Michael A. Patterson, OSB No. 7976
map@pattersonbuchanan.com
Keith A. Talbot, admitted pro hac vice
kat@pattersonbuchanan.com
Daniel P. Crowner, admitted pro hac vice
dpc@pattersonbuchanan.com
PATTERSON BUCHANAN FOBES & LEITCH, INC., P.S.
1001 SW Fifth Avenue, 11th Floor
Portland, OR 97204
Telephone 503.200.5400
Fax 503.200.5401

Luke W. Goodrich, admitted pro hac vice
lgoodrich@becketfund.org
Stephanie H. Barclay, admitted pro hac vice
sbarclay@becketfund.org
THE BECKET FUND FOR RELIGIOUS LIBERTY
1200 New Hampshire Ave. NW, Suite 700
Washington, DC 20036
Telephone 202.955.0095

James J. Nicita, OSB No. 024068
James.Nicita@gmail.com
302 Bluff Street
Oregon City, OR 97045
Telephone 503.799.0725

Attorneys for Plaintiffs

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, **HEREDITARY CHIEF JOHNNY JACKSON, a resident of Washington, and an enrolled member of the**	**Case No. 3:08-cv-1169-ST** **PLAINTIFFS OBJECTIONS TO FINDINGS AND RECOMMENDATIONS OF MAGISTRATE JUDGE (ECF NO. 300)** **Request for Oral Argument**

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules and Regulations

Other Authorities

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 the religious exercise of Native Americans—their graves have been obliterated, their sacred artifacts stolen, and their altars destroyed.

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

The key facts of this case, as acknowledged by the magistrate, are not in dispute. It is undisputed that Plaintiffs' sacred site occupied a fraction of five acres in the A.J. Dwyer Scenic Area, was traditionally known to Plaintiffs' tribes as *Ana Kwna Nchi nchi Patat* (the "Place of Big Big Trees"), included a campground and burial ground marked by an ancient stone altar and other stone monuments, and contained medicine plants and sacred, old-growth trees. ECF 292 at 5-8. It is undisputed that many Native Americans, including Plaintiffs, used this site for their religious practices for many decades. *Id.* at 8-10. It is undisputed that Plaintiffs advocated for the protection of this site throughout the 1980s and 1990s and specifically made the Government aware of the sacred nature of the site before the highway widening project began. *Id.* at 10-13, 18-19. It is undisputed that the widening project physically destroyed every

element of the site used in Plaintiffs' religious practices. *Id.* at 19-23. And it is undisputed that the Government had several alternatives for widening the highway without harming Plaintiffs' sacred site, and that it used these alternatives to protect nearby wetlands but not Plaintiffs' site. *Id.* at 15.

Nevertheless, the magistrate rejected Plaintiffs' claims based on several legal arguments that have already been rejected by this Court. First, the recommendation asserted that Plaintiffs failed to establish standing because they failed to demonstrate a "substantial burden" under RFRA. But courts have repeatedly recognized that the question of standing is distinct from the question of a "substantial burden" under RFRA. More importantly, this Court already recognized in a prior ruling that Plaintiffs have standing because they used the site for many years and would do so again if the site were remediated. ECF 48 at 27-29; ECF 52. That decision is both correct and binding as law of the case.

Second, the recommendation adopts the Government's stilted interpretation of RFRA, arguing that Plaintiffs can establish a "substantial burden" only if they show that they were forced to "choose" between giving up their religious exercise or suffering a penalty. ECF 300 at 6-7, 13. But this Court has already rejected that argument. ECF 131 at 9-10. And numerous courts, including the Ninth Circuit, have recognized that a forced "choice" is only *one type* of substantial burden, and that the Government can engage in even more coercive action by eliminating the choice and making a religious exercise impossible. That is just what the Government has done here.

Third, the recommendation misapplies *Lyng* and *Navajo Nation*. In both cases, the courts went out of their way to emphasize that no denial of access to a sacred site occurred, much less destruction of the site or religious artifacts. If such destruction had occurred, both would have been different cases. The recommendation fails to address these key distinctions.

Ultimately, the recommendation fails to grapple with a simple fact: The Government has destroyed Plaintiffs' sacred site for no good reason, making Plaintiffs' religious exercise impossible. That is a substantial burden as a matter of law.

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.[1]

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

[1] All exhibit citations refer to the exhibits originally attached to ECF 292, Plaintiffs' Response to Defendants' Motion for Partial Summary Judgment.

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. 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 (McKenzie at 1712). Logan is a "Traditional Practitioner of the Clackamas Tribe" and a spiritual leader for other Native Americans. 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*, 115 Or. Hist. Soc'y Q. 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 the faithful to join Him 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; 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).

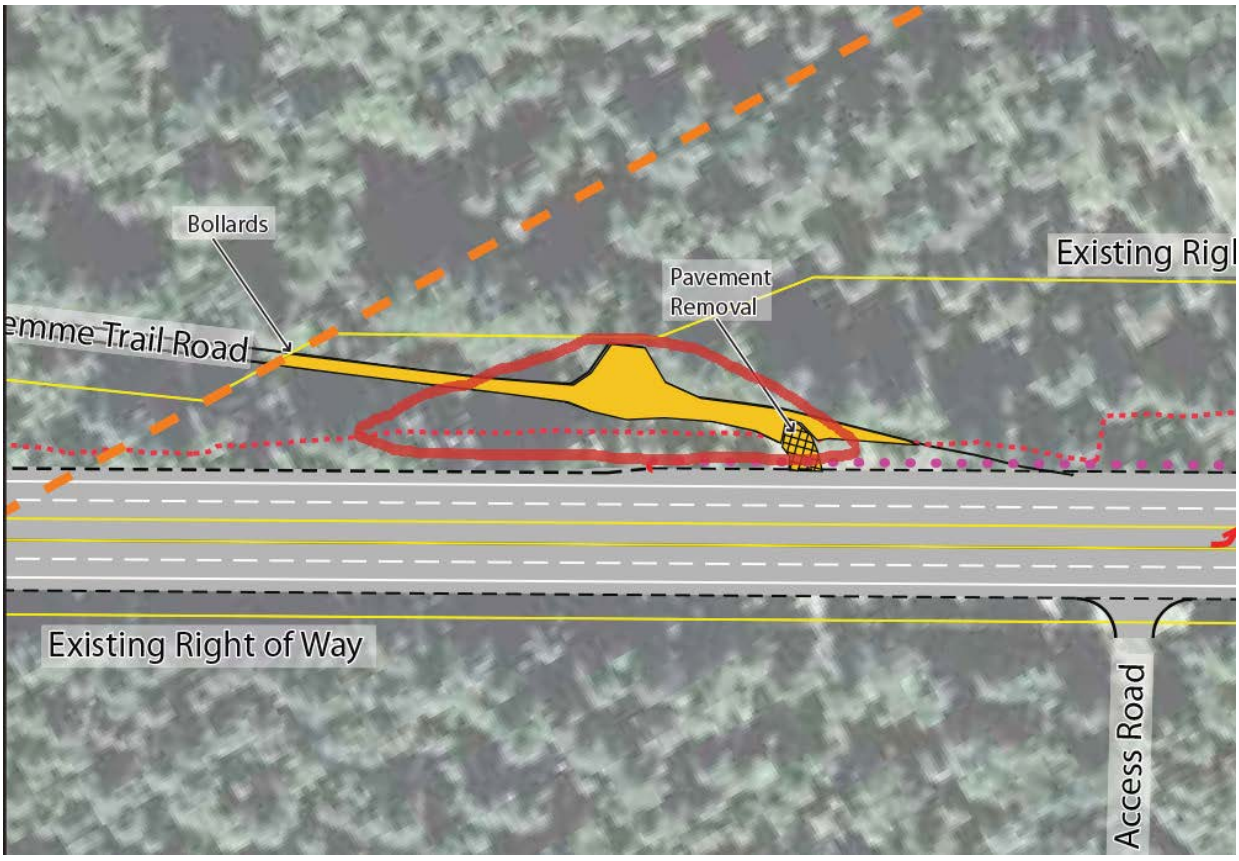
Although *Washat* and other Native American religions "revere the natural world in its entirety," certain sacred sites are "accorded special reverence." Ex.5-10 (Robert Charles Ward, *The Spirits Will Leave: Preventing the Desecration and Destruction of Native American Sites on Federal Land*, 19 Ecology 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 measured approximately 100 meters long by 30 meters wide. Ex.39 BLM 000017-000018.

