

No. 02-8009

**IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

WYOMING SAWMILLS INCORPORATED, a Wyoming corporation,
Plaintiff-Appellant,

v.

UNITED STATES FOREST SERVICE; and
ANN M. VENEMAN, Secretary, U.S. Department of Agriculture;
DALE N. BOSWORTH, Chief, U.S. Forest Service; **RICK D. CABLES**,
Regional Forester, Region II, U.S. Forest Service; and **BILL BASS**,
Supervisor, Bighorn National Forest, all in their official capacities,
Defendants-Appellees,

and

**MEDICINE WHEEL COALITION ON SACRED SITES OF NORTH
AMERICA**,
Defendant-Intervenor.

On Appeal from the U.S. District Court for the District of Wyoming,
Civil Action No. 99-CV-0031-J, The Honorable Alan B. Johnson.

**BRIEF OF *AMICI CURIAE*
OF THE BECKET FUND FOR RELIGIOUS LIBERTY
AND VARIOUS CHRISTIAN, JEWISH AND MUSLIM ORGANIZATIONS
IN SUPPORT OF DEFENDANTS AND DEFENDANT-INTERVENOR**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici* state that none of the *amici* has a parent corporation, nor does any *amicus* issue any stock.

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INTEREST OF AMICI

The Becket Fund for Religious Liberty is a non-partisan, interfaith public-interest law firm that defends the free religious expression of all religious traditions. The Becket Fund has represented Christians, Jews, Muslims, Native Americans, Sikhs, and Buddhists in a wide variety of religious liberty cases throughout the country. The Becket Fund has appeared before this Court in a similar case, *Bear Lodge Municipal Ass'n v. Babbitt*, 175 F.3d 813 (10th Cir. 1999), the facts of which also necessitated interpretation of the Establishment Clause. In addition to *Bear Lodge*, The Becket Fund has also appeared before this Circuit in support of several other individuals and entities and their religious liberty interests. *See, e.g., Bauchman v. West High School*, 132 F.3d 542 (10th Cir. 1997); *Fleming v. Jefferson County Sch. Dist.*, 298 F.3d 918 (10th Cir. 2002).

The Bureau of Catholic Indian Missions has been the voice of the Roman Catholic Church with regard to the Indian Tribes in the United States since its founding in 1874 by Archbishop Roosevelt Bayley of Baltimore. The Bureau was officially recognized as an agency of the U.S. Roman Catholic Church in 1884 by the Third Plenary Council of the U.S. Catholic hierarchy. The Bureau raises funds for Catholic Indian ministries and is an advocate for recognition of Indian rights and respect for Indian culture before the Congress and Federal officials.

The General Conference of Seventh-day Adventists is the highest administrative level of the Seventh-day Adventist Church and represents nearly 41,000 congregations with more than nine million members worldwide. The North American Division of the General Conference administers the work of the church in the United States, Canada, and Bermuda, and represents more than 4,300 congregations in the United States with nearly 800,000 members. The Seventh-day Adventist Church strongly supports the twin concepts of free exercise of religion and the separation of church and state. The Working Policy in North America points out “that religious liberty is best achieved, guaranteed and preserved when church and government respect each other’s proper areas of activity and concern” and that “in matters where secular and religious interests overlap, government, in the best interests of both church and government, must observe strict neutrality in religious matters, neither promoting nor restricting individuals or the Church in the legitimate exercise of their rights.”

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is the senior continuing officer of the highest governing body of the Presbyterian Church (U.S.A.). The Presbyterian Church (U.S.A.) is a national Christian denomination with approximately 11,500 congregations organized into 173 Presbyteries under the jurisdiction of 16 Synods. The General Assembly does not claim to speak for

all Presbyterians, nor are its deliverance and policy statements binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all of the denomination's members. Since the end of the Second World War, Presbyterian General Assemblies have consistently taken progressive positions on issues affecting Native Americans. An area of abiding concern for Presbyterians is that Native Americans have full freedom to practice their religion. Most recently the 200th General Assembly (1988) directed:

That the PC(U.S.A.), as a matter of policy, sign on as amicus curiae to briefs that argue for the protection of First Amendment rights to practice land theologies, and that the PC(U.S.A.) join with other churches, civil liberties organizations, and traditional Indian people in an effort to bring to national awareness the gross violations of the First Amendment rights of traditional Indian People.

(PC[USA]), 1985,564.

The Union of Orthodox Jewish Congregations of America ("U.O.J.C.A."), founded in 1898, is the largest Orthodox Jewish umbrella organization in the United States. Through its Institute for Public Affairs, the U.O.J.C.A. researches and advocates the legal and public policy positions promoted by the traditional

Jewish community. The U.O.J.C.A regularly files or joins in friend of the court briefs in cases that impact upon religious freedom in federal and state courts of all levels. In this instance, the U.O.J.C.A. and its constituency have a strong interest in ensuring that the principle of accommodating religious practices enshrined in our Constitution's First Amendment is protected and upheld.

