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)

AMICUS BRIEF OF THE NATIONAL CONGRESS OF AMERICAN INDIANS, A TRIBAL ELDER, AND OTHER FEDERAL INDIAN LAW SCHOLARS AND ORGANIZATIONS

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INTERESTS OF THE *AMICI*

Amici are the National Congress of American Indians, a Tribal Elder, other Native American cultural heritage and rights organizations, and Federal Indian Law Scholars. *Amici* submit this brief to highlight the history of the U.S. Government's seizure of Indigenous lands and scared sites, the substantial burden posed by the destruction of Oak Flat, the lack of a compelling government interest, and Rio Tinto's recent history of desecrating Indigenous sacred sites.

The National Congress of American Indians ("NCAI") is the oldest, largest, and most representative organization comprised of American Indian and Alaska Native tribal governments and their citizens. Established in 1944, NCAI serves as a forum for consensus-based policy development among its member Tribal Nations from every region of the country. Its mission is to promote better education about the rights of Tribal Nations and to improve the welfare of American Indians and Alaska Natives, including working to protect and preserve sacred spaces and areas of cultural significance located on ancestral lands.

Ramon Riley is a respected Apache elder who serves as the White

Mountain Apache Tribe's Cultural Resource Director, NAGPRA Representative, and Chair of the Cultural Advisory Board. Letters he sent to the federal government regarding Oak Flat are included in the record at Excerpts of Record for Plaintiff-Appellant Apache Stronghold, vol. 2 at 225-29 [hereinafter "ER"]. Riley has spent most of his life and career working to maintain Apache cultural knowledge and pass it down to future generations. He has spent the last two decades working to defend Oak Flat. He opposes the proposed mining project for Oak Flat, because he believes it is wrong to "destroy sacred land that made us who we are." 2-ER-226.

The members of the International Council of Thirteen Indigenous Grandmothers come together to protect the lands where Indigenous peoples live and upon which these cultures depend.

The MICA Group (Multicultural Initiative for Community Advancement) is a nonprofit organization that has worked with hundreds of Tribal Nations throughout the country on cultural revitalization and other projects.

Professor Marcia Zug teaches American Indian Law at the Univer-

sity of South Carolina School of Law. Professor Zug is a scholar who specialize in Federal Indian Law.[1]

SUMMARY OF THE ARGUMENT

Meaningful access to sacred sites is a necessary part of the religious exercise of many Indigenous peoples. But tribes have been repeatedly denied such access by the federal government, and thus repeatedly thwarted in their efforts to engage in these important religious practices. In many instances, that access has been irrevocably denied and those efforts permanently thwarted by the total destruction of Indigenous sacred sites. Indeed, the colonial, state, and federal governments of this Nation have been desecrating and destroying Native American sacred sites since before the Republic was formed. Now Chi'chil Biłdagoteel, called Oak Flat in English, is at risk of suffering the same fate, a risk the Government fully acknowledges.

[1] Amici state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person contributed money that was intended to fund preparing or submitting the brief.

An Environmental Impact Statement, rushed through by the outgoing Administration, admits that "[p]hysical . . . impacts on . . . tribal sacred sites . . . would be immediate, permanent, and large in scale." 2 U.S. Forest Serv., *Final Environmental Impact Statement: Resolution Copper Project and Land Exchange* at 789 [hereinafter "FEIS"].[2] Further, once the mining operations commence, the "cultural properties cannot be reconstructed" nor their destruction "fully mitigated," "[s]acred springs would be eradicated," and changes would "permanently affect the ability of tribal members to access . . . special interest areas for cultural and religious purposes." 3 FEIS at 856. This will constitute an "irreversible loss." *Id.* In other words, the Government acknowledges that its actions will result in the complete and irreversible physical destruction of a religious site, and that that destruction will totally prevent the religious exercise that has occurred there for centuries. Such a loss constitutes a substantial burden under the Religious Freedom Restoration Act (RFRA).

The Government's arguments to the contrary misinterpret or ig-

[2] All six volumes of the Final Environmental Impact Statement are available at https://www.resolutionmineeis.us/documents/final-eis.

nore the applicable case law, eviscerate protections for Indigenous peoples, and give disfavored treatment to Indigenous peoples' practices at sacred sites compared to other forms of religious exercise. This Court should decline the Government's invitation to set precedent regarding the substantial burden analysis that would cause further catastrophic consequences for Native peoples already facing widespread destruction of their most sacred places.

Further, the Government has not even tried to carry its burden under the compelling interest test. But in any event, even the interests that it *could* have invoked are weak, and amount to little more than a desire to generate more profits at the expense of religious exercise.

