No. 21-35220

In the United States Court of Appeals for The Ninth Circuit

HEREDITARY CHIEF WILBUR SLOCKISH; CAROL LOGAN;
CASCADE GEOGRAPHIC SOCIETY; MOUNT HOOD
SACRED LANDS PRESERVATION ALLIANCE,
Plaintiffs-Appellants,

v.

UNITED STATES FEDERAL HIGHWAY ADMINISTRATION, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the District of Oregon
No. 3:08-cv-1169
Hon. Marco A. Hernández

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

GLOSSARY viii

INTRODUCTION 1

ARGUMENT 3

I. The case is not moot 3

II. The Government violated RFRA. 8

III. The Government violated the Free Exercise Clause. 18

IV. The Government's waiver defense fails 19

V. The Government violated NEPA, NHPA, FLPMA, and DTA 27

CONCLUSION 32

CERTIFICATE OF COMPLIANCE 34

CERTIFICATE OF SERVICE 35

TABLE OF AUTHORITIES

Page(s)

Cases

Anacostia Watershed Soc'y v. Babbitt,
871 F. Supp. 475 (D.D.C. 1994) 27

Apache Survival Coal. v. United States,
21 F.3d 895 (9th Cir. 1994) 7

Bowen v. Roy,
476 U.S. 693 (1986) 15

Burwell v. Hobby Lobby Stores, Inc.,
573 U.S. 682 (2014) 16, 17

Cal. Parents v. Torlakson,
973 F.3d 1010 (9th Cir. 2020) 18

Cal. Wilderness Coal. v. DOE,
631 F.3d 1072 (9th Cir. 2011) 29

Carr v. Saul,
141 S. Ct. 1352 (2021) 21

Coal. for Canyon Pres. v. Bowers,
632 F.2d 774 (9th Cir. 1980) 7

Comanche Nation v. United States,
No. CIV-08-849, 2008 WL 4426621
(W.D. Okla. Sept. 23, 2008) 12, 13

Conner v. Burford,
848 F.2d 1441 (9th Cir. 1988) 5

Cree v. Flores,
157 F.3d 762 (9th Cir. 1998) 30

Cutter v. Wilkinson,
544 U.S. 709 (2005) 10, 16

Davis v. Coleman,
521 F.2d 661 (9th Cir. 1975) 6

Del. Riverkeeper Network. v. U.S. Army Corps of Eng'rs,
869 F.3d 148 (3d Cir. 2017) 23

Fazaga v. FBI,
965 F.3d 1015 (9th Cir. 2020) 18

Foster Poultry Farms, Inc. v. SunTrust Bank,
377 F. App'x 665 (9th Cir. 2010) 5

Fulton v. City of Philadelphia,
141 S. Ct. 1868 (2021) 18

Gonzales v. O Centro,
546 U.S. 418 (2006) 16

Grand Canyon Tr. v. Tucson Elec. Power Co.,
391 F.3d 979 (9th Cir. 2004) 7

Great Basin Mine Watch v. Hankins,
456 F.3d 955 (9th Cir. 2006) 21, 26

Greene v. Solano Cnty. Jail,
513 F.3d 982 (9th Cir. 2008) 11

Haight v. Thompson,
763 F.3d 554 (6th Cir. 2014) 11

Herb Reed Enters., LLC v. Fla. Ent. Mgmt.,
736 F.3d 1239 (9th Cir. 2013) 7

Holt v. Hobbs,
574 U.S. 352 (2015) 16

'Ilio'ulaokalani Coal. v. Rumsfeld,
464 F.3d 1083 (9th Cir. 2006)..22

Jones v. Carter,
915 F.3d 1147 (7th Cir. 2019)..11

Lands Council v. McNair,
629 F.3d 1070 (9th Cir. 2010)..25

Lyng v. Nw. Indian Cemetery Protective Ass'n,
485 U.S. 439 (1988)..*passim*

McAllen Grace Brethren Church v. Salazar,
764 F.3d 465 (5th Cir. 2014)..9

Nance v. Miser,
700 F. App'x 629 (9th Cir. 2017)..11

NPCA & Conservation Ass'n v. BLM,
606 F.3d 1058 (9th Cir. 2010)..24

Native Ecosystems Council v. Dombeck,
304 F.3d 886 (9th Cir. 2002)..22

Navajo Nation v. U.S. Forest Service,
535 F.3d 1058 (9th Cir. 2008)..13, 14, 15

Neighbors of Cuddy Mountain v. Alexander,
303 F.3d 1059 (9th Cir. 2002)..4

New Hampshire v. Maine,
532 U.S. 742 (2001)..7

NRDC v. EPA,
824 F.2d 1146 (D.C. Cir. 1987)..22

Nw. Env't Def. Ctr. v. Bonneville Power Admin.,
477 F.3d 668 (9th Cir. 2007)..5

Organized Vill. of Kake v. USDA,
795 F.3d 956 (9th Cir. 2015) 27

Petrella v. Metro-Goldwyn-Mayer, Inc.,
572 U.S. 663 (2014) 6

Portland Gen. Elec. Co. v. Bonneville Power Admin.,
501 F.3d 1009 (9th Cir. 2007) 22

Quechan Tribe of Fort Yuma Indian Rsrv. v. DOI,
755 F. Supp. 2d 1104 (S.D. Cal. 2010) 29

Rhoades v. Avon Prods., Inc.,
504 F.3d 1151 (9th Cir. 2007) 4

San Jose Christian Coll. v. City of Morgan Hill,
360 F.3d 1024 (9th Cir. 2004) 9

Save the Peaks Coal. v. USFS,
669 F.3d 1025 (9th Cir. 2012) 7

SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC,
137 S. Ct. 954 (2017) 5-6

Snoqualmie Indian Tribe v. FERC,
545 F.3d 1207 (9th Cir. 2008) 14

SPARC v. Slater,
352 F.3d 545 (2d Cir. 2003) 32

Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs,
239 F. Supp. 3d 77 (D.D.C. 2017) 7-8

Tandon v. Newsom,
141 S. Ct. 1294 (2021) 18, 19

Tanzin v. Tanvir,
141 S. Ct. 486 (2020) 10, 11

Thompson v. DOL,
885 F.2d 551 (9th Cir. 1989) 23

Trinity Lutheran Church of Columbia, Inc. v. Comer,
137 S. Ct. 2012 (2017) 19

Tyler v. Cuomo,
236 F.3d 1124 (9th Cir. 2000) 5

U.S. Telecom Ass'n v. FCC,
359 F.3d 554 (D.C. Cir. 2004) 29

United States v. Tydingco,
909 F.3d 297 (9th Cir. 2018) 31

West v. Sec'y of Dep't of Transp.,
206 F.3d 920 (9th Cir. 2000) 3

Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas,
2021 WL 3027687 (9th Cir. July 19, 2021) 22