The Baptist Joint Committee on Public Affairs is composed of representatives from various national cooperating Baptist conventions and conferences in the United States. It deals exclusively with issues pertaining to religious liberty and church-state separation and believes that vigorous enforcement of both the Establishment Clause and Free Exercise Clause is essential to religious liberty for all Americans. The Baptist Joint Committee's supporting bodies include: Alliance of Baptists; American Baptist Churches in the U.S.A.; Baptist General Conference; Cooperative Baptist Fellowship; National Baptist Convention of America; National Baptist Convention, U.S.A., Inc.; National Missionary Baptist Convention; North American Baptist Conference; Progressive National Baptist Convention, Inc.; Religious Liberty Council; Seventh Day Baptist General Conference; and Southern Baptists through various state conventions and churches. Because of the congregational autonomy of individual

Baptist churches, the Baptist Joint Committee does not purport to speak for all Baptists.

The Council on American Islamic Relations (CAIR) is a non-profit, grassroots membership organization dedicated to correcting stereotypes about Islam and Muslims and defending the civil liberties of American Muslims. CAIR seeks to empower the Muslim community in America through political and social activism. CAIR believes that First Amendment protections against discrimination on the basis of religious belief and practice are fundamental freedoms guaranteed by the Bill of Rights. CAIR recognizes that discrimination on the basis of religious observance and activities, or against any religious group, may lead to discrimination against all religions. CAIR has frequently defended the rights of non-Muslims to practice their religious and civil rights.

INTRODUCTION

The Medicine Wheel National Landmark is an archaeological and historical structure constructed hundreds or thousands of years ago on top of Medicine Wheel Mountain in the Bighorn National Forest. It remains a site of religious and cultural importance to the various Native American tribes in the region, who have gathered there for religious and other purposes for centuries. Due to the site's unique history, it is also visited extensively by non-Native Americans. Pursuant to its stewardship of the Bighorn National Forest, the Forest Service has formulated a Historic Preservation Plan ("HPP") to preserve the Medicine Wheel landmark and other valuable historic sites in the vicinity and make them accessible to both Native Americans who regard the sites as a sacred part of their culture and to the many interested visitors who travel to the mountain each year.

Plaintiff challenges the HPP on the basis that its accommodation for religious exercise of Native American faiths violates the Establishment Clause. For the reasons set forth below, this claim must be rejected. The HPP falls squarely within "the best of our traditions," *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952), of accommodating religious exercise. Indeed, the Supreme Court has consistently found "ample room for accommodation of religion under the Establishment Clause." *Corporation of Presiding Bishops v. Amos*, 483 U.S. 327,

338 (1987). The HPP is merely another example of a carefully crafted, constitutional exercise of the government's powers to accommodate religion by removing burdens to its practice while simultaneously accomplishing a variety of secular goals. In the alternative, the Court need not even reach the merits of the Establishment Clause claim because the Plaintiff lacks standing to challenge the accommodation.

ARGUMENT

I. THE HPP IS AN EXAMPLE OF ACCOMMODATION OF PRIVATE RELIGIOUS PRACTICE FOR WHICH THE SUPREME COURT HAS SAID THERE IS "AMPLE ROOM" UNDER THE ESTABLISHMENT CLAUSE

1. The Supreme Court Has Consistently, and Increasingly, Emphasized the Importance and Constitutional Validity of Accommodation of Religion As Permissible Under The Establishment Clause.

_____ It is well-established “that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause. . . . It is well established, too, that [t]he limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause.” *Amos*, 483 U.S. at 334-335 (internal citations and quotations omitted). Indeed, the Supreme Court has long held that when the government accommodates people's private religious practices, it "follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.” *Zorach*, 343 U.S. at 313-14. As the Court noted generally in *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984), the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. . . . Anything less would require the ‘callous indifference’ we have said was

never intended by the Establishment Clause.” *Id.* at 673.

That the federal government has substantial leeway under the Establishment Clause to “follow[] the best of our traditions” and accommodate private religious activities was made clear in *Amos*, 483 U.S. at 338, in which the Court held that “there is ample room for accommodation of religion under the Establishment Clause.” The Court stated that it “ha[d] never indicated that statutes that give special consideration to religious groups are *per se* invalid.” *Id.* To the contrary, the Court held it was a “permissible legislative purpose” to remove government imposed burdens on religious exercise. *Id.* at 335. *See also Walz v. Tax Comm'n*, 397 U.S. 664 (1970) (exemption from property tax for churches and other religious buildings from property tax proper government accommodation, even though exemption not required by Free Exercise Clause); *Larkin v. Grendel's Den*, 459 U.S. 116, 123-24 (1982) (secular purpose in regulating liquor sales in manner to protect disruption of church activities).

Three years after *Amos*, the Court clarified, and magnified, the role of the legislative and executive branches of government as accommodators of religion in *Employment Division v. Smith*, 494 U.S. 872 (1990). In *Smith*, the Court held that the Free Exercise Clause did not itself provide citizens with a religious exemption from generally applicable criminal laws. This, the Court was careful to note, did

not mean that the freedom to engage in a religious activity like sacramental peyote use was not a freedom contemplated by the Free Exercise Clause nor one which government may not protect. Rather, the Court in *Smith* rejected the notion that courts, rather than legislatures, may craft religious exemptions to generally applicable laws. The Court instructed:

Values that are protected against government interference through enshrinement in the Bill of Rights are not thereby banished from the political process. Just as a society that believes in the negative protection accorded to the press by the First Amendment is likely to enact laws that affirmatively foster the dissemination of the printed word, so also a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well.

