IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Phoenix Division

Apache Stronghold, Plaintiff, vs. United States of America, et al., Defendants.	No. 2:21-CV-00050-PHX-SPL **RAMON RILEY, THE MORNING STAR INSTITUTE, AND THE MICA GROUP'S MOTION FOR LEAVE TO FILE AMICUS BRIEF**

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Counsel for Amici

Ramon Riley, Morning Star Institute, the MICA Group (Multicultural Initiative for Community Advancement) respectfully move this Court for leave to file an *amicus curiae* brief in support of the Plaintiff. A copy of the brief has been submitted with this motion. Counsel conferred with the party's counsel regarding their position on this motion. Counsel for the Plaintiff consents to this motion. Defendants take no position on this motion.

I. Interests of *Amici*.

Amici are a Tribal Leader and Cultural Resource Expert, and Native American cultural heritage and rights organizations.

Ramon Riley is a respected Apache elder who serves as the White Mountain Apache Tribe's Cultural Resource Director, NAGPRA Representative, and Chair of the Cultural Advisory Board. Riley has spent most of his life and career working to maintain Apache cultural knowledge and pass it down to future generations. As part of that work, he has spent the last two decades working to defend Oak Flat. He opposes the proposed mining project for Oak Flat, because he believes it is wrong to "destroy sacred land that made us who we are."

The Morning Star Institute is a national Native American rights organization founded by Suzan Shown Harjo (Cheyenne and Hodulgee Muscogee.) The Institute organizes observances and ceremonies across the country to mark National Prayer Days to Protect Native American Sacred

Places. The first National Prayer Day was held on June 20, 2003, on the grounds of the U.S. Capitol and nationwide to emphasize the need for Congress to enact legislation to protect Native sacred places. At that event, Harjo said the following: "Many Native American sacred places are being damaged because Native nations do not have equal access under the law to defend them. All other people in the United States have the First Amendment to protect their churches. Only traditional Native Americans cannot get into the courthouse through the Freedom of Religion Clauses. That simply must change as a matter of fairness and equity." Harjo served as Congressional liaison for Indian Affairs in the Carter administration and later as president of the National Congress of American Indians. On November 24, 2014, Harjo received the Presidential Medal of Freedom, the United States' highest civilian honor.

The MICA Group is a nonprofit organization that has worked with hundreds of Tribal Nations throughout the country on cultural revitalization and other projects. MICA envisions a world in which Indigenous and minority cultures have a voice, equitable resources, and the capacity to flourish, and Indigenous knowledge systems are recognized as inherently valuable world resources. America's Indigenous sacred sites include 10,000-year-old medicine wheels carved in the bedrock, standing stones, breathtaking cave paintings, intaglios, soaring sacred mountains, mounds, and a miraculous oak forest, Oak Flat, in the middle of the desert. MICA believes that America's own Indigenous

places should be treated as irreplaceable world treasures, like Stonehenge, the Pyramids, Machu Picchu, and the Lascaux cave paintings. MICA and its Cultural Resource Fund, a $10 million grant fund dedicated to supporting and protecting Tribal languages, cultures, and places, have partnered with 52 Tribal Nations to protect their significant Indigenous sites.[1]

The *Amici* in this case will discuss how the substantial burden analysis under Religious Freedom Restoration Act (RFRA) ought to be addressed, should this Court reach that issue.

II. An Amicus Brief will Aid This Court and the Matters Presented Are Relevant to the Disposition of the Case.

This Court has "broad discretion" to permit a non-party to participate as *amicus curiae*. *Hoptowit v. Ray*, 682 F.2d 1237, 1260 (9th Cir. 1982) (district court *sua sponte* appointing *amicus*), *abrogated in part on other grounds by Sandin v. Connor*, 515 U.S. 472 (1995).[2] "There are no strict prerequisites that must be established prior to qualifying for amicus status; an individual seeking to appear as amicus must merely make a showing that his participation is useful

[1] Amici state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person contributed money that was intended to fund preparing or submitting the brief.

[2] Although the Local Rules of this Court do not include provisions specific to amicus curiae, Federal Rule of Appellate Procedure 29(a) states that non-governmental entities may file amicus curiae briefs by leave of court upon motion stating "the movant's interest" and the "reasons why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case." Fed. R. App. P. 29(a).

to or otherwise desirable to the court." *In re Roxford Foods Litig.*, 790 F. Supp. 987, 997 (E.D. Cal. 1991) (citation omitted). "[A]mici fulfill the classic role of amicus curiae by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that might otherwise escape consideration." *Funbus Sys., Inc. v. Cal. Pub. Utils. Comm'n*, 801 F.2d 1120, 1125 (9th Cir. 1986) (citation omitted). Indeed, "[d]istrict courts frequently welcome amicus briefs from non-parties concerning legal issues that have potential ramifications beyond the parties directly involved or if the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." *Infineon Techs. N. Am. Corp. v. Mosaid Techs., Inc.*, No. C-02-5772 JF(RS), 2006 WL 3050849, *3 (N.D. Cal. Oct. 23, 2006) (granting motion to file *amicus curiae* brief concerning motion to vacate judgment) (quoting *NGV Gaming, Ltd. v. Upstream Point Molate*, LLC, 355 F. Supp. 2d 1061, 1067 (N.D. Cal. 2005)).[3]

To the extent that the Court will address religious freedom claims, *Amici* have additional expertise on the application of the Religious Freedom Restoration Act's application in the context of Indigenous sacred sites. *Amici* also bring to bear a broader cultural view of the significance of the history of Native

[3] This Court has previously allowed amici to participate in other matters of significant public importance. *See, e.g., United States v. Arizona*, No. 2:10-CV-01413-SRB (Doc. 212); *Friendly House v. Whiting*, No. 2:10-cv-1061-PHX-SRB (Doc. 282); *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, No. 09-CV-8011-PCT-PGR, 2010 WL 1452863 (D. Ariz. Apr. 12, 2010).

American sacred site destruction, the toll that this destruction has taken on Native Americans, and how the Oak Flat litigation fits into this history.

CONCLUSION

For these reasons, the *Amici* respectfully request that the Court grant this Motion and accept its amicus brief.

Dated: February 10, 2021

Respectfully submitted,

s/ Stephanie H. Barclay
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona by using the appellate CM/ECF system on February 10, 2021.

I certify that all participants in the case have been served a copy of the foregoing by the appellate CM/ECF system or by other electronic means.

February 10, 2021

/s/ Stephanie H. Barclay
Stephanie H. Barclay

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INTERESTS OF AMICI CURIAE

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Ramon Riley is a respected Apache elder who serves as the White Mountain Apache Tribe's Cultural Resource Director, NAGPRA Representative, and Chair of the Cultural Advisory Board. Letters he sent to the federal government regarding Oak Flat have been attached as Exhibit A to this Amicus Brief. Riley has spent most of his life and career working to maintain Apache cultural knowledge and pass it down to future generations. As part of that work, he has spent the last two decades working to defend Oak Flat. He opposes the proposed mining project for Oak Flat, because he believes it is wrong to "destroy sacred land that made us who we are." Ex. A at 14.

The Morning Star Institute is a national Native American rights organization founded by Suzan Shown Harjo (Cheyenne and Hodulgee Muscogee.) The Institute organizes observances and ceremonies across the country to mark National Prayer Days to Protect Native American Sacred Places. The first National Prayer Day was held on June 20, 2003, on the grounds of the U.S. Capitol and nationwide to emphasize the need for Congress to enact legislation to protect Native sacred places. At that event, Harjo said the following: "Many Native American sacred places are being damaged because Native nations do not have equal access under the law to defend them. All other

people in the United States have the First Amendment to protect their churches. Only traditional Native Americans cannot get into the courthouse through the Freedom of Religion Clauses. That simply must change as a matter of fairness and equity." Harjo served as Congressional liaison for Indian Affairs in the Carter administration and later as president of the National Congress of American Indians. On November 24, 2014, Harjo received the Presidential Medal of Freedom, the United States' highest civilian honor.

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significant Indigenous sites.[1]

The *Amici* in this case discuss how the substantial burden analysis under Religious Freedom Restoration Act (RFRA) ought to be addressed, should this Court reach that issue.

SUMMARY OF THE ARGUMENT

Meaningful access to sacred sites is a necessary part of the religious exercise of many Indigenous peoples. But tribes have been repeatedly denied such access by the federal government, and thus repeatedly thwarted in their efforts to engage in these central practices of their religions. In many instances, that access has been irrevocably denied and those efforts permanently thwarted by the total destruction of Indigenous sacred sites. Indeed, the colonial, state, and federal governments of this Nation have been desecrating and destroying Native American sacred sites since before the Republic was formed. Now Chi'chil Biłdagoteel, called Oak Flat in English, is at risk of suffering the same fate, a risk the Government fully acknowledges and a fate it has all but sealed.

An Environmental Impact Statement, rushed through by the outgoing Administration, acknowledges that "[p]hysical . . . impacts on . . . tribal sacred sites . . . would be immediate, permanent, and large in scale." 2 U.S Forest Serv.,

[1] *Amici* state that no party's counsel authored the brief in whole or in part; no party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person contributed money that was intended to fund preparing or submitting the brief.

Final Environmental Impact Statement: Resolution Copper Project and Land Exchange § 3.12.4.10 [hereinafter "*FEIS*"].[2] Further, once the mining operations commence, the "cultural properties cannot be reconstructed" or "fully mitigated," "[s]acred springs would be eradicated," changes will "permanently affect the ability of tribal members to access . . . special interest areas for cultural and religious purposes," and this will constitute an "irreversible loss." 3 *FEIS* § 3.14.4.9. In other words, the Government acknowledges that its actions will result in the complete and irreversible physical destruction of a religious site, and that that destruction will totally prevent the religious exercise that has occurred there for centuries. Such a loss constitutes a substantial burden under the Religious Freedom Restoration Act (RFRA).

The Government's arguments to the contrary regarding RFRA misinterpret or ignore the applicable case law, would eviscerate protections for Indigenous peoples, and give disfavored treatment for sacred sites compared to other forms of religious exercise. This Court should decline the Government's invitation to set precedent regarding the substantial burden analysis that would increase catastrophic consequences for Native peoples already facing widespread destruction of their most sacred places. There may be difficult issues in some disputes over sacred sites on government property. But where, as here, the Government acknowledges its actions will result in physical and irreversible

[2] All six volumes of the Final Environmental Impact Statement are available at https://www.resolutionmineeis.us/documents/final-eis.

destruction of a site altogether, the substantial burden analysis should not be one of them.

