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15 **IN THE UNITED STATES DISTRICT COURT**  
16 **FOR THE DISTRICT OF ARIZONA**  
17 **PHOENIX DIVISION**

18 Apache Stronghold,  
19 a 501(c)(3) nonprofit organization,

20 Plaintiff,

21 v.

22 United States of America,  
23 Kevin Shea, Acting Secretary, U.S. Department  
24 of Agriculture (USDA),  
25 Vicki Christensen, Chief, USDA Forest  
26 Service,  
27 Neil Bosworth, Supervisor, USDA Tonto  
National Forest,  
and  
Tom Torres, Acting Supervisor, USDA  
Tonto National Forest,

Defendants.

No. 2:21-cv-00050-PHX-SPL

**EMERGENCY MOTION FOR  
INJUNCTION PENDING  
APPEAL**

1 Pursuant to Federal Rule of Civil Procedure 62(d) and Federal Rule of Appellate Pro-  
2 cedure 8(a)(1), Plaintiff respectfully requests that the Court stay its order of February 12,  
3 2021 (the Order) (ECF 57), and enter an injunction pending appeal prohibiting Defendants  
4 from taking any action to carry out the exchange of land described in section 3003 of the  
5 National Defense Authorization Act for Fiscal Year 2015, Public Law 113-291, or from  
6 taking any action to convey to Resolution Copper or any other private entity any right, title,  
7 or interest in the land described in section 3003 of the National Defense Authorization Act  
8 for Fiscal Year 2015, Public Law 113-291, until Plaintiff's interlocutory appeal has been  
9 fully resolved. In the alternative, Plaintiff requests that this Court enter a limited, 60-day  
10 stay of the exchange of land described in Public Law 113-291, prohibiting any conveyance  
11 before May 10, 2021, to give the Ninth Circuit an opportunity to address Plaintiff's request  
12 for an emergency injunction on a less time-compressed schedule. *See W. Land Exch. Pro-*  
13 *ject v. Dombeck*, 47 F. Supp. 2d 1216, 1218-19 (D. Or. 1999) (denying injunction pending  
14 appeal, but ordering 60-day delay in land exchange to permit groups to move appellate  
15 court for an injunction pending appeal). Because the parties have briefed Apache Strong-  
16 hold's motion for a preliminary injunction, and the same standard applies to an injunction  
17 pending appeal, Apache Stronghold requests that the Court rule expeditiously on this mo-  
18 tion without further briefing from the parties. *Feldman v. Ariz. Sec'y of State's Office*, 843  
19 F.3d 366, 374 (9th Cir. 2016).

20 Dated: February 19, 2021

Respectfully submitted,

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**MEMORANDUM OF POINTS AND AUTHORITIES**

1  
2 Apache Stronghold has noticed an interlocutory appeal to the United States Court of  
3 Appeals for the Ninth Circuit from this Court's Order of February 12, 2021, denying  
4 Apache Stronghold's motion for a preliminary injunction. *See* ECF 59 (notice of appeal);  
5 ECF 57, ECF 07, ECF 18, ECF 36, ECF 51 (briefing). But before Apache Stronghold can  
6 pursue injunctive relief in the Ninth Circuit on an emergency basis, it must first pursue an  
7 injunction pending appeal in this Court. Fed. R. App. P. 8(a)(1)(C); Ninth Circuit Rule 27-  
8 3(c)(v). Apache Stronghold therefore requests an injunction pending appeal, and incorpo-  
9 rates by reference its legal arguments, reasoning, and exhibits from its prior submissions  
10 in support of its request for a temporary restraining order and preliminary injunction. ECF  
11 07, ECF 29, ECF 36, ECF 45, ECF 51.

12 In evaluating a motion for an injunction pending appeal, the court considers whether  
13 the moving party has demonstrated that (1) it is likely to succeed on the merits, (2) it is  
14 likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of  
15 equities tips in its favor, and (4) an injunction is in the public interest. *Winter v. Nat. Res.*  
16 *Def. Council, Inc.*, 555 U.S. 7, 20 (2008).