Wild Wilderness v. Allen,
871 F.3d 719 (9th Cir. 2017) 3

Yellowbear v. Lampert,
741 F.3d 48 (10th Cir. 2014) 9, 11

Statutes

23 U.S.C. §139 22

42 U.S.C. §2000bb 16, 17

42 U.S.C. §2000bb-1 .... 10, 16

42 U.S.C. §2000bb-3 .... 4, 10

Regulations

43 C.F.R. §2805.15 4

73 Fed. Reg. 19,134 (Apr. 8, 2008) 7, 22

Other Authorities

Stephanie Barclay & Michalyn Steele,
Rethinking Protections for Indigenous Sacred Sites,
134 Harv. L. Rev. 1294 (2021) 17

Fed. R. Civ. P. 8(c)(1) 20

GLOSSARY

BLM	Bureau of Land Management
C-FASH	Citizens for a Suitable Highway
CGS	Cascade Geographic Society
DTA	Department of Transportation Act
EA	Environmental Assessment
EIS	Environmental Impact Statement
FEIS	Final Environmental Impact Statement
FHWA	Federal Highway Administration
FLPMA	Federal Land Policy and Management Act
FONSI	Finding of No Significant Impact
MHSLPA	Mount Hood Sacred Lands Preservation Alliance
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
ODOT	Oregon Department of Transportation
ONRCF	Oregon Natural Resources Council Fund
ORCA	Oregon Resource Conservation Act
REA	Revised Environmental Assessment
RFRA	Religious Freedom Restoration Act
SDMP	Salem District Resource Management Plan

INTRODUCTION

The Government doesn't dispute that it destroyed a sacred site over Plaintiffs' written objections, which are in the administrative record. Nor does it dispute that this destruction easily "could have been avoided." Resp.43. That violated federal law.

The Government seeks to avoid liability by claiming its destructive actions "cannot be undone," so the case is "moot." Resp.19. But the district court rightly rejected this argument. A case is not moot if a court can award *any* effective relief. Here, multiple forms of relief would at least partially restore the site and allow Plaintiffs to resume their religious practices—such as removing the earthen berm behind the guardrail, allowing Plaintiffs to rebuild the stone altar, and replanting native trees. These measures are fully consistent with ODOT's right-of-way. Indeed, the Government *actually offered* these measures during settlement negotiations—demonstrating their feasibility. Thus, the case isn't moot.

On RFRA, the Government offers an illogical and atextual reading of "substantial burden"—under which it is a substantial burden to impose small fines for trespassing at the site, but not to obliterate the site. But that interpretation can't be squared with RFRA's text, controlling precedent, or common sense. As many cases show, the Government imposes a "substantial burden" when it makes religious exercise *significantly more costly or difficult*—which it can do by imposing fines and denying benefits, *or* by making religious exercise impossible.

On NEPA, NHPA, FLPMA, and DTA, the Government asserts waiver—claiming Plaintiffs can't sue because they didn't attend the right public meetings. But this defense fails on multiple grounds. First, it is waived, because the Government failed to plead it. Second, it is belied by the administrative record, which shows the Government had *actual notice* of Plaintiffs' concerns. Third, it misstates the law, because Plaintiffs weren't required to participate in the administrative process before suing (though they did). And fourth, waiver is particularly inappropriate here, where Plaintiffs are elderly, culturally disadvantaged, and legally unsophisticated, and where the Government is supposed to respect their traditional reticence to disclose sacred sites due to the risk of vandalism—which Plaintiffs experienced.

* * *

Ultimately, the Government can't escape a simple fact: It knowingly and needlessly destroyed a Native American sacred site. To distract from this fact, it tries to blame the victim—claiming it would have protected the site "[i]f Plaintiffs had only [told them]." Resp.1. But this is belied by the administrative record, which shows Plaintiffs *did* tell them. And it is belied by the Government's position in *Apache Stronghold v. United States*, No. 21-15295, where plaintiffs told the Government all about Oak Flat, yet the Government still claims *carte blanche* to destroy it. Alternatively, the Government presses the callous claim that the case is moot

because the destruction already happened. But it says just the opposite in *Apache Stronghold*—that an injunction is premature because the destruction hasn't happened yet.

It is Government as Goldilocks: Native American claims are always too obscure or too insignificant, too late or too soon—never just right. The only constant is that Native Americans must lose. While that might reflect the Government's treatment of Native Americans historically, it doesn't reflect current law. Plaintiffs are entitled to relief.

ARGUMENT

I. The case is not moot.

The Government first says the case is moot because it already destroyed the site, which "cannot be undone." Resp.19. But the trial court rejected this argument, 1-ER-47-48, 92, with good reason.

A case is not moot if a court could grant "*any* effective relief." *Wild Wilderness v. Allen*, 871 F.3d 719, 724 (9th Cir. 2017); *e.g., West v. Sec'y of Dep't of Transp.*, 206 F.3d 920, 925 (9th Cir. 2000). Here, Plaintiffs proposed, and the district court recognized, multiple remedies that would at least partially restore the site, allowing Plaintiffs' religious practices to resume. 5-ER-936 (restore access); 5-ER-948-49 (remove earthen berm, replace vegetation); 3-ER-505 (return the altar); 5-ER-924 (remove

guardrail impeding access). Any of this relief would at least partially redress Plaintiffs' injury—meaning the case is live. *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1065-66 (9th Cir. 2002).

The Government claims "[o]nly ODOT" can remediate the site, because the Government granted ODOT a right-of-way. Resp.19-20. But the right-of-way reserves the federal Government's right to use "any portion of the right-of-way for non-highway purposes," unless it would "interfere with the free flow of traffic" or "safety." 5-ER-956-57; *see also* 43 C.F.R. §2805.15 (BLM retains "any rights" not "expressly convey[ed]," including the right to "authorize use of the right-of-way for compatible uses"). Here, rebuilding the altar or replanting trees would have no effect on traffic flow or safety, and the Government doesn't claim otherwise. Indeed, the Government *actually offered* this relief during settlement negotiations *after* ODOT's dismissal—proving such relief is feasible. *See Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1161-63 (9th Cir. 2007) (settlement discussions admissible to establish "subject matter jurisdiction").