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 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.

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) with BLM archaeologist Frances Philipek (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 privacy, 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. Plaintiffs are 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. 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 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.

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, repeatedly visited 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." 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, making Plaintiffs' continued religious exercise "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 travel to 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. 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 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, telling her "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.* Philipek's notes contain a message from a colleague instructing Philipek to "visit the site with a representative Indian and set things right." *Id.* BLM_000007. To Plaintiffs' knowledge, no such visit ever occurred.

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, in the late 1990s, the Government and ODOT again discussed widening U.S. 26 within Dwyer. Ex.24 FHWA_01977-002019. Although the Government claimed a safety interest in widening the road, 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).

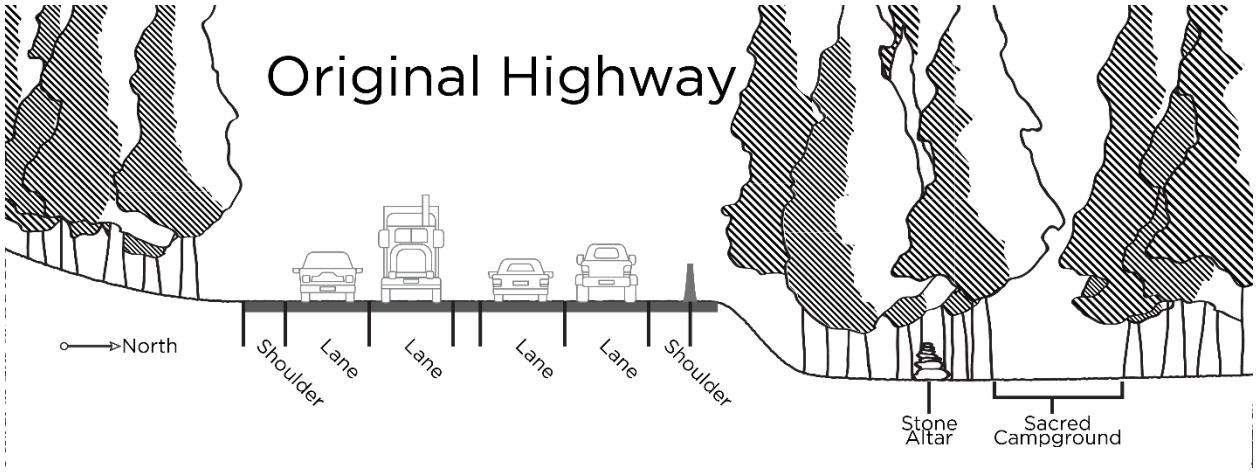
The Government and ODOT recognized that widening U.S. 26 to the north "would require … extensive filling" and "removal of many large diameter trees"—the same trees that the agencies had "expended considerable effort to protect" in the 1980s. Ex.24 FHWA_001980. Nevertheless, BLM was "willing to allow widening," and even to "clos[e] access to the Dwyer [site] north of Highway 26." *Id.*

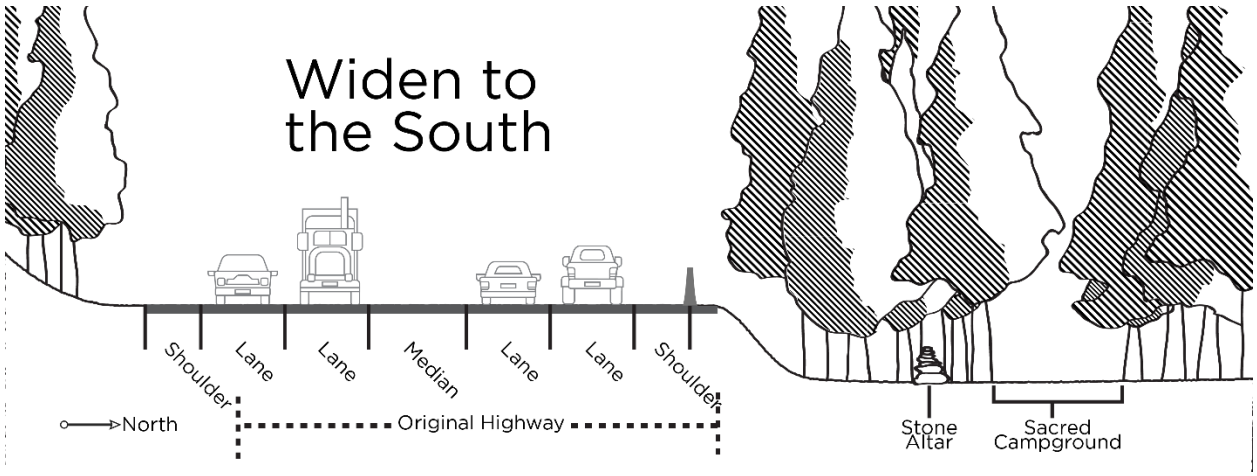
This new widening project—named the U.S. 26 Wildwood-Wemme Project—is the subject of this case. To initiate the project, in August 2004, FHWA, BLM, and ODOT

