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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Apache Stronghold,

No. CV-21-00050-PHX-SPL

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Plaintiff,

**ORDER**

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vs.

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United States of America, et al.,

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Defendants.

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15 **I. BACKGROUND**

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In 2014, Congress passed the National Defense Authorization Act for Fiscal Year 2015 (hereinafter “NDAA”). PL 113-291, available at <https://www.congress.gov/113/plaws/publ291/PLAW-113publ291.pdf> (last visited February 12, 2021). Section 3003 of the NDAA, known as the Southeast Arizona Land Exchange and Conservation Act, authorizes the exchange of land between the United States Government and two foreign mining companies (known collectively as “Resolution Copper”). 16 U.S.C.A. § 539p. The 2,422-acre parcel of Arizona land which the Government will convey to Resolution Copper, located within the Tonto National Forest, includes a sacred Apache ceremonial ground called Chi’chil Bildagoteel, known in English as “Oak Flat.” (Doc. 1 at ¶ 3). Congress’s stated purpose for authorizing the exchange is to “carry out mineral exploration activities under the Oak Flat Withdrawal Area.” 16 U.S.C.A. § 539p(6)(i).

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On January 12, 2021, Plaintiff Apache Stronghold, a nonprofit organization seeking

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1 to prevent the colonization of Apache land, filed a Complaint in this Court seeking to  
2 prevent the land exchange. (Doc. 1 at ¶ 11). Plaintiff argues the land is held in trust by the  
3 United States for the Western Apaches by way of an 1852 Treaty. (Doc. 1 at ¶ 7). Plaintiff  
4 further alleges the mine will desecrate Oak Flat in violation of the Apaches' religious  
5 liberties and will constitute a breach of the trust. (Doc. 1 at ¶ 10).

6 On January 14, 2021, Plaintiff filed a Motion for Temporary Restraining Order  
7 ("TRO") and Preliminary Injunction ("PI") seeking to prevent the United States  
8 Department of Agriculture from publishing a Final Environmental Impact Statement  
9 ("FEIS"), a document that "describes the potential environmental effects" of the mine and  
10 "includes detailed mitigation measures to minimize impacts." (Doc. 7); USDA Forest  
11 Service, *Resolution Copper Update*, available at [https://www.fs.usda.gov/detail/r3/  
12 home/?cid=FSEPRD858166](https://www.fs.usda.gov/detail/r3/home/?cid=FSEPRD858166) (last accessed February 12, 2021). The FEIS was set for  
13 publication on the following day, January 15. (Doc. 7 at 3). Plaintiff alleges Defendants  
14 "nefariously" moved up the timeline of the FEIS publication, which was previously set for  
15 April of 2021, so the land transfer could finalize before President Biden's inauguration and  
16 without adequate time for Plaintiff to contest the sale. (Doc. 1 at ¶ 33, 36-39).

17 On January 14, 2021, this Court denied the Motion to the extent it sought an  
18 emergency TRO because Plaintiff could not show immediate and irreparable injury.  
19 (Doc. 13). Specifically, because Plaintiff could not show the land conveyance would occur  
20 immediately upon the publication of the FEIS, and in fact Defendants would have 60 days  
21 from the publication to complete the exchange, a TRO without notice and opportunity for  
22 response was unwarranted. (Doc. 13 at 4). The FEIS was published on January 15, 2021 as  
23 scheduled, starting the 60-day clock. *See* USDA, FINAL Environmental Impact Statement,  
24 Resolution Copper Project and Land Exchange, available at [https://www.resolution  
25 mineeis.us/sites/default/files/feis/resolution-final-eis-vol-1.pdf](https://www.resolutionmineeis.us/sites/default/files/feis/resolution-final-eis-vol-1.pdf) (last visited February 12,  
26 2021). The parties then fully briefed the Motion. (Docs. 7, 18, & 30). In their Response,  
27 the Government indicate that the land sale would not take place until 55 days after the  
28 publication of the FEIS (*i.e.*, no earlier than March 11, 2021). (Doc. 18-1 at 3-4). The Court

1 held a hearing on the PI on February 3, 2021. (Doc. 37).

## 2 **II. LEGAL STANDARD**

3 A preliminary injunction is an “extraordinary remedy that may only be awarded  
4 upon a clear showing that the plaintiff is entitled to such relief.” *Titaness Light Shop, LLC*  
5 *v. Sunlight Supply, Inc.*, 585 F. App’x 390, 391 (9th Cir. 2014) (quoting *Winter v. Nat. Res.*  
6 *Def. Council, Inc.*, 555 U.S. 7, 22 (2008)). An injunction may be granted only where the  
7 movant shows that “he is likely to succeed on the merits, that he is likely to suffer  
8 irreparable harm in the absence of preliminary relief, that the balance of equities tips in his  
9 favor, and that an injunction is in the public interest.” *Herb Reed Enters., LLC v. Fla.*  
10 *Entm’t Mgmt., Inc.*, 736 F.3d 1239, 1247 (9th Cir. 2013) (quoting *Winter*, 555 U.S. at 20).  
11 However, the four factors may be evaluated on a sliding scale under this Circuit’s “serious  
12 questions” test: “[a] preliminary injunction is appropriate when a plaintiff demonstrates  
13 that serious questions going to the merits were raised and the balance of hardships tips  
14 sharply in the plaintiff’s favor.” *All. for the Wild Rockies v. Cottrell*, 632 F. 3d 1127, 1134-  
15 35 (9th Cir. 2011) (citing *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en  
16 banc)) (internal quotations omitted).

17 “Likelihood of success on the merits is the most important *Winter* factor; if a movant  
18 fails to meet this threshold inquiry, the court need not consider the other factors in the  
19 absence of serious questions going to the merits.” *Disney Enters., Inc. v. VidAngel, Inc.*,  
20 869 F.3d 848, 856 (9th Cir. 2017) (internal citations and quotations omitted); *see also, e.g.*,  
21 *Krieger v. Nationwide Mut. Ins. Co.*, No. CV-11-1059-PHX-DGC, 2011 WL 3760876, at  
22 \*1 (D. Ariz. Aug. 25, 2011) (“Because Plaintiff has failed to show a likelihood of success  
23 on the merits or the existence of serious questions, the Court will not issue a preliminary  
24 injunction. The Court need not address the other requirements for preliminary injunctive  
25 relief.”).

## 26 **III. DISCUSSION**

27 For the following reasons, the Court finds that Plaintiff has not demonstrated a  
28 likelihood of success on, or serious questions going to, the merits of its claims.

1           **A. Breach of Trust/Fiduciary Duties**

2                   *i. Standing*

3           Plaintiff alleges the land at issue is managed by the Government in trust for the  
4 Western Apaches “as a result of official U.S. Government support of actions unilaterally  
5 removing the Western Apaches from that land and forcing them to struggle to continue to  
6 maintain their relationships to their land.” (Doc. 1 at ¶ 51) (Count 3). Thus, Plaintiff argues  
7 the conveyance to Resolution Copper is in breach of the Government’s trustee and  
8 fiduciary duties.