Smith, 494 U.S. at 890. In short, the government may—and should—accommodate private religious practice.

Smith's statement regarding the importance of accommodation built not merely on the holding in *Amos* three years earlier, but also grew out of a case decided one year after *Amos*: *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). In *Lyng*, the Court held that, while the Free Exercise Clause did not require the federal government to halt a planned road and logging operations that would "have devastating effects on traditional Indian religious practices," *id.* at 453, it was free to choose to accommodate them.

The *Lyng* Court emphasized that "[t]he Government's rights to the use of its own land . . . need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents." *Id.* at 454 (emphasis added). Indeed, after *Lyng* was decided, Congress promptly moved to fulfill its constitutional role as a protector of First Amendment values by de-funding the project at issue in *Lyng* and thereby preserving the sacred land. *Department of the Interior and Related Agencies Appropriations Bill, 1989, H.R. Rep. No. 713, 100th Cong., 2d Sess. at 72 (1988)* ("prohibit[ing] the use of funds for construction of the Gasquet-Orleans (G-O) road in California, pending further review of the issue of Indian religious rights that would be significantly affected by the road construction").¹ *Lyng's* reasoning applies with equal force to the case at bar.

Plaintiff ignores *Amos* and its progeny, and the clear directions of the Supreme Court regarding accommodations set forth in *Smith* and *Lyng*, and misstates the holding in *Smith* and *Lyng* as prohibiting legislative and administrative accommodation of Native American religion. Such a contention

¹*See also Lee v. Weisman*, 505 U.S. 577, 628-29 (1992) (Souter, J., concurring) ("in freeing the Native American Church from federal laws forbidding peyote use, see Drug Enforcement Administration Miscellaneous Exemptions, 21 C.F.R. § 1307.31 (1991), the government conveys no endorsement of peyote rituals, the Church, or religion as such; it simply respects the centrality of peyote to the lives of certain Americans.").

would require callous indifference both to religion and to the clear language of these Supreme Court precedents.

Moreover, the dicta of *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980), that Plaintiff cites would produce a curious and unacceptable result if applied the way Plaintiff desires. *See* Pltf. Br. at 33-34. Extending this dicta to cover accommodations of religion would contravene the Supreme Court's holding in *Amos* and the Court's clear affirmation of government accommodation of private religious worship in *Lyng* and *Smith*. *Lyng* held that the government had the right to choose the manner in which to best use "what is, after all, *its* land." 435 U.S. at 453. By asking this Court to embrace the *Badoni* dicta regarding the Establishment Clause, and citing *Lyng* approvingly to support this, Plaintiff contends that the government may use its own land as it sees fit when it *hinders* private Native American religious practice as in *Lyng*, but government may not use its land as it sees fit when it *facilitates* private Native American religious practice. That is not the law. *Amos*, *Smith*, and *Lyng* make clear that accommodation of religious practice is a valid policy goal that may be weighed and balanced by the branches of government along with other policy goals.

In the instant case the Forest Service has acquired a pre-existing site of

religious practice. The religious practice is also of a site-specific nature.² If it were to prohibit such activity, or force it to be performed under disrespectful and inappropriate conditions, it would impose a substantial burden on religious exercise. It is a legitimate and entirely constitutional purpose, however, to lift a governmental burden on religious practice by allowing the practice and providing appropriate conditions for it.³ In the HPP, the Forest Service has not deprived the public of its use of the land. Rather, the Forest Service has gathered information, deliberated, and come up with a policy to accommodate religious exercise while balancing competing public uses.⁴ In doing so, it has "follow[ed] the best of our traditions." *Zorach*, 343 U.S. at 313-14.

2. Use of Government Land For Private Religious Purposes and Discouraging

² This court has taken note of the site-specific aspect of Native American religion. *Bear Lodge v. Babbitt*, 175 F.3d at 818. *See also Lyng*, 485 U.S.439, 460-461 (Brennan J, dissenting) (same).

³The provisions made to accommodate both religious and traditional cultural uses are rather slight. *See* Administrative Record ("AR") 2639-2640. For example, Native Americans who wish to use the site for religious or cultural purposes may request and if the Forest Service sees fit, be granted, privacy for their activities for a minimum of twelve days per year. Native Americans are also allowed certain consultation rights concerning how to mitigate the effect of activities allowed on the mountain.

⁴In fact, many different land uses are permitted on the mountain and land covered by the HPP. Consistent with the Forest Service's statutory obligations to manage the Forest for multiple uses, the HPP details several uses permitted in the area covered by the HPP, including an FAA radar station and five other electronics sites on Medicine Mountain itself, a small dredging operation, livestock grazing, and recreation. The HPP further notes that some of these are in fact objectionable to Native Americans who use the site, but are permitted over those objections. *See* AR 2662.