Even assuming a potential conflict between the right-of-way and the broadest possible relief—such as altering the highway—RFRA controls. RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise"—including the right-of-way grant. 42 U.S.C. §2000bb-3(a). When a court is "ask[ed] to remedy the violation of a public law" like RFRA, it is "not bound to stay within the terms of a

private agreement"; instead, it "may exercise [its] equitable powers to ensure compliance with the law." *Nw. Env't Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 679-80 (9th Cir. 2007). Thus, courts routinely order the Government to comply with federal law, even when doing so would "prevent [the Government's] performance of [its] contracts" or affect third parties' "property interests." *Conner v. Burford*, 848 F.2d 1441, 1459-61 (9th Cir. 1988) (prohibiting mining under Government leases); *Tyler v. Cuomo*, 236 F.3d 1124 (9th Cir. 2000) (changes to completed construction project).

Aware of its weakness on mootness, the Government pivots—claiming the "equitable relief" of restoring the site "is barred by laches." Resp.21. But the district court rightly rejected this argument, too. 1-ER-4. First, the Government waived laches by failing to raise it in any of its four answers (5-ER-951, 5-ER-908, 5-ER-904, 5-ER-900) or motion to dismiss (D.Or.ECF 28). This prejudiced Plaintiffs by denying them notice of a key defense during settlement negotiations and delaying final resolution of that defense until after two Plaintiffs died. *See infra* IV.A; *Foster Poultry Farms, Inc. v. SunTrust Bank*, 377 F. App'x 665, 669-70 (9th Cir. 2010) (laches was waived).

Second, laches doesn't apply to suits filed "within a limitations period specified by Congress." *SCA Hygiene Prods. Aktiebolag v. First Quality*

Baby Prods., LLC, 137 S. Ct. 954, 960 (2017). Here, Plaintiffs sued immediately after construction began—well within the four- and six-year limitations period for RFRA and APA claims respectively.

The Government says laches can still "bar *equitable* relief in cases brought within the statute of limitations." Resp.24 (citing *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 685-86 (2014)). But that misstates *Petrella*, where the Court rejected laches for both legal *and* equitable relief. 572 U.S. at 686-88. Instead, *Petrella* says that only in "extraordinary circumstances," such as a request for "total destruction" of a project, can any "particular relief" be barred at the "outset of the litigation." *Id.* at 668, 685-86. Even then, laches is not a "complete bar" to claims brought within the limitations period. *Id.* at 685-86. *Cf. Davis v. Coleman*, 521 F.2d 661, 670 n.11, 677-78 (9th Cir. 1975) (refusing to bar equitable relief where project was half complete at time of suit).

Here, Plaintiffs filed within the limitations period, and they seek various remedies far short of "total destruction" of the project. Under *Petrella*, that relief cannot be barred at the outset. The Government itself conceded this below. D.Or.ECF 351 at 15 ("recent Supreme Court caselaw strongly suggests that even for cases seeking equitable…relief, laches is best considered at the remedy phase" (citing *Petrella*)). Judicial estoppel precludes the Government from "persuading a court to accept [its] earlier position"—which the district court did, 1-ER-4—and then asserting "an

inconsistent position" on appeal. *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001).

Lastly, even assuming laches could entirely bar timely claims, it is disfavored "in environmental cases," *Coal. for Canyon Pres. v. Bowers*, 632 F.2d 774, 779 (9th Cir. 1980), and requires proof of (1) lack of diligence, and (2) prejudice, *Save the Peaks Coal. v. USFS*, 669 F.3d 1025, 1031 (9th Cir. 2012). The Government doesn't address prejudice. And on diligence, Plaintiffs filed suit just ten weeks into a yearlong construction project—far faster than in other cases rejecting laches. *E.g.*, *Grand Canyon Tr. v. Tucson Elec. Power Co.*, 391 F.3d 979, 988-89 (9th Cir. 2004) (eleven years). Indeed, Plaintiffs filed by the Government's *own deadline* for "claim[s] seeking judicial review," 73 Fed. Reg. 19,134, 19,134 (Apr. 8, 2008)—meaning any supposed "delay" couldn't possibly be "unreasonable." *Herb Reed Enters., LLC v. Fla. Ent. Mgmt.*, 736 F.3d 1239, 1246-47 (9th Cir. 2013).

Apache Survival is not to the contrary. Resp.21. There, plaintiffs ignored the agency's consistent, repeated attempts to involve them, and refused to give follow-up information when the agency proved "willing[] to listen." *Apache Survival Coal. v. United States*, 21 F.3d 895, 900 (9th Cir. 1994) ("Tribe failed to respond" and gave "[n]o response" to requests about "specific sites"); *Standing Rock Sioux Tribe v. U.S. Army Corps of*

Eng'rs, 239 F. Supp. 3d 77, 84-85 (D.D.C. 2017) (similar). Here, the magistrate said "the record does not reveal" that the Government made any "consistent, repeated attempts to consult with" Plaintiffs. 1-ER-71. And the Government's only response to Plaintiffs' communications was a letter flatly denying review. 5-ER-1041-43. So laches is inapplicable.[1]

II. The Government violated RFRA.

On the merits, the Government admits "this Project didn't include measures to protect the site," even though destruction "could have been avoided." Resp.45, 43. That's an admission that the Government cannot satisfy struct scrutiny. Thus, the only question is whether destruction of Plaintiffs' site is a substantial burden on their religious exercise.

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[1] The Government baselessly claims Plaintiffs "misrepresent[ed]" what it knew about the site. Resp.23. It says "no Plaintiff" told the Government they "used this site for religious purposes until 2010." *Id*. But the administrative record shows Jones telling the Government *in 1990* that Dwyer is a "sacred site" that Native Americans had been visiting "for years." 5-ER-966-67; *see also* 2-SER-234 (2009). It says no one "called this rock feature an 'altar'" until 2016. Resp.23. But terminology aside, record correspondence in *2007* shows potential "use of this stone pile…as a prayer area" that "the tribe is concerned about." 6-ER-1157. It says Wilferd Yallup didn't use "the 'word Dwyer'" when identifying areas with burials. Resp.23-24. But Jones testified that Yallup *pointed to Dwyer on a map* when indicating areas with burials, 5-ER-831—a point reaffirmed in his deposition (which our brief accurately quoted), 3-ER-424, and never contradicted. Lastly, the Government says Plaintiffs didn't assert RFRA until "2016." Resp.15-16. But the magistrate addressed their RFRA claim in *2011*, noting "their claim fits squarely within the RFRA…as the parties concur." D.Or.ECF 122 at 14-17.

