No. 13-56799

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LA CUNA DE AZTLAN SACRED SITES PROTECTION CIRCLE ADVISORY COMMITTEE, *et al.*, Plaintiffs-Appellants,
v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al*, Defendants-Appellees, and

BRIGHTSOURCE ENERGY, INC., *et al.*, Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA,
NO. CV 11–00400 DMG

RESPONSE BRIEF FOR THE FEDERAL APPELLEES

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STATEMENT OF JURISDICTION

The Federal Defendants-Appellees ("Federal Defendants") agree with the statements of district court and appellate jurisdiction by Plaintiffs-Appellants La Cuna De Aztlan Sacred Sites Protection Circle Advisory Committee; CAlifornians for Renewable Energy; Alfredo Acosta Figuero; Phillip Smith; Patricia Figueroa; Ronald Van Fleet; Catherine Ohrin-Greipp; Rudy Martinez Macias, and Gilbert Leivas (collectively "La Cuna").

STATEMENT OF THE ISSUE

Whether the Federal Defendants' approval of the construction of a solar power plant on land owned by the United States and managed by the Bureau of Land Management ("BLM") imposes a substantial burden on the exercise of religious beliefs held by members of La Cuna within the meaning of the Religious Freedom Restoration Act.

STATEMENT OF THE CASE

A. RFRA

Congress enacted the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq.*, following the Supreme Court's decision in *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872

(1990) ("*Smith*").[1] *Smith* caused concern in Congress, with many concluding that the Supreme Court had departed from past decisions concerning the standard for evaluating when an otherwise neutral statute nevertheless impermissibly infringed on an individual's exercise of religious rights. This concern caused Congress to enact RFRA, in which Congress stated its belief that *Smith* "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." 42 U.S.C. § 2000bb(a)(4). Congress also stated that the purpose of the RFRA was "to restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) [("*Sherbert*")] and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) [("*Yoder*")] and to guarantee its application in all cases where free exercise of religion is substantially burdened." *Id.* at § 2000bb(b)(1).

> The Religious Freedom Restoration Act states that:
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--
>
> (1) is in furtherance of a compelling governmental interest; and

[1] In *Smith*, the Supreme Court held that the Free Exercise Clause of the First Amendment does not require a neutral law of general applicability to be justified by a compelling governmental interest even if the laws substantially burdened a religious practice.

> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000bb-1(b).

As this Court has explained, to establish a prima facie claim under RFRA, a plaintiff has the obligation to allege facts establishing two elements: "First, the activities the plaintiff claims are burdened by the government must be 'an exercise of religion.' * * * Second, the government action must 'substantially burden' the plaintiff's exercise of religion." *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1068 (9th Cir. 2008) (*en banc*) ("*Navajo Nation*"). A "substantial burden" exists "only when individuals are forced to choose between following the tenets of their religion * * * and receiving a governmental benefit or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions* * *." *Id*. at 1070.

If a plaintiff meets his or her burden for the first two elements of a RFRA claim, then the burden shifts to the Government to prove that its action is in furtherance of a "compelling governmental interest" and is implemented by "the least restrictive means." *See* 42 U.S.C. § 2000bb–1(b). If the Government cannot meet its burden, then the court must find a RFRA violation. *Navajo Nation*, 535 F.3d at 1068.

B. Factual Background

1. The Ivanpah Solar Plant

The Ivanpah Solar Electric Generating System ("Ivanpah Solar Plant") is a 370-megawatt solar concentrating thermal power plant located 4.5 miles southwest of Primm, Nevada and 0.5 miles west of the Primm Valley Golf Club. The land on which the Plant has been built is part of the California Desert Conservation Area ("CDCA"). The CDCA is administered by BLM and contains 25-million acres in southern California. *See* 43 U.S.C. § 1781(d) (authorizing CDCA).

The Ivanpah Solar Plant contains fields of heliostat mirrors, which track the sun throughout the day and focus the sun's rays on boilers in central "power towers." The concentrated sun rays heat water in the boilers to generate steam that turns turbines and generates electricity. ER at 6. The total project area, including roads, natural gas, water, and transmission lines, and construction staging areas, occupies approximately 3,471 acres (*id.*), or about 5.4 square miles.

