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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA
Phoenix Division

Apache Stronghold, a 501(c)(3) nonprofit organization, Plaintiff, v. United States of America, et al. Defendants.	No. 2:21-cv-00050-PHX-SPL **PLAINTIFF'S CLOSING ARGUMENT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

I. INTRODUCTION

Why should Indians' religious worship rights be construed any less stringently than their aboriginal fishing rights, when interpreting treaties with the United States, especially the Apaches 1852 Treaty with the U.S.? Here, the Western Apaches' Treaty—which has no mention of "tribe," "band" or other official political entity, but with the

entire nation of Apache people—requires the Government to provide for the "happiness and prosperity" of the Apaches.

The Apache Nation was not comprised of "tribes" as the federal government later unilaterally denoted groups of them living in various places across their aboriginal lands. See Declaration of John R. Welch, Ph.D. and Dr. Welch's testimony at the February 3, 2021 preliminary injunction hearing; and see, esp., Hearing Transcript at p. 78, line 28 to p. 79, line 18. Plaintiff only brings two of its claims for its Motion: 1) the Treaty rights claim, which is of two subparts: a) land ownership and b) religious place use and enjoyment rights, and 2) the Religious Freedom Restoration Act ("RFRA") claim. See also, Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, Harvard Law Review (forthcoming 2021) at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3689111 .

II. ARGUMENT

A. Standing

Defendants at oral argument conceded that Plaintiff has standing to bring its RFRA claim. It follows therefore, that Defendants have accepted Plaintiff's representational standing for its Western Apache members. It further follows, that except for the specific party who is able to enforce the Treaty, that Defendants have conceded the remainder of Article III standing issues in this case. The test in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S.Ct. 2130 (1992)(cited by Defendants) is appropriate here. To defend the concrete nature required there must be "a factual showing of perceptible harm." *Id*. at 566. Here, both the testimony of Plaintiff's members Naelyn Pike and Dr. Wendsler

Nosie, Sr., met that requirement. The other element of injury-in-fact the test, actual or imminent, and then causal connection between the injury and the conduct, and finally it must be likely that the court can redress the injury with a favorable decision (redressability). *Id*. at 560-561.

Lujan holds that when the plaintiff is the object of the action, "there is ordinarily little question that the action…has caused him the injury, and that a judgment preventing…the action will redress it." *Id.* at 561-562. All of those items are met for both Plaintiff's members again, as to their Treaty claim, except whether they are beneficiaries under the treaty, as individual Western Apache, discussed below. As to not being able to enforce the 1852 Treaty between the U.S. and the Apache people, Defendants cases and arguments are distinguishable on the law, and the intervening facts. The Gadsden Purchase of 1853 indicates that the Defendants did not Hold Title to Western Apache Lands in 1852. The United States, in its brief, wrongly assumes that all of Arizona was Mexico's to "cede" to the United States in the Treaty of Guadalupe Hidalgo in 1848. It was not. As recognized in the Treaty in 1852, the land encompassing Oak Flat has belonged to the Western Apache people since time immemorial.

Mangus Coloradus signed on behalf of himself, his people, and their descendants, including Dr. Nosie and Ms. Pike. Not on behalf of any particular Tribe—the several Apache Tribes now recognized by the United States did not even exist as such in 1852. On the law, which is in our favor, Apache Stronghold calls the Court's attention to the landmark case and decision in *United States v. Winans*, 198 U.S. 371 (1905), which in interpreting a contemporaneous treaty, the 1855 Treaty of the Yakima, makes it clear that

rights reserved in a treaty with the "Tribes and Bands of the Yakima" were reserved to "every individual Indian, as though named therein."[1] That is a distinction with a difference. The four treaties negotiated at the 1855 Council at Walla Walla were signed between the United States and the "Tribes" and "Bands" of the various Native Peoples of the mid-Columbia Basin. The 1852 Treaty of Santa Fe, however, was signed between the United States and individual representatives of all of the Apaches. A distinction concerning the Apaches and how they lived and related to each other that Dr. Welch explained explicitly in his testimony.