17 Though this is the same as the standard for a preliminary injunction, *Feldman v. Ariz.*  
18 *Sec'y of State's Office*, 843 F.3d 366, 374 (9th Cir. 2016), a court may deny a preliminary  
19 injunction but enter an injunction pending appeal given the importance of preserving the  
20 status quo when the plaintiffs have raised serious legal questions and will suffer irreparable  
21 harm absent injunctive relief pending appeal. *See W. Land Exch. Project v. Dombeck*, 47  
22 F. Supp. 2d 1216, 1218-19 (D. Or. 1999) (denying injunction pending appeal, but ordering  
23 60-day delay in land exchange to permit groups to move appellate court for an injunction  
24 pending appeal); *Conservation Cong. v. U.S. Forest Serv.*, 803 F. Supp. 2d 1126, 1134  
25 (E.D. Cal. 2011) (denying an injunction pending appeal in a case challenging a timber sale,  
26 but "because of the potential for irreparable harm," granting plaintiff a limited injunction  
27 of 10 days to seek a stay from the Ninth Circuit); *Sovereign Inupiat for a Living Arctic v.*

1 *Bureau of Land Mgmt.*, No. 3:20-CV-00290-SLG, 2021 WL 454280, at \*4 (D. Alaska Feb.  
2 6, 2021) (granting a “brief and limited injunction” prohibiting land from being disturbed  
3 for 14 days). Such relief is appropriate here.

4 ***Irreparable Harm.*** Apache Stronghold contends that the land exchange authorized by  
5 Public Law 113-291, Section 3003, violates federal law, the Constitution, and the United  
6 States’ obligations under its own agreements. The consequences of those violations would  
7 be irreparable destruction of a centuries-old sacred site and irreparable loss of Plaintiffs’  
8 right to practice their religious beliefs. Upon the publication of the Forest Service’s Final  
9 Environmental Impact Statement on January 15, 2021, the federal government triggered a  
10 statutory requirement that the government “convey all right, title, and interest of the United  
11 States in and to the Federal land to Resolution Copper” within “60 days.” 16 U.S.C.  
12 539p(c)(10). That means that any transfer of the land must happen by March 16. And the  
13 government has stated that it may transfer the land as early as March 11, resulting in im-  
14 mediate, irreparable harm in just 20 days.

15 As this Court described in its Order: “The spiritual importance of Oak Flat to the West-  
16 ern Apaches cannot be overstated.” ECF 57 at 11. And if the land transfer is completed,  
17 “Resolution Copper’s planned mining activity on the land will close off a portal to the  
18 Creator forever and will completely devastate the Western Apaches’ spiritual lifeblood.”  
19 Order at 12. Thus, absent an injunction, the effects of a land transfer on the practice of the  
20 traditional Apache religion will be catastrophic.

21 Nor is the imposition on Apache religious exercise dependent only on the ultimate com-  
22 pletion of the mine and the destruction of Oak Flat altogether. Immediately upon the land  
23 transfer, Resolution Copper will have power to expel trespassers from the land, including  
24 Dr. Nosie, who has been living on the land since 2019 as a religious expression of the hope  
25 that his people “would be able to return to our holy and sacred places” and to “defend one  
26 of the last holy places . . . that we are tied to.” Transcript at 58:17-18, 61:17-18. A land  
27 transfer would prevent several planned religious ceremonies from taking place, including

1 critical coming of age Sunrise Ceremonies. Pike Decl., ECF 7-3 ¶ 10 (sunrise ceremonies);  
2 Hoffman Decl., ECF 7-1 ¶ 10. The ceremonies that are currently scheduled for the coming  
3 months will be indefinitely jeopardized if title to the land is in the possession of Resolution  
4 Copper. Pike Decl., ECF 7-3 ¶ 12 (destruction of Oak Flat will “harm these girls’ life and  
5 their connection to their rebirth”). Individual Apaches and members of other tribes will be  
6 unable to pray on the land. Hoffman Decl., ECF 7-1 ¶ 12. Each of these results are irrepa-  
7 rable harms that could be prevented by an order of this Court enjoining the land transfer.  
8 *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (“The loss of  
9 First Amendment freedoms, for even minimal periods of time, unquestionably constitutes  
10 irreparable injury.”) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)).

