BILLY J. WILLIAMS, Oregon State Bar No. 901366
United States Attorney
TIM SIMMONS, Oregon State Bar No. 924615
Assistant U.S. Attorney
tim.simmons@usdoj.gov
United States Attorney's Office

District of Oregon
405 E. 8th Ave., Suite 2400
Eugene, OR 97401
Telephone: (541) 465 -6740
Facsimile: (541) 465 -6917

JEFFREY H. WOOD
Acting Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division
REUBEN SCHIFMAN
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044-7611
Telephone: (202) 305-4224
reuben.schifman@usdoj.gov
Attorneys for Federal Defendants

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 Confederated Tribes and Bands of the Yakama Nation,** **CAROL LOGAN, a resident of Oregon,**	**Case No. 3:08-cv-1169** **Motion for Partial Summary Judgment**

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

Cases

Statutes

Rules

Regulations

Other Authorities

LIST OF EXHIBITS

Exhibit Letter	Title	Administrative Record Citation
A	Revised Environmental Assessment	FHWA_004951-4993
B	Jackson deposition transcript	
C	Logan deposition transcript	
D	Slockish deposition transcript	
E	Map of the Wildwood Recreation Site and A.J. Dwyer Area	
F	Environmental Assessment	FHWA_004343-4504
G	Jones deposition transcript	

FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs sue the Federal Highway Administration ("FHWA"), Bureau of Land Management ("BLM"), and Advisory Council on Historic Preservation (collectively the "Federal Defendants") alleging that a highway turn lane the Oregon Department of Transportation ("ODOT") constructed in 2008 "substantially burdens" their religious exercise under the Religious Freedom Restoration Act ("RFRA").

ODOT's construction of the challenged turn lane project, even if attributable to the Federal Defendants, does not constitute a "substantial burden" of Plaintiffs' religion as understood in RFRA. "Substantial burden" is a term of art in the Act defined through case law to encompass two situations: (1) where the federal government forces individuals to choose between following the tenets of their religion and receiving a governmental benefit, or (2) where the federal government forces individuals to act contrary to their religious beliefs by the threat of civil or criminal sanctions. Plaintiffs do not even allege either situation applies here. But even if they had, as a matter of law, management of public lands (including construction on federal lands) is not within the class of actions that can "substantially burden" religious exercise. An uninterrupted string of case law from this circuit and the Supreme Court confirm this point, and Federal Defendants are aware of no binding case to the contrary. Plaintiffs cannot invoke RFRA's waiver of sovereign immunity, and the claim fails as a matter of law.

As Plaintiffs lack a "substantial burden" sufficient to invoke RFRA, they similarly lack standing because the action they challenge is not fairly traceable to the Federal Defendants, nor—crucially—could the Federal Defendants change the now nine-year-old highway turn lane to provide redress even if they wished to. Due to the way the Federal-aid Highway program operates, only the state department of transportation—here, ODOT—can select which projects will be constructed on its highways. So even if FHWA wished to realign or otherwise alter the challenged turn lane, they would be unable to do so without ODOT's direction. Thus this Court could not provide redress and Plaintiffs have not demonstrated standing.

But even if this Court finds Plaintiffs have standing and have shown a "substantial burden" to their religious exercise, their claims fail on the affirmative defense of laches. Plaintiff Cascade Geographic Society ("CGS") was aware of this project well before construction began, and indeed commented on the environmental assessment for the project. But this single comment did not raise any religious concerns, did not mention the presence of any religious sites, and certainly did not provide such specificity as would have allowed the project to address any such concerns. Plaintiffs did not provide any other comments to the agency during the years of public meetings, open houses, and public comment leading up to the project. Having failed to alert officials to their concerns during the administrative process, it is improper for them to then sue the Federal Defendants for not accounting for these concerns now, nearly a decade after the administrative process concluded.

Plaintiffs have not shown a "substantial burden" on their religious exercise, and are thus not within the specific waiver of sovereign immunity provided by RFRA. They lack standing, and their RFRA claim is barred by the doctrine of laches. The Federal Defendants are entitled to summary judgment on Plaintiffs' RFRA claim.

II. BACKGROUND

A. Factual background

In the State of Oregon, Highway U.S. 26 runs roughly from Seaside, through Portland, east to Sandy, and eventually through John Day and into Idaho. The portion of this highway at issue in this lawsuit is a 1.26 mile stretch from mile posts 38.75 to 40.01, between the communities of Wildwood at the west and Weeme at the east. *See* Exhibit A, Revised Environmental Assessment (hereinafter "REA") at 004957–58.

U.S. 26 traverses the very northern portion of the Willamette valley, the entirety of which is sacred to the Plaintiffs. Exhibit B, Jackson deposition transcript (hereinafter "Jackson Dep.") at 36:4-7; 37:17-20; Exhibit C, Logan deposition transcript (hereinafter "Logan Dep.") at 79:1-11. The valley's religious significance stems, in part, from Plaintiffs' belief that this entire valley contains the remains of their ancestors who traveled through the area to collect food, and

perished there. Exhibit D, Slockish deposition transcript (hereinafter "Slockish Dep.") at 64:14-25. Plaintiffs Complaint alleges they practice their religion throughout the Willamette Valley, on Mount Hood, in a large collection of sacred sites including but not limited to:

> Enola Hill, Owl Mountain, Zig Zag Mountain, Hunchback Mountain, Huckleberry Mountain, Salmon River Butte, North Mountain, Crutcher's Bench, Flag Mountain, Big Laurel Hill, Buzzard's Butte, Wolfe Butte, Devil's Peak, Devil's Backbone, Bear Creek, Indian Meadow, Cedar Ridge, Alderwood, the Meadows (Rhododendron Meadow and the Big Island), the Big Deadening, Devils Half Acre, Barlow Pass, Summit Prairie, Red Top Meadow, Salmon River Canyon, Alder Mountain, McIntire Mountain, Sandy River Canyon, Veda Butte, Plaza Butte, Bull Run, the Wind Mountains, and Tom, Dick, and Harry Mountain.

Compl. ¶ 13; Slockish Dep. 28:25, 29:1-9; Jackson Dep. 23:11-16; Logan Dep. 44:11-23, 45:14-25, 46:1-7. Plaintiffs also allege they practice their religion at the A.J. Dwyer Memorial Scenic Area, an approximately eight-acre area managed by BLM, located immediately adjacent to U.S. 26 at milepost 39.3. *See* Exhibit E, a map of the Wildwood Recreation Site and A.J. Dwyer Area. As with the entire Willamette valley, Plaintiffs believe this area is also sacred.

Before the construction of the turn lane at issue in this case, there was a long-standing concern on the part of local residents about highway safety between approximately the committees of Wildwood and Weeme, Oregon. In this area, unlike the portion of highway immediately before and after, there was no center-turn "refuge" lane in the middle of the roadway for motorists to use while waiting to execute left turns across the oncoming lanes of traffic to the businesses and homes along the opposite side of the highway. Thus, people turning along this stretch of highway were more susceptible to severe rear-end collisions with other vehicles in the travel lanes, some resulting in fatal accidents. *See* REA at 004973.

In 1998, ODOT received a thirty-page letter containing a petition signed by 674 Oregon residents raising these safety concerns. REA at 004440. These residents who lived on or near U.S. 26 were concerned for their safety, noting that the center-turn lane "abruptly ends" at Wildwood, making the stretch of road "extremely dangerous" to cars attempting to turn, and to those approaching a turning car. *Id.* In response to these concerns, ODOT added a highway

widening project to the "State Transportation Improvement Program," the State's list of highway projects to be constructed in the following three to four years.

