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Attorneys for Plaintiff

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

Apache Stronghold, )  
a 501(c)(3) nonprofit organization, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
United States of America, )  
 )  
Sonny Perdue, Secretary, U.S. Department )  
of Agriculture (USDA), )  
 )  
Vicki Christensen, Chief, USDA Forest )  
Service, )  
 )  
Neil Bosworth, Supervisor, USDA Forest )  
Service, Tonto National Forest, )  
 )  
and )  
 )  
Tom Torres, Acting Supervisor, USDA )  
Forest Service, Tonto National )  
Forest, )  
Defendants. )  
\_\_\_\_\_ )

No. CV-21-\_\_\_\_\_-PHX-

**COMPLAINT**

For violations of:

Treaty Rights, Trust Responsibility and  
Fiduciary Duty; the Religious Freedom  
Restoration Act; First Amendment Rights to  
Free Exercise of Religion, and to Petition  
and for Remedy; and Fifth Amendment Right  
to Due Process.

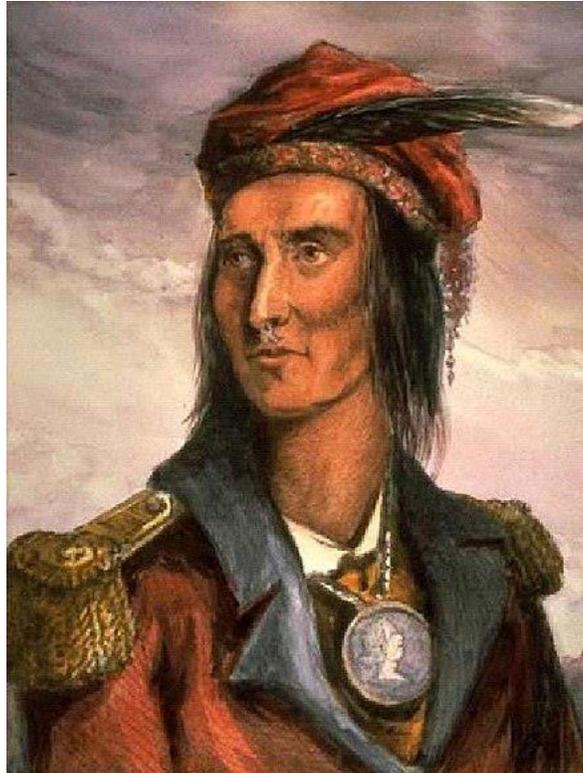
And to compel the performance of:

Trust Obligations & To Provide A Full  
Accounting

**JURY TRIAL DEMANDED**

*The Great Spirit made all things... So live your life that the fear of death can never enter your heart. Trouble no one about their religion; respect others in their view, and demand that they respect yours. Love your life, perfect your life, beautify all things in your life. Seek to make your life long and its purpose in the service of your people.*

Tecumseh, Shawnee Chief (1768-1813), from his speech to the Osages in 1811, and other speeches to other Native nations.



A version of Benson John Lossing's engraving (in wood) of Shawnee Chief Tecumseh, with water colors on a platinum print after a pencil sketch by French trader Pierre Le Dru at Vincennes, taken from life, c.1808.

Plaintiff Apache Stronghold and its members, by and through their attorneys, allege and state as follows:

### **THE NATURE OF THIS ACTION**

1. This is a gravely serious and urgent matter of the religious freedom rights, the treaty rights, and land rights of the Western Apache Peoples which the Defendants are now poised this week to obliterate forever. This case is at a crisis point precipitated by the

recklessly deliberate and illegal aggressions and harmful, damaging actions of the Defendants.

2. The deliberate and direct effect of the Defendants' publicly stated plans and planned actions is to illegally annihilate the religious freedom rights of the Western Apache Peoples at a sacred and actively utilized religious place and traditional Western Apache cultural property known to the Apache since time immemorial as Chi'chil Bıldagoteel. A literal English translation of Chi'chil Bıldagoteel is "Emory Oak extends on a Level," or more simply as it is commonly known: "Oak Flat."



IMAGE 1: Grove of Emory Oaks at Chi'Chil Bıldagoteel National Historic District & Western Apache Traditional Cultural Property.

Photograph by Russ McSpadden / Center for Biological Diversity, from "The Mine at Oak Flat: A Timeline of Government Bad Faith" by Asa Burroughs, *Moyers On Democracy* (December 29, 2020).

Available online at <https://billmoyers.com/story/the-mine-at-oak-flat-a-timeline-of-a-government-bad-faith/> .

3. The publicly stated primary purpose of the Defendants is to present a concrete plan and act to enable the conveyance in the immediate future of federally-managed land which includes Oak Flat, and other lands, to two foreign mining companies, Rio Tinto and BHP, to install a massive industrial complex to extract copper ore, while dumping the toxic waste nearby in the process, in spite of knowing that Oak Flat is a traditional cultural and religious property of the Plaintiff Apache Stronghold and all Western Apache Peoples. Evidence exists that the Oak Flat “parcel” within the proposed land exchange is not owned by the Defendant United States of America.

4. The traditional Western Apaches have never lost their vital relationship to Oak Flat, though the U.S. Government, at times in Apache history, has actually imprisoned Apaches on their own Reservations and often, and for prolonged periods of time, have not allowed Apaches to come to Oak Flat for any of their traditional reasons and needs which include for their physical and spiritual health and well-being, and especially in conformance with their traditional Apache religious beliefs and ceremonies that are centered and seated at Oak Flat.

5. This action is brought to protect the constitutional rights of Apache Stronghold and its members, guaranteed by the First Amendment Right to the Free Exercise of Religion, the First Amendment Right to Petition and Remedy, the Fifth Amendment Right to Due Process (Adequate and Effective Notice), the statutory rights guaranteed by the Religious Freedom Restoration Act, and for breach of treaty rights, trust responsibilities, and fiduciary duty owed to Plaintiff Apache Stronghold and its members by the Defendants.

## **FACTUAL ALLEGATIONS**

6. Evidence exists that the “Oak Flat Parcel” within the proposed “Southeast Arizona Land Exchange and Resolution Copper Mine Project” which—quite possibly as soon as January 15, 2021—is to be conveyed away by the Defendants to the foreign mining conglomerates Rio Tinto and BHP via their joint subsidiary Resolution Copper Mine, is not owned by the Defendants.