11 Once the United States’ interest in the land has been transferred, the religious practices  
12 of Apache Stronghold and its members will be immediately deterred. Dr. Nosie, a member  
13 of Apache Stronghold, has direct experience of what happens when private interests take  
14 over religious land. In 1997, Dr. Nosie traveled to Mount Graham for a sacred dance, but  
15 had to take a construction road down the mountain to avoid a rapidly approaching thunder-  
16 storm. Debra Utacia Krol, *Apache activist Wendsler Nosie followed a lifelong path to Res-*  
17 *olution copper mine protest*, Arizona Republic (Jan. 15, 2020, 7:00 AM),  
18 <https://perma.cc/BQB4-6AMC>. Because the road belonged to the University of Arizona,  
19 which operated massive telescopes on the mountain over Native American objections, Dr.  
20 Nosie was arrested by university police officers for trespassing. *Id.* He was threatened with  
21 a criminal fine and forced to undergo the cost, indignity, and emotional trauma of a criminal  
22 trial. *Id.* This is just one of many real and imminent harms Dr. Nosie and other Apache  
23 Stronghold members face if the unlawful land transfer is completed.

24 Lastly, if the transfer is completed and mining prep work begins, this Court could lose  
25 equitable authority to rescind the transfer later. That is precisely what happened in *Kettle*  
26 *Range Conservation Grp. v. U.S. Bureau of Land Mgmt.*, 150 F.3d 1083, 1087 (9th Cir.  
27 1998), where the Ninth Circuit held that the district court “was without authority to rescind”

1 a land transfer that was already complete. As Judge Reinhardt warned in concurrence:  
2 “[J]udges must be particularly sensitive to the practical consequences of their initial action  
3 or inaction [on requests for injunctive relief *pendente lite*], not only because of the effect  
4 on the transactions involved, but because of the need to ensure that the court does not in-  
5 advertently lose its ability to enforce an important Congressional mandate.” *Id.* at 1087–  
6 88. That is a serious risk here.

7 ***Likelihood of Success.*** Plaintiffs also have a strong likelihood of success on appeal.  
8 This Court acknowledged that the burden on Apache religious exercise here is “much more  
9 substantive and tangible than that imposed in *Navajo Nation*” (ECF 57 at 16)—including  
10 physical destruction of the site, rendering Plaintiffs’ religious practices impossible. None  
11 of the precedents relied on by this Court involved such destruction. In fact, the burden on  
12 the Apache’s religious exercise is much *greater* than in cases like *Sherbert* and *Yoder* be-  
13 cause the Apache people are not being offered a choice between government benefit or  
14 punishment and practicing their beliefs; rather, absent an injunction, their religious prac-  
15 tices will be rendered impossible. *Sherbert v. Verner*, 374 U.S. 398 (1963) (choice between  
16 a government benefit and religious beliefs); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (re-  
17 ligious belief gave rise to \$5 criminal penalty). Many cases decided under RLUIPA find  
18 that this kind of burden is substantial, as *amici* have shown. ECF 56. (We adopt and incor-  
19 porate *amici*’s arguments by reference.) And while this Court held that the “substantial  
20 burden” standard is different under RLUIPA and RFRA, the Supreme Court has repeatedly  
21 said the opposite: They provide “the same standard.” *Holt v. Hobbs*, 574 U.S. 352, 358  
22 (2015); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436  
23 (2006) (same). This, and the fact that the government has not even tried to meet strict scru-  
24 tinity, means that there is a strong likelihood of success on the merits of Apache Stronghold’s  
25 RFRA claims.