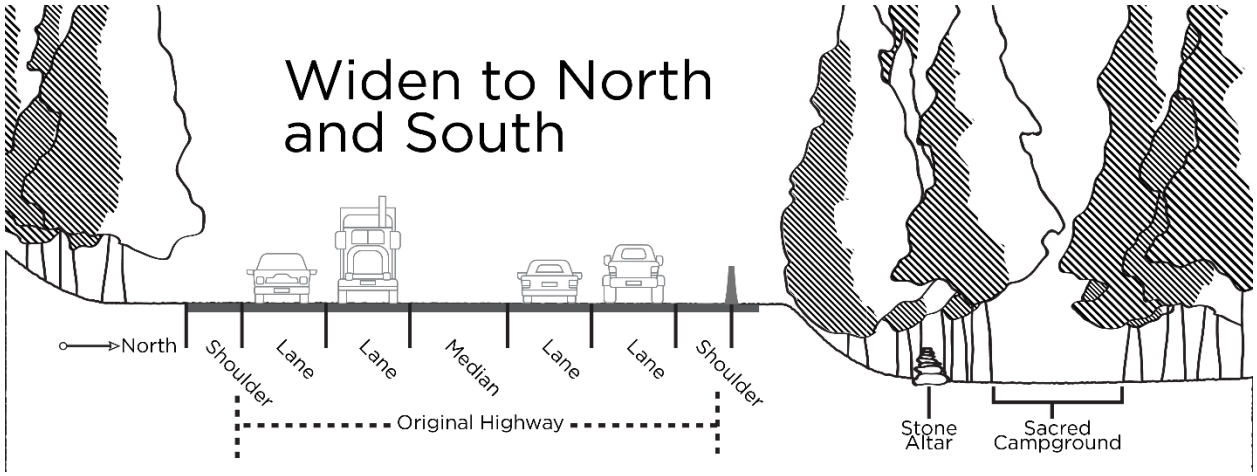
jointly prepared an Environmental Assessment (EA). The EA identified a number of alternatives for "improv[ing] safety" on U.S. 26, several of which would involve no impact on Dwyer. Ex.11 FHWA_004361. For instance, a center turn lane could be added by widening the road to the south, leaving the north 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.

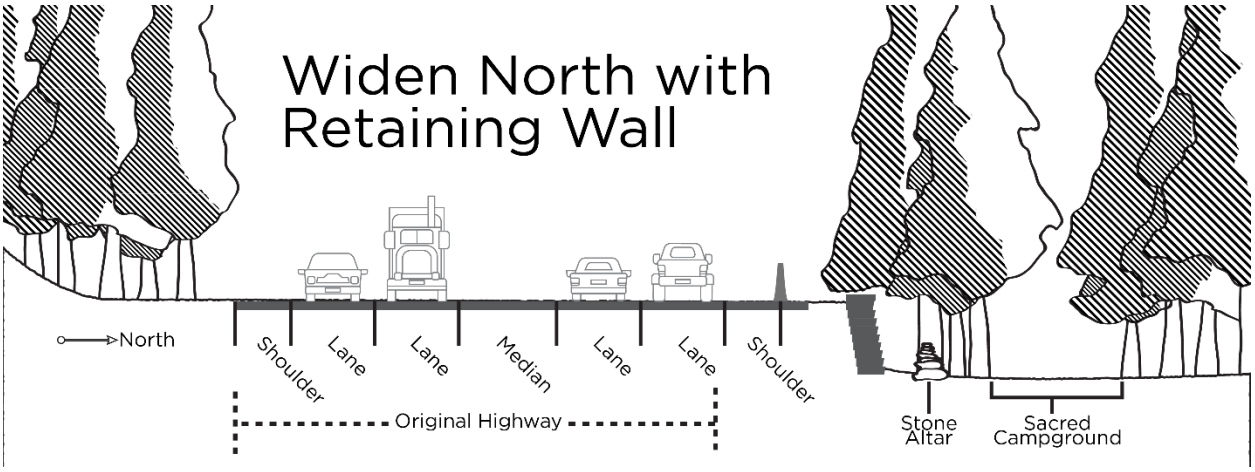
The option most destructive to Dwyer would be to widen the road to the north only. But within that option, the Government still recognized ways to reduce the impact. For instance, rather than using a longer 3:1 slope on the north side of the highway—one that ran three feet for every foot of rise—the 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

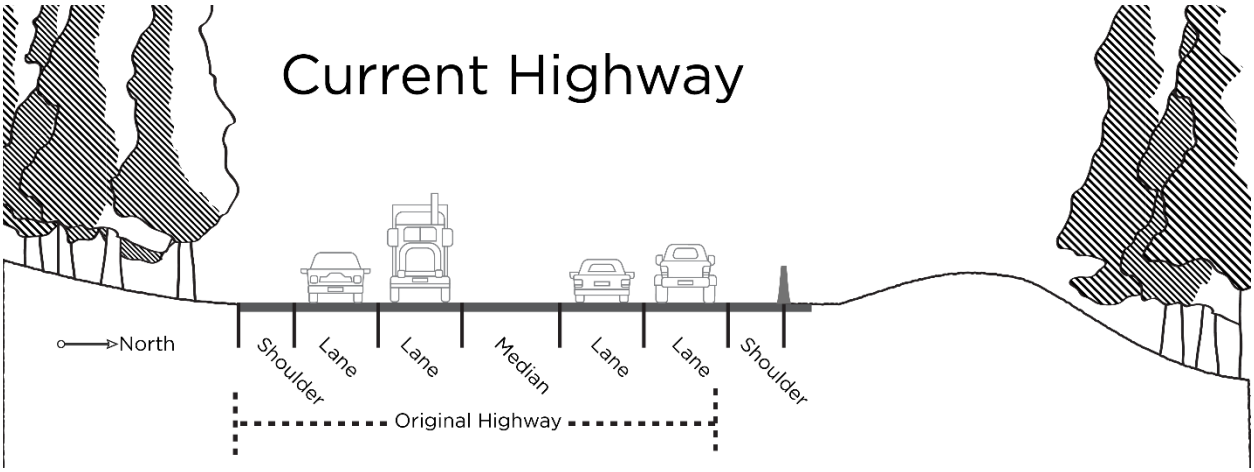

Widen to the South
Shoulder
Lane
Lane
Median
Lane
Lane
Shoulder
North
Original Highway
Stone Altar
Sacred Campground


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



For the few hundred feet of road bordering the sacred site, the Government also could have forgone a center turn lane entirely, because there are no exits or entrances on that stretch of road, making a turn lane unnecessary. *See, e.g.*, Ex.39 BLM 000017-000018. By including a center turn lane immediately east and west of the sacred site, but keeping the portion of road bordering the sacred site at its existing width, the Government could have protected the sacred site much like it did in 1986. *See* Ex.16 FHWA_000440,_000462-000464, 000474-000475; Ex.18 FHWA_005406.