7. The Western Apaches through their 1852 Treaty with the United States of America continue to have ownership interests in the lands proposed to be conveyed away in a land swap by the Defendants with the foreign mining conglomerates, Rio Tinto and BHP, via their joint subsidiary Resolution Copper Mine. Those lands particularly include, but are not limited to, the “Oak Flat Parcel.” And the “Oak Flat Parcel” of the proposed Resolution Copper Mine Project is located right smack dab in the middle of the Western Apaches’ 1852 Treaty lands.

8. The U.S. government as a trustee of the Apache Nations, and the Western Apache Peoples in particular, intends to dispose of and allow the total destruction of the Western Apaches’ Chi’chil Biłdagoteel National Historic District and Traditional Cultural Property, the seat of Western Apache religious beliefs and the exercises of their religious freedom as guaranteed first by the Apache Nations’ treaty rights under the 1852 Treaty of Santa Fe, and by the First Amendment to the United States Constitution, the Religious Freedom Restoration Act (42 U.S.C. § 2000bb, *et seq.*), and the United Nations Declaration on the Rights of Indigenous Peoples, to which the United States of America is a party.



IMAGE 2: Wendsler Nosie, Sr., co-founder of Apache Stronghold, standing alongside an Apache ceremonial sweat lodge frame at Chi'Chil Biłdagoteel (“Oak Flat”) on Friday, December 20, 2019 (Photo by Eli Imadali, Arizona Republic).

9. The deliberate and direct effect of the Defendants’ publicly stated concrete plans and planned actions is to illegally annihilate the religious freedom rights of the Western Apache Peoples at a sacred and actively utilized religious place and traditional Western Apache cultural property known to the Apache since time immemorial as Chi’chil Biłdagoteel. A literal English translation is “Emory Oak extends on a Level,” or more simply as it is commonly known: “Oak Flat.”

10. The publicly stated primary purpose of the Defendants is to enable the conveyance of federally-managed land which includes Oak Flat, and other lands, to two foreign mining companies, Rio Tinto and BHP, to install a massive industrial complex to extract copper ore there, while dumping the toxic waste nearby in the process, knowing that

Oak Flat is a traditional cultural and religious property of the Plaintiff Apache Stronghold and all Western Apache Peoples.

11. The Plaintiff Apache Stronghold organization and its members have no adequate administrative remedies available. Plaintiff and many of its members have repeatedly pleaded with Defendants directly in person and in correspondence, publicly and privately—including numerous appearances and presentation of testimony before Congress over the past several years—and participating in various federal agency and Forest Service administrative processes, asserting their Apache land rights and requesting Defendants to comply with their obligations and to recognize and honor their Apache land rights and religious freedom rights, and to either cease or redress the breaches of trust complained of herein, to no avail.

12. Plaintiffs have exhausted all reasonable avenues of redress and remedy other than this action. Only this Court can provide to Plaintiffs the relief and remedies to which they are entitled.

13. Plaintiff and its members' beliefs forbid them from participating in any plans and actions that will cause adverse effects, damage or harms to Oak Flat and all it contains, both physical and spiritual, or providing access to those who would cause such damage or harms. This includes participation in any plans and actions and agreements to accept monetary compensation or other compensation, including proffers of things and promises presented to the Plaintiff and its members as “mitigation” for the adverse effects, damage, or harms suffered heretofore—whether temporary or permanent. It also includes being involved in anything that is contrary to their religious beliefs and teachings.

14. Such attempted “mitigation” proffers, solicitations, and coercions alone—cloaked in the guise of “meetings,” “listening sessions,” and “consultations”—cause serious distress and harm to Plaintiff and its members because their religious beliefs forbid such engagements and actions. It is no different to them than Christians bargaining with the Devil for their souls. And yet, the Defendants have constantly urged the Plaintiff and its members to do just that.

15. The United States does not have the power and authority to transfer the land at issue in this case.

16. Oak Flat is within the vast area of land and property and the rights thereto reserved by the Apache Nations to themselves in their 1852 Treaty with the United States of America,<sup>1</sup> commonly known as the “1852 Treaty of Santa Fe,” which was ratified by the U.S. Senate and proclaimed by President Pierce on March 25, 1853. The 1852 Treaty was never amended, rescinded, nor terminated.

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<sup>1</sup> “1852 Treaty between the U.S. and the Apache Nation of Indians,” sometimes referenced as the “Treaty of Santa Fe”

*(Articles of a treaty made and entered into at Santa Fe, New Mexico, on the first day of July in the year of our Lord one thousand eight hundred and fifty-two, by and between Col. E. V. Sumner, U.S.A., commanding the 9th Department and in charge of the executive office of New Mexico, and John Greiner, Indian agent in and for the Territory of New Mexico, and acting superintendent of Indian affairs of said Territory, representing the United States, and Cuentas, Azules, Blancito, Negrito, Capitan Simon, Capitan Vuelta, and Mangus Colorado, chiefs, acting on the part of the Apache Nation of Indians, situate and living within the limits of the United States.)*

Transcribed copy of the 1852 Treaty available online at [https://avalon.law.yale.edu/19th\\_century/apa1852.asp](https://avalon.law.yale.edu/19th_century/apa1852.asp) .

17. The Western Apaches through their 1852 Treaty continue to have ownership interests in the lands proposed to be exchanged by the Defendants. Oak Flat is a place that has special significance—a place where Apaches traditionally pray, collect water and medicinal plants for ceremonies, gather acorns and other foods, and honor those that are buried here. Many traditional Western Apache religious beliefs are seated only at Oak Flat, which is one reason why they exercise their religion there.

18. American history and the land in Arizona is stained with the blood of Apache women, men, elders and children, hunted down on the Apaches own Treaty lands and individually killed and mass-murdered in family groups by European and Euroamerican colonists, “settlers,” “prospectors,” miners, and agents of the United States of America. Much of it caused by those invaders of Apache land seeking to separate the Apaches from their Treaty lands which miners and prospectors unscrupulously coveted.

