**No. 21-15295**

# In the United States Court of Appeals for the Ninth Circuit

APACHE STRONGHOLD,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
Honorable Steven P. Logan
(2:21-cv-00050-PHX-SPL)

## REPLY IN SUPPORT OF EMERGENCY MOTION FOR AN INJUNCTION PENDING APPEAL UNDER CIRCUIT RULE 27-3

MICHAEL V. NIXON
101 SW Madison Street #9325
Portland, OR 97207
(503) 522-4257
*michaelvnixon@yahoo.com*

CLIFFORD LEVENSON
5119 North 19th Street, Suite K
Phoenix, AZ 85015
(602) 544-1900
*cliff449@hotmail.com*

LUKE W. GOODRICH
*Counsel of Record*
MARK L. RIENZI
DIANA M. VERM
JOSEPH C. DAVIS
CHRISTOPHER PAGLIARELLA
DANIEL D. BENSON
THE BECKET FUND FOR RELIGIOUS LIBERTY
1919 Pennsylvania Ave. NW
Suite 400
Washington, DC 20006
(202) 955-0095
*lgoodrich@becketlaw.org*

*Counsel for Plaintiff-Appellant*

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## INTRODUCTION

Apache Stronghold's motion demonstrated the need for injunctive relief based largely on the Government's own admissions—including that the transfer of Oak Flat would immediately have "an adverse impact on resources significant to the tribes," and the destruction of Oak Flat would be "immediate" and "[i]rreversible." On these agreed facts, the district court didn't dispute irreparable harm. It denied relief based solely on a misinterpretation of RFRA—turning a statute meant to provide powerful protection for religious liberty into one authorizing complete destruction of core Apache religious practices.

Unable to defend on this record, the Government tries to change it. Six hours before filing its opposition, the Government purported to "rescind" the "*final* environmental impact statement" containing key admissions on irreparable harm. And unhappy with those admissions, the Government tries to contradict them with new declarations from non-party mining executives submitted for the first time Monday night.

These last-gasp efforts to change the record are unavailing. They don't change the facts on the ground. And even with its alternative facts, the Government doesn't deny that Oak Flat can be transferred during this appeal—and may *have* to be, given the text of the NDAA; that Resolution can immediately begin exploratory drilling, road building, and other destructive activities; and that Plaintiffs' religious practices will be curtailed.

Alternatively, the Government argues that destroying Oak Flat is lawful because it can do what it wants with "its own land" (which it took from the Apaches by force). But numerous cases hold that it is a substantial burden under RFRA to make religious practices impossible—which the Government admits will occur here. And destroying Oak Flat violates the Government's trust obligations toward Plaintiffs.

Ultimately, the Government's argument boils down to, "Trust us. The transfer and destruction of Oak Flat probably won't happen imminently. And if it does, it's legal." Given the Government's history of betrayal, Plaintiffs understandably put more faith in court orders than nonbinding Government assurances. And if the Government truly has no intent to transfer Oak Flat during this appeal, then an injunction barring transfer during appeal would simply hold the Government to its word—a welcome change for the Apaches.

## ARGUMENT

### I. The Government's actions will impose irreparable harm.

The Government's own FEIS establishes irreparable harm. It says the transfer immediately harms tribal members by removing Oak Flat from federal laws guaranteeing "access." 3 FEIS 824, available at https://www.resolutionmineeis.us/documents/final-eis. Oak Flat will be "directly and permanently damaged." 1 FEIS ES-28. Old-growth trees and sacred plants will be "lost." *Id.* at ES-29. "Sacred springs would be eradicated." 2 FEIS 790. "Burials," "many prehistoric…artifacts," and

"prehistoric petroglyphs" will be demolished. 1 FEIS ES-29, 40; 3 FEIS B-16. Mitigation "cannot replace" sacred property "that would be destroyed." 3 FEIS 856. And the destruction is "***immediate***, permanent, and large in scale." *Id.* (emphasis added).

The Government scarcely contested irreparable harm below—offering only a single paragraph saying that the crater "is not expected" to destroy Oak Flat for "six years." ECF 18 at 27. And the district court didn't disagree that harm is both imminent and irreparable.

The Government now tries to flee the FEIS in several unconvincing ways. *First*, six hours before its response deadline, the Government purported to rescind the FEIS. It says this means "transfer of title is *likely* not imminent." Opp.7 (emphasis added). It doesn't say transfer *won't* occur, or even that it won't occur *during this appeal*. In fact, the Government may lack authority to delay transfer, given that Section 3003 makes no provision for rescinding the FEIS and says the Secretary "shall convey" Oak Flat within 60 days from the "date of publication." P.L.113-291 §3003(c)(10) (emphasis added). Thus, the Government's public announcement admits "the Forest Service has limited discretion related to protection of Oak Flat." https://perma.cc/RD6A-EQZZ. Only an injunction can ensure no transfer during this appeal.