Construction of the Ivanpah Solar Plant is complete, and full operation began on February 14, 2014. *See* http://bigstory.ap.org/article/huge-thermal-plant-opens-solar-industry-grows.

2. La Cuna's Allegations Concerning the RFRA Claim

La Cuna originally alleged that the Federal Defendants' actions related to approval of the Ivanpah Solar Plant violated the National Environmental Policy Act ("NEPA"), the Federal Land Policy Management Act ("FLPMA"), the National Historical Preservation Act, Energy Policy Act of 2005 ("EPAct"), American Recovery and Reinvestment Act ("ARRA"), and RFRA. ER at 5. In its opening brief, La Cuna states that it is abandoning all of its claims except those made under RFRA. La Cuna Brief at 1.

The La Cuna organization is not an Indian Tribe, but describes itself as an organization that "advocates for the preservation of * * * physical sites and the protection of culturally and religiously significant plant and animal species," with no reference to geographic limitations. Figueroa Decl. ¶ 2. La Cuna has no rights under RFRA and brings this action on behalf of its members. The declarations of plaintiffs-appellants Alfredo Acosta Figueroa, Ronald Van Fleet, and Phillip R. Smith set forth their religious beliefs.

Figueroa claims that the Ivanpah Solar Plant is within the "focus area of the Native American Creation Story" for the Chemehuevi and other Indian Tribes. ER at 27. That area covers thousands of square miles, "extending 100 miles to the east and 100 miles to the west of the Colorado

River from Spirit Mountain (about 15 miles northwest of Laughlin, Nevada) in the north to the Gulf of California (in Mexico) in the south." *Id*. Contained in this vast area are the "Salt Song Trails," which Figuerora describes as "span[ning] four states and represent[ing] ancient villages, gathering sites for salt and medicinal herbs, trading routes, historic sites, sacred areas, ancestral lands, and pilgrimages in a physical and spiritual landscape of stories and songs[;] the Salt Songs are sung during memorial ceremonies that follow the trail." *Id*.

Figueroa claims that the "Ivanpah Project has significant portions of the Salt Song Trails running through it." ER at 27. However, neither he nor the other declarants explain where the Salt Song Trails are located with respect to the Ivanpah Solar Plant or how much of the Trails are now lost to them as a result the Plant's construction.

Van Fleet and Smith also claim that "glare" from the Ivanpah Solar Plant will "impede" the view from Metamorphosis Hill, which is located about 100 yards outside of the Plant's boundaries. ER 32, 37. Metamorphosis Hill is alleged to be important to La Cuna's members because it contains a triangular mount that points to three mountains considered to be sacred. ER at 32, 37.

Van Fleet and Smith make identical assertions concerning the possibility of being prosecuted for trespass should either seek to enter the Ivanpah Solar Plant: "[s]ince construction has began at the Ivanpah Project, I have tried to visit, but have been told that I will be arrested if I go onto the site." ER at 32 (Van Fleet), 36 (Smith). Figueroa states that "I have tried to visit the Ivanpah Project site several times since the Project was approved. The site has fencing and when I try to get through, guards tell me that I cannot be on the site and threaten to arrest me." ER at 29.

3. BLM's Efforts Under NEPA and NHPA to Determine Whether the Ivanpah Solar Plant Would Affect Indian Religious or Historical Sites

Because the Ivanpah Solar Plant was to be constructed on land owned by the United States, the agency responsible for managing that land (BLM) had to conduct an extensive review of the possible impacts of the Plant under the National Environmental Policy Act ("NEPA"), and, *inter alia*, the National Historic Preservation Act ("NHPA"). NHPA requires federal agencies to "take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." 16 U.S.C. § 470f. The regulations implementing the NHPA mandate that federal agencies consult "other parties with an interest in the effects of the undertaking on historic properties." 36 C.F.R. §

800.1. Indian tribes must be included in the consultation process, along with the State Historic Preservation Officer. 36 C.F.R. § 800.2. The consultation process can include, at the agency's discretion, any person who requests in writing to participate in the process. *Id*. at §§ 800.2(c)((5) and 800.3(f)(3).

