IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Division
United States Department of Justice

DAVID B. GLAZER (D.C. 400966)
Natural Resources Section
Environment & Natural Resources Division
United States Department of Justice
301 Howard Street, Suite 1050
San Francisco, California 94105
TEL: (415) 744–6491
FAX: (415) 744-6476
e-mail: david.glazer@usdoj.gov

Attorneys for Federal Defendant

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

FREEDOM FROM RELIGION FOUNDATION, INC., Plaintiff, v. CHIP WEBER and UNITED STATES FOREST SERVICE, Defendants.	No. 9:12-CV-00019 DLC FEDERAL DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT Date: N/A Time: N/A Hon. Dana L. Christensen

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

Federal Defendants U.S. Forest Service ("Forest Service") and Chip Weber (collectively, the "Federal Defendants") submit this brief in support of their motion for summary judgment.[1] In accordance with Local Rule 56.1(a), a separate Statement of Undisputed Facts ("SUF") accompanies this motion. This motion further relies on the Administrative Record filed in this case, ECF No. 25,[2] as well as the accompanying Declaration of Ian Smith and Expert Report of Ian Smith.[3]

I. INTRODUCTION

In this action, Plaintiff presents a constitutional challenge under the First Amendment's Establishment Clause to a narrow and limited federal action: the renewal of a Special Use Permit originally issued nearly sixty years ago to a private organization for maintenance of a privately-owned statue of Jesus on federal land leased to a private ski resort operator. The statue has existed without controversy for nearly sixty years until Plaintiff filed its lawsuit. Federal Defendants file this motion because the facts in this case are well known to all parties and not genuinely in dispute; thus, Federal Defendants believe that this case

[1] The Court's Scheduling Order, ECF No. 31, ¶ 1, gave Plaintiff the opportunity to file a motion for summary judgment by January 4, 2013, which Plaintiff elected not to do. Nevertheless, the Court's Order allows the Federal Defendants to file a motion for summary judgment and supporting papers by January 18, 2013. *Id.*

[2] Citations to the Administrative Record are given as "X-y," where "X" refers to the topical portion of the Record and "y" refers to the document number.

[3] Mr. Smith was deposed on October 31, 2012.

is ripe for summary resolution and that there is no need for the Court to expend its resources on a time-consuming trial.

II. BACKGROUND

A. Statutory Background

The Forest Service manages the National Forests pursuant to duties and obligations established under the Forest Service Organic Act of 1897, 16 U.S.C. §§ 472–482, 551, the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528–531, and National Forest Management Act, 16 U.S.C. §§ 1600–1614. Pursuant to delegated authority, the Forest Service may permit use of the national forests for a variety of purposes. *See* 36 C.F.R. § 251.53 (listing authorities and purposes for which permits may be issued).[4] Authorized uses include distributing noncommercial printed materials; operating public sanitariums, resorts, hotels, and educational facilities; conducting archeological investigations; constructing and operating oil and natural gas pipelines; grazing; mining; road-building; recreation; constructing and maintaining reservoirs and irrigation facilities; constructing and maintaining electrical distribution and communications facilities; and constructing and operating ski areas. *Id.*

[4] The Special Use Permit challenged here was issued under the Part 251 regulations.

The National Historic Preservation Act ("NHPA"), 16 U.S.C. §§ 470–470x-6, requires the Forest Service and other federal agencies to consider the historic value of properties and cultural artifacts that may be eligible for listing on the National Register of Historic Places ("NHRP"). *See Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 581 (9th Cir. 1998). NHPA obligations are chiefly procedural in nature; the NHPA is thus a "stop, look, and listen" statute. *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1097–98 (9th Cir. 2005); *Preserv. Coal., Inc. v. Pierce*, 667 F.2d 851, 859 (9th Cir. 1982). The criteria under which a property may be considered for NRHP-listing are set out at 36 C.F.R. § 60.4. In implementing the NHPA, federal agencies work with State Historic Preservation Officers.