"[T]reaties are not to be considered as exercises in ordinary conveyancing." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 630 (1970). "[T]reaties with Indians must be interpreted as they [the Indians] would have understood them, and any doubtful expression in them [the treaties] should be resolved in the Indians' favor." *Choctaw Nation* at 631 (citations omitted); *see also Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 465 (1995) ("[T]reaties should be construed liberally in favor of the Indians.")(citation omitted); *Oregon Dep't of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 766 (1985) ("[D]oubts concerning the meaning of a treaty with an Indian tribe should be resolved in favor of the tribe.").

And in no way should this Court infer that the National Defense Authorization Act of 2015 abrogated any of the Apaches rights at Oak Flat. "The purpose to abrogate treaty

[1] "The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein." *Winans* at 381.

rights of Indians is not to be lightly imputed to Congress." *Menominee Tribe of Indians v. U.S.*, 391 U.S. 412-413 (1968), regarding the 1854 Treaty of Wolf River. ("We decline to construe the Termination Act as a backhanded way of abrogating the hunting and fishing rights of these Indians. While the power to abrogate those rights exists (see *Lone Wolf v. Hitchcock,* 187 U.S. 553, 564-567) "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." *Pigeon River Co. v. Cox Co.,* 291 U.S. 138, 160 [1934]. See also, *Squire v. Capoeman,* 351 U.S. 1 [1956].).

Defendants rely on a footnote in a Supreme Court case regarding submerged lands along the California coast as to whether the U.S. or California held those lands. *United States v. California*, 436 U.S.32, 34 n.3 (1078). That case did not deal with any controlling law related to this case. More importantly, the United States' conduct two years after it signed the Treaty with the Western Apaches is more telling on its belief that it did not own the Western Apache land at the time the Treaty was signed. While, not the full Western Apaches' land was involved in the purchase, the southern portion of it was, which shows at the time of the Treaty that the United States was not getting land as part the Treaty, it was getting only the rights ceded by the Apaches' jurisdiction. So, even if the possessory interest in the land was given, the Apaches would not have given up their Holy Places, or at least their right to travel and worship there unencumbered in any way. And to continue to practice their religion at those sites. Knowing the connection that those people had to at least the Oak Flat and surrounding area, and the Holy Ground's significance in their religious practice in 1852, it is highly likely that the Western

Apaches believed that those sites would remain under their control as part of Article 9 in which they reserve their happiness and prosperity.

B. Plaintiff Raises Serious Questions Going to the Merits For its RFRA Claim

Plaintiff raises serious questions going to the merits of its Religious Freedom Restoration Act Claim ("RFRA"). To establish a *prima facie* claim under the RFRA, a plaintiff must prove: (1) a substantial burden imposed by the federal government on a (2) sincere (3) exercise of religion. 42 U.S.C. § 2000bb-1(a). Defendants have not challenged that Plaintiff's members have a sincere exercise of their native Apache religion, as was proved up by witness Nosie and Pike. A plaintiff must establish his *prima facie* case by a preponderance of the evidence. *United States v. Meyers,* 95 F.3d 1475, 1482 (10th Cir.1996), *cert denied,* 522 U.S. 1006 (1997).

The only element of Plaintiff's proof that Defendants challenge is the demonstration of their action causing a substantial burden on Plaintiff's members' religious exercise. The Court may select from three different standards. What the religious believer must show is the passing the land into private ownership of a mining company is a burden on their practices at Oak Flat and the surrounding area of the National Historic District. Also, they must show that such burden is substantial to meet the statute's test.