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. The trees and vegetation would be replaced with a large earthen berm. This alternative is illustrated below:



BLM and FHWA then removed the remaining legal obstacles to construction by granting a permit, granting a right of way, instructing ODOT to cut down trees at identified locations, and providing over 90% of the total funds needed for the project. Ex.28 BLM_000035-37; Ex.25 FHWA_003044-003045; Ex.29 BLM_000023-000032; Ex.30 FHWA_006590-006593; 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_006544; Ex.23 ACHP_000053, and despite Plaintiffs' 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 a 1991 meeting with tribal leader Wilferd Yallup, and a 1991 letter from a Yakama Nation official, Ex.33 FHWA_005562-000063—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_000047-000052; *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.

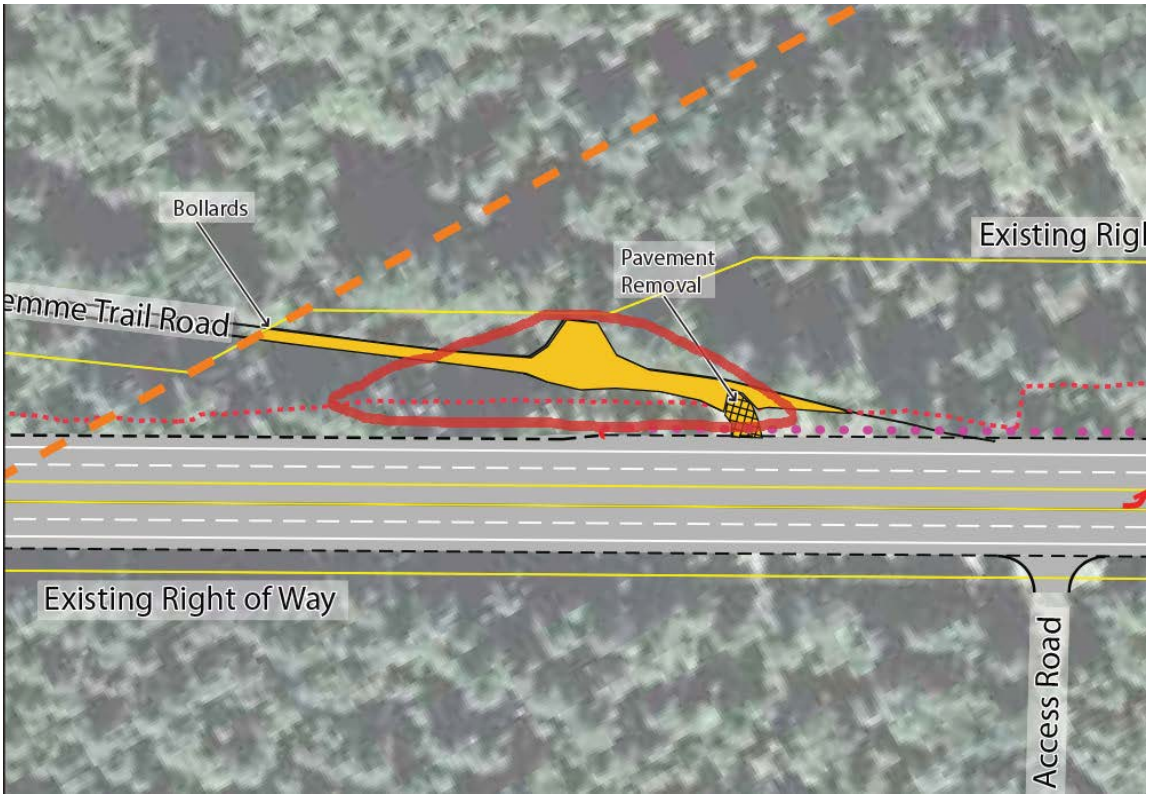
After tree removal but before construction, Jackson, Logan, and Slockish sent additional memoranda in April and May 2008, each detailing the Dwyer site's history and religious significance. Ex.33 ACHP_000117-000143. As Jackson's memo to federal officials put it: "[W]e are speaking out once more, even though the agencies who are widening the highway do not want us to speak about our sacred places that they are destroying." "[T]hese agencies do not want to hear…." Ex.33 ACHP_000133.

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_000021-000025. Her report included notes from her previous call with Michael Jones highlighting the sacred nature of the site. Ex.20 BLM_000006-000009.

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_000066. 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 sacred stone altar that had been "scattered and disturbed" during tree removal, Ex.35 BLM_0000021, was "disposed of." ECF 287 at 28. The traditional campground and burial grounds were bulldozed and buried beneath a massive earthen berm. Ex.3 ¶55. 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 marker of the burial sites and a focal point for worship services—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 282 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 17 (Magistrate Judge Stewart); ECF 131 at 9-10 (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 (Magistrate Judge You). On May 16, 2017, the Government filed a motion for summary judgment, reasserting the arguments that Plaintiffs lacked standing and had failed to show a "substantial burden." ECF 287 at 25-31, 14-23. Plaintiffs cross-moved for partial summary judgment on the ground that the Government's destruction of their sacred site is a "substantial burden" as a matter of law. *See* ECF 292; ECF 294.

On March 2, 2018, Magistrate Judge You recommended that this Court grant Defendants' motion for summary judgment and deny Plaintiffs' cross motion. Although she acknowledged that Magistrate Judge Stewart and Judge Brown had previously

ruled against the Government on the same issues, she said their rulings were "clearly erroneous." ECF 300 at 20. Instead, she concluded that Plaintiffs suffered no injury for purposes of standing, and that "destruction of a sacred site is not enough to constitute a 'substantial burden.'" *Id.* at 17, 20.

LEGAL STANDARD

The district court "must make a *de novo* determination" of "any portion" of the magistrate's recommendation that is objected to. *Barnes v. Chase Home Fin., LLC*, 825 F. Supp. 2d 1057, 1059 (D. Or. 2011); Fed. R. Civ. P. 72(b)(3). "[T]he court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C).

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).

ARGUMENT

I. Plaintiffs have standing.

This Court has already concluded that Plaintiffs have Article III standing. That ruling is not only law of the case but also correct. The magistrate's recommendation to the contrary is mistaken.

A. This Court's prior ruling that Plaintiffs have 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 means that this Court's prior rulings are

dispositive unless they rested on "an error of law" or "clearly erroneous findings of fact," or if the Court is "left with a definite and firm conviction that the [earlier court] committed a clear error of judgment." *United States v. Hinkson*, 585 F.3d 1247, 1283 (9th Cir. 2009) (internal quotation marks omitted). "[T]he clearly-erroneous standard is significantly deferential." *United States v. Stargell*, 738 F.3d 1018, 1024 (9th Cir. 2013) (internal quotation marks omitted). It is satisfied only if the previous decision was so off-base as to not "fall[] within any of the permissible choices the court could have made." *Hinkson*, 585 F.3d at 1260–61.

Law of the case doctrine applies to 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). It also applies at the summary judgment stage, even when the earlier ruling considered only the plaintiffs *allegations*, provided those allegations have been supported by summary judgment evidence. *Johnson v. Riverside Healthcare Sys., LP*, 433 F. App'x 610, 613 (9th Cir. 2011).

