ADAM R.F. GUSTAFSON
Acting Assistant Attorney General
United States Department of Justice
Environment and Natural Resources Division

ERIKA NORMAN (CA Bar 268425)
ANGELA ELLIS (DC Bar 1670713)
Trial Attorneys
Natural Resources Section
150 M St. NE, Third Floor
Washington, D.C. 20002
(202) 305-0475 (Norman)
Erika.norman@usdoj.gov
Angela.Ellis@usdoj.gov

Attorneys for Federal Defendants

THE UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA
PHOENIX DIVISION

Apache Stronghold, Plaintiff, v. United States of America, *et al.,* Defendants. Resolution Copper Mining, LLC, Defendant-Intervenor.	CIVIL NO. 2:21-cv-00050-SPL **FEDERAL DEFENDANTS' OPPOSITION TO PLAINTIFF'S EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

I. INTRODUCTION

This case concerns the congressionally-mandated transfer of approximately 2,422 acres of federal land in Pinal County, Arizona to Intervenor-Defendant Resolution Copper Mining, LLC under the Southeast Arizona Land Exchange and Conservation Act ("Act"). 16 U.S.C. § 539p. After its Motion for a Preliminary Injunction was previously denied by this Court and that denial affirmed on appeal, Plaintiff seeks the extraordinary relief of an injunction pending appeal while its petition for writ of certiorari, filed last fall, is decided by the Supreme Court, and for twenty-one days afterward. This request should again be denied.

To obtain emergency injunctive relief, Plaintiff must show a likelihood of success on, or serious questions going to, the merits of its claims. Plaintiff cannot do so here. This Court denied Plaintiff's prior request for a preliminary injunction because Plaintiff failed to show a likelihood of success on, or serious questions going to, the merits of its Religious Freedom Restoration Act ("RFRA") or Free Exercise Clause claim, and the Ninth Circuit affirmed that decision. *See Apache Stronghold v. United States*, 101 F.4th 1036 (9th Cir. 2024) (en banc). Plaintiff's current Motion presses those same legal claims. The fact that the en banc panel issued two majority opinions and some judges issued separate concurring or dissenting opinions should not alter this Court's analysis: where a binding decision by an appellate court forecloses Plaintiff's claims the district court must deny a motion for preliminary injunction and an injunction pending appeal. *See R.J. Reynolds Tobacco Co. v. Bonta*, No. 22-cv-1755, 2022 WL 16986580, at *1 (S.D. Cal. Nov. 15, 2022) ("The Court finds that the Ninth Circuit's decision in *County of Los Angeles* currently forecloses Plaintiffs' express preemption claim in this Court. This Court therefore must deny the motion for a preliminary injunction and an injunction pending appeal."), *aff'd*, No. 22-56052, 2023 WL 2010990 (9th Cir. Jan. 27, 2023).

This Court did not deem it necessary to reach the other *Winter* factors when it denied Plaintiff's first Motion for a Preliminary Injunction, Order 23, ECF No. 57, and

need not do so now. But should it do so, Plaintiff also fails to establish a significant threat of irreparable injury during the pendency of the proposed injunctive period. Even after the land exchange occurs, which under the Act could happen as soon as the Final Environmental Impact Statement is republished, Plaintiff's members will continue to have guaranteed access to Oak Flat, including expressly for traditional and ceremonial purposes. Commercial mineral production is years away.

Plaintiff acknowledges that "the Supreme Court is likely to resolve Plaintiff's petition . . . less than a month" after the earliest possible date on which the land exchange could occur—June 16, 2025. *See* Emergency Mot. for Lift of Stay and for Inj. Pending Appeal ("Pl.'s Mot.") 16, ECF No. 150. But Plaintiff inverts the standard when it argues "waiting a few days to let the Supreme Court complete its review would [not] cause the government any hardship." *Id.* It is Plaintiff, not Federal Defendants, who carries the burden to show a threat of irreparable harm and there is none during those "few days" that warrants the extraordinary relief they request. *Id.*

Congress decided long ago that this land exchange should go forward, and the administration has identified the Resolution Copper Project as a priority critical minerals project that is in the economic and national security interests of the United States. After the Ninth Circuit's decision affirming Plaintiff had not shown a likelihood of success on, or serious questions going to, the merits of its RFRA and free exercise claims and in the absence of immediate, irrevocable harm, this Emergency Motion for Injunction Pending Appeal should be promptly denied by the district court.