Other Uses Is Not A *Per Se* Establishment Clause Violation and Is a Common Practice.

Courts have upheld a wide variety of instances where the government has designated real property for private religious purposes, despite the fact that these designations by implication mean that other uses are excluded. The National Park Service frequently engages in such accommodations. In *O'Hair v. Andrus*, 613 F.2d 931 (D.C. Cir. 1979), the court held that there was no Establishment Clause violation in permitting the Pope to perform a mass on the National Mall in Washington, D.C., even though the Mass and a fence the Park Service erected for crowd control undoubtedly interfered with ordinary recreational uses of the mall, such as strolling, kite-flying, and bicycling. *See also* 38 C.F.R. 2.51; 2.52; 50.19; 50.52 (federal regulations for issuing permits for religious services on Park Service property).

Nor are accommodations permitting religious uses to the exclusion of other uses unique to the National Park Service. Government designation of its property as a space for private prayer has been consistently upheld. *See Van Zandt v. Thompson*, 839 F.2d 1215 (7th Cir. 1988) (upholding resolution by the Illinois House of Representative setting aside a former hearing room in the Capitol as a “prayer room”); *Hawley v. City of Cleveland*, 24 F.3d 814 (6th Cir. 1994) (leasing

space in airport for chapel “accommodates the religious needs of travelers” and a “reasonable observer would not conclude that the city endorses religion by allowing the diocese to maintain the chapel”); *Brashich v. Port Authority of New York and New Jersey*, 791 F.2d 224, 226 (2d Cir. 1980) (upholding leases for express purpose of constructing chapels at JFK airport).

Chaplain programs in the military, hospitals and prisons also involve the use of the government's real property for religious purposes. Accommodation of the religious needs of military personnel through the maintenance of military chaplain programs has been upheld against Establishment Clause challenge. *See Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985); *see also Murphy v. Derwinski*, 990 F.2d 540, 547 (10th Cir. 1993) (“Government chaplaincy programs have been upheld in the face of Establishment Clause challenges.”); *Carter v. Broadlawns Medical Center*, 857 F.2d 448 (8th Cir. 1988) (county hospital’s hiring of chaplain permissible under Establishment Clause).

The Supreme Court itself has noted in *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963), that the military chaplaincy program and its *use of government facilities* would withstand attack under the Establishment Clause, since in the military

the Government regulates the temporal and geographic environment

of individuals to a point that, unless it permits voluntary religious services to be conducted *with the use of government facilities*, military personnel would be unable to engage in the practice of their faiths.

Id. at 226 n.10 (emphasis added). *Cf. Hartmann v. Stone*, 68 F.3d 973 (6th Cir. 1995) (permitting day-care centers with religious elements on military bases would not violate the Establishment Clause). The analogy between a military chaplaincy and this case is clear: since the government owns and controls military bases and sites of spiritual significance such as Medicine Wheel, in both situations the religious practitioner would be unable to engage in their religious activity unless the government affirmatively accommodates that activity.

In all of the cases cited above, by setting aside government-owned space, such as a portion of an airport, some land on a military base, or a room in a state capitol, the government excludes others who may prefer a different use for the space. A master sergeant who decided to use a base chapel on Sunday morning for combat training exercises would undoubtedly quickly learn that the designation of the space for a chapel means that other uses are excluded. Similarly, a traveler would not be allowed to use an airport chapel to play frisbee.⁵ Accordingly, a

⁵Indeed, the same exclusion occurs whenever the government allows a temporary religious display in a public forum. *See Capital Square Rev. and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995). Once someone puts up a display, the government excludes others who might want to put up a different display, knock down the display, or deface it.

conclusion that the HPP is unconstitutional merely because in some instances it may allow for Native American religious use of government property to the exclusion of other uses would either implicitly contradict and invalidate chaplaincy and all religious accommodation on federal land, or reach the untenable position that other religions may be accommodated, but not those of Native Americans. Either conclusion would clearly contradict well-established Establishment Clause jurisprudence.⁶

II. THE HPP DOES NOT CONSTITUTE THE ESTABLISHMENT OF NATIVE AMERICAN RELIGION IN VIOLATION OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT.

1. The HPP Has Ample Secular Purpose and Does Not Endorse Religion in Violation of the Establishment Clause.

The HPP clearly passes muster under the tests used to review Establishment Clause claims. As discussed above, the government retains ample authority to accommodate religion, and the Constitution does not require that the purpose of every government-sanctioned activity be unrelated to religion. *See Wallace v.*

Jaffree, 472 U.S. 38, 64 (1985); *City of Albuquerque v. Browner*, 97 F.3d 415, 428

⁶Any conclusion that Native American religion is less deserving of accommodation is especially erroneous in view of the special relationship between the federal government and Native Americans. *Amici* join in Defendant-Intervenor's argument that accommodation of Native American religious practice is a well established permissible secular purpose of fulfilling the federal government's unique trust responsibility to Native Americans, especially given the historic background of attempts to extinguish Native American religion noted in *Bear Lodge*, 175 F.3d at 817, 818.

