

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)

**EMERGENCY MOTION FOR AN INJUNCTION
PENDING APPEAL UNDER CIRCUIT RULE 27-3
RELIEF REQUESTED BY MARCH 2, 2021**

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CORPORATE DISCLOSURE STATEMENT

Apache Stronghold is an Arizona nonprofit corporation with no parent company or stock.

CIRCUIT RULE 27-3 CERTIFICATE

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(ii) Facts showing the nature and existence of the emergency

The Apache peoples have used Chi'chil Bildagoteel, known in English as Oak Flat, as a sacred religious ceremonial ground since time immemorial. The district court found that “[t]he spiritual importance of Oak Flat to the Western Apaches cannot be overstated.” ER.11.

Yet on March 11, 2021, the United States is scheduled to transfer control over Oak Flat to a mining company, Resolution Copper, which will construct a mine collapsing and destroying the sacred site in a nearly two-mile-wide, 1,100-foot-deep crater. As the Forest Service said in its Final Environmental Impact Statement (FEIS), the “physical” impact on “tribal sacred sites” caused by the mine will be “immediate,” “permanent,” and “[i]rreversible”—“permanently affect[ing] the ability of tribal members” to use “known” sacred sites “for cultural and religious purposes.” FS Resolution Copper Project and Land Exchange Environmental Impact Statement, 2 FEIS at 790 (U.S.D.A. 2021), available at

<https://www.resolutionmineeis.us/documents/final-eis>.

This irreversible destruction of one of the most sacred indigenous sites in the country violates both the Religious Freedom Restoration Act (RFRA) and the Government's trust and fiduciary duties to the Apache tribes and members. Thus, Apache Stronghold seeks an emergency injunction pending appeal to preserve Oak Flat while this appeal proceeds.

Before filing this motion, Apache Stronghold asked the Government if it would agree to a 60-day stay of the land transfer (until May 10, 2021) so that this Court could consider the request for relief on a less compressed schedule. The Government refused. Thus, Apache Stronghold requests relief by March 2, 2021, so that if this Court denies relief, it can seek relief from the Supreme Court by March 10, 2021. To that end it proposes the following briefing schedule:

- February 23: Apache Stronghold's motion
- February 28: Defendants' response
- March 1: Apache Stronghold's reply
- March 2: Court's decision

(iii) Why the motion could not have been filed earlier

Apache Stronghold filed this lawsuit on January 12, 2021, seeking a TRO to prevent the Forest Service from issuing the FEIS and completing the land transfer. The district court then held a preliminary-injunction hearing on February 3, 2021 (ECF 37), and issued its opinion denying a preliminary injunction on February 12, 2021 (ECF 57, ER.1-23).

Apache Stronghold filed its Notice of Appeal the same day it retained new appellate counsel—February 18, 2021—who immediately began preparing motions for injunctions pending appeal for the district court and this Court. Apache Stronghold filed its district court motion the next day, February 19, 2021. That motion was denied on February 22, 2021, and Apache Stronghold filed this emergency motion the next day, February 23, 2021.

(iv) Notice and service on the opposing parties’ counsel

In compliance with FRAP 8(a)(2), Apache Stronghold’s notice of appeal and motion for injunction pending appeal in the district court gave Defendants advance notice of this motion. Apache Stronghold also notified Defendants’ counsel by email on February 19, 2021, of its intent to file this motion. Apache Stronghold’s counsel will email a PDF copy of this motion to Defendants’ counsel immediately after it is filed.

(v) Whether relief was first sought in the district court

Apache Stronghold filed a motion for injunction pending appeal in the district court on February 19, 2020, and that motion was denied on February 22, 2021.

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INTRODUCTION

Western Apaches have centered their religious practices on Chi'chil Bildagoteel—“Emory Oak Extends on a Level,” or “Oak Flat”—since time immemorial. As the district court found, “[t]he spiritual importance of Oak Flat to the Western Apaches cannot be overstated.” ER.11. Yet in 16 days, the federal government plans to transfer this sacred site to a third party for the express purpose of constructing a mine that all parties agree will destroy the site.

In a typical injunction case, a court might wonder whether the threatened harm is imminent or irreparable. Here, however, the Government has already attested to those facts. It concedes that upon transfer, Oak Flat will immediately “become private property and no longer be subject to [laws] or Forest Service management that provides for tribal access,” which is a serious “adverse impact on resources significant to the tribes.” 3 FEIS at 824. And construction of the mine—the avowed and only purpose of the transfer—will result in “immediate,” “permanent,” and “[i]rreversible” destruction of the site, forever ending religious practices at Oak Flat. 2 FEIS at 789-90. The district court expressed no disagreement.

Instead, the court denied relief based on its view of the merits of Plaintiffs’ RFRA, free exercise, and trust claims. But in doing so, it made several legal errors. First, in rejecting the RFRA claim, the court held that Plaintiffs can show a “substantial burden” on their religious exercise only if they suffer denial of a government benefit or threat of sanctions—not

destruction of their site. ER.17. Thus, if the Government merely fenced off the site and sanctioned Plaintiffs for trespassing, they would face a “substantial burden”; but if the Government destroys the site—rendering Plaintiff’s religious practices impossible—they do not. This holding defies both precedent and common sense. And since the project arises from the Government’s specific targeting of Oak Flat, it violates the Free Exercise Clause too.

Second, in rejecting Plaintiffs’ trust claim, the court held that only a tribal government, not individual members, may assert the tribe’s trust interest. That ruling directly contravenes multiple cases allowing individual tribal members to invoke tribal rights and treaties to protect individual interests. The court also held that the trust was nonexistent or abrogated by the land-transfer statute. But that contradicts precedent on how trusts are formed in the Indian-law context, and the rule that a statute abrogating treaty rights must do so expressly—which did not happen here. Thus, the transfer cannot proceed without violating the trust.

* * *

The United States Government has a tragic history of destroying Apache lives and lands for the sake of mining interests. This time, the Apaches simply ask that they be heard in court before their land is transferred beyond federal control and destroyed forever.

BACKGROUND

A. The Apaches and Oak Flat

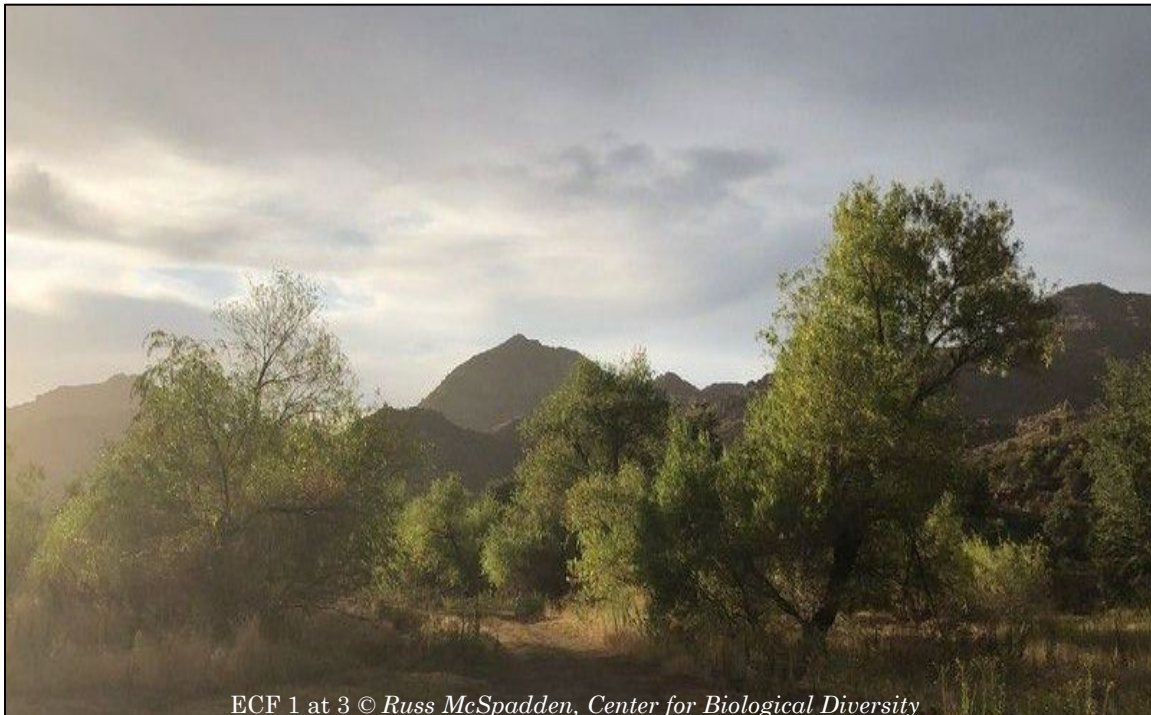
Since before recorded history, Western Apaches have lived, worshipped on, and cared for Oak Flat and surrounding lands. They believe that Usen, the Creator, gave life to all things. ER.65. Thus, everything has life, including air, water, and Nahagosan—Mother Earth herself. ER.93. The Apaches strive to remain “intertwined with the earth, with the mother” so they can “communicate with what [is] spiritual, from the wind to the trees to the earth to what [is] underneath.” ER.82.

Central to this connection are the Ga'an, who are “guardians” and “messengers” between the Creator and people in the physical world (ER.75)—roughly comparable to angels in Christianity. Usen created the Ga'an as “the buffer between heaven and earth” and created specific “blessed places” for the Ga'an to dwell. ER.81, 95.

One of the most important of the Ga'an dwelling places is Oak Flat—a 6.7-square-mile traditional cultural property between Apache Leap on the west and Ga'an Canyon (called Devil's Canyon by non-Indians) on the east. The central sacred area of Oak flat is depicted here:



The terrain of Oak Flat includes jagged cliffs, boulder fields, grassy basins, Emory oaks, and perennial waters used by songbirds, mountain lions, fox, bear, and deer:



ECF 1 at 3 © Russ McSpadden, Center for Biological Diversity



Apaches have held Oak Flat sacred since before recorded history. It is “uniquely endowed with holiness and medicine,” and neither “the powers resident there, nor [the Apache] religious activities that pray to and through these powers can be ‘relocated.’” ER.225. Only there can their “prayers directly go to [the] creator.” ER.65.

As the “direct corridor to [their] Apache religion,” Oak Flat is the site of key religious practices “that must take place there.” ER.65, 225. These include the Sunrise Ceremony, Holy Ground ceremonies, sweat lodge ceremonies, the gathering of “sacred medicine plants, animals, and minerals essential to [those] ceremonies,” ER.225, specific prayers and songs, and the use of “the sacred spring waters that flows from the earth with healing powers not present elsewhere.” *Id.*

The Sunrise Ceremony takes several days, marking an Apache girl's transition into womanhood. To prepare, the girl gathers plants from Oak Flat that contain "the spirit of Chi'chil Bildagoteel"; plants picked elsewhere don't "have the spirit that resonates." ER.65-67. As she gathers, she speaks to the spirit of Oak Flat, thanking it for providing the acorns, yucca, cedar, and other plants. ER.66-67.

After her godmother dresses her in "the essential tools of...becoming a woman," tribal members surround her and sing, dance, and pray. ER.71.



ER.131 © Photograph with family permission

In the night, the Ga'an at Oak Flat enter Apache men called crown dancers. ER.74. The Ga'an bless the girl, who joins the dance. *Id.*



ER.144 © Robin Silver Photography

On the final day, one of the Ga'an dancers paints the girl with white clay taken from the ground at Oak Flat, “mold[ing] her into the woman she is going to be.” ER.72-73. When her Godmother wipes the Oak Flat clay from her eyes, “she’s a new woman” forever “imprint[ed]” with the spirit of Oak Flat. ER.73.



ER.133 © Photograph with family permission

B. Mining Interests

Unfortunately, the Government has a tragic history of destroying Apaches' lives and land for the sake of mining interests. In the 1852 Treaty of Santa Fe, the United States promised the Apaches it would “designate, settle, and adjust their territorial boundaries” and “pass and execute” laws “conducive to the prosperity and happiness of said Indians.” ER.205. Although the formal designation of boundaries never took place, the earliest map, prepared by the Smithsonian Institution, shows Oak Flat as Apache, not U.S., territory. ER.110-11. Dr. John Welch, an expert in Apache anthropology and archaeology, testified there is “no evidence that the United States compensated the Apache treaty rights holders for Chi'chil Bildagoteel,” and “Oak Flat is Apache land.” ER.154.

After the treaty, as settlers and miners entered the area, U.S. soldiers and civilians committed numerous massacres of Apaches. 3 FEIS at 827. In 1862, U.S. Army General James Carleton “ordered Apache men to be killed wherever found.”¹ When miners discovered gold and silver nearby, General Carleton ordered “removal to a Reservation or...utter extermination” of the Apaches to make way for the “search of precious metals.” Welch at 8. The General Mining Act of 1872 authorized miners to take Apache land, and by 1874, the U.S. government had forced some 4,000

¹ John R. Welch, *Earth, Wind, and Fire: Pinal Apaches, Miners, and Genocide in Central Arizona, 1859-1874*, SAGE Open (2017) (35 lethal attacks from 1859-74), at 7 (hereinafter “Welch”).

Apaches onto the San Carlos Reservation, nicknamed “Hell’s 40 Acres” because it was a barren wasteland. 3 FEIS at 827; ER.128. Apache ancestral lands were decimated “by miners’ picks, shovels, drills, and dynamite blasts.” Welch at 11.

C. The Land Exchange

Still, the Government has long recognized Oak Flat’s centrality to Apache worship. In 1955, President Eisenhower reserved 760 acres of Oak Flat for “public purposes” to protect it from mining. 20 Fed. Reg. 7319, 7336-37 (Oct. 1, 1955). President Nixon renewed the protection in 1971. 36 Fed. Reg. 18,997, 19,029 (Sept. 25, 1971). The National Park Service placed Oak Flat in the National Register of Historic Places, concluding “that Chi'chil Biłdagoteel is an important feature of the Western Apache landscape as a sacred site, as a source of supernatural power, and as a staple in their traditional lifeway.”²

But mining companies covet Oak Flat. In 1995, miners discovered a large copper deposit 7,000 feet beneath the sacred ground.³ From 2005 to 2013, congressional supporters of Resolution Copper introduced thirteen

² NRHP Registration Form at 8-9, <https://perma.cc/4Y38-XQQE>.

³ Annette McGivney, *Revealed: Trump officials rush to mine desert haven native tribes consider holy*, Guardian (Nov. 24, 2020), <https://perma.cc/LE9H-RAZ6>.

different bills to give Oak Flat to Resolution Copper in a land exchange.⁴ Each bill failed. One bill sponsor, Representative Rick Renzi, was convicted for soliciting a bribe from Resolution Copper to support the land-transfer. *See United States v. Renzi*, 769 F.3d 731, 739-40 (9th Cir. 2014).

In 2013, Resolution Copper published a “General Plan of Operations” for a mine at Oak Flat. 1 FEIS 1.1. The next year, a looming government shutdown gave mine proponents their chance. Minutes before the midnight deadline for the must-pass National Defense Authorization Act, Arizona Senators McCain and Flake attached a rider authorizing transfer of a 2,422-acre parcel including Oak Flat to Resolution Copper in exchange for about 6,000 acres elsewhere. P.L.113-291 §3003(b)(2), (4); (c)(1). Rio Tinto, the majority owner of Resolution Copper, was a regular donor to McCain’s campaigns.⁵ Flake had worked as a Rio Tinto lobbyist.⁶

The rider revoked the presidential orders protecting Oak Flat from mining, §3003(i)(1)(A), and directed the transfer of Oak Flat to Resolution Copper “[n]ot later than 60 days after the date of publication of the final environmental impact statement.” §3003(c)(10).

The Forest Service estimated that the FEIS would not be ready until

⁴ Katharine E. Lovett, *Not All Land Exchanges are Created Equal: A Case Study of the Oak Flat Land Exchange*, 28 Colo. Nat. Res., Energy & Env’t’l L. Rev. 353, 366-67 (2017).

⁵ Lydia Millet, *Selling Off Apache Holy Land*, N.Y. Times (May 29, 2015), <https://perma.cc/VAQ8-SH4W>.

⁶ *Id.*

summer 2021.⁷ But that timeline changed after President Trump lost. In December 2020, the Department of Agriculture announced the FEIS would be published the following month.⁸ Officials admitted they pushed up the deadline because of “pressure from the highest level at the Department of Agriculture.”⁹ The FEIS was published January 15, 2021, triggering a deadline to complete the transfer no later than March 16, 2021. P.L.113-291 §3003(c)(10). The Government says it may transfer the land as early as March 11. ER.2.

D. The Mine

The FEIS acknowledges that the mine will cause “immediate, permanent, and large[-]scale” destruction of “archaeological sites, tribal sacred sites, [and] cultural landscapes.” 2 FEIS at 789. The loss of Oak Flat will “be an indescribable hardship to [native] peoples.” 1 FEIS at ES-29.

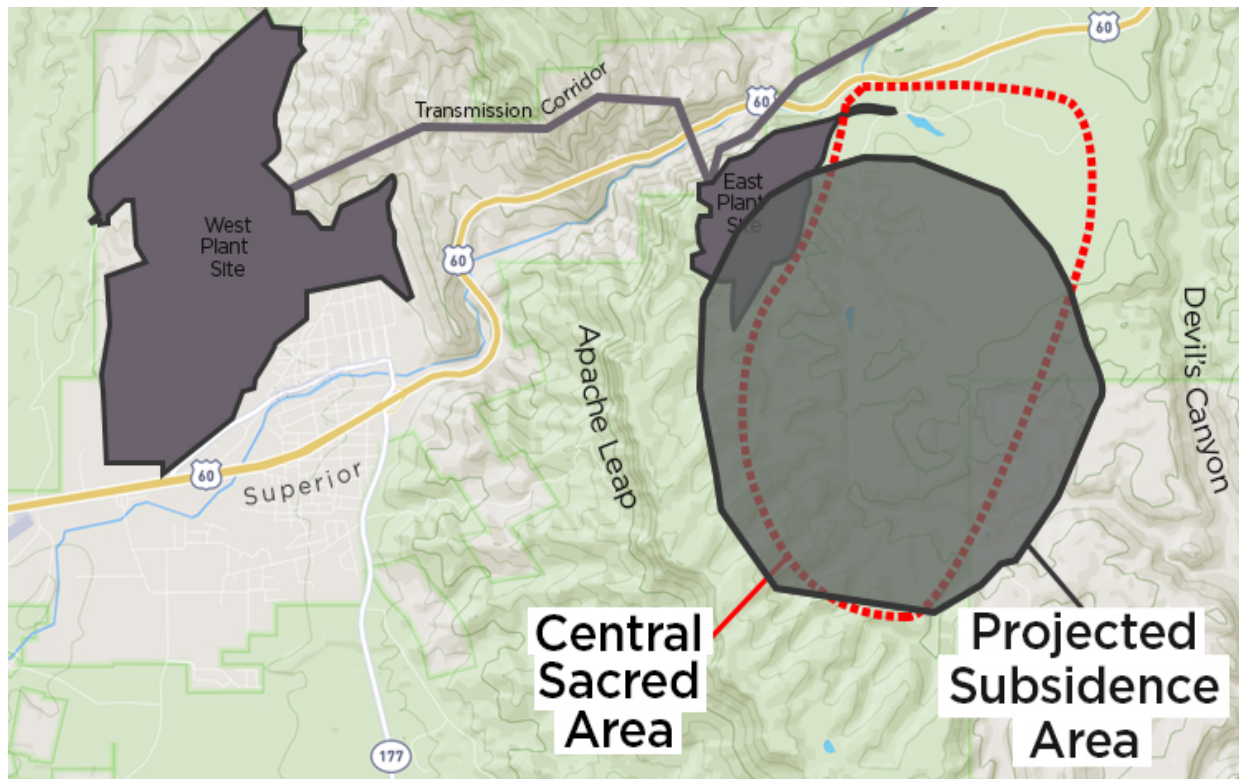
The copper exists 7,000 feet below the surface. 1 FEIS at 10. To mine it, Resolution Copper would tunnel below the ore, fracture it with explosives, and remove it from below. *Id.* After the ore is removed, the land above will collapse (or “subside”) into a massive crater approximately 2 miles across and 1,100 feet deep, destroying Oak Flat forever. *Id.*

⁷ Eric Lipton, *In Last Rush, Trump Grants Mining and Energy Firms Access to Public Lands*, N.Y. Times (Dec. 19, 2020), <https://perma.cc/YWX2-D4NS>.

⁸ *Id.*

⁹ McGivney, *supra* n.3.

This map shows the projected subsidence crater in relation to the central sacred area:



Cf. 1 FEIS 61.

The FEIS notes that the entire “NRHP-listed Chi'chil Bildagoteel Historic District [Traditional Cultural Property] would be directly and permanently damaged by the subsidence area at the Oak Flat Federal Parcel.” 1 FEIS at ES-28. This includes the permanent, physical destruction of the sacred sites used for the Sunrise Ceremony, Holy Ground ceremonies, and sweat lodge ceremonies, ER.68, ER.130, ER.91, ER.93, ER.122; the destruction of old-growth oak trees and sacred medicine plants essential to core religious practices, 1 FEIS at ES-29; the destruction of sacred springs with healing powers present nowhere else, 2 FEIS at 790; ER.65,

ER.142, ER.229; and the destruction of burial grounds and ancient religious and cultural artifacts, including many fragile petroglyphs. ER.142; 3 FEIS at 843, 846. According to the FEIS, these effects are “immediate, permanent, and large in scale.” 3 FEIS at 856. “Mitigation measures cannot replace or replicate the tribal resources and traditional cultural properties that would be destroyed.” *Id.* As Apache Stronghold members testified, this would render their core religious practices impossible. ER.65, ER.68, ER.122, ER.131-32, ER.145-46.

Upon transfer, Oak Flat will also “become private property and no longer be subject to [laws] or Forest Service management that provides for tribal access.” 3 FEIS at 824. The FEIS thus deems the transfer to have an immediate “adverse impact on resources significant to the tribes,” “regardless of the plans for the land,” because it places the land beyond the reach of key laws and judicial remedies. *Id.*

The transfer would also immediately prevent specific planned religious ceremonies from taking place, including critical coming-of-age Sunrise Ceremonies. ER.130-34, 122 ¶10. Apaches and members of other tribes would be unable to pray on the land. ER.122 ¶12. And they would be subject to criminal trespassing liability on their own sacred, ancestral land.

E. District Court Proceedings

Plaintiff Apache Stronghold is an Arizona nonprofit founded by Dr. Wendsler Nosie, former Chairman of the San Carlos Apache Tribe, to

unite Western Apaches with other allies to preserve indigenous sacred sites. It sued on January 12 and immediately sought a temporary restraining order and preliminary injunction to stop publication of the FEIS and land transfer. After a hearing, the district court on February 12 denied a preliminary injunction. This appeal followed.

ARGUMENT

An injunction pending appeal is appropriate when the plaintiff shows (1) likelihood of success on the merits, (2) likelihood of irreparable harm absent relief, (3) the equities favor relief, and (4) relief is in the public interest. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127 (9th Cir. 2011). If “the balance of hardships tips sharply in the plaintiff’s favor,” plaintiff need show only “serious questions going to the merits.” *Id.* at 1134-35. Here, all four factors favor relief. We start with the merits.

I. The Government’s actions violate RFRA.

RFRA provides that “[g]overnment shall not substantially burden a person’s exercise of religion” unless it satisfies strict scrutiny. 42 U.S.C. §2000bb-1(a)-(b). Under RFRA, plaintiffs must first show their “exercise of religion” has been “substantially burdened.” *Navajo Nation v. USFS*, 535 F.3d 1058, 1068 (9th Cir. 2008) (en banc). Then “the burden of persuasion shifts to the government” to prove the burden is “the least restrictive means” of furthering a “compelling governmental interest.” *Id.* Here, the Government has imposed a substantial burden by authorizing transfer and destruction of Plaintiffs’ sacred site. And it has not even

tried to satisfy strict scrutiny.

A. The destruction of Oak Flat imposes a substantial burden.

Under RFRA, the term “substantial burden” must “be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by [its] terms...and the Constitution.” 42 U.S.C. §2000cc-3(g).

The Supreme Court has long held that both “indirect” penalties and “outright prohibitions” can be a substantial burden. *Trinity Lutheran Church of Columbia v. Comer*, 137 S. Ct. 2012, 2022 (2017) (quoting *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450 (1988)). An example of an “indirect” burden is *Sherbert v. Verner*, where a state denied unemployment compensation to a Seventh-day Adventist who declined to work on her Sabbath. 374 U.S. 398, 399-401 (1963). This imposed a substantial burden because it forced her “to choose” between either “abandoning one of the precepts of her religion” or else “forfeiting benefits.” *Id.* at 403-04; *see also Holt v. Hobbs*, 574 U.S. 352, 357, 361 (2015) (putting Muslim prisoner to “choice” of shaving his beard or facing discipline “easily satisfied” substantial burden test).

But in some cases, the Government is even more coercive. Instead of offering a “choice,” it makes the religious exercise impossible. Where the Government “*prevents* the plaintiff from participating in a[] [religious] activity,” giving the plaintiff no “degree of choice in the matter,” the “coercive impact” of the government action “easily” imposes a substantial

burden. *Yellowbear v. Lampert*, 741 F.3d 48, 55-56 (10th Cir. 2014) (Gorsuch, J.) (emphasis added). Put differently, “[t]he greater restriction (bar[ring] access to the practice) includes the lesser one (substantially burden[ing] the practice).” *Haight v. Thompson*, 763 F.3d 554, 565 (6th Cir. 2014). Thus, as the Supreme Court recognized last year, government prevention of religious exercise through physical force—such as “*destruction of religious property*”—can constitute a “RFRA violation[.]” *Tanzin v. Tanvir*, 141 S. Ct. 486, 492 (2020) (emphasis added).¹⁰

That is just what has happened here. The Government offers Plaintiffs no “choice”—such as allowing them to use the sacred site subject to penalties. Instead, the Government has authorized the destruction of the

¹⁰ See also:

- *Greene v. Solano Cnty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008) (“little difficulty” finding that prison’s “outright” refusal to allow inmate to attend worship services was a “substantial burden”);
- *Warsoldier v. Woodford*, 418 F.3d 989, 996 (9th Cir. 2005) (government conceded that “physically forc[ing] an inmate] to cut his hair” would constitute a substantial burden);
- *Nance v. Miser*, 700 F.App’x 629, 631-32 (9th Cir. 2017) (prison’s denial of religious oils constituted substantial burden);
- *Koger v. Bryan*, 523 F.3d 789, 799 (7th Cir. 2008) (“substantial burden” if government renders a religious exercise “effectively impracticable”);
- *Murphy v. Mo. Dep’t of Corr.*, 372 F.3d 979, 988 (8th Cir. 2004) (“substantial burden” if government “significantly inhibit[s]” “person’s ability to...engage in [religious] activities”) (cleaned up).

site, barring Plaintiffs from engaging in their religious practices altogether. This is an *a fortiori* case.

This Circuit has applied the same principle to religious property cases. In *International Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1066-70 (9th Cir. 2011), the Government refused to let plaintiffs build a church at the only site in the city that would accommodate their religious practices. This Court recognized that the right to “a place of worship...consistent with...theological requirements” is “at the very core of the free exercise of religion.” *Id.* (citation omitted). Thus, preventing the plaintiff from building a place of worship could constitute a substantial burden. *Id.* at 1061, 1070.

The same principle applies to use of sacred sites on government-controlled land. In *Comanche Nation v. United States*, the Army planned to build a warehouse on federal land near Medicine Bluffs, a sacred site. No.CIV-08-849-D, 2008 WL 4426621, at *17 (W.D. Okla. Sept. 23, 2008). But the warehouse would have occupied “the precise location” where Native Americans stood for worship near the Bluffs—making their traditional religious practices impossible. *Id.* at *7, *17. The court held that this physical interference with plaintiffs’ religious exercise “amply demonstrate[d]” a “substantial burden.” *Id.*

Here, the Government admits that the mine will obliterate Oak Flat, leaving a nearly two-mile-wide, 1,100-foot-deep crater behind—destroy-

ing the sacred trees, eradicating the sacred springs, annihilating the ancient graves, and rendering Plaintiffs' religious practices impossible. As the FEIS says, this "[p]hysical" destruction of "tribal sacred sites" will be "immediate," "permanent," and "[i]rreversible." 2 FEIS at 789-90. Cultural destruction on the scale of the Bamiyan Buddhas makes this an easy case.

The district court failed to grapple with this straightforward analysis. Instead, it found no substantial burden based on three arguments, each meritless.

First, it tried to distinguish some of Plaintiffs' cases by saying they involved RLUIPA, not RFRA. ER.15 n.8. But that doesn't apply to *Tanzin* or *Comanche Nation*. More importantly, the Supreme Court and this Court have held that RLUIPA and RFRA impose "the same standard," *Holt*, 574 U.S. at 358; *Nance*, 700 F.App'x at 630—which makes sense, given that the operative text is identical.

Second, the court said that under *Navajo Nation* and *Lyng*, there is no substantial burden "[e]ven where land is physically destroyed." ER.17. But neither *Navajo Nation* nor *Lyng* involved physical destruction of a sacred site; in fact, both cases acknowledged the outcome would have been different otherwise.

In *Navajo Nation*, plaintiffs challenged the use of treated wastewater to make artificial snow for a ski area on a sacred mountain. 535 F.3d at 1062-63. In finding no substantial burden, this Court emphasized that

the snow would have *no physical impact* on the area: “no plants, springs, natural resources, shrines with religious significance, or religious ceremonies...would be physically affected[;] [n]o plants would be destroyed or stunted; no springs polluted; no places of worship made inaccessible, or liturgy modified.” 535 F.3d at 1063. The plaintiffs remained free to engage in all of their prior religious practices; “the sole effect of the artificial snow is on the Plaintiffs’ *subjective spiritual experience*.” *Id.* (emphasis added).

Here, by contrast, “plants *would* be destroyed”; “shrines with religious significance [and] religious ceremonies...*would* be physically affected”; and a place of worship *would* be made not just “inaccessible” but utterly destroyed. The claim isn’t just about “subjective spiritual experience”; it’s about complete physical destruction that annihilates core Apache religious practices forever.

Similarly, in *Lyng*, the Court emphasized that the Government “could [not] have been more solicitous” toward Native American religious practices. 485 U.S. at 454. It chose a route that was “the farthest removed from contemporary spiritual sites,” and “provided for one-half mile protective zones around all the religious sites.” *Id.* at 454, 443. This ensured that “[n]o sites where specific rituals take place [would] be disturbed.” *Id.* at 454 (emphasis added).

The district court cited the *Lyng* plaintiffs’ claim that the road would “virtually destroy” their “ability to practice their religion.” ER.16. But

that claim was not based on physical destruction of their sacred site; it was based solely on the effect of the road on their subjective “spiritual development.” *Lyng*, 485 U.S. at 451. Accordingly, the Court held that the existence of a substantial burden “cannot depend on measuring the effects of a governmental action on *a religious objector’s spiritual development*.” *Id.* (emphasis added). But the Court acknowledged that “prohibiting the Indian [plaintiffs] from *visiting* [their sacred sites] would raise a different set of constitutional questions.” *Id.* at 453 (emphasis added).

Here, Plaintiffs’ sacred site will not just be “disturbed,” *id.* at 454, but destroyed. They will not just be prevented from “visiting” their site, *id.* at 453, it will be gone, forever. And far from being maximally “solicitous” of Plaintiffs’ religious practices, *id.*, the Government is being maximally destructive.¹¹

Lastly, citing *Navajo Nation*, the district court said Plaintiffs can establish a “substantial burden” only if they face one of “two narrow situa-

¹¹ The same distinction of *Navajo Nation* and *Lyng* applies to the two other cases the district court cited. See *Snoqualmie Indian Tribe v. FERC*, 545 F.3d 1207, 1210-11 (9th Cir. 2008) (plaintiffs could still access the sacred falls, and the relicensing increased water flow); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, No. 16-1534, 2017 WL 908538, at *9 (D.D.C. 2017) (no claim that Government destroyed a sacred site—only that it rendered lake “ritually [im]pure” by allowing pipeline to be built underneath).

tions”: (1) they are “deprived [of] a government benefit” due to their religious practices, or (2) they are “coerced into violating their religious beliefs” by threat of “civil or criminal ‘sanction.’” ER.17. In other words, if the Government merely fenced off the site and threatened “sanctions” for trespassing, Plaintiffs would face a “substantial burden”; but if the Government obliterates the site—rendering Plaintiff’s religious practices forever impossible—they do not.

That is absurd. *Navajo Nation* says that “[a]ny burden imposed on the exercise of religion *short of*” losing a government benefit or suffering a criminal or civil sanction is not a “‘substantial burden’ within the meaning of RFRA.” 535 F.3d at 1069-70 (emphasis added). In other words, loss of benefits or threat of sanctions is the *minimum* government action needed to establish a substantial burden; it is not the *universe* of substantial-burden claims. If government action is *worse*, courts have “little difficulty” finding a substantial burden. *Greene*, 513 F.3d at 988.

Any other reading of *Navajo Nation* produces grotesque results. In *Wisconsin v. Yoder*, for example, the Supreme Court held that imposing a \$5 criminal fine on Amish families for violating compulsory schooling laws was a substantial burden. ER.14 (citing 406 U.S. 205 (1972)). But under the district court’s reasoning, forcibly rounding up Amish children and sending them to a public boarding school—as the Government did to Apache children in the 1800s—would not be. Stephanie Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134

Harv. L. Rev. 1294, 1332 (2021). Indeed, as long as the Government acted without threatening a penalty or denying benefits, it could impose a variety of troubling burdens without any consequence under RFRA—such as padlocking the doors of a church to prevent worship, confiscating religious relics, performing autopsies against the religious beliefs of surviving family, or forcibly removing religious clothing. *Id.* at 1332, 1338 (collecting cases).

Finally, even accepting the lower court’s misreading of *Navajo Nation*, the land transfer *does* subject Plaintiffs to penalties: for trespassing on now “private” land. *See* ER.67. And it *does* deny them a “governmental benefit”: the use and enjoyment of “government” land for religious exercise. Of course, it is “government” land only because it was taken from the Apaches by force. And many would say practicing religion at an ancestral sacred site is a human right, not a government benefit. But even assuming it is “government” land (which Plaintiffs dispute) and liberty to worship there is merely a “benefit” given by an indulgent government, Plaintiffs have been deprived of it, and therefore substantially burdened.

B. The Government has not even attempted to satisfy strict scrutiny.

Because the Government has imposed a substantial burden on Plaintiffs’ religious exercise, it bears the burden of satisfying strict scrutiny. 42 U.S.C. §2000bb-1(b). But it offered no argument on this issue below

and cannot do so for the first time on appeal. *United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990).

II. The Government's actions violate the Free Exercise Clause.

The Government's actions separately violate the Free Exercise Clause, for two reasons. First, *Employment Division v. Smith* protects from strict scrutiny only those burdens arising from a "valid and neutral law of general applicability." 494 U.S. 872, 879 (1990). But a law is not generally applicable if it applies to only one piece of land. *See, e.g., Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 92, 98 (1st Cir. 2013) (Lynch, J.) (law "designed to apply only to the Church" not generally applicable under *Smith* because its "purpose" was to address "particular properties"); *cf. Minneapolis Star & Tribune Co. v. Minn. Comm'r of Review*, 460 U.S. 575, 581 (1983) ("special tax that applies only to certain publications" was not "generally applicable"). Here, the law applies to only one piece of land and therefore is not generally applicable. *See* 16 U.S.C. §539p.

Second, the law here "targets religious conduct for distinctive treatment" and is therefore not neutral. *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534, 546 (1993). Targeting is measured by whether "the effect of [the] law in its real operation" accomplishes a "gerrymander." *Id.* at 535. Here, the statute, legislative history, and FEIS all show that the Government knew exactly what it was doing: destroying

an Apache religious site forever. See 16 U.S.C. §539p(c); *Resolution Copper: Hearing*, 112th Cong., 4 (2012) (Sen. McCain: “this Indian tribe is preventing them”); 1 FEIS at 40. It is immaterial that the Government claims to bear the Apaches no ill will: “Proof of hostility or discriminatory motivation may be sufficient to prove that a challenged governmental action is not neutral, but the Free Exercise Clause is not confined to actions based on animus.” *Shrum v. City of Coweta*, 449 F.3d 1132, 1145 (10th Cir. 2006) (McConnell, J.) (citation omitted). That the Government may be motivated by greed or indifference rather than animus is cold comfort to the Apaches; their holy place will still be destroyed.

III. The Government’s actions violate its trust obligation to the Apaches.

Plaintiffs are also likely to prevail on their treaty claim. The Supreme Court has held that members of a Tribe may assert treaty protections against individual injury. Here, the treaty created a trust—in addition to the “general trust relationship between the United States and the Indian people”—to preserve those rights necessary to the Apaches’ continued “prosperity and happiness.” *United States v. Mitchell*, 463 U.S. 206, 225 (1983); ER.205. Plaintiffs may assert that trust interest here.

A. *Herrera* and *McGirt* establish Plaintiffs’ interest.

Treaty provisions protecting tribes may be asserted in support of individual interests. In *Herrera v. Wyoming*, a tribal member successfully asserted a right against prosecution based on a treaty that memorialized

“*the Tribe’s* right to hunt off-reservation.” 139 S. Ct. 1686, 1693 (2019) (emphasis added). Likewise, in *McGirt v. Oklahoma*, a tribal member asserted “personal interests” that turned on asserting the tribe’s rights: that “the Creek Reservation persists today,” and was not disestablished. 140 S. Ct. 2452, 2460-62 (2020). *See also United States v. Winans*, 198 U.S. 371, 378 (1905) (fishing right “secured to said confederated tribes and bands of Indians” protected individuals).

The district court’s passing distinctions of these cases miss the individual injury. It said *Herrera* and similar cases could be ignored because “sovereign nations cannot fish or hunt,” wrongly implying that only individuals enjoy such rights. ER.6 n.2. It likewise dismissed *McGirt* as relating to “individualized injury” that implicated a treaty question. ER.5 n.1. But Plaintiffs *do* assert an individualized injury: their individual religious practices, which the Government’s action will make impossible. Cases antedating *Herrera* and *McGirt* are thus irrelevant.

B. Congress did not abrogate the trust relationship.

It is “undisputed” that there exists “a general trust relationship between the United States and the Indian people” arising from a “distinctive obligation” to those the Government has made “dependent and sometimes exploited.” *Mitchell*, 463 U.S. at 225. Thus “where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists,” *even where* “nothing is said expressly in the authorizing or underlying statute.” *Id.* (cleaned up).

Here, the 1852 Treaty sets forth a trust and specific incident obligations: that “the government of the United States” will “designate, settle, and adjust their territorial boundaries, and pass and execute” laws governing that territory “conducive to the prosperity and happiness of said Indians.” ER.205. This is exactly the sort of beneficiary language long understood to create an enforceable trust in the unique federal-tribal context. *See Mitchell*, 463 U.S. at 224-25 (requirement to consider “needs and best interests” of Indian beneficiaries in lumber decisions supported trust); *United States v. Navajo Nation*, 537 U.S. 488, 507-08 (2003) (explaining *Mitchell*). And the treaty here goes further in advocating a “liberal construction...as to secure the permanent prosperity and happiness” of the Apaches. ER.205.

The district court misconstrued Plaintiffs’ trust claim as a claim for formal title. ER.7. And the district court offered no authority for the notion that the Government’s failure to define territory obviated its trust responsibility to serve the Apaches’ wellbeing as dependent beneficiaries. Such a reading conflicts not only with *Mitchell*, but with the ordinary “rule that...treaty rights are to be construed in favor [of], not against, tribal rights.” *McGirt*, 140 S. Ct. at 2470.

The court’s alternative one-paragraph determination that “Congress made clear its intent to extinguish that trust relationship by passing Section 3003” runs squarely into *Herrera* and *McGirt*. ER.11. “If Congress seeks to abrogate treaty rights, ‘it must clearly express its intent to do

so.” *Herrera*, 139 S. Ct. at 1698; *see also McGirt*, 140 S. Ct. at 2469. Section 3003 fails to acknowledge the 1852 Treaty at all.

IV. The other injunction factors are met.

Besides likelihood of success (or a serious question) on the merits, the Court must also consider the likelihood of irreparable harm absent relief, the balance of equities, and the public interest. *All. for the Wild Rockies*, 632 F.3d at 1135. Here, each element sharply favors Apache Stronghold.

First, Plaintiffs need show only “a colorable First Amendment claim” to establish “irreparable injury.” *Warsoldier*, 418 F.3d at 1001 (cleaned up). “The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020). Here, the Government admits that the harm is irreparable. 2 FEIS at 789.

Second, the equities and the public interest weigh heavily in Plaintiffs’ favor. The land transfer was proposed 15 years ago and authorized by statute 7 years ago, but the FEIS was published just last month. After so much delay, the Government cannot “hurry up” at the expense of religious exercise. By contrast, the detriment to Plaintiffs’ religious exercise is immediate, permanent, and irreversible. As the district court held, it “will completely devastate the Western Apaches’ spiritual lifeblood.” ER.12. “It is clear that it would not be equitable or in the public’s interest” to permit the Government “to violate the requirements of federal law.” *Valle del Sol v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) (brackets

omitted). Indeed, a slight delay protecting the *status quo* costs the Government nothing; rushing forward costs Plaintiffs everything.

CONCLUSION

The Court should enjoin the transfer and destruction of Oak Flat pending appeal.