ODOT then engaged in a robust public outreach and comment campaign, beginning with circulation of a newsletter describing the project to 3,750 citizens and interested parties in December 2005. This newsletter introduced the project, reviewed the project history, advertised upcoming meetings about the project, reviewed the alternatives, and solicited public input on the options. REA at 4874. ODOT also held numerous public meetings on the project, the first on March 31, 2005. This and future meetings were advertised in local newspapers and provided both mailing and email addresses so that people who could not attend the meetings in person could share their feedback or concerns. *Id.* ODOT also created a public website with information about the project and means for individuals to provide comment about it. *Id.*

The purpose of the first public meeting ODOT held on March 31, 2005 was to gather public issues and concerns to help ODOT project staff develop a range of alternatives for consideration and study. REA 004973. ODOT held a second public meeting on September 13, 2005. At this meeting, participants viewed potential design alternatives and shared feedback with ODOT. *Id.* at 004974. A third meeting about the project was held on February 23, 2006. Following this meeting, ODOT published and distributed a second newsletter in April 2006. This newsletter described the alternatives considered in constructing the turn lane, listed preliminary environmental findings and provided a project schedule, and advertised additional upcoming meetings.

In August 2006, a draft Environmental Assessment ("EA") regarding this project was released to the public. *See* Exhibit F, Environmental Assessment (hereinafter "EA"); Compl. ¶ 23; REA at 004974. FHWA and ODOT selected as the "preferred alternative" the "widen to the north" alternative. *Id*. Also in August 2006, ODOT published a third newsletter describing publication of the EA, and inviting the public to meetings and to make comments on the proposed project and draft EA. *Id.* In September, an open house and public hearing was held to solicit the public's feedback on the alternative that ODOT selected in the draft EA, the "widen to

the north" alternative. *Id.* Large maps of the design and visual simulations showing before and after views of the proposed project were displayed. Preliminary findings of the environmental studies were also displayed. At this meeting, fifteen people submitted comments raising concerns about noise, trails, tree falling, speed limits, drainage, and other issues. *Id.* The open house and public hearing on September 21, 2006 was publicized by distributing mailings to 736 nearby landowners, as well as by a U.S. Postal Service carrier route mailing and a media release. *Id.* at 4975. ODOT collected oral testimony at the hearing which was transcribed by a court reporter, and also collected written comments.

Plaintiff CGS was aware of these meetings, but their director boycotted them because he believed he did not receive sufficient advance notice. Exhibit G, Jones Deposition Transcript (hereinafter "Jones Dep.") at 82:5-18. At no point in this process did any plaintiff express concerns about the religious significance of the A.J. Dwyer Scenic area or the impact any of the various alternatives may have on their religious practice.

Throughout the process, ODOT also consulted with local organizations who expressed an interest in the project, including the Barlow Trail Association and the Mt. Hood Safety Corridor Citizens' Advisory Commission. ODOT also consulted with state and local governments, and with tribal governments including the Confederated Tribes and Bands of the Yakama Nation, Confederated Tribes of the Warm Springs, Confederated Tribes of the Siletz Indians of Oregon, and the Confederated Tribes of Grand Ronde. During the time that ODOT was undertaking consultation with the Confederated Tribes of Grand Ronde about this project, Plaintiff Carol Logan was a member of the tribal government, serving on the cultural committee, whose authority includes advising the Tribe on religious and cultural issues. Logan Dep. 35:4-17, 75:3-25, 76:1-25, 77:1-13. In her capacity as a member of the Tribe's cultural committee, Ms. Logan discussed the project with her tribal government. *Id.* All the tribal governments consulted expressed no concerns with the project. ODOT also consulted with the Oregon State of Historic Preservation Office, which concurred with the Section 106 finding that no historic properties would be affected by the project. EA at 004499-500.

To specifically address concerns and impacts to archaeological resources, ODOT employed archaeologists from the University of Oregon to examine the area in April 2005 and March 2006. These archaeologists found no prehistoric cultural materials. EA at 004389. To address concerns and impacts to historical and cultural resources, ODOT employed a historian to conduct field surveys on November 30, 2004, February 2, 2005, and March 23, 2005. This process resulted in the identification of historic resources such as a "barrel hoop, a house foundation, two trash scatters, and an Oregon Trail marker…[but n]o prehistoric cultural materials." *See* EA at 004389. The information from these surveys was shared with the Tribes for their review, comment and consideration.

ODOT published a final newsletter in January 2007. *Id.* This newsletter focused on the completion of the NEPA process and upcoming publication of the REA and Finding of No Significant Impact ("FONSI"). *Id.* After this extensive public hearing and public comment period, FHWA and ODOT circulated the REA that addressed the concerns raised in the years of public outreach and comment, and also issued a FONSI for the project on February 8, 2007. Compl. ¶ 28.

On February 15, 2008, Plaintiffs Carol Logan and CGS requested a new review of the Project under Section 106 of the National Historic Preservation Act ("NHPA"). Compl. ¶ 29. The FHWA responded on February 26, 2008 that the Section 106 review prepared with the EA was satisfactory. *Id*.

On February 28, 2008, BLM issued a permit for tree removal to ODOT. Compl. ¶ 32. In late March 2008, contractors began cutting trees within the Project area. *Id*. This operation was substantially complete by the end of March 2008. *Id*. On April 8, 2008, the FHWA published its Notice of Final Agency Actions regarding the Project. Compl. ¶ 34; Notice of Final Federal Agency Actions on U.S. 26, Wilwood to Wemme: Clackamas County, OR, 73 Fed. Reg. 19134-02 (April 8, 2008). Widening for the turn lane was completed by May 2009. Final paving and striping was completed by August 2009.

B. Procedural background

Plaintiffs were aware of the turn lane construction before it began and were present when construction began, in March 2008. Logan Dep. 22:8-20, 32:14-21. However, they did not bring the suit against the Federal Defendants until seven months later, in October 2008. The first legal action that Plaintiffs undertook was directed against ODOT and brought on June 20, 2008, when Plaintiff CGS filed two Notices of Intent to Appeal in the Oregon Land Use Board of Appeals ("LUBA"), case no. 2008-091 and case no. 2008-092. Regarding case no. 2008-091, Plaintiff CGS appealed based upon a claim that ODOT failed to seek review of the Project related to impacts on the Barlow Trail. Compl. ¶ 38. LUBA dismissed the appeal on August 20, 2008. *Id.* Regarding case no. 2008-092, Plaintiff CGS appealed based upon a claim that the Oregon Department of Environmental Quality failed to comply with Oregon's land use statute in permitting ODOT to undertake clearance, grading, and construction activities pursuant to an NPDES 1200-CA erosion and sediment control permit. Compl. ¶ 39. LUBA dismissed this appeal on August 20, 2008. *Id.* The Court of Appeals affirmed LUBA's final opinion and order on November 26, 2008. *Id.*

On July 7, 2008, Plaintiffs Slockish, Jackson and Logan filed a Notice of Intent to Appeal with LUBA, case no. 2008-101. Compl. ¶ 40. These plaintiffs appealed based upon a claim that ODOT failed to comply with Oregon's land use statutes. *Id.* LUBA dismissed this appeal on December 29, 2008. *Id.*

Plaintiffs filed their first complaint against the Federal Defendants and ODOT on October 6, 2008. ECF No. 19. Plaintiffs filed their first amended complaint on February 3, 2009. Federal Defendants moved to dismiss the first amended complaint on May 21, 2009. On October 13, 2009, this Court granted Federal Defendants' motion to dismiss in part. Plaintiffs filed a second amended complaint on June 16, 2010. ECF No. 64. Federal Defendants lodged an administrative record on October 28, 2010, ECF Nos. 82-86, and supplemental administrative record on March 7, 2011. ECF No. 90.

