No. 21-15295

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
No. CV-21-00050-PHX-SPL (Hon. Steven P. Logan)

FEDERAL DEFENDANTS' OPPOSITION TO EMERGENCY MOTION FOR INJUNCTION PENDING APPEAL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Treaties

LIST OF EXHIBITS

Federal Exhibit 1	Resolution Copper Project and Land Exchange Final Environmental Impact Statement (January 2021) (excerpts)
Federal Exhibit 2	Resolution Copper Project and Land Exchange Draft Record of Decision (January 2021) (excerpts)
Federal Exhibit 3	Declaration of Victoria Peacey (February 2021)*
Federal Exhibit 4	Declaration of Andrew Lye (February 2021)*
Federal Exhibit 5	Access and Management Plan Oak Flat Campground (November 2020) (excerpts)
Federal Exhibit 6	Memorandum from USDA to USFS directing it to rescind Final Environmental Impact Statement and Record of Decision and to withdraw Notice of Availability (March 1, 2021)
Federal Exhibit 7	USFS Letter to EPA requesting withdrawal of Notice of Availability for Resolution Copper Final Environmental Impact Statement (March 1, 2021)

* Exhibits 3 and 4 are declarations prepared by Resolution Copper employees to recount facts critical to the allegations of irreparable harm set forth in Plaintiff's filing. These facts are also supported by citations to the FEIS and ROD. Resolution Copper is not a party to this litigation.

GLOSSARY

FEIS	Final Environmental Impact Statement
RFRA	Religious Freedom Restoration Act of 1993
ROD	Record of Decision
USDA	U.S. Department of Agriculture
USFS	U.S. Forest Service

INTRODUCTION

More than six years after Congress directed the land exchange at issue, Plaintiff seeks the extraordinary relief of an emergency injunction pending appeal. Such a request mandates a showing that there is a significant threat of irreparable injury *during the pendency of the appeal*, and the facts do not establish one here.

On March 1, 2021, the U.S. Department of Agriculture directed the Forest Service to rescind the Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) for the Resolution Copper Project in order to reinitiate consultation with Tribes and ensure impacts have been fully analyzed. In light of the withdrawal of the FEIS, the land exchange is likely to be delayed. At this time, the United States cannot estimate how long the consultation process will take. But in any event, as explained *herein*, there is no imminent harm to Plaintiff.

When the land exchange occurs, Plaintiff will continue to have guaranteed access to Oak Flat for years, including for traditional and ceremonial purposes. No irreversible, surface-impacting mining activity will occur for at least two years. And if this Court were to determine, on the merits, that Congress' directive to transfer the land was unlawful either under the Religious Freedom Restoration Act (RFRA) or the constitution, this Court retains the power to reverse the transfer. In sum, the harms alleged by Plaintiff were never imminent, and they are even less so now. Nothing warrants this extraordinary relief.

Plaintiff also fails to show likelihood of success on the merits. The government's disposition of its own property cannot create a substantial burden on Appellant's members' religious exercise. And as there is no trust obligation concerning the land, there can be no breach. While Defendants do not question the sincerity of Plaintiff's connection to the lands at issue, Congress has decided this land exchange should go forward.

Absent immediate, irrevocable harm, this emergency motion for injunction pending appeal should be denied.

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—to the United States. 9 Stat. 922 (1848); *United States v. California*, 436 U.S. 32, 34 n. 3 (1978). In 1852, the United States signed a treaty with the Western Apache, which agreed that unspecified territorial boundaries would be designated at a later date. Treaty with the Apache, July 1, 1852, 10 Stat. 979. 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 USFS to convey title to 2,422 acres of the Tonto National Forest to Resolution Copper in exchange for 5,459 acres of conservation lands. *Id.* § 539p(b)(2), (d)(1).

The Act requires, *inter alia*, that USFS: (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 permits to Resolution Copper; (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 clearly imposed on USFS a non-discretionary duty to convey Resolution title to the land after the FEIS.

After the passage of the Act, the *Chí'chil Biłdagoteel*/Oak Flat area was listed on the National Register of Historic Places; the listing imposes no restrictions on the use of private property.