(10th Cir. 1996). Courts have long recognized the historical, social and cultural significance of religion in our lives and in the world, generally. *See, e.g., Lynch*, 465 U.S. at 674-679 (including six page listing of such relationships with federal activity). Similarly, courts recognize that “a variety of motives and purposes are implicated” by government activity in a pluralistic society. *Id.* at 680.

To sustain an Establishment Clause claim, a plaintiff must allege facts indicating the defendants have no “clearly secular purpose.” *See Jaffree*, 472 U.S. at 56 (conduct violates the Establishment Clause if it is "entirely motivated by a purpose to advance religion"). In the alternative, a plaintiff can allege facts showing that in spite of the existence of a legitimate secular purpose, the defendants’ “actual” purpose is to endorse or disapprove of religion. *See County of Allegheny v. ACLU*, 492 U.S. 573, 592 (1989); *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987); *Jaffree*, 472 U.S. at 56; *Lynch*, 465 U.S. at 690 (O'Connor, J. concurring). However, that inquiry into the government's purpose should be “deferential and limited.” *Jaffree*. 472 U.S. at 74 (O'Connor, J., concurring) and a court must resist attributing unconstitutional motives to the government, particularly where it can discern a plausible secular purpose. *See id.* at 74-75; *Mueller*, 463 U.S. at 394-95.

In conducting this analysis, this Court must examine the entire context in

which the Forest Service is acting to ascertain whether, giving due deference to the government's decisions, the Court can perceive *a* legitimate secular purpose. *See Jaffree*, 472 U.S. at 56. Moreover, in considering whether “the reasonable observer’ would view the [government] practice as an endorsement. The reasonable observer, much like the reasonable person of tort law, is the embodiment of a collective standard and is thus deemed aware of the history and context of the community and forum in which the display appears.” *Gaylor v. United States*, 74 F.3d 214, 217 (10th Cir. 1996) (internal citation and quotation omitted).

Of course, as discussed above, the accommodation of religion by lifting an identifiable burden upon its free exercise is one recognized legitimate secular purpose.⁷ In this case, however, the context and contents of the HPP reveals several other legitimate secular purposes, none of which would reasonably be perceived as endorsement of religion.

In particular, the Forest Service’s stewardship of the Medicine Wheel site so as to preserve its historical—including its religious historic value—and

⁷ “Under the *Lemon* analysis, it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.” *Amos*, 483 U.S. at 335. *See also Brown v. Gilmore*, 258 F.3d 265 (4th Cir. 2001).

archeological value and allow visitors to appreciate this resource it in its natural setting is a legitimate secular purpose. The Advisory Council on Historic Preservation refers to Medicine Wheel as an “irreplaceable historic property.” AR 2591. Similarly, the Wyoming State Historic Preservation Office stated:

The Medicine Wheel and the surrounding ethnographic, historic and archaeological localities comprise a set of uniquely significant cultural resources that merit the greatest possible protection under the law. The Native American traditional use areas and other sites that occupy medicine Mountain express a profound spiritual heritage, as well as anthropological values that are connected by the common thread of centuries of use by Native Americans. It is one of the very few historic reserves in the United States where the prehistoric past and the ethnographic present are unequivocally linked. The cultural significance of the Medicine Wheel National Historic Landmark should be commemorated by establishing boundaries that not only encompass the numerous ethnographic and archaeological sites, but portray the compelling landscape in which the Medicine Wheel is found.

AR 2593. The HPP’s goal of preserving this valuable historic site by balancing the allowed uses, while also allowing continuation of its historic uses (including religious ones) within a natural setting,⁸ is a legitimate purpose clearly apparent to the reasonable observer.

A reasonable observer would also be aware, as this Court discussed in *Bear*

⁸The viewshed, mapped by Forest Service Landscape Architect J. Gutkoski, is considered an important factor in the value of the site. Presumably the meaning of the site to the thousands of visitors, both Native and non-Native, would be significantly different if it were surrounded by clear-cut land and souvenir stands. The management direction summary clearly states that “*Activities may take place, but proper mitigation* is required to blend these activities into the landscape so intrusions do not detract from the natural setting.” AR 2634 (emphasis added).

Lodge, 175 F.3d at 817-818, of the importance of site-specific traditions and religious worship to Native American tribes. Such an observer would know that Medicine Wheel Mountain is considered to be a precious historic resource for the nation as a whole precisely because those tribes have used it for such observances for centuries. The history—including the religious history—that is preserved and celebrated there is precisely the history of that area of our country. As many courts have noted, it is not possible or necessary to attempt to purge history or culture of all its religious components. *See Lynch*, 465 U.S. at 674-78 (detailing the “unbroken history of official acknowledgment of the role of religion in American life from at least 1789”). Nor is such purging of religion from history the general practice. For example, the history of the settlement of the original thirteen colonies is taught and celebrated as including the flight from religious persecution by the Pilgrims, Quakers and several other religious groups; any attempt to hide religion in the presentation of that history would distort the nature of our government and people. A similar distortion of history would occur if the Forest Service is barred from preserving the religious nature of Medicine Wheel Mountain’s history.