Respectfully submitted,

/s/Luke W. Goodrich

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February 23, 2021

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 5,520 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

Dated: February 23, 2021

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2021, the foregoing emergency motion for an injunction pending appeal 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

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)

EXCERPTS OF RECORD

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1 **WO**

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

8 Apache Stronghold,) No. CV-21-00050-PHX-SPL
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/](https://www.congress.gov/113/plaws/publ291/PLAW-113publ291.pdf)
18 [plaws/publ291/PLAW-113publ291.pdf](https://www.congress.gov/113/plaws/publ291/PLAW-113publ291.pdf) (last visited February 12, 2021). Section 3003 of
19 the NDAA, known as the Southeast Arizona Land Exchange and Conservation Act,
20 authorizes the exchange of land between the United States Government and two foreign
21 mining companies (known collectively as “Resolution Copper”). 16 U.S.C.A. § 539p. The
22 2,422-acre parcel of Arizona land which the Government will convey to Resolution
23 Copper, located within the Tonto National Forest, includes a sacred Apache ceremonial
24 ground called Chi’chil Bildagoteel, known in English as “Oak Flat.” (Doc. 1 at ¶ 3).
25 Congress’s stated purpose for authorizing the exchange is to “carry out mineral exploration
26 activities under the Oak Flat Withdrawal Area.” 16 U.S.C.A. § 539p(6)(i).

27 On January 12, 2021, Plaintiff Apache Stronghold, a nonprofit organization seeking
28

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/](https://www.fs.usda.gov/detail/r3/home/?cid=FSEPRD858166)
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](https://www.resolutionmineeis.us/sites/default/files/feis/resolution-final-eis-vol-1.pdf)
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.

A. Breach of Trust/Fiduciary Duties

i. Standing

Plaintiff alleges the land at issue is managed by the Government in trust for the Western Apaches “as a result of official U.S. Government support of actions unilaterally removing the Western Apaches from that land and forcing them to struggle to continue to maintain their relationships to their land.” (Doc. 1 at ¶ 51) (Count 3). Thus, Plaintiff argues the conveyance to Resolution Copper is in breach of the Government’s trustee and fiduciary duties.

As an initial matter, Plaintiff Apache Stronghold lacks standing to bring the breach of trust claim. The “irreducible constitutional minimum of standing consists of three elements . . . [t]he plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Spokeo v. Robins*, ___ U.S. ___, 136 S.Ct. 1540, 1547 (2016) (internal punctuation omitted) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)). Closely related to the constitutional standing requirement that a plaintiff must suffer a personal injury is the prudential requirement that a plaintiff “cannot rest his claim to relief on the legal rights or interests of third parties.” *Warth v. Seldin*, 422 U.S. 490, 499 (1975). This limitation serves an important function: It prevents “the adjudication of rights which those not before the Court may not wish to assert” and seeks to ensure “that the most effective advocate of the rights at issue is present to champion them.” *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 80 (1978).

But “since the prohibition against a party asserting the legal rights of another is prudential—not constitutional—the Supreme Court may ‘recognize[] exceptions to this general rule.’” *Al-Aulaqi v. Obama*, 727 F.Supp.2d 1, 15 (D.D.C. 2010) (alteration in original) (quoting *Coal. of Clergy, Laws., & Professors v. Bush*, 310 F.3d 1153, 1160 (9th Cir. 2002)). For example, an organization may have standing to sue on behalf of its 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
18

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

13
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 ⁷ Apache Stronghold argues the law is in fact intentionally discriminatory. *See* (Doc.
26 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).

2019) (defining a “sanction” as a “provision that gives force to a legal imperative by either rewarding obedience or punishing disobedience”). “Just as the Ninth Circuit and other courts must follow *Lyng* until the Supreme Court instructs otherwise, this Court must do the same.” *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 239 F. Supp. 3d 77, 94 (D.D.C. 2017). Accordingly, Plaintiff’s RFRA and Free Exercise claims must fail.¹⁰

C. First Amendment Free Exercise Clause (Intentional Discrimination)

At the PI hearing, Plaintiff indicated that “for the purposes of the preliminary injunction, the only two issues before the Court . . . are the Treaty rights and the serious question of who owns that land, and the Religious Freedom Restoration Act rights that have been violated.” (Doc. 47 at 80). However, the Court notes that Plaintiff has not demonstrated a likelihood of success on, or serious questions going to, the merits of its other claims.

Plaintiff alleges Section 3003 intentionally discriminates against the Western Apaches because the Government “designed” the land conveyance “in a way that made it impossible for Plaintiffs to comply with [] their religious beliefs” and further promulgated the sale “in order to suppress the religious exercise of Plaintiff Apache Stronghold and its Western Apache members.” (Doc. 1 at ¶ 84).

¹⁰ Plaintiff cites *Burwell v. Hobby Lobby* for the proposition that the RFRA cannot be read “as restricting the concept of the ‘exercise of religion’ to those practices specifically addressed in our Pre-*Smith* decisions.” 573 U.S. 682, 714 (2014); *see also* (Doc. 47 at 12) (Plaintiff arguing that the *Hobby Lobby* decision “admonished the lower courts not to narrowly follow the ‘specific’ holdings of its pre-*Smith* ‘ossified’ cases to limit religious believers’ RFRA claims”). But in *Hobby Lobby*, the Court considered the discrete issue of whether corporate entities could be considered “persons” under the RFRA, not the type of government activity that would cause a “substantial burden.” *See Hobby Lobby*, 573 U.S. 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).

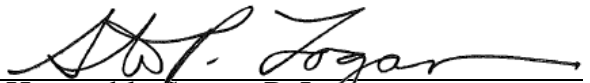
Nosie further testified that he presented testimony to Congress before the passage of the NDAA “many “[m]any times.” (Doc. 47 at 65). In fact, Nosie “visited all of the Congressional agencies, leaders, you know, to express the concerns and positions of the tribe,” testimony which was “specifically in regard to the religious importance of Oak Flat and what was being proposed in terms of a copper mine.” (Doc. 47 at 65). Although Congress disagreed with, or perhaps even disregarded, Apache Stronghold’s pleas, Apache Stronghold was not denied a voice—at least not under the law. Plaintiff is therefore unlikely to succeed on its Due Process or Petition Clause claims.

IV. CONCLUSION

For the foregoing reasons, Plaintiff has not identified a likelihood of success on, or serious questions going to, the merits of its claims. Accordingly, the Court need not address the remaining *Winter* factors. The Court cannot grant the preliminary injunction requested.

IT IS THEREFORE ORDERED that Plaintiff’s Motion for Temporary Restraining Order and Preliminary Injunction (Doc. 7) is **denied**.

Dated this 12th day of February, 2021.


Honorable Steven P. Logan
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Apache Stronghold,)	
)	
Plaintiff,	)	CV-21-0050-PHX-SPL
)	
vs.	)	Phoenix, Arizona
	)	February 3, 2021
United States of America, et al.,	)	9:09 a.m.
)	
Defendants.)	
)	

BEFORE: THE HONORABLE STEVEN P. LOGAN, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HEARING ON MOTION FOR PRELIMINARY INJUNCTION

Official Court Reporter:
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Proceedings Reported by Stenographic Court Reporter
Transcript Prepared by Computer-Aided Transcription

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6	<u>WITNESSES</u>
7	<u>PLAINTIFF WITNESSES:</u>
	<u>Direct</u> <u>Cross</u> <u>Redirect</u>
8	John R. Welch, Ph.D. 22 35 39
9	Naelyn Pike 40
10	Wendsler Nosie, Sr., Ph.D. 54 75

13	<u>EXHIBITS</u>	
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15	No. 1 (Map 1 - Declaration of John R. Welch, Ph.D.)	22
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18	from USFS/Resolution Final EIS Vol. 1)	
	No. 6A (Image of the Barringer Arizona Meteor Crater	22
19	(for comparative scale reference.)	

20	<u>DEFENDANTS' EXHIBITS:</u>	
21	No. 101 (July 1, 1852 Treaty with the Apaches)	22
	No. 102 (June 27, 1969 Findings of Fact by the ICC)	22
22	No. 103 (September 12, 1972 Findings of Fact by ICC)	22

P R O C E E D I N G S

THE CLERK: Civil case 21-050, Apache Stronghold
versus United States of America.

This is the time set for hearing on motion for
preliminary injunction.

Please announce your presence for the record.

THE COURT: Plaintiffs, please announce.

MR. LEVENSON: Good morning, Your Honor. Clifford
Levenson appearing on behalf of and with plaintiffs Apache
Stronghold.

MR. NIXON: Good morning, Your Honor. Michael Nixon
also counsel for Apache Stronghold with the plaintiff.

THE COURT: Good morning to both of you. Who do you
have behind you there?

MR. LEVENSON: Your Honor, to my right --

THE COURT: Sir, I need you to pick one of the
microphones and speak into it, please.

MR. NOSIE: Wendsler Nosie, Sr., San Carlos Apache,
Chiricahua.

MR. WELCH: Good morning, Your Honor. My name is John
Welch.

THE COURT: Good morning.

MS. PIKE: Good morning. My name is Naelyn Pike,
Apache Stronghold.

THE COURT: Good morning.

1 MR. HOFFMAN: Morning, Your Honor. My name is
2 Cranston Hoffman on behalf of Apache Stronghold.

3 THE COURT: Good morning to you as well.
4 Defense.

5 MR. SCHIFMAN: Good morning, Your Honor. My name is
6 Ben Schifman for the federal defendants. On the line with me
7 is Tyler Alexander, my colleague, also with the United States
8 Department of Justice, Environment and Natural Resources
9 Division, on behalf of the federal defendants.

10 THE COURT: Counsel, good morning to you as well. I
11 am going to ask you to move closer to your phone. You sounded
12 really muffled. I could barely understand what you were
13 saying.

14 So during the course of the hearing, I need you to
15 make sure you speak clearly so we have an accurate record of
16 everything that's going on.

17 Let the record reflect I have had a chance to review
18 all of the documents that are part of the case file.

19 Specifically, I have with me this morning document
20 number 29, which is the joint prehearing statement. I have
21 document number 7, which is the motion for temporary
22 restraining order and preliminary injunction.

23 I have document number 15, which is the notice of
24 erratum. I have document number 18, which is the opposition to
25 plaintiff's motion for a preliminary injunction.

1 I have document number 30, which is the amended reply
2 memorandum in support of the motion for a preliminary
3 injunction. I also have document number 28, which is the
4 notice of filing of defendants' proposed findings of fact and
5 conclusions of law.

6 And I have document number 1, which is the jury trial
7 demand for violations of treaty rights; trust responsibility
8 and fiduciary duty; the Religious Freedom Restoration Act;
9 First Amendment rights to free exercise of religion, and to
10 petition and for remedy; and Fifth Amendment Right to due
11 process.

12 What I am missing is findings of fact and conclusions
13 of law from the plaintiffs. I have never had a case where
14 plaintiffs have filed papers such as these and failed to meet a
15 simple deadline for conclusions of law -- I mean facts and
16 conclusions. So what happened?

17 MR. NIXON: Yes, Your Honor. Michael Nixon for the
18 plaintiffs. I take full responsibility for that.

19 We have approached and undertaken the task with ardor
20 given the complexities of both our complaint and motion as well
21 as the response and the need for our reply to create the basis
22 for presenting you with findings of fact, which are quite
23 detailed, and the conclusions of law, which are very focused.

24 And I had hoped to have them in on Monday as I
25 represented to the Court's deputy clerk. Unfortunately, that

1 was not possible. I can get them into the court before close
2 of business today. I just have a few things to clarify and
3 make clear, and so I beg the Court's indulgence and grace on
4 that.

5 One other note, I apologize for the misspelling of
6 your name. For someone with a middle name that begins with V,
7 I sincerely apologize for giving you a P-H.

8 THE COURT: Mr. Levenson, just make sure, if you ever
9 have any -- I am sorry --

10 MR. NIXON: Mr. Nixon.

11 THE COURT: Mr. Nixon. My apologies. Mr. Nixon, if
12 you ever find yourself in this position again where you have
13 business with this court, deadlines mean everything. We have
14 deadlines for a reason; just like you, everyone that I work
15 with, we have different deadlines and things we must do.

16 If every single case that I had, had a litigant who's
17 late by days, I would never be in a position to resolve
18 anything. I don't know what's generally your practice, but you
19 need to take better steps to make sure your client is
20 represented. And as part of that representation, is when
21 there's a deadline, you need to meet it, okay, sir?

22 MR. NIXON: Yes, Your Honor. And I take that very
23 seriously and fully understand, as a former judge's clerk and a
24 judge who was also a commanding general of the state Air
25 National Guard at the time, I certainly would never want to

1 disappoint, much less frustrate, any judge, and it's the first
2 time in my career that I have ever missed a deadline. And I
3 sincerely apologize.

4 THE COURT: Well, Mr. Nixon, I certainly appreciate
5 you placing that on the record. And there's no need to have a
6 contempt hearing, so we will move forward.

7 Plaintiffs, do you have some type of opening statement
8 that you would like to place on the record? If you do, I will
9 give you ten minutes to do that, and you can remain in counsel
10 chair. Just pull the microphone close.

11 And for those of you that are listening to this
12 hearing right now, my apologies that we didn't have room to
13 have all of you sit in the courtroom.

14 Because of this pandemic situation that we are
15 currently under, it would be irresponsible for me to allow
16 attendees in this courtroom and subject you all to potentially,
17 not only contracting the virus, but spreading the virus, and
18 that goes for all parties. Please exercise your social
19 distance as much as you can.

20 And plaintiffs, you have ten minutes.

21 MR. NIXON: Thank you, Your Honor. Michael Nixon for
22 plaintiff Apache Stronghold.

23 First, for the Court's benefit, and for the benefit of
24 defense counsel, there's a housekeeping note I would like to
25 mention regarding our reply memo.

1 First of all, we had a corrected amended reply memo
2 lodged with the clerk for your consideration where we cleared
3 up some typographical errors. And so subsequent to the
4 hearing, if -- to please refer to that document, there is a non
5 sequitur on page 9, I believe.

6 THE COURT: And Mr. Nixon, my apologies for
7 interrupting. When was that filed?

8 MR. NIXON: I think it was Monday. It was late -- it
9 might have been early Tuesday morning, like maybe 5:30 in the
10 morning. I can't remember.

11 THE COURT: Thank you very much. Go ahead, please.

12 MR. NIXON: The other housekeeping note is in regards
13 to our reply memo. We misconstrued the dissent in the Hobby
14 Lobby case and the Little Sisters of the Poor case, Your Honor,
15 and its regard of the Third Circuit's test that was used by the
16 Third Circuit in that case.

17 We had presented our reply memo as an either-or test,
18 but in fact, it is -- close reading, it's clear that it's an
19 "and" test, so it is a conjunctive first and second part test.
20 So I just wanted to clarify that, especially for defense
21 counsel's sake as well going forward.

22 So may it please the Court, RFRA does not define
23 substantial burden. RFRA being the Religious Freedom
24 Restoration Act.

25 The Supreme Court has defined the term by stating that

1 a governmental action which substantially burdens a religious
2 exercise is one where --

3 THE COURT: Mr. Nixon, my apologies again. Because of
4 the mass -- the nature of the proceeding, sometimes people will
5 read really fast. I want to make sure that I can take in
6 everything that you say. Every word is important to me, and I
7 need to make sure that I can take notes and understand what you
8 are saying, so please slow down.

9 MR. NIXON: Thank you, Your Honor. And just as a
10 preview, I did not expect to take the full ten minutes.

11 So the Religious Freedom Restoration Act does not
12 define a substantial burden. The Supreme Court has defined the
13 term by stating that a governmental action which substantially
14 burdens a religious exercise is one where, quote, the
15 noncompliance has substantial adverse practical consequences.

16 And that is from Burwell versus Hobby Lobby,
17 Incorporated, 573 U.S. at 720 to 723.

18 And the compliance causes -- and, quote, the
19 compliance causes the objecting party to violate its religious
20 beliefs as it sincerely understands them.

21 That's Hobby Lobby at 723, 726. As cited by Little
22 Sisters of the Poor Saints Peter and Paul Home versus
23 Pennsylvania, which we will refer to as the Little Sisters or
24 Little Sisters of the Poor case.

25 And that is from Judge Alito's concurring opinion in

1 Little Sisters.

2 That case regarded applying an agency rule, but more
3 appropriate definition for this situation in our case is the
4 definition that almost mirrors the Little Sisters definition
5 that was applied in the case below in the Third Circuit.

6 That case defines substantial burdening as, quote, the
7 government puts substantial pressure on an adherent to
8 substantially modify his behavior and to violate his beliefs.

9 That's a quote from Pennsylvania versus President of
10 the U.S., which I will refer to as "Pennsylvania case,"
11 930 F.3d 543 at 572, which was reversed on other grounds in
12 Little Sisters just last year in May.

13 Now, in this proceeding, the defendants argue for a
14 much narrower definition, which requires the affected party to
15 lose a benefit or to have some threat of legal coercion occur
16 because of the person exercising her religious beliefs.

17 And they cite Navajo Nation versus U.S. Forest
18 Service, a Ninth Circuit 2008 case at 535 F.3d 1058, 1070, and
19 cert was denied by the U.S. Supreme Court in 2009 at 556, 1281.

20 As it may appear, and as the defendants argue, this
21 court would normally follow Navajo Nation's definition as
22 controlling law for determining the Religious Freedom Act
23 substantial burden test.

24 The Navajo Nation's test relies solely on the two
25 pre-Smith cases of Sherbert v. Verner and Wisconsin v. Yoder.

1 And the Smith cases are -- the Smith case is the Oregon
2 Employment Division versus Smith, which was the case decided a
3 couple years after Lyng versus Northwest Indian Cemetery
4 Protective Association.

5 However, since Navajo Nation, the Supreme Court has
6 admonished the lower courts to not narrowly follow the, quote,
7 specific, closed quote, holdings of its pre-Smith, quote,
8 ossified, closed quote, cases to limit religious believers'
9 RFRA claims.

10 And that is the Supreme Court speaking in Burwell
11 versus Hobby Lobby at page 716, in 2014.

12 The Hobby Lobby Court also notes that the amendment of
13 RFRA went further, providing that the exercise of religion
14 shall be construed in favor of a broad protection of religious
15 exercise to the maximum extent permitted by the terms of this
16 chapter, meaning the chapter of the U.S. Code where RFRA is
17 codified, and the Constitution.

18 That's Hobby Lobby at 714.

19 Also in Hobby Lobby, the Court expanded the
20 traditional class of persons protected from their religious
21 beliefs because their entities were not traditional religious
22 organizations but closely held businesses.

23 If the Court were to follow Navajo Nation here, it
24 would be perpetuating the use of the ossified cases, as the
25 Supreme Court characterized them, to narrow religious

1 protections that the Supreme Court admonished against.

2 Therefore, in this instance, with the proposed
3 conveyance of the land in question to a private business, which
4 is not required to abide by the Religious Freedom Restoration
5 Act by the terms of the law, and the ultimate planned and
6 expected total destruction of the sacred site, this Court must
7 hold that the appropriate current substantial burden protection
8 shall be the one found in that case defining substantial
9 burdening as, quote, the government put substantial pressure on
10 an adherent to substantially modify his behavior and to violate
11 his beliefs.

12 Again, that's the Pennsylvania versus President of the
13 U.S. case, 930 F.3d 543 at 572, the Third Circuit's 2019
14 opinion that was reversed on other grounds. And we can refer
15 to this as the Pennsylvania slash -- or Pennsylvania Little
16 Sisters of the Poor test.

17 That is, the government action would significantly
18 burden the plaintiff's religious belief, if that conduct put
19 substantial pressure on the religious follower to substantially
20 modify their behavior and to violate their beliefs.

21 In addition, the Ninth Circuit case of Mockaitis
22 versus Harclerod at 104 F.3d 1522, in the Ninth Circuit, 1996,
23 which was overturned on other grounds by the City of Boerne v.
24 Flores, 521 U.S. 507, is relevant here.

25 There a Catholic priest was recorded in one of his

1 sacraments he performed with a prisoner by a jailer. While
2 Mockaitis was a First Amendment free exercise of religion case,
3 it further justifies the Pennsylvania Little Sisters of the
4 Poor test.

5 The Mockaitis holding indicates that the harm was to a
6 higher church official rather than the lay practitioner or
7 priest, and that there was no benefit lost or coercion applied
8 to that official; rather it was an affront on the religious
9 practice itself.

10 This further supports a finding of a definition that
11 is greater than the passé Navajo Nation definition.

12 So under RFRA, if a prima facie case is shown, the
13 burden shifts to the government to demonstrate that the
14 application of the burden to the person is one in furtherance
15 of a compelling government interest; and two, is the least
16 restrictive means of furthering that government -- compelling
17 governmental interest. The government must satisfy this burden
18 by a preponderance of the evidence.

19 That's from the case Gonzales v. O Centro, and -- I
20 don't have the full cite here in my notes. Gonzales v. O
21 Centro at 429.

22 Plaintiff's RFRA allegations emphasizes that Oak Flat
23 has historically been the focus of sacred Apache traditional
24 religious practices and it continues to have religious
25 significance at the present time.

1 More specifically, plaintiff contends that the entire
2 National Historic District of Chi'Chil Bildagoteel, Oak Flat as
3 it is known, has traditionally been an area in which religious
4 practitioners gather to pray, gather plans for use in healing
5 and religious ceremonies, and engage in sacred observances.

6 Defendants argue that the land exchange, especially as
7 to those lands that are within the historic district, does not
8 substantially burden plaintiff's members ability to exercise
9 their religious beliefs.

10 They try to base their argument on the fact that
11 plaintiff's members will not lose a benefit or be coerced by a
12 threat of a civil or a criminal penalty in any form.

13 Again, the passé Navajo Nation list. That is a
14 terribly cynical and twisted view today.

15 The real and truthful view is this, it is indisputable
16 that a two-mile-wide, 1,000-foot-deep crater of Oak Flat and
17 its holy ground is the loss of a benefit, a benefit that is of
18 and runs with the land since time immemorial and that is
19 reserved and preserved to the Apaches by the 1852 Treaty of
20 Sante Fe. Thank you, Your Honor.

21 THE COURT: Mr. Nixon, thank you very much.

22 Mr. Schiffman, do you want to the utilize your 10
23 minutes?

24 MR. SCHIFMAN: Yes. This is Ben Schiffman for the
25 federal defendants. I will speak shortly in response. Your

1 Honor, plaintiff has not established entitlement to the
2 extraordinary injunctive relief that it seeks.

3 The land exchange that plaintiff challenges was
4 approved by Congress in 2014 and was found by Congress to be in
5 the public interest, placing thousands of acres of land into
6 conservation and federal stewardship, but also generating
7 valuable minerals jobs and economic development in Arizona.

8 Plaintiff waited more than six years after the law was
9 passed to bring suit, and yet any mining on the property is
10 still years away. But most significantly, plaintiff has not
11 demonstrated a chance of success on the merits of their legal
12 claim.

13 Each of these claims fail on the merits, and
14 plaintiffs also lack standing to pursue several of their
15 claims. This is fatal to plaintiff's request for injunctive
16 relief.

17 Since plaintiff has limited their discussion on the
18 merits to the RFRA claim, I will also discuss that, unless Your
19 Honor has any questions as to the other claims.

20 So turning to the Religious Freedom Restoration Act
21 claim, in order to prevail on this claim, plaintiffs must show
22 that the government has, quote, substantially burdened their
23 religious exercise.

24 However, the Supreme Court has held in the Lyng case,
25 L-Y-N-G, that plaintiff has not discussed today, that the

1 government's management of its own property cannot as a matter
2 of law constitute a substantial burden of plaintiff's religious
3 exercise, which is not the case, Your Honor.

4 Every action the government took with its own
5 property, so that could be using -- doing a land exchange, as
6 is the case here, or it could be a timber sale, or it could be
7 anything with even a government federal building, anything
8 could be subject to suit by an unlimited parade of religious
9 objectors.

10 THE COURT: Just one -- Mr. Schiffman, just one moment.

11 Mr. Nixon, I couldn't help but notice that you are up
12 and down and walking out of the courtroom and walking back in
13 during an open session of court. Are you having some medical
14 episode? Are you okay?

15 MR. NIXON: I was thirsty, Your Honor. We don't have
16 any water at the table.

17 THE COURT: Okay. I am sure you received information
18 that you could have brought some bottled water into the
19 courtroom.

20 But go ahead, Mr. Schiffman.

21 MR. SCHIFMAN: Thank you, Your Honor. Ben Schiffman
22 for the federal defendants, continuing here.

23 So, Your Honor, the Supreme Court's Lyng decision has
24 been repeatedly affirmed, and that's a decision concerning the
25 federal government's management of its own property not being a

1 substantial burden to anyone else's religious exercise. That
2 has been repeatedly affirmed. It has been reaffirmed in
3 circuits throughout the country, and, of course, in this
4 circuit as well.

5 For instance, the Snoqualmie Indian Tribe versus
6 Federal Energy Regulatory Commission case that is discussed in
7 our briefs. That's a prime example.

8 In that case, the plaintiffs allege that a proposed
9 hydroelectric dam would deny them access to waterfalls
10 necessary for their religious experience. That citation,
11 excuse me, for that case is 545 F.3d, and I would like to cite
12 from page 1213.

13 Ninth Circuit found that, quote, the tribe's arguments
14 that the dam interferes with the ability of tribal members to
15 practice religion are irrelevant to whether the hydroelectric
16 project forces them to choose between practicing their religion
17 and receiving the government benefit, or coerces them into a
18 catch-22 situation of exercising their religion under fear of
19 civil or criminal sanctions, end quote.

20 And that, Your Honor, is the applicable standard
21 affirmed in that Ninth Circuit case I just discussed, and in
22 Navajo Nation that plaintiff's counsel referred to.

23 Plaintiffs must identify either a forced choice
24 between practicing religion or receiving a government benefit,
25 or between practicing religion and facing a criminal sanction.

1 Plaintiff has alleged neither, and this is fatal to the
2 plaintiff's RFRA claim.

3 Now, plaintiff discussed the Hobby Lobby versus
4 Burwell decision, but frankly, Your Honor, plaintiff is
5 seriously misreading the case.

6 Hobby Lobby did not concern the definition of
7 substantial burden. It certainly didn't concern the
8 government's management of its own national forest land or
9 other resources, and it didn't explicitly or even implicitly
10 overturn Lyng.

11 Really, Hobby Lobby -- the portions of Hobby Lobby
12 that plaintiff is discussing concerned a question whether a
13 corporation, Hobby Lobby, could sue under RFRA, and the Court
14 rejected as, quote, absurd, the argument that just because no
15 earlier Supreme Court case had squarely held that a for-profit
16 corporation has free-exercise rights, that RFRA does not confer
17 that protection.

18 But that argument has no bearing on this case, and the
19 court's larger opinion does indeed fit squarely within the
20 framework that I just discussed above from Navajo Nation and
21 from the Supreme Court's earlier decisions.

22 So -- and to be clear about how it falls into the
23 framework, that is how the Hobby Lobby case concerned an
24 entity, the Hobby Lobby company having to choose between its
25 religious exercise and receiving a benefit or facing a penalty.

1 In Hobby Lobby, the contraceptive mandate that was at issue in
2 that case forced the company to pay what the Court called an
3 enormous sum of money, as much as \$475 million per year if they
4 essentially did as they thought was complying with their
5 religious exercise.

6 So that's very clearly the kind of sanction that fits
7 squarely within the RFRA case law.

8 Plaintiffs are not being fined. They are not being
9 criminally sanctioned. They are not being forced to choose
10 between receiving a benefit and practicing their religion.

11 Indeed, this case is squarely in line with Navajo,
12 Lyng, Snoqualmie, and others that holds that the government's
13 management of its own property cannot be a substantial burden
14 on plaintiff's religious exercise.

15 So I will end my discussion of the merits there,
16 unless Your Honor has questions, and turn briefly to the other
17 two factors.

18 So in order to prevail on the extraordinary injunctive
19 relief that plaintiffs seek, they not only have to demonstrate
20 a likelihood of success on the merits, but they also have to
21 show that the harm that they allege is imminent and
22 irreparable.

23 And we've indicated that the mining activity on the
24 land is not going to occur for some six years, so that's
25 clearly not imminent harm. And additionally, plaintiff's

1 delaying and waiting some years since the law was passed also
2 indicates that perhaps this isn't as imminent as they are now
3 claiming.

4 Turning very briefly now to the equities.

5 THE COURT: Counsel. Counsel. Mr. Schiffman, you have
6 30 seconds. Go ahead.

7 MR. SCHIFMAN: Okay. Yes. So just one quick
8 statement on the equities, which is that Congress found when it
9 passed the law that led to this, you know, land exchange in
10 2014 that it would be in the public interest, and I think
11 that's a good indication that it is indeed in the public
12 interest. So I will conclude there and urge Your Honor to deny
13 the injunctive relief that plaintiffs request. Thank you.

14 THE COURT: Mr. Schiffman, I have seven exhibits from
15 the plaintiffs -- actually, six and a 6A; do you have any
16 objections to the Court receiving those?

17 MR. SCHIFMAN: Yes, Your Honor. We've noted our
18 objections in the prehearing statement. I can repeat those
19 now. Obviously it might be easier to do it as plaintiffs
20 introduce or talk about each exhibit, but I can briefly state
21 our objections now if you'd like.

22 THE COURT: No, I've read through your papers. I am
23 very, very familiar. I just wanted to place that on the live
24 record that we have right now. Your objections will be
25 overruled. Plaintiff Exhibits 1 through 6 and 6A will be

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1 received.

2 (Plaintiff's Exhibits 1 through 6A are received.)

3 THE COURT: Mr. Nixon, do you have any objections to
4 the defendants' three exhibits?

5 MR. NIXON: No, Your Honor.

6 THE COURT: They are all received as well.

7 (Defendants' Exhibits 101 through 103 are received.)

8 THE COURT: Mr. Nixon, please call your first witness.

9 MR. NIXON: Mr. Levenson will be conducting the
10 witness examination, Your Honor.

11 THE COURT: Thank you very much.

12 Mr. Levenson, go ahead, please, sir.

13 MR. LEVENSON: Thank you, Your Honor. We would call
14 Dr. John Welch.

15 THE COURT: Dr. Welch, what I am going to ask you to
16 do, this gentleman that just stood up, just sit in his chair.
17 Make sure you have a microphone. Please stand and raise your
18 right hand to be sworn.

19 **JOHN WELCH, Ph.D., PLAINTIFF'S WITNESS, SWORN**

20 THE COURT: Dr. Welch, go ahead and have a seat there.

21 Mr. Levenson, you may begin direct examination.

22 MR. LEVENSON: Thank you, Your Honor.

23 DIRECT EXAMINATION

24 BY MR. LEVENSON:

25 Q. Good morning, Dr. Welch.

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1 A. Good morning.

2 Q. First of all, would you describe your background in
3 addressing the natural human history, geography, and management
4 of the American Southwest?

5 A. Yes. I am an anthropologist and an archeologist with
6 lifelong interest in Apache peoples and especially Apache
7 people and land in Arizona.

8 Q. All right. Are you a registered professional archeologist?

9 A. I am.

10 Q. All right. Do you have degrees in anthropology?

11 A. I do. Both of my advanced degrees are anthropology from
12 the University of Arizona, master's degree and a Ph.D.

13 Q. Thank you, sir.

14 And could you describe briefly your employment with
15 Western Apache tribes?

16 A. I have worked for and with the Western Apache tribes in
17 Arizona, principally the San Carlos Apache tribe and the White
18 Mountain Apache tribe, since 1984.

19 When I was an employee of the University of Arizona, I
20 helped run archeological field schools on White Mountain Apache
21 tribe lands. From there, I began a consulting career working
22 in various parts of central and east central Arizona in the
23 mountains to the east of Phoenix as a consultant for a couple
24 of different companies.

25 And then went to work for the federal government

1 itself, first for the Bureau of Land Management in Safford,
2 Arizona, and then for the Bureau of Indian Affairs in White
3 River, Arizona, at which time I was also the historic
4 preservation officer from 1996 to 2005 for the White Mountain
5 Apache tribe.

6 I have continued since that time working closely with
7 especially the White Mountain Apache tribe, but also the San
8 Carlos Apache tribe in various capacities, including helping to
9 run a nonprofit organization called the Fort Apache Heritage
10 Foundation that's a nonprofit owned by the White Mountain
11 Apache tribe.

12 Q. Thank you, Doctor.

13 During the course of your employment and study, have
14 you become familiar with the 1852 Treaty of Santa Fe?

15 A. I have.

16 Q. Okay. Does that -- who are the parties to that Treaty?

17 A. So the parties really just on the part of the United
18 States, both civilian authority and military authority signed
19 that Treaty, which was then ratified and duly proclaimed by
20 President Pierce.

21 On the Apache side there's six signatories. Five
22 are -- that signed the Treaty on the 1st of July in 1852 in
23 Santa Fe, and then Mangas Coloradus, the principal leader of
24 the Western Apaches signed it on behalf of the Western Apaches
25 at Acoma Pueblo on the 11th of July in 1852.

1 Q. So the parties are in fact the Apache people rather than
2 any particular tribe; is that correct?

3 A. That's correct. There were no tribes in 1852 in any formal
4 sense. There were coalitions of leaders and Magnas ascended to
5 replace predominant and transcendent importance in terms of the
6 span of his authority and allegiance, I guess I'll say, on the
7 part of his followers to the place where he could sign on
8 behalf of all of the Apaches -- by "Western Apaches," in this
9 context, Your Honor, I am referencing the Apaches who live to
10 the west side of the Rio Grande. The western bands, and so,
11 yes, no tribes. Yes, leaders representing dozens of groups of
12 tribes -- dozens of groups of Apaches, excuse me.

13 Q. And did this Treaty concern land including the land we are
14 discussing here today, the Oak Flat area?

15 A. It is ambiguous in the Treaty.

16 Your Honor, in fact, the Treaty makes multiple
17 references, as you are probably aware, to "treaty territory"
18 Apache territory, and Apache territories, referencing the fact
19 there's different Apache groups with different territory.

20 The territory of the Western Apaches certainly
21 extended to include the Pinal Mountains, the entirety of the
22 Tonto National Forest, and areas even to the west of that.

23 So the short answer is yes. That territory is
24 included in the provisions of the Treaty, but it's not -- it
25 doesn't specifically say, yes, you know, the Pinal Mountains or

1 the area including Oak Flat is part of this Treaty.

2 Q. But just to clarify, the Treaty land -- the lands that the
3 Treaty addresses is a larger area than Oak Flat? Oak Flat is
4 contained within the lands addressed in the Treaty?

5 A. That's absolutely true, from my point of view, yes.

6 Q. You heard the lawyer for the United States refer to Oak
7 Flat as, and I quote, its own property.

8 Does the Treaty of 1852, or any other document of
9 which you are aware, make Oak Flat the property of the United
10 States?

11 A. It does not. The Treaty recognizes jurisdiction of the
12 United States in Apache Treaty Territory. It certainly does
13 not recognize anything like ownership of Apache territory.

14 Q. All right. So the United States management of the area
15 including Oak Flat, by management of the Tonto National Forest,
16 is consistent with the trust responsibility of the United
17 States for Apache land; is that correct?

18 A. I would say that that's true, yes -- yes.

19 Q. Okay. There has been some discussion of proceedings before
20 the Indian Claims Commission having some effect on the issues
21 before the Court today.

22 Are you familiar with those discussions?

23 A. I am.

24 Q. Okay. What -- have you reviewed the Indian Claims
25 Commission actions in this regard?

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1 A. I have reviewed some of them. It is a long, complex
2 litigious history of documents in matters pertaining to Docket
3 22-D that the Apache tribes brought to the Indian Claims
4 Commission. I read as much as I can put my mitts on, but you
5 can't find it easily.

6 THE COURT: Mr. Levenson, my apologies for
7 interrupting you, sir.

8 Dr. Welch, I want to point your attention to Defense
9 Exhibit Number 1, which is the Treaty. I am sure the lawyers
10 have a copy of that in front of you. And I want you to read
11 Article 9.

12 Do you all have that? Defense Exhibit 1?

13 THE WITNESS: I had a copy on my computer. I just put
14 my computer down. So I can take a minute and call it back up.

15 THE COURT: The lawyers don't have copy of Defense
16 Exhibit 1?

17 MR. NIXON: Not any quicker than he can get it for
18 you, Your Honor.

19 THE COURT: All right. Thank you very much,
20 Mr. Nixon.

21 Dr. Welch, take your time.

22 And again, Mr. Levenson, my apologies for interrupting
23 you.

24 MR. LEVENSON: Thank you, Your Honor. It is quite all
25 right.

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1 THE WITNESS: Okay. I'm looking for the Treaty, and
2 you would like me to read Article 1; is that correct, sir?

3 THE COURT: No, Doctor, Article 9, if you would,
4 please.

5 THE WITNESS: Article 9, thank you.

6 THE COURT: And if you would, after you read that,
7 tell me what in your professional opinion you believe that
8 means.

9 THE WITNESS: Okay. Article 9: Relying confidently
10 upon the justice and the liberality of the aforesaid
11 government, and anxious to remove every possible cause that
12 might disturb their peace and quiet, it is agreed by the
13 aforesaid Apaches that the Government of the United States
14 shall at its earliest convenience designate, settle, and adjust
15 their territorial boundaries, and pass and execute in their
16 territory such laws as may be deemed conducive to the
17 prosperity and happiness of said Indians.

18 That's the end of Article 9.

19 My interpretation of this article, thank you for
20 asking, Your Honor, is that the parties agreed and the Apaches
21 were in fact petitioning for the Government of the United
22 States of America to set aside and secure their territorial
23 boundaries for them in order to disable any further incursions,
24 unwanted incursions, into their vast territory.

25 Apache leaders were famous for their broad cognizance

1 of the comings and goings within their lands, and they were
2 disturbed to find -- well, let me back up for one minute.

3 They were at first very encouraged to find the United
4 States as an ally in their long-standing conflict against Spain
5 and then Mexico.

6 Beginning in 1840s and -- they saw the United States
7 as -- incoming as an ally to assist them in securing their
8 territory from further assaults by Spain and Mexico. And so
9 the Apaches were very glad to sit and treat with the United
10 States of America.

11 Beginning shortly after the Treaty of Guadalupe
12 Hidalgo in 1848, however, the Apaches had misgivings because
13 the original arrangement between the Apaches and the United
14 States deteriorated on the basis of incoming miners and people
15 doing things in their territory that they did not condone or
16 approve of.

17 And the Apaches were also cognizant of the fact that
18 military forces of the United States would very often support
19 those uncondoned activities. They wanted to bring that to a
20 close. And they were appealing to the federal government to
21 recognize these territories, to make it so that they could not
22 be violated any further.

23 The United States agreed to do that, and, in fact, in
24 the years immediately following this Treaty, the United States
25 set out precisely to do that and initiated through the next

1 governor of the territory of New Mexico, a fellow named
2 David Meriwether, a variety of negotiations with multiple
3 tribes, both eastern Apaches on the east side of the Rio Grande
4 and western Apaches, to do just that, to designate and settle
5 the territories.

6 What happened, however, was that, quote, unquote,
7 settlers, nonIndians, intervened in these matters. They
8 disturbed the proceedings and oftentimes even -- well,
9 oftentimes -- in a number of instances actually sent armed
10 groups in order to evict Apaches from the lands that had been
11 promised to them while these treaties were on their way through
12 the administrative system of the executive branch towards the
13 legislative branch.

14 In part because of those interventions by citizens of
15 the United States, or people in the United States, those
16 treaties were never ratified. The Senate refused to adopt and
17 enact those treaties, leaving the Apaches confused and bereft
18 frankly.

19 They had pressure from the civilian and the military
20 authorities on them to settle down and get on their
21 territories. And when they tried to do that, they were
22 prevented from doing so. This led to what gets called the
23 Apache wars. Mangas Coloradus was murdered, you know,
24 basically while in care of the United States Army in 1863.

25 Later that same year -- well, no, excuse me -- not too

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1 different of a time in that same year, another principal
2 leader, Cochise, was also kept hostage and mistreated by the
3 federal government, even as he was effectively enacting this
4 Treaty, abiding by this Treaty, by protecting the Butterfield
5 Stagecoach line across southern Arizona and southern New
6 Mexico.

7 This was perceived as being duplicitous and contrary
8 and made the Apache people lose a great deal -- many Apaches,
9 not all of them, lose a great deal of confidence in the United
10 States.

11 THE COURT: Doctor, I really appreciate that. Thank
12 you.

13 Mr. Levenson, please continue, sir.

14 MR. LEVENSON: Thank you.

15 DIRECT EXAMINATION

16 BY MR. LEVENSON:

17 Q. Dr. Welch, your review of Indian Claims Commission
18 proceedings, does that lead you to conclude that any of those
19 proceedings led to a diminished -- I'm sorry -- diminishment of
20 the Apache people's reserve treaty rights?

21 A. No.

22 Q. Thank you, Doctor. I am going to move on to a discussion
23 of the role of Oak Flat in Western Apache religious practice.

24 You are familiar with as much as a non-Apache can be
25 with Western Apache religious practices?

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1 A. I have listened diligently as an outsider, that's correct,
2 and have done my best to study it as an outsider.

3 Q. All right. Is it your opinion that Apache religious
4 practice requires that Oak Flat remain intact?

5 A. It is.

6 Q. And by "intact," can you please describe what that means,
7 in terms of, you know, do they need access or does the land
8 have to remain undeveloped?

9 A. I will with respectful deference to Dr. Nosie offer very
10 brief comment on this, and that is that Apache religion is
11 centered in many ways on the fundamental precept of the
12 importance of the integrity of the natural world. That the
13 Creator put things the way they are for a number of very good
14 reasons, and all of those things must continue to unfold with
15 respectful deference, and only the most kind of benign type of
16 intervention by human beings. And that it's only through
17 showing that respect to the natural world and all of its
18 elements, that creation and all of the powers of those elements
19 will continue to bestow its blessings on human beings, and that
20 means that religious practice does not, with very few
21 exceptions, remove anything without a special petition. It
22 does not add anything without very due consideration. And so
23 any form of industrial intrusion, and certainly anything on the
24 scale of a mine affecting a place of outstanding importance in
25 Apache religion, is so dangerous it is hard to even describe --

1 to everybody, not just Apaches, to all of us.

