

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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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. )  

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BEFORE: THE HONORABLE STEVEN P. LOGAN, JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS  
HEARING ON MOTION FOR PRELIMINARY INJUNCTION

Official Court Reporter:  
Elva Cruz-Lauer, RMR, CRR  
Sandra Day O'Connor U.S. Courthouse, Suite 312  
401 West Washington Street, Spc. 33  
Phoenix, Arizona 85003-2151  
(602) 322-7261

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A P P E A R A N C E S

For the Plaintiff:

Michael V. Nixon, J.D.  
By: MICHAEL V. NIXON, ESQ.  
101 SW Madison Street #9325  
Portland, Oregon 97207

and

Clifford Levenson Attorney at Law  
By: CLIFFORD IRWIN LEVENSON, ESQ.  
5119 North 19th Avenue, Suite K  
Phoenix, AZ 85015

For the Defendants:

United States Attorney's Office  
Department of Justice  
Environmental and Natural Resources Section  
By: REUBEN S. SCHIFMAN, ESQ.  
TYLER M. ALEXANDER, ESQ.  
150 M Street NE, Third Floor  
Washington, D.C. 20002

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P R O C E E D I N G S

1  
2 THE CLERK: Civil case 21-050, Apache Stronghold  
3 versus United States of America.

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

6 Please announce your presence for the record.

7 THE COURT: Plaintiffs, please announce.

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

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

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

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

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

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

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

22 THE COURT: Good morning.

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

25 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

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.

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 Maguas 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?

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.

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

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?

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 Schifman 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. Schifman?

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.

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

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

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.



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?

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

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.

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

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



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,

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?

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

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. Schifman, 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.)

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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