B. Factual Background

The Forest Service issued a Special Use Permit to the Knights of Columbus in 1953, in response to their request for permission to erect a privately owned and maintained statue of Jesus Christ as a "shrine," to be located on a privately operated ski resort on the Flathead National Forest. SUF ¶ 1. The statue was erected in 1954. SUF ¶ 2. The 6-ft tall statue was originally located 400 feet beyond the upper terminus of what was then the main T-bar lift of the Resort and approximately 70 feet higher in elevation. SUF ¶ 3. The statue was thus not placed at a location on the mountain where it would mostly likely be seen. Once

the new Chair One was built in 1960, skiers had access to much higher skiing terrain on another area of the mountain. SUF ¶ 4. In 1968, a second chairlift (Chair Two) was built to replace the old T-bar lift; that lift dropped skiers off in an area above the statue. SUF ¶ 5. The statue is off to the side of the run served by Chair Two. *Id.* No hiking trails directly lead to the statue, which is located behind a copse of trees, and people ordinarily would not have occasion to see the statue in the summer unless they strayed from existing trails. *Id.* The statue is not advertised by the Resort as an attraction or feature of interest. *Id.* In 2010, prior to this litigation, the Resort installed a plaque at the base of the statue plainly indicating that the statue is a privately erected and maintained memorial, reciting that "[t]he statue was installed in 1955 and has been maintained by the Knights of Columbus from St. Matthew's ever since." SUF ¶ 21.

The Forest Service renewed the Special Use Permit for the statue in 1990 and 2000, both times for ten-year terms. SUF ¶ 6. The Knights of Columbus again sought renewal of the Special Use Permit in 2010, which the Forest Service initially denied on August 24, 2011, citing constitutional concerns.[5] SUF ¶ 7. On October 21, 2011, the Forest Service withdrew its earlier denial and issued a public

[5] The denial letter noted that "the Establishment Clause of the First Amendment to the United States Constitution prohibits the government from promoting or affiliating itself with any religious doctrine or organization." A-18, at 2.

notice soliciting comments on a formal proposal for reissuance of the Permit. SUF ¶ 8. In response to its solicitation for public comment, the Forest Service received approximately 95,000 comments from October 19 to December 8, 2011.[6] SUF ¶ 9. On January 31, 2012, after evaluating the statue's historical context and special value to the community, the Forest Service issued a new decision to reauthorize the Special Use Permit for a term of ten years. SUF ¶¶ 10, 11.

In its January 31, 2012 Decision Memo, the Forest Service noted that the statue "has been a long standing object in the community since 1953 and is important to the community for its historical heritage." SUF ¶ 11. The Cultural Resource Summary, A-07, prepared pursuant to the NHPA in connection with the Special Use Permit renewal request,[7] explained that the statue's "primary historical value is its association with the early development of the Big Mountain ski area, now Whitefish Mountain Resort. . . ." and that "[i]t is a contributing (and minor) piece of the ski hill's overall sociocultural, economic, and technological history." SUF ¶ 12. In a September 19, 2011 letter to the Forest Service, the Montana State

[6] As Plaintiff acknowledges, public support for the statue was overwhelming, including tens of thousands of supporters who had responded through a public advocacy group and a public website established by then-Representative Denny Rehberg. *See* Compl. ¶ 43.

[7] That analysis had not been completed prior to the issuance of the Forest Service's initial denial on August 24, 2011, but was completed prior to the January 31, 2012 Decision Memo reauthorizing the Special Use Permit.

Historic Preservation Officer concurred that the statue "has long been a part of the historic identity of the area" and that "it is a local land mark that skiers recognize, and it is a historic part of the resort." SUF ¶ 13.

The Forest Service's Heritage Resource Inventory Report, D-04, completed as part of the Agency's NHPA analysis on December 15, 2011,[8] further explains the significance of the statue as an object of potential historical significance under the NHPA. The Report describes how the

> Big Mountain Ski Resort, now Whitefish Mountain Resort, has had a significant influence on the history of Whitefish[,] playing a significant role in the transition of Whitefish from a town heavily dependent on the lumber industry to a community built around tourism, skiing, and outdoor recreation.