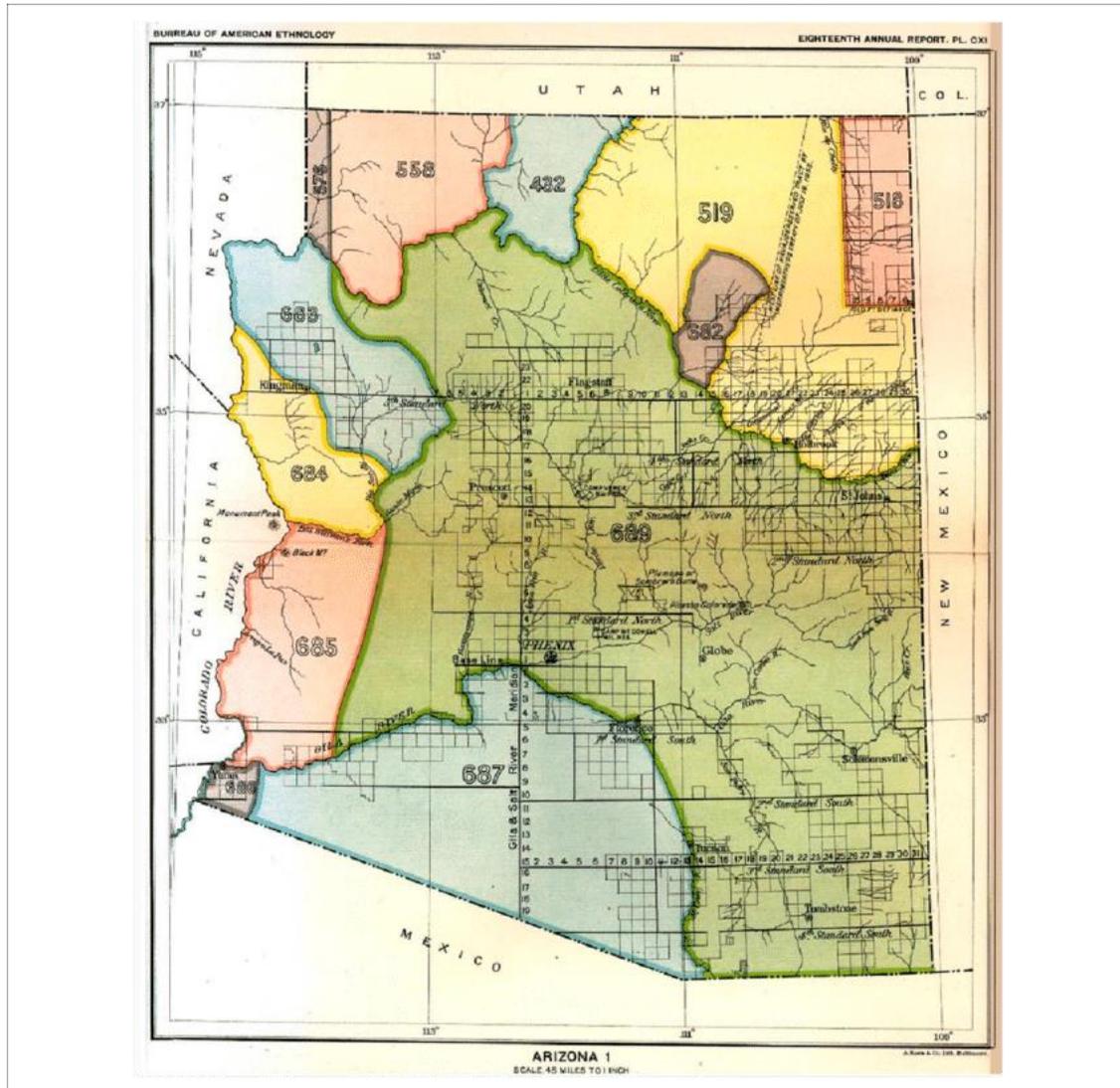
19. Those murderous campaigns and genocidal pogroms were rationalized by dehumanizing the Apache Peoples. See, *e.g.*, Welch, John R., “Earth, Wind, and Fire: Pinal Apaches, Miners, and Genocide in Central Arizona, 1859-1874.” (Sage Open Journal, October-December:1-19 (2017)).<sup>2</sup>

20. The United States of America does not have the power and authority to transfer the Oak Flat land at issue in this case, and in fact has a trust responsibility and fiduciary duty to Plaintiff Apache Stronghold, and all Western Apaches, to conserve and preserve that precious and irreplaceable asset and sacred religious property for the benefit of Apache

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<sup>2</sup> Article available in Sage Open Journal online at:  
<https://journals.sagepub.com/doi/full/10.1177/2158244017747016>

Stronghold and all Western Apaches, and to protect Oak Flat from any harm, diminishment, waste, or loss.



MAP 1: Royce's Arizona map No. 1, depicting Arizona portions of Western and Chiricahua Apache homelands (in green, #689) recognized in the treaty of Santa Fe; in the public domain. Royce, C. C. (1899). "Indian land cessions in the United States" (Arizona map No. 1, p. 922), Eighteenth annual report of the Bureau of American Ethnology (Washington, DC: Smithsonian Institution). Retrieved from the Library of Congress at <https://lccn.loc.gov/13023487>.

21. Here is a partial summary timeline of significant and relevant events so far to date (1955-2020)<sup>3</sup>:

**September 27, 1955** – President Dwight D. Eisenhower signs Public Land Order 1229 declaring Oak Flat off limits for mining due to cultural and natural value. [[Subcommittee on Public Lands and Forests](#)]

**September 25, 1971** – The Department of the Interior, under President Richard M. Nixon, renews the mining ban at Oak Flat but opens a loophole in the law: the land cannot be mined under federal ownership, but it can be traded to private holders who won't be subject to land use restrictions. [[Colorado Natural Resources, Energy & Environmental Law Review](#)]

**November 2013** – Resolution Copper introduces the General Plan of Operations (GPO) for a proposed mine at Oak Flat. [[Resolution Mine EIS](#)]

**December 19, 2014** – Congress passes the National Defense Authorization Act — a military spending bill — that includes Section 3003, added by Arizona Senators John McCain and Jeff Flake. The “Midnight Rider,” introduced the night before a vote, states that Oak Flat would be swapped with private land owned by Rio Tinto and BHP Billiton Mining companies. Senator McCain received campaign contributions from Rio Tinto affiliates; Senator Flake was a lobbyist for Rio Tinto in Namibia. [[NYT](#)]

