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A Dubious Religious Liberty Case Against Oak Flat Copper Mine

The government isn't required to grant perpetual access to federal property for worship purposes.

By William P. Barr
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Mine shafts tower over the Resolution Copper Mining Company facility in Miami, Ariz., June 9, 2023. MATT YORK/ASSOCIATED PRESS

A small group of activists are waging an intense legal battle to stop the permitting of a proposed Arizona copper mine. Their bid to derail development of the world's second-largest untapped copper deposit has attracted a strange bedfellow: religious-liberty organizations embracing reckless legal theories and false narratives.

No mineral is more essential to modern society than copper. Immense quantities are required to carry electricity throughout the economy, drive new technologies like artificial intelligence and power the defense systems that keep our nation safe. Sufficient only 30 years ago, the U.S. now relies on imports for half its copper needs. As demand soars worldwide, the International Energy Agency projects a 30% shortfall in global supply by 2035.

The deposit found in Arizona's "Copper Triangle," an area of intensive mining for more than 150 years, is a behemoth. When developed, it could supply a quarter of U.S. copper demand for the next 60 years. Some of the find lies under federally owned land known as Oak Flat, a 6.7-square-mile section of federal land adjacent to the historic Magma Copper mine. In 2014, after a decade of deliberations, including intensive consultations with all tribal groups potentially affected, Congress enacted a carefully crafted compromise directing that 2,422 acres of federal land, including Oak Flat, be conveyed to Resolution Copper, a private mining company, in exchange for the preservation, in perpetuity, of 5,459 acres of environmentally sensitive and culturally important land.

Many Apache people support the project, which will create thousands of jobs and pump billions of dollars into the local area. But the nonprofit Arizona Mining Reform Coalition and members of the San Carlos Apache tribe (one of several Apache tribal groups in the region) used to block the land exchange that Congress directed. They claim Oak Flat is sacred ground with great cultural meaning and the site of religious ceremonies that can't take place anywhere else.

The plaintiffs assert that the First Amendment's protection of free exercise of religion and the Religious Freedom Restoration Act guarantee these believers the right to use this property in perpetuity and prohibit Congress from using the land for a mine (or anything else) that would disrupt their religious worship. So far the courts have repeatedly rejected these claims under longstanding Supreme Court precedent recognizing that the government doesn't substantially burden religious practice when it chooses how best to manage its own property.

Every American has the right to practice his religion freely in his own home or private place of worship, but no one has the right to demand perpetual access to federal property, for religious worship or any other purpose.

Courts are required by judicial precedent to take plaintiffs' religious assertions at face value. But the actual record falls far short of demonstrating that Oak Flat has long been widely considered sacred by the Apache and is needed to exercise Apache religion.

Dale Miles, the former San Carlos tribal historian, attests that no one considered Oak Flat sacred until the recent mining controversy; that a mine shaft was built there in 1970 without a peep of opposition; that religious ceremonies and rituals have generally been held at dozens of sites within the reservation; and that there is no long history of using Oak Flat for ceremonies. Harrison Talgo, the former tribal chairman, has said that Oak Flat isn't sacred and that many tribal members support the project but are afraid to challenge current tribal leadership for fear of losing tribal services in retaliation.

The plaintiffs' legal theories would also overthrow long-settled principles and take religious liberty law on an untenable course. Governance would be impossible if the government were prohibited from taking any actions on its own property that have the incidental effect of constraining religious activities. The law is clear: Government may not impose coercive requirements on religious adherents that compel or induce them to violate their own religious beliefs, nor may it discriminate against religious believers by denying them an equal share of rights enjoyed by other citizens. But Congress's decision to transfer a parcel of federal property to an Arizona-based mining company (not a Chinese company, as plaintiffs falsely allege) plainly involves neither discrimination nor coercion.

Oak Flat is public land, but the government has no obligation to provide public property—either land or funds—to support or enable particular religious activities. The government may choose to make public resources available to private persons, and when it does —such as by opening up public land to private recreation —it can't exclude persons simply because they wish to engage in religious worship.

But when the government decides not to provide particular resources to the public generally—as in the case of Oak Flat—it isn't required to continue providing access to those resources forever just because the people requesting access are motivated by spiritual concerns.

The gravamen of the plaintiffs' position is that, when any person sincerely deems certain public land "sacred," he effectively establishes a perpetual right to enter and use the land for religious purposes. But as a federal appellate court explained, that is legally untenable: All citizens have a stake in public property, and the Constitution entrusts Congress to manage it for the public at large, not solely by conferring unique privileges on particular groups who choose to undertake religious worship on public land. When it comes to access to public resources, the law guarantees religious adherents equal rights, not greater rights.

Plaintiffs are poised to wage a protracted fight to stop the project, but their radical attempts to remake religious-liberty law, if accepted, could disrupt Congress's efforts to use swaths of the country for the public good. Some Native American tribes sincerely believe that entire forests, rivers or mountain ranges are sacred. That belief alone doesn't entitle them to block needed infrastructure or projects, like Resolution Copper, that are essential to the American economy.

Mr. Barr served as U.S. attorney general, 1991-93 and 2019-20.

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