SUF ¶ 14. The Report notes that "the ski area has changed a great deal over the years with new lifts, runs, and facilities and many of the original lifts and runs have been moved or realigned and the ski area as a whole is probably not eligible for listing in the National Register of Historic Places due to a lack of integrity." *Id.* On the other hand, while the Resort itself may have changed, the Report observes that

> [t]he statue has integrity of location, setting, materials, workmanship, feeling, and association and is a part of the early history of the ski area

[8] Like the Cultural Resource Summary, A-07, the Heritage Resource Inventory Report was not completed until after the August 2011 permit renewal denial. However the Forest Service did have the benefit of both reports prior to issuing the January 2012 Decision Memo granting the renewal request.

> and would be considered a contributing element of such a historic district. Individually, it represents a small part of the history of the ski area but since so little remains intact of that early history, the statue of Jesus has been determined eligible for listing on the National Register of Historic Places under criteria "a" — associated with events important to local history and criteria consideration "f" [i.e., "property primarily commemorative in intent if design, age, tradition, or symbolic value has invested it with its own exceptional significance"].[9]

Id.

Religious observances, when they occur, have often been held in locations other than at the statue, and the statue has not been advertised as a place of religious worship. SUF ¶ 15. Over time, the statue site has been used as a backdrop by a variety of civic and religious groups, including the Boy Scouts, church youth groups, and veterans' associations, for private affairs. SUF ¶ 16. Such events have included weddings and scatterings of ashes; some of those private observances have included prayer. *Id.* While there is anecdotal evidence that, in the past, some prayer services have been held at the statue, one pastor who conducted such services in 1999 or 2000 discontinued them because of poor attendance and bad weather. SUF ¶ 17. Two other pastors conducted services elsewhere on the mountain. *Id.*

Although the statue intermittently has been the location of some private religious devotion, it has predominantly served as a convenient rendezvous point, a

[9] The Report cites the NRHP listing criteria under 36 C.F.R. § 60.4.

site for photo opportunities, and an object of merry-making. SUF ¶ 18. Visitors have often treated the statue with an attitude of playful irreverence, adorning it with ski gear, ties, necklaces, and gloves, or "high-fiving" it as they ski by. *Id.*; *see also* Smith Report at 19 (contemporary photographs of statue). On the whole, secular uses of the statute and its environs have predominated over religious uses. SUF ¶ 18. The statue has long been part of the fiber of the Big Mountain Resort, as a matter of "historic," not religious identity. SUF ¶ 19. And despite the fact that the statue has stood in its present location since 1954 (that is, for all but the first seven years of the Resort's life), no one has complained about it until the present litigation. SUF ¶ 20.

C. Standard of Review

1. Standard for Granting Summary Judgment

Under Rule 56 of the Federal Rules of Civil Procedure, a court shall grant a motion for summary judgment when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). The moving party bears the initial burden of identifying the elements of the claim or defense and evidence that it believes demonstrates the absence of an issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986). Where the moving party has the burden at trial, "that party must support its motion with credible evidence . . . that would

entitle it to a directed verdict if not controverted at trial." *Celotex*, 477 U.S. at 331. The burden then shifts to the non-moving party "and requires that party . . . to produce evidentiary materials that demonstrate the existence of a 'genuine issue' for trial[.]" *Id.*; *Anderson*, 477 U.S. at 256–57.

2. Review of agency action

The United States, together with its agencies and its employees, may not be sued in the absence of a waiver of sovereign immunity. *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994); *Loeffler v. Frank*, 486 U.S. 549, 554 (1988); *United States v. Testan*, 424 U.S. 392, 399 (1976). Because only Congress can waive the federal government's sovereign immunity, a suit against the United States or its agencies or employees acting in their official capacities may proceed only in accordance with federal statute and under such conditions as Congress may impose. *Testan*, 424 U.S. at 399; *United States v. Sherwood*, 312 U.S. 584, 586–88 (1941).[10] Section 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, waives federal sovereign immunity for certain claims seeking nonmonetary relief and challenging final agency action.[11] Under section 706 of the APA, the

[10] Sovereign immunity, absent a waiver, bars equitable claims as well as monetary claims against the government. *Beller v. Middendorf*, 632 F.2d 788, 796 (9th Cir. 1980) ("Unless sovereign immunity has been waived or does not apply, it bars equitable as well as legal remedies against the United States"), *overruled on other grounds*, *Witt v. Dep't of the Air Force*, 527 F.3d 806 (9th Cir. 2008).