The specific burdens are at least three in nature and have been described to the Court. First, once the land becomes private, the protections and assertion of rights to protect any remaining religious freedoms they have will end. As noted in the briefs. *Hall v. American Nat. Red Cross*, 86 F.3d 919,921 (9th Cir. 1996), *cert. denied*, 519 U.S. 1010

(1996). Further, once the property is owned by the mining company, likely fencing will be erected and trespassing will not be allowed. Both of those harms are close to being done immediately on transfer. The third burden is the utter destruction of the site in a time period beginning six years after mining starts, culminating about two decades later with a massive crater two miles in diameter and larger than the famous meteor crater in eastern Arizona, and the altered landscape including the Holy Ground of Oak Flat will be at the bottom of a 1,000-foot crater.

The three different tests that the Court has available to it are from: 1. Justice Alito in a 2020 concurrence opinion; 2. the U.S. Court of Appeals for the Third Circuit's ("Third Circuit's) 2019 opinion, which was the case below that Justice Alito expressed his slightly modified test in; and 3. the U.S. Court of Appeals for the Ninth Circuit's ("Ninth Circuit's") 2008 en banc opinion. As presented, in this type of case and with the Supreme Court noting that in a 2014 related the expanded protections available to religious people, found RFRA:

> [S]hall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." § 2000cc–3(g). It is simply not possible to read these provisions as restricting the concept of the "exercise of religion" to those practices specifically addressed in our pre-Smith decisions.

Burwell v. Hobby Lobby, Inc. (Hobby Lobby), 573 U.S. 682, 714 (2014).

With that backdrop, the Court subsequently found a substantial burden is when "the non-compliance ha[s] substantial adverse practical consequences, [*Burwell v. Hobby Lobby, Inc.*,] 573 U.S. at 720–723," and the "compliance cause[s] the objecting party to violate its religious beliefs, *as it sincerely understands them*. *Id.* at 723–726." *Little*

Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 573 U.S, ___, 140 S.Ct. 2367, 2389 (2020)(*J. Alioto concurring)*.

The Third Circuit's test which Plaintiff believes applies best here (Religious rights lost and land destruction) is to show a substantial burden is when, "(2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs." *Pennsylvania v. President U.S.*, 930 F.3d 543, 572 (2019). Plaintiff's members can show a substantial burden under all of the tests. Naelyn Pike testified that she believed that Oak Flat was essentially a site where spirits and blessings arose from deep within the earth. Essentially, it is a sacred portal that the Western Apache spirits and blessings emanate from. And it is also a location where Western Apaches perform religious ceremonies honoring those spirits and the earth. Ms. Pike testified that if she could no longer visit there, or if the Holy Ground and its surrounding were destroyed that a benefit would be removed from her.

In the strictest of tests, the Ninth Circuit requires that a benefit be removed, to show a substantial burden under RFRA. *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058 (9th Cir. 2008)(*en banc*), *cert. denied*, 556 U.S. 1281 (2009). There is nothing to be said that benefits only derive from monetary payments. Benefit is anything good that comes to a person. With such great religious things coming to Ms. Pike and Dr. Nosie from that Holy Ground the removal of that spiritual situation, the Plaintiff meets its test under *Navajo Nation.* Also, the Plaintiff meets its substantial burden test under both other tests sought to be used. Clearly the damage and loss of the site would cause non-compliance with her religious beliefs and there accepting the Holy Ground going into

private ownership would violate all Western Apaches' religious beliefs, both before the site was destroyed by physical restrictions, and after when it was destroyed.

