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Tribal, Religious Groups Back Apache Bid To Halt Copper Mine

By [Andrew Westney](#)

Law360 (March 26, 2021, 10:18 PM EDT) -- Native American groups, religious groups and legal scholars have urged the Ninth Circuit to block the federal government's planned transfer of sacred tribal land in Arizona, saying the destruction of the site for the Resolution Copper mine project would run roughshod over an Apache group's religious rights.

Three groups of amici — the [National Congress of American Indians](#) and Indian law scholars, the Jewish Coalition for Religious Liberty and others, and religious liberty legal scholars — filed briefs Thursday backing nonprofit Apache Stronghold's [bid to overturn a decision](#) allowing the federal government to transfer the Western Apaches' sacred Chi'chil Bildagoteel land, also known as Oak Flat, for the copper mine joint venture of [Rio Tinto Group](#) and [BHP Group](#).

The NCAI said in its brief that the federal government "acknowledges that its actions will result in the complete and irreversible physical destruction of a religious site, and that that destruction will totally prevent the religious exercise that has occurred there for centuries," and that a lower court judge wrongly found that didn't qualify as a "substantial burden" in violation of the Religious Freedom Restoration Act.

And the [U.S. Department of Agriculture](#) and its [U.S. Forest Service](#) haven't shown that the federal government has a compelling interest that might let it carry out the land exchange under RFRA, the group said.

While late Sen. John McCain of Arizona said the 2014 law authorizing the exchange was enacted for national security reasons, "the United States' copper supply is secure, with or without the Oak Flat land exchange," the NCAI said. In addition, Rio Tinto "has a track record of unnecessarily demolishing Indigenous sacred sites," the NCAI said, pointing to "an international scandal" around the destruction of two sites in Australia last year.

The USDA declined to comment, and Rio Tinto did not provide comment on the suit Friday.

Apache Stronghold claimed in its [January complaint](#) against the USDA that there wasn't enough notice about the project and that it infringes treaty and religious rights, improperly handles

Apache land, and violates RFRA.

The mining companies gained access to the land after the passage of a 2014 military spending bill that included a section added by former Arizona U.S. Sens. McCain and Jeff Flake swapping Tonto National Forest acreage containing the Oak Flat parcel for private land owned by Rio Tinto and BHP. Days after the complaint was filed, the USDA released the final environmental impact statement for the land swap.

In February, U.S. District Judge Steven P. Logan denied Apache Stronghold's request for a preliminary injunction against the USDA to halt the land swap, saying losing the sacred site doesn't amount to a "substantial burden" on the group's religion under the RFRA.

The judge said a "substantial burden" means the government has coerced someone by forcing them to choose between their religion and receiving a government benefit, or penalized them for exercising their religion, and "even where land is physically destroyed, the government action must still fall within those two narrow situations to make out a free exercise violation under [the law]."

On March 1, the federal government told the Ninth Circuit it was revoking the final environmental impact statement and draft record of decision issued in January so it can further review the proposed land exchange and consider input from tribes and parties including Apache Stronghold. Four days later, a split Ninth Circuit panel [refused an emergency bid](#) to block the land exchange.

In its opening brief to the Ninth Circuit, Apache Stronghold pressed the court for an injunction on the planned land swap, saying the federal government's decision to extend the environmental review of the project doesn't guarantee the mine won't go forward.

In another amicus brief filed Thursday, a group of religious liberty law scholars called the lower court's ruling "an astonishing and cramped interpretation of RFRA's text," as the law's "purpose was to implement Congress's desire that courts require the government to justify substantial burdens placed on religious exercise."

"Penalties and withheld benefits are coercive incentives to be sure, but prohibitions like those challenged here are greater, more fundamental, absolute burdens that deprive believers of any choice and, by the imposition of brute force, compel violations of religious strictures or prevent religious exercise in toto," the scholars said.

The scholars said that the [U.S. Supreme Court](#) found in its November decision in *Roman Catholic Diocese of Brooklyn v. Cuomo* "that COVID restrictions prohibiting or even severely curtailing religious observances constitute a substantial burden on the exercise of religion under the First Amendment and under RFRA."