II. BACKGROUND

a. Oak Flat

In the Treaty of Guadalupe Hidalgo, signed on February 2, 1848, Mexico ceded land in the present-day state of Arizona—including the Oak Flat area at issue here—to the United States. Treaty with Mexico, 9 Stat. 922 (1848); *United States v. California*, 436 U.S. 32, 34 n. 3 (1978). In 1852, a treaty was signed between the United States and

the Western Apache people as a whole, which agreed that territorial boundaries would be designated later. Treaty with the Apaches, 10 Stat. 979 (1852). The United States has never alienated title to the lands at issue in this suit.

b. The Land Exchange

Land exchanges are "quite common in the West[.]" *Salazar v. Buono*, 559 U.S. 700, 727 (2010). In December 2014, President Obama signed the Southeast Arizona Land Exchange and Conservation Act (the Act) into law. 16 U.S.C. § 539p. This Act of Congress directs the Forest Service to convey title to 2,422 acres of the Tonto National Forest to Resolution Copper in exchange for 5,460 acres of conservation lands. *Id.* § 539p(b)(2), (d)(1).

The Act also requires, among other things, that the Forest Service: (1) engage in "consultation with affected Indian tribes," *id.* § 539p(c)(3); (2) obtain appraisals of the land to be exchanged, *id.* § 539p(c)(4); (3) issue special use permits to Resolution Copper, *id.* § 539p(c)(6); (4) prepare a final environmental impact statement ("FEIS") to inform future agency decision making associated with the exchange, *id.* § 539p(c)(9); and (5) convey title to the exchanged land "[n]ot later than 60 days after the date of publication of the [FEIS]" *Id.* § 539p(c)(10). In passing the Act, Congress imposed on the Forest Service a non-discretionary duty to convey Resolution title to the land after the FEIS is published. Plaintiff also characterizes the actions to be taken by the Secretary of Agriculture in non-discretionary terms. *See, e.g.*, Pl.'s Mot. 9 ("the transfer must occur within 60 days of publishing the FEIS"). After the passage of the Act, the *Chí'chil Bildagoteel*/Oak Flat area was nominated for inclusion in the National Register of Historic Places. As with all registered areas, the listing imposes no restrictions on the use of private property.

The initial target date set by the Forest Service for the publication of the FEIS was July 2020. The FEIS was published on January 15, 2021, and later withdrawn on March 1, 2021. On April 17, 2025, Federal Defendants provided notice that they intended to

publish a Notice of Availability of the FEIS and Draft Record of Decision ("DROD") for the subject land exchange and Project in the Federal Register no earlier than 60 days from the date of the notice—June 16, 2025. ECF No. 148. The Forest Service noted that if Plaintiff's certiorari petition remains pending or has been granted by the end of the 60 days, then it may "reevaluate how to proceed." *Id.*; Ltr. from the Solicitor General (Apr. 21, 2025), *Apache Stronghold v. United States*, No. 24-291, *available at* https://www.supremecourt.gov/docket/docketfiles/html/public/24-291.html.

c. Procedural history

Plaintiff first filed this suit on January 12, 2021, seeking to stop the land exchange.[1] On January 14, 2021, Plaintiff filed a Motion for Temporary Restraining Order (TRO) and Preliminary Injunction seeking to prevent the issuance of the FEIS, which was set for publication the next day. This Court denied the Emergency Motion for a TRO on January 14, 2021, and on February 12, 2021, after a hearing, also denied Plaintiff's Motion for a Preliminary Injunction, concluding that Plaintiff was unlikely to succeed on the merits of its free-exercise or RFRA claims.[2] ECF Nos. 13, 57. Plaintiff appealed and filed an Emergency Motion for Injunction Pending Appeal, which this Court denied. Order, ECF No. 64. Plaintiff also sought an emergency injunction from the court of appeals, but while that Motion was pending the government withdrew the FEIS