[11] Plaintiff relies on the APA as the applicable waiver of sovereign immunity. (Footnote continued)

court may set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "contrary to constitutional right, power, privilege, or immunity[.]" 5 U.S.C. § 706(2)(A), (B).

3. Review under the Establishment Clause

As stated by the Ninth Circuit, the traditional test used to determine whether a government action violates the Establishment Clause is the one set forth in *Lemon v. Kurtzman,* 403 U.S. 602 (1971). Under the *Lemon* test, to be constitutional, the government action must "(1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not foster an excessive government entanglement with religion." *Barnes-Wallace v. City of San Diego*, __ F.3d __, Nos. 04-55732, 04-56167, 2012 WL 6621341, at *11 (Dec. 20, 2012) (quoting *Lemon*, 403 U.S. at 612–13). The Court has subsequently acknowledged that entanglement is "an aspect of the inquiry into a statute's effect," *Agostini v. Felton,* 521 U.S. 203, 233 (1997), and therefore "fold[ed] the 'excessive entanglement' inquiry into . . . the 'effect' prong." *Card v. City of Everett*, 520 F.3d 1009, 1015 (9th Cir. 2008) (quotation omitted). That combined inquiry requires a court to examine "(i) whether governmental aid results in government indoctrination; (ii) whether recipients of the aid are defined by reference to religion; and (iii) whether the aid creates excessive government entanglement with religion." *Barnes-*

Compl., ECF No. 1, ¶ 5.

Wallace, 2012 WL 6621341, at *12 (quoting *Card*, 520 F.3d at 1015). Both the purpose and effect of the challenged government action are evaluated from the viewpoint of a "reasonable, informed observer." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 773, 780 (1995) (O'Connor, J., concurring).

In 2005, however, the Supreme Court cast doubt upon the continuing applicability of the *Lemon* test to passive monuments with religious content. In *Van Orden v. Perry*, 545 U.S. 677 (2005), a case concerning a Ten Commandments monument on the grounds of the Texas state capitol, a four-Justice plurality stated that "[w]hatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. 545 U.S. at 686. Justice Breyer, in a separate concurrence that has been recognized as the controlling opinion, likewise declined to apply the *Lemon* test, stating that there is "no test-related substitute for the exercise of legal judgment . . . ." *Id.* at 700. Justice Breyer acknowledged that the *Van Orden* display "undeniably ha[d] a religious message, invoking, indeed emphasizing, the Deity," but held that the existence of religious content "cannot conclusively resolve th[e] case." *Id.* at 700–01. Instead, he emphasized that a court must "examine how the [monument] is *used*," its context, and its history. *Id.* (emphasis in original). Justice Breyer found it "determinative" that the monument in *Van Orden* had been in place for 40 years

without legal challenge, indicating that

> few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to "engage in" any "religious practic[e]," to "compel" any "religious practic[e]," or to "work deterrence" of any "religious belief."

Id. at 702 (quoting *School Dist. of Abington Tp., PA v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring)). Again quoting from Justice Goldberg's concurrence in *Schempp*, Justice Breyer emphasized that courts must distinguish between a real threat of an establishment of religion and the "mere shadow" of such a threat, finding that with the Decalogue display at issue in *Van Orden*, "we have only the shadow." *Id.* at 704.

The Ninth Circuit has noted that *Van Orden* "establishes an 'exception' to the *Lemon* test" in certain cases involving "'longstanding plainly religious displays that convey a historical or secular message in a non-religious context[,]'" *Trunk v. City of San Diego*, 629 F.3d 1099, 1107 (quoting *Card*, 520 F.3d at 1016), but that the scope of that exception is unclear. In *Card*, which involved a Ten Commandments monument virtually identical to the one considered in *Van Orden*, the Ninth Circuit applied *Van Orden*, while in *Trunk*, which involved a large Latin cross, the Ninth Circuit declined to decide which standard applied, holding that it was immaterial since "both cases guide[d] [them] to the same result." *Trunk*, 629 F.3d at 1107.