The popularity of the site with all sorts of people reinforces the conclusion that preserving Medicine Wheel’s history is a legitimate secular purpose. In 1998,

despite that fact that it is remote, accessible only over dirt roads, open only five months of the year, and requires a 1 ½ mile walk up the mountain, 20,055 people visited the Medicine Wheel. Of them only 841 were Native Americans - about four percent.⁹ A reasonable observer would therefore conclude that there is something about the site which many Americans think is worth going considerably out of there way to visit and therefore worthy of protection. Moreover, a reasonable observer would understand the choice to preserve the site's historical value in its natural setting as a secular decision allowing visitors to experience the history in an authentic setting, in much the same way as the Park Service's preservation and operation of homes, gardens, and even a tavern on the several blocks around Independence Hall allows visitors to visualize and understand the context of our founding fathers. Thus, keeping the site in a relatively natural state that provides appropriate context for the many visitors to this important historic site is a legitimate, secular purpose in that it preserves what may be one of north central Wyoming's major tourist destinations.¹⁰

Similarly, the HPP's provisions for consultation concerning uses of the site

⁹ Medicine Wheel Report, 1998, Bighorn National Forest, AR 3323.

¹⁰The safety of those visitors is also a legitimate secular purpose for keeping logging trucks off the dirt road they walk along to reach the site. Nor, given the number of visitors, would a reasonable observer think, as Plaintiff urges, that the HPP is only preserving Medicine Mountain for the benefit of Native American religious practitioners.

with tribal, as well as federal, state, and local, governmental authorities advances an appropriate secular purpose. Specifically, it provides the Forest Service with relevant advice from several perspectives (not merely religious) on how to allow multiple uses of the land while also preserving this valuable historical site in a manner which reflects its religious and cultural heritage. Furthermore, the consultation with tribal authorities, far from having the purpose of endorsing religion, is one mandated by statute requiring the government to honor its unique trust obligations to Native Americans. *See* National Historic Preservation Act, 16 U.S.C. § 470a(d)(6); 42 U.S.C. § 1996; Exec. Order No. 13,007, 61 Fed. Reg. 26,671 (1996); *see also* Defendant-Intervenor’s Br., at. 30-32.¹¹

Finally, the nature of the accommodation afforded to Native American religious practitioners prevents any implication that the Forest Service endorsed some particular Native American religious belief. The HPP allows Native Americans to request privacy for the conduct of their religious observations at the Medicine Wheel site on twelve or more days a year. Because the religious observations are private, it is self-evident that there can be no perception of

¹¹This Court itself has recently recognized the importance of accommodating Native American religion. *See United States v. Hardman*, 297 F.3d 116 (10th Cir. 2002) (finding substantial burden on Native American religious exercise by government regulations limiting access to eagle feathers).

governmental endorsement of religious beliefs and practices which neither the government nor the general public even has access to observe.¹²

Plaintiff's suggestion that the HPP's use of the term "sacred site" to describe Medicine Mountain demonstrates a non-secular purpose lacks merit. A reasonable observer would not be so misled. Use of the word "sacred" accurately represents the historical fact that for centuries, Native Americans and others have understood the site to be sacred or viewed by others as sacred. The Forest Service need not distort historical understandings or facts by dropping the word "sacred" from its description of the site anymore than the Park Service need distort the common perception that cemeteries are "sacred" ground by removing the sign at Arlington National Cemetery stating "Our Nation's Most Sacred Shrine . . . Please Conduct Yourself With Dignity and Respect at All Times."¹³ Mere use of the term "sacred" does not establish a non-secular purpose, or undermine the numerous secular purposes supporting the HPP.¹⁴

¹²Moreover, the fact that Native Americans are given privacy to conduct religious observances is no different than the privacy that would be afforded to others allowed to use the Forest. For example, if Plaintiff were allowed access to log in the Forest, it could presumably exclude the public from at least some of its logging activities.

¹³*See* Appendix A. This photograph is part of the Court's record in *Bear Lodge*, specifically Defendant-Intervenor's Appendix A1, and is attached for the convenience of the Court.

¹⁴Moreover, Plaintiff's suggestion that no activities or considerations other than Native American religious ones are included in the HPP is not grounded in fact. The HPP allows for

In sum, the HPP clearly has legitimate secular motives concerning proper stewardship of this valuable historic site, and they coincide with the equally legitimate purpose of accommodating religion by preserving the site as one where Native Americans may practice their faith.

2. The HPP Does Not Constitute Government Entanglement with Religious Organizations.

The HPP allows the chosen representatives of tribal governments to consult on various aspects of the management of the Area of Consultation and allows Native Americans to request privacy for their religious activities. Mere consultation, with the government retaining final discretion over decision-making, does not give rise to entanglement. Indeed the Plan specifically reserves all final decisions to the Forest Service and limits the consulting parties to a right to meet, discuss, and raise objections on limited issues of mitigation of effects of activities in the Area of Consultation. *See* AR 2619-25.

Nonetheless, attempting to manufacture an entanglement issue, Plaintiff distorts these consultation provisions through two demonstrably false assertions.