**July 22, 2015** – Apache protestors finish a cross-country trip to Washington, D.C with a gathering on the lawn of the Capitol building. Naelyn Pike, a 16-year-old Apache activist and co-leader of the Apache Stronghold coalition, tells the Huffington Post: “[The Resolution Copper Mining Proposal is] like taking away a church. But the thing about Oak Flat is it's worse, because you can rebuild a church. Oak Flat will be completely destroyed and it could never come back.” [[Huffington Post](#)]

**November 5, 2015** – Senators Bernie Sanders (D-VT) and Tammy Baldwin (D-WI) introduce the first version of the Save Oak Flat Act, S. 2242 to repeal Senator McCain's midnight rider in the National Defense Authorization Act:

“Section 3003 was strongly opposed by Indian tribes nationwide because it sets dangerous legislative precedent for the lack of protection of tribal sacred areas located on Federal lands by mandating the conveyance of Federal lands with

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<sup>3</sup> Adapted from “The Mine at Oak Flat: A Timeline of Government Bad Faith,” Asa Burroughs, *Moyers On Democracy* (December 29, 2020). Available online at <https://billmoyers.com/story/the-mine-at-oak-flat-a-timeline-of-a-government-bad-faith/>

significant religious, cultural, historic, and anthropological significance for Indian tribes to a private company that will destroy the land.”

The Save Oak Flat Act will die in congress that year. [[GovTrack](#)]

**March 18, 2016** – The Environmental Impact Statement (EIS) for Resolution Copper begins. The Federal Register notes that, “The EIS will analyze the no action alternative, which would neither approve the proposed GPO [General Plan of Operations] nor complete the land exchange. However, the responsible official does not have discretion to select the no action alternative...” [[The Federal Register](#)] This means that the EIS alone, which will take four years and include hundreds of hours of public comment, cannot stop the Rio Tinto mine.

**January 17, 2019** – Senator Sanders introduces a third version of the Save Oak Flat Act. [[Govtrack](#)]

**August 9, 2019** – Tonto National Forest releases a 1,400-page Draft EIS kickstarting 90 days of public comment. Wendsler Nosie, Sr., Apache resistance leader and grandfather of youth activist Naelyn Pike, offers testimony at a public hearing: “It’s like destroying Mount Sinai...How is that going to be replaced?” [[Resolution Mine EIS – Public Meeting Transcript](#)]

**March 13, 2020** – Scientists and Apache activists testify before a congressional subcommittee calling for a halt to the Resolution Copper project. Naelyn Pike, now 21 years old, asked: “How can we practice our ceremonies at Oak Flat when it is destroyed? How will the future Apache girls and boys know what it is to be Apache, to know our home when it is gone?” [[AZ Central](#)]

**May 24, 2020** – A Rio Tinto mine in Australia destroys an Aboriginal site with evidence of continued human inhabitation dating back 46,000 years. [[The Guardian](#)]

**June 11, 2020** – A Rio Tinto senior executive tells employees that the company’s public apologies about the Aboriginal site do not reflect any concession of wrongdoing. [[The Guardian](#)]

**September 11, 2020** – The Rio Tinto CEO and two top executives resign over controversies relating to the destruction of the Aboriginal site. [[The Guardian](#)]

**December 1, 2020** – The website for the US Department of Agriculture is updated with a new release date for the Resolution Copper Environmental Impact Timeline — January 2021. [[ResolutionMine.US](#)]

**January 4, 2021** – Reuters breaks the news and reports that the U.S. Forest Service will publish the FEIS on January 15, 2021, quoting Tonto National Forest Acting

Supervisor Tom Torres: “The U.S. Forest Service will publish a final environmental impact statement for the mine on Jan. 15, a necessary step to complete the land exchange, said Tom Torres, acting supervisor of the Tonto National Forest, where the mine would be built.”<sup>4</sup>