---

[1] There are two other cases active in district court challenging the FEIS and land exchange: *San Carlos Apache Tribe v. United States Forest Service*, No. 2:21-cv-68-DWL (D. Ariz. filed Jan. 14, 2021) and *Arizona Mining Reform Coalition v. United States Forest Service*, No. 2:21-cv-122-DLR (D. Ariz. filed Jan. 22, 2021). The government has provided its 60-day notice in both cases and has proposed that the district court set deadlines for any emergency motions to stop the land exchange during the notice period.

[2] The Court also found Plaintiff lacked standing to bring a breach of trust claim, and even if it did, it was unlikely to succeed on the merits. Order at 4-11, ECF No. 57.

and the Motion was denied. *Apache Stronghold v. United States*, No. 21-15295, 2021 WL 12295173, at *1 (9th Cir. Mar. 5, 2021).

In June 2022, a panel of the court of appeals affirmed the district court's denial of a preliminary injunction. *Apache Stronghold v. United States*, 38 F.4th 742, 748 (9th Cir. 2022). The Ninth Circuit then granted rehearing en banc and again affirmed the district court's denial of a preliminary injunction, issuing a per curiam order and several separate opinions. *Apache Stronghold*, 101 F.4th 1036. The per curiam order explained that the eleven-judge en banc court had produced two majority holdings explained in different opinions. *Id.* at 1043-44. In the lead opinion, a majority of the en banc court held that Plaintiff's free-exercise claim is foreclosed by the Supreme Court's decision in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), and that *Lyng's* constitutional holding is incorporated into the concept of a "substantial[] burden" codified in RFRA, 42 U.S.C. § 2000bb-1(a), therefore foreclosing Plaintiff's RFRA claim as well. 101 F.4th at 1043-44. The Ninth Circuit then declined Plaintiff's request to rehear the case en banc before the full court. *Id.* at 1043.

After obtaining an extension, Plaintiff petitioned for a writ of certiorari on September 11, 2024, which the United States and Resolution Copper opposed. The petition remains pending before the Supreme Court. While the Supreme Court could carry the pending petition to next term, the government agrees with Plaintiff that it is likely a decision on the pending petition will be made by early July. *See* Pl.'s Mot. 16.

III. ARGUMENT

a. Plaintiff is not likely to succeed on the merits.

This Court has already concluded that Plaintiff failed to establish a likelihood of success on, or serious questions going to, the merits of its claims and denied Plaintiff a preliminary injunction on that basis alone. *Apache Stronghold v. United States*, 519 F. Supp. 3d 591, 611 (D. Ariz. 2021), *aff'd,* 101 F.4th 1036 (9th Cir. 2024) (en banc). This Court also already held that "Plaintiff is not entitled to a Rule 62(d) injunction pending

appeal" for the same reason: "because it has not demonstrated a likelihood of success on, or serious questions going to, the merits of its claims." *Apache Stronghold v. United States*, No. CV-21-00050, 2021 WL 689906, at *1 (D. Ariz. Feb. 22, 2021). The Ninth Circuit twice affirmed that conclusion, first in a panel decision issued in June 2022, *Apache Stronghold v. United States*, 38 F.4th 742, 748 (9th Cir. 2022), and again in an en banc decision in May 2024, *Apache Stronghold*, 101 F.4th at 1044. These decisions are the law of this case. *Gonzalez v. Arizona*, 677 F.3d 383, 389 n.4 (9th Cir. 2012) ("Under the law of the case doctrine, a court will generally refuse to reconsider an issue that has already been decided by the same court or a higher court in the same case.").

