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# Copper Mine Would Crater Sacred Site, Native Groups Say

By **Andrew Westney**

Law360 (February 11, 2021, 9:42 PM EST) -- Native American rights advocates on Thursday backed a San Carlos Apache nonprofit's suit opposing the Resolution Copper mine project, telling an Arizona federal judge that the federal government's planned land swap for the project would lead to the site's destruction and the group's loss of any ability to practice their religion there.

The Morning Star Institute, the Multicultural Initiative for Community Advancement Group and White Mountain Apache tribal official Ramon Riley filed an amicus brief Wednesday supporting nonprofit Apache Stronghold's suit against the U.S. Department of Agriculture over the joint Rio Tinto PLC and BHP Billiton mine project, in particular claims the project would violate the religious freedom of the Western Apache people at their sacred Chi'chil Biłdagoteel land, also known as Oak Flat.

The advocates said in their brief that the government's final environmental impact statement for the project acknowledges that it would create a massive crater at the site, and "such immediate and wholesale destruction of Oak Flat" is a clear "substantial burden" on Indigenous peoples' religious exercise there under the Religious Freedom Restoration Act.

"Ultimately, the government cannot escape a simple fact: It has not merely made plaintiffs' religious exercise costlier or more difficult; it has made it impossible," the amici said.

Apache Stronghold **claimed in its Jan. 12 complaint** against the USDA that there was not enough notice about the project and that it infringes treaty and religious rights, improperly handles Apache land and violates the RFRA.

According to the complaint, Rio Tinto PLC and BHP Billiton gained access to the land after passage of a 2014 military spending bill that included a section added by former Arizona U.S. Sens. John McCain and Jeff Flake swapping national forest acreage containing the Oak Flat parcel for private land owned by Rio Tinto and BHP.

Days after the complaint, the USDA **released the final environmental impact statement** for the land swap, hours after an Arizona federal court rejected a motion from Apache Stronghold for a temporary restraining order to block the EIS.

In a press release at the time, Rio Tinto said that "decisions on whether to invest fully in developing the project ... remain subject to further permitting processes and a feasibility study that will be conducted over several years," and that it was "committed to ongoing engagement with Native American Tribes over the coming years to seek consent, before any potential decision by the partners to invest in developing this project."

Riley, who is the White Mountain Apache Tribe's cultural resource director, along with the

Morning Star Institute and the MICA Group, said in their amicus brief Thursday that "given the admitted physical impossibility of further religious exercise at [the Oak Flat] site, the substantial burden question is an easy issue in favor of the plaintiffs."

"The colonial, state, and federal governments of this nation have been desecrating and destroying Native American sacred sites since before the republic was formed," the amici said. "Now Chi'chil Biłdagoteel, called Oak Flat in English, is at risk of suffering the same fate, a risk the government fully acknowledges and a fate it has all but sealed."

The brief says the site is "sacred to numerous Native American peoples, including the ancestors of today's O'odham, Hopi, Zuni, Yavapai, and Apache tribes," and that "to deprive tribal people of access to certain sites, or to compromise the integrity of those sites, is to effectively prohibit the free exercise of their religion."

And the government's stance in the case "would result in a double standard in the law that provides Indigenous peoples with less protection for their religious exercise than for other groups in comparable situations," the amici claimed, adding, "in effect, that the burden on plaintiff's religious exercise is too great to qualify as a 'substantial burden.'"

"Under this approach, if the government were threatening to issue a small fine to individuals like Mr. Riley for performing ceremonies at Oak Flat, that would constitute a substantial burden," the amici said. "But because the government wants instead to allow a mining company to leave a crater where Oak Flat once was, Mr. Riley has suffered no substantial burden to his religious exercise."

Stephanie Hall Barclay of the Religious Liberty Initiative at Notre Dame Law School, who represents the amici, told Law360 on Thursday that the government has historically shown a pattern of "callous disregard" for tribal religious rights.

"Oak Flat is one place where I think we can change that pattern by not having this double standard in the law, but provide the same protections we do for other religious practices," Barclay said.

Michael V. Nixon, counsel for Apache Stronghold, told Law360 on Thursday that the group is arguing that the Apaches rather than the federal government actually own the land at issue in the case, but the judge could decide the case on the basis of the RFRA claims without getting into the ownership issue.

Also Thursday, the Advisory Council on Historic Preservation said in a statement that it wouldn't sign off on a proposed agreement for dealing with issues around protecting historic properties while developing the Resolution Copper Mine, and terminated consultation over the project.

The ACHP, an independent federal agency, said in a letter Thursday to a U.S. Forest Service Official that "it is clear that the proposed undertaking would destroy significant historic properties, including the highly significant Oak Flat," and that the provisions of the proposal already agreed to by several federal agencies, Resolution Copper and others "are not sufficient to adequately resolve those adverse effects."

Representatives for Resolution Copper and the USDA were not immediately available for comment Thursday.

The amici are represented by Stephanie Hall Barclay of the Religious Liberty Initiative at The

University of Notre Dame Law School and Michalyn Steele of Brigham Young University Law School.

Apache Stronghold is represented by Clifford Irwin Levenson and Michael V. Nixon.

The federal government is represented by Tyler McVeigh Alexander of the Department of Justice.

The case is Apache Stronghold v. United States of America et al., case number 2:21-cv-00050, in the U.S. District Court for the District of Arizona.

--Additional reporting by Diamond Naga Siu and Emma Whitford. Editing by Ellen Johnson.