2 Q. Do the actions that Apache Stronghold seeks to enjoin taken
3 by the defendants, do those actions impose a substantial burden
4 on Apache religious practice at Oak Flat?

5 A. I would think that they --

6 MR. SCHIFMAN: This is Ben Schiffman for the federal
7 defendants. Sorry. I would like to object to that question on
8 the grounds of relevance.

9 THE COURT: On the grounds of what, Mr. Schiffman?

10 MR. SCHIFMAN: On the grounds of relevance, Your
11 Honor. I believe he is offering a legal conclusion as to the
12 definition of substantial burden, and so I am objecting on
13 that.

14 THE COURT: That's overruled.

15 You may answer.

16 THE WITNESS: Sorry, can you repeat? I am having such
17 a hard time hearing the defense, Your Honor, I get distracted.

18 MR. LEVENSON: Thank you, Doctor. I will try to
19 rephrase the question.

20 BY MR. LEVENSON:

21 Q. In your opinion, are the actions that the plaintiff's seek
22 to enjoin in this case, those actions by the U.S. Government,
23 do those constitute a burden on the religious practices of the
24 Western Apache?

25 A. The religious practices of the Western Apache people, and

1 especially the Western Apache people who make use of, pray to
2 and through Oak Flat, have already been disturbed and
3 encumbered by the United States in just preparing for and doing
4 the initial drilling for prospecting for this ore body, and
5 certainly the unfolding of the mine involves an incalculable
6 burden, a huge burden, yes.

7 Q. Doctor, something you said struck me. You said, "Religious
8 practices at and through Oak Flat." Can you expand on the
9 particular nature of place in Western Apache religious
10 practices?

11 A. Many, many Apache prayers and spiritual singing, other
12 types, whether they are enunciated or said silently, recited in
13 individuals' heads, are petitions to specific places and the
14 powers that are associated with and sort of dwell within those
15 places.

16 Those powers are not meant to be disturbed. They are
17 meant to be deferred to and given utmost respect and left just
18 the way they are. And so it's important for Apaches to be able
19 to know that those places are being respected and treated
20 properly so that the powers that are there will continue to
21 bestow blessings and allow the world to be good.

22 Q. Thank you, Doctor.

23 MR. LEVENSON: That's all the questions I have at this
24 time. Thank you, Your Honor.

25 THE COURT: You are very welcome.

CROSS-EXAMINATION - JOHN WELCH, PH.D.

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1 Mr. Schiffman, do you have any questions for Dr. Welch?

2 MR. SCHIFMAN: Yes, Your Honor, a few short questions.

3 THE COURT: And Mr. Schiffman, we are having difficulty
4 here in court hearing you, so I am going to ask you to speak a
5 little slower.

6 MR. SCHIFMAN: Okay. I apologize, Your Honor. I am
7 speaking into my cell phone. It's not on speaker or anything
8 of that nature, and I will just send a thought to the Verizon
9 infrastructure and hope that it carries my voice as clearly as
10 possible, and I will speak slowly.

11 CROSS-EXAMINATION

12 BY MR. SCHIFMAN:

13 Q. Dr. Welch, I just want to ask you a few quick questions
14 here. The first is just to confirm that you are not trained as
15 an attorney; is that correct?

16 A. That's correct.

17 Q. And you did not attend law school?

18 A. I did not.

19 Q. And so you didn't receive training in legal research; is
20 that correct?

21 A. I am not a trained legal researcher.

22 Q. You are not trained to provide legal interpretation of
23 statutes passed by Congress; is that correct?

24 A. I am not trained to provide that interpretation.

25 Q. You are not trained to provide legal interpretation of

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1 treaties passed by Congress and signed by the President; is
2 that correct?

3 A. Yes. I have not been to law school.

4 Q. And you are also not trained to adjudicate property
5 disputes; is that correct?

6 A. I am sorry, I think you said, I am not trained to review
7 property disputes?

8 Q. I said, "adjudicate" property disputes.

9 THE WITNESS: I'm sorry, Your Honor, I can't hear.

10 THE COURT: He said, "adjudicate" property disputes.

11 THE WITNESS: Oh, yes. No, I am not a judge.

12 BY MR. SCHIFMAN:

13 Q. Thank you. And I am sorry I am not coming through as
14 clearly as possible. I will continue to speak slowly.

15 Doctor, I would like you to direct your attention to
16 the -- actually, let me back up.

17 So earlier you talked about the Indian Claims
18 Commission and Docket 22-D; is that correct?

19 A. Yes -- well, I referenced Docket 22 and Docket 22-D, of
20 course, is the docket for the Western Apache -- primarily the
21 San Carlos and White Mountain Apache.

22 Q. Okay, thank you.

23 Now I would like to direct your attention to
24 defendants' second exhibit. I am not sure you have that in
25 front of you or if you -- so could you let me know when you

1 have that in front of you.

2 A. I am sorry. Could you -- I am not sure I have them
3 numbered properly. Is this the affidavit of Tracy Parker? Oh,
4 no, I think it's the map. Is that it?

5 THE COURT: Mr. Schiffman, just one moment, please. I
6 have an extra copy of the defendants' exhibits.

7 Mr. Levenson, if you will walk up here and take this
8 binder, I am sure that will help the plaintiffs.

9 MR. SCHIFMAN: Thank you, Your Honor.

10 THE COURT: You are very welcome.

11 THE WITNESS: I am looking for Defense Exhibit Number
12 2; is that correct, Your Honor?

13 THE COURT: Yes, the second one in the binder. It's
14 most likely labeled as "102," I believe.

15 THE WITNESS: Uh-huh. Okay.

16 So just to confirm, Mr. Schiffman, we are talking about
17 the findings of fact for Docket 22-D dated or decided June 22nd
18 1969?

19 BY MR. SCHIFMAN:

20 Q. Yes, that's correct.

21 A. Okay.

22 Q. So -- this is more confirmation, but just to be sure, the
23 caption of the document Defense Exhibit 102, the caption reads,
24 Before the Indian Claims Commission; is that right?

25 A. Yes.

1 Q. And it says on the right side, Docket No. 22-D; is that
2 correct?

3 A. Yes.

4 Q. And one of the plaintiffs, so the parties listed on that
5 left side, is, quote, the Western Apache and each group and
6 band thereof; is that right?

7 A. Yes.

8 Q. And the defendant is the United States; is that right?

9 A. Yes.

10 Q. Okay. So you reviewed these proceedings to prepare for
11 your testimony; is that correct?

12 A. I reviewed this document, yes.

13 Q. And so you agree or concluded from reviewing this that the
14 United States took from the Western Apache their Indian title
15 to all of their aboriginal lands; is that right?

16 A. I don't agree that the United -- that that's the final
17 ruling on the taking of the United States of the aboriginal
18 territory.

19 I believe that there are rights reserved in the 1852
20 Treaty. The United States identified and -- through the Indian
21 Claims Commission and came up with a series of negotiated
22 stipulations between the parties. That was the Indian Claims
23 Commission's job. I don't think it necessarily has final word
24 on title.

25 Q. Okay. Thank you, Doctor.

1 I would like to now direct your attention to paragraph
2 12 of this same exhibit that you have in front of you. That's
3 on page 219.

4 A. I am finding that. One more minute, please, or a few more
5 seconds. Here we go. Yes, I see it.

6 Q. Okay. So that paragraph 12 on page 219 of Defense Exhibit
7 102 says that as of 1873, quote, the United States took from
8 the Western Apache their Indian title to all of their
9 aboriginal lands; did I read that correctly?

10 A. Yes.

11 Q. Okay.

12 MR. SCHIFMAN: I have no further questions.

13 THE COURT: Mr. Levenson, do you have any redirect of
14 the doctor?

15 MR. LEVENSON: Just a couple. Thank you, Your Honor.

16 REDIRECT EXAMINATION

17 BY MR. LEVENSON:

18 Q. Dr. Welch, are you a trained historian?

19 A. I am not trained in history, no. Trained in anthropology
20 and have made extensive use of historical documents in my
21 anthropological and archeological studies.

22 Q. Okay. So part of the discipline of anthropology includes
23 review and interpretation of historical documents?

24 A. Emphatically, yes.

25 Q. Okay. And just one more question. You -- the plaintiffs

DIRECT EXAMINATION - NAELYN PIKE

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1 submitted your declaration as an attachment to their motion for
2 a preliminary injunction. Is that declaration -- is there
3 anything in there that you'd correct, or is that still true and
4 correct to the best of your knowledge?

5 A. What's in there is true and correct. I am looking forward
6 to the opportunity to amplify matters that I think are
7 important to the Court.

8 Q. All right.

9 MR. LEVENSON: I have no further questions, Your
10 Honor. Thank you.

11 THE COURT: Mr. Levenson, please call your second
12 witness.

13 MR. LEVENSON: Your Honor, we call Naelyn Pike.

14 THE COURT: Ms. Pike, how do you spell your first
15 name?

16 THE WITNESS: N-A-E-L-Y-N, Naelyn.

17 THE COURT: Thank you. Please swear the witness in.

18 **NAELYN PIKE, PLAINTIFF'S WITNESS, SWORN**

19 THE COURT: Mr. Nixon, you can begin your examination.

20 DIRECT EXAMINATION

21 BY MR. NIXON:

22 Q. Naelyn, can you please tell us and tell the Judge how you
23 come to know of Oak Flat, and what it is to you?

24 A. First (speaking in Apache).

25 Thank you for hearing our voice.

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1 Chi'chil Bildagoteel, which is Oak Flat, it's a place
2 where I used to go to since I was a little girl. My mom and my
3 dad would take me to go pick the acorn field. But as I got
4 older, the stories from my great-grandmother and her people,
5 that's where she came from. And so those stories that my
6 grandfather who taught my mother, who taught me, I am fourth
7 generation of, I guess prisoners of war.

8 And so when I would go to Oak Flat -- and because San
9 Carlos, our Apache reservation, is two hours east from Phoenix,
10 Oak Flat is in between that. And so we would go and pray.
11 Every time we drive by, I go and pray.

12 And so Chi'chil Bildagoteel is a place where we
13 practice our ceremonies, where I learn to be an Apache woman,
14 and to have that understanding, and to be able to take the
15 medicine and use that in our everyday life.

16 It is not a place where, you know, you go here and
17 there, or it's a seasonal thing. Chi'chil Bildagoteel is every
18 day. And so when my -- sorry.

19 When my grandfather and my mom and all my family -- we
20 always go there, and same as other families in San Carlos or,
21 you know, just bringing people there because it's a sacred
22 place. It's something that's been time immemorial in our
23 stories. The petroglyphs that are there tell that story.

24 Q. Naelyn, can you do that anywhere else other than Oak Flat?

25 A. So Chi'chil Bildagoteel, that land, and that land around

1 it, is a spirit. So in Apache religion, we believe that Usen,
2 the Creator, has given life to the plants, to the animals, to
3 the land, to the air, to the water. And even what's underneath
4 it is a living being.

5 And because Chi'chil Bildagoteel, Oak Flat, is that
6 direct corridor to our Apache religion, and to be able to speak
7 to our creator. So when I go there, and I am praying there, my
8 prayers directly go to our creator, and I can't have it
9 anywhere else.

10 On that land we are able to pick the acorn and the
11 (speaking Apache) which is the berries, and we make juice. Or
12 we can get (speaking Apache) the saguaro cactus fruit, or the
13 yucca for our rope or for our wickiup, where we build our
14 homes. And as young girls, we are able to build our homes.

15 And in our coming of age ceremony, that's a huge part,
16 to show the people that we are able to provide, and that's what
17 Oak Flat gives us. It gives us all of that.

18 But without any of that, specifically those plants,
19 because they have that same spirit, that same spirit at Oak
20 Flat, that spirit is no longer there. And so without that
21 spirit of Chi'chil Bildagoteel, it is like a dead carcass.

22 And so the prayer is from my ancestors, from when they
23 were free -- to my ancestors that were prisoners of war, to us
24 being able to leave the reservation, and to me, that is a place
25 where it has that same exact spirit. And so my prayers go up

1 and they get heard by the Creator. Everything that I was able
2 to do and that my family and my sisters were able to do, have
3 that spirit.

4 And so in Apache tradition, we have oral history, and
5 we have to physically show the people, this is how you tie the
6 rope, this is how you pick the acorn, and it gives us a sense
7 of like -- of life and understanding and not taking anything
8 for granted and being able to respect what's around you.
9 Because without all of that, then it's gone.

10 And so all those teachings, that molds us into the
11 people we are today, are through the land base and through the
12 spirit of the Creator and of the red Ga'an and of the plants
13 and the animals, in that place Chi'chil Bildagoteel.

14 Q. Thank you. Is it because of that, which is related to Oak
15 Flat and everything there as it is, is that why you can't do
16 any of that anywhere else, like what if there is an Oak Tree
17 next to the cathedral in downtown Phoenix, isn't that adequate?

18 A. Chi'chil Bildagoteel -- the acorn, as I said before, if it
19 is anywhere else, it is picked; however it doesn't have the
20 spirit that resonates.

21 When we go to Oak Flat, it is like a corridor, so we
22 enter it, in a good way. And we go and we pick it. We go to
23 the tree, and we talk to it and say, thank you (speaking
24 Apache) for giving me this so that I can feed my family, and we
25 talk to the spirit of Oak Flat. Thanking it for offering it to

1 us and giving it to us so that we can give it to our family.
2 And that's what brings that good medicine. That's what brings
3 the spirit into our homes, into our hearts, into our mind and
4 our soul, is the spirit within the acorn, within the (speaking
5 Apache) within the rope of the yucca, within the cedar, within
6 it all. It is all there, but it is provided through the spirit
7 of Chi'chil Bildagoteel, Oak Flat.

8 Q. So if that all would fall into a crater a thousand feet
9 deep in a hole in the earth that the copper mine will
10 eventually create two miles wide, would you consider that the
11 loss of a benefit?

12 A. Yes, deeply.

13 Q. Would you consider that a penalty?

14 A. Yes. Without Chi'chil Bildagoteel --

15 THE COURT: I'm sorry, Mr. Nixon.

16 Mr. Levenson, can you give the witness the box of
17 tissues behind you, sir? Thank you very much.

18 THE WITNESS: Thank you, Your Honor.

19 THE COURT: Ma'am, just take a moment.

20 THE WITNESS: I can only explain it like this. I am
21 the oldest of 28 grandchildren, my maternal and paternal side
22 of the family.

23 I have -- my mom has four girls. I am the oldest of
24 three younger sisters. My sister Nizhoni had her Sunrise
25 Ceremony there. Our Sunrise Ceremony is our coming of age

1 ceremony. So when we have our first menstrual, it means that
2 we can have children, and it also represents the creation story
3 of the white painted woman.

4 And so we do this ceremony, and this ceremony is a
5 four-day ceremony. It is like a reborn, you know. In our
6 creation story, she came from underneath the ground, and she is
7 painted in white, and that's one of the photos in my
8 declaration. And it is of my sister Nizhoni. And so she had
9 her dance there.

10 In that ceremony, you are reborn, your transformation
11 into womanhood, and we are symbolizing what it means to give
12 life and what it is for our future as a people. And when these
13 girls have these Sunrise ceremonies, their connection to the
14 land is direct. Their life span is direct.

15 And so when we talk about Oak Flat being gone, it's
16 cutting a tie to my sister's life and to all of the girls'
17 past, present, who have had their Sunrise Ceremony there. The
18 connection to Chi'chil Bildagoteel is gone. It is taken away
19 from them, stripped away from them, and that's only that.
20 That's not including our stories, our medicine, our connection,
21 everything will put a burden -- the wind is so important to our
22 Apache tradition. And if we don't have that connection to
23 Nahgosan, the earth, and to Oak Flat, then we are dead inside.
24 We can't call ourselves Apache.

25 The people, that real life, that soul, that spirit,

1 everything that is given to us by our Creator is taken away
2 from us. It's gone. And that's why we have to fight so hard,
3 because it is our people, our generation past, present, and
4 future, that's going to be taken away.

5 Q. Thank you, Naelyn. Take a moment. Here is some water.

6 You refer to your declaration. And so I have the
7 photographs from the declaration, and for the benefit of
8 defense counsel and for the Court, why don't we just take a
9 moment and you can explain the significance of the photos,
10 okay?

11 A. Okay.

12 Q. And that's about the Sunrise Ceremony that takes place in
13 Oak Flat. And these are photographs from one of the ceremonies
14 there several years ago; is that correct?

15 THE COURT: Mr. Nixon, one moment.

16 Are you using my hard copies of the exhibits?

17 MR. NIXON: No, Your Honor.

18 THE COURT: If you can hand those to Lisa, please.

19 Thank you very much.

20 BY MR. NIXON:

21 Q. Okay. So while the Judge is getting his copy of the
22 exhibits back, I am going to refer to Plaintiff Exhibit Number
23 4-2, which is the second photo. The first photo is a picture
24 of you. And while I mention it, where is this first photo
25 taken, Exhibit 4-1? That's a photograph of you. Where are

1 you?

2 A. So that's a photo of me in Standing Rock, and that photo,
3 why we had went to Standing Rock is because of -- their sacred
4 site was going to be destroyed, and so what we did was, my
5 family took the Mount Graham water from Dzil Nchaa Si'An and
6 the water from Oak Flat to gift it to them so that they have
7 our prayers too.

8 Q. Okay. I am going to hand you Plaintiff Exhibit Number 4-2,
9 which is the next photo. If you could describe for defense
10 counsel in Washington, D.C. on the telephone who has a copy of
11 that there --

12 And counsel, have you been able to pull that up for
13 yourselves, 4-2?

14 MR. SCHIFMAN: Yes, I have. Thank you.

15 MR. NIXON: Okay. Certainly.

16 BY MR. NIXON:

17 Q. Can you tell the Court and defense counsel what that
18 picture depicts? Who the people are?

19 A. Okay. In that photo, the left is my sister Nizhoni Pike,
20 and her Godmother Michelle Antonio. And this is them starting
21 off their Sunrise Ceremony. And Nizhoni is about to get
22 dressed into her buckskin. So this is the first day of the
23 ceremony where the Godmother, the chosen person, dresses her
24 into -- putting on like her feather, her abalone shell, her
25 buckskin, and those are all essential parts of the beginning of

1 the story.

2 Because in this moment, Nizhoni is starting to connect
3 her soul and her spirit to the mountain, to Oak Flat. And that
4 is the start-off and the kick-off of the beginning of the
5 ceremony where she's not my sister no more, she's the changing
6 woman. She's becoming what we said, how she resembles the
7 white painted woman, our creation story.

8 Q. Okay. Thank you. I am going to hand you Plaintiff Exhibit
9 Number 4-3, which is another photograph.

10 If you could describe who the people are and what is
11 happening there?

12 A. So in this photo, it's of that same day, and now you see
13 that the Godmother is putting on her feather, her buckskin, and
14 all of the essential tools of beginning her first day as
15 becoming a woman.

16 And the people surrounding her are also members of our
17 tribe in San Carlos, and they come and they sing. They sing
18 the songs for her. They dance and participate and they pray.
19 And so this is at Oak Flat, too. And in this, I was her
20 partner.

21 Q. Okay. Thank you. I am going to hand you Plaintiff Exhibit
22 Number 4-4, which is the next one in the series.

23 If you could describe what's going on there for
24 everyone's benefit. Thank you.

25 A. In this one, the medicine man, who is in front of my

1 sister, is praying to her and talking to her about what she is
2 going to be doing and the role she is going to take because she
3 blesses the people. Her and the spirit that is within her.
4 They bless and they provide for the people.

5 And next to her are her Godparents, which is Michelle
6 Antonio, Alvin Antonio, and her medicine man, Leroy Kenton,
7 which are all members of the San Carlos Apache tribe here at
8 Oak Flat.

9 THE COURT: Mr. Nixon, just one moment.

10 Go ahead, sir.

11 BY MR. NIXON:

12 Q. So the next photo from your declaration, which we have
13 marked Plaintiff Exhibit 4-5, can you describe for us who that
14 is and at what point in the ceremony that is and anything else
15 you can tell us?

16 A. Okay. So in this photo, it's Nizhoni on the third day.
17 And on this day of the Sunrise Ceremony is when she gets
18 painted with the white clay.

19 And all the tools that were used here in the ceremony
20 like the teepee and the trees that -- it's like four trees.
21 It's a circle, and there's one tree in front of another and
22 side to side like, and those all came from Oak Flat. And
23 that's the most important part about this, is that everything
24 that we are able to use for the ceremony comes from Chi'chil
25 Bildagoteel, Oak Flat.

1 And she is painted in this white clay. It molds her
2 into the woman she is going to be from now on. And this is my
3 favorite part of the Sunrise Ceremony, because when she is
4 being painted by what I can call is like our angels, our
5 messengers, the Ga'an people, which is on the arm of his shirt,
6 it is like a patch of a God. So they come and they come from
7 the mountains, and the spirit of the red Ga'an is there at Oak
8 Flat, and what they do is they bless her, and her Godfather
9 bless her, and they mold that into her. It is like glue, you
10 mold it and it sticks with the prayers of the people, of what
11 she is praying for, the medicine man, and it also represents
12 our creation story.

13 And when -- the favorite part of mine is her eyes are
14 closed throughout this whole process when they paint her. And
15 when the God -- at the last song, the Godmother will have a
16 handkerchief and wipe her eyes. And in that moment when she
17 opens her eyes, she's a new woman, she's a new girl. That
18 spirit is in her. That's why she is and that's why she will be
19 for the rest of her life. It is that confirmation to the world
20 that she took her imprint at Chi'chil Bildagoteel and on the
21 world. And so that's what that represents.

22 Q. Thank you, Naelyn. Then the last photo from your
23 declaration we have marked Plaintiff Exhibit Number 4-6. It
24 may be misnumbered in the set that was sent, it may also have
25 4-5 on it.

1 Defense counsel, do you have that handy?

2 THE COURT: Mr. Nixon, during your examination, if
3 Mr. Schiffman doesn't have the document, I'm pretty sure he will
4 let me know.

5 MR. NIXON: Thank you, Your Honor.

6 BY MR. NIXON:

7 Q. If you could tell us what is going on in that photo, who
8 the people are and where that is, et cetera?

9 A. Okay. So this one is of a photo of Lauren Pina. She had
10 her Sunrise Ceremony at Oak Flat too. And this is on the
11 second day in the night. And the girls behind her show that --
12 they also had their Sunrise Ceremony, and so these girls dance
13 to the crown dancers.

14 And so on Saturday night, the Ga'an people, our
15 messengers, come from the mountains, and they dance and they
16 bless the people and they bless her, and that's what they
17 bring.

18 So in this photo, they are dancing in a line waiting,
19 because what happens is that the Ga'an will come and do their
20 prayers, and then when they are done finishing their prayers,
21 the girls will come up behind them and we in a sense shadow
22 them, we follow them, and this is all a part of our ceremony
23 that happened at Oak Flat.

24 Q. So one last question. When you mention the Ga'an and you
25 refer to them as the Ga'an or the spirit dancers or the crown

1 dancers, are those actual spirits?

2 A. Yes. The Ga'an people are spirits, are messengers between
3 Usen, the Creator, and us here in the physical world. And
4 those spirits come from the mountain. They come from the
5 ground, and they come into what -- the people in the physical
6 world, which would be the men, the five men. And specifically,
7 the red Ga'an has made its imprint, its spirit on Chi'chil
8 Bildagoteel, on Oak Flat.

9 MR. NIXON: I do have one last question, Your Honor,
10 to help us understand.

11 Q. Two-part question. First, are you familiar with the
12 concept of angels in Judeo-Christian religion?

13 A. Yes.

14 Q. How are the Ga'an -- are the Ga'an like angels?

15 A. That's the closest interpretation that I could put it. The
16 Ga'ans are guardians. They all have a specific meaning. They
17 may not look like it -- and what's so amazing -- the sadness
18 about this part is that there's Devil's Canyon right next to
19 Oak Flat. But to us, we call it Ga'an Canyon, because when the
20 settlers were first coming in, they felt -- they heard and they
21 would see the spirit of the Ga'an people, and they were scared
22 because they have these huge crowns, and they are painted and
23 they don't look human.

24 And so what the settlers would say, you know, when
25 they would try to come in is, oh, those are devils, and they

1 would be afraid, and that was Devil's Canyon.

2 But my grandfather and I, my family, we pray at Ga'an
3 Canyon because that's where the imprints of the Ga'ans. They
4 are not devils to us. They are angels, they're blessings,
5 they're guardians. They shield us from evil. And that's there
6 at Oak Flat, and that's all a part of the spirit of Chi'chil
7 Bildagoteel. And without the spirit, then there's nothing.
8 There's nothing at all, and that cannot be taken away. It
9 cannot be destroyed.

10 THE COURT: Mr. Nixon, this is actually a perfect time
11 to take our morning recess. Court will be in recess until
12 10:45.

13 Hold on just one second.

14 (Discussion held between Court and courtroom deputy.)

15 THE COURT: The court is in recess until 10:45.

16 (Recess taken at 10:29 a.m.; resume at 10:50 a.m.)

17 THE COURT: This court will come to order. All
18 parties present when the court last closed are present again.

19 Mr. Nixon, please continue.

20 MR. NIXON: Yes, thank you, Your Honor. I believe
21 that I concluded my question, and I was just going to let
22 Ms. Pike know that the Court or defense counsel may have some
23 questions for her now.

24 THE COURT: Yes.

25 Mr. Schiffman, do you have any questions for Ms. Pike?

DIRECT EXAMINATION - WENDSLER NOSIE, SR., PH.D.

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1 MR. SCHIFMAN: This is Mr. Ben Schiffman for the
2 federal defendants. We have no questions at this time, Your
3 Honor.

4 THE COURT: Ms. Pike, thank you so much for your
5 testimony this morning.

6 Mr. Nixon, please call your -- I'm sorry, Ms. Pike,
7 were you trying to tell me something?

8 THE WITNESS: I just wanted to say thank you.

9 THE COURT: You are very welcome.

10 Mr. Nixon, please call your next witness.

11 MR. NIXON: Yes. Our next witness is our last
12 witness, Your Honor, it's Dr. Wendsler Nosie, Sr.

13 THE COURT: Sir, for the record, please, if you can
14 spell your name.

15 THE WITNESS: It's Wendsler, W-E-N-D-S-L-E-R. Nosie,
16 N-O-S-I-E. Sr., S-R.

17 THE COURT: I'm sorry, what's your last name again?

18 THE WITNESS: Nosie, N-O-S-I-E.

19 THE COURT: Sir, welcome to our courtroom.

20 Lisa, if you would please swear the witness.

21 **WENDSLER NOSIE, SR., PLAINTIFF'S WITNESS, SWORN**

22 THE COURT: Go ahead, Mr. Nixon.

23 DIRECT EXAMINATION

24 BY MR. NIXON:

25 Q. Dr. Nosie, could you please introduce yourself in terms of

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1 your education and your position with Apache Stronghold?

2 A. Again, my name is Wendsler Nosie. I graduated from Globe
3 Arizona, Globe High School. I also hold a bioethics
4 sustainability in global health -- global public health, Ph.D.
5 from American University of Sovereign Nations.

6 And I am also a former chairman of the San Carlos
7 Apache tribe, as well as tribal council. I have served in the
8 tribal government for 29 years.

9 I also hold a Certificate in the Arizona Banking
10 Academy. So -- I am also, I guess you would say, the founder
11 of the Apache Stronghold that we currently have right now.

12 Q. And where are you currently living?

13 A. Over a year a half ago, I vacated the reservation of San
14 Carlos. I am in -- a tribal member of San Carlos Apache tribe.
15 Over a year ago, I went to the United States and -- to the
16 agricultural department and also informed Congress that I was
17 vacating the reservation and moving into Oak Flats, based on
18 the negligence of the trust responsibility they were to hold
19 with our tribe. And so I had returned back to Oak Flats and
20 have been there since November 18 of 2020 -- '19, yeah, a year
21 ago.

22 Q. You just mentioned that -- because of a violation of trust
23 responsibility. Can you explain what you are referring to,
24 please?

25 A. Well, as a tribal chairman at that time, and also being

1 involved with the argument on day one, was the NEPA, the
2 National Environment Policy and our argument to ask the United
3 States to follow the NEPA process. And for several years, you
4 know, we did have the Tonto National Forest agreeing with the
5 tribe, that it was very -- that the land was very important to
6 the Apaches, not until the rider that gave exemptions to
7 Resolution Copper that the whole tide turned.

8 And so since that time, you know, we have been facing
9 that argument and continue to ask the United States to follow
10 the NEPA process. And so it just led on to the arguments that
11 the Apaches had years ago. In the early '60s, when I was
12 growing up at that time with my grandfather my uncles, my
13 dad -- when they were alive, you know, they talked about the
14 promises that the United States made and being a Chiricahua
15 Apache, being brought in as a prisoner of war from that time,
16 of what my family had experienced, was that we were waiting to
17 return back to our ancestral homelands.

18 And at that time, they talked about the treaties that
19 were made and that -- the disappointment, because none of that
20 was fulfilled. Because as the people of San Carlos were held
21 as prisoners of war, there was no way to leave the reservation.
22 So it was a very disappointing life that they lived, and I grew
23 up in that.

24 And so as a young six, seven-year-old, telling my
25 uncles that one day I will return -- and they used to cry and

1 laugh and say, you know, when you do, we will go with you.

2 And being a Chiricahua, you know, they were talking
3 about these treaties that were made. And my grandfather -- my
4 great-grandfather was one that argued the point about these
5 areas of indigenous lands of holiness to the people. So I grew
6 up in that arena, in that era, and was totally affected by how
7 our people were being treated.

8 And so on that side of the -- on the other side of the
9 token being brought up traditionally with holy ground and how
10 that played a really important part about sustainability, about
11 surviving in a prison and what it meant to us, but yet, you
12 know, there was a lot of social illness, social -- seeing our
13 people not develop the way we should be developing with -- and
14 with the promises never that were fulfilled.

15 THE COURT: I'm sorry, Doctor. My apologies for
16 interrupting you.

17 Can you give me some examples of how -- you just made
18 a comment that -- socially seeing our people not developing the
19 way they should be developing -- what do you mean by that?

20 A. Well, what I mean by that is it was a new change, a change
21 came. And if you can imagine a way of life coming to a
22 complete stop and not knowing what the next day was to be and
23 how it was formenting. And from -- say an economic base, a
24 social base, and a religious base. These were all being
25 affected by a -- just like a car coming to a complete stop, and

1 not being really informed and well informed what our people was
2 facing. And so it really created a lot of social illness to
3 where, how do we deal with this?

4 But one of the things that the people held on to was
5 the religious base. And the religious base -- because we
6 didn't know what was happening. My dad, my uncles, my
7 grandfather, you know, it was hard to tell the child what you
8 were going to be.

9 And so since a lot of our people grew up like that, in
10 the fear -- because our parents still had the fear of military
11 presence, and they felt that with Indian health and BIA because
12 at that time, in the '60s, they could still dress up in
13 military uniform. So there was a suppressed way of life still
14 happening to them.

15 But the crucial part was the religious part of why it
16 was so important that we hang on to that. Because there was a
17 saying that we would be able to return to our holy and sacred
18 places if we conform to being assimilated. And that really
19 scared the people, because we -- in our religion, we are tied
20 to the earth. We are tied to the mother.

21 And these special places is where the -- well, what
22 people know him as is God, gave these blessed places a unique
23 way for us to communicate. And that's where, in Apache, we
24 call them Ga'an, but they are deities. They are actually
25 spirit people.

1 And so anyway, growing up in that time and then
2 eventually becoming a tribal leader and reading a lot of these
3 documents, and, you know, having it all before me and see what
4 was happening to our people.

5 And one of the most important thing was to return and
6 to once again exercise our religion within those boundaries of
7 what is holy, and to come to find that a lot of our people
8 prior escape the reservation to go to the prayer and return
9 back as quick as they can because of the fear.

10 THE COURT: Now, Doctor, do you -- and maybe you can't
11 answer this question. When you spoke of assimilation minutes
12 ago, do you believe that your relatives from the past were
13 being asked to give up what they believed to be most sacred of
14 the Apache people?

15 THE WITNESS: They were being forced. There was an
16 attempt to force our people to give up everything that they
17 were, but they couldn't. It was not going to happen. Because
18 in the religion, that's who we are. We are intertwined with
19 the earth, with the mother.

20 THE COURT: When you say, everything that they were,
21 tell me what the "everything" is?

22 THE WITNESS: Everything that they were was that they
23 could communicate with the world. They could communicate with
24 what was spiritual, from the wind to the trees to the earth to
25 what was underneath. And they knew how the spirituality tied

1 to everything to make us who we are. And that was important
2 because that created the integrity and the character of the
3 people.

4 And like my mother would tell me that prior to the
5 territory -- the area changing, that the people were very
6 religious and very holy. You know, if we would -- if we were
7 really mean people, then the outcome would have been different,
8 but we are all intertwined. That's why our language is so
9 important. Our language ties, it communicates with the spirit,
10 of what Naelyn was talking about. And it contains the key time
11 immemorial how the world came to be and how the oldest religion
12 came to be what it is today.

13 And I tell many people around the world, when they are
14 trying to understand and identify this, I say, that's no
15 different than the Old Testament or the one before the old
16 testament, when they talked about life in the beginning. I
17 said, here we still hold on to that strongly, because that was
18 the greatest gift that was given the world.

19 And that's why these deities that we are talking about
20 that are Ga'an people, they are a crucial part to our personal
21 being of who we are and -- as a community and as what we can
22 give to the rest of the world.

23 But in this place, it's the only area that has this
24 place, and that's why it's so crucial, like Naelyn was talking
25 about, that if it subsides and it falls, it is gone forever.

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1 And for me being a tribal leader, you know, to have
2 that experience and know how the federal government works, you
3 know, we have the Constitution of the United States that talks
4 about the freedom of religion. Well, how come we are not
5 afforded that?

6 Because I can go way back, in working with the tribe
7 and prior to the tribe, of how much our people relied on the
8 Bureau of Indian Affairs, how they relied on the ones before
9 the Bureau of Indian Affairs, and then how we relied on the
10 Forest Service and giving them all this information.

11 All the things that, you know, I'm talking about
12 today, they have it. And it is saddening because our people
13 gave a lot of trust into this and gave information and was, you
14 know, it never developed into that relationship that we were
15 told it was going to be.

16 So, you know -- and that's one of the big reasons why
17 I had to go back. I had to go back to defend one of the last
18 holy places that are tied -- that we are tied to. Because if
19 this subsides and is gone forever, then what does it mean to
20 our children that have yet to be born?

21 I mean, how would -- if they found silver, gold,
22 copper under Mount Sinai and they did that to it, what would it
23 mean to the biblical? What would it mean to their stories? So
24 it's identical to -- you know, if they did it there.

25 And so this place is very important. So as a tribal

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1 leader, as a tribal member, it's -- and just being who I am,
2 it's always been spiritual. And we had been told that one of
3 the last things that will probably be taken from us would be
4 our religion.

5 And it saddens me because with the U.S. Forest
6 Service, you know, they know all of these things. They know.
7 And like for me living there a whole year, the federal policies
8 for the Forest Service says you have to vacate out of there in
9 13 days. And I have been there. You know, they know it.

10 And when this past summer, when there was a huge fire
11 and they were vacating everybody, the only one they didn't
12 vacate was me. Because they know what I was doing there, to
13 take care of what was neglected. And so as far as me being a
14 person and being brought up, those are my responsibility,
15 religiously, you know, that's who I am.

16 BY MR. NIXON:

17 Q. Dr. Nosie, you mentioned that the Forest Service knew and
18 that they had been told. To help us all understand, I am going
19 to refer to that National Defense Authorization Act of 2015,
20 which was passed in December of 2014. That's what you referred
21 to earlier as the rider, correct?

22 A. Yes.

23 Q. Okay. And you brought a book with you today.

24 I am not going to introduce it into evidence, Your
25 Honor. And defense counsel, please excuse me. Just if you

1 would indulge me for a moment, I will place this in the proper
2 order in terms of a point of order for the courtroom, Your
3 Honor.

4 This document, can you read the cover sheet you have
5 there?

6 And I did not ask you to bring this, did I?

7 A. No. No, you did not ask me. I brought it. Chi'chil
8 Bildagoteel, Oak Flats, Comments on the Resolution Copper
9 Project and Land Exchange Draft Environmental Impact Statement
10 submitted by the Apache Stronghold October 2019.

11 Q. How thick is that book?

12 A. It's a good -- a little over an inch.

13 Q. Okay. And I mention this -- defense counsel, just in
14 noting in the response reference to participating in any
15 administrative processes.

16 And so I would suggest, and I am not asking for a
17 ruling today, and I would definitely, of course, have defense
18 have any opportunity it needs, but perhaps it would not be
19 improper for judicial notice of that document. And that is a
20 suggestion, and I could make the motion if it's favored by the
21 Court.

22 THE COURT: Well, I would like to see what you have
23 there at counsel table. If one of you could walk it up to
24 Lisa, that would be helpful.

25 MR. NIXON: I may ask a question to help, Your Honor

1 --

2 THE COURT: Just one moment, please.

3 MR. NIXON: Okay.

4 THE COURT: Mr. Nixon, I note this was signed off, the
5 initial letter was signed by Mr. Rambler; is that correct?

6 THE WITNESS: Yes, it was.

7 THE COURT: You may approach.

8 Go ahead, Mr. Nixon.

9 MR. NIXON: I just -- in regards to this document, I
10 just would point the Court and defense counsel to a reference
11 in our corrected amended reply, that this case is not brought
12 before the Court in accordance with the Administrative
13 Procedures Act. We are not seeking any judicial review of any
14 administrative action taken in compliance with that act. But
15 this was just to point out that indeed Apache Stronghold had
16 participated in that external process.

17 THE COURT: And that will be noted for the record. I
18 had an opportunity to see that the witness on the stand right
19 now made several appearances in Washington, D.C. at various
20 committees. And there appears to be newspaper articles and
21 other miscellaneous photographs about Oak Creek (sic) and some
22 of the things that we've talked about this morning.

23 MR. NIXON: Thank you, Your Honor.

24 THE COURT: You're welcome. Please continue.

25

1 BY MR. NIXON:

2 Q. When you refer to the Forest Service having known about
3 these things, did you mean also before the National Defense
4 Authorization Act was passed in December of 2014, were they
5 told anything or did they know anything, in your opinion?

6 A. It was way before that event that took place, 2002. As a
7 tribal council at that time, having a meeting with the Forest
8 Service and the tribe expressing their concern, and at that
9 time, not getting too much of anything back from the Forest
10 Service, and not really telling us directly what was already
11 moving. But they were informed -- well informed by a tribal
12 resolution that was passed by the tribe.

13 Q. And had you had any opportunity and did you present any
14 testimony to Congress prior to December of 2014?

15 A. Many times. I have been before Congress. I have visited
16 all of the Congressional leaders, agencies, you know, to
17 express the concerns and positions of the tribe. And at that
18 point in time, a lot of it was well received until the NDAA,
19 the late night rider that took place.

20 Q. And just to be clear, that testimony you presented to
21 Congress was specifically in regard to the religious importance
22 of Oak Flat and what was being proposed in terms of a copper
23 mine?

24 A. Yes, of course, because the people of San Carlos were
25 looking at the religious impacts that it would take on our

1 future children.

2 And then again, with the environmental impacts, it
3 would also hurt the region, especially when the exemption was
4 passed and didn't allow Arizona to see the total report, the
5 pros and cons and for Arizona to make -- Arizona people to make
6 that decision. And so, yes, made those attempts.

7 Q. You had mentioned your ancestors, your grandfather, can you
8 please tell the Court what relationship, if any, you have to
9 Mangas Coloradus, the -- one of the signatories of the 1852
10 Treaty at Sante Fe between the United States and Apache
11 Nations?

12 A. Within our family, we come from the Chiricahuas on my
13 father, and my father through his father Willy, and his father
14 through John, who goes into the 1800s and -- tied into with --
15 at that time, with Geronimo Cochise and Mangas, and this is why
16 my grandfather, great-grandfather, John Nosie, knew of the
17 treaties that were taking place and why he became very
18 displeased.

19 And when the tribe was -- the tribal leaders at that
20 time were arguing about the land base that was being taken and
21 what was agreed upon between the Western Apaches, the
22 Chiricahuas, and that's when I was saying in an earlier
23 statement, that's where I am rooted from and why, when I became
24 a tribal leader, it was very important for me to look at what
25 occurred on our people and why are we living in the conditions

1 we were living in.

2 And again, looking -- as a leader, looking at the
3 environmental impacts that would take place, and the effects
4 that it would affect in the Southwest, and -- you know, so it
5 was from that descendant blood that I come from that was very
6 important, as well as my mother being a very -- person who
7 prayed and who -- in her time, lived in the area of Oak Flats
8 and why that was sacred, you know, both to my parents. Because
9 my mom resided in the area, but you know, through my dad I was
10 a Chiricahua Apache.

11 Q. You mentioned your great-grandfather John Nosie. Can you
12 tell us when did he live, approximately?

13 A. Well, from records that showed, you know, he -- well, he
14 lived up -- John Nosie was in the early -- well, late 1800s,
15 early 1800s, when he was a young boy, they'd tell me around
16 1854 -- no, I am sorry, 1844, around that area, when he was a
17 young man and growing up in that time.

18 So that was my grandfather. Then eventually to my
19 father -- grandfather Willy Nosie. And then my father who was
20 born in 1928. And then from there me, born in 1959.

21 Q. So to be clear then, Chief John Nosie lived in the second
22 half of the 19th Century and into the early years of the 20th
23 Century; is that correct?

24 A. What was that again?

25 Q. The latter half of the 19th Century, the 1800s and into the

1 early part of the 20th Century, the early 1900s?

2 A. Yes.

3 Q. Okay, thank you.

4 I am going to hand you Plaintiff Exhibit 5.1. These
5 are the first of three photographs that were in your
6 declaration. If you could kindly tell the Court what that is a
7 photograph of and where it's at and why it was in your
8 declaration?