Federal Defendants and ODOT moved for judgment on the pleadings. ECF Nos. 105-106. ODOT's motion was granted and they were dismissed from the case; Federal Defendants' motion was granted in part. ECF Nos. 122, 131.

Plaintiffs moved to supplement the administrative record and for discovery. ECF No. 93. The Court granted this motion in part, finding discovery was not appropriate as to the APA claims. ECF No. 156.

Plaintiffs filed a third amended complaint on July 3, 2012. ECF No. 157. The parties then engaged in settlement discussions, which were ultimately unsuccessful. ECF No. 208.

Plaintiffs filed a fourth amended complaint, for the first time adding a RFRA claim, on January 7, 2016. ECF No. 223. The parties began limited discovery, related only to the RFRA claim and not to those brought under the APA, in March 2016. ECF No. 236.

Plaintiffs' thirteenth claim of their fourth amended complaint—the only claim at issue in the instant motion—alleges that by "damaging and destroying the historic campground and burial grounds through tree cutting and removal, grading, and ultimately burying the campground and burial grounds; and by blocking off access to these by installation of a new guard rail, the Federal Defendants have substantially burdened" Plaintiffs' religious exercise. Compl ¶ 95.

C. Statutory Background

1. Federal-Aid Highway Program

The Federal-Aid Highway Program ("Highway Program") is a federally-assisted state program that provides states with financial assistance for the construction, maintenance and operations of transportation projects including the nation's 3.9 million-mile highway network, the National Highway System.[1] 23 U.S.C. § 101, *et seq*. The FHWA administers the Highway Program and reimburses states for a portion of the costs they incur on such activities from the funds apportioned by Congress to each state. *See id*. § 104. Crucially, under the Highway

[1] *See generally* https://www.fhwa.dot.gov/federal-aidessentials/federalaid.cfm

Program, states retain their "sovereign rights . . . to determine which projects shall be federally financed" and the sole responsibility to construct and maintain them. *Id.* §§ 145(a) , 114(a), 116.

The primary purpose of the FHWA is to "monitor the effective and efficient use of funds" on these activities, *id.* § 106(g)(1)(A), 49 U.S.C. § 104(a), but the FHWA does not design, build, or maintain the roads comprising the National Highway System. With several exceptions not relevant here, the states are the owners and operators of all the National Highway System roadways within their borders. The FHWA can authorize funding only in response to a request from the state after certain legal requirements have been met, 23 C.F.R. §§ 635.114(b), 23 C.F.R. § 1.9(b), including compliance with the National Environmental Policy Act ("NEPA"), see 23 C.F.R. § 771.113, and actually has very limited discretion to withhold funds. *See* 23 C.F.R. § 1.9(a).

In passing the Highway Act that established the Highway Program, Congress sought to "accelerate the construction of Federal-aid highway systems . . . to meet the needs of local and interstate commerce for the national and civil defense." 23 U.S.C. § 101(b); *Citizens Organized to Defend the Env't v. Volpe*, 353 F. Supp. 520, 526, 530–31 (S.D. Ohio 1972). Additionally, Congress intended to promote highway safety, 23 U.S.C. §§ 101(a)(24), 105(f), 109(a), (d), (e), (f), 116, conformity to the particular needs of each locality, 23 U.S.C. § 109(a), the creation of an efficient transportation network, 23 U.S.C. §§ 101(b)(3), 103(b)(2)(D)-(E), 105(c), 109(b), the provision of direct and convenient access to public facilities, 23 U.S.C. § 103(b)(1)(A), and the economical use of federal funds, 23 U.S.C. §§ 101(e), 108(a), 109(a), 112; *Citizens*, 353 F. Supp. at 526 n. 9.

2. National Environmental Policy Act (NEPA)[2]

Congress enacted NEPA, 42 U.S.C. §§ 4321, et seq., "to reduce or eliminate environmental damage and to promote 'the understanding of the ecological systems and natural resources important to' the United States." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756 (2004) (quoting 42 U.S.C. § 4321). NEPA is an "essentially procedural" statute, meant to ensure that federal agencies reach "a fully informed and well-considered decision." *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978).

The "twin aims" of NEPA require an agency "to consider every significant aspect of the environmental impact of a proposed action" and then "inform the public that it has indeed considered environmental concerns in its decisionmaking process." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983) (internal quotation marks omitted). "NEPA's requirements are not absolute, [they] are to be implemented consistent with other programs and requirements." *San Luis Obispo Mothers for Peace v. Nuclear Regulatory Comm'n*, 449 F.3d 1016, 1034 (9th Cir. 2006).

If the federal action will not "significantly affect[ ] the quality of the human environment," 42 U.S.C. § 4332(C), an agency may prepare an EA, 40 C.F.R. §§ 1501.3(b), 1501.4, 1508.9; *see also Theodore Roosevelt Conservation P'ship v. Salazar*, 616 F.3d 497, 503–04 (D.C. Cir. 2010) (describing the difference between an environmental impact statement ("EIS") and an EA). An EA is a "concise public document … that serves to … [b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement [EIS] or a finding of no significant impact [(FONSI)]." *Id.*, quoting 40 C.F.R. § 1508.9(a)(1). The Federal Defendants here complied with NEPA through their issuance of an EA and FONSI. *See* AR 004954 (FONSI).

---

[2] Information regarding NEPA is provided for general background; the instant brief does not seek summary judgment on the merits of Plaintiffs' NEPA or NHPA claims, which are heard on the administrative record rather than based on discovery. If Federal Defendants prevail on the instant motion, they anticipate next agreeing to a schedule for briefing cross motions for summary judgment on any remaining claims.

3. National Historic Preservation Act (NHPA)[3]

Section 106 of the NHPA requires federal agencies to consider the potential effects of projects they carry out, financially assist, or permit ("undertakings"). 16 U.S.C. § 470f (2013).[4] Section 106 requires agencies to "take into account the effect of the undertaking on any historic property." 54 U.S.C. § 306108 (formerly 16 U.S.C. § 470f) ("Section 106"). This is "a 'stop, look, and listen' provision that requires each federal agency to consider the effects of its programs." *Muckelshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999). The Advisory Council on Historic Preservation ("ACHP") administers Section 106 of the NHPA. *See* 16 U.S.C. §§ 470i, 470s. The regulations implementing Section 106 require the agency to "make a reasonable and good faith effort" to identify historic properties within the undertaking's area of potential effects. 36 C.F.R. § 800.4(b)(1).

The Section 106 regulations permit an agency to "use a phased process to conduct identification and evaluation efforts" or to "defer final identification and evaluation of historic properties." 36 C.F.R. § 800.4(b)(2). The regulations also allow an agency to use what is known as a "programmatic agreement" when addressing effects from multiple or complex undertakings. 36 C.F.R. § 800.14(b). Programmatic agreements are particularly useful "[w]hen effects on historic properties cannot be fully determined prior to approval of an undertaking." 36 C.F.R. § 800.14(b)(1)(ii). "Compliance with the procedures established by an approved programmatic

---

[3] Information regarding the NHPA is provided for general background; the instant brief does not seek summary judgment on the merits of Plaintiffs' NEPA or NHPA claims, which are heard on the administrative record rather than based on discovery. If Federal Defendants prevail on the instant motion, they anticipate next agreeing to a schedule for briefing cross motions for summary judgment on any remaining claims.

[4] The NHPA has recently been repealed and recodified. Pub. L. No. 113-287, § 7, 128 Stat. 3094, 3272-73 (2014). This brief and the administrative record refer to the earlier codification because this project began and ended before December 19, 2014.

agreement satisfies the agency's section 106 responsibilities." 36 C.F.R. § 800.14(b)(2)(iii); *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1216 (9th Cir. 2008).