The Third Circuit's test is easily complied with as has been shown, as just the transfer of ownership with the loss of RFRA rights puts substantial pressure on the worshipers to substantially modify their behavior and to violate their beliefs. Because many courts have found that the burden must be more than inconsequential, this planned destruction of the Holy Ground and the surrounding National Historic District is much more substantial than the seasonal spraying of water that took place in the *Navajo Nation* case. The planned destruction is also much more detrimental than finishing and upgrading a road in an area where the public was also allowed to travel already. See *Lyng v. Northwest Indian Cemetery Protective Ass'n*., 485 U.S. 439 (1989). Defendants also present an argument that RFRA cannot apply on federal land. In addition to the arguments on file, a further reason is that the Court has expressed the broad nature of federal applicability as: "RFRA specifies that it 'applies to all Federal law, *and the implementation of that law*, whether statutory or otherwise.' § 2000bb–3(a)." *Little Sisters*, 140 S.Ct. at 2383 (*J. Alito concurring*)(emphasis added). The Justice also noted that certain statutes were excluded from RFRA. The Southeast Arizona Land Exchange and Proposed Resolution Copper Mine, 16 U.S.C. § 539p, is not exempt, nor is the implementation of it in the form of the proposed land exchange.

C. Trust Responsibility & Constructive Trust in Equity

This Court in the exercise of its full power and authority in equity can certainly recognize and declare that the actions of the Defendant United States in unilaterally

depriving the Western Apaches of the full use and enjoyment of their rights in the land containing Oak Flat thereby assumed and are charged with the duties of a trustee holding that land in trust by operation of the ages-old equitable principle of constructive trust. For example, as the Supreme Court of Arizona, in Honk v. Karlsson, 80 Ariz. 30, 292 P.2d 455 (1956), has explained:

> "It is a fundamental principle of equity that no one can take advantage of his own *34 wrong. See, Butterfield v. Nogales Copper Co., 9 Ariz. 212, 217, 80 P. 345. As is stated in 89 C.J.S., Trusts, § 139 a.:
> "* * * So, the doctrine of constructive trust is an instrument of equity for the maintenance of justice, good faith, and good conscience, resting on a sound public policy requiring that the law should not become the instrument of designing persons to be used for the purpose of fraud. * * *" (Emphasis supplied.)
> In the case of MacRae v. MacRae, 37 Ariz. 307, 312, 294 P. 280, 282, this court laid down a definition of a constructive trust which has often been cited in subsequent decisions, to wit:
> "A constructive trust is one which does not arise by agreement or from the intention of the parties, but by operation of law, and fraud, actual or constructive, is an essential element thereto. Actual fraud is not always necessary, but such a trust will arise whenever the circumstances under which the property was acquired make it inequitable that it should be retained by the one who holds the legal title. These trusts are also known as trusts ex maleficio or trusts ex delicto. Their forms and varieties are practically without limit, as they are raised by courts of equity whenever it becomes necessary under the particular circumstances of the case to prevent a failure of justice, but the element of fraud, either actual or implied, must always be present."

Honk at 33-34.

D. A Closing Note on "Consultation" by Federal Agencies

Near the end of injunction hearing Plaintiff's counsel, Mr. Nixon, in response to a question by the Court concerning "consultation," made an erroneous overstatement (Transcript at pp. 81-82) that bears correction here. The fact is that there is one regulation—by the President's Advisory Council on Historic Preservation promulgated

pursuant to Section 106 of the National Historic Preservation Act ("NHPA") that does provide a definition for "consultation" for NHPA Section 106 purposes, which is especially relevant to the Oak Flat crisis.[2] Plaintiff's counsel's point at the hearing was that the federal agencies, particularly the Forest Service, make it a practice to emphasize the quantity of meetings, letter, and other communications it has rather than the quality of those communications, and that the Forest Service pays little practical heed to what they receive from Indians in particular in the course of that intercourse.[3]

Dated: February 5, 2021 Respectfully submitted,

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[2] 36 C.F.R. 800.16(f)("*Consultation* means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process. The Secretary's "Standards and Guidelines for Federal Agency Preservation Programs pursuant to the National Historic Preservation Act" provide further guidance on consultation.").

[3] See, *e.g.*, Welch, John R., Riley, Ramon, and Nixon, Michael V., *Discretionary Desecration: Dzil Nchaa Si An (Mount Graham) and Federal Agency Decisions Affecting American Indian Sacred Sites*, American Indian Culture and Research Journal, Vol.33, No.4 (2009).