87 (1986); *see also Evenson v. Life Ins. Co. of North America*, No. CV 10–57–BU–DLC–CSO, 2012 WL 893919, at *4 (D. Mont. Jan. 4, 2012), *report and recomm. adopted*, 2012 WL 893907 (D. Mont. Mar. 15, 2012) (Christensen, J.).

Although Plaintiff opposes Federal Defendants' motion for summary judgment and has filed responses to Federal Defendants' Statement of Undisputed Facts ("SUF Resp. (Fed.)"), ECF No. 89, the relevant facts in this case are not in dispute. A great many of Plaintiff's responses do not dispute Federal Defendants' statements. *See, e.g.*, SUF Resp. (Fed.) ¶¶ 2–10, 16, 17. In other cases, Plaintiff states that there is "[n]o dispute" as to Federal Defendant's citations from documentary evidence in the record, but that it does not "concede the truth of the

matters stated," while at the same time citing no contrary evidence. *See, e.g.*, SUF Resp. (Fed.) ¶¶ 11–14. In still other cases, where the Plaintiff disputes Federal Defendants' statements of fact, either the disputed facts are not material or the dispute is not genuine. So, for instance, Plaintiff disputes SUF ¶ 15 ("Religious observances have often been held elsewhere on the mountain when they occur. The statue has not been advertised as a place of religious worship."). However, Plaintiff's response is only to "[d]ispute that religious observances have not been held at the Jesus Statue." SUF Resp. (Fed.) ¶ 15. But Federal Defendants have never stated that religious observances have never been held at the statue and, on the contrary, concede that there have been religious observances there from time to time.[3] Fed. Br. at 7, 16, 19, 21–22. Elsewhere, Plaintiff purports to dispute Federal Defendants' contentions that the statue has been used for a wide variety of secular purposes and often treated with irreverence. SUF Resp. (Fed.) ¶ 18. But Plaintiff's response cites only Plaintiff's separate Statement of Disputed Facts ("SDF") ¶¶ 118, 122, which in turn merely quarrel with the extent of such "irreverence" and what it might mean. Similarly, Plaintiff disputes Federal Defendants' statement that the statue has long had secular significance and that "[m]any individuals have fond memories of the statue as a historic landmark, a

[3] What consequences flow from these indisputable facts is a question of law.

meeting place, or spot marking a beautiful vista." SUF ¶ 19. But, again, Plaintiff's contrary evidence does not really dispute that the statue has secular significance, in addition to being for some an object of veneration.[4] *See* SUF Resp. (Fed.) ¶ 19. Finally, Plaintiff does not really dispute the absence of documented complaints about the statue over the nearly sixty years of its presence on Big Mountain. SUF ¶ 20. Instead, Plaintiff merely offers evidence that two of its members have harbored ill feelings towards the statue, which they evidently never aired until this lawsuit was either filed or at least contemplated.[5] SUF Resp. (Fed.) ¶¶ 156, 168.

As explained further below, on the undisputed facts of record, Federal Defendants are entitled to summary judgment.

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[4] Plaintiff disputes that the statue is on land "actively operated" by the Whitefish Mountain Resort, SUF Resp. (Fed.) ¶ 1, but cites only to SUF ¶¶ 5 and 21 as contrary evidence. But SUF ¶ 5 merely notes that the statue stands in a somewhat out-of-the-way spot, and SUF ¶ 21 merely quotes the dedication plaque placed next to the statue in 2010. There is no evidence that the statue is located anywhere but on land operated under lease by the Whitefish Mountain Resort.

[5] Although not cited in Plaintiff's response to SUF ¶ 20, Plaintiff states that another member, Douglas Bonham, has had unwanted exposure to the statue, SDF ¶ 158, but again that evidence does not contradict Federal Defendants' statement that there have been no documented complaints during the statue's presence on the mountain.