In this case, ODOT consulted, on Federal Defendants' behalf, with the Oregon State Office of Historic Preservation who concurred with ODOT's conclusion that no historic properties would be affected. EA at 004499-500.

4. Religious Freedom Restoration Act (RFRA)

In 1993, Congress enacted RFRA in response to the Supreme Court's decision in *Employment Division v. Smith.* 494 U.S. 872 (1990). In *Smith*, the Supreme Court addressed whether the Free Exercise Clause of the First Amendment allowed the state of Oregon to deny unemployment benefits to two members of the Native American Church who were fired from their jobs because of their sacramental, yet state-law prohibited use of peyote. *Id.* There, the Court "held that, under the First Amendment, 'neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest.'" *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2761 (2014) (citing *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997)). In so holding, *Smith* departed from the Court's previously employed compelling interest test articulated in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), which, if not departed from, "would have asked whether Oregon's prohibition substantially burdened a religious practice, and, if it did, whether the burden was justified by a compelling government interest." *Boerne*, 521 U.S. at 513 (specifically referencing *Sherbert).* This reduction of scrutiny by the Court prompted Congress to pass RFRA.

Under RFRA, the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," 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).[5]

Therefore, to establish a prima facie case under RFRA, a plaintiff must show that the law substantially burdens his ability to freely exercise his religion. *Guam v. Guerrero*, 290 F.3d 1210, 1222 (9th Cir. 2002). If a plaintiff can establish a prima facie case, the burden shifts to the government to demonstrate that the law furthers a "compelling interest" using the least restrictive means. *Id.*

RFRA does not define "substantial burden," but consistent with Congress's purpose of "restor[ing] the compelling interest test" of *Sherbert* and *Yoder*, courts look to pre-*Smith* cases in construing the term. 42 U.S.C. § 2000bb(b)(1). Under those cases, "a 'substantial burden' is imposed only when individuals are [either 1] forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or [2] coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069-70 (9th Cir. 2008) (en banc). "[P]re-*Smith* case law makes it clear that strict scrutiny does not apply to government actions involving . . . the use of the Government's own property or resources," including management of public lands. *See* S. Rep. No. 111, 103d Cong., 1st Sess. 9 (1993); *Navajo Nation*, 535 F.3d at 1069-79.

RFRA contains a limited waiver of the United States' sovereign immunity. *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 840 (9th Cir. 2012). But if a plaintiff has not met their burden of demonstrating their religious exercise has been "substantially burdened" under RFRA, they are not within its waiver, and therefore have no subject matter

---

[5]42 U.S.C. § 2000bb(b) states: "The purposes of this chapter are (1) to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government." *See also* S. REP. No. 103–111, at 2, 8–9 (1993), *reprinted in* 1993 U.S.C.C.A.N. 1892, 1893, 1897–98 (explaining the purpose of RFRA); H.R. Rep. No. 103–88, at 1–5 (1993) (same).

jurisdiction, and the RFRA claim must be dismissed. *See United States v. Mitchell*, 463 U.S. 206, 212 (1983); *see also United States v. Sherwood*, 312 U.S. 584, 586 (1941) ("The United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit.") (citations omitted); *Lane v. Peña*, 518 U.S. 187, 192 (1996) (citing *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33–34, 37 (1992)).

III. LEGAL STANDARD

Summary judgment is appropriate if "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). "[S]ummary judgment for a defendant is appropriate when the plaintiff fails to make a showing sufficient to establish the existence of an element essential to [his] case, and on which [he] will bear the burden of proof at trial." *Miller v. Glenn Miller Prods.*, 454 F.3d 975, 987 (9th Cir. 2006) (quotations omitted). Here, Plaintiffs bears the burden of proof to show they have invoked a valid waiver of the United States' sovereign immunity, that they have standing, and that their religious exercise has been "substantially burdened" as defined by RFRA and the case law interpreting it. They have not met this burden.

IV. ARGUMENT

Plaintiffs' thirteenth claim in their Fourth Amended Complaint alleges that the Federal Defendants have substantially burdened their religious exercise in violation of RFRA. Plaintiffs bear the burden of showing their religious exercise has been substantially burdened (as that term of art is used in RFRA) and have failed to make a showing sufficient to establish this element. As a result, Federal Defendants are entitled to summary judgment on this claim.

A. Plaintiffs have not met their burden to show a "substantial burden" on their religious exercise.

To establish a prima facie RFRA claim, a plaintiff must allege that a government action "substantially burden[s]" the plaintiff's exercise of religion. *Navajo Nation*, 535 F.3d at 1068 (citation omitted). Under governing Ninth Circuit precedent, a "substantial burden" is imposed,

just as under the Free Exercise Clause of the U.S. Constitution in two limited circumstances, namely:

> only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*) . Any 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, and does not require the application of the compelling interest test set forth in those two cases.

Navajo Nation, 535 F.3d at 1070 (citing *Sherbert* and *Yoder*). An alleged effect on an individual's subjective, emotional experience, or claimed diminishment of spiritual fulfillment—"serious though it may be"—falls short of a "substantial burden" cognizable under RFRA. *Id.*; *see also Guerrero*, 290 F.3d at 1222 (a "substantial burden" requires "'substantial pressure on an adherent to modify his behavior and to violate his beliefs,'" including potential sanctions) (citations omitted). Because Plaintiffs have not been denied a government benefit nor coerced to change their religious beliefs, they have not demonstrated a "substantial burden" under RFRA.

1. Plaintiffs Have Not Been Denied a Government Benefit Based on their Religious Beliefs.

Plaintiffs do not allege—nor can they demonstrate—that they were forced to choose between following the tenets of their religion and receiving a government benefit. As the Ninth Circuit explained in *Navajo Nation*, the Supreme Court's decision in *Sherbert* is the prototypical example of this type of claim. 535 F.3d at 1070. *Sherbert* involved the denial of unemployment compensation solely based on the applicant's inability to work on a Saturday because she was a Seventh Day Adventist. 374 U.S. at 399-401. Thus, under the "governmental benefit" theory, a RFRA claim exists only where a plaintiff must make a choice antithetical to the principles of his or her religion in order to receive some sort of government benefit, typically a benefit derived under public welfare legislation. *See Sherbert*, 374 U.S. at 410 (holding that "no State may exclude … the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation") (internal quotation omitted) (citing *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947)); *see also Emp't Div., Dep't of Human Res. of Or. v. Smith*, 485

U.S. 660, 663 (1988) (unemployment compensation); *Callahan v. Woods*, 736 F.2d 1269, 1271 (9th Cir. 1984) (social security benefits).

Here, neither Plaintiffs' complaint, their standing declarations, nor their deposition testimony identifies any government benefit that Plaintiffs would receive if they changed or disavowed their religious beliefs or practices. Plaintiffs may attempt to argue that they are denied the "benefit" of access to the A.J. Dwyer area, generally, or access to the A.J. Dwyer area that is managed as they would prefer (i.e., without the turn lane construction impacting it). In addressing a similar claim regarding access to land, a court in this Circuit reasoned:

> Plaintiffs additionally allege that they are being denied a government benefit…namely, access to the land. Denial of a government benefit, however, only implicates RFRA if the denial is a response to Plaintiffs' religious practices or, in other words, if a governmental benefit were "conditioned . . . upon conduct that would violate the Plaintiffs' religious beliefs." *Navajo Nation*, 535 F.3d at 1063. Yet, Plaintiffs have not provided any evidence that the [Project] is being built *in response* to Plaintiffs' religious practices. Thus, Defendants are entitled to summary judgment on Plaintiffs' RFRA claim.