9 A. This exhibit here, you see -- in Apache, we call it --
10 (speaking Apache) and it's a sweat lodge, I guess in the
11 English word. And this one here is a ceremony that takes place
12 for our young boys that are coming into manhood, and that's
13 when their choices change.

14 And just like Naelyn was talking about, about what a
15 young lady goes through, a young man goes through this
16 ceremony. And it teaches him patience. It teaches him to
17 think. And he is taught by his elders. The elders that are
18 within the sweat lodge.

19 And really, it's a womb of Mother Earth. Your Honor,
20 I am sorry, I -- these kind of things are really hard to talk
21 about, because as a young man, our -- us, we are taught to be
22 careful what we say out there, because we always see our ways
23 being destroyed.

24 And so forgive me and Naelyn, you know, we are giving
25 you a lot more than anybody has ever gotten, and that's what I

1 am doing today. But it does hurt me, because it's like our
2 religion is being on trial. And it goes back to what our
3 prophecy would say to us, that one day we will be put on trial,
4 and this is not right. But I will do my best.

5 This (speaking Apache) is a womb of Mother Earth. And
6 because a woman goes through menstrual once a month, she
7 cleanses herself, but men, we don't. So to be in balance and
8 understand life, we have to take our sons, elder men, medicine
9 people, take men into this so we can purify ourselves once a
10 month. And so that we can understand and know the balance of
11 life.

12 And so this (speaking Apache) is done ---- I am so
13 happy because it's finally back to where it originated from.
14 And so this is at Oak Flat, one of the areas that our medicine
15 man here, Cranston, you know, he holds his ceremonies there
16 because it brings, you know, what it was before we were
17 removed -- forcefully removed from the area.

18 But this is the (speaking Apache) for the men. And as
19 Naelyn spoke, the question of the Ga'an people. Well, with the
20 Ga'an people, the men have to go through a purification in
21 order to do that sacred dance, that holy dance. And in the
22 very end, they come together as one, the spirit and the human.
23 And those are the ones that bless at the Sunrise Ceremony.

24 But this (speaking Apache) is a very important part of
25 the ceremony. I mean, it is not just one thing. It is so many

1 things that is within that time period of when the ceremony is
2 going to take place.

3 So actually, when you are a father or a parent, you
4 have a daughter, and the daughter is born, you have that 12
5 years to prepare. And when it's a young man, he has that 14 --
6 he has that 13 to 14 years to prepare. So it is a continuation
7 of preparing for that ceremony to take place. It is just not
8 something you put up.

9 And that's why in this first exhibit, it's very
10 crucial because it's not -- you know, the women part is very
11 important because it gives life, but the men, it gives us the
12 understanding of why we are supposed to protect Nahagosan,
13 meaning the Mother Earth. And -- but we have to go back into
14 the earth to understand and continue to understand what a woman
15 is, because a woman is very crucial in the world. And so men
16 have to have that discipline. So it's really something that --
17 now that we vacated and able to do the ceremony openly and not
18 afraid has been the biggest difference.

19 Q. When you said that (speaking Apache) or the sweat lodge
20 originated there, you meant at Oak Flat?

21 A. At this holy place, yes. That's where everything is
22 originated from.

23 Q. Okay. I am going to hand you Plaintiff's Exhibit Number
24 5-2.

25 If you could describe for the Court's benefit and for

1 defense counsel what that is a photograph of?

2 A. Thank you, Your Honor. I just pause because this is our
3 Angel. It is not something to just really talk about. You
4 know, I tell people that, you know, things are the way they are
5 in Europe and the way the world changed through what is
6 capitalism.

7 But when you come to America, and especially in the
8 southwest of Arizona, we describe it as a rattlesnake. The
9 coil, the last coil is really the last place. And when you
10 come to our area, it's really the last place about what is holy
11 and what is sacred.

12 And not that any of the other places are not, it's
13 just what I am referring to is that so many of these places
14 have been attacked. And so when you describe what this is, you
15 know, I just ask that it be accepted respectfully, because when
16 you look at the crown, it's a halo. The real terminology in
17 English, it's a halo.

18 And that halo, it describes the reason why we are here
19 and what we got to maintain. So the holy people put the
20 designs into the crown to remind the people of the importance
21 of the world.

22 And then the marking on his body also describes the
23 identity of who this person is. And it's really tough to put
24 it out there, because the way things are today, there's animals
25 being killed, and it referenced a certain species, and it's

1 scary to really put it out there, because we see them being
2 killed, and we don't want to put a whole lot of information out
3 there.

4 But these are spirit people, that is the buffer
5 between heaven and earth, and they are the communicators to us.
6 And they bring the message through the Creator, and that's why
7 they are the ones that do all of the blessings.

8 And as it was told to me, that because we have touched
9 capitalism, that we have become dirty from the mother. So we
10 have to be obedient by doing the things that we need to do, and
11 that's why it's so important that our people go through the
12 sweat, our young men go through the sweat, because we ask for
13 forgiveness so that the spirit and the human body can come
14 together as one.

15 And these are deities. These are holy angels. And
16 these are the ones that we say, you know, live in the area of
17 Oak Flats. And it's really hard for us to tell where they
18 live, because in history, when the exchange between Mexico and
19 the United States, a lot of these places were being exploded
20 and collapsed, and it really feared the Indian people to really
21 tell any more than what they wanted to tell.

22 And -- but this, what we are talking about here, you
23 know, is -- this deity, you know, resides in the area, and
24 that's what my granddaughter was saying, it's the red deity
25 that is there. And this is what we're saying that it's going

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1 to be totally annihilated by the collapse of this place if
2 Resolution continues to move forward and get what they want.

3 But this is why it's so crucial to us. It's going to
4 be an everlasting effect. But this is our deity.

5 Q. Thank you. I'm going to hand you Plaintiff Exhibit Number
6 5-3. And can you tell us -- that's a photograph of you
7 somewhere in Oak Flat, correct?

8 A. Your Honor, you know, I -- excuse me. This -- I get
9 emotional because this is the oak tree. It takes 100 years
10 before an oak tree can produce an acorn.

11 If you could look at a -- one pound of a coffee can
12 acorn grinded into powder, that could feed up to 3- to 400
13 people. And if it's just a family of five, it could last them
14 four months; two cans will last them a whole year.

15 And this is very crucial to our survival and as well
16 as our ceremony. Because where Emory Oak is at, there's an
17 abundance of water. And it's not that all Emory Oak gives is
18 acorn. There's only -- several.

19 So when I was able to vacate the reservation and go
20 back to Oak Flats, it's the first time since one of my people
21 has ever had the four seasons to live that life again. And it
22 hurt, because a lot of our prayers and our songs relate to what
23 my granddaughter was saying, and to the spirit. And so I have
24 miners who disagree.

25 And one stopped by and said to me, you better check,

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1 because the first thing they are going to attack is the Emory
2 Oak. They are going to cut all of the oak trees. If they can
3 kill all the oak trees, then they solve the Indian problem, the
4 Indian people won't be there.

5 But the thing about it is that I got to see the birth
6 of an acorn. I got to see my grandkids come and pick the acorn
7 for ceremony. And then on top of that, I got to see dozens and
8 dozens of my people come back to pick the acorn, because they
9 felt the security that they weren't going to be kicked off
10 anymore.

11 And I stand there with all of the pressure of the
12 government, Resolution Copper, and trying to defend them off so
13 that our people can have what is rightfully theirs, the
14 ceremony for their families, for their children, for the world.

15 But this is the acorn tree. And, you know, they are
16 facing death. You know, they are human beings too. They have
17 a spirit too. But -- I am in the center of the area where it
18 is going to subside. That is where I am at.

19 Q. Thank you, Dr. Nosie.

20 Have you recently checked the price of copper on the
21 market? And what was the price the last time you looked and
22 when was that?

23 A. The last time I looked, a pound of copper was like \$3.14.

24 Q. And what would be the price of a pound of acorn from Oak
25 Flat, approximately?

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1 A. It's going for \$60.

2 Q. Thank you.

3 MR. NIXON: No further questions.

4 THE COURT: Mr. Schiffman, do you have any
5 cross-examination for Dr. Nosie?

6 MR. SCHIFMAN: Yes, Your Honor, I have one brief line
7 of questioning.

8 So my question is, is everyone able to hear me okay?
9 Just before I continue here.

10 THE COURT: Yes.

11 MR. SCHIFMAN: Okay. Thank you.

12 CROSS-EXAMINATION

13 BY MR. SCHIFMAN:

14 Q. So my question is, are you here on behalf of the San Carlos
15 Apache Tribal Government?

16 A. Am I here on behalf of the San Carlos Tribal Government?
17 Is that the question?

18 THE COURT: Yes.

19 THE WITNESS: I am here on behalf of the Apache people
20 of San Carlos.

21 BY MR. SCHIFMAN:

22 Q. Okay, thank you. But not as a representative of the San
23 Carlos Apache Tribal Government; is that right?

24 A. No, I am not here -- my document does show the concurrence
25 of the tribal chairman on all of the work that the Apache

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1 Stronghold has been doing. Thank you.

2 Q. Okay.

3 MR. SCHIFMAN: No further questions, Your Honor.

4 THE COURT: Mr. Nixon, in light of those two
5 questions, do you have any redirect for your witness?

6 MR. NIXON: No, Your Honor.

7 THE COURT: Do you have any additional witnesses?

8 MR. NIXON: No, Your Honor.

9 THE COURT: Dr. Nosie, thank you for testifying this
10 morning.

11 Do you have any additional evidence that you would
12 like to provide to the Court for consideration, Mr. Nixon, or
13 Mr. Levenson?

14 MR. LEVENSON: No, Your Honor. Thank you.

15 THE COURT: Mr. Schiffman, do you have any witnesses
16 you plan to present?

17 MR. SCHIFMAN: No, Your Honor, we do not plan to call
18 any witnesses.

19 THE COURT: Do you have any additional evidence that
20 the Court hasn't received?

21 MR. SCHIFMAN: Nothing further, Your Honor, other than
22 the exhibits, which we have previously filed.

23 THE COURT: Okay. I have some questions for the
24 plaintiffs.

25 First question is, why isn't the Western Apache tribe

1 named as a plaintiff?

2 MR. NIXON: I can answer that question, Your Honor.

3 THE COURT: Yes, please, Mr. Nixon. Why don't you
4 remain seated and pull the microphone closer so we can all hear
5 you.

6 MR. NIXON: Okay. It just felt good to stretch my
7 legs.

8 THE COURT: Oh, that's fine, if you want to do that
9 also. Just speak up.

10 MR. NIXON: Your question why isn't the Western Apache
11 tribe joined as a plaintiff, I take it that you meant why isn't
12 one of the four Western Apache tribes joined as a plaintiff;
13 for example, the San Carlos Apache tribe itself?

14 THE COURT: You are correct.

15 MR. NIXON: We didn't believe it was necessary, Your
16 Honor, especially in light of the Supreme Court's recent
17 decision in McGirt versus Oklahoma, where an individual
18 asserted and vindicated his entire tribe's treaty rights to a
19 vast part of the state of Oklahoma.

20 However, in regards to the standing defense raised by
21 the defense, if that is essentially what Your Honor's question
22 goes to, I would say that if there is any doubt that the Apache
23 Stronghold has standing here in this matter, we would gladly
24 join the tribes. We could implead them.

25 There is no sovereign immunity at issue in that case

1 because -- or in this case because we are talking about land
2 and land rights, which would be subject to the immovable
3 property rule, and therefore sovereign immunity does not
4 withstand the power and the effect of the immovable property
5 rule, which was recently the subject of a Supreme Court case,
6 an argument in the Upper Skagit Tribe versus Lundgren, a case
7 that was remanded to the Washington State Supreme Court,
8 because that issue was first presented in that case after
9 certiorari was granted and at oral argument at briefing before
10 the Supreme Court. And that case subsequently settled.

11 That was a case involving suit for quiet title brought
12 by the tribe against a couple who had bought some land that the
13 tribe felt was adversely possessed but not within -- or beyond
14 the statute of limitations.

15 But the immovable property rule is the central subject
16 of the oral argument per the brief submitted by the Lundgrens.

17 THE COURT: Mr. Nixon, I want to take a step back to
18 the actual Treaty, which I know you have read several times
19 now.

20 Do you believe that the language in the Treaty
21 indicates that the chiefs who signed were signing on behalf of
22 the entire tribe?

23 MR. NIXON: Well, as Dr. Welch made a point of
24 clarifying, there were no such things as tribes. That's an
25 artificial construct created later by the American Government

1 to try to develop an organizational system or even to be able
2 to classify these different groups of people, these nations of
3 native peoples.

4 The title of --

5 THE COURT: What word would you use besides "tribe"?

6 MR. NIXON: Well, it's in the title of the Treaty
7 itself. It's the 1852 Treaty between the United States and the
8 Apache Nations, of which there are Eastern Apaches and Western
9 Apaches. So it is all the people.

10 They lived in places. They had family relationships,
11 but they didn't have a, quote, unquote, tribe, and they didn't
12 have political boundaries and borders that you crossed or
13 didn't. It was all people within the landscape stretching from
14 west Texas to throughout Arizona.

15 THE COURT: Okay. Well, let's go back to my question.
16 Do you believe the language in the Treaty is indicative of the
17 chiefs who signed it, signing on behalf of the Apache Nation?

18 MR. NIXON: Yes, indeed. Every single Apache.

19 THE COURT: Mr. Nixon, do you or Mr. Levenson have any
20 case law that supports the proposition in your briefing that
21 the descendants of chiefs who signed the Treaty have standing
22 to enforce the Treaty rights?

23 MR. NIXON: Not off the top of my head, Your Honor,
24 but we could provide that briefing of citation to any cases
25 that would exist to that effect.

1 THE COURT: Well, will one of you gentlemen please
2 take notes of that question, because I will allow your closing
3 arguments in writing, and we will talk about that later this
4 morning.

5 Again, Mr. Nixon, are your due process and petition
6 clause claims based only on the publication of the FEIS?

7 MR. NIXON: Yes, Your Honor. And I'd also like to
8 point out that for the purposes of the preliminary injunction,
9 the only two issues before the Court for the purpose of the
10 preliminary injunction hearing today, are the Treaty rights and
11 the serious question of who owns that land, and the Religious
12 Freedom Restoration Act rights that have been violated as we
13 have alleged.

14 THE COURT: Mr. Schiffman, I have a question for you.
15 To what extent has the government complied with its obligation
16 to consult with the Western Apaches before completing the
17 exchange?

18 MR. SCHIFMAN: Your Honor, you are asking about the
19 obligation within the -- what we're calling the "rider"; is
20 that correct?

21 THE COURT: That is correct.

22 MR. SCHIFMAN: The citation -- perfect. Okay. Well,
23 the document that is at issue here, the Final Environmental
24 Impact Statement, discusses the consultation that has occurred.
25 And we believe that consultation has been, you know, as

1 contemplated by the law.

2 I can refer to that document if you give me a second
3 to bring it up and point to some of the specific instances of
4 consultation. But just off the top of my head, there was a
5 scoping period and comment period where interested parties,
6 including the tribes, could be heard and indeed were heard. So
7 that's an answer in a nutshell.

8 MR. NIXON: If I may, Your Honor?

9 THE COURT: Yes, please, Mr. Nixon.

10 MR. NIXON: Okay. First of all, that's -- your
11 question was in regard to the National Defense Authorization
12 Act consultation requirement; is that correct?

13 THE COURT: Correct.

14 MR. NIXON: And the tribe itself has its own lawsuit,
15 which it filed shortly after hours, as the Court is probably
16 aware. And among the claims presented in that complaint under
17 the Administrative Procedures Act, includes the National
18 Environmental Policy Act process, but also the National
19 Historic Preservation Act process.

20 And I think -- I would be doing the Court a favor to
21 advise or caution on the meaning of the word "consultation,"
22 because it is undefined in the law. There's no statutory
23 definition. There's no regulatory definition. It is kind of
24 like a common English definition of consultation, but it can
25 mean many different things.

1 So just having a meeting is often listed by the U.S.
2 Forest Service, not just in this case, but regularly, it's kind
3 of a pattern of practice, a meeting with Indians or anybody
4 will equal consultation for their purposes of satisfying
5 consultation requirements under NEPA, the National Historic
6 Preservation Act, or specialized statutes such as the National
7 Defense Authorization Act.

8 But I would point out, I think, that Dr. Welch cited
9 one of his articles called Discretionary Desecration, in which
10 he talks about, what is consultation and the quality of it, not
11 just the frequency of a meeting or the mere fact of a meeting,
12 like what consultation really is and what it isn't.

13 And so I would just note that and say that I've been
14 to many consultation meetings, so-called consultation meetings,
15 in other cases over the years involving the Apaches and the
16 Forest Service. And basically, it is just a listening session,
17 and nothing of substance takes place, in terms of true
18 consultation when you consult with somebody, like consult with
19 a doctor. It is nothing like that.

20 THE COURT: Well, Mr. Nixon, because the FEIS has
21 already been published, how will a favorable decision from me
22 on your due process and petition clause claims redress your
23 injury?

24 MR. NIXON: Because that FEIS making available to the
25 public and we do not concede it was published under the law as

1 the law requires or defines publication for -- and again, we
2 are not here under the Administrative Procedure Act, but
3 constitutionally, for terms of adequate effective notice and
4 due process in regards to the consequential effect of that act
5 of so-called publishing, it began the march of a 60-day
6 mandate, which will then result in an attempted conveyance of
7 this land whose ownership is in serious question.

8 I mean, whether or not you believe we've proved it's
9 Apache land now, certainly the government has never proved it
10 is theirs, or how much of an interest in it they have. Do they
11 have a total fee interest? Nobody knows. They certainly
12 don't, because they don't even have a legal description in the
13 FEIS, the draft EIS. It is to be provided later.

14 You look at the maps they have for the FEIS and the
15 DEIS, and the legal description is to be provided later, and
16 it's a map from a few years ago, I think March of a few years
17 ago.

18 THE COURT: Just one moment.

19 Olivia.

20 (Discussion held between Judge and Law Clerk.)

21 THE COURT: Mr. Schiffman, I have a question for you.
22 Do you contest plaintiff's standing to bring the First
23 Amendment free-exercise claims and the RFRA claim?

24 MR. SCHIFMAN: We -- so as to the R-F-R-A, RFRA
25 claims, we do not contest plaintiff's standing to bring that.

1 That's not needing to be asserted on behalf of the tribe. And
2 the same goes for plaintiff's free exercise of religion claim.

3 THE COURT: Mr. Schiffman, in your papers you cited
4 that where individual tribe members lack standing to assert
5 treaty rights under the Nonintercourse Act, can the same
6 reasoning from those cases be extended to other claims not
7 brought under that act?

8 MR. SCHIFMAN: Yes, that's correct, Your Honor. I
9 believe you are referring to the -- I am going to struggle to
10 pronounce this, so I won't do it, but the first of the cases
11 that we cite in our brief on page 6, Golden Hill Paugussett,
12 which I might not be pronouncing correctly, that was a
13 Nonintercourse claim, if I remember them correctly, and I
14 believe that some of the other cases were.

15 But the general principle that a treaty is between two
16 governments, so the United States Government and a government
17 of a federally recognized tribe, such as the San Carlos Apache
18 tribe, that principle stands for more than just cases brought
19 under the Nonintercourse Act.

20 So just as I as a citizen of the United States can't
21 go to the country of Italy and try to bring up treaties between
22 the United States Government and Italy, so too with tribal
23 members and the United States Government. The tribes -- the
24 treaties are between the tribal government and the United
25 States Government as part of a government-to-government

1 relationship.

2 THE COURT: Mr. Schiffman, again, the -- in the papers,
3 plaintiffs argue that the RFRA and free exercise claim should
4 be analyzed under an alternative framework set out in the
5 Supreme Court Little Sisters case. How does that framework
6 differ from the framework set out in the Ninth Circuit Navajo
7 Nation case?

8 MR. SCHIFMAN: Well, Your Honor, the Little Sisters
9 case that plaintiffs want to take the framework from, I believe
10 they are not citing the Supreme Court case but in fact citing a
11 Third Circuit case that was being decided on other grounds by
12 the Supreme Court.

13 So I think that's an important distinction that the
14 Supreme Court has never altered the substantial burden as
15 plaintiffs seem to be suggesting.

16 So I don't think it differs, but the -- another
17 important aspect of the substantial burden inquiry goes to the
18 Lyng case, and certainly no Supreme Court case that plaintiffs
19 have cited has either directly or indirectly called into
20 question the holding of that case, which is that the
21 government's management, use, disposition of its own property
22 cannot be a substantial burden.

23 THE COURT: Mr. Nixon, do you agree with defense
24 counsel's proposition just placed on the record?

25 MR. NIXON: Absolutely not. That's incorrect. I can

1 give the point of clarification with regards to the Little
2 Sisters of the Poor and the underlying reasoning in the Third
3 Circuit that we were spotlighting for you, if I may?

4 And I have some notes on it. I will just -- I was
5 prepared for this point --

6 THE COURT: Well, I'll tell you what, let's do this.
7 While you gather your notes, I have a question for Dr. Welch.

8 Dr. Welch, if you could move back to counsel table and
9 help me, please.

10 Sir, if you know, what specific language in the 1852
11 Treaty, or any subsequent document, indicates that a trust was
12 formed between the United States and the Western Apaches
13 regarding the land in issue? That's if you know.

14 THE WITNESS: I am not aware of any sort of codified
15 or written-down trust associated with the totality of the
16 Western Apaches or the Eastern Apaches territory referenced in
17 that 1852 Treaty.

18 The notion of a trust, to me, involves an obligation
19 on the part of the United States to designate those treaties
20 and to legislate and act for the happiness and, I think the
21 word is prosperity, of the Apaches affected by that treaty.

22 THE COURT: Well, Doctor, as you are well aware, the
23 1852 Treaty states in pertinent part the parties would later
24 designate boundary lines.

25 Do you know, in your research, if that was ever done?

1 THE WITNESS: I noted that there were various efforts
2 to designate the territories, and that those ultimately
3 floundered and failed for want of ratification at the Senate
4 level.

5 THE COURT: So the maps that are part of the record,
6 you don't believe created any type of trust relationship?

7 THE WITNESS: The maps you are referencing being of
8 course the main big map of Arizona and New Mexico, map 1?

9 THE COURT: And the designated boundary lines, that's
10 correct.

11 THE WITNESS: Your question is whether or not those
12 lands were placed into trust; is that correct?

13 THE COURT: Yes, if the maps that we have, that have
14 been received into evidence, do you think that created some
15 sort of trust relationship?

16 And Mr. Nixon, you can help the Doctor with my
17 question.

18 THE WITNESS: There are three maps from the plaintiffs
19 of course, and the only really two relevant ones are the first
20 one and the second one.

21 The first one being the conjoined maps produced in
22 1899 by Charles Royce. And they identify a polygon in there.
23 It's a big greenish area that encompasses southwestern New
24 Mexico and most of eastern -- excuse me -- central Arizona.

25 And that's polygon like 689, I believe, and that's

1 what's identified as the Western Apaches territory as
2 interpreted by Charles Royce. He, like I, as an anthropologist
3 and as the defense pointed out, we are not judges, this was his
4 interpretation based on the records that he reviewed in the
5 1880s, and I am adopting that as my best interpretation of what
6 the United States and the parties to the 1852 treaties would
7 have agreed to as the time as being Western Apache's treaty --
8 treaty territory, yes.

9 THE COURT: Dr. Welch, thank you very much.

10 MR. NIXON: And that Royce map is an official U.S.
11 Government document, correct?

12 THE WITNESS: Yes.

13 MR. NIXON: How so?

14 THE WITNESS: It was produced while Charles Royce was
15 in the employ of the Smithsonian Institution. One part of that
16 Smithsonian Institution called the Bureau of American
17 Ethnology.

18 THE COURT: Doctor, I appreciate your answers to my
19 questions.

20 Mr. Nixon, if I find that there's no trust
21 relationship, does that impact any of your other claims, other
22 than the breach of trust claim?

23 MR. NIXON: No, Your Honor. The trust relationship,
24 the trust duty and responsibility, the fiduciary duty to which
25 we are referring is a basic principle of constructive trust

1 based on the behavior of the United States Government in
2 usurping that land and based on the nature of the relationship
3 per the law of the land in federal Indian law in America
4 tracing back to Justice Marshall's opinion in Johnson v.
5 McIntosh, whereby Indian nations are considered to be domestic
6 dependent nations and essentially a ward of the United States
7 in that perspective.

8 There is an overarching trust duty based on the very
9 basic principles of constructive trust besides any voluntary
10 trust duty the United States would ever decide to give to
11 itself by statute or by regulation or other means.

12 And I do have an answer to your question, not from my
13 notes but just from my memory, in regards to that issue about
14 the Little Sisters of the Poor case looking at that Third
15 Circuit test.

16 And defense counsel characterized it from their
17 perspective. What I would say is that is an inaccurate
18 characterization and tends to gloss over what actually happened
19 there.

20 When you look at the Hobby Lobby decision, which is a
21 long opinion and very complex, it was a landmark case. And it
22 has progeny, of which Little Sisters of the Poor is one of the
23 most recent Supreme Court progeny.

24 There's a Second Circuit case just from the results of
25 the COVID-related pandemic strictures on churches and

1 synagogues in New York City, which tracks along with this. And
2 it may or may not end up in the Supreme Court; it remains to be
3 seen.

4 However, in the Little Sisters of the Poor case, just
5 like the Pennsylvania versus President of the United States
6 case, what the Supreme Court did was -- what took six pages in
7 an opinion on Justice Alito, I believe, a concurring opinion in
8 Hobby Lobby, they distilled it down, utilizing some of the
9 principles that the Third Circuit did, but they never rejected
10 the Third Circuit's improved test or the application of it or
11 its significance.

12 They were able to, after reiterating it in a more
13 simplified and more easily understandable way, found that they
14 could resolve the issue in that particular case by looking
15 elsewhere and different aspects of RFRA.

16 THE COURT: Mr. Nixon, why did you wait six years from
17 when the Southeast Arizona Land Exchange and Conservation Act
18 was signed into law to bring this claim?

19 MR. NIXON: It didn't become real until they published
20 the FEIS. They didn't have to publish that on January 15th.
21 It could have taken another 10 years. It was indefinite.
22 There was no mandate on the publication date of the FEIS.

23 And what we are attacking is the law as applied. It
24 is a very gigantic undertaking, Your Honor, to launch a case
25 like this. And we have three lawsuits right now in this

1 district that have appeared, ours -- a few days before the FEIS
2 got published, and two immediately thereafter.

3 And so whether we are -- we are not attacking the
4 direct constitutionality of the passage of the NDAA, but we are
5 certainly attacking and defending against its unconstitutional
6 application at this time, which just started less than a month
7 ago.

8 THE COURT: Mr. Nixon, the FEIS states that a surface
9 crater is not expected to break through on the land until six
10 years after the mining process begins.

11 In light of this, what immediate irreparable harm will
12 you suffer from the land exchange?

13 MR. NIXON: RFRA would no longer apply to that land,
14 and all the protections provided by Congress to the Apache
15 religious believers and livers would evaporate in an instant,
16 if in fact the U.S. Government even owns any legal interest in
17 that land, which we dispute and they certainly haven't proved.

18 THE COURT: Well, what evidence do you have of
19 discriminatory intent behind the land exchange, separate from
20 its discriminatory impact?

21 MR. NIXON: Just this morning, Your Honor, you heard
22 directly from Dr. Nosie himself who in various capacities, as
23 an individual, as member of Apache Stronghold, and in his prior
24 official capacities as tribal councilman and tribal chairman,
25 presented repeatedly before the introduction of the National

1 Defense Authorization Act Section 3003 rider, about the central
2 religious importance of this place, Oak Flat.

3 And the government, Congress, when it passed that
4 law -- you can't read in that law. We recognize the central
5 religious importance -- there's no deliberate regard of it,
6 much less an utterance that there's a compelling government
7 interest to have some Australian and English copper mining
8 companies take the copper ore out of here and take it overseas
9 and make some copper wire out of it. There's nothing like
10 that, and so that's why.

11 You know, for years, from the get-go, we are talking
12 now almost 18 years ago or more, the Apaches have been doing
13 everything they possibly can with the system we have. So this
14 brings us to court because it's inevitable the march went on
15 this way and it brought us here for which we are grateful to
16 have the opportunity, and this is where we, I say "we" as a
17 representative legal counsel for Apache Stronghold and its
18 members, are taking their stand because they have to do it
19 here.

20 THE COURT: Mr. Schiffman, in light of the Court's
21 questions, the last four questions, do you have anything that
22 you would like to place on the record?

23 MR. SCHIFMAN: Your Honor, I would like to make one
24 brief clarification as to the questions about title and the
25 United States' ownership of the land that plaintiff's counsel

1 has just brought up, just very briefly.

2 I would direct the Court -- Your Honor, we didn't
3 brief this, but if Your Honor has questions, we could elaborate
4 on this further.

5 But if plaintiffs are correct that the tribes at one
6 time had aboriginal title, the United States could extinguish
7 that title, and I would direct Your Honor's attention to a case
8 called Havasupai Tribe -- and I will spell that,
9 H-A-V-A-S-U-P-A-I, versus United States, 752 F. Supp. 1471,
10 which is a District of Arizona case that was then affirmed by
11 the Ninth Circuit.

12 And that case stands for the proposition, excuse me,
13 and I will quote, reservation of land for forest purposes
14 (silence on the line) whatever the questions of title and
15 whether the tribe had aboriginal title might have been, at the
16 time that the forest was placed into forest reserve, which you
17 know, occurred, I believe, over 100 years ago, at that time,
18 any title question would have been settled.

19 So that's the only thing I would like to clarify, at
20 this point, Your Honor.

21 MR. NIXON: Your Honor, if I may?

22 THE COURT: Yes, Mr. Nixon, go ahead. I will give you
23 a minute.

24 MR. NIXON: That's very presumptive, you know, and
25 certainly, for one thing, it would violate a trust

1 responsibility to make such a declaration. Certainly in this
2 case.

3 Whatever happened in that case, in regards to that
4 national forest and that tribe and its treaty history and its
5 Indian Claims Commission history, which by the way, Indian
6 Claims Commission decisions, which are administrative
7 procedures, do not have the effect and power or the authority
8 explicitly to extinguish aboriginal title.

9 One thing is for sure in this case, Western Apache
10 aboriginal title to the area that includes Oak Flat has never
11 ever been extinguished. It has never been given away by the
12 Apaches, never yielded. And so that case and that conclusion
13 is just inapplicable on the facts and the law.

14 THE COURT: Mr. Nixon, I will give you until 5:00
15 today to file your findings of fact and conclusions of law.

16 MR. NIXON: Thank you, Your Honor.

17 THE COURT: You're welcome.

18 We will not have closing arguments today. What I will
19 allow the parties to do is by close of business this coming
20 Friday, which is the 5th of February, by 5:00 p.m. Arizona
21 time, I need your written arguments.

22 They will not be more than 10 pages. That's including
23 any attachments you may have, and I will issue an order on the
24 matter no later than next Friday, which is -- what is that, the
25 13th?

1 Whatever next Friday is by 5:00 p.m -- the 12th.

2 MR. NIXON: Point of clarification, Your Honor?

3 THE COURT: Yes.

4 MR. NIXON: The written arguments, 10 pages total
5 including any attachments, what particular points of concern or
6 --

7 THE COURT: Whatever you believe helps your client the
8 most with what you are asking this Court to rule?

9 MR. NIXON: Very well. Thank you, Your Honor.

10 THE COURT: You're very welcome.

11 Is there anything else from the plaintiffs?

12 MR. NIXON: No, Your Honor.

13 MR. LEVENSON: No, Your Honor. Thank you.

14 THE COURT: Mr. Schiffman, is there anything from you?

15 MR. SCHIFMAN: Nothing from the federal defendants,
16 Your Honor.

17 THE COURT: This hearing is adjourned. Everyone be
18 safe. Thank you for your time.

19 (Proceedings conclude at 12:02 p.m.)
20
21
22
23
24
25

C E R T I F I C A T E

I, ELVA CRUZ-LAUER, do hereby certify that I am duly appointed and qualified to act as Official Court Reporter for the United States District Court for the District of Arizona.

I FURTHER CERTIFY that the foregoing pages constitute a full, true, and accurate transcript of all of that portion of the proceedings contained herein, had in the above-entitled cause on the date specified therein, and that said transcript was prepared under my direction and control.

DATED at Phoenix, Arizona, this 4th day of February, 2021.

s/Elva Cruz-Lauer
Elva Cruz-Lauer, RMR, CRR

UNITED STATES DISTRICT COURT

ER119

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Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA

Apache Stronghold,	)	No. CV-21-_____
a 501(c)(3) nonprofit organization,)	
)	
Plaintiff,	)	DECLARATION OF
	)	CRANSTON HOFFMAN JR.
v.)	
)	
United States of America,)	
)	
Sonny Perdue, Secretary, U.S. Department)	
of Agriculture (USDA),)	
)	
Vicki Christensen, Chief, Forest Service,)	
USDA,)	
)	
Neil Bosworth, Supervisor, Tonto National)	
National Forest, USDA,)	
)	
And)	
)	
Tom Torres, Acting Supervisor, Tonto)	
National Forest, USDA,)	
)	
Defendants.)	

Under the penalties of perjury in accordance with the laws of the United States of America, I hereby declare:

1. I, Cranston Hoffman Jr, am an enrolled member of the San Carlos Apache Tribe.
2. I was born on May 31, 1952 in San Carlos, Arizona.
3. I am of the Tanasgizin Clan ("Washed People") on my mother's side and born for the Tiis tu ayeh Clan ("Cottonwood Sticking in the Water") on my father's side.
4. I am a Veteran. I served in Desert Storm in the Persian Gulf.
5. I am an Apache Traditional Practitioner and Medicine Man who conducts the Apache Holy Grounds Ceremony.
6. I was raised by parents who taught me and my siblings about the Apache way of life.
7. When I was a child, I remember early memories of Chi'Chil Bildagoteel ("Oak Flat") when my family stopped to pick acorn at Oak Flat. I also remember picking medicine in the area too. My family and I drove around in the nearby Pinto Creek where there were plenty of cottonwood and acorn trees along the creek. This whole region we visited at different seasons of the year.
8. Chi'Chil Bildagoteel ("Oak Flat") is a holy place. It is part of Western Apache lands. Today there are living descendants of our ancestors whose clans come from this territory. Many of the living descendants are enrolled tribal members from the San Carlos Apache Tribe. In early history, the United States Government prevented us from freely roaming through these lands because the lands were rich in natural resources. During this time and for many years, the Government also restricted Apaches from freely practicing their traditional ceremony, both on and off the reservation. Instead of stopping our religious practices we had our ceremonies in secluded areas. The Government laws were strict and our ceremonies were hidden but we kept conducting them, even at Chi'Chil Bildagoteel.
9. I was taught and learned the ways of the Holy Ground ceremony from the Hoffman side of my family. The stories, songs, and prayers from the Holy Ground ceremony have been passed down for

many generations within my family line. In return, I am teaching the next generation so they will be able to teach the future generations about the Holy Grounds ceremony.

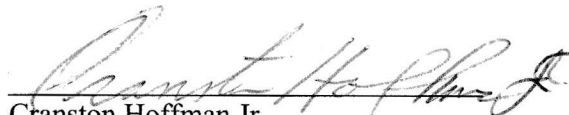
10. The Holy Grounds Ceremony is a blessing and a healing ceremony. At Chi'Chil Bıldagoteel ("Oak Flat") the Holy Ground ceremony is conducted for people who are sick, have ailments or seek guidance. The Holy Grounds ceremony is also a ceremony to pray for elements that are part of the eco-system, like rain, so water can rain down upon the People (the Apache), the animals, medicines, minerals, and trees. Oak Flat is a holy place for healing.

11. I have conducted the Holy Grounds ceremony at Chi'Chil Bıldagoteel ("Oak Flat") for many years. The Holy Ground ceremony at Oak Flat supports life, and the emotional, physical and spiritual well-being of our People (the Apache). It is a ceremony that should not be recorded or shared in social media or newspapers as it is very personal.

12. To have a land exchange occur at Oak Flat and to have destruction of this spiritual place by mining—these actions will have a direct, negative effect on me and members of the Holy Ground group who assist me in conducting these ceremonies. The prayers we have offered will be disrupted, the negative things extracted will resurface and we believe that these negative elements will come back to hurt us, our loved ones, and/or our tribal community. Our religious beliefs in the good that we do by conducting prayers at a special, holy place will be broken. We do not want this for our People, for our Future and for Ourselves. Just as I served to defend this Country as a soldier in the Army, I serve my People to defend our traditional Apache Way of Life as an Apache Medicine Man who conducts the Apache Holy Grounds Ceremony at Oak Flat. I request that our declarations be heard and considered fairly and in good faith.

Respectfully submitted,

Dated: January 10, 2021


Cranston Hoffman Jr.

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 Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA
 Phoenix Division

Apache Stronghold,	)	No. 2:21-cv-00050-CDB
a 501(c)(3) nonprofit organization,)	
)	
Plaintiff,	)	DECLARATION OF
	)	CLIFFORD LEVENSON
v.)	
)	
United States of America,)	
)	
Sonny Perdue, Secretary, U.S.)	
Department of Agriculture (USDA),)	
)	
Vicki Christensen, Chief, Forest Service,)	
USDA,)	
)	
Neil Bosworth, Supervisor, Tonto)	
National Forest, USDA,)	
)	
And)	
)	
Tom Torres, Acting Supervisor, Tonto)	
National Forest, USDA,)	
)	
Defendants.)	

I, Clifford Levenson, under the penalties of perjury in accordance with the laws of the United States of America, hereby declare:

1. I am counsel of record for the Plaintiff, Apache Stronghold, in the above captioned matter.

2. On January 13, 2021, at approximately 10:30am, I called the U.S Attorney's Office in Flagstaff, Arizona, and identified myself as counsel for Apache Stronghold in its lawsuit against the United States. I provided the receptionist with the case number, and my contact information, and indicated that I wished to provide the U.S. Attorney's Office with a copy of the lawsuit, and to discuss the matter. The receptionist indicated that my contact information would be provided to an attorney from the civil division in Phoenix, and that I would get a return call. I did not receive a return call.

3. On January 13, 2021, at 4:23pm, I called the U.S. Attorney's Office in Phoenix. There was no answer, and there was no voice mail available.

4. I have provided a certified process server with copies of all pleadings filed by the Plaintiff in this matter, and the process server has been directed to serve the documents on the U.S. Attorney's Office in Phoenix on the morning of January 14, 2021.

Respectfully submitted,

/s/Clifford Levenson
Clifford Levenson

Date: January 13, 2021

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 Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA
 Phoenix Division

Apache Stronghold,	)	No. 2:21-cv-00050-CDB
a 501(c)(3) nonprofit organization,)	
)	
Plaintiff,	)	DECLARATION OF
	)	NAELYN PIKE
v.)	
)	
United States of America,)	
)	
Sonny Perdue, Secretary, U.S.)	
Department of Agriculture (USDA),)	
)	
Vicki Christensen, Chief, Forest Service,)	
USDA,)	
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National Forest, USDA,)	
)	
And)	
)	
Tom Torres, Acting Supervisor, Tonto)	
National Forest, USDA,)	
)	
Defendants.)	

I, Naelyn Pike, under the penalties of perjury in accordance with the laws of the United States of America, hereby declare:

1. I am a member of the San Carlos Apache Tribe and reside on the San Carlos Apache Reservation in rural Southeast Arizona. I am Chiricahua Apache, and my family has lived in what is now Southeastern Arizona since time immemorial.

2. Chi'Chil Biłdagoteel (“Oak Flat”) is Apache sacred and religious land and has been since time immemorial. I exercise my religion there and my religious beliefs are centered in and on the land of Oak Flat.

3. I make this Declaration today to advocate for the protection of my Apache peoples’ land, our Apache religion, our Apache religious beliefs, and our traditional Apache homeland on behalf of the next generation and the generations yet to come, and to stop the terrible plans of the foreign mining corporations Rio Tinto, BHP Billiton, and their new local company Resolution Copper, to take and destroy Oak Flat and destroy our Apache religious lives.



Naelyn Pike (Photo: Apache Stronghold).

4. The essence of an Apache woman is our traditional land and our religious connection to to Nahgosan, Mother Earth, which includes the sacred places like Oak Flat.

5. At least eight Apache clans and two Western Apache bands have documented history in what is today known as Oak Flat and Apache Leap. Apache people are deeply connected to our traditions and to the land that we have called home since first put here by Usen, the Creator. Our religious beliefs entwine with land, water, plants, and animal. My people have lived, prayed, and died in Oak Flat and Tonto National Forest for centuries.

6. The United States Calvary had forced my people from the land and onto the reservation in the late 1800s as prisoners of war. While we had to leave our sacred places at gunpoint, these areas still retain their spiritual, cultural, and historical connection to the

Apache people. Today we continue cultural and religious practice and have the right to continue our religious freedom now, and in the future, as it was given to us by Usen.

7. Just the other day, the Forest Service publicly stated for the first time that the Forest Service will publish the Final Environmental Impact Statement (“Final EIS” or “FEIS”) for the Southeast Arizona Land Exchange and Resolution Copper Mine (“SALE-RCM”) on this coming Friday, January 15, 2021.¹

8. We have the right to go back to these places because San Carlos is where we were forced to by the U.S. Army and placed as prisoners of war after the Apache defense of our homeland in the 1800s. San Carlos—that’s not my Apache home. My ancestors that were forced to leave home were placed in Old San Carlos, where settlers from back east called “Hell’s 40 Acres” because it was a place where no human beings could live. This was a place for my ancestors to live the rest of their lives as prisoner and now that name is called tribal member. My ancestors lived and roamed in Oak Flat and Mount Graham before law was created and boundaries were set not allowing them to go back. I am a descendent of those who were prisoners that continues to fight for the freedom to pray and be free just as those before me since time immemorial.