As part of its obligations under both NEPA and NHPA, in 2007 BLM contacted the California Native American Heritage Commission asking for any information on Indian cultural resources in the area of the proposed Plant and to request a list of Indian contacts that also might have such information. SER at 52. Also in 2007, BLM sent letters about the proposed Plant to eight Indian Tribes recognized by the Federal Government that might have an interest in the area of the proposed Plant. Among these eight tribes were the Fort Mojave Tribe, of which La Cuna declarant Ronald Van Fleet is a member, and the Chemehuevi Tribe. SER 53, 62; ER 31. In 2009, BLM sent a copy of the Draft Environmental Impact Statement ("Draft EIS") to these Tribes, and later sent them copies of the Supplemental Draft EIS in 2010. *Id*. at 54. BLM notified the Tribes in writing in 2009 when an archaeological site was discovered east of the proposed Plant site. *Id*.[2]

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[2] Plaintiff-Appellant Figueroa states that he is one of the Tribal Sacred Sites Monitors for the Chemehuevi Tribe and claims that none of the other

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BLM did not limit its outreach efforts to recognized Indian Tribes. It also contacted three groups of Indians in the area not recognized as Tribes.[3] And BLM conducted a large outreach effort directed at the general public. As the district court noted, this effort included "'a variety of activities * * * in which BLM received additional information regarding the proposed project and potential alternatives, impacts, and mitigation measures,' including receipt of comments, public testimony, workshops, and submission of additional technical reports, project design information, impact analyses, and applicant-proposed mitigation measures by

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Tribal Sacred Monitors told him that BLM had sought consultation on the Ivanpah Solar Plant. ER at 26. He says that it was the "practice" of the Monitors to pass such information on to all other monitors. *Id*. Additionally, Figueroa says he has "conferred with several members of the Chemehuevi tribal council to find out whether the United States government has initiated any form of consultations with the council directly without going through any of the Monitors[,]" and that the council members to whom he spoke knew of no such consultation. *Id*. Nonetheless, it is abundantly clear from the record that BLM solicited input from the Chemehuevi Tribe, notifying them by registered letter. SER at 88. In any event, Figueroa's assertion is irrelevant because the district court granted summary judgment to the Federal Defendants on La Cuna's NHPA consultation claim, and La Cuna chose to drop that claim from its appeal. La Cuna Brief at 1.

[3] The groups of Indians contacted that are not federally-recognized Indian Tribes are the Serrano Nation of Indians, the San Fernando Band of Mission Indians, and the Pahrump Paiute Tribe. SER at 62. BLM also contacted the AhaMaKav Cultural Society, Fort Mojave Indian Tribe as part of its outreach and consultation efforts. *Id*.

BrightSource." ER at 18-19, quoting from Final EIS, Supplemental Excerpts of Record filed by Appellees-Defendants BrightSource, *et al*., ("SER") at 58.

Despite its efforts, made over years, BLM received no information that the Ivanpah Solar Plant would affect Indian religious or historical sites. The California Native American Heritage Commission had no information on any religious or historical sites that would be affected by construction of the Ivanpah Solar Plant. SER at 53. None of the Indian Tribes contacted by the BLM (including the Chemehuevi Tribe) ever identified any sacred or religious sites (such as the Salt Song Trails) that would be affected by the construction of the Ivanpah Solar Plant. *Id*. The Salt Song Trails were never mentioned. Indeed, although Phillip Smith, one of the Plaintiffs, did attend a public meeting and at the meeting told BLM that the Chemehuevi Indians used to live in the mountains surrounding the Ivanpah Valley and that the word "Ivanpah" means good water, he did not tell BLM that any sacred or historical sites (such as the Salt Song Trails) would be affected by construction of the Ivanpah Solar Plant. *Id*.[4]

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[4] La Cuna did allege in the district court that BLM had violated the consultation requirements of the NHPA, resting its argument on Smith not being included in the consultation process. The district court granted summary judgment to the Federal Defendants on this issue, noting that consultation with Indian Tribes was required, but was only discretionary with respect to individuals. Moreover, an individual (whether or not an

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4. The District Court's Decision

La Cuna brought suit challenging the Government's approval of the Ivanpah Solar Plant, naming as defendants the Federal Defendants and the project's sponsor, BrightSource Energy, Inc. and companies associated with BrightSource (collectively referred to as "BrightSource").