La Cuna de Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of the Interior ("*La Cuna II*"), No. CV 11-00400 DMG, 2013 WL 4500572 at *10 (C.D. Cal. Aug. 16, 2013). Similarly, a court in this Circuit dismissed a RFRA claim where Plaintiffs alleged denying them access to land burdened their religion, holding that "[a]lleging that the Project impedes Plaintiff's access to a religious site is simply not enough to suggest that the Plaintiffs are deprived of the kind of benefit protected by RFRA." *La Cuna de Aztlan Sacred Sites Prot. Circle Advisory Comm. v. U.S. Dep't of the Interior* ("*La Cuna III*"), No. 2:11-cv-00395-ODW, 2012 WL 2884992, *7 (C.D. Cal. July 13, 2012). Even assuming Plaintiffs have been denied access to land—as discussed in section IV(A)(2), below, they have not—the Court should reach the same result here. There is no evidence that any official has denied Plaintiffs a public benefit based on their religious beliefs.

2. Plaintiffs Have Not Been Coerced to Change Their Religious Beliefs.

Plaintiffs also cannot demonstrate that they are being "forced . . . or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions . . ." *Navajo Nation*, 535 F.3d at 1070. *Yoder* provides the prototypical example of situation where individuals were forced to violate their religious beliefs under threat of sanction, and there is no conduct even closely analogous to that case here.

In *Yoder*, defendants, who were members of the Amish religion, were prosecuted for violating a law that required their children to attend school, under the threat of criminal sanctions for the parents. *Yoder*, 406 U.S. at 207–08. The defendants sincerely believed their children's attendance in high school was "contrary to the Amish religion and way of life." *Id.* at 209. The Supreme Court reversed the defendants' convictions, holding the application of the compulsory school-attendance law to the defendants "unduly burden[ed]" the exercise of their religion, in violation of the Free Exercise Clause. *Id.* at 207, 220. The Court held that the Wisconsin law "affirmatively compel[led the defendants], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Id.* at 218.

There is simply no analogue to *Yoder* in this case. There is no allegation that Federal Defendants have threated Plaintiffs with any criminal sanction whatsoever. Nor can Plaintiffs demonstrate that Federal Defendants have somehow coerced Plaintiffs into taking an action that violates their beliefs. *Cf. Ruiz–Diaz v. United States*, 703 F.3d 483, 486 (9th Cir. 2012) (explaining the nature of the "forced choice" captured in RFRA's substantial burden component and finding plaintiffs' RFRA claim non-meritorious because "the challenged regulation does not affect their ability to practice their religion"); *Snoqualmie*, 545 F.3d at 1213–15 (finding no substantial burden where plaintiffs failed to allege government action "coerce[d] them into a Catch–22 situation").

Plaintiffs may argue that they have felt threatened by local law enforcement when they stopped on the highway median, adjacent to the A.J. Dwyer area. *See* Slockish Dep. 87:24-25,

88:1-25, 89:1-10. First, this is in no way an action by the government that "affirmatively compel[led the defendants], under threat of criminal sanction, to perform acts undeniably at odds with fundamental tenets of their religious beliefs." *Yoder* at 218. However, even if Plaintiffs' belief that they may be denied access to the site constituted threat of criminal sanction, which it does not, any such "threat" is not attributable to the Federal Defendants. Even if Plaintiffs are correct that ODOT was somehow acting as an agent of Federal Defendants, there is no evidence whatsoever that the entire Oregon police department was doing so. *See Vill. of Bensenville v. FAA*, 457 F.3d 52, 68 (D.C. Cir. 2006). Indeed, the evidence cannot ultimately support any assertion that Plaintiffs have ever actually been affirmatively denied access to the site.

Further, any alleged threat of criminal sanction for accessing the site is belied by the fact that Plaintiffs are in fact able to access the site as evidenced by their own testimony, as well as a video that appears at their lawyers' website that shows them freely assembling there. Slockish Dep. 54:21-25, 55:1-12.[6] Not only have Plaintiffs failed to identify any instance on which any federal official denied them access, none of them ever contacted BLM to seek access the site. Such a failure cannot be excused—after all, BLM has repeatedly expressed to Plaintiffs that it is willing to reasonably accommodate religious ceremonies at the A.J. Dwyer Scenic Area. Indeed, it is the official policy of BLM to "accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners" on public lands. *See* 61 Fed. Reg. 26771 (May 24, 1996). BLM has never prohibited Plaintiffs nor any other individuals from accessing the A.J. Dwyer

---

[6] *See* http://www.becketlaw.org/case/slockish-v-u-s-federal-highway-administration/#caseMedia (last accessed May 16, 2017); https://youtu.be/y2XUZBd3CV0?t=1m19s. Plaintiffs' Complaint, as amended, however, now acknowledges that the A.J. Dwyer Area was accessed by Plaintiffs by "*either* an opening in the continuous guardrail…*or the East Wemme Trail Road*." ECF No. 223 at ¶ 25 (the italicized portion was added to most recent Complaint). Therefore even assuming the Federal Defendants had acted to exclude Plaintiffs from the Dwyer Area by repairing a guardrail, Plaintiffs have not alleged that the Federal Defendants have in any way prohibited Plaintiffs from using East Wemme Trail to access the site.

Area, either before or after the turn-lane project. And Federal Defendants have certainly not threatened Plaintiffs with criminal sanction for entering the A.J. Dwyer Scenic Area.[7]

Under these circumstances, the uncontroverted facts conclusively demonstrate that Plaintiffs have not been forced to violate or change their religion, and thus have failed to establish a prima facie RFRA case.

3. Construction on public lands—even if attributable to Federal Defendants—is as a matter of law, not a "substantial burden" on religion.

Plaintiffs have not demonstrated that they had either been denied a public benefit or been forced to violate their religion under threat of criminal sanction. But even if they had, the Supreme Court's decision in *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), is fatal to Plaintiffs' claim that construction of the turn lane "substantially burdened" their religion by reducing the sacredness of the A.J. Dwyer Scenic Area, which is federal property.

In *Lyng*, Indian tribes challenged the Forest Service's approval of plans to construct a logging road in the Chimney Rock area of the Six Rivers National Forest in California. *Id.* at 442–43. The tribes contended the construction would interfere with their free exercise of

---

[7] Even assuming *arguendo* that Plaintiffs had been entirely excluded from the A.J. Dwyer area, case law from this circuit also holds that where a group has alternate means to practice their religion, that one means has been restricted does not constitute a "substantial burden" under RFRA. In *Oklevueha Native American Church Of Hawaii, Inc. v. Lynch*, Plaintiffs' religion practice involved use of "all entheogenic naturally occurring substances, including Ayahuasca, Cannabis (aka Rosa Maria and Santa Rosa), Iboga, Kava, Psilocybin, San Pedro, Soma, Teonanacatyl, Tsi–Ahga, and many others." 828 F.3d 1012, 1016 (9th Cir. 2016). Plaintiffs objected to the United States' prohibition of cannabis. *Id.* at 1014. However the Circuit held that Plaintiffs "have produced no evidence that denying them cannabis forces them to choose between religious obedience and government sanction, since they have stated in no uncertain terms that many other substances including peyote are capable of serving the exact same religious function as cannabis." *Id.* at 1017. Here, the A.J. Dwyer Scenic Area is not the only area in which they can practice their religion. Indeed, the entire Willamette Valley, as well as all of Mount Hood, is sacred to Plaintiffs, and they practice their religion at dozens of other sites. Compl. ¶ 13; Slockish dep. 28:25, 29:1-9; Jackson dep. 23:11-16; Logan dep. 44:11-23, 45:14-25, 46:1-7. That a single site has allegedly been made less sacred or less accessible does not constitute a violation of RFRA.

religion by disturbing a sacred area. *Id.* at 442–43.[8] The area was an "integral and indispensable part" of the tribes' religious practices, and a Forest Service study concluded the construction "would cause serious and irreparable damage to the sacred areas." *Id.* at 442 (citations and internal quotation marks omitted).