¹ “Trump To Approve Land Swap For Rio Tinto's Resolution Copper Project,” Ernest Scheyder, Reuters (January 4, 2021) (“The U.S. Forest Service will publish a final environmental impact statement for the mine on Jan. 15, a necessary step to complete the land exchange, said Tom Torres, acting supervisor of the Tonto National Forest, where the mine would be built.”). Article accessed on January 10, 2021, for citation at <https://www.msn.com/en-gb/news/world/trump-to-approve-land-swap-for-rio-tintos-resolution-copper-project/ar-BB1ct2gu>.

9. That is why I'm fighting for my Apache home, for Chi'Chil Bildagoteel ("Oak Flat") and Dzil Nchaa Si'An (known to settlers and their descendants today as "Mount Graham").

10. I am fighting for those Apache places because those places—you can be born there, you can live there, take the medicinal plants, eat the food and drink the water, have Apache religious ceremonies, and be free, and live that essence of life of who we are—is a God-given gift that our creator has given to us for sacred religious purposes that we believe in as we must as God expects us to, and it must be protected for that reason. And also that the future of our children can still have the ability to pray where they should and to be able to still believe in the spiritual things that live there and know we can connect to Usen, as it was taught to me by my great-grandmother.



Apache Religious Sunrise Ceremony at Oak Flat
(Photograph with family permission ©).

11. In Apache religion, Usen gives the gift of life and the bearing of children to the female. In this gift our people celebrate the beginning, and the first women who gave life to our people. This is the Sunrise Ceremony that our young Apache girls do when they have their first menstrual. This is what I did on Mount Graham and my sister, Nizhoni Pike did at Oak Flat. The sunrise ceremony is given to us as a right of passage that sets a path for our life in the future. It doesn't just bring life and blessing to the girls but for all of Usen's creation.



Apache Religious Sunrise Ceremony at Oak Flat
(Photograph with family permission ©).

12. We believe that the place the ceremony takes place is the life thread forever connecting the place and the girls who have their ceremony there, and their direct connection to the land. The destruction of Oak Flat will not only destroy the land, water,

plants, animals, cultural history, historical artifacts, and Apache religious beliefs seated there, but it will also harm these girls' life and their connection to their rebirth.



Apache Religious Sunrise Ceremony at Oak Flat
(Photograph with family permission ©).



Apache Religious Sunrise Ceremony at Oak Flat
(Photograph with family permission ©).

13. True unity is accepting one another's diversity, because each and every one of us is beautiful as the Creator has made us in His image. We all have a story. I have my own story. My mom has her story. Those before us have a story. This mine will not allow the future to have a story. But, as long as we understand each other's stories and we accept that beautiful diversity in all people, because we are human beings in this world, the one thing we can understand is that we all have one issue on which we can relate: living in peace together.



Traditional Apache Religious 'Changing Woman' Sunrise Dance Ceremony at Chi'Chil
Bildagoteel ("Oak Flat")

(Photograph with family permission. © Robin Silver Photography).

Respectfully submitted,

/s/Naelyn Pike
Naelyn Pike

Date: January 10, 2021

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IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA
 Phoenix Division

Apache Stronghold,	)	No. 2:21-cv-00050-CDB
a 501(c)(3) nonprofit organization,)	
)	
Plaintiff,	)	DECLARATION OF
	)	WENDSLER NOSIE, SR., Ph.D.
v.)	
)	
United States of America,)	
)	
Sonny Perdue, Secretary, U.S.)	
Department of Agriculture (USDA),)	
)	
Vicki Christensen, Chief, Forest Service,)	
USDA,)	
)	
Neil Bosworth, Supervisor, Tonto)	
National Forest, USDA,)	
)	
And)	
)	
Tom Torres, Acting Supervisor, Tonto)	
National Forest, USDA,)	
)	
Defendants.)	
_____)	

I, Wendsler Nosie, Sr., under the penalties of perjury and in accordance with the laws of the United States of America, hereby declare:

1. Chi'Chil Bildagoteel ("Oak Flat") is Apache sacred land and a Western Apache traditional cultural property and religious ground where my religious beliefs are seated and are freely exercised, as it has been for Western Apaches since time immemorial. It is still Western Apache land by the 1852 Treaty of Santa Fe and belongs to all Western Apaches. Oak Flat does not belong to the United States of America and so the United States has no authority to sell it, exchange it, or otherwise convey it or give it away.

2. Even though the United States has tried to steal Oak Flat away from us, we have never given up or sold that Treaty land. Our traditional Apache religion does not even allow us to do such a bad thing as that. Oak Flat is ours and always has been since time immemorial, long before the United States of America ever existed.



Wendsler Nosie, Sr. standing alongside an Apache ceremonial sweat lodge frame at Chi'Chil Bildagoteel ("Oak Flat") (Photo by Eli Imadali, Arizona Republic).

3. I was born in July 1959, on the San Carlos Apache Reservation. I was raised in a traditional Apache way of life. I graduated from the Globe High School in May 1978 and attended Merritt College in Oakland, California, attended Phoenix College in Phoenix, Arizona, and completed the State of Arizona Banking Academy. On February 26, 2016, I received my title as AUSN Professor in the Practice of indigenous Knowledge from the American University of Sovereign Nations and on June 13, 2018 received my PhD, a Doctorate in Bioethics, Sustainability and Global Public Health from the American University of Sovereign Nations.

4. I am the son of the late Elvera Ward Nosie and the late Paul Nosie Sr. My mother, Elvera Nosie was born in Old San Carlos as a Prisoner of war. Her father was

George Ward and her mother Maria Galvan. My grandfather George Ward, the son on Hiram Ward and Altisa were among the first Yavapai prisoners at Old San Carlos, driven from the Pinal Mountains and Oak Flat area, and Camp Verde areas to Old San Carlos. My father Paul Nosie Sr. was the son of William Nosie and April Logan, the descendants of Chief John Nosie of the Chiricahuas. April Logan was the Daughter of Walter and Ella Mary Logan, the family of Abraham Logan, the keeper of the Holy Ground in Seven Mile, San Carlos.AZ My clan is Stiniye and I am a descendent of the Bedonkohe band of Apaches, the band of Geronimo.

5. Naelyn Pike is my granddaughter. I have read her Declaration in this case and I adopt it and incorporate her words here into my Declaration, too. We have come a long way together through this struggle to protect our ancestral homelands, and I am thankful for her never-ending support and courage, especially during the most difficult times. Her powerful voice and determination to help protect the things we hold dear are a constant reminder that we must do so for future generations as Apache people.

6. I have been elected and served in the government of the San Carlos Apache Tribe as a Councilman (1989-92; 2004-2006; 2010-2012; 2012- 2016) and as Chairman (2006-2010).

7. I am the co-founder and spokesperson of Apache Stronghold, a 501(c)(3) not-for-profit organization registered in Arizona, and headquartered in the town of San Carlos in the San Carlos Apache Tribe's reservation land, bordered by the White Mountain Apache Tribe, the Navajo Tribe, the State of Arizona, and some federally-managed lands of the United States.

8. For over a decade our Tribe fought to stop the Southeast Arizona Land Exchange (“Land Exchange”), a proposal to transfer approximately 2,422 acres of our ancestral homelands in the Tonto National Forest (“TNF”) to foreign mining conglomerates, Rio Tinto and BHP, to dig a questionable and vast copper mine beneath lands we hold as sacred. Thanks to the vocal opposition of more than 400 Native Nations and tribal organizations the House of Representatives pulled the Land Exchange from floor consideration twice during the 113th Congress (January 3, 2013, to January 3, 2015) due to lack of support.

9. Despite this nationwide opposition, the Land Exchange was buried on page 1,103 of a 1,700-page National Defense Authorization Act (“NDAA”) that was unveiled on December 13, 2014, just minutes prior to midnight, the evening before votes.¹ This despicable action is the antithesis of democracy and has threatened to forever destroy our way of worship and life, yet the United States and its Forest Service leaders persist, now rushing this week to publish a Final Environmental Impact Statement (“FEIS”) so it can trigger the provision in Section 3003 of the NDAA that allows the Forest Service to immediately do the Land Exchange to transfer ownership to Resolution Copper.

¹ “Senate passes spending bill, ends government shutdown threat,” By David Lawder and Amanda Becker, Reuters (December 13, 2014) <https://www.reuters.com/article/us-usa-congress-budget/senate-passes-spending-bill-ends-government-shutdown-threat-idUSKBN0JR0I820141214>. See also, “Crowd protests copper mine on sacred lands,” Apache Messenger/Indianz.com (December 22, 2014) <https://www.indianz.com/News/2014/015978.asp>.

10. This past week, as we suddenly learned without any prior official notice—even though we have been actively involved in the process directly with the U.S. Forest Service and the other federal agencies working with the Forest Service on the proposed Oak Flat Land Exchange, such as the President’s Advisory Council on Historic Preservation (“ACHP”)—that as the Forest Service publicly stated to a news reporter² that they will publish the FEIS this Friday, January 15, 2021, setting up the stage for the Land Exchange of Oak Flat—which could then happen the very same day as the publication of the FEIS.

11. There is nothing mandating that the Forest Service must publish the FEIS on January 15, 2021, or even any day this month or next. In fact, there is no FEIS publication date mandated in the NDAA at all.

12. If the Land Exchange is permitted to move forward through finalization of a flawed Draft Environmental Impact Statement (“DEIS”) process, the mining corporation and TNF, both acknowledge that the mine will cause a vast subsidence in the earth, destroying our Sacred Oak Flat, our religion, and with that, destroying our ability to have and preserve our traditional Apache way of prayers, our religious beliefs and ceremonies, and our religious Apache way of life.

² “Trump To Approve Land Swap For Rio Tinto's Resolution Copper Project,” Ernest Scheyder, Reuters (January 4, 2021) (“The U.S. Forest Service will publish a final environmental impact statement for the mine on Jan. 15, a necessary step to complete the land exchange, said Tom Torres, acting supervisor of the Tonto National Forest, where the mine would be built.”). Accessed on January 10, 2021 via <https://www.msn.com/en-gb/news/world/trump-to-approve-land-swap-for-rio-tintos-resolution-copper-project/ar-BB1ct2gu>

13. We said for years, Resolution Copper’s mining operations will have devastating impacts on our history, our culture, our religious practices, and the natural resources and environment of this area, especially the region’s water supply. For years, proponents of Resolution Copper ignored these harsh realities and insisted that the benefits of jobs, which were greatly exaggerated and fluctuated frequently, were worth the toll to the environment and life of the surrounding communities. Yet, the DEIS confirmed in large part the permanent damage and losses we already knew would occur to the broader physical environment, and our places of religious worship and cultural reverence should the project be allowed to proceed.

14. The proposed mine would directly, adversely and permanently affect and destroy numerous cultural artifacts, sacred seeps and springs, traditional ceremonial areas, resource gathering localities, burial locations, and other places of high spiritual value to tribal members.

15. The analysis of the Tribal Values and Concerns focuses the impacts of the proposed Land Exchange and Resolution Copper Mine on the past without recognizing the current presence of religious and cultural practices that have endured at Oak Flat for centuries. This erasure of Native Americans in contemporary terms perpetuates the genocidal history of America.³

³ See, e.g., “Earth, Wind and Fire: Pinal Apaches, Miners, and Genocide in Central Arizona, 1859-1874,” Welch, John R., Sage Open Journal, vol.7, no.4 (October-

16. What was once gunpowder and disease is now replaced with bureaucratic negligence and mythologized past that treats us, as Native people, as something invisible or gone. We are not. We are still a vibrant and vital part of our Nation's fabric despite repeated attempts to relegate our cultures as artifacts in museums or blubs in history books. However, the permanent damage that will be caused by the Resolution Copper Mine is something that will contribute to this genocidal narrative continuing now and well into the future.

December 2017). Available online at
<https://journals.sagepub.com/doi/full/10.1177/2158244017747016>.

DECLARATION OF WENDSLER NOSIE, SR., Ph.D.

8

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Ga'an Mountain Spirit Dancer, Western Apache Sunrise Religious Ceremony at Oak Flat (May 19, 2012) Photograph with family permission.
© Robin Silver Photography.

17. It is important to understand that we have never lost our relationship to Chi'Chil Bildagoteel. Despite the violent history of the U.S. Government's exile, forced march and imprisonment of Native people on reservations, and the efforts by the U.S. Government to discourage, impede, or fully disallow us from coming to this holy area, we have our own legacy of persistence and never letting go of this place.

18. Chi'chil Bildagoteel's religious value to our prayers, our ceremonies, and in our family histories cannot be overstated. Native religion was the first religion practiced in this area.

19. We have established an encampment to protect the Holy Ground at Chi'chil Bildagoteel with its four crosses, which represent the entire surrounding Holy and Sacred area, including its water, animals, oak trees, and other plants central to our Western Apache tribal identity.

20. It is important to note that Chi'chil Bildagoteel is listed in the National Park Service's National Register of Historical Places ("NRHP") as a Historic District and Traditional Cultural Property ("TCP").⁴ Emory oak groves at Oak Flat used by tribal members for acorn collecting are among the many living resources that will be lost along with more than a dozen other traditional plant medicine and food sources. Other unspecified mineral and plant collecting locations and culturally important landscapes will also be affected.

21. Development of the Resolution Copper Mine would directly and permanently damage Chi'chil Bildagoteel, our sacred holy ground that is vital to us, which is why we strongly oppose this operation. The impacts that will occur to Oak Flat will undeniably prohibit the Apache people from practicing our ceremonies at our Holy site. Construction

⁴ U.S. Department of Agriculture Tonto National Forest (2015) National Register nomination for the Chi'chil Bildagoteel National Historic District, Pinal County, Arizona (U.S. National Park Service, National Register of Historic Places, approved March 4, 2016). Retrieved from <http://bloximages.chicago2.vip.townnews.com/tucson.com/content/tncms/assets/v3/editorial/8/b1/8b10c3b0-77ed-560b-bd5f-bc0552df7e7c/56e363c6b87ba.pdf.pdf>

of the mine would cut off access and once the mine has been completed, the destruction will create a permanent barrier preventing Apache ceremonies from taking place.

22. Our connections to the Oak Flat area are central to who we are as Apache people. Numerous people speak of buried family members. Most of them include childhood memories. Everyone speaks to the deep spiritual and religious connection that Apaches have to the land, water, plants and animals at Oak Flat that would be permanently destroyed by this proposed action.

23. The destruction to our lands and our sacred sites has occurred consistently over the past century in direct violation of treaty promises and the trust obligation owed to Indian tribes.

24. Please keep in mind that the Land Exchange was achieved through a backroom agreement, literally at midnight the evening before attaching it to the NDAA. We would not be in this position today had the Land Exchange gone through regular order and been subject to meaningful and honest debate.

25. It always has been told and taught to us for generations by our parents, our elders, our traditional Apache religious leaders—and it is embedded in our way as passed down from our Apache ancestors—that this place, Oak Flat, is special and holy and sacred. This is a unique and special sacred place as we believe in the spiritual forces of God the Creator that he put there for us and for us to protect and honor in the humble exercise of our traditional Apache religious lives.

26. When our families gather at Oak Flat to celebrate our religious beliefs, we are no different

than our Christian brothers and sisters who gather at their respective churches on Sundays and other holy days. The only difference is our permanent place of prayer and worship is under attack and will be destroyed if the FEIS is published this Friday, January 15, and the transfer of possession of Oak Flat to Resolution Copper takes place.

27. This case is for the survival and protection of our Apache religion, and the Forest Service must be stopped from publishing that FEIS this Friday, January 15, because there is no compelling reason for them to do that so suddenly and right now.

28. The publication of the FEIS on January 15, 2021, would violate our Due Process rights under the Fifth Amendment to the U.S. Constitution which guarantees us the right to have adequate and effective notice of government acts that will affect our legal rights. Ten (10) days' notice is utterly inadequate for such a momentous decision having such catastrophic adverse effects on our First Amendment Rights to our religious beliefs and the free exercise of our Apache religion, and prejudices and harms our First Amendment Rights to Petition the Government for Redress of Grievances and the corresponding Right to Remedy included within the Petition Clause of the First Amendment.

29. Oak Flat is Apache land and we must be allowed to protect our land and our religious beliefs and religious freedom rights before the harms increase and accelerate with the Forest Service's publication of the FEIS this coming Friday, just four (4) days from now.

30. Neither Apache Stronghold, nor myself or any Apache officials received direct or adequate notice that the Forest Service has suddenly decided to make the

publication of the FEIS on January 15, 2021 until it was revealed to us only by us seeing that online news report by Reuters the other day. This FEIS publication is also a precursor genocidal act and this Court must not allow it.



Wendsler Nosie, Sr., at Chi'Chil Bildagoteel ("Oak Flat") (Photo by Adriana Zehbrauskas for The New York Times)

Respectfully presented,

/s/ Wendsler Nosie
Wendsler Nosie, Sr., Ph.D.

Date: January 11, 2021

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IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA

Apache Stronghold,)	No. CV-21-_____
a 501(c)(3) nonprofit organization,)	
)	
Plaintiff,	)	DECLARATION OF
	)	JOHN R. WELCH, Ph.D.
v.)	
)	
United States of America,)	
)	
Sonny Perdue, Secretary, U.S. Department)	
of Agriculture (USDA),)	
)	
Vicki Christensen, Chief, Forest Service,)	
USDA,)	
)	
Neil Bosworth, Supervisor, Tonto National)	
National Forest, USDA,)	
)	
And)	
)	
Tom Torres, Acting Supervisor, Tonto)	
National Forest, USDA,)	
)	
Defendants.)	
_____)	

Under the penalties of perjury in accordance with the laws of the United States of America, I hereby declare:

1. I, John R. Welch, am a tenured full professor, jointly appointed in the Department of Archaeology and in the School of Resource and Environmental Management, at Simon Fraser University, British Columbia, Canada. I also direct research and outreach activities in my capacities and the director of the nonprofit Archaeology Southwest's Landscape and Site Preservation Program.

2. I have a lifelong interest in the natural and human history, geography, and management of the American Southwest and earned my graduate degrees in anthropology (MA, 1985; PhD, 1996) from the University of Arizona, Tucson.

3. I am a registered professional archaeologist (RPA 10027) and, over the last 36 years, have been employed by private consulting firms, by the University of Arizona, by the U.S. Department of the Interior, by the White Mountain Apache and San Carlos Apache Tribes, by Archaeology Southwest, and by Simon Fraser University.

4. I began working with Western Apache (Ndee) lands and leaders in 1984, while a graduate student, and from 1992 to 2005 served as the archaeologist and historic preservation officer for the White Mountain Apache Tribe. My work during this period included documenting, assessing the significance of, and protecting archaeological and cultural resource sites, training crews of Apache foresters and resource technicians to do the same, and assisting in the planning and implementation of land alteration and forest treatment projects. I also advised Apache elected and cultural leaders regarding their participation in the implementation of the Native American Graves Protection and Repatriation Act (NAGPRA). I also advised Apache leaders in their consultations with federal agencies, including the U.S. Forest Service and the Tonto National Forest, as those agencies attempted to comply with the National Historic Preservation Act and the National Environmental Policy Act.

5. My work on Western Apache archaeology and land use has involved close collaborations with recognized Western Apache experts in history and culture. Those collaborations have allowed me to acquire knowledge of changes in the use, occupation, and management of Western Apache ancestral

lands, including the area containing Chí'chil Bítłagoteel ("Emory Oak Extends on a Level," widely known as "Oak Flat"). I have endeavored to translate the privileges flowing from my collaborations with Western Apache people and their lands into useful and informative publications about regional history, archaeology, and persistent Apache interests in their lands and places within and beyond reservation boundaries. A full chronicle of these publications and my employment and research funding histories are presented in my curriculum vitae, which is attached hereto and incorporated herein by this reference.

6. In February 2018, relying on the same expertise I outlined above, I gave sworn expert testimony on behalf of the San Carlos Apache Tribe before the Arizona Department of Environmental Quality in Administrative Hearing No. 17-001-WQAB.

7. Reviewing all of the information presented herein, including the history of the 1852 Treaty between the Apache Nation and the United States, the proceedings of the Indian Claims Commission, and all relevant federal executive orders and agency decisions, I have reached an opinion regarding tenure of the land now known as Oak Flat. That opinion is that Oak Flat is Western Apache ancestral land contained within the Western Apaches' Treaty Territory and cannot be owned by the United States of America or any other entity or person. The information that I have relied on is the kind of information that an archaeologist and historian would rely on to determine the opinions that I have formed here

8. I have, over the decades, heard stories from many Western Apache leaders and colleagues to the effect that U.S. Army forces attacked the camps of their forebears, killing their families, evicting them from most of their ancestral lands, and concentrating the survivors at San Carlos and Fort Apache. The results of my 2017 peer-reviewed study on this deeply disturbing facet of Arizona history are freely available as "Earth, Wind, and Fire: Pinal Apaches, Miners, and Genocide in Central Arizona, 1859-1874" (Sage Open [October-December]:1-19).¹

9. That research into the Pinal Apache Genocide and related aspects of Western Apache-U.S. relations prompted further inquiry into the use and tenure of Western Apache ancestral lands not included

¹ Available online at: <https://journals.sagepub.com/doi/full/10.1177/2158244017747016>

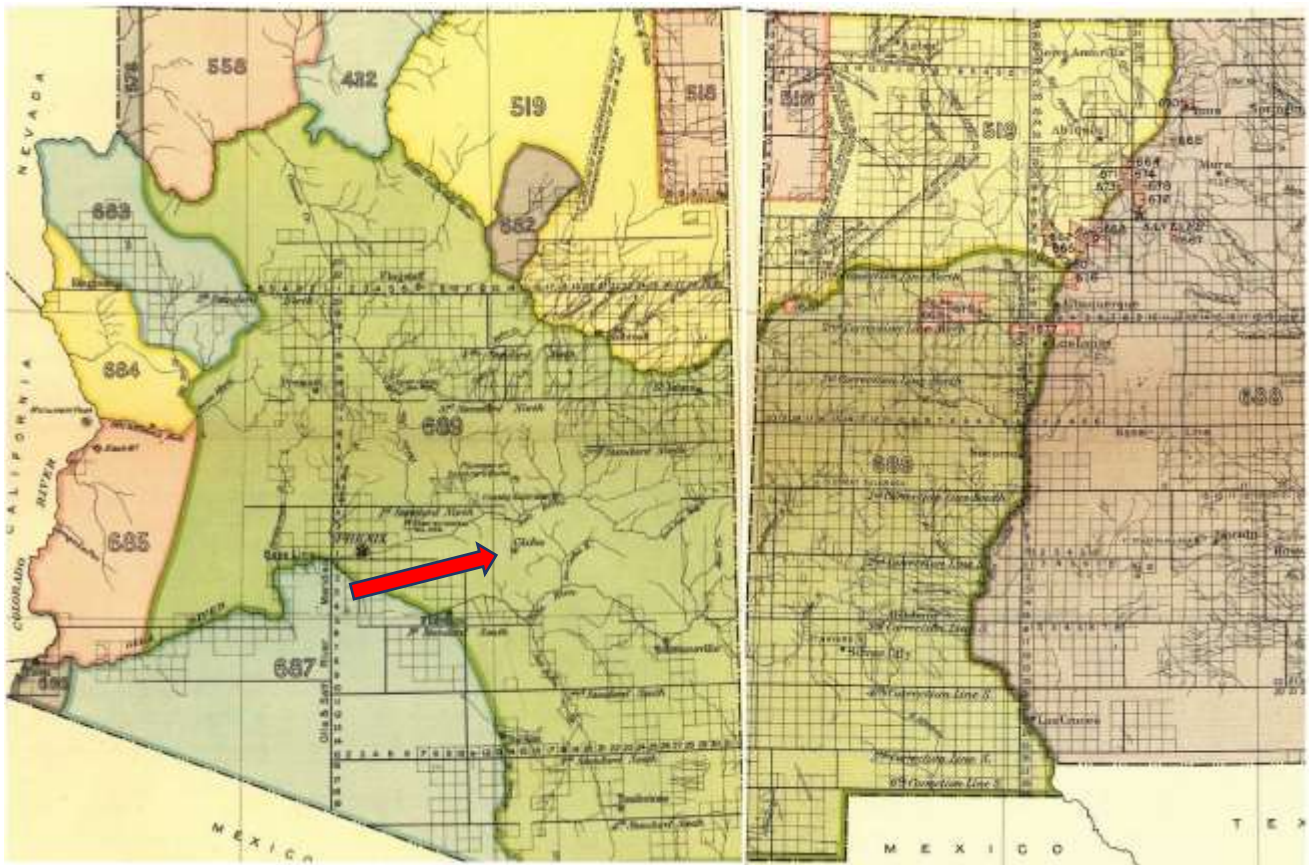
within the U.S. Government-designated boundaries of Western Apache tribal trust lands (i.e., the Camp Verde, San Carlos, Tonto, and White Mountain Apache reservations).

10. In later 2018 and continuing through 2020, I took a particular interest in the 1852 Treaty between the U.S. and the Apache Nation of Indians (sometimes referenced as the Treaty of Santa Fe), (herein “1852 Treaty”). That 1852 Treaty was signed by representatives of Apache peoples living both to the east of the Rio Grande (that is, Eastern Apaches—the Plains and Mescalero Apache) and west of the Rio Grande (that is, the Western Apaches—the Chiricahua and Western Apache).² The 1852 Treaty was duly ratified by the U.S. Senate and proclaimed by President Pierce on March 25, 1853. I did not find evidence that the 1852 Treaty was ever amended or rescinded. This research has resulted in a draft manuscript being prepared by me for professional, peer-reviewed publication.

11. My research investigated the articles of that 1852 Treaty, the boundaries of the Apache lands covered by that agreement, which I refer to as the Western Apaches’ Treaty Territory, and the Treaty’s signatories, application, and enforcement. My review of the 11 articles of the 1852 Treaty identified found several articles that recognize Apache territory through direct and indirect references. Article 7 of the 1852 Treaty affirms that the “people of the United States of America shall have free and safe passage through the territory of aforesaid Indians.” In Article 8, the parties agree that, “to preserve tranquility and to afford protection to all the people and interests of the contracting parties, the government of the United States will establish such military posts and agencies, and authorize such trading houses at such times and places as the said government may designate.” Article 9 affirms “that the government of the United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.” In Article 11, the parties agree the “Treaty shall be binding [and] ... the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.”

² Kappler, Charles J., Compiler and Editor (1904). *Indian Affairs: Laws and Treaties*, Vol. II (Treaties). Washington DC: Government Printing Office, pages 598-600.

12. My investigation of the 1852 Treaty found that the U.S. Smithsonian Institution, Bureau of American Ethnology, mapped and published what I refer to as the Western Apaches' Treaty Territory to encompass most of the southern half of New Mexico Territory (present day New Mexico and Arizona) west of the Rio Grande (Figure 1, Map Area 689).³ Map 1, below shows cropped portions of two maps, "Arizona 1" and "New Mexico 1" conjoined to depict the 1852 Western Apaches' Treaty Territory (central greenish area "689"). The red arrow points to the approximate location, within the Western Apaches' Treaty Territory, of the Apache place known as Chi'chil Bildagoteel (Oak Flat).



MAP 1

13. My research has also included a review of U.S. Federal Government actions—including those of the Legislative, Executive, and Judicial branches—purporting to alter or transfer ownership or control

³ Royce Charles C. (1899). *Indian land cessions in the United States* (Arizona and New Mexico map No. 1, pp. 922-923) (Eighteenth annual report of the Bureau of American Ethnology). Washington, DC: Smithsonian Institution. From <https://lccn.loc.gov/13023487>, accessed October 20, 2020.

of the Western Apaches' Treaty Territory. I found dozens of such actions affecting millions of acres within the Western Apaches' Treaty Territory. I have yet to discover a single instance in which the legal authority for the action by the United States—whether act of Congress, executive order, or court decision—explicitly recognizes either the 1852 Treaty or the effect and apparent impingement of those Federal actions on the Treaty and the Western Apaches' Treaty Territory and associated Treaty rights.

14. I investigated the proceedings of the Indian Claims Commission for Docket 22, addressing claims to compensation for lands taken by the United States from tribes representing Apache, Yavapai, and Navajo plaintiffs. The Docket 22 records are scattered, and the Indian Claims Commission ultimately partitioned Docket 22 into multiple proceedings, but I examined Docket 22 materials in libraries and the U.S. National Archives Record Group 279. I gave particular attention to the following: testimonies provided by tribal elders, reports of subject matter experts regarding claimant tribes' histories and land uses, and Findings of Fact and legal decisions of the Indian Claims Commissioners. I followed these related lines of inquiry to learn where and under what circumstances the Federal Government, through the Indian Claims Commission, may have attempted to “quiet” Apaches' reserved treaty rights or aboriginal land title, principally through providing compensation for or refusing to provide compensation for aboriginal lands, defined by the Indian Claims Commission as lands subjected to “exclusive tribal use and occupation from “time immemorial.””⁴

15. I found no evidence, in the proceedings of the Indian Claims Commission or elsewhere, of any change or diminishment in the Apaches' reserved treaty rights to the Western Apaches' Treaty Territory. I found no evidence that the United States compensated the Apache treaty rights holders for Chí'chil Bildagoteel (Oak Flat). Oak Flat is Apache land, as it has been for centuries and is not owned by the United States of America or any other entity or person.

⁴ United States Indian Claims Commission (1979). *Final Report, August 13, 1946-September 30, 1978*. U.S. Government Printing Office: 1979-271-733 (the quotation appears on page 10). The map of aboriginal land areas adjudicated by the Indian Claims Commission is available at <https://pubs.er.usgs.gov/publication/70114965>, accessed April 1, 2020. For an account of aspects of the adjudication of Docket 22, see Lieder, Michael, and Jake Page (1997). *Wild Justice: The People of Geronimo Vs. the United States*. New York, Random House.

16. With specific reference to the proposed Resolution Copper mine and the land area slated for mechanical, hydrological, and atmospheric impacts (see Map 2, below), I learned that Western Apache and Yavapai people living in the period prior to sustained contact with Americans (that is, during the Pinal Apache Genocide, 1859–1874) agreed on at least two fundamental aspects of land tenure history.

17. First, they agreed that the crest of the Mazatzal Mountains and Pinal Mountains constituted a general dividing line between the Western Apache and Yavapai ancestral territories.

18. Second, they agreed that line of division was permeable. The generally peaceful relations between the two peoples allowed family groups to cross that boundary whenever it was convenient or useful for them to do so, even without permission from those on the other side of the divide. These crossings typically occurred as Apache and Yavapai family groups pursued seasonally and spatially distributed concentrations of wild plant foods, including cactus fruits and nut masts. Apache and Yavapai groups, especially those groups located close to the Mazatzal-Pinal boundary, shared information and land use, also occasionally intermarrying, camping nearby, and cooperating in defense of their territories.

19. These agreed-upon facts from the Indian Claims Commission Docket 22 proceedings are further affirmed in results from investigations and tribal consultations undertaken by the U.S. Forest Service concerning the proposed Resolution Copper Mine, as required by federal environmental and historic preservation laws and by Section 3003 of the National Defense Authorization Act of 2015.⁵

20. The two maps, included below, show that the impact area for the proposed Resolution Copper mine extends across westerly portions of the Western Apache (Docket 22-D) aboriginal lands, as judicially established by the Indian Claims Commission (ICC map areas 140 and 141, see Map 2), and across easterly portions of Yavapai (Docket 22-E, ICC area 146) and Pima-Maricopa (Docket 228, ICC area 147) aboriginal lands. Map 2 provides a regional view; Map 3 provides a more detailed view of the Resolution Mine potential impact area, with Chí'chil Bıldagoteel (Oak Flat) at the center of the impacts.⁶

⁵ In particular, see Maren P. Hopkins, Chip Colwell, T.J. Ferguson, and Saul L. Hedquist (2015) Ethnographic and Ethnohistoric study of the Superior area, Arizona, prepared for Resolution Copper Mining by Anthropological Research, L.L.C.

⁶ Professional cartographers prepared Map 1 and Map 2 under the direction of John R. Welch using information

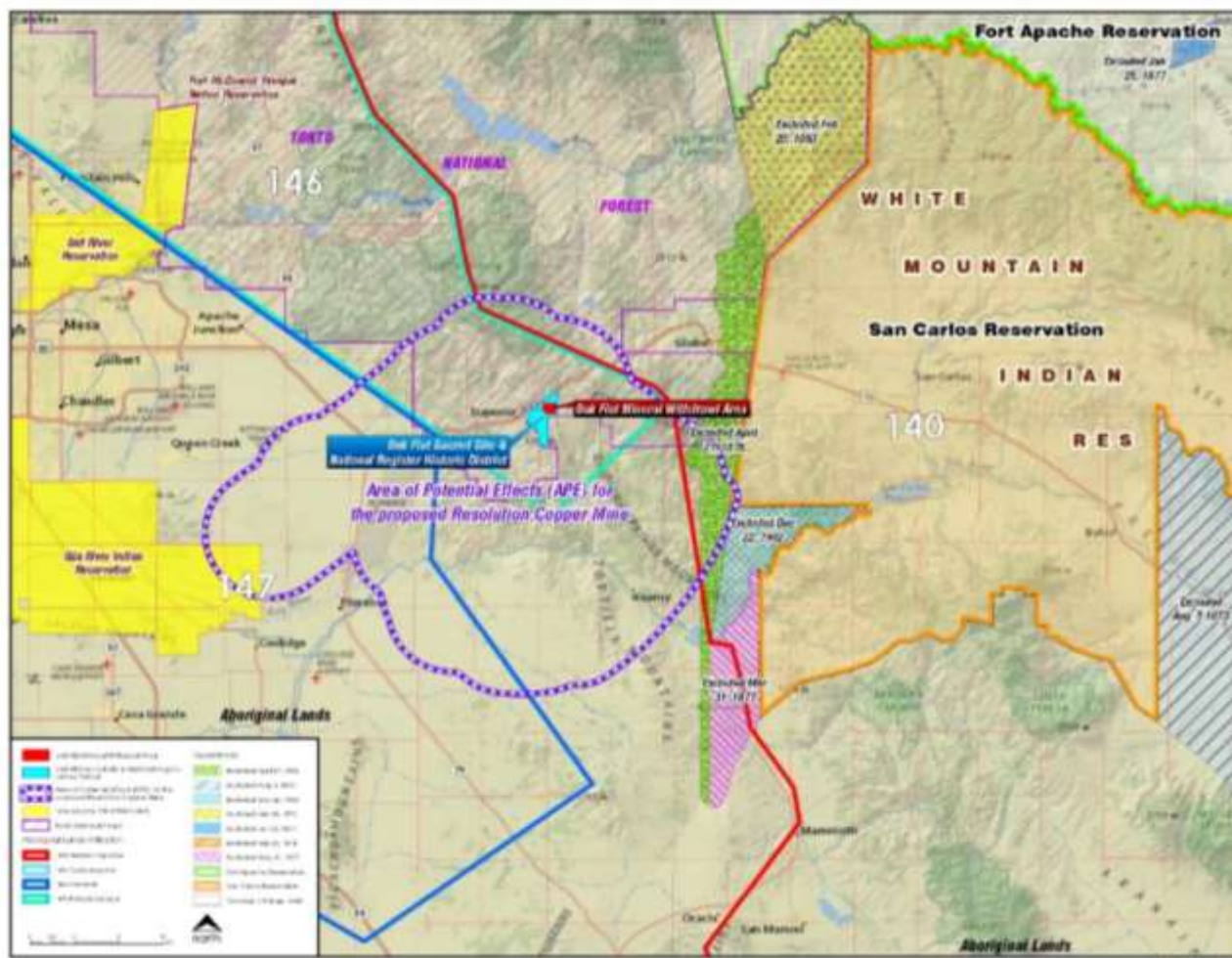


DECLARATION OF JOHN R. WELCH, Ph.D.

21. Map 2 depicts the original “White Mountain Reservation,” the San Carlos Reservation and Fort Apache Reservation divisions (1897) of that original reservation, and the various tracts excluded from those reservations by unilateral U.S. Federal Government actions, none of which reference or comport with the articles of the 1852 Treaty. Map 2 and Map 3 both show the conjoined turquoise blue and red lines depicting most of the boundary between the Western Apache and Yavapai lands along the crest of the Mazatzal and Pinal Mountains and the area of concern, Chí’chil Bildagoteel (Oak Flat), on the west side of that boundary, near the southern edge of Yavapai aboriginal lands (Docket 22-E, ICC map area 146, delineated in turquoise blue). These two maps also show that the impact area for the proposed Resolution Copper mine affects Western Apache, Yavapai, and Pima-Maricopa aboriginal lands and a tract south and southeast of Yavapai and Western Apache aboriginal lands. Because the rules adopted by the Indian Claims Commission prohibited the recognition of tracts used by multiple Indian peoples as the aboriginal lands of any single claimant group, the Commission did not identify this tract aboriginal lands. No Tribe received compensation for the “every man’s lands” south of Yavapai aboriginal lands.⁷

22. The Indian Claims Commission proceedings in Docket 22-D resulted in compensation to the San Carlos and White Mountain Apache Tribes for the taking by the U.S. of millions of acres of Apache lands. The lands for which the Western Apache tribes received compensation did not include Chí’chil Bildagoteel (Oak Flat) or other lands for which the Yavapai tribes apparently received compensation pursuant to Docket 22-E.

⁷ U.S. Indian Claims Commission (1965). Findings of Fact in Docket 22-E (15 Ind. Cl. Comm., March 3, 1965), Records Group 279, Entry 11UD. Washington, DC: National Archives. U.S. Indian Claims Commission (1969). Findings of Fact in Docket 22-D (21 Ind. Cl. Comm., June 27, 1969), Records Group 279, Entry 11UD. Washington, DC: National Archives.



MAP 3

23. The cartographic, documentary, and archaeological materials that I have investigated are part of the information that form the basis of my expert opinions that (a) Western Apaches retain reserved treaty rights to Chí'chil Bıldagoteel (Oak Flat); (b) Indian Claims Commission decisions in Docket 22-D (San Carlos and White Mountain [Western Apache] Tribes) and Docket 22-E (Yavapai Tribes) never affected or otherwise diminished Western Apaches' reserved treaty rights, including those of the San Carlos Apache Tribe and its members created by the 1852 Treaty, and (c) because of the evidence presented in Indian Claims Commission Docket 22 proceedings and in the nomination of Chí'chil Bıldagoteel to the U.S. National Register of Historic Places (see below), the Indian Claims Commission should not have recognized Chí'chil Bıldagoteel (Oak Flat) as land exclusively used and occupied by

Yavapai. Yavapai and Apache customary practice includes the sharing of food gathering areas. Yavapai and Apache oral traditions include specific references to sharing acorn gathering areas and Oak Flat. The Chí'chil Bıldagoteel National Register District includes abundant archaeological evidence of Apache use and occupation of the Chí'chil Bıldagoteel District.

24. Chí'chil Bıldagoteel is a place of extraordinary and axiomatically unique importance in Western Apache culture, spirituality, and history, with special reference to the Pinal Apache Genocide.

25. While my academic training, research interests, and expertise do not extend to or include Apache religion or spiritual practice, many breakthroughs in my understanding of Apache archaeology and land use have come from intently listening to Western Apache cultural practitioners explain the importance of places and their roles in Western Apache history, spirituality, and metaphysics.

26. Four lessons from my listening to Western Apache knowledge keepers are pertinent to this declaration: (a) Western Apache conceptions of time, space, power, history, and human interrelations with these are distinct from Western conceptions (including those I was brought up with); (b) Western Apache people perceive, learn from, and act with profound respect in relation to places, including the big places often referenced as landscapes, in ways that are both culturally shared and intensely personal; (c) Non-Apaches, myself included, should generally leave it to knowledgeable Western Apache people to interpret or comment upon Western Apache religious places in general, and upon specific places, like and including Chí'chil Bıldagoteel, that are known to be holy places; and (d) Notwithstanding these concerns, there are occasional appropriate roles for non-Apaches to offer technical support (for example, archaeological or cartographical) and external comments as means to bridge the vast chasms between Western Apache and non-Apache regard for and treatment of place and places.⁸

27. Specifically, the lovely, 40-acre grove of old-growth Emory oaks most widely known as Oak Flat, is a primary activity area for a much larger cultural landscape. Apache cultural experts, knowledge holders representing other regional tribes, and professional archaeologists from diverse backgrounds have

⁸ The essential book corroborating these points is Basso, Keith H. (1996). *Wisdom Sits in Places: Landscape and Language Among the Western Apache*. Albuquerque: University of New Mexico Press.

recognized as Oak Flat a local hub for at least 10 centuries of residence, food gathering, and ceremonial activity.⁹ Pottery fragments, engravings on boulders and cliff faces, roasting areas, and remnants of diverse house structures and other activity areas surround the grove and contribute to Chí'chil Bıldagoteel historical significance, sense of place, and what I refer to here as potency.

28. Converging lines of evidence from multiple tribes' oral histories, historical documents, and archaeological studies obliged the U.S. Forest Service to nominate, and the Keeper of the U.S. National Register to list, Chí'chil Bıldagoteel in the National Register of Historic Places. Chí'chil Bıldagoteel's landforms, springs, woodlands, canyons, and religious sites collectively embody and define a 4,309-acre cultural landscape of past and ongoing use by and high significance to Western Apache people.¹⁰

29. The 4,309-acre National Register District encompasses the entirety of the 2,422-acre parcel of the Western Apaches' Treaty Territory and Western Apache ancestral land proposed for the land exchange. The Chí'chil Bıldagoteel in the National Register District is essential both in the practice of Western Apache religion and in the implementation current proposal for the Resolution Copper mine.

30. As to the question of cultural and religious significance of Chí'chil Bıldagoteel, only Western Apache people with Western Apache religious beliefs and who conduct Western Apache religious practices are fully qualified to answer. I will say, nonetheless and with utmost deference, that many Western Apache people view the desecration, or even disrespect, of holy places, most especially in pursuit of profit or other individual gain at others' cost, as an affront to all that is right and good. Many Western Apache people also view such reckless behavior as extremely dangerous intrusions of secular concerns into highly sensitive and sacred domains of limitless natural and supernatural forces.