9           As an initial matter, Plaintiff Apache Stronghold lacks standing to bring the breach  
10 of trust claim. The “irreducible constitutional minimum of standing consists of three  
11 elements . . . [t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly  
12 traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed  
13 by a favorable judicial decision.” *Spokeo v. Robins*, \_\_\_ U.S. \_\_\_, 136 S.Ct. 1540, 1547  
14 (2016) (internal punctuation omitted) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555,  
15 560 (1992); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167,  
16 180–81 (2000)). Closely related to the constitutional standing requirement that a plaintiff  
17 must suffer a personal injury is the prudential requirement that a plaintiff “cannot rest his  
18 claim to relief on the legal rights or interests of third parties.” *Warth v. Seldin*, 422 U.S.  
19 490, 499 (1975). This limitation serves an important function: It prevents “the adjudication  
20 of rights which those not before the Court may not wish to assert” and seeks to ensure “that  
21 the most effective advocate of the rights at issue is present to champion them.” *Duke Power*  
22 *Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 80 (1978).

23           But “since the prohibition against a party asserting the legal rights of another is  
24 prudential—not constitutional—the Supreme Court may ‘recognize[ ] exceptions to this  
25 general rule.’” *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1, 15 (D.D.C. 2010) (alteration in  
26 original) (quoting *Coal. of Clergy, Laws., & Professors v. Bush*, 310 F.3d 1153, 1160 (9th  
27 Cir. 2002)). For example, an organization may have standing to sue on behalf of its  
28 members—but only if “its members would otherwise have standing to sue in their own

1 right.” *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977); *see also*  
2 *Ecological Rights Found. v. Pacific Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000). The  
3 issue here, then, is whether Apache Stronghold’s members have standing.

4 Apache Stronghold argues “[t]here were no tribes in 1852 in any formal sense” and  
5 that, instead, there were “leaders representing . . . dozens of groups of Apaches.” (Doc. 47  
6 at 25). Accordingly, Plaintiff argues “the Treaty of 1852 was between the United States  
7 and the Western Apache peoples, not with any particular Tribe.” (Doc. 30 at 3). By  
8 extension, then, Apache Stronghold argues its individual members have standing to assert  
9 the Western Apaches’ treaty rights because they are direct descendants of Mangas  
10 Coloradus, “one of the Apache signatories to the 1852 Treaty,” since they “are among the  
11 intended beneficiaries of [their] direct ancestor’s agreement with the United States.” (Doc.  
12 30 at 3).<sup>1</sup> Plaintiff’s arguments are unavailing.

13 “[T]he existence of a trust relationship between the United States and an Indian or  
14 Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue  
15 the trustee for damages resulting from a breach of the trust.” *United States v. Mitchell*, 463  
16 U.S. 206, 226 (1983). However, a treaty, by its very definition, “is ‘essentially a contract  
17 between two sovereign nations,’” not between individuals. *Herrera v. Wyoming*, 587  
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19 <sup>1</sup> Plaintiff also argues that the recent Supreme Court case *McGirt v. Oklahoma*  
20 “made it abundantly clear that even a single individual Native American and enrolled  
21 member of a federally recognized Indian tribe can assert his treaty rights and the aboriginal  
22 land title rights of his people.” (Doc. 30 at 4) (citing *McGirt v. Oklahoma*, 591 U.S.\_\_\_\_,  
23 140 S.Ct. 2452 (2020)); *see also* (Doc. 47 at 77) (Plaintiff’s counsel stating he “didn’t  
24 believe it was necessary” to join the Western Apache tribes as plaintiffs “in light of the  
25 Supreme Court’s recent decision in *McGirt v. Oklahoma*, where an individual asserted and  
26 vindicated his entire tribe’s treaty rights to a vast part of the state of Oklahoma”). But in  
27 *McGirt*, the plaintiff did not assert or seek to enforce tribal treaty rights. Rather, he suffered  
28 individualized injury belonging to him, not the tribe—he had been tried and convicted of a  
crime by the state of Oklahoma despite committing the crime on federal Indian land. The  
Court had to adjudicate the tribal land issue before it could adjudicate McGirt’s individual  
rights. Here, at least as it relates to the breach of trust claim, the individual Apache  
Stronghold members assert no such personalized right. Accordingly, *McGirt* is not  
instructive here.

1 U.S. \_\_\_, 139 S. Ct. 1686, 1699 (2019) (citing *Washington v. Wash. State Com. Passenger*  
2 *Fishing Vessel Assn.*, 443 U.S. 658, 675 (1979)). Accordingly, in most situations, “[r]ights,  
3 enumerated under treaties, are reserved to communities or ‘tribes’ rather than to  
4 individuals.” *United States v. State of Or.*, 787 F. Supp. 1557, 1566 (D. Or. 1992), *aff’d*,  
5 29 F.3d 481 (9th Cir. 1994), *amended*, 43 F.3d 1284 (9th Cir. 1994).<sup>2</sup>

6 Where a treaty grants rights to an entire tribe rather than to individual tribal  
7 members, “[o]nly the tribe that signed the treaty, or the signatory tribe, can exercise treaty  
8 rights.” *State v. Posenjak*, 127 Wash. App. 41, 49, 111 P.3d 1206, 1211 (2005) (citing  
9 *United States v. Washington*, 641 F.2d 1368, 1372 (9th Cir. 1981) (“The appellants seek to  
10 exercise treaty rights as tribes. They may do so only if they are the tribes that signed the  
11 treaties.”)). And “[i]ndividual Indians do not have any treaty rights, *even if they are*  
12 *descendents [sic] of the signers of the treaty*, because a treaty is a contract between  
13 sovereigns, not individuals.” *Posenjak*, 127 Wash. App. at 49 (emphasis added) (rejecting  
14 plaintiff’s argument that “he has treaty rights because his great-great-great-grandfather  
15 signed the Point Elliott Treaty” since “[t]reaty rights are rights of signatory tribes, not  
16 individual Indians.”) (citing *Washington*, 443 U.S. at 675).<sup>3</sup>

17 \_\_\_\_\_  
18 <sup>2</sup> Plaintiff urges the Court to consider cases like *United States v. Winans* in which  
19 courts have found individual Indian fishing and/or hunting rights reserved in treaties. (Doc.  
20 51 at 3-4) (citing 198 U.S. 371). But sovereign nations cannot fish or hunt. They can,  
21 however, hold title to land. *Compare, e.g., Bess v. Spitzer*, 459 F.Supp.2d 191, 196 (E.D.  
22 N.Y. 2006) (finding that “individual Indians lack standing to sue under the Treaty of Fort  
23 Albany of 1664 because that Treaty secures rights for ‘tribes and bands of Indians’ rather  
24 than individuals”) *with, e.g., United States v. State of Wash.*, 384 F. Supp. 312, 399 (W.D.  
25 Wash. 1974), *aff’d and remanded*, 520 F.2d 676 (9th Cir. 1975) (individual Indians had  
standing to enforce treaty rights because the treaties at issue had individually enforceable  
provisions guaranteeing the right of the individual Indians to fish on the land). The line of  
cases in which individual Indians sought to enforce their individual treaty rights to fish or  
hunt on aboriginal land is inapplicable here.