I. The U.S. Government has a History of Callousness and Coercion Regarding Indigenous Sacred Sites.

For many Native peoples, they are people *of* a particular place, and their particular homelands and landscapes are inextricably tied to their identity as peoples.[3] So, too, are particular places inextricably tied to spiritual and cultural rites and identity. As Professor Alex Skibine and others have noted: "Native American religions are land based."[4] To deprive tribal people of access to certain sites, or to compromise the integrity of those sites, is to effectively prohibit the free exercise of their religion. There is no adequate substitute and no adequate compensation for the deprivation. The religion is, for all intents and purposes, banned because the specific sites involved are so integral to the rites and beliefs of the people.

While the use of sacred sites is an integral element of worship for many Indigenous peoples,[5] the importance of sacred sites is not wholly unique to them. The Western Wall in Jerusalem is the most holy site in the world for Jewish

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[3] Much of the material in this Section is drawn from the following article: Stephanie Hall Barclay & Michalyn Steele, *Rethinking Protections for Indigenous Sacred Sites*, 134 Harv. L. Rev. 1294 (2021).

[4] Alex Tallchief Skibine, *Towards a Balanced Approach for the Protection of Native American Sacred Sites*, 17 Mich. J. Race & L. 269, 270 (2012).

[5] *See* Fed. Agencies Task Force, American Indian Religious Freedom Act Report, at i, 51 (1979) ("The attachment of the Native American people to the land is a fact well noted in American history.").

people.[6] The Shrine of Our Lady of Mariapoch, in Burton, Ohio, is a place of pilgrimage for Byzantine and Hungarian-American Catholics.[7] Members of the Church of Jesus Christ of Latter-day Saints find great religious significance in places like the Sacred Grove in upstate New York.[8] Among the five pillars of Islam is the Hajj, encouraging every able-bodied Muslim to make a pilgrimage to Mecca—the holiest city for Muslims—at least once in her lifetime.[9] Practitioners of many and varied religious faiths escape the mundane to commune with the Divine in specific places set aside and sanctified for that purpose.

But what *is* perhaps unique about sacred sites for Indigenous peoples in countries such as the United States is the extent of the obstacles that government has created and maintains to inhibit use of these sacred sites by Native peoples. These obstacles, both historic and contemporary, have resulted in significant interference with Indigenous spiritual practices related to particular sites—often operating as an effective prohibition on these practices.

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[6] Western Wall, Encyclopedia Britannica (Sept. 16, 2020), https://perma.cc/X4B5-VRQ2.

[7] *See* The Shrine Today, Shrine of Mariapoch, https://perma.cc/3TWQ-ASVR.

[8] Sacred Grove, The Church of Jesus Christ of Latter-Day Saints, https://perma.cc/LF4N-NXFA.

[9] The Quran 2:126 (Maulawi Sher 'Ali trans., 4th ed. 2015) (significance of the Kaaba shrine); *id.* 2:197-203 (instructions for pilgrimage); *id.* 3:97-98 (importance of Mecca); *see also* Pillars of Islam, Oxford Islamic Stud. Online, https://perma.cc/58QS-USYY.

Conflicts arise regarding use of sacred sites largely because so many of these sites are located on what is now government property. Indigenous peoples are then often placed in the difficult position of being beholden to the Government to continue to engage in centuries-old practices and ceremonies. And the Government came to acquire much of this land by ignoring treaties or simply confiscating additional land.[10] For example, at the time of the Dawes Act or General Allotment Act of 1887, 76 Indian tribes held around 138 million acres secured by treaty and executive order. By 1934, after implementation of the allotment policy, tribes had been divested of nearly 100 million additional acres of their remaining lands through opening so-called "surplus" lands to non-Indian settlement and government confiscation.[11]

For many Indigenous peoples, the reality of government divestiture of land means that their most sacred sites are completely within the government's control. And, unfortunately, the government has not often been a respectful neighbor, much less a faithful steward of these sacred spaces. At the hands of both public and private actors, graves have been despoiled, altars decimated, and sacred artifacts crassly catalogued for collection, display, or sale.[12] Nor is this

[10] Plaintiff Apache Stronghold asserts that Oak Flat is another such instance, wherein the government has ignored an 1852 treaty that contemplated Apache claims to land in the southwest and 1899 Smithsonian-prepared maps that depicted Oak Flat as within Apache lands. *See* Complaint ¶ 21.
[11] *See* Barclay & Steele, 1311-12.
[12] *See id.*

callous destruction simply a troubling relic of the past. Within the past several years, Indigenous sacred sites have been bulldozed,[13] developed for commercial interests, and even blown up.[14]

Chi'chil Biłdagoteel, called Oak Flat in English, is just the latest episode in this unfortunate saga. An area of land east of present-day Phoenix, Arizona, Oak Flat is sacred to numerous Native American peoples, including the ancestors of today's O'odham, Hopi, Zuni, Yavapai, and Apache tribes. Ex. A at 15. For more than 1,000 years it has been a place where Native peoples have lived, gathered, and held religious ceremonies. Welch Decl. ¶ 27 p. 11-12. The area contains hundreds of Indigenous archaeological sites, Apache burial grounds, ancient petroglyphs, medicinal plants, and numerous sacred sites.[15] As Mr. Riley describes, Chi'chil Biłdagoteel remains today an active site of prayer, the harvesting of sacred plants, and the conducting of religious ceremonies, and is revered as a place where holy springs flow from the earth and where holy beings reside. Ex. A at 15-16.

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[13] *See Slockish v. U.S. Fed. Highway Admin.*, No. 08-cv-01169, 2018 WL 2875896, at *1 (D. Or. June 11, 2018); *see also* Plaintiffs' Objections to Magistrate's Findings and Recommendations at 17-18, *Slockish*, No. 08-cv-01169 (D. Or. Apr. 22, 2020).

[14] Native Burial Sites Blown Up for US Border Wall, BBC News (Feb. 10, 2020), https://perma.cc/DC56-Z4DQ; Erik Ortiz, *Ancient Native American Burial Site Blasted for Trump Border Wall Construction*, NBC News (Feb. 12, 2020, 6:13 PM), https://perma.cc/K5CY-NWDU.

[15] *Outcry as Trump officials to transfer sacred Native American land to miners*, The Guardian, https://www.theguardian.com/environment/2021/jan/16/sacred-native-american-land-arizona-oak-flat.

The 40-acre grove of old-growth Emory Oaks that comprise Oak Flat, as well as nearly 4,000 additional acres surrounding it, are listed in the National Register of Historic Places as the Chi'chil Biłdagoteel Historic District. Welch Decl. ¶¶ 28-29 p. 12. Chi'chil Biłdagoteel has been on the National Register since 2016, where it is recognized by the federal government as a place of national significance.[16] But the Government's involvement with Oak Flat neither started nor ended in 2006, and it has not always been so positive.

In 1852 the Apaches signed a treaty with the U.S. Government that recognized their territorial rights in several articles, see Motion for TRO at 7, and in 1899 that territory was set out on a map, prepared by the Smithsonian Institution's Bureau of American Ethnology,[17] showing Oak Flat comfortably within Apache territory. Welch Decl. ¶ 12. The significance of these articles is a contested issue in this case. But what is clear is that the Government, without the input of Native peoples—whether through the 1848 Treaty of Guadalupe Hidalgo between the United States and Mexico or otherwise—has in this instance claimed land long occupied and held sacred by Native peoples. That claim was not so absolute at first. Indeed, in 1955, President Eisenhower

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[16] *See* National Register Database and Research Ref. # 16000002, NAT'L PARK SERV., https://www.nps.gov/subjects/nationalregister/database-research.html.

[17] The Bureau of American Ethnology (or BAE, originally named the Bureau of Ethnology) was established in 1879 by an act of Congress for the purpose of transferring archives, records and materials relating to the Indian of North American from the Interior Department to the Smithsonian Institution. *See* https://library.si.edu/digital-library/author/smithsonian-institution-bureau-american-ethnology (accessed February 10, 2021).

declared Oak Flat off limits to mining. But President Nixon added a loophole 16 years later that would allow mining if the land was first transferred to private owners. Complaint ¶ 21.

That transfer, to mining companies Rio Tinto and BHP Billiton, was enabled by a last-minute rider to a 2014 appropriations bill. *Id.* Repeated efforts over several years by a number of Senators to save Oak Flat on account of its religious significance fell short. *Id.* And last month, the outgoing Administration rushed through a Final Environmental Impact Statement[18] that acknowledges that the future mining operations will result in a crater over 1,000-foot-deep, two miles wide at Oak Flat. *Id.* ¶ 40.

II. The Planned and Anticipated Physical Destruction of Oak Flat, an Indigenous Sacred Site, Constitutes a Substantial Burden under RFRA.

RFRA provides that the "[g]overnment shall not substantially burden a person's exercise of religion" unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a), (b). RFRA claims

[18] *Outcry as Trump officials to transfer sacred Native American land to miners*, The Guardian, https://www.theguardian.com/environment/2021/jan/16/sacred-native-american-land-arizona-oak-flat ("[T]he administration sped up the environmental approval process for the transfer by a full year. During a meeting with environmental groups, regional Forest Service officials attributed the accelerated timeline to 'pressure from the highest levels' of the US Department of Agriculture, though the government says it is only because the work was finished more quickly than expected.").

proceed in two parts. First, the Plaintiff must show that their "exercise of religion" has been "substantially burdened." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1068 (9th Cir. 2008) (en banc). Second, "the burden of persuasion shifts to the government" to satisfy strict scrutiny—i.e., to prove that burdening the Plaintiff's religious exercise is "the least restrictive means" of furthering a "compelling governmental interest." *Id.* The purpose of this framework is to provide "very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014).

The Supreme Court has long recognized that government imposes substantial burdens on religious exercise when it makes voluntary religious exercise more costly or difficult, through things like threatened government penalties or denials of government benefits.[19] But courts have recognized that the substantial burden requirement is even more easily satisfied when government makes the voluntary religious exercise physically impossible, by taking away the choice altogether.