Government "substantially burdens" religious exercise when it makes it significantly more costly or difficult. This can be done by threatening sanctions or loss of benefits (such as a fine for possessing eagle feathers), or by making the exercise impossible (such as by confiscating the feathers). *Cf. McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 472 (5th Cir. 2014). When government makes religious exercise impossible, it "easily" qualifies as a substantial burden. *Yellowbear v. Lampert*, 741 F.3d 48, 55-56 (10th Cir. 2014) (Gorsuch, J.).

The Government's efforts to evade this rule contradict RFRA's text, precedent, and common sense.

1. Text. The "ordinary, contemporary, common meaning" of "'substantial burden'" is "a 'significantly great' restriction or onus on 'any exercise of religion.'" *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034-35 (9th Cir. 2004). Destroying the sacred site obviously qualifies, because it makes Plaintiffs' religious practices impossible—which the Government doesn't dispute.

Instead, the Government tries to redefine "substantial burden." It says "the substantial-burden inquiry examines what the government is doing *to the plaintiff,*" not plaintiff's religious exercise. Resp.35. And it says "no matter how serious its impact on an individual's religious exercise," "government action does not impose a substantial burden" unless it involves

"compulsion or punishment." Resp.29. This distorts RFRA in two respects. First, it changes the object of the burden from plaintiff's "religious exercise" to "the plaintiff" himself. This contravenes RFRA's text, which asks whether Government has substantially burdened *not* the *plaintiff* but "a person's *exercise of religion*." 42 U.S.C. §2000bb-1(a) (emphasis added). Second, it artificially limits the universe of burden-causing actions to only two types: "compulsion or punishment." But RFRA's text includes no such limit. Instead, RFRA "applies to *all Federal law,* and *the implementation of that law*"—whether or not it involves compulsion or punishment. 42 U.S.C. §2000bb-3(a) (emphasis added).

Thus, the Government substantially burdens a prisoner's exercise of religion by not just punishing him for reading the Koran, but also "damag[ing] or discard[ing]'" his Koran. *Cutter v. Wilkinson*, 544 U.S. 709, 716 n.5 (2005). And Government substantially burdens a Native American's religious exercise by not just fining her for trespassing at a site, but also destroying the site.

2. Precedent. The Government also has no good response to the many cases interpreting RFRA according to its plain meaning. *See Tanzin v. Tanvir*, 141 S. Ct. 486, 491 (2020) (using "plain meaning" for undefined terms in RFRA).

First, in *Tanzin*, the Supreme Court said "RFRA violations" can in-

clude "destruction of religious property" or performing an unwanted "autopsy." 141 S. Ct. at 492. The Government doesn't dispute these are substantial burdens. It simply asks the Court to ignore *Tanzin* because it didn't discuss "religious sites on public land." Resp.34. But that misses the point. *Tanzin* expressly recognizes substantial burdens that *don't* involve imposing punishment or denying benefits—and thus don't fit the Government's theory.

The Government likewise fails to distinguish the many prisoner cases finding a substantial burden when governments make religious exercise impossible. The Government says these cases involved a "specific prohibition" of religious exercise. Resp.40. Not so. Each involved a refusal to *facilitate* religious exercise *on government property*.

- *Yellowbear*, 741 F.3d at 53 (declining escort to sweat lodge);
- *Greene*, 513 F.3d at 989 (declining escort to group worship);
- *Nance*, 700 F. App'x at 632 (declining purchase of prayer oils);
- *Jones*, 915 F.3d at 1149 (declining kosher food trays);
- *Haight*, 763 F.3d at 565 (declining ceremonial foods).

Each court found a substantial burden *not* because of a *prohibition*, but because "[t]he greater restriction" of making a practice impossible "includes the lesser one" of prohibiting it—even on government property. *Id.*

Alternatively, the Government says the prisoner cases involved "coercive control." Resp.40. But so does this one. Whether managing a prison

or managing federal land, the Government has "coercive control" over the location needed for religious exercise. And when it manages the location in a way that renders religious exercise impossible, it imposes a substantial burden. Indeed, the Government's position oddly gives more protection to prisoners worshiping in high-security prisons than to Plaintiffs worshiping at an open-to-the-public sacred site.

For similar reasons, the Government cannot distinguish the many RLUIPA land-use cases holding that interference with the use of religious property is a substantial burden. Br.33-34. The Government says these cases involve the plaintiffs' "*own* property." Resp.34. But RFRA, unlike RLUIPA, doesn't ask about ownership; it asks whether the Government substantially burdened plaintiffs' "exercise of religion." Whether the government stops a church from worshiping by denying rezoning, or stops Plaintiffs from worshiping by destroying their sacred site, the effect on *religious exercise* is the same—it ends.

Finally, the Government admits it cannot distinguish *Comanche Nation v. United States*, which held that constructing a warehouse on a Native American worship site "amply demonstrate[d]" a substantial burden. No. CIV-08-849, 2008 WL 4426621, at *17 (W.D. Okla. Sept. 23, 2008). It merely says *Comanche Nation* "declined to follow" *Navajo Nation*. Resp.41. But the cases don't conflict. In *Navajo Nation*, the "sole effect"

of the government's action was on plaintiffs' "subjective spiritual experience," 535 F.3d 1058, 1063 (9th Cir. 2008), while in *Comanche Nation*, the government's action made plaintiffs' religious practices objectively, physically impossible. Br.36.

3. Navajo Nation and Lyng. Lacking a response to these cases, the Government overreads *Navajo Nation* and *Lyng*. It says the two types of burdens identified in *Navajo Nation*—threat of penalties or denial of benefits—are the entire universe of substantial burdens. Resp.29-30. And it says this case is factually indistinguishable from *Navajo Nation* and *Lyng*. *Id.* at 36-39. It is wrong on both counts.

First, *Navajo Nation* didn't purport to describe the full universe of substantial burdens. Immediately after listing the threat of penalties and denial of benefits, the Court said "[a]ny burden…*short of*" these cannot be substantial. 535 F.3d at 1069-70 (emphasis added). But that indicates that a burden *greater than* these can be. The Government offers no alternative understanding of this language.