First, it asserts that under the HPP, the Forest Service “delegated to or shared with

multiple uses, including logging for forest health, tourism, grazing, dredging and six different “electronics” sites including a radar dome, AR 2648-2699, despite the fact that many of these uses were objectionable to the Native Americans. AR 2662.

religious institutions,’ the Alliance and the Coalition, the power to determine what activities are permitted on...Medicine Mountain.” Pltf. Br., at 31 (emphasis added). This claim that the Medicine Wheel Medicine Wheel Coalition and the Medicine Wheel Alliance are tribal *religious* organizations is false. No doubt there are such authorities, but the Administrative Record makes clear that these are not such. The Coalition is a political organization authorized to represent several of the legitimate governments of federally recognized Indian tribes in the region, AR 1245-1249, which have statutory rights to be consulted just as the County government does. Asserting that it is a religious institution disregards the nature and rights of tribal government. Nor is the Alliance a religious institution. It is a Montana non-profit corporation with membership of Native Americans and other environmentalists without a common religious profession as a membership criterion. *See* AR 865-867.¹⁵

Second, Plaintiff asserts that the HPP “aids” religion “by prohibit[ing] any and all public use of Medicine Mountain that is inconsistent with its designation as a ‘sacred site’” and “has formed a permanent union . . . to ensure that no multiple uses occur on Medicine Mountain that might in the view of . . . American Indians

¹⁵Additionally, these organizations are merely two institutions among many, including the FAA, the Bighorn County Commissioners, the Advisory Council on Historic Preservation, with whom the Forest Service consults under the HPP.

‘detract from the spiritual and traditional values associated with [Medicine Mountain.]’” Pltf.’s Br., at 30. This assertion ignores the plain fact that the HPP allows numerous uses to which Native Americans objected, belying any claim that the act of consulting Native Americans somehow gave rise to some form of holy union with the Forest Service. Dredging, grazing activities, and the FAA radar dome—the most prominent feature on the Mountain—are just a few examples of the uses to which the Native Americans objected as detracting from the Medicine Wheel site, but which were allowed to continue. *See* AR 2662. The HPP notes the disapproval of various Native Americans to some permitted activities, but still allows for their existence, even over their objection. *Id.* Plaintiff’s entanglement theory, built on fictions, must be rejected.¹⁶

III. PLAINTIFF LACKS STANDING UNDER THE ESTABLISHMENT CLAUSE TO BRING THIS ACTION.

“[F]undamental and longstanding principles of judicial restraint require that courts avoid reaching constitutional questions in advance of the necessity of deciding them.” *Lyng*, 485 U.S. at 445. Accordingly, this Court carefully scrutinizes the standing of parties asserting Establishment Clause claims. *See Bear Lodge Multiple Use Association v. Babbitt*, 175 F.3d 814, 821-822 (10th Cir.

¹⁶*Amici* also note that there is simply no fair reading of the facts that would implicate any religious considerations in the postponement of the Horse Creek timber sale.

1999); *see also* *ACLU-NJ v. Township of Wall*, 246 F.3d 258 (3rd Cir. 2001).

Standing exists only if each of three elements is satisfied:

First, the plaintiff must have suffered an "injury in fact"-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Bear Lodge, 175 F.3d at 821-22 (internal citation and quotation omitted).

Plaintiff's claim fails this test because the HPP did not cause an injury in fact and its elimination would not redress the claimed injury.¹⁷

1. Plaintiff Lacks Standing to Challenge the HPP Based on the Closure of FDR 12 to Logging Traffic.

The plaintiff premises its standing on "the loss of an opportunity to bid for timber contracts." Pltf. Br., at. 22. However there is no factual basis for the claim that the HPP deprived it of any such opportunity.

First, as to logging land accessible only over FDR 12, the District Court

¹⁷ This section treats only Plaintiff's claim that it was injured by losing an opportunity to bid on logging contracts which had or in the future *might have been* offered for bid, "but for" the HPP. Plaintiff has disavowed that its standing is premised on its being offended by the religious symbolism of the Medicine Wheel and has apparently dropped its taxpayer claim to injury. Pltf. Br. at 21, 22. *Amici* leave to Defendants the task of addressing additional standing issues (*i.e.*, whether Plaintiff has a claim to procedural rights under the National Forest Management Act and the Federal Advisory Council Act).

found no evidence that this road had been used for logging at anytime in living memory. Opinion at 38 n. 19. The decision to log a particular parcel rests entirely within the Secretary of the Interior's discretion, *see* 43 U.S.C. §§ 315, 315b.

Setting aside the HPP as Plaintiff requests would not guarantee that logging could occur over that road. Thus any lost opportunity to log on land accessible by FDR 12 is speculative. *See Bear Lodge*, 175 F.3d at 821-22 (conjectural injury does not suffice to provide standing)

Second, the speculative nature of the injury is also demonstrated by the fact that the HPP does not prohibit logging. Instead, the HPP *specifically* allows lumbering *and* states as a goal that additional road access is to be provided. AR 2672-2684; AR p. 2674 The HPP further provides that the Forest Service specifically retains the right to decide whether to log the area and provides detailed plans for managing logging and fire control. *Id.*¹⁸

Third, FDR 12 was *already* closed to lumbering; the HPP merely reflects a continuation of that existing closure policy. *See* AR pp. 2643, 2644.