La Cuna first raised concerns about loss of access to parts of the Salt Song Trails in its Second Amended Complaint, ECF # 72 (August 5, 2011), long after the comment period on construction of the proposed Project had closed and BLM had approved construction of the Plant.[5] The Federal Defendants and BrightSource filed motions to dismiss this claim because La Cuna neither alleged that its members were subject to any coercion to violate their religious beliefs, nor did it allege that its members had been deprived of a government benefit because they exercised their religious

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Indian) wanting to be included in the consultation process had to submit a request in writing, which Smith never did. ER at 18, citing 36 C.F.R. § 800.2(c)(5) & 800.3(f)(3). In any event, as we have noted, La Cuna has abandoned its NHPA claim on appeal. La Cuna Brief at 1.

5 Had anyone during the outreach process identified a concern that construction of the Ivanpah Solar Plant would affect Indian sacred sites, the Government would have sought to address that concern. Executive Order 13007 requires that federal land management agencies such as BLM "shall, to the extent practicable * * * (1) accommodate access to and ceremonial use of Indian sacred sites by Indian religious practitioners and (2) avoid adversely affecting the physical integrity of such sacred sites."

beliefs. ER at 16-17. The district court agreed, and dismissed La Cuna's RFRA claim with leave to refile it. *Id.*

La Cuna pled a modified RFRA claim in its Third Amended Complaint, and for the first time alleged that its members had been threatened with criminal prosecution if they sought access to the Salt Song Trails located within the Ivanpah Solar Plant. SER at 13. Additionally, La Cuna claimed that the Ivanpah Solar Plant would deprive its members of the Government benefit of "the government benefit of the CDCA and other laws." *Id.*

The Federal Defendants and BrightSource moved for summary judgment on the RFRA and all other claims, and the district court granted the motions. Concerning the RFRA claims, the district court concluded that La Cuna had again failed to state a claim. The district court concluded that "denial of access to land, without a showing of coercion to act contrary to religious belief, does not give rise to a RFRA claim[.]" ER at 20. The district court quoted the Supreme Court's statement in *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 453 (1988) ("*Lyng*"), that Indian religious rights "'do not divest the Government of its right to use what is, after all, *its* land.'" ER at 20, emphasis by the Supreme Court. The district court ruled that the plaintiffs did not meet their burden of demonstrating

that the proposed project would substantially burden the exercise of their religious beliefs. It likewise rejected La Cuna's other now-abandoned claims. It therefore granted summary judgment to the Federal Defendants and BrightSource.

SUMMARY OF ARGUMENT

In finding that La Cuna had failed to establish a RFRA claim, the district court followed the settled law of this Circuit and the Supreme Court. Under this Court's standard for what constitutes a "substantial burden" on the exercise of religious brief, La Cuna clearly failed to meet its burden to state a claim under RFRA. As this Court held in *Navajo Nation*, a substantial burden is recognized only "when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." 535 F.3d at 1070.

It has long been established that while the Free Exercise Clause "affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures." *Bowen v. Roy*, 476 U.S. 693, 700 (1986). In the context of the Government's management of federal lands the Supreme Court has held that the alleged interference with Indian

Tribes' "ability to pursue spiritual fulfillment according to their own religious beliefs," was not a substantial burden on religion that must be justified with a compelling governmental interest. *Lyng*, 485 U.S. at 448-50. The test employed in *Lyng*, a pre-RFRA case, for determining substantial burden is the same test this Court employs under RFRA. As pertinent here, La Cuna claims that its members consider sacred as much as 40,000 square miles located in four states. The Ivanpah Solar Plant contains less than 0.02 percent of this land. The district court correctly determined that, on the facts of this case, La Cuna has failed to establish a substantial burden on its members' exercise of their religious rights.

ARGUMENT

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*. *Guatay Christian Fellowship v. Cnty. of San Diego*, 670 F.3d 957, 970 (9th Cir. 2011).