*Next*, unwilling (and unable) to commit to stopping the transfer, the Government suggests that even after transfer, Plaintiffs will "have access

to Oak Flat." Opp.8. This is sophistry. What the Government and Resolution offer is not access "to Oak Flat" but "to the Oak Flat ***campground***"—a handful of developed campsites and pit toilets comprising only ***1%*** of Oak Flat (emphasis added). Even that is offered only temporarily and conditionally—to the extent "practicable," if consistent with "safety," "as determined by Resolution Copper." P.L.113-291 §3003(i)(3); Ex.1 at J-27. Plaintiffs cannot carry out their sacred practices while cut off from 99% of Oak Flat. 1 FEIS 314 ("public access would be lost to the parcel itself"); Mot.13 (map); ER.68, ER.95-97, ER.122.

*Third*, the Government says the transfer can be rescinded. Opp.10. But that is another "promise" it cannot guarantee. Rescinding a completed land transfer is an act of *judicial* discretion, "controlled by principles of equity." *Nat'l Wildlife Fed'n v. Espy,* 45 F.3d 1337, 1343 (9th Cir. 1995). Once title transfers, Resolution immediately has authority to take steps rendering Oak Flat unusable for religious worship, making future recission futile. That is what happened in *Kettle Range Conservation Group v. BLM*, where this Court declined to undo a land transfer because by the time the merits appeal was heard, the land had been "denuded" and it was too late to "unscramble the eggs." 150 F.3d 1083, 1085, 1087 (9th Cir. 1998).

So too here. This Court typically takes 15-32 months to decide appeals. In yet another new declaration filed this morning, the Government says transfer can occur "after publication" of another FEIS, within "a matter

of months." ECF 22. There is no representation that transfer won't occur during this appeal. *Id.* So absent injunction, the Government has ample time to complete the transfer during this appeal, and Resolution has every incentive to take immediate action rendering recission "impractical." *Kettle Range*, 150 F.3d at 1087. Indeed, Resolution's owner has a tragic record of intentionally destroying sacred sites—including most recently 46,000-year-old Aboriginal caves of "the highest archaeological significance in Australia." NCAI Br.14 (citing report).

*Lastly*, the Government says the final destruction of Oak Flat will not occur until "the future." Opp.9. But harms upon transfer begin immediately, because Oak Flat loses protection from key federal laws and judicial remedies. 3 FEIS 824; Ex.2 at 16. Resolution can begin drilling "new shafts" and constructing "new roads," "electrical installations," and "underground infrastructure," hindering religious practices and damaging Oak Flat. 1 FEIS 57; Ex.4 at 46. And Plaintiffs who use the 99% of Oak Flat outside of the campground are subject to immediate eviction and trespassing liability.

Ultimately, all of the Government's irreparable harm arguments are transparent efforts to evade its own FEIS, which says transfer immediately undermines "tribal access" and results in destruction that is "immediate" and "[i]rreversible." 3 FEIS 824, 856.

**II. The Government's actions violate RFRA.**

Plaintiffs are also likely to succeed under RFRA. On substantial burden, the Government admits the mine will obliterate Oak Flat. 1 FEIS ES-28. It admits it would be a substantial burden merely to fence Oak Flat and fine Plaintiffs for trespassing, making their religious practices more costly. Opp.16. *A fortiori*, it is a substantial burden to obliterate Oak Flat and make their religious practices impossible. Mot.16-18.

Remarkably, the Government ignores the many RFRA and RLUIPA cases upholding this principle. Mot.16-23. It has no answer for this Court's decisions in *Greene*, *Warsoldier*, *Nance*, or *International Church*. It pretends *Comanche Nation* doesn't exist.

Instead, it stakes everything on twisted readings of *Lyng* and *Navajo Nation*. First, it strains to characterize *Lyng* as involving physical destruction—saying "[t]he Supreme Court in *Lyng* observed that the road would cause 'serious and irreparable damage to the sacred areas.'" Opp.15. But what the Government quotes is not an "observation" from the Court, but the "draft" EIS the Forest Service had rejected. 485 U.S. 439, 442-43 (1988). The actual plan in *Lyng* "provided for one-half mile protective zones around all the religious sites," *id.* at 443, and the Supreme Court emphasized that "*[n]o sites where specific rituals take place [would] be disturbed*." *Id.* at 453-54 (emphasis added).