As discussed more fully below, the statue on Big Mountain is a longstanding monument with both religious content and historical significance, whose present use is principally secular. *Van Orden*, therefore, is instructive in analyzing the situation presented in this case. At the same time, following the Ninth Circuit's guidance in *Trunk*, application of the *Lemon* test also reveals that the Forest Service did not violate the Establishment Clause in renewing the Knights of Columbus's Special Use Permit for the continued display and maintenance of the 60-year old statue. Thus, regardless of which test the court applies here, the Big Mountain Jesus statue passes constitutional muster.

III. ARGUMENT

A. Reissuance of the Special Use Permit is Constitutional Under the *Lemon* Test

Under the *Lemon* test as subsequently explained in *Agostini* and *Card*, the action challenged here is constitutional.[12]

[12] That the Knights of Columbus is a religious organization does not affect this conclusion. *See Barnes-Wallace*, 2012 WL 6621341, at *12 (acknowledging religious activities of the Boy Scouts, but finding no Establishment Clause violation); *see also Buono v. Norton*, __ U.S. __, 130 S. Ct. 1803, 1816 (2010) (privately erected cross on public land was not an attempt to obtain stamp of government endorsement of religion).

1. Reissuance of the Special Use Permit does not reflect a religious purpose on the government's part

Under the first prong of the *Lemon* test, it is clear that the government's action in renewing the Special Use Permit had a secular purpose. In renewing the Special Use Permit, the Forest Service merely allowed a private organization to continue to maintain a long-standing, historically significant, privately owned memorial on land leased to another private entity. SUF ¶¶ 1, 21. The Forest Service expressly noted that the statue "has been a long standing object in the community since 1953 and is important to the community for its historical heritage." SUF ¶ 11. Under *Lemon*, the Court evaluates the government's purpose through the eyes of a "reasonable observer," *Pinette*, 515 U.S. at 773, who "knows all of the pertinent facts and circumstances surrounding the symbol and its placement, *Buono v. Norton*, __ U.S. __, 130 S. Ct. 1803, 1819–20 (2010). A government action will fail *Lemon*'s purpose prong "[o]nly if it is motivated *wholly* by an impermissible purpose," *Am. Family Ass'n, Inc. v. City & Cnty. of San Francisco,* 277 F.3d 1114, 1121 (9th Cir. 2002) (emphasis in original). If the government's action is motivated "at least in part by [a] secular purpose," then it is constitutionally permissible. *Cholla Ready Mix v. Civish*, 382 F.3d 969, 975 (9th Cir. 2004). Moreover, in reviewing the government's purpose, the Court must be wary of second-guessing the government's motives or assuming an illicit intent. *Buono*, 130 S. Ct. at 1816–18 (Kennedy, J., for the plurality).

Here, it is abundantly clear that the Forest Service's decision to renew the Special Use Permit was not "motivated wholly" (or motivated at all) by an impermissible purpose; rather, the government's action was motivated by an entirely secular purpose, as set forth in the Agency's January 31, 2012 Decision Memo.

The fact that the Knights of Columbus chose to erect a statue of Jesus on land leased from the Forest Service by the Resort operator and on purely secular terms does not convert the Knights of Columbus's purpose into an impermissible *governmental* purpose. *See Barnes-Wallace*, 2012 WL 6621341, at *12 & n.15 (city lease of property to Boy Scouts does not reflect impermissible government purpose, despite Scouts' religious activities, when city leases property to wide variety of secular organizations). And the fact that the plaque placed at the statue's base in 2010 prominently declares that the monument was privately erected and is privately maintained also argues strongly against any impermissible governmental purpose. *See Van Orden*, 545 U.S. at 681–82 (inscription identifying monument as private gift); *Card*, 520 F.3d at 1020 (display of Ten Commandments on city property does not violate Establishment Clause where, among other things, it bears an inscription identifying it as a private donation).