For example, in *Greene v. Solano County Jail*, 513 F.3d 982, 988 (9th Cir. 2008), a prison refused to allow an inmate to attend worship services with other prisoners. The Ninth Circuit noted that the prison was not merely giving the

[19] *Sherbert v. Verner*, 374 U.S. 398, 399-401 (1963) (state denied unemployment compensation to a Seventh-day Adventist who declined to accept work on her Sabbath); *Wisconsin v. Yoder*, 406 U.S. 205, 207-08, 218 (1972) (government threatened a fine for families who kept Amish children out of school); *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (requiring a Muslim prisoner to either shave the beard he grew for religious reasons or else face disciplinary action).

inmate a "false choice" between forgoing his religious practice or suffering prison discipline. *Id.* Instead, it was stopping his religious practice entirely. *Id.* The court had "little difficulty" concluding that "an outright ban on a particular religious exercise is a substantial burden." *Id.*; *see also Warsoldier v. Woodford*, 418 F.3d 989, 996 (9th Cir. 2005) ("physically forc[ing an inmate] to cut his hair" would constitute a substantial burden); *Yellowbear v. Lampert*, 741 F.3d 48, 51-52 (10th Cir. 2014) (Gorsuch, J.) ("it d[idn]'t take much work to see that" making religious exercise physically impossible "easily" resulted in a substantial burden by removing any "degree of choice in the matter"); *Haight v. Thompson*, 763 F.3d at 560, 565 (6th Cir. 2014) ("[t]he greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice)").

Likewise, in *International Church of Foursquare Gospel v. City of San Leandro*, 673 F.3d 1059, 1066-70 (9th Cir. 2011), the government refused to let plaintiffs build a church at the only site in the city that would accommodate their religious practices. The Ninth Circuit recognized that the right to "a place of worship . . . consistent with . . . theological requirements" is "at the very core of the free exercise of religion." *Id.* (citation omitted). It therefore held that preventing plaintiff from building a place of worship could constitute a substantial burden. *Id.* at 1061, 70. All of these cases involve the same kind of substantial burden—one in which the government has not made an individual's choice to exercise religion more difficult (through fines or denials of benefits), but

has taken away the choice all together.[20]

The physical destruction the government anticipates at Oak Flat will likewise take away any choice Mr. Riley and Plaintiff witnesses have to continue performing their religious exercise at this sacred site. Based on the destruction that will occur at Oak Flat, religious exercise for individuals like Mr. Riley and other Plaintiff witnesses will be made physically impossible. As scholars have acknowledged, Native American religions are "land based," Skibine, *supra* at 270, and the Apache religion of Mr. Riley and other Plaintiff witnesses is no exception. In that religion, Chi'chil Biłdagoteel is land where spiritual powers are physically located, and thus land where religious ceremonies and prayers *must* take place to be effective. "Chi'chil Biłdagoteel is a place of perpetual prayer and the location for eternal ceremonies that must take place there to benefit from and demonstrate religious obligation, responsibility, and respect for the powers at and of Chi'chil Biłdagoteel." Ex. A at 15.

Some of these ceremonies have been described in testimony before this Court. Perhaps most vividly, Ms. Naelyn Pike described the Sunrise Ceremony,

[20] Although *Greene* and *International Church of Foursquare Gospel* involve claims made under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), as opposed to RFRA, the Supreme Court and Ninth Circuit have held that RLUIPA and RFRA impose "the same standard." *Holt*, 135 S. Ct. at 860; *Nance v. Miser*, 700 F. App'x 629, 630 (9th Cir. 2017). Thus, courts routinely rely on RLUIPA cases to interpret RFRA and vice versa. *Holt*, 135 S. Ct. at 860 (RLUIPA case relying on RFRA precedent); *Gonzales v. O Centro Espirita Benef-icente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) (RFRA case relying on RLUIPA precedent).

a coming-of-age ceremony for Apache women that represents the Apache creation story. That ceremony relies on tools taken directly from the oaks of Oak Flat, and involves "direct" spiritual "connection to the land" of Chi'chil Biłdagoteel. Hearing of Feb. 3, 2021 Transcript at 44-45. That connection, and thus the continued existence of Oak Flat, is necessary for the ceremony and thus to the exercise of the Apache religion. As Ms. Pike testified, "if we don't have that connection to Nahgosan, the earth, and to Oak Flat, then we are dead inside. We can't call ourselves Apache." *Id.* at 45.

But the Sunrise Ceremony is just part of the religious exercise that occurs at Chi'chil Biłdagoteel. The Apache believe that the Ga'an, spiritual beings akin to angels in the Judeo-Christian tradition, messengers between Usen, the Creator, and the physical world, reside at Oak Flat. *Id.* at 52. All this renders Oak Flat a place "uniquely endowed with holiness and medicine"—from the "holy beings and powers" inscribed on cliffs and boulders, to the acorns that grow on the old-growth Emory oaks, the Apaches' "actual Trees of Life"; from sacred burial sites of Apache warriors, akin to Arlington National Cemetery, to "the sacred spring waters that flow[] from the earth with healing powers not present elsewhere"—and thus a place that "cannot be replaced" if the Apache religion is to continue. Ex. A at 15-16.

These oaks and acorns, burials and springs, and holy beings—particularly the red Ga'an—come from the very ground of Chi'Chil Biłdagoteel. Hearing Tr.

at 52. But if the mining operations go forward as planned, that ground will be nothing but a 1,000 foot deep, two mile wide hole. As the Government acknowledges, this hole will swallow the oaks and acorns, bury graves and springs, and destroy or drive away the red Ga'an, who the U.S. Department of the Interior National Park Service's National Register of Historic Places database lists as a "Significant Person[]" at the site.[21] But the damage will be permanent and devastating long before the crater forms. The FEIS acknowledges that the "[p]hysical . . . impacts on . . . tribal sacred sites . . . would be immediate, permanent, and large in scale." 2 *FEIS* § 3.12.4.10. The FEIS continues:

> Traditional cultural properties cannot be reconstructed once disturbed, nor can they be fully mitigated. Sacred springs would be eradicated by subsidence or construction of the tailings storage facility, and affected by groundwater drawdown. Changes that permanently affect the ability of tribal members to access TCPs and special interest areas for cultural and religious purposes also consist of an irreversible loss of resources. For uses such as gathering traditional materials from areas that would be within the subsidence area or the tailings storage facility, the project would constitute an irreversible loss of resources.

3 *FEIS* Vol. 3 § 3.14.4.9.

Such immediate and wholesale destruction of Oak Flat will, as the FEIS fully contemplates, make it impossible for Mr. Riley and other Indigenous peoples to conduct religious activities at Oak Flat as they have been doing for

[21] National Register Database and Research Ref. # 16000002, NAT'L PARK SERV., https://www.nps.gov/subjects/nationalregister/database-research.html.

centuries—activities that make up a necessary part of their religious exercise and can take place nowhere else. As a result, Plaintiff easily satisfies RFRA's substantial burden requirements.

Not all tribal members need to share the same belief regarding the importance of sacred sites to be able to bring a RFRA claim. Tribal leaders like Mr. Riley have sincere religious beliefs about religious practices that will no longer be possible at the site if the planned destruction takes place. That is sufficient to at least raise a prima facie RFRA claim. Even if these views were not shared by many tribal members (and they are), the Supreme Court has affirmed that religious freedom protections are "not limited to beliefs which are shared by all of the members of a religious sect" and include protections for even "idiosyncratic" beliefs. *Holt v. Hobbs*, 574 U.S. 352, 353 (2015) (quoting *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 715-16 (1981)).[22]

III. The Government's Arguments Misunderstand the Law and Would Create a Disfavored Standard for Indigenous Religious Exercise.

The Government's arguments about substantial burden analysis misunderstand both the text and caselaw regarding RFRA. The rule the

[22] Eugene Volokh, *The Individualistic American Law of Religious Exemptions*, Wash. Post (Jan. 19, 2015), www.washingtonpost.com/news/volokh-conspiracy/wp/2015/01/19/the-individualistic-american-law-of-religious-exemptions ("Small sects, minority groups within sects, and even idiosyncratic religious believers are as protected as large sects. One doesn't need a note from one's priest to prevail in a religious exemption case.").

Government proposes would result in a double standard in the law that provides Indigenous peoples with less protection for their religious exercise than for other groups in comparable situations.

The Government argues, in effect, that the burden on Plaintiff's religious exercise is *too* great to qualify as a "substantial burden." *See* ECF 18 at 16. The Government says that a "substantial burden" can *only* arise when religious individuals are "forced to choose between following the tenets of their religion and receiving a government benefit," or to choose between their religious exercise and receiving a "criminal sanction." *Id.* at 19. Under this approach, if the Government were threatening to issue a small fine to individuals like Mr. Riley for performing ceremonies at Oak Flat, that would constitute a substantial burden. But because the Government wants instead to allow a mining company to leave a crater where Oak Flat once was, Mr. Riley has suffered no substantial burden to his religious exercise.

This type of rule, if the law, would lead to absurd results. Rather than encourage the Government to act less coercively to avoid liability under religious freedom law with respect to Native American religious liberty rights, such a limited understanding of coercion would encourage the Government to act *more* coercively to avoid liability. For example, courts universally acknowledge that there was a substantial burden in *Yoder*, where Amish families were forced to choose between keeping their children out of school or facing a five-dollar

criminal fine. *Wisconsin v. Yoder*, 406 U.S. 205, 207-08, 218 (1972). But under the Government's reasoning, there would be a substantial burden *only* if the Government threatened a fine or penalty, and there would be no substantial burden if the government forcibly rounded up the children and sent them to a public boarding school without giving the parents a choice. Tragically, that is precisely what the Government did to Native American families from the 1880s to the 1930s.[23] Thus, while threats of penalties or loss of benefits are the most common sticks the Government wields as means of influencing private behavior, they are not the only tools. Naked force is an even stronger instrument of government power.