The Supreme Court rejected the Indian tribes' Free Exercise Clause challenge. The Court held the government plan, which would "diminish the sacredness" of the land to Indians and "interfere significantly" with their ability to practice their religion, did not impose a burden "heavy enough" to violate the Free Exercise Clause. *Id.* at 447–49. The plaintiffs were not "coerced by the Government's action into violating their religious beliefs" (as in *Yoder*), nor did the "governmental action penalize religious activity by denying [the plaintiffs] an equal share of the rights, benefits, and privileges enjoyed by other citizens" (as in *Sherbert*). *See id.* at 449.

The *Lyng* Court, with language equally applicable to this case, further stated:

> The Government does not dispute, and we have no reason to doubt, that the logging and road-building projects at issue in this case could have devastating effects on traditional Indian religious practices.
> …
> Even if we assume that ... the [logging] road will "virtually destroy the ... Indians' ability to practice their religion," the Constitution simply does not provide a principle that could justify upholding [the plaintiffs'] legal claims. However much we might wish that it were otherwise, government simply could not operate if it were required to satisfy every citizen's religious needs and desires.
> …
> No disrespect for these practices is implied when one notes that such beliefs could easily require *de facto* beneficial ownership of some rather spacious tracts of public property.
> …
> The Constitution does not permit government to discriminate against religions that treat particular physical sites as sacred, and a law prohibiting the Indian respondents from visiting the Chimney Rock area would raise a different set of constitutional questions. *Whatever rights the Indians may have to the use of the*

---

[8] As the Ninth Circuit observed in *Navajo Nation*, "[t]hat *Lyng* was a Free Exercise Clause, not RFRA, challenge is of no material consequence. Congress expressly instructed the courts to look to pre-*Smith* Free Exercise Clause cases, which include *Lyng*, to interpret RFRA." 535 F.3d at 1071 n.13 (citing 42 U.S.C. § 2000bb(a)(5) (parenthetical sentence omitted)).

> *area, however, those rights do not divest the Government of its right to use what is, after all, its land.*

Id. at 451–53 (citation omitted) (last emphasis added). Thus, binding Supreme Court precedent provides that actions the government takes on its own land do not constitute a "substantial burden" on religious exercise.

Like the plaintiffs in *Lyng*, the Plaintiffs here challenge a project, conducted on the government's own land, on the basis that the project will diminish their spiritual fulfillment. Even were we to assume, as did the Supreme Court in *Lyng*, that the government action in this case will "virtually destroy the ... Indians' ability to practice their religion," there is nothing to distinguish the road-building project in *Lyng* from the road project here.

Lyng was not overturned by RFRA, and indeed legislative history confirms that its holding was meant to be incorporated into the Act's understanding of "substantial burden." As Senator Hatch explained, RFRA

> does not effect [sic] *Lyng*.., a case concerning the use and management of government resources, because, like *Bowen v. Roy*, the incidental impact on a religious practice does not "burden" anyone's free exercise of religion. In *Lyng*, the court ruled that the way in which government manages its affairs and uses its own property does not impose a burden on religious exercise. Unless a burden is demonstrated, there can be no free exercise violation.

139 Cong. Rec. S14461, at S14470 (daily ed. Oct. 27, 1993) (statement of Sen. Hatch); *see id.* (statement of Sen. Inouye) (RFRA will not address "the circumstance in which Government action on public and Indian lands directly infringes upon the free exercise of a native American religion."). Immediately following these remarks, the Senate passed RFRA, *id.* at S14471; the identical legislation was enacted as Public Law 103-141.

Construing RFRA in light of pre-*Smith* case law, this Court has consistently and correctly held that "a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*)." *Navajo Nation*, 535 F.3d at 1069-70.

Many other cases in this Circuit have affirmed *Lyng's* holding. For instance, in *Snoqualmie Indian Tribe v. F.E.R.C.*, the plaintiffs alleged that a proposed hydroelectric dam would, among other things, deny them access to waterfalls necessary for their religious experiences. 545 F.3d at 1213. The Ninth Circuit found that:

> [t]he Tribe's arguments that the dam interferes with the ability of tribal members to practice religion are irrelevant to whether the hydroelectric project either forces them to choose between practicing their religion and receiving a government benefit or coerces them into a Catch-22 situation: exercise of their religion under fear of civil or criminal sanction.

Id. at 1214. *See also Holly v. Jewell*, 196 F. Supp. 3d 1079 (N.D. Cal. 2016); *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, No. CV 16-1534 (JEB), 2017 WL 908538, at *11 (D.D.C. Mar. 7, 2017).

However, in a February 27, 2012 Order, this Court denied Defendants' Motion for Judgment on the Pleadings, and sought to "distinguish[] *Lyng* by pointing out that construction of the guardrail on Highway 26 prevents Plaintiffs from having any access to their religious site, and, in addition, religious artifacts at the site were destroyed." ECF No. 131 at 9-10. As this case has been further developed since the Court's February 2012 Order, the points previously relied on by the Court to distinguish *Lyng* no longer apply. As indicated above, the Plaintiffs amended their complaint to acknowledge that the guardrail on Highway 26 did not bar access to the site resulting in Plaintiffs' continuous access through East Wemme Trail Road. Thus, Plaintiffs have always had access to the Dwyer site and the Federal Defendants have taken no steps to exclude them from this area. In addition, the Plaintiffs have failed to establish a record to support their claims that the Federal Defendants were responsible for destroying any artifacts at the site. As discussed above, Supreme Court and Ninth Circuit precedent regarding *Lyng* have made no exceptions to the rule that government's action on its own property does not constitute a "substantial burden" under RFRA. Therefore even if taking such action could constitute an exception to *Lyng*, it would not apply here.

Lyng and the Ninth Circuit precedent following it make clear that government activity on its own land does not constitute a "substantial burden" under RFRA. Such a burden is imposed

only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*). As neither circumstance is present here, Plaintiffs' RFRA claim cannot succeed.

4. The Federal Defendants have not violated RFRA because a third party—ODOT—has taken the allegedly religion-burdening action.

A further overarching problem with Plaintiffs' legal theory is that the actual conduct Plaintiffs object to—the construction of the turn lane—was not done by Federal Defendants, but rather by ODOT. There are some situations where the actions of third parties that infringe on rights can be attributed to the United States. However these situations are few and far between, and the circumstances of this case are not such that ODOT's action can properly be attributed to Federal Defendants.

RFRA provides that the "*[g]overnment* shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section." 42 U.S.C. § 2000bb–1 (emphasis added). RFRA defines "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." 42 U.S.C. § 2000bb–2(1). RFRA does not apply to the States. *See Boerne*, 521 U.S. 507.

Thus, unless "the government" (in this case, Federal Defendants) has taken an action to substantially burden Plaintiffs' exercise of religion, there is no valid RFRA claim. But the actions Federal Defendants took—providing funds and an easement—did not directly burden Plaintiffs' religious exercise (i.e., federal officials did not cut down trees and clear ground to construct the turn lane). Thus, the question is whether the government is nonetheless legally responsible for ODOT's actions.

The D.C. Circuit directly faced this question in *Village of Bensenville v. Federal Aviation Administration*. In that case, plaintiffs brought a RFRA challenge to the FAA's approval of a City of Chicago plan to expand O'Hare airport; the plan included the relocation of a church

cemetery. To determine whether the federal defendant (FAA) could be responsible under RFRA for actions taken by Chicago, the *Bensenville* court looked to the case law concerning whether actions of a third party are attributable to the government such that they are a violation of constitutional rights. *Cf. Rendell-Baker v. Kohn*, 457 U.S. 830, 838 (1982); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999).