Here, the Government has not disputed that this Court already resolved the same standing issues it now seeks to relitigate—nor could it, given that its current arguments repeat the old arguments nearly verbatim. ECF 292 at 25–26. Specifically, in 2010, the Government argued that Plaintiffs suffered no injury because (1) they failed to allege "any intent to visit the [sacred] site in the future," and (2) their injury is not redressable. ECF 28 at 8-9, 11.

But this Court rejected both arguments. It concluded first that Plaintiffs had suffered an injury in fact because they "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 Judge Stewart's report and recommendation); ECF 52 (Judge Brown adopting ECF 48). Second, it concluded that that this Court could still "order mitigation of the harm to cultural resources" and that "some effective relief remains available," which is all that is required for redressability. ECF 52 at 5-8, 10 (Judge Brown); *see also* ECF 48 at 21-23 (Magistrate Judge Stewart) (remediation could include placing a sign, a commemorative marker, or other structure). Since those rulings, Plaintiffs have offered even more undisputed facts detailing their past and planned use of the site, as well as various options for remediation. *See* Ex.1 ¶¶17-19, 22, 37, 43-44; Ex.3 ¶¶15, 18, 50, 61-63; Ex.2 ¶¶12, 16, 33, 35.

Far from demonstrating that this Court's previous standing rulings were "clearly erroneous," the magistrate failed to mention them. ECF 300 at 16-17. Thus, the rulings are still law of the case.

B. Plaintiffs have suffered an injury cognizable for standing.

This Court's prior rulings are also correct. Plaintiffs have demonstrated all three elements of standing: (1) an injury in fact; (2) that is fairly traceable to defendants; and (3) that is redressable by a favorable court ruling.

Injury in Fact. In cases involving use of land, a plaintiff establishes an injury by showing "a connection to the area of concern sufficient to make credible the conten-

tion 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)). Under *Laidlaw*, this standard is met when the defendant's actions have deterred the plaintiff from using a site that he otherwise would use. ECF 292 at 27–28 (citing *Laidlaw*, 528 U.S. at 180–84). In such a case, the plaintiff can establish standing by offering statements that *if* the site were remediated, the plaintiff would return. *Laidlaw*, 528 U.S. at 184; *see also Atay v. County of Maui*, 842 F.3d 688, 697 (9th Cir. 2016).

That is what Plaintiffs did here. Plaintiffs testified that they repeatedly visited the site to exercise their religion for many years, and would resume doing so if the site were remediated. *See, 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.

Traceability. To establish 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). Here, but-for causation is undisputed. The Government owns the relevant land, so if BLM hadn't granted a right-of-way and a tree-removal permit, the destruction couldn't have occurred. *See* Ex.30 FHWA_006590; Ex.27 44-45; 43 C.F.R. § 5511.3-2(b)(1). The Government was also much more than the but-for cause—it funded, planned, guided, coordinated, and profited from the destruction. *See* ECF 292 at 41-46. But nothing more is needed for traceability.

Redressability. An injury is redressable if there is any possible judicial remedy that could at least partially redress the plaintiff's injury. *Neighbors of Cuddy Mtn. v. Alexander*, 303 F.3d 1059, 1065-66 & n.5 (9th Cir. 2002). Here, 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 various types of remediation: The Government could remove all or part of the earthen berm covering the campsite and burial grounds, *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 could be done on the Government's own land and would redress at least part of Plaintiffs' injury.

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, given that the Government claims authority to destroy other sacred sites used by Plaintiffs without regard to RFRA. 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).

C. Standing is a distinct legal question from the merits of a RFRA claim.

The magistrate did not address any of these arguments. Instead, she conflated the merits of the RFRA claim with the question of standing, concluding that "by failing

to establish a *prima facie* case under the RFRA, plaintiffs have failed to establish that they have suffered an injury in fact." ECF 300 at 17. That is incorrect.

The Ninth Circuit and Supreme Court have repeatedly admonished that standing is a threshold question that "precedes, and does not require, analysis of the merits." *Equity Lifestyle Props., Inc. v. County of San Luis Obispo*, 548 F.3d 1184, 1189 n.10 (9th Cir. 2008) (citing *Warth v. Seldin*, 422 U.S. 490, 500 (1975)); *see also Maya*, 658 F.3d at 1068 (collecting cases). Thus, they have criticized district courts for "improperly conflat[ing]" the plaintiff's "standing with whether she would prevail on the merits." *Kirola v. City & Cty. of San Francisco*, 860 F.3d 1164, 1175 (9th Cir. 2017).

RFRA cases are no different, as courts have recognized that the questions of standing and "substantial burden" are distinct. *See, e.g.*, *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 588 F.3d 718, 723 (9th Cir. 2009) (summarizing district court's conclusion that "the Tribes…had standing to bring the RFRA claim" but had no "likelihood of success of establishing a substantial burden"). Indeed, in both *Navajo Nation* and *Lyng*—the two cases relied upon most heavily by the magistrate—the courts concluded there was no substantial burden without ever questioning the plaintiffs' standing. Thus, there is no basis for the magistrate's recommendation on standing.

II. Plaintiffs have established a substantial burden under RFRA.

The recommendation also said Plaintiffs failed to establish a "substantial burden" under RFRA. ECF 300 at 21. But the recommendation ignores contrary authority, is inconsistent with the law of the case, and misinterprets *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) (citing 42 U.S.C. § 2000cc–1(a)). 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*. Although the term "substantial burden" is not defined by statute, the statute provides that it must "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g). 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 his beard or 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. 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.

But in some cases, the Government is even more coercive. Instead of giving the plaintiff a "choice," it uses its power and control to make a religious exercise impossible. In these cases, where the Government "*prevents* the plaintiff from participating in a[] [religious] activity," giving the plaintiff no "degree of choice in the matter," the "coercive impact" of the government action "easily" gives rise to a substantial burden. *Yellowbear v. Lampert*, 741 F.3d 48, 55-56 (10th Cir. 2014) (Gorsuch, J.). That is just what has happened here. The Government has not given Plaintiffs a "choice"—such as by telling them that they can use the sacred site but will be subject to penalty if they do. Instead, the Government has prevented Plaintiffs from engaging in their religious practices altogether by destroying the site. Thus, 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. 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 preventing 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) (Government conceded that "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 the plaintiff from building a place of worship could constitute a substantial burden. *Id.* at 1061, 70; *see also Harbor Missionary Church Corp. v. City of San Buenaventura*, 642 F. App'x 726 (9th Cir. 2016) (same); *Cottonwood Christian Ctr. v. Cypress Redevelopment Agency*, 218 F. Supp. 2d 1203, 1226 (C.D. Cal. 2002) (same).