The initial target date set by USFS for the publication of the FEIS was July 2020. It was published on January 15, 2021, and, as detailed below, rescinded on March 1, 2021.

C. District court proceedings

On January 12, more than 6 years after the Act, Plaintiff sought to stop the land transfer. It alleged that the land is held in trust by the United States and that the mine operation will desecrate Oak Flat in violation of Plaintiff's religious liberties. On January 14, Plaintiff moved for a Temporary Restraining Order (TRO) and Preliminary Injunction seeking to prevent the issuance of the FEIS, which was set for publication the next day.

On January 14, the district court denied the emergency TRO because Plaintiff could not show immediate and irreparable injury. The FEIS was published on January 15. The district court held a hearing on the Preliminary Injunction on February 3.

On February 12, the district court denied a preliminary injunction, concluding that Plaintiff had failed to satisfy the factors necessary to obtain a preliminary injunction. Plaintiff filed a notice of appeal (February 18), and an emergency motion for an injunction pending appeal (February 19), which the district court denied (February 22). Plaintiff now renews its motion for an injunction pending appeal in this Court and requests expedited review.

D. Withdrawal of the FEIS and ROD

On March 1, the U.S. Department of Agriculture (USDA) directed USFS to rescind the FEIS and ROD. Ex. 6. USFS promptly complied and requested the

Environmental Protection Agency to withdraw the Notice of Availability for the FEIS. Ex. 7. USDA's decision was made because "additional time is necessary to fully understand concerns raised by Tribes and the public and the project's impacts to these important resources and ensure the agency's compliance with federal law." Ex. 6. While USFS "cannot give a precise length of time for completing the re-initiation of consultation," "consultations such as this generally take several months."[1] Resolution EIS Project Update, https://www.resolutionmineeis.us/ (March 1, 2021). As stated above, the Act tags the date on which the land exchange must take place to the date that a final EIS is published. *See* 16 U.S.C. § 539p(c)(1).

ARGUMENT

Injunction pending appeal is "an extraordinary and drastic remedy" that should be granted in only exceptional circumstances. *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012). Plaintiff must establish (1) that it is likely to succeed on the merits of its appeal; (2) that it is likely to suffer irreparable harm absent

[1] Counsel had previously orally represented in two other cases active in district court challenging the FEIS and land exchange that the transfer would not occur before March 15. *San Carlos Apache Tribe v. U.S. Forest Service*, No. 2:21-cv-68-DWL (filed Jan. 14, 2021); *Arizona Mining Reform Coal. v. U.S. Forest Service*, No. 2:21-cv-122-DLR (filed Jan. 22, 2021). The United States has moved to consolidate those cases (both seeking preliminary injunctions) with this litigation.

injunctive relief; (3) "that the balance of equities tips in [its] favor"; and (4) "that an injunction is in the public interest." *Winter v. NRDC*, 555 U.S. 7, 20 (2008).

The core issue in any request for injunctive relief is that a "plaintiff must demonstrate that there exists a significant threat of irreparable injury." O*akland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1376 (9th Cir. 1985). This is because preliminary relief is "a device for preserving the status quo and preventing the irreparable loss of rights before judgment." *Textile Unlimited, Inc. v. A. BMH and Co.*, 240 F.3d 781, 786 (9th Cir. 2001). The harm alleged must occur—not sometime in the future—but during the pendency of the appeal itself. *Doe #1 v. Trump*, 957 F.3d 1050, 1070 (9th Cir. 2020) ("The preliminary injunction preserves the status quo *during the pendency of this appeal*." (emphasis added)).

And the Supreme Court has "held that plaintiffs must demonstrate that harm is likely, not just possible." *Cascadia Wildlands v. Scott Timber Co.*, 715 F. App'x 621, 623 (9th Cir. 2017) (citing *Winter*, 555 U.S. at 22). This is so even where environmental damage is alleged, *see Amoco Prod. Co. v. Vill. Of Gambell*, 480 U.S. 531, 544-45 (1987). So too, with alleged harms to religious interests. *See, e.g.*, *Tenacre Found. v. I.N.S.*, 892 F. Supp. 289, 294 (D.D.C. 1995), *aff'd*, 78 F.3d 693 (D.C. Cir. 1996); *Singh v. Carter*, 185 F. Supp. 3d 11, 22 (D.D.C. 2016).