2. Reissuance of the Permit does not reflect government endorsement of religion

In this case, the reasonable observer would be aware that the statue is privately owned and maintained; indeed, the plaque at the base of the statue makes

that clear. SUF ¶ 21. The reasonable observer would further understand that the statue is located on a ski resort that is a private concession run by a private, for-profit entity. SUF ¶ 1. While there have been some *private* religious observances at the monument, SUF ¶¶ 16, 17, no one has alleged — not even the Plaintiff — that the Forest Service actively promotes religion at the statue site. SUF ¶ 20. In fact, no private party has sought to indoctrinate members of the public. Indeed, the statue has not been placed in a location that would be optimal if the government's purpose were religious indoctrination. SUF ¶¶ 4, 5. *Cf. Trunk*, 629 F.3d at 1103 (challenged cross "visible from miles away and towers over the thousands of drivers who travel daily on Interstate 5 below").[13] The statue has not been advertised as a place for religious worship. SUF ¶ 15. The mere fact that some private groups may have included prayer in their events[14] does not support any inference that the government has promoted any religious indoctrination or has otherwise made any endorsement of religion. *See Barnes-Wallace*, 2012 WL 6621341, at *2, *3, *12 (no indoctrination where city leased public land to Boy Scouts for

[13] By way of contrast, the current Resort president was not even aware of the statue until several months after he started work there. Smith Report at 9.

[14] For instance, there have been anecdotal reports of religious services from time to time at the statue, SUF ¶ 17; Smith Report at 10–11, 13–14, and one of the pastors interviewed by the Federal Defendants' expert historian briefly conducted services himself, until poor attendance and uncertain weather convinced him to abandon them, SUF ¶ 17; Smith Report at 14–15. Two other local pastors who were inter-
(Footnote continued)

activities including religious observances).

This is not a case where an object with religious import is placed in the classroom, where it could be seen as an effort to indoctrinate impressionable or immature minds. *See Van Orden*, 545 U.S. at 690–91 (Rehnquist, C.J., for the plurality) (distinguishing *Stone v. Graham*, 449 U.S. 39, 41–42 (1980) (striking down law requiring Decalogue displays in classrooms)); *id.* at 703 (Breyer, J., concurring) (drawing same distinction). Rather, this case involves a statue located in a privately operated resort to which people choose to come for recreation and enjoyment of the outdoors. It is therefore more like the display upheld in *Van Orden* — a purely passive monument display, located in an area to which people may choose to come or not, which therefore does not reflect any government endorsement of religion. *See* 545 U.S. at 691 (Rehnquist, C.J., for the plurality); *id.* at 703 (Breyer, J., concurring). Indeed, the statue on Big Mountain — placed behind a copse of trees in a privately operated ski resort, SUF ¶ 5 — is even more innocuous than the Decalogue display in *Van Orden*, located on the state capitol plaza, *Van Orden*, 545 U.S. at 706 (App. A, photo). And the statue is certainly not located within or near any federal buildings. *See id.* at 688–89 (Rehnquist, C.J.) (noting placement of Decalogue depictions in numerous federal buildings in the

---

viewed stated that they conducted services elsewhere on Big Mountain. *Id.* at 15.

Nation's capital, including the Supreme Court building).

3. Reissuance of the Permit does not create excessive government entanglement with religion

It is undisputed that the statue is privately maintained. SUF ¶ 1. There is consequently no basis for concluding that the statue creates *any* — much less *excessive* — government entanglement in religion. Indeed, in a case where the City of San Diego leased city-owned land to the Boy Scouts for their ongoing activities, the Ninth Circuit declined to find any such entanglement. *Barnes-Wallace*, 2012 WL 6621341, at *12. A similar conclusion is compelled in this case: a privately owned and maintained statue on privately leased land does not create excessive government entanglement with religion.

B. Reissuance of the Special Use Permit is Constitutional Under the *Van Orden* Test

Under *Van Orden*, a monument may withstand an Establishment Clause challenge, even if it has plainly religious content, if the monument's use, context, and history demonstrate that the government is not using that monument to send a religious message. 545 U.S. at 701. The monument's message need not be *completely* nonreligious. As both the plurality and concurring opinions in *Van Orden* observed, many monuments and other artifacts on the American cultural landscape partake of both the religious and the secular. 545 U.S. at 688–90 (Rehnquist, C.J., for the plurality); *id.* at 700–01 (Breyer, J., concurring). And "the

Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious." *Van Orden*, 545 U.S. at 690 (Rehnquist, C.J.); *Buono*, 130 S. Ct. at 1818 (the Establishment Clause "does not require eradication of all religious symbols in the public realm") (Kennedy, J., for plurality). Here, although the statue of Jesus on Big Mountain depicts a religious figure, the statue's use, history, and context support a broader view of its significance — one that does not violate the Establishment Clause.

