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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

HEREDITARY CHIEF WILBUR SLOCKISH, a resident of Washington, and an enrolled member of the Confederated Tribes and Bands of the Yakama Nation,	**Case No. 3:08-cv-1169-ST** **PLAINTIFFS' REPLY IN SUPPORT OF CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT**

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

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

CASCADE GEOGRAPHIC SOCIETY, an Oregon nonprofit corporation,

and

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

Plaintiffs,

v.

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

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

and

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

Defendants.

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INTRODUCTION

The Government's response brief is most remarkable for what it does not dispute. It does not dispute 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"); lay along a traditional trading route used by Native Americans for centuries; 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 does not dispute that many Native Americans, including Plaintiffs, used this site for their religious practices for many decades. *Id.* at 8-10. It does not dispute 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 does not dispute that the widening project physically destroyed every element of the site used in Plaintiffs' religious practices. *Id.* at 19-23. And it does not dispute 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.

Instead, the Government repeats several legal arguments that have already been rejected by this Court. First, it repeats the claim that Plaintiffs have no "imminent" injury because "they have no plans to visit the site." ECF 295 at 16. But this Court has already recognized that Plaintiffs used the site for many years and would do so again if the site were remediated. ECF 48 at 27-29; ECF 52. That is more than enough to establish an injury under controlling Supreme Court precedent.

Second, the Government repeats the claim that Plaintiffs' injury cannot be redressed because the site "has been destroyed," and any remediation of the site might interfere with "maintenance of [the] highway." ECF 295 at 18-19. But this Court has already identified several ways that the site can be remediated—such as by removing the earthen berm, rebuilding the stone altar, and replanting trees. And the Government has not even attempted to show that this remediation would interfere with highway maintenance. Indeed, the Government itself has offered some of this remediation in settlement negotiations—belying any claim that remediation is impossible.

Third, the Government repeats its stilted interpretation of the Religious Freedom Restoration Act (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. 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 impose even harsher burdens by eliminating the choice and making a religious exercise impossible. That is just what the Government has done here.

Ultimately, the Government cannot escape a simple fact: It has destroyed Plaintiffs' sacred site for no good reason, making Plaintiffs' religious exercise impossible. That is a substantial burden as a matter of law.

ARGUMENT

I. Plaintiffs have standing.

A. The Government's standing arguments are foreclosed by law of the case.

This Court has already rejected both of the Government's standing arguments in this litigation. ECF 292 at 25-26. First, the Court held that Plaintiffs have suffered a concrete injury, because they used the site in the past and "would do so in the future" but for the Government's destructive actions. ECF 48 at 27-29; ECF 52. Second, the Court held that the injury is redressable, because the Court can "order mitigation of the harm to cultural resources." ECF 52 at 5-8. Under law of the case, these 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). The Government offers no persuasive reasons to depart from this rule.

First, the Government claims that "law of the case does not apply to jurisdictional issues." ECF 295 at 11–12, 16. But the sole case it cites dealt not with the jurisdictional issue relevant here—Article III standing—but with jurisdiction to consider an appeal. *Malone v. Avenenti*, 850 F.2d 569, 571 (9th Cir. 1988). The Ninth Circuit has expressly held that "jurisdiction to consider an appeal . . . is a different question from . . . whether the federal courts have subject matter jurisdiction," and that a prior decision on "subject matter jurisdiction is the law of the case." *Hanna Boys Ctr. v. Miller*, 853 F.2d 682, 686 & n.1 (9th Cir. 1988). Accordingly, the Ninth Circuit has repeatedly

applied law of the case to prior rulings that a plaintiff had Article III standing. *See Nordstrom v. Ryan*, 856 F.3d 1265, 1270 (9th Cir. 2017); *Barnes-Wallace v. City of San Diego*, 704 F.3d 1067, 1076–78 (9th Cir. 2012). The Government simply ignores these cases.

Second, the Government suggests that law of the case does not apply because its standing arguments were rejected before Plaintiffs asserted their RFRA claim. ECF 295 at 16. But law of the case applies to all "*issue*[*s*] previously decided," either "explicitly or by necessary implication." *United States v. Jingles*, 702 F.3d 494, 499–500 (9th Cir. 2012) (emphasis added) (internal quotation marks omitted). This is true even if the issue is "raised in the context of a" "different claim[.]" *Marchiol v. United States*, No. CV-16-2235, 2017 WL 913599, at *9 (D. Ariz. Feb. 13, 2017) (citing *Jingles*, 702 F.3d at 502–03). The Government does not dispute 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. *See* ECF 292 at 25–26.

