

No. 21-15295

In the United States Court of Appeals for The Ninth Circuit

APACHE STRONGHOLD,
Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Arizona
Honorable Steven P. Logan
(2:21-cv-00050-PHX-SPL)

**MOTION TO EXPEDITE CONSIDERATION
OF WHETHER TO GRANT REHEARING EN BANC
RELIEF REQUESTED BY OCTOBER 4, 2022**

MICHAEL V. NIXON
101 SW Madison Street #9325
Portland, OR 97207
(503) 522-4257
michaelvnixon@yahoo.com

CLIFFORD LEVENSON
5119 North 19th Street, Suite K
Phoenix, AZ 85015
(602) 544-1900
cliff449@hotmail.com

LUKE W. GOODRICH
Counsel of Record
MARK L. RIENZI
DIANA VERM THOMSON
JOSEPH C. DAVIS
DANIEL D. BENSON
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1919 Pennsylvania Ave. NW
Suite 400
Washington, DC 20006
(202) 955-0095
lgoodrich@becketlaw.org

Counsel for Plaintiff-Appellant

Plaintiffs respectfully move this Court to expedite consideration of whether to grant rehearing en banc and to issue any order granting or denying rehearing by October 4, 2022—28 days after the parties’ simultaneous en banc briefs are filed. *See, e.g., Doe v. San Diego Unified Sch. Dist.*, 22 F.4th 1099 (9th Cir. 2022) (17 days after en banc opposition filed); *Inupiat Community of the Arctic Slope v. Salazar*, No. 11-72943, ECF 96 (9th Cir. 2012) (24 days after rehearing petition filed). If the Court denies rehearing, Plaintiffs respectfully request that any statements or dissents regarding rehearing be issued by December 1, 2022. The Government opposes this motion. In support of this motion, Plaintiffs state as follows:

BACKGROUND

1. This appeal involves the threatened destruction of Oak Flat, a sacred site of unparalleled significance to Western Apaches and other tribes, and the site of core religious practices that cannot take place anywhere else.

2. In 2021, the United States authorized the transfer of Oak Flat to a mining company, Resolution Copper, for the express purpose of constructing a mine that all parties agree would destroy the site. The transfer was to be completed on March 11, 2021. ECF 6-1 at 23.

3. Sixteen days before transfer (and the day after the district court denied its motion for injunction pending appeal), Plaintiff Apache Stronghold filed an emergency motion in this Court asking for an injunction pending appeal to prevent the transfer. ECF 6-1.

4. Six hours before the Government's response was due, the Government temporarily paused the transfer, stating it needed "additional time" to consider tribal concerns and ensure compliance with federal law. It then argued that the emergency motion should be denied. ECF 18-1 at 14.

5. By a 2-1 vote, this Court denied emergency relief, noting that the Government represented "under penalty of perjury" that it would give "30-days advance notice" to Apache Stronghold "prior to the publication of a new FEIS [Final Environmental Impact Statement]," and that it would not transfer Oak Flat until "after publication of a new FEIS, which will take 'months.'" ECF 26 at 1-2. That was 18 months ago.

6. Judge Bumatay dissented, stating "[i]t is clear from the record that, absent an injunction, Apache Stronghold faces a strong likelihood of imminent, irreparable harm"—including irreversible transfer of the land, immediate "exclu[sion] from the Oak Flat site," and irreparable loss of "First Amendment rights ... by the certain destruction of their religious site." ECF 26 at 13-15.

7. On June 24, 2022, a divided panel of this Court ruled against Apache Stronghold, affirming the district court’s denial of Apache Stronghold’s motion for a preliminary injunction. ECF 85-1.

8. On August 15, 2022, this Court *sua sponte* ordered the parties to file simultaneous briefs on whether this case should be reheard en banc. ECF 86. Those briefs are due September 6, 2022.

ARGUMENT

9. This Court has authority to expedite proceedings for “good cause”—including where, “in the absence of expedited treatment, irreparable harm may occur.” Cir. R. 27-12. Here, good cause exists because (a) irreparable harm may occur absent expedited treatment, and (b) expedited treatment will aid further judicial review.