"To the extent COVID restrictions substantially burden religious exercise by preventing or limiting the size of a religious worship services for a limited period of time, so too the destruction of Oak Flat presents a similar — if not exponentially greater — burden by rendering

religious worship or exercise at Oak Flat fundamentally impossible forever," according to the brief.

In a separate brief Thursday, the Jewish Coalition for Religious Liberty, the International Society for Krishna Consciousness, the [Sikh Coalition](#), the Church of Jesus Christ of Latter-Day Saints and Protect the 1st said the case is "of enormous importance, not just for members of the Apache Nation, but for all people and communities of faith."

"While, on its surface, this case concerns Native American religious rights, the district court's erroneously narrow standard for what qualifies as a substantial burden under RFRA will harm Jewish, Muslim, Sikh, Buddhist, Hare Krishna, Christian and all manner of religious communities, organizations and individuals," the groups said.

RFRA applies to laws of general applicability, so "neutral but substantial burdens on religious exercise count under RFRA," such as the burden on the Apaches' worship, the groups said. Destroying Oak Flat "would arguably be even more devastating to the Western Apaches than an obliterated Vatican for Catholics, or a demolished Kaaba (in Mecca) for Muslims," since "at least Catholics and Muslims could still worship elsewhere, unlike the Apaches here," according to the brief.

And the lower court wrongly rejected precedents dealing with the "substantial burden" test in the Religious Land Use And Institutionalized Persons Act, since the RFRA and RLUIPA tests "are identical, not fraternal twins," the groups said.

Luke Goodrich of the Becket Fund for Religious Liberty, which represents Apache Stronghold in the appeal, praised the "powerful, diverse coalition" backing the group in a series of tweets Friday.

Gene C. Schaerr of [Schaerr Jaffe LLP](#), which represents the Jewish Coalition for Religious Liberty and other groups, said in a statement Friday, "We're delighted at the opportunity to represent a wide variety of faith communities in supporting the Western Apaches' challenge to the district court's unconscionably narrow approach to determining what constitutes a 'substantial burden on religion.'"

Stephanie Hall Barclay of the Religious Liberty Initiative at Notre Dame Law School, who represents the NCAI and others, told Law360 on Friday that the federal government's history of seizing sacred Indigenous sites "is a big part of the story of why these sites are in governmental control and so difficult for Indigenous people to access."

Rep. Raúl Grijalva, D-Ariz., the chairman of the House Committee on Natural Resources, [reintroduced legislation](#) March 15 that would repeal the 2014 congressional authorization for the land exchange, after previous incarnations of his bill failed.

Apache Stronghold is represented by Luke W. Goodrich, Mark L. Rienzi, Diana M. Verm, Joseph C. Davis, Christopher Pagliarella, Daniel D. Benson and Kayla A. Toney of the Becket Fund for Religious Liberty, Clifford Irwin Levenson and Michael V. Nixon.

The government is represented by Katelin Shugart-Schmidt, Joan M. Pepin, Tyler M. Alexander, Erika B. Kranz, Reuben S. Schiffman, Erika Norman and Jean E. Williams of the [U.S. Department of Justice](#)'s Environment and Natural Resources Division.

The NCAI, Ramon Riley, the International Council of Thirteen Indigenous Grandmothers and the MICA Group 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](#).

The religious liberty law scholars are represented by Miles E. Coleman of [Nelson Mullins Riley & Scarborough LLP](#) and Thomas Hydrick of Hunter Windham.

The Jewish Coalition for Religious Liberty, the International Society for Krishna Consciousness, the Sikh Coalition, the Church of Jesus Christ of Latter-Day Saints and Protect the 1st are represented by Gene C. Schaerr, Riddhi Dasgupta and Joshua J. Prince of Schaerr Jaffe LLP.

The case is Apache Stronghold v. U.S. et al., case number [21-15295](#), in the [U.S. Court of Appeals for the Ninth Circuit](#).