Aside from being logically backwards, the Government's argument misunderstands both *Navajo Nation* and *Lyng v. Northwest Indian Cemetery Protective Association*. While *Navajo Nation* discussed the denial of benefits and threats of penalties categories of government action, the court immediately after that held that "[a]ny burden imposed on the exercise of religion *short of* that

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[23] *See* Charla Bear, American Indian Boarding Schools Haunt Many, NPR (May 12, 2008, 12:01 AM), https://perma.cc/7WF9-44FD ("Children were sometimes taken forcibly, by armed police."); Margaret D. Jacobs, *A Battle for the Children: American Indian Child Removal in Arizona in the Era of Assimilation*, 45 J. Ariz. Hist. 31, 31 (2004) (describing how the government would surround Native American camps with troops and take the children away to boarding school with military escort). In an 1887 case, the Alaskan federal district court denied the habeas petition of an Indigenous Alaskan woman who sought to regain custody of her eight-year-old son who had been forced to attend a government-funded Presbyterian school. *In re Can-ah-couqua*, 29 F. 687, 687, 690 (D. Alaska 1887). The court required the child to stay at the school and gave the mother only limited visitation rights. *Id*. at 690.

described by *Sherbert* and *Yoder* is not a 'substantial burden' within the meaning of RFRA." 535 F.3d at 1069-70. In other words, *Navajo Nation* held that *Sherbert* and *Yoder* constitute a floor for substantial burden claims, not a ceiling for the type of government coercion that could lead to a finding of substantial burden. Thus, interference with religious exercise that is even greater than the burdens in *Sherbert* and *Yoder* should easily qualify as "substantial" under RFRA.

One court to address government action rendering use of a sacred site physically impossible followed this line of reasoning. In *Comanche Nation v. United States*, the Army attempted to build a warehouse on federal land near Medicine Bluffs, a Native American sacred site. No. CIV-08-849, 2008 WL 4426621 (W.D. Okla. Sept. 23, 2008). But Native Americans sued under RFRA, arguing that the warehouse would occupy "the central sight-line to the Bluffs"—the place where they stood to center themselves for meditation—making their "traditional religious practices" physically impossible. *Id.* at 17. The court explained that a substantial burden resulted where the government action "inhibit[ed]" or "den[ied]" reasonable opportunities to engage in religious activities. *Id.* Under these facts, the court held that the Government's physical interference with religious exercise "amply demonstrate[d]" a "substantial burden on the traditional religious practices of Plaintiffs." *Id.* at 3, 17.

Navajo Nation and *Lyng* are also distinguishable from the Oak Flat case because neither case involved the destruction of a sacred site; rather, both

involved claims that the Government had merely "'diminish[ed] the sacredness'" of a site. *Navajo Nation*, 535 F.3d at 1071 (quoting *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439, 448 (1998)).

In *Lyng*, the plaintiffs alleged that a road would impinge on the "purity" of religious practices in an area encompassing "more than 17,000 acres." 485 U.S. at 453. The Government, however, chose a route that was "the farthest removed from contemporary spiritual sites" so that "[n]o sites where specific rituals take place [would] be disturbed." *Id.* at 453-54. Thus, the plaintiffs in *Lyng* did not allege that any sacred site was destroyed; they alleged that the project made their religious practices less spiritually satisfying. *Id.* at 448-53. Indeed, the Court in *Lyng* said that if the plaintiffs had been "prohibit[ed] . . . from visiting" the area, that "would raise a different set of constitutional questions." *Id.* at 453.[24]

Here, by contrast, Mr. Riley and other Plaintiff witnesses are not saying that the Government has interfered with the purity of their religious practices. They are saying that the Government's actions will prevent them from engaging in those practices at all—by obliterating the area used for those practices and leaving a hole in the ground where Oak Flat once was. Further, in *Lyng*, the

[24] It is also worth noting that *Lyng* pre-dates RFRA, so did not consider the application of that law's substantial burden test. And the Supreme Court has specifically rejected the idea that "RFRA merely restored the Supreme Court's" religious freedom standard prior to RFRA, describing such an argument as "absurd." *Hobby Lobby*, 134 S. Ct. at 2773.

Government "could [not] have been more solicitous" toward Native American religious practices while building the road. *Id.* at 453-54. Here, the Government has engaged in underhanded legislative tactics and cut corners on procedural requirements—all to ramrod a deal through that would disregard any protection for this sacred site.

Navajo Nation is equally inapposite. There, plaintiffs challenged the use of recycled wastewater to make artificial snow on small fraction of the acreage in a sacred mountain range. 535 F.3d at 1062-63. The Ninth Circuit held that there was no substantial burden, because the snow would have no physical impact on the area: "no plants, springs, natural resources, shrines with religious significance, or religious ceremonies . . . would be physically affected[; n]o plants would be destroyed or stunted; no springs polluted; no places of worship made inaccessible, or liturgy modified." *Id.* at 1063. Instead, "the sole effect of the artificial snow [was] on the Plaintiffs' subjective experience." *Id.*

But this case is not about a diminishment of Plaintiff's "subjective experience" in using the site; it is about their inability to use the site at all. Here, unlike *Navajo Nation*, "plants [will be] destroyed"; areas of "religious significance [will be] physically affected"; and a "place[] of worship [will be] made inaccessible" by being turned into a crater. Thus, the holding in *Navajo Nation*, focused on an injury to "religious sensibilities" divorced from any physical impact to the site, is inapplicable here. *Id.* at 1064.

The Government also argues that "Supreme Court precedent provides that actions government takes on its own land categorically do not constitute a 'substantial burden' on religious exercise." *Id.* at 23. Not so. In *Lyng* and *Navajo Nation*, the courts could have written much shorter opinions if this were the rule, merely stating: "government land, government rules." Of course, as discussed above, neither the Supreme Court nor the Ninth Circuit wrote such an opinion, instead taking pains to highlight the limited nature of the government interference with religious sensibilities. And for good reason. The text of RFRA applies to "all . . . implementation of [federal law]"—foreclosing any blanket carve-out for federal land management decisions. 42 U.S.C. § 2000bb-3(a). Not surprisingly, then, several courts have held that RFRA applies to "a federal governmental decision about what to do with federal land." *Village of Bensenville v. FAA*, 457 F.3d 52, 67 (D.C. Cir. 2006).

In fact, it is precisely because the Government claims control over this land that a baseline of interference with religious exercise exists, much the same way such a baseline of interference exists in the prison context, the military, or even with regards to government zoning.[25] In those other legal arenas, either through statutory or constitutional requirements, Government has recognized that absent affirmative accommodation of religious exercise, the religious practices will be impossible. Ignoring the baseline of government interference here will

[25] *See* Barclay & Steele, 1333-38.

result in a disparity in the law that provides lesser protection for Indigenous religious exercise regarding sacred sites.[26]

Ultimately, the Government cannot escape a simple fact: It has not merely made Plaintiffs' religious exercise costlier or more difficult; it has made it impossible. Such an acknowledgement on the Government's part satisfies RFRA's substantial burden requirement.

CONCLUSION

If this Court addresses Plaintiff's RFRA claim, the Court should rule that the Government has substantially burdened the religious exercise of Plaintiff members. The Government acknowledges that the anticipated mining project will result in irreversible destruction that will necessarily end the religious gatherings that have been taking place on this site for centuries. Given the admitted physical impossibility of further religious exercise at this site, the substantial burden question is an easy issue in favor of the Plaintiffs.[27]

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[26] *Id.*

[27] *Amici* thank Daniel Loesing, Daniel Judge, Alexandra Howell, and Hadyn Petterson for their work in preparing this brief as student participants in the Notre Dame Religious Liberty Initiative.

Dated: February 10, 2021

Respectfully submitted,

s/ Stephanie H. Barclay
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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 5,803 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f)

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 13-Point Century Schoolbook.

February 10, 2021

/s/ Stephanie H. Barclay
Stephanie H. Barclay

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the District of Arizona by using the appellate CM/ECF system on February 10, 2021.

I certify that all participants in the case have been served a copy of the foregoing by the appellate CM/ECF system or by other electronic means.

February 10, 2021

/s/ Stephanie H. Barclay
Stephanie H. Barclay

EXHIBIT A

APACHE STRONGHOLD
POB 766 SAN CARLOS, AZ 85550

November 13, 2020

John Fowler, Executive Director
The President's Advisory Council on Historic Preservation
401 F Street NW, Suite 308
Washington, DC 20001
via email to jfolwer@achp.gov

RE: Council NHPA §106 Compliance Review Pursuant to 36 C.F.R. §800.9(a) for the Proposed Resolution Copper Mine and Southeast Arizona Land Exchange Undertakings

Dear Executive Director Fowler:

As the co-founder and spokesperson of the Apache Stronghold, and as an enrolled member and former Chairman of the San Carlos Apache Tribe ("Tribe"), I write to request that this letter be given due consideration and be made a part of the administrative record in the National Historic Preservation Act ("NHPA") Section 106 process in the proposed Resolution Copper Mine and Southeast Arizona Land Exchange (the "Undertakings").

We hereby acknowledge and incorporate by reference the words of advice and warning offered to you and other federal and state historic preservation officials and responsible parties by the respected Apache elder, White Mountain Apache Tribe Cultural Resource Director, Ramon Riley, in his November 9, 2020 open letter to U.S. Federal Government Trustees and Tribal Leaders, "Subject: Proposed Resolution Copper Mine and Land Exchange Impacts on First Amendment and Human Rights to Religious Freedom, Exercise and Beliefs." Further, we reference Director Riley's letter of September 11, 2020 and request that Director Riley's letters be made part of the administrative record in the Undertakings' NHPA Section 106 process. Copies of Director Riley's letter are attached.

This correspondence and the Council's ongoing agency compliance review pursuant to 36 C.F.R. § 800.9(a) comes at an ideal time. It is apparent that the U.S. Forest Service ("USFS") seeks to execute a flawed programmatic agreement ("PA")("version 8" of July 27, 2020) to conclude the NHPA Section 106 process for the proposed above-referenced Undertakings.

It is also apparent that USFS does not intend to consult with tribes, the Apache Stronghold, the public, or other consulting parties on any sort of consistent or transparent basis. Indeed, USFS appears unable or unwilling to establish required measures to avoid and minimize adverse effects to historic properties adversely affected by the Undertakings. USFS has thus far dodged its duties and legal obligations to consider our human rights and constitutional rights to the free exercise of our Apache religion and our religious beliefs within our traditional land, especially our *Chi'chil Biłdagoteel* ("Oak Flat") religious place and National Register District, all of which is targeted for deliberate and forewarned destruction by the proposed mining.

We also want to be sure that the Council understands that the Tribe's detailed review of that July 27, 2020 "version 8" of the PA, and the Tribe's September 3, 2020 letter by Chairman Terry Rambler to Tonto National Forest Supervisor Neil Bosworth, were both produced under an unnecessary and suddenly short deadline set on us by USFS after eight months of undue and unexplained USFS delays. The Tribe's official review of the PA has made clear to our Tribe's

17,000 members that our USFS federal trustee appears unwilling to properly consult with affected tribes, our organization, other consulting parties, and the public regarding necessary remedial changes to the version 8 draft PA.