Finally, even if the HPP completely closed part of the land covered by the

¹⁸Indeed, the portion of the HPP describing the specific management direction for the Area provides, "Essentially, the Forest is directed by laws and policies to manage timber and vegetation resources to meet the multiple use goals and objectives outlined in the Forest Plan . . . This is accomplished by a variety of means, *the most common of which is commercial timber sales.*" AR 2674 (emphasis added).

Area of Consultation under the HPP to logging, that would not decrease the amount of timber Plaintiff could remove from the Forest. That is so because the Forest has an annual timber capacity more than three times the amount that the Forest Plan actually permits for logging. *See* Defendant-Intervenor Br. at 19. Even if the HPP did (and it does not) remove all acres within the Area of Consultation that are suitable for logging, there would still be excess logging capacity in the Forest, and the removal would not change the amount of timber the Forest Service allows to be logged in the Forest. Thus, Plaintiff is still able to remove all the timber it could have removed before the HPP went into effect and thus lacks any legally cognizable injury in fact.

In sum, Plaintiff completely lacks any Article III injury with regard to FDR

12. As such, a decision vacating the HPP would not redress any harm.

2. Plaintiff Lacks Standing to Challenge the HPP on the Grounds that It Closes FDR 11 and 14.

The HPP does not close FDR 11 and 14 to logging or any other traffic.

Instead, it is very specific in that it only requires *consultation* with certain parties concerning how to mitigate the effect of logging and other activities on the area covered by the HPP.¹⁹ Contrary to Plaintiff's assertion, the consulting parties are

¹⁹With regard to mitigation, the HPP's management directory summary states that "Activities may take place, but proper mitigation is required to blend these activities into the

not given veto power over permissible activities; the Forest Service specifically reserves the right to make final decisions and to manage the forest in accordance with its multiple use policy and statutes. AR 2629-2625.

Furthermore, the consultation obligations of the Forest Service were not even *created* by the HPP. Instead, as the HPP sets out, *see* AR 2619-2622, consultation is required by various Federal statutes, including § 106 of the National Historic Preservation Act and ensuing regulations. The consultation mechanism created by the HPP simply facilitates consultation that is already required for using the land. Thus, even in the absence of the HPP, or if this Court were to vacate the HPP, the Forest Service would still have the same obligation to consult with Native American Tribes, the Advisory Council on Historic Preservation and other government agencies concerning any use of land on Medicine Wheel. There is no redressible injury.

In sum, mere consultation, which may or may not result in any specific mitigation activity being taken, is not an injury to the Plaintiff, and even if the HPP were vacated, the consultation of which Plaintiff complains would still continue because it is required by law. Plaintiff therefore lacks standing to challenge the HPP on the basis that it requires consultation to mitigate the effects

landscape so intrusions do not detract from the natural setting.” AR 2634

of activities on FDR 11 or 14.²⁰

3. Plaintiff Lacks Standing to Challenge the Postponement of the Horse Creek Timber Sale.

In addition to the fact that only consultation as to mitigation of negative effects is required by the HPP as far as moving logs over FDR 11 and 14, there are several other Article III standing problems with Plaintiff's claim that it was unconstitutionally prevented from bidding on the Horse Creek Timber sale.

First, the sale was not cancelled, only postponed and thus there may be no final agency action to appeal. *See State of Utah v. Babbitt*, 137 F3d 1193, 1203 (10th Cir. 1998). Second, the consulting parties did not require that the sale be cancelled. They merely pointed out that the Forest Service had failed to fulfill some of its procedural obligations. The record demonstrates, and the District Court found, that the HPP was not the cause of the postponement of the Horse Creek sale. Plaintiff fails to tell the Court that once the Forest Service examined the sale, it realized there were several environmental and procedural concerns that it had ignored in offering the tract for bid and that these are considered "fatal" by the responsible officials. *See Memorandum of Medicine Wheel District Ranger to*

²⁰The statements of the Medicine Wheel District Ranger and the Forest Service also make clear that consultation is all that was involved in the initial postponement of the Horse Creek Sale. Aplt. Ap. at 534; AR 3796.

the Forest Supervisor, Aplt. Ap. 567, 569 (noting lack of an EIS, failure to address wildlife issues raised by Wyoming Game and Fish Department; failure to consider elk habitat issues; failure to do consultation mandated by the National Historic Preservation Act). Plaintiff does not have a right to have the Service engage in a sale that would violate its various environmental and procedural obligations. Because such a sale would not be lawful, there is no legally cognizable injury, no causal connection to the HPP, and no way in which the requested relief could remedy the alleged injury.

CONCLUSION

For the reasons set forth above, the District Court's judgment should be affirmed.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of November, 2002, I served two (2) true and accurate copies of the foregoing Motion for Leave to File Amicus Brief and Amicus Brief by U.S. Mail, first-class postage prepaid, addressed to the following:

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