26 <sup>3</sup> Although decisions from the Washington Court of Appeals are not binding on this  
27 Court, the Ninth Circuit affirmed the *Posenjak* decision, holding in relevant part that  
28 “*Posenjak* also claims treaty rights as an individual, but the Point Elliott Treaty reserves  
rights to tribes as communities, not to American Indians as individuals.” *Posenjak v. Dep’t*  
*of Fish & Wildlife of State of Wash.*, 74 F. App’x 744, 746 n.2 (9th Cir. 2003).

1 Here, it is immaterial that Apache Stronghold’s members are direct descendants of  
2 the signatories to the 1852 Treaty because the Treaty only grants tribal rights, not individual  
3 rights. Although Plaintiff argues the Apache people were not a “tribe” when the Treaty was  
4 signed, it is clear from the plain language of the Treaty that the signors bound the Western  
5 Apache people as a whole. The Treaty consistently refers to the Apaches as a “nation or  
6 tribe” in the Treaty. In the preamble, the Treaty provides that the individual Apache  
7 signatories were “acting on the part of the Apache Nation of Indians.” Treaty with the  
8 Apache preamble, July 1, 1852, 10 Stat. 979. Further, Article I of the Treaty states “[s]aid  
9 *nation or tribe* of Indians *through their authorized Chiefs*” submit to U.S. jurisdiction. *Id.*  
10 at art. 1 (emphasis added). The Treaty continuously refers to the “*nation or tribe* of Indians”  
11 as the party bound to the agreement. Even reading the language of the 1852 Treaty with a  
12 liberal construction in favor of Plaintiff’s members’ interests as Indians, the Court cannot  
13 infer an enforceable trust duty as to any individual Indians. *See Herrera*, 139 S. Ct. at 1699  
14 (describing canon of construction requiring courts to interpret treaties in favor of the  
15 Indians). Stated differently, Plaintiff has not shown the Treaty—or any other source of  
16 law—creates an *individual* trust duty the United States breached by authorizing the land  
17 exchange. The individual Western Apache members therefore lack standing to assert a  
18 breach of the trust.

19 *ii. Merits*

20 Even if Apache Stronghold had standing to assert the breach of trust claim, it is  
21 unlikely to succeed on the merits. Plaintiff does not point to any specific trust language  
22 regarding the land at issue, in the 1852 Treaty or elsewhere. Plaintiff has alluded to a trust  
23 duty arising from the relationship between the Government and the Indians generally. *See*  
24 (Doc. 36 at 5, n.3) (citing the general “federal-Tribe trust relationship” and “the United  
25 States’ trust responsibility to all federally recognized Indian tribes and individual Indian  
26 beneficiaries”); *see also* (Doc. 47 at 86) (“The notion of a trust, to me, involves an  
27 obligation on the part of the United States to . . . act for the happiness and . . . prosperity,  
28 of the Apaches.”). However, at the PI hearing, Plaintiff’s expert witness Dr. John R. Welch

1 testified that he is “not aware of any sort of codified or written-down trust associated with  
2 the totality of the Western Apaches or the Eastern Apaches territory referenced in [the]  
3 1852 Treaty.” (Doc. 47 at 86).

4 In 1983, the United States Supreme Court held that “where the Federal Government  
5 takes on or has control or supervision over tribal monies or properties, the fiduciary  
6 relationship normally exists with respect to such monies or properties (unless Congress has  
7 provided otherwise) *even though* nothing is said expressly in the authorizing or underlying  
8 statute (or other fundamental document) about a trust fund, or a trust or fiduciary  
9 connection.” *United States v. Mitchell*, 463 U.S. 206 (1983) (emphasis added) (citing  
10 *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Ct. Cl. 1980)). In *United*  
11 *States v. Jicarilla*, however, the Court clarified the “general trust” relationship between the  
12 Government and the Indians. 564 U.S. 162 (2011). The Court acknowledged that a general  
13 trustee/beneficiary analogy applied to the Government’s relationship with the Indians “in  
14 limited contexts.” *Id.* at 173. However, the Court explained that, although “relevant statutes  
15 denominate the relationship between the Government and the Indians as a ‘trust,’ that trust  
16 is defined and governed by statutes rather than the common law.” *Id.* Accordingly, “the  
17 [trust] analysis must train on specific rights-creating or duty-imposing statutory or  
18 regulatory prescriptions.” *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003).

19 The requirement that Congress create a specific trust duty by statute derives from  
20 Congress’s plenary authority over Indian affairs. “[T]he organization and management of  
21 the trust is a sovereign function subject to the plenary authority of Congress.” *Id.* With this  
22 plenary power in mind, the Government “has often structured the trust relationship to  
23 pursue its own policy goals.” *Jicarilla*, 546 U.S. at 176. Although the Government’s trust  
24 relationship with the Indians “relat[es] to the welfare of the Indians,” it remains “distinctly  
25 an interest of the United States” subject to congressional control. *Heckman v. United States*,  
26 224 U.S. 413, 437 (1912). For example, in *Heckman*, the Government sued to prevent  
27 certain conveyance of lands by members of an Indian tribe because the conveyances  
28 violated restrictions on alienation imposed by Congress. *Id.* at 445–46. The Government



1 sued as the representative of the very Indian grantors whose conveyances it sought to  
2 cancel because, while it was formally acting as trustee, the Government was in fact  
3 asserting its own sovereign interest in the disposition of the Indian lands. *Id.* at 445. “Such  
4 a result was possible because the Government assumed a fiduciary role over the Indians  
5 not as a common-law trustee but as the governing authority enforcing statutory law.”  
6 *Jicarilla*, 546 U.S. at 176.

7 It is undeniable that the Government “has charged itself with moral obligations of  
8 the highest responsibility and trust” to Indians, *Seminole Nation v. United States*, 316 U.S.  
9 286, 296–97 (1942), obligations “to the fulfillment of which the national honor has been  
10 committed,” *Heckman*, *supra*, at 437. Nonetheless, this Court must follow Supreme Court  
11 precedent. And the Supreme Court tells us that when “the Tribe cannot identify a specific,  
12 applicable, trust-creating statute or regulation that the Government violated, . . . neither the  
13 Government’s ‘control’ over [Indian land] nor common-law trust principles matter.”  
14 *United States v. Navajo Nation*, 556 U.S. 287, 302 (2009). “The Government assumes  
15 Indian trust responsibilities *only* to the extent it expressly accepts those responsibilities by  
16 statute.” *Jicarilla*, 546 at 177 (emphasis added).

17 Here, Mexico ceded the land at issue in this case to the United States via the Treaty  
18 of Guadalupe Hidalgo in 1848, four years before the 1852 Treaty was executed. *See* Map  
19 of the United States Including Western Territories (scanned map), in NATIONAL ARCHIVES  
20 CATALOG (1848), available at <https://catalog.archives.gov/id/2127339> (last accessed  
21 February 12, 2021). At that point, the United States took legal title to the land. This Court  
22 has carefully examined the 1852 Treaty and supporting documentation in this case and  
23 finds no evidence that the United States ever forfeited that title, or that Congress intended  
24 the Government to hold the land in trust for the Western Apaches.