In *Yellowbear*, the plaintiff sought to use the prison's sweat lodge, but the prison refused. In an opinion by then-Judge Gorsuch, the Tenth Circuit held that "it d[idn]'t

take much work to see" that religious exercise had been substantially burdened, because the Government had "prevent[ed] [him] from participating" in the religious exercise entirely, which "easily" constituted a substantial burden. 741 F.3d at 56-56.

As these and numerous other courts have confirmed: "The greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice)." *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014); *see also* ECF 292 at 34-35 (collecting cases); *Nance v. Miser*, 700 F. App'x 629, 631-32 (9th Cir. June 29, 2017) (denial of scented oils constituted substantial burden); *Koger v. Bryan*, 523 F.3d 789, 799 (7th Cir. 2008) (Government imposes a "substantial burden" if it renders a religious exercise "effectively impracticable"); *Murphy v. Missouri Dep't of Corr.*, 372 F.3d 979 (8th Cir. 2004) (Government imposes a "substantial burden" if it "significantly inhibit[s]" or "meaningfully curtail[s] a person's ability to…engage in [religious] activities" (internal quotation marks and alterations omitted)).

The same principle applies to Native American use of land. In *Comanche Nation v. United States*, the Army planned to build a warehouse on federal land near Medicine Bluffs, a Native American sacred site. No. CIV-08-849-D, 2008 WL 4426621, at *17 (W.D. Okla. Sept. 23, 2008). But the warehouse would have occupied "the central sight-line to the Bluffs"—including the "the precise location" where Native Americans stood to "center" themselves on the Bluffs—making their traditional religious practices impossible. *Id.* at *7, *17. The court held that this physical interference with plaintiffs' religious exercise "amply demonstrate[d]" a "substantial burden." *Id.*

Here, the Government has admitted that Plaintiffs are unable "to visit and worship in the Dwyer area as it existed in January 2008." ECF 295 at 18. It acknowledges that the sacred trees "have been cut"; the ancient stone altar "no longer exists"; and the traditional campsite and burial ground is "cover[ed]" by an "earthen berm." *Id.* And it does not dispute that each aspect of the site used in Plaintiffs' religious practices "has been destroyed" (*id.*)—making Plaintiffs' religious exercise impossible. That makes this an easy case: The "coercive impact" of government action has "*prevent[ed]* the plaintiff from participating in an activity motivated by a sincerely held religious belief." *Yellowbear*, 741 F.3d at 55.

The magistrate failed to grapple with this straightforward analysis. Her recommendation tries to duck the clear holdings of *Greene*, *Yellowbear*, and *Haight* by pointing out that these cases "involve claims made under the Religious Land Use and Institutionalized Persons Act ("RLUIPA")…, not the RFRA." ECF 300 at 14. But the Supreme Court and Ninth Circuit have held that RLUIPA and RFRA impose "the same standard." *Holt*, 135 S. Ct. at 860; *Nance*, 700 F. App'x at 630. Thus, courts routinely rely on RLUIPA cases to interpret RFRA and vice versa. *Holt*, 135 S. Ct. at 860 (RLUIPA case relying on RFRA precedent); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) (RFRA case relying on RLUIPA precedent). If anything, RLUIPA prisoner cases are especially instructive here, because they all involve plaintiffs seeking to exercise their religion *on government property*.

The magistrate also ignores the Government's concession in *Warsoldier*, where it admitted that forcing an inmate to "cut his hair"—without giving him a choice—would obviously be a substantial burden. 418 F.3d at 996. And the recommendation does not even mention *Comanche Nation* or *International Church of Foursquare Gospel*, much less try to distinguish them. These cases remain controlling, and the magistrate erred by failing to apply them.

B. The magistrate's reliance on *Lyng* and *Navajo Nation* is both misplaced and foreclosed by law of the case.

Rather than applying this straightforward analysis, the magistrate offered a series of arguments designed to avoid a finding of a substantial burden. But these arguments are both mistaken and foreclosed by the law of the case.

First, the magistrate claims that this case is indistinguishable from "*Lyng* and *Navajo Nation*, which are controlling Supreme Court and Ninth Circuit precedent." ECF 300 at 10. According to the magistrate, under these cases, "the actual destruction of [plaintiffs'] religious site" makes no difference. *Id.* at 10-11. But neither *Lyng* nor *Navajo Nation* involved physical destruction of a sacred site; in fact, both cases acknowledged that the outcome would have been different if the Government had denied access to or destroyed a sacred site.

In *Navajo Nation*, for example, the court emphasized that the artificial 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." 535 F.3d at 1063. The plaintiffs remained free to engage in all of their prior religious practices; "the sole effect of the artificial snow is on the Plaintiffs' *subjective spiritual experience*." *Id.* (emphasis added).

Here, by contrast, "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. ECF 292 at 39. Plaintiffs aren't complaining merely about their "subjective spiritual experience"; they can't engage in their religious practices *at all*, because the site has been destroyed.

Similarly, in *Lyng*, the Court emphasized that the Government "could [not] have been more solicitous" toward Native American religious practices. 485 U.S. at 454. It chose a route that was "the farthest removed from contemporary spiritual sites," and "provided for one-half mile protective zones around all the religious sites." *Id.* at 454, 443. This ensured that "*[n]o sites where specific rituals take place [would] be disturbed*." *Id.* at 454 (emphasis added).

The magistrate tries to seize on plaintiffs' claim in *Lyng* that the road would "virtually destroy" their "ability to practice their religion." ECF 300 at 11. But that claim was not based on any physical destruction of their sacred site; it was based solely on the effect of the road on their subjective "spiritual development." *Lyng*, 485 U.S. at 451. Accordingly, the Court held that the existence of a substantial burden "cannot depend on measuring the effects of a governmental action on *a religious objector's*

spiritual development." *Id.* (emphasis added). But the Court acknowledged that "prohibiting the Indian [plaintiffs] from *visiting* [their sacred sites] would raise a different set of constitutional questions." *Id.* at 453.

Here, Plaintiffs' sacred site has not just been "disturbed," *id.* at 454, but destroyed. They do not base their claim on their subjective "spiritual development," but their inability to "visit" the site that has been destroyed. *Id.* at 451, 453. And unlike *Lyng*, where the Government had no alternatives short of "abandoning its project entirely," *id.* at 454, here the Government had multiple alternatives, such as widening the other side of the road or using a retaining wall—which it actually used to protect a nearby wetlands. So, far from being maximally "solicitous" of Plaintiffs' religious practices, *id.*, the Government was maximally destructive.

The magistrate expressed concern that finding a substantial burden here would unleash endless interference with the Government's use of "its own land," giving each citizen "an individual veto to prohibit the Government action solely because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires." ECF 300 at 7 (quoting *Navajo Nation*, 535 F.3d at 1063-64). But the Ninth Circuit worried about this in *Navajo Nation* precisely because the plaintiffs' claims were based on their "subjective spiritual experience"—a boundless claim that could be triggered by any government action. *Id.* at 1063. Here, by contrast, Plaintiffs challenge the physical destruction of a historic sacred site—an event that is objectively and geographically defined and, fortunately, rare. Thus, a ruling for Plaintiffs can easily be distinguished any time the Government has not engaged in physical destruction.