Finally, the Government resorts to arguing that both Magistrate Judge Stewart and Judge Brown were simply wrong. But again, applying law of the case would be reversible error only if the decisions were not just wrong, but "clearly erroneous." ECF 295 at 11. "[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. As explained below, far from being "clearly erroneous," the prior standing decisions were correct.

B. Plaintiffs have suffered a cognizable injury.

The first element of standing is injury in fact. ECF 292 at 25. The Government argues that Plaintiffs lack a cognizable injury because they have not offered "concrete plans" detailing "*when*" they will return to the Dwyer site. ECF 295 at 16-17 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009)). But under *Laidlaw*, concrete plans to visit a site are unnecessary when the defendant's actions have deterred plaintiffs from using the site. ECF 292 at 27–28 (citing *Friends of the Earth, Inc. v. Laidlaw Env'l Servs. (TOC), Inc.*, 528 U.S. 167, 180–84 (2000)). In such a case, the plaintiffs can establish standing by offering "conditional statements"—*i.e.*, statements that *if* the site were remediated, the plaintiffs would return. *Laidlaw*, 528 U.S. at 184. That is what Plaintiffs have done here. *See* ECF 292 at 28.

The Government does not attempt to distinguish *Laidlaw*. Instead, it suggests that *Summers* somehow implicitly overruled it. ECF 295 at 17. But it offers no authority for this proposition. Nor can it, because the two cases are fully consistent. *Summers* involved *anticipated* damage to a site; it held that if a site has not been damaged yet, the plaintiff must offer more than "'some day' intentions" to visit the site in the future. *Summers*, 555 U.S. at 496 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992)). But *Laidlaw* involved *present* damage to a site; it held that if the damage has already occurred, the plaintiff can offer "conditional statements" that they "would use the nearby [site]" if the damage were remedied. 528 U.S. at 705–06 (quoting *Lujan*, 504 U.S. at 564); *see also Hirsch v. Hui Zhen Huang*, No. 10 Civ.

9497, 2011 WL 6129939, at *3 (S.D.N.Y. Dec. 9, 2011); *Fiedler v. Ocean Props., Ltd.*, 683 F. Supp. 2d 57, 69 (D. Me. 2010) (*Laidlaw* recognizes "current deterrence" injury). That is what Plaintiffs allege here.

Indeed, contrary to the Government's claim, lower courts continue to apply *Laidlaw* in this way after *Summers*. *See, e.g.*, *Hill v. Coggins*, ___ F.3d ____, 2017 WL 3471259, at *3–4 (4th Cir. Aug. 14, 2017); *Atay v. Cty. of Maui*, 842 F.3d 688, 697 (9th Cir. 2016). In *Hill*, for example, decided just weeks ago, the Fourth Circuit held that Native Americans had standing to challenge a zoo's treatment of bears because the plaintiffs had "confirm[ed] their intent to return to the nearby Zoo *if* the bears' setting improved." 2017 WL 3471259, at *4 (emphasis added). *Laidlaw* controls here.

C. Plaintiffs' injury was caused by the Government.

The second standing element is causation, which requires the plaintiff's injury to be "fairly traceable" to the defendant's conduct. ECF 292 at 25. As Plaintiffs have explained, this element requires even less than "but-for" causation—yet but-for causation has been established here, because the project could not have been completed unless the Government granted the right of way and tree-removal permit necessary for the project to begin. ECF 292 at 40–41. The Government now abandons its prior causation argument (ECF 287 at 27), instead conceding that the highway widening "result[ed]" from its actions in granting a "right-of-way over federal land." ECF 295 at 1. Causation is therefore undisputed.

D. Plaintiffs' injury is redressable.

The final standing element is that the plaintiff's injury must be likely to be redressed by the relief sought. ECF 292 at 25. The Government offers several redressability arguments, none of which have merit.