We note with appreciation, the Council's perspective regarding the fundamental inadequacies of PA version 8, as expressed in the September 15, 2020 comments on that PA draft, to Supervisor Bosworth. We especially appreciate Dr. McCulloch's reminder to Supervisor Bosworth of the Council's July 23, 2020 Guidance, "Section 106 and Coronavirus Impacts."[1] We strongly support the Council's recommendation in the September 15, 2020 letter concerning the Forest Service's lack of a transparent Section 106 schedule and framework:

> *"…we recommend the TNF now move rapidly to clarify its remaining schedule and framework moving forward to conclude the Section 106 process as it addresses the concerns noted below and the comments provided by other consulting parties. This summation should include milestones for any future consultation meetings and for providing responses to existing comments."*

The USFS' misconduct of the Section 106 process to date spotlights lack of transparency and disregard of core responsibilities under the Section 106 regulations at 36 CFR Part 800. Given our experiences with the USFS—especially mistreatments of our other sacred traditional cultural properties, most particularly Dził Nchaa Si'an ("Big Seated Mountain" aka "Mount Graham") and Dził Cho (San Francisco Peaks)—this systemic misconduct has continued to proceed despite our attempted corrections, for decades.

USFS officials now attempt, once again, to ignore their lawful obligations to consider the integrity, the cultural and religious significance of affected Apache and regionally shared Native American historic and traditional cultural properties. The USFS' failures include dereliction of legal requirements to develop and evaluate feasible alternatives or modifications to the Undertakings—such as alternative methods of mining, earth surface conservation, and disposal of mine wastes—that could avoid, minimize, or mitigate adverse effects to our historic and traditional cultural properties and corresponding effects the Undertakings to our cultures and sacred places.

USFS has most especially failed to meet its obligations to consider the Chi'chil Biłdagoteel National Historic District ("Oak Flat"), the complex of sacred sites targeted by and already suffering adverse effects from, these disrespectful, controversial and harmful Undertakings. Given that the elected method of copper mining enabled by the proposed land exchange would obliterate Chi'chil Biłdagoteel via massive, landscape-scale earth surface subsidence and dewatering, the Council and other signatories stand on the verge of complicity in deception—by USFS the Undertakings' Resolution Copper proponent, the joint venture of Rio Tinto and Broken Hill Properties ("BHP")—to accept the fallacy of "the continued access to Oak Flat" as a "mitigation initiative."

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[1] One pertinent excerpt from that July 23, 2020 Guidance:

> *Extraordinary circumstances in the current situation warrant case by case adjustments to this process. Specifically, the Section 106 deadlines for the response of State and Tribal Historic Preservation Officers, and Indian tribes and Native Hawaiian organizations (NHOs) that attach religious and cultural significance to historic properties affected by the undertaking, regardless of its location (collectively, states/tribes/NHOs), will be considered paused while, due to the COVID-19 outbreak, an office is closed or work conditions are such that the states/tribes/NHOs are unable to carry out their Section 106 duties or statutory rights to consultation in a timely fashion (e.g., staff unavailability due to health reasons; restricted access to records; state or tribal laws requiring hard copy records; lack of Internet access or telework capabilities). The clock will resume once the conditions are no longer in effect.*

That temporary offering is both short-lived and cruel because it would give us access to nothing but the reality of aggravated and compounded cumulative transgenerational pain and trauma, eternal reminders of profound disrespect and abuse by our "trustee," to be entombed in a massive and agonizing crater of desecration where Chi'chil Biłdagoteel had existed, since time immemorial as a place of peace.

This is no different than Resolution Copper's co-parent corporation Rio Tinto's deliberate destruction of the Puutu Kunti Kurrama and Pinikura ("PKKP") peoples' sacred place and heritage site, Jukkan, in present-day Western Australia's Pilbara region earlier this year. That human rights abuse and deliberate desecration caused an "investor revolt" within Rio Tinto, forcing the resignation of multiple Rio Tinto executives, including CEO Jean-Sebastien Jacques. In the aftermath, Rio Tinto's Board Chairman, Simon Thompson, declared:

> *"What happened at Juukan was wrong.* ***We are determined to ensure the destruction of a heritage site of such exceptional archaeological and cultural significance never occurs again at a Rio Tinto operation.****"*[2]

Jacques' pledge seems to us dubious, at best. Just more empty words from strange people who would do anything to get what they want here. Rio Tinto gives every indication that it will continue, in defiance of its own policies and international law, to deny and stomp on essential human and Indigenous peoples' rights to the land Resolution has targeted.

USFS has avoided compliance with the Section 106 regulations despite multiple requests, including last year's letters to USFS from the Arizona State Historic Preservation Office ("SHPO") and the Council. To assure that the Council and other consulting parties are informed regarding the views of Apache Stronghold, we supplement the San Carlos Tribe's comments on PA version 8 with our review of concerns with the USFS' attempted exercise of the Section 106 process so far.

Our comments on procedural and content deficiencies in the Section 106 process for the Undertakings make clear that USFS has seriously compromised the process. The significance of Chi'chil Biłdagoteel, and Apaches' long-running, highly publicized and internationally-reported defense of our sacred traditional cultural property on our aboriginal land, was well-known to both Rio Tinto and BHP, as well as the USFS, long before they successfully lobbied Senator John McCain, Representative Ann Kirkpatrick, and our other "trustees" to insert an 11th hour rider into the "must pass" Defense appropriations bill on the eve of a looming government shutdown in December 2014.

We urge and advise that the Section 106 process be re-initiated with a transparent and detailed agenda, then conducted in proper conformance with regulations at 36 CFR §800, applicable USFS agreements and policies, and relevant memoranda and guidance documents of the Council and the U.S. Department of the Interior National Park Service.

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[2] "Rio Tinto CEO, top executives resign amid cave blast crisis," by Nick Toscano and Hamish Hastie, Sydney Morning Herald (September 11, 2020)("Mr. Jacques, Mr. Salisbury and Ms. Niven – whose department oversees community relations – were last month stripped of $7 million of their 2020 bonuses after a board-led review found they had to bear some responsibility."), https://www.smh.com.au/business/companies/rio-tinto-ceo-top-executives-resign-amid-cave-blast-crisis-20200910-p55uf8.html .

And see, *e.g.*, "Grieving after Rio Tinto blast, Aboriginal owners fear Fortescue plans," by Nick Toscano, Sydney Morning Herald (October 12, 2020) https://www.smh.com.au/business/companies/grieving-after-rio-tinto-blast-aboriginal-owners-fear-fortescue-plans-20201012-p564az.html .

Unless this is done, the Council may find that termination must be considered per 36 CFR §800.7, to preserve semblances of integrity in NHPA administration and oversight, to demonstrate fidelity to Federal Government Indian and public trust responsibilities, and to avoid further prejudices, undue burdens and harms to us, and violations of the legal, constitutional, and human rights of Apache people and other affected Native American tribal members.

Defects In The Section 106 Process For The Undertakings

The San Carlos Apache Tribe, on behalf of its members such as those of us who have assembled as Apache Stronghold, and most other consulting parties have been dutiful participants in the various Section 106 process attempts for the Undertakings since 2015. Our Tribe has allocated limited staff resources in efforts to protect Chi'chil Biłdagoteel and to assist USFS in meeting its statutory and regulatory obligations without infringing on our legal and human rights.

Our Tribe sent many of our most respected elders to collaborate in the Ethnographic and Ethnohistoric Study of the Superior Area, a study mostly ignored by USFS. We participated in at least fifteen (15) USFS-sponsored meetings regarding the Undertakings. We submitted at least seven (7) substantive sets of comments on prior drafts of the PA and on documents prepared pursuant to the National Environmental Policy Act ("NEPA").

Other tribes, the Arizona SHPO, and the Council have been similarly diligent in assisting USFS in the proper conduct of the Section 106 process. The primary product of collective diligence on the part of the consulting parties, version 8 of the PA, combines failures to meet basic regulatory requirements with unorthodox attempts to use the PA to advance various corporate interests and other purposes not contemplated under the NHPA or its implementing regulations.

The substantial investments by our Tribe and other parties, including the Council, in assuring legitimacy and improving the USFS' faithless performance of its Section 106 duties, have yet to translate into adequate USFS performance. In particular, despite information and advice from consulting parties, USFS has failed to develop and evaluate alternatives or modifications to the Undertakings that could avoid or minimize adverse effects on historic properties. Neither has USFS explained its rationales for ignoring or discarding the information and advice that has been forthcoming from the consulting parties. USFS has yet to simply identify, describe, and evaluate the functions, attributes, and values of our historic properties, especially including Chi'chil Biłdagoteel. USFS has yet to explicitly consider our properties' religious functions, attributes, and values. These steps are prerequisite to USFS completion of mandatory USFS considerations of the adverse effects that the Undertakings will have on these and all other historic properties.

USFS failures to administer the Section 106 process transparently and in accord with the NHPA and the regulations at 36 CFR Part 800 are adding disrespectful insults to the injuries that Apaches and other traditional religious practitioners are experiencing with the industrial damage, alteration, and destruction of Chi'chil Biłdagoteel.

USFS failures fall into four overarching and aggregating categories of defects. Defects One and Two are procedural. Defects Three and Four are substantive, content-specific failures stemming from USFS derelictions in its Indian trust responsibilities, in its government-to-government consultation duties, in its obligations to analyze and disclose adverse effects on historic properties, and in its mandates to seek to avoid, minimize, or mitigate adverse effects.

What follows here below is a review of those four fundamental defects, intended to assist the Council with its compliance review and to guide USFS in the necessary reboot of the Section 106 process. We think that reboot should include an admission of errors in fulfilling of fiduciary

responsibility and should initiate a truthful reconciliation with the Native nations, tribes, and tribal members and citizens and harmed and disrespected by USFS and Rio Tinto-BHP conduct to date.

Defect One: Bifurcation of the 106 Process and Exclusion of Consulting Parties

In a manner inconsistent with both 36 CFR Part 800 and authoritative advice provided by consulting parties, USFS has excluded tribal consulting parties from its communications with government agency consulting parties, and vice versa. The regulations at 36 CFR Part 800 do not allow agencies to make unilateral selections of which consulting parties to communicate with. The regulations do not enable agencies to select which agency determinations to disclose to different subsets of consulting parties, or to presume to speak on behalf of sovereign Indian tribes to others, especially without prior informed written consent and without the presence of the tribes' official representatives. SHPO's September 19, 2019 letter to USFS spotlights that defect: "tribal consultation under Section 106 and the provisions outlined in 36 CFR Part 800 . . . has not proceeded apace of other federal authorities guiding consultation with Native American tribes."