26 Even absent a showing of a substantial burden on their religious belief under RFRA,  
27 Apache Stronghold has provided evidence that the government’s actions were explicitly

1 designed to circumvent their religious objections to the land transfer. That constitutes an  
2 independent violation of the First Amendment. *See Church of the Lukumi Babalu Aye, Inc.*  
3 *v. City of Hialeah*, 508 U.S. 520, 547 (1993) (“Legislators may not devise mechanisms,  
4 overt or disguised, designed to persecute or oppress a religion or its practices.”); *see also*  
5 *id.* at 535 (“The design of these laws accomplishes instead a ‘religious gerrymander’”).

6 Apache Stronghold is also likely to succeed on its claims that the Defendants have vi-  
7 olated the United States’ treaty obligations. The government cannot allow the destruction  
8 of Native American land without calling into question the United States’ treaty obligations  
9 to the Native Americans who worship on that land. The Supreme Court recently noted that  
10 it would “hold the government to its word” regarding treaty obligations to Native Ameri-  
11 cans. *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020). The Ninth Circuit could easily  
12 decide to follow suit and hold the federal government to its promises in the 1852 treaty  
13 with the Apache. Furthermore, this Court attempted to distinguish *McGirt* on the grounds  
14 that the plaintiff there “suffered individualized injury belonging to him.” Order at 5 n.1.  
15 But here, loss of the right to exercise religion on a historic sacred site, and threat of prose-  
16 cution for trespass, is no less an “individualized injury” than the plaintiff’s criminal con-  
17 viction in *McGirt* or the loss of hunting or fishing rights in cases like *United States v.*  
18 *Winans*, 198 U.S. 371 (1905). Apache Stronghold’s Western Apache members individually  
19 observe and honor traditional Apache religious beliefs. Thus, they have standing as indi-  
20 viduals to challenge the government’s encroachments on those beliefs as descendants of  
21 the group with which the government covenanted.

22 ***Balance of Equities and Public Interest.*** By establishing that the government’s actions  
23 likely violate RFRA, the First Amendment, and the government’s trust obligations, Apache  
24 Stronghold has also established that both the balance of equities and public interest favor  
25 injunctive relief. “It is clear that it would not be equitable or in the public’s interest” to  
26 permit the government “to violate the requirements of federal law, especially when there  
27 are no adequate remedies available.” *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029

1 (9th Cir. 2013) (brackets omitted). The state, in contrast, “suffers no harm from an injunc-  
2 tion that merely ends unconstitutional practices and/or ensures that constitutional standards  
3 are implemented.” *Doe, #1 v. Kelly*, 878 F.3d 710, 718 (9th Cir. 2017).

4 Indeed, the land transfer at the heart of this case was first proposed over fifteen years  
5 ago. It was authorized by statute almost seven years ago. There is no urgency behind this  
6 transaction. The copper will still be there even after a brief extension of time to allow the  
7 courts to resolve the very serious legal claims at stake. By contrast, if the transfer is com-  
8 pleted, the harm to Apache Stronghold is severe, immediate, and irreparable.

9 **CONCLUSION**

10 Given the imminent, irreparable harm to Apache Stronghold and its members starting  
11 in 20 days, and the likelihood of success on the merits, Plaintiff respectfully requests that  
12 this Court enter an injunction of the land transfer pending appeal or, in the alternative, that  
13 this Court enter an injunction of the land transfer for 60 days (until May 10, 2021) to give  
14 the Ninth Circuit an opportunity to address Plaintiff’s request for an emergency injunction  
15 on a less time-compressed schedule.

16 Dated: February 19, 2021

Respectfully submitted,

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