Second, neither *Navajo Nation* nor *Lyng* involved *physical destruction* of a site, rendering religious practices *objectively impossible*. In *Navajo Nation*, the government didn't destroy the site; it allowed recycled wastewater to be sprayed on it, which plaintiffs claimed would "spiritually contaminate" the mountain and "devalue their religious exercises." *Id.* at 1063; *id.* at 1070 ("The only effect of the proposed upgrades is on

the Plaintiffs' subjective, emotional religious experience."). Likewise, in *Lyng*, the construction "was removed as far as possible from the sites used by contemporary Indians for specific spiritual activities"; the plaintiffs' claim was that the construction would "diminish the sacredness of the area" and "create distractions" while they worshiped. 485 U.S. 439, 443, 448 (1988); *id.* at 454 ("No sites where specific rituals take place were to be disturbed.").

Thus, "the sole question" in those cases was "whether a government action that affects *only subjective spiritual fulfillment* 'substantially burdens' the exercise of religion." *Navajo Nation*, 535 F.3d at 1070 n.12 (emphasis added). Here, the project didn't just diminish Plaintiffs' subjective spiritual fulfillment from worshipping at the site; it destroyed the site entirely. So *Navajo Nation* and *Lyng* are "of little help here, where the religious burden in controversy is not mere interference with 'subjective' experience, but the undisputed, complete destruction of the entire religious site." Order at 11, *Apache Stronghold v. United States*, No. 21-15295 (9th Cir. Mar. 5, 2021) (Bumatay, J., dissenting).[2]

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[2] The same is true of *Snoqualmie*. The Government says the "absence of coercion" in "physically alter[ing] a sacred waterfall" meant no substantial burden. Resp.37. But the facility in *Snoqualmie* didn't "prevent the…religious ceremonies"—unlike here. *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1213, 1215, 1219 (9th Cir. 2008).

The Government responds that *Lyng* and *Navajo Nation* "expressly *rejected* the supposed distinction" between objective and "'subjective'" effect on religious exercise. Resp.37. But remarkably, *Navajo Nation* says precisely the opposite: the *"distinction…[we are] drawing today*" is "*between objective and subjective effect on religious exercise*." 535 F.3d at 1070 n.12 (emphasis added).

This distinction matters. A secular court "cannot weigh" subjective spiritual effects for itself. *Lyng*, 485 U.S. at 449-50. So if subjective spiritual effects alone sufficed, the Court would have to accept plaintiffs' word that the spiritual effects were "substantial." But whether the Government's actions have rendered a particular religious exercise physically impossible is an objective, ascertainable fact, independent of plaintiffs' beliefs, and as easily evaluated as any other substantial burden.

Nor is the Government correct that *Lyng* rejected a subjective/objective distinction in discussing *Bowen v. Roy*, 476 U.S. 693 (1986). Resp.37-38. Rather, *Lyng* held that this distinction didn't help the plaintiffs, because they were on the wrong (subjective) side of the line. Both cases centered on claims about the spiritual "efficacy of" plaintiffs' practices, and courts cannot engage in "a factual inquiry into the degree to which…spiritual practices would become ineffectual." 485 U.S. at 450-51. That reasoning is inapposite here, where Plaintiffs' claims concern not spiritual efficacy but physical impossibility.

Finally, the Government fails to rebut the argument that even under its narrow, two-category reading of *Navajo Nation*, it *has* coerced the Plaintiffs to stop their religious exercise and *has* denied them the benefit of access to the site. Br.41-42. The Government says only a "*discriminatory* denial" of access counts. Resp.39. But RFRA doesn't require discrimination; it applies "even if the burden results" from "neutral," "general[ly] applicab[le]" laws. 42 U.S.C. §§2000bb(a), 2000bb-1(a).

4. Parade of Horribles. Lacking textual support, the Government posits a parade of horribles, claiming "'no government…could function'" if RFRA is applied textually. Resp.2, 41-43. But these are the same "slippery-slope concerns" invoked by drug-enforcement officers, *Gonzales v. O Centro*, 546 U.S. 418, 435-36 (2006), prison officials, *Cutter*, 544 U.S. at 725-26; *Holt*, 574 U.S. at 361, 369, and public-health officials, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 735 (2014)—and rejected by the Supreme Court each time. Indeed, Congress rejected these very concerns in passing RFRA. *Hobby Lobby*, 573 U.S. at 735-36.[3]

RFRA's text provides the proper limits: a "substantial burden" must be imposed by the Government, affect sincere religious exercise, and be

[3] The Government insinuates that Plaintiffs hold "vast areas" of the country sacred and would seek to block Government action everywhere. Resp.42. This is a willful misrepresentation of Plaintiffs' beliefs based on stereotypes. Plaintiffs "revere the natural world in its entirety," but also have specific sacred sites that are "accorded special reverence." Br.8 (citing sources). Their testimony amply explains why this 0.7-acre site is the locus of religious practices that cannot be replicated elsewhere.

objectively substantial. Even then, the Government still wins if it satisfies strict scrutiny. This is a crucial limit on RFRA that the Government simply ignores. But it is "the compelling interest test"—not the substantial-burden test—that Congress chose as the "workable test for striking sensible balances between religious liberty and competing prior governmental interests." *Id*. (quoting 42 U.S.C. §2000bb(a)(5) (cleaned up)).

The real untoward consequences come not from "enforc[ing] RFRA as written," *id.*, but from the Government's artificial revision of RFRA—which would immunize the Government not only when it destroys sacred sites, but also when it padlocks church doors, confiscates religious relics, or forcibly removes religious clothing. *See* Stephanie Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1332 (2021); *id.* at 1327, 1332 & nn.205-208; Jewish Coalition Br.3-7 (collecting examples). The Government says these examples involve "coercive power." Resp.35-36. But so does this case: coercive power making religious exercise impossible.

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The Government's position founders on basic logic. It admits that if it fined Plaintiffs for trespassing at the site, that would be a substantial burden. Resp.26-27, 30. Yet it indisputably imposed a *far greater burden* by destroying the site, making their religious exercise physically impossible. Thus, this is an *a fortiori* case.

III. The Government violated the Free Exercise Clause.

The Government's actions also trigger strict scrutiny under the Free Exercise Clause because they weren't neutral or generally applicable. Br.44-45. The Government used a steeper slope to protect wetlands on the same side of the highway as Plaintiffs' site, but refused to use the same measure to protect Plaintiffs' site—even though it now admits this would have "avoided" its destruction. Resp.43.