Plaintiff contends the en banc decision was wrongly decided. Pl.'s Mot. 12, 13 (asserting the decision "contradicts RFRA's plain tex[t,]" "conflicts with Supreme Court precedent[,]" and "also conflicts with six other circuits."). Relying on dissenting opinions and its pending petition for certiorari, Plaintiff urges this Court to reverse course and find that Plaintiff has now raised serious questions on the merits of its RFRA and free-exercise claims. *Id*.

That request is not for the district court, which has already decided this issue and is bound by the Ninth Circuit's en banc decision. That both the panel and the en banc decisions were divided and issued over vigorous dissents is immaterial to this Court's analysis. It is the law of this case—decided by this Court and twice affirmed by the Ninth Circuit—that Plaintiff has failed to establish a likelihood of success on, or serious questions going to, the merits of its claims. Plaintiff's Motion should be denied on that basis alone. *See Mann v. GTCR Golder Rauner, LLC*, 483 F. Supp. 2d 864, 870-71 (D. Ariz. 2007) (declining to reevaluate holding because "law of the case doctrine is determinative").

The en banc decision is also the law of this circuit: it is binding precedent that this Court cannot disregard, and it controls this Motion. *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2025) (circuit authority is binding unless overruled by the circuit court

sitting en banc or by the Supreme Court); *Gonzalez*, 677 F.3d at 389 n.4 (exceptions to law-of-the-case doctrine "are not exceptions to our general 'law of the circuit' rule" that published Ninth Circuit decisions "must be followed unless and until overruled by a body competent to do so") (citing *Hart*, 266 F.3d at 1170). That the Supreme Court may be "actively considering" whether to grant certiorari to review the en banc panel's decision, Pl.'s Mot. 14, does not permit this Court to ignore binding precedent. *Hart*, 266 F.3d at 1175 ("A district court bound by circuit authority . . . has no choice but to follow it, even if convinced that such authority was wrongly decided."). Because the Ninth Circuit has resolved the precise questions at issue—in this very case, on the same claims presented now—this Court cannot conclude that Plaintiffs have shown a likelihood of success on, or serious questions going to, the merits of its claims. *Gonzalez*, 677 F.3d at 389 n.4; *see also R.J. Reynolds*, 2022 WL 16986580, at *1 (denying injunction pending appeal where the plaintiffs' motion was "foreclosed in [the district court] by Ninth Circuit precedent" and plaintiffs sought appellate relief).

Indeed, as discussed below, the Ninth Circuit spoke definitively on the merits of both Plaintiff's free-exercise and RFRA claims and correctly determined that Plaintiff has not established a likelihood of success or serious questions as to either. Because it is bound by that decision, this Court must do the same.

i. Plaintiff is not likely to succeed on the merits of the free-exercise claims.

In the leading majority opinion affirming this Court's denial of Plaintiff's Motion for a Preliminary Injunction, the en banc court held that Plaintiff's free-exercise claim is foreclosed by the Supreme Court's decision in *Lyng*, 485 U.S. 439.[3] In *Lyng*, a group of

[3] As the per curiam order explains, a majority of the en banc court (the five dissenting judges and Judge Ryan Nelson, who joined the lead opinion and issued a separate concurrence) overruled *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008) (en banc), *cert. denied*, 556 U.S. 1281 (2009). *Apache Stronghold*, 101 F.4th at

Indian and environmental plaintiffs challenged the Forest Service's decision to construct a road and allow logging on federal lands in an area within a national forest that had "historically been used for religious purposes." *Lyng*, 485 U.S. at 442. The Court acknowledged that the proposed project would have "severe adverse effects on the practice of [the plaintiffs'] religion." *Id.* at 447. But the Court nonetheless rejected the plaintiffs' free-exercise claim, explaining that the First Amendment confers no right to a "religious servitude" on public lands, *id*. at 452, and that the government's management of its own property did not impose a cognizable burden on the plaintiffs' exercise of their religion, *see id.* at 451-53. Noting that a "broad range of government activities—from social welfare programs to foreign aid to conservation projects—will always be considered essential to the spiritual well-being of some citizens, often on the basis of sincerely held religious beliefs[,]" the *Lyng* Court explained that "government simply could not operate if it were required to satisfy every citizen's religious needs and desires" in matters such as the administration of public lands." *Id.* at 452.