Indeed, Rio Tinto—the majority owner of Resolution Copper—has a practice of destroying sacred sites for revenue-generating activities over the objections of Indigenous peoples. The Government's claims that the Apache will have continued access to their sacred sites once Rio Tinto controls the land is ludicrous. *See* Def's Opp'n Emergency Mot. Inj. 7-9, ECF No. 18-1.

There may be difficult issues in some disputes over sacred sites on government property. But where, as here, the Government acknowledges

that its actions will result in the wholesale physical and irreversible destruction of a site integral to religious exercise, the substantial burden analysis should not be one of them. Considered alongside the lack of a compelling government interest and the assured destruction of Oak Flat once in the hands of Rio Tinto, a preliminary injunction is warranted.

ARGUMENT

I. The U.S. Government has a History of Callousness and Coercion Regarding Indigenous Sacred Sites.

For many Native peoples, they are people *of* a particular place, and their particular homelands and landscapes are inextricably tied to their identity.[3] So, too, are particular places inextricably tied to religious and cultural rites and identity. As Professor Alex Skibine and others have noted: "Native American religions are land based."[4] To deprive tribal people of access to certain sites, or to compromise the integrity of those sites, is effectively to prohibit the free exercise of their religion. There is no adequate substitute and no adequate compensation for the deprivation.

[3] Much of the material in this Section is drawn from the following article: Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294 (2021).
[4] Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 Mich. J. Race & L. 269, 270 (2012).

The religion is, for all intents and purposes, banned.

While the use of sacred sites is an integral element of worship for many Indigenous peoples, the importance of sacred sites is not unique to them. Practitioners of many and varied religious faiths escape the mundane to commune with the Divine in specific places set aside and sanctified for that purpose—Jews at the Wailing Wall in Jerusalem, Catholics at the Grotto at Lourdes, members of the Church of Jesus Christ of Latter-day Saints at the Sacred Grove in upstate New York, Muslims at the Kaaba in Mecca, and many others.

But what *is* unique to Indigenous peoples in countries such as the United States is the extent of government-created obstacles that inhibit their use of these sacred sites. These obstacles, both historic and contemporary, have resulted in significant interference with Indigenous spiritual practices related to particular sites and often operate as an effective prohibition on religious practices.

Conflicts arise regarding use of sacred sites largely because so many of these sites are located on property now claimed by the federal government. Indigenous peoples are often beholden to the Government to con-

tinue to engage in centuries-old practices and ceremonies. And the Government came to acquire much of this land—including, as Plaintiff alleged below, Oak Flat, *see* 2-ER-240-42, 256-57—by ignoring treaties or confiscating additional land. The Native inhabitants who once lived on the confiscated land, including the Apaches in the area of Oak Flat, were forced out, often violently. As Plaintiffs explain, "as settlers and miners entered the area [of Oak Flat], U.S. soldiers and civilians committed numerous massacres of Apaches, including 35 lethal attacks from 1859-1874." Appellant's Opening Br. 14. Indeed, in order to make way for mining interests one of those soldiers, General James Carleton, "ordered 'removal to a Reservation or . . . utter extermination' of the Apaches." *Id.* at 15 (quoting John R. Welch, *Earth, Wind, and Fire: Pinal Apaches, Miners, and Genocide in Central Arizona, 1859-184*, SAGE Open at 8 (2017)).

For many Indigenous peoples, such divestiture means that their most sacred sites are completely within the Government's control. And, unfortunately, the Government has not often been a faithful steward of these sacred places. At the hands of both public and private actors, graves have been despoiled, altars destroyed, and sacred artifacts catalogued for

collection, display, or sale. Nor is this callous destruction simply a troubling relic of the past. Just within the past several years, Indigenous sacred sites have been bulldozed,[5] developed for commercial interests, and even blown up at the hands of the federal government.[6] The United States has continually chosen its own profit, or the profits of private contractors, at the expense of the Native peoples—a direct violation of its duties as trustee.[7]

Chi'chil Biłdagoteel is the latest episode in this shameful saga. An area of land east of present-day Phoenix, Arizona, Oak Flat is sacred to numerous Native American peoples, including the ancestors of today's O'odham, Hopi, Zuni, Yavapai, and Apache tribes. 2-ER-227. For more

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[5] *See Slockish v. U.S. Fed. Highway Admin.*, No. 08-cv-01169, 2018 WL 2875896, at *1 (D. Or. June 11, 2018); *see also* Plaintiffs' Objections to Magistrate's Findings and Recommendations at 17-18, *Slockish*, No. 08-cv-01169 (D. Or. Apr. 22, 2020).

[6] *Native Burial Sites Blown Up for US Border Wall*, BBC News (Feb. 10, 2020), https://perma.cc/DC56-Z4DQ.