Inconsistent and apparently biased and selective USFS attention to its consultative duties is also seen in USFS failures—despite the Undertakings' complexity, controversial nature, and massive and unmitigated adverse effects on historic properties—to involve the public pursuant to 36 CFR §800.2(d). A conscientious non-governmental organization brought this deficiency to USFS attention a year ago (Arizona Mining Reform Coalition letter to USFS Supervisor Bosworth, November 4, 2019). Despite that appeal, USFS continues to exclude the public from participation in the Section 106 process (other than commentary on the PA), to discount and disregard most values linked to historic properties other than the scientific values associated with National Register Criterion D, and to enable plans for the destruction of hundreds of historic properties despite good options for effect avoidance and minimization. The result of USFS conduct and decision making in the course of this alleged NHPA Section 106 process has been prejudicial and detrimental to the tribal parties' interests, and particularly to our interests and rights to the free exercise of our traditional religion and the protection of our traditional sacred places within and related to the Chi'chil Biłdagoteel sacred property and National Historic District.

Defect Two: Failure to Conduct the Section 106 Consultations Stepwise

The NHPA Section 106 regulations at 36 CFR Part 800 prescribe a protocol for a multi-phased sequence of communications involving disclosures of federal agency plans and proposed determinations intended as a basis for seeking informative comments from consulting parties and the public. While it is understood that the Section 106 regulations are to be flexibly applied, it is not permissible to distort or omit key steps—whether intentionally in bad faith, or negligently as the result of a failure to exercise due care. Earlier phase consultations are, of course, intended to serve as rational bases for procedural and substantive improvements in subsequent phases. Instead of making use of the stepwise method, as prescribed, USFS has ignored NHPA in both letter and spirit by excluding tribal consulting parties from participation in critical steps of the Section 106 process. The San Carlos Apache Tribe's letters of July 10 and September 30, 2019 advised USFS of this chronic defect.

On a parallel track, the SHPO's letter of September 19, 2019 expressed concerns with USFS' management of the process and its substance:

> *"This letter is a follow up to and memorialization of the August 29, 2019 meeting between TNF and SHPO staff regarding the Resolution Copper Mine Programmatic Agreement (PA) and ongoing Section 106 Consultation. At our meeting, SHPO reiterated our continuing concerns with the tribal consultation process, which has not been accomplished in concert with the process laid out in 36 CFR Part 800."*

The Council's October 25, 2019 letter to USFS Supervisor Bosworth likewise expresses concerns with "the lack of clarity on how the TNF has provided tribes with a reasonable opportunity to identify concerns about historic properties; advise on the identification and evaluation of properties of traditional religious and cultural importance to them; articulate their views on the undertaking's effects on such properties; and participate in the resolution of adverse effects." (See at p.1, "Consultation with Indian Tribes"). The reason why it is unclear to the Council, to the SHPO, and to the tribal parties is obvious and has nothing to do with the particular challenges of these Undertakings: the USFS' conduct is unrecognizable when compared with the standard required practices and regulatory requirements.

The USFS December 5, 2019 response to the Tribe feigns innocence and ignorance:

> *"It is not clear form [sic] your letter, which 'specific procedural requirements' you are referring to. The very purpose of the PA is to ensure the Forest is following the legal requirements for section 106."*

As the Council is aware, and as the Tribe and other parties have repeatedly advised USFS, even as consultations are essential foundations for PA preparation, any procedures set forth in an agreement document cannot substitute for specific procedural requirements to consult with the Tribe and other consulting parties regarding proposed methods to be used: to identify historic properties, per 36 CFR §800.4(b); to make evaluations of significance and determinations of eligibility, per §800.4(c); to provide assessments of adverse effect, per §800.5; and, to compose reasonable resolutions of adverse effect, per §800.6.

PA version 8 reveals that USFS has begun taking some of these required steps, but this has not been done in consultation with the tribal consulting parties. The attempt in PA version 8 to exclude tribes from the list of consulting parties is as emblematic of unreliable USFS performance of its duties as it is harmful to the special relationship with tribes that USFS officials are sworn and otherwise legally bound to uphold.

Defect Three: Violations of Government-to-Government Duties and Protocols, and Infringements on Tribal Sovereignties

The Section 106 regulations and other rules that define lawful USFS conduct also prohibit USFS actions that harm or diminish tribal sovereignty. USFS has defied these rules and notifications from our Tribe that we have not been properly consulted about the USFS "Tribal Monitor Program." This "Program" has been co-conceived and fostered by USFS and the Undertakings' proponent and administered by a contractor guided by USFS officials and financially controlled by Rio Tinto-BHP through Resolution Copper.

The "Tribal Monitor Program" must be disclosed and analyzed for what it is: a USFS-sponsored corporate industrial operation to recruit and employ individual tribal member-citizens to provide USFS and Rio Tinto-BHP-Resolution Copper with sensitive cultural information that is privileged and collectively owned by the affected tribes, all in the absence of prior, fully informed, written consent from tribal governing bodies. The San Carlos Apache Tribe's letters of July 10 and September 30, 2019 advised USFS to suspend this "Program" and all other attempts to convert invaluable, tribal cultural, historical, and geographical knowledge into a "currency" for USFS and the Undertakings proponent to "purchase" compliance with NHPA, NEPA, and the Southeast Arizona Land Exchange and Conservation Act.

Instead of initiating non-discretionary, government-to-government consultations regarding the "Tribal Monitor Program," USFS Supervisor Bosworth's December 5, 2019 letter attempted to dodge concerns, claiming that "the Tribal Monitor Program is not part of government-to-

government consultation." USFS continues to champion that operation and to advocate for its commercial collaborators' unauthorized intrusion into the Tribes' sovereign affairs. Despite requests from multiple parties, USFS has failed to clarify, specify, and consult within the Section 106 and NEPA processes about the roles of the "Tribal Monitor Program." Ongoing implementation of that "Program" has corrupted various phases of an already complex and mismanaged Section 106 process, one sorely lacking in demonstrated good faith by USFS.

We once again invoke the Council's trust responsibilities for tribal welfare and assistance in suspending the "Tribal Monitor Program" pending proper completion of the required government-to-government consultations with our Tribe and other affected tribes. In light of USFS resistance to such consultations, Apache Stronghold now must insist on binding and legally enforceable assurances that any and all collectively owned Western Apache traditional knowledge already captured by USFS and the various third-party contractor(s) without proper authorization and prior informed written consent cannot and will not be used for any purpose, including NHPA and NEPA compliances, without the prior informed written consent of the tribal owners.

The Council appears to also be aware that Section IX of PA version 8 includes USFS schemes, only recently announced to tribal officials using means other than government-to-government consultations, regarding "tribal programs" supported by "four financial trusts that would provide 40 years of funding for a variety of programs to meet a number of specific purposes" linked to the mitigation of the Undertakings (USFS Supervisor Bosworth July 24, 2020 letter to San Carlos Apache Tribe Chairman Rambler). This apparent further attempt to co-opt tribal government prerogatives and transfer duties for the avoidance, minimization, and mitigation of adverse effects from the USFS to private third parties, even if permissible, is subject to public disclosures and tribal consultations pursuant to NHPA, NEPA, and other federal laws and rules.

USFS is not meeting these essential fundamental mandates. Instead, USFS is attempting to authorize or legitimize these still-vague schemes through very late insertion in a "final draft" PA, along with the sudden introduction of a new private commercial signatory party and intended PA beneficiary (more about this trickery is presented in Defect Four here below). Those daring and provocative stunts are patently unacceptable in any legitimate Section 106 process, especially because the USFS subsequently informed Apache tribal officials that the USFS is not providing for any tribal consultation about it, only accepting written comments– thereby effectively terminating the Section 106 process on the Undertakings.

We urge the Council to assist USFS in consulting with tribal governments in good faith about the precise roles in the Section 106 process of both its proposed "Tribal Monitor Program" and the proposals outlined in the July 24, 2020 USFS letter and PA Section IX. We Apaches are under no obligation, with or without the overdue government-to-government consultation, to further assist USFS or the proponent of the Undertakings in superficially satisfying their legal obligations or enabling their bad faith and self-serving endeavors to manipulate the Tribe and its members, and the other tribes and their members, with such schemes.

Defect Four: Inattention to Adverse Effects to Historic Properties and Impediments to Free Exercise of Religion and Undue Burdens on Religious Beliefs

Neither the Section 106 process nor the NEPA process for these Undertakings have contributed materially to any plans other than to do no more than generally and casually note just some of the adverse and cumulative effects of the Undertakings on the *Chí'chil Biłdagoteel* Historic District and multi-tribal sacred place. Hundreds of other historic properties, the vast majority of which were created and are cared for by American Indians, are also being targeted for imminent alteration or complete obliteration. USFS failure to analyze feasible alternate mining methods, or to disclose and consult with the Tribe about the substantive results and treatment

options emerging from those analyses, indicates that the Undertakings will violate and destroy *Chí'chil Biłdagoteel* and the many values and historic properties there and nearby.

Indeed, actions by USFS and Rio Tinto-BHP-Resolution Copper already have been inhibiting and unduly burdening the free exercise and beliefs of members of American Indian religions. They certainly are unjustly encumbering and unduly burdening our religious beliefs and violating our senses of place, vitality, security, identity, health and wellness.

USFS has also failed to analyze and consider the adverse effects of prior undertakings in relation to values other than scientific values or National Register criteria other than Criterion D. These prior and ongoing undertakings include the many drilling sites, road "improvements," and other surface and subsurface alterations, including many actions the Tribe sees as adverse and cumulative effects within and around the boundaries of Chí'chil Biłdagoteel. Neither the individual USFS permits issued with "no adverse effect" determinations for those subsidiary undertakings, nor the proposed land exchange's Draft Environmental Impact Statement ("DEIS"), nor any of the eight (8) draft PAs, account for (much less analyze or resolve) the adverse effects and impacts those actions have had and are continuing to have.