A. Irreparable Harm

10. Due to the denial of a preliminary injunction, nothing presently prevents the Government from republishing the FEIS and transferring Oak Flat for destruction at any time. Indeed, once the Government republishes the FEIS, it *must* transfer Oak Flat to Resolution Copper in 60 days or less. 16 U.S.C. § 539p(c)(1); ECF 18-1 at 14 (Government agreeing that “the date that a final EIS is published” triggers “the date on which the land exchange *must* take place”) (emphasis added).

11. In March 2021, just ten days before the transfer of Oak Flat was to be completed, and six hours before the Government’s response to Plaintiffs’ motion for emergency relief was due, the Government temporarily

withdrew the FEIS and paused the transfer, stating it needed “additional time” for tribal consultation. ECF 18-1 at 14. The Government stated that it “cannot give a precise length of time” for completing this process, but it would likely “take several months.” ECF 18-1 at 14.

12. That was 18 months ago.

13. Meanwhile, on July 12, 2022, the Government filed a status report in the district court stating that it has “completed” its “meetings with Tribal leaders.” 2:21-cv-50, ECF 97 at 2. The only remaining steps it has identified in its process are “to consider the Tribes’ comments,” decide “whether to conduct additional NEPA analysis,” and “meet with Resolution Copper,” *id.*—after which it can publish the FEIS on 30 days’ notice. Thus, the Government appears poised to republish the FEIS and complete the transfer while this case remains pending before this Court or the Supreme Court.

14. Before filing this motion, on August 25, Apache Stronghold conferred with the Government’s counsel via email, stating that Apache Stronghold would not need to file this motion if the Government could represent that it would not republish the FEIS or complete the transfer while this case remains pending here or at the Supreme Court. On August 26, the Government replied that it has not yet reached a decision on that and expects to provide an answer next week. Apache Stronghold will consider withdrawing this motion if the Government provides the requested representation.

15. As Judge Bumatay explained, when the Government moves forward, “[i]t is clear from the record that, absent an injunction, Apache Stronghold faces a strong likelihood of imminent, irreparable harm.” ECF 26 at 13-15. First, Oak Flat will immediately be removed from federal laws guaranteeing “tribal access” and will become private land. 3-FEIS-824. Apache Stronghold will be “effectively excluded from the Oak Flat site,” ECF 26 at 14, and unable to carry out important religious ceremonies. 2-ER-70, 97–99, 124.

16. Second, transfer will result in “the certain destruction of [the Apaches’] religious site.” ECF 26 at 13 (Bumatay, J., dissenting). Resolution Copper can immediately begin “preparatory activities that are likely to degrade the Oak Flat environment”—such as constructing “new shafts,” “new roads,” a “water treatment plant,” an “admin building,” and “substations.” *Id.* at 13-14 (quoting 1-FEIS-57, Fig. 2.2.2-3). And the mine will swallow Oak Flat in a massive crater, ending Apache religious practices forever. *Id.* at 3. As the Government has admitted, the destruction of Oak Flat will be “immediate, permanent, and large in scale.” 2-FEIS-789.

17. Third, while the Government has claimed “the transfer can be reversed if it turns out that the Western Apaches’ free exercise rights are being violated,” Judge Bumatay rightly dismissed this argument as “absurd[.]” ECF 26 at 15. Rescinding a completed land transfer “is a matter

of judicial discretion.” *Id.* And once title transfers, Resolution Copper immediately has authority to take steps rendering Oak Flat “unfit for religious worship, making reversal of the transfer futile.” *Id.* at 15 (citing *Kettle Range Conservation Group v. BLM*, 150 F.3d 1083, 1085, 1087 (9th Cir. 1998) (declining to undo a land transfer where the land had been “denuded” and it was too late to “unscramble the eggs.”)). Thus, the likelihood of irreparable harm “is clear from the record.” *Id.* at 13.