25 The 1852 Treaty certainly did not create a trust relationship. The parties merely  
26 agreed that they would, at a later date, designate territorial boundaries. *See* Treaty with the  
27 Apache art. 8, July 1, 1852, 10 Stat. 979 (stating that “the government of the United States  
28 shall at its earliest convenience designate, settle, and adjust their territorial boundaries”).

1 When courts have considered such language in the past, they have consistently held it did  
2 not give rise to a trust relationship. For example, in *Robinson v. Salazar*, 838 F. Supp. 2d  
3 1006, 1022 (E.D. Cal. 2012), the treaty at issue could “not be said to recognize Indian title”  
4 because, by its terms, it did not “designate, settle, adjust, define, or assign limits or  
5 boundaries to the Indians” and instead left “such matters to the future.” *Id.* The language  
6 in the *Robinson* treaty is identical to the language in the 1852 Treaty at issue here. *Id.*  
7 (treaty stating that “the aforesaid Government shall, at its earliest convenience, designate,  
8 settle, and adjust their territorial boundaries”); *see also Uintah, Uintah Ute Indians v.*  
9 *United States*, 28 Fed. Cl. 768, 789 (1993) (finding no trust created based on identical  
10 language). And here, Plaintiff concedes that, while there were various efforts to designate  
11 those boundaries, those efforts ultimately failed. (Doc. 47 at 87).<sup>4</sup> The 1852 Treaty simply  
12 provides no indication that the United States is holding the land in trust for the Apaches.<sup>5</sup>

13  
14 <sup>4</sup> Although Plaintiff provides the Court with maps indicating territorial boundaries,  
15 the maps were created decades after the signing of the Treaty by the Smithsonian Institute  
16 based on anthropologists’ “best interpretation of what the United States and the parties to  
17 the 1852 treaties *would have* agreed to as [sic] the time as being Western Apache’s . . .  
18 treaty territory.” (Doc. 47 at 87-88) (emphasis added). They do not change the conclusion  
19 that no government document created a trust.

20 <sup>5</sup> Plaintiff also references the Western Apaches’ aboriginal title to the land. *See, e.g.,*  
21 (Doc. 7 at 7) (“[T]he Federal Government . . . attempted to ‘quiet’ Apaches’ reserved treaty  
22 rights *or aboriginal land title*”). But Apache Stronghold would run into the same standing  
23 issue if it sought to assert aboriginal title to the land. *See United States v. Dann*, 873 F.2d  
24 1189, 1195 (9th Cir. 1989) (finding that “individual Indians do not even have standing to  
25 contest a transfer of tribal lands” because “[t]he common view of aboriginal title is that it  
26 is held by tribes”). Additionally, any aboriginal title the tribes may have had was  
27 extinguished in 1873. *See The San Carlos Apache Tribes of Arizona, et al. v. United States*,  
28 21 Ind. Cl. Comm 189, 219 (June 27, 1969) (findings of fact), available at  
<https://portal.azoah.com/oedf/documents/17-001-WQAB/SCAT-3-IndianClaimsComm'n.1969.Bates.pdf> (last accessed February 12, 2021). (“May 1, 1873 marks the date on which  
the United States took from the Western Apache Indians their Indian title to all of their  
aboriginal lands.”); *see also United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 347  
(1941) (“The exclusive right of the United States to extinguish Indian title has never been  
doubted. And whether it be done by treaty, by the sword, by purchase, by the exercise of  
complete dominion adverse to the right of occupancy, or otherwise, its justness is not open  
to inquiry in the courts.”) (internal quotations omitted).

1 Finally, even assuming the 1852 Treaty did create a trust relationship, Congress  
2 made clear its intent to extinguish that trust relationship by passing Section 3003 of the  
3 NDAA, and this Court cannot disturb that decision. “It is well settled that an act of  
4 [C]ongress may supersede a prior treaty, and that any questions that may arise are beyond  
5 the sphere of judicial cognizance and must be met by the political department of the  
6 government.” *Thomas v. Gay*, 169 U.S. 264, 271 (1898). “Plenary authority over the tribal  
7 relations of the Indians has been exercised by Congress from the beginning, and the power  
8 has always been deemed a political one, not subject to be controlled by the judicial  
9 department of the government.” *Lone Wolf v. Hitchcock*, 187 U.S. 553, 565 (1903); *see*  
10 *also Cherokee Nation v. Hitchcock*, 187 U.S. 294, 308 (1902) (“The power existing in  
11 Congress to administer upon and guard the tribal property, and the power being political  
12 and administrative in its nature, the manner of its exercise is a question within the province  
13 of the legislative branch to determine, and is not one for the courts”); *Winton v. Amos*, 255  
14 U.S. 373, 391 (1921) (“Congress has plenary authority over the Indians and all their tribal  
15 relations, and full power to legislate concerning their tribal property.”)

16 In 1971, President Nixon authorized Oak Flat to be mined if it were first conveyed  
17 to a private entity, and in 2014, Congress authorized that conveyance. (Doc. 7 at ¶ 21). This  
18 Court’s hands are tied both by Congress and by the Constitution. *Skoko v. Andrus*, 638 F.2d  
19 1154, 1158 (9th Cir. 1979) (“The courts cannot interfere with the administration of public  
20 property as arranged by the Congress and the Executive, so long as constitutional  
21 boundaries are not transgressed by either branch.”). The breach of trust claim must fail.

#### 22 **B. RFRA and First Amendment Free Exercise Clause (Substantial Burden)**

23 Although the court cannot find any codified trust, the evidence before the Court  
24 shows that the Apache peoples have been using Oak Flat as a sacred religious ceremonial  
25 ground for centuries. *See* (Doc. 47 at 41) (“[T]he stories from my great-grandmother and  
26 her people, [Oak Flat]’s where she came from. And so those stories that my grandfather  
27 who taught my mother, who taught me, I am fourth generation of, I guess prisoners of  
28 war.”). The spiritual importance of Oak Flat to the Western Apaches cannot be overstated

1 and, in many ways, is difficult to put into words. The importance was immediately apparent  
2 at the PI hearing in the sometimes-tearful testimony of Apache Stronghold members  
3 Wendsler Nosie and Naelyn Pike. Nosie, co-founder and spokesperson of Apache  
4 Stronghold and a member of the San Carlos Apache Tribe, testified that the Apache people  
5 grew up with a “fear of military presence” from the U.S., which created a “suppressed way  
6 of life.” (Doc. 47 at 58). The Apaches, armed with a promise from the U.S. that they “would  
7 be able to return to [their] holy and sacred places if [they] conform to being assimilated,”  
8 were deeply troubled by the forced assimilation. (Doc. 47 at 58). But the Apaches did  
9 everything they could to remain connected to their spirituality, remaining “tied to the  
10 earth,” and “intertwined with the earth, with the mother.” (Doc. 47 at 59).