⁹ Hopkins, Maren P., Colwell, Chip, Ferguson, T. J., & Hedquist, Saul L. (2015). Ethnographic and Ethnohistoric study of the Superior area, Arizona. Prepared for Resolution Copper Mining. Tucson, AZ: Anthropological Research, L.L.C.

¹⁰ U.S. Department of Agriculture Tonto National Forest (2015) National register nomination for the Chí'chil Bıldagoteel national register historic district, Pinal County, Arizona (U.S. National Park Service, National Register of Historic Places, approved March 4, 2016). Retrieved from <http://bloximages.chicago2.vip.townnews.com/tucson.com/content/tncms/assets/v3/editorial/8/b1/8b10c3b0-77ed-560b-bd5f-bc0552df7e7c/56e363c6b87ba.pdf.pdf>

31. The late Nick Thompson, a Western Apache resident of Cibecue, White Mountain Apache Tribe lands, and a knowledgeable authority on Western Apache places, culture, and religion, made this point in an interview many years ago with Keith H. Basso using terms I would never attempt to improve upon: “If you hurt one of these holy places, it’s very, very bad. You will hurt yourself and all your people if you do that. You must always show respect and take care of those holy places. Each one helps us in some way. We depend on them to help us live right, to live the way we should. So we leave them alone except when we really need them. We pray to them to help us. If we hurt them they would stop helping us – and we would only know trouble.”¹¹

Respectfully submitted,



Dated: January 11, 2021

John R. Welch, Ph.D.

¹¹ Hon. Terry Rambler (2019). Comment on behalf of San Carlos Apache Tribe on the Draft Environmental Impact Statement for the Resolution Copper Project and Land Exchange, submitted to U.S. Department of Agriculture Tonto National Forest, December 23, 2019, pp. 12-13.

John R. Welch, PhD, Registered Professional Archaeologist 10227

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EDUCATION

1996 Ph.D. Anthropology, University of Arizona, Tucson, U.S.
 1985 M.A. Anthropology, University of Arizona, Tucson, U.S.
 1983 A.B. Anthropology (Honors), Spanish, Hamilton College, Clinton, New York, U.S.

INTERESTS

Sovereignty-driven cultural and biophysical heritage stewardship and research

Keywords: Sovereignty-driven research; Community-based conservation; Customary law and practice; Cultural resources management; Historic preservation; Indigenous archaeology; Activist archaeology; Resistance; American Southwest and British Columbia

Western Apache archaeology, history, and human ecology in the Arizona uplands

Keywords: Apache archaeology; Trail archaeology; Sacred sites protection; Land claims; Heritage tourism and culturally appropriate economic development; Indigenous management models

COURSE PORTFOLIO

Archaeological Resource Management

Co-Management with Indigenous Peoples

Cultural Heritage Crime

Heritage Resource Management Law & Policy

EMPLOYMENT

April 2005–Current	Professor & Director of the Professional Graduate Program in Heritage Resource Management , jointly appointed in the Department of Archaeology and School of Resource and Environmental Management, Simon Fraser University
February 2018–Current	Director, Landscape and Site Preservation Program , Archaeology Southwest, Tucson. Lead collaborative, preservation-focused, management, advocacy, and tribal and public engagement initiatives.
January 2005–Current	Advisor, Consulting Historian, and Expert Witness , White Mountain Apache Tribe, Whiteriver, Arizona & San Carlos Apache Tribe, San Carlos, Arizona. Assist in redeveloping the Fort Apache Historic District, reclaiming lands erroneously excluded from the reservation, repatriating cultural items, and protecting sacred sites
September 2008–Current	Associate Faculty , Archaeology, Arizona State Museum, University of Arizona, Tucson
April 2010–July 2013	Faculty Mentor , White Mountain Apache – University of Arizona Western Apache Ethnography and GIS Field School
September 1998–June 2005	Visiting Scholar , Department of Anthropology, University of Arizona, Tucson

Curriculum Vitae

John R. Welch, RPA

- September 1992–June 2005 **Archaeologist**, U.S. Bureau of Indian Affairs (BIA), Fort Apache Agency, Whiteriver, Arizona
Provided cultural heritage protection, planning, and compliance services for the federal agency administering White Mountain Apache Tribe trust lands
- November 1996–Jan 2005 **Tribal Historic Preservation Officer**, White Mountain Apache Tribe, Whiteriver, Arizona
Established the Fort Apache Heritage Foundation 501(c)3; Managed research, intergovernmental consultation, environmental protection, and repatriation initiatives in support of White Mountain Apache heritage conservation and economic and community development
- May 1996–September 2002 **Archaeologist**, U.S. Dept of Interior, Emergency Rehabilitation Team. Cultural resource lead on interdisciplinary team that created treatment plans for wildfire-impacted federal and Indian lands
- January 1998–May 2001 **Associate Faculty** and chair of the Heritage Preservation Curriculum Committee, Northland Pioneer College, Holbrook, Arizona
- September 1990–May 1991 **Associate Faculty**, Human Sciences, Pima Comm. College, Tucson
- August 1990–Dec 1993 **Assistant Project Director**, Statistical Research Inc, Tucson
Directed study of Tonto Basin and Verde River agricultural ecology and ethnohistory under contract to the U.S. Bureau of Reclamation
- April 1992–October 1992 **Gila Resource Area Archaeologist**, Safford District, U.S. Bureau of Land Management, Arizona
Provided heritage preservation, research, and interpretation services
- May 1990–August 1990 **Archaeologist**, International Archaeological Research Institute Inc.
Assisted with excavation and survey on island of Moloka'i, Hawaii
- August 1983–Dec 1989 **Teaching Assistant** and **Assistant Director**, Archaeological Field School, Anthropology, University of Arizona, Tucson
- August 1988–June 1989 **Archaeologist in Residence**, Fenster School, Tucson

FUNDING FOR RESEARCH AND RELATED SCHOLARLY PURSUITS

1. **Grant:** Mitacs Accelerate Internship Cluster Grant **Period:** 2019–2021 **Project Title:** Expanding Cultural Heritage Stewardship Knowledge and Capacity with Nlaka'pamux Nation Tribal Council and Teck Highland Valley Copper Operations **Funding:** Mitacs **Total:** \$105,000 **Involvement:** Project Director **Collaboration:** I am recruiting HRM Professional Program students and matcing them with SFU faculty supervisors and one of the seven funded research internships to optimize Nlaka'pamux capacity building and research impacts from the Teck HVC operations.
2. **Grant:** Community Listening Foundations for District-Scale Interpretation of the Fort Apache and Theodore Roosevelt School National Historic Landmark **Period:** 2020–2021 **Funding:** Arizona Humanities Council **Total:** \$10,000 **Involvement:** Project Director **Collaboration:** I will work with Cline Griggs, fellow Fort Apache Heritage Foundation Board, to plan and facilitate about 20 focus group sessions to learn what Apache community members regard as the desired future for Fort Apache and what stories they want to be told, and how, during the next phase of property interpretation and presentation.

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3. **Grant:** Conservation Assessment Program for Fort Apache and Theodore Roosevelt School National Historic Landmark **Period:** 2019–2020 **Funding:** American Institute for Conservation **Total:** \$20,000 **Involvement:** Project Director **Collaboration:** I planned and facilitated an interdisciplinary review by five established professionals of the 26 historic buildings and associated collections that constitute the Fort Apache Historic Park, resulting in a detailed assessment of conservation issues to serve as the plan for the next phase of property preservation and presentation.
4. **Grant:** Interdisciplinary Workshop Grant **Period:** 2018–2019 **Project Title:** Cultural Heritage Crime and Forensic Sedimentology: Global Theoretical and Local Tactical Responses to Thwart and Prosecute Heritage Destruction and Theft **Funding:** Wenner-Gren Foundation for Anthropological Research **Total:** \$20,000 **Involvement:** Project Director **Collaboration:** I planned and facilitated a workshop at Fort Apache to focus theoretical perspectives and practical tools on the prevention, investigation, and prosecution of heritage Resource Crime.
5. **Grant:** SSHRC Research Connections Grant **Period:** 2018–2020 **Project Title:** A Knowledge Creation Plan for Advancing Stó:lō Collaborative Resource Stewardship and Shared Land-Use Decision-Making in Southwest British Columbia **Total:** \$45,676 **Involvement:** Co-Principal Investigator **Collaboration:** I support David M. Schaepe (Sto:lo Research and Resource Management Centre) and Natasha Lyons (Ursus Consulting & SFU Archaeology) in convening a workshop and preparing a white paper to guide the first-ever Sto:lo Nation research plan.
6. **Contract:** Research and Consulting Contract **Period:** 2018–2022 **Project Title:** Technical Assistance in Heritage Site Restoration and Preservation **Funding:** U.S. Bureau of Indian Affairs **Total:** \$875,000 **Involvement:** Principal Investigator **Collaboration:** I am a principal in Archaeology Southwest’s assistance to BIA in preventing and investigating archaeological resource crime, in repairing damages to affected sites, and in creating training and outreach materials.
7. **Grant:** Graduate Research Fellowship Grant **Period:** 2017–2018 **Project Title:** Climate Change Adaptation Planning in Two Indigenous Conservation Organizations. **Funding:** Pacific Institute for Climate Studies **Total:** \$5000 **Involvement:** Project Director **Collaboration:** I direct and support master’s research by Vivian Gauer with the Fort Apache Heritage Foundation and the Stolo Research and Resource Management Centre.
8. **Grant:** Open Educational Resource Development Grant (SFU) **Period:** 2016–2017 **Project Title:** OER Assessment and Development for a New Breadth-Humanities Course, Heritage Stewardship in Global Context (ARCH 286) **Funding:** SFU Library OER Fund **Total:** \$3000 **Involvement:** Project Director **Collaboration:** Facilitate collaborations among Erin Hogg, Hope Power, and other SFU colleagues in identifying and refining OERs for ARCH 286.
9. **Grant:** Publication Grant **Awarded:** 2016 **Period:** 2016–2017 **Project Title:** Digital Publication of the SFU Archaeology Press Catalogue **Funding:** SFU Scholarly Digitization Fund **Total:** \$4960 **Involvement:** Principal Investigator **Collaboration:** Facilitate creation of a comprehensive online compendium of the 31 books published by SFU Archaeology Press.
10. **Grant:** Research Grant **Period:** 2016 **Project Title:** ‘Ground Truthing’ of Ancestral Pueblo Settlement of the Southern and Western Flanks of Arizona’s White Mountains, White Mountain Apache Tribe Lands, Arizona. **Funding:** Arizona Archaeological and Historical Society **Total:** \$500 **Involvement:** Project Director **Collaboration:** I led seven colleagues on a mobile symposium to visit and boost documentation for 16 Ancestral Pueblo villages.

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11. **Contract:** Professional Consulting Services **Period:** 2016
Project Title: San Carlos Apache Strike Team **Funding:** San Carlos Apache Tribe, Arizona
Total: \$19,650 **Involvement:** Cultural heritage consultant **Collaboration:** I supported the Apache Strike Team's opposition to the Proposed Resolution Copper Mine by conducting historical research and preparing strategic assessments of documents and plans prepared by the mining company, U.S. Forest Service, and their consultants.
12. **Contract/Grant:** Research and Exhibition / Outreach **Period:** 2015–2016
Project Title: Scowlitz Virtual Museum Companion Project **Funding:** SFU Community Engagement Fund **Total:** \$10,000 **Involvement:** Co-Principal Investigator **Collaboration:** I support Kate Hennessey (SFU SIAT) and David Schaepe in developing and installing twin exhibits—in the SFU Museum of Archaeology and Ethnology and the Sto:lo Research and Resource Management Centre—to expand the reach of the Virtual Museum of Canada website dedicated to the Scowlitz ancestral village site.
13. **Contract/Grant:** Professional Consulting Services **Period:** 2015–2016
Project Title: A Cultural Heritage Program for the San Carlos Apache **Funding:** Resolution Copper Mining Corporation, Arizona **Total:** \$10,578 **Involvement:** Cultural heritage consultant **Collaboration:** I supported Statistical Research Inc. Foundation and Apache colleagues in creating a values-based program to protect and perpetuate Apache cultural heritage in the face of changing social, economic and biophysical environments.
14. **Grant:** Curriculum Development Research **Period:** 2015–2016
Project Title: Assessment of a Required Graduate Course, *Social Science of Resource Management: Theories of Cooperation* (REM 601) **Funding:** SFU Teaching and Learning Center **Total:** \$5000 **Involvement:** Project Director **Collaboration:** I worked with Soudeh Jamshidian and other SFU colleagues to survey students and refine REM 601, the social science core course in the Master's of Resource Management (MRM) program.
15. **Grant:** Curriculum and Credential Development **Period:** 2015–2016
Project Title: A Professional Online MA Program in Heritage Resource Management (HRM) **Funding:** SFU Professional Online Scholarship and Training (POST) grant **Total:** \$100,000 **Involvement:** Program Director **Collaboration:** I facilitate and direct SFU and HRM industry colleagues in creating and delivering a new Master's program, starting fall 2016.
16. **Grant:** Research Grant **Period:** 2014–2017
Project Title: Trails of the Apache **Funding:** SSHRC Small Institutional **Total:** \$6950 **Involvement:** Principal Investigator **Collaboration:** I direct landscape-scale efforts to document ancient Apache activity hubs using least-cost path GIS analyses to identify trails and the residential, agricultural, and foraging localities they connect.
17. **Grant:** Research and Internet Publication Grant **Period:** 2013–2015
Project Title: People of the River: Sq'éwwets **Funding:** Virtual Museums of Canada **Total:** \$193,000 **Involvement:** Collaborator **Collaboration:** I support the team led by David Schaepe and Natasha Lyons in facilitating virtual repatriation to the Scowlitz community of all information and other materials relating to their most important ancestral village site.

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18. **Grant:** Publication Grant **Awarded:** 2013 **Period:** 2013–2014
Project Title: Digital Publication of Documents on the History and Management of White Mountain Apache Lands, Arizona **Funding:** SFU Scholarly Digitization Fund **Total:** \$5000
Involvement: Principal Investigator **Collaboration:** I helped Ian Song (SFU Library) and students develop a text-searchable archive of documents relating to (mis)management of Apache lands.
19. **Contract:** Contract **Awarded:** 2012 **Period:** 2012–2013
Project Title: History of the Northern Boundary Dispute, White Mountain Apache Reservation
Funding: U.S. Bureau of Indian Affairs **Total:** \$17,380 **Involvement:** Principal Investigator
Collaboration: I supported Robert D. Brauchli (White Mountain Apache Legal Department) in prosecuting a White Mountain Apache claim to lands erroneously excluded from their reservation.
20. **Grant:** Management grant **Awarded:** 2012 **Period:** 2012–2013
Project Title: Digitizing FAIRsite, the Fort Apache Indian Reservation heritage site inventory
Funding: The Digital Archaeological Record (tDAR) **Total:** \$2680 **Involvement:** Principal Investigator
Collaboration: I supported Frank McManamon (Arizona State U and Digital Antiquity), Matt Peeples (Archaeology Southwest), and Mr. Mark Altaha (White Mountain Apache Tribe) in designing and trialing a system to incorporate existing site files into a permanent records repository, complete with a digital index to enable heritage site research and conservation.
21. **Grant:** Research Grant **Awarded:** 2011 **Period:** 2011–2014
Project Title: CNH: Long-term vulnerability and resilience of coupled human-natural ecosystems to fire regime and climate changes at an ancient Wildland Urban Interface **Funding:** National Science Foundation Grant 1114898 **Total:** \$1,498,027 **Involvement:** Co-Investigator
Collaboration: I supported Tom Swetnam (U Arizona), Chris Roos (Southern Methodist U), T.J. Ferguson (U Arizona) in integrating dendrochronology, archaeology, and ethnography in pursuit of recommendations for forest, fuels and fire management in the upland Southwest U.S.
22. **Grant:** Research and Curriculum Development Grant **Awarded:** 2011 **Period:** 2012–2014
Project Title: Tribal Historic Preservation Officer Toolkit: Essential Guide for Tribal Programs
Funding: U.S. National Park Service **Total:** \$39,634 **Involvement:** Project Consultant
Collaboration: I supported John Brown (Narragansett Tribe), D. Bambi Kraus (National Association of Tribal Historic Preservation Officers), and an advisory team by conducting surveys, compiling comparable toolkits, and facilitating consultations to build a curriculum to train tribal officials in the functions of tribal historic and cultural preservationists.
23. **Grant:** Research Grant **Awarded:** 2010 **Period:** 2010–2013
Project Title: Western Apache Ethnography and GIS Research Experience for Undergraduates
Funding: National Science Foundation Grant 1004556 **Total:** \$254,694 **Involvement:** Joint Investigator
Collaboration: I supported Karl Hoerig (White Mountain Apache Cultural Center) and T.J. Ferguson (U Arizona) in running a community-based field school that maps traditional use sites across Western Apache homelands.
24. **Grant:** Internship Grant **Awarded:** 2010 **Period:** 2011–2013
Project Title: Community land-use planning on First Nations reserves and the influence of land tenure: A case study with the Penticton Indian Band **Funding:** MITACS Accelerate **Total:** \$30,000 **Involvement:** Co-Preceptor
Collaboration: Murray Rutherford (SFU School of Resource and Environmental Management), the Penticton Indian Band Development Corporation, and I supervised intern Marena Brinkhurst's study of how different forms of land tenure influence the process and results of land use planning on Penticton Indian Band lands.

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25. **Contract:** Contract **Awarded:** 2010 **Period:** 2010–2012
Project Title: History of the Northern Boundary Dispute, White Mountain Apache Reservation
Funding: U.S. Bureau of Indian Affairs **Total:** \$9950 **Involvement:** Principal Investigator
Collaboration: I supported Robert D. Brauchli (White Mountain Apache Legal Department) in prosecuting a White Mountain Apache claim to lands illegally excluded from their reservation.
26. **Grant:** Publication Grant **Awarded:** 2010 **Period:** 2010–2011
Project Title: Documenting the Management History of White Mountain Apache Tribe Lands, Arizona **Funding:** SFU Scholarly Digitization Fund **Total:** \$5000 **Involvement:** Principal Investigator **Collaboration:** Ian Song (SFU Library) and I engaged students to build a digital archive of documents relating to federal (mis)management of White Mountain Apache lands.
27. **Contract:** Contract **Awarded:** 2010 **Period:** 2010–2011
Project Title: Intergovernmental protocol for Heritage Site Protection, Tla'amin Territory
Funding: City of Powell River **Total:** \$3770 **Involvement:** Principal Investigator
Collaboration: I facilitated efforts by First Nation, City, and Provincial officials to improve consultation and protection for heritage sites threatened by proposed land use changes.
28. **Grant:** Internship Grant **Awarded:** 2010 **Period:** 2010–2011
Project Title: An Evaluation of Cultural Heritage as a Basis for First Nations Land Use Planning
Funding: MITACS Accelerate **Total:** \$30,000 **Involvement:** Preceptor **Collaboration:** David Schaepe (Stó:lo Research and Resource Management Centre), Ch-ihl-kway-ukh Forest Limited officials, and I supervised an intern Karen Brady's development of land use planning tools grounded in Stó:lo cultural precepts and site-specific knowledge.
29. **Contract:** Contract **Awarded:** 2010 **Period:** 2010
Project Title: Archaeological Site Inspection, Savary Island Dock Enhancement, Tla'amin First Nation Territory, British Columbia **Funding:** Powell River Regional District **Total:** \$6970
Involvement: Principal Investigator **Collaboration:** Megan Caldwell (U Alberta), Chris Springer (SFU) and I conducted pre-project heritage site identification surveys and project monitoring to avoid dock expansion impacts to heritage sites.
30. **Grant:** Management grant **Awarded:** 2009 **Period:** 2010–2011
Project Title: Pilot Assessment of the Archaeological Sensitivity of the Surface of the Fort Apache and Theodore Roosevelt School Historic District, Arizona
Funding: Fort Apache Heritage Foundation **Total:** \$7100 **Involvement:** Principal Investigator
Collaboration: I guided student crews led by Jenifer Lewis in gathering detailed data to identify significant areas within the 300-acre fort and residential school site.
31. **Grant:** Research Grant **Awarded:** 2008 **Period:** 2008–2011
Project Title: Community forests as a new model for forest management in British Columbia
Funding: Social Sciences and Humanities Research Council **Total:** \$136,820
Involvement: Joint Investigator **Collaboration:** I supported Evelyn Pinkerton's (SFU) interdisciplinary assessments of ecological, economic, cultural, and policy issues to promote community forests as alternatives to industrial timber management models.

*Curriculum Vitae***John R. Welch, RPA**

32. **Grant:** Major Collaborative Research Initiative **Awarded:** 2007 **Period:** 2008–2016 **Project Title:** Intellectual Property in Cultural Heritage **Funding:** Social Sciences and Humanities Research Council **Annual:** \$400,000 **Total:** \$2,500,000 **Involvement:** Joint Investigator **Collaboration:** I support and am a Steering Committee member and working group co-chair for George Nicholas' (SFU) major collaborative research initiative (MCRI) examining relationships among past legacies and contemporary assertions of cultural and intellectual property rights and interests.
33. **Contract:** Consultant contract **Awarded:** 2008 **Period:** 2008–2009 **Project Title:** Tribal Engagement in Fort Lowell Master Plan **Funding:** Pima County and City of Tucson, Arizona **Total:** \$8900 **Involvement:** Principal Investigator **Collaboration:** I served as tribal liaison in the planning efforts and contributed to draft and final reports.
34. **Grant:** Research Grant **Awarded:** 2008 **Period:** 2008–2010 **Project Title:** Ancestral Knowledge, Ethnohistory, and Archaeology of Two Tahltan Village Sites **Funding:** Copper Fox Metals, Inc. **Total:** \$15,000 **Involvement:** Principal Investigator **Collaboration:** I supported Tahltan community engagement in Vera Asp's Ph.D research.
35. **Grant:** Research Grant **Awarded:** 2008 **Period:** 2008–2009 **Project Title:** Tourism Development By and For the White Mountain Apache Tribe **Funding:** Coastal Rainforest Alliance and Harvard University Project on American Indian Economic Development **Total:** \$800 **Involvement:** Principal Investigator
36. **Grant:** Strategic Research Grant **Awarded:** 2007 **Period:** 2008–2011 **Project Title:** Sovereignty and stewardship: Expanding First Nations conservation and collaborative capacities **Funding:** Aboriginal Research Program, Social Science and Humanities Research Council **Total:** \$219,000 **Involvement:** Principal Investigator **Collaboration:** I coordinated participant-driven research with Tla'amin, Tahltan, Scowlitz and Katzie First Nations to create and implement plans to advance stewardship-based sovereignty.
37. **Grant:** Research Grant **Awarded:** 2007 **Period:** 2007–2008 **Project Title:** Ancestral knowledge, Ethnohistory, and Archaeology of Two Tahltan Village Sites. **Funding:** Fortune Minerals, Inc. **Total:** \$500 **Involvement:** Principal Investigator **Collaboration:** I supported Tahltan community engagement in Vera Asp's Ph.D research.
38. **Grant:** Research Grant **Awarded:** 2007 **Period:** 2007–2008 **Project Title:** Ancestral knowledge, Ethnohistory, and Archaeology of Two Tahltan Village Sites **Funding:** Copper Fox Metals, Inc. **Total:** \$10,000 **Involvement:** Principal Investigator **Collaboration:** I supported Tahltan community engagement in Vera Asp's Ph.D research.
39. **Grant:** Research Grant **Awarded:** 2007 **Period:** 2007–2009 **Project Title:** Evaluating ecological, economic, and social trade-offs of managing for valued species **Funding:** BC Forest Science Program **Total:** \$80,000 **Involvement:** Joint Investigator **Collaboration:** I supported Evelyn Pinkerton's (SFU) interdisciplinary assessment of the value spectra linked to non-timber forest flora. Other team members included K. Lertzman and M. Rutherford (SFU), U Toronto (S. Kant), and Kamloops First Nation (J. McGrath).

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40. **Grant:** Research Grant **Awarded:** 2007 **Period:** 2007–2008
Project Title: Community Resistance as a Window into Customary Conservation Policy and Practice **Funding:** Social Sciences and Humanities Research Council **Total:** \$4950
Involvement: Principal Investigator **Collaboration:** I compiled oral and documentary histories in support of R. Ewing's MA thesis and repatriation studies. Non-SFU partners: Arizona State Museum (U Arizona); Peabody Museum, Harvard; Glenbow Museum, White Mountain Apache Tribe, Tohono O'odham Nation, Hopi Tribe.
41. **Grant:** Equipment Grant **Awarded:** 2004 **Period:** 2005–2008
Project Title: First Nations Cultural and Environmental Resource Management Equipment Infrastructural Development **Funding:** Canada Foundation for Innovation, BC Knowledge Fund, SFU Matching Funds **Total:** \$312,000 **Involvement:** Principal Investigator
42. **Grant:** Research Grant **Awarded:** 2005 **Period:** 2005–2007
Project Title: A Survey of First Nations Heritage Stewardship **Funding:** SFU President's Research Grant **Total:** \$10,000 **Involvement:** Principal Investigator
43. **Grant:** Research Grant **Awarded:** 2005 **Period:** 2005–2007
Project Title: Seals of Fate **Funding:** SFU Discovery Parks **Total:** \$5000
Involvement: Principal Investigator
44. **Grant:** Operating Grant **Awarded:** 2002 **Period:** 2003–2006
Project Title: Preservation Plan Implementation, Kinishba Ruins National Historic Landmark **Funding:** Save America's Treasures Program, White House Millennium Council, Washington, DC **Total:** \$383,000 **Involvement:** Principal Investigator **Collaboration:** Arizona State grant (\$100,000) provided matching funds to provide stabilization treatments for the entire site.
45. **Grant:** Research Grant **Awarded:** 2003 **Period:** 2003–2005
Project Title: Cultural Affiliation Assessment, White Mountain Apache Tribal Lands **Funding:** National NAGPRA Office, U.S. National Park Service **Total:** \$75,000
Involvement: Principal Investigator **Collaboration:** I facilitated intertribal collaboration resulting in the repatriation of collections and a guide to the groups affiliated with tribal lands.
46. **Grant:** Research Grant **Awarded:** 2002 **Period:** 2003–2005
Project Title: The Battle of Cibecue: Investigation and Preservation Planning for the Fight that Changed the Apache World **Funding:** American Battlefield Protection Program, U.S. National Park Service **Total:** \$24,000 **Involvement:** Principal Investigator **Collaboration:** Chip Colwell-Chanthaphonh (Center for Desert Archaeology, Tucson) and I developed and published a study.
47. **Grant:** Operating Grant **Awarded:** 1998 **Period:** 1998–2005
Project Title: White Mountain Apache Tribe Historic Preservation Office
Funding: U.S. National Park Service **Total:** \$480,000 **Involvement:** Principal Investigator
48. **Grant:** Operating and Training Grant **Awarded:** 2001 **Period:** 2002–2004
Project Title: Undergraduate Research Experience in Native American Archaeology and Heritage Preservation: A Cooperative Project of the University of Arizona and the White Mountain Apache Tribe (co-PI with Barbara J. Mills) **Funding:** U.S. National Science Foundation Research Experiences for Undergraduates **Total:** \$221,999 **Collaboration:** Mills directed the U Arizona field school and research agendas Welch directed the White Mountain Apache stewardship agenda.

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49. **Grant:** Strategic Grant **Awarded:** 2002 **Period:** 2002–2003
Project Title: Organization Development for the Fort Apache Heritage Foundation
Funding: National Trust for Historic Preservation Locals Initiative **Total:** \$2500
Involvement: Principal Investigator
50. **Grant:** Operating Grant **Awarded:** 2001 **Period:** 2001–2003
Project Title: Exterior Restoration, Fort Apache Officers Quarters no. 205 **Funding:** Heritage Fund, Arizona State Parks **Total:** \$91,100 **Involvement:** Principal Investigator
51. **Grant:** Operating Grant **Awarded:** 2001 **Period:** 2001–2003 **Project Title:** Nohwiki'i Nohwanane' (Bringing Home the Ancestors): The Western Apache Repatriation Working Group
Funding: NAGPRA Program, U.S. National Park Service **Total:** \$71,381 **Involvement:** Principal Investigator **Collaboration:** I supported Western Apache Repatriation Working Group consultations with and visits to major U.S. museums.
52. **Grant:** Operating Grant **Awarded:** 1999 **Period:** 1999–2002
Project Title: Preservation Treatments to the Fort Apache Historic District
Funding: Save America's Treasures Program, White House Millennium Council, Washington, DC **Total:** \$313,000 **Involvement:** Principal Investigator
53. **Grant:** Operating Grant **Awarded:** 1998 **Period:** 1998–2000
Project Title: Rehabilitation of Fort Apache Officers Quarters no. 203. **Funding:** Heritage Fund, Arizona State Parks **Total:** \$82,572 **Involvement:** Principal Investigator
54. **Grant:** Operating Grant **Awarded:** 1997 **Period:** 1997–2000
Project Title: Stabilization and Rehabilitation of Grasshopper Ruins **Funding:** University of Arizona Research Fund **Total:** \$33,420 **Involvement:** Principal Investigator
55. **Grant:** Research Grant **Awarded:** 1997 **Period:** 1997–1999
Project Title: Western Apache Placenames Survey **Funding:** Historic Preservation Fund Grants to Indian Tribes, U.S. National Park Service **Total:** \$49,900 **Involvement:** Principal Investigator
Collaboration: I facilitated participation by representatives from Arizona's five Apache tribes in the documentation of toponyms.
56. **Grant:** Operating Grant **Awarded:** 1997 **Period:** 1997–1999
Project Title: Rehabilitation of Fort Apache Officers Quarters no. 207 **Funding:** Heritage Fund, Arizona State Parks **Total:** \$101,190 **Involvement:** Principal Investigator
57. **Grant:** Research Grant **Awarded:** 1997 **Period:** 1997–1998
Project Title: Fort Apache Rehabilitation Planning **Funding:** U.S. Department of the Interior **Total:** \$145,000 **Involvement:** Principal Investigator
58. **Grant:** Operating Grant **Awarded:** 1997 **Period:** 1997–1998
Project Title: Fort Apache Restoration Cost Assessment **Funding:** World Monuments Fund/American Express Foundation **Total:** \$80,000 **Involvement:** Principal Investigator
59. **Grant:** Operating Grant **Awarded:** 1996 **Period:** 1996–1998
Project Title: Rehabilitation of Cibecue's Oldest Church **Funding:** Heritage Fund, Arizona State Parks **Total:** \$34,775 **Involvement:** Principal Investigator
60. **Grant:** Operating Grant **Awarded:** 1994 **Period:** 1994–1998
Project Title: Nohwiki'i Nohwanane': Establishment of the Western Apache Repatriation Working Group **Funding:** NAGPRA Program, U.S. National Park Service **Total:** \$55,000 **Involvement:** Principal Investigator

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61. **Grant:** Operating Grant **Awarded:** 1994 **Period:** 1995–1997
Project Title: White Mountain Apache Tribe Museum Director Salary
Funding: AZ Commission on Arts **Total:** \$15,000 **Involvement:** Principal Investigator
62. **Grant:** Research Grant **Awarded:** 1995 **Period:** 1995–1996
Project Title: Needs Assessment for the White Mountain Apache Historic Preservation Office
Funding: Historic Preservation Fund Grants to Indian Tribes, U.S. National Park Service **Total:** \$30,000 **Involvement:** Principal Investigator
63. **Grant:** Research Grant **Awarded:** 1994 **Period:** 1994–1996
Project Title: Architectural Preservation and Visitor Use Planning for Kinishba Ruins National Historic Landmark **Funding:** Heritage Fund, Arizona State Parks **Total:** 22,532
Involvement: Principal Investigator
64. **Grant:** Operating Grant **Awarded:** 1994 **Period:** 1994–1994
Project Title: Emergency Stabilization, Sole Surviving Cavalry Stables at Fort Apache National Register District **Funding:** Heritage Fund, Arizona State Historic Preservation Office **Total:** \$5000 **Involvement:** Principal Investigator
65. **Contract:** Contract **Awarded:** 1991 **Period:** 1991–1992
Project Title: Factors Affecting Agricultural Sustainability in Tadla, Morocco
Funding: U.S. Agency for International Development **Total:** \$16,000
Involvement: Principal Investigator

FUNDING PROPOSALS UNDER ADJUDICATION

1. **Grant:** Research Grant **Period:** 2021–2022
Project Title: Intersectional analysis of the experiences of Canadian archaeologists **Funding:** Social Sciences and Humanities Research Council (Small SSHRC) **Total:** \$7,000 **Involvement:** Principal Investigator, in collaboration with the Canadian Archaeological Association's Working Group on Equity and Diversity
2. **Grant:** Archives Management Grant **Period:** 2020–2022
Project Title: Inventory, Conservation, and Management Planning for the White Mountain Apache Tribe National Archives **Funding:** Mellon Foundation **Total:** \$100,000 **Involvement:** Principal Investigator
3. **Grant:** Designer-Led Place-Making **Period:** 2021–2023
Project Title: Engaging Apache Cultural Preferences and Community Creativity in Site Presentation and Visitor Experience Planning for the Fort Apache and Theodore Roosevelt School National Historic Landmark, Arizona **Funding:** National Endowment for the Arts **Total:** \$100,000 **Involvement:** Principal Investigator

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9. Welch, John R.; Burley, David V.; Driver, Jonathan C.; Hogg, Erin A.; Jayasundera, Kanthi; Klassen, Michael; Maxwell, David; Nicholas, George P.; Pivnick, Janet; and Dore, Christopher D. (2018) Digital Bridges Across Disciplinary, Practical and Pedagogical Divides: An Online Professional Master's Program in Heritage Resource Management. *Journal of Archaeology and Education* 2. <https://digitalcommons.library.umaine.edu/jae/vol2/iss2/1>
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Selected Conference Presentations and Invited Lectures, Colloquia, Seminars

1. Welch, J.R., and the Archaeology Southwest-BIA ARPA Initiative Team (2020) 2020 Perspectives and Tools for Addressing Archaeological Resource Crime in Indian Country: Prevention, Detection, Investigation, Remediation. Webinar invited by the Arizona State Site Stewards, November 12, 2020.
2. Welch, J.R. (2020) A Tale of Two Cities: Casa Malpais, Kinishba, and the Elusive Promise of Archaeological Tourism. Archaeology Southwest Café, May 5, 2020, <https://www.archaeologysouthwest.org/event/why-you-should-experience-casa-malpais-and-kinishba/>
3. Welch, J.R. (2019) The White Mountain Experiment in Community-Based Site Protection. Archaeology Southwest Tea Series, May 6, 2019, <https://www.youtube.com/watch?v=lmTircN5PYo>
4. Welch, J.R. (2018) Landscapes, Consultations, Archaeologies, and the Promise of Full-Spectrum Heritage Resource Management. Invited keynote. Annual meeting of the Federal Columbia River Power System Cultural Resource Program, Kalispell, Montana, November 8, 2018
5. Welch, J.R. (2018) Fort Apache: Conflict, Conservation, and (Re)Conciliation(?) in Indian Country. Haffenreffer Museum 2018 Shepard Krech III Lecture, Brown University, April 5, 2018. https://www.youtube.com/watch?v=qCj_xKgVUNc&index=1&list=PL031FD246CE1CDC15&t=0s
6. Lyons, Natasha, Lisa Hodgetts, Kisha Supernant, John R. Welch (2018) What Does #MeToo Mean for Archaeology? Paper presented in “Unsettling Archaeology” symposium at the 51st Annual Meeting of the Canadian Archaeological Association, Winnipeg, Manitoba May 3, 2018
7. Welch, J.R., David Burley, Erin Hogg, Kanthi Jayasundera, David Maxwell, George Nicholas, Janet Pivnick, Christopher D. Dore, and Michael Klassen (2017) Digital bridges across disciplinary, practical and pedagogical divides: An Online Professional Master’s Program in Heritage Resource Management. Paper presented in “The ‘Other Grand Challenge’: Archaeological Education & Pedagogy in the Next 50 Years,” Chacmool Conference, Calgary, Alberta, November 9, 2017.
8. Welch, J.R. (2017) Fort Apache: Pasts, Presents, Futures. Summer Public Lecture Series, Fort Vancouver, Washington, July 20. <http://www.friendsfortvancouver.org/archeology-lecture-series-july-2017/>
9. Welch, J.R. (2017) Open Eyes, Open Minds, Open Arms, and Open Hearts Open Archaeology. Paper presented at the Society for American Archaeology Annual Meeting, Vancouver, April 1.
10. Welch, J.R., Francis Vigil, and Rachel A. Loehman (2015) Toward a Sovereignty-Driven Paradigm for Transdisciplinary Research on Social-Ecological Systems. Paper presented at the Society for American Archaeology Annual Meeting, San Francisco, California, April 17.
11. Welch, J.R. (2015) Tribal Historic Preservation Officer Toolkit Training Workshop: Quick Start Guide—Essential Guide for Tribal Programs. Full-day workshop presented to 20 tribal government officials at the National Tribal Preservation Conference, Laguna Pueblo lands near Albuquerque, New Mexico, August 17.
12. Schaepe, David M., Bill Angelbeck, John R. Welch, and David Snook (2015) Archaeology as Therapy: Linking Community Archaeology to Community Health. Paper presented at the meeting of the Society for Applied Anthropology, Pittsburgh, Pennsylvania, March 28.
13. Welch, John R. (presenter and discussant) (2015) Sovereignty-Driven Research Ethics: Beyond Baseline Compliance, Consent and Limitation of Liability. Panel discussion, Indigenous Research Ethics conference, Vancouver, February 19. <https://indigenousresearchethics2015.wordpress.com/>
14. Welch, J.R. (2015) Tribal Historic Preservation Officer Toolkit Training Workshop: Essential Guide for Tribal Programs. Full-day workshop presented to 22 tribal government officials at the National Tribal Preservation Conference, Milwaukee, Wisconsin, September 11.

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15. Welch, John R. (presenter) (2014) Fire and Humans in Resilient Ecosystems. Curriculum development workshop for teachers, Laboratory for Tree-Ring Research and College of Education, University of Arizona, Tucson, June 23.
16. Welch, John R. (organizer and moderator) (2014) CRM-ology: Toward a Research Design for Improving the Dominant Form of Archaeological Practice. Forum, Society for American Archaeology Annual Meeting, Austin, Texas, April 25.
17. Hogg, Erin A., and John R Welch (2014) What does Collaborative Archaeology Mean to You? Community-Engagement in Field Schools, Research Projects, and Consulting. Poster presented at the meeting of the Society for American Archaeology, Austin, Texas, April 25.
18. Ruth Aloua and John R. Welch (2014) Closing the Gap Between Management Practice and Policy at a National Historical Park in Hawai'i. Paper presented in the invited symposium, Society for Applied Anthropology, Albuquerque, New Mexico.
19. Hogg, Erin, and John R. Welch (2013) Do you Collaborate? Community Engagement in Field Schools, Research, and Consulting Projects. Poster presented at the meeting of the Canadian Archaeological Association, Whistler, B.C, May 17, 2013.
20. Welch, John R., and Ian Lilley (organizers and moderators) (2013) Beyond the Equator (Principles): Community Benefit Sharing in Relation to Major Land Alteration Projects and Associated Intellectual Property Issues in Cultural Heritage. Forum, Society for American Archaeology Annual Meeting, Honolulu, Hawaii. April 5.
21. Welch, John R., and Karl A. Hoerig (2013) Fort Apache Heritage Foundation. Presentation in symposium, Bellwhether Nonprofits of the Southwest. Society for American Archaeology Annual Meeting, Honolulu, Hawaii. April 4.
22. Atalay, Sonya, Lee Rains Clauss, Randall H. McGuire, and John R. Welch (organizers) (2013) Archaeology, Relevance, and Activism. Seminar, Amerind Foundation, Arizona. February 27-March 3.
23. Welch, John R. (2013) Placemaking and Displacement at Fort Apache and the Theodore Roosevelt School. Archaeology Café public lecture, sponsored by Archaeology Southwest, available at <http://www.archaeologysouthwest.org/event/archaeology-cafe-tucson-placemaking-and-displacement-at-fort-apache-and-theodore-roosevelt-school/>.
24. Welch, John R. (2012) Home, Home at the Fort: A Millennium of Place Making and Displacement at Fort Apache and TR School National Historic Landmark, Arizona. Environmental Science Program Seminar, Thompson Rivers University, Kamloops, British Columbia.
25. Welch, John R., and Neal Ferris (2011) Making a Sustainable Archaeology. Society for American Archaeology Annual Meeting, Sacramento, California.
26. Ferris, Neal, John R. Welch, and Aubrey Cannon (2011) Capacities for a Sustainable Archaeology. Sustainable Archaeology Workshop, Taipei, Taiwan.
27. Lepofsky, Dana, John R. Welch, and Michelle Washington (Siemthlut) (2011) The Tla'amin-SFU Field School in Archaeology and Heritage Stewardship. People of the River Conference, May 2011.
28. Welch, J.R., Dana Lepofsky, and Michelle Washington (Siemthlut) (2010) Assessing Collaboration with the Sliammon First Nation in a Community-Based Heritage Research and Stewardship Project, in "Perspectives on the Ethical Engagement of Indigenous Peoples In Archaeological Practice" symposium organized by Kerry Thompson, annual meeting of the Society for American Archaeology, St. Louis, Missouri.