In response, the Government says free-exercise plaintiffs must show not only a lack of neutrality but also a "substantial burden." Resp.43. Not so: Laws that are not "neutral and generally applicable" may be challenged "[r]egardless of the magnitude of the burden imposed." *Fazaga v. FBI*, 965 F.3d 1015, 1058 (9th Cir. 2020). The Government simply ignores *Fazaga*. And its citation of *Torlakson* is inapposite. There, the Court held that plaintiffs "failed to allege *any* burden on their religious exercise"—not a "*substantial* burden." *Cal. Parents v. Torlakson*, 973 F.3d 1010, 1019 (9th Cir. 2020) (emphasis added). This tracks recent Supreme Court decisions omitting the "substantial burden" inquiry and treating any "burden" as enough. *Tandon v. Newsom*, 141 S. Ct. 1294 (2021) (no substantial-burden analysis); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876-77, 1881 (2021) (six mentions of "burden," zero of "substantial").

Alternatively, the Government claims a law can't lack neutrality unless it expressly "prohibit[s] religious conduct." Resp.44. But that's not the law. *Tandon* says a law lacks neutrality if it "treat[s] *any* comparable

secular activity *more favorably* than religious exercise." *Tandon*, 141 S. Ct. at 1296 (second emphasis added). This favoritism can occur without any "prohibition" at all—such as when government distributes benefits to secular recipients but not religious ones, *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021-22 (2017), or preserves property valued for environmental use, but destroys property valued for religious use.

Lastly, the Government claims this cannot be the law because it would mean "the action in *Lyng* would not be neutral and generally applicable." Resp.45. But in *Lyng*, the Court emphasized that the project chose the route "farthest removed from contemporary spiritual sites," "provided for one-half mile protective zones around all the religious sites," and "could [not] have been more solicitous" toward religious practices. 485 U.S. at 453-54. In other words, it treated religious exercise *at least as favorably* as comparable secular activity—if not more so. Here, by contrast, the Government admits that "the destruction of [Plaintiffs'] sacred site could have been avoided" by the same measures it used to protect nearby wetlands. Resp.43. That renders its action non-neutral.

IV. The Government's waiver defense fails.

The Government also violated multiple environmental and procedural statutes. Its main defense—waiver—is both waived and meritless.

A. The Government waived waiver.

The Government doesn't dispute that "waiver" "must [be] affirmatively state[d]" in an answer to be preserved. Fed. R. Civ. P. 8(c)(1). It claims only that "Plaintiffs were not prejudiced." Resp.52. Not so.

The Government pled multiple affirmative defenses in its answer and asserted them in a motion to dismiss in May 2009—but not waiver. D.Or.ECF 28. Had the Government asserted waiver then, rather than waiting *nine years*, D.Or.ECF 340, this case would have been drastically simplified long ago. This also would have affected Plaintiffs' position in years-long settlement negotiations—which Plaintiffs undertook in good faith, while the Government was hiding its key affirmative defense.

Even more importantly, had the Government timely asserted waiver, Plaintiffs could have appealed years earlier. At the latest, Plaintiffs could have appealed in June 2018, after the ruling on their RFRA claim. 1-ER-89-92; D.Or.ECF 318 (requesting final judgment); 1-ER-92 (denying final judgment given pending APA claims). Instead, Plaintiffs had to continue litigating their APA claims for almost *three more years*, until the district court finally held them waived. It was during those years that Plaintiffs Jones and Jackson died. Thus, the Government's tardy assertion of waiver not only prolonged the litigation, but also deprived Jones and Jackson of *ever* seeing its resolution. That is severe prejudice.

B. The waiver defense fails.

The waiver defense is also meritless. Recent Supreme Court precedent holds that there is no requirement to raise claims during non-adversarial administrative proceedings where, as here, "no statute or regulation obligated" it—and the Government identifies none. *Carr v. Saul*, 141 S. Ct. 1352, 1358 (2021). Nor were there any "adversarial" agency proceedings "analog[ous] to…litigation"; thus, no "judicially created issue-exhaustion requirement" is permitted. *Id.*

At most, the agency simply needed "the opportunity to rectify the violations…alleged." *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 965 (9th Cir. 2006) (cleaned up). That standard is easily met here.

First, the premise of the Government's waiver argument—that "Plaintiffs made *no* attempt to notify Defendants of their concerns during the administrative process," Resp.47 n.13—is wrong. At the *latest*, Plaintiffs sent written and verbal notice of their concerns in January 2008. The relevant statute defines the "environmental review process" to extend through the "completion of any environmental permit [or] approval…required for a project under any" non-NEPA "Federal law." 23 U.S.C. §139(a)(3)(B); *see* Br.63. Here, Plaintiffs' 2008 outreach occurred *before* issuance of the tree-cutting permit (February 28) or right-of-way (April 2)—meaning it occurred *during* the administrative process. Br.21-23.

The Government says this "misread[s]" §139, but never says how. Resp.49. And Plaintiffs' reading tracks FHWA's own reading during this

project. FHWA published its "Notice of Final Federal Agency Actions" on April 8, 2008, stating the project was now "final" under "139(*l*)(1)." 73 Fed. Reg. at 19,134. Thus, the project wasn't "final," and the "environmental review process" wasn't complete, until *after* Plaintiffs' participation. 23 U.S.C. §§139(a)(3), (*l*)(1); *cf. Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, ___F.4th____, 2021 WL 3027687, at *6-7 (9th Cir. July 19, 2021) ("final" agency action "mark[s] the consummation of the agency's decisionmaking process" (cleaned up)).

In any event, even a plaintiff's "total abstention from participation in" administrative proceedings doesn't necessarily violate any "exhaustion requirement." *NRDC v. EPA*, 824 F.2d 1146, 1150-52 (D.C. Cir. 1987). The question is simply whether the agency "had an opportunity to consider the issue." *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1023-24 (9th Cir. 2007). This standard is met if the record reflects the agency's "independent knowledge" of the issues underlying the plaintiff's claim. *'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1092 (9th Cir. 2006).

Plaintiffs have shown this knowledge claim-by-claim, Br. 65-67, and the Government hasn't refuted it. Indeed, the agencies actually "addressed" many of the issues underlying Plaintiffs' claims—meaning they necessarily had "notice" of them. *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 899-900 (9th Cir. 2002). Defendants discussed whether

Dwyer's old-growth trees required additional environmental review or justified special treatment in the widening; they acknowledged Dwyer was subject to ORCA and a protected "Special Area" under the SDMP; and they created a report about the altar, attaching Jones's 1990 statements identifying Dwyer as a "Nat[ive] Amer[ican] sacred site" visited "for years." Br.66-67. Because the Government "considered and rejected" these concerns, they "cannot" be waived. *Del. Riverkeeper Network v. U.S. Army Corps of Eng'rs*, 869 F.3d 148, 155 (3d Cir. 2017).