11 Naelyn Pike, Nosie’s granddaughter, testified that, despite the turmoil and  
12 threatened ouster, the Apaches have maintained their spiritual connection to the land.  
13 Today, the Apache people believe “Usen, the Creator, has given life to the plants, to the  
14 animals, to the land, to the air, to the water.” (Doc. 47 at 42). Because of this, the Apaches  
15 view Oak Flat as a “direct corridor” to the Creator’s spirit. (Doc. 47 at 42). The land is also  
16 used as a sacred ceremonial ground. Many of the young Apache women have a coming of  
17 age ceremony, known as a “Sunrise Ceremony,” in which each young woman will “connect  
18 her soul and her spirit to the mountain, to Oak Flat.” (Doc. 47 at 42, 48). Apache individuals  
19 pray at the land and speak to their Creator through their prayers. The Apache people also  
20 utilize the land’s natural resources, picking acorns, berries, cactus fruit, and yucca to use  
21 for consumption. (Doc. 47 at 42). Because the land embodies the spirit of the Creator,  
22 “without any of that, specifically those plants, because they have that same spirit, that same  
23 spirit at Oak Flat, that spirit is no longer there. And so without that spirit of Chi’Chil  
24 Bildagoteel, it is like a dead carcass.” (Doc. 47 at 42). If the mining activity continues,  
25 Naelyn Pike testified, “then we are dead inside. We can’t call ourselves Apaches.” (Doc.  
26 47 at 45). Quite literally, in the eyes of many Western Apache people, Resolution Copper’s  
27 planned mining activity on the land will close off a portal to the Creator forever and will  
28 completely devastate the Western Apaches’ spiritual lifeblood.

1 In light of the Western Apaches’ deep connection to Oak Flat, Apache Stronghold  
2 alleges in this lawsuit that conveying the land to Resolution Copper “puts government-  
3 imposed coercive pressure on Plaintiffs to change or violate their religious beliefs” in  
4 violation of the Free Exercise Clause of the First Amendment and the Religious Freedom  
5 Restoration Act of 1993 (“RFRA”), 42 U.S.C. §§ 2000bb *et seq.* (Doc. 1 at ¶¶ 65, 73).  
6 Defendants “do not question the sincerity of Plaintiff’s religious and historical connection  
7 to the lands at issue” and instead argue “Plaintiff has not alleged a government action that  
8 ‘substantially burdens’ their religious exercise.” (Doc. 18 at 15, 27).<sup>6</sup>

9 The Free Exercise Clause of the First Amendment provides that “Congress shall  
10 make no law . . . prohibiting the free exercise [of religion].” U.S. Const., amend. I.  
11 In *Employment Division v. Smith*, the Supreme Court held that the Free Exercise Clause  
12 does not bar the Government from burdening the free exercise of religion with a “valid and  
13 neutral law of general applicability.” 494 U.S. 872, 879 (1990). However, Congress  
14 thereafter enacted the Religious Freedom Restoration Act (“RFRA”) because the *Smith*  
15 decision “virtually eliminated the requirement that the government justify burdens on  
16 religious exercise imposed by laws neutral towards religion.” 42 U.S.C. § 2000bb(a)(4)  
17 (citing *Smith*, 494 U.S. at 872). Thus, the RFRA “created a cause of action for persons  
18 whose exercise of religion is substantially burdened by a government action, regardless of  
19 whether the burden results from a neutral law of general applicability.” *Navajo Nation v.*  
20 *U.S. Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008) (citing 42 U.S.C. § 2000bb-1). In  
21 other words, RFRA is limited to situations in which Congress has passed a religiously

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22 <sup>6</sup> Defendants also argue that construction on public land cannot, as a matter of law,  
23 constitute a “substantial burden” on religion. (Doc. 18 at 30- 35). While this Court need  
24 not reach this argument, the Court notes that the Ninth Circuit has indicated it would reject  
25 this argument. In *Navajo Nation*, the Ninth Circuit assumed, without deciding, “that RFRA  
26 applies to the government’s use and management of its land” and the dissenting opinion  
27 explained that “[i]t is hardly an open question whether RFRA applies to federal land. . . .  
28 There is nothing in the text of RFRA that says, or even suggests, that such a carve-out from  
RFRA exists. No case has ever so held, or even suggested that RFRA is inapplicable to  
federal land.” *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1095 (9th Cir. 2008)  
(Fletcher, J., dissenting).

1 neutral law of general applicability, but nonetheless must provide exemptions under that  
2 law for certain religious practices if not doing so would substantially burden them.

3 The law at issue here here—Section 3003 of the NDAA—is a neutral law of general  
4 applicability. It merely authorizes the exchange of land with a mining company, and,  
5 although it will affect the Apaches’ religious practices deeply, that is not its purpose.<sup>7</sup> In  
6 the Ninth Circuit, where courts consider a neutral law of general applicability, Free  
7 Exercise violations are found only in very limited situations. “Under RFRA, a ‘substantial  
8 burden’ is imposed *only when* individuals are forced to choose between following the tenets  
9 of their religion and receiving a governmental benefit (*Sherbert*) or coerced to act contrary  
10 to their religious beliefs by the threat of civil or criminal sanctions (*Yoder*).” *Navajo*  
11 *Nation*, 535 F.3d at 1058 (emphasis added) (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)  
12 and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)). In *Yoder*, “the application of the compulsory  
13 school-attendance law” to the Amish plaintiffs violated the RFRA because it “affirmatively  
14 compel[led them], under the threat of criminal sanction, to perform acts undeniable at odds  
15 with fundamental tenets of their religious beliefs.” *Id.* (citing *Yoder*, 406 U.S. at 218). In  
16 *Sherbert*, the plaintiff refused to work on Saturdays, her faith’s day of rest, but was denied  
17 government unemployment benefits for failing to accept work without good cause. *Id.*  
18 (citing *Sherbert*, 374 U.S. at 399). The state’s conditioning of unemployment benefits on  
19 the plaintiff’s ability to work on Saturdays unconstitutionally forced her “to choose  
20 between following the precepts of her religion and forfeiting benefits.” *Sherbert*, 374 U.S.  
21 at 404. In *Navajo Nation*, the Ninth Circuit held that “[a]ny burden imposed on the exercise  
22 of religion short of that described by *Sherbert* and *Yoder* is not a ‘substantial burden’ within  
23 the meaning of RFRA, and does not require the application of the compelling interest test  
24 set forth in those two cases.” *Navajo Nation*, 535 F.3d at 1070.<sup>8</sup>

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25  
26 <sup>7</sup> Apache Stronghold argues the law is in fact intentionally discriminatory. *See* (Doc.  
1 at 28). The Court considers that argument more thoroughly *infra* Section (III)(C).