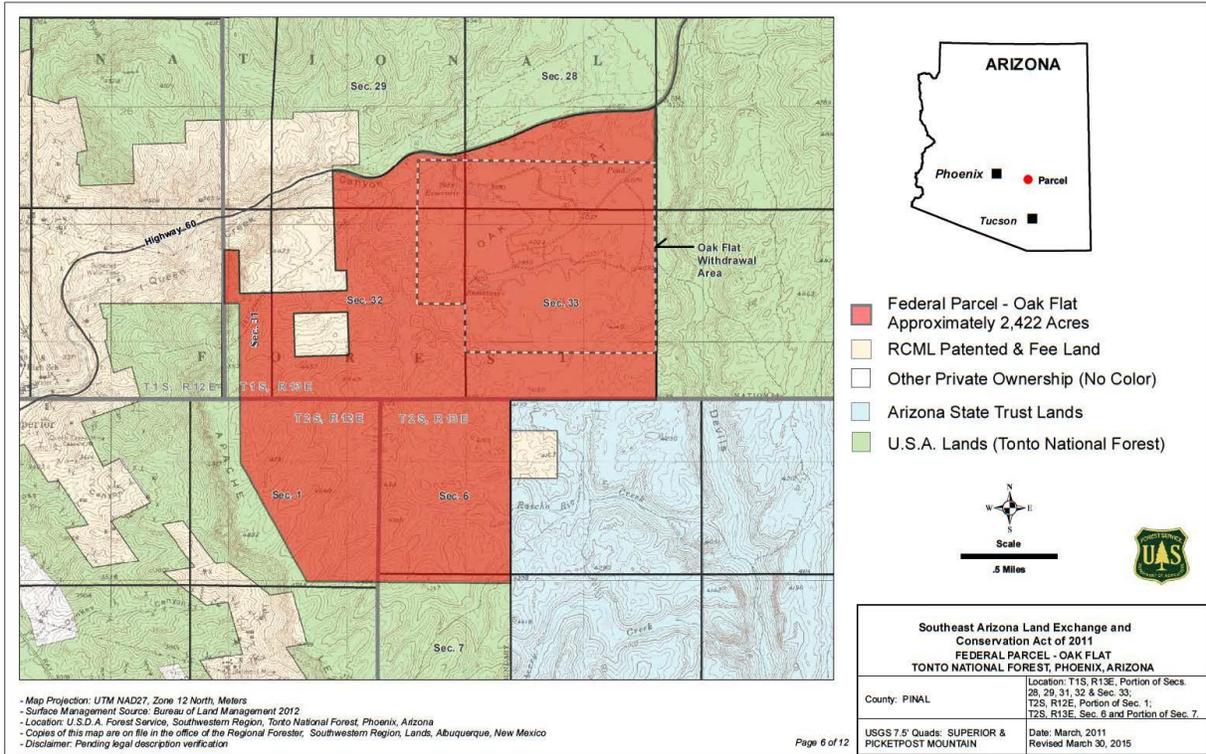
### **JURISDICTION AND VENUE**

22. This Court has jurisdiction over federal claims pursuant to the constitutional provisions enumerated and pursuant to 28 U.S.C. § 1331 (Federal Question), and 28 U.S.C. § 1361, because this is “an action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff. This Court also has jurisdiction over the claims pursuant to 28 U.S.C. § 1343 (3) and (4), as they are brought to redress deprivations of rights, privileges and immunities secured by the United States Constitution and by law. Jurisdiction is also proper pursuant to the Declaratory Judgment Act 28 U.S.C. §§ 2201(a) and 2202, and in equity.

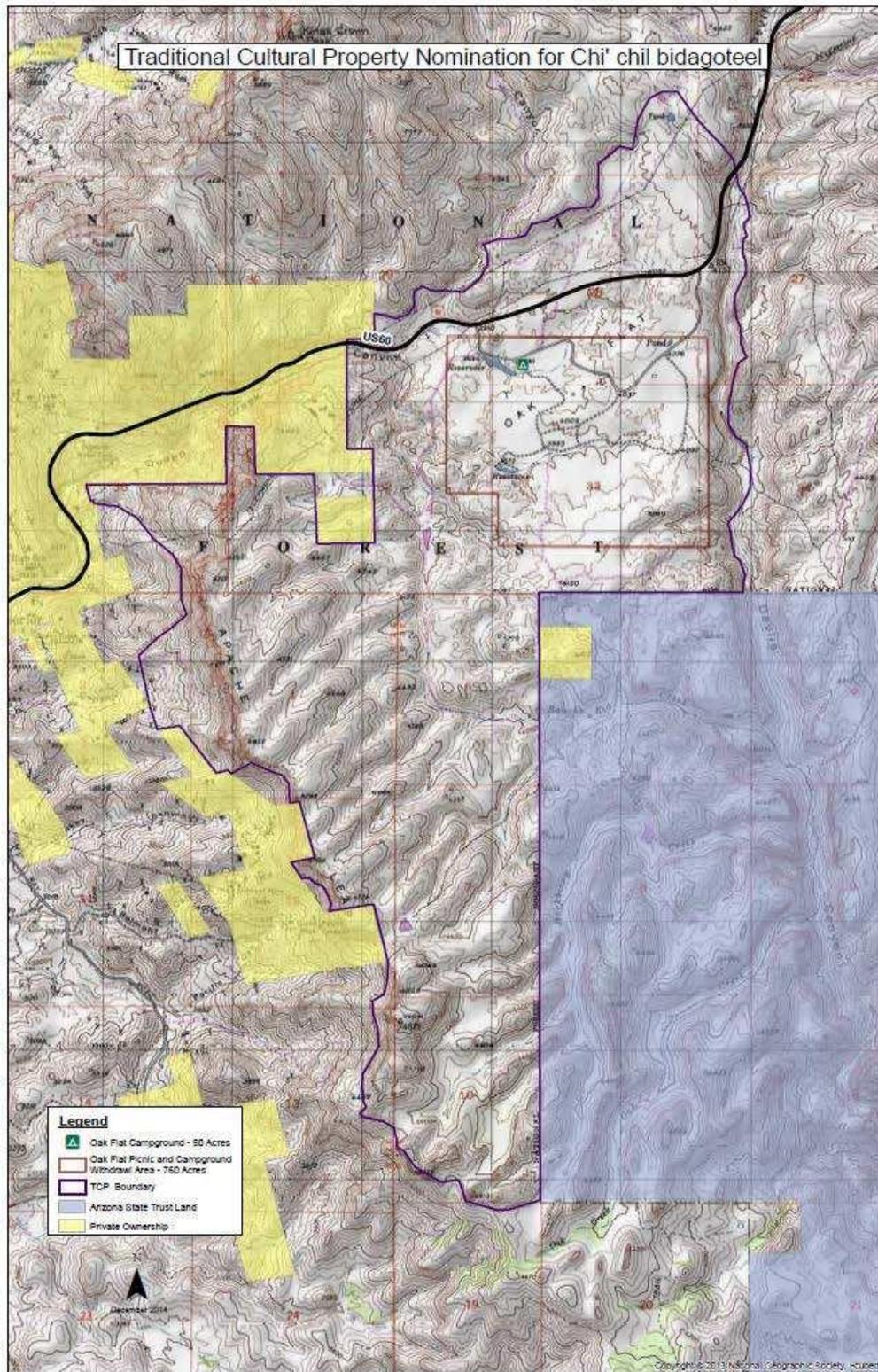
23. Venue is proper in the U.S. District Court of the District of Arizona, Phoenix Division, under 28 U.S.C. § 1391(b)(1) & (2), and 28 U.S.C. § 1391(c)(2), and 28 U.S.C. § 1391(e)(1) because a substantial part of the events or omissions giving rise to the claim occurred in this district, and a substantial part of the property that is the subject of the action is situated in Pinal County and Gila County, the principal place of business of the Plaintiff Apache Stronghold is located within Gila County, and Defendants include officers and employees of the United States and the Department of Agriculture acting in their official capacities or under color of legal authority.

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<sup>4</sup> “Trump to Approve Land Swap for Rio Tinto's Resolution Copper Project,” Ernest Scheyder, Reuters (January 4, 2021). Article accessed on January 10, 2021, for citation at <https://www.msn.com/en-gb/news/world/trump-to-approve-land-swap-for-rio-tintos-resolution-copper-project/ar-BB1ct2gu> .



MAP 2: USDA Tonto National Forest Map of the “Oak Flat Parcel” (March 2011; revised March 30, 2015).