First, the Government claims that redress is impossible because "the Court [cannot] undo construction after it has occurred." ECF 295 at 18. But in support, it cites three out-of-circuit cases in which the plaintiffs had *failed to request* any remediation of a completed project, and *for that reason* lacked redressability. *See Friends of Tims Ford v. Tenn. Valley Auth.*, 585 F.3d 955, 970–71 (6th Cir. 2009); *Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 170 F. Supp. 3d 6, 14 (D.D.C. 2016); *Fox v. Palmas Del Mar Props., Inc.*, 620 F. Supp. 2d 250, 262 (D.P.R. 2009). Here, Plaintiffs *do* seek remediation of the site. *See* ECF 292 at 29–30. And under binding Ninth Circuit precedent, the court's "remedial powers" with respect to completed construction include ordering "structural changes," including that the construction be "taken down." *West v. Sec'y of Dep't of Transp.*, 206 F.3d 920, 925–26 & n.5 (9th Cir. 2000); *see also Feldman v. Bomar*, 518 F.3d 637, 642–43 (9th Cir. 2008) (when construction causes "continuing" harm, case remains justiciable "even after the contested . . . projects [are] complete"). This Court already recognized as much when it rejected the Government's argument the first time, noting that the remedy could include "ordering removal of the offending portions of U.S. Highway 26." ECF 48 at 22; ECF 52 at 4, 8–10 (rejecting the Government's argument that "the Court cannot order the completed highway widening project to be 'undone'").

Next, the Government claims that even though it owns the land in question, this Court cannot order remediation because remediation might conflict with ODOT's right of way. ECF 295 at 19–20. But this argument is confused at multiple levels. First, there is no conflict between most of the forms of remediation Plaintiffs seek and ODOT's right of way. ODOT's right of way is limited to the "operation and maintenance of a highway," and it expressly reserves to *the federal Government* the right to use "any portion of the right-of-way" for any purpose, so long as it does not "interfere with the free flow of traffic or . . . safety of the highway." ECF 292-39 BLM_000012; *see also* 43 C.F.R. § 2805.15 (stating that BLM retains "any rights" not "expressly convey[ed]" in a right of way, including the right to "authorize use of the right-of-way for compatible uses"). Here, Plaintiffs seek several forms of relief that will *not* interfere with the flow of traffic or highway safety—including removing the earthen berm beyond the guardrail, rebuilding the stone altar, and replanting trees. The Government does not even attempt to show that these forms of relief would threaten highway safety. In fact, the Government has already offered some of this relief during settlement negotiations—belying any claim that this relief would conflict with the right of way. *See Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1161–63 (9th Cir. 2007) (settlement discussions admissible under Fed. R. Evid. 408 to establish "subject matter jurisdiction").

Even assuming a potential conflict between the right of way and more extensive forms of relief under RFRA—such as altering the highway—RFRA controls. RFRA "applies to all Federal law, and the implementation of that law, whether statutory or

otherwise"—including the grant of a right of way. 42 U.S.C. § 2000bb-3(a). As the Ninth Circuit has explained, when a court is "ask[ed] to remedy the violation of a public law" like RFRA, it is "not bound to stay within the terms of a private agreement"; instead, it "may exercise [its] equitable powers to ensure compliance with the law." *Nw. Env'l Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 679–80 (9th Cir. 2007). Thus, courts routinely order the Government to comply with federal law, even when doing so will "prevent [the Government's] performance of [its] contracts" or affect the "property interests" of third parties. *See Conner v. Burford*, 848 F.2d 1441, 1459-61 (9th Cir. 1988) (prohibiting mining under Government leases issued in violation of federal law); *Tyler v. Cuomo*, 236 F.3d 1124 (9th Cir. 2000) (court can order changes to completed construction project to comply with federal law).

Lastly, the Government claims that ODOT is a "required party"—either because ODOT must be present to "protect a claimed legal interest," or because ODOT's absence might subject the Government to "inconsistent obligations." ECF 295 at 20. But ODOT has already undermined this argument by successfully getting itself dismissed from the case. *See* ECF 105, 131. As the Ninth Circuit has noted, a former defendant's "voluntary" exit from a case is "the best evidence that [his] absence would not impair or impede his ability to protect his interests" under Rule 19. *U.S. ex rel. Morongo Band of Mission Indians v. Rose*, 34 F.3d 901, 908 (9th Cir. 1994); *see also United States v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999) (joinder not required under Rule 19 if the party whose interests are allegedly at risk "was aware of th[e] action and chose not to" participate).

Nor is there any risk of "inconsistent obligations." As noted above, enforcing RFRA will not interfere with the right of way, because Plaintiffs seek remediation that will not affect traffic safety. But even if the Government disagrees, it can raise traffic safety as part of its strict scrutiny defense under RFRA. 42 U.S.C. § 2000bb-1(b). If the Court agrees with the Government, the appropriate response is not to dismiss the case for lack of jurisdiction, but to "shap[e] the relief" to avoid safety problems—or, failing that, to reject the claim on the merits. Fed. R. Civ. P. 19(b)(2)(B); *see also* Wright & Miller, 7 *Federal Prac. & Proc.* § 1608 (3d ed.) (Rule 19 "obligat[es courts] to seek out an alternative to dismissing the action"). Either way, then, there is no risk of "inconsistent obligations," because the scope of the right of way and any traffic safety concerns will be fully considered as part of the merits of the RFRA claim.