27 <sup>8</sup> The Court is in receipt of the Amicus Brief filed in this case (Doc. 56), and has  
28 considered the arguments and cases cited therein. The Brief urges the Court to find that the  
limited *Yoder/Sherbert* scenarios merely “constitute a floor for substantial burden claims,

1           The facts of this case are similar to those of *Navajo Nation*. There, the Government  
2 released plans to use artificial snow containing treated sewage water to expand the Arizona  
3 Snowbowl Ski Resort, located within sacred government-owned Navajo land in northern  
4 Arizona. *Id.* at 1063. The plaintiffs, the Navajo Tribe and its members, argued the use of  
5 the sewage water would “spiritually contaminate the entire mountain and devalue their  
6 religious exercises” in violation of the Free Exercise Clause. *Id.* The Ninth Circuit held that  
7 the plaintiffs could not maintain an RFRA action because they could not show “substantial  
8 burden.” *Id.* The Ninth Circuit acknowledged the land’s “long-standing religious and  
9 cultural significance to Indian tribes.” *Id.* at 1064. The Navajo people believed the  
10 mountains were “a living entity,” conducted religious ceremonies on them, and collected  
11 plants, water, and other materials from them. *Id.* Nonetheless, bound by precedent, the  
12 Ninth Circuit held “there is no showing the government has coerced the Plaintiffs to act  
13 contrary to their religious beliefs under the threat of sanctions, or conditioned a  
14 governmental benefit upon conduct that would violate the Plaintiffs’ religious beliefs, there  
15 is no ‘substantial burden’ on the exercise of their religion.” *Id.* at 1063; *see also, e.g.,*  
16 *Snoqualmie Indian Tribe v. F.E.R.C.*, 545 F.3d 1207, 1213–15 (9th Cir. 2008) (rejecting  
17 tribe’s RFRA claim because “[t]he Tribe’s arguments that the dam interferes with the

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18  
19 not a ceiling for the type of government coercion that could lead to a finding of substantial  
20 burden.” (Doc. 56 at 24). However, all of the cases cited in the brief interpret what is  
21 required for “substantial burden” under the Religious Land Use and Institutionalized  
22 Persons Act (“RLUIPA”), which applies to prisoners’ rights and state land use laws, not  
23 the RFRA. And while it is true that each statute uses “the same standard,” *see Holt v.*  
24 *Hobbs*, 135 S. Ct. 853, 860 (2015), this merely means that both statutes require the  
25 government to pass a strict scrutiny analysis where the law in question imposes a  
26 “substantial burden” on religious rights. What constitutes a “substantial burden,” however,  
27 has evolved differently under each statute. *See Navajo Nation*, 535 F.3d at 1078 (expressly  
28 rejecting plaintiffs’ reliance on RLUIPA cases because “instead the ‘substantial burden’  
question must be answered by reference to the Supreme Court’s Pre-*Smith* jurisprudence,  
including *Sherbert* and *Yoder*, that RFRA expressly adopted. Under that precedent, the  
Plaintiffs have failed to show a ‘substantial burden’ on the exercise of their religion”).  
Under current Ninth Circuit RFRA precedent, Section 3003 does not impose a substantial  
burden.

1 ability of tribal members to practice religion are irrelevant to whether the hydroelectric  
2 project either forces them to choose between practicing their religion and receiving a  
3 government benefit or coerces them into a Catch-22 situation: exercise of their religion  
4 under fear of civil or criminal sanction.”).

5 To be sure, the *Navajo Nation* court found no substantial burden in part because  
6 there were “no plants, springs, natural resources, shrines with religious significance, or  
7 religious ceremonies that would be physically affected by the use of such artificial snow.  
8 No plants would be destroyed or stunted; no springs polluted; no places of worship made  
9 inaccessible, or liturgy modified.” *Navajo Nation*, 535 F.3d at 1063. Instead, “[t]he only  
10 effect of the proposed upgrades is on the Plaintiffs’ subjective, emotional religious  
11 experience.” *Id.* at 1070. And this Court recognizes that the burden imposed by the mining  
12 activity in this case is much more substantive and tangible than that imposed in *Navajo*  
13 *Nation*—the land in this case will be all but destroyed to install a large underground mine,  
14 and Oak Flat will no longer be accessible as a place of worship. *See, e.g.*, FEIS at 84  
15 (finding that the “[c]onstruction and operation of the mine would profoundly and  
16 permanently alter . . . Chí’chil Bı́ldagoteel (Oak Flat) . . . through anticipated largescale  
17 geological subsidence”); FEIS at 25 (“the proposed mine would disturb large areas of  
18 ground and potentially destroy native vegetation”).

19 However, the Ninth Circuit also explained that the Supreme Court *Lyng* decision  
20 would have compelled it to reach the same result even if the use of artificial snow would  
21 “virtually destroy the . . . Indians’ ability to practice their religion.” *Navajo Nation*, 535  
22 F.3d at 1072. In *Lyng*, the plaintiffs, Indian tribes, challenged the U.S. Forest Service’s  
23 approval of plans to construct a road on a ceremonial tribal ground. *Lyng v. Northwest*  
24 *Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988). The tribes alleged the construction  
25 would interfere with their free exercise of religion by disturbing a sacred area. *Id.* at 442–  
26 43. The area was an “integral and indispensable part” of the tribes’ religious practices, and  
27 a Forest Service study concluded the construction “would cause serious and irreparable  
28 damage to the sacred areas.” *Id.* at 442 (citations and internal quotation marks omitted).



1 Nonetheless, the Supreme Court rejected the Indian tribes' Free Exercise Clause challenge.  
2 The Court held that, although the government's plan would "diminish the sacredness" of  
3 the Indian land and would "interfere significantly" with their ability to practice their  
4 religion, it did not impose a "heavy enough" burden to violate their Free Exercise Clause  
5 rights. *Id.* at 447-49. Because the plaintiffs were not "coerced by the Government's action  
6 into violating their religious beliefs" nor did the "governmental action penalize religious  
7 activity by denying [the plaintiffs] an equal share of the rights, benefits, and privileges  
8 enjoyed by other citizens," they could not make out an RFRA claim. *See id.* at 449. Even  
9 where land is physically destroyed, the government action must still fall within those two  
10 narrow situations to make out a Free Exercise violation under RFRA.<sup>9</sup>

11 Apache Stronghold runs into the same problem as plaintiffs in both *Navajo Nation*  
12 and *Lyng*, each of which is still good law and binding upon this Court: Plaintiff has not  
13 been deprived a government benefit, nor has it been coerced into violating their religious  
14 beliefs. The Court does not dispute, nor can it, that the Government's mining plans on Oak  
15 Creek will have a devastating effect on the Apache people's religious practices. To that  
16 same end, the Western Apache peoples no doubt derive great "benefits" from the use of  
17 Oak Flat, at least in the common sense of the word. However, Oak Flat does not provide  
18 the type of "benefit" required under RFRA jurisprudence: It isn't something the  
19 Government gave to the Western Apaches, like unemployment benefits, and then took  
20 away because of their religion. Similarly, building a mine on the land isn't a civil or  
21 criminal "sanction" under the RFRA. *See* SANCTION, Black's Law Dictionary (11th ed.

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22 <sup>9</sup> Plaintiff urges this Court to apply what it considers a "much more lenient test to  
23 prove substantial burden than the *Navajo Nation* test" as set forth in *Little Sisters of the*  
24 *Poor Saints Peter and Paul Home*, 140 S.Ct. 2367 (2020). (Doc. 30 at 12-14). Plaintiff  
25 urges the Court to instead consider whether "the government puts substantial pressure on  
26 [the Apaches] to substantially modify [their] behavior and to violate [their] beliefs." (Doc.  
27 30 at 13). But the *Little Sisters* case did not abrogate the test set forth in *Lyng* and *Navajo*  
28 *Nation*—it did not reconsider the "substantial burden" standard at all. And in fact, the Ninth  
Circuit has applied the *Yoder/Sherbert* framework set forth in *Lyng* and *Navajo Nation*  
recently as July 20, 2020. *See, e.g., Fazaga v. Fed. Bureau of Investigation*, 965 F.3d 1015,  
1061 (9th Cir. 2020).