18. This Court has previously resolved rehearing requests on an expedited basis when petitioner alleged a risk of irreparable harm. *See, e.g., San Diego Unified Sch. Dist.*, 22 F.4th 1099 & ECF 22 at 23 (9th Cir. 2022) (alleging irreparable harm to free exercise rights; order issued 17 days after en banc opposition filed); *Inupiat Community of the Arctic Slope*, No. 11-72943, ECF 96 (9th Cir. 2012) (alleging irreparable harm if oil drilling began during appeal; order issued 24 days after rehearing petition filed). The same approach is warranted here.

B. Judicial Review

19. Expedited treatment will also aid further judicial review. If this Court grants rehearing by October 4, it can immediately proceed with rehearing and reverse the denial of the preliminary injunction, reducing the likelihood the Government will republish the FEIS and complete the land transfer during this appeal.

20. If this Court denies rehearing by October 4, Plaintiffs can immediately petition the Supreme Court for a writ of certiorari. Based on the

Court's typical scheduling practices, if Plaintiffs file their certiorari petition by October 5, 2022, their appeal can still be heard during the Supreme Court's October Term 2022, with a decision no later than June 2023.*

21. However, if Plaintiffs' petition is delayed beyond October 5, their appeal will likely be delayed until the following Supreme Court term, with a decision likely delayed until 2024. This significantly increases the likelihood that the Government will seek to republish the FEIS and complete the land transfer while Plaintiffs' appeal remains pending—which would necessitate another request for emergency relief in the district court, this Court, and possibly the Supreme Court. *But see Does 1-3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., & Kavanaugh, J., concurring in denial of emergency application) (“emergency docket” would “force the Court” to review “on a short fuse without benefit of full briefing and oral argument”).

22. Thus, expedited treatment will aid in orderly judicial review and reduce the likelihood that this appeal will again need to be addressed on an emergency basis.

* For example, in the last two Terms, eighteen of twenty cases argued in the final Supreme Court sittings (April 2021 and April 2022) had petitions for certiorari filed no later than October 5 of the prior year, with most filed in September or earlier. *See, e.g., Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022) (cert petition filed Sept. 14, 2021). The two exceptions were *Biden v. Texas*, 142 S. Ct. 2528 (2022) (petition filed Dec. 29, 2021) and *Yellen v. Confederated Tribes*, 141 S. Ct. 2434 (petitions filed Oct. 21, 2021 and Oct. 23, 2021).

CONCLUSION

Plaintiffs respectfully move this Court to expedite consideration of whether to grant rehearing en banc and to issue any order granting or denying rehearing by October 4, 2022. If the Court denies rehearing, Plaintiffs respectfully request that any statements or dissents regarding rehearing be issued by December 1, 2022.

Respectfully submitted,

/s/Luke W. Goodrich

MICHAEL V. NIXON
101 SW Madison Street #9325
Portland, OR 97207
(503) 522-4257
michaelvnixon@yahoo.com

LUKE W. GOODRICH
Counsel of Record
MARK L. RIENZI
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JOSEPH C. DAVIS
DANIEL D. BENSON
THE BECKET FUND FOR
RELIGIOUS LIBERTY
1919 Pennsylvania Ave. NW
Suite 400
Washington, DC 20006
(202) 955-0095
lgoodrich@becketlaw.org

CLIFFORD LEVENSON
5119 North 19th Street
Suite K
Phoenix, AZ 85015
(602) 544-1900
cliff449@hotmail.com

August 26, 2022

CERTIFICATE OF COMPLIANCE

This motion complies with the requirements of Fed. R. App. P. 27(d) and Circuit Rules 27-1(1)(d) and 32-3(2) because it has 1,681 words.

This motion also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

/s/ Luke W. Goodrich

Luke W. Goodrich

CERTIFICATE OF SERVICE

I hereby certify that on August 26, 2022, the foregoing motion was filed electronically with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit through the Court's CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system and that a PDF copy of this motion will be emailed to opposing counsel immediately after it is filed.

/s/ Luke W. Goodrich

Luke W. Goodrich