II. The Government has abandoned its laches argument.

The Government's motion also claimed that Plaintiffs' claims are "barred" by laches. ECF 287 at 29–30. But as we have explained, a claim with a statutory limitations period, like RFRA, cannot be barred by laches. ECF 292 at 30; *see also SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960–61 (2017). The Government now abandons its laches argument, asking instead that the Court merely "take account of [Plaintiffs'] delay" in crafting equitable remedies. ECF 295 at 21–23 (quoting *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1966 (2014)).

But the Court should reject even this pared back request. Under *Petrella*, a plaintiff's delay justifies curtailing equitable relief only in "extraordinary circumstances." *Petrella*, 134 S. Ct. at 1977. And the court must take into account the defendant's

"knowledge of [the plaintiff's] claims." *Id.* at 1978-79. Here, the only "extraordinary circumstance" is the Government's callous disregard of Plaintiffs' longstanding concerns, which they repeatedly expressed to the Government throughout the 1980s, 1990s, and immediately before and after construction began. ECF 10-13, 18-19. Thus, there is no basis for barring equitable relief. *Cf. Davis v. Coleman*, 521 F.2d 661, 670 n.11, 677–78 (9th Cir. 1975) (refusing to bar equitable relief where up to 50% of the project was complete by the time of suit).

III. Plaintiffs have established a substantial burden.

The Government fares no better on the merits of the RFRA claim. It recycles old arguments that this Court has already rejected, mischaracterizes Plaintiffs' religious exercise, and ignores controlling precedent. Its efforts only reinforce the conclusion that Plaintiffs have demonstrated a substantial burden as a matter of law.

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

The Government admits 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 (which it derisively calls a "rock pile") "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 Supreme Court has long held that a burden on religious exercise can be substantial even when it is merely "indirect"—such as when an individual faces a "choice" between either giving up her religious exercise or losing

a government benefit. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). But the analysis is even "easi[er]" when the government makes a religious exercise impossible—giving an individual no "degree of choice in the matter." *Yellowbear v. Lampert*, 741 F.3d 48, 55-56 (10th Cir. 2014) (Gorsuch, J.). As numerous courts have confirmed, "[t]he 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); ECF 292 at 34-35 (collecting cases); *see also Nance v. Miser*, No. 16-15321, 2017 WL 2814508, at *2 (9th Cir. June 29, 2017) (denial of scented oils constituted substantial burden).

The Government tries to avoid this principle by arguing that some of these cases "involve prisoners," and that prisoner cases are "different" because prison is "highly coercive." ECF 295 at 4. But that misses the point. The point is that the burden on a religious exercise is *greater* when the government makes the exercise *impossible* than when it merely makes the exercise *costlier*. That principle is just as true in this case as in the prison context. Indeed, both contexts share the same key feature: the government *controls the location* needed for the religious exercise, so the government can make the religious exercise *impossible*.

Alternatively, the Government claims that these prisoner cases *did*, in fact, involve a "choice" under "threat of sanction." ECF 295 at 5. But that is simply false. In *Greene v. Solano County Jail*, the prison refused to let the inmate attend worship services altogether. 513 F.3d 982, 984 (9th Cir. 2008). In *Haight*, the prison refused to provide traditional foods altogether. 763 F.3d at 560. In *Yellowbear*, the prison

stopped the inmate from using the sweat lodge altogether. 741 F.3d at 53. And in *Shaw v. Norman*, the prison took away the inmate's religious items altogether. No. 6:07cv443, 2008 WL 4500317, at *13 (E.D. Tex. Oct. 1, 2008). None of these inmates had a "choice" to engage their religious exercise and suffer a penalty; they simply could not do it at all. That is why the courts said they were "eas[y]" cases. *Yellowbear*, 741 F.3d at 56. The same is true here.