Curriculum Vitae

John R. Welch, RPA

29. Speller, C., D. Lepofsky, A. Benson, M. Washington, M. Caldwell, J.R. Welch, D. Yang. (2010) Reconstructing Past Abundance, Diversity, and Use of Herring in the Pacific Northwest of North America, International Council for Archaeozoology, 11th Annual Conference, Paris, France, August 23–28.
30. Welch, J.R., Siemthlut (Michelle Washington) and Dana Lepofsky (2009) *Getting to 100: Harmonizing Community, Research, and Societal Interests Through the Tla'amin First Nation-Simon Fraser University Field School in Archaeology and Heritage Stewardship*, in "Practicing Public Archaeology: Contemporary Issues of Engagement and Action" symposium organized by Paul Thacker, annual meeting of the Society for Applied Anthropology, Santa Fe, New Mexico.
31. Laluk, Nicholas C. and J.R. Welch (2008) Interpretation and Indigenation of Place: Fort Apache, Arizona, in "Archaeology of the Recent Indigenous Past" symposium organized by Nina Swidler, annual meeting of the Society for Historical Archaeology, Albuquerque, New Mexico.
32. Welch, J.R., Vera J. Asp and George Kaufmann (2008) Linking Documentary and Material Histories Through Community-Based Archaeology in Tahltan Territory, British Columbia, in "Ways of Becoming Athapaskan" symposium organized by H. Kory Cooper, B. Sunday Eiselt, and J.R. Welch, annual meeting of the Society for American Archaeology, Vancouver.
33. Ewing, Robyn and J.R. Welch (2008) Seeking Middle Ground: Repatriation's Roles in the Negotiation of New Relationships among Indigenous Communities, Museums and Archaeologists, annual meeting of the Society for American Archaeology, Vancouver.
34. Washington, Michelle, J.R. Welch and Dana Lepofsky (2008) Digging Common Ground: The Tla'amin-Simon Fraser University Field School in Archaeology and Heritage Stewardship, September meeting of the Archaeological Society of British Columbia, Vancouver.
35. Welch, J.R., Dana Lepofsky and Siemthlut (Michelle Washington) (2008) Getting to 100: Harmonizing Community, Research, and Societal Interests through Archaeology and Heritage Stewardship, seminar, Vancouver Island University, Powell River, British Columbia.
36. Asp, Vera J., J.R. Welch and George Kaufmann (2008) A Cultural Landscape Approach to the Integration of Documentary and Material Histories in Tahltan Territory, British Columbia, Northwest Archaeological Conference, Victoria, British Columbia.
37. Welch, J.R. and Karl Hoerig (2007) Archaeology, Ndee Identity, and Tribal Sovereignty, in "Archaeologists as Gatekeepers of American Indian Identity" symposium organized by Sonya Atalay and Randy McGuire, annual meeting of the Society for American Archaeology, Austin, Texas.
38. Welch, J.R. (2006) Of, By, and For the Ndee: Archaeology, Heritage Stewardship, and White Mountain Apache Sovereignty, in "Decolonizing Archaeology" symposium, Chacmool Conference, Calgary, Alberta.
39. Welch, J.R. (2005) Ancient Masonry Fortresses of the Upper Salt River, Arizona, September meeting of the Archaeological Society of British Columbia, Vancouver.
40. Welch, J.R. (2005) Panellist, "Anthropologist as Expert Witness," organized by Sylvia Rodriguez.
41. Welch, J.R., Mark Altaha and Nicholas Laluk (2004) Apache? "The Protohistoric Period in the Southern Southwest" symposium, Arizona Archaeological Council, Tucson.

Works in Press

1. Roos, Christopher, J.R. Welch (2021) Native American Fire Management at an Ancient Wildland-Urban Interface in the Southwest US. *PNAS* 2020-18733R In press.

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John R. Welch, RPA

2. Hogg, Erin A., Chelsea H. Meloche, George P. Nicholas, and John R. Welch (2021) Whose Rights? Whose Heritage?: Policy Changes in Canada. In press
3. Welch, J.R., (2020) Archaeology Law and Policy in the United States. In *Open Archaeology: An Introduction to the Field*, edited by Katie Kirakosian (accepted).
4. Hogg, Erin A., and John R. Welch (2020) Archaeological Evidence in the Tsilhqot'in Decision. *Canadian Journal of Archaeology* (in press)

Works in Preparation and Under Review

1. Welch, J.R. (2019) 'The only prompt, economical, and humane process': The Pinal Apache Genocide and other Legacies of Industrial Mining in Central Arizona. (in preparation)
2. Hogg, Erin A., and John R. Welch (2020) Expert Witnesses' and Lawyers' Perspectives on the Use of Archaeological Data as Evidence in Aboriginal Rights and Title Litigation. *BC Studies: The British Columbian Quarterly*.
3. Welch, J.R. (2019) *Fort Apache: Places and Displacements at a Frontier Icon in Indian Country*, University of Arizona Press (in preparation, with approved book proposal)

TRAINING AND SUPERVISION

Graduate Student Supervision & Completion at SFU

	Name	Degree	Project / Thesis	Start–Finish
1	McKillop, Vanessa	M.A. (HRM)	Weji-sqalia'tiek, they 'sprouted up from the earth': Archaeology and Management of Shubenacadie River Valley Paleoshorelines, Nova Scotia	2017– 2019
2	Owens, Camille	M.A. (HRM)	Engaging Public Archaeology Protocols in the Interpretation of Museum Collections	2017–
3	Pitul, Michael	M.A. (HRM)	A Policy Framework for Underwater Archaeology in Ontario	2017– 2019
4	Campbell, Michael	M.A. (HRM)	CRM Archaeology and Native Land Claims in British Columbia	2017–
5	Johnson, Meaghan	M.A. (HRM)	Building Representation: The Development of Barkerville Historic Town & Park's Chinese Narrative	2017–2019
6	O'Neil, Casey	M.A. (HRM)	Evaluation of Sample Size Protocols for Large Data Recovery Projects	2016 –2019
7	Gauer, Viviane	M.R.M.	Climate Change Adaptation Planning if Two Native-Owned Conservation Organizations	2016 –2019
8	Jaclyn McLeod	M.A.	Building Representation: The Development of Barkerville Historic Town & Park's Chinese Narrative	2016–2018
9	Huck, Michael	M.R.M.	Co-constructing Rural Climate Adaptation: Insights from the State of Climate Adaptation and Resilience in the Basin Pilot Project	2015–2019
10	Hogg, Erin	Ph.D.	Archaeological Data as Evidence in Aboriginal Rights and Title Litigation in Canada	2014–2019

Curriculum Vitae**John R. Welch, RPA**

	Name	Degree	Project / Thesis	Start–Finish
¹¹	Hogg, Erin	M.A.	Community Engagement in British Columbia Archaeology	2012–2014
¹²	Aloua, Ruth	M.A.	Closing the Policy-Practice Gap in Heritage Management at Kaloko-Honokohau NHP, Hawaii	2011–2015
¹³	Nelly Bouevitch	M.R.M.	Co-Management at Gulf Islands National Park	2011–2016
¹⁴	Knighton, Mykol	M.R.M.	Cultural Heritage Tourism Planning for the Tla’amin First Nation	2010–2016
¹⁵	Lewis, Jennifer	Ph.D.	Revaluating “looted” archaeological materials at Fort Apache and Theodore Roosevelt School National Historic Landmark, Arizona	2010–2017
¹⁶	Morrison, Jessica	M.R.M.	Stó:lo Connect: A Case Study in Collaborative First Nation Referral Management	2010–2013
¹⁷	Brady, Karen	M.R.M.	Cultural Heritage as Foundation for Regional Planning	2009–2014
¹⁸	Hoffmann, Tanja	Ph.D.	An Indigenous Model for Environmental Impact Assessment	2008–2017
¹⁹	Jamshidian, Soudeh	Ph.D.	Effects of Top-Down Environmental Management in Post-Conflict Settings	2007–2020
²⁰	Kasstan, Steven	Ph.D.	Caribou is Life: An Ethnoarchaeology of Ethen-eldëli Denesųliné Respect for Caribou	2007–2016
²²	Ewing, Robyn	M.A.	Negotiated Repatriation as Middle Ground	2006–2010

Graduate Student Committees at SFU

	Name	Degree	Thesis / Project	Start–Finish
	Meloche, Chelsey	Ph.D.	TBA	2015–
	Stefanyshen, Earl	M.A. (HRM)	Microstratigraphic protocol to assess the impact of wildland fires on subsurface archaeological sites	2017–2019
	Settle, Kathleen	M.A. (HRM)	Vacuum Truck Excavation as a New and Effective Technique in Urban Archaeology	2016–2019
	Brinkhurst, Marena	M.R.M	Community Land Use Planning on First Nations Reserves and the Influence of Land Tenure: A Case Study with the Penticton Indian Band	2010–2013
	Matthews, Beth	M.A.	A Spatial Analysis of Pleistocene-Holocene Transition Sites in the Southern Columbia Plateau and Northern Great Basin of North America	2008–2016
	Duke, Guy	M.A.	Past Irrigation Practices in the Memories of the Indigenous Peoples of Chimborazo, Ecuador	2008–2010
	Johnson, Sarah	M.A.	A Tla’amin Cultural Landscape	2007–2010
	Kaufmann, George	M.A.	Missionary Classrooms in a Northern Indian Agency	2007–2009

Curriculum Vitae

John R. Welch, RPA

Name	Degree	Thesis / Project	Start–Finish
Peters, Alana	M.A.	Archaeology and Memories of the Casa Grande	2007–2011
Hammond, Joanne	M.A.	First Nations Heritage Policies as a Window into Community Stewardship	2006–2009
Klassen, Michael	Ph.D.	Indigenous Heritage Stewardship and the Transformation of Archaeological Practice	2005–2013
Lennentine, Miku	M.R.M	Brave New World of Community Forestry	2006–2009
Astofooroff, Nikki	M.R.M	Achieving Environmental Sustainability in British Columbia Coastal Communities: A Case Study of Haida Gwaii	2006–2008
Speller, Camilla	Ph.D.	Investigating Turkey Domestication in the Southwest Through Ancient DNA Analysis	2005–2009
Badenhorst, Shaw	Ph.D.	The Zooarchaeology of Great House Sites in the San Juan Basin of the American Southwest	2005–2008
Fothergill, Brooklynne	M.A.	Investigations of the Bluff Great House Fauna	2005–2008
Sanderson, Darlene	Ph.D.	Nipiy Wasekimew / Clear Water: The Meaning of Water, From the Words of the Elders	2002–2007
Dunn, Catharine	M.R.M	Aboriginal Partnership for Sustainable 2010 Olympic and Paralympic Winter Games	2004–2007
Woodward, Robyn	Ph.D.	Medieval Legacies: The Industrial Archaeology of an Early Sixteenth Century Sugar Mill at Sevilla La Nueva, Jamaica	2004–2006
Rawlings, Tiffany	Ph.D.	Faunal Analysis and Meat Procurement: Reconstructing the Sexual Division of Labor at Shields Pueblo, Colorado	2001–2006

Graduate Student Committee Membership Outside SFU

Name	Degree	Institution / Thesis Topic	Start–Fin.
Rich Hutchings	Ph.D.	University of British Columbia / <i>Rising Affluence, Rising Seas</i> —Archaeology and Resource Management Responses to The Maritime Heritage Crisis	2009–2014
Joshua Dent	Ph.D.	University of Western Ontario / Accounts of Engagement: Conditions and Capitals of Indigenous Participation in Canadian Commercial Archaeology	2010–2016
Aaron Naumann	Ph.D.	University of Washington / Indigenous Archaeology Revisited	2016–
Jonathan Clapperton	Ph.D.	University of Saskatchewan / <i>Stewards of the Earth?</i> Aboriginal Peoples, Environmentalists and Historical Representation	2008–2012
Nicholas Laluk	Ph.D.	University of Arizona / Historical Archaeology at the Chiricahua – Western Apache Interface	2008–2014

Curriculum Vitae

John R. Welch, RPA

Name	Degree	Institution / Thesis Topic	Start–Fin.
Mary Ann Wade	Ph.D.	University of Northern Arizona / Theodore Roosevelt School and White Mountain Apache Education	2007–2010
Karen Capuder	Ph.D.	University of Washington / Skokomish Cultural Landscapes	2006–2012
Bill Angelbeck	Ph.D.	University of British Columbia / Archaeology of Coast Salish Conflict (External Examiner)	2004–2009
Nicholas Laluk	M.A.	University of Arizona / Apache Scout Camp Archaeology at Fort Apache	2003–2006
Lauren Jelinek	M.A.	University of Arizona / Apache Archaeology of the Forestdale Valley	2003–2005

Supervision of Research Personnel

2011–2012	Erica Kowsz, A.B., Fulbright Canada Scholar	Funded by: Fulbright Program
2009–2011	Fred Foster, B.S., Research Assistant	Funded by: Social Sciences and Humanities Research Council Aboriginal Program Grant
2007–2010	Natasha Lyons, PhD, Post-Doctoral Fellow	Funded by: Social Sciences and Humanities Research Council
2006–2007	Robyn Ewing, B.A, Research Assistant	Funded by: SFU President's Grant

SERVICE

Academic (External)

2020	External Reviewer for Tenure and Promotion Case: University of British Columbia
2017–2019	Registrar, Register of Professional Archaeologists
2017	External Reviewer for Tenure and Promotion Case: Harvard University
2015–2020	Member, Editorial Board, <i>Advances in Archaeological Practice</i>
2014–2020	Co-Chair, Amity Pueblo Task Force, Society for American Archaeology
2013–2016	Member, Government Affairs Committee, Society for American Archaeology
2013	External Reviewer for Tenure and Promotion Cases: Southern Methodist University, Ft. Lewis College
2011–2013	Chair, Continuing Professional Education Committee, Register of Professional Archaeologists
2003–Life	Trustee, Josephine H. Miles Testamentary Trust, benefiting the Colorado Historical Society and three American Indian schools in Wyoming and Montana
2003–2010	Member, Government Archaeology Committee, Society for American Archaeology
2006–2009	Co-Chair, Continuing Professional Education Committee, Register of Professional Archaeologists

Curriculum Vitae

John R. Welch, RPA

2003–2007	Institutional Grant Administrator, <i>Doo Aniina' Agot'eehi Baa Nohwii Nagoshd'</i> (I'll Tell You About How it Was): Programming Endowment Challenge Grant, U.S. National Endowment for the Humanities
2003–2006	Humanities Scholar, The San Pedro Ethnohistory Internet Project, U.S. National Endowment for the Humanities and Southwest Foundation grant to Center for Desert Archaeology, Tucson
2003–2005	Member, Board of Directors, Ocotillo Literary Endeavors, Tucson
2002–2005	Project Advisor, Ndee Bike' (Footprints of the Apache) and The Fort Apache Legacy, U.S. National Endowment for the Humanities Interpretation Program Implementation grant to Nohwike' Bagowa White Mountain Apache Tribe Cultural Center and Museum
1998–2005	Founding Member of Board of Directors, U.S. National Association of Tribal Historic Preservation Officers, Washington, DC
2003–2004	Project Advisor, Guide to Historic Sites of American Indians and the U.S. Military, U.S. Department of Defense
2002–2004	Member of Project Review Panel, American Indian Treaty Rights and Historic Preservation, U.S. Department of Defense
2002–2003	Project Humanities Scholar, Our Apache Books, Arizona Humanities Council
1997–1999	Member of Board of Directors, Arizona Archaeological Council

SFU (Senate, University-Wide, Faculty, and Departmental)

2017–2018	Member, Tenure & Promotion / School of Resource and Environmental Mgmt.
2015–2019	Director, Professional Graduate Programs in Heritage Resource Management
2012–2016	Member, Tenure & Promotion / Department of Archaeology
2015–2017	Member, Pacific Water Research Center Steering Committee
2013–2014	Chair, Graduate Studies Com./ School of Resource and Environmental Mgmt.
2013–2014	Member, Graduate Studies Committee / Department of Archaeology
2013	Member, Design Committee Environmental Resource Mgmt. Major (BENV)
2012–2013	Member, Tenure & Promotion / School of Resource and Environmental Mgmt.
2011–2013	Member, Senate Committee on International Activities
2011–2012	Chair, Undergraduate Studies Committee/ Department of Archaeology
2011–2014	Member, two President's Super Colloquia Steering Groups: <i>Toward a Theory of Global Justice</i> (Spring 2013) and <i>Protecting Indigenous Heritage</i> (Fall 2014)
2011	Member, Community Teaching Fellows Proposal Adjudication Committee
2010–2011	Chair, Student Awards / School of Resource and Environmental Management
2007–Current	Member, Museum of Archaeology and Ethnology Collections Committee
2007–2010	Member, Grad. Studies / School of Resource and Environmental Management
2006–2011	Member, First Nations Studies Advisory Committee
2005–2007	Member, First Nations University-Wide Coordinating Committee
2006–2008	Member, Tenure & Promotion / School of Resource and Environmental Mgmt.
2005–08, 2010–14	Member, Tenure & Promotion / Department of Archaeology
2005–2006	Member, Harassment, Equity and Ethics Com. / Resource and Environ. Mgmt.
2005–2006	Member, Student Awards / Department of Archaeology

Curriculum Vitae

John R. Welch, RPA

Community

- 2007–2019 Member and Board Secretary, Fort Apache Heritage Foundation Board of Directors
- 2015–2016 Advisory Committee member, *Tribal Preservation Planning Needs in Case of Emergency*, project developed by the National Association of Tribal Historic Preservation Officers (NATHPO) with support from the U.S. Federal Emergency Management Agency.
- 2005–2012 Archaeology Department liaison, SFU United Way Campaign
- 2005–2011 Archaeology and REM School liaison, SFU United Way Campaign
- 2007–2010 Member, Public Education Committee, Archaeological Society of British Columbia
- 2007–2009 Member, Fort Apache Master Plan Revision Team, White Mountain Apache Tribe
- 1998–2007 Founding Board Member (ex officio), Secretary, Executive Director (pro tempore), Fort Apache Heritage Foundation, Fort Apache, Arizona
- 2003–2005 Member, Board of Directors, Arizona Wilderness Coalition
- 2002 Judge, Miss White Mountain Apache Queen Committee, White Mountain Apache Tribe

AWARDS AND HONORS

- 2005–15 **Title:** Canada Research Chair (Tier 2) **Type:** Research **Organization:** Social Sciences and Humanities Research Council **Details:** Academic appointment to address indigenous heritage stewardship
- 2007 **Title:** Fellow **Type:** Service **Organization:** Society for Applied Anthropology **Details:** Endorsement by SfAA Board of the nomination by Shelby Tisdale
- 1999 **Title:** Governors Award **Type:** Service **Organization:** State of Arizona **Details:** For individual achievement in historic preservation
- 1992 **Title:** Appreciation Award **Type:** Service **Organization:** Arizona Archaeological and Historical Society **Details:** For contributions to preservation and public education
- 1991 **Title:** Comins Fellowship **Type:** Fellowship **Organization:** University of Arizona **Details:** Support for dissertation preparation
- 1983 **Title:** Undergraduate Essay Prize **Type:** Research **Organization:** Northeastern Anthropological Association **Details:** Annual prize for the best student essay submittal
- 1983 **Title:** Harold C. Bohn Anthropology Prize **Type:** Scholarship **Organization:** Hamilton College **Details:** Award to the best graduate anthropology major

OTHER

Manuscript and Proposal Refereeing (Last Five Years)

<i>American Antiquity</i>	<i>Canadian Journal of Archaeology</i>
<i>Journal of Social Archaeology</i>	<i>Journal of Archaeological Science</i>
Roman & Littlefield	<i>Environment and History</i>
University of Hawaii Press	University of Arizona Press
University of Utah Press	Research Council of Norway
<i>Journal of Environmental Education Research</i>	Left Coast Press
Social Science and Humanities Research Council of Canada	

Memberships

Az Archaeological and Historical Society (1983–life)	World Archaeological Congress (2006–current)
BC Assn Professional Archaeologists (2010–current)	Archaeological Society of BC (2005–current)
Society for Applied Anthropology (2003–2013)	Canadian Archaeological Assn (2005–current)
Register of Professional Archaeologists (1998–current)	Amer. Anthropological Assn (1986–2016)
Society for American Archaeology (1984–current)	

Exhibit A

1 PAUL E. SALAMANCA
2 Deputy Assistant Attorney General
3 United States Department of Justice
4 Environment and Natural Resources Division

4 TYLER M. ALEXANDER (CA Bar No. 313188)
5 Trial Attorney
6 Natural Resources Section
7 150 M St. NE, Third Floor
8 Washington, D.C. 20002
9 (202) 598-3314
10 tyler.alexander@usdoj.gov

9 *Attorneys for Defendants*

10 **THE UNITED STATES DISTRICT COURT**
11 **DISTRICT OF ARIZONA**
12 **PHOENIX DIVISION**

13 Apache Stronghold,
14

15 Plaintiff,

16 v.

17 United States of America, *et al.*,

18 Defendants.

CIVIL NO. 2:21-cv-00050-CDB

**DECLARATION OF
TRACY PARKER**

1 I, Tracy V.L. Parker, state as follows:

2

3 1. I am the Southwest Regional Director for Lands and Minerals for the United
4 States Department of Agriculture, Forest Service ("Forest Service"). I have held this
5 position since 2014. I have 30 years of experience with the Forest Service. I have held
6 positions at all levels of the organization, with increasing levels of responsibility with the
7 Lands and Minerals Program, including working at the National Headquarters in
8 Washington, D.C.

9 2. In my role as Regional Lands and Minerals Director, I oversee the delivery of the
10 Forest Service's Southwest Region's Lands program, which includes implementation of
11 the Southeast Arizona Land Exchange and Conservation Act, set forth in Section 3003 of
12 the Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for
13 Fiscal Year 2015, signed into law on December 19, 2014, as Public Law (P.L.) 113-291;
14 and codified at 16 U.S.C. § 539p ("Act").

15 3. I make this declaration based on my personal knowledge, my experience working
16 for the Forest Service, and information made available to me in my official capacity.

17 4. I am familiar with the above-captioned lawsuit and the Motion for Temporary
18 Restraining Order and Preliminary Injunction filed by Plaintiff. I am also familiar with
19 the Resolution Copper Project and Land Exchange ("Project"), including the land
20 exchange mandated by Congress pursuant to the Act.

21 5. On January 15, 2021, the Forest Service published the Final Environmental Impact
22 Statement ("FEIS") for the Project.

23 6. After publication of the FEIS for the Project, the Secretary of Agriculture, acting
24 by and through the Forest Service, is directed by the Act to convey all right, title, and
25 interest of the United States in and to the Federal land, as defined in the Act, to
26 Resolution Copper.

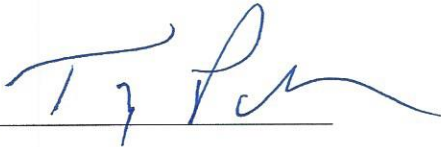
27 7. Due to the several steps left to close on the land exchange, including but not
28 limited to, executing a land exchange agreement, receiving the appraisal for the Federal

1 land, reviewing the Federal land appraisal, and drafting detailed escrow instructions,
2 Resolution Copper and the Forest Service will not exchange deeds to the Federal and
3 non-Federal lands, as defined in the Act, any sooner than 55 days after the publication of
4 the FEIS.

5 8. Additionally, with respect to subsidence effects to the surface of the exchange
6 parcel caused by underground mining activities, the FEIS at ES-3.2 states that “[t]he
7 subsidence zone at the Oak Flat Federal Parcel would break through the surface at mine
8 year 6...” (i.e., the FEIS effects analysis projects that a surface crater will start to appear
9 six years after active mining commences).

10
11 I declare under penalty of perjury that the foregoing is true and correct.

12
13 Executed on this 21st day of January, 2021.

14
15 

16 Tracy Parker
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Exhibit B

L.P.
Boundaries Tonto
Proc. # 795
Jan. 13, 1908

TONTO NATIONAL FOREST
ARIZONA
(SECOND PROCLAMATION)

By the President of the United States of America

A Proclamation

WHEREAS, it appears that the public good would be promoted by adding to the Tonto National Forest certain lands, within the Territory of Arizona, which are in part covered with timber, and by also including therein the area heretofore reserved and set apart as the Pinal Mountains National Forest;

Now, therefore, I, THEODORE ROOSEVELT, President of the United States of America, by virtue of the power in me vested by the Act of Congress, approved June fourth, eighteen hundred and ninety-seven, entitled, "An Act Making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," do proclaim that the Tonto National Forest is hereby enlarged to include the said additional lands, and that the boundaries of the aforesaid National Forest are now as shown on the diagram forming a part hereof;

Excepting from the force and effect of this proclamation all lands which are at this date embraced in any legal entry or covered by any lawful filing or selection duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, if the statutory period within which to make entry or filing of record has not expired; and also excepting all lands which at this date are embraced within any withdrawal or reservation for any use or purpose with which this reservation for forest uses is inconsistent: Provided, that these exceptions shall not continue to apply to any particular tract of land unless the entryman, settler, or claimant continues to comply with the law under which the entry, filing, or settlement was made, or unless the reservation or withdrawal with which this reservation is inconsistent continues in force; not excepting from the force and effect of this proclamation, however, any part of the National Forest hereby enlarged which may have been withdrawn to protect the coal therein, but this proclamation does not vacate any such coal land withdrawal; and provided that these exceptions shall not apply to any land embraced in any selection, entry, or filing, which may have been permitted to remain of record subject to the creation of a permanent reservation; and provided also that since the withdrawal made

Tonto N.F., 2nd Proc.
Proc. #795, 1-13-08

by this proclamation and any withdrawal heretofore made for national irrigation works are consistent, both shall be effective upon the land withdrawn, but the withdrawal for national irrigation works shall be the dominant one and may, when necessary, be changed to a withdrawal for irrigation from such works.

Warning is hereby given to all persons not to make settlement upon any of the lands reserved by this proclamation, unless and until they are listed by the Secretary of Agriculture and opened to homestead settlement or entry by the Secretary of the Interior under the Act of Congress, approved June eleventh, nineteen hundred and six, entitled, "An Act To provide for the entry of Agricultural lands within forest reserves:" Provided, that lands heretofore restored to settlement or entry under the provisions of the foregoing act shall be excepted from the force and effect of this proclamation.

In Witness Whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the City of Washington this 13th day of January,
in the year of our Lord one thousand nine hundred
and eight, and of the Independence of the United
States the one hundred and thirty-second.

[SEAL.]

THEODORE ROOSEVELT

By the President:

ELIHU ROOT

Secretary of State.

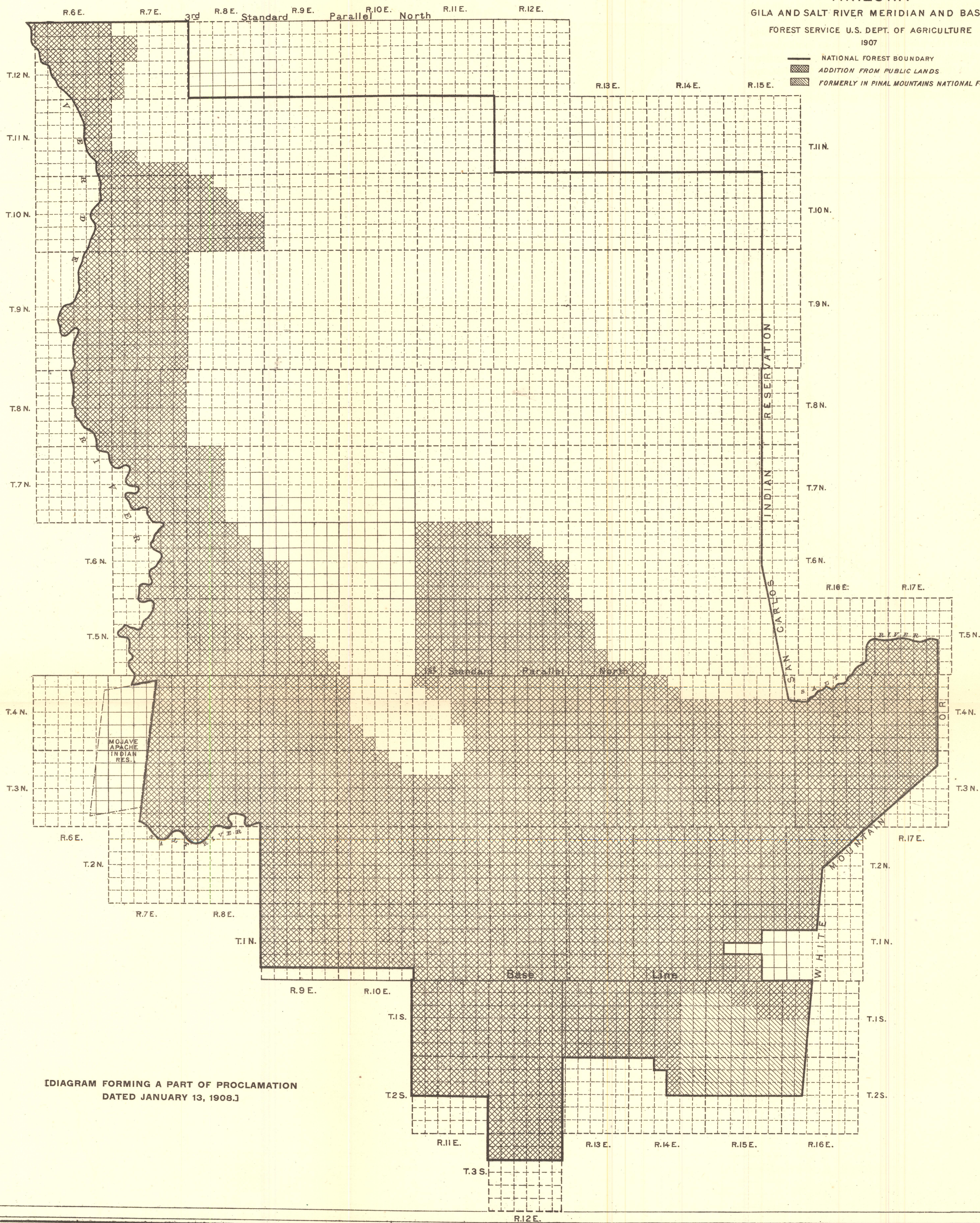
[No. 795.]

TONTO NATIONAL FOREST ARIZONA

GILA AND SALT RIVER MERIDIAN AND BASE

FOREST SERVICE U.S. DEPT. OF AGRICULTURE
1907

- NATIONAL FOREST BOUNDARY
- ADDITION FROM PUBLIC LANDS
- FORMERLY IN PINAL MOUNTAINS NATIONAL FOREST



IDIAGRAM FORMING A PART OF PROCLAMATION
DATED JANUARY 13, 1908.]

Exhibit C



DATE DOWNLOADED: Fri Jan 15 16:11:35 2021
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Citations:

Bluebook 21st ed.
Treaty with the Apaches, . 10 Stat. 979 (1852).

ALWD 6th ed.
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(1852): 979-982

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TREATY WITH THE APACHES. JULY 1, 1852.

979

FRANKLIN PIERCE,

PRESIDENT OF THE UNITED STATES OF AMERICA:

July 1, 1852.

TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

WHEREAS a Treaty was made and concluded at Santa Fé, New Mexico, on the first day of July, in the year of our Lord one thousand eight hundred and fifty-two, by and between Col. E. V. Sumner, U. S. A., commanding the 9th Department, and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said Territory, representing the United States, and Cuentas Azules, Blancito, Negrito, Captain Simon, Captain Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache nation of Indians, situate and living within the limits of the United States, which treaty is in the words following, to wit:

Preamble.

Articles of a Treaty made and entered into at Santa Fé, New Mexico, on the first day of July in the year of our Lord one thousand eight hundred and fifty-two, by and between Col. E. V. Sumner, U. S. A., commanding the 9 Department and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said Territory, representing the United States, and Cuentas, Azules, Blancito, Negrito, Capitan Simon, Capitan Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache Nation of Indians, situate and living within the limits of the United States.

ARTICLE 1. Said nation or tribe of Indians through their authorized Chiefs aforesaid do hereby acknowledge and declare that they are lawfully and exclusively under the laws, jurisdiction, and government of the United States of America, and to its power and authority they do hereby submit.

Authority of United States acknowledged.

ARTICLE 2. From and after the signing of this Treaty hostilities between the contracting parties shall forever cease, and perpetual peace and amity shall forever exist between said Indians and the government and people of the United States; the said nation, or tribe of Indians, hereby binding themselves most solemnly never to associate with or give countenance or aid to any tribe or band of Indians, or other persons or powers, who may be at any time at war or enmity with the government or people of said United States.

Peace to exist.

The Apaches not to assist other tribes in hostilities.

ARTICLE 3. Said nation, or tribe of Indians, do hereby bind themselves for all future time to treat honestly and humanely all citizens of the United States, with whom they may have intercourse, as well as all persons and powers, at peace with the said United States, who may be lawfully among them, or with whom they may have any lawful intercourse.

Good treatment of citizens of the United States by nations at peace with them.

ARTICLE 4. All said nation, or tribe of Indians, hereby bind themselves to refer all cases of aggression against themselves or their property and territory, to the government of the United States for adjustment, and to conform in all things to the laws, rules, and regulations of said government in regard to the Indian tribes.

Cases of aggression on them to be referred to government. Laws to be conformed to.

ARTICLE 5. Said nation, or tribe of Indians, do hereby bind themselves for all future time to desist and refrain from making any "incursions within the Territory of Mexico" of a hostile or predatory character; and that they will for the future refrain from taking and conveying into

Provisions against incursions into Mexico.

captivity any of the people or citizens of Mexico, or the animals or property of the people or government of Mexico; and that they will, as soon as possible after the signing of this treaty, surrender to their agent all captives now in their possession.

Persons injuring the Apaches to be tried and punished.

ARTICLE 6. Should any citizen of the United States, or other person or persons subject to the laws of the United States, murder, rob, or otherwise maltreat any Apache Indian or Indians, he or they shall be arrested and tried, and upon conviction, shall be subject to all the penalties provided by law for the protection of the persons and property of the people of the said States.

Free passage over the Apache territory.

ARTICLE 7. The people of the United States of America shall have free and safe passage through the territory of the aforesaid Indians, under such rules and regulations as may be adopted by authority of the said States.

Military posts, agencies, and trading houses to be established.

ARTICLE 8. In order to preserve tranquillity and to afford protection to all the people and interests of the contracting parties, the government of the United States of America will establish such military posts and agencies, and authorize such trading houses at such times and places as the said government may designate.

Territorial boundaries to be adjusted.

ARTICLE 9. Relying confidently upon the justice and the liberality of the aforesaid government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Apache's that the government of the United States shall at its earliest convenience designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

Presents to the Apaches.

ARTICLE 10. For and in consideration of the faithful performance of all the stipulations herein contained, by the said Apache's Indians, the government of the United States will grant to said Indians such donations, presents, and implements, and adopt such other liberal and humane measures as said government may deem meet and proper.

When treaty to be binding.

ARTICLE 11. This Treaty shall be binding upon the contracting parties from and after the signing of the same, subject only to such modifications and amendments as may be adopted by the government of the United States; and, finally, this treaty is to receive a liberal construction, at all times and in all places, to the end that the said Apache Indians shall not be held responsible for the conduct of others, and that the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.

How construed.

In faith whereof we the undersigned have signed this Treaty, and affixed thereunto our seals, at the City of Santa Fé, this the first day of July in the year of our Lord one thousand eight hundred and fifty-two.

WITNESSES :

F. A. CUNNINGHAM,
Paymaster, U. S. A.

E. V. SUMNER, [SEAL.]
Bvt. Col. U. S. A. com'g 9th Dept. in charge of Executive Office of New Mexico.

J. C. McFERRAN,
1st Lt. 3d Inf. Act. Ast. Adj. Gen.

JOHN GREINER, [SEAL.]
Act. Supt. Indian Affairs, New Mexico.

CALEB SHERMAN.

CAPITAN VUELTA, his x mark [SEAL.]

FRED. SAYNTON.

CUENTAS AZULES, his x mark [SEAL.]

CHAS. McDOUGALL,
Surgeon, U. S. A.

BLANCITO ———, his x mark [SEAL.]

S. M. BAIRD,
Witness to the signing of Mangus Colorado.

NEGRITO ———, his x mark [SEAL.]

JOHN "OPE,
Bvt. Capt. T. E.

CAPITAN SIMON, his x mark [SEAL.]
MANGUS COLORADO, his x mark [SEAL.]

AND WHEREAS the said Treaty having been submitted to the Senate of the United States, for its constitutional action thereon, the Senate did, on the twenty-third day of March, one thousand eight hundred and fifty-

TREATY WITH THE APACHES. JULY 1, 1852.

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three, advise and consent to the ratification of its articles, by a resolution in the words and figures following, to wit:

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES,

March 23d, 1853.

Resolved, (two thirds of the Senators present concurring,) That the Senate advise and consent to the ratification of the Articles of a Treaty made and entered into at Santa Fé, New Mexico, on the first day of July, in the year of our Lord, 1852, by and between Colonel E. V. Sumner, United States Army, commanding the 9th Department, and in charge of the Executive Office of New Mexico, and John Greiner, Indian Agent in and for the Territory of New Mexico, and acting Superintendent of Indian Affairs of said Territory, representing the United States, and Cuentas Azules, Blancito, Negrito, Capitan Simon, Capitan Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache nation of Indians, situate and living within the limits of the United States.

Attest —

ASBURY DICKINS, *Secretary.*

Now, therefore, be it known, that I, FRANKLIN PIERCE, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in their resolution of the twenty-third day of March, one thousand eight hundred and fifty-three, accept, ratify, and confirm the said treaty.

In testimony whereof, I have caused the seal of the United States to be herewith affixed, having signed the same with my hand.

Done at the city of Washington, this twenty-fifth day of March,
in the year of our Lord one thousand eight hundred and
[L. s.] fifty-three, and of the Independence of the United States the
seventy-seventh.

FRANKLIN PIERCE.

BY THE PRESIDENT:

W. L. MARCY, *Secretary of State.*

August 26, 1852.

A PROCLAMATION.

WHEREAS a Supplementary Commercial Convention between the United States of America and His Majesty the King of the Netherlands, was concluded and signed by their Plenipotentiaries, in this city, on the twenty-sixth day of August last, which Supplementary Convention is, word for word, as follows :—

Preamble.

Negotiators.

Vol. vii. p. 524.

ARTICLE I.

ARTIKEL I.

**Provisions re-
specting duties.**

Goods and merchandise, whatever their origin may be, imported into or exported from the ports of the United States, from and to any other country, in vessels of the Netherlands, shall pay no higher or other duties than shall be levied on the Goederen en koopwaren, overschillig welke derzelve herkomst zij, met Nederlandsche schepen wordende in of nit gevoerd, in of de havens der Vereenigde Staten, van en naar elk ander land, zullen geene hoogere noch andere regten betalen.

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONAWITNESS LIST

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Case Number: 2:21-cv-00050 Judge Code: SPL Date: February 3, 2021Case Name: Apache Stronghold vs. United States, et al.☐ X Plaintiff / Petitioner ☐ Defendant / Respondent☐ Non-Jury Trial ☐ Jury Trial ☐ X Other Hearing: Preliminary Injunction

Name	Sworn	Appeared
John R. Welch, Ph.D.	2-3-21	2-3-21
Naelyn Pike	2-3-21	2-3-21
Wendsler Nosie, Sr., Ph.D.	2-3-21	2-3-21

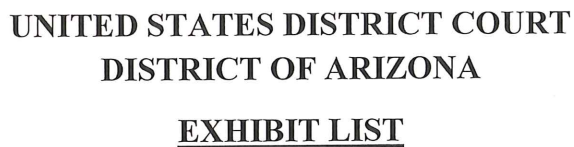
[illegible]

EXHIBIT A

APACHE STRONGHOLD

POB 766 SAN CARLOS, AZ 85550



November 13, 2020

John Fowler, Executive Director
The President's Advisory Council on Historic Preservation
401 F Street NW, Suite 308
Washington, DC 20001
via email to jfowler@achp.gov

RE: Council NHPA §106 Compliance Review Pursuant to 36 C.F.R. §800.9(a) for the Proposed Resolution Copper Mine and Southeast Arizona Land Exchange Undertakings

Dear Executive Director Fowler:

As the co-founder and spokesperson of the Apache Stronghold, and as an enrolled member and former Chairman of the San Carlos Apache Tribe ("Tribe"), I write to request that this letter be given due consideration and be made a part of the administrative record in the National Historic Preservation Act ("NHPA") Section 106 process in the proposed Resolution Copper Mine and Southeast Arizona Land Exchange (the "Undertakings").

We hereby acknowledge and incorporate by reference the words of advice and warning offered to you and other federal and state historic preservation officials and responsible parties by the respected Apache elder, White Mountain Apache Tribe Cultural Resource Director, Ramon Riley, in his November 9, 2020 open letter to U.S. Federal Government Trustees and Tribal Leaders, "Subject: Proposed Resolution Copper Mine and Land Exchange Impacts on First Amendment and Human Rights to Religious Freedom, Exercise and Beliefs." Further, we reference Director Riley's letter of September 11, 2020 and request that Director Riley's letters be made part of the administrative record in the Undertakings' NHPA Section 106 process. Copies of Director Riley's letter are attached.

This correspondence and the Council's ongoing agency compliance review pursuant to 36 C.F.R. § 800.9(a) comes at an ideal time. It is apparent that the U.S. Forest Service ("USFS") seeks to execute a flawed programmatic agreement ("PA") ("version 8" of July 27, 2020) to conclude the NHPA Section 106 process for the proposed above-referenced Undertakings.

It is also apparent that USFS does not intend to consult with tribes, the Apache Stronghold, the public, or other consulting parties on any sort of consistent or transparent basis. Indeed, USFS appears unable or unwilling to establish required measures to avoid and minimize adverse effects to historic properties adversely affected by the Undertakings. USFS has thus far dodged its duties and legal obligations to consider our human rights and constitutional rights to the free exercise of our Apache religion and our religious beliefs within our traditional land, especially our *Chi'chil Bildagoteel* ("Oak Flat") religious place and National Register District, all of which is targeted for deliberate and forewarned destruction by the proposed mining.

