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

MICHALYN STEELE
Professor of Law
BYU LAW SCHOOL
J. Reuben Clark Building
Provo, Utah 84602
steelem@law.byu.edu
Telephone: (801) 422-3239

STEPHANIE HALL BARCLAY
Counsel of Record
Associate Professor of Law
Director, Religious Liberty Initiative
NOTRE DAME LAW SCHOOL
3120 ECK HALL OF LAW
Notre Dame, IN 46556
stephanie.barclay@nd.edu
Telephone: (574) 631-6898
stephanie.barclay@nd.edu

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statute

Other Authorities

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.

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 ER 223-27.

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 Vickie Sutton is the Paul Whitfield Horn Distinguished Professor of Law and Director of the Center for Biodefense, Law and Public Policy at the Texas Tech University School of Law. Professor Marcia Zug teachers American Indian Law at the University of South Carolina School of Law. Professors Sutton and Zug are scholars who specialize in Federal Indian Law.[1]

---

[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.

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 practices of their religions. 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.

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* § 3.12.4.10 [hereinafter "FEIS"].[2] Further, once the mining operations commence, the "cultural properties

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

cannot be reconstructed" or "fully mitigated," "[s]acred springs would be eradicated," changes will "permanently affect the ability of tribal members to access . . . special interest areas for cultural and religious purposes," and this will constitute an "irreversible loss." 3 FEIS at 856. 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 regarding RFRA misinterpret or ignore the applicable case law, would eviscerate protections for Indigenous peoples, and give disfavored treatment for 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 increase catastrophic consequences for Native peoples already facing widespread destruction of their most sacred places. Nor has the Government even tried to carry its burden under the compelling interest test. Emergency relief for members of Apache Stronghold is warranted.

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

For many Native peoples, particular places are inextricably tied to religious and cultural rites and identity.[3] 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 to effectively prohibit the free exercise of their religion. 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 wholly 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,

---

[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).

Muslims at the Kaaba in Mecca, and many others.

But what *is* perhaps unique about sacred sites for Indigenous peoples in countries such as the United States is the extent of government-created obstacles that operate to inhibit use of these sacred sites by Native peoples. These obstacles 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 what is now government property. And the Government came to acquire much of this land by ignoring treaties or confiscating additional land. For example, between 1887 and 1934, tribes were divested of nearly 100 million acres of their lands through opening so-called "surplus" lands to non-Indian settlement and government confiscation.[5]

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 spaces. Graves have been despoiled, altars destroyed, and

---

[5] *See* Barclay & Steele, *supra*, 1311-12.

sacred artifacts catalogued for collection, display, or sale. Just within the past several years, Indigenous sacred sites have been bulldozed,[6] developed for commercial interests, and even blown up at the hands of the federal government.[7] 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.[8]

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. ER.225. The area contains hundreds of Indigenous archaeological sites, Apache burial grounds, ancient petroglyphs, medicinal plants, and numerous sacred sites. As Mr. Riley describes, Chi'chil Biłdagoteel remains today an active

---

[6] *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).
[7] *Native Burial Sites Blown Up for US Border Wall*, BBC News (Feb. 10, 2020), https://perma.cc/DC56-Z4DQ.
[8] *See* Barclay & Steele, *supra*, 1351-58.

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. ER.225.

Last month, the outgoing Administration rushed through a Final Environmental Impact Statement[9] that acknowledges that the future mining operations will result in a crater over 1,000-foot-deep, two miles wide at Oak Flat. 2 FEIS at 790.

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

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.[10] But courts have recognized that the

---

[9] *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.

[10] *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, 361 (2015).

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 Warsoldier v. Woodford*, 418 F.3d 989, 996 (9th Cir. 2005); *Yellowbear v. Lampert*, 741 F.3d 48, 51-52 (10th Cir. 2014) (Gorsuch, J.); *Haight v. Thompson*, 763 F.3d 554, 560, 565 (6th Cir. 2014); *Int'l Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1066-70 (9th Cir. 2011).

The physical destruction the Government anticipates at Oak Flat will likewise take away any choice Mr. Riley and Plaintiff witnesses have to continue performing their religious exercise at this sacred site. The

destruction to occur at Oak Flat will make religious exercise for individuals like Mr. Riley and other Plaintiff witnesses physically impossible. As a result, Plaintiff easily satisfies RFRA's substantial burden requirements.

The district court's substantial burden analysis misunderstands both the text and caselaw regarding RFRA, for the reasons described in Plaintiff's Motion at 15-24. 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

---

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

of [federal law]"—foreclosing any blanket carve-out for federal land management 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* ER.13 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

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

disparity in the law that provides lesser protection for Indigenous religious exercise regarding sacred sites.[13]

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; it will make it impossible. Such an acknowledgement on the Government's part should easily satisfy RFRA's substantial burden requirement.

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.[14] 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

---

[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").

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

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 Act'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 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 Amish children before the Court attend *one more year* of public education instead of trade-oriented education. *Id.* at 214-15.