Of course, *some* prisoner cases involve a "choice" between a religious exercise and a penalty. That is what the Court recognized in *Navajo Nation v. United States Forest Service*, where it observed that the inmate in *Warsoldier* was "forced to choose" between cutting his hair or "confinement to his cell." 535 F.3d 1058, 1078 (9th Cir. 2008). That is a substantial burden, too. But the burden is even greater when the prisoner has no choice—*i.e.*, when the prison simply pins the inmate down and shaves his head. Indeed, the government in *Warsoldier* acknowledged just that—admitting that there would be a substantial burden if the inmate were "physically forced to cut his hair." *Warsoldier v. Woodford*, 418 F.3d 989, 996 (9th Cir. 2005).[1]

The Government fares no better in its attempt to distinguish land use cases like *International Church of the Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1066-70 (9th Cir. 2011), which held that the government imposed a substantial burden by refusing to allow plaintiffs to build a church. The Government concedes that

[1] The Government also tries to distinguish prisoner cases on the ground that they are "not even brought under RFRA but rather under [RLUIPA]." But both statutes use identical language, and the Supreme Court has repeatedly said that they impose "the same standard." *Holt v. Hobbs*, 135 S. Ct. 853, 860 (2015) (quoting *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006)).

"a threat of coercion and legal sanction" was "not discussed directly in *Foursquare*." ECF 295 at 6. Undeterred, the Government claims that such a "threat" must have existed implicitly, because if the church had built a building without a permit, they might have faced fines under the zoning code. *Id.* (citing City of San Leandro Zoning Code Part v. Art. 29 at 5-2908). But if this is what the Government means by a "threat of civil or criminal sanctions," then the same threat is present here, too.

Specifically, BLM regulations impose civil and criminal penalties for "using, occupying, or developing the public lands . . . without a required authorization." 43 C.F.R. § 2888.10; 43 C.F.R. § 9262.1. Although the Government says that Plaintiffs can "freely assembl[e] at the Dwyer area," ECF 295 at 15, Plaintiffs do not want to "assemble" on top of an earthen berm with no trees, no altar, and no native plants. They want the sacred site to be restored. ECF 292 at 29-30. If Plaintiffs engaged in self-help by renting a backhoe, removing the earthen berm, opening the guardrail, planting new trees, and rebuilding their altar, they would face civil or criminal penalties no less than the plaintiffs in *Foursquare*. Thus, the Government's attempt to distinguish *Foursquare* is unavailing.

Ultimately, the Government cannot escape a simple fact: It has not merely made Plaintiffs' religious exercise costlier; it has made it impossible. That makes this an *a fortiori* case.

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

The Government also fails to confront the fact that neither *Navajo Nation* nor *Lyng* involved 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 took pains to explain 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 Government also conceded at oral argument in *Navajo Nation* that a denial of access would be a substantial burden. ECF 292 at 39-40. Similarly, in *Lyng*, the Court noted that "prohibiting the Indian respondents from *visiting* [a sacred site] would raise a different set of constitutional questions." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988) (emphasis added).

Here, of course, "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. And Plaintiffs cannot "visit" the site in any meaningful sense because the site has been destroyed. The Government simply ignores this language (and its own concession) from *Navajo Nation* and *Lyng*.

Instead, the Government repeats the claim that *Navajo Nation* recognizes only two types of substantial burdens—a denial of government benefits under *Sherbert*, or a civil or criminal penalty under *Yoder*. ECF 295 at 3. But as Plaintiffs have already noted (ECF 292 at 37), the *very next sentence* of *Navajo Nation* says that "[a]ny burden imposed on the exercise of religion *short of* that described by *Sherbert* and *Yoder* is

not a 'substantial burden' within the meaning of RFRA." 535 F.3d at 1069-70 (emphasis added). In other words, *Sherbert* and *Yoder* describe the *minimum* needed to establish a substantial burden; they do not describe the *universe* of substantial burden claims. Obviously, if a burden is "[*greater than*] that described by *Sherbert* and *Yoder*" (*id.*)—as it is here—then it is still substantial. The Government never responds to this point, because it has no response.[2]

The Government also has no good response to *Hobby Lobby*, which rejected as "absurd" the Government's argument that RFRA "merely restored this Court's pre-*Smith* decisions." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2773 (2014). The Government now doubles down on that argument, claiming that RFRA is *not* "divorced from the pre-*Smith* cases" but was merely "passed to restore" them. ECF 295 at 6. But *Hobby Lobby* says the opposite: RFRA, as amended by RLUIPA, was "an obvious effort to effect a *complete separation from First Amendment case law*." *Hobby Lobby*, 134 S. Ct. at 2761-62 (emphasis added); *see also id.* at 2791-92 (Ginsburg, J., dissenting) (criticizing the majority for "see[ing] RFRA as a bold initiative departing from, rather than restoring, pre-*Smith* jurisprudence"). It would be hard

[2] The same distinction applies to the other cases the Government cites, none of which involved destruction of a sacred site. *See* ECF 292 at 40-41 (citing *Snoqualmie Indian Tribe v. F.E.R.C.*, 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) (the government specifically guaranteed "access to sites" and "use and possession of sacred objects"); *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).

for the Government to craft an argument more obviously in conflict with *Hobby Lobby*.