1. The statue has long been used as a secular landmark

Throughout the statue's life, its secular uses have predominated over any religious uses. SUF ¶ 18. The statue has been the setting of a wide variety of events staged by civic and other groups, including the Boy Scouts, other youth groups, and veterans' associations, and for private affairs, including weddings. SUF ¶ 16. It has most frequently served as a convenient and easily identifiable rendezvous point, site for photo opportunities, and object of playful fun. SUF ¶ 18. When religious observances have been held on Big Mountain, they have often been hosted in areas other than at the statue, which has not been advertised as a place of worship. SUF ¶ 15. But even those religious observances held from time to time at the statue do not support the conclusion that display of the statue is unconstitutional. *See Card*, 520 F.3d. at 1020 (presence of clergy at dedication of Decalogue display does not undermine monument's constitutionality).

2. The statue's historical significance predominates over its religious content

The Big Mountain statue "has been a long standing object in the community since 1953 and is important to the community for its historical heritage." SUF ¶ 11. From the standpoint of individuals in the community, the statue has long been part of the fiber of the Big Mountain Resort because of its historic, not religious, identity. SUF ¶ 19. Many individuals have fond memories of the statue as a historic landmark, a meeting place, or spot marking a beautiful vista. *Id.* Moreover, the monument has been the focus of a variety of nonreligious activities. SUF ¶¶ 16,18. Thus, the statue's history bespeaks an intrinsic value quite apart from any religious content.

The statue has further secular significance to the larger community as a whole. As described in the documents in the administrative record supporting the Forest Service's NHPA analysis, the statue is associated strongly with the early days of the Resort, with the development of Big Mountain and the town of Whitefish, and with the transition of the local economy from resource extraction to tourism. SUF ¶¶ 11–14, 19. As the Forest Service understood when it decided to renew the Special Use Permit, the statue has long been part of the identity of Big Mountain and is one of the few historic remnants of the Resort's early days. SUF ¶¶ 12–14. As such, it reflects the evolution of Whitefish from a lumber town to a tourist center. SUF ¶ 14. As the Montana State Historic Preservation Officer

agreed, the statue is a "local landmark" and a "historic part of the resort," SUF ¶ 13, which qualities have nothing to do with the statue's religious content. The statue thus has secular meaning in addition to any religious import.

Because the statue has independent secular value, reissuance of the Special Use Permit is constitutionally sound. "Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause," *Van Orden*, 545 U.S. at 690 (Rehnquist, C.J.), and "the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious." *Id.* at 699 (Breyer, J.). Indeed, a contrary view would not only be "inconsistent with our national traditions, but would also tend to promote the kind of social conflict the Establishment Clause seeks to avoid." *Id.*

3. The statue's context does not promote a religious message

The context in which the statue is displayed further underscores its predominantly secular nature. No one could possibly mistake the statue's location for a religious setting. Indeed, its location is not well suited to religious observance or even contemplation, situated as it is near an active ski run during the winter and not directly served by any hiking trails during the summer. SUF ¶ 5. And while one individual recalls holding sporadic religious services at the statue in 1999 or 2000, they were discontinued precisely because the statue's location is a poor site

for religious observances: an exposed mountainside affected by uncertain and often inclement weather. SUF ¶ 17. Moreover, there are no surrounding objects that reinforce the statue's religious content, and there are no seats or other accommodations to encourage contemplation or veneration of the statue. *See Card*, 520 F.3d at 1021 (monument's poor setting for prayer or contemplation suggests a nonreligious message). It simply stands in isolation, off to the side of a ski run, a well-loved reminder for locals of the mountain's early days.