[7] *See* Barclay & Steele, *supra*, 1351-58. As a trustee, the government has a duty to exercise the highest standard of care to federally recognized Indian tribes and their resources. *Id.* The federal government "has charged itself with moral obligations of the highest responsibility and trust" in its relations with the Indian people. *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942). The existence of "a general trust relationship between the United States and the Indian people" is "undisputed." *United States v. Mitchell*, 463 U.S. 206, 225 (1983).

than 1,000 years it has been a place where Native peoples have lived, gathered, and held religious ceremonies. 2-ER-161-62. The area contains hundreds of Indigenous archaeological sites, Apache burial grounds, ancient petroglyphs, medicinal plants, and numerous sacred sites. In 1852, in an attempt to make peace after multiple violent conflicts on Apache land, Apache Chief Mangas Coloradas signed the Treaty of Santa Fe, in which the U.S. Government promised the Apaches it would "designate, settle, and adjust their territorial boundaries" and "pass and execute" laws "conducive to the prosperity and happiness of said Indians." 2-ER-207. The promised designation of boundaries never took place, but the earliest map prepared in 1899 by the Smithsonian Institution shows Oak Flat as Apache territory. 2-ER-112-13. An expert in anthropology and archaeology testified below that there is "no evidence that the United States compensated the Apache treaty rights holders for Chi'chil Biłdagoteel," and "Oak Flat is Apache land, as it has been for centuries." 2-ER-156.

As Mr. Riley and other tribal members have described, Chi'chil Biłdagoteel remains today an active site of prayer, the harvesting of sacred plants, and the conducting of religious ceremonies, and is revered as

a place where holy springs flow from the earth and where holy beings reside. 2-ER-227.

The transfer of Oak Flat to mining companies Rio Tinto and BHP Billiton was enabled by a last-minute rider to a 2014 appropriations bill, over the objections of many tribal members for whom the site is sacred. 2-ER-243. Repeated efforts over several years by a number of Senators to save Oak Flat on account of its religious significance fell short. 2-ER-243-44. In January, the outgoing Administration rushed through a Final Environmental Impact Statement[8] that acknowledges that the future mining operations will result in large underground tunnels that will eventually cave in, leaving Oak Flat to collapse into the void, and turning a centuries-old sacred site into a crater over 1,000 feet deep and two miles wide. *See* 2 FEIS at 790. Because the mine and the sacred site are almost entirely co-extensive, this crater would destroy all of Oak Flat.

[8] *Outcry as Trump officials to transfer sacred Native American land to miners*, The Guardian (Jan. 16, 2021, 4:30 PM), https://www.theguardian.com/environment/2021/jan/16/sacred-native-american-land-arizona-oak-flat.

II. The Planned and Anticipated Physical Destruction of Oak Flat, an Indigenous Sacred Site, Constitutes a Substantial Burden under RFRA.

RFRA provides that the "[g]overnment shall not substantially burden a person's exercise of religion" unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b). RFRA claims proceed in two parts. First, the Plaintiff must show that their "exercise of religion" has been "substantially burdened." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008) (en banc). Second, "the burden of persuasion shifts to the government" to satisfy strict scrutiny—i.e., to prove that burdening the Plaintiff's religious exercise is "the least restrictive means" of furthering a "compelling governmental interest." *Id.* The purpose of this framework is to provide "very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014).

The Supreme Court has long recognized that government imposes substantial burdens on religious exercise when it makes voluntary religious exercise more costly or difficult, through things like threatened

penalties or denials of benefits.[9] But courts have recognized that the substantial burden requirement is even more easily satisfied when government makes voluntary religious exercise physically impossible by taking away the choice altogether.

For example, in *Greene v. Solano County Jail*, 513 F.3d 982, 988 (9th Cir. 2008), a prison refused to allow an inmate to attend worship services with other prisoners. The Ninth Circuit noted that the prison was not merely giving the inmate a "false choice" between forgoing his religious practice or suffering prison discipline. *Id.* Instead, it was stopping his religious practice entirely. *Id.* The court had "little difficulty" concluding that "an outright ban on a particular religious exercise is a substantial burden." *Id.*; *see also Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1066-70 (9th Cir. 2011) (preventing the plaintiff from building a place of worship could constitute a substantial burden); *Warsoldier v. Woodford*, 418 F.3d 989, 996 (9th Cir. 2005) ("physically forc[ing an inmate] to cut his hair" would constitute a substantial burden); *Haight v. Thompson*, 763 F.3d 554, 560, 565 (6th Cir.

[9] *Sherbert v. Verner*, 374 U.S. 398, 399-401 (1963); *Wisconsin v. Yoder*, 406 U.S. 205, 207-08, 218 (1972); *Holt v. Hobbs*, 574 U.S. 352 (2015).