Because an injunction is "never awarded as of right," 555 U.S. at 24, the moving party must make a "clear showing" that it has met all four requirements of

the standard, *id.* at 22. Failure to establish any one of the required elements precludes preliminary relief. *Id.* at 24. As elaborated below, Plaintiff cannot make the required showing.

I. Plaintiff has not demonstrated a likelihood of immediate, irreparable harm from the land transfer while this appeal is pending.

Plaintiff has failed to establish that it will suffer immediate and irreversible injury. USFS's March 1 withdrawal of the FEIS and ROD means transfer of title is likely not imminent. Even if the exchange were to occur, moreover, it would not cause either immediate or irreparable harm. "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 harm that Plaintiff alleges is an inability to access Oak Flat to participate in its core religious practices. Mot. at 1. But access to the land will continue; no subsidence-causing activities will occur for at least two years after any transfer, and if the Act is ultimately held to violate the Constitution or RFRA, the transfer can later be reversed.

A. Plaintiff will continue to have access to the land after the land transfer, and no subsidence-causing mining activities will occur for at least two years.

Plaintiff wrongly asserts that the land transfer will lead to "immediate," "permanent" harm, and its motion misstates the facts. Even setting aside that the

land transfer itself is likely to be delayed by the withdrawal of the EIS, any subsidence-causing mining activities are still years in the future, and public access to Oak Flat *will continue* until safety risks preclude it. Neither issuance of the FEIS nor the land exchange, if it occurs at some point in the future, prevents Plaintiff's use of Oak Flat. No irreparable harm justifies this emergency injunctive relief.

First, Plaintiff, along with the public, would continue to have access to Oak Flat after the land exchange (whenever that land exchange occurs). Ex. 1 at J-27; Ex. 2 at 31; Ex. 3 ¶ 33-49; Ex. 5 at 1. Open access would continue to the maximum extent practicable until the operation of the mine precludes public access for safety reasons. Ex. 2 at 31; Ex. 3 ¶ 46; Ex. 5 at 8. Resolution's management of the campground would match current USFS management, and Resolution would also accommodate requests to periodically close the campground to the public so it can be used exclusively for traditional and ceremonial purposes. Ex. 1 at J-27; Ex. 2 at 31; Ex. 3 ¶ 46; Ex. 5 at 8. This would include harvesting of the Emory oak groves. Ex. 3 ¶ 38. Access would also continue for recreational climbing, off-highway vehicle use, and travel through the property to reach other hunting areas. Ex. 3 ¶ 33, 43-45.

These are not empty platitudes—the Act authorizing the land exchange mandates such access, 16 U.S.C. § 539p, and Resolution has detailed these commitments within the FEIS, ROD, and site management plan. Ex. 1 at J-27; Ex.

2 at 31; Ex. 5 at 1, 8. In short, the "immediate" impact of the land exchange would *not* be loss of access to Oak Flat.

Second, Plaintiff's alleged harms are linked not to the exchange itself, but to mining that may occur in the future. But before that mining can occur, Resolution must conduct additional feasibility study work and detailed study of the geologic characteristics and mineralization of the orebody, as well as environmental studies. Ex. 1 at ES-3; Ex. 4 ¶ 8. This information is required before much of the required underground infrastructure can be developed, and such development is "several years away, perhaps longer." Ex. 4 ¶ 10-11. Additional regulatory hurdles also exist. Ex. 1 at 27-30. For example, Resolution must secure special use permits for roads through other federal lands to conduct its operations. Ex. 3 ¶ 31.

Active mining will not occur at the site for several years at the earliest (and subsidence at the site is not expected until a decade from now). Ex. 1 at ES-3; Ex. 2 at 2; Ex. 3 ¶ 49; Ex. 4 ¶ 11. Plaintiff repeatedly refers to future mining activity on the property, but tellingly, there is *no* explanation for how the mining project threatens an *imminent* harm. The only relatively near-term event—transfer of title— is itself now likely to be delayed, and in any event, it would not cause immediate harm and is reversible. Any action that would irrevocably alter the character of the land is not days or weeks but *years* in the future, leaving ample time for this Court's review without injunction pending appeal.