1 2019) (defining a “sanction” as a “provision that gives force to a legal imperative by either  
2 rewarding obedience or punishing disobedience”). “Just as the Ninth Circuit and other  
3 courts must follow *Lyng* until the Supreme Court instructs otherwise, this Court must do  
4 the same.” *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 239 F. Supp. 3d  
5 77, 94 (D.D.C. 2017). Accordingly, Plaintiff’s RFRA and Free Exercise claims must fail.<sup>10</sup>

### 6 **C. First Amendment Free Exercise Clause (Intentional Discrimination)**

7 At the PI hearing, Plaintiff indicated that “for the purposes of the preliminary  
8 injunction, the only two issues before the Court . . . are the Treaty rights and the serious  
9 question of who owns that land, and the Religious Freedom Restoration Act rights that  
10 have been violated.” (Doc. 47 at 80). However, the Court notes that Plaintiff has not  
11 demonstrated a likelihood of success on, or serious questions going to, the merits of its  
12 other claims.

13 Plaintiff alleges Section 3003 intentionally discriminates against the Western  
14 Apaches because the Government “designed” the land conveyance “in a way that made it  
15 impossible for Plaintiffs to comply with [] their religious beliefs” and further promulgated  
16 the sale “in order to suppress the religious exercise of Plaintiff Apache Stronghold and its  
17 Western Apache members.” (Doc. 1 at ¶ 84).

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18  
19  
20 <sup>10</sup> Plaintiff cites *Burwell v. Hobby Lobby* for the proposition that the RFRA cannot  
21 be read “as restricting the concept of the ‘exercise of religion’ to those practices specifically  
22 addressed in our Pre-*Smith* decisions.” 573 U.S. 682, 714 (2014); *see also* (Doc. 47 at 12)  
23 (Plaintiff arguing that the *Hobby Lobby* decision “admonished the lower courts not to  
24 narrowly follow the ‘specific’ holdings of its pre-*Smith* ‘ossified’ cases to limit religious  
25 believers’ RFRA claims”). But in *Hobby Lobby*, the Court considered the discrete issue of  
26 whether corporate entities could be considered “persons” under the RFRA, not the type of  
27 government activity that would cause a “substantial burden.” *See Hobby Lobby*, 573 U.S.  
28 at 715-716 (“[T]he results would be absurd if RFRA merely restored this Court’s pre-*Smith*  
decisions in ossified form and did not allow a plaintiff to raise a RFRA claim unless that  
plaintiff fell within a category of plaintiffs one of whom had brought a free-exercise claim  
that this Court entertained in the years before *Smith*.”). The *Hobby Lobby* decision did not  
amend the previous “substantial burden” standard set forth in *Lyng*, and it does not change  
that analysis here.

1 As explained above, the Free Exercise Clause provides that “Congress shall make  
2 no law . . . prohibiting the free exercise [of religion],” U.S. Const., amend. I. The right to  
3 freely exercise one’s religion, however, “does not relieve an individual of the obligation to  
4 comply with a ‘valid and neutral law of general applicability on the ground that the law  
5 proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” *Emp. Div.,  
6 Dep’t of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (quoting *United States v.  
7 Lee*, 455 U.S. 252 (1982) (Stevens, J., concurring in judgment)). Under the governing  
8 standard, “a law that is neutral and of general applicability need not be justified by a  
9 compelling governmental interest even if the law has the incidental effect of burdening a  
10 particular religious practice.” *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,  
11 508 U.S. 520, 531 (1993).

12 In assessing neutrality and general applicability, courts evaluate both “the text of  
13 the challenged law as well as the effect . . . in its real operation.” *Stormans, Inc. v. Wiesman*,  
14 794 F.3d 1064, 1076 (9th Cir. 2015) (ellipsis in original) (internal quotation marks  
15 omitted). “A law lacks facial neutrality if it refers to a religious practice without a secular  
16 meaning discernable from the language or context.” *Lukumi*, 508 U.S. at 533. Even if a law  
17 is facially neutral, it may nonetheless fail the neutrality test if “[t]he record . . . compels the  
18 conclusion that suppression of [a religion or religious practice] *was the object* of the  
19 ordinances.” *Id.* at 534, 542 (emphasis added); *see also Selecky*, 586 F.3d at 1130 (“[I]f the  
20 *object* of a law is to infringe upon or restrict practices because of their religious motivation,  
21 the law is not neutral.”) (emphasis added) (quoting *Lukumi*, 508 U.S. at 533).

22 The Southeast Arizona Land Exchange and Conservation Act is facially neutral, and  
23 Plaintiff has provided no evidence of any discriminatory intent behind its passage. At the  
24 PI hearing, when asked what evidence of discriminatory intent Apache Stronghold has,  
25 Plaintiff’s counsel could not directly answer the question. (Doc. 47 at 91-92). Instead,  
26 Plaintiff argued Apache Stronghold’s members “presented repeatedly before the  
27 introduction of the National Defense Authorization Act Section 3003 rider, about the  
28 central religious importance of this place, Oak Flat” but that “there’s no deliberate regard

1 for it” in the Act, “much less an utterance that there’s a compelling government interest”  
2 to convey the land to Resolution Copper. (Doc. 47 at 92). But a lack of deliberate regard  
3 for the Apaches religious ties to the land, as disappointing and inappropriate as it may be,  
4 in no way shows that the law was passed with the objective to discriminate against them.  
5 *Pers. Adm’r of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979) (“[E]ven if a neutral  
6 law has a disproportionately adverse effect . . ., it is unconstitutional under the Equal  
7 Protection Clause only if that impact can be traced to a discriminatory purpose.”).

8 Because Section 3003 is neutral, Plaintiff is unlikely to succeed on its Intentional  
9 Discrimination claim. A neutral law need only be “rationally related to a legitimate  
10 government purpose.” *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1075-76 (9th Cir. 2015).  
11 The Court finds, at this juncture, that the governmental interest in supporting economic  
12 development of mineral resources is likely more than sufficient to withstand rational basis  
13 review. *See, e.g., Merrifield v. Lockyer*, 547 F.3d 978, 991 (9th Cir. 2008) (noting the  
14 “relatively easy standard of rational basis review”). Accordingly, Plaintiff is unlikely to  
15 succeed on the Free Exercise Clause Intentional Discrimination claim.