As the Tribe has previously informed USFS, these significant environmental impacts and adverse effects specifically include impacts, effects, and undue impositions on the free exercise and beliefs of Apache religion and on the ability of myself and other Apache people to avail ourselves of the unique, place-based spiritual and emotional benefits of exercising our religious beliefs without the encumbrances of drilling sites, wells, roads, and other industrial intrusions. Neither the draft PA versions 1-8 nor the DEIS contain either general planning approaches or specific protocols for avoiding or reducing adverse effects to historic properties, except through the additional and compounding adverse effects of rote archaeological testing and data recovery.

USFS has also failed to fulfill its binding legal duties to analyze and consider the Undertakings—pursuant to NEPA, NHPA, the First Amendment's Free Exercise Clause, the Religious Freedom Restoration Act ("RFRA"), as amended, and other legal requirements—in terms of cumulative effects. Neither the DEIS nor the Section 106 process has heretofore disclosed, considered, or analyzed quantitative or qualitative dimensions of current, reasonably foreseeable, and cumulative adverse effects to the cultural and religious values and uses directly and indirectly linked to the historic properties on the verge of destruction.

It bears particular mention that the USFS DEIS selected the preferred action alternative for the Undertakings, an option that ensures the greatest number and magnitude of adverse effects to historic properties. In the course of planning and evaluating these Undertakings and other recent undertakings, USFS has overseen and is failing to regulate, avoid, minimize, or mitigate the ongoing and cumulative transformation of our Pinal Mountain Apache cultural landscape into an industrial wasteland. Apache Stronghold asks the Council to assist USFS in providing due consideration, per NEPA, NHPA, 36 CFR § 800.5(a)(1), and our Constitutional and statutory rights, of these and other cumulative effects.

The most recent example of a detail of the compounding defects we review here is the unheralded and late-hour appearance of the Salt River Project ("SRP") as a signatory party in version 8 of the draft PA. SRP has a history of working against tribal rights and interests. The surprise introduction of SRP as a signatory party to the "final draft" PA introduces another realm of adverse effects to our historic properties and sacred places. This abrupt addition also implicates facets of environmental equity and environmental justice. SRP involvements, plans, and attendant issues require bona fide and good faith consultation—which has been, so far, non-existent—in accordance with NHPA Section 106, NEPA, and other applicable laws and executive orders.

For the in-progress Section 106 process, such consultation should be grounded in adequate prior USFS disclosures of SRP involvements in the undertakings and SRP contributions to the resolution of adverse effects. The apparent USFS attempt to add SRP into a final draft PA and to provide coverage for undisclosed and distinct SRP undertakings further violates basic tenets of good faith consultation per NHPA Section 106. We hope the Council will be effective in advising USFS of its duties in leading consultative negotiations. Because this particular Section 106 process involves treaties, tribal sovereignty, religious freedom, basic human rights, and hundreds of Register-eligible historic properties it deserves and requires utmost good faith which has been sorely lacking so far on the part of USFS, SRP, and Rio Tinto-BHP-Resolution Copper.

Concluding Comments, Recommendations, and Requests

We are grateful in anticipation of the Council's thorough exercise of its federal oversight authority to assist and advise USFS in this matter. We hope to see real progress toward the setting of reasonable and enforceable limits to any further alteration to our ancestral lands, and to our religious and cultural relationships to our imperiled ancestral lands.

We urge the Council's attention to the 2015 "Ethnographic and Ethnohistoric Study of the Superior Area, Arizona," which is part of the administrative records in these NHPA and NEPA processes. That study describes much of the historical depth, cultural breadth, and religious potency of connections among individual historic properties and tribal member-citizens and communities. The ninety-four (94) tribal representatives involved in that Ethnohistoric Study affirmed that the Undertakings would cause direct, indirect, and cumulative adverse effects to historic properties and to the individuals and communities that rely upon these properties for health, vitality, identity, orientation, and other aspects of wellness, peace, and security. Although USFS has recently given nominal attention to that study, it continues to ignore and omit "community health" and "tribal health" place-based relationships in its Section 106 and NEPA plans and analyses for the Undertakings.

Each and all of the four categories of defects discussed above could have been avoided or remedied if USFS had consulted properly and acted accordingly in the attempted Section 106 process. Whatever USFS has and has not done—through negligence, incompetence, or lack of good faith—however great the limitations on USFS discretion and however vigorous and costly its bureaucratic machinations for the Undertakings, the USFS has **not** administered a "process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising" as required by the NHPA and the Council's implementing regulations.

Instead, USFS has chronically disregarded its fiduciary responsibility to federally recognized tribes. USFS has subverted government-to-government protocols, unlawfully distorted the Section 106 process and most harmfully, prioritized special discretionary service to the corporate entity created by two transnational corporations and presented as the proponent of the Undertakings. And now the USFS shamelessly seeks to also provide special rapid NHPA-bypass service to SRP.

USFS failures and miscarriages could and should have been averted or remedied on the basis of either the prior communications from consulting parties, or the lessons USFS should have learned over several decades from similar careless blunders and deliberate insults to tribes and our sacred and holy places—*Dził Nchaa Si'an* (Mount Graham), *Dził Cho* (San Francisco Peaks), *Ba Whyea* (Taos Pueblo's Blue Lake), the Mountain Badger-Two Medicine Traditional Cultural District, etc., etc. Instead, USFS now stubbornly proceeds to fast-track the destruction of *Chí'chil Biłdagoteel* with presumed impunity, posing behind the façade of a defect-ridden pseudo-Section 106 process.

In addition to its great cultural and religious importance to other tribes, *Chí'chil Biłdagoteel* is profoundly central to the cultural and religious beliefs and practices of the San Carlos, White Mountain, Cibecue, and Tonto Apaches. The *Chí'chil Biłdagoteel* National Register Historic District unmistakably deserves and requires thorough and imminently respectful consideration in terms of its manifold values and the many options available to avoid and reduce adverse effects to those values. The adverse effects and significant impacts from the proposed Undertakings would be a massive undue burden on our Constitutional, religious, and basic human rights. These effects and impacts would all but eliminate our Tribe's ability to practice and transmit to future generations the religious ceremonies, values, beliefs, and practices necessary to sustain our cultural existence.

Apache Stronghold declares that the time has come to expose USFS' attempted unlawful manipulations of the Section 106 process for the Undertakings and to reestablish the legitimacy of these essential proceedings in accordance with the law. We gratefully anticipate Council's thorough review of our concerns and the concerns expressed by our Tribal government officials. We particularly anticipate robust oversight and the responsible Federal Government officials' reassertion of their Indian fiduciary duties and re-establishment of lawful, meaningful, and timely government-to-government consultations regarding all matters related to the proposed Undertakings.

In closing, we would like to acknowledge your recently announced and upcoming retirement as the Executive Director and express our appreciation for your accomplishments in the field of historic preservation and cultural heritage protection, particularly your influence and leadership in providing for better understanding and respect for Native American traditional culture and heritage, the preservation of our sacred places, and protection of our religious freedom and human rights.

Sincerely,

Wendsler Nosie, Sr. Ph.D.
APACHE STRONGHOLD
apaches4ss@yahoo.com

Attachments (2) (White Mountain Apache Tribe Cultural Resources Director Ramon Riley's letters of September 11, 2020 and November 9, 2020).

cc (2-page list, as follows):
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White Mountain Apache Cultural Center
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September 11, 2020

To the Arizona Tribal Leaders Affected by the Proposed Resolution Copper Mine:

I am responding due to a letter by Neil Bosworth, Forest Supervisor, Tonto National Forest (dated August 28, 2020, File Code: 1560) to the White Mountain Apache Chairwoman, Gwendena Lee-Gatewood regarding the Southeast Arizona Land Exchange with Oak Flat to Resolution Copper.

First, I represent myself here as an Apache elder. I am almost 80 years old and have spent most of my life and career working to maintain, and pass down to our younger generations, our greatest birthright —our Apache language and cultural knowledge. Second, I am a White Mountain Apache Tribal official. I serve as the Tribe's Cultural Resource Director/NAGPRA Representative, Chair of the Cultural Advisory Board, and on other local Boards.

I am opposed to the proposed Resolution Copper Mine. I think it is time for our Pima, Tohono O'odham, Yavapai, and Apache Nations, our great leaders, and our esteemed cultural representatives to suspend all involvement in making plans for the proposed Resolution Copper Mine that will result in the destruction and desecration of Chich'il Bil Dagot'eel, our holy site.

We have had supposed "consultations" and submitted many statements describing the sacredness and cultural areas and our opposition to the plans by the Resolution Copper Mine corporation. The majority owner is Rio Tinto, the Australian company responsible, just four months ago, for obliterating the sacred Juukan Gorge rock shelters in Western Australia without properly notifying the Aboriginal traditional owners. Rio Tinto is working hard to do the same thing here. Their plan is to damage 35,000 acres (more than 50 square miles) of our beautiful ancestral lands and to make a toxic soup out of billions of gallons of precious clean water. Our homelands will never be the same….

These "consultations" are wrongheaded. In the old days, if somebody killed one of our relatives, if retaliation in-kind was not swift, then they did the next honorable thing: the relatives of the murderer came to the victim's family to provide a just and fair compensation for the loss. They provided the loved one's family with food, horses, and other goods. Amends were made and life went on.

Nobody would ever think about having a discussion with murderers before their foul and evil deed. But I see in that August 28, 2020 letter that Resolution Copper wants to close the deal to get the Tribes to participate in receiving funds for "Tribal Monitors" and "Cultural Programs." This is Resolution Copper's way to try to get tribes' help to legitimize and legalize killing our land and impeding our religious and cultural beliefs and spiritual traditions. Why would we ever agree to this?

Exb.12

I know we all need funding to support language and culture programs, of course, but let's not take this blood money now. Let's stand together and fight these foreign corporate invaders! Let's support the San Carlos Apache Tribe to stop the Resolution Copper Mine and protect our sacred ancestral land as our ancestors did for centuries.

Tonto National Forest and Resolution Copper officials think they have the laws on their side, but those laws all passed without knowledge, consultation, or support from Native People. AZ congressional members underhandedly submitted the attachment to a bill without our knowledge years ago. The land they want to destroy—the waters they want to poison and dry up, the plants and animals they want to kill, the sacred and holy resting places they want to desecrate—are Indigenous land. It is up to Tribal People to defend and protect it.

It is wrong for our People to be involved in planning to destroy sacred land that made us who we are. I am asking for all Native People to stop working with, and helping Tonto National Forest and Resolution Copper officials get approval for their mine.