B. Federal land exchanges can be reversed.

The transfer of title, whenever it occurs, cannot have an irrevocable impact because—if this Court determines that the land exchange violates the Constitution or RFRA—the transfer can be reversed.

This Court has reversed federal land exchanges after they have occurred. *Desert Citizens Against Pollution v. Bisson*, 231 F.3d 1172, 1187 (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).

And, in *Youpee v. Babbit*, 519 U.S. 234 (1997), the Supreme Court held that the Indian Land Consolidation Act's escheat provision was an unconstitutional taking, even after partial distribution of property had been validated and decreed. The Supreme Court has applied a similar principle when a congressionally authorized land transfer conflicted with a treaty of the United States. *Jones v. Meehan*, 175 U.S. 1 (1899).

Here, as in *Desert Citizens Against Pollution v. Bisson*, this is not a case in which an exchange has been "completed substantially prior to the initial challenge before the district court," or where a reversal of the exchange would "return federal

lands which have been irrevocably changed by private actions." 231 F.3d at 1187; *see, e.g.*, *Kettle Range Conservation Grp. v. Bureau of Land Mgmt.*, 150 F.3d 1083, 1085 (9th Cir. 1998) (denying injunctive relief where plaintiffs had made no effort to join private entities who had obtained title to the lands and begun ground-disturbing activities). No irreversible impacts like clear-cutting or blasting would occur immediately after transfer. *See, e.g.*, *Sovereign Inupiat for a Living Arctic v. Bureau of Land Mgmt.*, 2021 WL 454280, at *4 (D. Alaska 2021); *W. Land Exch. Project v. Dombeck*, 47 F. Supp. 2d 1216, 1218 (D. Or. 1999).

Thus, an injunction pending appeal is unnecessary because the mere transfer of title is not irreversible. Plaintiff cannot meet its burden of establishing that *imminent, irreparable* harm is likely. The Court should deny the motion on this basis alone. *Winter*, 555 U.S. at 22.

II. Plaintiff is not likely to succeed on the merits

Plaintiff also fails to meet the required showing for the requested injunction because Plaintiff has failed to demonstrate a likelihood of success the merits. *Winter*, 555 U.S. at 22.

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

Congress enacted RFRA, 42 U.S.C. § 2000bb et seq., in response to the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990), which held that neutral, generally applicable laws that incidentally burden religious

practice need not be justified by a compelling governmental interest. *Id*. at 882-890. RFRA sought to restore the compelling interest test as a matter of federal statutory right by providing that the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government demonstrates that application of the burden "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.

To establish a prima facie claim, a plaintiff must show that the government has substantially burdened its exercise of religion. If it does so, the burden shifts to the government to show that it has acted in the least restrictive means to further a compelling interest. *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1068 (9th Cir. 2008) (en banc). RFRA does not define "substantial burden," but it "expressly referred to and restored a body of Supreme Court case law that defines what constitutes a substantial burden on the exercise of religion." *Id.* at 1074, citing 42 U.S.C. §§ 2000bb(a)(4)-(5); 2000bb(b)(1).

One particularly relevant pre-*Smith* case is *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988). In that case, plaintiffs claimed that a planned road on federal land would "virtually destroy [their] ability to practice their religion," and thus violated the Free Exercise Clause. *Id.* at 451. The

Supreme Court rejected that claim, holding that a cognizable burden exists only when "the affected individuals [would] be coerced by the Government's action into violating their religious beliefs" or when "governmental action penalize[s] religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Id.* at 449. The "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs," do not require the government to demonstrate a compelling justification, the Court held, "[f]or the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Id.* at 450-51. The government's "right to use what is, after all, *its* land" is simply not subject to a "religious servitude" to enable or facilitate the religious needs of any citizen. *Id.* at 452-53 (emphasis in original).