The Government's rigid, two-category formula is also contrary to RFRA's legislative history. That history says that "the definition of governmental activity covered by the bill is meant to be all inclusive"—meaning that "in order to violate the statute, government activity *need not coerce individuals into violating their religious beliefs nor penalize religious activity by denying any person an equal share of the rights, benefits and privileges enjoyed by any citizen*." H.R. Rep. No. 103-88 (1993) (emphasis added). "Rather, 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 Government's stilted reading of *Navajo Nation* produces absurd results. For example, the Government admits that there was a 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 Government's theory, there would be no substantial burden if the Government 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 Government's theory would authorize a variety of extreme and troubling actions. As long

[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."); Margaret D. Jacobs, *A Battle for the Children: American Indian Child Removal in Arizona in the Era of Assimilation*, 45 J. of Ariz. Hist. 31 (2004), http://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1002&context=historyfacpub (the

as the Government simply took action without threatening a penalty, it could confiscate religious relics,[4] mock individuals for their religious beliefs,[5] stop individuals from praying in their own homes,[6] or forcibly remove religious clothing[7]—all without consequence under RFRA. That is obviously inconsistent with case law and common sense.

Unable to address this logic, the Government claims that *Navajo Nation* and *Lyng* still apply because there is only a "philosophical" difference between "diminish[ing] the sacredness" of a site and physically destroying a site. ECF 295 at 8-10. According to the Government, because Plaintiffs can still stand on top of the earthen berm where their campsite, altar, and trees once stood, their site "is not 'destroyed' so much as 'diminished.'" ECF 295 at 9-10. But this is like bulldozing a church and saying "the [church] still exists"; it is just "in a form Plaintiffs consider spiritually diminished." *Id.* at 9. That is, frankly, insulting. A church is more than a set of GPS coordinates.

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government would surround Native American camps with troops and take the children away to boarding school with military escort).

[4] The Fifth Circuit found a substantial burden where a government worker was prohibited from bringing her religious article of faith, a kirpan, to work. *Tagore v. United States*, 735 F.3d 324 (5th Cir. 2013). But under the Government's theory, it would have been at liberty to simply confiscate the item and leave no choice.

[5] *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!").

[6] *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").

[7] Dell Cameron, *Muslim woman sues California police who 'forcibly' removed her hijab*, Daily Dot, May 3, 2016, https://www.dailydot.com/layer8/kirsty-powell-hijab-long-beach-police-lawsuit/ (government sued after forcibly removing a woman's hijab); Complaint, *Powell v. City of Long Beach*, No. 2:16-cv-2966 (C.D. Cal. filed Apr. 29, 2016); Notice of Settlement, *Powell v. City of Long Beach*, No. 2:16-cv-2966 (C.D. Cal. June 28, 2017), ECF No. 34.

It consists of physical items, like an altar, baptistry, stained glass windows, and spires. Likewise, Plaintiffs' sacred site consisted of an altar, native plants, burial markers, and tall trees. As Plaintiff Jackson said, it was "like a church [that] never had walls, never had a roof, and never had a floor," but "[was] still just as sacred as a white person's church." ECF 292 at 9. When those physical items were destroyed, it became impossible for Plaintiffs to perform their religious ceremonies at the site—just as Christians cannot gather inside a church that has been destroyed.

Echoing the same theme, the Government says that Plaintiffs "concede the Dwyer area has not been destroyed . . . by arguing they could increase their religious use of this federal land if the government took actions such as erecting a sign and planting trees." ECF 295 at 9. But that is nonsense. To use a historic example, during World War II, the famous Baroque Lutheran *Frauenkirche* church was left in shambles after the bombing of Dresden.[8] For 50 years, it lay in ruins—a pile of charred stones and debris. But after the reunification of Germany, the government spent two decades reconstructing the church, using about one-third of the original stones and two thousand pieces of the original altar.[9] The *Frauenkirche* will always bear the scars of war, but it has been restored as a place of worship.[10] The Government's argument here—that a request for remediation means that the site was never really destroyed—is just

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[8] Patricia Keegan, *Rebuilding the Frauenkirche*, Washington International, http://www.washingtoninternational.com/washington-international/2016/6/15/rebuilding-the-frauenkirche (last visited Sept. 5, 2017).