B. The Big Mountain Jesus Statue Does Not Violate the *Lemon* Test[6]

1. The Forest Service had a legitimate secular purpose in renewing the Special Use Permit for the statue[7]

The Forest Service renewed the Special Use Permit for the Big Mountain Jesus statue because the statue has had a long and significant historical association with the Whitefish Mountain Resort and the surrounding community. Fed. Br. 5–7; SUF ¶¶ 11–13. That is a legitimate secular purpose. *See, e.g.*, *Lynch v. Donnelly*, 465 U.S. 668, 681 (1984) (city had legitimate secular purpose in displaying Christmas crèche, which celebrates and depicts origins of holiday); *Barnes-Wallace*, 2012 WL 6621341, at *12 (city had legitimate purpose in leasing land to Boy Scouts); *Kreisner v. City of San Diego*, 1 F.3d 775, 782 (9th Cir. 1993) (city may allow private group to erect overtly religious holiday display in public park; city's purpose to allow private religious expression is legitimate).[8] Although

[6] Plaintiff argues that the permit renewal violates the "purpose" and "effect" prongs of the *Lemon* test, but does not separately assert that it "entangles" the government in religious matters. *See Card*, 520 F.3d at 1015 ("entanglement" may be seen as part of "effect" prong).

[7] Plaintiff argues that because, in its view, the permit renewal served no legitimate secular purpose, it is invalid under *Van Orden*. Pl. Opp. at 19. But under *Van Orden*, the analysis of a monument's constitutionality must be contextual. 545 U.S. at 703–04. As set forth in Section II.C, below, that contextual analysis supports the constitutionality of the Big Mountain Jesus statue.

[8] The government need only have "a" secular purpose in approving a display; that purpose need not be the *only* purpose. *Lynch*, 465 U.S. at 680, 681 n.6; *Kreisner*, 1 F.3d at 782 (government action will violate *Lemon*'s "purpose prong 'only if it is (Footnote continued)

Plaintiff casually invites the Court to disregard the Forest Service's stated purpose, Pl. Opp. at 20–23, the Court should not lightly infer an improper purpose or dismiss the government's asserted rationale. *Buono v. Salazar*, 130 S. Ct. 1803, 1816–18 (2010).[9]

Plaintiff cites a number of out-of-circuit cases, Pl. Opp. at 20–21, but none of those decisions calls into question the government action at issue here. The district court in *Mercier v. City of La Crosse*, 276 F. Supp. 2d 961, 974–79 (W.D. Wis. 2003), held, *inter alia*, that the sale to a private party of a parcel of city land where a Decalogue was displayed violated the Establishment Clause, but that decision was reversed on appeal, *Mercier v. Fraternal Order of Eagles*, 395 F.3d

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motivated wholly by an impermissible purpose.'") (quoting *Bowen v. Kendrick*, 487 U.S. 589, 602 (1988)); *Access Fund v. U.S. Dep't of Agric.*, 499 F.3d 1036, 1046 (9th Cir. 2007) ("the Establishment Clause does not bar the government from protecting an historically and culturally important site simply because the site's importance derives at least in part from its sacredness to certain groups.") (quoting *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 977 (9th Cir. 2004)).

[9] Although Plaintiff points to the Forest Service's consideration of whether to waive the administrative fee for the permit, Pl. Opp. at 7, 34, that question is by now a non-issue. The Forest Service has required, and the Knights of Columbus have paid, the applicable fee. Glazer Decl. Exh. 1. Similarly, Plaintiff states that the statue was dedicated in 1954 with the assistance of a Catholic priest. Pl. Opp. at 19 (citing Bolton Decl. Exh. 2, ECF No. 87-2). But the document Plaintiff cites does not support that factual claim. In any event, it is irrelevant; the only pertinent factor is the *government's* purpose in permitting the display. *See Kreisner*, 1 F.3d at 782 (city had legitimate secular purpose, even if proponent of display sought to convey religious message). Finally, Plaintiff claims that the statue was dedicated to "[t]he Honor and Glory of God," again citing Bolton Declaration Exhibit 2, but (Footnote continued)

693 (7th Cir. 2005). Similarly, in *Freedom from Religion v. Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000), the Seventh Circuit held that ordinarily the sale of public land used for a religious display can extinguish the appearance that the government endorses a religious message. Finally, Plaintiff cites *Washegesic v. Bloomingdale Public School*, 813 F. Supp. 559 (W.D. Mich. 1993), *aff'd*, 33 F.3d 679 (6th 1994), which invalidated the display of a portrait of Jesus outside the office of a school principal. As the court noted, "[t]he Supreme Court 'has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools.'" *Id*. at 561 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987)); *see also Van Orden*, 545 U.S. at 703 (government must take special care in separating church and state in the school context, given the impressionability of the young). But we are not dealing with school property here, nor with displays along public highways or outside law enforcement offices. *Cf*., *Duncan*, 637 F.3d at 1121 & n.13. Instead, we have a privately constructed and maintained statue, conveying a private message,[10] placed on land leased by another private entity for commercial, not governmental, purposes. SUF ¶¶ 1, 2, 21. In that context, the Forest Service's stated purpose of maintaining an object of historical

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that document does not contain the quoted language.