The same conclusion holds under RFRA, this Court held in *Navajo Nation*. In that case, the government approved a plan to use recycled wastewater for snowmaking and fire suppression on the San Francisco Peaks in Arizona. Several Tribes and individuals sued, claiming that the wastewater would desecrate a sacred site, substantially burdening their religious exercise in violation of RFRA. This Court, sitting en banc, rejected that claim: "We hold that the Plaintiffs have failed

to establish a RFRA violation. The presence of recycled wastewater on the Peaks does not coerce the Plaintiffs to act contrary to their religious beliefs under the threat of sanctions, nor does it condition a governmental benefit upon conduct that would violate their religious beliefs, as required to establish a 'substantial burden' on religious exercise under RFRA." *Navajo Nation*, 535 F.3d at 1067. Like the Supreme Court in *Lyng*, 485 U.S. at 452-53, this Court noted that "no government—let alone a government that presides over a nation with as many religions as the United States of America—could function" under a contrary rule. *Navajo Nation*, 535 F.3d at 1064. "Were it otherwise, any action the federal government were to take, including action on its own land, would be subject to the personalized oversight of millions of citizens," each holding "an individual veto." *Id.* at 1063.

After a thorough, thoughtful discussion, the district court correctly concluded that plaintiff here "runs into the same problem as plaintiffs in both *Navajo Nation* and *Lyng*, each of which is still good law and binding upon this Court: Plaintiff has not been deprived a government benefit, nor has it been coerced into violating their religious beliefs" by the threat or imposition of penalties. "Accordingly," the court held, "Plaintiffs' RFRA and Free Exercise claims must fail." ER-17-18.

Plaintiff attempts to distinguish *Lyng* and *Navajo Nation*, alleging that "neither . . . involved physical destruction of a sacred site; in fact, both cases acknowledged the outcome would have been different otherwise." Mot. at 19. Plaintiff is twice wrong. The Supreme Court in *Lyng* observed that the road would cause "serious and irreparable damage to the sacred areas," 485 U.S. at 442, yet found no substantial burden. Amici Religious Liberty Scholars argue that *Lyng* held that "a different set of constitutional questions" would arise if worshippers were prohibited from visiting a sacred site, but they take that language out of context and distort its meaning. Amicus Brief at 11, quoting *Lyng*, 485 U.S. at 453. The very same sentence makes clear that the *Lyng* court was talking about *discrimination* against religious uses. But here, as in *Lyng*, there is no discrimination; the land exchange statute treats all users of Oak Flat equally. As for *Navajo Nation*, the sacred sites were not physically destroyed, but the Court explicitly acknowledged that the outcome would *not* have been different otherwise: "Even were we to assume, as did the Supreme Court in *Lyng*, that the government action in this case will 'virtually destroy the Indians' ability to practice their religion,' there is nothing to distinguish the roadbuilding project in *Lyng* from the use of recycled wastewater on the Peaks." *Navajo Nation*, 535 F.3d at 1072. There is likewise nothing to distinguish the land exchange here.

Finally, Plaintiff argues that they have been threatened with penalties (for trespassing) and have been denied a benefit (using *Chi'chil Biłdagoteel* for religious exercise). Mot. at 23. But RFRA does not compel the government to dispense particular benefits; it requires only that the government not make benefits *conditional* upon conduct that would violate Plaintiff's religious beliefs. *Navajo Nation*, 535 F.3d at 1063, 1067, 1070. The government has never made any benefit conditional on a violation of Plaintiff's religious beliefs, and the land transfer statute does not do so either. As for trespass, RFRA applies only to *government-imposed* penalties or threats thereof. The United States has never threatened Plaintiff with trespassing penalties for visiting Oak Flat, and Plaintiff does not allege otherwise.

B. Plaintiff is not likely to succeed on its Free Exercise Clause claim.

Plaintiff argues that the land transfer statute violates the Free Exercise Clause because it is, in their view, too narrow in scope to qualify as a "valid and neutral law of general applicability." Mot. at 24, quoting *Smith*, 494 U.S. at 879. No Supreme Court or Circuit precedent supports that claim, but even if it were true, Plaintiff's Free Exercise claim would still fail under *Lyng*, a Free Exercise Clause case, for the reasons discussed above.