2014) ("[t]he greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice)"); *Yellowbear v. Lampert*, 741 F.3d 48, 56 (10th Cir. 2014) (Gorsuch, J.) (explaining that "it doesn't take much work to see that" making religious exercise physically impossible "easily" results in a substantial burden by removing any "degree of choice in the matter").

The physical destruction the Government anticipates at Oak Flat will likewise take away any choice Mr. Riley and other tribal members have to continue performing their religious exercise at this sacred site.[10] The destruction to occur at Oak Flat will make religious exercise for individuals like Mr. Riley and other tribal members physically impossible. As scholars have acknowledged, Native American religions are "land based," Skibine, *supra* at 270, and the Apache religion of Mr. Riley and other tribal members is no exception. In that religion, Chi'chil Biłdagoteel is land where spiritual powers are physically located, and thus land where religious ceremonies and prayers *must* take place to be effective.

[10] As Appellant correctly explains, "treaty provisions protecting tribes may be asserted in support of individual interests." *See* Appellant's Opening Br. 54-55. Not only is this argument right on the law, but it is also the proper understanding of Native rights regarding sacred places, which are both collective and individual.

"Chi'chil Biłdagoteel is a place of perpetual prayer and the location for eternal ceremonies that must take place there to benefit from and demonstrate religious obligation, responsibility, and respect for the powers at and of Chi'chil Biłdagoteel." 2-ER-227.

Some of these ceremonies were described in testimony before the court below. Perhaps most vividly, Ms. Naelyn Pike described the Sunrise Ceremony, a coming-of-age ceremony for Apache women that represents the Apache creation story. That ceremony relies on tools taken directly from the oaks of Oak Flat, and involves "direct" spiritual "connection to the land" of Chi'chil Biłdagoteel. 2-ER-069-70. That connection, and thus the continued existence of Oak Flat, is necessary for the ceremony and thus to the exercise of the Apache religion. As Ms. Pike testified, "if we don't have that connection to Nahgosan, the earth, and to Oak Flat, then we are dead inside. We can't call ourselves Apache." 2-ER-070.

But the Sunrise Ceremony is just part of the religious exercise that occurs at Chi'chil Biłdagoteel. The Apache believe that the Ga'an, spiritual beings akin to angels in other religious traditions, messengers between Usen, the Creator, and the physical world, reside at Oak Flat. 2-

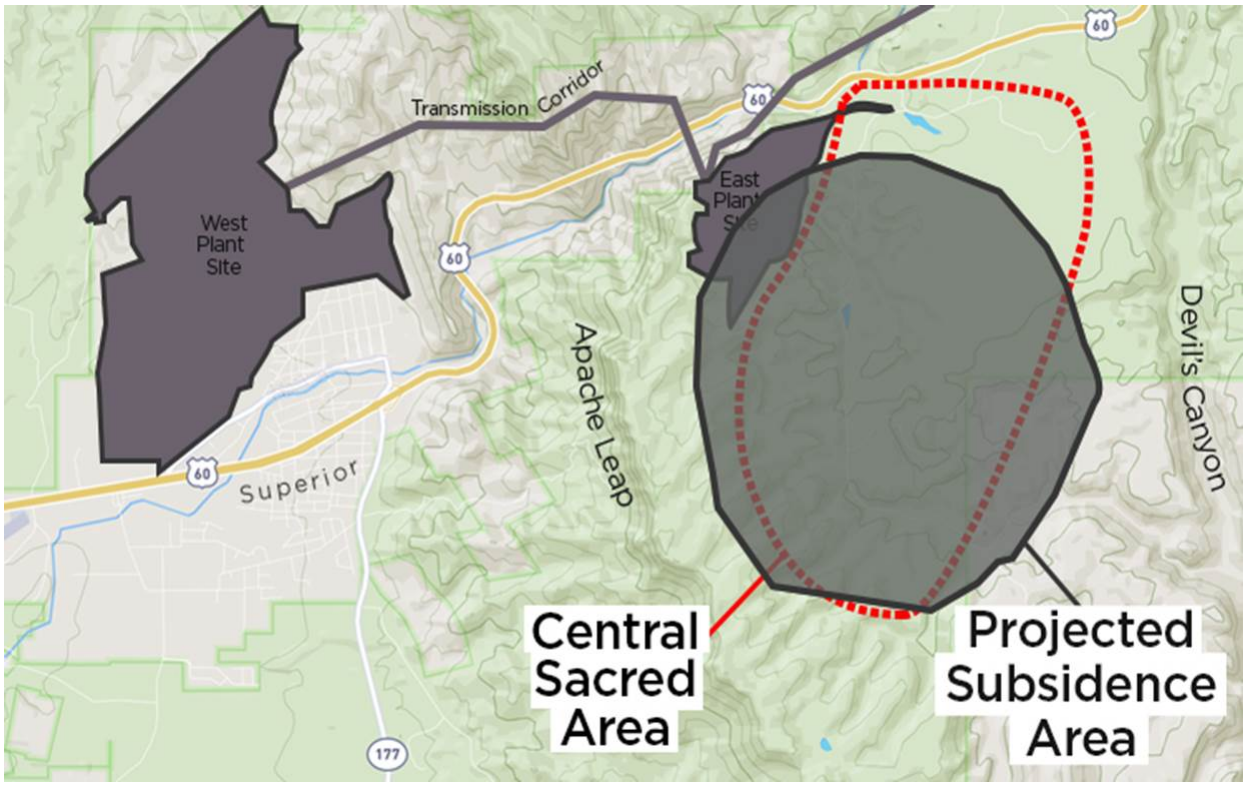
ER-077. All this renders Oak Flat a place "uniquely endowed with holiness and medicine"—from the "holy beings and powers" inscribed on cliffs and boulders, to the acorns that grow on the old-growth Emory oaks, the Apaches' "actual Trees of Life"; from sacred burial sites of Apache warriors, akin to Arlington National Cemetery, to "the sacred spring waters that flow[] from the earth with healing powers not present elsewhere"—and thus a place that "cannot be replaced" if the Apache religion is to continue. 2-ER-227-28.