Relying on *Lyng*, the Ninth Circuit explained that the land transfer required by the Act is "indistinguishable" from the government action in *Lyng*. *Apache Stronghold*, 101 F.4th at 1051. As in *Lyng*, the transfer would have "no tendency to coerce" any persons "into acting contrary to their religious beliefs." *Id.* (quoting *Lyng*, 485 U.S. at 450). Nor would the transfer "'discriminate' against [Plaintiff's] members, 'penalize' them, or deny them 'an equal share of the rights, benefits, and privileges enjoyed by other citizens.'" *Id*. at 1052 (quoting *Lyng*, 485 U.S. at 449, 453). The Ninth Circuit concluded that Plaintiff's constitutional claim amounts to an unfounded request for "a 'religious servitude' that

---

1043. In denying Plaintiff's Preliminary Injunction Motion, this Court had relied on both *Navajo Nation* and the Supreme Court's decision in *Lyng*. *Apache Stronghold*, 519 F. Supp. 3d at 606-08. That the Ninth Circuit has now overruled *Navajo Nation* is immaterial to this motion, however, because the en banc majority nevertheless held that Plaintiff was not likely to succeed on the merits of its claims under *Lyng*. *See* 101 F.4th at 1092 (concurring in majority's denial of injunctive relief) (Nelson, J., concurring).

would uniquely confer on tribal members '*de facto* beneficial ownership'" of the federal lands at issue. *Id.* (quoting *Lyng*, 485 U.S. at 452-53). The Court therefore found Plaintiff unlikely to succeed on its free-exercise claim.

ii. Plaintiff has not shown a substantial burden on their religious exercise under RFRA.

The Ninth Circuit en banc opinion also affirmed this Court's conclusion that Plaintiff failed to demonstrate a likelihood of success on, or serious questions going to, the merits of its RFRA claim. *Apache Stronghold*, 101 F.4th at 1063. RFRA forbids the government from "substantially burden[ing] a person's exercise of religion" unless "application of the burden to the person" furthers a "compelling governmental interest" and is "the least restrictive means of furthering that" interest. 42 U.S.C. § 200bb-1(a) and (b).

In rejecting Plaintiff's RFRA claim, the en banc decision relied again on *Lyng*, concluding that it continues to inform "what counts as a *cognizable* substantial burden" on religious exercise for purposes of that statute. *Apache Stronghold*, 101 F.4th at 1061. In particular, the court viewed RFRA's reference to a "substantial burden" as a term of art that incorporated the Supreme Court's pre-*Smith* case law. *Id.* at 1063. The court thus concluded that "RFRA's understanding of what counts as 'substantially burden[ing] a person's exercise of religion' must be understood as subsuming, rather than abrogating, the holding of *Lyng*." *Id.* (alteration in original). As a result, the court concluded that *Lyng*'s "holding therefore governs Apache Stronghold's RFRA claim as well," and the RFRA claim therefore "fails for the same reasons" as Plaintiff's free-exercise claim. *Id.*

* * * *

The Supreme Court's decision in *Lyng* and the Ninth Circuit's en banc decision remain good law and controlling precedent. Thus, this Court is bound by the Ninth Circuit's holding that Plaintiff has not raised serious questions or established a likelihood of success on its free-exercise or RFRA claims. *Apache Stronghold*, 519 F. Supp. 3d at

607-08 ("Just as the Ninth Circuit and other courts must follow *Lyng* until the Supreme Court instructs otherwise, this Court must do the same.") (quoting *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 239 F. Supp. 3d 77, 94 (D.D.C. 2017))). Plaintiff's Motion for Injunction Pending Appeal must be denied on this basis alone. *See Apache Stronghold*, 2021 WL 689906, at *1 (denying injunction pending appeal without considering other factors where Plaintiff failed to establish likelihood of success on the merits).

b. Plaintiff has not shown a likelihood of immediate, irreparable harm from the land transfer *while* their petition for certiorari is decided.