Let's resist the divide-and-conquer strategy that made it even possible for this terrible idea for mining one of our most sacred places to have made it this far. Please join me and **just say NO to the proposed Resolution Copper Mine.**

Respectfully,

Ramon Riley

Ramon Riley, Cultural Resource Director/
NAGPRA Representative
Nohwike' Bagowah Culture Center
White Mountain Apache Tribe

Exb.13

White Mountain Apache Cultural Center
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November 9, 2020

Subject: Proposed Resolution Copper Mine and Land Exchange Impacts on First Amendment and Human Rights to Religious Freedom, Exercise and Beliefs

To Our U.S. Federal Government Trustees and Tribal Leaders:

I am an elder and culture bearer for the Apache people and it is my duty to tell the truth and defend our Apache lands, culture, language, and lifeways. I have tried for the last two decades to explain to the Federal Government, to various mining company officials, and to others of the clear duty to protect the Chi'chil Biłdagoteel (Oak Flat). Most have listened, but too few have heard my message and learned, so I am writing it down.

I want to be clear that this is not an issue of "access" and that neither Chi'chil Biłdagoteel, the powers resident there, nor our religious activities that pray to and through these powers can be "relocated." It is painful to experience the continued dismissal by Tonto Forest officials of our rights to exercise our religion at a place uniquely endowed with holiness and medicine. The lands proposed for destruction by the proposed mine cannot be replaced and prompt action is needed to protect Chi'chil Biłdagoteel.

Chi'chil Biłdagoteel, including all 4,309 aces of public lands managed by the Tonto National Forest as the Chi'chil Biłdagoteel National Register Historic District, requires protection for many reasons, especially because it is a place:

- Respected and protected for many centuries for religious use, beliefs, and practice by the ancestors of today's O'odham, Hopi, Zuni, Yavapai, and Apache Tribes, as well as by Spanish, Mexican, and early Anglo residents. All who get to know the Chi'chil Biłdagoteel come to realize, honor, and celebrate its deep and universal sacredness.

- Recognized for the holy beings and powers as inscribed on cliffs and boulders.

- Visited for respectful and sustainable harvest of sacred medicine plants, animals, and minerals essential to our Apache Holy Ground ceremonies and other religious and cultural ceremonies.

- Revered and used for the sacred spring waters that flows from the earth with healing powers not present elsewhere. Chi'chil Biłdagoteel is a place of perpetual prayer and the location for eternal ceremonies that must take place there to benefit from and demonstrate religious obligation, responsibility, and respect for the powers at and of Chi'chil Biłdagoteel.

- Honored for the warriors who sacrificed their lives to protect their lands and families. Apaches and other Native and non-Native peoples recognize battlefields and burial places, much like

Arlington Cemetery, as sacred and protected lands. Why does the Federal Government deny protection for the Apaches who died at and near Chi'chil Biłdagoteel and the Apache Leap?

- Valued as one of the most important sources of our favorite and best acorns, a principal source of Ndee (Western Apache) cultural identity, historical orientation, and good food. We Western Apache are an Acorn Nation. We rely on and nurture oak groves through our ceremonies, prayers, and lifeways. These are our actual Trees of Life.

It is my understanding that the land exchanges authorized in Section 3003 of the FY 2015 National Defense Authorization Act cannot proceed unless and until the Federal Government, the trustee for the welfare of myself, my tribe (White Mountain Apache), the Ndee (Western Apache Nation), and all other federally recognized tribes and their members and citizens does at least four things:

1. Complies with the legal requirements of the National Historic Preservation Act through the execution of a programmatic agreement for the protection of historic properties, including our places of religious and cultural importance, threatened with irreparable damage and destruction by the proposed Resolution Copper Mine.

2. Certifies bona fide appraisals of the lands to be exchanged to enable the proposed Resolution Copper Mine, including the heartless giveaway of the Chi'chil Biłdagoteel, the multi-tribal holy site, sacred place, ceremonial area, and U.S. National Register Historic District previously protected by the Federal Government from mining.

3. Publishes the final environmental impact statement for the proposed Resolution Copper Mine.

4. Defends Federal Government actions and decisions against lawsuits.

The point here is that there is plenty of time for Federal Government officials and the cultural and elected leaders of tribes across Arizona, New Mexico, and beyond, to awaken to moral and legal mandates to protect Chi'chil Biłdagoteel. Let's work together to save this natural and cultural wonderland!

I urge careful attention to the religious and cultural significance of Chi'chil Biłdagoteel in the National Historic Preservation Act Section 106 compliance process underway on the part of the Tonto National Forest. I am asking for our Federal Government Trustee to give focused attention to a key problem with the Tonto Forest Land Exchange and proposed Resolution Copper Mine Project that has been either neglected or deliberately disregarded by our Trustee and other responsible federal and state officials.

The Section 106 process and Programmatic Agreement has given lip service to minimizing and mitigating the adverse effects of the propose mine and land exchange. The key problem is that both Federal and Arizona State government representatives have avoided the mandatory and fundamental step of identifying and evaluating the adverse effects that the proposed mine and land exchange will have on Apache free exercise of our traditional religion and Apache religious beliefs. The Federal Government is pretending to comply with NHPA while avoiding any identification and evaluation of Apaches' deeply rooted First Amendment religious rights to and relationships with Chi'chil Biłdagoteel. This is made clear in the Forest Service's draft NHPA programmatic agreements, and especially in lack of any attempt to avoid impacts to Chi'chil Biłdagoteel and in the sudden appearance of the Salt River Project as a signatory and regulatory beneficiary—much to our detriment.

Tonto Forest representatives have yet to consider and properly document how to avoid, minimize and mitigate the adverse effects on our religious rights of free exercise and beliefs in consultation with us, and with our prior informed written consent. This is, of course, required by the United Nations Declaration of the Rights of Indigenous Peoples and by the Golden Rule of doing to others only what you would have them do to you.

Tonto National Forest and Resolution Copper officials think they have the laws on their side, but none of those are greater than the universal laws of respect for land, life, and religious freedom. Please join me in recognizing that religious and cultural freedom and perpetuation are far more important than money and copper. Please do this, specifically and per my previous letter and request of September 11, 2020, by suspending all planning for mitigation efforts unless and until (1) the options for impact and adverse effect avoidance and reduction have been exhausted and (2) the four Federal Government actions listed above have been completed.

Respectfully,

Ramon Riley

Ramon Riley, Cultural Resource Director/
NAGPRA Representative
Nohwike' Bagowah Culture Center
White Mountain Apache Tribe

EXHIBIT B

INTERNATIONAL COUNCIL OF THIRTEEN INDIGENOUS GRANDMOTHERS

February 10, 2021

We, The International Council of Thirteen Indigenous Grandmothers, represent a global alliance of prayer, education, and healing for our Mother Earth, all her inhabitants, and the next seven generations to come. We are deeply concerned about the unprecedented destruction of our Mother Earth and Indigenous ways of life.

All over the world there are human beings who have not separated themselves from the land and from nature. Indigenous cultures have an unbroken chain that extends back to the time when our ancestors first settled the continent. For thousands of years, we lived on this continent and it remained much as it was in the beginning under our care. We have utilized the knowledge passed down from our ancestors about how to live from time immemorial. The San Carlos Apache Stronghold of Oak Flats are among these Indigenous Peoples. We offer this message in support of our relatives who are bringing their concerns before this court.

The cultural survival of the San Carlos Apache is under grave threat from the proposed Resolution Mine. We reaffirm our responsibility to speak for the protection and enhancement of the well-being of Mother Earth, nature, future generations, and all humanity and life. We bring these matters forward as our responsibility.

For the San Carlos Apache, health, law, and the environment are all interconnected. The Oak Flat Stronghold is not just a place, but a home to spiritual powers. There, the sacred springs have healing power, Apache warriors are buried, and the acorns grow from actual trees of life. For centuries, Oak Flat has remained an active place where Indigenous people come to pray, harvest, and gather where holy beings reside and holy springs flow. The San Carlos Apache cannot have this spiritual connection with the land anywhere else on Earth.

Infrastructural incursions from surface and underground mines, dams, roads, ports, and large industrial processing plants contaminate ground and drinking water and threaten the very essence of life on Mother Earth. These actions also degrade an ancient way of thinking, permeating, and influencing the traditional and cultural values, which preserves the wisdom of how to maintain balance of the Mother Earth. If construction on the Resolution Mine were allowed to begin, the San Carlos Apache's sacred connection to the land would be severed and their identity as Apache would be destroyed.

The health and wellbeing of the San Carlos Apache cannot be separated from this land.

Indigenous people are those who are the most far removed from the existing policies and governmental decision-making in regard to access and rights yet are the most impacted. Governments, corporations, and the dominant society do not consider the Indigenous teachings.

We recognize the significance of this convening of a hearing and reaffirm the historic meeting whereby, we issue this statement, in support of the Apache Stronghold Oak Flat's rights regarding the proposed Resolution Mine.

We recommend that there be a review of the existing Environmental Impact Statement and the record of how the industry upholds their existing agreements with other land holders throughout the world before entering into any agreements to their proposals. We feel it is imperative that consideration be given to the points that have been raised regarding the protection, conservation, safety, and access to clean water as a priority in any discussion of the proposal issues. The proposed Resolution Mine poses a grave threat to the cultural survival of the San Carlos Apache and the environment surrounding the mine, as far away as Phoenix. It is imperative that full and effective measures are taken to ensure that these threats are fully and fairly considered when actions and policies with respect to the area are made.

Serious consideration must be given to projects that will irreparably alienate the land and its waters from the San Carlos Apache. The San Carlos Apache must be heard before they are permanently separated from their homes, sacred sites, medicinal gathering areas, and clean water. They must be heard before their way of life and spiritual identity is destroyed forever.

We emphatically ask the governmental institutions, corporations, and all organizations to embrace this sense of commitment to act responsibly to ensure and guarantee generations of our children, grandchildren, great-grandchildren a future landscape full of promise and peace. We are in concert with the need to give voice to the San Carlos Apache perspective of guardianship of all the natural resources including the precious water.

We, the International Council of Thirteen Indigenous Grandmothers believe that it is the obligation of all concerned to ensure that the basic human rights of the San Carlos Apaches to practice their religion are respected, upheld and recognized, now and for the future generations in any determination regarding the Resolution Copper Mine. These words that we share are our strong statement and we are glad to be heard.

Respectfully submitted: On February 10, 2021

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