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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**

8 Apache Stronghold,)
9)
10 Plaintiff,) **ORDER**
11 vs.)
12 United States of America, et al.,)
13 Defendants.)
14 _____)

15 **I. BACKGROUND**

16 In 2014, Congress passed the National Defense Authorization Act for Fiscal Year
17 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
18 the NDAA, known as the Southeast Arizona Land Exchange and Conservation Act,
19 authorizes the exchange of land between the United States Government and two foreign
20 mining companies (known collectively as “Resolution Copper”). 16 U.S.C.A. § 539p. The
21 2,422-acre parcel of Arizona land which the Government will convey to Resolution
22 Copper, located within the Tonto National Forest, includes a sacred Apache ceremonial
23 ground called Chi’chil Bildagoteel, known in English as “Oak Flat.” (Doc. 1 at ¶ 3).
24 Congress’s stated purpose for authorizing the exchange is to “carry out mineral exploration
25 activities under the Oak Flat Withdrawal Area.” 16 U.S.C.A. § 539p(6)(i).
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27 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).¹ 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 ¹ 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).²

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).³

17
18 ² 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 ³ 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).⁴ The 1852 Treaty simply
12 provides no indication that the United States is holding the land in trust for the Apaches.⁵

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14 ⁴ 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 ⁵ 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).⁶

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

22 ⁶ 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.⁷ 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 1070.⁸

25
26 ⁷ 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 ⁸ 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

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.⁹

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.

22 ⁹ 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.¹⁰

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).

18
19
20 ¹⁰ 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).

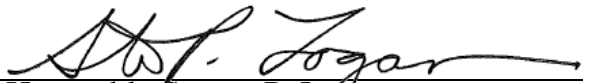
1 Nosie further testified that he presented testimony to Congress before the passage of the
2 NDAA “many “[m]any times.” (Doc. 47 at 65). In fact, Nosie “visited all of the
3 Congressional agencies, leaders, you know, to express the concerns and positions of the
4 tribe,” testimony which was “specifically 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
19 United States District Judge
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