[10] A privately erected plaque makes this clear that the monument is privately maintained. SUF ¶ 21.

and community significance, SUF ¶¶ 11–13, is perfectly legitimate. *Lynch*, 465 U.S. at 681; *Barnes-Wallace*, 2012 WL 6621341, at *12–13; *Kreisner*, 1 F.3d at 782.

2. The effect of the permitted display is not to promote religion

The Big Mountain Jesus stands to the side of a ski run — not even the main ski run — located on a privately operated resort. SUF ¶¶ 1, 3–5. The statue was privately constructed and is privately maintained. *Id.* ¶¶ 1, 2, 21. It is not located alongside — and certainly does not "loom over"[11] — any public highway (or even the Resort, itself). *Cf. Trunk v. City of San Diego*, 629 F.3d 1099, 1101–03 (9th Cir. 2011) (large Latin cross "towers over" Interstate 5); *Duncan*, 637 F.3d at 1121 & n.13 (12-ft. crosses placed along public highways and on lawn of state highway patrol offices); *cf. Kreisner*, 1 F.3d at 782 ("Notwithstanding its strong religious content," a "display [of] private speech in a traditional public forum removed from the seat of government . . . does not have the primary effect of advancing religion."). The Big Mountain Jesus cannot therefore have the effect on a reasonable observer of suggesting any government endorsement of religion.

[11] *See* Pl. Opp. at 3, 10, 14.

C. The Big Mountain Jesus Statue is Constitutional Under *Van Orden*

Plaintiff insists that the Big Mountain Jesus statue gives the appearance of a government endorsement of religion and thus fails the contextual analysis set forth in *Van Orden*. Pl. Opp. at 26–28 (discussing *Van Orden* and *Trunk*). In so doing, Plaintiff attempts to make much of the supposed lack of "secularizing features" surrounding the Big Mountain statue, Pl. Opp. at 26–27, while ignoring the most salient fact: the statue at issue here stands wholly within a privately operated recreational resort. *See* Section I, *supra*. Thus, it does not convey the type of religious message that troubled the Ninth Circuit in *Trunk*, where a 43-ft. high Latin cross dwarfed any secularizing elements of the surrounding monument grounds and "tower[ed] over" motorists on the nearby Interstate highway. 629 F.3d at 1101–03, 1122–25.

Moreover, as noted in the Federal Defendants' opening brief, at 18–24, the statue's history and context do not support the notion that it promotes religion or expresses any government endorsement of a religious message.[12] Rather, the

[12] Plaintiff argues that upholding the Establishment Clause does not "evince hostility to religion," Pl. Opp. at 29–30, but the Supreme Court has cautioned that an unyielding interpretation of the Establishment Clause may do just that. *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring). Plaintiff also suggests that the absence of documented complaints may be due to faulty government record-keeping, Pl. Opp. at 31–32, offering evidence that the *Van Orden* record did not include complaints that Plaintiff asserts had, in fact, been made, *see* SDF ¶¶ 193–95. But Plaintiff does not contend that in *this* case, the Freedom From Religion (Footnote continued)

statue has long been seen by many as a secular landmark with strong historic and community significance. *See Van Orden*, 545 U.S. at 700–03 (monument had both religious and secular meaning). Thus, under both *Lemon* and *Van Orden*, the Forest Service did not violate the Establishment Clause when it reauthorized the Special Use Permit challenged here.

Respectfully submitted,

DATED: March 8, 2013

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Foundation or any of its members had complained about the Big Mountain Jesus statue prior to their correspondence in 2011, *see* SDF ¶¶ 167, 180, 181, even though the Foundation has been around since the 1970s, SDF ¶¶ 177, 191.

CERTIFICATION OF COMPLIANCE WITH CIVIL L.R. 7.1(d)(2)(E)

I hereby certify that the foregoing brief contains exactly 3,229 words, exclusive of caption, certificates of service and compliance, table of contents and authorities, and exhibit index, as computed by the word-count function found in the Microsoft Word word-processing application used to create this document.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 8, 2013

/s/*David B. Glazer*
David B. Glazer

CERTIFICATE OF SERVICE

I, David B. Glazer, hereby certify that I have caused the foregoing to be served upon counsel of record through the Court's electronic service system.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 8, 2013

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