These oaks and acorns, burials and springs, and holy beings—particularly the Ga'an—come from the very ground of Chi'Chil Biłdagoteel. 2-ER-077. But if the mining operations go forward as planned, that ground will be nothing but a 1,000-foot-deep, two-mile-wide hole. As the Government acknowledges, this hole will swallow the oaks and acorns, bury graves and springs, and make further religious ceremonies at this site impossible. 3 FEIS at 856. But the damage will be permanent and devastating long before the crater forms. The FEIS acknowledges that the "[p]hysical . . . impacts on . . . tribal sacred sites . . . would be immediate, permanent, and large in scale." 2 FEIS § 3.12.4.10. The FEIS continues:

> Traditional cultural properties cannot be reconstructed once disturbed, nor can they be fully mitigated. Sacred springs

> would be eradicated by subsidence or construction of the tailings storage facility, and affected by groundwater drawdown. Changes that permanently affect the ability of tribal members to access TCPs and special interest areas for cultural and religious purposes also consist of an irreversible loss of resources. For uses such as gathering traditional materials from areas that would be within the subsidence area or the tailings storage facility, the project would constitute an irreversible loss of resources.

3 FEIS at 856.



Sacred Site Map, Appellant's Opening Br. 21.

Such immediate and wholesale destruction of Oak Flat will, as the FEIS fully contemplates, make it impossible for Mr. Riley and other tribal members to conduct religious activities at Oak Flat as they have

been doing for centuries—activities that make up a necessary part of their religious exercise and can take place nowhere else. As a result, Plaintiff easily satisfies RFRA's substantial burden requirements.

The district court's substantial burden analysis misunderstands both the text of RFRA and caselaw applying it. In addition, the Government argued below that "Supreme Court precedent provides that actions government takes on its own land categorically do not constitute a 'substantial burden' on religious exercise." Def.'s Opp'n to Pl.'s Mot. for Prelim. Inj. 23. Not so.

In *Lyng* and *Navajo Nation*, the courts could have written much shorter opinions if this were the rule, merely stating: "government land, government rules." Of course, neither the Supreme Court nor the Ninth Circuit wrote such an opinion, instead taking pains to highlight the limited nature of the government interference with religious sensibilities.[11] And for good reason. The text of RFRA applies to "all . . . implementation of [federal law]"—foreclosing any blanket carve-out for federal land man-

[11] *See Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008)

agement decisions. 42 U.S.C. § 2000bb-3(a). Not surprisingly, then, several courts have held that RFRA applies to "a federal governmental decision about what to do with federal land." *Village of Bensenville v. FAA*, 457 F.3d 52, 67 (D.C. Cir. 2006). And the district court below correctly rejected this argument by the Government. *See* 1-ER-013 n.6.

In fact, it is precisely *because* the Government claims control over this land that a baseline of interference with religious exercise exists, much the same way such a baseline of interference exists in the context of prisons, the military, or even government zoning.[12] In those other arenas, the Government has recognized that absent affirmative accommodation of religious exercise, certain religious practices will be impossible. Ignoring this baseline of government interference here will result in a disparity in the law that provides lesser protection for Indigenous religious exercise regarding sacred sites.[13]

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[12] *See* Barclay & Steele, *supra*, at 1333-38.