[9] *Id.*

[10] *Landmark Dresden Church Completes Rise from the Ashes*, DW News, Oct. 29, 2005, http://www.dw.com/en/landmark-dresden-church-completes-rise-from-the-ashes/a-1758986.

as absurd as claiming that the *Frauenkirche* was never really destroyed. The possibility of restoration does not negate the fact of destruction.[11]

Unable to eliminate the common-sense distinction between destruction and diminishment, the Government offers an even more extreme argument: Destruction doesn't matter. ECF 295 at 13. According to the Government, even if the site was destroyed, "such destruction occurred as part of a construction project on federal land," and "as a matter of law, no substantial burden can result from the government's construction on its own land." *Id.* But RFRA applies to "*all* . . . implementation of" "Federal law"—foreclosing any blanket carve-out for federal land management decisions. 42 U.S.C. § 2000bb-3(a) (emphasis added). Thus, unsurprisingly, no court has ever accepted the Government's extreme argument.

Indeed, if the Government's argument were correct, much of *Navajo Nation* and *Lyng* is simply dicta. There was no need in *Navajo Nation* to explain that "no plants, springs, natural resources, shrines with religious significance, or religious ceremonies . . . would be physically affected." 535 F.3d at 1063. There was no need to detail the Plaintiffs' religious practices or emphasize that the project affected only "the Plaintiffs' subjective, emotional religious experience." *Id.* at 1070. There was no need in *Lyng* to highlight that the Government "could [not] have been more solicitous" to-

[11] The Government claims that treating physical destruction differently from subjective diminishment will "have significant consequences for federal land management." ECF 295 at 10. But the Government doesn't usually destroy entire sacred sites when other alternatives are readily available. And if destroying a site is truly unavoidable, the Government will be able to satisfy strict scrutiny.

ward Native American religious practices, chose a route that was "the farthest removed from contemporary spiritual sites," and ensured that "[n]o sites where specific rituals take place [would] be disturbed." 485 U.S. at 453-454. And there was no need to say that "prohibiting the Indian respondents from visiting [their sacred site] would raise a different set of constitutional questions." *Id.* at 453. Both Courts could have written very short opinions—simply saying that "as a matter of law, no substantial burden can result from the government's construction on its own land." ECF 295 at 13. But the courts did not do that, because there is no such rule.

The Government itself has conceded as much. At oral argument in *Navajo Nation*, the Government conceded that it would be a substantial burden to eliminate access to a religious site on federal land. Oral Argument at 41:50, 43:21, *Navajo Nation*, 535 F.3d 1058 (No. 06-15371). And in *Bensenville*, the Government conceded that it would be a substantial burden for the government to acquire a church's cemetery and relocate the bodies to a different plot of land. *Vill. of Bensenville v. Fed. Aviation Admin.*, 457 F.3d 52, 59 (D.C. Cir. 2006).

Ignoring these concessions, the Government says the Court should adopt its novel, sweeping rule because there are no "case[s] to hold otherwise," and the "same result has been followed . . . throughout the country." ECF 295 at 8. But this is incorrect. In *South Fork Band v. U.S. Dep't of Interior*, the defendant made the very same argument, claiming that RFRA as a matter of law "does not apply to the federal government's management of its own land." 643 F. Supp. 2d 1192, 1198 (D. Nev. 2009), *aff'd in part, rev'd in part on other grounds*, 588 F.3d 718 (9th Cir. 2009). But the court

rejected this argument, holding that "neither [*Navajo Nation* nor *Lyng*] indicate that RFRA or the corresponding compelling interest test never apply to the government's management of its own land." *Id.*

Even more tellingly, in *Comanche Nation v. United States*, the Army attempted 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 Native Americans sued under RFRA, arguing that the warehouse would occupy "the central sight-line to the Bluffs"—the place where they stood to center themselves for meditation—making their "traditional religious practices" impossible. *Id.* The court held that this "amply demonstrate[d]" a "substantial burden on the traditional religious practices of Plaintiffs." *Id.* Thus, while courts *have* held that interfering with religious practices on federal land is a substantial burden, the Government cannot point to a single case where a court allowed destruction of a sacred site without consequence under RFRA.

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

Not surprisingly, the Government's substantial burden argument has already been rejected by this Court—and is therefore also foreclosed by law of the case. Specifically, the Court held that *Navajo Nation* and *Lyng* are "distinguish[able]" where, as here, the Government has "prevent[ed] Plaintiffs from having any access to their religious site, and, in addition, [destroyed] religious artifacts at the site." ECF 131 at 9-10. The Government offers three arguments in response, none of which have merit.