Unable to contort *Lyng*—and admitting that "the sacred sites were not physically destroyed" in *Navajo Nation* (Opp.15)—the Government doubles down on its stilted reading of *Navajo Nation*, arguing that a substantial burden exists only when individuals are "deprived of a government benefit" or "coerced into violating their religious beliefs." Opp.14 (citing 535 F.3d 1058, 1070 (9th Cir. 2008)). Tellingly, the Government omits the *very next sentence* of *Navajo Nation*, which says that "[a]ny burden imposed on the exercise of religion *short of* that…is not a 'substantial burden.'" 535 F.3d at 1069-70 (emphasis added). In other words, sanction or loss of benefits is the *minimum* required to show a substantial burden. But if a burden is "[*greater than*] that"—as here—it is still substantial. The Government offers no response to this. Nor does it address the absurdity of its position—that fencing Oak Flat and fining trespassers is a substantial burden, but obliterating it isn't.

Instead, the Government attacks a strawman, arguing that Plaintiffs' position means that "any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citizens"—as if Native Americans could never lose under RFRA. Opp.14. But Plaintiffs' position is narrow: complete physical destruction of a sacred site, rendering core religious practices impossible, is a substantial burden. Thankfully, complete physical destruction of sacred sites is rare. And even then, destruction is allowed when Government satisfies strict scrutiny.

***Lastly***, unable to rebut the distinction between physical destruction (this case) and subjective experience (*Lyng* and *Navajo Nation*), the Government reveals just how boundless its position is: It says it can sell off and destroy *any* sacred site on federal land, because RFRA can never apply to "government's disposition of its own property." Opp.2. That endangers *all* sacred sites on federal land—from native sites to historic mission churches to military chapels to Ebenezer Baptist Church where Dr. King preached. Stephanie Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294, 1341-42 (2021). It is also contrary to RFRA's text, which applies to "all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. §2000bb-3. Unsurprisingly, no court has ever adopted this argument, and the district court rejected it. ER.13 n.6.

Given the substantial burden here, the Government must pass strict scrutiny. But it hasn't even tried to do so, waiving the defense. Nor could it. As *amicus* notes: "The United States' copper supply is secure, with or without the Oak Flat land exchange." NCAI Br.16.

**III. The Government's actions violate the Free Exercise Clause.**

Section 3003 is not, under *Smith*, a "neutral law of general applicability." 494 U.S. 872, 879 (1990). It is targeted legislation "designed to apply only" to a "particular propert[y]," *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 92, 98 (1st Cir. 2013), and the "effect of [the] law in its real operation" is to destroy Native American religious

practices and no others, *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 535 (1993).

In response, the Government says there is no "discriminatory purpose" here because Section 3003, in its majestic equality, "treats all users of Oak Flat equally"—destroying the land for Apaches and Baptists alike. Opp.15, 17. But "[f]acial neutrality is not determinative." *Lukumi*, 508 U.S. at 534. Even if a law furthers "multiple concerns unrelated to religious animosity," it is non-neutral if "the effect of [the] law in its real operation" is to "target" "religious practices." *Id.* at 535. That's the effect here. Apache religious practices are destroyed; all others are left alone. Besides, there *is* evidence of hostility. The bill sponsor criticized "the San Carlos Apache" for "car[ing] more about some issues [*i.e.*, religion] than they do about the prospect of employment," and called for "an end to" religious "delays." *Resolution Copper: Hearing*, 112th Cong., 4 (2012).

**IV. The Government's actions violate its trust obligations.**

The transfer and destruction of Oak Flat also violates the Government's trust obligations. When a treaty violation curtails tribal members' religious practices, those members have standing to seek individual redress. Mot.25-26.

In response, the Government says neither *Herrera* nor *McGirt* involved assertion of the "rights of an absent Tribe." Opp.18. But that's wrong; no tribe was a party to either case, yet individuals asserted tribal rights in both. *See also Washington State Dep't of Licensing v. Cougar*

*Den Inc.*, 139 S.Ct. 1000, 1011 (2019) (plurality) (Tribe member's business invoked defense that treaty "reserv[ed] to the Yakama Nation"); *United States v. Winans*, 198 U.S. 371, 381 (1905) (treaty implicitly "reserved rights…to every individual Indian"). This is also consistent with *Skokomish*, which recognized that "some treaty-based rights might be cognizable" in Section 1983 lawsuits. *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 515-16 & nn.7-8 (9th Cir. 2005).

On the merits, the 1852 Treaty imposes a duty to govern land historically occupied by the Apaches in a way "conducive to [their] prosperity and happiness." ER.205. That duty is informed by both the Treaty's "liberal construction" provision, *id.*, and the rule that "treaties with the Indians must be interpreted as they would have understood them," with "any doubtful expressions…resolved in the Indians' favor." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630-31 (1970) (citing cases).