The record likewise reflects notice of Plaintiffs' other claims. Jones and C-FASH commented in the 1980s that widening through Dwyer would destroy old-growth trees, endanger a sacred site, and require §4(f) consideration. Br.65. The Government recognized the new project posed "the same issues as before," 7-ER-1458; indeed, it relied on the 1980s treatment of §4(f) to dismiss §4(f) concerns again, 7-ER-1416, 1426-30.

The Government's counterarguments are meritless. It says "concerns about a *different* agency action…cannot preserve concerns about *this* project." Resp.48. But administrative-waiver doctrine asks whether the Government had *notice*, not its *source*. And all these comments were in *this* project's administrative record, meaning they were by definition considered by "agency decision-makers" during their decision—which the Government doesn't dispute. *Thompson v. DOL*, 885 F.2d 551, 555 (9th Cir. 1989); *see* Br. 62, 66. The Government's sole citation says nothing on-

point, instead merely reciting a general exhaustion requirement (and finding it *met*). *NPCA v. BLM*, 606 F.3d 1058, 1065-66 (9th Cir. 2010).

Next, the Government says "Jones'[s] comments in the 1980s and '90s were inadequate to alert Defendants to Plaintiffs' current claims." Resp.48. According to the Government, "[f]rom prior comments, Defendants knew that removal of large trees from Dwyer could be controversial," but that "provided no notice" that the removal required an EIS or could constitute "timber harvest" prohibited by the SDMP. *Id.* Likewise, the Government asserts Jones's "gravesite" comments "did not alert Defendants to Plaintiffs' later claims about a sacred campsite and altar." *Id.*

Each assertion is foreclosed by the record. Officials specifically contemplated whether the controversy over tree-removal in the 1980s required heightened NEPA review for the new project, 7-ER-1458-60, and whether the SDMP's designation of Dwyer "as a 'Special Area,'" where "timber harvest is not allowed," would "affect[] our ability to authorize the removal of trees on the north side of the highway," 7-ER-1416. And although Jones sometimes called the altar a grave, Resp.48, in 1990 he described Dwyer as a "sacred site," discussed a "ceremony" involving the "pile of stones" there, and identified particular practitioners who visited the site for religious purposes—all of which, again, is in *this* project's administrative record. 5-ER-966-67. Contrary to the Government's sugges-

tion, Resp.48, the archaeological investigation corroborates Plaintiffs' account of the altar's significance: it presumed the altar was man-made, found it "may be at least several hundred years (and possibly much more) old," and couldn't rule out "aboriginal" origin. 11-ER-2295.

The Government's nitpicking also distorts the controlling standard. "[C]laimant[s] need not raise an issue using precise legal formulations"; "general terms" are "enough." *Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010). Plaintiffs' comments exceed this bar; indeed, many (*e.g.,* that Dwyer is protected "parkland" because it is within "the Wildwood Recreation Site," 9-ER-1952, 1973; *compare* Br.59-61) couldn't track more precisely the legal particulars of Plaintiffs' claims.

The Government's complaints about Plaintiffs' 2008 comments are equally meritless. The Government says those "comments were too broad and vague" because they addressed multiple "heritage resources." Resp.49. But no law permits ignoring Native Americans' concerns about one site simply because they also mention others. Likewise, the Government concedes that fear of disclosing a sacred site's location is "understandable," but says Plaintiffs should have "commented privately." Resp.50-51. But Plaintiffs *did* tell Defendants where the "American Indian sites" were located—in the small, 5-acre "Dwyer Memorial Forest" abutting the highway. *E.g.*, 6-ER-1150. And even if they hadn't, the Government never squares its position with FHWA's Tribal Consultation

Guidelines, which say it is "vital" for agencies to "respect[] tribal desires to withhold specific information" regarding sites, since Native beliefs often require that "the location and even the existence of [sacred sites] not be divulged." 10-ER-2236.

The Government's position would make these respectful Guidelines a trapdoor to waiver. Indeed, the Government's theory turns waiver doctrine on its head. Waiver's purpose is to prevent administrative proceedings from becoming "a game" in which parties make "cryptic and obscure reference to matters" *ex ante* only to spring a failure-to-consider claim *ex post*. *Great Basin*, 456 F.3d at 967. Yet the Government would flip this exactly backwards, turning administrative proceedings into a game of gotcha for plaintiffs: even when the Government has *actual notice* of a concern, a claim based on that concern is waived if the plaintiff didn't attend the right meetings.

Such a rule makes little sense generally, but even less for parties like these Plaintiffs, who are elderly, culturally disadvantaged, and legally unsophisticated—unlike the repeat players in many of the Government's cases (Resp.46-47). As *amici* explain, it is particularly inappropriate to apply "rigid issue-exhaustion requirement[s]" where "communication…may be fraught with cultural barriers," and where agency procedures are supposed to accommodate "different degrees of experience in

dealing with the government." Indian Law Scholars Br. 14-16. Plaintiffs' claims aren't waived.

V. The Government violated NEPA, NHPA, FLPMA, and DTA.

On the merits, Defendants violated the relevant statutes in ten ways. Their brief all but concedes some of these violations—and rehabilitates none.

1. BLM violated **NEPA** by never performing any NEPA analysis for the tree-cutting permit and right-of-way. Br.46-47. The Government doesn't deny these actions at least required an EA, but says FHWA's EA "satisfie[d] the NEPA duties of all Defendants." Resp.55. But "an agency may not avoid its NEPA obligations by simply relying on another agency's conclusions"; it must formally "adopt" the NEPA document—which BLM didn't do. *Anacostia Watershed Soc'y v. Babbitt*, 871 F. Supp. 475, 485 (D.D.C. 1994).

2. FHWA also violated **NEPA** by preparing only an EA, not an EIS, despite the severe impact on Dwyer's old-growth trees. Br.47-49. The Government seeks "defer[ence]" for its *ipse dixit* that Dwyer's "unique" characteristics were "lichens and vascular plants," not trees. Resp.53. But there's no dispute that the Government treated Dwyer's trees as its key feature for decades, Br.47-48, even admitting in 2005 that the SDMP "designated [Dwyer] as a 'Special Area' for the protection of its botanical and scenic values *with emphasis on the older forest along the highway*."

7-ER-1416 (emphasis added). An agency must give "reasoned explanation for disregarding previous" findings; here, the Government gives none. *Organized Vill. of Kake v. USDA*, 795 F.3d 956, 969 (9th Cir. 2015).

