



November 23, 2011

Project Leader Derek Milner
Tally Lake Ranger District
650 Wolfpack Way
Kalispell, MT 59901

VIA E-mail:
comments-northern-flathead-tally-lake@fs.fed.us
Fax# 406-758-5367
and U.S. Mail

Re: Public Comment in Favor of National Forest Service Keeping War
Memorial in Flathead National Forest

Dear Mr. Milner:

In response to the Forest Service's request for public comments, the Alliance Defense Fund (ADF) wishes to encourage the Forest Service to extend the special use permit for the WWII memorial located in Flathead National Forest. ADF is a legal alliance that defends the right to hear and speak the Truth through strategy, training, funding, and litigation. ADF has defended numerous memorials throughout the country, including the World Trade Center Cross Memorial and the cross memorials for highway troopers in Utah, against calls to remove these memorials. In light of its unique experiences, ADF wishes to offer its expertise and provide a clear explanation why the Forest Service can and should allow private citizens to honor the memory of the brave men and women who served and died in WWII.

FACTS

In 1953, WWII veterans joined with a local Knights of Columbus Council and requested a permit from the National Forrest Service to erect a memorial to commemorate fallen members of the Army's 10th Mountain Division. The 10th Mountain Division is a division of the United States Army now based at Fort Drum in New York. Activated in 1943, the 10th Mountain Division was one of the last divisions to enter combat during WWII. And soldiers of the 10th Mountain Division fought and gave their lives in some of the roughest terrain in Europe --- in the mountains of Italy. Because the 10th Mountain Division sacrificed so much and fought so hard in a mountainous area, it was only appropriate that the memorial here be placed in a mountainous area in Flathead National Forest.

After the veterans and the Knights of Columbus requested the permit in 1953, the National Forest Service granted that permit, and the veterans and the

Knights of Columbus erected their memorial in 1955, a statue of Jesus on a 25' by 25' plot of land. The memorial has remained on that land until present day and has served to remind others about the great sacrifices made by WWII veterans for our country. But in the face of that great sacrifice, the Freedom From Religion Foundation (FFRF) wrote a letter to the Forrest Service on May 26, 2011 and demanded that the memorial be taken down because, according to the FFRF, the memorial violated the Establishment Clause.

This conclusion is sorely mistaken. As this public comment will explain, the National Forest Service can allow the memorial to remain under the Establishment Clause, and therefore the National Forest Service should allow the memorial to remain so that private citizens can honor those who gave their lives for our freedoms and for our country.

LEGAL ANALYSIS

To analyze the validity of passive religious displays on public property, the proper standard comes from the Supreme Court's decision in *Van Orden v. Perry*, 545 U.S. 677 (2005). In *Van Orden*, a majority of the Supreme Court—the four-justice plurality and Justice Breyer's concurrence—refused to apply the Lemon/Endorsement test when analyzing a passive religious display on government land. The plurality's analysis instead considered “the nature of the [display],” “the strong role played by religion and religious traditions throughout our Nation's history,” and the Establishment Clause's core concern that “governmental intervention in religious matters [might] itself endanger religious freedom.” *Id.* at 683, 686. Along similar lines, Justice Breyer's concurrence considered the purpose for the monument, the setting of the monument, and the historic lack of complaints about the monument. *Id.* at 700-01. *See also Card v. City of Everett*, 520 F.3d 1009, 1019-21 (9th Cir. 2008) (setting forth factors from Justice Breyer's concurrence by which to analyze passive religious displays on public property).

When applied to the memorial in Flathead National Forest, these factors conclusively prove the constitutionality of this memorial. First, the memorial obviously has a historic purpose --- remembering and honoring WWII veterans and their sacrifices. Second, the setting for the monument is not religious nor does it invite religious activities. Third, the monument has stood since 1955, and no one complained for roughly 60 years. Even now, the only entity to complain is a group (as the name of the group indicates) devoted to removing all traces of religious references from our history and culture. The historic lack of complaints about the memorial proves that the memorial has a historic purpose and communicates a predominantly historic message.

But even apart from these factors, the National Forest Service should not ignore the most important factor justifying the memorial in Flathead National

Forest: this nation's long tradition of memorializing its heroes with monuments that contain religious references and symbols. Chief Justice Rehnquist himself pointed out several such examples in *Van Orden*:

The apex of the Washington Monument is inscribed "Laus Deo," which is translated to mean "Praise be to God," and multiple memorial stones in the monument contain Biblical citations. The Jefferson Memorial is engraved with three quotes from Jefferson that make God a central theme. Inscribed on the wall of the Lincoln Memorial are two . . . inscriptions [which] include . . . extensive acknowledgments of God. The first federal monument, which was accepted by the United States in honor of sailors who died in Tripoli, noted the dates of the fallen sailors as "the year of our Lord 1804. . . ."