[13] *Id.* *See also* Joel West Williams & Emily deLisle, *An "Unfilfilled, Hollow Promise":* Lyng*,* Navajo Nation*, and the Substantial Burden on Native American Religious Exercise*, Ecology L. Q. (forthcoming 2021) (manuscript at 16), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3780851 (arguing that mistaken interpretation of RFRA's substantial burden requirement "has resulted in the continued denial, rather than the intended restoration, of Native Americans' ability to engage in religious exercise requiring access to sacred places").

Unfortunately, this Court's ruling in *Navajo Nation* partakes of this flawed reasoning, ignoring the baseline of government coercion that exists in the context of sacred sites. *See* Barclay & Steele at 1320-26. But *Navajo Nation* does not control the outcome of this case since, as Plaintiff explains, no physical destruction of the sacred site occurred in that case. Appellant's Opening Br. 35-37.[14] Regardless, this Court should recognize that this precedent itself creates a double standard when it comes to evaluating government interference with religious exercise for Indigenous sacred sites.

Ultimately, the Government cannot escape a simple fact: It's transfer of Oak Flat will not merely make Plaintiffs' religious exercise costlier or more difficult or less rewarding; it will make it impossible. Such an acknowledgement on the Government's part should easily satisfy RFRA's substantial burden requirement.

[14] The transfer of ownership is also unique in this case, as the private control itself will prevent tribal members from accessing Oak Flat as they have in the past. Appellant's Opening Br. 57.

III. The Government has Not Demonstrated a Compelling Interest in the Oak Flat Land Exchange.

The Government has admitted that the Oak Flat land exchange would gravely and irreparably harm Plaintiff's religious free exercise.[15] Therefore, to satisfy RFRA, the Government must show that it has a compelling interest in carrying out the Oak Flat land exchange, and that its actions are the least restrictive means of accomplishing that interest. 42 U.S.C. §2000bb-1(b). The Supreme Court has emphasized that since "the Government bears the burden of proof on the ultimate question of [the challenged law's] constitutionality, [Plaintiff] . . . must be deemed likely to prevail unless" the Government has fulfilled this evidentiary burden. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 429 (2006) Here, the Government has not even tried.

Under RFRA, the Supreme Court has emphasized that strict scrutiny requires courts to "look[] beyond broadly formulated interests" and instead "scrutinize[] the asserted harm of granting specific exemptions to *particular* religious claimants." *Gonzales* 546 U.S. at 431 (emphasis

[15] *See*, *e.g.*, 2 FEIS at 789 ("Physical . . . impacts on . . . tribal sacred sites . . . would be immediate, permanent, and large in scale.").

added). In *Wisconsin v. Yoder*, 406 U.S. 205 (1972), for example, the Supreme Court did not analyze the Government's interest in compulsory public education generally. It assessed the Government's interest in making *the particular* Amish children before the Court attend *one more year* of public education instead of trade-oriented education. *Id.* at 214-15.

Here, as in *Gonzales* and *Yoder*, the compelling interest analysis must not merely focus on the benefits of obtaining copper in general. Rather, it must ask whether the Government has a compelling interest in obtaining the copper at *this particular* location, and whether it can accomplish that interest in another way.

At the time of the Oak Flat bill's passage, Sen. John McCain referred to the Resolution Copper project as a matter of "national security."[16] It should be noted, however, that the mined copper will belong to Resolution, a foreign company that will be free to sell it to whomever they choose, and who have a track record of callous destruction of significant

[16] Rebekah L. Sanders, *Congress Approves Colossal Arizona Copper Mine*, The Republic, Dec. 12th, 2014 (available at https://www.azcentral.com/story/news/arizona/politics/2014/12/12/congress-clears-arizona-copper-mine/20327087/).

Indigenous sites. *See infra* Part IV. Additionally, the United States has other alternatives to obtain additional copper. According to the United States Geological Survey, since 1950 there have been, on average, forty years of copper reserves available worldwide.[17] And even as demand for copper has grown, available copper reserves have grown proportionally.[18] Within the vicinity of Oak Flat, there are many sites where copper could be mined.