And even when the Government destroys a sacred site, it still gets an opportunity to satisfy strict scrutiny. *See Haight*, 763 F.3d at 565-66 (rejecting similar slippery-slope concerns).

For the same reasons, this Court has already rejected the magistrate's interpretation of *Navajo Nation* and *Lyng*. In 2011, the Government made precisely the same arguments about these cases. ECF 104 at 6, 12-14. But Magistrate Judge Stewart and Judge Brown disagreed, concluding that this case is distinguishable because "religious artifacts at the site were destroyed" and the Government prevented Plaintiffs from "freely access[ing] the site." ECF 122 at 17 (Magistrate Judge Stewart); ECF 131 at 9-10 (Judge Brown). Those rulings are law of the case.

The magistrate claims that these rulings were "clearly erroneous" because "destruction of a sacred site is not enough to constitute a substantial burden." ECF 300 at 20 (internal quotation marks omitted). But no court has ever adopted a rule allowing physical destruction of sacred sites and artifacts. In fact, the only other court to consider this scenario adopted the same rule as Judges Stewart and Brown. *See Comanche Nation*, 2008 WL 4426621 at *17 (Army imposed a substantial burden by destroying the "central sight-line" to sacred bluffs). Thus, while courts have held that physically destroying a sacred site is a substantial burden, the magistrate identifies no case allowing the contrary result under RFRA. Far from committing clear error, Magistrate Judge Stewart and Judge Brown were correct.[2]

[2] The same distinction applies to the other cases the magistrate cites. ECF 300 at 7-9. These cases stand for the straightforward proposition that a plaintiff must demonstrate more

Next, relying on *Navajo Nation*, the magistrate claims that Plaintiffs can establish a "substantial burden" only if they demonstrate one of two "critical elements": (1) "that they are being coerced to act contrary to their religious beliefs under the threat of sanctions," or (2) "that a governmental benefit is being conditioned upon conduct that would violate their religious beliefs." ECF 300 at 10. In effect, the magistrate says the burden on Plaintiffs' religious exercise is *too great* to qualify as substantial. If the Government had merely threatened Plaintiffs with fines for trespassing at the site ("threat of sanctions"), Plaintiffs would have suffered a "substantial burden"; but because the Government destroyed the site (making their religious practices impossible), there is no "substantial burden."

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than a subjective impact on their spiritual development to demonstrate a substantial burden. None involved physical destruction of a sacred site:

- *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1210-11 (9th Cir. 2008) (plaintiffs could access the sacred falls, and the relicensing increased water flow);
- *La Cuna De Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of the Interior*, No. 11-cv-00395, 2012 WL 2884992, at *8 (C.D. Cal. July 13, 2012) (Government specifically guaranteed "access to sites" and "use and possession of sacred objects");
- *S. Fork Band v. U.S. Dep't of Interior*, 643 F. Supp. 2d 1192, 1198 (D. Nev. 2009) ("Plaintiffs will continue to have access to the areas identified as religiously significant"), *aff'd in part, rev'd in part on other grounds*, 588 F.3d 718 (9th Cir. 2009);
- *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-1534, 2017 WL 908538, at *9 (D.D.C. March 15, 2017) (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).

The magistrate's reliance on *La Cuna* is particularly problematic, because the magistrate cites only the district court opinion. *See* ECF 300 at 8, 20-21. But the Ninth Circuit didn't affirm the district court's reasoning; it affirmed on the narrower ground that plaintiffs had failed even to show that their sacred site was located within the project area. 603 F. App'x 651 (9th Cir. 2015).

Not surprisingly, this argument is both wrong and foreclosed by law of the case. It is wrong because it misinterprets *Navajo Nation*. True, *Navajo Nation* said that plaintiffs can establish a substantial burden by showing that they have been "forced to choose" between practicing their religion or else (1) suffering "civil or criminal sanctions" or (2) losing "a governmental benefit." 535 F.3d at 1070. But the *very next sentence* of *Navajo Nation* says that "[a]ny burden imposed on the exercise of religion *short of* [these] is not a 'substantial burden' within the meaning of RFRA." *Id.* at 1069-70 (emphasis added). In other words, the threat of sanctions or loss of benefits are the *minimum* government coercion needed to establish a substantial burden; they are not the *universe* of substantial burden claims. Obviously, if coercion is *greater than* the threat of sanctions or loss of benefits—as it is here—then courts have "little difficulty" finding a substantial burden. *Greene*, 513 F.3d at 988.

The magistrate's rigid, two-category formula also parrots the same argument the Government made in this case in 2011. Specifically, the Government argued that "government action imposes a 'substantial burden' on the exercise of religion only when the government action (1) forces individuals to choose between following the tenets of their religion and receiving a governmental benefit or (2) coerces individuals to act contrary to their religious beliefs by the threat of civil or criminal sanctions." ECF 104 at 12. This Court rightly rejected this argument because of the even more coercive destruction at issue in this case. ECF 131 at 9 (Judge Brown).

The magistrate's argument is also contrary to RFRA's text and legislative history. RFRA expressly applies to "all Federal law, and the implementation of that law"—

not just to threats of sanctions or denials of benefits. 42 U.S.C. § 2000bb-3(a). The legislative history likewise confirms that "the definition of governmental activity covered by the bill is meant to be *all inclusive*." H.R. Rep. No. 103-88 (1993) (emphasis added). "The test applies whenever a law or an action taken by the government to implement a law burdens a person's exercise of religion." *Id.*

Finally, the magistrate's stilted reading of *Navajo Nation* produces absurd results, allowing governments to act *more* coercively while avoiding liability under RFRA. For example, the magistrate acknowledges the substantial burden in *Wisconsin v. Yoder*, where Amish families were forced to choose between keeping their children out of public school or facing a $5 criminal fine. 406 U.S. 205, 208 (1972). But under the magistrate's theory, there would be no substantial burden if the Government had forcibly rounded up the children and sent them to a public boarding school—without giving the parents a choice. (Sadly, that is exactly what the Government did to Native American families from the 1880s to the 1930s.[3])

Indeed, the magistrate's theory would authorize a variety of extreme and troubling actions. As long as the Government simply took action without threatening a

[3] Charla Bear, *American Indian Boarding Schools Haunt Many*, NPR (May 12, 2008), http://www.npr.org/templates/story/story.php?storyId=16516865 ("Children were sometimes taken forcibly, by armed police.").

penalty or denying benefits, it could padlock the doors of a church to prevent worship,[4] confiscate religious relics,[5] mock individuals for their religious beliefs,[6] stop individuals from praying in their own homes,[7] or forcibly remove religious clothing[8]—all without consequence under RFRA. That is obviously inconsistent with controlling cases, common sense, and the law of this case.