Plaintiff has also failed to demonstrate that it will suffer immediate and irreversible injury while its petition is pending and for twenty-one days afterward. The land exchange will occur no earlier than June 16, 2025—mere days from the end of the current Supreme Court term—and any irreparable harm Plaintiff alleges will occur because of the exchange is years away. There must be a "'sufficient causal connection' between the alleged irreparable harm and the activity to be enjoined" to justify injunctive relief. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 886 F.3d 803, 819 (9th Cir. 2018). The irreparable harm that Plaintiff alleges is an inability to access Oak Flat and participate in its core religious practices as well as the impacts of mining activities which begin with "preparatory activities—like constructing new shafts, new roads, a water treatment plan, an admin building, and substations." Pl.'s Mot. 14 (cleaned-up). This alleged harm will not occur for months to years, much less while the Supreme Court petition is pending. *See Apache Stronghold*, 101 F.4th at 1047-48 ("[I]t will be as much as six years before the mining facilities will be operational. And during that time, Resolution Copper is required by the terms of § 3003 to keep Oak Flat accessible to 'members of the public, including Indian tribes, to the maximum extent practicable, consistent with health and safety requirements.'" (quoting 16 U.S.C. § 539p(i)(3))).

Nor is there any irreparable harm resulting from the land transfer itself, because access to the property will continue afterward for years and commercial mineral production is also years away. *See id.*; Decl. of Matthew Pierce in Supp. of Def.-Intervenor's Br. in Opp'n to Pl.'s Mot. ("Pierce Decl.") ¶ 20, ECF No. 156 (Ex. B).

i. Plaintiff will continue to have access to the land for traditional and cultural activities long after the land transfer, and mining operations are years away.

Plaintiff is wrong in asserting that the land transfer will cause irreparable harm, and its Motion misstates the facts. Not only are any subsidence-causing mining activities still years in the future, even after the land exchange occurs, access to Oak Flat for cultural and traditional purposes will continue until safety risks preclude it. *C.f.* Pl.'s Mot. 14-15 (arguing that upon transfer Resolution will have the "power to exclude Apache Stronghold's members from Oak Flat and to restrict the timing and location of religious ceremonies that regularly take place at Oak Flat"). The issuance of the FEIS (and the land exchange) does not prevent Plaintiff's use of Oak Flat during the pendency of the appeal (or for years thereafter). No irreparable harm justifies this emergency injunctive relief.

First, Plaintiff, along with the public, will continue to have access to and use Oak Flat even after the land exchange for as long as safely possible. *Apache Stronghold*, 101 F.4th at 1047-48; Decl. of Victoria Peacey in Supp. of Def.-Intervenor's Br. in Opp'n to Pl.'s Mot. ("Peacey Decl.") ¶¶ 36-37, 40-41, 46-50, 54, ECF 156 (Ex. A). The Act authorizing the land exchange mandates that access continue, 16 U.S.C. § 539p(i)(3), and Congress explicitly set aside another religiously significant area, Apache Leap, to "preserve [its] natural character" and "allow for traditional uses of the area." *Id.* § 539p(g)(2). Resolution's commitments to continue to allow public access to Oak Flat will be detailed in the republished FEIS and ROD and are also found in the existing Access and Management Plan for the Oak Flat Campground. Access and Management Plan: Oak Flat Campground at 1, 8, https://www.resolutionmineeis.us/documents/resolution-oak-

flat-access-management-plan-2020. Plaintiff's and the public's access to Oak Flat will continue to the maximum extent practicable until the operation of the mine precludes public access for safety reasons. *Apache Stronghold*, 101 F.4th at 1047-48; Access and Management Plan at 8; Peacey Decl. ¶¶ 49-50. Further, not only will Resolution's management of the Oak Flat Campground be consistent with current Forest Service management, but Resolution will also accommodate requests to periodically close the Campground to the public so it can be used exclusively for traditional and ceremonial purposes. Access and Management Plan at 8; Peacey Decl. ¶ 49. These purposes include harvesting of the Emory oak groves. Peacey Decl. ¶ 41.