Here, as in *Gonzalez* 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* 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."[15] It should be noted, however, that the mined copper will belong to Resolution, a foreign company who will be free to sell it to whomever they choose, and who have a track record of callous destruction of significant Indigenous sites. Just last year, Rio Tinto, the majority owner of Resolution, destroyed a 46,000 year-old aboriginal site of "the highest archaeological significance in Australia." 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). A report issued by

---

[15] 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/).

the Australian Parliament found that "Rio knew the value of what they were destroying but blew it up anyway." *Id.*

Additionally, the United States has other alternatives to obtain additional copper. According to the United States Geological Survey, since 1950 there has been, on average, forty years of copper reserves available worldwide.[16] And even as demand for copper has grown, available copper

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

reserves have grown proportionally.[17] Within the vicinity of Oak Flat, there are many sites where copper could be mined.

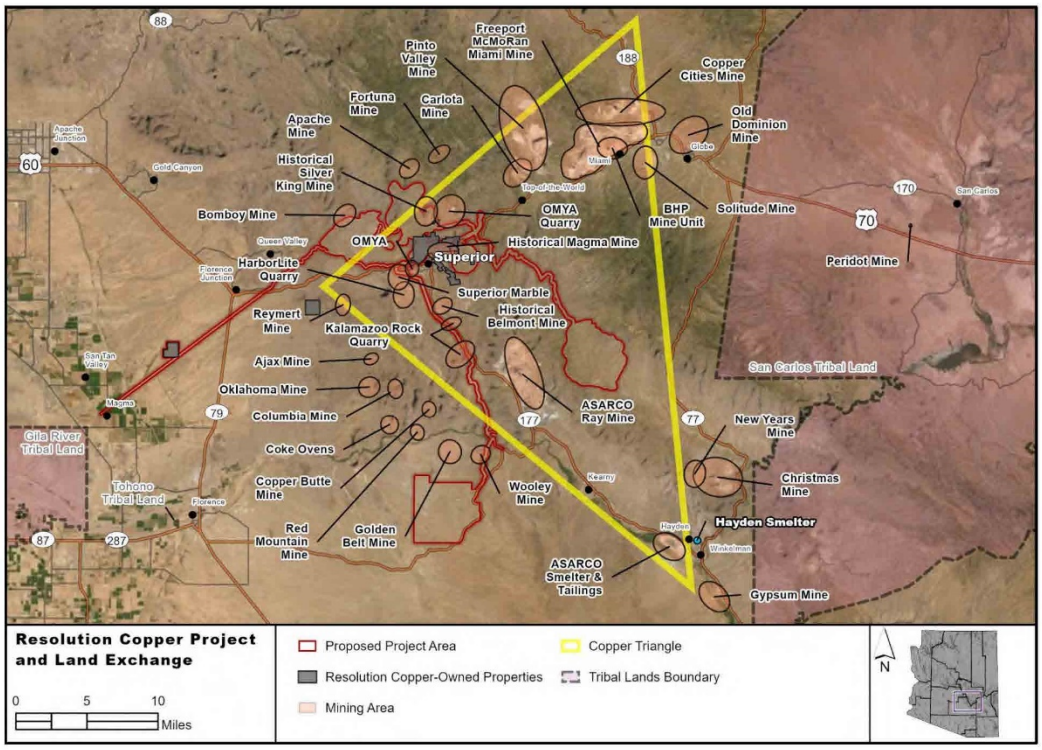

Figure 1.2-1. The Copper Triangle map

Copper Triangle Map, 1 FEIS at 8.

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

Attempts to claim a compelling interest become even flimsier in light of the Government's existing interest in protecting tribal rights.

---

[17] *Id.*

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 Apache. *See* Barclay & Steele at 1351. The Court has recognized this "duty of protection" for nearly a century and a half. *See United States v. Kagama*, 118 U.S. 375, 384 (1886). 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.

CONCLUSION

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

February 26, 2021

Respectfully submitted,

/s/ Stephanie Hall Barclay

MICHALYN STEELE
Professor of Law
BYU LAW SCHOOL
J. Reuben Clark Building
Provo, Utah 84602
steelem@law.byu.edu
Telephone: (801) 422-3239

STEPHANIE HALL BARCLAY
Counsel of Record
Associate Professor of Law
Director, Religious Liberty Initiative
NOTRE DAME LAW SCHOOL
3120 ECK HALL OF LAW
Notre Dame, IN 46556
stephanie.barclay@nd.edu
Telephone: (574) 631-6898
stephanie.barclay@nd.edu

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that this amicus brief complies with Fed. R. App. P. 29(a)(5), Cir. R. 32-3(2), and the length limits in this Court's January 5, 2021 supplemental briefing order (Dkt. 25) as it contains 2,797 words, excluding the portions exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

/s/ Stephanie Hall Barclay
Stephanie Hall Barclay

Dated: February 26, 2021

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2021, the foregoing amicus brief in support of an 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 motion will be emailed to opposing counsel immediately after it is filed.

/s/ Stephanie Hall Barclay
Stephanie Hall Barclay

Dated: February 26, 2021