3. The Government also violated **NEPA** by failing to consider viable alternatives—like a steeper slope or retaining wall within Dwyer. Br.49-50. The Government *admits* those alternatives were viable, but argues it didn't know enough to consider them. Resp.54. That is both factually wrong, Br.22-23, and legally mistaken; at minimum, the Government knew about Dwyer's old-growth trees, and these are the alternatives it *actually adopted* previously to preserve them, Br.49-50.

4. Next, BLM violated **NHPA** by failing to perform any Section 106 process before its "undertakings"—the tree-cutting permit and right-of-way. Br.50-51. The Government suggests neither were undertakings, Resp.56, but doesn't distinguish Plaintiffs' contrary caselaw, Br.51. The Government also says it "cooperatively produc[ed] a thorough Section 106 process." Resp.56. Yet NHPA doesn't let one agency avoid its obligations just because other agencies purportedly discharged theirs.

5. Defendants also violated **NHPA** because no federal agency consulted with any tribe before undertaking this project. Br.50-52. The Government concedes the premise, but claims ODOT consulted on its behalf under a "programmatic agreement[]" "authorize[d]" by "regulations." Resp.58. But the question isn't whether *programmatic agreements* are

authorized—it's whether *subdelegations of tribal-consultation* duties are. And although Defendants complain about Plaintiffs citing BLM's own handbook—which unambiguously forbids subdelegation, Resp.58—they never dispute that NHPA provides no "affirmative evidence of authority" for "subdelegation to an outside party," *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 565-66 (D.C. Cir. 2004)—which means it is forbidden.

6. Even if subdelegation were valid, ODOT's consultation with the Yakama violated **NHPA** as untimely. Br.53. The Government claims harmless error. Resp.58. But "the role of harmless error is constrained" in agency review "[t]o avoid gutting the APA's procedural requirements." *Cal. Wilderness Coal. v. DOE*, 631 F.3d 1072, 1090-91 (9th Cir. 2011). And the "Ninth Circuit has emphasized that the timing of required review processes can affect the outcome." *Quechan Tribe of Fort Yuma Indian Rsrv. v. DOI*, 755 F. Supp. 2d 1104, 1108 (S.D. Cal. 2010). That may have been so here, where Yakama leaders were divided.

Lacking a substantive defense, the Government claims Plaintiffs lack standing to press *any* NHPA claims. Yet the magistrate's similar recommendation was based on a misreading of *Te-Moak* that even the Government doesn't defend. Br.55. And the Government's sole authority—*La Cuna*—is nonprecedential, predates Supreme Court cases permitting individual claims based on tribal rights (*McGirt* and *Herrera*), and has been

distinguished in circumstances like those here, *see* Br.55. The Government dismisses *McGirt* and *Herrera* as involving claimants asserting "*individual* interests." Resp.57. But Plaintiffs, too, assert individual interests in religious exercise, and those interests (like Herrera's and McGirt's) are harmed by the Government's failure to respect tribal rights.

7. The Government violated Executive Order 13007 (and thus **FLPMA**) by destroying a Native American sacred site. Br.56-57. The Government doesn't dispute that Plaintiffs established "ceremonial use" of the site, and that EO 13007 requires agencies to "avoid adversely affecting" such sites. Br.56. Instead, it says Plaintiffs (1) weren't "authoritative" enough to identify the site, because they didn't represent their tribes, and (2) didn't "specifically identif[y]" the area. Resp.60-61.

Both arguments fail. The first confuses representatives of a *religion* (what the EO requires) with representatives of a *tribe*. The Government never asserts a better representative of the *religious tradition at issue* than Hereditary Chiefs and an Elder who lead and organize the relevant ceremonies. 5-ER-898, 914; *see Cree v. Flores*, 157 F.3d 762, 773 (9th Cir. 1998) ("[t]estimony…by Yakama elders").

Second, the Government complains that Plaintiffs "sought protection of the *entire*[*ty*]" of Dwyer, without specifying the sacred "area" within it. Resp.61. But the "entirety" of Dwyer is only 5 acres; the portion threatened by the project was only the "25 to 50 feet"-wide strip abutting the

highway, 6-ER-1264; and Plaintiffs specifically identified the stone altar, which the BLM archaeologist visited (twice)—making it hard to see how to pinpoint the site more precisely. Defendants' derisive reference to a "long list" (Resp.61) is mistaken; the list wasn't of other sites Plaintiffs sought to protect *then* but of sites of concern in the future. 6-ER-1150-52.

8. The Government also violated **FLPMA** by permitting "timber cutting" in Dwyer in violation of ORCA. Br.58. The Government has *no* response for why "removal of approximately 65 trees" (Resp.61) isn't "timber cutting"; it addresses only the separate phrase "timber harvest." But even if "harvest" had a nuanced meaning, the Government unambiguously engaged in "cutting"—what ORCA forbids. Defendants suggest this plain reading would raise difficulties with "hazard[s]," Resp.62, but the statute makes express exception for hazards. 5-ER-1547.

9. The tree-cutting also violated **FLPMA** by contravening the SDMP, which prohibits "timber harvest" in Dwyer. Br.58-59. The Government says the "ordinary meaning of 'harvest'" means "cutting trees to obtain 'forest products.'" Resp.62. But this would transform all "timber harvest" into "'*commercial*' timber harvest"—an activity the SDMP treated separately. Br.59. "[D]ifferent terms" should have "distinct meaning[s]." *United States v. Tydingco*, 909 F.3d 297, 303 (9th Cir. 2018).

10. Finally, the Government violated **DTA** by failing to prepare a §4(f) evaluation and minimize harm to Dwyer, which was within Wildwood, a protected recreation area. Br.59-61.

The Government concedes the omission, but argues §4(f) doesn't apply, because while *Wildwood* is a recreation area, *Dwyer* was "not used for any recreation purposes." Resp.63. But "official[] designat[ion]" alone suffices, *SPARC v. Slater*, 352 F.3d 545, 555-56 (2d Cir. 2003)—and it's undisputed that Dwyer was designated as within the "Wildwood Recreation Site." 10-ER-2223-24; *see* Br.60. In any event, the only record evidence indicates Dwyer *was* used for recreation. 9-ER-1970, 1973-75. And BLM in 2005 acknowledged plans to use Dwyer for "development of a trail"—an admittedly "recreation[al]" use. 7-ER-1416.

CONCLUSION

The Court should remand for entry of judgment for Plaintiffs.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO 9TH CIRCUIT RULE 32-1 FOR CASE NUMBER 21-35220

I certify that this brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 6,969 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 6, 2021. All participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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