Plaintiff also alleges that the land transfer statute at issue was specifically targeted at their religious conduct, and is thus subject to strict scrutiny. Mot. at 24-

25, citing *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993). As the district court noted, however, Plaintiff "has provided no evidence of any discriminatory intent behind its passage," and when asked about it, "Plaintiff's counsel could not directly answer the question." ER-19. On appeal, Plaintiff does not even attempt to show a discriminatory purpose, arguing instead that the intent is "immaterial." That is not the law. To show that a law targeted religious practice, a plaintiff must prove that the law was enacted "because of, not merely in spite of, its adverse effects upon" plaintiffs' religious practice. *Pers. Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (quotation marks omitted); *accord Church of the Lukumi Babalu Aye*, 508 U.S. at 540 (1993) (holding that equal protection cases guide neutrality inquiry under Free Exercise Clause, and relying on the previous quotation). This they have failed to do.

C. Plaintiff lacks standing to bring a breach-of-trust claim and cannot show an existing trust obligation.

Plaintiff also fails to show a likelihood of success on its breach of trust claim.

First, even if Plaintiff had identified a specific substantive source of trust obligations or property that was subject to those obligations (which, as discussed below, it has not), Plaintiff lacks standing to bring such a breach-of-trust claim. Plaintiff is a nonprofit organization that includes some Apache tribal members, but Plaintiff is not a Tribe, nor could it be the beneficiary of any trust created by the

1852 Treaty. To the extent that Treaty created any duties that could support the type of breach of trust claim Plaintiff asserts here (and it could not), such a claim must be brought by a federally-recognized Indian Tribe or Tribes. It is not enough that individual members of Plaintiff are members of such a Tribe. The injuries they allege—however individually experienced—are collective, and to the extent there were any trust duties owed for the Oak Flat area, those duties would have been to the Tribe or Tribes as a whole, not to individuals.[2]

Herrera v. Wyoming, 139 S. Ct. 1686 (2019), and *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), are not to the contrary. Neither case was, at heart, an individual asserting an alleged trust duty owed to a Tribe. Both involved individuals arguing that they were not subject to prosecution—in *Herrera*, for exercising a Treaty-protected hunting right, in *McGirt*, for charges stemming from activity in "Indian country" that had been brought in state court. Both cases involved resolution of the scope of tribal rights, but neither case addressed a circumstance like this case, in which a non-Tribe sought to assert the purported rights of an absent Tribe. Courts have routinely held that individual tribal members may not sue to enforce right or duties held by or owed to the Tribe as a whole. *See, e.g.*, *Skokomish Indian Tribe v. United States*, 410 F.3d 506, 515 (9th Cir. 2005) (noting that individual members

[2] As Footnote 1 noted, the San Carlos Apache Tribe is pursuing relief against the land exchange but has not brought a breach of trust claim against the United States.

could not seek to vindicate communal rights); *Hackford v. Babbitt*, 14 F.3d 1457, 1466 (10th Cir. 1994) (member lacks standing to sue as to tribal asset); *James v. Watt*, 716 F.2d 71, 72 (1st Cir. 1983) (individual Indians lacked standing to assert tribal rights to land). This limitation follows naturally from the rule that, absent specific provisions providing for individual rights, treaties between sovereigns "do not create privately enforceable rights." *Mora v. New York*, 524 F.3d 183, 201 & n.25 (2d Cir. 2008) (collecting cases).

Second, Plaintiff does not identify a discrete, enforceable trust duty that the government has violated. The only Treaty provision Plaintiff specifically identifies states that "the government of the United States" will "designate, settle, and adjust their territorial boundaries, and pass and execute" laws governing that territory "conducive to the prosperity and happiness of said Indians." Mot. at 26 (citing ER-205). Plaintiff does not argue what specific duty this imposed on the United States with regard to Oak Flat. And while Plaintiff refers to a "trust" or "trust interest," the land is not, in fact, held in trust for the Apache. The cited treaty language at most indicated a plan to adjust boundaries or establish trust lands in the future, *see Robinson v. Salazar*, 838 F. Supp. 2d 1006, 1022 (E.D. Cal. 2012); *Uintah Ute Indians v. United States*, 28 Fed. Cl. 768, 789 (1993) (parsing identical language in other treaties), but no such designation occurred to include Oak Flat. Plaintiff also does not argue that this language specifically required the United States to hold the

land in trust for the Western Apache Tribe, nor do they otherwise specify what, exactly, is the duty that the United States violated. And Plaintiff disclaims any title to the Oak Flat area. Mot. at 27.