Van Orden, 545 U.S. at 689 n.9.¹

Government use of religious symbols as memorials is perhaps most poignantly displayed in this country's national cemeteries. The United States currently maintains over one hundred and twenty-five domestic national cemeteries. Department of Veterans Affairs National Cemeteries, <http://www.cem.va.gov/cem/cems/listcem.asp> (last visited November 4, 2011). Since the end of World War I—almost ninety years—the government, upon request of the family, has engraved the Latin cross on headstones in its national cemeteries. History of Government Furnished Headstones and Markers, <http://www.cem.va.gov/cem/hist/hmhists.asp> (last visited November 4, 2011). A visit to Arlington National Cemetery reveals that the Latin cross is pervasive in the sea of white headstones. Unidentified soldiers who fell in battle are honored by Arlington's Tomb of the Unknown Soldier, which reads, "Here Rests in Honored Glory an American Soldier Known but to God."² The United States also maintains twenty-four overseas military cemeteries. American Battle Monuments Commission, <http://www.abmc.gov/home.php> (last visited November 4, 2011). Virtually all of the overseas military cemeteries are overwhelmingly dominated by a single memorial symbol—rows upon rows of white, Latin crosses. *See id.* (ABMC Video, "Fields of Honor"). These examples demonstrate that this nation enjoys a long and unbroken tradition of using religious symbols as memorials.

¹ The Liberty Bell is also inscribed with the following Bible verse, "Proclaim LIBERTY Throughout All the Land Unto All the Inhabitants Thereof (Leviticus, 25:10)." *See* Liberty Bell Center, <http://www.nps.gov/inde/liberty-bell-center.htm> (last visited November 4, 2011).

² *See* The Tomb of the Unknowns, Arlington National Cemetery, <http://www.arlingtoncemetery.mil/VisitorInformation/TombofUnknowns.aspx> (last visited November 4, 2011).

Arlington National Cemetery also contains a number of memorial crosses erected there, *e.g.*, the Argonne Cross Memorial, which is a memorial to the soldiers of the World War I American Expeditionary forces in France,³ and the Canadian Cross of Sacrifice, which honors U.S. citizens who served in the Canadian forces in the First and Second World Wars and Korean War.⁴ There are countless crosses emblazoned on the tombstones of fallen servicemen and women. Likewise, in Mendocino National Forest, there is a memorial commemorating the service of 15 firefighters who died fighting a wildfire fire in 1953. This memorial contains 15 crosses honoring those firefighters.⁵ For a full history of this memorial and defense of it, see (Amicus Brief of New Tribes Mission, attached to this public comment as Exhibit A). And on Storm King Mountain in White River National Forest, there is a memorial honoring 14 firefighters who died fighting a wildfire. This memorial contains 14 crosses honoring those firefighters. For a full history of this memorial and defense of it, see (Amicus Brief of Robert E. Mackey, attached to this public comment as Exhibit B).

In light of this long history and tradition, there can be no doubt that the memorial honoring WWII veterans in Flathead National Forest complies with constitutional requirements and with the deeply rooted practices and traditions of this nation. Indeed, were the Forest Service to remove the memorial in Flathead National Forest and adopt the logic of the FFRF, that decision would set a dangerous precedent and would endorse a logic requiring the government to remove all of the memorials mentioned above. Such an extreme result shows the absurdity of FFRF's arguments and of the FFRF's attack on the memorial in Flathead National Forest. The Forest Service should reject this absurd logic and should continue to allow the memorial in Flathead National Forest since this memorial is a constitutionally valid and desirable way to commemorate the lives and the sacrifices of our great WWII service members.⁶

³See <http://www.arlingtoncemetery.mil/VisitorInformation/MonumentMemorials/ArgonneCross.aspx> (last visited November 4, 2011).

⁴See <http://www.arlingtoncemetery.mil/VisitorInformation/MonumentMemorials/CanadianCross.aspx> (last visited November 4, 2011).

⁵ See http://www.fs.usda.gov/wps/portal/fsinternet!/ut/p/c4/04_SB8K8xLLM9MSSzPy8xBz9CP0os3gDfxMDT8MwRydLA1cj72BTQxNjAwjQL8h2VAQA9Dlhuv!!/?ss=110508&navtype=BROWSEBYSUBJECT&navid=1103600000000000&pnavid=1100000000000000&position=null&recid=25274&groupid=93711&ttype=photogallery&pname=Mendocino National Forest- Picnicking (last visited November 4, 2011).

⁶ At the very least, the Forest Service should transfer the land where the memorial is located in Flathead National Forest to private parties. See <http://rehberg.house.gov/index.cfm?sectionid=26&parentid=5§iontree=5,26&itemid=1797> (last visited November 14, 2011). That way, the Forest Service could avoid making a decision on whether to keep or remove the WWII memorial. A land

Sincerely,

A handwritten signature in black ink, appearing to read 'Jonathan Scruggs', with a large, stylized flourish extending to the right.

Jonathan Scruggs
Litigation Staff Counsel

JAS/mk
Enclosures

transfer would also allow the Forest Service to avoid any litigation against it for keeping or for removing the WWII memorial. Indeed, a land transfer would negate any Establishment Clause concerns. *See, e.g., Salazar v. Buono*, 130 S.Ct. 1803 (2010) (Roberts, C.J., concurring); (Alito, J., concurring). Finally, a land transfer would remove the Forest Service from the public spotlight on this issue and appease all of the Forest Service's constituents. For these reasons, a land transfer to private parties is an imminently reasonable choice for the Forest Service to make in this situation. ADF would encourage the Forest Service to consider taking this avenue.