I. The District Court Properly Applied this Court's Precedents to Find that the Ivanpah Solar Plant Does Not Impose a Substantial Burden on the Exercise of Religious Beliefs by La Cuna's Members.

To maintain its RFRA claim, La Cuna must show that construction of the Ivanpah Solar Plant forces its members "to choose between following the tenets of their religion and receiving a governmental benefit or coerced

[them] to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Navajo Nation*, 535 F.3d at 1070. La Cuna argues that the loss of access to land located within the Ivanpah Solar Plant imposes a substantial burden on their religious practices. La Cuna Brief at 8-9.

Courts have rejected similar allegations as failing to show a substantial burden on the exercise of religious belief. In *Lyng*, several Indian Tribes claimed that their right to expression of religious beliefs would be substantially burdened because timber harvesting projects would deny them access to an area "significant as an integral and indispensible part of Indian religious conceptualization and practice." 485 U.S. at 442 (internal quotation marks and citations omitted). However, the Court held that the timber harvest could proceed even if the "projects at issue in this case could have devastating effects on traditional Indian religious practices." *Id*. at 451. [6] Similarly, in *Snoqualmie Indian Tribe v. F.E.R.C.*,

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[6] Congress's subsequent enactment of RFRA did not disturb this holding in *Lyng*. Congress stated in RFRA that it expected "that the courts will look to free exercise cases decided prior to [*Employment Div. Dept. of Human Res. of Oregon v.*] *Smith*[, 494 U.S. 872 (1990)] for guidance in determining whether the exercise of religion has been substantially burdened." S. Rep. 103-111 at 8-9, reprinted in 1993 U.S.C.C.A.N. at 1898. The D.C. Circuit has quoted from the Senate Report for RFRA that "'the purpose of [RFRA] is only to overturn the Supreme Court's decision in *Smith*,' not to 'unsettle other areas of the law.'" *Village of Bensenville v.*

Cont.

545 F.3d 1207, 1212 (9th Cir. 2008), the plaintiffs claimed that construction of improvements to a power plant would deny their rights of religious expression by denying them access to an area essential for "necessary religious experiences" and altering elements of the environment essential to their religious practices. 545 F.3d at 1213. Nevertheless, this Court held that such allegations did not support a RFRA claim because the inaccessibility and disruption of the site did not force plaintiffs to either (1) choose between following the tenets of their religion and receiving a government benefit, or (2) act contrary to their religious beliefs by the threat of sanction. *Id*. at 1214.

This case presents facts similar to those found in *Lyng*, *Navajo Nation*, and *Snoqualmie*. La Cuna's members claim harm from loss of a small portion (a smaller portion than was involved in any of these cases) of land because of a Government land management decision. The claimed loss is in the nature of what this Court has termed "the diminishment of spiritual fulfillment," and this Court has held that "under Supreme Court precedent, the diminishment of spiritual fulfillment – serious though it may be – is not a 'substantial burden' on the free exercise of religion."

Federal Aviation Admin., 457 F.3d 52, 62 (D.C. Cir. 2006), quoting S. Rep. No. 103-111, at 12, as reprinted in 1993 U.S.C.C.A.N. at 1902.

Navajo Nation, 535 F.3d at 1070 & n.12 (*discussing Yoder, Sherbert,* and *Lyng*).

La Cuna asserts that this case is different from the cases relied on by the district court because those cases did not address the possible prosecution for trespass and sanctions that La Cuna's members have been threatened with. La Cuna Brief at 9-10. Notably, La Cuna's declarations do not identify a specific area of concern. Some areas in the vicinity of the project site, but spiritually important to La Cuna, including Metamorphosis Hill, are outside the project area. ER 27. And such sites have been accessible to the Declarants. *See, e.g.*, Van Fleet ("I regularly visit the site where the Ivanpah Solar Project is being constructed. For example, the administrative record in this action contains a picture of me on a sacred ridge that overlooks the Ivanpah Solar Project"). ER 31. Nor do La Cuna's declarations explain who denied them access. ER 29, 32, 36. Likewise they fail to note if, following the alleged threats of trespass, they appealed to officials within BLM or the Department of the Interior for access.[7] And