MAP 3: Chi' chil Bidagoteel Traditional Cultural Property (TCP) Boundary Map from Chi' chil Bidagoteel National Historic District Nomination, United States Department of the Interior National Park Service

National Register of Historic Places Registration Form, at p.38 (September 22, 2014).

### **IDENTIFICATION OF THE PARTIES**

24. Plaintiff Apache Stronghold, is a 501(c)(3) Arizona nonprofit community organization of individuals who come together in unity to battle continued colonization, defend Holy sites and freedom of religion, and are dedicated to building a better community through neighborhood programs and civic engagement. Apache Stronghold is based in the Western Apache lands of the San Carlos Apache Tribe at San Carlos, within the State of Arizona, connecting Apaches and other Native and non-Native allies from all over the world.

25. Defendant United States of America (“United States” or “U.S.”) is sued for the wrongful acts of its representatives, employees and agencies. The United States is further implicated by and through the actions, policies, patterns, practices, and customs of the other named Defendants and its policy-makers, agents, and officers.

26. Defendant Perdue is the Secretary of Agriculture and chief officer for the U.S. Department of Agriculture (“USDA”), and as such is charged with the primary duties and responsibilities of the United States and the USDA, including the USDA’s Forest Service, and those as trustee and fiduciary regarding management of lands and other assets under USDA Forest Service control or responsibility to which members of federally-recognized Indian tribes and treaty tribes have rights, including members of the Plaintiff organization, Apache Stronghold. Perdue is sued in his supervisory and individual capacity.

27. Defendant Christensen is the Chief of the USDA Forest Service and is charged with the primary duties and responsibilities of the United States and the USDA Forest Service, and those as trustee and fiduciary regarding management of lands and other assets under USDA Forest Service control or responsibility to which members of federally-recognized Indian tribes and treaty tribes have rights, including members of the Plaintiff organization, Apache Stronghold. Christensen is sued in her supervisory and individual capacity.

28. Defendant Neil Bosworth at all times material herein was the Supervisor of the USDA Tonto National Forest, and as such is charged with the primary duties and responsibilities of the United States and the USDA Forest Service, and those as trustee and fiduciary regarding management of lands and other assets under USDA Forest Service control or responsibility to which members of federally-recognized Indian tribes and treaty tribes have rights, including members of the Plaintiff organization, Apache Stronghold. Bosworth is currently serving in an unknown capacity with the USDA Forest Service within or under supervision and control of the Regional Forester in the Southwest Region Office. Bosworth is sued in his supervisory and individual capacity.

29. Defendant Tom Torres, is the Acting Supervisor, USDA Tonto National Forest, and as such is charged with the primary duties and responsibilities of the United States and the USDA Forest Service, and those as trustee and fiduciary regarding management of lands and other assets under USDA Forest Service control or responsibility to which members of federally-recognized Indian tribes and treaty tribes have rights, including members of the Plaintiff organization, Apache Stronghold. Torres is sued in his

supervisory and individual capacity, as well as in his former capacity in his position previous to his appointment as Acting Supervisor of the Tonto National Forest.

### **ADDITIONAL FACTUAL ALLEGATIONS**

**30. The National Defense Authorization Act for Fiscal Year 2015 (“NDAA of 2015”)**

The defendant United States of America, by and through its Department of Agriculture agency, the Forest Service, and their personnel, has suddenly publicly stated for the first time its intent to publish a Final Environmental Impact Statement (“FEIS”) on this coming Friday, January 15, 2021.<sup>5</sup> That mere act of publication will immediately enable the Forest Service to attempt to convey a 2,422-acre parcel of “Forest Service land” to an entity owned entirely by foreign mining corporations, pursuant to a mandate in Section 3003 of the “Cromnibus”<sup>6</sup>

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<sup>5</sup> “The final EIS and draft Record of Decision (ROD) presently are scheduled to be published in the Federal Register on January 15, 2021. Visit [Resolution Copper Timeline \(link is external\)](#) for more information.” From United States Department of Agriculture, National Forest Service, Tonto National Forest, Resolution Copper Project and Land Exchange Environmental Impact Statement webpage, <https://www.resolutionmineeis.us/documents/nez-2014> accessed January 8, 2021. See also, “Current Status (as of Jan. 4, 2021)” <https://www.resolutionmineeis.us> (“The final EIS and draft Record of Decision are scheduled to be published in the Federal Register on January 15, 2021.”).

<sup>6</sup> See, “Get on the Cromnibus: What this odd phrase has to do with the US budget,” Tom McCarthy, The Guardian (December 12, 2014) <https://www.theguardian.com/us-news/2014/dec/12/cromnibus-odd-phrase-budget-battle-spending-bill> . And see, “Senate passes spending bill, ends government shutdown threat,” By David Lawder and Amanda Becker, Reuters (December 13, 2014) <https://www.reuters.com/article/us-usa-congress-budget/senate-passes-spending-bill-ends-government-shutdown-threat-idUSKBN0JR0I820141214> . See also, “Crowd protests copper mine on sacred lands,” Apache Messenger/Indianz.com (December 22, 2014) <https://www.indianz.com/News/2014/015978.asp>

National Defense Authorization Act of 2015 (“the NDAA”),<sup>7</sup> slipped in at the 11<sup>th</sup> hour with a total federal government operational shutdown looming.



G'an (Mountain Spirits) Canyon at Chi'chil Bıldagoteel National Historic District and Western Apache Traditional Cultural Property and Sacred Place (Photo by Robert A. Witzeman, M.D., Maricopa Audubon Society)

### **The Land Exchange Mandate**

31. While Section 3003 of the NDAA mandates that the Southeast Arizona Land Exchange shall be done no later than sixty (60) days after the publication of the FEIS, there

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<sup>7</sup> H.R.3979 - Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, Public Law No: 113-291 <https://www.congress.gov/bill/113th-congress/house-bill/3979/text> | <https://www.congress.gov/113/plaws/publ291/PLAW-113publ291.pdf> .

is no such mandate in the NDAA establishing any particular date or time frame for the publication of the FEIS.

32. The FEIS is the precursor act for the land exchange mandate.

33. Until as recently as this past summer, the FEIS was not even scheduled in the Tonto National Forest's Schedule of Proposed Actions ("SOPA") to be published until at least April 2021.