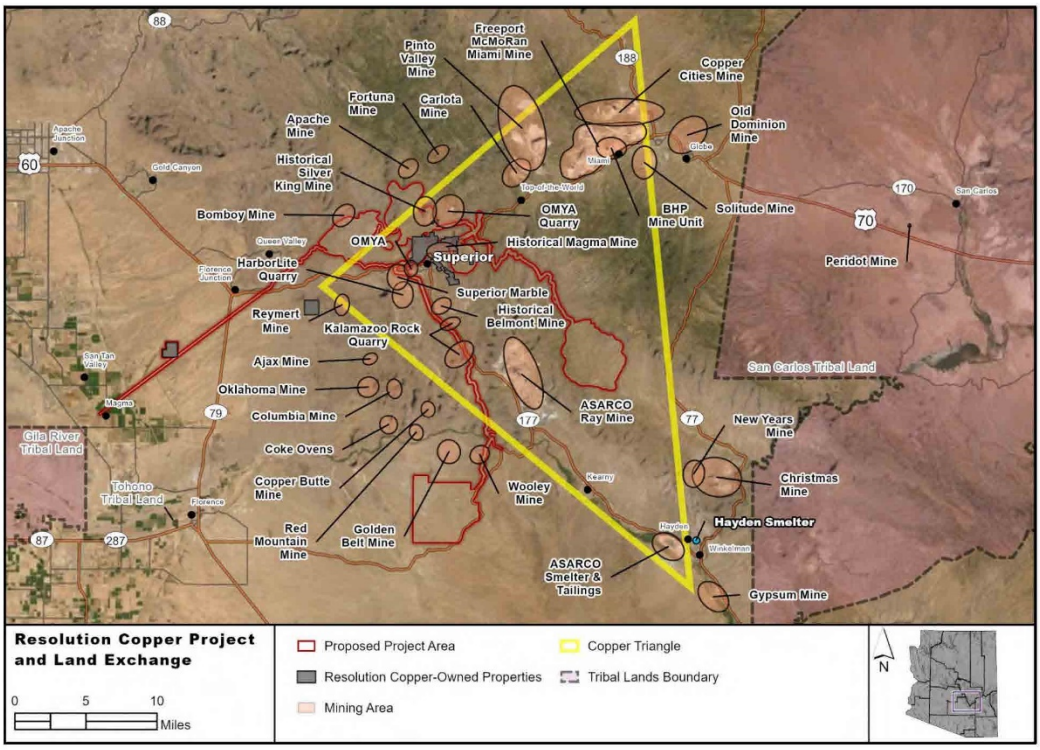

Figure 1.2-1. The Copper Triangle map

Copper Triangle Map, 1 FEIS at 8.

[17] United States Geological Survey, Copper 2020 (available at https://pubs.usgs.gov/periodicals/mcs2021/mcs2021-copper.pdf).
[18] *Id.*

The United States' copper supply is secure, with or without the Oak Flat land exchange.

To the extent that the Government is relying on purported economic benefits from the land transfer as a justification for its actions, the Ninth Circuit noted in *International Church of Foursquare Gospel* that revenue generation was "not a compelling state interest" when the government's denial of a conditional use permit imposed a substantial burden on religious exercise. 673 F.3d at 1071. Further, the Supreme Court has repeatedly recognized that saving money is not a compelling government interest. *See*, *e.g.*, *Turner v. Safley*, 482 U.S. 78, 90 (1987) ("In the necessarily closed environment of the correctional institution, few changes will have no ramifications . . . on the use of the prison's limited resources for preserving institutional order."); *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 263 (1974) ("The conservation of the taxpayers' purse is simply not a sufficient state interest."); *Graham v. Richardson*, 403 U.S. 365, 375 (1971) ("[A] concern for fiscal integrity" is not a "compelling" interest); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) ("The saving of welfare costs" is not a compelling interest).

Attempts to claim a compelling interest become even flimsier in light of the Government's existing interest in protecting tribal rights. Under the federal-tribal trust doctrine, the United States is obligated to act as a trustee for the benefit of federally recognized tribes such as the San Carlos Apache tribe. *See* Barclay & Steele at 1351; Vickie Sutton, *Lost in Translation: A Translation That Set in Motion the Loss of Native American Spiritual Sites*, 7 Indigenous Peoples' Journal of Law, Culture & Resistance ____ (2021). The Court has long recognized the responsibility of trust and the duty of protection arising from the course of dealings of the United States with the Indian tribes. *See, e.g.*, *Worcester v. Georgia*, 31 U.S. 515, 519 (1832)." The Government's actions regarding Oak Flat are blatant and callous dismissals of this duty. Any purported compelling interest contradicts—and fails to surmount—the Government's known and professed responsibility for the interests of Native Americans.[19]

[19] The Government's interest is further undermined by the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the U.N. Declaration on the Rights of Indigenous Peoples; in both of these instances, the Government has recognized its duty to protect religious practices tied

IV. Rio Tinto Has a Track Record of Unnecessarily Demolishing Indigenous Sacred Sites

The foreign-owned, private company to which the Government intends to trade Oak Flat is already embroiled in an international scandal regarding the destruction of sacred Indigenous sites. Less than a year