Here, that language is reasonably construed to obligate the United States to preserve core Apache religious practices on the land, just as general language in other treaties has been understood to preserve other historical rights. *See, e.g.*, *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 406 (1968) (treaty implicitly protected "right to fish and to hunt"). This satisfies the requirement of "a substantive source of law that establishes specific…duties." *United States v. Navajo Nation*, 537 U.S.

488, 506 (2003). And cases where the complained-of acts took place outside the treaty lands are inapposite. *See, e.g.*, *Gros Ventre Tribe v. United States*, 469 F.3d 801, 803 (9th Cir. 2006).

Nor has the Government's duty been terminated. The Government says the "purpose of [Section 3003]" shows an intent to terminate. Opp.21. But treaty rights cannot be terminated by implication, and Section 3003 "makes no mention of Indian treaty rights." *Herrera v. Wyoming*, 139 S.Ct. 1686, 1698 (2019). Nor is Section 3003 "irreconcilable" with protecting religious sites from destruction, *id.* at 1695, given its caveats about consulting with and minimizing impact on tribes, P.L.113-291 §3003(c)(3). Indeed, the Supreme Court has repeatedly rejected claims of abrogation based on language far "clearer" than Section 3003. *See Menominee*, 391 U.S. at 410 (statute dissolving tribe and applying state laws "to the tribe and its members in the same manner as they apply to other citizens or persons"); *McGirt v. Oklahoma*, 140 S.Ct. 2452, 2465 (2020) (statutes fragmenting reservation, abolishing tribal courts, and seizing tribal property).

## V. The other injunction factors are met.

Both the balance of equities and public interest also favor an injunction. The Government identifies no harm from preserving the status quo. The copper isn't going anywhere. And the eleventh-hour rescission of the FEIS—to "ensure the agency's compliance with federal law," Ex.6—only confirms that pausing the land transfer causes no harm and furthers the

public interest. The Government's lone remaining assertion—that destroying an ancient sacred site would "further Indian self-government," Opp.23—is perverse.

* * *

The Government doesn't dispute that it has marked Oak Flat for transfer and destruction, which will render Plaintiffs' religious exercise impossible. It doesn't dispute that the transfer *can* take place during this appeal and *will* ultimately take place absent legal intervention. Instead, it says an injunction is unnecessary because the transfer and destruction of Oak Flat is "likely to be delayed" for at least "several months." Opp.5, 8. But if that is true, then there is no reason to deny an injunction, because the Government, by its own telling, would lose nothing. If it is false, there is every reason to grant the injunction, because the Apaches would lose everything. Either way, the equities favor an injunction preserving the status quo.

That is just what the Supreme Court held in granting emergency relief to Catholics challenging COVID restrictions. *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63, 74 (2020). There was "no good reason to delay issuance of the injunctions," because if the State rescinded its restrictions, "the Court's injunctions today will impose no harm on the State"; and if State reimposed its restrictions, "then today's injunctions

will ensure that religious organizations are not subjected to the unconstitutional [harms]." *Id.* (Kavanaugh, J., concurring). Apaches deserve no less protection for their religious exercise than Catholics.

## CONCLUSION

The Court should enjoin the transfer of Oak Flat pending appeal.

Respectfully submitted,

*/s/Luke W. Goodrich*

LUKE W. GOODRICH
*Counsel of Record*
MARK L. RIENZI
DIANA M. VERM
JOSEPH C. DAVIS
CHRISTOPHER C. PAGLIARELLA
DANIEL D. BENSON
THE BECKET FUND FOR RELIGIOUS LIBERTY
1919 Pennsylvania Ave. NW
Suite 400
Washington, DC 20006
(202) 955-0095
*lgoodrich@becketlaw.org*

MICHAEL V. NIXON
101 SW Madison Street #9325
Portland, OR 97207
(503) 522-4257
*michaelvnixon@yahoo.com*

CLIFFORD LEVENSON
5119 North 19th Street
Suite K
Phoenix, AZ 85015
(602) 544-1900
*cliff449@hotmail.com*

March 3, 2021

## CERTIFICATE OF COMPLIANCE

This motion complies with the requirements of Fed. R. App. P. 27(d) and Circuit Rules 27-1(1)(d) and 32-3(2) because it has 2,779 words.

This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

*/s/ Luke W. Goodrich*
Luke W. Goodrich

## CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2021, the foregoing reply in support of emergency motion for an injunction pending appeal was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system and that a PDF copy of this document will be emailed to opposing counsel immediately after it is filed.

*/s/ Luke W. Goodrich*
Luke W. Goodrich