34. Plaintiff Apache Stronghold and many of its members, including but not limited to Wendsler Nosie, Sr., and Naelyn Pike, have been actively engaged throughout the Forest Service's conduct of the public administrative processes concerning Rio Tinto and BHP's intent to establish a copper mine on local lands near the San Carlos Apache Reservation, including those managed by the U.S. Forest Service.

35. The names and addresses, and even email addresses, of Apache Stronghold and many of its members, including but not limited to Wendsler Nosie, Sr., and Naelyn Pike, have been known to the Forest Service for a considerable amount of time, and the Forest Service has been well aware of their religious rights and legal interests in Oak Flat and the proposed land exchange and copper mine.

36. Without any prior notice to Apache Stronghold and its members—particularly including but not limited to Wendsler Nosie, Sr., and Naelyn Pike—and in deliberate and reckless disregard of the rights and legal interests of Apache Stronghold and its Western Apache members, the Forest Service by and through Tonto National Forest Acting Supervisor Tom Torres leaked to a Reuters news reporter on or before January 4, 2021, that the Forest Service will be publishing the FEIS on January 15, 2021.

### **The Mandate's Effect on Plaintiff and the Need for Immediate Relief**

37. That news, and the now suddenly looming ten (10) day deadline, was a surprise announcement without any adequate or effective notice of that January 15, 2021 date to Plaintiff Apache Stronghold and its members who have been actively engaged in the environmental and cultural resources review processes from the beginning days. Plaintiff Apache Stronghold and its members were shocked and distressed to learn that, first through a rumor that day, and then through reading the news report.

38. Plaintiff notes the obvious fact that the surprise announcement of the publication date was made and the agency action of publication of the FEIS would be consummated by the Forest Service before the new Biden Presidential Administration is inaugurated at 11:00 AM Eastern Standard Time on January 20, 2021.

39. That choice of date, even of all the possible dates just in the month of January 2021, is not a coincidence or a mere act of ministerial housekeeping by an outgoing administration. It is a nefarious act and breach of fiduciary duty and trust by a federal trustee of the Plaintiff and its Western Apache members, and violates their treaty rights, unduly burdens their constitutional rights, and their other rights to this land that is at the center of this case.

40. The Resolution Copper Mine is planned and expected to cause a 1,000+ foot deep, 2-miles wide subsidence crater that would be centered at Oak Flat:



Map shows area of massive mining subsidence that would occur to Oak Flat if that land is exchanged by the U.S. Forest Service for other land elsewhere in Arizona owned by Rio Tinto-BHP's joint venture entity, Resolution Copper Mine, and Oak Flat gets undermined.(© Reuters/Nancy Wiechec).

<https://www.msn.com/en-gb/news/world/trump-to-approve-land-swap-for-rio-tintos-resolution-copper-project/ar-BB1ct2gu>

41. Acting Tonto National Forest Supervisor Torres is the person who on January 5, 2021, publicly admitted to a Reuters news reporter that the publication date of the Forest Service's Oak Flat Southeast Arizona Land Exchange and Resolution Copper Mine Project Final Environmental Impact Statement would be Friday, January 15, 2021. That news report was published online on or about January 4, 2021.<sup>8</sup>

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<sup>8</sup> "Trump To Approve Land Swap For Rio Tinto's Resolution Copper Project," Ernest Scheyder, Reuters (January 4, 2021) ("The U.S. Forest Service will publish a final environmental impact statement for the mine on Jan. 15, a necessary step to complete the

**CLAIMS**

**COUNT 1**

**Violation of the Fifth Amendment to the United States Constitution  
Due Process (Inadequate and Ineffective Notice)**

42. Plaintiffs incorporate by reference all preceding paragraphs, images, maps, and figures.

43. Defendants knew Plaintiff's U.S. Post Office mailing address and email address and never provided Plaintiff with official notice of their intent and plan to publish the FEIS on January 15, 2021.

44. Defendants lack of adequate and effective notice unlawfully and illegally prejudiced Plaintiff Apache Stronghold and its members' treaty rights, property rights, religious freedom rights, and other legal rights, in violation of their Fifth Amendment Right to Due Process (Adequate and Effective Notice) in order to be able to effectively petition the government for redress and the right to remedy to vindicate and protect their rights.

45. Absent injunctive and declaratory relief against the Mandate, Plaintiff and its members have been and will continue to be harmed.

**COUNT 2**

**Violation of the First Amendment to the United States Constitution  
Petition Clause and Right to a Remedy**

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land exchange, said Tom Torres, acting supervisor of the Tonto National Forest, where the mine would be built.”). Article accessed on January 10, 2021, for citation at <https://www.msn.com/en-gb/news/world/trump-to-approve-land-swap-for-rio-tintos-resolution-copper-project/ar-BB1ct2gu> .

46. Plaintiffs incorporate by reference all preceding paragraphs, images, maps, and figures.

47. The time period of actual notice elapsing from January 4, 2021 to January 15, 2021, is prejudicial and woefully inadequate to provide Plaintiff Apache Stronghold and its members a fair opportunity to defend their rights and to effectively petition the government for redress and remedy, and caused undue harm, damage, and imposed an undue burden on Plaintiff Apache Stronghold and its Western Apache members' ability to protect their treaty rights, religious freedom rights, and other legal rights.

48. Absent injunctive and declaratory relief against the Mandate, Plaintiff and its members have been and will continue to be harmed.

### **COUNT 3**

#### **Breaches of Trust and Fiduciary Duties Demand for Protection of Assets, a Full Accounting, and Damages**

49. Plaintiffs incorporate by reference all preceding paragraphs, images, maps, and figures.

50. See "MAP 1: Royce's Arizona map No. 1, depicting Arizona portions of Western and Chiricahua Apache homelands," above at p.9, incorporated herein by this reference.

51. The land and property rights containing and pertaining to Chi'chil Bildagoteel (Oak Flat) were reserved by the Apaches in the 1852 Treaty of Santa Fe and it has been managed in trust for them by the U.S. Government as a result of official U.S. Government support of actions unilaterally removing the Western Apaches from that land and forcing

them to struggle to continue to maintain their relationships to their land, especially their traditional cultural and religious relationships.

52. This has caused Plaintiff and its Western Apache members undue hardships and harms throughout all relevant times from their birth.

53. The 1852 Treaty land and traditional cultural and religious property was to have been managed in trust for the Western Apaches by U.S. Government & its agencies once the Defendant United States of America forced the Western Apaches off of their Treaty land.