[7] It is hardly remarkable that unannounced visitors to a fenced construction site may be threatened with trespass if they proceed into a project area. Indeed few members would presume unfettered access into such environments. What is remarkable is that La Cuna never made any efforts to work with BLM to obtain access through, for example, a memorandum of agreement. As La Cuna's brief (p. 9) notes the plaintiffs in *Cont.*

finally none of the declarations expressly state that the visit upon which prosecution for trespass had allegedly been threatened was a visit undertaken within intent to worship. Or put another way, none of the declarants expressly states that the threat of prosecution prohibited him from worshipping or engaging in his religious practice on the day that he visited the secure project site. ER 32, 36, 29.

In any event, La Cuna's suggestion that allegations of potential trespass prosecutions distinguish this case from, for example, this Court's decision in *Snoqualmie*, is unfounded. At issue in *Snoqualmie* was access to the Snoqualmie Falls Hydroelectric Project. 545 F.3d at 1213. There can be little doubt that an individual attempting to access parts of a hydroelectric facility would be at risk of prosecution for trespass no less than a trespasser at the Ivanpah Solar Plant, and the reason is plain: energy production facilities are inherently dangerous and plant managers seek to keep individuals out of harm's way. This Court need not find that the threat of

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Navajo Nation secured access to the mountain for cultural and religious reasons through a memorandum of agreement. *Navajo Nation*, 553 F.3d at 1063. And La Cuna itself had, in 2008, executed a Memorandum of Understanding with the BLM to protect sacred sites and glyphs in the region. ER 28-29. But at no time, either before or after the alleged threats of trespass prosecution did La Cuna ever attempt to obtain access to the site through an agreement with BLM.

trespass can never burden the practice of religion on public lands to find that on the facts of this case, no substantial burden to the religious practice of La Cuna's members has been shown.

Nor can La Cuna meet the other prong of this Court's substantial burden test. La Cuna's allegations concerning the loss of a governmental benefit fail because those allegations do not identify any benefit lost because its members "follow[ed] the tenets of their religion." La Cuna states in its brief here that the benefit allegedly lost was that of access to public land. La Cuna Brief at 9.[8] Any public land effectively closed by construction of the Ivanpah Solar Plant has been lost by all members of the public, regardless of their religious beliefs. In contrast, in *Sherbert*, 374 U.S. at 408-09, the plaintiff lost her right to an unemployment check only because she chose to follow her religious beliefs, which forbade working on Saturdays. La Cuna's members are not in an analogous situation.

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[8] In the Third Amended Complaint, La Cuna alleged that its members had lost "the government benefit of the CDCA and other laws." SER at 13. Aside from being hopelessly vague, La Cuna's allegations do not tie loss of whatever the benefit was from the CDCA and "other laws" to the exercise of religious belief.

II. The District Court Properly Recognized that a Contrary Holding Would Significantly Interfere with the Government's Ability to Manage Its Land.

The Government manages its lands for the public good and endeavors as a matter of established federal policy to accommodate religious practices on public lands and to minimize the impacts of federal activities on sacred sites. The government attempts to accommodate religious activities to the extent practicable, and as explained above, pp. 7-11, made extensive efforts to identify religious and cultural sites and to consult with Tribes in the affected area. The precedents applicable here — *Lyng*, *Navajo Nation* and *Snoqualmie* – make clear that the Government was not required to do more than it has already done in this case.[9]

Here, La Cuna seeks to shut down a functioning 370-megawatt solar power plant. La Cuna says that "[n]obody disputes that weaning the country from its dependence on fossil fuels is a noble cause; Appellants applaud it." La Cuna Brief at 1. But La Cuna's "applause" for this "noble cause" is tempered; La Cuna has filed five additional lawsuits to block

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9 The Government's accommodation of Indian religious beliefs have led agencies of the Government to ban recreational activities such as rock climbing in some areas considered sacred to Indian religious beliefs, *see Access Fund v. U.S. Dept. of Agriculture*, 499 F.3d 1036, 1039 (9th Cir. 2007), or to impose limitations on access by non-Indians to other sacred sites during religiously significant parts of the year. *Bear Lodge Multiple Use Ass'n v. Babbitt*, 175 F.3d 814, 815-16 (10th Cir. 1999)

construction of five additional different solar energy plants and in four of the five cases it has included claims under RFRA.[10]