Third, the magistrate argues that Plaintiffs have not suffered a substantial burden because they can still "freely access" their sacred site—by standing on the earthen berm where their campsite, altar, and trees once stood. ECF 300 at 19. But this is like claiming that because parishioners can stand on a pile of rubble where their bulldozed church once stood, they can "freely access" their church. This is, frankly, insulting. A sacred site, like a church, is more than a set of GPS coordinates. Plaintiffs cannot "freely access" their sacred site, because the site has been destroyed.[9]

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[4] *McCurry v. Tesch,* 738 F.2d 271 (8th Cir. 1984) (finding a substantial burden and calling the Government's action "drastic").

[5] *Tagore v. United States*, 735 F.3d 324 (5th Cir. 2013) (finding a substantial burden where a government worker was prohibited from bringing her religious article of faith to work).

[6] *Mack v. Loretto*, 839 F.3d 286 (3d Cir. 2016) (finding a substantial burden when a prison official put a sticker that read "I love bacon" on the back of a Muslim inmate, and made statements like "there is no good Muslim, except a dead Muslim!").

[7] *Sause v. Bauer*, 859 F.3d 1270, 1274 (10th Cir. 2017) (assuming that "defendants violated…rights under the First Amendment when...[police officers] repeatedly mocked" a woman and "ordered her to stop praying").

[8] Complaint, *Powell v. City of Long Beach*, No. 2:16-cv-2966 (C.D. Cal. filed Apr. 29, 2016) (Government sued after forcibly removing a woman's hijab); Notice of Settlement, *Powell v. City of Long Beach*, No. 2:16-cv-2966 (C.D. Cal. June 28, 2017), ECF No. 34.

[9] Even if Plaintiffs had reason to go to the former site, it is often impossible to do so, because the Government removed the opening in the guardrail—meaning that Plaintiffs must risk blocking traffic on a narrow road that is prone to flooding and take a hike that is difficult in their elderly condition. ECF 292 at 9-10.

Alternatively, the magistrate argues that "denial of access to land, without a showing of coercion to act contrary to religious belief, does not give rise to a RFRA claim, regardless of how that denial of access is accomplished." ECF 300 at 20 (quoting *La Cuna II*, 2013 WL 4500572, at *9 (internal alterations omitted)). But that is directly contrary to *Lyng*, which noted that "prohibiting the Indian respondents from *visiting* [a sacred site] would raise a different set of constitutional questions." 485 U.S. at 453 (emphasis added). It is also contrary to the Government's own concession in *Navajo Nation*, where it admitted that it would be a substantial burden to eliminate access to a religious site on federal land. *See* Oral Argument at 41:50, 43:21, *Navajo Nation*, 535 F.3d 1058 (No. 06-15371); *see also Village of Bensenville v. Fed. Aviation Admin.*, 457 F.3d 52, 59 (D.C. Cir. 2006) (Government conceded if it acquired a church's cemetery and relocated the bodies to a different plot of land, that would be a substantial burden). And it is contrary to this Court's prior rulings, which held that denial of access to a sacred site—particularly by destroying it—is a substantial burden. ECF 122 at 17 (Magistrate Judge Stewart). These prior rulings cannot be clearly erroneous if they are consistent with the Government's own concessions in other cases.

Finally, the magistrate asserts that Plaintiffs have not shown a substantial burden because they supposedly have "substitute" sites that are "capable of serving the exact same religious function." ECF 300 at 11-12, 20-21 (quoting *Oklevueha Native Am. Church of Hawaii, Inc. v. Lynch*, 828 F.3d 1012, 1016 (9th Cir. 2016)). But this argument misapprehends both the facts and the relevant legal standard. Factually,

there is no evidence of any other altar anywhere in the Mount Hood area remotely similar to the prehistoric altar that was used by Plaintiffs in their religious ceremonies and destroyed by the Government. ECF 292 Ex.8 38:22-39:6, 42:2-17; Ex.6 ¶¶ 28-29; Ex.12 ¶ 14. To the contrary, the archeology report regarding the altar states that its preparers were aware of no other analogous altar in the area. ECF 292 Ex.13. Nor are the spirits of Plaintiffs' ancestors' fungible; each has a unique journey to the afterlife that Plaintiffs have a duty to protect. ECF 292 Ex.5-8; Ex.2 ¶¶24, 28. At this sacred site, Plaintiffs also gathered sacred medicine plants, and it is undisputed that they are not aware of another location where these plants grow. ECF 292 Ex.8 13:15-17, 86:3-23. The *Oklevueha* case, by contrast, turned on plaintiffs' *admission* that cannabis was "simply a substitute for peyote," which was both available and "capable of serving the exact same religious function." 828 F.3d at 1016-17. Plaintiffs have made no such admission here; all of their testimony is to the contrary.

As a legal matter, the Supreme Court has rejected the notion that there is no substantial burden on one aspect of a plaintiff's religious exercise just because the plaintiff remains free to engage in another. In *Holt v. Hobbs*, the lower court upheld the Government's policy of requiring an inmate to shave his religious beard because the Government allowed the inmate to practice his religion in other ways, including use of prayer rugs or observing religious holidays. 135 S. Ct. 853, 862 (2015). The Supreme Court held that this was error, because the "substantial burden inquiry asks whether the Government has substantially burdened religious exercise (here, the growing of a ½–inch beard), not whether the RLUIPA claimant is able to engage in

other forms of religious exercise." *Id.* at 862; *see also Greene*, 513 F.3d at 987 (same). The magistrate engaged in the same flawed reasoning; that reasoning cannot justify departing from the law of the case here.

Ultimately, the magistrate fails to grapple with a simple fact: The Government has not merely threatened Plaintiffs with a penalty for worshipping at their sacred site; it has made that religious exercise impossible. That makes this an easy case. As this Court has already held, that constitutes a substantial burden under RFRA.

CONCLUSION

For these reasons, the Court should reject the magistrate's recommendation, deny Defendants' motion for partial summary judgment, and grant Plaintiffs' motion for partial summary judgment.

Dated this 16th day of March, 2018.

Respectfully submitted.

/s/ Michael A. Patterson
Michael A. Patterson, OSB No. 7976
Keith A. Talbot, Pro Hac Vice
Daniel P. Crowner, Pro Hac Vice
Patterson Buchanan Fobes & Leitch, Inc., P.S.
1001 SW Fifth Avenue, 11th Floor
Portland, OR 97204

Luke W. Goodrich, Pro Hac Vice
Stephanie H. Barclay, Pro Hac Vice
The Becket Fund for Religious Liberty
1200 New Hampshire Ave. NW
Suite 700
Washington, DC 20036

James J. Nicita, OSB No. 024068
302 Bluff Street
Oregon City, OR 97045

Attorneys for Plaintiffs

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 10,988 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.

March 16, 2018

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

CERTIFICATE OF SERVICE

I certify that on March 16, 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

March 16, 2018

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