54. The U.S. Government and its agents at the USDA as Trustee intend to illegally and unconstitutionally dispose of Western Apache land and religious property.

55. U.S. Government and its agents at USDA as Trustee intends to illegally and unconstitutionally allow total destruction of Plaintiff Apache Stronghold and its Western Apache members' land and religious property, and total destruction of the traditional Western Apaches' religious beliefs and their free exercise of religion at Oak Flat.

56. The United States and its agents breached their fiduciary duties as a trustee for the Plaintiff Apache Stronghold and its Western Apache members, causing harm and damage to the Western Apaches as beneficiaries of the trust and fiduciary duties.

57. Absent injunctive and declaratory relief against the Mandate, Plaintiff and its members have been and will continue to be harmed.

#### **COUNT 4**

#### **Violation of the First Amendment to the United States Constitution Free Exercise Clause – Substantial Burden**

58. Plaintiff incorporates by reference all preceding paragraphs, images, maps, and figures.

59. Plaintiff Apache Stronghold and its members' sincerely held religious beliefs originate at, and are seated at, Oak Flat. Plaintiffs' compliance with these beliefs is a religious exercise.

60. Neither the NDAA of 2015 nor the Mandate is neutral.

61. Neither the NDAA of 2015 nor the Mandate is generally applicable.

62. The Mandate furthers no compelling governmental interest.

63. The Mandate is not narrowly tailored to any governmental interest.

64. The Mandate is not the least restrictive means of furthering Defendants' stated interests.

65. The Mandate creates government-imposed coercive pressure on Plaintiff Apache Stronghold and its members to change or violate or abandon their religious beliefs.

66. The Mandate chills, burdens, inhibits, and destroys Plaintiff Apache Stronghold and its members' religious exercise.

67. The Mandate imposes a substantial burden on Plaintiff Apache Stronghold and its members' religious exercise.

68. The Mandate is not narrowly tailored to any compelling governmental interest.

69. The Mandate and Defendants' threatened enforcement of the Mandate violate Plaintiff Apache Stronghold and its members' rights secured to them by the Free Exercise Clause of the First Amendment to the United States Constitution.

70. Absent injunctive and declaratory relief against the Mandate, Plaintiff and its members have been and will continue to be harmed.

**COUNT 5**

**Violation of the Religious Freedom Restoration Act  
Substantial Burden**

71. Plaintiffs incorporate by reference all preceding paragraphs, images, maps, and figures.

72. Plaintiff Apache Stronghold and its members' sincerely held religious beliefs originate at, and are seated at, Oak Flat. Plaintiffs' compliance with these beliefs is a religious exercise.

73. The Mandate creates government-imposed coercive pressure on Plaintiffs to change or violate their religious beliefs.

74. The Mandate chills, burdens, inhibits, and destroys Plaintiffs' religious exercise.

75. The Mandate furthers no compelling governmental interest.

76. The Mandate is not narrowly tailored to any governmental interest.

77. The Mandate is not the least restrictive means of furthering Defendants' stated interests.

78. The Mandate and the Defendants' threatened execution of the Mandate violate Plaintiffs' rights secured to them by the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.*

79. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have been and will continue to be harmed.

**COUNT 6**

**Violation of the First Amendment to the United States Constitution**

**Free Exercise Clause  
Intentional Discrimination**

80. Plaintiffs incorporate by reference all preceding paragraphs, images, maps, and figures.

81. Plaintiff Apache Stronghold and its members' sincerely held religious beliefs originate at, and are seated at, Oak Flat. Plaintiffs' compliance with these beliefs is a religious exercise.

82. Plaintiffs sincerely held religious beliefs prohibit them from allowing harm to occur at or on or to Oak Flat.

83. Plaintiffs' compliance with these beliefs is a religious exercise.

84. Despite being informed in detail of these beliefs beforehand, Defendants designed the Mandate in a way that made it impossible for Plaintiffs to comply with both their religious beliefs and to allow the Mandate to be imposed.

85. Defendants promulgated the Mandate in order to suppress the religious exercise of Plaintiff Apache Stronghold and its Western Apache members and other traditional Western Apaches.

86. The Mandate and Defendants' threatened enforcement of the Mandate thus violate the Plaintiffs rights secured to them by the Free Exercise Clause of the First Amendment to the United States Constitution.



Ga'an Mountain Spirit Dancer, Apache Sunrise Ceremony, Oak-Flat (May 19, 2012)  
(Photograph with family permission. © Robin Silver Photography).

87. Absent injunctive and declaratory relief against the Mandate, Plaintiffs have  
been and will continue to be harmed.



Western Apache Women in Sunrise Ceremony at Oak Flat  
(Photograph with family permission. © Robin Silver Photography).

### **PRAYER FOR RELIEF**

Wherefore, Plaintiffs respectfully request that the Court:

1. Declare that the Defendants violated the Plaintiff's Fifth Amendment Right to Due Process (Adequate and Effective Notice), and violated the Plaintiff's First Amendment Right to Petition for Redress and Remedy;
2. Declare that the parcel of land containing Chi'chil Biłdagoteel ("Oak Flat") is Apache land with treaty and property rights reserved by and to the Apaches in accordance with the terms of the 1852 Treaty of Sante Fe, and that the Defendant United States of America does not own that land, and does not have the power or authority or any right in law or in equity to convey that Apache land to anyone;

3. Declare that the Mandate and Defendants' actions and enforcement of the Mandate against Plaintiff and its members violate the First and Fifth Amendments to the United States Constitution;
4. Declare that the Mandate and Defendants' actions and enforcement of the Mandate against Plaintiff and its members violate the Religious Freedom Restoration Act;
5. Declare that Defendants breached their trust responsibilities and duties as fiduciaries, and caused damage to the Plaintiff and its members, and order a full and accurate accounting;
6. Issue a permanent injunction prohibiting the Mandate;
7. Award Plaintiff damages, and the costs of this action and reasonable attorney's fees and expert witness fees; and
8. Award such other and further relief as the Court deems equitable and just.

**JURY DEMAND**

Plaintiff requests a trial by jury on all issues so triable.

Dated: January 12, 2021

Respectfully submitted,

/s/Michael Nixon  
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