As discussed above, La Cuna has failed to demonstrate a substantial burden on its members' exercise of their religious beliefs. It is also unclear what relief La Cuna now seeks in light of the operational status of the Ivanpah Solar Plant. The uprooting of this facility on the basis of La Cuna's assertions would be unprecedented. In granting summary judgment to the

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[10] In addition to this case, in two of the cases La Cuna's RFRA claims have been dismissed for essentially the same reasons given by the district court here. *See La Cuna de Aztlan Sacred Sites Protection Circle Advisory Commn v. United States Department of Interior*, No. 11-1478, ECF No. 228 (C.D. Cal., June 20, 2014) (minute order granting United States summary judgment on La Cuna's claims under RFRA that proposed solar energy plant would place a substantial burden on Native Americans' religious rights through loss of access to Salt Song Trails); *La Cuna de Aztlan Sacred Sights Protection Circle Advisory Commn v. v. United States Department of Interior*, No. 11-395, ECF No. 67 (C.D. Cal., July 13, 2012) (dismissing with prejudice La Cuna's RFRA claim that loss of access to Salt Song Trails imposed substantial burden on Native American's religious rights). In a third case, La Cuna abandoned its RFRA claim and the district court agreed not to reach the merits. *La Cuna De Aztlan Sacred Sites Protection Circle Advisory Committee v. Western Area Power Administration*, 2012 WL 6743790,No. 12-005 (C.D. Cal. 2012). In a fourth case, *La Cuna v. U.S. DOI*, 2:11-cv-04466-JAK-OP (C.D. Cal.), the complaint was dismissed without prejudice when the case became moot or not ripe due to project changes. ECF No. 140 (October 29, 2013). In a fifth case, *La Cuna De Aztlan Sacred Sites Protection Circle Advisory Committee v. United States Department of the Interior*, No. 10-2664 (S.D. Cal.), La Cuna did not plead a RFRA claim, but alleged that a solar power plant should not be built based on allegations that other federal statutes had been violated. That case was dismissed when the project was abandoned.

Federal Defendants and BrightSource, the district court pointed out that while "'Native Americans may have some rights to use sacred sites, 'those rights do not divest the Government of its right to use what is, after all, *its* land.'" ER at 20, quoting *Lyng*, 485 U.S. at 453 (emphasis added by the Supreme Court.

Here, La Cuna's members could potentially invoke RFRA to claim access to any Government land located within the 40,000 square miles in the United States they consider sacred. This far exceeds the 27,000 acres (about 42.18 square miles) of land at issue in *Lyng*, which the Supreme Court referred to as "rather spacious tracts of public property." 485 U.S. at 453.

If La Cuna were to prevail here, then

> any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citizens. Each citizen would hold an individual veto to prohibit the government action solely because it offends his religious beliefs, sensibilities, or tastes, or fails to satisfy his religious desires. Further, giving one religious sect a veto over the use of public park land would deprive others of the right to use what is, by definition, land that belongs to everyone.

Navajo Nation, 535 F.3d at 1063-64.

La Cuna has failed to established that the approval of the Ivanpah Solar Plant has substantially burdened its members' exercise of religion. La Cuna's members have not been forced to choose between their religious

beliefs and receiving a government benefit, nor have they been forced to act contrary to their religious beLa Cunaliefs under threat of sanction. *See id*. at 1070.

CONCLUSION

For these reasons, the district court's judgment should be affirmed.

Respectfully submitted,

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90-1-4-13354

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28.2.6, the undersigned counsel for the Federal Defendants identifies as a related case *Western Watersheds Project v. Salazar*, Case No. 11-56363 (9th Cir.), which is fully briefed and awaiting oral argument.

/s/ Robert H. Oakley
Robert H. Oakley

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Signature /s/ Robert H. Oakley

Attorney for United States Department of the Interior, et al.

Date July 14, 2014

9th Circuit Case Number(s) No. 13-56799

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