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to land use. RLUIPA holds that "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person" unless strict scrutiny is satisfied. 42 U.S.C. § 2000cc. The Declaration affirms the rights of Indigenous peoples like the Apache to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard." G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples Art. 25 (Sept. 13, 2007); *see also id.* Art. 12 ("Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies" and "to maintain, protect, and have access in privacy to their religious and cultural sites."). Supported by the United States since 2010, the Declaration has not been codified as a matter of federal law. Yet the Declaration is "an authoritative statement of human rights by the U.N. General Assembly, [and] elaborates U.N. member states' obligations to promote and respect human rights under the U.N. Charter." Kristen A. Carpenter, *Living the Sacred: Indigenous Rights and Religion*, 134 Harv. L. Rev. (forthcoming Apr. 2021) (book review); *See also* Advisory Council on Historic Pres., Achp Plan to Support the United Nations Declaration on the Rights of Indigenous Peoples (2013) (agency guidance on the use of the Declaration's articles 8, 11, 12, 15, 16, 18, 25, 31, and 38 in sacred sites management). Two recent executive orders further undermine the Government's interest in transferring the land to Resolution Copper. Exec. Order. No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021). Exec. Order No. 14017, 86 Fed. Reg. 11849 (Feb. 24, 2021).

ago, Rio Tinto—the majority owner of Resolution Copper—unnecessarily demolished two 46,000-year-old aboriginal rock shelters at Juukan Gorge. Joint Standing Comm. on N. Aus., Parliament of the Commonwealth of Aus., *Never Again: Inquiry into the Destruction of 46,000 Year Old Caves at the Juukan Gorge in the Pilbara region of Western Australia - Interim Report* vi (2020).

Like Oak Flat is to the Apache, the Juukan Gorge in Australia is a place of immense religious significance to the Puutu Kunti Kurrama and Pinikura people. Mr. Burchell Hayes, a descendant of the Puutu Kunti Kurrama and Pinikura Aboriginal Corporation (PKKPAC) people, described Juukan Gorge as "the anchor of our culture." *Id.* at 2. Juukan Gorge includes a "distinctive and sacred rock pool" that "is known to be a place where spirits of our relatives who have passed away, even recently, have come to rest." *Id.* "This is why Juukan Gorge is important," Hayes further explained. "It is in the ancient blood of our people and contains their DNA. It houses history and the spirits of ancestors and it anchors the people to this country. *Id.*

According to a report issued by the Australian Parliament, "Rio knew the value of what they were destroying but blew it up anyway." *Id.*

at vi. Rio Tinto was provided "[s]ubstantial evidence" over several years about the significance of the rock shelters. *Id.* In fact, Rio Tinto had funded studies that uncovered around 7,000 artifacts directly linked to the First Nations people and its own archaeological report characterized Juukan Gorge as a place of "the highest archaeological significance in Australia." *Id.*

Despite the company's knowledge of the cultural and religious value of the Juukan Gorge to the First Nations people of Australia, Rio Tinto "made a deliberate decision to choose the only one of four mine expansion options that required the destruction of the rock shelters on the basis that it would maximize the company's access to the lucrative iron ore body located in the area." *Id.* at 6-7. This unnecessary destruction of these culturally and religiously significant sites was "inexcusable." *Id.* at vi. The report from Parliament characterizes this incident as stemming from a deeper problem than "a series of 'unfortunate mistakes' or mere ineptitude"; rather, "Rio Tinto's conduct reflects a corporate culture which prioritised commercial gain over the kind of meaningful engagement with Traditional Owners that should form a critical part of their social licence to operate." *Id.* at 7.

The tragic events in Australia further illustrate the great danger of placing the future of Oak Flat in the hands of Rio Tinto. The company has a history of destroying Indigenous sacred sites—even when other mining options are available—and Oak Flat is slated for the same fate.

CONCLUSION

The Government acknowledges that the anticipated mining project will result in irreversible destruction, necessarily ending the religious gatherings that have been taking place on this site for centuries. The Government offers no justification of its actions under strict scrutiny, and so injunctive relief is warranted under RFRA.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this amicus brief complies with the typeface and typestyle requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century Schoolbook.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 5,556 words, excluding the portions exempted by Fed. R. App. P. 32(f).

/s/ Stephanie Hall Barclay
Stephanie Hall Barclay

Dated: March 25, 2021

STATEMENT OF THE PARTIES' CONSENT

In accordance with Fed. R. App. P. 29(a), counsel reports that all parties have given consent to the filing of this amicus brief.

/s/ Stephanie Hall Barclay
Stephanie Hall Barclay

Dated: March 25, 2021

CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2021, the foregoing amicus brief in support of a preliminary injunction 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 motion will be emailed to opposing counsel immediately after it is filed.

/s/ Stephanie Hall Barclay
Stephanie Hall Barclay

Dated: March 25, 2021