We also want to be sure that the Council understands that the Tribe's detailed review of that July 27, 2020 "version 8" of the PA, and the Tribe's September 3, 2020 letter by Chairman Terry Rambler to Tonto National Forest Supervisor Neil Bosworth, were both produced under an unnecessary and suddenly short deadline set on us by USFS after eight months of undue and unexplained USFS delays. The Tribe's official review of the PA has made clear to our Tribe's

17,000 members that our USFS federal trustee appears unwilling to properly consult with affected tribes, our organization, other consulting parties, and the public regarding necessary remedial changes to the version 8 draft PA.

We note with appreciation, the Council's perspective regarding the fundamental inadequacies of PA version 8, as expressed in the September 15, 2020 comments on that PA draft, to Supervisor Bosworth. We especially appreciate Dr. McCulloch's reminder to Supervisor Bosworth of the Council's July 23, 2020 Guidance, "Section 106 and Coronavirus Impacts."¹ We strongly support the Council's recommendation in the September 15, 2020 letter concerning the Forest Service's lack of a transparent Section 106 schedule and framework:

"...we recommend the TNF now move rapidly to clarify its remaining schedule and framework moving forward to conclude the Section 106 process as it addresses the concerns noted below and the comments provided by other consulting parties. This summation should include milestones for any future consultation meetings and for providing responses to existing comments."

The USFS' misconduct of the Section 106 process to date spotlights lack of transparency and disregard of core responsibilities under the Section 106 regulations at 36 CFR Part 800. Given our experiences with the USFS—especially mistreatments of our other sacred traditional cultural properties, most particularly Dził Nchaa Si'an ("Big Seated Mountain" aka "Mount Graham") and Dził Cho (San Francisco Peaks)—this systemic misconduct has continued to proceed despite our attempted corrections, for decades.

USFS officials now attempt, once again, to ignore their lawful obligations to consider the integrity, the cultural and religious significance of affected Apache and regionally shared Native American historic and traditional cultural properties. The USFS' failures include dereliction of legal requirements to develop and evaluate feasible alternatives or modifications to the Undertakings—such as alternative methods of mining, earth surface conservation, and disposal of mine wastes—that could avoid, minimize, or mitigate adverse effects to our historic and traditional cultural properties and corresponding effects the Undertakings to our cultures and sacred places.

USFS has most especially failed to meet its obligations to consider the Chi'chil Bıldagoteel National Historic District ("Oak Flat"), the complex of sacred sites targeted by and already suffering adverse effects from, these disrespectful, controversial and harmful Undertakings. Given that the elected method of copper mining enabled by the proposed land exchange would obliterate Chi'chil Bıldagoteel via massive, landscape-scale earth surface subsidence and dewatering, the Council and other signatories stand on the verge of complicity in deception—by USFS the Undertakings' Resolution Copper proponent, the joint venture of Rio Tinto and Broken Hill Properties ("BHP")—to accept the fallacy of "the continued access to Oak Flat" as a "mitigation initiative."

¹ One pertinent excerpt from that July 23, 2020 Guidance:

Extraordinary circumstances in the current situation warrant case by case adjustments to this process. Specifically, the Section 106 deadlines for the response of State and Tribal Historic Preservation Officers, and Indian tribes and Native Hawaiian organizations (NHOs) that attach religious and cultural significance to historic properties affected by the undertaking, regardless of its location (collectively, states/tribes/NHOs), will be considered paused while, due to the COVID-19 outbreak, an office is closed or work conditions are such that the states/tribes/NHOs are unable to carry out their Section 106 duties or statutory rights to consultation in a timely fashion (e.g., staff unavailability due to health reasons; restricted access to records; state or tribal laws requiring hard copy records; lack of Internet access or telework capabilities). The clock will resume once the conditions are no longer in effect.

That temporary offering is both short-lived and cruel because it would give us access to nothing but the reality of aggravated and compounded cumulative transgenerational pain and trauma, eternal reminders of profound disrespect and abuse by our “trustee,” to be entombed in a massive and agonizing crater of desecration where Chi’chil Bıldagoteel had existed, since time immemorial as a place of peace.

This is no different than Resolution Copper’s co-parent corporation Rio Tinto’s deliberate destruction of the Puutu Kunti Kurrama and Pinikura (“PKKP”) peoples’ sacred place and heritage site, Jukkan, in present-day Western Australia’s Pilbara region earlier this year. That human rights abuse and deliberate desecration caused an “investor revolt” within Rio Tinto, forcing the resignation of multiple Rio Tinto executives, including CEO Jean-Sebastien Jacques. In the aftermath, Rio Tinto’s Board Chairman, Simon Thompson, declared:

“What happened at Juukan was wrong. We are determined to ensure the destruction of a heritage site of such exceptional archaeological and cultural significance never occurs again at a Rio Tinto operation.”²

Jacques’ pledge seems to us dubious, at best. Just more empty words from strange people who would do anything to get what they want here. Rio Tinto gives every indication that it will continue, in defiance of its own policies and international law, to deny and stomp on essential human and Indigenous peoples’ rights to the land Resolution has targeted.

USFS has avoided compliance with the Section 106 regulations despite multiple requests, including last year’s letters to USFS from the Arizona State Historic Preservation Office (“SHPO”) and the Council. To assure that the Council and other consulting parties are informed regarding the views of Apache Stronghold, we supplement the San Carlos Tribe’s comments on PA version 8 with our review of concerns with the USFS’ attempted exercise of the Section 106 process so far.

Our comments on procedural and content deficiencies in the Section 106 process for the Undertakings make clear that USFS has seriously compromised the process. The significance of Chi’chil Bıldagoteel, and Apaches’ long-running, highly publicized and internationally-reported defense of our sacred traditional cultural property on our aboriginal land, was well-known to both Rio Tinto and BHP, as well as the USFS, long before they successfully lobbied Senator John McCain, Representative Ann Kirkpatrick, and our other “trustees” to insert an 11th hour rider into the “must pass” Defense appropriations bill on the eve of a looming government shutdown in December 2014.

We urge and advise that the Section 106 process be re-initiated with a transparent and detailed agenda, then conducted in proper conformance with regulations at 36 CFR §800, applicable USFS agreements and policies, and relevant memoranda and guidance documents of the Council and the U.S. Department of the Interior National Park Service.

² “Rio Tinto CEO, top executives resign amid cave blast crisis,” by Nick Toscano and Hamish Hastie, Sydney Morning Herald (September 11, 2020) (“Mr. Jacques, Mr. Salisbury and Ms. Niven - whose department oversees community relations - were last month stripped of \$7 million of their 2020 bonuses after a board-led review found they had to bear some responsibility.”), <https://www.smh.com.au/business/companies/rio-tinto-ceo-top-executives-resign-amid-cave-blast-crisis-20200910-p55uf8.html> .

And see, e.g., “Grieving after Rio Tinto blast, Aboriginal owners fear Fortescue plans,” by Nick Toscano, Sydney Morning Herald (October 12, 2020) <https://www.smh.com.au/business/companies/grieving-after-rio-tinto-blast-aboriginal-owners-fear-fortescue-plans-20201012-p564az.html> .

Unless this is done, the Council may find that termination must be considered per 36 CFR §800.7, to preserve semblances of integrity in NHPA administration and oversight, to demonstrate fidelity to Federal Government Indian and public trust responsibilities, and to avoid further prejudices, undue burdens and harms to us, and violations of the legal, constitutional, and human rights of Apache people and other affected Native American tribal members.

Defects In The Section 106 Process For The Undertakings

The San Carlos Apache Tribe, on behalf of its members such as those of us who have assembled as Apache Stronghold, and most other consulting parties have been dutiful participants in the various Section 106 process attempts for the Undertakings since 2015. Our Tribe has allocated limited staff resources in efforts to protect Chi'chil Bıldagoteel and to assist USFS in meeting its statutory and regulatory obligations without infringing on our legal and human rights.

Our Tribe sent many of our most respected elders to collaborate in the Ethnographic and Ethnohistoric Study of the Superior Area, a study mostly ignored by USFS. We participated in at least fifteen (15) USFS-sponsored meetings regarding the Undertakings. We submitted at least seven (7) substantive sets of comments on prior drafts of the PA and on documents prepared pursuant to the National Environmental Policy Act ("NEPA").

Other tribes, the Arizona SHPO, and the Council have been similarly diligent in assisting USFS in the proper conduct of the Section 106 process. The primary product of collective diligence on the part of the consulting parties, version 8 of the PA, combines failures to meet basic regulatory requirements with unorthodox attempts to use the PA to advance various corporate interests and other purposes not contemplated under the NHPA or its implementing regulations.

The substantial investments by our Tribe and other parties, including the Council, in assuring legitimacy and improving the USFS' faithless performance of its Section 106 duties, have yet to translate into adequate USFS performance. In particular, despite information and advice from consulting parties, USFS has failed to develop and evaluate alternatives or modifications to the Undertakings that could avoid or minimize adverse effects on historic properties. Neither has USFS explained its rationales for ignoring or discarding the information and advice that has been forthcoming from the consulting parties. USFS has yet to simply identify, describe, and evaluate the functions, attributes, and values of our historic properties, especially including Chi'chil Bıldagoteel. USFS has yet to explicitly consider our properties' religious functions, attributes, and values. These steps are prerequisite to USFS completion of mandatory USFS considerations of the adverse effects that the Undertakings will have on these and all other historic properties.

USFS failures to administer the Section 106 process transparently and in accord with the NHPA and the regulations at 36 CFR Part 800 are adding disrespectful insults to the injuries that Apaches and other traditional religious practitioners are experiencing with the industrial damage, alteration, and destruction of Chi'chil Bıldagoteel.

USFS failures fall into four overarching and aggregating categories of defects. Defects One and Two are procedural. Defects Three and Four are substantive, content-specific failures stemming from USFS derelictions in its Indian trust responsibilities, in its government-to-government consultation duties, in its obligations to analyze and disclose adverse effects on historic properties, and in its mandates to seek to avoid, minimize, or mitigate adverse effects.

What follows here below is a review of those four fundamental defects, intended to assist the Council with its compliance review and to guide USFS in the necessary reboot of the Section 106 process. We think that reboot should include an admission of errors in fulfilling of fiduciary

responsibility and should initiate a truthful reconciliation with the Native nations, tribes, and tribal members and citizens and harmed and disrespected by USFS and Rio Tinto-BHP conduct to date.

Defect One: Bifurcation of the 106 Process and Exclusion of Consulting Parties

In a manner inconsistent with both 36 CFR Part 800 and authoritative advice provided by consulting parties, USFS has excluded tribal consulting parties from its communications with government agency consulting parties, and vice versa. The regulations at 36 CFR Part 800 do not allow agencies to make unilateral selections of which consulting parties to communicate with. The regulations do not enable agencies to select which agency determinations to disclose to different subsets of consulting parties, or to presume to speak on behalf of sovereign Indian tribes to others, especially without prior informed written consent and without the presence of the tribes' official representatives. SHPO's September 19, 2019 letter to USFS spotlights that defect: "tribal consultation under Section 106 and the provisions outlined in 36 CFR Part 800 . . . has not proceeded apace of other federal authorities guiding consultation with Native American tribes."

Inconsistent and apparently biased and selective USFS attention to its consultative duties is also seen in USFS failures—despite the Undertakings' complexity, controversial nature, and massive and unmitigated adverse effects on historic properties—to involve the public pursuant to 36 CFR §800.2(d). A conscientious non-governmental organization brought this deficiency to USFS attention a year ago (Arizona Mining Reform Coalition letter to USFS Supervisor Bosworth, November 4, 2019). Despite that appeal, USFS continues to exclude the public from participation in the Section 106 process (other than commentary on the PA), to discount and disregard most values linked to historic properties other than the scientific values associated with National Register Criterion D, and to enable plans for the destruction of hundreds of historic properties despite good options for effect avoidance and minimization. The result of USFS conduct and decision making in the course of this alleged NHPA Section 106 process has been prejudicial and detrimental to the tribal parties' interests, and particularly to our interests and rights to the free exercise of our traditional religion and the protection of our traditional sacred places within and related to the Chi'chil Bıldagoteel sacred property and National Historic District.

Defect Two: Failure to Conduct the Section 106 Consultations Stepwise

The NHPA Section 106 regulations at 36 CFR Part 800 prescribe a protocol for a multi-phased sequence of communications involving disclosures of federal agency plans and proposed determinations intended as a basis for seeking informative comments from consulting parties and the public. While it is understood that the Section 106 regulations are to be flexibly applied, it is not permissible to distort or omit key steps—whether intentionally in bad faith, or negligently as the result of a failure to exercise due care. Earlier phase consultations are, of course, intended to serve as rational bases for procedural and substantive improvements in subsequent phases. Instead of making use of the stepwise method, as prescribed, USFS has ignored NHPA in both letter and spirit by excluding tribal consulting parties from participation in critical steps of the Section 106 process. The San Carlos Apache Tribe's letters of July 10 and September 30, 2019 advised USFS of this chronic defect.

On a parallel track, the SHPO's letter of September 19, 2019 expressed concerns with USFS' management of the process and its substance:

"This letter is a follow up to and memorialization of the August 29, 2019 meeting between TNF and SHPO staff regarding the Resolution Copper Mine Programmatic Agreement (PA) and ongoing Section 106 Consultation. At our meeting, SHPO reiterated our continuing concerns with the tribal consultation process, which has not been accomplished in concert with the process laid out in 36 CFR Part 800."

The Council's October 25, 2019 letter to USFS Supervisor Bosworth likewise expresses concerns with "the lack of clarity on how the TNF has provided tribes with a reasonable opportunity to identify concerns about historic properties; advise on the identification and evaluation of properties of traditional religious and cultural importance to them; articulate their views on the undertaking's effects on such properties; and participate in the resolution of adverse effects." (See at p.1, "Consultation with Indian Tribes"). The reason why it is unclear to the Council, to the SHPO, and to the tribal parties is obvious and has nothing to do with the particular challenges of these Undertakings: the USFS' conduct is unrecognizable when compared with the standard required practices and regulatory requirements.

The USFS December 5, 2019 response to the Tribe feigns innocence and ignorance:

"It is not clear from [sic] your letter, which 'specific procedural requirements' you are referring to. The very purpose of the PA is to ensure the Forest is following the legal requirements for section 106."

As the Council is aware, and as the Tribe and other parties have repeatedly advised USFS, even as consultations are essential foundations for PA preparation, any procedures set forth in an agreement document cannot substitute for specific procedural requirements to consult with the Tribe and other consulting parties regarding proposed methods to be used: to identify historic properties, per 36 CFR §800.4(b); to make evaluations of significance and determinations of eligibility, per §800.4(c); to provide assessments of adverse effect, per §800.5; and, to compose reasonable resolutions of adverse effect, per §800.6.

PA version 8 reveals that USFS has begun taking some of these required steps, but this has not been done in consultation with the tribal consulting parties. The attempt in PA version 8 to exclude tribes from the list of consulting parties is as emblematic of unreliable USFS performance of its duties as it is harmful to the special relationship with tribes that USFS officials are sworn and otherwise legally bound to uphold.

Defect Three: Violations of Government-to-Government Duties and Protocols, and Infringements on Tribal Sovereignties

The Section 106 regulations and other rules that define lawful USFS conduct also prohibit USFS actions that harm or diminish tribal sovereignty. USFS has defied these rules and notifications from our Tribe that we have not been properly consulted about the USFS "Tribal Monitor Program." This "Program" has been co-conceived and fostered by USFS and the Undertakings' proponent and administered by a contractor guided by USFS officials and financially controlled by Rio Tinto-BHP through Resolution Copper.

The "Tribal Monitor Program" must be disclosed and analyzed for what it is: a USFS-sponsored corporate industrial operation to recruit and employ individual tribal member-citizens to provide USFS and Rio Tinto-BHP-Resolution Copper with sensitive cultural information that is privileged and collectively owned by the affected tribes, all in the absence of prior, fully informed, written consent from tribal governing bodies. The San Carlos Apache Tribe's letters of July 10 and September 30, 2019 advised USFS to suspend this "Program" and all other attempts to convert invaluable, tribal cultural, historical, and geographical knowledge into a "currency" for USFS and the Undertakings proponent to "purchase" compliance with NHPA, NEPA, and the Southeast Arizona Land Exchange and Conservation Act.

Instead of initiating non-discretionary, government-to-government consultations regarding the "Tribal Monitor Program," USFS Supervisor Bosworth's December 5, 2019 letter attempted to dodge concerns, claiming that "the Tribal Monitor Program is not part of government-to-

government consultation.” USFS continues to champion that operation and to advocate for its commercial collaborators’ unauthorized intrusion into the Tribes’ sovereign affairs. Despite requests from multiple parties, USFS has failed to clarify, specify, and consult within the Section 106 and NEPA processes about the roles of the “Tribal Monitor Program.” Ongoing implementation of that “Program” has corrupted various phases of an already complex and mismanaged Section 106 process, one sorely lacking in demonstrated good faith by USFS.

We once again invoke the Council’s trust responsibilities for tribal welfare and assistance in suspending the “Tribal Monitor Program” pending proper completion of the required government-to-government consultations with our Tribe and other affected tribes. In light of USFS resistance to such consultations, Apache Stronghold now must insist on binding and legally enforceable assurances that any and all collectively owned Western Apache traditional knowledge already captured by USFS and the various third-party contractor(s) without proper authorization and prior informed written consent cannot and will not be used for any purpose, including NHPA and NEPA compliances, without the prior informed written consent of the tribal owners.

The Council appears to also be aware that Section IX of PA version 8 includes USFS schemes, only recently announced to tribal officials using means other than government-to-government consultations, regarding “tribal programs” supported by “four financial trusts that would provide 40 years of funding for a variety of programs to meet a number of specific purposes” linked to the mitigation of the Undertakings (USFS Supervisor Bosworth July 24, 2020 letter to San Carlos Apache Tribe Chairman Rambler). This apparent further attempt to co-opt tribal government prerogatives and transfer duties for the avoidance, minimization, and mitigation of adverse effects from the USFS to private third parties, even if permissible, is subject to public disclosures and tribal consultations pursuant to NHPA, NEPA, and other federal laws and rules.

USFS is not meeting these essential fundamental mandates. Instead, USFS is attempting to authorize or legitimize these still-vague schemes through very late insertion in a “final draft” PA, along with the sudden introduction of a new private commercial signatory party and intended PA beneficiary (more about this trickery is presented in Defect Four here below). Those daring and provocative stunts are patently unacceptable in any legitimate Section 106 process, especially because the USFS subsequently informed Apache tribal officials that the USFS is not providing for any tribal consultation about it, only accepting written comments— thereby effectively terminating the Section 106 process on the Undertakings.

We urge the Council to assist USFS in consulting with tribal governments in good faith about the precise roles in the Section 106 process of both its proposed “Tribal Monitor Program” and the proposals outlined in the July 24, 2020 USFS letter and PA Section IX. We Apaches are under no obligation, with or without the overdue government-to-government consultation, to further assist USFS or the proponent of the Undertakings in superficially satisfying their legal obligations or enabling their bad faith and self-serving endeavors to manipulate the Tribe and its members, and the other tribes and their members, with such schemes.

Defect Four: Inattention to Adverse Effects to Historic Properties and Impediments to Free Exercise of Religion and Undue Burdens on Religious Beliefs

Neither the Section 106 process nor the NEPA process for these Undertakings have contributed materially to any plans other than to do no more than generally and casually note just some of the adverse and cumulative effects of the Undertakings on the *Chi’chil Bildagoteel* Historic District and multi-tribal sacred place. Hundreds of other historic properties, the vast majority of which were created and are cared for by American Indians, are also being targeted for imminent alteration or complete obliteration. USFS failure to analyze feasible alternate mining methods, or to disclose and consult with the Tribe about the substantive results and treatment

options emerging from those analyses, indicates that the Undertakings will violate and destroy *Chí'chil Bildagoteel* and the many values and historic properties there and nearby.

Indeed, actions by USFS and Rio Tinto-BHP-Resolution Copper already have been inhibiting and unduly burdening the free exercise and beliefs of members of American Indian religions. They certainly are unjustly encumbering and unduly burdening our religious beliefs and violating our senses of place, vitality, security, identity, health and wellness.

USFS has also failed to analyze and consider the adverse effects of prior undertakings in relation to values other than scientific values or National Register criteria other than Criterion D. These prior and ongoing undertakings include the many drilling sites, road “improvements,” and other surface and subsurface alterations, including many actions the Tribe sees as adverse and cumulative effects within and around the boundaries of *Chí'chil Bildagoteel*. Neither the individual USFS permits issued with “no adverse effect” determinations for those subsidiary undertakings, nor the proposed land exchange’s Draft Environmental Impact Statement (“DEIS”), nor any of the eight (8) draft PAs, account for (much less analyze or resolve) the adverse effects and impacts those actions have had and are continuing to have.

As the Tribe has previously informed USFS, these significant environmental impacts and adverse effects specifically include impacts, effects, and undue impositions on the free exercise and beliefs of Apache religion and on the ability of myself and other Apache people to avail ourselves of the unique, place-based spiritual and emotional benefits of exercising our religious beliefs without the encumbrances of drilling sites, wells, roads, and other industrial intrusions. Neither the draft PA versions 1-8 nor the DEIS contain either general planning approaches or specific protocols for avoiding or reducing adverse effects to historic properties, except through the additional and compounding adverse effects of rote archaeological testing and data recovery.

USFS has also failed to fulfill its binding legal duties to analyze and consider the Undertakings—pursuant to NEPA, NHPA, the First Amendment’s Free Exercise Clause, the Religious Freedom Restoration Act (“RFRA”), as amended, and other legal requirements—in terms of cumulative effects. Neither the DEIS nor the Section 106 process has heretofore disclosed, considered, or analyzed quantitative or qualitative dimensions of current, reasonably foreseeable, and cumulative adverse effects to the cultural and religious values and uses directly and indirectly linked to the historic properties on the verge of destruction.

It bears particular mention that the USFS DEIS selected the preferred action alternative for the Undertakings, an option that ensures the greatest number and magnitude of adverse effects to historic properties. In the course of planning and evaluating these Undertakings and other recent undertakings, USFS has overseen and is failing to regulate, avoid, minimize, or mitigate the ongoing and cumulative transformation of our Pinal Mountain Apache cultural landscape into an industrial wasteland. Apache Stronghold asks the Council to assist USFS in providing due consideration, per NEPA, NHPA, 36 CFR § 800.5(a)(1), and our Constitutional and statutory rights, of these and other cumulative effects.

The most recent example of a detail of the compounding defects we review here is the unheralded and late-hour appearance of the Salt River Project (“SRP”) as a signatory party in version 8 of the draft PA. SRP has a history of working against tribal rights and interests. The surprise introduction of SRP as a signatory party to the “final draft” PA introduces another realm of adverse effects to our historic properties and sacred places. This abrupt addition also implicates facets of environmental equity and environmental justice. SRP involvements, plans, and attendant issues require bona fide and good faith consultation—which has been, so far, non-existent—in accordance with NHPA Section 106, NEPA, and other applicable laws and executive orders.

For the in-progress Section 106 process, such consultation should be grounded in adequate prior USFS disclosures of SRP involvements in the undertakings and SRP contributions to the resolution of adverse effects. The apparent USFS attempt to add SRP into a final draft PA and to provide coverage for undisclosed and distinct SRP undertakings further violates basic tenets of good faith consultation per NHPA Section 106. We hope the Council will be effective in advising USFS of its duties in leading consultative negotiations. Because this particular Section 106 process involves treaties, tribal sovereignty, religious freedom, basic human rights, and hundreds of Register-eligible historic properties it deserves and requires utmost good faith which has been sorely lacking so far on the part of USFS, SRP, and Rio Tinto-BHP-Resolution Copper.

Concluding Comments, Recommendations, and Requests

We are grateful in anticipation of the Council's thorough exercise of its federal oversight authority to assist and advise USFS in this matter. We hope to see real progress toward the setting of reasonable and enforceable limits to any further alteration to our ancestral lands, and to our religious and cultural relationships to our imperiled ancestral lands.

We urge the Council's attention to the 2015 "Ethnographic and Ethnohistoric Study of the Superior Area, Arizona," which is part of the administrative records in these NHPA and NEPA processes. That study describes much of the historical depth, cultural breadth, and religious potency of connections among individual historic properties and tribal member-citizens and communities. The ninety-four (94) tribal representatives involved in that Ethnohistoric Study affirmed that the Undertakings would cause direct, indirect, and cumulative adverse effects to historic properties and to the individuals and communities that rely upon these properties for health, vitality, identity, orientation, and other aspects of wellness, peace, and security. Although USFS has recently given nominal attention to that study, it continues to ignore and omit "community health" and "tribal health" place-based relationships in its Section 106 and NEPA plans and analyses for the Undertakings.

Each and all of the four categories of defects discussed above could have been avoided or remedied if USFS had consulted properly and acted accordingly in the attempted Section 106 process. Whatever USFS has and has not done—through negligence, incompetence, or lack of good faith—however great the limitations on USFS discretion and however vigorous and costly its bureaucratic machinations for the Undertakings, the USFS has not administered a "process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising" as required by the NHPA and the Council's implementing regulations.

Instead, USFS has chronically disregarded its fiduciary responsibility to federally recognized tribes. USFS has subverted government-to-government protocols, unlawfully distorted the Section 106 process and most harmfully, prioritized special discretionary service to the corporate entity created by two transnational corporations and presented as the proponent of the Undertakings. And now the USFS shamelessly seeks to also provide special rapid NHPA-bypass service to SRP.

USFS failures and miscarriages could and should have been averted or remedied on the basis of either the prior communications from consulting parties, or the lessons USFS should have learned over several decades from similar careless blunders and deliberate insults to tribes and our sacred and holy places—*Dził Nchaa Si'an* (Mount Graham), *Dził Cho* (San Francisco Peaks), *Ba Whyea* (Taos Pueblo's Blue Lake), the Mountain Badger-Two Medicine Traditional Cultural District, etc., etc. Instead, USFS now stubbornly proceeds to fast-track the destruction of *Chí'chil Bìldagoteel* with presumed impunity, posing behind the façade of a defect-ridden pseudo-Section 106 process.

In addition to its great cultural and religious importance to other tribes, *Chir'chil Bida'goteel* is profoundly central to the cultural and religious beliefs and practices of the San Carlos, White Mountain, Cibecue, and Tonto Apaches. The *Chir'chil Bida'goteel* National Register Historic District unmistakably deserves and requires thorough and imminent respectful consideration in terms of its manifold values and the many options available to avoid and reduce adverse effects to those values. The adverse effects and significant impacts from the proposed Undertakings would be a massive undue burden on our Constitutional, religious, and basic human rights. These effects and impacts would all but eliminate our Tribe's ability to practice and transmit to future generations the religious ceremonies, values, beliefs, and practices necessary to sustain our cultural existence.

Apache Stronghold declares that the time has come to expose USFS' attempted unlawful manipulations of the Section 106 process for the Undertakings and to reestablish the legitimacy of these essential proceedings in accordance with the law. We gratefully anticipate Council's thorough review of our concerns and the concerns expressed by our Tribal government officials. We particularly anticipate robust oversight and the responsible Federal Government officials' reassertion of their Indian fiduciary duties and re-establishment of lawful, meaningful, and timely government-to-government consultations regarding all matters related to the proposed Undertakings.

In closing, we would like to acknowledge your recently announced and upcoming retirement as the Executive Director and express our appreciation for your accomplishments in the field of historic preservation and cultural heritage protection, particularly your influence and leadership in providing for better understanding and respect for Native American traditional culture and heritage, the preservation of our sacred places, and protection of our religious freedom and human rights.

Sincerely,



Wendler Nossie, Sr. Ph.D.
APACHE STRONGHOLD
apaches4ss@yahoo.com

Attachments (2) (White Mountain Apache Tribe Cultural Resources Director Ramon Riley's letters of September 11, 2020 and November 9, 2020).

cc (2-page list, as follows):

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Yavapai-Prescott Indian Tribe, Culture Research Department Director, Linda Ogo, 530 E. Merritt Street, Prescott, AZ 85301



September 11, 2020

To the Arizona Tribal Leaders Affected by the Proposed Resolution Copper Mine:

I am responding due to a letter by Neil Bosworth, Forest Supervisor, Tonto National Forest (dated August 28, 2020, File Code: 1560) to the White Mountain Apache Chairwoman, Gwendena Lee-Gatewood regarding the Southeast Arizona Land Exchange with Oak Flat to Resolution Copper.

First, I represent myself here as an Apache elder. I am almost 80 years old and have spent most of my life and career working to maintain, and pass down to our younger generations, our greatest birthright—our Apache language and cultural knowledge. Second, I am a White Mountain Apache Tribal official. I serve as the Tribe's Cultural Resource Director/NAGPRA Representative, Chair of the Cultural Advisory Board, and on other local Boards.

I am opposed to the proposed Resolution Copper Mine. I think it is time for our Pima, Tohono O'odham, Yavapai, and Apache Nations, our great leaders, and our esteemed cultural representatives to suspend all involvement in making plans for the proposed Resolution Copper Mine that will result in the destruction and desecration of Chich'il Bil Dagot'eel, our holy site.

We have had supposed "consultations" and submitted many statements describing the sacredness and cultural areas and our opposition to the plans by the Resolution Copper Mine corporation. The majority owner is Rio Tinto, the Australian company responsible, just four months ago, for obliterating the sacred Juukan Gorge rock shelters in Western Australia without properly notifying the Aboriginal traditional owners. Rio Tinto is working hard to do the same thing here. Their plan is to damage 35,000 acres (more than 50 square miles) of our beautiful ancestral lands and to make a toxic soup out of billions of gallons of precious clean water. Our homelands will never be the same....

These "consultations" are wrongheaded. In the old days, if somebody killed one of our relatives, if retaliation in-kind was not swift, then they did the next honorable thing: the relatives of the murderer came to the victim's family to provide a just and fair compensation for the loss. They provided the loved one's family with food, horses, and other goods. Amends were made and life went on.

Nobody would ever think about having a discussion with murderers before their foul and evil deed. But I see in that August 28, 2020 letter that Resolution Copper wants to close the deal to get the Tribes to participate in receiving funds for "Tribal Monitors" and "Cultural Programs." This is Resolution Copper's way to try to get tribes' help to legitimize and legalize killing our land and impeding our religious and cultural beliefs and spiritual traditions. Why would we ever agree to this?


I know we all need funding to support language and culture programs, of course, but let's not take this blood money now. Let's stand together and fight these foreign corporate invaders! Let's support the San Carlos Apache Tribe to stop the Resolution Copper Mine and protect our sacred ancestral land as our ancestors did for centuries.

Tonto National Forest and Resolution Copper officials think they have the laws on their side, but those laws all passed without knowledge, consultation, or support from Native People. AZ congressional members underhandedly submitted the attachment to a bill without our knowledge years ago. The land they want to destroy—the waters they want to poison and dry up, the plants and animals they want to kill, the sacred and holy resting places they want to desecrate—are Indigenous land. It is up to Tribal People to defend and protect it.

It is wrong for our People to be involved in planning to destroy sacred land that made us who we are. I am asking for all Native People to stop working with, and helping Tonto National Forest and Resolution Copper officials get approval for their mine.

Let's resist the divide-and-conquer strategy that made it even possible for this terrible idea for mining one of our most sacred places to have made it this far. Please join me and **just say NO to the proposed Resolution Copper Mine.**

Respectfully,


Ramon Riley, Cultural Resource Director/
NAGPRA Representative
Nohwike' Bagowah Culture Center
White Mountain Apache Tribe

White Mountain Apache
(928) 338-4625 Fax (520) 338-1716



Cultural Center
P.O. Box 507 • Fort Apache, AZ 85926

November 9, 2020

Subject: Proposed Resolution Copper Mine and Land Exchange Impacts on First Amendment and Human Rights to Religious Freedom, Exercise and Beliefs

To Our U.S. Federal Government Trustees and Tribal Leaders:

I am an elder and culture bearer for the Apache people and it is my duty to tell the truth and defend our Apache lands, culture, language, and lifeways. I have tried for the last two decades to explain to the Federal Government, to various mining company officials, and to others of the clear duty to protect the Chi'chil Bildagoteel (Oak Flat). Most have listened, but too few have heard my message and learned, so I am writing it down.

I want to be clear that this is not an issue of "access" and that neither Chi'chil Bildagoteel, the powers resident there, nor our religious activities that pray to and through these powers can be "relocated." It is painful to experience the continued dismissal by Tonto Forest officials of our rights to exercise our religion at a place uniquely endowed with holiness and medicine. The lands proposed for destruction by the proposed mine cannot be replaced and prompt action is needed to protect Chi'chil Bildagoteel.

Chi'chil Bildagoteel, including all 4,309 acres of public lands managed by the Tonto National Forest as the Chi'chil Bildagoteel National Register Historic District, requires protection for many reasons, especially because it is a place:

- Respected and protected for many centuries for religious use, beliefs, and practice by the ancestors of today's O'odham, Hopi, Zuni, Yavapai, and Apache Tribes, as well as by Spanish, Mexican, and early Anglo residents. All who get to know the Chi'chil Bildagoteel come to realize, honor, and celebrate its deep and universal sacredness.
- Recognized for the holy beings and powers as inscribed on cliffs and boulders.
- Visited for respectful and sustainable harvest of sacred medicine plants, animals, and minerals essential to our Apache Holy Ground ceremonies and other religious and cultural ceremonies.
- Revered and used for the sacred spring waters that flows from the earth with healing powers not present elsewhere. Chi'chil Bildagoteel is a place of perpetual prayer and the location for eternal ceremonies that must take place there to benefit from and demonstrate religious obligation, responsibility, and respect for the powers at and of Chi'chil Bildagoteel.
- Honored for the warriors who sacrificed their lives to protect their lands and families. Apaches and other Native and non-Native peoples recognize battlefields and burial places, much like

Arlington Cemetery, as sacred and protected lands. Why does the Federal Government deny protection for the Apaches who died at and near Chi'chil Bildagoteel and the Apache Leap?

- Valued as one of the most important sources of our favorite and best acorns, a principal source of Ndee (Western Apache) cultural identity, historical orientation, and good food. We Western Apache are an Acorn Nation. We rely on and nurture oak groves through our ceremonies, prayers, and lifeways. These are our actual Trees of Life.

It is my understanding that the land exchanges authorized in Section 3003 of the FY 2015 National Defense Authorization Act cannot proceed unless and until the Federal Government, the trustee for the welfare of myself, my tribe (White Mountain Apache), the Ndee (Western Apache Nation), and all other federally recognized tribes and their members and citizens does at least four things:

1. Complies with the legal requirements of the National Historic Preservation Act through the execution of a programmatic agreement for the protection of historic properties, including our places of religious and cultural importance, threatened with irreparable damage and destruction by the proposed Resolution Copper Mine.
2. Certifies bona fide appraisals of the lands to be exchanged to enable the proposed Resolution Copper Mine, including the heartless giveaway of the Chi'chil Bildagoteel, the multi-tribal holy site, sacred place, ceremonial area, and U.S. National Register Historic District previously protected by the Federal Government from mining.
3. Publishes the final environmental impact statement for the proposed Resolution Copper Mine.
4. Defends Federal Government actions and decisions against lawsuits.

The point here is that there is plenty of time for Federal Government officials and the cultural and elected leaders of tribes across Arizona, New Mexico, and beyond, to awaken to moral and legal mandates to protect Chi'chil Bildagoteel. Let's work together to save this natural and cultural wonderland!

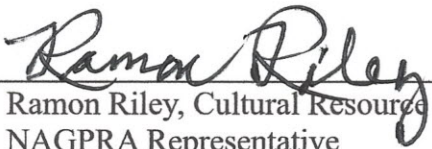
I urge careful attention to the religious and cultural significance of Chi'chil Bildagoteel in the National Historic Preservation Act Section 106 compliance process underway on the part of the Tonto National Forest. I am asking for our Federal Government Trustee to give focused attention to a key problem with the Tonto Forest Land Exchange and proposed Resolution Copper Mine Project that has been either neglected or deliberately disregarded by our Trustee and other responsible federal and state officials.

The Section 106 process and Programmatic Agreement has given lip service to minimizing and mitigating the adverse effects of the proposed mine and land exchange. The key problem is that both Federal and Arizona State government representatives have avoided the mandatory and fundamental step of identifying and evaluating the adverse effects that the proposed mine and land exchange will have on Apache free exercise of our traditional religion and Apache religious beliefs. The Federal Government is pretending to comply with NHPA while avoiding any identification and evaluation of Apaches' deeply rooted First Amendment religious rights to and relationships with Chi'chil Bildagoteel. This is made clear in the Forest Service's draft NHPA programmatic agreements, and especially in lack of any attempt to avoid impacts to Chi'chil Bildagoteel and in the sudden appearance of the Salt River Project as a signatory and regulatory beneficiary—much to our detriment.

Tonto Forest representatives have yet to consider and properly document how to avoid, minimize and mitigate the adverse effects on our religious rights of free exercise and beliefs in consultation with us, and with our prior informed written consent. This is, of course, required by the United Nations Declaration of the Rights of Indigenous Peoples and by the Golden Rule of doing to others only what you would have them do to you.

Tonto National Forest and Resolution Copper officials think they have the laws on their side, but none of those are greater than the universal laws of respect for land, life, and religious freedom. Please join me in recognizing that religious and cultural freedom and perpetuation are far more important than money and copper. Please do this, specifically and per my previous letter and request of September 11, 2020, by suspending all planning for mitigation efforts unless and until (1) the options for impact and adverse effect avoidance and reduction have been exhausted and (2) the four Federal Government actions listed above have been completed.

Respectfully,



Ramon Riley, Cultural Resource Director/
NAGPRA Representative
Nohwike' Bagowah Culture Center
White Mountain Apache Tribe

EXHIBIT B

INTERNATIONAL COUNCIL OF THIRTEEN INDIGENOUS GRANDMOTHERS

February 10, 2021

We, The International Council of Thirteen Indigenous Grandmothers, represent a global alliance of prayer, education, and healing for our Mother Earth, all her inhabitants, and the next seven generations to come. We are deeply concerned about the unprecedented destruction of our Mother Earth and Indigenous ways of life.

All over the world there are human beings who have not separated themselves from the land and from nature. Indigenous cultures have an unbroken chain that extends back to the time when our ancestors first settled the continent. For thousands of years, we lived on this continent and it remained much as it was in the beginning under our care. We have utilized the knowledge passed down from our ancestors about how to live from time immemorial. The San Carlos Apache Stronghold of Oak Flats are among these Indigenous Peoples. We offer this message in support of our relatives who are bringing their concerns before this court.

The cultural survival of the San Carlos Apache is under grave threat from the proposed Resolution Mine. We reaffirm our responsibility to speak for the protection and enhancement of the well-being of Mother Earth, nature, future generations, and all humanity and life. We bring these matters forward as our responsibility.

For the San Carlos Apache, health, law, and the environment are all interconnected. The Oak Flat Stronghold is not just a place, but a home to spiritual powers. There, the sacred springs have healing power, Apache warriors are buried, and the acorns grow from actual trees of life. For centuries, Oak Flat has remained an active place where Indigenous people come to pray, harvest, and gather where holy beings reside and holy springs flow. The San Carlos Apache cannot have this spiritual connection with the land anywhere else on Earth.

Infrastructural incursions from surface and underground mines, dams, roads, ports, and large industrial processing plants contaminate ground and drinking water and threaten the very essence of life on Mother Earth. These actions also degrade an ancient way of thinking, permeating, and influencing the traditional and cultural values, which preserves the wisdom of how to maintain balance of the Mother Earth. If construction on the Resolution Mine were allowed to begin, the San Carlos Apache's sacred connection to the land would be severed and their identity as Apache would be destroyed.

The health and wellbeing of the San Carlos Apache cannot be separated from this land.

Indigenous people are those who are the most far removed from the existing policies and governmental decision-making in regard to access and rights yet are the most impacted. Governments, corporations, and the dominant society do not consider the Indigenous teachings.

We recognize the significance of this convening of a hearing and reaffirm the historic meeting whereby, we issue this statement, in support of the Apache Stronghold Oak Flat's rights regarding the proposed Resolution Mine.

We recommend that there be a review of the existing Environmental Impact Statement and the record of how the industry upholds their existing agreements with other land holders throughout the world before entering into any agreements to their proposals. We feel it is imperative that consideration be given to the points that have been raised regarding the protection, conservation, safety, and access to clean water as a priority in any discussion of the proposal issues. The proposed Resolution Mine poses a grave threat to the cultural survival of the San Carlos Apache and the environment surrounding the mine, as far away as Phoenix. It is imperative that full and effective measures are taken to ensure that these threats are fully and fairly considered when actions and policies with respect to the area are made.

Serious consideration must be given to projects that will irreparably alienate the land and its waters from the San Carlos Apache. The San Carlos Apache must be heard before they are permanently separated from their homes, sacred sites, medicinal gathering areas, and clean water. They must be heard before their way of life and spiritual identity is destroyed forever.

We emphatically ask the governmental institutions, corporations, and all organizations to embrace this sense of commitment to act responsibly to ensure and guarantee generations of our children, grandchildren, great-grandchildren a future landscape full of promise and peace. We are in concert with the need to give voice to the San Carlos Apache perspective of guardianship of all the natural resources including the precious water.

We, the International Council of Thirteen Indigenous Grandmothers believe that it is the obligation of all concerned to ensure that the basic human rights of the San Carlos Apaches to practice their religion are respected, upheld and recognized, now and for the future generations in any determination regarding the Resolution Copper Mine. These words that we share are our strong statement and we are glad to be heard.

Respectfully submitted: On February 10, 2021

Author:

Mona Polacca

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Email:mpolacca@gmail.com

Phone: 602-810-5823

Mona Polacca is the President of the International Council of the Thirteen Indigenous Grandmothers, Co-Secretariat of an Indigenous World Forum on Water and Peace. She served as the focal point for the Indigenous Peoples program of the World Water Forum: Citizen's Process 2018. She works with Indigenous Peoples in addressing access to clean safe drinking water and drafting Water Statements and Water Declarations.