In short, to the extent that Plaintiff bases its Emergency Motion on loss of access to Oak Flat the Motion is without merit, because Plaintiff's access will not end with the republication of the FEIS or the land exchange.

Second, the environmental harms Plaintiff allege, *see* Pl.'s Mot. 14, are linked not to the exchange itself, but to mining that will occur much later. Before Resolution can begin mining it must conduct further exploration to better understand the orebody and then build the necessary underground infrastructure, a process which will take years. Pierce Decl. ¶¶ 14-15, 20. The initial exploration activities will not disturb the surface or cause subsidence. *Id.* ¶ 15. It will be several months or more before Resolution may disturb the surface, by building a section of new road, new drill pads, and an emergency helipad. Peacey Decl. ¶ 52. The construction of new surface facilities such as a water treatment plant, an admin building, and substations are more than a year out and will not be located on Oak Flat in any event. *Id.* ¶ 53. Mining will not occur at the site for several years (and subsidence at the site is not expected to occur for at least six years from the time Resolution starts mining). Pierce Decl. ¶¶ 20-22.

Additional regulatory steps also must be taken before operations could begin. The DROD to be published with the FEIS covers discretionary special use authorizations for power lines, tailings, and water pipelines, and roads running over federal lands. *See* 36

C.F.R. Part 251 Subpart B. Based on the Forest Service's objection process set forth in 36 C.F.R. Part 218, the earliest the Final ROD could be published is after the issuance of responses to objections. *See* 36 C.F.R. § 218.26. Unlike the congressionally-mandated land exchange itself, these discretionary decisions about mining operations, once ripe, may be the subject of proper legal challenge.

Plaintiff's brief focuses on the harms caused by mining operations and "preparatory activities," but tellingly, there is no explanation for how these activities will cause Plaintiff harm *during the limited period for which Plaintiff seeks an injunction*. *See* Pl.'s Mot. 14. And, as explained above, even the "preparatory activities" are months out. It is true that the Forest Service assumes that mining will ultimately lead to subsidence. But the only near-term event—transfer of title—is not tantamount to something that will occur only years from now. Plaintiff has more than enough time, in the absence of an injunction, to advance whatever rights it has and to seek to halt mining activity long before irrevocable changes to the land occur.

In sum, any action that would irrevocably alter the character of the land is not days or weeks away but will only occur years in the future and cannot justify Plaintiff's request for emergency relief.

ii. The Court need not decide at this juncture whether the land exchange can be reversed.

Plaintiff argues it will suffer irreparable harm in the absence of an injunction now, because the Court may lack authority to reverse the transfer later. The Court need not resolve this question to deny Plaintiff's Emergency Motion, because Plaintiff has failed to establish a likelihood of success on, or serious questions to, the merits before the Ninth Circuit and even the "preparatory activities" Plaintiff suggests could prevent a reversal is months away.

Although Federal Defendants do not concede that it would be appropriate relief here, the Ninth Circuit has found it appropriate to reverse federal land exchanges after

they have occurred. *E.g.*, *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1187-88 (9th Cir. 2000) (ordering that a land exchange be voided); *see Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt.*, 606 F.3d 1058, 1063-64 (9th Cir. 2010) (explaining the district court's decision to set aside an already-effected land exchange); *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1342-43 (9th Cir. 1995); *Nat'l Forest Pres. Grp. v. Butz*, 485 F.2d 408, 411 (9th Cir. 1973). This case is also distinguishable from *Kettle Range Conservation Group v. U.S. Bureau of Land Management*, that Plaintiff relies on, because no ground-disturbing activities have begun and the private entity to receive title is a party to the action. 150 F.3d 1083, 1084-85 (9th Cir. 1998) (per curiam).