The amorphous references to a "trust" and "trust responsibilities" are insufficient to establish that the United States has breached trust duties to the Apache Tribe. To succeed on breach of trust claim, a Tribe must "identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003). The analysis of the government's alleged failure to meet its duties as a trustee "must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *Id.* There may be a specific rights-creating trust duty when identifiable tribal assets are formally held in trust by the government, but this Court has held—consistent with the Supreme Court precedent—that the obligations to manage tribal assets held in trust does not extend to a more generalized duty to "regulate third-party use of non-Indian resources for the benefit of" Tribes. *Gros Ventre Tribe v. United States*, 469 F.3d 802, 812-13 (9th Cir. 2006); *see also Inter Tribal Council of Arizona, Inc. v. Babbitt*, 51 F.3d 199, 203 (9th Cir. 1995) (denying breach of trust claim where property at issue "is not properly the subject of a trust corpus. The off-reservation school was not part of Indian lands. . . .Tribes have no interest in the School

Property, which was owned and controlled by the United States government."). Plaintiff's breach of trust claim cannot succeed absent identification of any specific trust duties established by specific rights-creating or duty-imposing statutory or regulatory prescriptions, and the absence of any allegedly mismanaged tribal asset that is held in trust.

Third, even if Congress created a distinct trust obligation with respect to Oak Flat in the 1852 Treaty, Congress extinguished that obligation when it passed the Act. Congress's power to legislate in the realm of Indian affairs is "plenary and exclusive," *United States v. Lara*, 541 U.S. 193, 200 (2004), and "not subject to be controlled by the judicial department of the government," *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903). While the United States cannot terminate a treaty right by implication, the express purpose of the Act was to transfer Oak Flat to private companies for mining. That express purpose is in direct and obvious conflict with Plaintiff's theory that the land is subject to any trust responsibility (although, as explained above, Plaintiff has not made clear what that trust duty is). This is not, as in *Herrera* and the precedent upon which it relies, a later act of Congress that arguably might implicitly subvert some interest held by a Tribe; it is an express abrogation of any trust duties related to Oak Flat. Any such abrogation is ultimately a political act, within Congress's authority, and not the proper subject of a breach of trust claim.

Plaintiff has accordingly failed to establish a likelihood of success on its breach of trust claim.

III. 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 injunction pending appeal has already failed. *See Nken v. Holder*, 556 U.S. 418, 435-36 (2009). But should the Court proceed to these factors, they favor denying the motion.

First, in passing the law that created the land exchange, Congress has determined that facilitating copper mining in Arizona and expanding the Tonto National Forest—a Forest which serves multiple public purposes including recreation opportunities and habitat conservation—is in the public interest. "Congress's prerogative to balance opposing interests and its institutional competence to do so provide one of the principal reasons for deference to its policy determinations." *Salazar v. Buono*, 559 U.S. at 717 (reversing injunction against land-transfer statute); *see also 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) (cleaned up). Where 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).

Second, the federal government has a long-recognized policy of "furthering Indian self-government." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). In analyzing whether injunctive relief advances the public interest, courts consider whether an injunction furthers this policy. *See Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1253 (10th Cir. 2001); *Seneca-Cayuga Tribe of Okla. v. Oklahoma*, 874 F.2d 709, 716 (10th Cir. 1989). Here, allowing Plaintiff to pursue claims on behalf of federally-recognized Tribes that the Tribes themselves decline to pursue would not further Indian self-government. This policy consideration also suggests Plaintiff's request for injunctive relief is not in the public interest.

CONCLUSION

For the foregoing reasons, Plaintiff's emergency motion for an injunction pending appeal should be denied.

Respectfully submitted,

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March 1, 2021
90-1-0-16230

Certificate of Compliance

The foregoing response complies with the length limits permitted by Ninth Circuit Rules 27-1 and 32-3, which together establish a word-limit of 5,600 words. This response is 5,469 words, and the type size and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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