#### 16 **D. Due Process and Petition Clause Claims**

##### 17 *i. Standing*

18 Plaintiff’s Due Process and Petition Clause claims are based only on the publication  
19 of the FEIS. (Doc. 47 at 80). As an initial matter, Plaintiff likely lacks standing to contest  
20 the publication of the FEIS because Plaintiff cannot show that a favorable decision from  
21 this Court would redress its alleged injury. As the Court stated in its Order denying the  
22 TRO, Plaintiff’s alleged injury stems from the land exchange, not the FEIS publication.  
23 (Doc. 13 at 3). But the land exchange, and subsequent mining activity, can still occur even  
24 if the FEIS was not published or is somehow otherwise rescinded. *See* 16 U.S.C. § 539p(B)  
25 (stating that the FEIS “shall be used as the basis for all decisions under Federal law related  
26 to the proposed mine and the Resolution mine plan of operations” but not requiring that it  
27 be published before the exchange can occur). Although the NDAA indicates that the land  
28 exchange would occur within 60 days of the FEIS publication, Plaintiff has not shown the

1 publication was a *requirement* to proceed with the land exchange. From the plain text of  
2 the FEIS, it doesn't appear so. Accordingly, Apache Stronghold hasn't demonstrated its  
3 standing to bring the Due Process and Petition Clause claims.

4 *ii. Merits*

5 Even if Apache Stronghold had standing to assert the Due Process and Petition  
6 Clause claims, it is unlikely to succeed on the merits of those claims. Per Plaintiff's own  
7 timeline, on January 4, 2021, Reuters reported that the Forest Service was set to publish  
8 the FEIS on January 15, 2021. (Doc. 1 at 12). Plaintiff alleges this eleven-day window did  
9 not provide sufficient time for Plaintiff to challenge the FEIS publication and protect their  
10 "treaty rights, property rights, religious freedom rights, and other legal rights." (Doc. 1 at  
11 ¶ 44). But Plaintiff had much longer than eleven days to contest the FEIS and land  
12 exchange.

13 "The Due Process Clause of the Fifth Amendment prohibits the United States . . .  
14 from depriving any person of property without 'due process of law.'" *Dusenbery v. United*  
15 *States*, 534 U.S. 161, 167 (2002); *see also* U.S. Const. amend. XV. "[D]ue process requires  
16 the government to provide 'notice reasonably calculated, under all the circumstances, to  
17 apprise interested parties of the pendency of the action and afford them an opportunity to  
18 present their objections.'" *Jones v. Flowers*, 547 U.S. 220, 226 (2006) (quoting *Mullane v.*  
19 *Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). Similarly, the First  
20 Amendment Petition Clause protects "the right of the people . . . to petition the Government  
21 for a redress of grievances." U.S. Const. amend. I. However, the Petition Clause "does not  
22 impose any affirmative obligation on the government to listen, to respond to or . . . to  
23 recognize" those grievances. *Smith v. Ark. State Highway Emps., Local 1315*, 441 U.S.  
24 463, 465 (1979). Plaintiff is unlikely to succeed on the Due Process and Petition Clause  
25 claims because it received sufficient notice of, and opportunity to contest, the FEIS and the  
26 land exchange itself.

27 "Publication in the Federal Register is legally sufficient notice [under the Fifth  
28 Amendment] to all interested or affected persons regardless of actual knowledge or

1 hardship resulting from ignorance.” *State of California ex rel. Lockyer v. F.E.R.C.*, 329  
2 F.3d 700, 707 (9th Cir. 2003) (citing *Camp v. U.S. Bureau of Land Mgmt.*, 183 F.3d 1141,  
3 1145 (9th Cir.1999)); *see also* 44 U.S.C. § 1507 (providing that Federal Register  
4 publication generally “is sufficient to give notice of the contents of the document to a  
5 person subject to or affected by it”). Here, Defendants—specifically the Forest Service—  
6 published the “Notice of intent to prepare an Environmental Impact Statement for approval  
7 of a plan of operations for the Resolution Copper Project and associated land exchange;  
8 request for comments; and notice of public scoping” on the Federal Register on March 18,  
9 2016. *See* Federal Register, Tonto National Forest; Pinal County, AZ; Resolution Copper  
10 Project and Land Exchange Environmental Impact Statement, available at  
11 [https://www.federalregister.gov/documents/2016/03/18/2016-05781/tonto-national-forest](https://www.federalregister.gov/documents/2016/03/18/2016-05781/tonto-national-forest-pinal-county-az-resolution-copper-project-and-land-exchange-environmental)  
12 [-pinal-county-az-resolution-copper-project-and-land-exchange-environmental](https://www.federalregister.gov/documents/2016/03/18/2016-05781/tonto-national-forest-pinal-county-az-resolution-copper-project-and-land-exchange-environmental) (last visited  
13 January 26, 2021). The Forest Service received comments for two months following  
14 publication. Commentors were invited to send written comments by P.O. box or email,  
15 submit comments on USDA’s Resolution Copper website, submitting verbal messages to  
16 a phone number, or submitting written or oral comments during open house held by the  
17 Forest Service on four separate dates.

18 Although January 4th may have been the first notice of the January 15th date of  
19 publication, it is not the first notice Plaintiff had of the land exchange. To the contrary,  
20 Apache Stronghold alleges its members “have repeatedly pleaded with Defendants directly  
21 in person and in correspondence, publicly and privately—including numerous appearances  
22 and presentation of testimony before Congress over the past several years—and  
23 participating in various federal agency and Forest Service administrative processes,  
24 asserting their Apache land rights and requesting Defendants to comply with their  
25 obligations and to recognize and honor their Apache land rights.” (Doc. 1 at ¶ 11). And at  
26 the PI hearing, Wendsler Nosie presented a book, over an inch thick, detailing Apache  
27 Stronghold’s “Comments on the Resolution Copper Project and Land Exchange Draft  
28 Environmental Impact Statement submitted by the Apache Stronghold.” (Doc. 47 at 63).

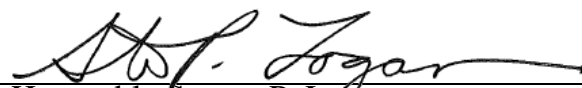
1 Nosie further testified that he presented testimony to Congress before the passage of the  
2 NDAA “many “[m]any times.” (Doc. 47 at 65). In fact, Nosie “visited all of the  
3 Congressional agencies, leaders, you know, to express the concerns and positions of the  
4 tribe,” testimony which was “specifically in regard to the religious importance of Oak Flat  
5 and what was being proposed in terms of a copper mine.” (Doc. 47 at 65). Although  
6 Congress disagreed with, or perhaps even disregarded, Apache Stronghold’s pleas, Apache  
7 Stronghold was not denied a voice—at least not under the law. Plaintiff is therefore  
8 unlikely to succeed on its Due Process or Petition Clause claims.

#### 9 **IV. CONCLUSION**

10 For the foregoing reasons, Plaintiff has not identified a likelihood of success on, or  
11 serious questions going to, the merits of its claims. Accordingly, the Court need not address  
12 the remaining *Winter* factors. The Court cannot grant the preliminary injunction requested.

13 **IT IS THEREFORE ORDERED** that Plaintiff’s Motion for Temporary  
14 Restraining Order and Preliminary Injunction (Doc. 7) is **denied**.

15 Dated this 12th day of February, 2021.

16  
17   
18 Honorable Steven P. Logan  
United States District Judge