The question asked in this case is whether "there is a sufficiently close nexus between the [federal defendant] and the challenged action of [third party] so that the action of the latter may be fairly treated as that of the [federal defendant] itself." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). "The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the [Federal Defendants are] *responsible* for the specific conduct of which the plaintiff complains." *Id.* *Bensenville* and the case law it relies upon is clear that the actions taken by Federal Defendants here are not sufficient to find them responsible for ODOT's actions under RFRA—neither funding nor permitting is sufficient.

Bensenville and the cases it relies upon uniformly find that the receipt of public funds, even of "virtually all" of an entity's funding, is not sufficient to fairly attribute the entity's actions to the government. *See Rendell–Baker,* 457 U.S. at 840–41 (citing *Blum,* 457 U.S. at 1011); *Bensenville*, 457 F.3d at 64. Consequently, the fact that funding was provided through the Federal-Aid Highway Program does not make the turn lane project attributable to the Federal Defendants for RFRA purposes. Federal funding of state programs occurs regularly through many programs. Therefore, a finding that receiving federal funding is sufficient to make actions done by states attributable to the Federal Government under RFRA would have the effect of reversing the Supreme Court's *City of Boerne* decision, which declined to extend RFRA to the states.

Second, involvement by federal officials in environmental review under the NEPA process is not sufficient. As the *Bensenville* court observed, NEPA applies extremely widely throughout federal action and "importing NEPA's applicability into RFRA would give the statute

far greater breadth than Congress ever intended." 457 F.3d at 62; *see also Howe v. Burwell*, No. 2:15-CV-6, 2015 WL 4479757, at *11 (D. Vt. July 21, 2015).

Third, Federal Defendants' overall involvement in regulation of ODOT is not sufficient. The Supreme Court has held that "[t]he mere fact that a business is subject to [government] regulation does not by itself convert its action into that of the State." *Jackson*, 419 U.S. at 350; see also *Howe* at *11.

Finally, that the third party at issue here is a sovereign state government provides further reason to grant summary judgement in favor of Federal Defendants because the Supreme Court expressly overturned RFRA's original applicability to States. *Boerne*, 521 U.S. at 536. Attributing an alleged RFRA violation here to Federal Defendants would run contrary to this holding as it would effectively require the State of Oregon to comply with the statute in contravention of the Supreme Court's holding.

In sum, the involvement of Federal Defendants in the conduct that Plaintiffs ultimately object to—the construction of the turn lane itself—is not sufficient for Federal Defendants to be responsible for the alleged violation under RFRA.

B. Plaintiffs have not have not met their burden to show standing

As Plaintiffs have not borne their burden to show their religious exercise has been "substantially burdened" under RFRA, they have not demonstrated standing sufficient to sue. The "'irreducible constitutional minimum' of standing consists of three elements." *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). "The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* A plaintiff is required to "demonstrate standing for each claim he seeks to press," and "for each form of relief sought." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) (quotations omitted).

Here, Plaintiffs have not demonstrated that they have an injury to their legally protected interests under RFRA. But even assuming an injury, they have not demonstrated this injury is

sufficiently traceable to Federal Defendants. Finally, and most seriously, there is simply nothing an order of this Court could do to restore Plaintiffs' religious site absent non-party Oregon.

1. Plaintiffs lack an invasion of their legally protected interests

Standing requires a plaintiff to show that it suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not 'conjectural' or 'hypothetical.'" *Lujan*, 504 U.S. at 560 (internal citations omitted). As demonstrated above, Plaintiffs' religious exercise under RFRA has not been "substantially burdened." As such, Plaintiffs do not have an injury sufficient to show standing for their RFRA claim. However, even assuming Plaintiffs did have an injury to their interests under RFRA, they still fail to show that such injury is "actual or imminent" as a matter of law.

Under *Summers v. Earth Island* and subsequent cases, to establish an "actual or imminent" injury, a plaintiff's alleged injury must identify a particular site that is at issue in the action, and relate their use of that site to an imminent future injury—as opposed to a past injury. In addition, the plaintiff must have a "firm intention to visit" the location at issue in the future. *Summers*, 555 U.S. 488, 496 (2009). "'[S]ome day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." *Id.* at 496 (quoting *Lujan*, 504 U.S. at 564). *See Lujan*, 504 U.S. at 564 ("That [affiants] 'had visited' the areas of the projects before the projects commenced proves nothing. . . . [Even] affiants' profession of an 'inten[t]' to return to the places they had visited before . . . is simply not enough."). Here, none of the named Plaintiffs have identified concrete plans to visit the A. J. Dwyer area. Logan Dep. 57:6-14; Slockish Dep. 49:7-10, 51:10-19; Jackson Dep. 57:10-14. Thus, they have not demonstrated an "actual or imminent" injury.

Further, even if Plaintiffs had a concrete plan to visit the site—which they do not—they have not demonstrated that they would be barred by Federal Defendants from practicing their religion there. Logan Dep. 89:15-22, 91:23-25. To the extent Plaintiffs fear prosecution for practicing their religion at the site, they have at best a speculative injury, as opposed to a

concrete one. "[N]either the mere existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 1999) (citation omitted). "Rather, there must be a 'genuine threat of imminent prosecution.'" *Id.* (citation omitted); *see also San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1127 (9th Cir. 1996). There is no threat here, and thus Plaintiffs have not demonstrated that their injury—to the extent there is one—is "actual or imminent."

2. Federal Defendants are not the cause of any alleged injury to Plaintiffs' religious exercise.

Plaintiffs also lack standing because any injury to Plaintiffs' religious exercise is not attributable to Federal Defendants. For purposes of standing it is insufficient "if the injury complained of is the result of the *independent* action of some third party not before the court." *Bennett v. Spear*, 520 U.S. 154, 169 (1997) (citation and punctuation omitted); *see Howe* at *12 ("To the extent Plaintiff asserts a RFRA claim based upon third party health insurers' decision to offer coverage for NFF abortion services . . . Plaintiff's RFRA claims are hereby DISMISSED for lack of standing."); *see also San Diego Cty.*, 98 F.3d at 1130. As demonstrated above, ODOT, rather than the Federal Defendants, took the actions that Plaintiffs allege caused their injuries. Therefore Plaintiffs have not demonstrated standing, namely, that their injury is attributable to Federal Defendants.

3. To the extent Plaintiffs seek return of a rock cairn, trees, and campground that has been destroyed, no relief is possible; and only ODOT can re-route the highway.

To demonstrate redressability, a plaintiff must show that the injury "is likely to be redressed by a favorable decision." *Id.* at 38, 41. Plaintiffs' alleged injury to their religious beliefs and practices is that a highway turn lane has been constructed thereby "damaging and destroying the historic campground and burial grounds through tree cutting and removal, grading, and ultimately burying the campground and burial grounds; and by blocking off access to these by installation of a new guardrail." Compl. ¶95. To the extent the injury here is damage

or destruction of a religious site, according to Plaintiffs' own testimony it cannot be undisturbed. *See, e.g.*, Slockish Dep. 18:13-18, 19:5-20. Thus no redress is possible.

But even if it were possible to remediate the site, to the extent Plaintiffs seek return of a rock cairn, trees, and a campground that has now been buried, there is simply no way for this court to return these objects by ruling against the Federal Defendants, as these items were disposed of by ODOT's contractors many years ago. *See Armendariz-Mata v. DEA*, 82 F.3d 679, 682 (5th Cir. 1996) (rejecting plaintiff's prayer for return of certain property because "[a]ll the property has . . . been destroyed . . . and cannot be returned"); *United States v. Redd*, No. 1:97cr006 (JCC), 2007 WL 4276408, at *2 (E.D. Va. Dec. 3, 2007) ("Given that the Government destroyed Defendant's property, the [item] is obviously no longer in the Government's possession, and the Court cannot order the Government to return it."); *cf. G.M. Leasing Corp. v. United States*, 429 U.S. 338, 359 (1977) (acknowledging that because the photocopies in question had been destroyed by the government, they could not be returned).