The fact that nothing in the statue's setting encourages or reinforces a religious message further underscores that the government, in allowing the continued display of this private statue on leased land, is not sending a religious message. The mere fact that a private party has placed a solitary religious symbol on government land should not be seen as "an attempt to set the *imprimatur* of the state on a particular creed." *Buono*, 130 S. Ct. at 1816; *see also Access Fund v. U.S. Dept. of Agric.*, 499 F.3d 1036, 1046 (9th Cir. 2007) ("the Establishment Clause does not bar the government from protecting an historically and culturally important site simply because the site's importance derives at least in part from its sacredness to certain groups") (quoting *Cholla Ready Mix*, 382 F.3d at 977).

4. The statue has stood unchallenged for nearly 60 years

Finally, the fact that no one (until now) has challenged the statue in the almost 60 years since it was placed on Big Mountain suggests

> more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion, to "engage in" any "religious practic[e]," to "compel" any "religious practic[e]," or to "work deterrence" of any "religious belief."

Van Orden at 702 (quoting *Schempp*, 374 U.S. at 305 (Goldberg, J., concurring)). While the Plaintiff has certainly taken issue with the statue in this litigation, the opinion of one affected person[15] that this privately owned statue, on privately leased land, represents a government establishment "of Christianity in general, and Roman Catholicism, in particular," Compl., ECF No. 1 ¶ 49, does not determine the statue's message.

Justice Breyer in *Van Orden* found "determinative" the 40-year period in which the Ten Commandments monument at issue in that case had stood unchallenged. 545 U.S. at 702. For the same reasons, the nearly six decades that the Big Mountain Jesus has stood without challenge ought to be determinative here, too. *See also Buono*, 130 S. Ct. at 1817 (cross had stood for nearly seven decades prior to challenged legislative enactment); *Card*, 520 F.3d at 1021 (no complaints surfaced until monument had been in place for 30 years); *cf. McCreary v. Am. Civil Liberties Union*, 545 U.S. 844, 851–58 (2005) (citing protracted

[15] Plaintiff has put forward only one individual who has alleged injury from unwanted exposure to the statue. *See* Declaration of William A. Cox, ECF No. 46.

litigation and attempts to defend Ten Commandments displays in county courthouses); *Trunk*, 629 F.3d at 1102–05 (reciting decades of litigation over cross atop Mt. Soledad in Southern California).

IV. CONCLUSION

The statue that Plaintiff belatedly challenges in this case has stood on Big Mountain for nearly 60 years, the object of religious import for some, but the object of simple affection and nostalgia for many more. There may be instances in which a religious symbol on public land can only be seen as government endorsement of a religious message, but this is not that case, and the "mere shadow" of an Establishment Clause threat is not enough to support a constitutional challenge. *Van Orden*, 545 U.S. at 704.

> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

Schempp, 374 U.S. at 308 (Goldberg, J., concurring), quoted in *Van Orden*, 545 U.S. at 704 (Breyer, J., concurring).

For these sound reasons, the Federal Defendants respectfully urge the Court to grant their motion for summary judgment.

Respectfully submitted,

DATED: January 18, 2013

IGNACIA S. MORENO
Assistant Attorney General
Environment & Natural Resources Division

/s/*David B. Glazer*
DAVID B. GLAZER
Natural Resources Section
Environment & Natural Resources Division
United States Department of Justice
301 Howard Street, Suite 1050
San Francisco, California
Tel: (415) 744-6491
Fax: (415) 744-6476
E-mail: David.Glazer@usdoj.gov

Attorneys for Federal Defendants

OF COUNSEL
Alan J. Campbell
Office of General Counsel
U.S. Department of Agriculture

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(d)(2)(E)

I hereby certify that the foregoing document was prepared with Microsoft Word using Times New Roman 14-point proportionally spaced font. The document contains 6,049 words, including headings, quotations, and footnotes, but excluding the caption pages, tables, this Certificate of Compliance, the Certificate of Service, and signature blocks. That word count was given by the word-count feature of the Microsoft Word program with which this document was created.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 18, 2013

/s/*David B. Glazer*
David B. Glazer

CERTIFICATE OF SERVICE

I, David B. Glazer, hereby certify that I have caused the foregoing to be served upon counsel of record through the Court's electronic service system.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 18, 2013

/s/*David B. Glazer*
David B. Glazer