In sum, Plaintiff has not met its burden of establishing that imminent, irreparable harm is likely in the absence of an injunction against the publication of the FEIS and the land exchange. The FEIS will not be republished until June 16, 2025, at the earliest. Between now and then, the Supreme Court could deny Plaintiff's petition for certiorari, removing any possibility of success on the merits. If the Supreme Court decides to grant review or carry the petition to next term, the government "may reevaluate how to proceed," ECF No. 148; Ltr. from the Solicitor General (Apr. 21, 2025), *Apache Stronghold v. United States*, No. 24-291. As such, there is no threat of irreparable harm now, especially when any alleged harm to the land or to Plaintiff's ability to access it is months or years away. The Court could deny the Motion on this basis alone. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008); *All. For the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

c. While this Court need not reach them, the remaining factors favor the agencies.

This Court need not go further to consider the balance of equities and public interest, since Plaintiff's showing of entitlement to an emergency injunction has failed. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) ("Once an applicant satisfies the first two factors, the traditional stay inquiry calls for assessing the harm to the opposing party and

weighing the public interest. These factors merge when the Government is the opposing party."). But should the Court proceed to these factors, they are not as lopsided as Plaintiff suggests. *See* Pl.'s Mot. 15-16.

In passing the law that created the land exchange, Congress determined that facilitating copper mining in Arizona and expanding the Tonto National Forest—a Forest which services multiple public purposes including recreation opportunities and habitat conservation—is in the public interest. *See, e.g.*, *Am. Motorcyclist Ass'n v. Watt*, 714 F.2d 962, 967 (9th Cir. 1983). The equities thus favor the Federal Defendants under the principle that "a court sitting in equity cannot 'ignore the judgment of Congress.'" *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497 (2001) (citation omitted). When Congress has affirmatively spoken on a matter—here, the land transfer—it is in accord with the public interest to not frustrate Congress's intent. *Id.* (citations omitted).

Further, the land exchange Plaintiff asks the Court to enjoin will facilitate the domestic production of a critical mineral—copper—under the property. Increased domestic mineral production of copper is in the public and national interest of the United States. On March 20, 2025, President Trump issued an Executive Order, Immediate Measures to Increase American Mineral Production, which affirms that the national and economic security of the United States are acutely threatened by the United States' reliance on mineral production by hostile foreign governments and it is "imperative for our national security that the United States take immediate action to facilitate domestic mineral production to the maximum possible extent." Exec. Order 14241, 90 Fed. Reg. 13673 (Mar. 20, 2025), https://www.whitehouse.gov/presidential-actions/2025/03/immediate-measures-to-increase-american-mineral-production/. The President's Executive Order required the identification of "priority" mineral projects to be considered as transparency projects on the Permitting Dashboard established under section 41003 of title 41 of the Fixing America's Surface Transportation (FAST) Act, Pub. L. No. 114-94, 129 Stat. 1312, 1748 (2015). The Resolution Copper Project was

listed in the first wave of critical mineral projects to be added to the dashboard as "FAST-41 Transparency Projects." *See FAST-41 Transparency Projects*, Permitting Council, https://www.permits.performance.gov/projects/transparency-projects (last visited April 30, 2025).

Republishing the FEIS and completing the attendant land exchange are actions that are in the public interest as determined by Congress and affirmed through the President's recent actions to increase domestic production of critical minerals.

IV. CONCLUSION

For all these reasons, Plaintiff's Emergency Motion for Injunction Pending Appeal should be denied.

Submitted April 30, 2025,

ADAM R.F. GUSTAFSON
Acting Assistant Attorney General
U.S. Department of Justice
Environment & Natural Resources Division

/s/ Erika Norman
ERIKA NORMAN
ANGELA ELLIS
Trial Attorneys
Natural Resources Section
150 M St. NE, Third Floor
Washington, D.C. 20002
(202) 305-0475 (Norman)
Erika.norman@usdoj.gov
Angela.Ellis@usdoj.gov

Attorneys for Federal Defendants