Nor can the Federal Defendants restore the portions of the site that are now buried by the new turn lane, or remove a guard rail or other portion of the highway. To the extent that the ultimate relief Plaintiffs seek is restoration of the campground and realignment or other modification of the highway, only ODOT can do that. ODOT is the owner-operator of the highway. It retains the "sovereign right[]" to determine which projects to undertake using federal assistance and the sole responsibility to construct and maintain them. 23 U.S.C. §§ 145(a), 114(a), 116. Only ODOT can decide to make modifications to its property or undertake any particular highway project on the federal aid-eligible roads within its jurisdiction.[9] FHWA's role is limited to providing oversight and "monitor[ing] the effective and efficient use of funds"

[9] If Plaintiffs do seek modification of the highway in this way, ODOT is a necessary party under Rule 19, and it cannot be joined due to sovereign immunity; therefore, in that case this suit should be dismissed. *See Alto v. Black*, 738 F.3d 1111, 1126 (9th Cir. 2013); *see also Dawavendewa v. Salt River Project Agric. Improvement & Power Dist.*, 276 F.3d 1150, 1155 (9th Cir. 2002) (citing *Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498 (9th Cir. 1991); *Skokomish Indian Tribe v. Goldmark*, 994 F. Supp. 2d 1168, 1186 (W.D. Wash. 2014).

on such projects. *Id*. § 106(g)(1)(A). It does not itself design, build, own, or maintain the roads comprising the highway network in Oregon under the Federal-Aid Highway Program.

Accordingly, even if Plaintiffs' alleged injury were fairly traceable to Federal Defendants, and even if Plaintiffs had demonstrated that Federal Defendants substantially burdened their religious exercise (which they did not), any relief this Court could order against Federal Defendants would not prevent ODOT from continuing to cause the harm alleged by Plaintiffs. *See Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663-64 (D.C. Cir. 1996) (en banc) (redressability element of standing examines "whether the relief sought, assuming that the court chooses to grant it, will likely alleviate the particularized injury alleged by the plaintiff").

At best, Plaintiffs may argue that a ruling against the Federal Defendants may somehow force them to exert pressure on ODOT. But the impact of any such relief granted to Plaintiffs on their claims against Federal Defendants would be highly speculative, and Plaintiffs' conjecture is thus insufficient to confer standing upon them to assert their claims against Federal Defendants. *See Lujan*, 504 U.S. at 561–62; *see also Renal Physicians Ass'n v. HHS*, 489 F.3d 1267, 1277-78 (D.C. Cir. 2007); *Fulani v. Brady*, 935 F.2d 1324, 1329 (D.C. Cir. 1991) ("an injury will not be ... 'redressable' where the injury depends not only on [the defendant's challenged conduct], but on independent intervening or additional causal factors"); *Atl. Urological Assoc. v. Leavitt*, 549 F. Supp. 2d 20, 28 (D.D.C. 2008) ("Plaintiffs cannot demonstrate that the Final Order caused them an injury 'likely to be redressed by a favorable decision'") (quotation omitted). Finally, such relief would not even be possible as "RFRA does not permit Plaintiff 'to impose a restraint on another's action based on the claim that the action is religiously abhorrent.'" *Howe* at *11; *see also Native Ams. for Enola v. U.S. Forest Serv.*, 60 F.3d 645, 646 (9th Cir. 1995).

C. Plaintiffs' RFRA claim is barred by laches

The Plaintiffs' claims are also barred by the affirmative defense of laches. *See Lathan v. Brinegar*, 506 F.2d 677, 691–92 (9th Cir. 1974) (quoting *Costello v. United States*, 365 U.S. 265, 282 (1961)); *Lifeway Foods, Inc. v. Millenium Prods., Inc.*, No. CV 16-7099-R, 2016 WL 7336721, at *3 (C.D. Cal. Dec. 14, 2016) (citation omitted) ("'Laches is an equitable time

limitation on a party's right to bring suit,' resting on the maxim that 'one who seeks the help of a court of equity must not sleep on his rights.'"). For more than three years prior to construction, FHWA, BLM, the public, tribal governments, the State of Oregon, local governments, and other federal agencies worked their way through the administrative process for the turn-lane project. During all that time, Plaintiffs never told Federal Defendants or ODOT that they believed that this turn lane would harm their religious practice. Plaintiffs did not raise these concerns when ODOT held public meetings, or during the public comment period for the EA, or even after construction began. Plaintiff CGS did comment on other aspects of the project, but chose to boycott public meetings. Jones Dep. 82:5-18; REA at 004977. And Plaintiffs Logan and Slockish asserted they expressed concerns to their respective tribal governments. Logan Dep. 75:18-25, 76:1-25, 77:1-13; Slockish Dep. 82:17-21. But neither CGS, Logan, nor any other Plaintiff reached out to *any* federal or state official during the administrative process to express their religious concerns. In fact, Plaintiffs did not identify their concerns with sufficient specificity until filing this lawsuit, after approval and indeed, construction, of the turn lane.

The facts in this case are in this way similar to those in *Apache Survival Coal. v. United States*, 21 F.3d 895 (9th Cir. 1994). In that case, a tribe chose not participate in the long administrative NEPA and NHPA process and then sued, alleging that the construction of the Mount Graham observatory would harm the tribe's sacred sites. *Id*. at 898–900. The Ninth Circuit found that the tribe "ignored the *very process* that its members now contend was inadequate" and that as a result, it had asserted its rights "with inexcusable tardiness," and its claims were barred by laches. *Id*. at 907–10; *see also Stow v. United States*, 696 F. Supp. 857 (W.D.N.Y. 1988); *Standing Rock Sioux Tribe*, 2017 WL 908538, at *5 (claim for preliminary injunctive relief barred by laches).

Here, the Plaintiffs chose—like the tribe in *Apache*—to remain silent about their concerns with the turn-lane project during the long administrative process that led to its approval and then, after construction began, to file a lawsuit to stop construction. That delay is more than sufficient to support a finding that the Plaintiffs' claims are now barred by laches. *See Apache*,

21 F.3d at 909 n.16; *Save the Peaks Coal. v. U.S. Forest Serv.*, 669 F.3d 1025, 1031-32 (9th Cir. 2012).

V. CONCLUSION

For the foregoing reasons, Summary Judgment should be granted for Federal Defendants on Plaintiff's 13th claim alleging a violation of the Religious Freedom Restoration Act.

Respectfully submitted on May 16, 2017,

JEFFREY H. WOOD
Acting Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division

By: */s/ Reuben Schifman*
REUBEN SCHIFMAN
Trial Attorney
U.S. Department of Justice
Environment and Natural Resources Division
Natural Resources Section
P.O. Box 7611
Washington, D.C. 20044-7611
Telephone: (202) 305-4224
reuben.schifman@usdoj.gov

BILLY J. WILLIAMS, Oregon State Bar No. 901366
United States Attorney
TIM SIMMONS, Oregon State Bar No. 924615
Assistant U.S. Attorney
tim.simmons@usdoj.gov
United States Attorney's Office

District of Oregon
405 E. 8th Ave., Suite 2400
Eugene, OR 97401
Telephone: (541) 465 -6740
Facsimile: (541) 465 -6917

Attorneys for Federal Defendants

CERTIFICATE OF SERVICE

I, Reuben S. Schifman, hereby certify that on May 16, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and copies will be sent electronically to the registered participants as identified in the Notice of Electronic Filing.

/s/ Reuben Schifman
REUBEN S. SCHIFMAN