First, the Government claims that the substantial-burden question is "jurisdictional," and "law of the case does not apply to jurisdictional issues." ECF 295 at 11. But the Government cites no case that has ever treated the substantial-burden question as jurisdictional. Nor can it. The courts have uniformly treated the existence of a substantial burden as part of "the merits" of a RFRA claim. *S. Fork Band Council of W. Shoshone v. United States DOI*, 588 F.3d 718, 723 (9th Cir. 2009). And, in any event, the Ninth Circuit has repeatedly applied law of the case to jurisdictional issues. *Nordstrom*, 856 F.3d at 1270; *Barnes-Wallace*, 704 F.3d at 1076–78.

Second, the Government claims that Magistrate Judge Stewart and Judge Brown "committed a clear error of judgment" by failing to hold that "as a matter of law, no substantial burden can result from the government's construction on its own land." ECF 295 at 11, 13. But as explained above, no court has ever adopted such a sweeping rule, and the only court to consider it has rejected it. Thus, far from committing "a clear error of judgment," Magistrate Judge Stewart and Judge Brown were correct.

Third, the Government claims that Magistrate Judge Stewart and Judge Brown committed a "clear error[] of fact" by concluding that "Plaintiffs lack 'free access to the site.'" ECF 295 at 13. According to the Government, because Plaintiffs can stand on the earthen berm where their campsite, altar, and trees once stood, they can "freely access" the sacred site. ECF 295 at 9-10. But again, this is like claiming that because parishioners can stand in a parking lot where their bulldozed church once stood, they can "freely access" their church. Plaintiffs cannot "freely access" their sacred site, because the site has been destroyed. And even if they 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. Finally, the Government ignores the fact that the Court's prior ruling was premised not only on the lack of "access," but on the independent ground that "religious artifacts at the site were destroyed." ECF 131 at 9. The Government does not dispute that artifacts were destroyed, and this is an independent basis for applying law of the case.

D. The burden was imposed by the Government.

Lastly, the Government does not dispute that destruction of the sacred site could not have occurred but for the Government's actions on its *own land*. To the contrary, the Government repeatedly argues that it should escape liability precisely because the destruction resulted from "actions the government t[ook] on its own land." ECF 287 at 21; *id.* at 22 ("government activity on its own land"). The Government also concedes that it funded the project leading to destruction of the sacred site, granted the easement that made the destruction possible, and coordinated on the environmental review facilitating the destruction. ECF 295 at 21. The Supreme Court, Ninth Circuit, and other courts have all decided Free Exercise Clause and RFRA claims based on the Government's actions on its own land. ECF 292 at 42 (citing cases). Yet the Government does not respond to these cases.

Further, the Government does not dispute the many additional steps it took to encourage and coordinate with other actors to accomplish the destruction of Plaintiffs'

sacred site. The Government initially suggested the need for an environmental assessment (EA) to permit highway construction, helped draft the EA, indicated a preference for the widening alternative most destructive to Plaintiffs' sacred site, helped ODOT avoid a survey of trees that was "technically" required under BLM protocol, worked closely with BLM on tree removal so it could stretch the rules and use felled trees for other Government projects, referred to ODOT as its "agent," and sent its own archeologist to survey the site multiple times. ECF 292 at 44-45. This "willful participa[tion] in joint action" is more than enough to show a "sufficiently close nexus" between the challenged action and the federal government. *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012); *Bensenville*, 457 F.3d at 62, 64 (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)).

Nearly abandoning any joint action argument, the Government says that at the very least it is BLM, and not FHWA, that is "responsible" for any RFRA violation. ECF 295 at 21. But this ignores the fact that both agencies were coordinating via interagency agreement. ECF 292 at 18. And, in any event, a finding that *either* federal agency was responsible for the substantial burden is sufficient for a ruling in Plaintiffs' favor. *See* 42 U.S.C. §§ 2000bb-1(a); 2000bb-2(1) (the term "Government" under RFRA includes any "agency . . . of the United States").

CONCLUSION

Plaintiffs have demonstrated a substantial burden as a matter of law. Their motion for partial summary judgment should be granted, and the Government's motion for partial summary judgment should be denied.

Dated this 5th day of September, 2017.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 7,269 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.

September 5, 2017

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CERTIFICATE OF SERVICE

I certify that on September 5, 2017, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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